Neutral Citation Number: [2010] EWHC 1850 (Ch)

Case No: HC 09 C 02346

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Monday, 28th June 2010

Before:

MR JUSTICE NORRIS

- -

Between:

INNOVATIS INVESTMENT FUND LIMITED	**Claimant**
- and -	
EJDER GROUP LIMITED	**Defendant**

- -
- -

MR ROMIE TAGER QC and MR STUART HORNETT (instructed by **Messrs Lass Salt Garvin**) for the **Claimant**
MR MATTHEW PARKER (instructed by **Messrs McGrigors**) for the **Defendant**

- -

APPROVED JUDGMENT

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MR JUSTICE NORRIS:

1. On 30th May 2008 Lehman Brothers Treasury Co. BV issued a Note. It was a 12-year Note and, on maturity, paid a return fixed by reference to three indices. For the first year of its term it had a coupon of 6%. Although the Note was first traded on 30th May 2008, the settlement was 9th June 2008, and it was by reference to that date that the return was fixed. The Note was part of a very much larger medium term programme. Only US $7 million of the Note were issued and the entire issue was taken up by Sheikh Al Maktoum.

2. At the time of issue of the Note Lehman Brothers International indicated that it might from time to time make a secondary market in the note, but the terms of the Note made clear that it was not required to do so, and indeed that any secondary market might be discontinued as a consequence of adverse market conditions.

3. In those circumstances, the market value of the Note would in fact depend on whether there were any trades directly between individual market participants. The price at which the Note traded on the market would be fixed by reference to the worth of the covenant of the issuer - which (as Lehman Brothers) was at the time viewed as sound, although Lehmans was facing difficulties - and the anticipated index growth to maturity (or any shorter period of ownership). There was a guaranteed minimum return on the Note, but that return of course depended on the strength of the covenant behind the Note.

4. Although this was a unique issue, there would in the market have been similar issues with different maturity dates issued under the same programme. It was the practice of Bloomberg to quote an indicative price for the Lehman Note, the indicative price being calculated by reference to Bloomberg's estimate of the present value of a right to receive from Lehmans a sum of money twelve years hence calculated by reference to the anticipated performance of the indices. The expert evidence described the note as "esoteric".

5. Innovatis Investment Fund Limited ("Innovatis") was a Bahamian registered investment fund managed by Innovatis Asset Managers in Austria. Its fund manager was Erwin Lasshofer. The custodian, administrator, registrar and agent of the fund was Finter Bank and Trust of the Bahamas ("Finter").

6. Ejder Group Limited ("Ejder") was a company which assisted institutional clients with project funding through structured finance and venture capital. It had substantial Middle Eastern connections. Mr Sevket was described as its consultant and asset manager. Ejder had a board of four or five directors, who were all professional men - accountants and fiduciaries. Mr Sevket rendered to them, according to his evidence, daily reports. He did not have authority to deal on behalf of Ejder because he was an undischarged bankrupt. Accordingly, although Ejder was in his substantial, though not formal, ownership, transactions had to be approved by the board.

7. The present action concerns dealings between Innovatis and Ejder concerning the Note in the period in July to September 2008. At the heart of the action lies the question: on what terms and in what capacity did Ejder deal with Innovatis? The transaction concerned dealing with the entire holding of US $7 million of the illiquid and esoteric Lehman Note. Notwithstanding that, almost incomprehensibly, neither

Ejder nor Innovatis recorded the transaction in writing. Indeed, to my mind incompetently, neither Mr Lasshofer nor Mr Sevket even exchanged confirmatory emails as to the final terms of the deal that they agreed.

8. It therefore falls to me to examine, on the basis of the documents and the oral evidence, what they agreed. It is well at the outset to remind oneself of the basic principle which governs the approach of English law to such circumstances. It is summarised in Chitty on Contracts, 30th edition, at paragraph 1.004. The existence of an agreement is not an issue merely of fact to be found by a psychological investigation of the parties at the time of its alleged origin. English law takes an "objective" rather than a "subjective" view of the existence of agreement and of its terms. So the starting point is the manifestation of mutual assent by two or more persons to one another. Agreement is not a mental state, but an act, and, as an act, is a matter of inference from conduct. Accordingly, the parties are to be judged, not by what is in their minds, but by what they have said or written or done.

9. I will begin my account at 9th June 2008 with the formal issue of the Note. The Note was issued to Sheikh Al Maktoum and was held by his bankers, VP Bank of Zurich. On 27th June 2008 the Note was transferred from VP Bank to Barclays Bank in Zurich, where it was held for the account of Ejder. I shall have later, briefly, to examine the circumstances in which this occurred, but from 27th June 2008 until 18th August 2008 the Note was held at Barclays in a safekeeping account in Ejder's name. It is evident that Ejder was seeking to realise the Note, notwithstanding that it had only just been issued.

10. On the morning of 10th July 2008 there occurred a conversation between Mr Souk Dhillon (an introducer who had been invited to find buyers by Ejder) and Mr Lasshofer. Mr Dhillon introduced a possible sale of the Note, which he said was currently trading at 98%, offering to sell it at 95% of face value. The Note was not of course trading, for the entire issue was held in Ejder's safekeeping account.

11. That conversation was followed by an email that morning, where Mr Dhillon confirmed the availability of the Note for purchase, but without disclosing who the vendor was. That would follow from his role as an introducer, who would not want to put the parties in direct contact until a deal had been done. Innovatis at this stage had made no investments, for it was a new fund. If Innovatis purchased this Note, it would be the first investment which Mr Lasshofer had undertaken for the fund. At the time of this email Lehmans had just reported losses of US $2.8 billion and its shares had declined 73% over the course of the first six months of the year.

12. Ejder's pleaded case is that Innovatis was told by Mr Dhillon that Ejder was not the beneficial owner of the Note. Its pleaded case is that Mr Dhillon was introducing a sale on behalf of the Sheikh and that Mr Lasshofer was informed of this (see paragraphs 8 to 11 of the Amended Defence). Mr Lasshofer's evidence is that he was told no such thing. He says he was told by Mr Dhillon that Ejder was the owner of the Note, though he could not recall whether he gave the full group name.

13. Mr Lasshofer was not interested in purchasing the Note at 95% of its face value. Nothing became of the introduction. But on 31st July there was renewed contact. Mr Lasshofer appears to have requested from Mr Dhillon another copy of the details of

the Lehman Note. Mr Dhillon sent it, and on this occasion said that the Note was for sale at a price of 66% of face value, provided the sale went through immediately.

14. Mr Lasshofer's evidence is to the effect that he thought that this was about 20% below "market value". He says that he told his colleague, Mr De Lange, that this was his view; and Mr De Lange in his evidence confirmed that that was so. Whether Mr Lasshofer's view was right or wrong is immaterial.

15. That contact led to the sending on 1st August 2008 of a "letter of intent" by which Mr Lasshofer, on behalf of Innovatis, indicated the intention to purchase the 12-year note with a face value of US $7 million at a price of 66%. He gave the details of Finter Bank so that settlement could proceed.

16. In his evidence Mr Lasshofer said that shortly after the contact with Mr Dhillon he had telephoned Mr Sevket, whose details he had been given; that there followed several telephone conversations, in the course of which Mr Lasshofer says that he was told that the Note was held by Barclays Bank on behalf of Ejder. However, in cross-examination he resiled from this evidence and simply said that Mr Sevket did not say who owned the Note but that he later produced documentary evidence that it was held in Ejder's account with Barclays in order that the parties could make an arrangement; and that from that material Mr Lasshofer himself drew the conclusion that the Note belonged to Ejder.

17. The parties agreed to deal on those terms. 1st August 2008 was a Friday, and settlement was set up for the Monday morning (4th August) with Barclays. Instructions were given by Mr Lasshofer to Finter to purchase the Note. On 4th August, in the course of the afternoon, Mr Lasshofer spoke to Finter and received the information that they were in the process of closing. Mr Sevket responded to this information by asking Mr Lasshofer to let him know "if we have traded and settled".

18. There was difficulty in the officials at Finter speaking with the officials at Barclays, but eventually contact was made. When contact was made Finters were told by Barclays that Barclays could not execute the trade. Barclays said that Finters or Innovatis "should know the reason"; but neither did know the reason. So Mr Lasshofer immediately e-mailed Mr Sevket to ask for an explanation. The explanation appears to have been given over the telephone.

19. After the dispute blew up, there was a meeting between Mr Lasshofer and Mr Sevket, which Mr Lasshofer surreptitiously taped. In the course of that meeting Mr Lasshofer recounted to Mr Sevket his recollection of the reason why the sale did not proceed. He said:

> "Barclays could not sell it because the ownership was not clear. This was the problem."

To this, Mr Sevket responded:

> "It was. It was one document where, instead the Sheikh signing in the middle, he signed where the bank obviously sign and that was the problem."

That appears to be a reference to a power of attorney which the Sheikh had granted to his agents Benk Finance to deal with the Note on his behalf.

20. The Amended Defence pleads that in the course of these exchanges Mr Sevket told Mr Lasshofer that the Note belonged to the Sheikh and that the Sheikh was prepared to sell the note at 66% of its face value. It is pleaded that Mr Lasshofer knew that the Note was owned by the Sheikh and that Ejder did not have authority to conclude any agreement for its sale.

21. In his Further and Better Particulars of his Defence Mr Sevket says on behalf of Ejder that he specifically recalls telling Mr Lasshofer that Ejder's role was limited to assisting in finding a purchaser for the Note on behalf of the Sheikh and that the Sheikh owned the note.

22. In his witness statement Mr Sevket said (at paragraph 41) that in the first conversation that he had directly with Mr Lasshofer, he specifically recalled telling Mr Lasshofer that Ejder was essentially acting as a middleman in arranging the sale of the Note on behalf of the Sheikh and that he definitely mentioned the Sheikh's name.

23. In cross-examination this position was abandoned. Mr Sevket said that at that time (i.e up to 4th August) the Sheikh had not asked him to sell the Note, but Ejder were going to sell it and keep the cash on behalf of the Sheikh, and that that was what was in his mind. He confirmed that he did not tell Mr Lasshofer that the Note belonged to the Sheikh, and, in answer to the question "Did you tell [Mr Lasshofer] you had been asked to sell the Note?", said that he did not go into detail, but that it was being sold directly by Ejder and that he did not say that he was acting as an intermediary.

24. The result of the dealings between the parties as at 4th August was that arguably there was a binding agreement to sell the Note, but that there was a problem with settlement. Although the matter was not addressed in any detail, it appears that over this period Mr Sevket was in touch with those acting on behalf of the Sheikh. They became alarmed that the Note may be being dealt with. Accordingly, solicitors on behalf of the Sheikh wrote to Mr Sevket seeking his confirmation that the original Lehman Brothers Note, which had been deposited by Benk Finance, via VP Bank, into the safekeeping account of Ejder at Barclays Bank, had not been “traded or otherwise dealt with” in any respect. They enquired whether the Note was still being held "strictly to our client's order".

25. To this, Mr Sevket responded by an email on 7th August. He enclosed the account statement from Barclays Bank which recorded the deposit on 27th June 2008, (although that would not have shown the position as at the date of the email). He then went on:

> "We can confirm that we have not dealt or traded the Lehman Brother note in any respect. However, I would like to point out that we have received the $7 million Lehman Brother note as payment against delivery of 2,000 shares issued by Avis Energy Limited to your client account and therefore the Lehman Brother note is the property of Ejder Group Plc."

The statement that Ejder had not "traded" the note was literally correct: the first attempt to do so had come to nothing and the second attempt was stalled by a problem with settlement. The statement that it had not "dealt" in the note was of course wrong. What appears to have happened is that, following that exchange of correspondence on 7th August, some arrangement was reached whereby Ejder would be permitted to sell the Note on behalf of the Sheikh.

26. Mr Sevket was clear in his evidence that, notwithstanding this change of arrangement, Mr Lasshofer was not informed. In answer to the question "Did you say that the Note that used to belong to Ejder now belonged to the Sheikh?", he answered in the negative, but asserted that Mr Lasshofer always knew that the Note belonged to the Sheikh.

27. When asked further about the dealings between 4th August and 13th August Mr Sevket gave evidence in cross-examination to the effect that he probably told Mr Lasshofer about sending the Note back to the Sheikh's account and "I will arrange for the sale and purchase direct with the Sheikh". He did not tell Mr Lasshofer that the Note which had belonged to Ejder now belonged to the Sheikh; but he explained, according to his evidence, that he had had problems with compliance and so the settlement would now be direct.

28. The documents which relate to this period disclose the following: that on the evening of 12th August Mr Dhillon had contacted Mr Lasshofer with a new proposal. In an email which Mr Lasshofer sent the following morning to Mr Sevket, Mr Lasshofer recounted the conversation in these terms:

> "Dhillon told me yesterday evening that you do prefer a Re-Po-Agreement. We are prepared to do as well if we can expect an attractive profit. A straight purchase still would be preferred. Please advise possibly this morning."

29. That is the first reference to a "repo". The expert evidence indicates that the term "repo" is understood in financial securities markets to refer to a repurchase agreement; that is, a sale of a security by a seller for immediate delivery to the buyer with an obligation on the seller to repurchase the same (or an equivalent) security, for a pre-agreed amount of money (called "the termination price") at a pre-agreed date in the future (called "the termination date"). The seller's obligation to repurchase is in effect secured by the security that is the subject of the transaction. This is known as "the collateral". A repo is accordingly, commercially, a form of secured finance. One party advances money to the other in return for the transfer of an asset coupled with the obligation to repurchase, the money advanced and the promise to repurchase being secured against the collateral asset.

30. One of the experts, Mr Corrigan, who was the only one to express a view on the subject, said that a security, once repo'd, remained on the balance sheet of the seller and the coupon (interest) continued to be treated as income of the seller for the period of the repo. That is because commercially the transaction is a loan and not a disposal. Neither Mr Lasshofer nor Mr Sevket had themselves been direct parties to a repo before. That is because non-institutional repos are, as Mr Lasshofer described it, "rather rare".

31. Mr Lasshofer's evidence was that the proposal which he received was that Innovatis should purchase the note at 66% of its face value and that Ejder would repurchase it one month later at a premium, thereby guaranteeing Innovatis a profit. In addition, Innovatis would hold the Note as security. He says that in telephone conversations Mr Sevket indicated that Ejder would repurchase the note within a month at an agreed margin, but that, in default, the price payable on the repurchase would increase by the same margin the next month and every month until the note had been repurchased.

32. Mr Lasshofer discussed the matter with Mr De Lange. The original proposed rate payable on the repo had been 2%, but after discussion Mr Lasshofer decided to seek 2.5%. Mr De Lange gave evidence to the effect that he was told of the intended purchase of the Lehman note by Mr Lasshofer and that he said that that was good and that Innovatis could sell on at an immediate profit; but that Mr Lasshofer responded that that was not possible because they had to hold the Note for 30 days.

33. Mr Sevket's evidence in his witness statement was that the renewed transaction following the discussions of 12th or 13th August involved an option - not a repo. An option, of course, would give Ejder the right to repurchase the Note, but not the obligation to do so. He says that the circumstances in which that came about were that Mr Aronson, who was connected with Ejder but did not give evidence, had a break-through idea. It was that, if the Sheikh was reluctant to sell the Note at such a deep discount to its face value as 66%, then the Note could be sold with an option to repurchase when the situation improved, say, three months down the line.

34. Mr Sevket says that, following the generation of this idea, he talked with the Sheikh's representative, Mr Kebil, who liked the idea, and that that was the origin of Mr Dhillon's email proposing the transaction to Mr Lasshofer. Mr Sevket's evidence was that the option terms were not finalised or confirmed by him, but rather directly between the Sheikh's representative, Mr Kebil, and Souk Dhillon now acting on behalf of Innovatis.

35. What is clear is that by 14th August the parties had agreed on a sale and purchase of the Note at a value of 66% of its face value. Subject to a submission by Mr Parker, I think it is also clear that they had agreed a further ancillary transaction. Innovatis say that it was a repo. Ejder say that it was an option.

36. On 14th August Ejder gave instructions to Barclays Bank, via Mr Sevket, for the retransfer of the Lehman note to VP Bank, the Sheikh's bank. Having given those instructions, Mr Sevket then sent an email to Mr Lasshofer in these terms:

> "I have today given instructions to transfer the Lehman's note back to VP Bank. I will arrange the trade and settlement directly from the sheikh account at VP Bank as soon as the note has been credited into the sheikh account. Please call me to discuss."

The telephone records indicate that that is exactly what Mr Lasshofer did. He then gave instructions to his own bank, Finter, to await the settlement.

37. On 15th August Mr Lasshofer enquired whether the trade had been executed; but it had then not been executed because the transfer to VP Bank, although initiated, in fact

only went through on 18th August. On that date the Note was settled as sold by Ejder to Innovatis at 66% of its face value. When Finter made its entry into the Innovatis ledger it entered the transaction as a straight purchase of a bond. It did not enter it as a loan by Innovatis. Mr Lasshofer's evidence was that he had not told Finter that this was, according to him, a repo and not a straight purchase.

38. One month from the trade date would have been 13th September. On 9th September 2008 Lehman Brothers shares plunged 45% on the day. On 13th September the Federal Reserve Bank called a meeting about the Lehman Brothers' plight and emergency talks commenced. On 13th September Mr Lasshofer sent Mr Sevket an email which said:

> "Please advise if you wish to repurchase the Lehman Brothers note at agreed price or if we sell on the market."

To this question there was silence.

39. On 15th September 2008 Lehman Brothers entered Chapter 11 proceedings in the United States. On 22nd September Mr Lasshofer renewed his enquiry under an email entitled "Repo agreement on Lehman Brothers 12-year basket note". He enquired:

> "In regards to repurchase agreement for the above-mentioned security issued by Lehman Brothers the commitment from you as the seller of this note is to repurchase it after one month at 68.5%. As we have purchased the security on 18th August already, we would like to have your formal confirmation until when the repurchase will be executed by you."

40. Mr Sevket did not respond to Mr Lasshofer, but sent this email to Mr Kebil. In his covering e-mail he said:

> "Please confirm if you are going to repurchase the Lehman Brothers note back, as you asked us to structure with the purchaser of the note."

41. The price of the Lehman Note at that stage was probably 8% or 9% of its face value. So far as Finter was concerned, in the presentation of its accounts for Innovatis, it was minded to include the note at a nil value having regards to the Lehman bankruptcy. This would look extremely bad for Mr Lasshofer with his investors. Accordingly, he set about trying to persuade Finter to show the note with a value of 68.5%, which it would have had if there had been a repo with a solvent counterparty.

42. He contacted Mr Dhillon. He expressed his thanks "to get the situation with the repo and Sencer's group and the sheikh solved". He said that he was disappointed with the response he had received and that he would easily have been able to sell the note with a profit "but we agreed on a repo and we stick to our arrangements".

43. He eventually persuaded Mr Dhillon to sign a letter which Mr Dhillon affirmed to be the absolute truth, saying that Ejder had agreed to repurchase the note and "this agreement has been made orally in the presence of Mr Lasshofer, myself and Mr

Sevket". It was common ground before me that that was not a true account of how the transaction had been brought about.

44. The parties were now plainly in dispute as to the terms of the agreement. Mr Lasshofer visited Mr Sevket on 11th November unannounced and with a hidden tape-recorder. This tape shows that the parties discussed the transaction which occurred between them. One must be wary of course in reading the transcript, because Mr Lasshofer would have been saying things “for the tape”, whereas Mr Sevket would be saying things without knowing that there was a tape running. But it is plain that on sundry occasions in the course of that conversation Mr Sevket referred to the transaction which had occurred between the parties as "a repo".

45. Although much of the dealings between the parties was canvassed at trial, I have to focus on what was agreed between the parties on 13th and 14th August in the telephone conversations which occurred within the context of the e-mails to which I have referred. I have to decide between whom the bargain was made, and I have to decide what the terms of the deal were.

46. Plainly, there was a sale and purchase of the Note. Mr Parker says that the terms of his Amended Defence entitle him to argue that that was the only transaction that occurred and nothing further. If one does deconstruct the Defence and focus upon its syntax, he may well be right; but I do not propose to take that course, because the argument that there was *only* a sale and purchase is entirely inconsistent with the substance of the Defence and the express terms of Mr Sevket's written and oral evidence.

47. There undoubtedly was an ancillary agreement, and the question is what it was. The key witnesses between whom the transaction occurred were Mr Lasshofer and Mr Sevket.

48. When looking at their evidence, I have to take into account that there were failures to give proper disclosure on either side. On the claimant's side the failure was obvious because there was a file in Innovatis's offices labelled "Lehman note" containing notes of telephone conversations which Mr Lasshofer had undertaken. But this default was largely remedied in the course of the trial. On Ejder's side, there seems to me to have been a wholesale failure to give proper disclosure. This was only partly remedied in the course of the trial as the result of an order that I made.

49. I consider that Mr Lasshofer took the process of giving evidence seriously. He told me the matters which had occurred, as he now remembered them. He engaged with the process of giving evidence, readily making concessions when required to do so. But I cannot simply accept his word without scrutiny.

50. First, his written evidence failed to follow the Chancery Guide. It showed signs of over-preparation. I felt that I was not reading his recollection, but a carefully constructed lawyer's account built from raw material which Mr Lasshofer had supplied. The same phraseology, the same mistakes and the same corrections occurred throughout Innovatis’ written and oral evidence.

51. Secondly, I felt he made too ready a resort to difficulties in translation or to difficulties in understanding idiomatic Austrian when faced with difficult questions.

52. Thirdly, he was plainly prepared to distort the truth in order to secure an advantage for the fund. His letter which was signed by Mr Dhillon is one such example. Another is the way in which he dealt in his witness statement with his receipt of the e-mail from Mr Sevket which mentioned "the sheikh account". In his written evidence Mr Lasshofer says that he must have received this on his Blackberry in London and not paid attention to it. To his credit, he acknowledged in oral evidence that that could not be correct and that he was in Salzburg on the relevant day at his desk. I therefore approach his evidence with caution. But I place more reliance on his oral evidence than his written evidence.

53. Mr Sevket's evidence focussed on the central theme which he had espoused at the meeting of 11th November, namely, that he had simply introduced the parties who had dealt directly. This was a constant theme of his evidence, which consisted of a series of speeches in which he endeavoured to ram home his analysis of events. The complete failure to give disclosure and an unfortunate accident with his computer, which meant that he was unable to produce e-mails for the crucial period, meant that his recollection was uncorroborated. Moreover, although the relevant transactions must have actually been authorised by the directors of Ejder, none of them gave evidence as to what they understood the transaction to have been. In these circumstances, I do not think I can trust the evidence of Mr Sevket unless it receives some sort of support or corroboration.

54. I deal, first, with the question of agency. Although it was Mr Sevket's case that the deal was done direct between Mr Lasshofer and Mr Kebil, or Mr Dhillon on behalf of Mr Kebil, that was not the position that emerged in the evidence. There is no doubt in my mind that the transaction which was entered into at some point on 13th and 14th August was entered into directly between Mr Lasshofer and Mr Sevket. If Mr Sevket wishes to say that he entered that transaction as an agent, then that must appear clearly from the evidence.

55. In *Yeung Kai Yung v. Hongkong and Shanghai Banking Corporation* [1981] AC 787, 795 Lord Scarman declared the true principle to be this:

> "The true principle of law is that a person is liable for his engagements (as for his torts) even though he is acting for another, unless he can show that by the law of agency he is held to have expressly or impliedly negatived his personal liability".

56. The circumstances in which that may be done were the subject of a classic analysis by Donaldson J in *Teheran-Europe v. ST Bolton Tractors* [1968] 2QB 53, at pages 59-60. He pointed out that

> "An agent can conclude a contract on behalf of his principal in one of three ways:
>
> (a) By creating privity of contract between the third party and his principal without himself becoming a party……
>
> (b) By creating privity of contract between the third party and his principal whilst also himself becoming a party to the contract ...

> (c) By creating privity of contract between himself and the third party, but no such privity between the third party and his principal….."

In the third case, in relation to the third party the concluder of the contract is a principal, but in relation to his principal he is an agent. The consequence of that arrangement is that the only person who can sue the third party, or be sued by him, is the agent.

57. I consider that this case falls into the third of those categories. I consider that Mr Sevket said to the outside world that it was Ejder's Note. One has to approach the matter in three stages. One has to look at the original transaction. One then has briefly to look at what transpired between 4th and 12th August. But one then has to look, in the light of that history, at what is likely to have happened on 13th and 14th August.

58. So far as the original sale on 1st August is concerned, I am in no doubt that Mr Sevket held himself out as the principal and as the contracting party.

i) There is no mention to Innovatis at this time of any agency arrangement and no disclosure of the Sheikh's identity, notwithstanding what Mr Sevket said in his written evidence and in his Defence.

ii) There is simply no credible evidence in favour of an agency situation at all at this stage.

iii) It is plain from Mr Sevket's evidence that in the background there was a transaction whereby he received from the Sheikh the Note in return for the issue of 2,000 Avis Energy shares to the Sheikh. It may well be that at the time of their issue the Avis shares were worthless, and that there was a plan to inject very substantial assets into Avis which would have injected value into the shares. No doubt there was also a loan arrangement to be entered into whereby Edjer would make funds available to the Sheikh in a Sharia-compliant way. But it seems to me plain, on the documents which have been produced (in particular, a sale agreement of 30th May 2008 and a confirmatory letter of 16th June 2008), that the Note was passed to Ejder as payment for the Avis shares. It accept that in the back of his mind Mr Sevket thought of the Note as security for some future obligation of the Sheikh which would arise if Ejder in turn entered into some loan arrangement: but that is not what the documents say. But all this deep background does not assist in the objective interpretation of the dealings between Ejder and Innovatis. From the documents, to the outside world Ejder owned the Note.

iv) When Mr Sevket opened Ejder's safekeeping account at Barclays, Mr Sevket was declared to be the beneficial owner of the Note. It was not said that he held it as security or as agent in some sense for the Sheikh.

v) When Ejder wrote to VP Bank to confirm the general nature of their dealings with the Sheikh, Ejder's agents made plain that the ownership of the Note was vested in Ejder and not in the Sheikh, and that the Sheikh was the owner of shares which had been transferred in exchange for the Note.

vi) Those within the company who had power to deal quite plainly treated Ejder as free to sell the Note at its own wish and without reference to anyone. That is plain from internal documents which demonstrate that, as soon as the Note was received, instructions were given within Ejder that it must be sold and sold for Ejder's account.

vii) It is plain that, in relation to Mr Sevket's dealings with his trustee in bankruptcy, he regarded the Note and its proceeds as available to him to satisfy his creditors.

viii) Lastly, when the Sheikh challenged a suspected trade in the Note, Ejder's publicly stated position was that the note was the property of Ejder Group and was not held to the order of the Sheikh.

59. Against this background, I find it inconceivable that, whereas internally and externally Ejder should say that it was principal and owner of the Note, when it came to deal with Mr Lasshofer, it should say that it was agent holding the Note on behalf of the Sheikh. I am satisfied that the original sale was sale *qua* owner and *qua* principal.

60. I am also satisfied that that sale only went off because there was a problem with settlement - a formal problem in making title. When one therefore comes to the dealings on 13th and 14th August, one has to look at those dealings against that background: an outright sale by Ejder as principal and beneficial owner which has run into difficulties with settlement.

61. In my judgment, whatever were the dealings between Ejder and the Sheikh about unscrambling the arrangements that they had entered into, the evidence to my mind is compelling that Innovatis knew nothing of this transaction lying in the deep background; that they were not told that the Note had belonged to the Ejder but now belonged to the Sheikh; and that they were only told of the Sheikh's involvement in connection with the settlement arrangements.

62. It is to be noted that the problem of persuading Barclays to deal with the note was not a new one. It had arisen in early July, and the solution then suggested by Mr Senn, who dealt with Ejder, was that it may be possible to achieve a settlement direct between the Sheikh (as transferor to Ejder) and whoever was the purchaser of the Lehman Note from Ejder. This is in fact what occurred.

63. If one looks at the e-mail from Ejder which disclosed to Mr Lasshofer the existence of the Sheikh, it is quite plain from its terms that the reader would not be aware of the nature of the Sheikh's involvement. It would tell the reader that the note was to go back to the Sheikh for settlement purposes, but it would not tell the reader anything about the nature of Ejder's power to deal with the Note. It may well be that Ejder was agent, but it is equally consistent with Ejder having a specifically enforceable right to call upon the Sheikh to transfer the note at Ejder's direction as beneficial owner. That is in fact what appears to be the true position.

64. Further, at the time of the deal on 13th or 14th August, Ejder was in fact still the legal owner of the note. The retransfer only took place subsequently. It was only in the context of settling the transaction that had actually been entered into between Ejder

and Innovatis that the Note was retransferred to the sheikh. There is simply no reason why Mr Lasshofer should have picked up from the dealings between himself and Ejder that there was in the background some agency arrangement, even if that was the true position.

65. Finally, it is noteworthy that the suggestion that Ejder was only the agent of the Sheikh is one that emerges relatively late in the dealings between the parties. Although Mr Lasshofer called upon Ejder to perform its obligation to repurchase on 13th September, it was not until the taped meeting on 11th November that Mr Sevket asserted that his only role in the transaction had been that of an intermediary.

66. I am therefore satisfied that the parties to the transaction were Ejder and Innovatis, and that they dealt as principals. If it is necessary to address Ejder's role as agent at all, then the sale and purchase of the Note fell within the third of Donaldson's J's categories in Teheran-Europe.

67. It then remains to identify the nature of the transaction. Was it a repo or an option? Many points were made that were neutral: for example, the absence of writing; the failure to incorporate any global master agreements; the lack of collateral terms (for example, relating to a margin call or the mode of exercise of an option). In truth, I think the decision falls to be made on relatively little material.

68. In favour of the transaction being a "repo", there are three points:

i) It is the only term that passes between the parties. There is no evidence in the documents that the word "option" was ever mentioned. I have looked carefully at this, and borne in mind that the term "repo" appears to have had its origin in a conversation between Mr Dhillon and Mr Lasshofer. Mr Dhillon gave evidence. His evidence was smattered with acronyms and jargon. I have asked myself whether, in describing the intended transaction as "a repo", Mr Dhillon was simply resorting to comfortable jargon and to his familiar acronyms. But I do not think that that is right; because it was the term that was adopted, without dissent, whenever the parties spoke or corresponded about the matter - corresponding at the time of the transaction between 12th and 18th August and speaking at the meeting on 11th November. This, I think, is an extremely powerful point, when the court has to look at what the parties objectively are to be taken as having done. There is no evidence that the parties had some sort of private dictionary whereby, when they spoke of "a repo", they really meant "an option". They must be taken to have meant what the term ordinarily means.

ii) I think one has to look at the probabilities arising from the commercial context. The commercial context was that on the one hand Ejder had reached an agreement with an investment fund to sell it the Lehman note, but could not perform because of settlement difficulties. On the other hand Ejder also had a Middle Eastern client to whom they had promised loan monies but which they were unable to raise (which seems to have led to the unscrambling of the transaction between themselves and the return of the note to the Sheikh). A repo provided the ideal solution. Innovatis got its note. The Sheikh got his loan Innovatis was guaranteed a profit. The Sheikh did not lose his Note.

iii) I do not think that an option made any commercial sense. If it is to be said that the transaction of 13th August was the purchase of an asset and creation of an option by Innovatis, then it was the grant of an option at the same price as a straight purchase. Whereas on 4th August Innovatis was going to pay 66% of face value for the right to acquire the Note and the right to deal freely with it, on 14th August Innovatis was going to pay 66% of face value for the right to acquire the Note encumbered with an option that restricted dealing. There was no premium charged for the option. Innovatis simply voluntarily ran the risk that the price of the Note would plummet, that the option would not be exercised, and that it would be left with a worthless asset. The only advantage it would get is if the price rose and it then decided to take only a 2.5% profit, even though the result of holding onto the Note would have yielded a higher profit. Moreover, would be proposing to grant an option over an illiquid and esoteric Note with which it could not deal at all in the intervening 30 days. It had simply to hold it. It could not itself sell and repurchase, because there was no market into which to sell and no market which afforded a prospect of buying back before the strike date.

69. In these circumstances, it seems to me that a repo is the more likely reading of the situation and the one that is supported by the evidence. I should nonetheless consider what might be urged in favour of an option. What might be most powerfully urged are the terms of the e-mail in which Mr Lasshofer asked whether the security was going to be repurchased. This is much more like the language of an option than the language of a repo. But I ask myself what would have been the point of an enquiry about whether an option was going to be exercised? The strike price was above the price at which the note had been sold, and sold at a time when Lehman's situation was less publicly precarious. Who would, on 13th to 18th September 2008, have volunteered to buy Lehman paper? And who would have thought it worth asking? The same is true of the November conversations.

70. It might also be urged that Mr Senn gave evidence that he had heard talk in Ejder's offices of “an option”. But this was purely internal to Ejder. It was not demonstrated that the term "option" had ever been used in the dealings between the parties. If it had been used, it seems to me there would be bound to be some challenge to each of the occasions on which the term "repo" is used in the correspondence to which I have referred. If the term used between the transacting parties was “repo” it is of no consequence whatever that within Ejder “repo” meant “option”.

71. Lastly, it might be urged that Finter entered the transaction into its books as a straight purchase and not as a repo. But that, I think, is accounted for by the fact that Mr Lasshofer did not tell Finter about the second leg of the transaction. Why he did not do so is a puzzle, but is possibly accounted for by the fact that he had no written record of it.

72. I consider the arguments in favour of the transaction being a repo to be much more powerful than the arguments in favour of it being an option. I accordingly conclude that the transaction that was entered into was a transaction between Ejder and Innovatis as principals, and that the transaction in question was a repo under which the Lehman Note was bound to be repurchased by Ejder some time between 14th and 18th September 2008 at 68.5% of face value. The failure to repurchase is a breach of contract.

73. I should note, finally, that there was some argument advanced in opening that this may be an open repo, under which a rate of 2.5% per month (an annualised rate of 44%) fell to be charged, and that the breach of contract subsisted until such time as the note was ultimately sold in October 2009. That argument was, to my mind, legally incoherent if the claim asserted that the first breach was on 18th September, and it was, in my judgment, rightly abandoned in closing.

74. In the circumstances, I will give judgment for Innovatis for damages, those damages to be assessed by reference to the sum payable for the exercise of the repo less the amounts which have been realised on the ultimate sale in October 2009.
