



Neutral Citation Number: [2024] EWHC 458 (Comm)

Case No: CL-2021-000165

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
KING'S BENCH DIVISION
COMMERCIAL COURT

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 06/03/2024

Before :

DAME CLARE MOULDER DBE
SITTING AS A JUDGE OF THE HIGH COURT

Between :

- 1. Sian Participation Corp. (In Liquidation)**
- 2. Hellicorp Investments Ltd**

**Claimants/
Respondents**

- and -

- 1. Domidias Limited**
- 2. Merbau Synergy Limited**

**Defendants/
Applicants**

Thomas Plewman KC and Paul Fradley (instructed by Seladore Legal Limited) for the
Claimants
Blair Leahy KC and Donald Lilly (instructed by Cooke Young & Keidan LLP) for the
Defendants

Hearing dates: 13 & 14 February 2024

Approved Judgment

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Dame Clare Moulder DBE :

Introduction

1. Domidias Limited (“Domidias”) and Merbau Synergy Limited (“Merbau”) (together the “Defendants”), by application dated 25 January 2023 (the “Application”) seek an order for summary judgment pursuant to CPR 24.2 or in the alternative that certain paragraphs of the Particulars of Claim be struck out pursuant to CPR 3.4(2)(a) and PD3A.1.5.

Background

2. The Second Claimant (“Hellicorp”) is a company incorporated under the laws of the British Virgin Islands. The First Claimant (“Sian”) is a company incorporated under the laws of the British Virgin Islands. Sian is a wholly-owned subsidiary of the Second Claimant.
3. The Claimants form part of a group of companies which operate as an investment and holding structure (the “SGS Investment Branch”) in respect of a 49.9997% stake in the issued share capital of Far Eastern Shipping Company PJSC (“FESCO”).
4. FESCO is a company incorporated under the laws of Russia and is the parent company of an international transportation and logistics group with operations in ports, rail, logistics and shipping (“FESCO Group”). In particular, the FESCO Group controls the Commercial Port of Vladivostok.
5. The ultimate beneficial owner of the SGS Investment Branch and its shareholding in FESCO (which has been confiscated (subject to ongoing appeals)) is Mr Ziyavudin Magomedov. On 1 December 2022, Mr Magomedov was convicted and sentenced to 19 years in prison by the Russian courts. Mr Magomedov has appealed this conviction and continues to deny the charges against him. Following his arrest on 30 March 2018, as well as after his conviction, assets belonging to Mr Magomedov have been confiscated by the Russian courts, including the SGS Investment Branch’s shareholding in FESCO.
6. Summa Group Limited Liability Company (“Summa Group”) is owned and controlled by Mr Magomedov and through this company he owned the SGS Investment Branch.
7. Domidias is a company incorporated under the laws of the British Virgin Islands. Domidias is the parent company of a further shareholder investment and holding structure (the “Domidias Investment Branch”) in respect of a 23.765% stake in the share capital of FESCO. Domidias was previously beneficially owned and controlled by Mr Mark Garber, a Russian businessman and former associate of Mr Magomedov.
8. Merbau is a company incorporated under the laws of the British Virgin Islands. Merbau is a wholly owned subsidiary of Domidias. Beneath Merbau in the Domidias Investment Branch sit a chain of subsidiaries through which the Domidias Investment Branch holds its 23.765% stake in the share capital of FESCO.
9. By way of further background as to the investors in FESCO I refer to the Particulars of Claim at paragraphs 14-16 (which I do not believe to be in issue):

“14. The SGS, Domidias and Zutrek Investment Branches acquired their shareholdings in FESCO at the same time in 2012 by way of a leveraged buy-out of the FESCO Group (the “Acquisition”).

15. For tax, financial and regulatory reasons, the Acquisition was initially structured such that Mr Magomedov and his business associates, Mr Garber and Mr Bazylev (the three together being the “Investors”), would each acquire ultimate beneficial ownership of separate shareholder stakes in FESCO. However, the intention and shared understanding between the Investors (as well as TPG Capital and Felix) at that time was that Mr Magomedov, via the SGS Investment Branch, would subsequently acquire the Domidias and Zutrek Investment Branches’ shareholdings in FESCO, with a view to the SGS Investment Branch eventually acquiring the entirety of the FESCO’s outstanding share capital.

16. This agreement between the three Investors was implemented through a series of option contracts which granted to various SGS Investment Branch entities the right to acquire the Domidias and Zutrek Investment Branches’ shareholdings in FESCO.”

10. I also understand the following, taken from paragraphs 17 and 18 of the Particulars of Claim, to be uncontentious:

“17. On 28 November 2012, Domidias (as Seller) and Sian (as Buyer) entered into a written “Call and Put Option Agreement” in respect of the entire issued share capital in Merbau (the “2012 Option Agreement”). Through the option to acquire the entire issued share capital of Merbau (the “Merbau Shares”), the 2012 Option Agreement gave Sian the right to acquire the Domidias Investment Branch’s shareholding in FESCO (the “2012 Call Option”).

18. Pursuant to the 2012 Call Option contained within the 2012 Option Agreement, Domidias granted to Sian an irrevocable option to buy the Merbau Shares on the following terms:

“2.1 [Domidias] irrevocably grants [Sian] an option to buy, and to require [Domidias] to sell, all or any of the Option Shares. The purchase price of the Call Option for the first year is US\$600,000 (six hundred thousand) ... (“Call Price”).”

2.2 The purchase price of the Call Option for the second and every subsequent year is US\$ 150,000 (one hundred fifty thousands) which amount is payable in full by the Buyer to the Seller within ten (10) Business Days following the beginning of second and every subsequent year unless (i) the Buyer acquired all Option Shares under this Agreement or otherwise, and (ii) the Agreement was terminated.

2.3 The purchase price of the Option Shares is US\$ 400,000 (four hundred thousand US dollars) (the “Call Option Share Price”) payable at the time of the exercise of the Call Option as described in this Agreement...

[...]”

11. The Claimants additionally claim that by virtue of a further written call and put option agreement (the “2019 Option Agreement”) Domidias granted Hellicorp an option (the “2019 Call Option”) to purchase the entire issued share capital in Merbau, in exchange for an annual payment by Hellicorp of US\$ 150,000 and a purchase price of US\$ 700,000 (where the 2019 Call Option was exercised on or after 1 September 2020).

12. The Claimants claim that by way of written notices dated 4 November 2020 purportedly served on Domidias, they exercised both the 2012 Call Option and the 2019 Call Option. The Claimants claim that in failing to transfer the requisite shares, the Defendants were in breach of their obligations under both the 2012 Option Agreement and the 2019 Option Agreement.
13. The Defendants dispute that Sian has validly exercised the 2012 Call Option and that the 2019 Option Agreement was a binding agreement and, even if it were, they further dispute that Hellicorp validly exercised the 2019 Call Option.
14. The Claimants rely by way of “*necessary background and context for the present proceedings*” on the conspiracies described in the draft amended Particulars of Claim in Section B5 as follows:

“54. From a date at present unknown to the Claimants but (at the latest) late 2019 onwards, the FESCO Group, and more particularly the SGS Investment Branch’s shareholding therein, has been the subject of a “corporate raid”, namely a co-ordinated attempt at a hostile takeover by various hostile parties acting in concert with individuals appointed as directors within the SGS Investment Branch and FESCO Group Companies. The corporate raid has been and is still being carried out pursuant to an unlawful means conspiracy and a lawful means conspiracy involving at least: FESCO, its subsidiary Halimeda International Limited, Domidias, Ms Leyla Mammad Zade (former Chairman of the board of FESCO), Mr Mikhail Rabinovich (a Russian businessman who is reported previously to have been involved in ‘corporate raids’) and unknown others (the “Hostile Parties” and the “FESCO Conspiracy” respectively).

55. The primary objective of the FESCO Conspiracy is to interfere with and ultimately wrest control of the SGS Investment Branch’s shareholding in FESCO away from Mr Magomedov for less than its fair value and for the sole benefit of the Hostile Parties and/or those who control them. The various unlawful means through which the Conspiracy has been (and is being) perpetrated include (but are not limited to): the wrongful obtaining of injunctive relief in Cyprus against two companies within the SGS Investment Branch (Smartilicious Consulting Limited and Enviartia Consulting Limited), so as to prevent them voting their shares at the FESCO Annual General Shareholders Meeting; the unlawful pressuring of SGS Investment Branch’s directors to act in the interests of the Hostile Parties; and the unlawful pressuring of the SGS Investment Branch’s nominees to the FESCO board into withdrawing their candidacy.

55A. Further, the interests of Mr Magomedov and his brother (Mr Magomed Magomedov) in PJSC Novorossiysk Commercial Sea Port have been subject to a further corporate raid (the “NCSP Conspiracy” and, together with the FESCO Conspiracy, the “Conspiracies”).

56. The corporate raid and the underlying FESCO Conspiracy were the subject of a separate claim brought by the SGS Investment Branch entities (including Sian and Hellicorp) against the Hostile Parties for unlawful means conspiracy in the British Virgin Islands (the “BVI UMC Claim”). On 20 July 2023, the Claimants (amongst others) issued claims in the English High Court relating to the FESCO Conspiracy and the NCSP Conspiracy in the tort of unlawful means conspiracy, further or alternatively the tort of conspiracy to injure, and in the further

alternative a claim under Russian law for causing harm unlawfully for which the relevant defendants are alleged to be at fault (the “English Conspiracy Claim”). Domidias is a defendant to the English Conspiracy Claim. The Claimants (including Sian and Hellicorp) in the BVI UMC Claim subsequently filed a notice of discontinuance on 24 July 2023 discontinuing the BVI UMC Claim. None of the claims or issues pursued in the English Conspiracy Claim are being put before this Court for determination in these proceedings. However, the Conspiracies, particularly the FESCO Conspiracy, and their underlying factual matrix provide necessary background and context for the present proceedings because the subject matter of these proceedings (Domidias’ breaches of the 2012 and 2019 Option Agreements (detailed below)), forms part of the FESCO Conspiracy and was motivated by the same underlying desire to harm the SGS Investment Branch’s position as shareholder of FESCO, by preventing it from exercising the 2012 and/or 2019 Call Options and thus from increasing its shareholding in, and control and influence over, FESCO.” [emphasis added]

15. Although the Defendants object that the conspiracies referred to above are irrelevant to the proceedings and should be struck out, the description is relevant to the submissions made on the Application and in addition provides background both as to what is alleged by the Claimants in the separate English proceedings and the nature of the alleged conspiracy.
16. As to the individuals who were involved at the relevant time, the following are referred to in this judgment:
 - a. Mr Elias Economou who was a director of Sian and Hellicorp at the time the 2019 Option Agreement was being negotiated.
 - b. Mr Konstantin Kuzovkov was from the Summa Group.
 - c. Mr Scott Senecal was a partner at Cleary Gottlieb Steen & Hamilton LLC (“Clearys”).
 - d. Ms Anastasia Averyanova was from the GHP Group, a company owned and controlled by Mr Garber.
 - e. Mr Denis Sukhanov also from GHP Group.

Issues for determination on the Application

17. The issues for determination in this judgment following the hearing of the Application are:
 - a. Whether, upon a proper construction of the 2012 Option Agreement, it expired prior to its exercise;
 - b. Whether the Claimants have a real prospect of establishing at trial that an interim arrangement or solution was agreed in relation to the expiry of the 2012 Option Agreement;

- c. Whether the Claimants have a real prospect of establishing at trial that the 2019 Option Agreement was concluded;
 - d. Whether certain parts of the Particulars of Claim relating to the alleged conspiracy, namely Section B5, should be struck out.
18. The Defendants' application dated 2 February 2024 for permission to rely on the additional ground of futility of specific performance and, if so, whether the claim for specific performance is now futile, by reason of confiscation orders in Russia was not pursued at the hearing.
 19. The Claimants' application to amend its particulars of claim follows from the outcome of the Court's decision on the issues above.

Evidence

20. In support of its Application the Defendants rely on the Fourth Witness Statement of Ms Lydia Danon, partner in the firm of Cooke, Young & Keidan LLP acting for the Defendants, dated 25 January 2023, the First Witness Statement of Mr Andrey Severilov and the Sixth Witness Statement of Ms Danon both dated 14 December 2023.
21. In response the Claimants rely on the Third Witness Statement of Mr Gareth Keillor, partner in the firm of Seladore Legal Limited, acting for the Claimants, dated 11 August 2023.
22. In support of the Defendants' application that the claim for specific performance sought by the Claimants is futile and should be struck out, the Defendants filed the First Witness Statement of Mr Andrey Severilov and the Sixth Witness Statement of Ms Danon both dated 14 December 2023. In response the Claimants rely on the Fifth Witness Statement of Mr Keillor dated 7 February 2023

Relevant principles on Summary Judgment application

23. The principles which the Court should apply on a summary judgment application were common ground and are as set out in the judgment of Lewison J in *Easyair Limited (Trading As Openair) v Opal Telecom Limited* [2009] EWHC 339 (Ch) at [15]:
 - i) *The court must consider whether the claimant has a "realistic" as opposed to a "fanciful" prospect of success: Swain v Hillman [2001] 2 All ER 91 ;*
 - ii) *A "realistic" claim is one that carries some degree of conviction. This means a claim that is more than merely arguable: ED & F Man Liquid Products v Patel [2003] EWCA Civ 472 at [8]*
 - iii) *In reaching its conclusion the court must not conduct a "mini-trial": Swain v Hillman*
 - iv) *This does not mean that the court must take at face value and without analysis everything that a claimant says in his statements before the court. In some cases it may be clear that there is no real substance in factual assertions made, particularly*

if contradicted by contemporaneous documents: ED & F Man Liquid Products v Patel at [10]

v) *However, in reaching its conclusion the court must take into account not only the evidence actually placed before it on the application for summary judgment, but also the evidence that can reasonably be expected to be available at trial: Royal Brompton Hospital NHS Trust v Hammond (No 5) [2001] EWCA Civ 550 ;*

vi) *Although a case may turn out at trial not to be really complicated, it does not follow that it should be decided without the fuller investigation into the facts at trial than is possible or permissible on summary judgment. Thus the court should hesitate about making a final decision without a trial, even where there is no obvious conflict of fact at the time of the application, where reasonable grounds exist for believing that a fuller investigation into the facts of the case would add to or alter the evidence available to a trial judge and so affect the outcome of the case: Doncaster Pharmaceuticals Group Ltd v Bolton Pharmaceutical Co 100 Ltd [2007] FSR 63 ;*

vii) *On the other hand it is not uncommon for an application under Part 24 to give rise to a short point of law or construction and, if the court is satisfied that it has before it all the evidence necessary for the proper determination of the question and that the parties have had an adequate opportunity to address it in argument, it should grasp the nettle and decide it. The reason is quite simple: if the respondent's case is bad in law, he will in truth have no real prospect of succeeding on his claim or successfully defending the claim against him, as the case may be. Similarly, if the applicant's case is bad in law, the sooner that is determined, the better. If it is possible to show by evidence that although material in the form of documents or oral evidence that would put the documents in another light is not currently before the court, such material is likely to exist and can be expected to be available at trial, it would be wrong to give summary judgment because there would be a real, as opposed to a fanciful, prospect of success. However, it is not enough simply to argue that the case should be allowed to go to trial because something may turn up which would have a bearing on the question of construction: ICI Chemicals & Polymers Ltd v TTE Training Ltd [2007] EWCA Civ 725.” [emphasis added]*

24. I do not believe that the additional authorities referred to by the Claimants in their written submissions depart from the principles in *Easyair* or materially add to them.
25. In oral submissions Counsel for the Claimants took the Court to the following passages in *Gulati v MGN Ltd* [2013] EWHC 3392 (Ch):

“7. Mr Desmond Browne QC, for MGN, submitted that a case should not be allowed to go for trial simply because it is asserted that some further evidence may turn up. In support of this submission he relied on ICI Chemicals v TTE Training [2007] EWCA Civ 725 at paras 12 to 14. He is right that a view to that effect was expressed by Moore-Bick LJ in that case but care must be taken in applying that view to a case such as the present. In that case Moore-Bick LJ was dealing with an argument that further facts might turn up which would affect the construction of a commercial document. He expressed the view that a submission that something might emerge should be treated “with caution”, not that it should be rejected out of hand. Paragraph 14 of his judgment makes it clear that he is seeking to

distinguish between real and fanciful prospects of success. That is the real distinction, in my view. He was also not dealing with the familiar case in which a claimant makes an ostensibly sustainable allegation but acknowledges that the process of disclosure is necessary to make the case stronger or to have it investigated properly. It is a familiar state of affairs that a claimant is ultimately reliant on disclosure from the other side in order to bring his case home, particularly in cases where the nature of the wrong is such that the defendant's activities were covert so that, if the case is good, the defendant is likely to have a substantial amount of material in its hands with no equivalent in the hands of the claimant. Unless the prospects of getting disclosure are "fanciful", the claimant is generally entitled to maintain its case in those circumstances. That is not to say that claimants are entitled to embark on speculative cases in the hope that disclosure will throw up something useful. The claimant must have more than that to start with, but the inability to make a full case without disclosure is not, in my view, a bar to starting the litigation in the first place.

8. The true position is reflected in *Doncaster Pharmaceuticals v The Bolton Pharmaceutical Co 100 Ltd* [2007] FSR 63:

"17. It is well settled by the authorities that the court should exercise caution in granting summary judgment in certain kinds of case. The classic instance is where there are conflicts of fact on relevant issues, which have to be resolved before a judgment can be given (see Civil Procedure Vol 1 24.2.5). A mini-trial on the facts conducted under CPR Pt 24 without having gone through normal pre-trial procedures must be avoided, as it runs a real risk of producing summary injustice.

18. In my judgment, the court should also hesitate about making a final decision without a trial where, even though there is no obvious conflict of fact at the time of the application, reasonable grounds exist for believing that a fuller investigation into the facts of the case would add to or alter the evidence available to a trial judge and so affect the outcome of the case."

9. The present cases are capable of falling into the category of cases which require full investigation. Provided that there is enough to prevent them falling into the category of the purely speculative, the nature of the wrong or alleged is such that the claimants will or may have little knowledge and evidence of their own at this stage and will need the benefits of pre-trial procedures in order to add to their case. There is nothing wrong with this. It is what disclosure (among other steps) is for. The alleged activities in this case were covert and, of their very nature, would be activities of which the victims would know little or nothing. Better evidence of what happened would lie with the defendant. There is nothing wrong with pleading a starting point, on an appropriate basis, and then expecting the case to become clearer after pleading and disclosure (if not the extraction of further information pursuant to a request)." [emphasis added]

2012 Option Agreement

Ground 1: The 2012 Option Agreement had expired

26. The Defendants seek summary judgment in relation to the claim under the 2012 Option Agreement which they submitted gives rise to a short point of construction, namely whether it terminated in accordance with its terms on 28/29 November 2019 (as the Defendants contend) or 28/29 November 2020 (as the Claimants contend). If the Defendants' construction is correct, the 2012 Call Option Notice was served after the

termination of the 2012 Option Agreement, and thus it was submitted that the Claimants' claims under that agreement must fail in their entirety.

27. It appeared to be common ground between the parties that this was an issue of construction where the Court has before it "*all the evidence necessary for the proper determination of the question and that the parties have had an adequate opportunity to address it in argument*". I am satisfied that in the circumstances of this case the Court should "*grasp the nettle*" and decide it.
28. In its application, the Defendants also relied (i) on a failure by Sian (and Hellicorp) to pay the option prices; and (ii) on a lack of evidence that Sian (and Hellicorp) could now pay the relevant exercise prices. However the Defendants have now taken the position that in light of the evidence filed by the Claimants, this limb of the application is no longer pursued.

2012 Option Agreement-relevant terms

29. For the purposes of this issue, the relevant provisions of the 2012 Option Agreement relating to its term are in Clause 13 and 15 as follows:

“13. TERM AND TERMINATION

13.1 This Agreement shall (unless terminated at an earlier date or extended pursuant to the terms of this Agreement) continue in force for a term of one (1) year from the date hereof. If the Agreement is terminated by means of the Termination Notice (according to clause 14) the Agreement shall be deemed terminated at the latest of the following dates: (i) at the last date of the period when the Termination Notice is received or (ii) after five (5) days after the Termination Notice was received by the Seller.

13.2 This Agreement shall terminate upon the Completion unless agreed otherwise by the Parties.” [...]

15 EXTENSION

This Agreement shall be automatically extended for a term of one (1) year provided that the Buyer does not send to the Seller a written objection to such extension (the “Termination Notice”) not later than thirty (30) Business Days before expiration of the term of this Agreement. After the seventh anniversary from the date hereof the Agreement shall not be extended automatically. Any further extension of this Agreement shall be made if the parties agree accordingly in writing.” [emphasis added]

30. It was common ground that the reference in Clause 13 to Clause 14 was an error and should refer to Clause 15 but in any event this has no relevance to the issue now before the Court.
31. As referred to below, the Defendants also rely on the provisions of Clause 4 which were as follows:

“4. EXERCISE OF CALL AND PUT OPTION

4.1 The Call Option may be exercised only:

4.1.1 by the delivery by the Buyer to the Seller of the Call Option Notice at any time after the date hereof. The Call Option Notice must specify the date of Completion and the Option Shares to which the Call Option Notice relates.

4.2 The Put Option may be exercised:

4.2.1 by the delivery by the Seller to the Buyer of the Put Option Notice after (i) seven (7) calendar years minus five (5) business days following the date hereof; or (ii) the receipt by the Seller of the Termination Notice (as defined in clause 15);
4.2.2 by the delivery by the Seller to the Buyer of the Put Option Notice at any time after the date hereof as may be separately agreed by the Parties.”

Relevant principles of contractual construction

32. In its skeleton the Claimants submitted that the principles applicable to the construction of contracts were well established and were summarised by Popplewell J in *Lukoil Asia Pacific Pte Ltd v Ocean Tankers (Pte) Ltd* [2018] EWHC 163 (Comm) at [8].

33. That summary reads as follows:

“8. There is an abundance of recent high authority on the principles applicable to the construction of commercial documents, including *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896 ; *Chartbrook Ltd v Persimmon Homes Ltd* [2009] 1 AC 1101 ; *Re Sigma Finance Corp* [2010] 1 All ER 571 ; *Rainy Sky SA v Kookmin Bank* [2011] 1 WLR 2900 ; *Arnold v Britton* [2015] AC 1619 ; and *Wood v Capita Insurance Services Ltd* [2017] AC 1173 . The court's task is to ascertain the objective meaning of the language which the parties have chosen in which to express their agreement. The court must consider the language used and ascertain what a reasonable person, that is a person who has all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract, would have understood the parties to have meant. The court must consider the contract as a whole and, depending on the nature, formality and quality of drafting of the contract, give more or less weight to elements of the wider context in reaching its view as to the objective meaning of the language used. If there are two possible constructions, the court is entitled to prefer the construction which is consistent with business common sense and to reject the other. Interpretation is a unitary exercise; in striking a balance between the indications given by the language and the implications of the competing constructions, the court must consider the quality of drafting of the clause and it must also be alive to the possibility that one side may have agreed to something which with hindsight did not serve his interest; similarly, the court must not lose sight of the possibility that a provision may be a negotiated compromise or that the negotiators were not able to agree more precise terms. This unitary exercise involves an iterative process by which each suggested interpretation is checked against the provisions of the contract and its commercial consequences are investigated. It does not matter whether the more detailed analysis commences with the factual background and the implications of rival constructions or a close examination of the relevant language in the contract, so long as the court balances the indications given by each.”

34. However in oral submissions counsel for the Claimants referred the Court to *Arnold v Britton* [2015] AC 1619 at [14] – [23] and submitted that:

“The point that I wanted to commend to your Ladyship on reading these paragraphs is the point about the primacy of the language”,

and further submitted that;

“what I take from Arnold v Britton is the language is fundamental”.

35. As I indicated to Counsel for the Claimants in the course of the hearing this seems to me to misstate the approach which is summarised by Popplewell J and which was set out by Lord Hodge JSC in *Wood v Capita Insurance Services Ltd* at [10]:

“The court’s task is to ascertain the objective meaning of the language which the parties have chosen to express their agreement. It has long been accepted that this is not a literalist exercise focused solely on a parsing of the wording of the particular clause but that the court must consider the contract as a whole and, depending on the nature, formality and quality of drafting of the contract, give more or less weight to elements of the wider context in reaching its view as to that objective meaning...”.

36. In response Counsel for the Claimants submitted that:

“What I do say is that, in that unitary exercise, textualism and contextualism — in that unitary exercise, the text is important, and ... my learned friend’s submission departs too far from the language.”

37. In my view the correct approach for the Court to adopt is as set out in *Wood*:

“12 This unitary exercise involves an iterative process by which each suggested interpretation is checked against the provisions of the contract and its commercial consequences are investigated: the Arnold case, para 77 citing In re Sigma Finance Corpn [2010] 1 All ER 571, para 12, per Lord Mance JSC. To my mind once one has read the language in dispute and the relevant parts of the contract that provide its context, it does not matter whether the more detailed analysis commences with the factual background and the implications of rival constructions or a close examination of the relevant language in the contract, so long as the court balances the indications given by each.

13 Textualism and contextualism are not conflicting paradigms in a battle for exclusive occupation of the field of contractual interpretation. Rather, the lawyer and the judge, when interpreting any contract, can use them as tools to ascertain the objective meaning of the language which the parties have chosen to express their agreement. The extent to which each tool will assist the court in its task will vary according to the circumstances of the particular agreement or agreements. Some agreements may be successfully interpreted principally by textual analysis, for example because of their sophistication and complexity and because they have been negotiated and prepared with the assistance of skilled professionals. The correct interpretation of other contracts may be achieved by a greater emphasis on the factual matrix, for example because of their informality, brevity or the

absence of skilled professional assistance. But negotiators of complex formal contracts may often not achieve a logical and coherent text because of, for example, the conflicting aims of the parties, failures of communication, differing drafting practices, or deadlines which require the parties to compromise in order to reach agreement. There may often therefore be provisions in a detailed professionally drawn contract which lack clarity and the lawyer or judge in interpreting such provisions may be particularly helped by considering the factual matrix and the purpose of similar provisions in contracts of the same type...” [emphasis added]

Submissions

38. It was submitted for the Defendants that:
- a. The contract is dated 28 November 2012. Clause 13 provides that the term of the contract would be for one year “*from the date hereof*”. The parties’ clear intention was that the agreement should last for one year, not one year plus one day. This means that the first term of the contract was from 29 November 2012 until 28 November 2013. Accordingly, the last day of the sixth extended term was 28 November 2019, and any further extended term would have commenced on 29 November 2019. This construction is consistent with the approach of the Court of Appeal in *Zoan v Rouamba* [2000] 1 WLR 1509 at [34] and is further supported by Clause 4.1.1, which provides that the call option could only be exercised “*after the date hereof*”, suggesting that the parties intended the operative terms of the contract to run from the day after the date of the agreement.
 - b. The prohibition in Clause 15 to the term being “*extended automatically*” after the seventh anniversary is not a reference to the moment the extension occurs, but the state of the contract being within an extended term (skeleton paragraph 37).
 - c. The identification of the seventh anniversary as the long-stop termination date in Clause 15 is also supported by the terms of Clause 4.2 of the 2012 Option Agreement. There is no obvious commercial rationale why Domidias would be entitled to exercise the put option five days before the seventh (as opposed to the eighth) anniversary, nor is there any obvious commercial rationale why Domidias and Sian should have concurrent put and call options subsisting over a period of one year (plus five days), when the parties intention otherwise was for the put option not to exist alongside the call option for the preceding seven years (less five days) (skeleton paragraphs 40 and 41).
39. It was accepted by Counsel for the Claimants that the term continues until midnight on the 28 November. It was further accepted for the Claimants that the seventh anniversary in the relevant year would have been 28 November 2019. However it was submitted that the seventh anniversary came to an end at midnight, at 11.59.59, on 28 November 2019 and thus it extended at midnight on 28 November 2019 but after that extension, there would not be any further automatic extension.
40. It was submitted by Counsel for the Claimants that the language is “*The extension won’t take place on 29 November or thereafter*” but that the extension had taken place at midnight on the 28th; that there is no interregnum where the term has expired but the new extended term has not yet occurred. The extension takes place at the close, on 28

November and that being so, at 11.59.59 on 28 November 2019, it was extended for one last time.

Discussion

41. Starting with the natural meaning of the language in the phrase “*After the seventh anniversary from the date hereof the Agreement shall not be extended automatically.*”
42. In my view the Claimants’ submissions depend on the automatic extension having occurred on the 7th anniversary i.e. 28 November 2019.
43. The Claimants submitted that the term was extended at 11.59.99 on the 7th anniversary but there is no basis for that on the language of the Agreement. The Claimants accepted that Clause 13 meant that the initial term of 1 year ran from 29 November 2012 to 28 November 2013. The Claimants also appeared to accept that by virtue of the automatic extension each term would then be from 29 November to 28 November in each year.
44. Thus it appeared to be accepted for the Claimants that the extension for the year 18/19 ran from 29 November 2018 to 28 November 2019 which was the seventh anniversary. Since the extension was automatic and required no act or event, there is no reason to infer that the automatic extension took place prior to the expiry of the then current term i.e. that it was extended on 28 November 2019. In light of the fact that the extension was automatic there was no need for the agreement to identify the precise moment that the extension took place but in any event, there is no basis for concluding that it took place at 11.59.99 on 28 November 2019 when the previous term was still extant.
45. In my view this is consistent with the approach of the Court of Appeal in *Zoan v Rouamba* at [34] where it said that the next period begins at the first moment of the next day:

“...The usual meaning of the words “after” or “from” in the context of reckoning time, as the authorities make clear, is that the day “after” or “from” which a period of time is to be reckoned is not included within the period. There are good reasons for this. The event which gives rise to the need to determine when a limited period of time has ended (or will end) may itself happen at any time of the day on which it occurs. It is in order to avoid disputes as to fractions of a day—and to give to the party who must comply with the limit the maximum period for such compliance—that time is reckoned, in effect, from the last moment of that day; that is to say, the period begins to run from the first moment of the next day. To treat a period of a year “from the date of the agreement” as commencing at the first moment after the end of the day on which the agreement is made is not (as the judge appears to suggest) to construe the words as if they read “a year from the day after the agreement.”” [emphasis added]

46. The language of the clause thus avoids any reference to the moment of extension but states instead that there is no automatic extension “after” 28 November 2019. This thus dovetails precisely (and avoids any interregnum) in that the previous term ends on 28 November 2019 and absent the sentence in issue in Clause 15, the new term would have started on 29 November 2019. However the sentence in question states that after 28 November 2019 there is no extension.

47. Given that any extension does not occur on 28 November, the natural meaning of the word “after” is to identify the period from and including 29th November (after the seventh anniversary) and the natural meaning of the sentence as a whole is that the next term which would otherwise have come into effect automatically from 29th November did not do so. To that extent I see force in the submission of the Defendants that the natural meaning of the language of the phrase refers to the state and not an event. In other words I agree with the Defendants’ submission (paragraph 37 of their skeleton) that the language is not addressing the moment the extension occurs but is stating that there is no extension for a further term once the term which ran from 29 November 2018 to 28 November 2019 has expired.
48. As stated in *Wood*, the Court must balance the suggested interpretations of the language against the factual background and the implications of the rival constructions. The Defendants’ interpretation of the language in my view is supported by the context when the agreement is taken as a whole. The structure of the agreement is that it grants a call option to Sian which it can exercise at any time in respect of all or part of the shares (Clause 4.1). Sian had to pay an initial payment of \$600,000 and then \$150,000 each year. Completion of the transfer of the shares would take place 5 Business Days after the Call Option Notice.
49. Clause 4 also provided that Domidias had a put option to require Sian to take the shares which it could exercise (absent a Termination Notice) on the date falling after the date which is 7 years minus 5 days.
50. The Defendants submitted (paragraph 41 of their skeleton) that there would be no obvious commercial rationale for a construction that the put option would extend not for 5 days prior to the end of the agreement but for 1 year 5 days, which is the effect of the Claimants’ construction.
51. The Claimants submitted that Clause 4.2 dealt with the life of the put option and did not bear on the language of Clause 15 at all, the parties chose to use different language in Clause 4.2 (referring to calendar years) and in Clause 15 and there was nothing in the agreement that told you that the put was intended only to arise at the end of the last extension of the call. Counsel for the Claimants submitted that in many contracts you can have coterminous puts and calls.
52. It seems to me that the Claimants in their submissions did not really engage with the context provided by the periods for the exercise of the put and call options and the consequences for the interpretation of Clause 13 and 15.
53. Whilst in abstract the exercise periods for the put and call options could have been wholly coterminous, this was clearly not the position in this case and the put was clearly exercisable only for a limited period at the end of the term of the Agreement. This appears to have been a professionally drafted contract where the put and call options have been structured to interrelate. As submitted for the Defendants, if the Claimants’ construction were adopted and the long stop date for the contract was in fact the eighth anniversary, there is no obvious commercial rationale why Domidias would be entitled to exercise the right to put the shares for a period from 5 days before the end of the 7th year (as opposed to the eighth anniversary) until the end of the 8th year.

54. The Claimants' submissions relying on the language of Clause 4.2 referring to calendar years and the possibility of coterminous periods did not provide a satisfactory counter argument for the commercial rationale of its interpretation of the put and call exercise periods and thus the context which it provides to the construction of Clause 15.
55. The 2012 Option Agreement provided that Sian was granted a right to call for the shares in return for a substantial annual fee whilst Domidias had the right to put the shares but paid only a nominal amount of \$1 for the right. The right for the Defendants to put the shares is expressly stated not to start until 5 business days before the 7th anniversary. It can therefore be inferred that as a commercial matter the put option was a residual right in the event that Sian had not exercised the call option or had exercised it only in part. There is no apparent commercial rationale as to why this put option (for which the Defendants paid only a nominal amount) would have been exercisable beyond the 5 day period at the end of the term and run concurrently for a period of 1 year and 5 days with the call option.
56. The Court is entitled to prefer the construction which is consistent with business common sense. In my view the structure of the put and call options set out in Clause 4 reinforces the conclusion on the language of Clause 15 that the agreement was not intended to continue beyond the 7th anniversary.

Conclusion

57. For the reasons set out above I find that the 2012 Option Agreement terminated in accordance with its terms on 28 November 2019.
58. Accordingly I find that the 2012 Call Option Notice was served after the termination of the 2012 Option Agreement

Alternative case on 2012 Option Agreement

59. In the alternative to the construction argument, the Claimants plead in the draft Amended Particulars of Claim at paragraph 24 that:

"...pending disclosure, it is Sian's case that Mr Economou (either himself or in conjunction with others) took steps to protect the position of Sian by agreeing a legally binding commitment with Domidias that the 2012 Option Agreement would not expire in November 2019."

60. In paragraph 8 of the Reply the Claimants set out this alternative case in more detail. In summary the Claimants plead that:
 - a. There was a risk that if steps were not taken to exercise the 2012 Call Option or to protect the position of Sian, Domidias might subsequently argue that the 2012 Call Option had expired.
 - b. By November 2019 it was in the best interest of Sian to seek a legally binding commitment from Domidias to protect itself against such risk.

- c. Mr Economou (himself or with others) took steps to protect the position of Sian by agreeing a legally binding commitment with Domidias: pending disclosure the best particulars that the Claimants can provide are that such commitment would have been in the form of (i) an agreement in writing between Sian and Domidias to extend its terms by one year; (ii) a contractual variation to similar effect; (iii) a promise by Domidias not to interpret the 2012 Option Agreement as imposing a November 2019 deadline; and/or (iv) a representation or common understanding that the 2012 Option Agreement would be extended by one year or until reasonable notice was given bringing the extension to an end.

Defendants' submissions

61. It was submitted for the Defendants that the Claimants' case was contradicted by the contemporaneous correspondence: the parties appeared to agree at the time that an extension was not possible because Sian had been struck-off the register in the BVI, hence the need to enter a new agreement with Hellicorp as is evident from the email from Mr Senecal of 11 November 2019.

Claimants' submissions

62. It was submitted for the Claimants that this is a factual dispute which the Court is not in a position to determine summarily especially in light of the current lack of documentary material. It was pointed out that the Defendants in their skeleton have accepted that the Defendants (and thus the Court) do not have the whole of the correspondence in relation to the negotiations that took place in November 2019 to January 2020. Counsel for the Claimants also relied on the evidence of Mr Keillor in his Third Witness Statement that although the Claimants do have some documents (including emails) which he understood were collected from the server of Summa Group, the Claimants do not believe they have a complete set of documents: for example Mr Economou did not work for Summa Group and so did not have a Summa Group email account; individuals such as Ms Mammad Zade and Mr Kuzovkov, did not always use their Summa Group email address.
63. It was further submitted that the Claimants are hampered by a lack of disclosure and access to the relevant documents as a result of the Conspiracy. It is wholly implausible that the Claimants (Mr Economou, Ms Mammad Zade, Mr Kuzovkov) would have simply allowed this right to lapse (skeleton paragraph 41.2).
64. It was submitted that the fact that the parties were negotiating the 2019 Option Agreement is consistent with the fact that the parties had found an interim solution to the potential termination of the 2012 Option Agreement. If no interim solution had been found then those representing the SGS Investment Branch would, logically, have acted with greater haste in the negotiations (given that the status of the SGS Investment Branch's options rights was uncertain) (skeleton paragraph 41.7).

Contemporaneous correspondence

65. In relation to this issue the Court had before it contemporaneous correspondence between the parties which ran from 22 October 2019 to December 2019.

66. I set out below the key exchanges during this period which show how the negotiations firstly to extend the 2012 Option Agreement and then to enter into the 2019 Option Agreement evolved.
67. The correspondence before the Court starts with an email from Mr Denis Kant Madal of Summa Group, raising the issue of the extension of the 2012 Option Agreement.
68. On 31 October 2019 Clearys responded to Mr Kurlanov and Mr Kant Mandal:

*“Dear Konstantin,
Indeed, the option expires on 28 November 2019.
We believe we should extend the option so that it continues to 31 December 2025 (as we did with Noubelius option) and also clean up the overdue IGLs between Hellicorp and Merbau so that they are also moved to be due on 31 December 2025.
We will draft the documents to implement such in due course.”*

69. On 6 November 2019 Clearys sent a further email this time also copied to Mr Economou. Mr Senecal wrote :

*“Dear all: pursuant to the below exchange, please find attached draft documentation under which:
1—the call option on “strand 2” (i.e. of Sian with Domidias in respect all the shares in Merbau), which currently expires on 28 NOV 2019 is extended to 31 DEC 2025 (the call option itself is attached for reference);
2—various debt obligations of Merbau to Sian (arising from the 2012 financings) are extended to 31 DEC 2025”.*

70. On 11 November 2019 Mr Senecal chased with a further email and suggested that instead of an extension of the existing agreement there should be a new agreement with Hellicorp:

*“All – we have not heard back on below re extending the put/call with Domidias over shares in Merbau, and separately I have been having discussions with Denis about documenting possible future payments to the ‘minor shareholders’, which might include Mr G. in this regard:
1—the current put/call is with Sian. Sian continues to be in bad standing. Given that efforts have been ongoing since June (if not earlier) to restore Sian to good standing, I am not confident that it will be in good standing by 28 NOV expires. Sian cannot sign an extension until it is in good standing.
2—we should not allow the current option to expire without a new option in place. If Sian is not in good health soon, I suggest we plan to have a new option in place between Domidias and Hellicorp (rather than Sian).
3—in the context of possible future payments to the minor shareholders, please recall that under this put/call, the following amounts are supposed to be paid to Domidias (under clauses 2.1-2.3): \$600k upfront (I am not sure if that was paid in 2012—does Summa team have any record of that?); \$150k each year on 28 NOV (or within 10 B days thereof) -- if this has been not been paid, then this has now accrued to \$900k; and upon exercise of the Call Option a purchase price of the Option Shares of \$400k.*

Does this remain the commercial deal? If we renew the put/call with Hellicorp, would we retain these pricing provisions? are we contemplating paying amounts in addition to those to Mr G? Thanks, scott”.

71. On 14 November Mr Economou responded agreeing to this proposal:

“I agree to proceed with a new option with Hellicorp. Please send me draft and if possible highlight any deviations from the Domidias Sian one for cross referencing purposes. Once I receive I will review and revert.”

72. On 15 November Mr Senecal wrote:

“Much thanks, elias, and we will circulate a draft of the new Hellicorp-Domidias put/call over Merbau shares to succeed the existing Sian-Domidias put/call over Merbau shares when the latter terminates on 28 NOV. in the circumstances, I see no need to commit to making annual payments of \$150k to Domidias (see para 3 in my email below), which I believe in practice have never been paid under the existing Sian put/call. Thanks, scott”.

73. On 18 November Mr Senecal sent out draft of the new agreement with Hellicorp to Mr Economou amongst others indicating that he was looking to sign it before 28 November:

“Dear Elias: pursuant to below, please find attached drafts of the replacement option agreement + share pledge, so that Hellicorp effectively replaces Sian under the existing arrangement. Blacklines are against the original option/share pledge. As you will see, we have respected the original docs, but as noted below, we did strike out the annual fee (which, as far as I know, has not been paid in practice). we did keep the \$400,000 payment to made option exercise. We specified a simple termination date of the new option to be 12/31/2025. Please note that in the share pledge we need to insert existing debt of Merbau per cl 3.1(n). Please let us know if you have any questions/comments. As you know, we should get this signed up before 28 NOV, and I’d hope we could get signed up this week. Much thanks, scott”.

74. On 20 November Mr Economou responded with comments:

“Please see attached the put call option agreement with our comments/amendments highlighted in green for your review and comments if any.”

75. On 20 November Ms Mammad Zade wrote:

“Dear Dmitry, To follow up on our conversation regarding Domidias option, Mr. Economou has sent updated Agreement, attached to his email below. We are kindly asking you to review. In short, the changes are as follows: 1. In case there is an amicable change of control over F. before Sept 1st 2020, option price increases to USD 5m. 2. “Standard price” of the call option is increased to USD 700k as a compensation of additional costs (given current circumstances) and as a mechanism of a repayment of accumulated fees. 3. There is also a change of pledge (given the change of the Buyer) and some other minor technical changes. Please note that all these changes have been discussed and agreed with Mr. Garber and his legal team. In case you agree with the proposed changes we are ready to

proceed with execution asap. Accordingly we are asking for your formal consent to proceed.”

76. On 28 November Mr Kuzovkov (from the Summa Group who represented Mr Magomedov’s interests) wrote sending changes made by Domidias:

“Please see below (hopefully) final draft of Domidias option. Colleagues from GHP (cc’cd) [i.e. Domidias] made some changes, I believe they are more of a technical nature. Please have a look and if you / TPG are OK, we are ready to proceed with execution.”

77. On 28 November Mr Senecal responded:

“Thanks, Konstantin - do have a couple queries on these changes: I—references to the existing Sian Pledge have been deleted. But my understanding is that the Sian Pledge exists today, and indeed cannot be formally terminated because Sian can take no legal action pending it being restored to good standing in the BVI. So why deleted? (and the corollary to this is that we call the new pledge the Second Ranking Share Pledge and Charge, and we cannot lose sight of the need to sign that up the same time we sign up this new put/call option.)...”

78. On 28 November Mr Kuzovkov wrote chasing Domidias for a response so the documents could be executed:

“Dear Anastasia, Could you please reply to Scott? From my side, I’m fine with his comments and would appreciate if you could accept them, so we could proceed with execution soon.”

79. On 29 November Ms Averyanova (from GHP Group which represented Domidias) responded:

“Dear Scott, good morning! We are waiting for confirmation from the UBO. Once we get it, we will revert to you immediately”.

80. On 29 November Mr Sukhanov (from GHP Group) responded with a new proposal:

“...On the below, the wording on Sian Pledge is accepted. On the second item (increased Call Option Share Price) we would suggest that the Call Option Share Price is automatically increased in case of a New Acquisition before 1 September 2020 save for a Resolution of the Board of the Buyer that such New Acquisition was made against the interests of the current shareholders/UBOs of the group (i.e. shareholders as of the date of the Call Option Agreement). In case of such Board resolution, the Seller shall have the right to contest it in the court, and before the court decision is made the call option cannot be exercised. This seems to be the balanced way to reflect the agreement of the parties.”

81. On 29 November Mr Senecal responded that the proposal needed to be considered by the principals.

82. On 3 December Mr Kuzovkov (from the Summa Group) chased for an update and set out his views on the outstanding issue:

“Dear colleagues, Just wanted to check whether we agreed on anything. As for suggestion that Denis [Sukhanov from GHP Group represented Domidias] mentioned, my understanding is as follows. There is a \$5m payment in case: (1) option is executed before September 1st, 2020, AND (2) Directors or Hellicorp didn't object the 5m payment (I suppose there should be 1-2 business days for such a notice; in case there is no objection within the timeframe, 5m is approved). Directors can object, however, on the ground that “change of control” deal (effectively, sale of control in FESCO) is hostile. In case they do object, there should be a rationale, specified in the resolution of Hellicorp (blocking \$5m). And this resolution/ objection could be disputed by Domidias in court. This is a guarantee for Domidias that decision of Hellicorp wouldn't be arbitrary.”

83. On 4 December Mr Senecal sent out the execution copies for signing by Domidias:

“Please find attached the Call/Put Option, clean and blackline against the draft circulated on 28 NOV, where I have implemented Konstantin's approach below, in execution form. And also attached is the DRAFT second-ranking pledge agreement, clean and blackline against prior draft. We understand there is a desire for the Call/put Option to be signed by Domidias today/tomorrow. That's ok, but then it should NOT be dated. Hellicorp will only sign after the internal review process of TPG is complete...”

84. On 6 December Ms Averyanova sent the signed option agreement for Domidias.

Discussion

85. The court must consider whether the claimant has a “realistic” as opposed to a “fanciful” prospect of success. A “realistic” claim is one that carries some degree of conviction. This means a claim that is more than merely arguable.
86. The Claimants' case is that Mr Economou took steps to protect the position of Sian - one possibility pleaded is that there was a written agreement to extend the 2012 Option Agreement or a contractual variation.
87. However there is no support for this possibility in the contemporaneous correspondence which is before the Court.
88. Firstly, the correspondence shows that Clearys took the view that Sian could not enter into any extension agreement until it had been restored to good standing in the BVI. This is evident from the email of 11 November from Mr Senecal:

“I the current put/call is with Sian. Sian continues to be in bad standing. Given that efforts have been ongoing since June (if not earlier) to restore Sian to good standing, I am not confident that it will be in good standing by 28 NOV expires. Sian cannot sign an extension until it is in good standing.”

2 *we should not allow the current option to expire without a new option in place. if Sian is not in good health soon, I suggest we plan to have a new option in place between Domidias and Hellicorp (rather than Sian)...* [emphasis added]

89. Although the Claimants submitted that in the negotiations that took place between November 2019-January 2020 Clearys were only acting for the indirect minority shareholder in Hellicorp, TPG Capital, it is clear from the emails that are before the Court that they were in effect coordinating the documentation process for Sian and Hellicorp.
90. Secondly, the correspondence shows that Mr Economou for Sian and Hellicorp agreed with Clearys' position that unless it was restored to good standing, Sian could not enter into an extension agreement. In response to Mr Senecal's proposal in his email of 11 November 2019 (set out above) that they should plan to have a new option in place between Domidias and Hellicorp rather than Sian, Mr Economou responded by email on 14 November 2019:

"I agree to proceed with a new option with Hellicorp. Please send me draft and if possible highlight any deviations from the Domidias Sian one for cross referencing purposes. Once I receive I will review and revert." [emphasis added]

91. Thirdly, Sian was not restored to good standing by 28 November 2019 and Clearys continued to be of the view that Sian could *"take no legal action pending it being restored to good standing"*. This is evident from an email that Mr Senecal sent on 28 November 2019 concerning the draft 2019 Option Agreement:

"...But my understanding is that the Sian Pledge exists today, and indeed cannot be formally terminated because Sian can take no legal action pending it being restored to good standing in the BVI..."

92. It was submitted for the Claimants (skeleton paragraph 41.6) that the fact that Sian was not at the time in good standing does not matter, since it is reasonable to assume that all would have understood that the legal effect of restoration is retrospective. However that was not the view taken by Clearys at the time: as is clear from the emails above, Clearys took the view that Sian could not sign up to an extension and Mr Economou, a director of both Sian and Hellicorp, did not dissent from that position.
93. The alternative to a signed agreement to extend or a contractual variation that is advanced in the Reply by the Claimants is that Sian was given a promise by Domidias not to interpret the 2012 Option Agreement as imposing a November 2019 deadline or that there was a representation or common understanding that the 2012 Option Agreement would be extended.
94. In my view there is no evidence currently before the Court to support these possibilities. The contemporaneous emails show that the parties were aware that the 2012 Option Agreement would expire on 28 November 2019 and initially there was a proposal to extend the 2012 Option Agreement. However the extension was subject to the caveat that Sian needed to be restored to good standing. This is reflected in a number of emails in October and November 2019. For example on 6 November 2019 Mr Senecal sent a draft to extend the call option to 31 December 2025 to a number of people including Mr Economou:

“Dear all: pursuant to the below exchange, please find attached draft documentation under which:

1—the call option on “strand 2” (i.e. of Sian with Domidias in respect all the shares in Merbau), which currently expires on 28 NOV 2019 is extended to 31 DEC 2025 (the call option itself is attached for reference);

2—various debt obligations of Merbau to Sian (arising from the 2012 financings) are extended to 31 DEC 2025.

Elias, could you please confirm the current legal addresses of Domidias and Sian?

Please note that we need Sian returned to good standing in the BVI prior to 28 NOV so that this can all be timely signed up... [emphasis added]

95. As referred to above, Mr Senecal then took the view that a new agreement with Hellicorp would be required but the emails show that the deadline for the expiry of the 2012 Option Agreement continued to be 28 November 2019 i.e. there had been no agreement or representation or understanding to extend the deadline. This is illustrated in an exchange between Mr Senecal and Mr Economou. On 18 November 2019 Mr Senecal sent an email to Mr Economou and amongst others Ms Mammad Zade:

“Dear Elias: pursuant to below, please find attached drafts of the replacement option agreement + share pledge, so that Hellicorp effectively replaces Sian under the existing arrangement. Blacklines are against the original option/share pledge. As you will see, we have respected the original docs, but as noted below, we did strike out the annual fee (which, as far as I know, has not been paid in practice). we did keep the \$400,000 payment to made option exercise. We specified a simple termination date of the new option to be 12/31/2025.

Please note that in the share pledge we need to insert existing debt of Merbau per cl 3.1(n).

Please let us know if you have any questions/comments. As you know, we should get this signed up before 28 NOV, and I’d hope we could get signed up this week. [emphasis added]

96. The Claimants submitted that the Court does not have the whole of the correspondence in relation to the negotiations and in particular there is a gap in the email correspondence between 21 November and 28 November 2019.
97. As the authorities make clear, the Court has to decide whether there are reasonable grounds for believing that disclosure may materially add to or alter the evidence relevant to whether the claim has a real prospect of success.
98. In this regard I take into account that there is nothing in the correspondence which is before the Court (for the period prior to 21 November and post 27 November) to suggest that having taken the view that Sian could not enter into an extension agreement and that the alternative was a new agreement with Hellicorp, the parties agreed that the position with Sian needed to be protected pending execution of the new agreement with Hellicorp. Rather the correspondence shows that the parties were progressing the finalisation of the 2019 Option Agreement but execution was delayed when last minute issues were raised on 28 November 2019.

99. On 28 November 2019 it appears from the emails that on the Sian/Hellicorp side they were ready to sign: Mr Kuzovkov (from the Summa Group) emailed Mr Senecal on 28 November copying amongst others Mr Economou:

“Please see below (hopefully) final draft of Domidias option. Colleagues from GHP (cc’cd) made some changes, I believe they are more of a technical nature. Please have a look and if you / TPG arc OK, we are ready to proceed with execution.” [emphasis added]

100. In response on the same day Mr Senecal raised a couple of queries on that draft to which Mr Kuzovkov sent a further email again on 28 November 2019 to Ms Averyanova (from GHP Group which represented Domidias) copying Mr Senecal and Mr Economou and pressing for the documents to be executed:

*“Dear Anastasia
Could you please reply to Scott?
From my side, I’m fine with his comments and would appreciate if you could accept them, so we could proceed with execution soon.”* [emphasis added]

101. On 29 November 2019 Ms Averyanova replied:

“Dear Scott, good morning! We are waiting for confirmation from the UBO. Once we get it, we will revert to you immediately”.

102. Thus even though the Court does not have the correspondence for the period between 21 and 27 November 2019, it is evident that on 28 November 2019 Mr Kuzovkov and Mr Economou were expecting the new 2019 Option Agreement to be executed imminently. If there had been an interim agreement or understanding reached in the preceding days (as the Claimants submit) for which the correspondence is not before the Court, it would not make sense for Mr Kuzovkov to be chasing hard with 2 emails sent on 28 November alone concerning execution of the new agreement.

103. It was submitted for the Claimants (skeleton paragraph 41.7) that the fact that the parties were negotiating the 2019 Option Agreement is consistent with the fact that the parties had found an interim solution to the potential termination of the 2012 Option Agreement and that if no interim solution had been found, those representing the SGS Investment Branch would have acted with greater haste in the negotiations. However in my view the emails show that the matter was being pursued with some urgency around 28 November and immediately thereafter. However despite Mr Kuzovkov chasing for execution it is clear that a new issue arose which delayed signing - Mr Sukhanov proposed in an email on Friday 29 November 2019 that the Call Option Share Price would be increased in case of a new acquisition before 1 September 2020 subject to certain conditions. This led to a further exchange of emails. On Tuesday 3 December 2019 Mr Kuzovkov chased the parties for a resolution:

“Just wanted to check whether we agreed on anything...”.

104. On 4 December Mr Senecal sent out revised drafts in execution form:

“Please find attached the Call/Put Option, clean and blackline against the draft circulated on 28 NOV, where I have implemented Konstantin's approach below, in execution form. And also attached is the DRAFT second-ranking pledge agreement, clean and blackline against prior draft.

We understand there is a desire for the Call/put Option to be signed by Domidias today/tomorrow. That's ok, but then it should NOT be dated. Hellicorp will only sign after the internal review process of TPG is complete...”. [emphasis added]

105. Whilst I accept the Claimants’ submissions (skeleton paragraph 41.4) that the correspondence shows that in November 2019 Sian's management and the lawyers were aware of the need to protect Sian’s position prior to the end of the month, the correspondence in my view shows that they were working towards execution of the 2019 Option Agreement and anticipating that signing would take place by 28 November but with last minute comments being raised on both sides were not in a position to sign on 28 November.
106. It was submitted for the Claimants (skeleton paragraph 41.5) that it would be inconsistent with the October and November 2019 emails, with their fiduciary duties and with the object of the Conspiracy for Mr Economou and Ms Mammad Zade to *“change course and abandon the protection of the contractual position”*. However in my view the contract expired on 28 November 2019 and thus it was not a case of abandoning the contractual protection but trying to put something in place when it expired. The contemporaneous correspondence shows that the parties adopted the course of negotiating a new agreement with Hellicorp because Sian could not enter into an extension agreement and expected that this would be executed by the deadline of 28 November 2019 and provide the protection.
107. *“A “realistic” claim is one that carries some degree of conviction.”* In reaching its conclusion the court must take into account *“not only the evidence actually placed before it on the application for summary judgment, but also the evidence that can reasonably be expected to be available at trial.”*
108. In my view this is a case where the alternative case which is advanced (that Sian reached a legally binding commitment with Domidias that the 2012 Option Agreement would not expire in November 2019) has no basis on the evidence of the contemporaneous correspondence and I have addressed above why I am of the view that there are no reasonable grounds to infer that disclosure and in particular emails for the period 21 November to 27 November 2019 would alter the conclusion.
109. It was submitted for the Claimants that it was *“wholly implausible”* that the Claimants would have simply allowed the right to lapse but in my view the contemporaneous evidence shows that the risk was identified, the right was not disregarded or abandoned but the parties sought to agree an option arrangement with Hellicorp in place of the agreement with Sian which for the reasons referred to above in the event meant that the 2019 Agreement did not get signed by the deadline of 28 November.
110. It was submitted that the Claimants are hampered by a lack of access to the relevant documents as a result of the Conspiracy. However the Claimants also submitted (skeleton paragraph 41.3) that in this instance the interests of Sian and the interests of those behind the Conspiracy were aligned in that an extension of the 2012 Option Agreement would

preserve the value of Sian that the conspirators were trying to obtain. It appears that the Claimants' case is that as part of the alleged Conspiracy, Mr Economou and others would have sought to enter into an extension or otherwise preserve the interests of Sian and the SGS Investment Branch. On this basis I cannot see that Mr Economou or others alleged to be involved in the Conspiracy would have documents that contradict the contemporaneous emails which show that there was an intention to preserve the benefit of the Call Option but to achieve that through a new agreement with Hellicorp.

Conclusion on alternative case

111. In my view for all the reasons discussed above, I find that there is no realistic prospect of the Claimants succeeding on this alternative case (as more particularly set out in paragraph 8.4 of the Reply) that Sian reached a legally binding commitment with Domidias that the 2012 Option Agreement would not expire in November 2019.

Summary Judgment in relation to the Alleged 2019 Option Agreement

112. The background to this issue is set out in the draft Amended Particulars of Claim which recites how a version of the 2019 Option Agreement signed by Mr Economou came to light in August 2020:

*“26. On or around 27 August 2020, Mr Shagav Gadzhiev, a director of both Claimant, received an email from Ms Ekaterina Vlasova, head of the “family office” (i.e. the entity managing the personal assets and enterprises of Mr Magomedov), attached to which was a document entitled “Call and Put Option Agreement re Shares of Merbau Synergy Limited Between Domidias Limited and Hellicorp Investments Ltd” (“2019 Option Agreement”). The document was signed by Mr Elias Economou who was at the time a director of Hellicorp, and had been found amongst the documents of Mr Economou.
27. It is unclear to the Claimants how the 2019 Option Agreement came to be agreed. Neither Mr Shagav Gadzhiev (a director of Hellicorp), nor Mr Magomedov, had any knowledge of the 2019 Option Agreement prior to Ms Vlasova’s email.”*

113. Hellicorp originally pleaded that it was unable to say whether or not the Alleged 2019 Option Agreement had been entered into. In its draft Amended Particulars of Claim the Claimants plead a revised case that Mr Economou had the requisite authority (whether actual or ostensible) to enter into the 2019 Option Agreement on behalf of Hellicorp. To the extent that it is required, Hellicorp now states that it adopts and/or ratifies Mr Economou's actions in entering into the 2019 Option Agreement on behalf of Hellicorp.
114. Accordingly it is the Claimants' case that the 2019 Option Agreement is valid and binding and Hellicorp is entitled to exercise its rights to acquire the Merbau shares under that agreement.
115. The Defendants' position advanced on the hearing of the Application (and in their skeleton paragraph 47) is that it is common ground that Domidias signed the December version of the 2019 Option Agreement (sent out by Mr Senecal with his email of 4 December 2019 referred to above) and that the sending of that December version to Hellicorp on 6 December 2019 constituted an offer by Domidias to contract on those

terms. However the Defendants submitted that the contemporaneous documentation demonstrates that Hellicorp did not accept the offer.

Contemporaneous documentation

116. The Court has evidence of contemporaneous emails between 19 December 2019 and 23 January 2020.

117. On 19 December Mr Senecal wrote:

“A reminder that we have yet to receive the requisite Merbau information to complete the pledge (and as such Hellicorp has not yet executed the put/call).”

118. There were then various emails chasing for financial information.

119. On 30 December Mr Economou responded to Mr Senecal:

“For Merbau you already have the registered address. As for the financial liabilities amount I have referred the question to the auditors to give us the exact figure (there is a relevant figure in the 2017 FS and there has been no activity ever since but we want to get the correct figure if there have been any adjustments etc”).

120. On 14 January 2020 Mr Senecal chased Mr Economou for a response to his request for information for the pledge:

“Elias, have the auditors with Merbau confirmed that figure?”.

121. On 16 January Mr Economou replied:

“They are working on it and am pushing them to get an answer”.

122. Also on 16 January Mr Economou sent a further email with the missing information requested by Mr Senecal for the pledge:

“Merbau address is: Akara Bldg, 24 De Castro Street, Wickhams Cay 1, Road Town, Tortola, British Virgin Islands And as per auditors confirmation: 3.1(n) as of the date hereof, Merbau has no outstanding financial liabilities save for the following amounts: USD 197, 903.560 Hope this concludes the matter.”

123. On 16 January Mr Senecal circulated execution versions of the pledge and the 2019 Option Agreement for signing by Hellicorp:

“Much appreciated, Elias. We have updated the pledge accordingly, as well as implementing anastasia's comment below re the notice provision in the pledge, and corrected a typo in clause 4.2.1 of the put/call Clean and blacklines attached. Anastasia, if this looks good for you, could you please then arrange executed of both documents by Domidias (but do not date) and then we will procure execution by Hellicorp.” [emphasis added]

124. On 20 January 2020 Mr Senecal sent a further email to a number of individuals including Mr Sukhanov, Ms Averyanova, Mr Kuzovkov, Ms Mammad Zade and Mr Economou chasing execution by Domidias:

“Anastasia, Denis, can I check that Domidias will be signing these two documents this week? thanks, scott”.

125. On 23 January 2020 Mr Senecal sent a further email to the same individuals, again chasing for execution by Domidias:

“Anastasia, denis [Sukhanov from GHP Group who represented Domidias], would be good to document the deal and sign this week if possible....thanks, scott”.

126. On 20 February 2020, Domidias sent a letter to Hellicorp which stated:

“On 06 December 2019, we sent to you Call and Put Option Agreement re shares of Merbau Synergy Limited between Domidias Limited (“Domidias”) and Hellicorp Investments Ltd (the “Option Agreement”) signed on behalf of Domidias. As by the current date we did not receive countersigned Option Agreement from your side we recall the Option Agreement and kindly ask you to note that Domidias has to think over again its position regarding entering into the proposed Option Agreement.”

Claimants’ submissions

127. It was submitted for the Claimants that the 2019 Option Agreement was signed by both Domidias and Hellicorp. On 6 December 2019 a representative of Domidias (Ms Averyanova) returned a signed copy and the Claimants noted that in their skeleton that the Defendants have now accepted this was an offer on the part of Domidias.
128. The Claimants’ case is that the issue is whether acceptance was communicated to Domidias (skeleton paragraph 49.3). It was submitted that it would have been logical to communicate acceptance having signed it and to ensure the value of Hellicorp was preserved (which conspirators sought to take control of).
129. It was further submitted that:
- a. The emails with the updated drafts of 16 January and the emails of 20 and 23 January were *“in no way inconsistent with the agreement having already been concluded”* (skeleton paragraph 49.5).
 - b. On 20 February 2020 Mr Sukhanov on behalf of Domidias sought to withdraw the offer but that could have no effect unless the agreement had not yet been concluded (skeleton paragraph 49.6).

Discussion

130. There were two main arguments advanced by the Defendants in support of this limb of their Application: one that the draft circulated on 16 January 2020 amounted to a counter offer and the second that the acceptance of the offer of 6 December was not

communicated to Domidias. I propose to deal with the latter as this in my view disposes of the issue.

131. I remind myself that the Court must not conduct a “mini trial” but also that this does not mean that the Court must take at face value and without analysis everything that a claimant says in his statements before the Court. In some cases it may be clear that there is no real substance in factual assertions made, particularly if contradicted by contemporaneous documents.
132. The Claimants in their oral submissions addressed the question of whether there was a real prospect that the Claimants would be able to establish at trial that the offer was communicated to Domidias by reference to two time periods: from 19 December 2019 to 16 January 2020 and from 16 January 2020 to 19 February 2020.
133. It seemed to be accepted for the Claimants that the email of 19 December 2019 from Mr Senecal showed that Hellicorp had not executed the document at that point. The email which was sent to Ms Averyanova, Mr Kuzovkov and Ms Mammad Zade and copied to Mr Sukhanov and Mr Economou read:

“A reminder that we have yet to receive the requisite Merbau information to complete the pledge (and as such Hellicorp has not yet executed the put/call).”
[emphasis added]

134. There was a suggestion by Counsel for the Claimants in oral submissions that Mr Senecal might not know that Hellicorp had executed the document at that point but the contemporaneous correspondence does not show any objection raised by anyone on the Summa Group side in response to this email. The evidence therefore suggests that even if the agreement had been signed by Mr Economou at this time, the acceptance of the offer had not been communicated to Domidias. Mr Economou does reply to the email but in his reply Mr Economou addresses the missing information requested by Mr Senecal not the issue of execution of the 2019 Option Agreement.
135. The question is therefore whether it is realistic for the Claimants to assert that having signed the 2019 Option Agreement, Mr Economou must have communicated this to Domidias and thus the offer must have been accepted during the period from 19 December 2019 to 15 January 2020.
136. It is notable that in the email of 19 December (above) Mr Senecal stated that they were waiting for information to complete the pledge and links the finalisation of the pledge to the execution of the 2019 Option Agreement:

“...as such Hellicorp has not yet executed the put/call”. [emphasis added]

137. The contemporaneous emails show that the details for the pledge were requested but not obtained until the revised draft of the pledge was sent out on 16 January 2020. There are a string of emails between Mr Senecal and Mr Economou concerning the missing information and at no point does Mr Economou mention that he has signed the December version let alone communicated acceptance of the offer to Domidias.
138. On 30 December Mr Economou wrote to Mr Senecal:

“For Merbau you already have the registered address. As for the financial liabilities amount I have referred the question to the auditors to give us the exact figure (there is a relevant figure in the 2017 FS and there has been no activity ever since but we want to get the correct figure if there have been any adjustments etc.”

139. On 14 January Mr Senecal wrote:

“Elias, have the auditors with Merbau confirmed that figure?”

to which Mr Economou responded on 16 January with 2 emails. In the first Mr Economou said:

“They are working on it and am pushing them to get an answer.”(sic)

140. In the second he wrote:

*“Merbau address is: Akara Bldg, 24 De Castro Street, Wickhams Cay 1, Road Town, Tortola, British Virgin Islands
And as per auditors confirmation:3.1(n) as of the date hereof, Merbau has no outstanding financial liabilities save for the following amounts: USD 197, 903.560
Hope this concludes the matter.”*

141. In response to the Defendants’ submission (paragraph 48 of their skeleton) that Mr Senecal made it clear in correspondence that Hellicorp would not execute either the pledge or the put/call option until after the information regarding the Merbau shares had been provided, it was submitted for the Claimants (paragraph 52.9 of their skeleton) that the position of Mr Senecal was not relevant as Senecal acted on behalf of TPG not Hellicorp.

142. But as referred to above, in my view the contemporaneous correspondence shows that Mr Senecal was clearly handling the documentation and taking the lead on the documentation of the deal for Sian and Hellicorp. In any event, at no point does Mr Economou indicate that he is taking a different approach; rather as referred to above he was in direct contact with Mr Senecal in January providing the details for finalising the pledge.

143. It was submitted for the Claimants that it would have been logical to communicate acceptance having signed it and to ensure the value of Hellicorp was preserved. But in my view it was equally logical to wait until the two documents were ready for execution as contemplated by Mr Senecal. The pledge supported the obligations and thus the value of the 2019 Option Agreement by creating security over the shares.

144. The Court must take into account not only the evidence actually placed before it on the application for summary judgment, but also the evidence that can reasonably be expected to be available at trial. The Claimants submitted that there is a gap in the email chain from 23 January 2020 to 20 February 2020. It was submitted that there must have been internal correspondence.

145. However in relation to the period from 19 December 2019 to 16 January 2020, the Court has the contemporaneous evidence which shows the negotiations that were taking place between the two sides through Clearys and in particular the correspondence between Mr Economou and Clearys. There are no reasonable grounds for an inference that other evidence including internal correspondence for the period after 23 January 2020 will alter or add to the inference that in the period from 19 December 2019 to 16 January 2020 Mr Economou was going along with the proposition that the pledge needed to be finalised before the 2019 Option Agreement would be executed and had not accepted the offer made by the execution of the December version.
146. The other time period during which the offer could have been accepted is from 16 January 2020 to 19 February 2020. (Counsel for the Claimants appeared to accept that Mr Economou could not have accepted the offer on the December version after the letter which was sent on 20 February.) Counsel for the Claimants appeared to accept that it was less likely that Mr Economou sought to bind Hellicorp to the December version of the 2019 Option Agreement after the revised version had been sent out on 16 January 2020. He suggested that it was possible that after 16 January 2020 Mr Economou had signed the “wrong” version and communicated that to Domidias but that is clearly less likely as a matter of common sense (Mr Economou was a lawyer and a director).
147. More significantly there is nothing in the contemporaneous emails to support the Claimants’ case that the December version of the 2019 Option Agreement was accepted during the period 16 January to 19 February 2020 and the emails of 20 and 23 January 2020 tend to suggest that this was not the case. In those emails Mr Senecal was chasing Domidias to execute the revised documents and no objection was raised by Mr Economou or Mr Kuzovkov or Ms Mammad Zade (all of whom were copied to both emails) that the earlier version had already been executed and come into effect such that Mr Senecal had no need to chase for execution.
148. The Court has to consider whether there are reasonable grounds for believing that disclosure may materially add to or alter the evidence relevant to whether the claim has a real prospect of success.
149. I accept that the document was signed by Mr Economou and there is no evidence before the Court as to why he signed the document. The Defendants submitted that the Claimants could have sought evidence from the individual who found the document and put that before this Court. However the absence of any such evidence is largely irrelevant to the issue now before this Court since the fact that he signed the document is not in dispute. The Claimants have to show that they have a realistic prospect of success at trial which means they have to have a realistic prospect of showing that Mr Economou communicated his acceptance of the offer made by Domidias by the execution of the December version.
150. I also have to consider whether the alleged Conspiracy is likely to make a difference to the prospects of the Claimants on this issue.
151. I am mindful of the passages in *Gulati* on which the Claimants placed particular reliance (above) in relation to the fact that disclosure has not yet taken place in a case where there is an alleged conspiracy and I note in particular the following passage in that case:

“It is a familiar state of affairs that a claimant is ultimately reliant on disclosure from the other side in order to bring his case home, particularly in cases where the nature of the wrong is such that the defendant's activities were covert so that, if the case is good, the defendant is likely to have a substantial amount of material in its hands with no equivalent in the hands of the claimant. Unless the prospects of getting disclosure are “fanciful”, the claimant is generally entitled to maintain its case in those circumstances. That is not to say that claimants are entitled to embark on speculative cases in the hope that disclosure will throw up something useful. The claimant must have more than that to start with, but the inability to make a full case without disclosure is not, in my view, a bar to starting the litigation in the first place.”

152. It is alleged by the Claimants (skeleton paragraph 13) the key individuals said to be Ms Mammad Zade, Mr Kuzovkov and Mr Economou at some point ceased acting in SGS's interest and that of Mr Magomedov and became hostile. The Claimants submitted (skeleton paragraph 56) that disclosure is required and investigation of when they joined the conspiracy.

153. Mr Keillor in his evidence said that:

“As a consequence of the alleged FESCO Conspiracy, the Claimants say that they have not yet been able to obtain all of the relevant evidence because this has either been concealed from them or has otherwise not been forthcoming, particularly in relation to the 2019 Option Agreement.”

154. The Claimants submitted that the evidence of Ms Danon that the Defendants do not hold any further documents, should not stand at face value and there is no suggestion that there has been a proper process of collecting electronic documents. The evidence of Mr Keillor is that the Claimants have not been able to access all company-related records and information which were maintained on Mr Economou's personal computer(s) and in his files, and that the Claimants were not provided with any handover of materials by Mr Economou presumably because he is now hostile to the interests of Mr Magomedov.

155. However it was also submitted for the Claimants (skeleton paragraph 52.4) that compliance by Mr Economou with his fiduciary duties and the interests of those behind the Conspiracy were aligned; that entry into the 2019 Option Agreement preserved and enhanced the value of the SGS Investment Branch which the conspirators were seeking to obtain.

156. I find it difficult to see that disclosure and investigation of the alleged Conspiracy including the allegation that evidence has been concealed is likely to affect the outcome of this particular issue such that it should be left to trial. The Claimants pleaded that:

“The primary objective of the Conspiracy is to interfere with and ultimately wrest control of the SGS Investment Branch's shareholding in FESCO away from Mr Magomedov for less than its fair value and for the sole benefit of the Hostile Parties and/or those who control them.”

If the intention of Mr Economou and others was to wrest control of the shareholding in FESCO away from Mr Magomedov it is difficult to see why Mr Economou would accept

the offer made by the execution of the December version. It would make more sense for him not to enter into a binding commitment under the 2019 Option Agreement at all and thus to deprive Hellicorp of the right to purchase shares in FESCO from Domidias.

157. Even if as was submitted to this Court, entry into the 2019 Option Agreement preserved and enhanced the value of the SGS Investment Branch which the conspirators were seeking to obtain, such that compliance by Mr Economou with his fiduciary duties and the interests of those behind the Conspiracy were aligned, I cannot see why it would have been in furtherance of his fiduciary duties or the alleged Conspiracy to have bound Hellicorp to the December version in circumstances where the parties were working on finalising the pledge agreement before executing both documents and where the pledge created security which supported the value of the 2019 Option Agreement and there is nothing to support this theory in the contemporaneous documents which are before the Court.
158. In my view for the reasons discussed above this is not a case where the disclosure even having regard to the alleged conspiracy, can reasonably be expected to make a difference. In my view this is in the category of a speculative case where the Claimants merely hope that disclosure will throw up something useful.

Conclusion in relation to the 2019 Option Agreement

159. For the reasons discussed above, I find that the Claimants do not have a realistic prospect of establishing at trial that the 2019 Option Agreement was concluded.

Strike-Out of the purported Conspiracy averments

160. Given my findings above the issue of whether to strike out the purported Conspiracy averments does not arise for determination.