Neutral Citation Number: [2011] EWHC 2030 (Ch)

Case No: HC08C02033

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 29/07/2011

Before :

THE HON MR JUSTICE ROTH

- -

Between :

WINNETKA TRADING CORPORATION	**Claimant**
- and -	
(1) JULIUS BAER INTERNATIONAL LTD	
(2) BANK JULIUS BAER & CO LTD	
(Trading as Bank Julius Baer & Co Ltd (Guernsey Branch))	**Defendants**

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- -

Michael Ashe QC and Timothy Carlisle (instructed by **Park Law**) for the **Claimant**
Bankim Thanki QC and Adam Sher (instructed by **Freshfields Bruckhaus Deringer LLP**) for the **Defendants**

Hearing dates: 24-25 March, 28-31 March, 1 April, 4-5 April and 11 April 2011

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Judgment

Mr Justice Roth :

Introduction

1. In this action, the claimant ("Winnetka") seeks damages for breach of contract and/or negligence on the basis that the defendants failed properly to comply with two sets of instructions issued in late December 2006 to purchase shares in Inyx Inc ("Inyx"), an American pharmaceuticals company listed on the NASDAQ exchange. Pursuant to the 1st instruction, $650,000 was paid out on Winnetka's account. Pursuant to the 2nd instruction, $8.8 million was paid out on Winnetka's account. Instead of the anticipated shareholdings of well over 4 million shares in Inyx, only 1,008,000 shares were received. Winnetka had planned to acquire this shareholding in anticipation of an imminent management buy-out of Inyx, whereupon it would have resold the shares at a substantial premium.

2. The Inyx Group effectively collapsed in early July 2007 when two subsidiaries filed for Chapter 11 bankruptcy protection in the United States. The shares in Inyx then became worthless.

3. In summary, Winnetka contends that in paying away substantial sums of money on account of the purchases of Inyx shares, the defendants failed to arrange a secure method of ensuring that the shares would be delivered against payment. If, contrary to Winnetka's primary case, the defendants were correct in their interpretation of, in particular, the second instruction and thus in making the payments, then Winnetka alleges that they failed to warn it of the risk of carrying out the transaction in that manner, and that if it had received such a warning it would not have proceeded with the transaction.

The parties

4. Winnetka is a Panamanian company. It is a vehicle for holding the portfolio investment of its beneficiaries. It has three beneficial owners: Mr Jacob (Jack) Hazout owns 48.5% of the shares; Mr Jean-Marie Valicon owns 26.5%; and Mr Olivier Reglade owns the remaining 25%. Winnetka operates out of a small office which is currently in Brussels but which was in Paris at the time of the events with which this case is concerned. Mr Hazout is and was undoubtedly the driving force in Winnetka but he was emphatic that he was not in effective control of the company and that he shared decision-making with Mr Valicon. Mr Valicon was indeed present in court for part of the trial and was evidently assisting the legal team, and although it was challenged I see no reason to doubt Mr Hazout's account of how the company was run. However, after the signing of the initial mandates with the second defendant, Mr Hazout alone was involved in direct communications and meetings with the defendants.

5. Prior to the establishment of Winnetka, Mr Hazout and Messrs Valicon and Reglade had been involved in a Madagascar telecommunications company called Madacom. The capital in Winnetka available for investment came from the sale of their interests in Madacom. It appears (and the details are not important for the present case) that either their interest was held in the name of, or the proceeds of sale were paid into the name of, Mr Hazout when the stake in the Madacom was sold in late 2005. Their involvement with Madacom came about as a result of a computer company, known as ESDS, that Mr Hazout and the other two gentlemen, whom he referred to as his partners, used to operate. The investment in Madacom arose because ESDS had been engaged to provide software and equipment to Madacom at the time when it was established by investors from Hong Kong; and the consideration for this was provided partly in cash and partly through an equity stake. Mr Hazout said that he had been involved in this way with Madacom for almost ten years, and that over that time he and his partners invested additional monies in Madacom.

6. Both defendants are part of the well-known Swiss banking group, Julius Baer, and are wholly-owned subsidiaries of Julius Baer Group Ltd. The second defendant is a Swiss company which carries on banking business in various jurisdictions. Its branch in Guernsey is known as Julius Baer Guernsey ("JBG"), and is regulated by the Guernsey Financial Services Commission. It provides banking, investment, custody and credit services. The first defendant ("JBI") is an English company, which carries on business as an investment firm based in London. It is authorised and regulated by the Financial Services Authority ("FSA") and the scope of its authorisation includes advising on investments, arranging (bringing about) deals in investments, and "arranging [the] safeguarding and administration of assets."

7. Prior to 2000, Julius Baer operated a banking service in London and the second defendant held a banking licence in the United Kingdom; but that year it ceased to operate as a bank in London and the group concentrated its operations here on wealth management through JBI. As it is put in the defendants' skeleton argument, "as a result, clients of JBI became clients of a branch of BJB off-shore - Guernsey, Zurich or Geneva - in order to have access to those services." JBI concentrates on high net worth individuals, described in the evidence as individuals with more than £½ million to invest. However, many of those individuals choose to hold their investments in private companies, often offshore. Winnetka fell into that category. Where it is unnecessary to distinguish between the two defendants, I shall refer to them together, and to the banking group as a whole, as "Julius Baer" or "the Bank". The head office of the group is in Zurich, from which office any securities trading on behalf of Julius Baer's clients is conducted.

Winnetka's relations with Julius Baer

8. Mr Hazout was introduced to Julius Baer in late 2005 by his brother-in-law, Mr Benchetrit, at a time when the proceeds of sale of the Madacom shareholding were becoming available for investment. Mr Hazout initially opened a bank account mandate and investment advisory and dealing services mandate in his own name in mid-October 2005, but they are not significant for the purpose of the present proceedings. It was in late December 2005 that Winnetka signed a bank account mandate ("Banking Mandate") with JBG. An investment advisory and dealing services mandate ("Investment Mandate") was signed shortly afterwards but was superseded by a further copy of the Investment Mandate signed by Mr Hazout on behalf of Winnetka on 1 May 2006.

9. Under the Banking Mandate, JBG agreed to honour payment instructions and other orders duly authorised by Winnetka. The mandate expressly incorporates JBG's General Banking Conditions. Those conditions include the following:

> "5. The Account Holder requests the Bank to provide custodial services and acknowledges that such services will be provided in accordance with the terms set out in attached Terms and Conditions forming an integral part of this Mandate.
>
> …
>
> 11. …The Account Holder acknowledges and agrees that neither the Bank nor its officers or employees shall be liable to the Account Holder for any loss, damage, expense or liability suffered by the Account Holder in connection with the operation of the Account Holder's account(s) or the performance of any other services under this Mandate other than loss damage expense or liability arising from the gross negligence fraud or wilful default of the Bank, its officers or employees.
>
> …

> 16. The Bank undertakes to execute correctly signed orders placed with it during business hours with requisite care. …"

The Terms and Conditions of Custody Services, referred to in the above clause 5, provide at paragraph 1:

> "…Delivery or payment by the other party to any transaction shall be at the Account Holder's risk and the Bank's obligation to account to the Account Holder for any investment shall be conditional upon receipt by the Bank of the relevant documents or sale proceeds from the other party."

10. Under the Investment Mandate, Winnetka engaged JBG to provide an "active advisory plus dealing service". That is defined as being a service "where the Adviser will regularly contact the Client with advice on investments and will effect transactions in investments when requested by the Client". Winnetka opted for the investment objective of "capital appreciation and income" and specified that the base currency for reporting was the euro. The Terms and Conditions set out in part 2 of the Investment Mandate include at clause 10 an extensive provision concerning "the Bank's liability". That provides, insofar as material:

> "10.1 The Bank will act in good faith and due diligence but, subject thereto, neither the Bank nor any Associate (the Bank contracting as trustee for such Associate for such purposes) shall be liable
>
> …
>
> (ii) for any loss or expense suffered by the Client under or in connection with this Agreement (including, without limitation, any occasioned by the insolvency or other default of any Counterparty) unless such loss or expense arises from its or their respective negligence, wilful default or fraud….
>
> 10.2 The Bank shall use its best endeavours to provide advice to the Client in a timely manner. The Bank shall not however be liable for any loss incurred or suffered by the Client by reason of or resulting directly or indirectly from any failure by the Bank to give timely advice to the Client ….
>
> …
>
> 10.5 The Bank will not be responsible for any loss of opportunity whereby the value of the Portfolio could have been increased, nor for any decline in the value of the Portfolio, nor for any loss arising from errors of fact or judgment or any action taken or omitted to be taken, however arising and whether direct, indirect, financial or consequential loss and caused by negligence or otherwise, except to the extent that any

> such error, act or omission is caused by the Bank's gross negligence, wilful default or fraud.
>
> 10.6 The Bank will not be responsible for anything done or suffered to be done by it in good faith in accordance with or in pursuance of any instructions or guidelines given by or on behalf of the Client."

It is common ground that JBI was an "Associate" of JBG for the purpose of clause 10.1.

11. Both the Banking Mandate and the Investment Mandate are governed by Guernsey law but it was not suggested that for the purpose of interpretation of these provisions there is any resulting difference from English law.

12. In addition to these mandates, Winnetka signed a number of internet waiver agreements with JBG authorising the bank to accept instructions sent from a specified email account. Although it was alleged in the Re-amended Particulars of Claim that the defendants had wrongfully acted upon instructions sent electronically that were not authorised, that allegation was not pursued. In the event, the terms of the internet waiver agreements do not have to be considered.

13. JBI had no contract with Winnetka. Pursuant to an Investment Management Agreement dated 23 May 2000, JBG delegated some of its functions to JBI and appointed JBI as manager of some of its discretionary portfolios and an investment advisor on its advisory portfolio. There is no doubt that the primary contact of Winnetka, as a client of Julius Baer, was as between Mr Hazout and Mr Darren Porter, who was at the time head of portfolio management at JBI. Their communications were conducted by telephone, email and at meetings. At no time did Mr Hazout, or either of the other beneficial owners of Winnetka, go to Guernsey. Mr Porter clearly regarded Winnetka as one of his clients.

14. Alongside the contractual obligations, it is accepted that JBG owed Winnetka a duty of care in tort, but that is a parallel duty which has no additional practical significance in the present case. As regards JBI, although denied in its pleaded defence, it was in the end sensibly accepted that JBI owed Winnetka independently a duty of care. However, the defendants contend that this duty is defined and circumscribed by the contractual obligations and exclusions in the contracts with JBG to which I have referred.

15. The defendants say that the payment provisions in both sets of instructions regarding Inyx were simple instructions to make payments and receive shares and that, therefore, only the Banking Mandate was engaged. Winnetka says that the instructions were to execute the transactions (ie, here to buy the shares) and thus the Investment Mandate was applicable and relevant.

16. As set out above, both Mandates contain limitation and exclusion provisions. Those include particular exclusions of liability for "gross negligence": Banking Mandate, cl. 11; Investment Mandate, cl. 10.5. The meaning of that expression is not entirely clear. However, since the Investment Mandate uses both the expressions "negligence" and, separately, "gross negligence", I consider that the two cannot be

intended to have the same meaning; and I think the language in the Banking Mandate should be construed consistently with the Investment Mandate. In that regard, I respectfully agree with the approach of Andrew Smith J in *Camarata Property Inc v Credit Suisse Securities (Europe) Ltd* [2011] EWHC 479 (Comm) at [161]. As he there observed, "the distinction between gross negligence and mere negligence is one of degree and not of kind", and therefore not easy to describe with precision. Like the judge in that case, I think it is appropriate to apply to the contractual provisions here the approach of Mance J in *Red Sea Tankers Ltd v Papachristidis* ("*the Ardent*") [1997] 2 Lloyd's Rep 547 at 586:

> "Gross negligence is clearly intended to represent something more fundamental than failure to exercise proper skill and/or care constituting negligence… As a matter of ordinary language and general impression, the concept of gross negligence seems to me capable of embracing not only conduct undertaken with actual appreciation of the risks involved, but also serious disregard of or indifference to an obvious risk."

However, it seems to me that "gross negligence" is not the same as subjective recklessness, although it may come close to it: see *A v Bottrill* [2002] UKPC 44, [2003] 1 AC 449, per Lord Nicholls at [76] and [79]. I note also that "gross negligence" is a term now used in the context of financial transactions in the Payment Services Regulations 2009, at reg 62(2)(b), but without any statutory definition.

17. In addition to the mandates, JBG agreed to provide Winnetka with a credit facility of €12.5 million secured against the value of the portfolio. The facility was approved in January 2006 but only became operational on 21 April 2006 when the original signed documents were returned to JBG by Winnetka.

Evidence

18. Before addressing the factual events and communications on which this case, in my view, depends, it is appropriate to comment on the evidence as presented at trial.

19. Winnetka called only one factual witness, Mr Hazout. He is a highly intelligent and confident young man with an energetic enthusiasm for the projects in which he is involved. His background is in electronic engineering and computer science, which he deployed when operating ESDS, and he apparently still does some consulting in that field. However, he is now primarily a full-time investor, an activity he pursues by a combination of himself following the markets and his personal contacts which have alerted him to particular investment opportunities. Those have included some investments outside the mainstream, where Mr Hazout perceived the potential for a good capital return.

20. Mr Hazout clearly feels a strong sense of grievance over what happened regarding the Inyx shares. That is fully justified: Winnetka paid away over $9 million as consideration for the purchase of over 4 million shares in Inyx but received only 1,800,000 shares. Although the primary blame for that clearly rests on the recipients of the money or on a Mr Jack Kachkar, the then chairman and CEO of Inyx, a mysterious figure who played a prominent role in the factual background to this litigation, I accept that Mr Hazout came to be wholly convinced that Winnetka had

been badly let down by Julius Baer in its handling of these two transactions. However, his resulting loss of confidence in Julius Baer has led him to believe that it could do virtually nothing right, and to make unwarranted assumptions or wide-ranging allegations against Julius Baer in ways that I consider wholly unjustified. Moreover, he was distinctly evasive in his evidence on a range of issues, particularly regarding some of his dealings with Mr Kachkar.

21. Mr Hazout's complaints about Julius Baer, which I note did not start until about half a year after the material events, have also, I regret to say, led him to give evidence on various points that I cannot accept as honest. I have come to that conclusion upon consideration of the entirety of his oral evidence, given over 4½ days in the witness box, and more particularly concerning certain specific matters. It will be necessary to consider some of those in detail in this judgment, but I mention at the outset two examples. On 22 December 2008, Mr Hazout and Winnetka together issued proceedings in the Canadian court against Bennett Jones LLP ("Bennett Jones"), a Canadian law firm, and three of its partners, claiming damages arising out of the second Inyx transaction. In the detailed Statement of Claim, it is specifically alleged that on 26 December 2006 the plaintiffs entered into an agreement with Mr Kachkar to purchase 4 million shares in Inyx at $2.20 per share; and that Bennett Jones, as solicitors for Mr Kachkar and Inyx, were to hold those shares in trust for the plaintiffs on the basis that the consideration was to be transferred by the plaintiffs to Bennett Jones for release to Mr Kachkar and Inyx after transfer of the shares. That pleaded allegation is fundamentally inconsistent with Winnetka's case in the present proceedings that no contract of purchase was made with Mr Kachkar, whether on 26 December 2006 or at all, but that he was only the facilitator of a purchase of the shares by Winnetka from Bennett Jones. Unsurprisingly, Mr Hazout was cross-examined regarding this inconsistency. His explanation was that there was a tight deadline in Canada to issue proceedings and so all had to be done in a rush. However, that explanation was not only unconvincing but manifestly untrue. By late disclosure made during the course of the trial, it emerged that Mr Hazout and Winnetka had instructed their Canadian lawyers eight months prior to the issue of the Canadian claim; and that a letter before action had been written in May 2008 which had alleged that Bennett Jones was the seller of the shares in a transaction which Mr Kachkar had only facilitated as an intermediary. It is therefore evident that the Canadian lawyers for Winnetka and Mr Hazout re-considered the matter subsequent to the despatch of that letter before re-casting the case in the Statement of Claim. Moreover, the Statement of Claim was not served for a year until 16 December 2009. Accordingly, there was ample time to amend it prior to service if it did not reflect the true position. In short, it is abundantly clear that the way that Winnetka's allegations were advanced in its Statement of Claim in Canada, in contrast to the previous letter before action, was a conscious decision which there had been ample time to consider.

22. Secondly, there was the story regarding Winnetka's attempted investment in a company called Tudou, which is apparently a Chinese equivalent to YouTube. This is of little relevance to the present proceedings other than for the way in which Mr Hazout was prepared to make allegations against Julius Baer. Winnetka had wished to participate in a private equity investment in Tudou being conducted through a private equity house, Crescent Point. In his second witness statement, Mr Hazout contended that Winnetka lost that opportunity when Julius Baer refused in February 2008 to make an investment on its behalf because Winnetka was by then in dispute

with the Bank; and that there was then inadequate time to arrange an alternative bank facility. Mr Hazout maintained that allegation in his oral evidence. He was shown an email sent on the afternoon of Thursday, 21 February 2008, in which he requested Julius Baer to subscribe $1 million on behalf of Winnetka in Tudou and which stated that they have until 25 February to do it. 25 February was the following Monday. Mr Hazout first said that he had sent the documentation to Julius Baer several weeks before this. However, it emerged that this was not correct and that 21 February was the first time Julius Baer had been approached on the subject. Indeed, the contemporary correspondence showed that Mr Hazout had first tried to make the investment through a new company on behalf of which he had approached several other banks, but their "know your client" compliance procedures were too involved for the investment to be made in time; and that it was for that reason that he had, at the last minute, turned to Julius Baer. Moreover, although Mr Porter tried to assist in arranging the subscription very quickly, he received the following response from Julius Baer Zurich, on 22 February:

> "Bank Julius Baer is no longer willing to make subscriptions of this kind on behalf of its clients. This results from the more demanding regulatory requirements that now apply, and the risks that arise from the extensive representations and warranties that have to be made as part of such subscriptions. It is necessary therefore for the client (Winnetka) to complete the subscription documentation. The client's funds at the Bank are of course available for the subscription."

23. There is not the slightest reason to doubt the accuracy of that statement, which was promptly passed on to Mr Hazout. Accordingly, not only was his assertion that Julius Baer refused to undertake the subscription because of the dispute over the Inyx transaction unjustified, but the allegation that Winnetka lost the opportunity to make this investment only because of Julius Baer's conduct was untrue.

24. The fact that I find that some of Mr Hazout's evidence was not given honestly does not mean that I reject his evidence whenever it was challenged. A witness can be untruthful in a misguided effort to bolster a case which is fundamentally sound, and there are some issues of difficulty in this case considered even on the documents alone. But it means that when his account was not supported by the contemporary documents, it requires, in my judgment, most careful scrutiny. Moreover, this is heavy and expensive litigation where much turns on a few key events and meetings. Accordingly, I would expect Winnetka to have called whatever evidence was available to support its version of those key matters. As Brooke LJ observed (Aldous and Roch LJJ agreeing) in *Wisniewski v Central Manchester HA* [1998] PIQR 324 at 340:

> "In certain circumstances the court is entitled to draw adverse inferences from the absence of a witness who might be expected to have material evidence to give on an issue."

25. On a number of such matters, Mr Hazout's account, if correct, could have received valuable support from Mr Valicon and, as to one particularly important meeting, from his brother-in-law, Mr Benchetrit. I have already referred to Mr Valicon, and Mr Hazout said in answer to a question from the court that he remains on good terms with

his brother-in-law. However, neither was called by Winnetka to give evidence and no reason was put forward as to why they were not called. In the circumstances here, I consider that the absence of such supporting evidence is significant and take that into account when determining whether I can accept Mr Hazout's testimony on those matters.

26. I should add that Mr Hazout's first language is French. His English is clearly fluent and impressive but he sometimes uses English expressions in ways that are not always strictly accurate, and it is necessary to bear that in mind. That should have been clear also to those with whom Mr Hazout dealt at Julius Baer.

27. Julius Baer called three factual witnesses. The first, and much the most extensive, was Mr Darren Porter. Mr Porter was Winnetka's client relationship manager ("CRM") at Julius Baer and the regular, and at times very frequent, point of contact for Mr Hazout. Where matters had to be conducted for Winnetka by JBG, it was Mr Porter, and not Mr Hazout, who would contact JBG to make the necessary arrangements. Mr Porter was cross-examined over some two days. He was very defensive over certain elements of Julius Baer's actions, but I consider that was understandable when his professional conduct was being called in question. I found him to be essentially an honest witness although one who, to express it metaphorically, saw matters in black and white terms and could not accept the possibility that there might be shades of grey in between. He was not prepared to contemplate that there could have been any lapse, however slight, from the standard the Bank sought to maintain. He had clearly regarded Winnetka as a demanding client and believed that he had personally worked very hard for Mr Hazout; and he felt indignant that anything which he had done could be called into question.

28. The two other factual witnesses called by Julius Baer were Anna Ducellier and Stephen Burt. Ms Ducellier is currently the director of the Client Documentation Unit of JBG and has been employed by JBG for 21 years. At the relevant time, she was an assistant director and her duties included receiving instructions passed on by the relevant CRM for the transfer of funds and receipt or delivery of securities. In relation to a transfer of funds, she would verify payment instructions which had been received and input by JBG onto the relevant Julius Baer system, to be picked up by Julius Baer Zurich who would arrange for the payment to be made. In relation to an instruction for receipt of securities, she would instruct the Julius Baer receipt department in Zurich to arrange for receipt. Stephen Burt was at the relevant time head of private banking and credit at JBG. He had a number of dealings with Mr Hazout regarding banking services but he never met him personally. Of relevance to the present proceedings is Mr Burt's involvement in applications for the provision of credit facilities. Thus he was involved in arranging approval of the credit agreement offered to Winnetka in January 2006 to provide the €12.5 million lending facility. Both Ms Ducellier and Mr Burt were impressive witnesses and clearly gave full and honest evidence which I accept in its entirety. Indeed, in the end there was no real challenge by Winnetka to their evidence.

29. Many of the internal and external telephone calls by the defendants' staff, including virtually all calls with Mr Hazout, were recorded. The transcripts of those recordings were in evidence and proved of considerable value in ascertaining what had happened. A few of those recordings were played to the court.

30. In addition, there were no less than six expert witnesses, although the two experts on Guernsey law were not called to testify and it was common ground that their evidence, as to which there was an agreed statement, was of tangential relevance. More central to this case were the two banking experts: Dr Thomas Walford and Mr Des Joyner. I found both of those experts to be helpful witnesses and, as one would of course expect, honest in their evidence. In fact, their respective expertise concerned different aspects of banking operations in the wider sense. Mr Joyner, who held before his retirement a very senior position at Dresdner Kleinwort Wasserstein, had extensive experience of settlement and operational (or 'back-office') procedures. Dr Walford, who was for several years head of private banking at Bank Leumi (UK) Ltd, was heavily involved during his career in giving investment advice and client management, and also has valuable experience of advising on, and dealing in, smaller companies. Both banking experts clearly put in significant effort to produce for the court a comprehensive joint statement, which is much appreciated.

31. Each side called a forensic accountant on the question of damages. However, their reports rested on various assumptions which, as will be evident from this judgment, I do not uphold and accordingly their evidence turned out to be of little relevance.

Winnetka's trading prior to Inyx

32. The investment strategy which Winnetka adopted for its portfolio through Julius Baer was to hold two-thirds of its capital in cash or cash equivalent and one-third in a mixture of funds and equities.

33. The defendants sought to emphasise the experience and sophistication of Winnetka, as personified by Mr Hazout, as an investor. I can accept that up to a point. Mr Hazout was a forceful character in pursuing his demands and ideas, and Mr Porter was generally very impressed by him. Of the suggestions that Mr Porter made for investments by Winnetka, Mr Hazout rejected almost all of them and came up with stock selections of his own. For example, when Mr Porter suggested that Winnetka should invest in Russian and Baltic funds, Mr Hazout explained how he then did his own research and chose East Capital Funds as his preferred holding in those fields because he found that they were more highly rated than the funds which Mr Porter had proposed. Moreover, Mr Hazout talked to Mr Porter about various other schemes in which he was planning to get involved. For example, at a meeting with Mr Porter on 1 May 2006, Mr Hazout said that he had just been meeting a series of business partners regarding a deal he hoped to put together to raise a stake in a Russian oil exploration company called Magellan Energy. He said that he was raising a consortium of investors to total $100 million that would take a 20% holding in Magellan that was in the initial stages of an IPO and would soon be listed on NASDAQ. It seem that nothing ever came of this, but it is just one instance of the kind of projects that Mr Hazout related to Mr Porter when they met.

34. It may be that Mr Hazout liked to "talk big" and may have exaggerated his acumen and understanding of investments. But there is no doubt that he followed Winnetka's portfolio with Julius Baer very closely and that he was astute in seeking opportunities. Mr Porter may have made assumptions about his level of understanding of share dealings that were not altogether correct. But for that, in my view, Mr Hazout is himself responsible. A client cannot complain if his professional advisor has mistakenly attributed to him a level of understanding of the activity in which he is

engaged that the client has himself professed to possess. As Mance J observed in *Bankers Trust International plc v P T Dharmala Sakti Sejahtera (No 2)* [1996] CLC 518 at 531E-F:

> "A recipient holding himself out as able to understand and evaluate complicated proposals would be expected to be able to do so, whatever his actual abilities."

35. It was submitted on behalf of the defendants that Winnetka had a significant appetite for risk. However, so far as Mr Porter's handling of Winnetka as a client of Julius Baer is concerned, I do not consider that the various other schemes which Mr Hazout spoke about were particularly relevant. Within the terms of the portfolio, Winnetka was prepared to contemplate some riskier investments managed by Julius Baer, although, that was within the overall balance of the portfolio where a very significant proportion was maintained in cash or cash equivalent. I do not consider that Winnetka can fairly be described as a client that was seeking a high risk strategy of investment with Julius Baer. Moreover, although Winnetka included within the portfolio a few higher risk investments, Mr Hazout explained, and I accept, that he was very careful in his selection of those investments.

36. As an indication of Winnetka's willingness to engage in riskier transactions, the defendants relied on its purchase of shares in Rockwell Petroleum ("Rockwell") in late August 2006. On 1 September 2006, Mr Hazout forwarded to Mr Porter email confirmation of the purchase by Winnetka of 80,000 shares in Rockwell at $Can 4 per share, with instructions to wire the total amount of $Can 320,000 to a Swiss bank for the account of Sequoia Asset Management Ltd ("Sequoia"). Mr Hazout explained this as a private equity placement in an unlisted company and therefore a transaction which had to be conducted off-market. The instructions given were for the money to be wired by Julius Baer prior to the issue of the shares. Mr Hazout accepted that, in theory, this involved an element of risk, but he explained that he did not feel concerned as the transaction was handled by Sequoia, a well-known and UK regulated investment management company. I accept that as this was a private equity placement, one would expect the transaction to be carried out in that way, and that the involvement of Sequoia, to whose account the money was sent, gave Mr Hazout reason to feel that the transaction was secure. The significance of the Rockwell transaction, in my view, is that it is an illustration of Mr Hazout executing a deal for the purchase of shares without the involvement of Julius Baer, and advising the Bank afterwards of the transaction with instructions to be involved only in settlement, ie the wiring of funds and receipt of the shares.

Some key expressions

37. Before proceeding further, it is appropriate to discuss some of the expressions which feature prominently in the narrative and analysis of the Inyx transactions.

38. DVP refers to "delivery versus payment". This is shorthand for a secure settlement arrangement whereby the consideration from the purchaser and the shares from the seller are released only one as against the other, ie the transfer of securities and payment are simultaneous. This can be achieved through the central depository operating for an exchange, and now is generally achieved through a depository with real time settlement in securities that can be transferred electronically, as in the

CREST system operated in the UK or Euroclear in Europe. To achieve simultaneous transfer, both the transferor and transferee need either to hold accounts or act through account holders in the central depository.

39. FOP stands for "free of payment". This is a contrasting settlement procedure whereby a security is delivered without a simultaneous payment of money to the transferor. As explained by Mr Joyner, FOP delivery may be used in a number of situations:

> "It may be that such money has already been paid (which is not uncommon (for example: in a private placement; in an IPO; in a situation where the vendor simply wants to have the money in its bank account before releasing the shares; where a US broker or fund manager does not have a direct relationship with the purchaser; and where the vendor himself is purchasing the shares from another party)), or will be paid later, or there may be no money being transferred at all. If and when the money moves is irrelevant for the purposes of a FOP settlement – there is only one movement, which is that of the security."

40. Mr Joyner observed that all central depositories offer the ability to settle transactions on either FOP or DVP bases. He states: "both are entirely acceptable settlement procedures within the securities industries and both are commonly used". Where a transaction is settled FOP, the money payment will not be made through the central depository but processed like any other money payment through the usual financial payment systems. Hence the payment can be sent by the buyer directly to the seller's bank account.

41. DTC is the initialism for "Depository Trust Company", a subsidiary of the Depository Trust & Clearing Corporation. It is a US company which offers clearing, settlement and custody services and is an equivalent in the United States to the Euroclear and CREST central depositories that operate in Europe and the UK. DTC, like CREST, has members or participants, who are banks and brokers, identified by a DTC number, who have an automated computer interface with the central depository. Many non-US banks, investment banks and private banks do not participate directly in the DTC but use as a correspondent on their behalf one of the many service providers who specialise in offering clearing and custody services. Hence, Julius Baer was not a DTC participant but used as its correspondent US bank, Brown Brothers Harriman, which is a DTC member.

42. Significantly, the two banking experts agreed that settlement by DVP through any central depository system, and thus through DTC, cannot take place unless the recipient of the funds and the transferor of the securities are the same.

The 1st Inyx transaction

43. On 13 December 2006, Mr Hazout emailed Mr Porter at JBI stating:

> "I am talking to a friend for a buy of stock in the US,
> He ask me my DTC details.
> Could you send me that."

The response given by Mr Porter later that afternoon was as follows:

> "I have spoken to my colleagues in Guernsey and they would require:
>
> - The name and branch of the Bank delivering
> - The contact person
> - Telephone and Fax number of the contact
> - The details of the stock(s) to be delivered."

The explanation for this reply is that Mr Porter had never heard of DTC and therefore made enquiries of his colleague, Ms Alison Le Huray, at JBG who in turn spoke to one of her colleagues before calling Mr Porter back. There were transcripts of both those telephone calls and the explanation which she gave Mr Porter is that it is like an American version of a bank code that was applied for the transfer of securities. She therefore gave Mr Porter the information which Julius Baer would need if it was to receive securities from a transferor in the United States, which would be passed on to Julius Baer in Zurich who would handle the transaction.

44. The response given by Mr Porter to Mr Hazout's question was of course not a full or correct answer. Winnetka obviously did not have a DTC account and Mr Porter's email could not be seen as giving DTC details. But although Mr Ashe QC, on behalf of Winnetka, sought to make much of this, in my view, this reply did not cause any damage.

45. It is necessary to describe the circumstances giving rise to Mr Hazout's emails. He says, and I accept, that he first learnt of Inyx at a meeting he had in Paris on 12 December. His original pleading stated that this meeting was with Mr Kachkar but he subsequently corrected that and, although it was challenged as a surprising mistake, I am prepared to accept his correction that the meeting was with a Mr Eugene Bokserman and that as of 12 December he had not met Mr Kachkar. However, he explained that he had previously met Mr Bokserman, who had been introduced to him by mutual friends and who was a broker at a major Canadian bank based in Toronto. Mr Hazout said that he had been impressed by Mr Bokserman and felt that he was someone one could trust. In that meeting in Paris, Mr Bokserman told him about Mr Kachkar and Inyx. He said that Mr Bokserman explained that Inyx was listed on the NASDAQ exchange and had good liquidity, and that Goldman Sachs was going to help Mr Kachkar to organise a leveraged buyout to take the company private. He referred to an announcement that had been made on 24 November 2006 and advised Mr Hazout that it would be a very good investment since the shares were trading at $2.20 and were expected to go up to more than $3.30 after the management buyout ("MBO").

46. Mr Hazout said that Mr Bokserman also explained to him that Mr Kachkar wanted to arrange a loan to provide a bridge for part of the leveraged buyout and was looking for a bank to do so. Mr Bokserman said that this bridging loan was to be secured against Inyx shares and real-estate as collateral. In response, Mr Hazout suggested introducing Mr Kachkar to Julius Baer as a potential lender. It was in these circumstances that he telephoned Mr Burt at JBG during the course of this meeting.

47. Mr Burt gave evidence about this telephone call and a tape of the call was played in court. Although at the time Mr Burt thought that the person in the background with whom Mr Hazout was conferring was Mr Kachkar, it is now common ground that it was in fact Mr Bokserman. In the telephone call, Mr Hazout referred to Mr Kachkar as "a friend in Canada", whom he described as a "Canadian tycoon", who needed a bridging loan of £10 million for 90 days. He explained the offer of collateral of Mr Kachkar's holdings in Inyx and real-estate in the US. Although it would have been clear from the conversation that Mr Hazout did not in fact know Mr Kachkar at all well, since he had constantly to refer to Mr Bokserman to answer simple questions about him, this call shows that Mr Hazout was prepared to promote Mr Kachkar to Julius Baer and seek to assist him in getting a loan. That may well be because the loan was to help the MBO on the basis of which Mr Hazout was going to make an investment. In any event, JBG refused to consider lending to Mr Kachkar, as Mr Burt explained in an email to Mr Hazout on 15 December:

> "Whilst I have not formally presented the proposal to the Credit Committee of the Bank my sense is that this would be a difficult one for Julius Baer to do.
>
> As a general rule the Bank has a fairly conservative lending policy and tends not to be credit led in respect of a new relationship. Naturally we remain happy to assist with the requirements of existing private banking clients such as yourself.
>
> Specifically with this particular proposition the security available in the private company shares and the US property may be difficult to realise in the event of a default. Ordinarily we could consider lending against the NASDAQ stock, despite the concentration of risk providing we had good liquidity in the security. Unfortunately in Mr K's case, because of the % of shares held, these could be very difficult to liquidate in an orderly and timely way.
>
> I'm sorry I could not offer a more positive outcome at this stage."

48. It is an example of the kind of allegation that Mr Hazout made in his evidence that he contended that this was not the full or indeed the real reason for the refusal. He said that it was because Mr Burt had discovered that Mr Kachkar had been declared bankrupt; and one of Mr Hazout's complaints against Julius Baer was that when arranging payment for the Inyx share transactions in which Mr Kachkar was clearly involved, Julius Baer failed to alert him to this fact. That was based on disclosure in these proceedings by Julius Baer of a Google search on Mr Kachkar that in fact said nothing about any bankruptcy but which had advertising links at the side of the page to websites concerning bankruptcy. However, Mr Burt gave evidence of the reasons for the unwillingness to grant a credit facility to Mr Kachkar and he explained that already in the initial telephone call he realised that the security being offered was not of the kind that Julius Baer would find acceptable. He said that he never himself saw this internet search, which was carried out by someone on his staff, nor indeed was

there any evidence at all before the court that Mr Kachkar was ever declared bankrupt. I consider that there is nothing whatever in this allegation advanced by Mr Hazout.

49. On the afternoon of 21 December, Mr Hazout sent two emails to Mr Porter. In the first, he asked Mr Porter to transfer the US dollars received from his personal account to the Winnetka account and said:

> "I will send you another email with the details for the Inyx shares transaction."

As I understand it, this was the first time that Mr Hazout had mentioned Inyx to Mr Porter.

50. The second email was entitled "Share Order of Inyx Shares". It forwarded an email exchange between Mr Hazout and Mr Kachkar (which exchange had been copied to Mr Bokserman). This email comprised the first instruction on which the claim is brought and it is necessary to set it out in full:

> "Darren,
>
> Could you sort out that.
> We will use the $ that we received from HK for that.
>
> Many thanks
>
> Jack Y. Hazout
>
> **De** : Kachkar, Jack/COR [mailto:jkachkar@tor.inyxgroup.com]
> **Envoyé** : mercredi 20 décembre 2006 16:08
> **À** : Jack Y. HAZOUT
> **Cc** : Eugene Bokserman
> **Objet** : RE: Share Order of Inyx Shares
>
> Hi Jack,
>
> Please send the $650,000 to the following account:
>
> Thor United Corp.
> A/c xxxxxx
> IBAN: xxxxxx
> Bank UBS Zurich
> Amount $650k
>
> Once they receive confirmation of fund transfer, they will DTC you the shares. Here is the stock/DTC contact information you requested last week:
>
> The shares held at Penson Financial Services Inc., Dallas Texas DTC#0234, account xxxxxx, Thor United Corp. The contact person will be Peter Kambolin or his assistant Olga Chekhlov,

> who could be reached at (646) 825-8084 tel., or (212) 973-0070 fax, or olga@thorunited.com.
> Please let me know when you will make transfer. We should get together next week.
>
> Thanks,
>
> Jack
>
> **From:** Jack Y. HAZOUT [mailto:jh@esds.com]
> **Sent:** Wed 12/20/2006 8:25 AM
> **To:** Kachkar, Jack /COR
> **Cc:** 'Eugene Bokserman'
> **Subject:** Share Order of Inyx Shares
>
> Jack,
>
> Hi I hope all is well with you, as I spoke with Eugene yesterday and I told him that I am willing to buy $US 650,000
> Send me the details to do so and I will send them to my banker to do the execution.
>
> I will forward you another email with the details of the questions taht [sic] the Bank is asking for the loan.
>
> I will also call you today to speak with you about Algeria and the details.
>
> Many thanks
>
> Jack Y. Hazout"

51. Mr Porter explained that he understood this as a clear instruction from Mr Hazout to do what was stated in the email to him from Mr Kachkar, ie to transfer the amount $650,000 as specified. From the previous explanation that he had received regarding DTC, he understood that Mr Hazout was being told that after the funds had arrived, the vendor would transfer the shares to Winnetka using the DTC codes in the manner in which he had understood them from his earlier enquires within the Bank.

52. Mr Hazout's explanation was very different. He said that by sending to Mr Porter the email exchange he had with Mr Kachkar, he intended that Julius Baer would handle the execution of the share purchase. In other words, it was for Julius Baer to do the deal, using the money that was transferred into Winnetka's account in accordance with his previous email. He did not at that point have a contract of purchase, but through Mr Kachkar as intermediary he knew that Thor United Corporation ("Thor") held Inyx shares of this value which were available for sale.

53. Further, Mr Hazout said that he had looked up DTC on the internet, where it was explained on the Depository Trust Corporation website that this was a secure means of purchasing shares and exchanging money. He said that he there read about the

DVP method of settlement and therefore felt "assured that our funds would be secure".

54. I do not accept Mr Hazout's evidence that he attributed this meaning to DTC at the time or that he regarded the reference by Mr Kachkar to DTC as meaning that a secure method of settlement (ie DVP) was to be used. Mr Hazout said that he had discussed this point about DTC, after the meeting with Mr Bokserman in Paris, with Mr Valicon before sending the instruction on 21 December. However, there was no evidence to that effect from Mr Valicon. In my judgment, on the balance of probabilities, Mr Hazout had no understanding at that stage of what DTC meant and he was just passing on what Mr Kachkar asked for. If Mr Hazout had understood the DTC system, and further intended that this should be a DVP transaction, then he would have complained forcefully to Julius Baer at the end of December when he learnt that the money had been paid over direct to Thor without the shares being received through the DTC system. Further, if he had spent time searching and reading about this on the internet, I consider that he would not repeatedly have made the mistake of referring to DTC as "DTS" in his own emails. That only demonstrates his unfamiliarity with what he was talking about.

55. I note that Dr Walford, in his expert report, considered that Mr Kachkar's 20 December email meant that he was intending to provide the shares after receipt of the funds in Thor's specified UBS account as an FOP delivery to the DTC account to be provided for the benefit of Julius Baer's clients. That interpretation seems to me clearly correct. Penson Financial Services, Inc, was evidently the DTC account holder used by Thor. Thus Mr Kachkar used DTC in the simple sense of an electronic method of transferring shares, and he continued to use it that way long after the payments had been sent: for example, on 24 January 2007, when Mr Hazout was chasing for delivery of the shares, Mr Kachkar sent an SMS message saying that "dtc is on the way". In my judgment, it was only many months after the event that Mr Hazout discovered that DTC offered a secure method of purchasing shares by means of DVP. As Mr Hazout said in his evidence when asked why it took him so long to make any complaint:

> "It took us until end of May [2007] where we started to understand that something is wrong. We started to talk to people in back office and people that do wealth management, and they started to explain to us that it is completely the fault of the banks."

56. However, that in itself does not resolve the question of whether Julius Baer were instructed to, in effect, simply do what Mr Kachkar said in the attached email from him of the day before, or whether Julius Baer was being asked to handle "the execution", which generally means entering into the transaction for the purchase of the shares as opposed to simply the subsequent settlement by way of payment and delivery.

57. Mr Porter focused only on Mr Kachkar's email and considered that it was what was set out there that he was being asked by Mr Hazout to "sort out". I accept Winnetka's argument that this was not correct and that the email exchange should be read as a whole. I do not think that Mr Hazout's email instruction to Mr Porter was clearly, on the one hand, to do what Mr Kachkar had requested, or on the other hand,

as Winnetka argued, to execute the deal. In my judgment, the meaning of Mr Hazout's brief instruction to "sort out that" was unclear. In those circumstances, Mr Porter, on behalf of Julius Baer, should have clarified the instruction with the client. The failure to do so was, in my view, a failure to exercise requisite care and therefore a breach of contract and also negligent. Whether it could be considered to be grossly negligent is a difficult question as it takes one into the problematic area of determining the standard for gross negligence. If it were necessary to decide the point, I would hold that it was not gross negligence.

58. However, I do not need to reach a firm decision on that point, because it is necessary to consider what would have happened if Mr Porter had asked for clarification. Mr Hazout maintained in his evidence that his was an instruction to purchase the shares on the market. As Winnetka's case developed, it was on the basis that Thor was ready to sell and Julius Baer should have proceeded to arrange a transaction with them, which could be done on the telephone, and then reported to the market and settled through the DTC by a DVP arrangement for the transfer of money against shares. However, I do not regard that as realistic in the light of my findings as to what, on the balance of probabilities, had transpired.

59. I find that what Mr Bokserman had told Mr Hazout was that Mr Kachkar would either himself sell the shares that were being held on his account by Thor, or that Thor would be the vendor. That was then discussed by Mr Hazout with Mr Valicon, and there followed exchanges by SMS message and telephone between Mr Bokserman and Mr Hazout on 13, 15, 18 and 19 December. Hence, on 13 December, the day after the meeting in Paris, Mr Bokserman sent an SMS message to Mr Hazout stating:

> "Up to 1.8 mm shs are available How many shs will you be taking? It closed yestday [sic] @ 2.14"

Then on 15 December he sent a further SMS saying:

> "will send u contact info for DTC I left Jack [Kachkar] some stock available for you but you must confirm quantity by Monday"

On Monday, 18 December, in the evening Mr Bokserman sent a further SMS to the same effect but saying "need an answer now".

60. Evidently, Mr Hazout spoke to Mr Bokserman on Tuesday when he agreed to buy $650,000 of Inyx shares. That emerges from his email of that day to Mr Kachkar which begins:

> "Jack,
>
> Hi I hope all is well with you, as I spoke with Eugene [Bokserman] yesterday and I told him that I am willing to buy $US650,000.
>
> Send me the details to do so and I will send them to my banker to do the execution.

> I will forward you another email with the details of the questions taht [sic] the bank is asking for the loan.
>
> I will also call you today to speak with you about Algeria and the details."

61. By the time of that email of 20 December, Mr Hazout was clearly in direct contact with Mr Kachkar, and he confirmed in his evidence that he had already spoken to Mr Kachkar by telephone although he was very vague about the terms of those conversations. Mr Hazout also said that he called Mr Kachkar later the same day, as indicated in the email, but just to give him the name of the contact in Algeria and that his reference to Algeria in this email was simply to recommend a contact there. I find that hard to accept as if that were the case I would expect this to be given in a further email rather than on the telephone, but this is of little significance. I consider in any event that, in all probability, a deal was agreed on the telephone with Mr Kachkar and that the basis of that deal was that payment would be sent first and that the release of the shares would follow. I reach that conclusion for five reasons in particular.

62. First, when asked in general terms about the handling by Julius Baer of Winnetka's share dealing, Mr Hazout confirmed that it was important for him to receive information about the results of execution of transactions so that he could follow what was happening on the portfolio. He agreed that he would complain to Mr Porter when he thought that he had not been told quickly enough. He kept a close eye on Winnetka's portfolio, monitoring its performance on a daily basis. However, for this first purchase of Inyx shares, neither the share price nor the number of shares to be purchased were specified in Mr Hazout's instructions to Mr Porter. If it had been for Julius Baer to negotiate the deal, then Julius Baer would have been involved in establishing the price and, therefore, the number of share to be acquired. Yet Mr Hazout never asked how many shares Julius Baer had agreed to purchase. There were no less than three occasions over the subsequent weeks when this would have been the natural question for Mr Hazout to ask: first, in one of his two telephone conversations with Mr Kevin Miskin, Mr Porter's assistant, on 27 December when Mr Hazout discussed his instructions regarding the second Inyx transaction; secondly at a meeting with Mr Porter in the offices of JBI on 28 December; thirdly, in his telephone call with Mr Porter on 9 January 2007, by which time he had become a little concerned that no shares had been received. Under cross-examination, Mr Hazout in the end said that he did ask about this in the meeting on 28 December, but that was not initially his oral evidence and it is not mentioned in the full account of that meeting set out in his witness statement. I reject Mr Hazout's final version and accept Mr Porter's evidence that he was not asked about the details of the 1st Inyx transaction (ie share price and/or volume) in the meeting. Mr Hazout was wholly unable to explain that lack of interest in these details, which was wholly out of character when considered against his many previous share dealings. That indicates that he in fact knew the price at which Winnetka was purchasing the Inyx shares, which explains why he simply forwarded to Mr Porter his exchange with Mr Kachkar without qualification.

63. Secondly, Mr Hazout had been put under pressure by Mr Kachkar, through Mr Bokserman, on 22 December to ensure that the money was transferred and in consequence he was quickly onto Julius Baer to ensure that the transfer of funds had

been carried out: hence on 22 December, he called Mr Porter to check that the money has left Winnetka's account at Julius Baer to go to Thor. Subsequently, when Mr Hazout was told that the money had been transferred without simultaneous delivery of the shares, in no way indeed did he question or criticise what Julius Baer had done or express any alarm that the transaction had been handled in that manner. The telephone conversation between Mr Hazout and Mr Porter of 9 January, of which the tape was played in court, is particularly striking in that regard. By that stage, Mr Hazout had become a little concerned at the lack of receipt of any shares and the following exchange took place:

> "JH: It can happen that we send the money and we didn't get the shares?
>
> DP: It's very unlikely…because you've paid the money of course, because it's what they call a free of payment. In settlement terms, it's called free of payment. If you do free of payment what it means is that they will deliver the shares and you will deliver the cash regardless of whether the other one's been received.
>
> JH: Yeah.
>
> DP: If it's called against payment…
>
> JH: Yeah
>
> DP: That means that it doesn't happen unless you have both in place, so cash and shares, but this is a free of payment delivery.
>
> JH: You don't want to call the guys in…?
>
> DP: We are chasing them, don't worry."

Then the next day, 10 January, in a further telephone conversation Mr Porter told Mr Hazout that the reason the shares had not been received has that the counterparty that had the stock had not yet given Julius Baer instructions for delivery. As Mr Hazout immediately observed, that was despite the fact that the money for the purchase had been paid "long ago". But notwithstanding his concern, Mr Hazout did not then suggest that Julius Baer was at fault because it had transferred the money.

64. Thirdly, I attach significance to two contemporaneous emails, one almost simultaneous to the instructions and the other a few weeks later, to which the Bank was not a party. On 21 December, Mr Bokserman emailed Mr Hazout regarding the "Share Order of Inyx Shares" stating:

> "Jack,
>
> As discussed in Paris, you'll have to transfer funds first and after that shares will be released.
>
> Regards, Eugene"

Then on 17 January, when Mr Hazout was pressing Mr Kachkar about the lack of delivery of the shares, Mr Kachkar's response included the statement:

> "You sent the guys $650k and they sent you 317,000 shares @ $2.05 per share and your broker sent them back – which I still don't understand why they did that – that is the original deal and the guys completed their end."

Although Mr Hazout denied that what was said in these emails, including the reference to "the original deal", was correct, and I accept that Mr Kachkar proved thoroughly untrustworthy, Mr Hazout did not challenge or query what Mr Bokserman and Mr Kachkar said at the time. Indeed, Mr Kachkar's email of 17 January was consistent with what he had said in an SMS message a week before.

65. Fourthly, I rely on the reasons for my conclusion regarding the 2nd Inyx transaction which I discuss below and which apply similarly here. For Mr Hazout and Winnetka, the purchase of Inyx shares was a very short-term investment intended to make a quick profit from a forthcoming MBO which Mr Bokserman had told him about. He was focussed on the profit they expected to make and manifestly did not see the shareholding in Inyx as part of the long-term investment portfolio. Mr Hazout said in answer to a question from the court that he trusted Mr Bokserman and, on his recommendation, felt no concern about trusting Mr Kachkar. Dealing in that way with people he believed he could trust, Mr Hazout never contemplated that there could be any possible problem over the receipt of the shares.

66. Fifthly, I regard it as significant that in these proceedings Winnetka originally referred to Mr Kachkar as the vendor: see the Reply, served on 18 June 2010. Mr Hazout's first very full witness statement, dated 16 November 2010 was to the same effect. He then contradicted himself in his second witness statement, dated 6 January 2011, where he asserted that Mr Kachkar "never was the vendor", and the Reply was amended shortly afterwards to describe Mr Kachkar instead as the "facilitator".

67. Altogether, although I consider that Julius Baer, through Mr Porter, should have clarified the 1st Inyx instruction with Mr Hazout, on balance I conclude that had it done so, it would have been told that the instruction meant what Mr Porter took it to mean. Accordingly, in sending the money free of payment to Thor's account, Julius Baer did what was asked of it.

68. Furthermore, as I explain below, Winnetka eventually received a transfer of Inyx shares that included the shares attributable to the 1st Inyx transaction.

69. Before turning to the 2nd Inyx transaction, I should mention the surprising emails of 22 December (ie, the day after the 1st Inyx instruction was received from Mr Hazout). That day, Mr Porter sent an email to Ms Alison Le Huray at JBG with the subject "Winnetka Trading". He asked her, first, to transfer the money from Mr Hazout's personal account to the Winnetka trading account, pursuant to Mr Hazout's instruction the day before. Secondly, he referred to the instruction received from Mr Hazout to transfer $650,000 to Thor, and quoted the Thor account details from the email of Mr Kachkar that had been included in Mr Hazout's email: see para 50 above. Mr Porter continued: "This is to pay for some new shares. Please see below." He then quoted the further details from Mr Kachkar's email. Ms Le Huray, in turn, forwarded that

email to Richard Perkins, who was then director of the client documentation unit at JBG (the position currently held by Ms Ducellier).

70. Surprisingly, Mr Porter omitted from his instruction to his colleagues in Guernsey the name of the company in which Winnetka was purchasing the shares. No doubt as a result of that, Mr Perkins then emailed Ms Olga Chekhlov at Thor stating:

> "I understand that once you have received funds from Mr Hazout, you will be transferring some shares in Thor United Corp to us.
>
> Before I instruct our back office in Zurich to liaise with you and arrange to receive the shares, please can you confirm that the transfer will be electronic rather than physical?"

71. That elicited a response from Ms Chekhlov:

> "The shares will be transferred using DTC, no physical shares certificates will be provided."

Shortly afterwards, Mr Perkins wrote to Ms Chekhlov again:

> "please confirm the number of shares, the ISIN Number and your DTC number if applicable."

Her reply was as follows:

> "Number of shares: 2,375,000
>
> Cusip: 461868101
>
> The shares will be sent from Penson Financial Service, Inc, Dallas Texas DTC #0234."

72. The number of shares stated in that response made no sense since the trading price of Inyx shares was over $2 per share. Neither side in this trial was able to explain how Ms Chekhlov could have arrived at the figure of over 2 million shares set out in her email. However, Mr Perkins did not appreciate this striking anomaly since he did not realise that the shares in question were in Inyx. But Mr Porter did appreciate it when he was told the figures on his return from his Christmas break on 28 December. The point was important, because Julius Baer needed to know the number of shares to be received since the DTC system requires the recipient account to specify the correct number otherwise the transfer would not be effective. By 28 December, Mr Hazout had given instructions for the 2nd Inyx transaction and so this point was then discussed in that context.

The 2nd Inyx transaction

73. Mr Hazout gave evidence that on 26 December he met Mr Kachkar in Paris. He said it was the first time they met face to face. Previously, they had spoken on the telephone, although he was able to say very little about those conversations in the witness box and barely referred to them in his witness statements. Presumably, at

some point Mr Hazout had told either Mr Bokserman or Mr Kachkar of Julius Baer's response to his enquiry about a loan facility for Mr Kachkar, but when or how that was communicated was not revealed. In any event, prior to the meeting of 26 December, Mr Hazout received a one page fax from Mr Kachkar. This had no cover sheet, was written in manuscript, and stated only:

> "Hi Jack!
>
> 2.067 million shares → $4,340,700 USD.
>
> Let me know what you did →
>
> to Thor again – you have all details for DTC.
>
> I have given them heads up
>
> [Signed JK]"

74. Following the meeting, on the evening of 26 December, Mr Hazout sent an email to Mr Porter. This is the email that sets out the instruction for the second transaction, and I refer to it as "the 2nd Inyx instruction". It is entitled "Buying shares of Inyx - More" and in view of its importance in this case I shall quote it in full:

> "Darren,
>
> I need to buy quickly another set of shares of Inyx Pharmaceuticals that should be sold by two parties listed below:
> The total acquisition scenario is about US$ 4.158.000 + 4.642.000 = a total of 8.800.000.
> It represented a total of 1,890,000 + 2.110.000 = a total of 4.000.000 at a value of 2.20 US$ per Share.
>
> The company should be completely bought next week at 3.25 per share by Goldman Sachs.
> We should sell our shares after next week and be paid in exchange of the shares.
>
> Then the total value of our share then should be:
> 4.000.000 x 3.20 US$ = $12.800.000 US$
> The buying price should be: 8.800.000 US$
> Then the benefit should be: 4.000.000 US$ at the end of January (maximum).
>
> To do this transaction, Darren could you please take all the money left, that we have in the US$ account and loan me the difference for a month.
> As you know and I already told you, I don't want to hold more dollars (I hold Euro) a [sic] rather prefer to have them loaned to me for a month.
>
> Then, the instructions and money has to be sent ASAP to:
>
> First Block
>
> Account holder
> Bennett Jones LLP lawyers Trust
>
> Bank
> Royal Bank of Canada
> 339-8th avenue SW Calagary [sic] AB

Canada – T2P 1C4
Bank Code: 003
Transit: 00009
Account: *xxxxxx*
Swift: *xxxxxx*
ABA *xxxxxx*
Reference: J Kachlar [sic]

Value of the transfer: 4.158.000 $ - numebr [sic] of shares 1.890.000 shares
We should got the DTS quickly, may be tomorrow.

Second Block
Account holder
Thor United corp

Bank:
UBS AG
Paradeplatz 6
POBOX CH 8098
Zurich – Switzerland
Bank UBS Zurich
Swift: *xxxxxx*
Beneficiary acct: *xxxxxx* (US$)
IBAN No *xxxxxx* L
Reference: J Kachlar

The shares are held at Penson Financial Services Inc. Dallas-Texas DTC#0234, account *xxxxxx*, Thor United Corp. The contact person will be
Peter Kambolin or his assistant Olga Chekhlov, who could be reached at (646) 825-8084 tel., or (212) 973-0070 fax, or olga@thorunited.com

Value of the transfer: 4.642.000 $ - numebr [sic] of shares 2.110.000 shares
We should got the DTS quickly, may be tomorrow.

Could you also send me in return the bank reference and the telephone contact to send them to cantac [sic] us for the issue of the DTS.

Could you advise me on that when it is ready.

Many thanks

I sould be in our office Wednesday morning for me and also for Jack Kachkar the CEO of the company.

Jack Y. Hazout"

75. The 2nd Inyx instruction cannot be read or interpreted as an instruction to carry out the transaction as DVP through DTC since that would be impossible as the recipient of the funds and the transferor of the shares are not the same in either case.

76. It seems clear, as Mr Hazout acknowledged, that although before the meeting in Paris Mr Kachkar had offered 2.067 million shares as set out in his fax, by reason of what transpired at the meeting Mr Hazout decided that Winnetka would purchase 4 million. Mr Hazout was emphatic that this 4 million was in addition to the shares Winnetka was expecting to receive for the initial payment of $650,000. Moreover, the total

acquisition would constitute by far the largest holding in Winnetka's portfolio. It would also represent some 10% of the voting capital of Inyx. Mr Hazout said that he was well aware of these points, as indeed one would expect, but the intention was that Winnetka would retain its shareholding in Inyx for only a short time – about one month – until the MBO which Mr Kachkar had given him to understand would occur sometime in late January.

77. In fact, unbeknown to Mr Hazout, Mr Porter was away from the office until 28 December and as at that time he did not have a Blackberry he did not receive the email on 27 December. So when Mr Hazout called JBI to speak to Mr Porter later that day, he came through to his assistant, Mr Miskin. He learnt from Mr Miskin that Mr Porter would be returning the next day but said that he would at once forward his email to Mr Miskin, who therefore received it on 27 December. Although Mr Hazout sought in his evidence to deny that there was any urgency, the fact that he did not want to wait until Mr Porter's return and was manifestly keen that steps should be taken on 27 December, when considered together with the opening words of his message ("I need to buy quickly...") show in my view that Mr Hazout regarded this instruction as urgent. As his email refers also to a buyout "next week", that underlines the point. Mr Hazout was clearly acting on what he had been told by Mr Kachkar in their meeting.

78. By his message, Mr Hazout sought also to use the loan facility for Winnetka that was in place. Mr Miskin therefore contacted BJG, and thus learnt about the existing credit facility against the portfolio, which he confirmed with Mr Stephen Burt in Guernsey. Given the scale of the transaction, Mr Porter was also contacted as Winnetka's client relationship manager, by telephone. There were transcripts of all the Julius Baer telephone calls on this matter that day. Mr Burt told Mr Porter that he needed to know the background to the transaction; that information was necessary for the Bank's money laundering checks.

79. A meeting had already been arranged for Mr Hazout to see Mr Porter at 10 am on 28 December. Mr Miskin told Mr Hazout that the payments specified in the 2nd Inyx instruction would be made on 28 December, but on transmitting those instructions to JBG by an email into which he cut and pasted the details from the instruction, Mr Miskin concluded:

> "Finally, Darren [Porter] is in the office tomorrow. Could you speak with him to check all is in order before actually making the payment."

80. On coming into the office on 28 December, Mr Porter spoke to Mr Perkins in Guernsey. The transcript of the call is timed at 9.44 am. His initial concern was to make sure that the new instruction did not embrace the $650,000 already sent so that there was no duplication in the payment. In the course of that conversation, Mr Perkins referred to the email from Ms Chekhlov (see (para 71 above) and Mr Porter at once realised that the numbers did not work out. Mr Perkins remarked: "...So you need to discus that with the client...", to which Mr Porter agreed. After some further discussion, Mr Perkins confirmed: "I will not release those payment until you tell me we can, you'll let us know after your meeting?", to which Mr Porter agreed.

81. The meeting with Mr Hazout must have taken place very shortly after that telephone conversation, since it was fixed for 10 am. Mr Hazout came to JBI's office with his brother-in-law, Mr Benchetrit. Both sides agree that this was an important meeting. Counsel for Winnetka, in their written closing submissions, described it as "crucial". The accounts given by Mr Hazout and Mr Porter are markedly different. Mr Porter said that Mr Hazout explained that the request to purchase $8.8 million of stock in Inyx was in anticipation of a buyout led by Goldman Sachs which would create a private pharmaceutical company with $900 million of sales, to be headed by Jack Kachkar, the present CEO of Inyx and a "business associate" of Mr Hazout. Mr Hazout also told him that Mr Kachkar would like to become a client of Julius Baer and that he was in the process of putting together a consortium to buy the Olympique de Marseille football club. Mr Porter said they discussed the payment instructions and Mr Hazout explained that the $650,000 was a separate deal that represented his buying some stock at an earlier stage and that the shares being delivered by Thor (ie the 2.375 million) included the shares from the 1st Inyx transaction and part of the shares from the 2nd Inyx transaction. He also said that the reference to "Saidazimov" in his email of 27 December under the DTC information for Bennett Jones was because Mr Saidazimov was the owner of Bennett Jones. During the meeting Mr Hazout called Mr Kachkar on his mobile and confirmed with him that he would be coming to see Julius Baer and Mr Porter with a view to becoming a client.

82. Mr Hazout in his evidence agreed that there was discussion about Mr Kachkar, including reference to his planned bid for Olympique de Marseille, and the intention to introduce him as a client of Julius Baer. As regards Inyx, he also said that he told Mr Porter a little more about the leveraged buyout. But, in sharp contrast to Mr Porter's evidence, he said that there was then discussion as to the whereabouts of the first block of shares and why they had not been received, and that he expressed his concern at the shares not having been delivered. He also said that Mr Porter told him that the Bank had already dealt with the second share purchase. As I have already mentioned, in his oral evidence Mr Hazout finally said that in this meeting he also enquired about the purchase price achieved for the 1st Inyx transaction. He said that he never told Mr Porter that Mr Saidazimov was the owner of Bennett Jones: that was preposterous since Bennett Jones is a leading Canadian law firm and he had never heard of Mr Saidazimov before his name appeared in the details given by Mr Kachkar for the 2nd Inyx transaction. In particular, Mr Hazout denied that there was any discussion in the meeting of the nature of the 2nd Inyx transaction.

83. On the critical points regarding this meeting, I accept Mr Porter's account of the meeting and reject the evidence of Mr Hazout. In the first place, after the meeting Mr Porter called JBG and spoke again to Mr Perkins. The transcript of that call is timed at 11.48 am. In that call, Mr Porter told Mr Perkins with reference to the 2nd Inyx transaction that "that money can go". He also confirmed that the $650,000 was for the first stage and that therefore what Olga Chekhlov was telling them that she was going to deliver referred to the full amount including the shares for the initial $650,000 and Thor's share of the second transaction in excess of 4 million. Mr Porter also said that Mr Saidazimov is actually the owner of Bennett Jones, so he had clearly got that impression from Mr Hazout but it may be that was a misunderstanding; in any event, that is of little relevance. What to my mind is absolutely clear is that the information which Mr Porter gave Mr Perkins on the

telephone at shortly before 12 noon on 28 December was the direct result of what he had been told by Mr Hazout in their meeting immediately beforehand.

84. Moreover, the most striking conflict regarding the meeting is that Mr Porter said that Mr Benchetrit was present throughout whereas Mr Hazout said that they came together to see Mr Porter but that Mr Porter saw them separately for a private discussion with each before they then left JBI together. If Mr Hazout was correct on this point that would seriously undermine Mr Porter's evidence and, therefore, Mr Benchetrit would provide valuable supporting evidence from another source of Mr Hazout's account. Yet Mr Benchetrit was not called by Winnetka to give evidence. As I observed earlier, I regard the fact that no evidence was adduced from Mr Benchetrit regarding this meeting as significant.

85. It follows from this that I reject Mr Hazout's evidence that there was discussion about the whereabouts of the shares under the 1st Inyx transaction, and that if he had not received reassurance from Mr Porter then he would have called a halt to the 2nd Inyx transaction. I find that Mr Hazout had made an agreement on behalf of Winnetka with Mr Kachkar in Paris on 26 December to purchase the shares covered by the 2nd Inyx transaction. Although Mr Hazout was emphatic that there was no agreement made that day, I consider that he was thinking more in terms of the lack of any formal written contract. Whether Mr Kachkar was the facilitator or himself the vendor as alleged in the Canadian proceedings, I find that Mr Kachkar told Mr Hazout that the two parties to which he referred, ie Bennett Jones as to 1,090,000 shares and Thor as to 2,110,000, would deliver those shares if Winnetka sent the money. Those details were recorded in a manuscript note produced during the meeting, which note was the basis of Mr Hazout's instructions to Julius Baer the next day. Julius Baer then did what it was instructed to do, ie to send two payments to the specified bank accounts for two parties and then arrange for receipt of the shares via DTC. I consider that there was no possible ambiguity in the instructions that were given for this 2nd Inyx transactions.

86. Winnetka's primary case was the 2nd Inyx instruction was an instruction to Julius Baer to arrange transactions with these two named vendors through DTC as DVP transactions. However, as I have noted, the experts agree that DVP was impossible since the named transferees of the money were not the same as the transferors of the shares. So on Winnetka's case, that would have required re-arrangement of the transactions with the vendors' consent. But that is not what the instruction required. Julius Baer was not being asked to execute the transactions: the deal had already been done. The observations which I made above about the lack of criticism or complaint by Mr Hazout in his conversations with Mr Porter on either 9 or 10 January apply with even greater force regarding the 2nd Inyx transaction in view of the very much larger amount of money involved. The complaints which Mr Hazout did make, with increasing and understandable concern over the subsequent weeks, were all directed at Mr Kachkar and in response Mr Kachkar effectively "strung along" Mr Hazout with false promises about arrangements for delivery of the shares.

The delivery of 1,008,000 shares

87. In an effort to obtain delivery, JBG also contacted Mr Kachkar. On 17 January 2007, Richard Perkins from JBG emailed Mr Kachkar directly, having been referred to him

by Olga Chekhlov, to inquire about the delivery of the 2,375,000 shares which she had said were being transferred from Thor. He responded to say that he would send an email later that evening, and when he did not Ms Ducellier (as Mr Perkins had gone on holiday) sent chasing emails, first on 18 January and then again on 22 January. In reply, Mr Kachkar stated on 22 January that:

> "… As per our discussion, the sellers has [sic] confirmed to me and will confirm this in writing to you today that they have to make all the DTC's out of Mirimar as they can only do third party dtcs. So therefore are collecting the shares there in order to transfer them to your client."

88. JBG was finally advised on 25 January by Miramar Securities LLC ("Miramar") that they would be delivering through DTC 1,008,000 shares in Inyx. JBG advised Julius Baer Zurich accordingly and those shares were received on about 31 January. Although this was considerably less than Ms Chekhlov's figure of 2,375,000 shares, since the transfer from Miramar was stated to be on account of the shares due from Thor and the figure of 2,375,000 had been clarified as including the shares purchased under the 1st Inyx transaction, with the delivery of those shares Winnetka received more than the number of shares that could be referable to the 1st Inyx transaction alone. Accordingly, albeit that both Mr Hazout and Julius Baer had to chase for delivery, it appears that Winnetka finally received the shares for its initial purchase of $650,000.

The alternative case

89. I turn to the secondary case advanced by Winnetka, namely that Mr Porter should have warned it (through Mr Hazout) that it was taking a very significant risk with the 2nd Inyx transaction, since proceeding that way gave it no security that the shares would be delivered. This alternative case is expressed in a number of rather more elaborate ways in the pleading, including reference to "good common banking practice", but this was in the end how I understood it to be advanced at trial. That raises two issues: (a) did Julius Baer have such a duty to warn; and (b) if such a warning had been given, what would Winnetka have done?

(a) Alleged duty to warn

90. Since the making of the payments and the receipt of the shares fall within the scope of the Banking Mandate, Mr Thanki QC, on behalf of Julius Baer, argued that this Mandate can be the sole source of an alleged obligation to warn. For Winnetka, Mr Ashe QC looked also to the Investment Mandate and referred in addition to the FSA rules and principles and the ongoing close relationship between Mr Porter and Julius Baer's client, through Mr Hazout. He relied on what Gloster J said in *JP Morgan Chase Bank v Springwell Navigation Company* [2008] EWHC 1186[1], at [57]:

[1] An appeal by Springwell to the Court of Appeal challenging other aspects of the judgment was dismissed: *Springwell Navigation Corporation v JP Morgan Chase Bank and ors* [2010] EWCA Civ 1221, [2010] 2 CLC 705.

> "…Mr. Brindle [for Springwell] submitted that, even leaving aside the circumstances in which JA was introduced to AP, and the role of the Private Bank, the width of the advisory activities which JA held himself out as performing, and actually performed, during the subsistence of the relationship, was "sufficient to crystallise advisory obligations on their own". He accepted that the extent of any advisory obligations assumed was always a fact-sensitive enquiry and that there can be different types or degrees of advice; thus he accepted that a bank which gives a client an ad hoc piece of investment advice once should not be taken to have assumed the role of a general investment advisor. He helpfully identified the Court's task as follows:
>
> > "It is critical, therefore, to assess the width of the advisory activity which a party holds itself out as undertaking. There is a spectrum of possibilities. At one end there will be an ad hoc piece of advice in response to a specific request with no expectation by either party of a further request or of further advice to come. At the other end a party will hold itself out as advising and willing to advise on an on-going basis both on particular investments and on the general composition of a client's portfolio as a whole."
>
> I agree with that approach."

91. As regards the relevance of the FSA rules, Mr Ashe relied on *Seymour v Caroline Ockwell* [2005] PNLR 39, [2005] EWHC 1137, where Mr Havelock-Allan QC, sitting as a Deputy High Court Judge, said at [77]:

> "I accept that whilst the ambit of the duty of care owed by a financial adviser at common law is not necessarily co-extensive with the duties owed by that adviser under the applicable regulatory regime, the regulations afford strong evidence as to what is expected of a competent adviser in most situations (see Lloyd Cheyham & Co Ltd v Eversheds (1985) 2 PN 154)…."

92. However, it is clear from these and other authorities that the starting point is the contract. Here, there was no duty to warn in either the Banking Mandate or in the Investment Mandate as regards investments selected by the client. Of course, if the matter was raised by the client in discussion and the CRM was asked for his view, then any view that was expressed would have to be given with due skill and care. But there is no suggestion that Mr Hazout ever asked Mr Porter for advice, or even for his opinion, regarding the Inyx investments. Nor, and I regard this as significant, did Mr Hazout ever ask Mr Porter how DTC worked or whether Winnetka was or could be protected against counterparty risk when making large payments to the recipient bank accounts specified in the 2nd Inyx instruction.

93. In its Particulars of Claim, Winnetka alleges various implied terms of the contract. Of those, whether or not Julius Baer was under an implied obligation to act in good

faith[2] is immaterial since it was not part of Winnetka's argument at trial, nor could it have been, that either defendant had acted in bad faith regarding the Inyx transactions. Of the other alleged implied terms, the only ones which I consider are of possible relevance to the alleged duty to warn and advise are (a) an implied term to act with all due skill, care and diligence; and (b) the term alleged at para 27(b):

> "that the first and second defendant would so organise and control their affairs so as to provide proper risk management systems in the conduct of their business in relation to the claimant."

94. I shall assume that an obligation to act with all due skill, care and diligence is to be implied. On that basis, insofar as the alleged obligation at (b) above concerning proper risk management systems is part of the ordinary skill, care and diligence expected of a banker or investment adviser handling securities transactions, it goes no further than the implied term at (a) above. Insofar as it goes beyond the ordinary skill, care and diligence expected of a banker or investment advisor, I consider that there is no basis for the implication of such a term. The criterion for implication of a term into a contract remains that of necessity, not simply reasonableness: is it necessary to make the contract work? See *Mediterranean Salvage and Towage Ltd v Seamar Trading and Commerce Inc (The Reborn)* [2009] EWCA Civ 531, [2009] 2 Lloyd's Rep 639, at [15]. But in any event, proper risk management would apply to the conduct of a transaction on behalf of a client when it was left to Julius Baer to determine how the transaction should be handled; in my view, it would not oblige Julius Baer to tell a client that what he had asked it to do was inadvisable or risky.

95. I accept Mr Ashe's general line of argument that the scope of the duty of care is to be determined by looking at the relations between the parties as a whole, and that its ambit can develop over time if, on the facts, the relationship alters from that which the initial contract described. However, in December 2006 Winnetka had been a client of Julius Baer for only a year and while the contacts between Mr Hazout and Mr Porter were very frequent, they were not conducted on the basis that Mr Hazout was dependant upon Mr Porter for advice. Despite the ingenuity of Mr Ashe in seeking to rely on the FSA rules to "inform" the scope of the duty of care, in my judgment, on the facts of this case that regulatory framework does not begin to create a duty as such to warn Winnetka that its express instruction involved an insecure or risky means of conducting a transaction in listed securities.

96. The expert called by Winnetka, Dr Walford, stated that he would have given such a warning. I of course accept that and indeed recognise that some CRMs would have done so. But that is a very different thing from saying that any CRM exercising his role with reasonable skill and care would have done so, such that the failure to give a warning was negligent. This is, as Gloster J observed, a fact-sensitive enquiry. The nature and apparent understanding of the particular client is therefore very relevant. Hence, in the context of a solicitor's alleged duty to warn his client of the risk of taking a guarantee from a limited company without investigating its financial standing, Lord Scott of Foscote, delivering the opinion of the Privy Council in *Pickersgill v Riley* [2004] UKPC 14, [2004] PNLR 31, said at [7]:

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[2] Presumably the implication is alleged as regards the Investment Mandate; there is an express obligation of good faith in the Banking Mandate, cl. 10.1: see para 10 above.

> "A youthful client, unversed in business affairs, might need explanation and advice from his solicitor before entering into a commercial transaction that it would be pointless, or even sometimes an impertinence, for the solicitor to offer to an obviously experienced businessman."

97. In Mr Hazout, Mr Porter was dealing with a seemingly sophisticated client who was the sole originator of the particular transaction based on his own personal relations with Mr Kachkar whom he gave the impression of knowing well. It is self-evident that if one sends a large sum of money to the bank account of an overseas vendor as a payment for shares without any guarantee that the shares are being transferred in return, one assumes the risk of counterparty default. This aspect of the case was advanced on the basis that (1) Mr Hazout assumed that the 2nd Inyx instruction involved a secure method of settling the transaction because of the references to DTC (which for him meant, in effect, DVP settlement), and (2) Mr Porter should have pointed out that this was not the case. However, for the reasons set out elsewhere in this judgment, I do not accept that (1) is correct; and even if it were, there was no reason for Mr Porter to think that Mr Hazout was under this misapprehension. Accordingly, I find that there was no breach of the duty to exercise due skill and care on the part of Julius Baer by the failure to give a warning, whether such duty derived from an implied term in the contract between Winnetka and JBG or as a matter of the common law duty of care that rested on JBI.

(b) Effect of a warning

98. In case I am wrong about that, I proceed to consider what would have happened if such a warning had been given. That is of course a hypothetical question, but for Winnetka to succeed on this ground it would be necessary to find, on the balance of probability, that in those circumstances Winnetka would not have proceeded with the transaction. When I asked Mr Hazout about this, that indeed was his answer. But of course it was an answer given with the benefit of hindsight, knowing all that subsequently went wrong with both these transactions and with Inyx itself. With the substantial loss that Winnetka, and thus Mr Hazout personally, suffered and with his strong feelings about the matter, I consider that it was very difficult for Mr Hazout now to put himself back into the position that Winnetka was in in late December 2006. In my judgment, on the balance of probabilities, Winnetka would have proceeded with the 2nd Inyx transaction notwithstanding a warning that payment without a secure arrangement for delivery of the shares was risky. I reach that conclusion for several reasons.

99. First, Winnetka expected to make a very substantial profit from these transactions in a very short time. Mr Hazout had been led to believe that an MBO at a price of $3.20 or $3.25 per share would be announced in a matter of weeks, whereupon he planned for Winnetka to resell all or most of the shares. Accordingly, Winnetka stood to make a profit from the 2nd transaction of at least 45% within a month on an investment of $8.8 million. Although Mr Hazout was keen to emphasise in his evidence that Winnetka did not need to make this investment and that he was under no pressure to do so, he was constrained to accept, after some equivocation, that at the time he saw this as an exceptional investment opportunity.

100. Secondly, Mr Hazout was prepared for Winnetka to invest a total of $9.45 million in a single, obscure pharmaceutical company. This amounted to by far the largest investment that Winnetka had ever made, was out of all proportion to the balance of the rest of the portfolio, and for the first time involved drawing on the loan facility set up several months before. Of course, Mr Hazout did so in the expectation of the MBO, but that in itself involved a major risk since there could be no guarantee that the MBO would take place, and indeed that is what happened.

101. The fact that Mr Hazout was prepared to take that risk demonstrates forcefully the degree of faith and trust which he had in what Mr Kachkar, backed up by Mr Bokserman, had told him. Indeed, he increased the extent of the further investment to be made in Inyx following his meeting with Mr Kachkar; see para 76 above. Mr Hazout said that Mr Kachkar made a good impression on him as a successful tycoon and he felt he could trust him. He said he relied also on the fact that the MBO of Inyx had been announced on NASDAQ. However, the actual announcement on which he relied, as disclosed in the evidence, was only that the Inyx board had formed a special committee comprised of three independent directors that would evaluate any specific proposal and would retain an independent investment-banking firm to review the fairness of any proposed offer that was made. Although it was announced that Mr Kachkar was working to make an offer, not only did the public announcement leave it uncertain that an offer would be accepted but, unsurprisingly, no price of any offer had been announced. If no MBO materialised, then Winnetka would be left holding 10% of the voting shares in a small company. Although Mr Hazout sought to suggest that this involved no risk since Winnetka could have resold those shares on the market, Winnetka's own expert, Dr Walford, gave evidence from his experience of small companies that if a holder sought to unload such a large quantity of stock it would have had a deeply depressing effect on price; and that to resell the shares in a prudent manner without such very serious losses would take many months to achieve. I consider that, as a sophisticated investor, Mr Hazout would have appreciated that. Indeed, Mr Burt, for JBG, had drawn attention to this aspect when writing to Mr Hazout to explain why a large holding of Inyx shares was not satisfactory as security for Mr Kachkar's requested loan: see para 47 above.

102. Accordingly, since Mr Hazout was prepared to trust Mr Kachkar on a matter as fraught with contingencies as a potential MBO at a price yet to be declared, I consider that he would have dismissed completely any suggestion that Mr Kachkar was asking him to send purchase monies to persons who might not deliver shares in return, and thus that there was a real risk for Winnetka in sending the monies FOP. In my view, Mr Hazout's position was neatly encapsulated in the email which he sent to Mr Kachkar and Mr Bokserman on 5 April 2007 when complaining about the failure to return Winnetka's monies: "I did the transfer after our meeting and I trusted you."

103. Thirdly, I am not satisfied that Mr Hazout ever considered that the transaction was secure in the sense of DVP. As I have already observed, in the telephone calls of 9 and 10 January there is no suggestion of any complaint or outrage by him at what Julius Baer had done, yet he was an individual who was not coy about complaining when he felt it was appropriate. Throughout the period until after the collapse in the share price in Inyx at the beginning of July 2007, all his protests were directed at Mr Kachkar. I regard that as a strong indication that he believed that the transaction Winnetka asked Julius Baer to carry out by the 2nd Inyx transaction was indeed FOP

(although Mr Hazout was doubtless unaware of that specific expression until afterwards). On that basis, the risk of counterparty default was obvious, yet Mr Hazout never hesitated before issuing the instruction to pay.

104. It follows that even if, contrary to my primary finding, Julius Baer was under a duty to warn and/or advise, the breach of such duty did not cause Winnetka any loss.

105. That is sufficient to dispose of this claim. Since I have found that the breach of contract and negligence regarding the 1st Inyx instruction had no causative effect and that there was no breach of contract or negligence regarding the 2nd Inyx instruction, it is unnecessary to explore the application of the exemption and limitation clauses or to examine the question of damages. I would only add that on Winnetka's primary case, it claimed damages on the basis that if it had received the full compliment of shares for its $9.45 million, it would have sold them at a profit at sometime in months preceding the collapse of the share price on 2 July 2007. However, Winnetka did not sell any of the 1.008 million shares in Inyx that it did receive. Mr Hazout's explanation was that Winnetka had to hold on to those shares since Mr Kachkar had told him that he could only unwind the transactions if Winnetka returned the shares which had been received. I regard that explanation as wholly unconvincing. In his first witness statement, Mr Hazout said that the decision to retain the shares was reached "following discussions with my colleagues", presumably a reference to Mr Valicon, who did not give evidence. The email from Mr Kachkar of 22 February 2007, on which Mr Hazout said he relied in reaching this important decision, does not support this assertion. It simply says:

> "I sent you an email yesterday and the day before yesterday an sms that the funds will be transferred by end of week due to shares (which were collected at Mirimar) having to be sent back to owners now.
>
> The dtc process initiated has to be unwound as you requested the funds back and the guys are trying to accommodate you now."

That hardly establishes that Winnetka would also have to send back the shares which it had received. In any event, the promise by Mr Kachkar to transfer back the monies by the end of the week, like so many promises made by Mr Kachkar, was not fulfilled. Therefore, whatever interpretation was placed on this email it had little relevance after the end of February.

106. In my view, it is much more likely that Winnetka retained the Inyx shares which it had received in the continuing hope that the anticipated MBO would materialise. On 26 March, Mr Hazout sent to the two other beneficial owners of Winnetka an article reporting an Inyx press release that an MBO at $3.01 per share was being proposed. A month later, a financial website reported a further press release date 16 April, suggesting that the MBO was only awaiting approval from the special committee of independent Inyx directors. In my judgment, Winnetka did not resell the Inyx shares which it did receive because it was waiting for the MBO; and if I have to assess the hypothetical situation of what Winnetka would have done if it had received the full compliment of Inyx shares, I find that it would acted in the same way. On that basis,

even if Winnetka had received all the shares in Inyx that it expected, it would have lost its investment when they became effectively valueless in July 2007.

107. In conclusion, therefore, Winnetka's claims against JBG and JBI are dismissed.