Neutral Citation Number: [2019] EWHC 3196(Ch)

Case No: BL-2018-002386

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
BUSINESS LIST (ChD)

The Rolls Building
7 Rolls Building
Fetter Lane
London EC4A 1NL

Date: 21 November 2019

Before :

MASTER TEVERSON

- -

Between :

(1) JAMES KINSELLA	**Claimants**
(2) ROBERT MCNEAL	
- and -	
(1) EMASAN AG	**Defendants**
(2) SANDOZ FAMILY FOUNDATION	

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Victoria Windle and Tom Coates of counsel (instructed by **Withers Worldwide LLP**) for the Claimants
Tom Ford of counsel (instructed by **Mayer Brown International LLP**) for the **Defendants**

Hearing dates: 3 and 25 July 2019

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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MASTER TEVERSON

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Introduction

1. The claim arises out of a dispute between the parties as to the sums payable to the Claimants consequential upon the sale of the Interoute group of companies in 2018.

2. The Claimants are US nationals and residents. They carry on business together as consultants and turn-around experts in the technology and telecommunications sectors. Between 1999 and 2018, the Claimants provided consultancy services in respect of the Interoute Group, a group of associated companies which carried on business as providers of telecommunications networks and private cloud services.

3. The First Defendant ("Emasan") is a company incorporated in Switzerland and is a wholly owned subsidiary of the Second Defendant. The Second Defendant, ("the Foundation") is a family foundation organised and existing under the laws of Liechtenstein.

4. The claim was issued on 12 November 2018. On 28 November 2018 the Claimants were granted permission to serve the claim form out of the jurisdiction on the Foundation in Liechtenstein. On 4 February 2019 the Claimants served Emasan at its statutory seat in Switzerland. Service was stated as being made pursuant to CPR r.6.33 on the basis that each claim made against Emasan was a claim which the court had power to determine under the Lugano Convention. The Lugano Convention is defined in CPR 6.31(j) to mean the Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, between the European Community and the Republic of Iceland, the Kingdom of Norway, the Swiss Confederation and the Kingdom of Denmark and signed by the European Community on 30th October 2007.

5. Emasan acknowledged service on 25 February 2019 stating an intention to contest jurisdiction. On 11 March 2019 Emasan applied under CPR r.11 for a declaration that the English Court does not have jurisdiction to try claims based on alleged breaches of what is referred to in the Particulars of Claim as "the 2002 Agreement".

6. The Foundation acknowledged service on 11 June 2019 also stating an intention to contest jurisdiction. On 14 June 2019 the Foundation issued its own jurisdiction challenge. The basis of its challenge is that the claims referred to by it as "the 2002 Agreement Claims, "the Ordinary Share Total Consideration Claims" and "the Misrepresentation Act Claims" do not satisfy the merits threshold to warrant the Foundation being required to submit to the jurisdiction in order to defend them.

7. On 24 June 2019, without prejudice to their jurisdiction challenges, Emasan and the Foundation applied for summary judgment asking the court to dismiss the 2002 Agreement Claims, the Ordinary Share Total Consideration Claims and the Misrepresentation Act Claims. It was explained to me by Mr Tom Ford, counsel appearing before me for Emasan and the Foundation, that the summary judgment application relied on exactly the same evidence as the Foundation's jurisdiction challenge and that, if successful, would result in those claims being dismissed against both Emasan and the Foundation.

8. On 26 June 2019, the Claimants applied for permission to amend their Particulars of Claim in accordance with the draft Amended Particulars of Claim attached to the application notice.

9. In summary, there are four applications before me:-

(1) Emasan's jurisdiction challenge dated 11 March 2019;

(2) The Foundation's jurisdiction challenge dated 14 June 2019;

(3) Emasan and the Foundation's combined summary judgment application dated 24 June 2019;

(4) The Claimants' application for permission to amend the Particulars of Claim dated 26 June 2019.

10. The legal principles to be applied in determining each of these applications was not in dispute before me.

11. In relation to Emasan's jurisdiction challenge, I was referred to the judgment of Green LJ in *Kaefer Aislamientos SA de CV v AMS Drilling Mexico SA de CV* [2019] EWCA Civ 10; [2019] 1 WLR 3514. In *Kaefer* at paragraph 70, Green LJ recorded that in *Goldman Sachs International v Novo Banco SA* [2018] 1 WLR 3683, the Supreme Court had unanimously approved Lord Sumption JSC's three-limbed reformulation of the test to be applied on applications disputing gateway jurisdiction set out in *Canada Trust v Stolzenberg (No 2)* [1998] 1 WLR 547. That reformulation is:-

"What is meant is (i) that the claimant must satisfy a plausible evidential basis for the application of a relevant jurisdictional gateway; (ii) that if there is an issue of fact about it, or some other reason for doubting whether it applies, the court must take a view on the material available if it can reliably do so; but (iii) the nature of the issue and the limitations of the material available at the interlocutory stage may be such that no reliable assessment can be made, in which case there is a good arguable case for the application of the gateway if there is a plausible (albeit contested) evidential basis for it. I do not believe that anything is gained by the word 'much', which suggests a superior standard of conviction that is both uncertain and unwarranted in this context."

12. Guidance on the proper application of the test was given by Green LJ between paragraphs 74-80 of his judgment. These paragraphs make clear that:-

(1)The test to be applied is a relative one – the court will consider who has the better of the argument;

(2) The test is not to be determined on the balance of probabilities, which standard of proof is apt for use at trial, but not at the interim stage;

(3) There is no requirement for the claimant to show it has "much" the better of the argument. It need only show, to the appropriate standard, that it has the better argument;

(4) Where the court is unable to say which party has a better argument, then if the claimant has put forward a plausible evidential basis for jurisdiction, there is a good arguable case for that jurisdiction.

13. At paragraphs 81 to 83, Green LJ considered the relationship of this test with Article 25 of the Recast Brussels Regulation. He concluded at paragraph 83:-

"I consider in such a case as the present where the background legal context is article 25 some regard must be paid to the fact that …the clear and precise" test must be taken into account as a component of the domestic test and the melding of the two is necessary to ensure that domestic law remains consistent with the Regulation. As with so much of the language used in this context, that which is "clear and precise" is not easy to define with precision. But I would rely upon it as providing at least an indication of the quality of the evidence required. It supports the conclusion that the prima facie test in limbs (i) and (ii) is a relative one; and in so far as the court cannot resolve outstanding material disputes (limb (iii)) it affords an indication as to the sort of evidence that a court will seek. I would not go much beyond this though."

Paragraphs 81 to 83 of Green LJ's judgment are also applicable in my judgment where the background legal context is Article 23 of the Lugano Convention.

14. In relation to the Foundation's jurisdiction challenge, it was agreed that the Claimants must satisfy the court that there is a serious issue to be tried on the merits of the case. In *Carvill America v Camperdown UK* [2005] EWCA Civ 645, Clarke LJ said that it was common ground between the parties before him that the merits test under CPR 6.20 (now CPR 6.37) is in substance no different from the test of a real prospect of success under CPR 3.4 or 24.2. The underlying rationale (as explained by Toulson J. in *MRG v Englehard Metals Japan* [2004] 1 LI Rep 731) is that the court should not subject a foreign litigant to proceedings which the defendant would be entitled to have dismissed summarily. Clarke LJ stated that it was, however, important in his opinion to have in mind that the test is not a high one. He said that a claimant has a real prospect of success if its chances of success are not fanciful.

15. In relation to the summary judgment application of Emasan and the Foundation, I was referred to the principles formulated by Lewison J. in *Easyair Ltd v Opal Telecom Ltd* [2009] EWHC 339 (Ch) at [15] and approved by the Court of Appeal in *AC Ward & Sons Ltd v Catlin (Five) Ltd* [2009] EWCA Civ 1098 at 24:-

"(i) The court must consider whether the claimant has a "realistic" as opposed to a "fanciful" prospect of success: Swain v Hillman [2001] 1 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 will 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 at 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] F.S.R. 3;

(vii) On the other hand it is not uncommon for an application under Pt 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 all 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 the 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."

16. In relation to the Claimants' application for permission to amend the Particulars of Claim, it was common ground before me that following *NML Capital Limited v Republic of Argentina* [2011] UKSC 31 there was no longer any objection to amending a pleading which had been served out of the jurisdiction (whether by amending to add a cause of action or to substitute one), unless the effect would be to add a claim in respect of which leave could not, or would not, have been given to serve out.

17. An application to amend will be refused if it is clear that the proposed amendment has no real prospect of success. The test to be applied is the same as for summary judgment under CPR Part 24. The court may reject an amendment seeking to raise a version of the facts of the case which is inherently implausible, self-contradictory or is not supported by contemporaneous documentation: Carr J in *Quah v Goldman Sachs International* [2015] EWHC 759 (Comm) at paragraph 36. The further principles dealing with very late amendments are not applicable in the present case.

Background facts and Claimants' case as set out in the Particulars of Claim

18. The facts on which the Claimants rely are set out in the Particulars of Claim. I shall summarise the background facts in order to put the applications in context. I am not thereby to be understood or treated as making any findings of fact.

19. On or around 6 December 2002, the parties orally agreed, on a conference call between the Claimants and Mr Gabriel Pretre, Mr Victor Bischoff and Mr Pierre Landolt for the Defendants, that the Claimants would for a nominal payment each be entitled to an interest in 2% of the issued share capital of the Interoute Group holding company. At the time the parent company of the Interoute Group was Interoute Communications Limited ("ICL").

20. It was agreed that such interest would not be capable of dilution until the occurrence of a liquidity event in the form of a sale of the Interoute Group or a flotation. This is referred to in the Particulars of Claim as "the 2002 Agreement".

21. Pursuant to the terms of the 2002 Agreement, on or around 28 October 2003, the Claimants each purchased 200 ordinary shares in Interoute Communications Holdings Limited ("ICHL") which by then had replaced ICL as the group's holding company, at €0.10 per ordinary share, at a total of €20. This represented 2% each of ICHL's entire issued share capital.

22. The share purchase was recorded in letters sent by each of the Claimants to Mr Pierre Landolt of the First Defendant and acknowledged as agreed and received on behalf of the Foundation by Mr Gabriel Pretre. The 2003 Letters state:-

> *"As per the agreement with you, Victor Bischoff and Gabriel Pretre earlier this year, I agree to purchase an undilutable 2% of [ICHL] at the current fair market value established by the Inland Revenue Service of the United Kingdom. As you know, that is €.10 per Ordinary Share, a price that represents full and adequate consideration for these shares. Specifically, of the 10,000 Ordinary shares of ICHL, I am purchasing 200 Ordinary shares at €.10/share for a total of €20."*

23. The 200 Ordinary Shares were not transferred to each of the Claimants but were held by Emasan (then Emasan SA) as nominee for each of the Claimants.

24. On 31 December 2004 Emasan transferred all its shares in ICHL, including the shares it held as nominee for the Claimants, to Broad BMedia Investments AG ("BBM").

25. From that date until 27 July 2005, BBM held the Claimants' shares as nominee for each of them.

26. On 27 July 2005 BBM transferred all its shares in ICHL to Interoute Communications Holdings SA ("ICHSA"), a company incorporated in Luxembourg (and hence referred to in the Deeds before me as "Luxco") in exchange for the issue of ordinary shares in ICHSA. The First and Second Claimants' 200 shares in ICHL were each exchanged for 75,000 shares in ICHSA.

27. During the summer of 2006 it was agreed between the parties that each of the Claimants would be granted the right to acquire up to 2.4% of the share capital of ICHSA. The Claimants' entitlement was raised from 2% to 2.4% to compensate them for any loss due to the tax treatment of their interests resulting from the delayed implementation of the 2002 Agreement.

28. On 30 October 2006, the Claimants entered into separate Option Deeds with BBM and the Foundation pursuant to which BBM granted to each of the Claimants an option to

acquire certain shares in ICHSA in accordance with the terms of that deed ("the Option Deed").

29. The Option Deed, as set out in the Particulars of Claim, recited that:-

"(A) In or around December 2002, [each of the Claimants] agreed with [the First Defendant], who at the time was the sole shareholder in [ICHL], that [each of the Claimants] would be entitled to an interest in 2% …of the issued share capital of ICHL for a nominal payment. That interest was intended to be "evergreen" (i.e. incapable of being diluted) until the occurrence of a liquidity event for [the First Defendant] or related parties (e.g. a trade sale or flotation)…

(B) [Each of the Claimants] agreed to purchase 200 Ordinary Shares ["the ICHL Shares"] in ICHL from [the First Defendant] in October 2003 and paid €20 for the Shares. When purchased, the ICHL Shares represented 2% of the issued Ordinary Shares of ICHL. The letter agreement pursuant to which [each of the Claimants] acquired the [ICHL Shares] referred to this entitlement as being "undilutable". However due to re-launch of the Interoute group, the challenging conditions being experienced in the telecommunications market, the letter agreement (and associated legal documentation) failed to implement the intentions of the parties and the [ICHL Shares] did not carry any protection against dilution whether in the form of rights to additional shares in the event of the issue of further shares or otherwise (other than normal pre-emption rights).

(C) The [ICHL Shares] are now represented by a holding of 75,000 ordinary shares [by each of the Claimants] in [ICHSA]…

(D) This Deed is to grant [each of the Claimants] a right to acquire shares in [ICHSA] in lieu of any rights he may have in relation to shares in ICHL.

30. Under clause 2.1 of the Option Deed, BBM granted to each of the Claimants an option to acquire the number of Shares set out in Clause 2.2. Clause 2.2 stated that the number of Shares subject to the Option was equal to 2.4% of the Ordinary Share Capital at the time of exercise, less the holding of 75,000 ordinary shares in ICHSA already held by each Claimant.

31. Clause 2.3 provided that the exercise price payable on any exercise of the Option was to be €1, regardless of the number of Shares acquired on the exercise.

32. "Share" was defined in clause 1 to mean an Ordinary Share of €1.25 in the capital of ICHSA (referred to as "Luxco") and "Shares" was to be construed accordingly.

33. Clause 16.1 of the Option Deed contained an unconditional guarantee by the Foundation to unconditionally and irrevocably guarantee to each of the Claimants the *"due and punctual performance, observance and discharge by BBM of its obligations under this Deed"*.

34. Clause 17 of the Option Deed contained an entire agreement clause in the following terms:-

"This Deed, together with the Share Deed and, to the extent relevant, the [other Claimant] Option, represents the whole and only agreement between the parties in relation to the subject matter of this Deed and supersedes any previous agreement between the parties (and between [the First Defendant] and [the relevant Claimant] in relation to that subject matter. In particular, this Deed and the Share Deed replace any right of [the relevant Claimant] to acquire shares in ICHL, whether from [the First Defendant] or BBM or any person connected with those companies."

35. Clause 18.1 provided that the Option Deed should be governed by and construed in accordance with English Law. Clause 18.2 provided that each party irrevocably submitted to the non-exclusive jurisdiction of the English Courts to settle any dispute which might arise *"under or in connection with this Deed or the legal relationships established by this Deed"*.

36. The Option Deed was sent to the Claimants under cover of a letter from Pierre Landolt on behalf of the Second Defendant. The letter stated:-

"As you know, the commercial intent behind the Option Deed is to implement our previous agreement reached in October 2003, when the Foundation agreed that you both would be entitled to a 2% (two per cent) interest in the then holding company of the Interoute group, which interest intended to be "evergreen" (i.e. incapable of being diluted) until the occurrence of a liquidity event (e.g. a trade sale or flotation). Unfortunately, the re-launch of Interoute and the challenging conditions being experienced in the telecommunications markets, the necessary capital restructurings of the Company and the need in 2005, to find a strategic partner took all precedence and the formal legal documentation required to implement our previous agreement was never put in place.

"Recognising that if our previous agreement had been implemented as was originally anticipated, it is possible that you might have achieved a more beneficial tax treatment of your interest in Interoute, we have, under the terms of the Option Deed, increased the number of Interoute shares in respect of which the option is granted from 2% (two per cent) to 2.4% (two point four per cent) (the ***"the Option"****)."*

37. The Share Deeds referred to in the Option Deed were executed on 11 April 2007. The Share Deeds confirmed that the Claimants had directed BBM to transfer the 200 Ordinary shares held by them in ICHL to ICHSA in exchange for 75,000 ordinary shares in ICHSA.

38. On 30 October 2007 two sets of further Deeds were executed consequential upon BBM wanting to transfer all the shares it held in ICHSA to Emasan (by then Emasan AG). These are conveniently referred to as "the October 2007 Share Deeds" and "the 2007 Supplemental Option Deeds".

39. The October 2007 Share Deeds recorded that BBM was the registered holder of 120,000,000 A Ordinary Shares in ICHSA and that 75,000 of these A Ordinary Shares were held as nominee for each of the Claimants. By the October 2007 Share Deeds the Claimants consented to their shares being transferred by BBM to Emasan.

40. Under the terms of the 2007 Supplemental Option Deeds, Emasan assumed all the obligations of BBM under the 2006 Option Deeds.

41. By this time, the share capital of ICHSA had been divided into A and B Ordinary Shares each with a par value of €1.25. Emasan held 70% of the share capital of ICHSA represented by the A Ordinary Shares. Al Mada Investments S.a.r.l. held the remaining 30% of the share capital represented by the B Ordinary Shares.

42. On 30 June 2009 ICHSA issued 200,000 preference shares with a par value of €1.25 each and for that purpose increased its share capital. Emasan subscribed for 140,000 of the new preference shares and Al Mada for the remaining 60,000. ICHSA's share capital had until this point comprised only ordinary shares.

43. The Claimants' case is that under the terms of the 2002 Agreement as varied during the summer of 2006 they automatically acquired a right to purchase up to 2.4% of the preference shares on payment of a nominal sum. In the alternative, the Claimants claim that if they did not acquire any such right, the Defendants by the issue of the preference shares permitted the Claimants' interest to be diluted in breach of the 2002 Agreement as varied.

44. In 2018 the Defendants entered into negotiations for the sale of the Interoute Group. On 20 February 2018 the parties entered into two further Deeds (one for each Claimant) for the transfer of the Claimants' shares to Emasan and for the release of their options, in order to facilitate the sale of ICHSA.

45. The 2018 Deeds recited that in the case of each Claimant, 75,000 A Shares in ICHSA were held by Emasan as nominee for the Claimant. They recited the options held by each Claimant to acquire certain A Shares pursuant to the Option Deed and the Supplemental Option Deed. The Deeds recited that if the option were to be exercised at the date of the Deed it would take effect as an option over 4,039,286 A Shares (being 2.4% of ICHSA's ordinary share capital, less 75,000 shares).

46. Clause 1 set out how the consideration was to be calculated for the Claimants' beneficial interest and ownership of the 75,000 shares each. Emasan agreed to pay each of the Claimants a proportion of the total sale consideration corresponding to the total number of each of the Claimants' ICHSA shares (being 75,000) divided by the aggregate number of A shares sold by Emasan or other shareholders in the ICHSA Sale (being 120,000,000).

47. Clause 2 set out how the consideration was to be calculated for the release of the Claimants' options. Emasan agreed to pay each of the Claimants a proportion of the aggregate consideration corresponding to the number of shares subject to each of the Claimants' options divided by the aggregate number of A shares sold by Emasan and/or other shareholders (being 120,000,000).

48. Clause 3 provided for payment of the consideration in cash in Euros as soon as practicable after payment by the Purchaser. The payment made to the Claimants was to be subject to the deduction of any PAYE Withholding.

49. Clause 4 provided for deduction of any UK income tax and/or employee national insurance contributions to be made under the Pay As You Earn System ("the PAYE Withholding").

50. The 2018 Deeds were governed by English law and the parties irrevocably submitted to the non-exclusive jurisdiction of the English Courts.

51. The sale of the Interoute group was effected by a Sale and Purchase Agreement dated 23 February 2018. Emasan was the seller of 120,000,000 A Ordinary Shares and 140,000 Preference Shares. This represented 70% of the ordinary and preference shares. Turbo Holdings Lux II Sarl was the seller of 51,428,571 B Ordinary Shares and 60,000 Preference Shares. This represented the remaining 30% of the ordinary and preference shares.

52. The sale closed on or around 31 May 2018. Closing statements are included before me within Exhibit MDR2 to the second witness statement of Miles David Robinson.

53. On 27 June 2018, Emasan paid €9,851,074 to the First Claimant (following a deduction by Emasan of €9,806,820 in PAYE Withholding) and €13,862,611 to the Second Claimant (following a deduction by Emasan of €5,795,282 in PAYE Witholding). In response on 2 July 2018 the Claimants claimed they were owed in the case of the First Claimant a further €14,457,694 and in the case of the Second Claimant a further €11,346,667. This was calculated by reference to a total equity value (ordinary and preference shares) on closing of €1,171,129,131.

54. The Claimants contend in paragraph 25 of the Particulars of Claim that pursuant to the provisions of the 2002 Agreement as varied, they each had a 2.4% interest in the entire issued share capital of ICHSA including preference shares. The claim is that the value attributable to the preference shares should not be excluded from the Claimants 2.4% interest. The Claimants contend that in addition to the consideration payable under the 2018 Deeds in respect of their interest in the Ordinary Shares, they are pursuant to the 2002 Agreement as varied entitled to 2.4% of the consideration paid for, alternatively the equity value of, the Preference Shares.

55. In paragraph 26 the Claimants contend that shortly prior to February 2018 the Defendants represented to the Claimants that the Defendants would pay the Claimants 4.8% of the value of the Ordinary and Preference Shares even though the Preference Shares were not mentioned in the 2018 Deed. This is referred to as "the Representation". The Claimants say this Representation induced them to enter into the 2018 Deeds.

56. In paragraph 27, in support of their case as to the terms of the 2002 Agreement as varied, and the claim for misrepresentation, the Claimants set out and rely on what they say were repeated assurances received from the Defendants that the Claimants were entitled to an undilutable 2.4% interest in the Interoute Group. These assurances are set out in paragraphs 27.1 to 27.14 and date from between 18 February 2004 and 29 September 2017.

57. In paragraph 27A (sought to be added by amendment) the Claimants contend that the Defendants by the statements and/or representations pleaded at paragraphs 26 and 27 above represented to the Claimants that (a) the Claimants were entitled to an undilutable 2.4% interest in the Interoute Group and (b) that in return for the release of their 2.4% interest, the Claimants would each receive 2.4% of the entire sale consideration, alternatively of the entire equity value of the Interoute Group. In paragraph 27A.5(a) it is claimed the Defendants are estopped from denying the Claimants' entitlement as set

out in the representations pleaded or from resiling from them. In paragraph 27.A5(b) it is claimed the parties agreed to add to or vary the 2006 Option Deeds, the 2007 Supplementary Deeds and/or the 2018 Deeds to include as terms the same representations.

58. The Claimants claim in paragraph 37 that by reason of the matters set out in paragraph 26 they have suffered loss in the form of the value of their options to purchase the Preference Shares. In paragraph 34 the Claimants claim to be entitled to the sum of €11,237,818 in respect of the preference shares (pleaded as being 2.4% of the consideration for the preference shares in ICHSA) alternatively to €6,926,808 (pleaded as being 2.4% of the equity value of the preference shares).

59. In paragraph 35, the Claimants make a separate and additional claim in relation to the Ordinary Shares. They claim to be entitled to 2.4% of the total consideration received for the Ordinary Shares in ICHSA. In the case of the First Claimant, the claim made is to the total sum of €30,563,851, less €1,597,896 in respect of a loan repayment, less €2,200,435 in respect of PAYE Withholding. The First Claimant claims to be entitled to €20,712,777. In the case of the Second Claimant, the claim is made to the total sum of €31,464,361, less €1,597,896 loan repayment, less €1,299,925 in respect of PAYE Withholding. The Second Clamant claims to be entitled to €17,601,750. These are the Ordinary Share Total Consideration Claims.

The 2002 Agreement Claims

60. I consider that I should proceed on the basis that the Claimants will succeed at trial in establishing the existence of the 2002 Agreement. The letters sent by the Claimants to Mr Landolt on 28 October 2003 refer to the agreement, with him, Victor Bischoff and Gabriel Pretre "earlier this year". I do not consider any uncertainty as to the precise date of the agreement to be a reason to doubt the existence of an agreement. The making of an agreement between each of the Claimants and Emasan in or around December 2002 is recited in recital (A) to the 2006 Option Deeds.

61. The Defendants suggest by reference to the letter sent by Mr Landolt accompanying the 2006 Option Deed and Recital (B) to the 2016 Option Deed that the original agreement was recognised by the parties as not being legally enforceable. The letter refers to the formal legal document required to implement "our previous agreement" never having been put in place. The recital refers to the letter agreement failing to implement the intention of the parties. I consider the Claimants have a realistic prospect of success in arguing that the 2002 Agreement was intended to have contractual force.

62. The Foundation seeks to rely on s.4 of the Statute of Frauds Act 1677 in relation to the 2002 Agreement. The Foundation says it was expressly party to the written Deeds as a guarantor. It relies on clause 16 of the 2006 Option Deeds in which it is stated that the Foundation was guaranteeing performance by BBM of its obligations. S.4 provides that:-

"No action shall be brought …whereby to charge the defendant upon any special promise to answer for the debt default or miscarriages of another person …unless the agreement upon which such action shall be brought or some memorandum or note thereof shall be in writing and signed by the party to be charged therewith or some other person thereunto by him lawfully authorised."

Assuming the contract is one which falls within s.4, the section prescribes two alternative methods of enforceability:-

(1) The agreement upon which the action is brought must be in writing and signed "by the party to be charged therewith or some other person thereunto by him lawfully authorised"; or

(2) A memorandum or note of the agreement must be similarly signed. In that event, the agreement may be oral.

In my judgment the letter dated 28 October 2003 send by each Claimant to Mr Landolt of Emasan adequately sets out the terms of the contract in order to constitute a memorandum or note of the agreement. The letters were signed by Mr Gabriel Pretre as "Agreed and received on behalf of the [Foundation] on 6 November 2003.

63. On behalf of the Defendants, it is submitted that the 2002 Agreement was entirely superseded by the 2006 Option Deed. It is submitted that there is nothing in the wording of the 2006 Option Deeds which supports the suggestion that they were executed as variations to the 2002 Agreement. It is argued that Recital (D) of the 2006 Deeds makes clear that the purpose of the 2006 Option Deeds was to grant the Claimants *"a right to acquire shares in Luxco in lieu of any rights [they] may have in relation to shares in ICHL"*.

64. The matter is it is submitted put beyond doubt by the terms of the entire agreement clause in the 2006 Option Deeds. That reads:-

"This Deed, together with the Share Deed and, to the extent relevant, the [Kinsella/McNeal] Option represents the whole and only agreement between the parties in relation to the subject matter of this Deed and supersedes any previous agreement between the parties (and between Emasan SA and [the Claimants] in relation to this subject matter. In particular, this Deed and the Share Deed replace any right of [the Claimants] to acquire shares in ICHL, whether from Emasan SA or BBM or any person connected with those companies."

65. Mr Ford relied on the express wording of Clause 17 that it represents the whole and only agreement between the parties and supersedes any previous agreement between the parties and between Emasan and the Claimants. He submitted that the clause additionally and expressly stated that the Deed and the Share Deed were to replace any right of the Claimants to acquire shares in ICHL. He submitted this covered the entirety of the rights that might previously have existed. He argued there was no room for any additional rights to survive.

66. Ms Windle submitted that the Claimants have a real prospect of successfully arguing and establishing by evidence at trial that the 2002 Agreement survived the 2006 Option Deed. In relation to Recital (D), she submitted this showed that the Deed had the narrow or limited purpose of granting the Claimants a right to acquire shares in ICHSA in lieu of ICHL following the reorganisation of the Interoute Group.

67. In relation to the entire agreement clause, Ms Windle submitted that the subject matter of the Deed covered by the entire agreement clause was an entitlement to ordinary shares. She said that clause 17 had nothing at all to say about entitlement to preference

shares. She submitted that construing the subject matter of the Deed in that way did not do violence to the clause itself and was consistent with the recitals recording that the earlier agreement did not carry any protection against dilution.

68. Entire Agreement clauses are construed strictly by the courts. Their interpretation is often heavily context dependant. The Claimants do in my judgment have a realistic prospect of success in arguing that notwithstanding the entire agreement clauses, a prior agreement that their entitlement would not be diluted remained enforceable. One way this might be achieved is by the court construing the subject matter of the Deeds in their context as the ordinary share capital of ICHSA. Another might be by the court construing the Deeds as setting out the then entire agreement between the parties relating to the Claimants' share entitlements but not the entire understanding between the parties relating to non-dilution. The entire agreement clauses fall to be construed in their context. At the time of the 2006 and 2007 Deeds no preference shares had been issued and there is no clear evidence to suggest that at the time of the 2006 and 2007 Deeds the idea of converting debt into equity by the issuing of preference shares had been made known to the Claimants.

69. In *MWB Business Exchange Ltd v Rock Advertising Ltd* [2018] UKSC 24, [2019] AC 119, Lord Sumption referred at paragraph 14 to the intention of entire agreement clauses being to achieve contractual certainty by nullifying prior collateral agreements relating to the same subject matter. Lord Sumption cited Lightman J. in *Inntrepeneur Pub Co (GL) v East Crown Ltd* [2000] 2 Lloyd's Reports 611 at para 7:-

"The purpose of an entire agreement clause is to preclude a party to a written agreement from threshing through the undergrowth and finding in the course of negotiations some (chance) remark or statement (often long forgotten or difficult to recall or explain) on which to found a claim such as the present to the existence of a collateral warranty. The entire agreement clause obviates the occasion for any such search and the peril to the contracting parties posed by the need in its absence to conduct such a search. For such a clause constitutes a binding contract between the parties that the full contractual terms are to be found in the document containing the clause and not elsewhere, and that accordingly any promises or assurances made in the course of the negotiations (which in the absence of such a clause might have effect as a collateral warranty) shall have no contractual force, save in so far as they are reflected and given effect in that document."

70. In my judgment, the Claimants have a realistic prospect of arguing successfully that the facts of the present case are different from the type of situation referred to by Lightman J. in *Inntrepreneur Pub Co v East Crown.* In *Ravennavi SpA v New Century Shipbuilding Co Ltd* [2007] 2 Lloyd's Rep 24, Moore-Bick LJ said:-

"The effect of an entire agreement clause …must depend primarily on its terms, since it is the language chosen by the parties to express their agreement (wherever it appears) which, construed in its proper context, provides the primary source of their intentions It is for this reason that I am unable to accept the suggestion in the Buyer's skeleton argument that clauses of this kind can be construed by reference to their supposed purpose or that their significance is diminished if they are found among what are sometimes called the "boilerplate" provisions of a formal contract of this kind. There may be circumstances, of course, in which the court can be satisfied that a clause of this kind, although apparently couched in language wide enough to encompass the

particular matter on which one or other party seek to rely, was not intended by the parties to operate in the way in which its terms would suggest, but any such conclusion must be borne out by the particular circumstances of this case."

71. In my judgment, the Claimants have a realistic prospect of success in arguing that the entire agreement clauses were not intended to operate in a way which would permit future dilution of the Claimants' interests in a manner not contemplated by the parties at the time of the execution of the 2006 and 2007 Deeds.

72. On behalf of Emasan and the Foundation, Mr Ford relied also on the wording of the second part of the entire agreement clause. This stated: *"In particular, this Deed and the Share Deed replace any right of [each Claimant] to acquire shares in ICHL, whether from Emasan SA or BBM or any person connected with those companies."*

73. In my judgment, that part of the clause is not determinative. It provides that the Deed and the Share Deed replace any right of each Claimant to acquire shares in ICHL. Its concern is to make express that the rights given to the Claimants to acquire shares in ICHSA are to replace any rights they had to acquire shares in ICHL. It does not in my judgment follow that the parties intended from the terms of the Deed and its subject matter that future dilution of the Claimants' shareholding interests in a way not then contemplated by the parties should be made permissible.

74. Further, in my judgment, this is a case in which reasonable grounds exist for believing that an investigation into the facts of the case might affect the outcome on this part of the claim. I think there is an inherent danger in the circumstances before me of treating this as a short point of law and construction and deciding it summarily. That investigation will include the background to the issuing of the preference shares and the Claimants' state of knowledge regarding the proposal that the company should replace debt for equity by the issue of preference shares. This will fall to be considered in the context of the Claimants' claims that they received repeated assurances that their share interest would not be diluted.

The 2018 Deeds and the Misrepresentation claim

75. The Claimants do not allege that they were induced to enter into the 2006 or 2007 Deeds as a result of misrepresentation. They contend they were induced to enter into the 2018 Deeds as a result of the Representation pleaded in paragraph 26 of the Particulars of Claim. As part of the background to that claim, they rely on what they say were repeated assurances received from the Defendants as set out in paragraph 27 of the Particulars of Claim that the Claimants were each entitled to an undilutable 2.4% interest in the Interoute Group.

76. The Claimants contend in paragraph 26.1 of the Particulars of Claim that shortly prior to February 2018, the Defendants represented to the Claimants that the Defendants would pay the Claimants 4.8% of the value of the Ordinary and Preference Shares even though the Preference Shares were not mentioned in the 2018 Deeds. It is alleged that in a telephone call on or around 2 February 2018, Mr Pretre said there was no time to change the draft of the 2018 Deeds and confirmed that the Defendants intended to provide to the Claimants "the economic benefits of 4.8% of ICHSA". It is further alleged that on 17 February 2018, three days before the date of the 2018 Deeds, Mr

Pretre said "Don't worry about the Preference Shares, your amount will be based on the entire economic value of Interoute" or words to that effect.

77. The Defendants accept (as they must) that there is a factual dispute (including as to whether the representations relied upon at paragraph 26 of the Particulars of Claim were made and if so, by whom, and with what authority). It was submitted however by Mr Ford that the misrepresentation claim did not have a real prospect of success as a matter of legal analysis.

78. Paragraph 37 of the Particulars of Claim pleads that by reason of the matters pleaded at paragraph 26, the Claimants suffered loss, in the form of the loss of value of their Options to purchase the preference shares. It is submitted by the Defendants that it is trite law that damages will not be awarded under s.2(1) of the Misrepresentation Act 1967 for loss of bargain (ie will not put the Claimant in the position in which he would have been in if the alleged misrepresentation were true). In relation to the pleaded loss, it is submitted that as of the time of the entry of the 2018 Deeds, the Claimants did not have legally enforceable options to purchase the preference shares and they accordingly did not suffer loss of the value of "their options" to purchase the preference shares.

79. For the reasons I have set out above, I do not consider the court should on a summary basis determine that as a result of the entire agreement clauses contained in the 2006 and 2007 Option Deeds or from the terms of those Deeds as a whole that the Claimants did not thereafter have any surviving contractual rights or expectations in relation to non-dilution of their interests or in connection with the consequences of the issue of the preference shares. As a result, I am not persuaded based on the argument concerning loss alone, that I should conclude that the Misrepresentation claims have no realistic prospect of success.

80. Further, as pointed out by Ms Windle, the 2018 Deeds did not themselves contain entire agreement clauses. The Claimants allege they were induced to enter those Deeds by representations made for the purpose of inducing them to enter into the 2018 Deeds. Those representations may be capable in law of amounting to collateral warranties depending upon what findings of fact are made at trial.

81. At trial, the court will have to determine what if any representations or assurances were made or given to the Claimants. It may be found they were not given or were made in terms that were clearly qualified and subject to board or executive committee approval. These are all matters that cannot be determined summarily.

82. The Defendants have not chosen to file evidence in support of their applications from anyone who is alleged to have made the representations to the Claimants. I am not persuaded that it would be right to dismiss either the 2002 Agreement Claims or the Misrepresentation Claim on a summary basis. Further, the Claimants are seeking by amendment to add an estoppel claim.

The Ordinary Share Total Consideration Claims.

83. Following completion of the SPA, the Claimants through their solicitors Withers LLP claimed to be entitled each to 2.4% of the Gross Equity Value of ICHSA. The Gross Equity value was stated as being €1,171,129,131. This was the total equity value for the Ordinary and Preference Shares. In their Particulars of Claim, the Claimants

advance a claim that they are each entitled to 2.4% of "the total consideration" for the Ordinary Shares and for the Preference Shares. The total consideration as pleaded is based on a total sale price of €1.9 billion. This is said to produce a total consideration for the Ordinary Shares of €1,431,757,585 and for the Preference Shares of €468,242,415.

84. On behalf of the Defendants, Mr Robinson of Mayer Brown International LLP says at paragraph 31 of his second witness statement that this allegation of breach is due to a misunderstanding and an incorrect contention by the Claimants as to the consideration paid for the shares. Mr Robinson says the total consideration paid for all of the Ordinary Shares, after adjustments, was €885,657,835. Mr Robinson says applying the terms of the 2018 Deeds, the gross figure to be paid to each of the Claimants was €21,255,789.52 which he says was also the equivalent of 2.4% of the total consideration payable for all of the Ordinary Shares (i.e. A and B).

85. The Claimants did not file evidence in response on this point. They point however to the Closing Statement attached as part of Exhibit "MDR 2". That shows total sums paid by the purchaser GTT of €1,915,263,551. This includes sums paid in order to pay off the target companies outstanding bank debt and to pay off a loan extended by shareholders to the Interoute Group in 2007.

86. The Claimants argue that they have at least reasonable prospects of showing that the total sums paid by the purchaser fall within the definition of "The Luxco [ICHSA] Consideration" under the terms of the 2018 Deeds. "The Luxco Consideration" is defined in Clause 1.2 as:-

"the aggregate consideration paid to Emasan and/or other shareholders for the sale of the whole of the issued A Shares in the Luxco Sale."

The Luxco Consideration is part of the formula used to calculate the consideration to be paid to each of the Claimants for agreeing to sell their 75,000 A Ordinary Shares and agreeing to release their options.

87. "The Luxco Consideration" refers not simply to *"the aggregate consideration"* but to *"the aggregate consideration paid and/or other shareholders for the sale of the whole of the issued A Shares in the Luxco Sale".* The Bank Pay-Off Amount was the amount required to discharge all amounts owed by any Target Company at Closing including all amounts of principal, interest and fees. It is clear from the Closing Statement that the sum of €644,506,667 was paid by GTT via a Correspondent Bank to Citibank as the bank of the ICHSA.

88. The Shareholder Debt is defined in the SPA as the aggregate amount required to be paid by the Target Companies in order to discharge all amounts outstanding under the Shareholder Loan on the Closing Date (including all amounts of principal and accrued interest). The purchaser was on the Closing Date required to procure the payment of the Shareholder Debt to the Seller's Account. The means by which the purchaser procures the payment of the Shareholder Debt is shown in the Funds Flow as "Purchaser Injects Capital into Company. Company redeems Shareholder Debt." The Shareholder Debt in the sum of €99,605,808 is paid into the Seller's escrow account. It is shown as a separate sum to the sum of €1,099,453,827 paid in respect of Equity after netting.

89. In my judgment, the Ordinary Share Total Consideration claims have no realistic prospect of success so far as it relates to the Bank Pay-Off Amount. That sum represented the Target Companies bank indebtedness.

90. The Shareholder Debt was paid to the Sellers' Escrow Account but was shown as a separate sum to the sum paid for the share price. The SPA distinguished between the purchaser's obligation to pay the Price to the Sellers under clause 2 and the obligation to procure the payment of the Shareholder Debt to the Sellers' Account. An adjustment was made in respect of the Shareholder Debt Interest Amount representing the aggregate amount of accrued but unpaid interest under the Shareholder Loan in respect of the period between the date of the SPA and the Closing Date (including both days). That in my judgment confirms that the accrued amount of the Shareholder Debt at the date of the SPA was treated as being separate and distinct from the share price consideration. The Claimants were not parties to the SPA but they were parties to the 2018 Deeds on which they rely for the purpose of this claim. In my judgment, it is clear that the discharge of the Shareholder Debt whilst part of the aggregate consideration paid by the purchasers under the SPA was not part of the aggregate consideration paid to Emasan for the whole of the issued A shares in ICHSA.

91. In correspondence following the SPA closing date, the Claimants' claim was calculated on their behalf by their solicitors by reference to the Gross Equity Value (ordinary plus preference shares) in the sum of €1,171,129,131. In my judgment that was correct. In my judgment the claim to share in 2.4% each of the total consideration including the amounts paid by the purchasers to pay off the bank debt and Shareholder Debt is one that can and should be determined without a further investigation of the facts. It is not supported by the terms of any of the documentation before the court including, in particular, the terms of the 2018 Deeds.

Emasan's jurisdiction challenge

92. The basis of Emasan's jurisdiction challenge is that:-

(1) Emasan is domiciled in Switzerland;

(2) The alleged 2002 Agreement was an oral agreement which was not subject to any jurisdiction agreement

(3) The alleged 2002 Agreement was not varied by the 2006 and 2007 Deeds in such a way as to bring claims for breaches of its alleged terms within the ambit of the jurisdiction clauses contained in those later Deeds, but was superseded by them.

(4) There is no other basis upon which the jurisdiction of the English Courts is established in relation to claims based on the 2002 Agreement.

93. Section 1, Article 2 of the 2007 Lugano Convention provides that:-

"1. Subject to the provisions of this Convention, persons domiciled in a State bound by this Convention, shall whatever their nationality, be sued in the courts of that State."

Section 7, Article 23 headed "Prorogation of Jurisdiction" states:-

"1. If the parties, one or more of whom is domiciled in a State bound by this Convention, have agreed that a court or the courts of a State bound by this Convention are to have jurisdiction to settle any disputes which have arisen or which may arise in connection with a particular legal relationship, that court or those courts shall have jurisdiction. Such jurisdiction shall be exclusive unless the parties have agreed otherwise. Such an agreement conferring jurisdiction shall be either:-

(a)in writing or evidenced in writing; or

(b) in a form which accords with practices which the parties have established between themselves; or

(c) [not relevant]"

94. Article 23 has two elements. First, there must be an agreement between the parties to confer jurisdiction on the court. Secondly, that agreement must satisfy the requirements for formality set out in (a), (b) or (c).

95. In his first witness statement dated 7 June 2019, the First Claimant (with whose statement the Second Claimant agrees) says that the parties worked on the basis that if there was a dispute about the relationship between them and the Foundation, it would be resolved in the English Courts. He says the English Courts were the obvious choice of jurisdiction for the arrangements between them and the Foundation. He says the Claimants were both native English speakers and would wish any dispute to be resolved in the English language. He says even before there was any written agreement, the Foundation executive members expressed their preference for the English courts as the venue in which to settle potential disputes.

96. The First Claimant says that every one of the written agreements made to give effect to their entitlement under the original 2002 Agreement included a jurisdiction clause recognising the jurisdiction of the English Courts.

97. In his third witness statement, the Defendants' solicitor Mr Robinson says the Claimants have not alleged in their pleadings that the parties expressly or impliedly agreed that the English Courts would have jurisdiction to settle disputes arising out of the 2002 Agreement. He says that is not expressly alleged in the witness statements of the First and Second Claimant dated 7 June 2019. Mr Robinson argues that the 2006 Deeds and the later 2018 Deeds were standalone agreements that superseded any earlier agreements. Mr Robinson also exhibits a copy of the loan agreement made between Emasan and the Claimants on 11 July 2014 which provides that it shall be governed by Swiss law and jurisdiction in Basel.

98. In my judgment, the evidence of the Claimants is sufficient to establish that the parties did agree that their particular legal relationship would be governed by the English courts. In paragraph 8 of his first witness statement, the First Claimant states that "*all the parties worked on the basis that if there was a dispute about the relationship between us and SFF, it would be resolved in the English Courts."* In paragraph 9.2 he states:-

"Even before there was a written agreement, in 2003, the SFF Executive Members expressed their preference for English courts as to the venue in which to settle potential

disputes. For example, Victor Bischoff, an SFF Executive Committee Member in 2002, repeatedly asserted that English Courts were "the best place for both sides to get a fair hearing"".

99. Emasan's evidence is limited to that provided by its solicitor Mr Robinson. He comments in effect on the quality of the Claimants' evidence but there is no positive evidence on the Defendants' side contradicting the evidence of the Claimants with the exception of the introduction into the evidence of the 2014 loan agreement.

100. The Claimants' case on jurisdiction is supported by the existence of the non-exclusive jurisdiction clauses in favour of the English Courts in the 2006, 2007 and 2018 Deeds. Article 23 is concerned with jurisdiction agreements in connection with *"a particular legal relationship"*. In my judgment, the Claimants' evidence is sufficient to establish there was a jurisdiction agreement between the parties in relation to the Claimants' share entitlements.

101. On behalf of Emasan, Mr Ford argued that the later Deeds could not and did not evidence in writing a jurisdiction agreement relating to the oral 2002 Agreement since they superseded the 2002 Agreement. I have concluded that the Claimants have a realistic prospect of successfully arguing that the 2006 and 2007 Deeds did not, viewed in their particular context, entirely supersede the agreement or understanding of the parties as to non-dilution of the Claimants' share entitlements. In any event, I consider the Claimants have put forward a plausible evidential basis for establishing an agreement that the English Courts should have jurisdiction to resolve disputes relating to the Claimants' share entitlements. Further I consider on the material available the Claimants have the better of the argument on jurisdiction and that the Claimants have shown there is a good arguable case for the jurisdiction of the English Courts in relation to the Claimants' shareholder entitlements. I consider that the agreement on jurisdiction can properly in the circumstances of this case be regarded as evidenced by the jurisdiction clauses in the 2006 and 2007 Deeds.

The Claimants' application for permission to amend their Particulars of Claim

102. I have set out above the tests to be applied in deciding whether or not to grant permission to amend.

103. Paragraph 8.3 of the Particulars of Claim pleads it was an implied term of the 2002 Agreement that if any further shares in the Interoute Group holding company were issued, the Claimants would automatically have a right to acquire for a nominal sum an interest in such shares. The Claimants seek permission to amend to plead in the alternative that the Defendants would grant that interest to the Claimants prior to the occurrence of a liquidity event in the form of a sale of the Interoute Group or a flotation. I will grant permission for that amendment and the amendment in paragraph 20 to allege there was a corresponding breach on the part of the Defendants by failing prior to the SPA to grant to each of the Claimants an option over 2.4% of the Preference Shares. I consider the Claimants have a realistic prospect of establishing that the failure to grant them an option over 2.4% of the Preference Shares prior to the SPA was a continuing breach and hence not statute-barred. In addition, I consider the Claimants are entitled to advance the claims set out in paragraphs 19 and 20 of the Particulars of Claim in the alternative.

104. In paragraph 27A the Claimants seek to add to their Particulars of Claim a claim based on estoppel and a collateral contract claim. The introduction of the estoppel claim is opposed on the basis that the nature of the estoppel is not adequately pleaded. In my judgment, the facts and matters pleaded are sufficient to found a claim based on estoppel. Such a claim has in my judgment a realistic prospect of success.

105. In paragraph 27A.5(b), the Claimants claim that *"the parties agreed to add to or vary the 2006 Option Deeds, the 2007 Supplementary Deeds and/or the 2018 Deeds to include as terms the said representation(s)"*. As stated above, there is no claim that the Claimants were induced to enter the 2006 or 2007 Deeds by misrepresentation. The Claimants case is that the 2006 and 2007 Deeds did not represent the entire agreement or understanding relating to their rights and that there remained in existence a wider agreement or understanding relating to the non-dilution of their share interests. It is not pleaded how or when or in what circumstances the parties agreed to add to or vary the 2006 or 2007 Deeds. The position in relation to the 2018 Deeds is different in that the Claimants do claim they were induced to enter into this Deed by the Misrepresentation pleaded. In those circumstances I will grant permission to amend under paragraph 27A.5(b) in relation to the 2018 Deeds but not the earlier Deeds.

Full and Frank Disclosure

106. On behalf of the Defendants reference was made to the duty of full and frank disclosure on an application for permission to serve proceedings out of the jurisdiction. In *Sloutsker v Romamova* [2015] EWHC 545 (QB) Warby J. said at paragraph 52 he was not persuaded that the approach should be less strict in principle than it is in respect of other kinds of applications which have an immediate and potentially severe impact on the defendant.

107. The application for permission to serve out on the Foundation was supported by the First witness statement of Stephen Ross, a Partner at Withers LLP, dated 27 November 2018. In paragraph 51 under the heading "Full and Frank Disclosure" Mr Ross referred to a number of points raised by Mayer Brown in response to the claim and exhibited a copy of Mayer Brown's letter dated 21 November 2018. That is a very detailed letter which focuses on the merits of the draft claim. Mr Ford did not identify a key point which was not disclosed. The making of full and frank disclosure on applications for permission to serve out is and remains very important. However, in a case which turns on very detailed consideration of the merits, I do not consider any shortcoming in the way paragraph 51 was set out to justify the immediate discharge of the order. This was not a point pressed by Mr Ford.

The PAYE Withholding Claim and the related delay in payment claims

108. It was agreed between the parties that these fell outside the scope of the applications before the court.

Discretion

109. Save in respect of the Ordinary Share Total Consideration Claims, which I do not consider meet the merits threshold or have a realistic prospect of success, I am satisfied that the Defendants' challenges to jurisdiction ought to fail. The Defendants were parties to Deeds which contained non-exclusive jurisdiction clauses providing for the

English Court to have jurisdiction. There are disputed issues concerning what if any representations were made to the Claimants prior, in particular, to the 2018 Deeds.

Disposal

110. For the reasons set out above:-

I dismiss the Foundation's jurisdiction challenge so far as it relates to the 2002 Agreement Claims and the Misrepresentation Claims and I dismiss the Defendants' application for summary judgment in relation to those claims. I allow the Foundation's jurisdictional challenge so far as it relates to the Ordinary Shares Total Consideration Claims and I grant the Defendants' summary judgment application so far as it relates to those claims. I dismiss Emasan's separate jurisdiction challenge. I grant permission to amend the Particulars of Claim under paragraphs 8.3 and 20; 27A, 27A.1, 27A.2, 27A.3, 27A.4 and 27A.5(a) I grant permission to amend under paragraph 27A.5(b) in respect of the 2018 Deeds but not in relation to the 2006 and 2007 Deeds.

111. I will hear the parties on matters arising from this judgment.

112. I am grateful to counsel on both sides for their written and oral submissions.