IN THE EASTERN CARIBBEAN SUPREME COURT
TERRITORY OF THE VIRGIN ISLANDS

IN THE HIGH COURT OF JUSTICE
COMMERCIAL DIVISION

CLAIM NO. BVIHC (COM) 0045/2013

BETWEEN:

COMODO HOLDINGS LTD

Claimant

v

[1] RENAISSANCE VENTURES LTD
[2] JOSEPH KATZ, as executor of the Estate of the late ERIC D EMANUEL

Defendants

Representation:

Mr. David Chivers QC, Mr. Adrian Francis, Mr. Simon Hall and Ms. Martha Ramtahal for the claimant
Mr. Paul Chaisty QC, Mr. Mark Forte, Ms. Lauren Peaty and Dr. Alecia Johns for the defendants

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2019: June 27-31, July 2-5, 8-11
July 25

JUDGMENT

[1] **JACK, J [Ag.]:** On 2nd October 2006, Eric Emanuel and his wife Alessandra were going to the airport. A van hit their vehicle. Both sustained life-threatening injuries. They were rushed to hospital. Mr. Emanuel was in a coma. Mrs. Emanuel survived. She was able to give evidence to me. Her husband never

regained consciousness. He died the following day. Mr. Emanuel's estate subsequently settled a wrongful death suit for $1 million.

[2] As often happens when people die unexpectedly, Mr. Emanual left his affairs in a state of some confusion. This claim is a consequence of this. At its heart is the question: was Mr. Emanuel a fraudster or an honest man?

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I. Overview

[3] Mr. Emanuel's career was on Wall Street. In 1964 he joined Paine Webber. In 1970 he became the vice-president of international sales. In 1975 he opened his own firm, Emanuel & Co, which acted as a brokerage. It is not quite clear whether Mr. Emanuel had partners in the firm. He may have done in the early years, but certainly by the early 1990's he was the sole owner. He owned 99 per cent of the firm through a limited liability partnership, of which he was the sole owner. The remaining 1 per cent he owned though a wholly owned corporation. Emanuel & Co ceased trading in 1994 in circumstances to which I shall come.

[4] The other main protagonist in this case is Melih Abdulhayoglu. He was born in Turkey in 1968. When he was 19, he went to study in England, initially at the University of Leicester, but after a year he moved to the University of Bradford, which he considered had a better micro-electronics department. He graduated in 1991. After university, he became an entrepreneur in the technology sector. With some others he developed a device which would allow computer gaming companies to rent computer games out, instead of selling them, which had been the standard business model thitherto. The device was marketed through a company called Gamester. The device was a technical success, but it was not commercially profitable. There also seems to have been some dispute about intellectual property rights, but this was not investigated in the course of the trial. The Gamester business was closed in 1997.

[5] One of the other people working in the Gamester business was a cousin of Eamonn McManus. Mr. McManus was a senior bank manager with the HSBC Bank in Hong Kong. He financed Gamester. After Gamester's closure, Mr. Abdulhayoglu decided to establish a new venture to provide cybersecurity services. This business was subsequently incorporated as Comodo Holdings Ltd

("Comodo"), the claimant in this action. Mr. McManus agreed to finance him with an initial capital of £190,000 sterling (although it is not entirely clear whether this included monies already invested in Gamester). At this point, Mr. Abdulhayoglu was living in a two-up two-down terrace house in Leeds. He had also purchased another building at a cost of £150,000. (Whether there were any mortgages over either property is unclear.) This building was used for the staff of the new venture. It was formerly the premises occupied by the Textiles Department of Bradford University. Apart from this real estate, Mr. Abdulhayoglu had no other source of income than Gamester and subsequently Comodo.

[6] In about 1995 Gamester started using the services of an accounting firm, called Business Solutions, based in Halifax in Yorkshire. The two men behind Business Solutions were Chris Robinson and Michael Whittam. Mr. Whittam was not formally qualified as an accountant, but had much practical experience. Mr. Robinson's background is not in evidence, but was likely to be similar. Both Mr. Robinson and Mr. Whittam continued to provide services for Comodo.

[7] In late 1997, Mr. Abdulhayoglu was introduced to Mr. Emanuel by Mr. Abdulhayoglu's brother's ex-sister-in-law. Discussions ensued as to whether and, if so, on what terms Mr. Emanuel would become involved with what would become Comodo. I shall revert to the details of these. On 18th May 1998, Comodo was incorporated in this Territory. Mr. Abdulhayoglu and Mr. McManus were the only shareholders with fifty shares each. The Articles of Association provide for the arbitration of shareholder disputes in New York. Negotiations with Mr. Emanuel continued, although it was only towards the end of 1998 that detailed terms started to be agreed.

[8] Mr. Robinson and Mr. Whittam continued to provide accountancy services to Mr. Abdulhayoglu and, what was now, Comodo. In the initial years, the majority of the work was done by Mr. Robinson, who was also Comodo's company secretary, but from about 2000 Mr. Whittam began to do more of the work and also acted as company secretary.

[9] On 4th January 1999, Mr. Emanuel incorporated Renaissance Ventures Ltd ("Renaissance"), also in this Territory. Mr. Emanuel was initially the sole shareholder. A business associate of his, Mr. José Luis Moreno, was somewhat later appointed as the sole director. Mr. Emanuel was granted a power of attorney to act as "attorney-in-fact" on behalf of Renaissance. On 2nd February 1999, 39,500 shares in Renaissance were allotted to Mr. Emanuel, 10,000 to Dr. Raymond Nisi and 500 to Starnet Universal Corp (a company owned by Mr. Moreno) ("Starnet"). However, on 19th November 1999 Mr. Emanuel's shares in Renaissance were cancelled.

[10] Subsequently two agreements were signed. The first was a Joint Venture Agreement ("the JVA") between (1) Owl's Nest Ltd ("Owl's Nest"), a BVI company wholly owned by Mr. McManus, (2) Mr. Abdulhayoglu, (3) Renaissance, (4) Comodo and (5) a British wholly-owned subsidiary of Comodo called Comodo Technology Development Ltd ("Comodo Tech"). The second was a Share Subscription Agreement ("the SSA") made between (1) Renaissance and (2) Comodo. Both agreements were dated 28th January 1999, but the actual signing was probably a little later. Nothing turns on the backdating. Under the terms of the SSA, Renaissance were to acquire 50 shares in Comodo at a price payable in instalments totaling $750,000. Again I shall come back to the terms of the JVA and the SSA.

[11] Comodo says it entered the JVA and the SSA on the basis of fraudulent misrepresentations made by Mr. Emanuel. Further fraudulent misrepresentations were made in the course of Comodo's dealings with Mr. Emanuel and Renaissance. I shall examine the pleaded case (and the unpleaded case) below.

[12] Mr. Emanuel, through Renaissance, started to raise funds from third party investors by selling them Renaissance shares, purportedly with a right to convert at one-to-one into Comodo shares. I shall return to the precise details of what third party investors were investing in and on what terms. This is a key issue in the case. The propriety of Mr. Emanuel's conduct in so acting is a central issue

this case, as is the question whether Renaissance itself actually paid anything for its 50 shares in Comodo.

[13] On 28th October 2000 by a resolution of Comodo's board, a transfer of Mr. Abdulhayoglu's shares was permitted into the name of Opal Cavern Ltd ("Opal Cavern"), a BVI company wholly owned by Mr. Abdulhayoglu. All the shares were then divided so as to give 400 million shares in total. Share certificates were issued for 100 million Comodo shares to each of Renaissance, Owl's Nest and Opal Cavern. This left 100 million shares unissued. Renaissance's share certificate for 100 million shares was numbered 6.

[14] On 13th June 2001 Comodo acknowledged that it had "received the respective amounts in advances of $540,550 from [Renaissance] and £111,472 from [Owl's Nest]." Subsequently on 28th August 2002 it was agreed that in consideration of the cancellation of this advance and other loans from Renaissance and the waiver of commission owed to Mr. Emanuel, Comodo would grant a further 11,665,000 shares to Mr. Emanuel. (I shall come back to how this was precisely carried out. There were also 5½ million shares to be allocated to others.) Again, Comodo say in fact no monies were owed to Renaissance or Mr. Emanuel, so the purported grant of additional shares should not be recognized. I shall come back to the legal arguments raised.

[15] Comodo's case, as finally developed in Mr. Chivers QC's closing submissions, is that Mr. Emanuel was a fraudster. He was a disgraced banker. He obtained his and Renaissance's shares by making fraudulent misrepresentations. He used Renaissance to carry out a Ponzi scheme. Renaissance was a sham and a mere instrument of fraud. The fraud was perpetrated both against the third party investors in Renaissance and against Comodo (to whom Mr. Emanuel failed to account for monies received by investors). Again I shall return to the legal arguments raised and the question of the extent to which this case is properly open to Comodo on the pleadings.

[16] The case on behalf of Renaissance and Mr. Emanuel's estate is that Mr. Emanuel was a respectable investment banker. Although he fell on (relatively) hard times following the failure of his Wall St business in 1993-94, he was nonetheless a wealthy man. He raised money in a perfectly honest fashion for Comodo and was open with Mr. Abdulhayoglu about what he was doing.

II. The pleadings and the procedural steps

[17] In order to understand the issues, it is necessary to examine the pleadings and the procedural steps taken by the parties with some care. This is because in his closing submissions, Mr. Chivers QC appearing for Comodo sought significantly to widen his case. The extent to which he is entitled to do so was hotly contested by the defendants.

[18] The full history of the pleadings is set out in paras [10] to [25] of the judgment of Green J delivered on 15th April this year[1]. The matters which remain relevant are these. Comodo issued its claim form, without naming a defendant, on 19th April 2013. It was a simple document. The only relief sought was four declarations (a) as to who was a shareholder in Comodo, (b) the significance of holding a sealed share certificate, (c) the jurisdiction of an arbitration panel to determine issues between shareholders, where one party was not a registered shareholder, and (d) whether there was an obligation to arbitrate any disputes in New York. Modest amendments were made to the claim form on 3rd May 2013 by adding Renaissance and Mr. Emanuel's estate as defendants and by limiting the dispute to issues between Comodo and the two defendants.

[19] The original Points of Claim were served on 6th May 2013. These provided:

[1] Comodo Holdings Ltd v Renaissance Ventures Ltd et al BVIHCM2013/0045 (delivered 15th April 2019, unreported)

"5. In or about 1999, after the Company's management determined that additional outside funding would be necessary, [Mr.] Emanuel was introduced to the Company's management as a wealthy Wall Street investment banker interested in investing his own money in the Company. [Mr.] Emanuel acting in his personal capacity by way of, what he represented as his personal investment vehicle Renaissance which he fully owned, agreed to provide capital to the Company.

6. As a consequence of the relationship of trust which was forged between the parties, [Mr.] Emanuel became a member of the board on or about 28 October 2000 and represented from time to time to the other members of the Company's board and officers that he was allowing certain of close friends and family to invest with him in the Company. It was on that basis that the Company granted [Mr.] Emanuel's requests to prepare a number of share certificates from time to time.

7. By share certificate numbered 6 dated 28 October 2000… Renaissance claims ownership of 100,000,000 shares in the Company.

8. By share certificates numbered 35 and 36 dated 12 June 2003 respectively [Mr.] Emanuel and his Estate though [Mr.] Katz claims [*sic*] 8,665,000 and 1,668,248 shares in the Company.

9. From about late 2008 (approximately 2 years following [Mr.] Emanuel's October 2006 death, the Company began to receive claims from various individuals asserting a shareholding interest in the Company, directly or via Renaissance. These parties were not close friends or relatives of [Mr.] Emanuel as he had represented to the Company's management. As a result of these claims the Company became aware that: a) the Company never received documentation from [Mr.] Emanuel of shares being sold to these individuals; b) [Mr.] Emanuel and/or Renaissance were withholding pertinent information from the Company; and c) that some of these parties actually paid [Mr.] Emanuel and/or Renaissance substantially more money for shares that the cumulative amounts received by the Company from [Mr.] Emanuel.

10. [Mr.] Emanuel['s] and/or Renaissance's wrongful acts in depriving the Company of substantial sums of money and/or by issuing shares to third parties under false pretences, caused the Company to suffer loss and damages in exposure to third party claims, damage to its reputation and [has] been deprived of a substantial sum of money to which it was rightfully entitled….

13. On [or] about 14 September 2012 the Company discovered that [Mr.] Emanuel never maintained or submitted a register of the shares he purportedly issued.

> 14. …[Investigations] confirmed that [Mr.] Emanuel's representations were false and that the only funds that the Company received were from third parties who otherwise received their own shares in the Company on account of such funds.
>
> 15. Consequently, from that point it was the Company's position that the shares represented by certificates 6, 35 and 36 were null and void, because there was no proof that [Mr.] Emanuel or Renaissance ever paid for those shares. Hence, on or about 17 December 2012 a formal register of members for the shares was prepared, sealed and submitted to the Company's Registered Agent."

[20] Details of the New York arbitration which Mr. Katz had attempted to launch were then given. (It is now accepted that the arbitrators in New York had no jurisdiction, so this issue no longer arises.) The prayer repeated the claim for the four declarations contained in the Re-Amended Claim Form. No money judgment or account was claimed against the defendants or either of them.

[21] On 9th August 2013, Comodo purported to serve what is described as a "Further Re-Amended Claim Form". Declarations were sought that neither defendant was a member of Comodo. Declarations were also sought that each of the defendants were liable to Comodo for $4,563,464.50 (or such other sum as the Court thought fit) as constructive trustees, for knowing receipt or for breach of fiduciary duty.

[22] Re-Amended Points of Claim were also served, completely replacing the original Points of Claim. These began by alleging that the defendants were not members of Comodo. They then pleaded:

> "3. In 1999, [Mr. Emanuel][2] was introduced to the Claimant's management team. He represented to the Claimant that:
>
> a. He was a wealthy individual;
> b. He wanted to be the principal investor in the Claimant;
> c. He would invest his own monies into the Claimant; and
> d. He might introduce some close friends and family as minor investors who would be offended if he did not introduce them

[2] The pleading throughout refers to "the Second Defendant", but this is an obvious mistake, since in 1999 Mr. Emanuel was still alive and Mr. Katz was not yet appointed as Mr. Emanuel's executor.

> into an investment opportunity like that which the Claimant presented.
>
> 4. It is averred that [Mr. Emanuel], contrary to his representations, never invested his own money in the Claimant, from which it is further averred that he was unable to afford to do so because in fact he was not or was no longer a wealthy individual by 1999.
>
> 5. However, as a consequence of the relationship of trust and confidence which was forged between the Claimant, [Renaissance and Mr. Emanuel], the Claimant resolved on or about 28th October 2000 that the Second Defendant should become a director of the Claimant.

[23] There is then an averment that sales in Comodo were sold to third parties, without Renaissance or Mr. Emanuel accounting fully for the sale proceeds. The pleading then alleges various breaches of fiduciary duties on the part of Renaissance and Mr. Emanuel and says that they are constructive trustees. The prayer repeats the declarations that the defendants are not members of Comodo and seeks declarations of Comodo's entitlement to $4,563,464.50.

[24] On 20th September 2013 the defendants served Points of Defence and Counterclaim. This was a comparatively simple document. It pleaded that Renaissance was issued with a share certificate for 100,000,000 shares and Mr. Emanuel was issued with certificates 35, 36 and 37 (the last consolidating the shares in certificates 35 and 36 with some additional shares also issued to him), all the shares being fully paid. The Counterclaim sought rectification of the share register. In October 2013 Comodo served a Reply and Defence to the Points of Defence and Counterclaim. It alleged that the defendants had never paid for their shares. It repeated the misrepresentations and breaches of fiduciary duty and trust set out in paras 3 to 7 of the Re-Amended Points of Claim.

[25] Comodo's money claims were struck out by order of Bannister J on 17th October 2013, but without prejudice to Comodo's right to apply for permission to amend the Re-Amended Claim Form. Bannister J also ordered that almost all of the "Further Re-Amended Points of Claim" from para 3 onwards, including all the allegations of

breach of fiduciary duty, be stricken out, but again without prejudice to Comodo's right to apply to amend further. That order was never appealed. At a hearing on 18th March 2019, before Green J, Mr. Francis, counsel for Comodo, said that "this was because Comodo was not interested in pursuing a monetary claim,"[3]

[26] On 25th September 2014, Renaissance sought summary judgment on its Counterclaim. The estate did not seek summary judgment. On 24th November 2014, before the hearing of the summary judgment application, Comodo purported to amend its Reply and Defence to Counterclaim. Bannister J refused Comodo permission to amend in the form sought, but the Court of Appeal allowed the amendment. This is thus the "live" pleading before me.

[27] The Amended Reply and Defence to Points of Defence and Counterclaim admitted that Comodo had represented to the defendants that they were shareholders in Comodo. "However," it continued, "the representations made by the Claimant were wrongfully induced by the Defendants pursuant to Mr. Emanuel's false representations and/or breach of fiduciary duty particularized below in the Amended Defence to Counterclaim."

[28] The Amended Defence to Counterclaim pleads:

> "10. In or about mid-1998 the management of the Claimant determined that additional funds would be necessary to further its business and thereafter its president, Mr. Melih Abdulhayoglu… was subsequently introduced to Mr. Emanuel as a possible investor.
>
> 11. During the course of the discussions that ensued Mr. Emanuel represented to Mr. Abdulhayoglu that:
>
> a. he was at that time a wealthy individual;
> b. he was a reputable investment banker and that he could provide investment banking and fundraising services to generate success for Comodo, just as he had done in prior ventures;
> c. he intended actively to market Comodo products;
> d. he would invest his own personal money in Comodo;
> ("the Initial Representations").

[3] See Green J's judgment of 15th April 2019, para [22].

> 12. In reliance on the Initial Representations the Claimant entered into [the JVA and the SSA].
>
> 13. The opportunity to subscribe for shares in the Claimant was a valuable opportunity which was only made available to Renaissance as a result of the Initial Representations. But for the Initial Representations neither the [JVA nor the SSA] would have been entered into by the Claimant.
>
> 14. The Initial Representations were, to the knowledge of Renaissance (such knowledge arising whilst Mr. Emanuel purported to act on Renaissance's behalf), false in that Mr. Emanuel:
>
> a. was not at that time a wealthy individual;
>
> b. was not a reputable investment banker: he had been the subject to two sets of regulatory proceedings brought against him personally by the National Association of Securities Dealers (for which he was censured and fined) and his securities firm, Emanuel & Co, had been the subject of at least 18 sets of proceedings, including claims by customers for misrepresentation, and by regulatory authorities for violations of industry rules, including those relating to fair practices; had had its brokerage licence revoked and was expelled from NASD in 1994 and therefore was unable to provide investment banking services to [the] Claimant;
>
> c. did not actively market (and, it is to be inferred, accordingly had no intention to actively market) Comodo products;
>
> d. did not invest (and, it is to be inferred, had no intention of investing) his own money in the Claimant."

[29] It will be recalled that para 9 of the original Points of Claim pleaded that Mr. Emanuel represented that he "was allowing certain of close friends and family to invest with him in the Company." This representation is not repeated in later iterations of the pleadings and is no longer a live pleaded issue, although it is a matter on which Mr. Abdulhayoglu placed much weight in his evidence.

[30] The new pleading then avers the payments by instalments due to Comodo from Renaissance under the SSA. It avers that the monies came first from Dr. Raymond Nisi and latterly from Don and Fran Golden, so that no monies were in

fact paid by Renaissance under the SSA. A **Quistclose**[4] trust is alleged. An allegation that any claim for rectification is barred by section 4 of the Limitation Act is made, but Comodo no longer rely on this.

[31] The pleading then says:

> "32. In further reliance on the false Initial Representations and further implied representation by Mr. Emanuel, on his own behalf and on behalf of Renaissance, that the payment obligations of Renaissance had been met and had (in accordance with the Initial Representations) been paid for from Mr. Emanuel's own money ('the Implied Representation') on 28 October 2000 the Claimant passed [the resolution of that date summarized above, whereby the share certificate no 6 for 100 million shares was issued to Renaissance]."

The falsity of the Implied Representation is then averred.

[32] The pleading then alleges that the shares were not fully paid. This remains a live issue. It makes a number of averments about Article 4.2 of Comodo's Articles of Association, the application again of the Limitation Act and laches, none of which are now relied upon.

[33] The pleading continues:

> "49. Mr. Emanuel induced Mr. Abdulhayoglu and Mr. Whittam to sign [the] Purported Emanuel Certificates 35 and 36 dated 12 June 2003 and to the impress of the Claimant's corporate seal thereon on the basis of a representation that Renaissance had loaned money to the Claimant and that the shares identified in those certificates ('the Loan Shares') had been paid for by the discharge of the Claimant's liability under that loan ('the Loan Representation').
>
> 50. The Loan Representation was false in that the money paid by Renaissance to the Claimant was not a loan by Renaissance but the payment to the Claimant of money it had collected as agent for the Claimant from persons who had subscribed for shares in the Claimant and which it held on trust for the Claimant."

[4] See Barclays Bank Ltd v Quistclose Investments Ltd [1970] AC 567.

Para 51 said no consideration was provided for the shares issued under certificates 35 and 36, which were accordingly not fully paid.

[34] Green J commented on this para 50 at para [38(e)] of his judgment of 15th April 2019 as follows.

> "While it is true to say that there is a plea of a trust for Comodo in there, and Mr Francis described it initially as an express trust but later as a constructive trust, there are two important points to be made:
>
> > (i) Para 50 is an explanation as to why the Loan Representation was false; that was because Renaissance had not loaned any money to Comodo but rather the third party investors had loaned money to Comodo via Renaissance who was acting as Comodo's agent;
> >
> > (ii) What is pleaded is only a trust of the monies and this has been done purely to show that Renaissance did not provide its own monies to Comodo; there is no claim by Comodo for those monies because it accepts that the monies were indeed paid to it. This is clear from para 51 which states that 'no consideration was provided for the Loan Shares'.
>
> Accordingly, this has nothing to do with a trust of the Disputed Shares. Nor is there any plea of breach of trust."

[35] Para 57 then says that certificate 37, issued to Mr. Emanuel on 14th July 2003 purported to consolidate certificates 35 and 36 with the addition of a further 160,613 issued to Mr. Emanuel. Para 58 then pleads:

> "Mr. Emanuel induced Mr. Abdulhayoglu, and Mr. Whittam to sign [and it then refers to certificates nos 35 and 36, whereas certificate no 37 is obviously intended] and to impress the Claimant's corporate seal thereon on the basis of a representation that the number of shares to which he was entitled in consideration of the discharge of Comodo's alleged loan liability had been miscalculated and that the correct figure should have included the Additional Shares ('the Consolidation Representation')."

Again, the falsity of the representation is averred. No consideration was given for the Additional Shares.

[36] The defendants served a Rejoinder and Reply to Amended Defence to Counterclaim. Although it runs to 70 paragraphs, apart from admitting the issuance of the various share certificates and the agreements as to the amounts owing as between the parties, it is largely just a denial.

[37] On 20th November 2018, Comodo applied to serve Re-Re-Amended Points of Claim and a Re-Amended Reply and Defence to Counterclaim. The amendment to the Points of Claim sought to add a claim to a declaration that the shares held by the defendants were held on trust for Comodo. It also sought to add extensive allegations of breach of fiduciary duty, running to some eight sub-paragraphs of particulars. The proposed Re-Amended Reply and Defence to Counterclaim followed from the amendments to the Points of Claim. Green J refused to allow the amendments to either pleading. His primary ground was that there was an arguable limitation defence available to the defendants[5]: but he would in any event have refused the amendments on case management grounds.[6]

[38] Thus Comodo's second attempt to add extensive averments of breach of fiduciary duty failed.

III. The Statute of Frauds Amendment Act 1828

[39] Section 6 of the Statute of Frauds Amendment Act 1828, also known as Lord Tenterden's Act, provides:

> "No action shall be brought whereby to charge any person upon or by reason of any representation or assurance made or given concerning or relating to the character, conduct, credit, ability, trade, or dealings of any other person, to the intent or purpose that such other person may obtain credit, money, or goods upon,[7] unless such representation or assurance be made in writing, signed by the party to be charged therewith."

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[5] See para [68] of his judgment of 15th April 2019;

[6] See *ibid* para [71].

[7] The otiose "upon" is in the original.

[40] Provisions such as the 1828 Act are treated as procedural matters governed by the *lexi fori*: see **Dicey, Morris & Collins on the Conflict of Laws**[8] rule 19 and the discussion at para 7-027f; and **Leroux v Browne**[9], applying the Statute of Frauds 1677 to a contract made in France and governed by French law. Statutes of Limitation were also treated as part of the *lex fori*.[10] (In England, but not here, this has now been modified by the Foreign Limitation Periods Act 1984.)

[41] By section 11 of the Eastern Caribbean Supreme Court Act (Virgin Islands) 1969, Cap.80:

> "The jurisdiction vested in the High Court in civil proceedings ... shall be exercised in accordance with the provisions of this Ordinance and any other law in operation in the Territory [of the Virgin Islands] and rules of court, and where no special provision is therein contained such jurisdiction shall be exercised as nearly as may be in conformity with the law and practice administered for the time being in force in the High Court of Justice in England."

[42] In **Doyle v Deane**[11] the Court of Appeal was considering whether under the version of section 11(1) applying in Grenada, in the absence of any local legislation on the subject, the English Judgments Act 1838 applied, so that interest ran on judgment debts in Grenada. Pereira CJ, after examining conflicting authorities, approved the holding of Sir Vincent Floissac CJ in **Panacom International Inc v Sunset Investments Ltd**:[12]

> "The English law intended to be imported by section 11 is the procedural law administered in the High Court of Justice in England. In enacting section 11, the legislature of St Vincent and the Grenadines could not have intended to import English substantive law nor English procedural law which is adjectival and purely ancillary to English substantive law."

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[8] (15th Ed, 2012)
[9] (1852) 12 CB 801, approved in Maddison v Alderson (1883) 8 App Cas 467 at 474, Morris v Baron & Co [1918] AC 1 at 15 and Irvani v G & H Montage GmbH [1990] 1 WLR 667
[10] See Dicey at para 7-055ff.
[11] GDAHCVAP2001/0020.
[12] (1994) 47 WIR 139.

[43] The 1828 Act is in my judgment a rule of English procedure. It is not ancillary to any rule of English substantive law. Accordingly, in the absence of any relevant BVI legislative provision, it applies in this Territory.

[44] The defendants have not pleaded any reliance on the 1828 Act. However, the Civil Procedure Rules 2000 ("CPR") only requires the pleading of facts: see CPR 8.7, 8.7A and 10.5. The failure to plead issues of law, such as the effect of the 1828 Act, does not in my judgment therefore waive the point.

[45] Mr. Chivers QC conceded these points. His answer to the 1828 point was a simple one: the representation must be "given concerning or relating to the character [etc] of any *other* person." Thus the estate of Mr. Emanuel cannot rely on the Act as a defence to fraudulent misrepresentations made by Mr. Emanuel about *himself*. In my judgment, Mr. Chivers QC is right about that in relation to the estate. However, it does not assist him in relation to Renaissance. Any representation made by Mr. Emanuel as agent for Renaissance should be treated as a representation by *Renaissance* about the character etc of Mr. Emanuel, a person different to Renaissance. Accordingly, Renaissance are in my judgment entitled to rely on the Act.

[46] The Act only applies to actions brought on fraudulent misrepresentations. In principle it does not apply to a defence. I shall, however, have to consider to what extent Comodo rely on its averments of fraudulent misrepresentation as a sword, not a shield.

IV. The burden of proof

[47] The burden of proof was the subject of dispute. Section 42(1) of the Business Companies Act 2004, which is the current Act applicable to Comodo, provides:

> "The entry of the name of a person in the register of members as a holder of a share in a company is *prima facie* evidence that legal title in the share vests in that person."

[48] The 2004 Act replaced *inter alia* the International Business Companies Act 1984, under which Comodo was incorporated. The 1984 Act did not have a section corresponding to section 42(1) of the 2004 Act. Instead, in section 27, it provided that a share certificate was "*prima facie* evidence of title". The 2004 Act contains no equivalent provision.

[49] Section 29 of the Interpretation Act 1985 provides:

> "Where an enactment repeals or revokes an enactment, the repeal or revocations shall not, except as in this section otherwise provided… (c) affect any right, privilege, obligation or liability acquired or incurred under the enactment so repealed or revoked."

[50] Certificates 6, 35, 36 and 37 were issued before the 2004 Act came into force. Therefore, at the date of the repeal, Renaissance and Mr. Emanuel had a vested right to have their share certificates treated as *prima facie* evidence of legal title. In my judgment, section 29 of the Interpretation Act protects that right. There is nothing in the 2004 Act to change the position. In particular, section 42(1), on which Comodo relies, provides that an entry on the share register is *prima facie* evidence of title. The contrary does not follow. The fact that a putative shareholder is *not* on the register is not in my judgment *prima facie* evidence that the putative shareholder is not a shareholder.

[51] Accordingly, in my judgment, Renaissance and Mr. Emanuel can rely on their share certificates as *prima facie* evidence of title. The burden of proof therefore lies on Comodo to show that they are not shareholders.

[52] I should add that, even if I were wrong about this, there would still be a question as to whether Comodo can rely on the 2012 register of members for the purposes of

the section 42(1) presumption. The reason is that, after a long struggle over Comodo's disclosure of documents, it has produced earlier *lists* of members, which include the shares purportedly granted to Renaissance and Mr. Emanuel. Comodo's case is that the 2012 document is the first *register*. However, some of the earlier *lists* are in the same form as a company's register of members could be expected to have. Moreover, an email dated 8th February 2005[13] from Beverley Daynes (an accountant who was Mr. Whittam's deputy) to Mr. Whittam is entitled: "Share register as of 7th February 2005". This obviously suggests that there was a list which was considered as a register.

[53] Neither the 1984 nor the 2004 Acts define what is meant by a "share register". Section 9 of the Company Clauses Consolidation (Scotland) Act 1845 (UK) required a company to which that Act applied, at the first and subsequent meetings of members to approve the share register and affix the company seal to the register. However, the English equivalent, the Joint Stock Companies Act 1844 did not have any such formal requirements: it merely required the directors to ensure that there was a register of members, in which standard details, such as name and address and the number of shares, had to be entered. So far as I have been able to ascertain, no subsequent Acts included any formal requirements for the turning of a "list of members" into a "register of members". The BVI's 2004 Act merely provides in section 41(1) that "a company shall keep a register of members containing" and it then specifies what must be included. In the case of Comodo, the requirements comprised solely the names and addresses of the members (para (a)), the number of shares (para (b)), the date on which the member was entered on the register of members (para (g)) and the date on which any person ceased to be a member (para (h)).

[54] There are earlier lists, which look very much like registers of members. If these earlier lists are in truth registers of members, then it seems to me that as a matter of law, a company cannot reverse the burden of proof by simply removing a

[13] G1/25/90

shareholder from the register. A shareholder who is on an earlier register can in my judgment rely on the earlier register as *prima facie* evidence of title. Even if I were wrong in holding that entry on an earlier register gave rise to a *legal* presumption in favour of a putative shareholder, the entry on an earlier register would give rise to a potential *factual* presumption in the putative shareholder's favour. The same factual presumption arises in my judgment, even if the earlier document is a "list" rather than a "register" of shareholders.

[55] The last list of shareholders showing Renaissance's 100 million shares and the estate's shares under certificate 37 is the list dated 12th September 2011. It is in my judgment at least sufficient to provide a factual presumption that Renaissance and the estate were shareholders. Even if I am wrong about the status of the pre-2004 Act share certificates, the factual burden (even if not the legal burden) of proving that Renaissance and the estate were not in fact shareholders would lie on Comodo.

[56] In fact, however, none of this matters to the outcome of this case. I have been able to determine this matter without regard to the burden of proof.

V. The standard of proof

[57] As regards the standard of proof, the House of Lords in one of its last judgments, **Re B (Children)**,[14] clarified the standard of proof to be applied in relation to serious allegations. The allegations in that case were of child abuse, but the same principle applies to allegations of fraud. Lord Hoffman said:

> "13. ...I think that the time has come to say, once and for all, that there is only one civil standard of proof and that is proof that the fact in issue more probably occurred than not...
>
> 14. Finally, I should say something about the notion of inherent probabilities. Lord Nicholls said [in **Re H**[15] at 586]... that

[14] [2008] UKHL 35, [2009] 1 AC 11.
[15] [1996] AC 563.

> 'the court will have in mind as a factor, to whatever extent is appropriate in the particular case, that the more serious the allegation the less likely it is that the event occurred and, hence, the stronger should be the evidence before the court concludes that the allegation is established on the balance of probability."

15. I wish to lay some stress upon the words I have italicised. Lord Nicholls was not laying down any rule of law. There is only one rule of law, namely that the occurrence of the fact in issue must be proved to have been more probable than not. Common sense, not law, requires that in deciding this question, regard should be had, to whatever extent appropriate, to inherent probabilities. If a child alleges sexual abuse by a parent, it is common sense to start with the assumption that most parents do not abuse their children. But this assumption may be swiftly dispelled by other compelling evidence of the relationship between parent and child or parent and other children. It would be absurd to suggest that the tribunal must in all cases assume that serious conduct is unlikely to have occurred. In many cases, the other evidence will show that it was all too likely. If, for example, it is clear that a child was assaulted by one or other of two people, it would make no sense to start one's reasoning by saying that assaulting children is a serious matter and therefore neither of them is likely to have done so. The fact is that one of them did and the question for the tribunal is simply whether it is more probable that one rather than the other was the perpetrator."

31. In **Ultraframe (UK) v Fielding**,[16] Lewison J (as he then was) addressing issues of dishonesty and fraud said at [9] that

"the evidence required to show the dishonest scheme alleged must be cogent. As Lord Nicholls said in **Re H** at 587:

> 'The more improbable the event, the stronger must be the evidence that it did occur before, on the balance of probability, its occurrence will be established. Ungoed-Thomas J expressed this neatly in **In re Dellow's Will Trusts**[17] [at] 455:
>
> > "The more serious the allegation the more cogent is the evidence required to overcome the unlikelihood of what is alleged and thus to prove it."'"

[16] [2005] EWHC 1638 (Ch), [2006] FSR 1.
[17] [1964] 1 WLR 451.

VI. Witnesses who are dead

[58] Mr. Emanuel is dead. So too are two important participants in the early days of Comodo and Renaissance, Dr. Raymond Nisi and Fran Golden. The fact that a potential witness is dead does not affect the burden and standard of proof. It means that there is a blank where that witness could have given oral evidence. The significance of a witness's demise is this. Where a live witness gives evidence of his interactions with the deceased, the Court will bear in mind that it is only hearing one side of the story.

[59] The Court will pay particular regard to the contemporaneous documentary evidence, something it does in any event in a case concerning events which occurred up to twenty years ago. It will also examine with care any apparent tailoring of the live witness's evidence in circumstances where the deceased cannot answer that evidence. There is of course no presumption that the live witness is lying or tailoring his evidence. The Court will consider his evidence in the same fair way it considers all oral evidence in the case. It just exercises particular care.

VII. The dog that did not bark

[60] I can take judicial knowledge of the fact that the United States of America has an extremely sophisticated regulatory regime for the issue of shares in companies. What I cannot take judicial knowledge of are the details of that regulatory regime. Neither side has adduced any expert evidence of American securities law. Accordingly, I have no admissible evidence of the regulatory requirements which Mr. Emanuel had to satisfy in the period 1999 to 2006, when he was selling shares in Renaissance and Comodo.

[61] Some lay evidence was adduced. As I have set out above, one of the misrepresentations originally relied on by Comodo, but subsequently abandoned, was that Mr. Emanuel was only selling to "family and friends". Notwithstanding that abandonment, references to "family and friends" became something of a

Leitmotiv in Mr. Abdulhayoglu's evidence, as he sought to damn Mr. Emanuel for misleading him as to the true nature of the investors introduced by Mr. Emanuel. Comodo's written closing submissions submit[18] that Mr. Emanuel "may have feared his fund-raising activities were breaching US securities law (which would explain his repeated references to friends and family)."

[62] It may well be that "friends and family" has a special meaning in American securities law. Mr. Emanuel when emailing Mr. Abdulhayoglu on 29th September 2006 said that Richard Berger, a Renaissance investor, "wants me to convert his shares and the other 'friends and family', that have Renaissance shares to Comodo. I knew this would start, as we get nearer to an IPO, but I will only do those that ask. See you tomorrow." The placing of "friends and families" in inverted commas (which Mr. Emanuel did elsewhere in correspondence with Mr. Abdulhayoglu) suggests that Mr. Emanuel was using the expression as some term of art. (The extent to which Mr. Abdulhayoglu knew this I consider below.) If the expression is a term of art, then I would expect (America being notoriously litigious, and securities law being litigated particularly hard) that there would be case-law on what constitutes being a friend or a family member. However, I was referred to none.

[63] That there were special rules applying to the issuance of shares in small companies can be seen from the evidence of Mr. Katz. He was taken to an affidavit made by Mr. Emanuel in 2004 in the Lacy litigation. Mr. Lacy had invested $800,000 in Renaissance. Subsequently he was made bankrupt. The trustee in bankruptcy sought return of the $800,000 from Renaissance. To that end, he had obtained an injunction from the US Bankruptcy Court which froze Renaissance's bank account. Renaissance applied to have the injunction lifted. At para 11 of his affidavit in support of the discharge application, Mr. Emanuel said that "Renaissance has attracted numerous accredited investors from within the

[18] Para 23.

United States…" According to Mr. Katz, "accredited" was a term of art, although he candidly admitted that he was not an expert.[19]

[64] When Mr. Emanuel was cross-examined in the Lacy litigation before the US Bankruptcy Judge, he was asked[20] "Well, is there any qualification that had been done by Renaissance of Mr. Lacy relative to his financial ability to acquire $1 million worth of stock in Renaissance before the acquisition took place, a 'big boy' letter?" Mr. Emanuel replied: "Well, I believe I was presented with most of Mr. Lacy's financials when he tried to induce me into becoming involved in funding his company, Independent Artists. And I had enough documentation at that time to know that he was a qualified investor." This seems to suggest there was a regulatory requirement that only "qualified" investors were permitted to invest in start-ups like Comodo and Renaissance.

[65] The number of shareholders permitted to hold shares in a company unregulated by the SEC (or only subject to light SEC regulation) also seems to have been restricted. After Mr. Emanuel's death, Mr. Katz sought to establish a definitive register of shareholders in Renaissance. David Schaffer, of Mr. Katz' law firm Meltzer Lippe Goldstein & Breitstone LLP, sent Mr. Katz an email on 13th July 2010 enclosing a list. He wrote: "Note that there are some 150 shareholders, but for '40 Act purposes, there are 95." Mr. Katz was cross-examined on this[21]:

> "Q. Are you able to give any indication as to what '40 Act purposes' mean?
> [Short digression for the document to be identified]
> A. I guess 'Act' refers to the Securities Act that you — 40 Act is a reference to I think the SEC Rules.
> Q. Right.
> A. And there are 95 of them [i.e. shareholders]. I think we're not supposed to go over a hundred of them, if I'm not mistaken. But the gift people don't, the non-US people don't count, and the gift don't count towards that maximum number. So we were still below I think the maximum number of 95 at that point in time."

[19] Transcript, day 8, page 75.
[20] [E4/2214-5]
[21] Transcript, day 8, pages 107-8.

[66] This is not evidence of what the regulatory requirements some years before 2010 were. If the regulatory requirements were the same in 1999 to 2006, it might explain why Mr. Emanuel did not want all the investors to be registered as shareholders in Comodo. However, in the absence of any expert evidence this would be speculation.

[67] The only admissible evidence adduced in the whole case about breaches of criminal or regulatory law by Mr. Emanuel was in relation to his use of stationary headed "Emanuel Financial Group, Inc". Mr. Oliver, who is a partner in the firm of Lowenstein Sandler LLP, Comodo's US attorneys, gave a witness statement, which by agreement was treated as read. He explains that under section 133 of New York's General Business Law it is a misdemeanor criminal offence for a person "with intent to deceive or mislead the public, [to] assume… as… a corporate, assumed or trade name… any name… which may deceive or mislead the public as to identity of such person…" Section 130 of that Law requires any person using a trading name to file with clerk of each county where the business is carried on a certificate stating the name of the person using the trading name.

[68] Mr. Oliver outlined the steps he had had taken to establish whether Emanuel Financial Group, Inc was incorporated. Unfortunately, this involved the usual problem of trying to prove a negative. Showing that a corporation is not incorporated in any of the fifty states of the Union is difficult enough: proving a corporation is not incorporated anywhere in the world is well nigh impossible. It is true that Mr. Untracht, who had audited various of Mr. Emanuel's companies in the period up to 1994, could not remember this entity. However, his evidence would be consistent with Mr. Emanuel incorporating a company after 1994 for use as a title on his stationary.

[69] Even assuming that the company was never incorporated, the only evidence anyone was deceived by it is that of Mr. Abdulhayoglu.[22] I shall come back to this

[22] See para 27 of his first witness statement.

in my assessment of his evidence. If the company was not incorporated, so that "Emanuel Financial Group, Inc" was a trading name, the only offence would be the failure to register the name with the county clerk, but again there is no evidence that any one suffered loss by Mr. Emanuel's use of the name. Given the absence of any identifiable victim, these potential breaches of sections 130 or 133 of the New York Law are comparatively minor.

[70] No other regulatory breaches whatsoever have been pleaded, still less proven, against Mr. Emanuel. That, in my judgment, is significant. Given the eye-watering sums expended on litigation in this matter, it is inconceivable that Comodo would not have adduced evidence of breaches of US securities law on the part of Mr. Emanuel, if such breaches could have been proven.

[71] I proceed on the basis that no breaches of US securities regulation have been shown whilst Mr. Emanuel was promoting Comodo and Renaissance to potential investors.

VIII. The early negotiations

[72] The first contact between Mr. Abdulhayoglu and Mr. Emanuel was shortly before 27th September 1997, when Mr. Abdulhayoglu sent Mr. Emanuel a fax referring to a meeting held between "Chris" (very probably Christopher Robinson) and Mr. Emanuel a few days before. On 3rd December 1997, he faxes Azra. She was his brother's sister-in-law and affected the introduction to Mr. Emanuel. He outlines the potential of his project and says: "There is only one space for one standard security device in the market place… Fortunately I am about 2 years ahead of anyone." He explains that Mr. McManus could finance expansion in the UK market, but probably not in the US market as well. He then asks Azra about Mr. Emanuel's interest in the project.

[73] On 3rd March 1998, Mr. McManus faxes Mr. Emanuel to give him an update. Mr. Abdulhayoglu is copied into the fax. Mr. McManus says he is preparing an

information memorandum and a business and marketing plan. He offers to allow Mr. Emanuel due diligence if "you have an in principle interest in being involved in either the marketing of the produce in the US and/or, possibly, taking an interest in the newly constituted holding company…"

[74] On 18th May 1998 Comodo was incorporated and Mr. Abdulhayoglu was appointed as the first director. On 8th June 1998 Mr. Abdulhayoglu faxes Mr. McManus with an update on his discussions with Mr. Emanuel. He said that Mr. Emanuel had "talked about one or two people he knows (a British billionaire) and wanted to introduce all these people to our project… What he was trying to say was (my own interpretation) was [*sic*] it is not the money aspect he wants to introduce other people for as he has enough money, it is the market acceptability and credibility he is trying to build into the project."

[75] On 17th August 1998 Mr. Abdulhayoglu, Mr. McManus and Mr. Emanuel signed a letter of intent, headed "subject to contract". Mr. Emanuel's duties were (first bullet point) to work with the others to produce a marketing plan, (second bullet point) to structure a marketing company and (fourth bullet point) to identify and employ an appropriate senior management team for the marketing company. The third bullet point gave him a responsibility:

> "to sufficiently capitalize Marketing Co to ensure it has sufficient funding to meet the agreed production, marketing and distribution budget. It is envisaged that this initial capital will comprise private equity and that the principal subscriber will be Eric Emanuel and his associates."

[76] It is clear that the financial arrangements were still at an early stage of negotiation. In a fax of 19th August 1998 Mr. McManus to Mr. Emanuel, copied to Mr. Abdulhayoglu, Mr. McManus said one possibility would be "to issue you with a specified percentage of new non-voting shares, say an initial 10%, in the IP holding company for a small cash consideration at the outset and to issue you with options for additional such shares… on certain financial milestones being achieved." This would, he suggested, "preserv[e] Melih's desire to maintain

strategic control over all matters concerning produce development." This followed a fax of 17th August 1998 from Mr. Abdulhayoglu to Mr. Emanuel in which the grant of shares in Comodo itself was floated.

[77] The limited surviving documentation shows that Mr. Emanuel was having discussions, in particular with a Barry Wolf and a man called Miles, about using them for marketing. Nothing ultimately came of these.

[78] By December 1998, money was getting tight at Comodo. In a fax to Mr. McManus of 12th December, Mr. Abdulhayoglu said he had told Mr. Emanuel that:

> "this month was the last month as the company runs out of funds. I told [Mr. Emanuel] that this does not mean that the project will stop but simply a turning point and we have to make a decision about which offer to take. I told him that you have some people lined up or even you could put the money for the development but like everything else everything has a cost."

[79] There is no independent evidence that there were other people lined up. Nor is there any evidence of any other "offer" about which a decision could be taken. In cross-examination, the only other potential investors identified by Mr. Abdulhayoglu were Mr. McManus and Kevin Westley, the chairman of HSBC Bank. Mr. McManus had been giving small, effectively bridging, loans, so that Comodo could pay the salaries of its staff. In addition, there is some evidence that he was financing some intellectual property litigation: see his fax to Mr. Abdulhayoglu of 20th April 2000.[23] What this litigation was about is unclear. It may have been a hold-over from Gamester. In that fax, Mr. McManus indicated a willingness to send a further £35,000 or $56,000 to Comodo, but as a "final contribution" and subject to Mr. Emanuel funding Comodo's ongoing research and development costs.

[80] Mr. McManus seems subsequently to have adhered to this policy. On 2nd September 2000, Mr. Abdulhayoglu faxed Mr. Emanuel to say that Comodo was in

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[23] [E2/847]

financial difficulties: "It is a matter of days (**I do mean days!**) before the whole thing collapses." (Emphasis as in the original.) Mr. McManus was not being asked to contribute more at this crisis point. By 13th June 2001, Comodo owed Owl's Nest (Mr. McManus' company) £111,472, but that appears to be earlier money.

[81] Mr. McManus's investment in Comodo in late 1998 was at most a loan of £200,000 sterling: see Mr. Abdulhayoglu's concerns in his fax of 18th December 1998. As set out in the previous paragraph, the only further advances were a net £111,472 — long short of $750,000. I find that Mr. McManus was not prepared to invest a further $750,000 into Comodo in 1999.

[82] Mr. Westley did eventually invest in convertible loan notes. The evidence from the letter of 24th February 2004 from solicitors acting for Owl's Nest, Mr. McManus and Mr. Westley[24] is that his initial investment was of $300,000 in the loan notes in February 2001. There is no evidence that he was prepared to invest in 1999 at this earlier stage in Comodo's life.

[83] On 18th December 1998, Mr. Abdulhayoglu faxed Mr. McManus to say that Mr. Emanuel "was to put the money [in] himself!... He wanted the cash requirement for next 12 months on monthly basis (I think he may want to introduce money on monthly basis!)." Mr. Emanuel proposed contacting Dell about Dell providing marketing services. On 23rd December 1998, Mr. Abdulhayoglu faxed Mr. McManus with a further up-date to say that Mr. Emanuel was "going ahead with him being the only investor and marketeer etc" and that he wanted to finalise the paperwork by mid-January. This up-date noted that Mr. Emanuel had said that his son was going out with a Rockefeller daughter. (There is no evidence that this was untrue.)

[84] On 12th January 1999, Mr. Abdulhayoglu faxed Mr. McManus with an update on his negotiations with Mr. Emanuel.

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[24] [E3/1376]

> "First of all he wanted to become a 1/3 shareholder straight away (as I expected) without having to go through the marketing etc… I mentioned… that… we really needed $750K. He did not express any problems with that. The idea is for him to introduce 1/3 of the investment this month (latest 28th January) and the remaining to be introduced quarterly over next 12 months in 4 equal tranches. He also mentioned that he did not want to be in a position where because he takes equal shareholding in the company he should be expected to do things free… He wants to be responsible of our merchant banking arrangements… Also he would like get, from the sales he brings in only, some sort of commission…. Then I asked him what his thoughts were for the company in the very near future. He said, if we all agree, we could sell (he said a small amount) a small equity in the company at a 'premium value' which then could reimburse everyone involved by simply giving a small fraction of our shares… We are looking to finish everything off at the latest 28th January 1999 as he knows we have run out of money!"

[85] On 15th January 1999, Mr. Abdulhayoglu asked Mr. McManus to send £7,000 to cover staff salaries. He promised that as soon as the first tranche of money came from Mr. Emanuel, Comodo Tech would reimburse Mr. McManus.

IX. Mr. Emanuel's representations as to his wealth

[86] There are similarities in the accounts given by Mr. Abdulhayoglu and Mr. Whittam of the representations Mr. Emanuel made to them about his personal circumstances. In Mr. Whittam's witness statement, at para 8 he gives hearsay evidence (which I ignore) about what Mr. Abdulhayoglu told him he had learnt about Mr. Emanuel. At para 9 he says:

> "At this early stage (1997) I did not have direct discussions with Mr. Emanuel, but discussed his possible investment in general conversations in Mr. Abdulhayoglu's office at that time between Mr. Abdulhayoglu, Chris Robinson and myself. We speculated how much money Mr. Emanuel had made with the 'Backstreet Boys' success which Mr. Emanuel had emphasized — $100 million was always the number we guessed at. Between 1998 and 2006 Mr. Emanuel orally represented directly to me on many occasions that he was a successful Wall Street banker (the youngest broker ever I seem to recall was one assertion that he made). Other oral statements made by Mr. Emanuel referred to the Backstreet

> Boys millions, how he had saved New York City from bankruptcy and that he had made a lot of money from municipal bonds in the 70's. He also had a routine in his NY apartment for first time guests which he performed for me on my first visit there — he would show you original art on the wall, have Maroma Resort brochures (that was his Mexico resort where Tony Blair stayed), finally he would point through the window to another apartment and explain that was where Henry Kissinger lived."

[87] Mr. Abdulhayoglu's account was similar:[25]

> "Eric used to tell people that he used to run [an] unincorporated entity in Wall Street for many years. He said he was the youngest VP of something something in Paine Webber when he was 20 something, and he built a very successful Wall Street banking business, and he was a marketing genius because he helped turn Backstreet Boys into a great success. Apparently Backstreet Boys wasn't a success until he got involved. He then, if you go to his apartment, My Lord, he then shows this, mentioned that before a tombstone of something that his name mentioned there. He says that, he did say, My Lord, that he saved, himself saved the New York City in 1970s. It was going to go bankrupt apparently, and he own[ed] airship companies, etc., etc., etc."

[88] None of these representations seem to have been false. The $100 million earnt from the Backstreet Boys was the speculation of the three men; it was not any representation made by Mr. Emanuel. Mr. Emanuel had been a successful Wall Street broker: see the evidence of Mr. Untracht to which I shall come. His firm, Emanuel & Co, had been unincorporated (albeit Mr. Emanuel had taken steps to avoid personal liability: again see Mr. Untracht's evidence below). He had joined Paine Webber and achieved promotion young. He had had involvement in the successful attempt to rescue New York City from bankruptcy. The "tombstone" showed that his involvement was as one of many firms. (Elsewhere it is suggested the tombstone contained the names of 126 firms involved in the rescue.) Any suggestion of Mr. Emanuel having saved New York singlehandedly would have been an obvious joke. He did have involvement with the Maroma Hotel (although exactly what is less clear: again see the evidence of Mr. Untracht

[25] Transcript, day 6, pages 46-47.

below). He did also have involvement in an airship company. This in fact was a scam carried out by a fraudster called Lou Pearlman, but no one knew that at that time. Mr. Emanuel was a victim of Mr. Pearlman…

[89] Mr. Abdulhayoglu's witness statement describes how he and Mr. McManus met Mr. Emanuel for the first time in July 1998:

> "25. As I recall, Mr. Emanuel's home was in midtown Manhattan; it was a luxury high-rise building and was well-decorated. Mr. Emanuel had awards and other business achievements displayed on the walls, including a plaque referencing The Backstreet Boys' platinum record sales and a framed certificate bearing his company's name as one of the companies that had underwritten bonds issued by the City of New York in the 1970's (if I recall the time period correctly).
>
> 26. At our initial meeting, which I recall lasting approximately two hours, Mr. Emanuel represented to me and Mr. McManus that he was a reputable, wealthy investor, that he had previously worked on Wall Street, and that he was interested in identifying and working with growth-stage companies that could benefit from his professional skills and expertise, including his sales, capital markets, and marketing experience, to become successful and raise capital through an initial public offering.
>
> 27. Specifically, Mr. Emanuel told us that he owned an investment firm, which I recall was named Emanuel Financial Group, Inc. He indicated that this company generated large profits and employed a large staff. He also described a profitable and successful career as a licensed broker and investment banker in the US securities industry and indicated that he would use that experience to create financial success for Comodo. He claimed that his firm had saved New York City in 1970's and he showed me a framed certificate relating to a bond issue for the City in which… his firm was one of many participants referred to.
>
> 29. When discussing his wealth, Mr. Emanuel enumerated several of the assets and ventures with which he was involved, including his hotel in Mexico, his involvement with Lou Pearlman (whom he always referred to as his 'partner') and The Backstreet Boys and his stake in the airship company. Furthermore, he made it a point to show me the bond certificate and platinum record plaque on his walls, as well as photographs of what he said was his hotel in Mexico."

[90] The alleged representation that Emanuel Financial Group, Inc was a large company which "generated large profits and employed a large staff" would have been false. After 1994, when Emanuel & Co collapsed, Mr. Emanuel had no large company and no large staff. The representation was not pleaded in the original Points of Claim (which were struck out by Bannister J), nor in my judgment subsequently. No specific representation about Emanuel Financial Group, Inc. is mentioned anywhere in the live pleadings (or for that matter in any of the superseded pleadings). There is only the most general allegation in para 11 of the Amended Defence to Counterclaim of Mr. Emanuel not being a reputable investment banker. Even assuming (which I do not accept), the representation about Emanuel Financial Group, Inc. could potentially fall within the pleading in para 11, there is no allegation of falsity in para 14 of the Amended Defence to Counterclaim. The allegations of disreputability in para 14 are directed at the FINRA findings in relation to Emanuel & Co, to which I shall come. Accordingly, no case is brought in connection with any allegations regarding Emanuel Financial Group, Inc. I will consider this issue, and its effect on the cogency of Mr. Abdulhayoglu's evidence below.

[91] I shall in due course make a determination as to whether Mr. Emanuel did in fact make a representation that he was wealthy. In the next section, however, I shall consider the evidence as to Mr. Emanuel's wealth.

X. Mr. Emanuel's wealth

[92] The main witness as to Mr. Emanuel's wealth in 1997-1999 was David Untracht, who was called by the defendants. Mr. Untracht had worked for Emanuel & Co between April 1983 and May 1985, before he left to form his own accountancy firm. Mr. Emanuel and his business were some of his launch clients. Although Mr. Untracht moved firms, as an independent accountant, he acted for Emanuel & Co until the firm's demise in 1994. He also acted throughout as Mr. Emanuel's personal accountant and tax advisor up until his death. The relationship was a professional one. The two men occasionally had dinner together, but did not

socialize generally. Mr. Untracht charged Mr. Emanuel for his professional services, although Mr. Emanuel when he fell on hard times was sometimes a slow payer.

[93] Mr. Chaisty QC submitted that Mr. Untracht was an impressive witness. Mr. Chivers QC said:[26] "My Lord, we agree with my learned friend [Mr. Chaisty QC]. Mr. Untracht was an impressive witness and, of course, we rely on his evidence as to the financial status [of Mr. Emanuel]." I agree with that assessment. In my judgment, Mr. Untracht was a patently honest witness doing his best to assist the Court.

[94] Mr. Untracht explained that the tax year in the United States is the calendar year. There is an obligation to file a tax return by 15th April of the following year, but this can be, and in complicated cases invariably is, extended to 15th October. In 1992 Emanuel & Co had made a substantial profit. The legal status of Emanuel & Co was that it was an unlimited partnership, the partners of which were a limited liability partnership, which owned 99 per cent of the equity in Emanuel & Co, and a corporation which owned the remaining one per cent. Mr. Emanuel was sole owner of both the limited liability partnership and the corporation. Under American tax law, this meant that Emanuel & Co was a "pass-through" entity. This is term of art in American tax law. (What it means in relation to Renaissance's function I discuss below.) It meant that Emanuel & Co and the limited liability partnership did not pay any tax. Instead the profits and losses were "passed through" to Mr. Emanuel personally. He was liable to pay tax on the profits as an individual. Equally he was able to claim tax relief on any losses.

[95] Mr. Untracht explained the background to Mr. Emanuel's problem with paying tax as follows:[27]

> "[D]uring the 1993, 1994 period Emanuel & Co suffered catastrophic financial losses that ultimately led it going out of business, and as was

[26] Transcript, day 13, page 111.
[27] Transcript, day 9, pages 27 to 29.

introduced to the record yesterday, Mr. Emanuel had very significant income, in particular, in 1992 when Emanuel & Co was very profitable."

I interpose that the profits that year had been about $1.4 or $1.5 million:[28]

> "And so the context of my letter [of 24th March 1997 to] Mr. Emanuel, the purpose of my letter was to explain to him that we needed to establish the losses from 1993 to 1994. And the reason that we were not able to file his tax returns timely was because his firm had suffered a hostile takeover and he wasn't in possession of the records for Emanuel & Co and my firm was also the accountants for Emanuel & Co and my professional problem was that I couldn't make up a number to put in his individual return. In order to claim those losses and his individual return, I had to be able to establish the amount of the loss and we did make efforts to reach out to the individual that took over the firm to obtain the records and get ourselves engaged to prepare the tax returns for Emanuel & Co. That person chose not to respond to us."

Mr. Untracht then outlined the steps he had taken to obtain the information and continued:

> "And because of the fact that we were faced with the statute of limitations, you know, I ultimately determined that it was in Mr. Emanuel's interest for us to prepare those 1993 and 1994 returns based upon the best available information to try and establish those losses before the statute of limitation had precluded us from doing. In particular, of the fact that there were tax liabilities outstanding from 1992 because when Emanuel & Co suffered these catastrophic losses, Mr. Emanuel's personal capital account was exhausted in the ordinary course and so he didn't have enough money to pay the 1992 tax."

[96] Even as late as 2002, there were ongoing discussions between Mr. Untracht and the Inland Revenue Service ("the IRS") about Mr. Emanuel's liability to tax for 1992.

[97] After 1994 there were ongoing discussions with the IRS about payment of his tax liabilities. On 23rd January 1999 (just days before the signing of the JVA and the

[28] See transcript, day 9, page 114.

SSA in relation to Comodo) Mr. Untracht wrote to the IRS in relation to tax due in 1982, 1986, 1987, 1992 and 1997. The letter read:

> "Mr. Emanuel has requested that we contact the Service regarding various assessed and unpaid taxes relating to the above referenced tax years…
> On behalf of our client, we would like to explore the possibility of entering into a combination of an offer in compromise and a deferred payment arrangement that might enable the taxpayer to satisfy his outstanding tax liabilities over some reasonable period of time…
>
> The taxpayer recently received various Notices of Intent to Levy with respect to each of the affected tax years… Our office made telephone calls to the Service and succeeded to in having the accounts held in abeyance for eleven weeks. **We respectfully request that a hold be placed on all further enforcement action for a reasonable period to enable us to receive and analyze transcripts and to prepare an appropriate submission to request an offer in compromise.** The taxpayer has limited economic resources at this time and any levy action will result in a significant hardship." (Emphasis in bold in the original)

[98] Mr. Untracht was cross-examined on this:[29]

> "Q.. Now that is indicative, is it not, of Mr. Emanuel's inability to meet those liabilities when due?
> A. Yes. My understanding at the time was that he didn't have liquidity to be able to just write a cheque and pay the tax liabilities. If he could have, he would have. The IRS is a very expensive creditor in terms of imposition of interest and penalties, so I think that I always advised Eric that it was in his interest to satisfy these tax liabilities as expeditiously as possible because it was just a rational thing and natural decision to do so.
> …
> Q. And then you say: "The taxpayer has limited economic resources at this time and any levy action will result in a significant hardship." So can you explain to us what that is signifying?
> A. I know. He didn't have a lot of cash and he didn't have a job, and so, I think, that was endemic of, you know, a large part of that period in Eric's life is review of what he had. He certainly [had] assets but he lack[ed] liquidity. So, again, I think, if Eric had the wherewithal to continue to live and pay his bills and also pay all of these understanding tax liabilities, it would have been in his interest to write the cheque, but he didn't have sufficient liquidity in order to be able to do so."

[29] Transcript, day 9, pages 34 to 36.

[99] That same day in January 1998 as Mr. Untracht was writing to the IRS, he wrote to the New York State Department of Taxation and Finance. (In America, a taxpayer must potentially pay both federal and state income tax.) He refers to a deferred payment arrangement ("DPA"), explains the issue about carrying back 1994 losses into 1992, and asks for a new DPA at $1,600 per month to include Mr. Emanuel's 1997 state tax liability.

[100] There was a lot of further evidence about Mr. Untracht's attempts to reduce Mr. Emanuel's tax liabilities and juggle his payments of them. For example, on 22nd October 1996, the New York tax authorities issued a warrant (the equivalent of a judgment debt) for $382,154.40 in respect of payroll taxes due in 1992. However, Mr. Untracht seems to have been able to negotiate the amount outstanding down to $25,727.43. To effect payment of this reduced sum, on 7th December 1998, he negotiated a further DPA (effectively an extension of the earlier DPA) of $1,600 a month, payable over 15 months.

[101] The nature of Mr. Emanuel's liquidity difficulties can be seen in relation to an investment property. Mr. Untracht explained:[30]

> "…Eric co-invested with a long-time client of his by the name of Marvin Herskowitz. The investment was made long before 2002 and what they did was they pooled their money and they bought condominium units. So 117 East 24th Street was a condominium conversion and under the laws of New York, if there were senior citizens living in those apartments you couldn't put them out on the street. And so Eric and his partner invested in, I want to say four, there were a bunch of them, maybe more, occupied condominium units that were long-term investments where the idea was you're buying them for less than market value because you couldn't kick the tenant out. And eventually you either paid the tenant to leave or the tenant left and then you could sell the condominiums at their then market value with the expectation of making a profit from those. So that was what that investment was about.
> …
> As I said, the investment would be long gone before 2002. It is my recollection in that there were in that period [2001-2002] I think one or two units that they still owned. There was one particular tenant that didn't

[30] Transcript, day 9, pages 55 to 62.

want to leave and they were unable to come to terms with that tenant. I think they ultimately litigated with the tenant. So these gains, the gains that I referred to in my e-mail would have been from the sale of one or more of those condominium units in that particular year.

…

Q. And while the sitting tenant was there, Mr. Emanuel was in fact incurring more in liabilities for maintenance of the property than he was receiving in rent from the sitting tenant?

A. I believe that to be the case.

Q. And that was giving rise to reported losses, wasn't it, on the tax returns of the partnership?

A. I believe that to be the case yes, in those years.

Q. There was a further complication, was there not, in relation to that property in that the IRS had a lien over Mr. Emanuel's interests in that property.

A. That is correct.

Q. But nevertheless, a solution was found to those problems. I think the solution was that Mr. Herskowitz financed the buyout of the tenant; is that correct?

A. That rings a bell. I don't think Eric had the liquidity to do it himself at that point.

Q. So Mr. Emanuel himself couldn't afford to contribute towards that. That's correct, isn't it?

A. I don't know that he couldn't afford to contribute towards it. I think, as I said, I think he had those issues during those years and what he chose to use his available capital for may have differed slightly from whether or not he had zero wherewithal to contribute. I think he had competing interests here in terms of what he used his liquidity for, he made business decisions about how to use the liquid resources that he did have access to."

[102] Counsel then referred to a fax of 18th June 2001 from the attorneys acting for the partnership with Mr. Herskowitz, in which the attorneys were asking the IRS to subordinate the liens for federal tax which the IRS had obtained in respect of Mr. Emanuel's outstanding tax liabilities. The attorneys explained that the sitting tenant had agreed to accept $612,000 for the surrender of his lease. They said:

"The taxpayer's partner, Marvin Herskowitz, is willing to put up the entire $612,000 to consummate the purchase, but he wants a mortgage on the property. Therefore we are requesting that the Internal Revenue Service subordinate their Federal Tax Liens to this mortgage. Once the tenant's occupancy rights are bought out, the apartment will become marketable and its value will be greatly appreciated."

[103] The property was sold on 14th May 2002 for $1.675 million. Mr. Emanuel's share was $431,351.

[104] Shortly before the date of sale, Mr. Untracht had on 16th March 2002 submitted a "collection information statement" (effectively a statement of means) to Ms. Torres, the IRS revenue officer dealing with enforcement, although the statement was unsigned. The document gives very few details of assets, save for the 25th Street property and another property bought in 1966 in Florida for $14,000. Comodo placed some reliance on his answer to a question about his home on 52nd Street. There were three boxes: "own home", "rent" and "other". The box "other" was ticked with the explanation "live with relative". Technically, however, this was correct (if not exactly fully candid). The 52nd Street property was owned (as I shall explain) by a trust. He was living there with Alessandra, his third wife, who can properly be considered as a relative.

[105] Mr. Untracht was asked about Mr. Emanuel's bank accounts and said:[31]

> "I think that he actually used a chequing account in someone else's name or perhaps in Alessandra's name. One of the things that I cautioned Eric about during this period of time when he had unpaid tax liabilities, that if he had cash sitting around in a bank account somewhere and the IRS became aware of it, they could just swoop in and levy it. And so to the extent that he was trying to manage his liquidity to the best of his ability, I think that he avoided having accounts sitting around with his name on it."

[106] The collection information form also disclosed that Mr. Emanuel had $157,389 in an individual retirement account. At the time, it was doubtful whether the IRS could seize this money. Mr. Untracht was able to persuade Ms. Torres not to.

[107] Mr. Katz' unchallenged evidence was that in 1992 he (as Mr. Emanuel's attorney advising on estate planning) had set up what is known as a QTIP trust (standing for "qualifying transfer interest property trust") for Mr. Emanuel and his then wife,

[31] Transcript, day 9, page 70.

Moira. This trust held the New York apartment at 444 East 52nd Street in Manhattan, later used by Mr. Emanuel to meet Mr. Robinson and Mr. Abdulhayoglu, and a property on Staten Island, 12 Seagate Road. Both were mortgaged, but there was substantial equity. The effect of the QTIP trust was to put the beneficial ownership of the property into the wife's name. Mr. Emanuel and Moira Emanuel separated in 1998. The marriage was dissolved on 17th September 1998.[32]

[108] By, what was effectively, a consent order of the Superior Court of California, probably made in about March 2002, Moira Emanuel was given $40,000, representing the net proceeds of sale of a condominium in Lake Worth, Florida. The order provided for Mr. Emanuel to remortgage the 52nd Street property and pay $25,000 to his former wife. In return, Moira Emanuel was to relinquish in favour of Mr. Emanuel all her beneficial ownership of the QTIP trust. On the face of it, this is a very modest divorce settlement, which would tend to imply that Mr. Emanuel had very modest assets. However, firstly, no evidence of either Californian or New York divorce law was adduced. I therefore have no idea whether the former Mrs. Emanuel might have been entitled to more, had Mr. Emanuel been richer. Secondly, the existence of the QTIP trust suggests that Mr. Emanuel had taken steps to protect his assets. This is supported by the fact Mr. Emanuel had a 1973 Rolls Royce motor car. The consent order, when read with a letter of 2nd April 2002 from Riede McCall & Mason, Moira Emanuel's attorneys, suggests that it had been put in Moira Emanuel's name and stood to be returned to him under the terms of the divorce settlement.

[109] Whilst operating as a Wall Street broker, Mr. Emanuel ran a serious risk of crippling personal liabilities, if he were ever sued. He had an incentive to keep assets out of his name, so that they did not form part of his estate on bankruptcy. If assets had been put in Moira Emanuel's name during the marriage, then that might explain why she did not seek more as part of the divorce settlement. She

[32] See the first recital in the order discussed in the next paragraph [E16/127].

would already have had the assets. In these circumstances, I can in my judgment put little weight on this point.

[110] One of the assets to which Mr. Emanuel particularly drew the attention of Mr. Abdulhayoglu and Mr. Whittam when they were first introduced was the Maroma Hotel resort in Mexico. Mr. Moreno, who it will be recalled, was a long-standing business associate of Mr. Emanuel, had an association with the hotel. Mr. Untracht at para 13 of his witness statement said:

> "I stayed at the Maroma hotel in 2001. I stayed with my wife as Eric's guest and it was absolutely beautiful. The staff there acknowledged that Eric was an owner of the hotel. It was very upscale and on a totally unspoiled beach. I also saw Eric's house that was under construction up the beach from the hotel."

[111] Mr. Untracht was cross-examined on this and explained: [33]

> "Well, in Eric's parlance an ownership interest could mean a lot of different things. So my knowledge of Eric was one or two things. Number one, I think he was cognizant of the fact that he had liabilities and he was probably hesitant to create assets in his name. And also Eric was a dealmaker, a promoter and so there are lots of situations where he tried to put together deals where he carried an interest in the profits therefrom, which in his mind made him an owner. And one could have a profits interest in a project without actually using one's own equity. So I don't know any of the facts with regard to Maroma but I don't know that Eric actually is the person that invested in building the place or acquiring it. I wasn't familiar with any of the details. But certainly when I was there with my wife, some of the staff members alluded to Eric as an owner, considered him to be an owner.
>
> …
>
> So I remember Eric telling me that those assets were owned by a Mexican corporation. I don't think he had any actual title interest in the shares of that corporation, but he did have a partner in Mexico that he had an understanding with. And so I do remember asking him about it and again, I think he went to some length to not own things that might be subject to the IRS trying to collect on them. But I think Eric was a very trusting guy and so maybe to his detriment.

[33] Transcript, day 9, pages 93, 98 to 99.

> And again, this was during a period in his life where I didn't speak with him a lot, but I think he had, and I think Mr. Moreno was allud[ed] to yesterday, I believe that he had various business dealings with Mr. Moreno, none of which I was privy to. But I think I asked Eric at least once about those Mexican assets and he told me he didn't actually have an equity ownership in them at that point, but he had some economic interest in them.
>
> …
>
> Again, Eric was a guy who kind of grew up on Wall Street. In the early days in Wall Street, a lot of business was done on handshakes, so it's entirely possible that he had some kind of arrangement with Mr. Moreno that either was or was not documented."

[112] What does this evidence say about Mr. Emanuel's wealth in 1998-99? Being wealthy is a necessarily imprecise concept. The Oxford English Dictionary gives a definition. Disregarding the obsolete and the dialectal, as well as an eponymously named North American dessert apple, there are three meanings:

> **"**2. Of persons: Having wealth or abundant means at command; rich, opulent. 3. Of a country, community, period, etc: Prosperous, flourishing, thriving; commanding riches. 4. In extended use: Rich *in* some possession or advantage; plentifully furnished with something; abundant, copious."

[113] In my judgment, the evidence suggests that Mr. Emanuel did have substantial wealth. It was not for the most part wealth which he could access easily, but he did have what can reasonably be described as an opulent life-style, with an apartment in a very prestigious part of Manhattan, a house in Staten Island, a Rolls-Royce and an interest in an hotel in Mexico. It is not necessary for assets to be in his name, it sufficed (in accordance with definition 2 above) that he had access to such assets ("ample means at his command"). *De facto* assets can properly be considered in assessing his wealth. Thus in considering whether he was wealthy the assets in the QTIP trust can properly be taken into consideration. Were it otherwise, a man who put all his assets in a discretionary trust of which he was the sole beneficiary would never be wealthy.

[114] Comodo points to the fact that Mr. Emanuel was having to enter deferred payment agreements and the like with the Revenue. A man who cannot pay his debts as when they fall due is insolvent. An insolvent man cannot be wealthy, they argue. This is not necessarily right in my judgment. There are in most legal systems two definitions of insolvency. The first is the inability to pay debts as and when they fall due. The second is balance sheet insolvency, where the debtor's debts exceed his liabilities. A man with illiquid assets may be insolvent under the first definition but wealthy under the second. Further, the fact that Mr. Emanuel entered into various DPA's with the Revenue is consistent with his taking a business decision to accept, what was effectively, expensive credit facilities from the IRS.[34] Having to juggle tax debts of hundreds of thousands of dollars might properly be described as a rich person's problem.

[115] In my judgment, Comodo have failed to prove that Mr. Emanuel was not a wealthy man.

[116] Even if I were wrong in this, I would have to consider whether Mr. Emanuel himself would have considered that he was making a fraudulent misrepresentation as to his wealth. In **Akerheim v Rolf de Mare**[35] the Privy Council held:

> "The question is not whether the defendant in any given case honestly believed the representation to be true in the sense assigned to it by the court on an objective consideration of its truth or falsity, but whether he honestly believed the representation to be true in the sense in which he understood it albeit erroneously when it was made. The subjective state of mind of the representor is also crucial in deciding whether a representation was fraudulently made":

[117] One thing which comes out of the evidence of all the witnesses, including that of Mr. Abdulhayoglu, was that Mr. Emanuel was a man of immense self-belief. Even if my conclusion as to his wealth were wrong, I would find that Mr. Emanuel

[34] See Mr. Untracht's evidence, transcript, day 9, page 34.
[35] [1959] AC 789 *per* Lord Jenkins at 805.

believed that he was wealthy. Accordingly, he lacked the subjective state of mind, necessary to find him guilty of making a fraudulent misrepresentation.

[118] The defendants criticise the way in which the fraudulent misrepresentation has been pleaded. It is well established that a pleading of fraud must be properly particularized. This too would have been a ground on which to hold that the misrepresentation was not made out.

[119] Lastly, I have to consider whether, if I am wrong on all the above, Mr. Emanuel did in fact make the representation that he was wealthy. The defendants dispute that he did. My determination on this depends on my assessment of Mr. Abdulhayoglu as a witness, since he is the only person to whom the representation is said to have been made. This I need to do holistically, having regard to all the evidence in the case. I shall therefore defer consideration of this issue until later in this judgment.

XI. Was Mr. Emanuel a disreputable banker?

[120] The Amended Defence to Counterclaim gave particulars of the matters relied upon to show that Mr. Emanuel was not a reputable investment banker. These comprised two main elements. The first was that he and his firm had been the subject of regulatory action by the National Association of Securities Dealers ("the NASD") which had resulted in sanctions. The second was that he had been expelled from the NASD and was therefore "unable to provide investment banking services."

[121] I can deal with this second element summarily. There is no evidence whatsoever that Mr. Emanuel or his firm were "expelled" from the NASD. The only evidence before me about the disciplinary record of Mr. Emanuel and his firm were the reports of FINRA, who are the regulator. These merely recite that Mr. Emanuel and his firm ceased to be members of the NASD in 1994. They say nothing about the reason for that cessation. Given that Emanuel & Co had gone bust, it is

scarcely surprising that it ceased to be a member. There is no evidence of any impropriety on the part of Mr. Emanuel or the firm resulting in the ending of membership, still less of any "expulsion".

[122] As to the question of Mr. Emanuel's ability to provide investment banking services, again the problem is the absence of any evidence about US securities law: see the discussion above. Now, banking, in the sense of deposit-taking, is very highly regulated all over the world. However, investment banking does not, or at least does not generally, involve deposit-taking. The selling of stocks and securities is a core function of an investment banker. There is no evidence that Mr. Emanuel in offering shares in Comodo and Renaissance was acting illegally or improperly. Accordingly the whole of this second element goes.

[123] The first element involves a consideration of the regulatory offences alleged against Mr. Emanuel and the firm. Again Mr. Untracht gives useful evidence:[36]

> "I knew something about [Mr. Emanuel's] regulatory record in the 1980s and yes, directly, because I was an employee and I knew about it. But my accounting firm at some point became the independent auditors thereof, so one of the things we would have been aware of what would have been regulatory infractions.
>
> My understanding in the brokerage world, there are different kinds of infractions. Every firm has infractions. So I don't care if you go to Goldman Sachs or Merrill Lynch, some of the infractions against Goldman Sachs in light of the financial crisis were quite spectacular and they paid many, many millions of dollars. My knowledge of Eric's infractions, some of them more direct, some were indirect, where there were more minor issues, little violations. He had a number of people that worked for him that were selling securities under his license. And there is a thing called the Failure to Supervise Penalty which is something that is pretty not at all unusual where somebody who is under your direction and control doesn't follow or violates a rule, the supervisor is also held responsible for that. So I think that it was quite normal and routine for any registered broker dealer to have some violations along the way. There are serious infractions and there are not serious infractions. And so I don't see that to be indicative of anything other than the fact that he was operating a highly regulated business and that being subjected to being fined by the NASD is

[36] Transcript, day 9, pages 99 to 100.

> just one of the costs of doing business. And one endeavours to play within the rules and sometimes you make a mistake and you get a penalty."

He then explained that he, as the auditor, had to provide an opinion to the NASD on relevant matters, including the regulatory record of the body audited.

[124] Mr. Katz' evidence about infractions and Mr. Emanuel's reputation was to similar effect, although he had fewer dealings with Mr. Emanuel over the period than Mr. Untracht. Mr. Untracht's and Mr. Katz' evidence accords with my own assessment of the FINRA records. The infractions were comparatively few, and some very old. There were no heavy fines. Accordingly, I do not find any of the allegations that Mr. Emanuel was a disreputable banker proven. I find that there were no misrepresentations in relation to Mr. Emanuel's respectability as a banker.

XII. Mr. Emanuel's intention actively to market Comodo products

[125] The third of the Initial Representations was that Mr. Emanuel had no intention of marketing Comodo products. At the trial, this representation was scarcely relied upon, although it was not formally abandoned. I have set out the steps he took in this regard prior to entering the SSA, including attempting to get Barry Wolf and Miles involved. The actual duties of Mr. Emanuel are fixed by the terms of the SSA. These supersede any previous discussions and representations.

[126] The SSA provides:

> "6.2 [Renaissance] confirms (and shall procure) that, following Completion, Mr. Emanuel will devote sufficient of his personal time and attention, and will use his best reasonable efforts in the following areas:
>
> (a) investment banking services, including identification of, and negotiation with, additional investors with a view to conclusion of a private placement (which it is envisaged would involve a combination of (i) issue of further new Shares to raise additional capital for furtherance of the Group's business objectives and (ii) sale of existing Shares by current shareholders of the Company)

> with strategic and other investors identified, or to be identified, by Mr. Emanuel; and
>
> (b) following (and assuming) successful development (and availability) of trial product samples (and availability of product for launch), marketing of the Group's products to appropriate industry participants and end-users in accordance with a marketing strategy to be agreed between Mr. Emanuel and the Company.
>
> 6.3 It is envisaged that Mr. Emanuel will perform the functions referred to in Clause 6.2 either personally or through affiliated entities, and (in either case) using all appropriate personal contacts. Notwithstanding that such services and functions may be rendered or performed through affiliated entities, Mr. Emanuel's personal involvement in the relevant processes is specifically expected."

[127] During Mr. Emanuel's lifetime there is no evidence of any complaint being made about any failure on Mr. Emanuel's part to market Comodo and its products. Any marketing could, perfectly properly, be done by affiliates. There is no evidence that marketing was not done. On the contrary, the phenomenal growth of Comodo shows that what marketing was done was very successful.

[128] Mr. Emanuel devoted his whole working time to building up Comodo. In 2000 he was preparing a memorandum for a private offering of $15 million of equity in Comodo: see the drafts of 26th September 2000 and 12th November 2000. A private equity placement had to be put on hold after the dot.com share market crash.

[129] Even, after Mr. Emanuel's death, there was no complaint about marketing. In his email of 11th March 2011 to Mr. Easley (one of the investors in Renaissance), Mr. Abdulhayoglu said:[37]

> "I gave Eric around 30% of the company for him to fund the company, help with IPO and acquisitions. Unfortunately this was not fully completed due to his tragic death. [A]re you prepared to give me back my shares I have to Eric for unfulfilled obligation? Will Renaissance give back the shares I gave to Eric/Renaissance for an unfulfilled obligation?"

[37] [E8/4673]

[130] Mr Abdulhayoglu's complaint here is that, by inconsiderately dying, Mr. Emanuel could not fulfil his duties, not that he had failed to do so whilst alive. In my judgment, there is no substance in this alleged third Initial Misrepresentation.

XIII. Personal investment by Mr. Emanuel

[131] The last of the Initial Representations is the averment that Mr. Emanuel represented that "he would invest his own personal money in Comodo." Again, although not formally abandoned, it had little prominence in Comodo's case before me. The representation as pleaded does not allege that *all* the investment monies would come from Mr. Emanuel personally. On its face it seems to say that *some* of the monies would be Mr. Emanuel's personally.

[132] There is an oddity about this alleged representation, because the representation cannot be taken literally. The $750,000 due under the SSA was an obligation of Renaissance, not of Mr. Emanuel personally. (He was not a party to the agreement.) Thus, any investment was an investment by Renaissance. What we are presumably to infer from the pleading, is some kind of figurative representation, to the effect that Mr. Emanuel would in some way advance the $750,000 to Renaissance, which in turn would advance it to Comodo. However, such an implied figurative representation is not properly pleaded, as it must be, particularly where the representation is said to have been made fraudulently.

[133] Interpreting the representation as a promise to invest monies via Renaissance also raises various problems as to what Mr. Emanuel was required to do. Could he, for example, lend the money to Renaissance, rather than purchase shares in the company? Would it have been objectionable for him to have borrowed the money to invest in Renaissance, or did he have to have the cash immediately available? Could he guarantee a bank loan made to Renaissance? Could he provide shares in Renaissance as security for such borrowings? As soon as one

asks these questions, one has to ask what objection there might be to Mr. Emanuel selling some shares in Renaissance — on the basis that it would still remain "his" company.

[134] Given these difficulties, in my judgment unless one knows what precisely is alleged against Mr. Emanuel, it is not possible to find that the representation had any sufficiently defined meaning to be actionable.

[135] Further, there is a problem of timing. Mr. Abdulhayoglu in his fax of 18th December 1998 tells Mr. McManus that Mr. Emanuel "wants to pay monthly with his own money." But that representation (assuming Mr. Emanuel made it) was superseded by the incorporation of Renaissance on 4th January 1999 and Renaissance becoming a party to the JVA and SSA. There is no evidence of the representation being repeated after 4th January 1999. Even assuming the representation was actionable when made, the substitution of Renaissance as the investor would nullify the representation.

[136] There is also a major issue as to whether there was in fact any reliance on the representation on the part of Comodo. Again, I shall consider this below, when I take a holistic view of the evidence and of Mr. Abdulhayoglu's testimony.

XIV. The money for the initial share subscription

[137] I turn then to the initial subscription for shares in Comodo.

[138] Under the terms of the SSA, Renaissance had to pay $250,000 on completion of the agreement and a further $125,000 on each of 28th April, 28th July, 28th October 1999 and 28th January 2000. Monies were in fact paid by Renaissance to Comodo US subsidiary as follows: 2nd March 1999, $250,000; 5th May 1999, $125,000; 13th August 1999 $75,000; 8th October 1999, $100,000; 29th October 1999, $50,000; and 19th January 2000, $150,000. (No issue as to breach of contract or forfeiture is taken on the pleadings arising from these slight irregularities as to timing and size in the making of the payments.)

[139] Renaissance had a bank account with the Miami branch of a Portuguese bank, Banco Espirito Santo. It was opened on 1st March 1999 with three separate transfers from Dr. Nisi, each of $100,000. There was no other money in the account than this $300,000. On 2nd March 1999 Renaissance transferred $250,000 to the Midland Bank account of Comodo Group Inc., Comodo's US subsidiary. There then seem to have been some withdrawals from the account for Mr. Emanuel's personal expenses. (This is a feature throughout, although there is also evidence of his repaying monies to Renaissance.)

[140] On 29th March 1999, Dr. Nisi made three further transfers of $50,000 each to the Espirito Santo account. That money was placed on a one month deposit at the bank. On 5th May 1999, $125,000 of that money was used to pay the next instalment of purchase monies to Comodo. On 13th August 1999, a further $75,000 of monies originating from Dr. Nisi was used to pay Comodo. (The Espirito Santo bank statements between March 1999 and January 2000 are missing, but there is other evidence of this.) On 6th October 1999, Don Golden transferred $400,000 to Renaissance. This is the probable origin of the $100,000 paid on 8th October 1999 and the $50,000 paid on 29th October 1999, although some may have come from Dr. Nisi. On 11th January 2000, Mr. Golden transferred a further $400,000 to Renaissance's account, which at that time had only $206.17 in it. $150,000 of that was paid to Comodo on 19th January 2000.

[141] What is the legal significance of these transfers? Bannister J in his judgment of 15th December 2014 held at para [13]:

> "I do not think that the fact that Renaissance used other people's money to make the payments would mean that the initial shares were not fully paid. While, in the cases where that was the position, the provider of the money might have a claim against Renaissance and might, if certain conditions were met, be able to follow or trace their money into Renaissance's assets (including the Shares), it is not suggested that the money was accepted by Comodo in bad faith or that Comodo had any reason to believe that it represented third party money being misapplied by Comodo. Comodo gave valuable consideration for its receipt of the

> funds by allotting the initial shares and is thus immune from any claim to restitution by the original provider(s) of those funds. As between Comodo and Renaissance, the payments (whatever their original source) clearly discharge the obligations of Renaissance under the subscription agreement."

[142] In effect, Bannister J was saying that Comodo were purchasers for value without notice, so they got good title to the purchase monies. Accordingly (whatever the position might be between Dr. Nisi and Mr. Golden on the one hand and Renaissance on the other), as between Renaissance and Comodo, Renaissance had paid in full for its shares. He granted Renaissance summary judgment.

[143] Comodo appealed against this part of the order, and also against Bannister J's refusal to allow Comodo to amend its Reply and Defence to Counterclaim by adding the allegations of misrepresentation. Most of the Court of Appeal's judgment[38] is concerned with the application to amend. Having decided that permission to amend should be granted, it held:

> "[91] It is the law that a respondent to a summary judgment application is not required to provide his case to a high standard. It will suffice to show that his case may succeed even though it is improbable…
>
> [92] Comodo's defence[s] on the payment of the shares and the breaches of the IBC Act are not frivolous. Neither is its contention on the interpretation of the forfeiture provisions fanciful…
>
> [93] …[T]he learned judge embarked on a mini trial and speculated quite a bit on important evidential matters…
>
> [94] It is well recognized that summary judgment will almost always be inappropriate where there are allegations of reprehensible conduct. In this case, there are serious allegations of improper conduct on the part of Mr. Emanuel, which may well be relevant in the court's determination of the title to [the] shares…
>
> [96] In the case before the court, the judge was not merely required to rectify the register but critically would have needed to determine who had title to the shares. He would only be able to properly do so after there is a

[38] BVIHCMAP 2014/0032.

> full ventilation of the issues that have been joined by Comodo and Renaissance."

[144] I do not read the Court of Appeal as saying that Bannister J was necessarily wrong in his holding that, as equity's darling, Comodo were fully paid by Renaissance for the 50 shares (subsequently divided so as to be 100 million shares) allotted to Renaissance. Rather, it was saying all matters should be investigated. This is what I shall do.

[145] The initial investors were Dr. Nisi and Don and Fran Golden, his estranged wife. Both Dr. Nisi and Mrs. Golden are dead, but Mr. Golden gave evidence to me.

XV. Dr. Nisi's investment

[146] There is in evidence a stock purchase agreement entered into between Renaissance and Dr. Nisi. Dr. Nisi executed it before a notary, who may have been related to him. Mr. Moreno signed on behalf of Renaissance and the company seal was affixed to the document. The stock purchase agreement is undated, but if it is a genuine record of the agreement between Dr. Nisi and Renaissance it must post-date 3rd February 1999, when Mr. Moreno was appointed as a director of Renaissance, and pre-date 20th March 1999, which was the date for closing.

[147] The agreement recites that Renaissance was capitalized with 50,000 shares of $1 each and wished to issue 10,000 of those shares to Dr. Nisi. The consideration was to be the payment by Dr. Nisi of $500,000 to Renaissance. By clause III.A)3.i) Renaissance represented and warranted that "[t]he primary asset of Renaissance is 50 shares of Comodo Limited, a company incorporated in the British Virgin Islands." The consideration was not in fact paid: Dr. Nisi only transferred $450,000. There may therefore be doubts as to what exactly occurred.

[148] On 15th April 2014 Dr. Nisi swore an affidavit in these proceedings, in which he said:

> "3. I was a good friend of Mr. Eric Emanuel. I invested a total of $450,000 in Renaissance in March 1999, and became a Renaissance shareholder. I had never heard of Comodo in 1999. I was investing Renaissance to become Mr. Emanuel's 'partner' in whichever companies Mr. Emanuel would invest in. I understood Renaissance to be a general investment fund. I received back payment of $250,000, resulting in a net investment of $200,000.
>
> 4. Four years later, in 2003, Mr. Emanuel advised me that the real value in Renaissance was then Comodo's shares and that when a hoped for Initial Public Offering would take place, it would be in my best interests to own Comodo shares directly. My Renaissance shares were then cancelled and I received Comodo shares."

[149] Dr. Nisi died on 8th July 2014 of heart complications. He was only 55. An appropriate hearsay notice was given in respect of the evidence above.

[150] Mr. Whittam gave evidence of his dealings with Dr. Nisi in 2011. This began with Dr. Nisi sending him copies of the JVA, Comodo's intellectual property licence and a power of attorney dated 18th January 1999, whereby the joint venturers appointed Comodo their attorney for certain purposes. That was followed by a conference call on 18th August 2011. Mr. Whittam's account of the call, in para 30 of his witness statement, was this:

> "I participated in the telephone call with Mr. Nisi, Mr. Abdulhayoglu, Comodo's inhouse counsel [Patricia Forsyth], and two outside counsel attorneys (Jeff Shapiro and Chris Porrino, both then of Lowenstein Sandler LLP) for Comodo… During this telephone call, Mr. Nisi expressly told us in no uncertain terms that he was intended to invest in shares in Comodo, not shares in Renaissance, all along."

XVI. A troubling matter

[151] Before making my determinations of fact on Dr. Nisi's investment, I should mention one troubling matter: Comodo's willingness to make scurrilous allegations, wholly irrelevant to the issues before the Court. Dr. Nisi was an ophthalmologist, admitted to practice in New York in 1990. In 1998 he faced disciplinary matters. It was alleged he had recommended inappropriate treatment for two patients and had been negligent. Although charges of gross negligence, fraudulent practice and moral unfitness were brought, these were not proceeded with. Dr. Nisi was placed on probation (the American equivalent of supervised practice). Ten years later he was again found guilty of negligence and inappropriate treatment. This time he was struck off. Mr. Whittam said[39]: "For this reason, in this Witness Statement, I refer to 'Mr.', rather than 'Dr.' Nisi."

[152] This evidence is wholly irrelevant to the issues in the case. Whether Dr. Nisi was a good or a bad ophthalmologist is of no relevance to the truth or otherwise of his affidavit in 2014. The evidence of his being struck off was clearly adduced simply in order to smear the man. Moreover, calling him Mr. Nisi is wrong in any event. Dr. Nisi's academic qualification was *medicinae doctor*. Thus, even if he was not entitled to practise medicine, he was still entitled to the academic title "Doctor". It will be remembered that Comodo attempted a similar smear when it alleged that Mr. Emanuel had been "expelled" from the NASD. Typical of this approach is Mr. Whittam saying that Mr. Emanuel had "squandered" money in relation to an investment he made with Fran Golden. What had in fact happened was that Mr. Emanuel had been persuaded to make an investment into what turned out to be a scam, of which he was the victim.[40] It was hardly deliberate squandering of money.

[153] Mr. Abdulhayoglu was also guilty of this behaviour. On the fourth day of his giving evidence, quite out of the blue, without any provocation and without any relevance

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[39] See witness statement, para 32.
[40] See transcript, day 6, page 213.

to the question he was being asked, he made scurrilous allegations about the man who is said to be the guiding mind of the defendants' litigation funder.[41] These allegations were just abuse. The gentleman was never going to give evidence. The allegations were completely irrelevant to the issues in the case. (I should add that the funding gentleman appears never to have been convicted of any of the allegations of criminal offences dredged up by Mr. Abdulhayoglu.)

[154] Particularly disgraceful is Mr. Abdulhayoglu's response to an anonymous letter he says he received, which said: "You have six months to pay off your investors their original investments. You children and wife will suffer greatly if you do not. Enough is enough." Mr. Abdulhayoglu told the Federal Bureau of Investigations that this letter was written by Thomas Easley. There does not seem to have been a scrap of evidence to support this. Mr. Easley was interviewed by the FBI and no further steps were taken. Mr. Easley and Mr. Abdulhayoglu had had during Mr. Emanuel's lifetime a close friendship, although this broke down in 2011 in circumstances to which I shall come. Having seen Mr. Easley in the witness box, I find it most unlikely that he would have been sending threatening letters to Mr. Abdulhayoglu or that Mr. Abdulhayoglu might genuinely have thought such a thing.

XVII. Conclusions on Dr. Nisi's intention when investing

[155] Returning to the substantive issues, I have to say that I found the way in which the evidence of the conference call on 18th August 2011 was adduced was unsatisfactory. Comodo at that time back in 2011 clearly considered that this was an important call. There were three lawyers party to it. Two of the lawyers, Ms. Forsyth, the in-house counsel, and Mr. Shapiro were actually in court during the trial before me. Neither gave evidence. It beggars belief that with three lawyers present, two of whom were presumably charging an hourly rate, none took a note of the conference call in 2011.

[41] See transcript, day 5, page 176.

[156] Mr. Whittam's evidence on this was very unsatisfactory. I cannot reproduce the whole of what in my view was a devastating cross-examination, [42] but the following gives a sufficient flavour[43]

> "Q. You see, I suggest, Mr. Whittam, that your recollection and description of this conversation with Mr. Nisi is inaccurate. Indeed it's untrue.
> A. I disagree.
> Q. He did not say 'in no uncertain terms' that he intended to invest in Comodo.
> A. I disagree.
> Q. You disagree. But you can't otherwise provide any explanation as to why there's no note of this. Was a note taken at the time, can you recall?
> A. I don't recall.
> Q. So just so that I'm clear. You don't recall why they [the lawyers] were asked to attend. You don't recall where the meeting took place and you don't recall whether you made a note of the meeting.
> A. That's correct.
> Q. But despite all of that, you do recall what Mr. Nisi said?
> A. I've made the assertion in my statement, that is correct.
> Q. No, there's a difference between making an assertion and the position being the truth. Are you saying that notwithstanding you can't remember why the lawyers were there; you can't remember where the meeting took place; and you can't remember whether a note was prepared, nonetheless, you can recall the conversation with Mr. Nisi?
> A. Yes.
> Q. Who did the talking?
> A. I don't recall everybody who did the talking.
> Q. How long did the meeting last?
> A. I don't recall."

[157] Despite the obvious issues raised, Comodo made no application to adduce late evidence from Ms. Forsyth or Mr. Shapiro. Nor was any note of the conference call subsequently produced. It was not suggested to me by Comodo's counsel that such a note might have been privileged or that there was any reason why the note could not have been produced. (My preliminary view would have been that any legal professional privilege in the note of the call with Dr. Nisi would have been waived by the evidence of Mr. Whittam adduced of the call, but because

[42] The relevant passages start at transcript, day 6, page 203.
[43] Transcript, day 6, from page 207

Comodo advanced no explanation for its non-production, I did not hear argument on the point.)

[158] There is clearly a discrepancy between Dr. Nisi's affidavit and the 1999 share purchase agreement. The share purchase agreement refers to Comodo and therefore belies Dr. Nisi's assertion that he had not heard about the company in 1999. The fact that by 2011 he had the JVA etc does not definitively show when he first received those documents. However, as I shall discuss below, Mr. Emanuel did show the Goldens the JVA. It is therefore probable that he showed at least the JVA to Dr. Nisi when inducing him to invest. Moreover, Mr. Abdulhayoglu's evidence is that Mr. Emanuel asked for the JVA to be separated from the SSA, so that he could show investors the JVA, without disclosing the price Renaissance had paid for its shares. If that was Mr. Emanuel's purpose when separating the JVA and the SSA, it would be strange if he did not use the JVA to encourage potential investors to invest.

[159] There is some evidence that Renaissance was intended to make investments other than just in Comodo. In 2000, Fran Golden invested $400,000 in Renaissance with a view to making an investment with Mr. Emanuel in a company called Leisure Resorts. The venture seems to have been a scam and both Mrs. Golden and Mr. Emanuel lost money (this was Mr. Whittam's "squandering" allegation) but it does show that at this early stage in Renaissance's existence it was not solely Comodo-focused.

[160] In my judgment the best evidence of what the agreement was between Dr. Nisi and Mr. Emanuel is the share purchase agreement. Admittedly there must have been some subsequent variation of the agreement to provide for the reduced payment of $450,000 and for a partial repayment of $250,000 to Dr. Nisi. (This seems to have been a sale-back of 2,500 of his 10,000 Renaissance shares. The payment to Dr. Nisi was made as to $200,000 on 14th January 2000 and as to

$50,000 on 16th November 2001.[44] Given that both Mr. Emanuel and Dr. Nisi are dead, there are matters which will never be capable of clarification. I prefer the evidence of the share purchase agreement to the very unsatisfactory evidence of Mr. Whittam. I do not accept the assertion in the affidavit that Dr. Nisi had not heard of Comodo in 1999, however, I do not rule out the possibility that Dr. Nisi was potentially providing money for other ventures into which Renaissance might invest.

[161] Dr. Nisi, I find, was investing in Renaissance, on the basis that Renaissance held shares in Comodo. He was not, and did not understand himself to have been, investing directly in Comodo.

[162] I should add that my conclusion on this issue is reinforced by the evidence, to which I shall come, about later investors and their understanding.

XVIII. The Goldens' investment

[163] Other early investors were Donald Golden and Fran Golden. They had been married for some ten years, but in 1999 were going through a divorce. Due to the matrimonial law regime which applied to them, their assets were held in escrow by a firm of attorneys. Any investment had to be made jointly. Mrs. Golden was a cousin of Lou Pearlman, the fraudster. At the time, Mr. Golden was doing marketing work for Mr. Pearlman in connection with the promotion of the Backstreet Boys. Both knew Mr. Emanuel through him. Mr. Emanuel persuaded Mrs. Golden to invest. She then persuaded Mr. Golden to allow the investment.

[164] Mr. Emanuel's handwritten record of share sales in Renaissance[45] shows the Goldens buying two million shares in a first tranche of $300,000 (at 15 cents a share) and a further one million shares with their second tranche of $400,000 (at 40 cents a share). (A third tranche of $150,000 invested does not appear in this list, but it was made considerably later on 18th March 2003.)

[44] See Mr. Emanuel's handwritten list of Renaissance shareholders [MF/4/67].
[45] MR/4/67.

[165] Fran Golden has died of cancer. Don Golden, however, was able to give evidence on behalf of Comodo. He was occasionally vague on points of detail. For example, there is an issue, which I do not need to resolve, as to whether the Goldens invested $850,000 or $950,000 in total. Despite this occasional vagueness, I found him a witness of truth, who was doing his best to assist the Court. The legal interpretation of what happened is, however, a matter for me.

[166] His understanding of how the investment was structured was this:[46]

> "THE COURT: And was your understanding that you were going to get direct shareholdings in Comodo, or were you going to be putting the money into Renaissance again?
> THE WITNESS: Directly into Comodo. When I first was approached, well, when my ex-wife was first approached by Mr. Emanuel to invest in Comodo, it was always an investment in Comodo. As I said he gave us a shareholders' agreement that showed Renaissance Ventures, which was his vehicle, to participate in the shareholders' agreement, he had one-third of the Company. And at the time he told us that because Comodo was just established that they didn't have share certificates that they were issuing to investors, and, therefore, the money would be paid to Renaissance. Eric would issue us Renaissance share certificates and then when Comodo was issuing shares, the Renaissance stock would be surrendered and we'd be issued Comodo shares which is exactly what happened."

[167] The shareholders' agreement with the Goldens is not in evidence, but the legal analysis of what occurred in my judgment is as follows. Mr. Emanuel sold the Goldens shares in Renaissance on the basis that the Renaissance shares would later be swapped one-for-one for Comodo shares. As Mr. Golden says, that is indeed what happened. On 11th April 2013 300,000 Comodo share certificates were issued to Action Communications Inc Retirement Plan (Mr. Golden's pension plan) and 12th June 2013, further share certificates for 3,000,000 shares in Comodo were issued to him (1,250,000) and Fran Golden (1,250,000) with 250,000 to each of their daughters, Lindsay and Amanda.

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[46] Transcript, day 7, page 75.

[168] Despite Mr. Golden's belief that he and his estranged wife were investing directly into Comodo, I find that they were in fact and in law investing in Renaissance, with an option to swap their Renaissance shares into Comodo shares.

XIX. Conclusions on the initial grant of shares to Renaissance

[169] I therefore find that Dr. Nisi and the Goldens were paying monies to Renaissance, not to Renaissance on behalf of Comodo. Yes, they invested because of the attractions of Comodo and (at least in the Goldens' case) the promised one-for-one share swap, but nonetheless they were paying monies beneficially to Renaissance. None complained that they were initially issued Renaissance shares. That is because they got what they bargained for.

[170] It is important to remember that Renaissance was to own a third of the shares in Comodo. Mr. Golden knew that: see the transcript quoted above. Thus, so long as Mr. Emanuel did not sell Dr. Nisi and the Goldens more shares than Renaissance held in Comodo, he could swap some of Renaissance's Comodo shares for the investors' shares in Renaissance (although he would need the other shareholders' consent.[47]). Now, what in fact happened, was different. So long as the price Dr. Nisi and the Goldens paid for their Renaissance shares was more than the price at which Mr. Emanuel could obtain fresh shares from Comodo, Mr. Emanuel had an incentive to organize the share swap by obtaining an allotment of fresh shares from Comodo, rather than by reducing Renaissance's holding of Comodo shares. This is likely to be what Mr. Emanuel envisaged (it would mean there was no breach of clause 8.1). Nonetheless, either way, the monies were being paid beneficially to Renaissance.

[171] The argument that there was some *Quistclose* trust, falls away. There was no agreement between Dr. Nisi and the Goldens on the one hand and Renaissance on the other, that the monies had to be paid to Comodo. The investors would have no knowledge of the arrangements between Renaissance and Comodo

[47] See clause 8.1 of the JVA.

under the SSA. The ability of Renaissance (subject to consent) to give the investors its own shares in Comodo would mean that no money needed to pass from Renaissance to Comodo. Renaissance were not obliged vis-à-vis Dr. Nisi and the Goldens to pay the money to Comodo; the monies cannot therefore be impressed with trusts in favour of Dr. Nisi and the Goldens.

[172] The averment in para 50 of the Amended Defence and Counterclaim also fails. This asserted that the monies obtained from Dr. Nisi and the Goldens had been "collected as agent for the Claimant from persons who had subscribed for shares in the Claimant and which it held on trust for the Claimant." Mr. Emanuel had not acted as agent for Comodo: he had acted as agent for Renaissance. Dr. Nisi and the Goldens had not subscribed for shares in Comodo: they subscribed for shares in Renaissance. The averment in the pleading that the monies were held on trust for Comodo is dependent on the allegation that Mr. Emanuel was acting as an agent for Comodo, so this way of putting the trust allegations fails as well. In the next part, I consider the way is put in Mr. Chivers QC's new case.

XX. Comodo's new case on the initial investments

[173] As I have said, Mr. Chivers QC in his closing submissions sought to rely on new averments. These matters were not pleaded. Mr. Chivers in opening had expressly said that he was not going to go outside the pleaded case.[48] It was therefore not open to him to widen his case so dramatically in his closing speech. However, since this matter may go further, I shall deal with these matters briefly.

[174] Mr. Chivers QC sought to argue that the monies paid by Dr. Nisi and the Goldens were held on trust on the basis of a fiduciary duty arising from the JVA and the SSA. Now it is true that some joint venture agreements give rise to fiduciary duties as between the joint venturers. However, as Mr. Chivers conceded, each case depends on its facts. The issue, he submitted, was whether the parties were

[48] See transcript, day 1, pages 4 and 9.

committed to a common objective and whether the parties understood that they were working together in the interests of all: **Chirnside v Fay**[49] at [91].

[175] **Chirnside** was a case of a quasi-partnership between property developers. The current case is quite different. It is dangerous to take general words from one case and apply them to another. The main purpose of the SSA was to provide for an investment of $750,000 by Renaissance. Clause 6.2(a) provides for Mr. Emanuel to provide investment banking services, which were directed at identifying investors for the purpose of a private placement involving the issue of new shares and the sale of the existing shareholders' shares. Mr. Emanuel (or his company) would be entitled to remuneration for such services.

[176] The sale of Renaissance's own shares does not in my judgment fall within clause 6.2(a). Mr. Emanuel, when identifying investors for a private placement of Comodo shares, would owe a fiduciary duty to Comodo. But it is not necessary to imply a fiduciary obligation in favour of Comodo, so as debar Mr. Emanuel from raising money for Renaissance by selling its own shares. Such fund raising falls outside clause 6.2(a).

[177] Mr. Chivers QC sought to rely on the faxes where Mr. Emanuel had discussed how the $750,000 would be raised. He submitted that, when the initial letter of intent of 17th August 1998[50] refers to "the principal initial subscriber [being] Eric Emanuel and his associates", "associate" was given the highly, highly technical meaning given to it in clause 1.2.3 of the JVA. (The clause refers to various definitions for tax purposes contained in sections 416 and 417 of the UK Income and Corporation Taxes Act 1988.) I regard this as a hopeless argument. There is no evidence that the detailed terms of the JVA were in the parties' contemplation when the letter of intent was signed. The letter of intent in my judgment shows that there was no objection to Mr. Emanuel bringing others in. The fact that he later said he would fund the operation on his own does not mean that Comodo

49 [2006] NZSC 68, [2007] 2 LRC 407
50 [E1/239]

could have properly (or for that matter, would have) objected to his bringing associates in. Mr. Abdulhayoglu's suggestion that the reference to "associates" was to managers employed by Mr. Emanuel in Emanuel Financial Group, Inc. is equally without evidential foundation.

[178] Mr. Chivers QC said that Mr. Emanuel was in breach of the confidentiality provisions of the JVA. In the light of Mr. Abdulhayoglu's evidence that the purpose of separating the JVA from the SSA was so that Mr. Emanuel could show investors the JVA, it is obvious that Mr. Emanuel had the other parties' consent to the disclosure of the JVA to potential investors. Trying to spin some form of fiduciary obligation out of a breach of confidence fails too.

[179] In relation to later transactions, Mr. Chivers QC alleged that Mr. Emanuel's fiduciary duties arose from his position as a director of Comodo. However, Mr. Emanuel was only appointed as a director on 28th October 2000, long after these transactions. This point therefore had no relevance to his duties in relation to the monies obtained from Dr. Nisi and (in this initial stage) the Goldens.

[180] For completeness, I should add that Mr. Emanuel's handwritten list of shareholders[51] included a grant to Starnet (Mr. Moreno's corporate vehicle) of one million Renaissance shares. The price was $50,000, but it may be that this was notional, in that the shares were given for Mr. Moreno's services as the director of Renaissance. Grants of one million shares to a John Olson for $100,000 (or 10 cents a share) and of 1.7 million shares to Richard Berger for $255,000 (or 15 cents a share) are also recorded. No reliance was placed by either party on these transactions. I shall therefore ignore them.

XXI. The subsequent raising of funds

[181] After the initial payment of $750,000 from Renaissance to Comodo, Renaissance continued to advance funds to Comodo. As noted above, on 13th June 2001

[51] [MR/4/67]

Comodo made a formal acknowledgement that Renaissance had advanced it $540,550. This is effectively an account stated.

[182] Just prior to this, Mr. Emanuel had arranged the sale of a total of one million Comodo shares to Dennis Quaid, the famous actor, and two of Mr. Quaid's associates, Mark Weiner and Steven Mendelson. The sale completed on 9th May 2001, with Comodo allotting 71,429 new shares to Mr. Quaid, 300,000 to Mr. Weiner and 200,000 to Mr. Mendelson, with Comodo granting permission to Renaissance to transfer 428,571 of its existing shares to Mr. Quaid: see the consent, signed by Mr. Abdulhayoglu of 9th May 2001. (Renaissance received the purchase monies and Renaissance shares were issued to Mr. Quaid and others on 21st June 2001.[52] However, the issuing of shares in Renaissance seems to have been an error; the shares were subsequently cancelled.)

[183] In the meantime, Renaissance had itself been selling Renaissance shares. I have already noted some of the sales. There is a further list at [MF/4/73]. The price rose over time, with some modest ups and downs around the 40 and 35 cent mark, until the price reached $1 per share. (A much later list shows sales at up to $2 a share.)

[184] In June 2003, there was discussion between Mr. Emanuel and Mr. Whittam about issuing additional shares in Comodo to Mr. Emanuel. These discussions seem to form part of wider discussions involving Mr. McManus. Unfortunately, only two emails survive, one of 3rd July 2003 sent by Mr. Emanuel to Mr. Whittam and copied to Mr. Abdulhayoglu, the other Mr. Whittam's reply of 14th July 2003. From these, it seems that in June 2003 it had been agreed that monies loaned to Comodo, as well possibly as monies owed to Mr. Emanuel for commission, would be converted into Comodo shares. The majority would be put in Mr. Emanuel's name, but some would be allocated to others. The actual amount which it was agreed was loaned does not appear in the surviving documentation.

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[52] [MF/C/91]

[185] The background seems to be at this time, or slightly after, that Mr. McManus was interested in exiting from Comodo. Mr. Emanuel and Mr. Abdulhayoglu had formed a new company, Tech IP, which was intended to acquire Mr. McManus's interest in Comodo. This required an assessment of the value of Mr. McManus's shares. At the same time the entitlements of Mr. Westley under his loan conversions were to be dealt with by having Mr. Westley's shares deducted from Mr. McManus's share entitlement. (In fact, Mr. McManus's exit was delayed. A share purchase agreement was only signed on 11th June 2004. It provided for the sale of his interest in Comodo to Tech IP at a price of $2.75 million, reducing to $2.6 million for early settlement.)

[186] The issue raised in the email of 3rd July was that there was a mathematical error. It had been agreed that Mr. Emanuel was entitled to 15,993,861 shares under the debt for equity swap. Of these 3,000,000 were to be issued to the Goldens, a total of 1,500,000 to Mr. Emanuel's wife, Alessandra, and his two children, Matthew and Jennifer, and 1,000,000 to Dr. Nisi. That added up to 5½ million shares. However, the share certificates No 35 and 36 only added up to 15,833,248 shares, so there was a shortfall of 160,613 shares. As a result, Mr. Whittam cancelled certificates 35 and 36 and issued a fresh certification No 37 for 15,993,861 shares in Comodo.

[187] Comodo's pleaded case is that Renaissance never lent any money to Comodo. All the monies which were advanced to Comodo were already Comodo's money. Share certificates 35 and 36 were issued because Mr. Emanuel represented that monies were due to Renaissance. (This is the "Loan Representation".) The issuance of certificate 37 was a continuance of that. (This is the "Consolidation Representation".) Investors intended directly to invest in Comodo, so the monies were already impressed with a trust in Comodo's favour.

[188] In my judgment, this has the same difficulty as the case in relation to Dr. Nisi and the Goldens. Again, I can turn to the evidence of Mr. Untracht. He said:[53]

> Q. We see there a Share Certificate No. 20 for Renaissance Ventures Limited dated the 15th of June 2002 again in your name, recording that you received 10,000 shares in that company. Do you see that?
> A. I do.
> Q. Can you explain to us, please, the circumstance in which you came to acquire shareholding in Renaissance?
> A. So yes. In one of my conversations with Eric during this particular period of time, I mean he and I had been speaking from time to time and I was aware of the fact that he was working on Comodo and he said to me in a conversation right around this time that he really thought that Comodo was going to be a really big thing, very profitable and I remember him telling me he was appreciative of the fact that I had stuck by him and continued to represent him and work with him and that his ability to pay was somewhat limited over those years. And he wanted me to have the opportunity to participate in the upside that he thought Comodo had. And I specifically remember him telling me he was going to be my best client again. And so he invited me to make an investment and I agreed.
> Q. An investment in?
> A. I knew I was investing in Renaissance, if that's the question. I knew I was getting shares in Renaissance.
> Q. Why were you investing in Renaissance?
> A. Because my understanding was that that was the vehicle through which Eric and shareholders affiliated with Eric were owning their shares early on. My understanding was that those would ultimately be converted into Comodo shares. So my understanding was it was a one for one investment in Comodo ultimately.
> Q. Very well, thank you.
> A. By the way, it was not clear to me at that time whether or not the money that I was paying was intended to go ultimately to Comodo or whether or not I was in some way diluting Eric's ownership and getting shares from him, nor did I care. I was completely indifferent at that point.
> Q. The attraction of giving over that money was the prospect of Comodo, wasn't it?
> A. Oh, unquestionably. I viewed it as an investment in Comodo. But it occurred to me that one might consider it relevant whether or not I had an understanding that I was investing directly in newly issued Comodo shares or not. And the answer is I didn't know. What I knew to be the case was that I was getting shares in Renaissance that were intended to represent a one for one investment in Comodo shares. Whether or not those were newly issued shares from Comodo or whether they came from

[53] Transcript, day 9, pages 86 to 91.

existing shares that Renaissance already had in Comodo was unclear to me, nor did I care. I was indifferent.

Q. So what did Eric tell you about Comodo? Did he tell you who owned Comodo?

A. Eric and I talked about Comodo from time to time. I would say in the years after he lost his business, Emanuel & Co, I think he went through a very difficult period personally and emotionally. He was a man who had been a very successful businessman, prominent on Wall Street and I think it was a real come down for him. And what I found in talking to him as he started to immerse himself in Comodo is this was his come back. He thought this was going to be great, he was completely immersed in it. I believe that he believed it was going to be very successful and that was the basis on which I agreed to invest. So I am not sure I answered your question.

Q. Yes, I think so. How did you understand Renaissance fitted into that?

A. As I said, we didn't have any long-winded conversations about it. It was just, you know, my understanding was that he formed this corporation which was the vehicle through which he and certain others owned their shares, had their interest in Comodo. I didn't know a lot about the structure of Renaissance at that time nor did I ask a lot of questions.

Q. So when was Renaissance first mentioned to you, in what context?

A. I am speculating a little bit, but he must have told me that I was getting shares in Renaissance and what it was and so I wouldn't be surprised when I got a stock certificate.

Q. That was going to be my next question.

A. The context I think he knew that I was sophisticated enough to say hey, wait a minute, these are not Comodo shares. Again, I don't want to suggest that I remember any specific details of the conversation, but I do know that when I got Renaissance share certificate of which I think this is a reproduction, it was not a surprise to me that I was getting Renaissance shares. I took the certificate, I put it in my file drawer at home. What I can tell you from recollection is I wasn't surprised or offended by the fact that I got a certificate that said Renaissance, because that was what I was expecting to get.

Q. And what did you understand Eric's relationship to Renaissance to be?

A. My understanding was that it was his company that was formed for the purpose of holding the shares that represented his interest in Comodo.

Q. Did you understand him to hold shares in Renaissance?

A. I don't think I understood anything at the time. I must have been of the understanding that Renaissance owned shares in Comodo because I certainly thought that by getting Renaissance shares I was becoming an indirect owner of Comodo shares. So I had to have known or thought as much. I don't think I asked all that many questions at the time. This was not a normal investment for me. This was somebody who I was friendly with who I trusted who said to me this is going to be a big deal, you should make this investment; it's going to make you a lot of money. Clearly, it wasn't a large investment, $10,000 was not a lot of money to me even at

> that time. I wasn't naive, I considered it to be a highly speculative investment. I knew there was a technology startup on the back end of this. And I looked at it and I said Eric believes this is going to be a home run, there is a possibility I am going to make a lot of money here. There is also a distinct possibility that I just wrote a $10,000 cheque that I'm never going to see again. So there was no naivety whatsoever. I knew exactly what I was getting into. I did zero due diligence. I made the investment on Eric's recommendation and needed nothing more."

[189] I find that evidence wholly convincing. There was no evidence called on the part of Comodo to gainsay what Mr. Untracht was saying in relation to his own share purchase.

[190] Similar evidence is given by Alessandra Emanuel[54], Sam Votta[55] and Thomas Easley[56] I shall need to consider whether these other witnesses are accurate in their recollection and what conclusions I can draw as to the basis on which investors other than Mr. Untracht invested. This I shall do below.

[191] In relation to other investors, we have a letter dated 15th July 2004 sent by Mr. Emanuel to a Ms. Blank. He writes:

> "This letter is to confirm the purchase of 50,000 shares of Renaissance Ventures Ltd by Dragon Investment Club. This transaction was for the investment in Comodo Holdings Ltd, which will be transferred on a one for one share basis when Comodo takes any of its subsidiaries public."

[192] Comodo placed some weight on Mr. Emanuel's testimony in the Lacy litigation. He was cross-examined on what happened to the $800,000 invested by Mr. Lacy prior to his bankruptcy and said:

> "The sole purpose of Renaissance is for the purpose of creating a funding mechanism for Comodo, to be able to fund its — its growth, its daily operations, its business acquisitions. It's primarily the sole source of

[54] See her witness statement para 12.
[55] Witness statement paras 6 to 8.
[56] Witness statement paras 7 and 8.

> funding for Comodo… Every investor has an understanding they're converting the stock at a future date. The reason why no one has gotten any statements on Renaissance, Renaissance is a pastor [*sic*] company for the funding purpose of Comodo… The money is passed directly from Renaissance to Comodo, and its subsidiaries. And that' the reason why it has — and everybody is under the understanding that that's what occurs.
> Q. And when you say 'everybody', all of the investors?
> A. All of the investors."

[193] The reference to "pastor company" is probably a transcribing error. "Pass-through company" is probably meant, but there is no evidence that in this context (unlike, say, the tax position of Emanuel & Co) the expression has any technical meaning.

[194] Now, it is true that Mr. Emanuel does not say that he withdraws monies from Renaissance himself. However, there is in my judgment nothing in this testimony which shows that monies paid to Renaissance were impressed with some trust, either in favour of the investor or in favour of Comodo. The question did not arise in that case. The issue which had brought Mr. Emanuel to court was the fact that the monies paid in by Mr. Lacy had been paid out. (He had been issued with 400,000 Renaissance shares on 16th September 2002.[57]) Mr. Emanuel's evidence was to show that there was no money available for the trustee in bankruptcy to seize from Renaissance. This evidence does not in my judgment undermine the evidence of Mr. Untracht and the other witnesses.

XXII. Post 14th July 2003 events up to Mr. Emanuel's death

[195] Events after 14th July 2003, when share certificate 37 was issued to Mr. Emanuel, are not directly relevant to the pleaded issues. They do, however, throw some light on pre-July 2003 events and reinforce the views which I reach about Mr. Abdulhayoglu's knowledge of what was happening. Mr. Chivers QC also relies on them as part of his "wider case" put forward in closing. Thus I should deal with them in case this matter goes further.

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[57] [E2/1179]

[196] From 2004 onwards there is email correspondence between Mr. Emanuel on the one hand and Mr. Whittam and Ms. Daynes on the other about issuing share certificates. For example, on 5th March 2004, Mr. Emanuel emails to say: "I need you to transfer some of my Comodo shares to some of my investors that hold Renaissance shares… [Y]ou can run an IOU against my holdings" and he asks that 150,000 be issued to a Mr. Slewett.

[197] By early 2005, Mr. Abdulhayoglu had an email address on the Comodo server for "investorrelations". Emails to this address went to Mr. Abdulhayoglu. For example, on 8th February 2005, one Jonathan Christodoro emailed investorrelations expressing interest in the company. Mr. Abdulhayoglu forwarded the email to Mr. Emanuel. The same thing happens on 9th March 2005 to an email from a Jessica Baker. Mr. Abdulhayoglu seems to have been actively cultivating third party investors by passing their interest in shares on to Mr. Emanuel.

[198] Around the time of these emails, Comodo was once again facing cash-flow problems. On 20th February 2005, Mr. Emanuel transfers $210,000 from his Bernard Herold & Co Inc brokerage account to Renaissance. On 21st February 2005, there is an email string between Ms. Daynes, Mr. Abdulhayoglu and Mr. Emanuel regarding an urgent need for $310,000. The following day Mr. Emanuel sent $200,000 to Comodo. On 2nd March 2005, Mr. Emanuel transferred a further $189,000 from his personal brokerage account with Bernard Herold to Renaissance. The same day Mr. Whittam was asking for a further $250,000.

[199] At the same time, Mr. McManus was pressing for payments due to him under the 11th June 2004 share purchase agreement. On 10th March 2005 he threatens to call in the guarantees given by Mr. Abdulhayoglu and Mr. Emanuel unless they paid him $500,000 "by next Monday". On 28th March 2005, they manage to send him $200,000, which is then calculated to represent a sale of 6,896,552 shares at 2.95 cents per share.[58]

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[58] See [E6/3051]

[200] On 16th March 2005, Mr. Emanuel sends, what appears to be the only surviving email of a wider chain of emails, regarding issuing one Alexa R. Hudson with 33,333 shares in Comodo. This email is sent to Ms. Daynes and Mr. Whittam, but is copied to Mr. Abdulhayoglu. Now Mr. Abdulhayoglu's evidence is that he never reads emails into which he is cc'd. I am doubtful about that. However, even if it is true, shortly after this on 5th May 2005[59] he changes the system for issuing Comodo shares, so that emails go to Ms. Daynes and Mr. Whittam and are then forwarded by them to him for his final approval. The new system was in place by 21st June 2005.[60] Overall, the evidence is strong that Mr. Abdulhayoglu took a keen interest in the issuance of Comodo shares.

[201] On 24th and 25th April 2005 Mr. Emanuel emails Mr. Abdulhayoglu to say he is depressed because he only has $100,000 to send out and says: "I am borrowing whatever money I can raise to support Comodo." Mr. Abdulhayoglu replies: "You have done an amazing job and through miracles come miracles."

[202] On 10th June 2005, Mr. Emanuel forwards Mr. Abdulhayogluu the query of an investor who had invested in Renaissance.[61]

[203] On 30th June 2005, Mr. Emanuel sent Ms. Daynes an email, which she then forwarded to Mr. Abdulhayoglu for approval. It read:

> "Dear Bev, I have been asked to finally deliver this certificate, as it is made up of a number of smaller investors that have been bugging my friend to get some proof of their investment. Sam Votta and his brother Walter have been very helpful in raising some funds for Comodo. Sam is still okay with his group, but Walter needs his share certificate… Please issue a certificate made out to Walter Votta's Investment Group for 407,900 shares."

[59] [E5/2508-9]
[60] [E5/2636-7]
[61] [E5/2627]

[204] On 29th August 2005, Mr. Whittam emails Mr. Emanuel to ask: "How many more shareholders we have who will require conversion from Renaissance stock to Comodo stock?"[62]

[205] On 19th January 2006, Mr. Emanuel emails Ms. Daynes to congratulate her on her pregnancy and to ask for various share certificates to be issued. This is forwarded to Mr. Abdulhayoglu, who replies: "Pls issue, so in theory that should at least equate to $650K work of investment that he previously made." (That comment implies a share price of $1 a share.) Mr. Whittam replies to both saying: "Bev, on any issues we need to the investment [*sic*] in order to calculate the share premium account entry. It would be good to go over some earlier ones as well and get the figures."

[206] On 1st March 2006, Matthew Hochhauser emails Mr. Emanuel to ask: "[W]ould you please convert mine and Jamie Propp's $14,062.5 ($1.50 per share price as per your instructions) into 21,091.75 shares of Comodo stock. Please feel free to round my number of shares down to an even 21,000 if that will allow you to round Jamie Propp's up to 21,200" The email is forwarded by Mr. Emanuel to Mr. Abdulhayoglu. In turn on 15th March 2006 Mr. Abdulhayoglu forwards the emails of 1st March 2006 to Ms. Daynes to deal with.[63] The next day, Mr. Emanuel asks Ms. Daynes to issue 10,000 shares to each of Mr. Hochhauser and Mr. Propp at $1.25 per share.

[207] These share prices should be contrasted with what Mr. Abdulhayoglu and Mr. Emanuel were paying Mr. McManus for his shares. The strike price agreed started at 2.80 cents in January 2005 and then rose by 0.05 cents each month, until the price in May 2006 would be 3.60 cents per share. The minutes of a board meeting of Comodo on 28th June 2006 recorded that Owl's Nest had 80,769,230 shares in Comodo at the beginning of 2005 (having sold 19,230,770 shares in 2004); that in May 2005 Owl's Nest had transferred 17,009,546 shares to to Tech

[62] [E5/2757]
[63] [E5/2966-7]

IP for $500,000; that in June 2006, 6,042,707 shares were transferred to Tech IP for $200,000; and that this left Owl's Nest owning 57,716,977 shares in Comodo.

[208] On 28th September 2006, Richard Berger, one of the very earlier investors, sends a very long email complaining about the delay in obtaining an IPO and asking for conversion. Mr. Emanuel forwards the email to Mr. Abdulhayoglu saying: "He wants me to convert his shares and the other 'Friends and Family', that have Renaissance shares to Comodo. I knew this would start, as we get nearer to an IPO, but I will only do those that ask. See you tomorrow!"

XXIII. Events after Mr. Emanuel's death

[209] Mr. Emanuel died on 3rd October 2006. On 7th October 2006, Mr. Easley asked about converting his 25,000 shares into Comodo stock. Mr. Abdulhayoglu replied: "I will make sure all Comodo investors are protected no matter where they have invested. I am already in touch with other investors of Renaissance and I will work with them all to make sure there is a smooth transition."

[210] On 8th December 2006, Mr. Whittam emails Mr. Abdulhayoglu and says: "Reality is that very little bar the early investors is able to be tied into cash. We had lumps of money from Eric, instructions to issue shares and then a conversion of his loan? In effect the money was used twice? If we go back to the individuals then we open a can of worms. My suggestion would be to deduct the number of shares issued without evidence of cash from Eric's loan conversion number – I think we would have ended up doing that anyway."[64]

[211] Subsequently negotiations began between Mr. Katz and Comodo as to how best to affect the conversion of Renaissance shares into Comodo shares. On 4th February 2008 Meltzer Lippe write to Mr. Whittam with a list of outstanding Renaissance shareholders. They include a letter of tax advice pointing to tax liabilities if shares in Comodo were simply distributed to Renaissance

[64] [E6/3291]

shareholders. They say it would be preferable to enter, what is described as, a "B" reorganization whereby "Comodo would acquire from the shareholders of Renaissance, in exchange solely for Comodo voting stock, sufficient stock of Renaissance so that immediately after the acquisition Comodo would own at least 80 per cent of all Renaissance stock… [S]uch reorganizations are tax free to the participating corporations and shareholders."[65]

[212] Matters thereafter dragged. On 8th January 2010, Mr. Whittam wrote to Renaissance confirming that Comodo "fully supports the efforts undertaken by Renaissance to explore and structure an arrangement that will result in Renaissance shareholders becoming direct shareholders of Comodo. We look forward to completing an arrangement as soon as possible that meets the needs of all concerned."

[213] On 22nd July 2010 Mr. Abdulhayoglu's daughter was born. Shortly after this, Mr. Abdulhayoglu says he learnt from Mrs. Emanuel that the initial money provided by Renaissance came from Dr. Nisi. In consequence, Mr. Abdulhayoglu says he started a forensic enquiry.

[214] Notwithstanding that, on 12th November 2010, Mr. Whittam confirmed to Mr. Katz that Renaissance held 106,327,474 shares in Comodo.[66] This was followed on 15th November 2010 by a long email from Mr. Whittam disputing the shares in the estate's name.[67]

[215] By February 2011, Mr. Abdulhayoglu's position had hardened: see the email to Mr. Chalk of 12th February 2011 quoted below. On 11th March 2011, Mr. Abdulhayoglu sent three emails to Mr. Easley. One said: "I do NOT know what happened to monies you and others have paid to Eric/Renaissance. I know I gave Eric Comodo shares in return for delivering his part, which was not fulfilled." In a later email that day, Mr. Abdulhayoglu said: "When I used to meet you in Eric's

65 [E7/3849]
66 [E8/4431]
67 [E8/4432]

parties, I thought I was meeting a friend. I didn't know Eric had raised money from you. Both me and Lesley [Abdulhayoglu, his wife] were very surprised to find out that was the case."

[216] Between those two emails, he sent one which said:

> "Let's get some facts straight: I did NOT ask for your money, Eric did. And Eric gave you shares/stock in his Company called Renaissance. This company has nothing to do with me. I didn't even know you were a shareholder of this company until after you had invested. I did NOT know Eric was raising money from his friends by selling Renaissance stock. Do you realize Thomas this (Renaissance) is a company that Eric setup and had NOTHING to do with Comodo? It was Eric's own company he used for his own purpose. Again, it had NOTHING to do with Comodo. It was his decision to sell Renaissance shares to people (as it turned out you are part of these people) and he partly fulfilled his obligation to Comodo by selling Renaissance shares as it appears."

[217] There is a list of Comodo shareholders dated 12th September 2011 which shows Renaissance's 100,000,000 shares and the shares on certificate 37. A fresh list on 18th May 2012 does not show that Renaissance and Mr. Emanuel and his estate are shareholders. This is followed by an internal exchange of emails between Mr. Whittam and Mr. Abdulhayoglu in which Mr. Whittam says those shares were removed because they had not been paid for.

XXIV. Mr. Abdulhayoglu's knowledge of investors in Renaissance

[218] I turn then to Mr. Abdulhayoglu's knowledge of what Mr. Emanuel was doing. It will be recalled that the original Points of Claim alleged that "[Mr.] Emanuel became a member of the board on or about 28 October 2000 and represented from time to time to the other members of the Company's board and officers that he was allowing certain of close friends and family to invest with him in the Company." The allegation of knowledge was that "[f]rom about late 2008 (approximately 2 years following [Mr.] Emanuel's October 2006 death, the Company began to receive claims from various individuals asserting a

shareholding interest in the Company, directly or via Renaissance. These parties were not close friends or relatives of [Mr.] Emanuel as he had represented to the Company's management."

[219] Mr. Abdulhayoglu's evidence is that he started to discover the truth about Mr. Emanuel's having sold Renaissance shares on a large scale to investors only after his death. He recounts seeing Mrs. Emanuel in hospital shortly after the 2006 car crash. He says that she thought she was dying and begged him to ensure that Renaissance shareholders got taken care of.

[220] Mr. Abdulhayoglu's ignorance of substantial share sales going on is belied by the documents. On 20th August 2002, Mr. Emanuel emailed Mr. Abdulhayoglu and Mr. McManus with a draft agreement.[68] This provided (without reproducing the block capitalization, with the spelling corrected and with no underlining):

> "This letter will constitute an agreement between the three major shareholders of Comodo…, which are Owl's Nest Limited, Opal Cavern Limited and Renaissance Ventures Limited (RVL).
>
> Whereby it is agreed that funding is essential for Comodo to receive financing to support is daily operations RVL has been supplying these funds on a continuous basis. It has done so by selling some [of] its own shares… 11,665,000 to date. It has sold RVL shares to Friends and Family, who prefer to deal with Eric Emanuel personally. Since the three majority shareholders have each begun with the same amount of shares, it's agreed that RVL will be issued these additional shares or Comodo will issue new shares in the above amounts to the Friends and Family members that purchased RVL shares.
>
> This way each major shareholder will maintain and equal dilution and resume the same amount of equity they started with, before outside third parties invested in Comodo.
>
> This procedure may continue until such time as all partners agree that funding of this type is no longer required or necessary."

[68] [E2/1170]

[221] The capitalization of “Friends and Family” is in the original. I have commented above on the significance of the term. A sale of over 11 million shares is a significant number. Mr. Abdulhayoglu made no complaint about these share sales, even though (on his case) this would have been the first time he had heard of them.

[222] The evidence of Mr. Golden, who it will be recalled was called to give evidence on behalf of Comodo, was that in March 2003 Mr. Emanuel approached him for a further investment of $150,000. Mr. Golden had by this time re-married. He consulted his wife, who suggested limiting the additional investment to $75,000. He made that proposal to Mr. Emanuel in a second conversation. There was then a third telephone conversation. Mr. Emanuel brought Mr. Abdulhayoglu into this conversation. Mr. Golden said:[69]

> “Eric called and said Melih is here, Melih made his case, [I] brought my wife in the room, she listened to what he had to say, put them on hold, we discussed it, and then we agreed to pay them $150,000.”

[223] Mr. Abdulhayoglu was asked about this conversation[70]

> “Can I just ask you to confirm that in 2003 you, together with Mr. Emanuel, spoke on the telephone to Mr. Golden and you both asked him if he would invest additional funds in Comodo. Do you accept that?
> A. I don’t recall that taking place.”

[224] On Mr. Abdulhayoglu’s case, he was in ignorance of what Mr. Emanuel was doing to raise finance. His claimed failure to recall this call is in my judgment only explicable if his making these types of call was a regular event. If he was truly in ignorance of Mr. Emanuel’s approach to obtaining finance, then this would have been a very memorable event: the only time he actually saw the dirty end of the fund-raising.

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[69] Transcript, day 7, page 77.
[70] Transcript, day 6, page 23.

[225] Moreover, his ignorance is difficult to reconcile with the evidence that he regularly met Comodo investors socially. Mr. Emanuel often invited investors to his apartment in New York or the house in Stony Point. I was shown photographs of some of these events. Mr. Easley and Mr. Sam Votta both gave detailed evidence about such meetings. Mr. Easley said[71] that he had many:

> "relaxing times with Melih and Eric, and we discussed my investment on those occasions. This is why is so shocking to me that Melih now says he did not know that Eric had raised funds from investors such as myself. Eric did not keep our investments secret from Melih; he introduced may of us to Melih. Given that Eric often updated me with Melih's views or snippets of news from Melih, it was natural that we discussed Comodo business when we were all together. Of course this included me speaking from my viewpoint as a Renaissance investor with an interest in Comodo."

[226] Mr. Votta was to similar effect. Alessandra Emanuel confirmed (witness statement para 11) that "Melih came to the apartment for investor meetings." Mr. Easley said that Mr. Emanuel regularly hosted social functions for "the Comodo family", by which Mr. Easley meant the investors brought in by Mr. Emanuel.

[227] Indeed, Mr. Abdulhayoglu himself in one of his emails of 11th March 2011 said to Mr. Easley: "I used to meet you in Eric's parties." It is inherently implausible that investors in Renaissance would not have discussed how Comodo was going when they met at social events.

XXV. Assessment of the defendants' witnesses

[228] I turn then to my assessment of the witnesses. I have already considered Mr. Untracht.

[229] So far as the remaining lay witnesses called by the defendants are concerned, Alessandra Emanuel was able to give little evidence of assistance to the issues, apart from the small snippets which I have identified. There is a minor issue as to

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[71] Witness statement para 10.

how far she assisted in the business. (Her case is she did very little in the business. Mr. Abdulhayoglu agrees.[72]) There are occasional emails where Mr. Emanuel uses her absence as an excuse for administrative failings.[73] . Whether she did do some administration, or whether Mr. Emanuel was using her as a white lie to cover up for his own administrative mistakes, is not something I need to determine. Her evidence was of peripheral importance, save for this. At para 11 of her witness statement, she said:

> "Eric and Melih were very close. They spent a lot of time together (not least because Melih came to the apartment for the investor meetings)… Eric's friends, many of whom were investors, became friendly with Melih and his wife."

She was not challenged in cross-examination on this.

[230] Mr. Easley is an artist. He is no businessman and has no head for details. He became emotionally attached to both Mr. Emanuel and Mr. Abdulhayoglu. After Mr. Abdulhayoglu's repudiation of any liability to Renaissance or Renaissance investors in 2011, he felt very personally let down by Mr. Abdulhayoglu. He had also invested what, to him, was quite a lot of money into Renaissance. Thus, he had a financial interest in the case. Nonetheless, I found him an honest witness, who was doing his best to assist the Court.

[231] Mr. Sam Votta had a distinguished career in the New York Police, before retiring and running a security firm. He and his brother established an investors' club, where investors who could only put smaller amounts of money in clubbed together. The money was then invested in the name of the club, rather than each individual investor. Mr. Emanuel rewarded Mr. Votta for his success in this regard on a generous scale. If he sold shares at $2 each, Mr. Emanuel gave Mr. Votta the same number of shares; if he sold shares at $1.50, Mr. Emanuel gave him shares on a slightly less generous basis. Mr. Votta in cross-examination denied

[72] See his second witness statement para 173.
[73] See for example his email of 13th March 2005 [E4/2324].

that Mr. Emanuel had paid him a commission. Rather, he said, these share allocations to him were "gifts". Mr. Votta said he would be embarrassed to receive commission on sales to friends. That was not to my mind a very convincing explanation. (There may have been regulatory issues preventing him receiving commission, but as I have explained this is simply a blank in the evidence.) Apart from that, however, Mr. Votta seemed to be a helpful and truthful witness.

[232] Mr. Katz gave evidence. Much of his two witness statements I struck out either because some parts did not comply with the rules of evidence (and were therefore inadmissible) or because he merely recites the effect of documents. (The latter elements I struck out on evidence-management grounds.) I attach no blame to Mr. Katz for the strike out: whoever had drafted his witness statements was clearly unaware of the requirements of a witness statement to be given at trial.

[233] Mr. Katz has been a lawyer for over 40 years. He retired from his firm, Meltzer Lippe, in 2006, but still keeps up a connection with the firm. He himself was a specialist in estates and trusts. He had a wealthy clientele. He had been Mr. Emanuel's attorney for estate planning purposes since at least 1990. He was appointed as Mr. Emanuel's executor in his will. In order to be able to litigate this case, both he and Meltzer Lippe have taken shares in Renaissance in lieu of fees. Therefore, both he and Meltzer Lippe have a significant financial stake in the case. Mr. Katz also seems to have taken the dispute with Mr. Abdulhayoglu quite personally.

[234] Despite these matters, in my judgment Mr. Katz was an honest witness. Indeed much of his admissible evidence was amply justified by documents. The defects in the defendants' disclosure of documents I consider below.

XXVI. Assessment of the claimant's witnesses

[235] Comodo called as live lay witnesses, Mr. Abdulhayoglu, Mr. Whittam, Mr. Jeffery Saponaro and Mr. Golden. Mr. Golden I have already considered. I have cited a

passage from Mr. Saponaro's evidence as to the relationship between Mr. Abdulhayoglu and Mr. Emanuel. Apart from that, Mr. Saponaro's evidence was of little relevance, because he invested directly into Comodo. He never held Renaissance shares.

[236] The key Comodo witness was Mr. Abdulhayoglu. I was able to observe him in the witness box for over four days and had an extremely good opportunity to assess his demeanour. Mr. Abdulhayoglu was clearly a very intelligent man. Although English was not his first language, his oral English was of near-native speaker quality. (The transcript sometimes shows minor grammatical infelicities, but I did not note these at the time. They may just be minor transcription issues. The transcript of Mr. Untracht's evidence, for example, also shows such minor imperfections.) Such of Mr. Abdulhayoglu's written English as I saw was of slightly lower standard, but it was still good English. Accordingly, I do not consider that there is any need to make any allowances for the fact that Mr. Abdulhayoglu was giving evidence in his second language.

[237] Mr. Abdulhayoglu's language abilities can be seen from the research he did as part of his case preparation:[74]

> "After this case happened, I've learnt about what trust issues were… Googled it, and I've learnt about equitable trust, different trusts. I've read a lot about it. I've read about the 1984 BVI law. I've learnt about the 2004 law."

This would have been sufficiently daunting for a native speaker.

[238] I am satisfied that Mr. Abdulhayoglu's command of English was such that he would have appreciated the significance of Mr. Emanuel putting inverted commas around "family and friends" and capitalizing that expression in legal documents. I find that he would have known that the expression was being used in some special or technical sense, not in its ordinary meaning.

[74]Transcript, day 2, page 23.

[239] I have to bear in mind that Mr. Abdulhayoglu has a financial interest in the case. Unlike other witnesses who have comparatively modest sums at stake, for Mr. Abdulhayoglu the amount in issue is enormous. If he loses the case, his interest in Comodo will be very substantially diluted. He has potentially hundreds of millions of dollars riding on the outcome of the case. (Mr. Abdulhayoglu was extremely cagey about the precise value of the company and refused to say what the sale price was for Comodo's UK subsidiary.)

[240] I regret to say that Mr. Abdulhayoglu was an exceptionally poor witness. It is right to say that there seemed to be bad personal chemistry between him and Mr. Chaisty QC, who was cross-examining him. That, however, is no excuse. Mr. Abdulhayoglu is the chief executive of a business which, until recent changes, had some 1,000 employees. A man in that position must be used to difficult conversations.

[241] Mr. Chaisty QC had, at least initially, a tendency to preface questions with an explanation of why he was asking a question. (I should record that Mr. Chivers QC at no point objected to such questions on the grounds that the form of the question was objectionable.) Mr. Abdulhayoglu repeatedly used this as a ground for complaining that he was being asked two questions: the question itself and the reason for asking the question. On various occasions I had to intervene to put the question to Mr. Abdulhayoglu so that he was forced to answer it. Although occasionally there was substance to Mr. Abdulhayoglu's complaint that the form of the question was confusing, for the most part, this was in my judgment merely a device for avoiding giving an answer to the question.

[242] On numerous occasions, when facing difficult questions, Mr. Abdulhayoglu retreated to saying that he could not recall. Obviously in a case going back twenty years, there will be matters which a witness genuinely cannot recall. However, the frequency with which Mr. Abdulhayoglu claimed an absence of recall again shows that he was using it as a device to avoid answering the question.

[243] In para 177 of his second witness statement Mr. Abdulhayoglu denied that he and Mr. Emanuel were "very close" or "spent a lot of time together" or that he attended "investor meetings", as alleged by Alessandra Emanuel. He also denied having socialized with Mr. Easley prior to Mr. Emanuel's death.

[244] Mr. Abdulhayoglu's evidence that he was not a close friend of Mr. Emanuel was contradicted by every witness who gave evidence on the topic. Typical is Jeffery Saponaro, who was called by Comodo. He was cross-examined on the three occasions he had seen Mr. Abdulhayoglu and Mr. Emanuel together:[75]

> "Q. And do you see Mr. Abdulhayoglu and Mr. Emanuel together on those three occasions?
> A. Yes.
> Q. And how would you describe, what was your impression of their relationship when you saw them on those occasions?
> A. Very friendly.
> Q. Very friendly?
> A. Yes, very close."

[245] Cross-examination of Mr. Abdulhayoglu as to whether he and Mr. Emanuel were friends took an astonishing five pages of transcript.[76] Mr. Abdulhayoglu dissembled at length about the meaning of "close" and "friend". This was in an attempt to show that he "looked up" to Mr. Emanuel but that they were not friends. The assertion that he only began to socialize with Mr. Easley after Mr. Emanuel's death was disproved by photographs showing Mr. Easley, Mr. Emanuel and Mr. Abdulhayoglu all socializing at Stony Point with their respective families.

[246] In my judgment, Mr. Abdulhayoglu was deliberately misrepresenting his relationship with Mr. Emanuel. It is a reasonable inference (and one which I draw) that he did this, because, if he admitted being a close friend to Mr. Emanuel, it undermined his case that that he knew nothing about the investments being made into Renaissance. The denial of having socialized with Mr. Easley is similarly

[75] Transcript, day 7, page 57.
[76] See transcript, day 2, pages 26 to 31.

explained. The fact that Mr. Abdulhayoglu was prepared to lie about something comparatively minor like his friendship with Mr. Emanuel, and when he started socializing with investors, means in my judgment that all of his evidence needs to be treated with great caution.

[247] It will be recalled that at para 27 of his first witness statement Mr. Abdulhayoglu said: "Mr. Emanuel told us that he owned an investment firm, which I recall was named Emanuel Financial Group, Inc. He indicated that this company generated large profits and employed a large staff." This is not a pleaded allegation. Yet, if Mr. Emanuel had made that representation, it would have been clearly fraudulent: his business had folded in 1994. The only sensible reason I can find for this allegation not having been pleaded is that Mr. Abdulhayoglu invented this alleged misrepresentation, long after pleadings had closed.

[248] Mr. Abdulhayoglu's case on his knowledge of investors has changed over time. In an email of 12th February 2011 to Adam Chalk, who ran one of the Renaissance investors' clubs, he said:[77]

> "1) I gave approximately 30% of the company to Eric (someone who I thought was financially well off and could provide everything he promised thru his own means).
> 2) I didn't know Renaissance was raising funds from individual investors in order to fulfill some of Eric's promise to Comodo.
> 3) I didn't realize until well after I moved to the US (end of 2004 is when I moved) the no of people Renaissance had as its shareholders.
> 4) I didn't know the funds invested in Comodo by Eric was investment obtained form individual shareholders via Renaissance."

[249] This is inconsistent with his telephone conversation with Mr. Golden in March 2003, which I find did take place. It is also inconsistent with his evidence that it was his conversation with Mrs. Emanuel shortly after the fatal accident which made him realise for the first time there were Renaissance investors who were expecting Comodo shares.

[77] See [E8/4528].

[250] There is a further inconsistency with the date of knowledge in the original Points of Claim (two years after Mr. Emanuel's death).

[251] In one of his emails to Mr. Easley on 11th March 2011, he said: "I did NOT know Eric was raising money from his friends by selling Renaissance stock." That is a lie. The emails of 19th January 2006 and 1st March 2006 show he was fully aware of investors putting money into Renaissance in the expectation of conversion into Comodo shares. The draft agreement of 20th August 2002 is damning evidence of Mr. Abdulhayoglu's knowledge.

[252] Further, Mr. Abdulhayoglu has in my judgment deliberately and dishonestly sought to mislead the Court. On 31st October 2017, Comodo sold a majority interest in Comodo CA Ltd ("Comodo UK") to Francisco Partners. The defendants obtained a freezing order against the proceeds of sale. Comodo applied to set aside the freezing order. Mr. Abdulhayoglu swore an affidavit (his seventh) on 11th December 2017. He explained the background to the sale. He said that Comodo had a "significant on-going business" and said:

> "26. Renaissance and Emanuel claim, completely falsely and without any reasonable basis or foundation other than [Mr.] Katz's naked conjecture about a 'massive dissipation of its asset base'... That the Comodo UK sale leaves Comodo effectively devoid of a business. To the contrary, Comodo remains a vibrant business with products and services in the market place and with more being developed. In fact, Comodo is finalizing arrangement to build an over 40,000 square foot security operation centre… in the United States…
>
> 30. Comodo, through its affiliated companies, has offices and personnel located in the United States, China, India, Romania and Turkey, and world-wide over 1,000 current employees. Its leased spaces cover approximately 200,000 square feet with three locations… I remain fully engaged with the business as does the rest of the non-Comodo UK management from out headquarters in the United States. I have no plans on leaving the Company.
>
> 34. The defendants' application, if granted, would cause devastating harm to Comodo."

[253] In fact, on 19th January 2018, Comodo transferred all the shares in its active subsidiaries, Comodo Group Inc and Comodo Security Solutions Inc, for a nominal figure to Mavecap LP, a New Jersey limited partnership owned by Mr. Abdulhayoglu. He says that the two subsidiaries were loss-making and had no value. (There is no independent evidence of this.)

[254] This disposal was just days before the hearing of the Applicants' application for the injunction. That hearing was listed for 23rd January 2018. On 19th January 2018, the day of the sale of the subsidiaries, Comodo served its skeleton argument in opposition to the injunction. The skeleton argued:

> "35. The defendants' evidence misleadingly seeks to give the impression that the partial sale by the claimant of… Comodo UK leave the claimant with little or no ongoing business or assets of substance; the claimant is a cash 'shell'; and the proceedings of the partial sale of Comodo UK (representing the substance of the Claimant's assets) could be paid away by the claimant otherwise than in the ordinary course of the business of the claimant, to the detriment of the defendants…
>
> 36. However, the reality is the opposite. As set out in the 7th affidavit of Mr. Abdulhayoglu… the Claimant remains a longstanding, very substantial, ongoing business. It employs (and continues to employ following the partial sale of Comodo UK) more than 1,000 and operates from numerous different locations."

[255] Prior to the injunction hearing on 23rd January 2018, Comodo had offered to consent to a continuation of the freezing order on the basis that the trial was due to start in March 2018. However, when the trial was adjourned, they renewed their application for discharge. In support of this application, they served a skeleton argument dated 11th June 2018. Paras 50 and 51 of that skeleton substantially repeated paras 35 and 36 of the earlier skeleton.

[256] Comodo in my judgment were attempting to deceive the Court. Apparently a Court in America required Mr. Abdulhayoglu to swear an affidavit in these proceedings correcting the misleading of this Court. (I have not seen the Order, but Mr. Abdulhayoglu agreed that it had been made.) In his fifteenth affidavit he

says blandly that "events occurred after the making of [his seventh] affidavit that superseded some of the facts stated therein. This change in circumstances was not brought to the Court's attention, as should have been…" He offered his "sincere and unreserved apologies for this omission, which was inadvertent."

[257] No explanation for the inadvertence was given. Nor was the person identified who had been inadvertent.

[258] In cross-examination Mr. Abdulhayoglu suggested[78] that it might have been Mr. Whittam or Ms. Forsyth who might have given the instructions to Comodo's lawyers and who are responsible for the failure of Comodo to correct what had become the misleading evidence in Mr. Abdulhayoglu's seventh affidavit. There is no evidence of this. It is in my judgment inherently improbable that in such an important matter as the discharge of a freezing order over the whole proceeds of sale of Comodo's major subsidiary Mr. Abdulhayoglu was not involved in giving instructions to his lawyers. He of course knew that he had made the seventh affidavit. By 19th January 2018 he knew full well that it had become grossly misleading, but he made no attempt to correct it.

[259] I find that Mr. Abdulhayoglu was not a witness of truth. I find that there is incontrovertible evidence that from as early as 2002 he knew about the sale of Renaissance shares to third party investors. (I shall consider shortly whether he knew from earlier than 2002.) That alone would have caused me to doubt his truthfulness. The other matters outlined above just on their own would have reinforced my view. The combined effect of all these matters is in my judgment to destroy the credibility of Mr. Abdulhayoglu as a witness completely. I do not accept any evidence given by him which is in dispute unless it is adequately corroborated.

[260] I did not find Mr. Whittam a satisfactory witness either. He is obviously dependent on Mr. Abdulhayoglu for his employment. He was evasive when giving evidence.

[78] See transcript, day 2, page 93.

I have set out one passage of his cross-examination. Another illustrative passage at transcript, day 7, pages 14 to 17, is too long to set out, but it shows Mr. Whittam refusing to make proper concessions and ducking the issues.

[261] The only matter which he does properly concede[79] is that "share lists were kept and we kept obviously nominal records of receipts from Renaissance." Apart from that, I attach little weight to what Mr. Whittam says unless it is corroborated by contemporaneous documentation.

XXVII. Mr. Abdulhayoglu's knowledge: Lucas direction

[262] The fact that I do not believe Mr. Abdulhayoglu on what knowledge he had of Mr. Emanuel's sale of Renaissance shares, does not automatically mean that he did have knowledge. From 2002 there is documentary evidence which I have outlined which shows that he had knowledge. The references in the 1998 documentation to investments by "associates" gives only a small basis for inferring knowledge in 1999. However, in 2002, when Mr. Abdulhayoglu did have knowledge, he raised no objection whatsoever to Mr. Emanuel having sold shares to third parties. I infer from this relaxed response on Mr. Abdulhayoglu's part that he knew well before 2002 and on balance of probabilities from the very outset of Renaissance's funding of Comodo that Renaissance was selling shares in itself to third party investors. Moreover, on balance of probability he would have been able to know the prices obtained: he had merely to ask Mr. Emanuel. If he did not ask, that would be because he did not care what price Mr. Emanuel was able to obtain, so long as Mr. Emanuel was able to keep the funding coming in.

[263] Even if I am wrong in drawing these inferences, I am entitled to give myself a **Lucas** direction.[80] These are of course usually given in criminal trials in the instructions to jurors, but (subject to the different burden of proof) apply equally to civil trials. I therefore direct myself as follows. Before I can use a lie to prove the

[79] See transcript day 7, page 16.
[80] See R v Lucas [1981] QB 720.

contrary, I must be satisfied on balance of probability of the following. Firstly, the lie must be proved or admitted. Secondly, the lie must be deliberate and must not have arisen through confusion or mistake. Thirdly, it must not be told for a reason unconnected with the witness's liability (for example, through fear the truth would not be believed, to protect another, or for some reason advanced on behalf of the witness). If I am satisfied all three elements are made out, then I may use the lie as some support for the other side's case. A warning often given to juries is that witnesses sometimes seek to bolster a truthful case by telling stupid lies. I give myself the same warning.

[264] As to the first element, I am satisfied that Mr. Abdulhayoglu was lying. As to the second element, it was a deliberate lie. As to the third element, there is no unconnected reason for Mr. Abdulhayoglu to lie. This was not a case of a witness seeking to bolster his case by telling a stupid lie. Mr. Abdulhayoglu was embarked on a deliberate attempt to deny Renaissance and Mr. Emanuel's estate their entitlement to Comodo shares. In my judgment, if it were necessary, I would draw a **Lucas** inference that Mr. Abdulhayoglu knew that Mr. Emanuel was bringing money into Renaissance from the outset from third party investors.

XXVIII. The quasi-expert accounting evidence

[265] By an Order of 11th July 2017, both parties were given permission:

> "3. …to file evidence from an accounting professional dealing with the issue of: *whether the share certificates No 6 and 35-37 is Comodo referred to in paragraph 3 of the Defence were paid for by the Respondents* (the 'Accounting Professional Evidence')
> 4. The Accounting Professional Evidence shall not be treated as expert evidence within the meaning of CPR Part 32."

[266] Comodo instructed Michael Saponara as its quasi-expert; the defendants instructed Frank Rudewicz. Both were extremely well-qualified expert forensic accountants. The US attorneys acting for Comodo instructed Mr. Saponara to investigate matters well beyond the limited issue permitted by the Order of 11th

July 2017. I have ignored his evidence insofar as he goes beyond the terms of the Order.

[267] So far as certificate 6 is concerned, there is no dispute about the facts, which I have set out above. The quasi-expert evidence proved otiose. As regards certificates 35 to 37, the issue as to payment of the shares is the nature of the agreement of 28th August 2002. Under this agreement, various outstanding claims in respect of monies advanced by Renaissance to Comodo (and possibly commission due to Mr. Emanuel) were compromised. Accountancy evidence was not relevant to that.

[268] The evidence was directed at the source of funds, but if the agreement of 28th August 2002 was in effect an account stated, it is only if the agreement on the sums due can be overturned that the matter can be reopened.

[269] My conclusion that investors in Renaissance knew that they were investing in Renaissance rather than Comodo renders the evidence about the source of the funding irrelevant.

XXIX. Drawing adverse inferences

[270] Both sides invited me to draw adverse inferences, firstly from alleged deficiencies in disclosure and secondly from failures to call certain witnesses. I have been able to reach my conclusions on the evidence without having to rely on any adverse inferences. However, since the matter may go further I shall consider these points. As will be seen, if it were necessary to draw adverse inferences, they would be inferences against Comodo. Thus, any adverse inferences drawn would merely reinforce the conclusions which I have already reached. The well-known case of **Wisniewski v Central Manchester Health Authority**[81] was cited to me and I have its principles well in mind. It is not necessary to extend this already lengthy judgment to quote passages from it.

[81] [1998] PIQR 324.

XXX. Deficiencies in disclosure

[271] Both Mr. Chivers QC and Mr. Chaisty QC criticized the disclosure given by the other side. It is true that there were defects in the defendants' disclosure. For example, with hindsight it is obvious that Mr. Katz should have been pursuing Mr. Untracht for the documentation which he had in possession going back to the early 1990's. The defendants also seem to have opposed, for no very good reason, an application made in the United States by Comodo under 23 USC § 1782 for the production of documents by Mr. Untracht.

[272] However, most of the alleged defects in the defendants' disclosure arise from the following facts. Firstly, Mr. Emanuel was dead. Secondly, he does not seem to have had good computer skills. Some key documents are in his own handwriting, which does not suggest that he had advanced administrative and document-retention skills. Thirdly, Mrs. Emanuel after her husband's death seems to have had a poor relationship with Mr. Katz and was not going out of her way to assist him in finding documents and assets. Fourthly, the first indication that litigation was on the cards was on 23rd January 2013, over six years after Mr. Emanuel's death. This was the point at which Mr. Katz came under a legal obligation to preserve documentation, but more importantly it was the point at which Mr. Katz would have realized the defendants had a forensic need to investigate what documents were available as regards the issues as they had developed. (Thitherto, the only relevant documentation was that showing who were Renaissance shareholders.)

[273] I draw no adverse inferences from the alleged defects in disclosure by the defendants.

[274] The position is different in relation to Comodo. All four disclosure statements are signed by Mr. Abdulhayoglu, but he seems to have had little personal involvement in the disclosure exercise. It is unclear what involvement BVI counsel had in the

conduct of the searches. Comodo's current legal representatives, Maples, did not do any review of the disclosure, because that had been a matter for Comodo's previous lawyers.

[275] Mr. Chaisty QC makes seven criticisms of the disclosure given by Comodo. Firstly, he relies on the initial non-disclosure of pre-2012 lists of shareholders. Eventually redacted lists were provided. It was only after a visit to the Court of Appeal that unredacted lists were provided. In my judgment, whilst this history is regrettable, the unredacted lists were eventually provided, so it would be wrong to draw any inference against Comodo for this failure.

[276] Secondly and thirdly, he relies on the failure to produce any bank statements or the nominal ledgers of Comodo and its subsidiaries. This is well founded. Mr. Whittam said in cross-examination that in 2012 and 2013 he had access to the ledgers, but could not now. This evidence was unconvincing and I do not accept it.

[277] Fourthly and seventhly, Comodo did not produce any emails predating 2010. Mr. Abdulhayoglu's explanation is that in 2010 Comodo moved from a system in which emails were stored on individual computers to a system in which they were stored centrally. In the light of my conclusion on Mr. Abdulhayoglu's credibility, I do not accept this. Moreover, on the morning of 8th July 2019(day 10 of the trial), Maples produced an email passing between Mr. Emanuel and Ms. Daynes about Mr. Emanuel purchasing 20 million shares from Mr. McManus. It was an obviously relevant document. The late production of this email shows that there were at least some emails which Comodo could have disclosed, but did not.

[278] Fifthly, Mr. Whittam said that he visited England in order to search for documents stored there. His evidence on this was woeful. He said that he had found boxes of documents in England, but he could not remember how many. Between two and one hundred was the best he could do. I have the gravest doubts as to whether any proper search was carried out in England. In the light of my view of

the credibility of Mr. Whittam I conclude that no proper search was carried out there.

[279] Sixthly, Comodo did not disclose the agreement of 28th August 2002. This may be so, but it was not explained to me how the document then came to be in evidence. In the light of my uncertainty as to the document's provenance, I can draw no adverse inference against Comodo.

XXXI. Failure to call witnesses

[280] Both sides criticized the other side for failing to call witnesses who, they said, should have been called.

[281] In opening, Mr. Chivers QC said that Mr. Emanuel's children, Matthew and Jennifer, should have been called. They were, however, not involved in their father's business during his lifetime. In these circumstances, I decline to draw any adverse inference in respect of these witnesses.

[282] Mr. Chaisty QC submitted that the following should have been called as witnesses by Comodo: Ms. Daynes, Mr. Robinson, any of the three lawyers participating in the conference call with Dr. Nisi, any Renaissance/Comodo investors other than Mr. Golden and Mr. Saponaro, Mr. McManus and Mr. Westley.

[283] I have already dealt with the lawyers on the conference call. So far as Ms. Daynes is concerned, she was employed by Comodo until the recent sale of Comodo UK. She now works as a consultant for Comodo UK, which is still part owned by Comodo. No reason was given as to why she would not have been willing to give evidence for Comodo. She was Mr. Whittam's deputy for most of the relevant period. She would have been able to give evidence about Comodo's knowledge of sales of Renaissance shares to investors. She was on most of the emails from Mr. Emanuel concerning the conversion of Renaissance shareholders into Comodo shareholders. I would draw adverse inferences from the failure to call her.

[284] Mr. Abdulhayoglu was in occasional contact with Mr. Robinson, who, Mr. Abdulhayoglu rather disobligingly said, had put on weight. Mr. Whittam was in more frequent contact. Rather incredibly he claimed he had not discussed the case with Mr. Robinson. It was not suggested that Mr. Robinson might be reluctant to give evidence to the Court. He had obviously important evidence to give, since he had more involvement than Mr. Whittam in the very early days of Comodo and was indeed the person who had originally spoken to Mr. Emanuel in the latter's apartment in New York back in 1998. Again, I would draw adverse inferences from the failure to call him.

[285] As to calling other investors, no particular investors were identified. In principle, either party could have approached investors, since there is no property in a witness. I draw no inferences from this.

[286] As to Mr. McManus, it is true that he could have given useful information. However, his retirement from the company following the agreement to buy out his shares in 2004 does not seem to have been amicable. He had instructed Brabners Chaffe Street, solicitors, in early 2004 to express his concerns. There is no reason to suppose he would have wished to give evidence for Comodo. The defendants could in any event have called him (or issued a letter of request for his evidence), if they had wanted to. The same goes for Mr. Westley, who in any event would have had less knowledge than Mr. McManus. I draw no adverse inferences in respect of them.

XXXII. Conclusions on Comodo's pleaded case

[287] I turn then to my conclusions on Comodo's pleaded case. I turn first to the Initial Representations. The first of these was that Mr. Emanuel represented to Mr. Abdulhayoglu that he was a wealthy individual. In the light of my conclusion as to Mr. Abdulhayoglu's veracity, I do not accept that any such express averment was made. Moreover, if it was made, it was true. Even if it was not true, I have found

that Mr. Emanuel would have believed that it was true. Accordingly, I find no actionable representation as to Mr. Emanuel's wealth.

[288] The second Initial Representation is that Mr. Emanuel represented that he was a reputable investment banker. I have found this to be true. As to the third Initial Representation, he did ensure the marketing of Comodo products; no complaint was ever made (even after his death) that he had failed to market Comodo.

[289] As to the last Initial Representation, I have held that the representation was overtaken by events. However, even if it was otherwise actionable, there was no reliance placed on it. Mr. Abdulhayoglu and Mr. McManus were both relaxed about Mr. Emanuel bringing associates into the investment: see the terms of the letter of intent of 17th August 1998. By the end of 1998, Comodo was in financial difficulty. There is no evidence of any other investor willing to put anything like $750,000 into the business. Mr. Emanuel must have come as a life-line.

[290] As to the Loan Representation, I have found that the monies supplied by Renaissance to Comodo were Renaissance's money from monies paid to Renaissance by investors who knew they were investing in Renaissance shares. In these circumstances, there was no misrepresentation. Neither Renaissance nor Mr. Emanuel were acting as Comodo's agent in getting these monies in. The point made by Bannister J in his judgment of 15th December 2014 about the initial $750,000 funding applies equally to the loans.

[291] The same applies equally to the Consolidation Representation.

[292] Accordingly, none of the allegations of misrepresentations are made out. Nor did Renaissance receive any monies as agent for Comodo: Renaissance was getting the money in beneficially for itself.

[293] Even if I were wrong in this, in my judgment the Statute of Fraud Amendment Act 1828 would apply to the first, second and fourth of the Initial Representations. Although these allegations are pleaded as a defence, in reality they are pleaded in

order to justify rescission of the agreements to grant the shares. They are the key allegations in support of the declarations sought by Comodo that Renaissance and Mr. Emanuel's estate are not shareholders. Since I have held that the pre-2004 share certifications raise a legal presumption that the shareholder has legal title, the burden of proving the contrary (and the need to plead the facts relied on to prove the contrary) rested on Comodo. The allegations of misrepresentation are thus part of the action brought against the defendants. (Technically the allegations of misrepresentation should have gone in the Points of Claim, but it does not matter that they have been pleaded in the Amended Defence to Counterclaim.) The fact that Comodo has not pursued the claim for damages pleaded in para 10 (based on the misrepresentations in para 5) of the original Points of Claim does not automatically mean that it is not making a claim in respect of the alleged fraudulent misrepresentations. On the contrary, Comodo's claims for declarations are merely the logical consequence of the para 5 and 10 allegations (now repleaded as the Initial Representations). The change in remedy does not alter the proper characterisation of the allegations of misrepresentation. Looking at the live pleadings as a whole, Comodo are in my judgment using the allegations as a sword not a shield. Renaissance can rely on the 1828 Act to resist Comodo's reliance on these three Initial Representations.

XXXIII. Comodo's unpleaded case

[294] I have dealt with some of Mr. Chivers QC's wider case above. Again, the matters with which I shall now deal are not pleaded, so I shall be brief.

[295] After Mr. Emanuel became a director of Comodo on 28th October 2000, he owed the ordinary fiduciary duties of a director to Comodo. However, it is well recognized that a director of one company can owe duties to other companies which conflict with those duties. On the facts which I have found, Mr. Abdulhayoglu was well aware that Mr. Emanuel was getting money into Renaissance from third party investors in accordance with Mr. Emanuel's duties as

Renaissance's "attorney-in-fact" and was perfectly content with that. Comodo cannot in my judgment complain about that.

[296] It is important to note Comodo's initial case, after Mr. Abdulhayoglu had taken the decision to disavow any rights of Renaissance shareholders to convert their shares. It will be recalled that in one of his emails of 11th March 2011 to Mr. Easley, Mr. Abdulhayoglu said:

> "Let's get some facts straight: I did NOT ask for your money, Eric did. And Eric gave you shares/stock in his Company called Renaissance. This company has nothing to do with me."

[297] Mr. Abdulhayoglu is not saying that Mr. Emanuel was Comodo's agent. Just the opposite: Mr. Emanuel was acting as Renaissance's agent and Mr. Easley had to look to Renaissance for whatever rights he might have. Insofar as Mr. Chivers QC is seeking to say that Mr. Emanuel was in truth acting as Comodo's agent, he fails on the facts. It is true that as a matter of law, Mr. Emanuel could theoretically be acting as agent for Renaissance but still owe fiduciary duties to account to Comodo for monies received. However, in the real world this is unlikely. Mr. Abdulhayoglu knew that Mr. Emanuel was getting from in from investors. In my judgment, he took the view that the monies he got in for Renaissance was Mr. Emanuel's affair and had nothing to do with Comodo. That negatives any duty to account.

[298] In my judgment, all the bases on which Mr. Chivers QC says Renaissance and Mr. Emanuel had a duty to account fail.

[299] Mr. Chivers QC asserts that Renaissance was an instrument of fraud. In my judgment, this assertion fails completely. As I have noted in relation to Dr. Nisi and the Goldens, Renaissance was always able to convert its shares one-for-one into Comodo shares by transferring its own Comodo shares to investors. Until the JVA ended with Mr. McManus's being bought out, this required the consent of Owl's Nest and Opal Cavern. However, Mr. Emanuel would have had no reason

to suppose that this would be difficult to obtain. There is certainly no fraud involved in having to overcome this restriction. Moreover, Mr. Emanuel's preferred method of obtaining the Comodo shares for Renaissance investors was to ask Comodo to issue fresh shares at a price which he would agree with Mr. Abdulhayoglu.

[300] If Comodo knew what Mr. Emanuel was doing (and I have found that it did), and investors were going to get the shares in Comodo for which they had bargained, there is no fraud. The only reason Renaissance investors are not getting their shares is because Comodo removed Renaissance from its share register, so that Renaissance had no shares to transfer to investors.

[301] Mr. Chivers QC also ran a technical argument. Because all of Renaissance's investor money was not passed on to Comodo, Comodo did not receive as much of a capital injection as the Renaissance investors thought they were contributing. Therefore the investors were being defrauded. Not one investor has given evidence that this was a concern. None would, I think, be surprised to learn that Renaissance had expenses which needed to be paid for. So long as an investor who bought 10,000 Renaissance shares in due course received 10,000 Comodo shares, he or she had no cause for complaint.

[302] In my judgment, the argument that Renaissance was an instrument of fraud fails utterly. The argument that Renaissance was a sham also fails. There are admittedly surprising features of Renaissance's corporate governance, but these are matters between the members of Renaissance. They are not issues in the current action.

[303] Mr. Chivers QC submitted that I should order an inquiry into the entitlement of Renaissance shareholders to Comodo shares. This would involve people who are not parties to the action having to be brought in. He cited no precedent for the suggested course. In my judgment, I have to determine the issues before me, not other issues which are not before me.

[304] Lastly, Mr. Chivers QC submitted that, as a matter of discretion, I should refuse to rectify the share register. Section 43 of the 2004 Act provides that "the Court may… order the rectification of the register [of members]." I initially wondered whether I had any real discretion in this matter. However, the cases he cited has convinced me that I do have wide discretion, albeit of course a discretion to be exercised judicially: **Re Sussex Brick Co**[82], **Re Starlight Developers Ltd; Bryan v Arpan**[83], and **Gaffoor No v Vangates Investments (Pty) Ltd.**[84]

[305] In the current case, I have found that neither Renaissance nor Mr. Emanuel have done anything wrong. All of Comodo's allegations of misrepresentation, fraud and breach of fiduciary duty have failed. In these circumstances, in exercising my discretion there is really nothing to weigh in the balance against the defendants' *prima facie* entitlement to have registered, what I have found to be, their legal title to the disputed shares.

XXXIV. Final conclusion

[306] I return then to the question I posed at the beginning of this judgment: was Mr. Emanuel a fraudster or an honest man? Again, I can refer to Mr. Untracht's evidence. His assessment of Mr. Emanuel's character was as follows:[85]

> "I think that having known Eric for a very long period of time, you get to know when someone and our ability to judge their character based upon the totality of a relationship. And I think Eric was a lot of things. I think he had very high ambitions. I think he fancied himself a promoter which I would proffer is very different from being a conman. I think a conman is someone who seeks to separate people from their money as distinguished from a promoter who seeks to put together people with business ideas with people that have money and have those people operate to their mutual advantage and make money from getting a carried interest alongside of those people.

[82] [1904] 1 Ch 598
[83] [2007] EWHC 1660 (Ch), [2007] BCC 929
[84] [2012] ZASCA 52 (Supreme Court of Appeal of South Africa)
[85] Transcript, day 9, pages 120 to 122.

In my experience with Eric, and I'll qualify my remarks by saying that I interfaced with him less and less in the later years, but in all of the years that I knew Eric, I don't think he ever set out to separate an investor from their money. I think my sense of him was his intention was always to make money for people and himself. And so to that end, I think there is a significant distinction between a conman and a promoter. And part of what prompted me to get on an airplane and come down here is my personal feeling having very fond memories of Eric that I felt that his character was being attacked and assassinated and he's not here to defend himself. So I wasn't actually certain until about two weeks ago that I was even going to come, because I have no material financial interest in the outcome of this case. And ultimately I said to my wife over dinner one night, I said Eric was a lot of things, but in my view he wasn't a crook or a criminal or a conman or certainly the Eric Emanuel that I knew was none of those things.

And so the thing that got me on an airplane on the 4th of July weekend was to come in here and to be able to look at you and say that the Eric Emanuel that I knew, to the best of my knowledge, was neither a crook nor a conman or someone who tried to steal money from others. I think Eric was a man with very high aspirations who portrayed himself as a wealthy man, lived as a wealthy man so that he could rub elbows with wealthy people all in an effort to be a successful businessman. I think that he was a spectacularly successful businessman at a young age. He had some great successes and some great failures. You know, did he have delusions of grandeur from time to time, absolutely. But it was only because he had aspirations to be very successful and a need to be prominent in his own right not because in my view that he set out to steal money from others.

And so when I see the word 'conman', it disturbs me to some extent to the point that I was willing to get on an airplane and come down here and look at you and tell you that the Eric Emanuel that I knew was not a crook or a conman and didn't steal from people."

[307] I accept that evidence. In my judgment, Mr. Emanuel was an honest man. I shall dismiss Comodo's case and order rectification of Comodo's share register. I shall hear counsel on the consequential orders to be made.

Hon Justice Adrian Jack (Ag)
Commercial Judge

By the Court

Registrar