[2020] EWHC 2327 (Comm)

Case No: CL-2020-00032

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

Royal Courts of Justice
Rolls Building, 7 Rolls Buildings
Fetter Lane, London EC4A 1NL

Date: 27 August 2020

Before :

STEPHEN HOFMEYR QC
(sitting as a Deputy High Court Judge)

- -

Between :

LOCHES CAPITAL LIMITED

Applicant

- and -

GOLDMAN SACHS INTERNATIONAL

Respondent

- -

Richard Salter QC and Lisa Lacob (instructed by **Acuity Law Limited**) for the **Applicant**
Mark Howard QC, Craig Morrison and Sophie Shaw (instructed by **Freshfields Bruckhaus Deringer LLP**) for the **Respondent**

Hearing dates: 16, 17 and 18 June 2020

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APPROVED JUDGMENT

Covid-19 Protocol: This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to BAILII. The date and time for hand-down is deemed to be 10am on Thursday 27th August 2020.

STEPHEN HOFMEYR QC (sitting as a Deputy High Court Judge)**:**

The application

1. This is an application by the Applicant, Loches Capital Limited ("**Loches**"), under section 33(2) of the Senior Courts Act 1981 and CPR r. 31.16 for pre-action disclosure in relation to an intended action by Loches against the Respondent, Goldman Sachs International ("**GSI**").

2. The application is opposed by GSI on three grounds:

    (1) First, GSI submits that Loches' proposed claim against GSI has no real prospect of success since it is squarely time-barred.

    (2) Second, GSI submits that pre-action disclosure should be refused because Loches has not shown that pre-action disclosure would serve any useful purpose. In particular, GSI submits that Loches has not shown that pre-action disclosure would assist in resolving the dispute without proceedings or save costs.

    (3) Third, GSI submits that pre-action disclosure should be refused in the exercise of the Court's discretion.

3. In the alternative, GSI submits that Loches' particular requests for documents are excessive and should be refused.

4. Loches' evidence in support of the application is contained in two statements of Richard Jansson, a director of Equilibrium Capital Limited, a wholly owned subsidiary of Loches, and in exhibits to his statements. GSI's evidence in response to the application is contained in a statement of Philip Linton, a Managing Director within GSI's Legal Division, and in exhibits to his statement. Mr Linton is a solicitor of the Senior Courts of England and Wales.

The prospective claim

5. The claim which Loches wishes to bring against GSI is a claim for unlawful means conspiracy. The claim is said to arise from the takeover in 2006 of Arcelor S.A. ("**Arcelor**") by Mittal Steel Company NV ("**Mittal**") and the subsequent merger of the two companies in 2007 – the largest merger the steel industry has ever seen. GSI's mergers and acquisitions team were a principal adviser to Mittal in connection with the transaction.

6. Arcelor was incorporated in Luxembourg and Luxembourg law provides protections for minority shareholders. Articles 265 and 266 of the Luxembourg law of 10 August 1915 on commercial companies is designed to protect shareholders in relation to a merger. It requires two sorts of report approving the merger terms:

    (1) Reports from the boards of directors of the companies concerned (under Article 265); and

(2) Reports from independent experts to be appointed by each of the merging companies (under Article 266), stating whether in their opinion the SER is or is not fair and reasonable and specifying any particular valuation difficulties that might exist.

7. Mr Lakshmi Mittal was the Chief Executive Officer and majority beneficial owner of Mittal. Loches alleges that GSI conspired with, *inter alios*, Mr Lakshmi Mittal, to carry out a dishonest scheme under which the shares of the small minority of Arcelor shareholders who did not accept Mittal's takeover offer ("**the rejecting Arcelor shareholders**") were exchanged for shares in the merged company at an artificially deflated Share Exchange Ratio ("**SER**") of 8:7 which, to the knowledge of the conspirators, was not based on and did not reflect the fair value of the shares of the rejecting Arcelor shareholders.

8. As regards the relevant parties, a complicating factor is that Loches was not itself one of the rejecting Arcelor shareholders. If it brings an action, Loches intends to do so as assignee of the rights of Deutsche Bank AG ("**DB**") under a Sale and Purchase Agreement dated 24 September 2012, as amended and restated on 21 November 2012 ("**the SPA**"). The pertinent parts of the SPA are set out at paragraph 116 below. The purpose of the SPA appears to have been that Loches would try to obtain a settlement payment from Mittal which Loches would share with DB. In the event, that did not happen.

Assumptions and findings of fact

9. On an application for pre-action disclosure the court may have to make (and, generally, of necessity, will have to make) assumptions about the factual circumstances, assumptions which may ultimately prove incomplete or incorrect. For this reason, any findings of fact or assumptions about the facts cannot be definitive and will not be binding at any trial of the substantive claim. Further, the court should be hesitant about embarking upon any determination of substantive issues in the case. In order to found an application under CPR r.31.16(3) it will normally be sufficient for the prospective claim to be properly arguable and to have a real prospect of success, and it will normally be appropriate to approach the conditions in CPR r.31.16(3) on that basis: ***Rose v Lynx Express Limited*** [2004] EWCA Civ 447 at [4].

The factual background

10. In 2006 Mittal made a series of takeover offers for Arcelor. The first two offers made by Mittal were rejected by the board of Arcelor on the basis that they were too low. A third, improved offer was made by Mittal in June 2006 which the board of Arcelor recommended be accepted. The third offer included various options comprising exchanges of Arcelor shares for Mittal shares and/or cash. One of the options was to exchange shares in Arcelor for shares in Mittal at a SER of 11:7, i.e. 11 Mittal shares for every 7 Arcelor shares. The third offer was accepted by the majority of the Arcelor shareholders. On 25 June 2006 a Memorandum of Understanding setting out the proposed process was agreed.

11. By 4 August 2006 Mittal controlled approximately 93.7% of the shares in Arcelor, by 10 October 2006 the boards of Mittal and Arcelor, respectively, had become composed of the same individuals and on 6 November 2006, Mr Lakshmi Mittal became Chief Executive of both companies.

12. On 14 November 2006 Mittal issued a press release in which it stated that:

> "*The share for share merger exchange ratio has not yet been fixed and will only be finally set in the course of the implementation of the merger process, in accordance with applicable laws. As publicly disclosed in the course of the offer, the merger exchange ratio will be consistent with the value of Arcelor shares pursuant to the secondary exchange offer* [i.e. at a SER of 11:7] *as at the date of its settlement and delivery on August 1, 2006.*"

The significance of this press release is that, amongst other matters, it formed the basis for many of the complaints made by the rejecting Arcelor shareholders who complained that what was eventually done was not what was publicly advertised, i.e. that the eventual ratio was not consistent with the earlier ratio.

13. The steps taken to complete the transaction – which ultimately did not involve a takeover but a merger – were announced on 3 May 2007:

    (1) Mittal was first to be merged into a Luxembourg subsidiary, ArcelorMittal SA ("**AM1**") at a SER set at 1:1.

    (2) AM1 would then be merged into Arcelor at a SER that remained to be determined.

    (3) Finally, Arcelor was to be renamed ArcelorMittal ("**AM2**").

14. It is Loches' contention that, at the time of this announcement, DB held approximately 1.25m Arcelor shares. GSI submits that there is very real doubt whether DB had any interest in Arcelor on this date and, therefore, that there is very real doubt whether Loches has any right to bring a claim against GSI at all.

15. The SER for the second step was ultimately set, on 16 May 2007, at a ratio of 8:7. The SER was announced to the public in a press release. As a consequence of the merger of AM1 into Arcelor at a SER of 8:7, the rejecting Arcelor shareholders were bought out at the reduced SER, putting them in a considerably worse position than they would have been in had they accepted the third offer in June 2006.

16. In the context of the transaction, GSI was engaged by the board of Mittal to provide its opinion on the fairness of the 8:7 SER to Mittal shareholders. Four other institutions, including Morgan Stanley and Société Générale, gave opinions to the shareholders of Arcelor. Each concluded that the 8:7 SER was fair to the shareholders of Arcelor.

17. As already noted, Luxembourg law additionally requires the draft terms of a merger to be the subject of an examination and of a written report to shareholders carried out and drawn up by independent experts. The experts are required in the report to state whether the share exchange ratio "*is or is not fair and reasonable*". They are also

required (i) to identify the method or methods used to arrive at the proposed share exchange ratio, (ii) to indicate whether such method or methods are adequate in the circumstances, (iii) to give an opinion as to the relative importance attributed to such methods in determining the value actually adopted and (iv) to "*describe any special valuation difficulties which may have arisen*".

18. Audit opinions were obtained some 4 months later, in September 2007, from the Luxembourg branch of Mazars (for the benefit of the Mittal shareholders) and from Compagnie Luxembourgoise d'Expertise et de Revision Comptable ("**CLERC**") (for the benefit of the Arcelor shareholders). Somewhat curiously, CLERC was formed on 27 September 2007, two days after the opinion was issued on 25 September 2007. CLERC comprised the Luxembourg team of Grant Thornton. The opinions issued by Mazars and CLERC each stated that, in their opinion, the SER of 8:7 was fair and reasonable and that no special valuation difficulties existed. It was these opinions which ultimately enabled the merger to proceed at the SER of 8:7. One of the complaints which Loches makes is that the auditors were rushed into making their decisions in a very short space of time.

19. As the Arcelor shares were also quoted on the US Stock Exchange, a United States Securities and Exchange Commission Filing was necessary. The SEC Filing dated 28 September 2007 recorded that the exchange ratio was determined through arm's length negotiations:

> *"The exchange ratio of 0.875 Arcelor shares for every one ArcelorMittal share was determined through arm's-length negotiations between Mittal Steel and Arcelor and was approved by the Boards of Directors of Mittal Steel, ArcelorMittal and Arcelor. Goldman Sachs provided advice to Mittal Steel during these negotiations. Goldman Sachs did not, however, recommend any specific exchange ratio to Mittal Steel or ArcelorMittal or the Boards of Directors of Mittal Steel or ArcelorMittal or that any specific exchange ratio constituted the only appropriate exchange ratio for the merger."*

20. The merger was approved on 5 November 2007 and completed on 13 November 2007.

21. The setting of the SER at 8:7 prompted an immediate negative reaction from certain minority shareholders in Arcelor. They complained that the SER was not fair to the minority shareholders and was inconsistent with earlier public statements. The complaints were made in respect of the merging parties, the investment banks advising them and the auditors. Minority shareholders threatened litigation and sought action from regulatory authorities in Luxembourg, France, the Netherlands and the United States of America. There have been numerous investigations and proceedings concerning the transaction brought by minority Arcelor shareholders and criminal authorities (including a criminal investigation in France), although, to date, none have been brought against GSI. Some of the investigations and proceedings are ongoing, but many have concluded. None of the investigations or proceedings have found any fault with any of the steps taken; and none have found that the SER was unfair.

22. The investigations and proceedings commenced as early as April 2007, even before the SER was set, when ADAM (a French shareholders Association representing certain of

the rejecting Arcelor shareholders) obtained and submitted to Mittal a report prepared by Sorgem Evaluation, which argued that there was no justification for any reduction in the SER from the third offer level.

23. In March 2008, about four months after the merger had completed, a group of rejecting Arcelor shareholders (not including DB) filed a criminal complaint with the French Prosecution Office ("**the FPO**") against the merged company, AM2, alleging that false and misleading information had been provided in various documents issued in July 2006 and May 2007. In particular, complaint was made about the statement by Mittal in the 25 June 2006 Memorandum of Understanding between Arcelor and Mittal that the proposed merger would be effected "*using a share for share exchange ratio consistent with the value of the* [third] *Offer as at the date of its settlement*". It is common ground that it is very likely that DB could, with success, have applied to join the French criminal proceedings.

24. In the French criminal proceedings, the FPO used a formal judicial process to get the Luxembourg authorities to seize the email traffic passing between Mittal and Mazars at the material time ("**the Mazars Documents**"). The FPO also enlisted the British Serious Fraud Office to carry out interviews on its behalf, including an interview of the head of the GSI team.

25. In early 2013 the complainants in the French criminal proceedings were provided with copies of the Mazars Documents and transcripts of interviews conducted in London by the Serious Fraud Office. For ease of reference, these documents obtained by the complainants in the French criminal proceedings are referred to as "**the FPO documents**". The FPO documents were of three types: (i) extracts from the minutes of the 15 May 2007 board meetings of Arcelor and Mittal; (ii) copies of emails passing between Mittal and Mazars at the material time; and (iii) transcripts of the interviews conducted by the SFO.

26. The FPO appears also to have used the formal judicial process to get the Luxembourg authorities to seize the email traffic passing between Arcelor and CLERC at the material time ("**the CLERC Documents**"). The CLERC Documents were also provided to the complainants in the French criminal proceedings in early 2013.

27. The French criminal proceedings were eventually dismissed.

28. Civil proceedings were also begun in France on the same basis (not involving DB). In the French civil proceedings, Société Générale and Mazars are defendants. The allegations were, essentially, claims for misrepresentation. The French civil proceedings, which were stayed pending determination of the criminal complaint, may continue.

Loches' involvement

29. A subsidiary of Loches, Equilibrium Capital Limited ("**Equilibrium**"), was approached by DB in 2007 about the proposed merger and began to follow the merger process on DB's behalf.

30. Among the complainants in the French proceedings was a company called Artannes Capital Limited ("**Artannes**"). Artannes approached Equilibrium to invite it and/or DB to participate in the French proceedings, and Equilibrium subsequently agreed to try to introduce Artannes to other rejecting Arcelor shareholders (though no such introductions in fact took place). By September 2012, some of the rejecting Arcelor shareholders had opened settlement discussions with AM2 and the other defendants to the French proceedings. Loches thought that it might be in a position to negotiate such a settlement, and accordingly entered into the SPA with DB, under which it agreed to share any "*Seller Compromise Payment*" equally with DB.

31. According to Loches, its view of matters was subsequently transformed. Between March 2015 and May 2016, in breach of its duties under French law not to share with third parties documents obtained in the proceedings, Artannes gave Equilibrium and Loches access to the FPO documents, which included the Mazars Documents and transcripts of interviews conducted in London by the Serious Fraud Office with, *inter alios*, the leader of the mergers team at GSI. For reasons which have not been explained, Artannes did not give Equilibrium and Loches access to the CLERC Documents.

32. It is Loches' case that the FPO documents revealed for the first time what Loches now believes to be the dishonest scheme orchestrated by Mittal to rig the merger SER. In particular, they revealed (according to Loches) the extraordinary extent to which Mittal interfered with the production of the Article 266 report by Mazars – to such a degree as to make it not "*independent*" in the sense required by Article 266 – and the fact that Mittal indemnified Mazars against claims by any rejecting Arcelor shareholders. It is, Loches believes, a fair inference that Mittal also similarly interfered with the production of the Article 266 report by Grant Thornton. According to Loches, the FPO documents also inferentially indicated the probable involvement of GSI in that dishonest scheme. That inference (which Loches says is a fair inference from the information presently available) is the factor which Loches now seeks to have confirmed (or disproved) by the direct evidence in the documents of which it now seeks pre-action disclosure. It is not without significance that GSI, whilst entirely rejecting the suggestion that it acted dishonestly, has never sought to suggest why the inferences are wrong or to produce documents showing that the inferences are wrong.

The law

33. The application is made under section 33(2) of the Senior Courts Act 1981 and CPR r. 31.16.

34. Section 33(2) provides as follows:

> *(2) On the application, in accordance with rules of court, of a person who appears to the High Court to be likely to be a party to subsequent proceedings in that court ... the High Court shall, in such circumstances as may be specified in the rules, have power to order a person who appears to the court to be likely to be a party to the proceedings and to be likely to have or to have had in his possession, custody or power any documents which are relevant to an issue arising or likely to arise out of that claim—*

(a) to disclose whether those documents are in his possession, custody or power; and

(b) to produce such of those documents as are in his possession, custody or power to the applicant or, on such conditions as may be specified in the order—

(i) to the applicant's legal advisers; or

(ii) to the applicant's legal advisers and any medical or other professional adviser of the applicant; or

(iii) if the applicant has no legal adviser, to any medical or other professional adviser of the applicant.

35. CPR r. 31.16 provides as follows:

(1) This rule applies where an application is made to the court under any Act for disclosure before proceedings have started.

(2) The application must be supported by evidence.

(3) The court may make an order under this rule only where-

(a) the respondent is likely to be a party to subsequent proceedings;

(b) the applicant is also likely to be a party to those proceedings;

(c) if proceedings had started, the respondent's duty by way of standard disclosure set out in rule 31.6 would extend to the documents or classes of documents of which the applicant seeks disclosure; and

(d) disclosure before proceedings have started is desirable in order to:

(i) dispose fairly of the anticipated proceedings;

(ii) assist the dispute to be resolved without proceedings; or

(iii) save costs.

36. Every application for pre-action disclosure should be crafted with great care so that it is properly limited to what is strictly necessary: ***Snowstar Shipping Company Limited v Graig Shipping Plc*** [2003] EWHC 1367 (Comm) at [35].

37. CPR r. 31.16(3)(a)-(d) set out the jurisdictional thresholds that must be satisfied before a pre-action disclosure order may be made. The application has to be made by a person likely to be a party to subsequent proceedings against a person likely to be a party to the proceedings; the respondent's duty by way of standard disclosure would extend to the documents sought if proceedings had started; and disclosure before proceedings have started must be desirable for at least one of three reasons. The Court is only permitted to consider the granting of pre-action disclosure where there is a real prospect in principle of such an order (i) being fair to the parties if litigation is commenced, or (ii) of assisting the parties to avoid litigation or (iii) of saving costs in any event: ***Black v Sumitomo*** [2002] 1 W.L.R. 1562 at [81].

38. Only if the jurisdictional thresholds are met does the Court have a discretion to determine whether to make an order. It is therefore essential in each case that the Court carries out both stages of the analysis.

39. There is no express or implied jurisdictional threshold regarding the merits of the claim: ***Smith v Secretary of State for Energy*** [2014] 1 W.L.R. 2283 at [23].

40. The leading case on pre-action disclosure is ***Black v Sumitomo*** [2002] 1 W.L.R. 1562 in which the correct approach to a pre-action disclosure application is explained in some detail by Rix LJ.

41. A list of propositions which may be derived from the judgment of Rix LJ were helpfully gathered by Waksman J in ***The ECU Group Plc v HSBC Bank Plc*** [2017] EWHC 3011 (Comm) at [17]:

   (1) The requirements in [CPR r. 31.16] *sub-paragraph (3) (a) and (b) are simply about the likely parties to any claim, not its underlying merits and "likely" in this context means "may well"; see paragraphs 71 and 72;*

   (2) Requirement (c) will raise the question of the clarity of the issues which would arise once the litigation has started, without which such clarity it will be difficult to say if the documents now sought would fall within standard disclosure; see paragraph 76;

   (3) Requirement (d) with its three possible variants constitutes both a jurisdictional threshold and also a set of factors which are required to be considered in more detail when the question of discretion is dealt with; see paragraphs 81 and 82;

   (4) The jurisdictional threshold is not intended to be a high one and the real question is likely to be the exercise of discretion which will not be much assisted by the simple fact that the jurisdictional threshold is met; see paragraph 73; if it were otherwise, that would tend to suggest that orders would be made much more frequently under this provision than they are; see paragraph 85;

   (5) The discretion itself is not confined and will depend on all the facts of the case; important considerations will include the nature of the injury or loss complained; the clarity and identification of the issues raised by the complaint; the nature of the documents requested; the relevance of any protocol or pre-action enquiries and the opportunity which the complainant has to make his case without PAD; see paragraph 88;

   (6) In addition, if there is considerable doubt as to whether the usual disclosure staged would ever be reached, the court can take this into account as affecting discretion; see paragraph 77. This must be a reference to practical or legal obstacles which the putative claim may face;

   (7) At paragraph 92 Rix LJ stated "unless there is some real evidence of dishonesty or abuse which only early disclosure can properly reveal and which may, in the absence of such disclosure, escape the probing eye of the litigation process and thus possibly all detection, I think that the court should be slow to allow a merely

prospective litigant to conduct a review of the documents of another party, replacing focused allegation by a roving inquisition". This observation was made in the context of Rix LJ having found that the complaint in that case was factually and legally "speculative in the extreme" see paragraph 91. Context is important because it is otherwise hard to see why it must be shown that in the absence of early disclosure the evidence would (later) escape the eye of the legal process;

(8) *The more focused the complaint, and the more limited the disclosure sought in that connection, the easier it is for the court to exercise its discretion in favour of PAD, even where the complaint might seem somewhat speculative or the request argued to be mere fishing. The court might be entitled to take the view that transparency was what the interest of justice and proportionality most required. But the more diffuse the allegations and the wider the disclosure sought more sceptical the court is entitled to be about the merit of the exercise; see paragraph 95.*

42. As already noted, the Court's discretion is not confined and will depend on all the facts of the case. Factors that may be relevant to the exercise by the Court of its discretion, additional to those identified above, include any opportunity the applicant may have of obtaining the documents from an alternative source, which would militate against pre-action disclosure: ***Black v Sumitomo*** at [97]; the applicant's conduct in the proceedings, including any "*lack of frankness*" concerning the basis for pursuing a claim and the existence of proceedings in other jurisdictions raising similar issues which reflect the "*centre of gravity*" of the disputes: ***Pineway Limited v London Mining Company Limited*** [2020] EWHC 1143 (Comm) at [54] – [55]; and where there is no prospect of the applicant being able to establish a viable claim: ***Smith v Secretary of State for Energy*** [2014] 1 W.L.R. 2283 at [23] – [26]. It has also been said that "*the more speculative the claim, the less inclined the court is to grant the application, and its weakness is a factor which* [may be taken] *into account when considering whether a pre-action disclosure order should be made*": ***Snowstar Shipping Company Limited v Graig Shipping Plc*** [2003] EWHC 1367 (Comm) at [33].

43. In almost every dispute a case could be made out that pre-action disclosure would be useful in achieving a settlement or otherwise saving costs, but that is not sufficient. There must be something unusual – something which takes the case outside the usual run – before pre-action disclosure will be ordered: ***Hutchison 3G UK Limited v 0_2 (UK) Limited*** [2008] EWHC 50 (Comm) at [55]; ***Taylor Wimpey UK Limited v Harron Homes Limited*** [2020] EWHC 1190 (TCC) at [39]. In most cases pre-action disclosure will not be appropriate.

44. There is no general rule that pre-action disclosure cannot be granted when an applicant can already plead its claim. The power to grant pre-action disclosure was intended to assist not only those who needed disclosure as a vital step in deciding whether to litigate at all or as a vital ingredient in the pleading of their case, but also those who could plead a cause of action to improve their pleadings: ***Black v Sumitomo*** [2001] EWCA Civ 1819 at [68]. However, it is not enough that disclosure would enable a case to be pleaded with greater specificity, since something more than an ability to focus pleadings is required for there to be pre-action disclosure: ***Graffica Limited v The University of Birmingham*** [2018] EWHC 2683 (Ipec) at [9]. Further, if it were "*perfectly possible*" for the applicant to commence proceedings without pre-action

disclosure, disclosure would not be needed "*to dispose fairly of the anticipated proceedings*" within the meaning of CPR r.31.16(3)(d): ***Attheraces Ltd and others v Ladbrokes Betting and Gaming Ltd and others*** [2017] EWHC 431 (Ch) at [42].

45. From time to time courts are tempted to compare the facts of reported pre-action disclosure cases with the facts of the cases before them to aid them in their analysis. Attention may be drawn to factual similarities and courts may be invited to reach similar conclusions. This exercise of comparison is usually an unhelpful exercise since each case presents its own unique facts. The circumstances which are relevant to the exercise of discretion in one case and the weight to be given to each will inevitably vary from case to case. Reported pre-action disclosure cases are useful for the general principles they enunciate, but an exercise of comparing facts is seldom profitable.

Loches' claim revisited

46. The claim which Loches intends to bring against GSI, unless pre-action disclosure precludes it, is a claim of unlawful means conspiracy.

47. The essential ingredients of the tort of unlawful means conspiracy are not in dispute. They were summarised by Morgan J in ***Digicel (St Lucia) Ltd v Cable & Wireless plc*** [2010] EWHC 774 (Ch) at [9]:

> "*The necessary ingredients of the conspiracy alleged are: (1) there must be a combination; (2) the combination must be to use unlawful means; (3) there must be an intention to injure a claimant by the use of those unlawful means; and (4) the use of the unlawful means must cause a claimant to suffer loss or damage as a result …*".

As the name of the tort suggests, "*unlawful means*" are fundamental to it.

48. Draft Particulars of Claim have been produced by Loches. The draft Particulars of Claim plead a detailed case of unlawful means conspiracy. It is an inferential case put forward on the basis that, if there was a conspiracy, GSI must have been part of it. In summary, Loches alleges that the conspirators, in furtherance of their dishonest scheme to rig the SER, interfered decisively in the Article 266 reports and committed acts which were unlawful under both Luxembourg and English law:

> *"C.7 Mittal interfered decisively in the LCL Article 266 reports*
>
> *89. Mittal and its advisers (including the Defendant) interfered substantially in the production of the Auditors' reports, including by deliberately providing one-sided and self-serving financial analyses in circumstances where there was no independent financial adviser acting for Arcelor and where the Auditors had not been provided with any financial forecasts or other financial information by Arcelor (as distinct from Mittal or ArcelorMittal-1) or its own advisers. Neither of the Auditors' reports was independently prepared, as required by Article 266.*

90. *There was no party involved in the independent audit process representing the interests of the Minority Shareholders whose shares were to be acquired, and for whose apparent protection Article 266 existed.*

91. *The degree of interference by Mittal with the Auditors' opinions is demonstrated by the following facts and matters:*

    [There are 17 sub-paragraphs]

…

93. *As to the Grant Thornton report:*

    93.1. *Pending disclosure of communications between Mittal and its advisers (including the Defendant) and Grant Thornton, it is inferred that there was a similar level of interference by Mittal and the Defendant with the Grant Thornton/CLERC report, despite the fact that Grant Thornton/CLERC had been retained by Arcelor.*

    93.2. *In the first draft of its report, Grant Thornton set out a full page of the valuation difficulties it had encountered, including the absence of recent financial information for both companies, the fact that the Value Plan was not the product of discussions between two independent companies and the impossibility of confirming that the actual results conformed with the Value Plan.*

    93.3. *On 11 September 2007, Mr Deschamps of Grant Thornton sent an email to Mazars enclosing Mittal's mark up of Grant Thornton's draft report. In relation to the valuation difficulties section, the mark up of the Grant Thornton report stated "To be discussed", that this section was not correct (when it was) and instructed Grant Thornton to "Please ask for information needed to change this conclusion".*

    93.4. *The final CLERC report did not specify any valuation difficulties at all.*

    93.5. *It is inferred that the valuation difficulties section of the draft report was removed by Grant Thornton/CLERC on the instruction of Mittal and its advisers (including the Defendant). It is not known whether Grant Thornton/CLERC received an indemnity in respect of any claims by the Minority Shareholders.*

94. *While the Defendant had been formally retained by Mittal and ArcelorMittal-1 and not by Arcelor, the Defendant knew that there was no other financial adviser providing information to the Auditors and that it was being treated by the Auditors as "the independent expert designated to value the Companies" (being the words used in Mazars' retainer letter). If the Defendant had been acting honestly, it would not have provided financial information to the Auditors (and, in particular, Grant Thornton who had been appointed by Arcelor) which it knew had been manipulated to favour Mittal.*

95. *If it had not been for the interference in the production of the Auditors' opinions and the manipulated financial information provided to the Auditors:*

95.1. The Auditors would not have reported that the New SER was fair and reasonable, alternatively would not have done so without specifying the particular valuation difficulties that existed.

95.2. The Second Stage of the Merger would not have proceeded on the basis of the New SER of 8:7.

D. Unlawful acts

96. The scheme to rig the SER involved the commission of unlawful acts under Articles 1382 and 1383 of the Luxembourg Civil Code ("Code") (general tort liability for wrongful acts), namely:

96.1. The preparation by (it is inferred) Mr Mittal, Aditya and possibly other Mittal directors, with the likely assistance of the Defendant, of false Forecast Information, knowing that the information would be used to support the rigged SER, and its use in doing so.

96.2. The Defendant's conduct in producing a fairness opinion stating that the New SER represented fair value, and the communication of that opinion and other advice to the Mittal directors (who were the same individuals as the Arcelor directors) to support the rigged SER, in circumstances where the Defendant knew the Forecast Information was untrue.

96.3. The approval by the directors of Arcelor of the New SER as "fair value" for the Minority Shareholders notwithstanding the facts, matters and circumstances stated in paragraphs … above.

96.4. The misrepresentations made to the market described in … above.

96.5. The interference by Mittal and its advisers (including the Defendant) with the Auditors' reports required under Article 266, including by providing manipulated and self-serving financial information, re-writing substantial parts of the draft reports and agreeing the Mazars Indemnity.

97. The delivery of a non-compliant Article 265 report by the directors of Arcelor and ArcelorMittal-1 was a breach of LCL Article 59, which provides for joint and several liability by directors of a company resulting from any violation of the LCL, and is also an unlawful act under Articles 1382 and 1383 of the Code.

98. As to the LCL Article 266 reports:

98.1. The degree of interference by Mittal and its advisers with Mazars and (it is inferred) Grant Thornton/CLERC's reports substantially compromised (as was intended to compromise) the Auditors' independence, such that there was a breach by both Mazars and (it is inferred) Grant Thornton/CLERC of Article 266.

98.2. Further, the failure by both Mazars and Grant Thornton/CLERC to refer to any special valuation difficulties (following, it is inferred, persuasion or pressure being exerted by Mittal) was a breach of Article 266.

> *98.3. The breaches of Article 266 were induced or procured by Mittal and its advisers (including GSI).*
>
> *99. Further, or in the alternative, the scheme to rig the SER involved the commission of unlawful acts under English law, in particular the making of false statements by way of the dissemination and use of the false Forecast Information (as in paragraph 96.1 above); the communication of the false fairness opinion (as in paragraph 96.2 above); and the deliberate misrepresentations to the market (as in paragraph 96.4 above); with the intention to deceive those relying on them.*
>
> ***E. The Defendant's knowing involvement in the dishonest rigging of the SER***
>
> *100. As the financial adviser to Mittal and ArcelorMittal-1 in the Post-Offer Phase, the Defendant played a central role in the orchestration and implementation of the above actions. In particular, the Defendant: … ."*

49. Loches does fairly accept that actual direct evidence of GSI's interference does not appear all that often in the Mazars Documents. However, it points to Mazars engagement letter dated 15 May 2007 and submits that this shows that Mazars saw GSI's role as being substantial and possibly crucial in helping them arrive at their conclusions. In the third section, "*The Companies'* [i.e. AM1 and Mittal's] *responsibility for providing us with information and assistance*", the letter provides that they "*also undertake to request their advisors and financial experts, and in particular Goldman Sachs, the independent expert designated to value the Companies and assist their Boards of Directors in determining the share exchange parity, to provide us their own assistance in accomplishing our procedures*." Loches points to the fact that Mazars were seeing GSI as being the independent expert who was actually (i) valuing the companies, (ii) providing them with assistance in doing what they, Mazars, had to do and (iii) helping the directors on both sides to determine the share exchange parity. Loches also points to the meetings which were taking place at the material time which, Loches says, give a reasonable inference of the involvement of GSI in the alleged conspiracy.

50. Loches makes the following further points in relation to the alleged unlawful acts under Luxembourg law:

    (1) It is clear that a breach of a foreign law statute can constitute "*unlawful means*" for the purposes of this tort: ***Mahonia Ltd v JP Morgan Chase Bank (No.2)*** *[*2004] EWHC 1938 (Comm) at [234]; ***Digicel (St Lucia) Ltd v Cable & Wireless Plc*** [2010] EWHC 774 (Ch); and ***Lebara Mobile Ltd v Lycamobile UK Ltd*** [2015] EWHC 3318 (Ch) at [41]. That being so, the conspirators would be liable in this tort if their own actions (for example, in interfering with the Article 266 reports or providing false information) were unlawful under Luxembourg law or if they induced others (e.g. Mazars and/or CLERC) to act unlawfully under Luxembourg law.

(2) As to the indemnity which Mazars obtained from Mittal for any liability arising from its report ("**the Mazars Indemnity**"), Mr Linton states that "*indemnities are entirely normal in a banking context, especially in a situation where third parties are threatening litigation*": but this does not address the question of whether such an indemnity may compromise a statutory auditor's independence under Luxembourg law in the context of Article 266.

51. GSI has of course taken issue with Loches on the factual allegations. Not without significance, however, GSI has not sought to deploy on this application any of its internal documents – which, on GSI's case, ought to be readily available to GSI – to rebut the inferences which Loches presently seeks to draw from the FPO Documents.

Pre-application correspondence

52. Loches set out the details of the intended claim and made its request for pre-action disclosure from GSI in a solicitors' letter dated 29 April 2019. Freshfields Bruckhaus Deringer ("**Freshfields**") responded on behalf of GSI on 28 May 2019. Freshfields asserted that there were three "*fundamental threshold issues* [standing, cause of action/governing law and limitation] *that are clear to be fatal to your client's claim and which render it unnecessary to engage further with the substance of your complaint ... and your request for pre-action disclosure*". Acuity Law, on behalf of Loches, provided a response on 1 July 2019. Freshfields' reply dated 1 August 2019 repeated that "*Until we have had satisfactory responses to the* [threshold issues, i.e. standing, governing law, limitation], *our client will not engage with you further*".

53. After a further exchange of letters on 7 and 14 November 2019, on 6 December 2019 Acuity Law wrote a further lengthy letter seeking to answer the queries raised by Freshfields. Freshfields' response dated 17 December 2019 raised further complaints about the alleged lack of information provided by Loches and repeated that "*our client is not prepared voluntarily to provide pre-action disclosure of documents. It is for you to demonstrate that your client has both a claim and standing to bring it. We do not accept that your client has demonstrated that it has an interest that is capable of giving rise to a claim against GSI; and nor have you (even belatedly) provided a sufficient response to the other, significant threshold points we have raised*".

54. Loches makes three points in relation to this correspondence:

(1) First, the correspondence shows that Loches has from the first been genuinely seeking to obtain information and documents from GSI so as to establish whether the inferences adverse to GSI that Loches has so far drawn from the FPO documents are well-founded.

(2) Second, it illustrates how, at least until the first witness statement of Mr Linton was served, GSI has stonewalled and steadfastly refused to engage with the substance of Loches' allegations. Even then, it has relied on a statement from a witness who, by his own admission, "*was not involved in the historical events to which the Application relates*" and who has chosen to exhibit only documents already in the public domain. GSI has not disclosed or sought to rely on any of

the internal GSI documents sought by this application and which might have demonstrated the falsity of the inferences which Loches has presently drawn.

(3) Third, the blanket refusal of GSI to engage except in regard to the so-called "*threshold issues*" has made it impossible for Loches further to refine its disclosure requests by, for example, discussing search parameters such as the identity of custodians, the appropriate keywords, and the correct date ranges.

Documents of which Loches seeks disclosure

55. The categories of documents which Loches is seeking by way of pre-action disclosure are, in summary, the following:

(1) Specific documents recording the advice given by GSI to Mittal in relation to the public offers made by Mittal for Arcelor shares in the 6-month period 1 January 2006 to 25 June 2006 (on the basis of which, it is inferred, Mittal and Arcelor agreed the Improved Offer SER of 11:7 on 25 June 2006).

(2) Specific documents containing financial information about Mittal and Arcelor which are referred to expressly in an opinion produced by GSI and addressed to Mittal dated 15 May 2007 ("**the GSI fairness opinion**") and which were obtained by GSI after 1 August 2006 (which may explain how the greatly reduced SER of 8:7 came to be proposed and to be agreed on 15 May 2007).

(3) The management accounts and financial statements for Arcelor and Mittal from January 2006 to September 2007, and the "Growth Plan" referred to in the AM2 press release dated 11 September 2007.

(4) Communications between GSI and other parties in the period between 1 February 2007 and 27 September 2007 concerning the report of Grant Thornton.

56. The documents referred to in paragraph 55(1) above are sought by Loches in order to set a baseline, as it were. Did GSI advise in June 2006 that 11:7 was fair value? Loches wishes to see this advice because, if it shows that GSI did not consider 11:7 to be a fair value at the time, that fact might seriously undermine Loches' inferential case and, if so, might save significant cost, assist the dispute to be resolved without proceedings and help to dispose fairly of the case.

57. The documents referred to in paragraphs 55(2) to 55(4) above are sought by Loches so that they can be compared with the baseline documents, the documents referred to in paragraph 55(1) above which will reveal GSI's opinion in June 2006. If the baseline documents show that GSI did consider 11:7 to be a fair value in June 2006, what caused GSI to change its mind and based on what information? The documents are likely either to show that the inferences Loches are drawing are correct i.e. that there was no material change in circumstances, or to show that the inferences Loches are drawing are incorrect i.e. that there was a material change in circumstances which GSI reasonably relied upon.

58. If the inferences which Loches are drawing are wrong, it is highly unlikely that Loches will wish to proceed with the claim. Should this be the case, the disclosure is likely

both to assist the dispute to be resolved without proceedings and to save costs. If the inferences which Loches are drawing are correct, it is possible that GSI will enter into some form of alternative dispute resolution process with Loches which might (i) result in the fair disposal of the anticipated proceedings, (ii) assist in resolving the dispute without proceedings and (iii) save costs.

59. It is not seriously in dispute that, if these documents exist, they are documents which standard disclosure would require GSI to disclose – as documents on which GSI would rely or which adversely affect its case or which support or adversely affect Loches' case.

Why, according to Loches, disclosure before proceedings is "*desirable*"

60. The relevance and importance of these documents to Loches' proposed claims and the reasons why Loches submits that it is desirable that they should be disclosed before proceedings are as follows.

61. The inferences about the advice that GSI gave to Mittal concerning the relative valuations of Arcelor and Mittal as at 25 June 2006 (when the third offer SER of 11:7 was agreed) are pleaded in paragraph 28 of the draft Particulars of Claim:

> "*28. Further, as the Defendant was acting as Mittal's principal financial adviser at the time of the Improved Offer (and had been since January 2006), it is inferred that:*
>
> *28.1. The Defendant had prepared financial analyses for Mittal in relation to the respective contributions of Arcelor and Mittal to the proposed merged entity, including analyses of (among other things) (i) the relative portion of the merger synergies allocable to Arcelor (ii) the relative contribution of Arcelor to EBITDA and (iii) the relative portion of capital expenditure allocable to Arcelor.*
>
> *28.2. On the basis of the Defendant's financial analyses, the Defendant had advised Mittal as to Arcelor's and Mittal's relative valuations.*
>
> *28.3. In particular, the Defendant had advised Mittal that the Improved Offer represented a fair relative valuation of the Arcelor and Mittal shares from the point of view of Mittal as at 25 June 2006."*

62. Loches does not know (nor can it presently know) on what basis GSI advised Mittal that a SER of 11:7 represented a fair relative valuation of the Arcelor and Mittal shares as at 25 June 2006. This means that Loches' case is vulnerable to be contradicted by documents which are in GSI's possession (but which Loches has not yet seen) setting out GSI's advice to Mittal in the period 1 January 2006 to 25 June 2006. It is possible that those documents could show that GSI considered that the 11:7 ratio represented an overvaluation of Arcelor as at June 2006. On the other hand, if those documents show that GSI considered that the 11:7 ratio represented a fair valuation (or even an undervaluation) of Arcelor as at June 2006, Loches does not know (and has no means

of knowing) the basis on which GSI changed its publicly expressed view on the fair relative valuation of the Arcelor shares between June 2006 and May 2007.

63. By May 2007, Mittal had merged into a new Luxembourg company, AM1, at a SER of 1:1.

64. On 16 May 2007, a press release stated that the boards of directors of Mittal, AM1 and Arcelor had unanimously decided that the second stage merger would be effected on the basis of the reduced SER of 8:7. The press release also stated:

> *"… the exchange ratio will be reviewed by independent auditors as required by Luxembourg law.*
>
> *In order to provide the market with information equivalent to that provided to the institutions having delivered the fairness opinions, the following information is being communicated:*
>
> - *approximately 41% of the previously-announced synergies generated by the combination of Arcelor and Mittal Steel will be realized at the level of Arcelor;*
> - *Arcelor will contribute approximately 49% of the combined Arcelor/Mittal Steel group EBITDA indicated in the combined Arcelor/Mittal Steel group harmonized value plan 2008,*
> - *Arcelor will account for approximately 50% of the combined Arcelor/Mittal Steel group's capital expenditures indicated in the harmonized value plan 2008*".

65. Although Loches does not have access to the materials from which GSI worked at the time, the inferences drawn by Loches that this financial information was rigged and that GSI knew of this are pleaded in paragraphs 73.2 and 74.7 of the draft Particulars of Claim:

> "*73.2 It is inferred from the matters set out at paragraph 74.2, 74.3, 74.5 and 75 below, that the Forecast Information was not based on any actual financial analyses of (i) the relative portion of the merger synergies allocable to Arcelor (ii) the relative contribution of Arcelor to EBITDA or (iii) the relative portion of capital expenditure allocable to Arcelor. It was manipulated to justify the proposed New SER of 8:7."*
>
> "*74.7 The Defendant knew the matters set out at paragraphs 74.1-74.6 above, and therefore it is inferred that (even if the Defendant was not centrally involved in the creation of the Forecast Information) the Defendant knew that the Forecast Information had been manipulated by Mittal."*

66. If GSI relied on actual financial figures and independent analyst reports to produce its fairness opinion, rather than relying simply on self-serving and unsubstantiated forecasts provided by Mittal, that could well change Loches' view of the merits of the

conspiracy claim. On behalf of GSI, Mr Linton has stated that by May 2007, "*the same share exchange ratio [11:7] would in fact have delivered a significant additional premium to the minority shareholders of Arcelor*". However, he is not a financial analyst and cannot provide commentary on the relative valuation of the two companies' shares in May 2007. Further, he does not set out any basis for this statement. The allegation against GSI will not just be that it got the respective valuations of Arcelor and Mittal wrong. The allegations against GSI will be that it acted dishonestly. Loches recognises (as it must) that it will not be enough for it to obtain its own expert evidence that the reduced SER was unfair to Arcelor's Minority Shareholders in May 2007. The conspiracy claim is not about whether 8:7 was in fact a fair SER, but how, if it did, GSI came to form a view that it was fair.

67. It is for these reasons that Loches is asking for an order for pre-action disclosure, in respect of (i) the valuation advice given by GSI to Mittal in the period from January to 25 June 2006, (ii) the new financial information and forecasts said to have been considered by GSI for purposes of its 15 May 2007 opinion and which (apparently) moved GSI to change its view and (iii) the management accounts and financial statements for Arcelor and Mittal from January 2006 to September 2007 and a "Growth Plan" referred to in an AM1 press release dated 11 September 2007. As to (i), Loches is asking for very specific documents (being the end results of GSI's analysis), not all relevant emails and other communications. As to (ii) Loches is simply asking for the documents listed by GSI itself in the third paragraph on page 2 of its fairness opinion. As to (iii) Loches is asking for very specific, highly relevant accounts and statements and a stand-alone document referred to by AM1 in a press release.

68. As regards the fourth category of documents ("*Communications between GSI and other parties in the period between 1 February and 27 September 2007 concerning the report of Grant Thornton*") Loches makes the following points. The Mazars Documents clearly show that a good deal of pressure was applied to Mazars by Mittal and its advisers. Loches believes that it is a fair inference that similar pressure was applied to Grant Thornton/CLERC, who acted for Arcelor. There is already some material available including references to weekly calls, meetings and sharing of draft reports, in the documents which Loches has already seen. There is also some evidence as to the evolution of Grant Thornton/CLERC's report which strongly supports this inference:

    (1) In the first draft of its report, Grant Thornton set out a full page of the valuation difficulties it had encountered, including the following highly critical matters: (i) the absence of recent financial information for both companies; (ii) the fact that the value plan produced by Mittal on which they had been invited to rely was not the product of discussions between two independent companies; and (iii) the impossibility of confirming that the actual results conformed with the value plan.

    (2) On 11 September 2007, Mr Deschamps of Grant Thornton sent an email to Mazars enclosing a mark-up (prepared by Mittal and/or its advisers) of Grant Thornton's draft report. In relation to the section setting out the difficulties encountered in the context of evaluation, the mark up stated:

    > "*To be discussed – This is not correct since the companies publish stand alone accounts. Please ask for information needed to change this conclusion.*"

The draft (which was being said by Mittal and its advisors to be incorrect) provided:

> *"The major difficulty encountered in the course of our assignment comes from the fact that the two companies to be merged are now part of the same group. The businesses of Arcelor and Mittal Steel have by now effectively been integrated and it is now difficult to separately value each company.*
>
> *...*
>
> *Since the control of Mittal Steel over Arcelor, the Board of Directors and the Group Management Board of both companies are composed by the same persons. The "Harmonised Value Plan 2008"and the allocation of the costs and benefits thereof have since not been discussed in a contradictory debate as would be the case between two independent companies."*

(3) The final CLERC report (like the Mazars report) did not specify any valuation difficulties at all. The section under the heading "*difficulties encountered in the context of evaluation*" had been removed. It is a reasonable inference that the valuation difficulties section of the draft report was removed by Grant Thornton/CLERC on the instruction of Mittal and its advisers (including GSI).

69. Unfortunately, the relevant communications between 11 and 25 September 2007 do not form part of the Mazars Documents, and Loches presently has little direct information about the communications between Mittal/GSI and Grant Thornton/CLERC. It also does not know whether Grant Thornton/CLERC also received the same sort of indemnity from Mittal as Mazars did against claims by Minority Shareholders and, if so, whether GSI knew about this indemnity.

70. However strong the inferences that may be drawn from the behaviour of Mittal and its advisers towards Mazars concerning the behaviour of Mittal and its advisers towards Grant Thornton/GSI, the best evidence of what actually happened is likely to come from the disclosure of the actual communications passing between GSI (including via third parties) and Grant Thornton/CLERC.

71. Loches contends that it is critical to its intended claim to know how the Grant Thornton report evolved and what influence the communications from Mittal and its advisers had on the content of that report. If Grant Thornton signed off on the reduced SER without extensive interference or pressure being brought to bear upon them by Mittal/GSI, then that might cause Loches to reconsider whether it will be able to sustain the allegation that the new SER had been rigged. On the other hand, if there was unusual interference in the production of Grant Thornton's report (to the extent of changing draft conclusions on substantive valuation matters), that would strongly support the allegation that Mittal and its advisers knew that the 8:7 SER had been rigged.

72. The sudden transfer from Grant Thornton to CLERC and communications relating to the transfer may also be of significance to the question of whether Grant Thornton were (or believed they were) being induced or persuaded to produce a report in breach of their Article 266 duties. Communications between GSI and Grant Thornton/CLERC which indicate that the transfer from Grant Thornton to CLERC was related to concerns

about that report and consequent liability (that transfer presently being wholly unexplained) would strongly support the inference of an unusual degree of interference or pressure being brought to bear on Grant Thornton. On the other hand, the contemporary documents may show that the last-minute switch from Grant Thornton to CLERC was not (or not evidently) the result of Grant Thornton's unwillingness to have the report submitted in its name.

73. GSI relies on the explanation for the Grant Thornton/CLERC separation contained in the SEC filing, but without giving reasons for it:

> "*On May 15, 2007, the Board of Directors of Arcelor appointed Grant Thornton Luxembourg S.A. as independent auditor, for purposes of the second-step merger process. After Grant Thornton Luxembourg S.A. commenced its work in this regard, its relationship with the Grant Thornton International network ceased for reasons unrelated to the merger. The Grant Thornton Luxembourg S.A. team in charge of the assignment, which subsequently operated under the name of Compagnie Luxembourgoise d 'Expertise et de Revision Comp table (CLERC), completed its review of the second step merger process and issued its written report to the Arcelor Board of Directors.*"

Loches submits that it is simply inconceivable that Arcelor's relationship with the Auditor engaged under Luxembourg law to provide a report which would seal the deal on this very large merger terminated a matter of days before that report was due to be produced and that Mittal and its advisors would have been told nothing about the reason for this.

GSI's case

74. It is GSI's case that the application should be dismissed for one or more of four reasons. First, GSI submits that Loches' proposed claim against GSI has no real prospect of success since it is squarely time-barred. Second, GSI submits that pre-action disclosure should be refused because Loches has not shown that pre-action disclosure would serve any useful purpose. In particular, GSI submits that Loches has not shown that pre-action disclosure would assist in resolving the dispute without proceedings or save costs (requirements (ii) and (iii) of CPR r.31.16(3)). For these two reasons GSI's case is that the court does not even have a discretion to make an order for pre-action disclosure. Loches cannot pass "*jurisdictional thresholds*" which have to be passed in order to vest the court with discretion. Third, GSI submits that pre-action disclosure should be refused in the exercise of the Court's discretion. Fourth, and in the alternative, GSI submits that, even if a *prima facie* case for relief has been made out, Loches' particular requests for documents are excessive and should be refused.

75. Each of GSI's arguments are considered in turn below.

Limitation

76. GSI submits that Loches' proposed claim has no real prospect of success because it is time-barred. The alleged events of which Loches complains took place in 2006 and

2007, more than 12 years ago, and proceedings have not yet been commenced by Loches. The primary limitation period expired in 2013 at the latest and, unless Loches can rely upon section 32 of the Limitation Act 1980, its claim must fail.

77. It is common ground that the primary limitation period has expired and that for Loches to succeed in its proposed action against GSI it will have to rely on section 32 of the Limitation Act 1980. It is also common ground that Loches, as assignee of DB's rights, cannot be in a better position than DB in relation to an intended claim, including in relation to limitation.

The law

78. Section 32 of the Limitation Act 1980 provides as follows:

> "*(1) Subject to subsections (3) and 4A) below, where in the case of any action for which a period of limitation is prescribed by this Act, either—*
>
> *(a) the action is based upon the fraud of the defendant; or*
>
> *(b) any fact relevant to the plaintiff's right of action has been deliberately concealed from him by the defendant; or*
>
> *(c) the action is for relief from the consequences of a mistake;*
>
> *the period of limitation shall not begin to run until the plaintiff has discovered the fraud, concealment or mistake (as the case may be) or could with reasonable diligence have discovered it.*"

79. Loches relies upon both sections 32(1)(a) and 32(1)(b) of the Limitation Act 1980. It alleges that the claim is based on "*fraud*" and that the relevant facts were "*deliberately concealed*". GSI does not accept Loches' assertion that a claim based on unlawful means conspiracy is necessarily an action based on fraud. It submits that the question whether a claim for unlawful means conspiracy is based on fraud will depend upon a close analysis of the unlawful means alleged. It submits that not all unlawful means are fraudulent. Nevertheless, for the purposes of the present application, GSI has indicated that it is willing to assume that Loches' claim could be capable of engaging either section 32(1)(a) or section 32(1)(b).

80. The phrase "*the plaintiff has discovered the fraud*" in Section 32(1) refers to knowledge of the precise fraud which the applicant alleges had been perpetrated on it: ***Barnstaple Boat Co Ltd v Jones*** [2007] EWCA Civ 727 at [34]. An applicant will not have "*discovered the fraud*" which it alleges has been perpetrated on it until it has knowledge of the critical allegations on which the claim is based. Nor can it be said of an applicant that it "*could with reasonable diligence have discovered it*", unless reasonable diligence would have led the applicant to have "*discovered the fraud*" i.e. acquired knowledge of the critical allegations on which the fraud claim is based. In so far as Mr Howard QC sought to suggest that the phrase "*could with reasonable diligence have discovered it*" refers to knowledge of less than the precise fraud which the applicant alleges has been perpetrated on it, the submission is unsupported by

authority. In ***Libya Investment Authority v JP Morgan Markets Ltd*** [2019] EWHC 1452 (Comm) Bryan J stated:

> *"33. For the fraud to be known or discoverable by a claimant under s.32 (such that time will start running against them), it is not necessary that the claimant knows or could have discovered each and every piece of evidence which it later decides to plead. See Sir Terence Etherton in* ***Arcadia Group Brands v Visa*** *[2015] EWCA Civ 883 at [49]:*
>
>> *"**Johnson**, the **Mirror Group Newspaper** case and **The Kriti Palm** are clear authority, binding on this court, for the following principles applicable to section 32(1)(b) of the 1980 Act: (1) a "fact relevant to the plaintiff's right of action" within section 32(1)(b) is a fact without which the cause of action is incomplete; (2) facts which merely improve prospects of success are not facts relevant to the claimant's right of action; (3) facts bearing on a matter which is not a necessary ingredient of the cause of action but which may provide a defence are not facts relevant to the claimant's right of action."*
>
> *34. Therefore, the court must "look for the gist of the cause of action that is asserted, to see if that was available to the claimant without knowledge of the concealed material" (**AIC Ltd v ITS Testing Services (UK) Ltd (The Kriti Palm)** [2007] 1 All ER (Comm) 667 per Buxton LJ at [453], quoted in **Arcadia** at [48]). At the point at which the claimant can plead the complete cause of action, however weak or strong, time starts to run. Not every detail needs to be known and a realistic view must be taken by the court."*

On the issue of the correct interpretation of section 32(1)(b), these cases are in my view wholly consistent.

81. The concept of "*reasonable diligence*" and the question when the period of "*reasonable diligence*" begins have been considered in a number of cases:

(1) There needs to be something (i.e. a fact or matter) which objectively puts the applicant on notice as to the need to investigate to which the statutory reasonable diligence requirement then attaches: ***Gresport Finance Limited v Battaglia*** [2018] EWHC Civ 540 at [49]. If there is no relevant trigger for investigation, then a period of reasonable diligence does not begin: ***JD Wetherspoon Plc v Van De Berg & Co. Ltd*** [2007] EWHC 1044 (Ch) at [42].

(2) In ***Peco Arts Inc v Hazlitt Gallery*** [1981] 1 WLR 1315 at 1323, Webster J concluded that:

> "*reasonable diligence means not the doing of everything possible, not even necessarily the doing of anything at all; but it means the doing of that which an ordinary prudent buyer and possessor of a valuable art work would do having regard to all the circumstances, including the circumstances of the purchase*".

(3) While reasonable diligence may not require "*the doing of everything possible*", the enquiry involves more than simply the question whether the claimant has acted reasonably (or what would have happened if it had). In ***Paragraph Finance v DB Thakerar & Co*** [1999] 1 All ER 400, Millet LJ explained the position at page 418:

> "*The question is not whether the plaintiffs should have discovered the fraud sooner; but whether they could with reasonable diligence have done so. The burden of proof is upon them. They must establish that they could not have discovered the fraud without exceptional measures which they could not reasonably have been expected to take ... the test was how a person carrying on a business of the relevant kind would act if he had adequate but not unlimited staff and resources and was motivated by reasonable but not excessive sense of urgency.*"

(4) This passage was cited with approval by Neuberger LJ in ***Law Society v Sephton & Co (a firm)*** [2005] QB 1013, [110]. At [116], he continued:

> "*There must be an assumption that the claimant desires to discover whether or not there has been a fraud. Not making any such assumption would rob the effect of the word 'could', as emphasised by Millet LJ, of much its significance. Further, the concept of 'reasonable diligence' carries with it, as the judge said, the notion of a desire to know, and indeed, to investigate*".

82. The passage from the judgement of Millet LJ in ***Paragraph Finance v DB Thakerar & Co*** quoted at paragraph 81(3) above, also makes the point that an applicant relying on section 32 of the Limitation Act 1980 bears the burden of proof.

83. Given Loches' status as assignee, it is common ground that Loches must show that neither DB nor Loches "*discovered the fraud ... or could with reasonable diligence have discovered it*" in the six years prior to the issue of any claim.

84. GSI submits (and it is not seriously in issue) that the correct approach to assessing whether facts could have been discovered with reasonable diligence involves the following stages. First, the court must identify the relevant facts necessary for an applicant properly to plead its claim: ***Granville Technology v Infineon*** [2020] EWHC 415 (Comm) at [28] – [29]. An applicant cannot rely on a lack of knowledge of facts that merely go to the strength of its claim or its confidence in it: ***Arcadia Brands Group v Visa*** [2015] EWCA Civ 883 at [59] and [62]). Second, there must be sufficient material objectively to put the applicant on notice of something which merited investigation – sometimes referred to as a '*trigger*': ***Granville Technology v Infineon*** [2020] EWHC 415 (Comm) at [43]-[48]. It will be sufficient that it is "*objectively apparent that something "has gone wrong" – where the claimant has lost property, failed to receive something it expected to receive, or suffered an injury of some kind – which event ought itself to prompt the claimant to ask "why?" and investigate accordingly*." (ibid at [48]). Third, the question is then whether the applicant could, exercising reasonable diligence, have discovered the facts necessary to plead the claim.

85. In relation to the third stage, GSI makes the following three points:

(1) There must be an assumption that the claimant desires to discover whether or not a fraud has been committed. As Neuberger LJ held in ***Law Society v Sephton*** [2004] EWCA Civ 1627 at [116], "*the concept of "reasonable diligence" carries with it ... the notion of a desire to know, and, indeed, to investigate*."

(2) The Court should consider what steps were required to be taken in order to exercise "*reasonable diligence*". "[T]*he exercise of "reasonable diligence may require investigatory measures to be taken by a claimant/applicant (including instituting legal proceedings to obtain disclosure)*": ***Libyan Investment Authority v JP Morgan Markets Ltd v JP Morgan Markets Ltd*** [2019] EWHC 1452 (Comm) at [32]).

(3) It is then question of fact in each case whether the claimant could with reasonable diligence have discovered the relevant fraud or concealment: ***Gresport Finance Limited v Battaglia*** [2018] EWCA Civ 540 at [50].

86. These three propositions, each of which relates to the so-called "third stage" referred to in paragraph 84 above, are not seriously disputed. However, there is a dispute (or there appears to be a dispute) between the parties in relation to the so-called "second stage".

87. It was said on behalf of GSI at the hearing that "*all that is necessary is that there is a trigger for investigation which would arise when there was something which objectively put the claimant on enquiry such that a reasonable person would take further steps to investigate the position*". It was also said that "*if you know you've suffered a loss and reasonable diligence would require you to investigate that loss, you may not know that actually it was as a result of a fraud but you know ... something has gone wrong. If those investigations would uncover that actually there was a fraud, then time has start to run*". In my view, these propositions are in far too general terms. The propositions are said to derive from the analysis of Foxton J in ***Granville Technology v Infineon*** [2020] EWHC 415 (Comm), but I cannot find support for such general propositions in the judgment. For the reasons explained by Aikens LJ in ***Allison v Horner*** [2014] EWCA Civ 117 at [14], the question for the court is narrower. The phrase "*the plaintiff has discovered the fraud*" in section 32(1) refers to knowledge of "*the precise deceit which the claimant alleges had been perpetrated on him*". Although the observations made by Aikens J in ***Allison v Horner*** concerned the construction of the phrase "*the plaintiff has discovered the fraud*", his observations apply with equal force to the construction of the phrase "*could with reasonable diligence have discovered* [the fraud]". It seems to me that the question for the court on this application is whether DB (or Loches) was put on enquiry that GSI might have committed *the fraud* so that it ought to have followed the matter up. It is too general a proposition, for example, to suggest that DB's awareness either that it had suffered a loss or that "*something had gone wrong*" was itself a trigger giving rise to a duty to exercise reasonable diligence to investigate whether the loss has been caused by a fraud.

The correct approach

88. There is no particular rule of law or practice as to how a court dealing with an application for pre-action disclosure should deal with any question of limitation as opposed to any other "merits" point. After stating this in ***The ECU Group Plc v HSBC Bank Plc and others*** [2017[EWHC 3011 (Comm) at [24], HHJ Waksman QC (as he then was), continued:

> "*Obviously, if it is submitted and the court finds that the claim is hopelessly time-barred with no real prospect of overcoming it, that would be a powerful if not conclusive reason not to order PAD since the entire exercise would be a waste of time. But if that is not the submission or finding, then it is simply a matter to be weighed in the exercise of discretion*."

89. In my view, these statements accurately reflect the approach a court dealing with an application for pre-action disclosure should adopt. Further, as already noted, courts should be hesitant about embarking upon any determination of substantive issues in the context of an application for pre-action disclosure, and the determination of issues of limitation fall within this category.

90. On this application, the court is not being asked to (and will not) embark upon the final determination of the issue of limitation which has been raised. Further, as there is no jurisdictional "*arguability threshold*" – the jurisdictional requirements for the making of an order under CPR r.31.16 are expressly set out at heads (a)-(d) of sub-paragraph (3) of the rule – the question the court has to answer is whether the applicant has no prospect of being able to establish a viable claim. Unless the matter is so clear on the face of the contemporary documents or the admitted facts as to permit of only one answer, the court should not engage in an attempt to resolve the issue.

Application of the law

91. On this application the relevant question is whether it is unarguably the position that Loches or DB could with reasonable diligence have discovered "*the fraud*" more than 6 years before the date on which proceedings are issued. For the purposes of this application, the cut-off date is taken to fall in June 2014 at the earliest.

92. GSI contends that it is unarguably the position for two primary reasons. First, because Loches has failed to give any evidence as to the steps taken by either DB or Loches to investigate the claim at any stage prior to 2015 when primary limitation had already expired; and, second, because, had DB and/or Loches acted with reasonable diligence, they would have joined the French Criminal Proceedings and, by joining the proceedings, have obtained the FPO Documents.

93. In my view the arguments deployed by GSI do not demonstrate that they would be bound to win a strike out on limitation grounds had an action been commenced by Loches. Accordingly, GSI's submission that the "threshold" requirements of CPR r.31.16(3) are not met because the claim is time-barred is not made out.

94. On the facts presented on this application it is tolerably clear that Loches did not in fact discover the fraud which it now alleges against GSI, if it did discover it, until it received the FPO documents in 2015 (and the contrary is not seriously suggested).

95. Further, it is at the very least arguable that neither DB nor Loches could with reasonable diligence have discovered the fraud it now alleges against GSI prior to June 2014, six years earlier than the date of the hearing. That the SER applied to the rejecting Arcelor shareholders (8:7) was less than the SER applied to those Arcelor shareholders who accepted the third Mittal takeover offer (11:7) was at least arguably not itself a "*trigger*" for the purposes of section 32 of the Limitation Act 1980. For the reasons stated above, it is too general a proposition to suggest that every "*loss*" gives rise to a need to investigate whether it has been caused by a fraud. It is at least arguable that only some fact or matter that puts the applicant on notice of the need to investigate whether there had been a *fraud* would do. The exercise of deciding whether there has been a trigger is fact specific; and, on the facts presented on this application, prior to June 2014 there was no such fact or matter which objectively put DB on notice of the need to investigate whether there had been a fraud. Put another way, there was no such fact or matter which triggered a need to exercise reasonable diligence. The existence of the French criminal proceedings at least arguably did not put DB on notice of the need to investigate whether it had been the subject of a fraud; nor did the existence of the French civil proceedings; nor did the complaints made by the Arcelor shareholders association to the auditors in October 2007; nor did the various press reports to which I was referred. The focus of these was different – on the provision by Mittal of false and misleading information – and did not put DB on notice of the need to investigate a fraud. Nor did the Sorgem report dated 23 April 2007, which pre-dated the alleged unlawful means conspiracy.

96. Further, even if there was such a trigger, it is at least arguable that reasonable diligence did not require DB or Loches to join the French criminal proceedings, which might have resulted in their obtaining the FPO Documents earlier than they did. The claims that rejecting Arcelor shareholders believed were capable of being pursued and were pursuing prior to 2015 were primarily claims for misrepresentation, i.e. the dissemination of false and misleading information. None were made against GSI. Neither DB nor Loches had any interest in pursuing these claims (which claims GSI described as fundamentally unmeritorious) and it is at least arguable that reasonable diligence did not require them to do so. It was only in 2015 that Loches became aware of a potential conspiracy claim.

97. And, even if DB or Loches had joined the French criminal proceedings and gained access to the FPO Documents, it is at least arguable that it would have been unlawful for DB or Loches to use the documents obtained in French criminal proceedings to pursue a fraud claim. It is also at least arguable (and Loches has reserved the right to argue) that Loches has not yet discovered the fraud within the meaning of section 32(1)(b) of the Limitation Act 1980 because there are material facts still to be discovered.

98. For these reasons, GSI's submission that the "threshold" requirements of CPR r.31(16)(3) are not met because the claim is time-barred is not made out.

Whether pre-action disclosure is "*desirable*"

99. The second ground on which Loches' application is opposed by GSI is that Loches has not shown that pre-action disclosure would serve any useful purpose. In particular, in reliance on CPR r.31.16(3)(d)(ii) and (iii), GSI submits that Loches has not shown that pre-action disclosure would assist in resolving the dispute without proceedings or save costs, respectively. GSI's contention is that Loches cannot pass the "*jurisdictional thresholds*" imposed by CPR r.31.16(3)(d)(ii) and (iii). GSI does not address the jurisdictional threshold imposed by CPR r.31.16(3)(d)(i) on the ground that Loches has not, in its view, developed a case that disclosure is necessary to "*dispose fairly of the anticipated proceedings*".

100. In a nutshell, GSI's case is that this is an application with no obvious rationale. Loches does not assert that it needs pre-action disclosure in order to formulate its claim: it has already prepared a draft set of Particulars of Claim running to 38 pages. Instead, it purports to justify the application on various grounds.

    (1) First, that there is every chance that early disclosure of those documents will have a very real effect on the shape of the intended claim or whether it goes forward at all. Loches purports to justify the application on the ground that, if GSI provided documents that satisfied Loches its allegations were false, then Loches may need to reassess the conspiracy allegation, or if the evidence showed that Loches' allegations were well-founded, then this may force GSI to reassess its response to the intended claim. Loches submits that it is possible that further evidence may affect the inferences Loches has drawn, change Loches' view of the merits, cause Loches to reconsider whether it will be able to sustain its allegations or narrow the issues between the parties.

    (2) Second, further evidence might alter the way in which GSI will respond to the intended claim – it might prefer to resolve matters without the need for proceedings.

    (3) Third, the further evidence might bolster Loches' case – it might provide the underlying documents which would support Loches' inference.

101. GSI submits that none of these points come close to providing a justification for pre-action disclosure. Pre-action disclosure is not appropriate in every case. It is only appropriate where there is something which takes the case outside the usual run of disputes. As to the prospects of GSI settling the matter, GSI has concluded that the claims are misconceived and that there is therefore no reason to think that pre-action disclosure will have any meaningful impact on whether the claim is to proceed. Further, obtaining documents to strengthen one's case has never been a proper basis for pre-action disclosure.

102. GSI's contention that Loches has not developed a case that disclosure is necessary to "*dispose fairly of the anticipated proceedings*" (CPR r.313.16(d)(i)) is surprising. That Loches' application was based on all of the reasons stated in CPR r.31.16(d) was evident from both its skeleton argument and its oral submissions.

103. It seems to me, on balance, that disclosure before proceedings have started is likely to be desirable in this case for each of the three alternatives required by CPR r.31.16(d). Accordingly, the jurisdictional thresholds imposed by the rule are satisfied.

104. The fact that Loches is in a position to prosecute its claim without the pre-action disclosure, if it be a fact, is not of itself fatal to an application for pre-action disclosure. This would be a factor which the Court would take into account, and it would be an important factor. See paragraph 44 above. Although it is not clear to me that, if an action were commenced, Counsel would in fact be willing to put his or her name to the draft Particulars of Claim which have been produced on this application, I have nevertheless made an assumption to that effect, which I consider to be fair. It is accordingly a factor which I have taken into consideration along with others.

105. Another important factor is that, if pre-action disclosure is ordered in respect of the financial documents identified at sub-paragraphs 55(1), 55(2) and 55(3) above, there is a real prospect that it would shed real and direct light on why GSI advised Mittal to make the third offer in June 2006 and whether GSI performed a proper financial analysis before delivering its opinion stating that the new and substantially reduced SER was fair in May 2007. If it transpires that GSI's advice in June 2006 was that the third offer represented an overvaluation of Arcelor or if GSI's May 2007 fairness opinion was the product of considered analysis of new information and financial forecasts which indicated that Arcelor would lag behind Mittal in the long term or that the synergies to be expected from the Merger had changed, Loches may need to reassess the merits of pursuing its conspiracy allegation. Conversely, if disclosure indicates that Loches' suspicions about GSI's dishonesty are well-founded, it may well be that GSI would prefer to resolve matters without the need for proceedings. Either way, there is a real prospect that any claim would be settled without litigation, or at least at an early stage.

106. Even if the above analysis is not correct, there would be a real prospect of narrowing the issues between the parties. If the documents disclosed show that GSI simply assumed the correctness of the information produced by Mittal and that it is that information which altered GSI's view on the respective valuations, then the dispute may come down to whether GSI had an honest basis for believing that that information was correct.

107. As to the documents identified at sub-paragraph 55(4) above, if the correspondence shows that GSI knew that significant pressure had been exerted on Grant Thornton by Mittal and its advisers to delete the valuation difficulties section of its report or that Grant Thornton had queries about the financial information which could not be answered (to the extent that Grant Thornton was not prepared to sign off on the report), it is entirely realistic to suppose that this would alter the way in which GSI responds to the intended claim pre-action.

108. Further, and as noted at paragraph 51 above, it is not without significance that GSI has not sought to deploy on this application any of its internal documents – which, on GSI's case, ought to be readily available to GSI – to rebut the inferences which Loches presently seeks to draw from the FPO Documents. It would have been a simple task for GSI to exhibit and refer to a few internal documents by way of example to rebut the

inferences which Loches seeks to draw from the FPO Documents. GSI has chosen not to do so and it is reasonable to infer from its failure that there are no such documents.

Discretion

109. As the jurisdictional requirements of CPR r.31.16(3) are met in this case, the Court must go on to consider the question of discretion. The Court must exercise the discretion having regard to all the facts and in detail, not merely in principle. See paragraphs 41(5) and 42 above.

110. GSI invites the Court to refuse pre-action disclosure for four reasons:

(1) First, Loches' case on limitation is very weak;

(2) Second, there is nothing on the facts of this case to render it "*unusual*" or to take it outside the "*usual run*";

(3) Third, Loches has been less than frank in its evidence in relation to DB's standing (and, hence, Loches' standing) to bring a claim and there is real doubt as to whether Loches has any right to bring a claim against GSI at all; and

(4) Fourth, GSI has real concerns that the application is being pursued for an ulterior purpose.

111. These reasons are considered in turn, below.

Limitation

112. Beyond the conclusion that Loches' limitation defence is at least arguable it is not prudent to go. It would be unwise (and certainly unsatisfactory) for the Court on this application to seek to decide the issue of limitation or even to express firm views on the issue one way or the other. As the Court of Appeal pointed out in ***Rose v Lynx Express Limited*** [2004] EWCA Civ 447 at [4]:

> "*there are practical dangers about considering any substantive issue, and particularly the core issue in the action, in the context of an application for pre-action disclosure. At the pre-action stage, the parties may not have thought through or seen all the implications of the issue in the same way as they will have done by the time when it comes to be tried. Any pre-action determination will have to take place in the light of assumptions about the factual circumstances, which may prove incomplete or incorrect. The actual factual circumstances, when known, may throw up problems about a particular construction of the articles which may not have been apparent at the pre-action stage. We think therefore that courts should be hesitant, in the context of an application for pre-action disclosure, about embarking upon any determination of substantive issues in the case. In our view it will normally be sufficient to found an application under CPR, r.31.16(3) for the substantive claim pursued in the proceedings to be properly arguable and to have a real prospect of success, and it will normally be appropriate to approach the conditions in CPR, r,31.16(3) on that basis.*"

113. Accordingly, the limitation issue is a neutral factor which should have no influence on the Court's discretion.

Not unusual

114. GSI contend, second, that there is nothing on the facts of this case to render it "*unusual*" or take it outside the "*usual run*" so as to warrant pre-action disclosure and that this is a factor which goes to the Court's discretion. I do not agree. It seems to me, as I have already stated, that disclosure before proceedings have started is likely to be desirable in this case for each of the three alternatives required by CPR r.31.16(d).

Loches' standing to bring a claim

115. GSI contend that there is very real doubt as to whether Loches has any right to bring a claim against GSI at all. To succeed at trial Loches would be required to prove that DB held an equivalent claim against GSI at the date of the assignment but there is very real doubt whether Loches would be able to do so. GSI contends that Loches has been less than frank in its evidence in relation to DB's standing; that it has been remarkably coy about giving details of DB's interest in Arcelor; that Loches has been diffident about giving details of the factual basis on which Loches asserts that DB has suffered a relevant loss; and that the evidence which Loches has provided suffers from serious inconsistencies.

116. For its part, Loches relies upon a letter from DB to Loches confirming that, as at 15 May 2007, the date before the public announcement of the merger SER, DB owned 1,252,473 shares in Arcelor and that, as at 6 November 2007, the day before the completion of the merger, DB owned 593,344 shares in Arcelor. Loches also relies upon the SPA, which provides, *inter alia*, as follows:

> *"WHEREAS*
>
> *(A) Words and expressions defined in this Agreement shall have the same meanings when used in these recitals.*
>
> *(B) In 2007,* [AM2] *acquired Arcelor through the Merger and consequently the Seller became the owner of shares in* [AM2]*, the entitlement to which was determined at the Exchange Ratio.*
>
> *(C) A number of former Arcelor shareholders who acquired shares in* [AM2] *through the Merger have issued proceedings against, and/or been in settlement discussions with, amongst others,* [AM2]*, concerning the appropriateness of the Exchange Ratio, which may result in the making of a Compromise Payment.*
>
> *(D) The Purchaser* [i.e. Loches] *believes that it may be in a position to negotiate a Seller Compromise Payment.*
>
> *(E) The Seller* [i.e. DB] *has agreed to sell its rights to the Seller Compromise Payment to the Purchaser who has agreed to acquire the same, subject to the terms and conditions hereof.*
>
> *NOW IT IS HEREBY AGREED as follows:*

1. Definition

Unless the context otherwise requires, in this Agreement the following expressions shall have the following meanings:

"Arcelor" means Arcelor S.A.;

"Compromise Payment" means any payment made to a former holder of Shares which is paid to such person in that capacity in settlement of any existing, threatened, anticipated or possible legal proceedings challenging the sufficiency or adequacy of the Initial Entitlement and whether such payment is expressed to be in addition to the Initial Entitlement or otherwise;

"Custodian" means Deutsche Bank AG, Amsterdam Branch;

"Effective Date" means the date of the satisfaction of the conditions set out in paragraph 2.03 of this Sale and Purchase Agreement;

“Exchange Business Day” means any calendar day on which the Shares are open for trading on the Paris Stock Exchange;

"Exchange Ratio" means 8 (eight) ordinary ArcelorMittal shares for every 7 (seven) Shares;

"Further Consideration" means fifty percent (50%) of any Seller Compromise Payment;

“Initial Entitlement" means the amount of entitlement each holder of Shares received following the Merger, being an amount equal to (i) the number of pre-restructuring Shares held by that person divided by 0.875 (7 divided by 8)(such quotient being referred to as "A") or (ii) if such number was not a whole number, the immediately lower whole number of post-restructuring Shares (such number being referred to as "B") and a number of fractions of a seventh of a post-restructuring Arcelor ordinary share equal to seven multiplied by the difference between A and B;

"Merger" means the merger undertaken between ArcelorMittal and Arcelor which occurred in 2007 pursuant to which the shareholdings of ArcelorMittal and Arcelor merged in exchange for ArcelorMittal shares at the Exchange Ratio;

"Mittal Steel" means Mittal Steel Company N.V.;

"Pre-restructuring Date" means each of (i) 14 May 2007; (ii) 5 November 2007; and (iii) 9 November 2007, as appropriate, each being the Exchange Business Day immediately prior to the Restructuring Date;

"Purchaser's Account" means the account nominated by the Purchaser at a bank situated in a country of its choice, denominated in the relevant currency and notified to the Seller as the account to which the payment of the Seller Compromise Payment shall be made in accordance with the provisions of Clause 2.02;

"Purchase Price" means Euro 1.00 in aggregate;

“Restructuring Date” means each of: (i) 15 May 2007; (ii) 6 November 2007; and (iii) 12 November 2007, as appropriate, each being the

Exchange Business Day on which the various stages of the Merger came into effect;

"Seller Compromise Payment" means any Compromise Payment(s) made in relation to the Seller Holding;

"Seller Holding" has the meaning, as at the relevant Pre-restructuring Date and the relevant Restructuring Date, set out in the Schedule hereto, being, in each case, the number of actual settled Shares held by the Custodian on behalf of the Seller on each such Pre-restructuring Date and Restructuring Date.

"Seller's Residual Rights" means all and each and any rights to which the Seller was or may have been entitled to as at and following each respective Pre-restructuring Date and each Restructuring Date and the completion of the Merger (including any rights accruing thereafter) which were or are referable to, derived from or otherwise ascertainable by the Seller Holding including, without limitation, the Seller Compromise Payment and the right to assert, claim and compromise the same;

"Shares" means the ordinary shares of Arcelor listed on the Paris Stock Exchange with ISIN code LU0140205948 and ISIN code LU0325453354;

2. <u>Sale and Purchase</u>

2.01 With effect from … the Effective Date and in consideration of the payment of the Purchase Price, the Seller sells to the Purchaser and the Purchaser acquires all the rights and obligations of the Seller to the Seller's Residual Rights.

2.02 (a) On the Effective Date, the Purchaser shall pay the Purchase Price to the Seller (i) in cash, or (ii) to an account denominated in Euros at such bank and in such country as the Seller shall direct ("the Seller's Account");

(b) Should any Seller Compromise Payment be made or required to be made to the Seller, the Seller shall pay the same to the Purchaser's Account as soon as reasonably practicable following the Seller actually receiving such Seller Compromise Payment; and

(c) Following any payments made in accordance with clause 2.02(b), the Purchaser shall pay to the Seller's Account any Further Consideration received by the Purchaser after the Effective Date, such payments to be made as soon as reasonably practicable following the Purchaser actually receiving the Seller Compromise Payment(s)

2.03 The obligation of the Purchaser to pay the Purchase Price to the Seller shall be subject to the Purchaser having received a duly signed original of this Sale and Purchase Agreement.

…

4. <u>Risk Acceptance and Other Representations</u>

Subject to the other terms and conditions hereof, the Purchaser hereby accepts without recourse to the Seller the full risks of and responsibility for

the Seller Residual Rights, which it shall not be under obligation to pursue and the Seller shall have no responsibility for and makes no representation or warranty in respect of the validity, enforceability or collectability of the Seller Residual Rights or the financial condition of ArcelorMittal. The Seller shall have no duty or responsibility either initially or on a continuing basis to provide the Purchaser with any credit or other information relating to Arcelor or ArcelorMittal or to the financial condition or creditworthiness of Arcelor or ArcelorMittal, it being understood that the Purchaser has made such independent appraisals and examinations of the same as It thinks necessary or advisable.

…

8. Governing Law

This Sale and Purchase Agreement and the rights and obligations of the parties hereto shall be governed and construed in accordance with the laws of England and the Seller and the Purchaser submit to the exclusive jurisdiction of the English Courts and the courts entitled to hear appeals therefrom."

117. It is inherently implausible that DB would enter into a formal legal agreement stating a position, and provide a formal letter restating that position, unless what it stated to be the position was in fact the position. The SPA clearly identifies (in the Schedule) the shares held by DB on the dates identified and (in the body of the agreement) passes to Loches whatever rights DB had in relation to its shareholding on those dates.

118. GSI points to the following deficiencies in Loches' evidence:

119. First, the nature and extent of DB's interest in Arcelor, and the circumstances in which the purported assignment was concluded remain obscure. Loches was repeatedly asked in pre-action correspondence to explain the nature of this interest but was reticent to do so. Loches only disclosed the full SPA on 6 December 2019, very shortly before this application was issued on 24 December 2019. Once it had been disclosed it was evident that the SPA does not refer to a conspiracy claim (or any other cause of action) directly, instead providing for the assignment of a right to Loches to seek to negotiate a "*Seller Compromise Payment*", presumably with ArcelorMittal itself, regarding the appropriateness of the SER. Further, the SPA also made clear that DB was offering no assurances that any relevant rights existed: Clause 4 stated (amongst other things) that DB "*shall have no responsibility for and makes no representation or warranty in respect of the validity, enforceability or collectability of the Seller Residual Rights*".

120. Second, Loches dealt with DB's interest in Arcelor and the assignment very briefly in its initial evidence; and its reply evidence provided limited further evidence on DB's alleged interest in Arcelor, but this revealed further and serious inconsistencies regarding the nature and extent of that interest. In particular, Loches has sought to present DB as a pre-existing minority shareholder in Arcelor, which was prejudiced by the course of the Merger and (in particular) a change in the exchange ratio by Mittal after it had acquired initial control over Arcelor. GSI contend that this cannot be true. Loches' reply evidence shows that DB only began to acquire the relevant shares in Arcelor on 17 November 2006, the day the offer closed for acceptance. The

presentation by Loches of DB as an existing minority shareholder, at the mercy of Mittal, is therefore simply not borne out by the available evidence. Further, the SPA states that DB held 1,252,473 shares on 14 May 2007. Loches' Draft Particulars of Claim rely on this figure, asserting a resulting loss of €22,807,533. However, Loches' reply evidence shows that DB held 1,131,203 shares in Arcelor at 14 May 2007. Loches was asked about this issue in correspondence: its answer was that it was "*unable to explain this discrepancy*", but that it did not matter because Loches had a valuable claim nonetheless. GSI contends that this is an inadequate answer. The discrepancy is far from trivial: it amounts to a difference of c.10% in the size of DB's alleged shareholding, worth c.€2 million to Loches' purported claim. It also casts doubt on the accuracy of the SPA more generally, which appears not to have been prepared with due care. Further, the Revised and Restated SPA states that DB held 401,098 shares in Arcelor on 5 November 2007 and 593,344 shares on 6 November 2007. However, Loches' reply evidence shows that DB had sold all its shares in Arcelor before November 2007, when the Merger completed. No explanation for this discrepancy has been offered. Further, no explanation has been given as to why DB would exit its position in Arcelor while maintaining rights of action associated with the shares as so-called "*Seller's Residual Rights*". Nor is it clear how a conspiracy claim based on shares which allegedly "*were exchanged at a rigged Share Exchange Ratio*" could be brought by a party which did not own any shares at the point of exchange in November 2007.

121. Third, Loches has not provided (and may not have) any information that would explain the purpose of DB's shareholding and its interrelationship with any other related positions that DB might have. If DB had other positions linked to Arcelor or Mittal then it may have suffered no loss at all: any loss on DB's shareholding in Arcelor from the reduced SER could be offset by a corresponding gain elsewhere. For example, DB might have hedged its Arcelor position or the Arcelor position may itself have been a hedge of another transaction. It is already apparent that DB had positions in other entities linked to the Merger, having acquired a short position in ArcelorMittal-1 in 2007. This has not been explained and it is entirely possible that other positions were taken which would have hedged DB's interest in Arcelor. Without full disclosure of DB's overall positions, it is impossible to know whether and to what extent DB suffered any loss. If DB did have no (or no material) net exposure to Arcelor as a result of the Arcelor/Mittal merger, this would also explain elements of the evidence that appear puzzling. For example, it would explain why DB was prepared to sell its interest in the "Seller's Residual Rights" for €1, and why it has exhibited no interest in either pursuing those rights itself or in assisting Loches in bringing its claim. It may also explain why the SPA is directed at negotiating a compromise payment, rather than at bringing a claim requiring proof of loss.

122. GSI contends that it is unclear how Loches intends to make good these deficiencies and prove its claim. DB does not now appear to be cooperating with Loches. Loches has suggested that it will seek third-party disclosure in due course to resolve the discrepancies in its evidence. However, GSI contends that the problem is more fundamental, since Loches has provided no evidence to suggest DB has actually suffered a loss at all. It appears that Loches has seen fit to advance a €20m claim against GSI on a speculative basis in the hope it can prove its interest to bring the claim at some later date. The court should not require GSI to provide pre-action disclosure in

circumstances where Loches has not demonstrated any relevant interest in the claim at all.

123. Loches accepts that there are discrepancies in its evidence on standing to bring a claim. However, it places reliance on the terms of the amended SPA. Loches contends (and it is not in dispute) that an unlawful means conspiracy is capable of assignment as any other cause of action. Loches contends further that the SPA expressly assigns all and any claims which DB had by virtue of its position as a former Arcelor shareholder as at and immediately prior to certain specified dates, namely, 14 May, 15 May, 5 November, 6 November, 9 November and 12 November 2007. On its face the SPA therefore covers any claims which DB had against any third party as at those dates, provided that the claim derived from or was otherwise referable to the fact of DB's ownership of the Arcelor shares.

124. As regards DB's interest in Arcelor, Loches accepts that there is some discrepancy in the documentation as to DB's precise shareholding on 15 May 2007 which will need to be resolved in due course, but states that, whichever figure is correct, DB had a very substantial interest in Arcelor on the relevant date.

125. Having regard to the evidence before me on this application, Loches is able to establish its claim based on the express terms of the SPA made with DB, although DB's precise shareholding will need to be resolved hereafter given the discrepancies in the documentation. Repeating the conclusion at paragraph 117 above, it is inherently implausible that DB would enter into a formal legal agreement stating a position, and provide a formal letter restating that position, unless what it stated to be the position was in fact the position. That Loches' initial explanations as to its standing lacked clarity is a factor to which the Court must have regard. However, those initial failings go nowhere near undermining the cogent evidence embodied in the SPA.

<u>Loches' ulterior motive</u>

126. A further argument featured in GSI's skeleton argument and was touched on lightly in oral submissions. GSI contends that the application should be refused because it, GSI, has real concerns that the application is being pursued for an ulterior motive. The argument proceeds on the assumption that Loches is already able to issue its claim and speculates as to why, in the circumstances, the application is being pursued. GSI notes that it is possible that Loches simply wants to obtain documents to allow it to further develop its claim or to strengthen the inferences it has drawn, but that this would not be a proper reason for pre-action disclosure. However, GSI believes that Loches' real objective is to obtain GSI's documents in order to permit it to bring other claims, to which it has not averted, against either other defendants or in other jurisdictions and suggests that Loches "*has form*" for this type of conduct. The example it gives in support of the "*form*" allegation is the use made by Loches of the FPO Documents which (it is common ground) were obtained in breach of French law. It alleges that the subsequent authorisation by the French prosecutor for the use of the documents in England was obtained on the basis of an inaccurate and misleading explanation. GSI also relies upon what it alleges has been a lack of candour on the part of Loches concerning its business, its spokesperson and Equilibrium, and its willingness to rely on incomplete and misleading evidence regarding DB's interest in Arcelor. Against this background, and in the absence of any credible explanation for why this application is

being brought at all, GSI contends that the Court should be very slow to order pre-action disclosure of documents to Loches. Even if it has the jurisdiction to do so, disclosure should be refused in the exercise of the Court's discretion.

127. The difficulty with this argument is that there is a mismatch between the example given by GSI and the conduct GSI says it fears, namely, that Loches intends to use any pre-action disclosure it may obtain on this application in order to bring unidentified claims against other defendants or in other jurisdictions. Loches was never a party to the French proceedings and did not make an application as a party to those proceedings for pre-action (or any) disclosure. There is no similarity between Loches' conduct in relation to the French proceedings (to which it was not a party) and its conduct on this application. Further, there is no evidence to support GSI's suggestion that Loches intends to use any documents it might obtain pursuant to this application in order to bring claims against other defendants or in other jurisdictions. Such conduct would in any event be in breach of Loches' undertaking to the Court not to the use the documents for purposes other than the intended proceedings, an undertaking with which I would expect Loches to comply.

Relief

128. As the Court is willing in principle to consider requiring pre-action disclosure to Loches, the next question which arises is what documents GSI should be required to disclose, if any.

129. The documents of which Loches seeks pre-action disclosure are set out in the Schedule to the application. A summary of the categories of documents is at paragraph 55 above.

130. GSI's contention is that Loches' requests are excessive and, for this reason, should be refused. In support of its contention that the requests are excessive, it makes the following points:

(1) With the exception of the "*Value Plan*" and the "*2012 Growth Plan*" referred to referred to in paragraphs 2.1 and 4 of the Schedule, respectively, Loches seeks categories of documents (some of which are broad and loosely defined) rather than specific materials which will require searches and manual review (akin to standard disclosure) in order to identify the documents falling within them.

(2) It cannot be said of the categories of disclosure sought that they are limited to what is "*strictly necessary*", not least as they do not appear to be necessary to bring the claim at all.

(3) GSI has already applied search terms and date ranges to its document set to create a pool of documents that would form the basis of the review that would be required if pre-action disclosure were to be granted. The documents that are within this pool number 70,000. The cost of the further review exercise required to comply with the order sought by Loches is estimated at £200,000.

(4) What is being asked by way of pre-action disclosure is essentially a full disclosure exercise.

131. GSI's submissions are unpersuasive. Loches is seeking limited categories of documents which are as sharply focussed as they can be given the documentary material which is currently available. The ambit of the disclosure sought is far from "*wide and woolly*", using the colourful language of Morrison J in the ***Snowstar Shipping Company Limited v Graig Shipping Plc*** [2003] EWHC 1367 (Comm); and it is a significant over-statement to suggest, as GSI does, that what is being asked for is essentially a full disclosure exercise. What Loches is seeking is targeted material aimed specifically at proving or disproving the inferences which Loches has currently drawn.

132. Further, GSI has not sought to engage in a dialogue with Loches – of the kind required by the Commercial Court Guide and the provisions of Practice Direction 51U – with a view to focussing the categories of documents more sharply or to identifying appropriate search terms. Instead GSI has adopted a binary, all or nothing approach. GSI ought to have entered into a course of dialogue with Loches with a view to refining the disclosure requests. Before engaging in the expensive search process which it has conducted, GSI ought also to have liaised and co-operated with Loches with a view to reaching agreement on search parameters such as the identity of custodians, the appropriate keywords and the correct date ranges.

133. For these reasons I do not consider Loches' disclosure requests to be excessive.

Conclusion

134. For these reasons, Loches' application for pre-action disclosure succeeds.