Neutral Citation Number: [2020] EWHC 1995 (Comm)

Case No: CL-2019-000142

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

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

Date: 23/07/2020

Before :

CHRISTOPHER HANCOCK QC
(SITTING AS A JUDGE OF THE HIGH COURT):

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Between :

MEDICAL ASSOCIATES OF NORTHERN VIRGINIA INC., PROFIT SHARING PLAN	**Claimant**
- and –	
1) STEWARD MALTA LIMITED **2) STEWARD MALTA ASSETS LIMITED** **(3) STEWARD MALTA MANAGEMENT LIMITED**	**Defendants**

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Daniel Shapiro QC (instructed by **Lewis Silkin**) for the **Claimant**
Lucie Briggs (instructed by **DLA Piper UK LLP**) for the **Defendants**

Hearing dates: 5 June 2020

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Approved Judgment

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

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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 23 July 2020 at 2:00 pm.

Christopher Hancock QC (sitting as a Judge of the High Court): :

Introduction and factual background.

1. This is an application for summary judgment pursuant to CPR Part 24 and to strike out the Defendants' Defence pursuant to CPR 3.4(2). However, Mr Shapiro QC helpfully conceded that if he did not succeed in his summary judgment application he could not succeed in his alternative application and I therefore concentrate on the summary judgment application.

2. The facts of the matter can be shortly stated.

    (1) The Claimant and Bluestone Investment Management ("BIM"), the parent company of the Defendants, were involved in a joint venture which was bidding for health care concessions in Malta in about 2015.

    (2) As part of the arrangements between the parties, the Claimant's evidence is that Dr Gupta, who I am told is a successful health care professional in the USA, and is a trustee of the Claimant, caused the Claimant to make certain loans to the Defendants. In addition, the Claimant says that Dr Gupta advanced funding to support the project and by his participation allayed possible concerns as to the medical capabilities of the Defendants.

    (3) In the event, the Defendants were awarded the concession. I return below to certain potential allegations as to the manner in which that concession was obtained, potential alleged wrongdoing in this regard, and the part that it may be said the Claimant had in this.

    (4) However, it would appear that there was then a falling out between the Claimant and Defendants, and there were claims and cross claims made by the parties. Thus:

        (a) The Claimant alleged that it had not been repaid his loans;

        (b) Medical Associates of Northern Virginia Inc also alleged that it had not been paid the agreed consultancy fees;

        (c) Finally, Dr Gupta and the Claimant asserted that they had not been allotted promised shares in BIM.

        (d) For their part, the Defendants alleged that Dr Gupta was seeking to derail the project and that this might lead to losses of up to $200m.

    (5) The parties then entered into a Settlement Agreement, dated 16 December 2016. The material parts of that Agreement, for present purposes, are the Recitals, the payment clause, and the confidentiality clause. Those provided as follows:

    WHEREAS:

    (A) BIM was involved in negotiations for the purchase of St. James' Hospital in Malta and to undertake a services concession for the redevelopment, maintenance,

management, and operation of a number of healthcare sites in Malta, including particularly St. Luke's Hospital, Karin Grech Rehabilitation Hospital and Gozo General Hospital in Malta (hereinafter referred to as the "Healthcare Projects");

(B) The MANV Parties and the BIM Parties (as defined below), as applicable, entered into a series of agreements on 7 January 2015 and other ancillary agreements thereto for the purpose of defining the terms of their proposed collaboration in support of BIM's tender for the Healthcare Projects and the raising of financing to enable BIM to meet key milestones as part of its tender for the Health care Projects;

(C) Each of MANV Trust, Dr Gupta, BSS#4, Mr Pawley, PIL, Mr Tumuluri and BIM subsequently entered into an agreement on 26 March 2015, setting out in detail the terms of both their collaboration in support of the Healthcare Projects and its financing. Amongst other things the agreement also set out obligations and duties between the parties thereto and terms upon which shares were to be issued and held in BIM;

(D) BIM's tender for the Healthcare Projects was successful. On 30 November 2015 definitive agreements were entered into by BIM's subsidiaries VGHA and VGHM with the Government of Malta. Such agreements included a 142 page Service Concession Agreement and a 151 page Health Services Delivery Agreement;

(E) On 1 December 2015, MANV Inc entered into a Consultancy Agreement with BIM pursuant to which MANV Inc was to provide services in support of the Healthcare Projects (the "Consultancy Agreement");

(F) Subsequent to the 26 March 2015 agreement, further ancillary agreements were entered into by BIM, PIL, Mr Tumuluri, MANV Trust and Dr Gupta regarding the continued funding of the Healthcare Projects. Such agreements included, but are not limited to, agreements dated 11 January 2016 and 17 January 2016;

(G) As at the date of this Deed MANV Trust has caused a total of US$4,082,000 to be advanced to BIM in support of the collaboration between the Parties, the tender and the Healthcare Projects. Included as part of this advance, MANV Trust caused JAG Partners LLC ("Jag"), who acted as agent for MANV Trust, to advance €650,000 to BIM on MANV Trust's behalf. The MANV Parties understand that the €650,000 was duly used as a bond payment in support of the tender for the Healthcare Projects;

(H) Thereafter a dispute arose between the MANV Parties on the one hand and the BIM Parties on the other in relation to their collaboration in the Healthcare Projects, its funding and their equity shares in BIM arising under the above-mentioned agreements. The claims by the MANV Parties were set out in a letter by their solicitors Lewis Silkin LLP addressed to each of Morgan Lewis & Bockius LLP (for BSS#4 and BIM), Mr Pawley, PIL and Mr Tumuluri, dated 13 September 2016. Subsequently, Messrs Morgan, Lewis & Bockius LLP wrote letters in reply dated 26 September 2016 and 12 October 2016 advancing claims against the MANV Parties including a claim against Dr Gupta personally which was put at in excess of EUR€200,000,000.00, allegations of breach of the Consultancy

Agreement and breach of good faith. Further matters were raised by Morgan Lewis & Bockius LLP in correspondence to Lewis Silkin LLP on 9 December 2016 including an apparent leak of confidential documents along with defamatory statements apparently made to third parties. For convenience, the issues between the Parties including the matters as set out in the aforementioned letters by Lewis Silkin LLP and Morgan Lewis & Bockius LLP are hereinafter defined as the "Dispute";

(I) The MANV Parties do not have, and nor have they had at any point in time, any direct contractual relationship with any of the VGH Parties (as defined below) other than indirectly as consultant and lender; and

(J) The Parties to this agreement are desirous of settling the Dispute and regulating the terms of an exit of the MANV Parties from any further collaboration in BIM and the Healthcare Projects and the termination of the Consultancy Agreement

NOW IT IS HEREBY AGREED as follows:

AGREEMENT TO PAY
The BIM Parties and the VGH Parties shall cause to be paid to MANV Trust the sum of TEN MILLION US DOLLARS (US$10,000,000) (the "Settlement Sum") as follows:

(a) FIVE MILLION US DOLLARS (US$5,000,000) to be received in cleared funds by no later than 5pm London time on 21 December 2016 (the "First Payment"); and

(b) FIVE MILLION US DOLLARS (US$5,000,000) to be received in cleared funds by no later than 5pm London time on 20 February 2017 (the "Second Payment").
4.2 If the First Payment and/or the Second Payment is not received on time and in full as required above, interest shall accrue daily and be payable on the amount outstanding at the rate of 8% per annum from the relevant due date until paid in full and MANV Trust shall immediately be entitled to sue for such unpaid sums (together with interest) as a debt without further notice….
… 4.4' Each of BSS#4, PIL, BIM and the VGH Parties shall be jointly and severally liable to make the payments referred to in this clause 4….

CONFIDENTIALITY
The terms of this Deed and the substance of all negotiations in connection with it are private and confidential to the Parties, their lawyers and professional advisers, their Related Parties and Mr Shaukat Ali.
12.2 The Parties further confirm that the underlying agreements made in furtherance of the Healthcare Projects are confidential to the Parties and their professional advisors and the parties to those agreements and their professional advisers.
12.3 The confidential matters at clauses 12.1 and 12.2 shall not be disclosed or otherwise communicated to any other party without the prior written consent of all of the Parties (including in the case of matters in clause 12.2, the parties to those agreements), other than:
(a) Mr Shaukat Ali; or

(b) the Parties' Related Parties; or
(c) in circumstances where a Party seeks to enforce the terms of this Deed in the event of a breach; or
(d) the Parties' respective auditors, brokers, insurers, reinsurers, prospective insurers and reinsurers (and their lawyers) and/or their former and/or present and/or future professional advisers who have a reasonable need to know and on terms which preserve confidentiality; or
(e) pursuant to an order of a court of competent jurisdiction, or pursuant to any proper order or demand made by any competent authority or body where they are under a legal or regulatory obligation to make such a disclosure; or
(f) where the information has already come into the public domain or so becomes other than as a result of a disclosure by any Party.
12.4 The Parties are entitled to confirm the fact that their collaboration in relation to the Healthcare Projects has ended but not the terms upon which it has ended. Included at Schedule 1 to this Deed is an agreed form of wording which the Parties agree may be used when describing this settlement and the end of their collaboration to third parties."

(6) At the time of the settlement agreement, the Claimant was represented by Lewis Silkin and the Defendants by Morgan Lewis Bockhuis.

(7) The first tranche of monies due under the settlement agreement was duly paid by the Defendants.

(8) However, when it came to the time for payment of the second tranche, no payment was made. Although payment was promised on a number of occasions by the Defendants, no payment was ever forthcoming. It is this second tranche, and interest thereon, which is claimed by the Claimant in this action.

(9) The Defendants were purchased by Steward Healthcare International Limited ("Steward") from BIM at some time in early 2018. The solicitors who acted for Steward, McDermott, Will and Emery ("MWE"), confirmed, in answer to a request from Lewis Silkin that they were acting for Steward, and (by letter dated 14 March 2018) stated that Steward was conducting a full scale investigation into the Defendant companies.

(10) There then followed a series of correspondence over March and April 2018 in which MWE sought, and were given, details of the disputes which had been settled by virtue of the Settlement Agreement.

(11) Following a letter from Lewis Silkin answering MWE's queries, and dated 10 April 2018, there was then silence from the Defendants for almost another year. Following this, the Claimant sent on draft points of claim in February 2019.

(12) Over the next month, MWE stated that they understood that clients were in contact with one another with a view to an amicable resolution. However, by June 2019 this had not occurred, and papers were then prepared for formal service in Malta. Those papers were served, although negotiations between clients were apparently continuing, and an acknowledgment of service was

filed in December 2019. By this time, DLA Piper UK LLP ("DLA Piper") had taken over representation of the Defendants.

(13) A Defence was served on 14 February 2020. I return to the terms of that Defence below. For present purposes, it is sufficient to say that it is a holding document, which also contains a number of requests for disclosure.

(14) This application was then issued on 20 March 2020, supported by the First Witness Statement of Mark Lim, of Lewis Silkin. In turn, Mr Giles of DLA Piper put in a responsive witness statement, and Mr Lim produced a second witness statement.

CPR Part 24.

3. CPR Part 24 provides as follows:

> *"Grounds for summary judgment*
> ***24.2*** *The court may give summary judgment against a claimant or defendant on the whole of a claim or on a particular issue if –*
> *(a) it considers that –*
> *(i) that claimant has no real prospect of succeeding on the claim or issue; or*
> *(ii) that defendant has no real prospect of successfully defending the claim or issue; and*
> *(b) there is no other compelling reason why the case or issue should be disposed of at a trial."*

4. The principles to be applied on a summary judgment have been comprehensively laid down by Lewison J (as he then was) in *Easyair Ltd (t/a Openair) v Opal Telecom Ltd* [2009] EWHC 339 (Ch), in a passage which has been approved by the Court of Appeal. He said:

> *"As Ms Anderson QC rightly reminded me, the court must be careful before giving summary judgment on a claim. The correct approach on applications by defendants is, in my judgment, as follows:*
>
> *i) The court must consider whether the claimant has a "realistic" as opposed to a "fanciful" prospect of success: Swain v Hillman [2001] 1 All ER 91;*
>
> *ii) A "realistic" claim is one that carries some degree of conviction. This means a claim that is more than merely arguable: ED & F Man Liquid Products v Patel [2003] EWCA Civ 472 at [8]*
>
> *iii) In reaching its conclusion the court must not conduct a "mini-trial": Swain v Hillman*
>
> *iv) This does not mean that the court must take at face value and without analysis everything that a claimant says in his statements before the court. In some cases it may be clear that there is no real substance in factual assertions made, particularly if contradicted by contemporaneous documents: ED & F Man Liquid Products v Patel at [10]*

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

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

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

5. There was no dispute before me but that these are the relevant principles.

The Defence.

6. Turning to the Defence put forward here, the relevant paragraphs are paragraphs 5 to 9 and 13 to 15 which read as follows:

"5.BIM was successful in its bid for the concession for the Healthcare Project which was granted to BIM's subsidiary companies (the Defendants) (the "Concession") and for which the Claimant, through its representative, Mr. Ambrish Gupta, MD ("Dr. Gupta"), was one of the initial investors. The Defendants understand that the Settlement Deed intended to resolve disputes between the Claimant and other investors in connection with their collaboration in the Concession, its funding and equity shares.

6. Based on public media reports it is the Defendants understanding that in or around October 2014 the investors in the Concession may have met with representatives of the Government of Malta to discuss the terms of the Concession in anticipation of the official Request For Proposal ("RFP") process, and

subsequently signed a Memorandum Of Understanding with the Government of Malta on or around 10 October 2014 ("the October 2014 MOU"), five months before the official RFP process that started in March 2015.

7. Public media reports also suggest that, on or around November 2014, a month after the October MOU was signed, the investors in the Concession, including Dr. Gupta, signed a second Memorandum of Understanding among themselves ("the November 2014 MOU"), excerpts of which were published in media reports, that expressly referenced a prior "agreement with the Government of Malta" and which appears to provide specific details on the terms of the Concession at a time when the public was allegedly unaware of the Malta Government's intention to provide a concession agreement to third parties to manage the operations of the three public hospitals.

8. Based on public media reports, it is the Defendants understanding that on or around 30 October 2019, and following the public allegations of purported improper conduct surrounding the negotiations of the Concession, the National Audit Office ("NAO") of Malta publicly confirmed, that it was conducting an "extensive investigation" into the Concession agreement.

9. Media reports further indicate that, on or around 29 November 2019, the Court of Appeal upheld a Magistrate judge's decision to open a magisterial inquiry into the actions of three ministers for the Malta government in relation to the negotiations of the Concession, after a civil society filed a second application to open such an inquiry based on the facts revealed publicly by the media. In particular, according to media reports, the Court of Appeal recommended this magisterial inquiry into the three ministers "to be combined with a separate ongoing inquiry into money laundering and corruption into the same business deal [i.e. the Concession] involving [additional parties]."…

…13. As to paragraphs 3 to 6, it is admitted that the Defendants have not paid or caused to be paid the "Second Payment" as referred to in clause 4.1(b) of the Settlement Deed.

14. Given the facts and matters set out in paragraphs 3 to 11 above and in particular the fact that the current beneficial owner of the Defendants was not involved with the tender process for the Concession as described in paragraphs 3 to 5 above, or the Settlement Deed and is not aware that it has any information relating to the factual basis for the Claimant and Defendants entering into the Settlement Deed, the Defendants have concerns as to whether or not the Settlement Deed may also be affected by the investigation described in paragraph 8 and 9 above.

15. In the premises, the Defendants are unable to admit or deny the legitimacy or legality of the Settlement Deed, or whether it is binding upon the parties. The Claimant is required to prove the same."

The Defendants' contentions.

7. Ms Briggs, for the Defendants, submitted that summary judgment should not be granted because the Claimant was not able to show that either limb of CPR Part 24 was satisfied.

8. Starting with CPR Part 24(1)(a), she submitted that the non-admission in paragraph 15 of the Defence was sufficient to require that the matter be allowed to go further. However, in circumstances in which a signed copy of the relevant settlement agreement has been produced and put in evidence, and where there is no dispute but that the second tranche due under that agreement has not been paid, then in my judgment the Claimant has clearly done enough to prove both the existence of the agreement and its non-fulfilment. In fairness to Ms Briggs, she accepted that this limb of her argument was not the main limb.

9. She did however submit that there was a compelling reason to allow the claim to go further, to trial or at least towards trial, to permit disclosure in order to enable proper inquiry to be made into the circumstances surrounding the grant of the concession and the entering into of the settlement agreement. The matters relied on are those set out in the pleading and quoted above. I was not however shown the various press reports relied on, which had not been put into evidence by the Defendants.

10. After a degree of pressing, she clarified that the defence which might exist and which the Defendants contend might impugn the validity of the settlement agreement is as follows:

    (1) First, the concession was obtained illegally, since it was obtained as a result of the wrongful conduct referred to in the press reports to which I have already made reference. The only conduct on the part of the Claimant that she referred me to in this regard was the allegation that Dr Gupta signed the second MOU between the parties, which in turn made reference to the first MOU with the Maltese Government, which it is said was unlawful because it predated the tender process.

    (2) Secondly, it might also be that the obtaining of the concession involved other illegal acts, such as money laundering, on the part of currently unspecified parties.

    (3) Thirdly, it might be the case that the settlement agreement, and in particular the confidentiality agreement, were designed to ensure that a conspiracy to obtain the concession unlawfully, did not come to light.

    (4) Fourthly, therefore, that because the settlement agreement was entered into for an illegal purpose, it was void or unenforceable.

11. Ms Briggs emphasised that she was not in fact making these allegations, since she did not have the evidence to support such. However, the Defendants, as she put it, had concerns as to whether the above scenario was in fact the case, arising out of the press reports referred to in the pleadings. Hence, since the Defendants wished to have time to investigate these matters and since they required documentation which, she submitted, the new beneficial owners of the Defendants did not have, or, in the words of Mr Giles, were not aware that they had, the defence should not be struck out at this stage.

12. I asked for further submissions as to whether, in the event that I was not persuaded that unconditional leave to defend should be granted, I should allow leave to defence on a conditional basis. It was accepted by both parties that I have jurisdiction to order this.

13. The relevant principles, as set out in the Practice Direction to Part 24, are as follows:

> *"The court's approach*
>
> ***4.*** *Where it appears to the court possible that a claim or defence may succeed but improbable that it will do so, the court may make a conditional order, as described below.*
>
> *Orders the Court may make*
>
> ***5.1*** *The orders the court may make on an application under Part 24 include:*
>
> *(1) judgment on the claim,*
> *(2) the striking out or dismissal of the claim, (3) the dismissal of the application,*
> *(4) a conditional order.*
>
> ***5.2*** *A conditional order is an order which requires a party:*
> *(1) to pay a sum of money into court, or*
> *(2) to take a specified step in relation to his claim or defence, as the case may be, and provides that that party's claim will be dismissed or his statement of case will be struck out if he does not comply.*
>
> *(Note – the court will not follow its former practice of granting leave to a defendant to defend a claim, whether conditionally or unconditionally.)"*

14. The Defendants, for their part, relied on the decisions of the Court of Appeal in Allen & Bloomsbury Publishing Ltd v JK Rowling [2011] EWCA Civ 943, Global Flood Defence Systems Ltd (and others) v Van Den Noort Innovations BV (and others), [2015] EWHC 153 (IPEC) and Abbot Investments (North Africa) Ltd v Nestoil Ltd [2017] EWHC 119 (Comm). In the latter case, Teare J set out the relevant principles, as follows:

> *"20. The court's jurisdiction to make such an order is not found in CPR Part 24 which deals with applications for summary judgment. It is to be found in CPR 3.1(3) ; see Deutsche Bank v Unitech Global [2016] 1 WLR 3598 at paragraphs 72-77. CPR Part 24.6provides that the court determining a summary judgment application may give directions for the filing of a defence and notes that CPR Part 3.1(3) provides that the court may attach conditions when it makes an order. PD 24 paragraph 4 provides that where the court considers that it is possible that a defence may succeed but improbable that it will do so, the court may make a conditional order. Paragraph 5 provides that such an order may require a party to pay a sum of money into court.*
>
> *21. Since the court's jurisdiction stems from CPR Part 3.1(3) it follows from the judgment of Moore-Bick LJ in Huscroft v P&O Ferries [2011] 1 WLR 939 at paragraph 19 that "before exercising a power given by rule 3.1(3) the court should identify the purpose of imposing a condition and satisfy itself that the condition it has in mind represents a proportionate and effective means of achieving that purpose ……"*

22. Where the making of such an order may stifle the defence the court will only make such an order in an exceptional case; see Olatawura v Abiloye [2003] 1 WLR 275 at paragraph 22 and Ali v Hudson [2004] CP Rep 15 at paragraph 40.

23. Mr. Kulkarni relied upon the statement by Simon Brown LJ in Olatawura v Abiloye [2003] 1 WLR 275 at paragraph 26 that an order for security for costs will usually not be justified merely because the claim or defence is "somewhat weak". Simon Brown LJ stated that "the court will be reluctant to be drawn into an assessment of the merits beyond what is necessary to establish whether the person concerned has "no real prospect of succeeding" and the occasions when security for costs is ordered solely because the case appears weak may be expected to be few and far between." Mr. Kulkarni submitted that the same approach must apply when the court is considering making an order that a sum be paid into court to secure a claim. In my judgment care must be exercised when considering what is meant by a "weak" case in this context. Obviously, the fact that a court may consider that a defence is only just more likely to fail than succeed would not justify a conditional order. But where a defence is very likely to fail because, for example, the evidence relied upon appears to be inconsistent with the contemporaneous documents, such circumstances are typically regarded as justifying an order for payment in of a sum of money which will secure the claim; see, for example, Homebase Limited v LSS Services Limited [2004] EWHC 3182 (Ch) per Peter Smith J. at paragraphs 31-34. In this regard it is, I think, significant that in Olatawura v Abiloye [2003] 1 WLR 275 at paragraph 23 Simon Brown LJ referred to orders under the old rules for payment in securing a claim in respect of an "unpromising defence." He did not say that the court's discretion to make such orders was now more restrictive. On the contrary, he observed that CPR 24 is now wider than it was before and enables payments in to be made to secure the defendant's costs of an "unpromising claim." Although PD 24 paragraph 5 notes in parenthesis that the court will not follow its former practice of granting leave to a defendant to defend a claim, whether conditionally or unconditionally, that merely reflected a change in the form of the order (to a conditional order as defined in PD 24 paragraph 5). In the light of PD 24 paragraph 4 (which provides that the court may make a conditional order when a claim or defence is improbable) it is unlikely that the previous practice of ordering a payment in of the whole or part of the sum claimed when the defence appeared particularly weak was intended to be changed. Peter Smith J in Homebase Limited v LSS Services Limited [2004] EWHC 3182 (Ch) at paragraph 33 referred to the case where doubts were raised by the contemporaneous evidence as a "classic justification" for a conditional order. Mr. Kulkarni relied on the decision of Flaux J. in Shagang Shipping v HNA Group [2014] EWHC 2241 (Comm) . However, that was a case where a defence of bribery was alleged by amendment in circumstances where it was supported by a report of the Chinese police. The claimant did not seek to say that the application to amend should be refused on the grounds that it had no real prospect of success but said that permission to amend should only be given on terms that security was provided for the costs dealing with the defence on the grounds that the defence was concocted, a sham or shadowy. Those grounds were not supported by evidence; see paragraphs 7-9. The judge refused to make a conditional order because the defence was arguable, it had a reasonable prospect of success and the claimant had no evidence to suggest that it was a sham. It is a very different case from a case, like the present, where although it cannot be said that the defence has no real prospect

of success there are real grounds to doubt the reliability of the evidence on which it is based."

15. The Defendants submitted that this case does not fall within the category of cases in which a conditional order can or should be made under CPR Part 24. Here, the 'nub' of the issue is not whether or to what extent the Defence *as pleaded* "may succeed". The central point is that the Claimant has not provided the Defendants with key documents that were reasonably requested within the Defence in order to allow them to respond to the claim and plead a full Defence, particularly in light of the enquiry currently being conducted in Malta. This is a compelling reason why the case should proceed under Part 24.2(b).

16. The Defendants further submitted that there can be no fair judgment made as to the relative probability of any defence succeeding at this stage and it is, in the Defendants' submission, not correct for the court to impose a conditional order in these circumstances. To do so would not only be outside the guidelines set out in the Practice Direction but would, in effect, prejudice the Defendants because of the Claimant's failure to cooperate in providing the documents reasonably requested and instead move to a premature application for summary judgment.

17. Secondly, the Defendants submitted that this is not an order sought by the Claimant in its application and it has submitted no evidence in support of such relief. To the extent the Claimant now seeks a conditional order requiring payment in of any substantial sum, the court should not make any order requiring the same without giving the parties full opportunity to submit evidence going to the grounds upon which such order is said to be appropriate, the purpose for which such sum is sought, whether it is a reasonable and proportionate means of achieving said purpose and importantly the Defendants' means and ability to meet any such order without it having the effect of stifling the defence.

18. Thirdly, in this case it was submitted that the circumstances do not merit (or come close to meriting) any such order, even if this case did fall *prima facie* into the category of such cases where an order should be considered. In particular the Defendants submitted:

    (1) As set out in the cases referred to above, the fact that a defence is perceived as being 'weak' or that a defendant has only just succeeded in resisting a summary judgment application is not, on its own, sufficient grounds for making a conditional order. This is not, for example, a case in which the Defendants seek to rely upon evidence which is inconsistent with contemporaneous documents. As set out above, this is a case where the Defendants have been unable to properly respond to the claim due to lack of disclosure of key documents by the Claimant. The circumstances of this case were put very clearly before the court.

    (2) There has been no flouting of court procedures (and indeed no such flouting is alleged). Nor has any 'want of good faith' has been shown. The Defendants have pleaded a Defence, which was served within the timescale agreed via a Consent Order between the parties. That Defence raised legitimate concerns and made a reasonable request for disclosure of key documents which are clearly within the possession of the Claimant. Rather than address those concerns and provide those documents voluntarily and cooperate (or even

correspond) with the Defendants in this regard, the Claimant applied for summary judgment. To the extent the application for summary judgment is unsuccessful, it follows that the application was premature. Any failure to cooperate or to act within the spirit of the CPR lies with the Claimant not the Defendants.

(3) Interest is currently running on the principal sum at 8%. There can be no serious suggestion of any prejudice to the Claimant arising out of a short disclosure / re-pleading process.

19. Fourthly, the Defendants submitted that the purpose of requiring a payment-in has not been identified. Nor has any submission been made to the effect that a payment in is "necessary to do justice" between the parties. There is no significant prejudice to the Claimant in being kept out of the funds or proceeding on an unsecured basis for a short additional period whilst it provides disclosure of documents that it could (and the Defendants' say should) have provided promptly in response to the Defence rather than waste further time and costs making this application before having done so. Contractual interest is set at 8%. As such it cannot be said that the Claimant will be unduly prejudiced by a short further delay.

20. The Defendants submitted that the timetable for the disclosure is within the hands of the Claimant. The Defendants have, in the witness statement of Mr Giles (paragraph 29), proposed a period of just 28 days to amend their Defence (if advised) following disclosure. Thus the extent of any further 'delay' really lies within the hands of the Claimant in providing the documents required. Had they already done so rather than make this application, it is submitted that much, if not all, of the further delay could have been avoided. This is another reason why it would be unjust, unnecessary and disproportionate to order any payment-in by the Defendants.

21. In the Defendants' submission, a requirement to pay into Court any significant sum by way of security for costs or the principal sum is not necessary (or likely) to achieve any purpose and certainly cannot be said to be a proportionate or effective means of achieving anything other than to cause significant prejudice to the Defendants, who have done nothing wrong either procedurally or substantially. The court is reminded that the Defendants have complied with all Orders thus far and submitted their Defence within the timetable agreed via Consent Order. As set out above, it is the Claimant's failure to cooperate in the provision of further key documents that has led to any undue delay.

22. The Defendants submitted that to the extent the Claimant is genuinely concerned about further delay and/or the potential for wasted costs in relation to the requirement for disclosure prior to the pleading of any further Defence, a proportionate and effective response to address those concerns, which would achieve justice between the parties, would be to make appropriate case management directions per Rule 24.6(b) as follows:

(1) Ordering a short (but realistic) timetable for the provision of the disclosure requested. It is noted that that timetable is in the Claimant's hands. The documents can, of course, be provided earlier than ordered.

(2) Ordering that any amendment of the Defence be filed and served promptly thereafter. In this regard the Defendants have proposed 28 days for any amendment following disclosure (see paragraph 29 of Mr Giles' statement).

(3) At most, the payment-in of the reasonable costs of the disclosure exercise could be ordered. This would at least reflect the circumstances of the case, and secure the costs of what the Claimant (presumably) avers is an unnecessary exercise. There is no reason why the Claimant's previous costs should be secured. Those to date have been expended in the usual manner. Those falling after the amended Defence can be considered in light of the amended Defence on the usual principles and/or may be irrelevant in light of the amended Defence.

(4) Certainly, to the extent that what is being said is that the Defendants ought to 'buy' the right to see the documents because the Claimant submits they are unlikely to provide any further Defence, any payment in should reflect the anticipated costs to be incurred by the Claimant to that point and no more. Following such disclosure either the Defendants will be in a position to plead (as they ought to have been had the Claimants proffered the documents as opposed to bring the application) or they will not in which case the position in relation to security / payments in can (if necessary) be reviewed properly at that point.

(5) Whilst there is no costs estimate before the Court, other than the Claimant's costs to date and the costs of the application, it is submitted that, in the absence of any estimate from the Claimant, a sum of no more than £45,000 would be appropriate to cover any disclosure exercise. The Defendants confirm that they have access to such funds and could pay the same into court within 28 days of any Order.

23. The Defendants submitted that in summary this is not a case where a conditional order is appropriate under the Rules. To the extent the application is dismissed, the court implicitly recognises that the Defendants reasonably need the further disclosure requested in order to be able to respond to the claim and plead their Defence. No explanation has been given for why the Claimant did not, prior to making this application, simply provide the documents sought (other than making the unhelpful assertion the Defendants ought to have them). To the extent there is any further delay, this could have been avoided by volunteering the disclosure.

24. An indication was given at the hearing that disclosure ought to be provided either voluntarily or that the parties ought to cooperate in this regard. As set out above, the Defendants believe that an appropriate order, taking due consideration of any timetable the Clamant proposes for the exercise, would be more helpful and avoid further applications and delay.

25. The Defendants submitted that even if this case did fall *prima facie* into the category of cases where a conditional order could be considered, it is not one of the rare cases where a conditional order requiring a payment-in is required or justified in order to do justice between the parties. It would unfairly penalise the Defendants. It will not serve any legitimate purpose and would not be a proportionate, necessary or effective means of case management.

26. The Defendants submitted that what is required is an order for disclosure and a requirement for any consequential amendments to the Defence to be made within a suitable timetable with appropriate penalty for any failure to comply. That will adequately address any concerns the Claimant may have as to further significant delay (although as above it is noted that the provision of the disclosure is and always has been within their hands) and attaching an appropriate sanction in relation to the timetable for the provision of an amended Defence will be adequate so as to ensure that the Defendants do (as they always have) meet any court ordered or agreed timetable.

27. The requests for disclosure / further information were made in paragraph 16 of the Defence and paragraph 25 of Mr Giles' witness statement.

The Claimants's submissions.

28. Turning to the submissions for the Claimant, Mr Shapiro QC submitted as follows in relation to the suggestion that the matter should be allowed to go further to permit investigation and disclosure:

    (1) The Defendants had not identified the defence which was contemplated but not yet pleaded until pressed in the course of oral argument. It was wholly unsatisfactory that such a case should be put forward with no real warning.

    (2) The evidence put before the Court in this regard was wholly lacking in particularity. The relevant press reports were not in evidence; there was no clarity as to what was being asserted; and there was no evidence of relevant Maltese law.

    (3) There was no clear account of how it is said that the allegations now made would give rise to a defence in English law.

    (4) There was no proper explanation as to why these points had not been raised at any time in the 3 years during which payment has been due, nor as to why payment of the first tranche was made without demur.

    (5) The suggestion that the Defendants did not know that they had this defence because the relevant individuals had all left when the new shareholders took over was one which was again entirely without evidential foundation and one which I should not accept.

    (6) The submission that the settlement agreement was entered into to hide a previous unlawful conspiracy was both serious and without any proper foundation. On its face, the settlement agreement clearly related to a defined dispute; both parties were represented by lawyers at the time of the settlement; the confidentiality clause was a standard form clause; and the suggested defence of illegality was entirely far-fetched.

29. In relation to conditional leave, Mr Shapiro QC accepted and adopted the statement as to the relevant principles set out in the judgment of Teare J in thje *Abbot Investments* case. He argued that the Defendants' possible and as yet un-pleaded defence of a conspiracy is plainly "*improbable*" (at best). The second part of the criteria for a conditional order – the improbability of the defence – is met. The as yet un-pleaded,

hypothetical defence is not known to the Defendants who wish to put it forward. It might only exist at all if it is discovered from the Claimant's documents. It is the epitome of a particularly weak defence.

30. The Claimant submitted that the Defendants are asking the Court not to enter judgment in the sum of USD 6,316,164.38 for a debt plainly due under a Settlement Agreement. This indulgence is to allow them the opportunity to construct some sort of defence based only on documents to be provided by the Claimant, the Defendants themselves apparently having no knowledge of the same. The appropriate condition for the Defendants to avoid summary judgment and to be allowed to progress their improbable defence is the payment into Court of the full sum which is on the face of it outstanding (or the provision of an appropriately worded First Class London Bank Guarantee). It would be just for the Claimant to be secured for the amount it is, on the face of things, entitled to under the Settlement Agreement.

31. The Claimant submitted that the Defendants suggested that they wanted this resolved quickly and that the Claimant was protected by interest running at £1,000 per day. The Claimant is only protected if payment is actually going to be made, which will be effected by the payment in.

32. It is to be noted that there has been no suggestion from the Defendants of any inability to make the payment of the Judgment sum. Importantly, such a suggestion was not offered in evidence as a reason for the failure to pay. Further, it is clear from the Defendants' evidence that their Defence is being driven by their beneficial owners, substantial US corporations which would have the means to pay. It has not been suggested to the Claimant prior to the service of this Skeleton that the Defendants cannot comply with a condition for the payment in of USD 6,316,164.38.

Discussion and conclusions.

33. My starting point is the fact that, in my judgment, the Defence clearly pleads no tenable defence to the claim; indeed, in my view, Ms Briggs all but accepted this. The settlement agreement, on its face, establishes the Claimant's rights to the relief sought.

34. Instead, the Defendants point to certain materials that they say may enable them in due course enable them to plead a defence, but which they cannot properly plead as yet.

35. I would make the following comments on the current state of the evidence and the sources for further evidence.

    (1) Clearly, there will be documentation in the possession of the Claimant, relating both to the original bid process and relating to the circumstances in which the settlement was reached.

    (2) In addition, there would have been documentation in the possession of the Defendants' former lawyers as to the circumstances of the settlement. The Defendants have produced no very clear explanation of why these documents have not been obtained, which is unsatisfactory.

    (3) Thirdly, there would have been material in the possession of the individuals who were formerly associated with the Defendants, and who were also

involved with the bid process. However, I understand that the Defendants were handicapped in relation to the obtaining of such evidence because, by reason of the purchase of the shares in the Defendants by their new owners, the Defendants have, at least, a more limited ability to obtain such evidence.

(4) Fourthly, there is material coming out in the public media in Malta, on which the Defendants rely, suggesting the possibility of some wrongdoing in the course of the bid. Whilst it is unfortunate that these press articles were not produced at the hearing, I have no reason to doubt Mr Giles' account of their contents.

36. In these circumstances, it is my view that there is as yet no defence properly pleaded, but there is a possibility that there may in due course be such a defence.

37. However, I take the view that the most important question is likely to be the background to the bid itself. Here, the relevant knowledge will be that of the individuals who participated in the bid. Whether there was any corruption involved will be something which is likely to be within the knowledge of those individuals. Whether any such corruption as there may have been (and of course I am in no position to reach any conclusion on this) would have any legal impact on the settlement agreement is a yet further question. Those individuals include both the individuals formerly associated with the Defendants, who are no longer so associated, and Dr Gupta.

38. I have concluded that there is no question of simply dismissing the application for summary judgment. There is no tenable defence currently put forward; and I would describe the potential defence put forward as at best speculative on the facts. Moreover, the exact legal nature of the defence is not at the moment clear, and, as I have indicated, was something that only really emerged during the hearing.

39. In these circumstances, applying the approach adumbrated by Teare J in the *Abbott Investments* case, it seems to me that the defence put forward is no more than speculative; and that even then it cannot be said to be an obviously strong one, on the present evidence. It is, in the words of the Rule, improbable; and, in the words used by Teare J, unpromising.

40. In my judgment, this is a classic case for the imposition of conditions on the right to defend. I accept of course that the imposition of conditions cannot be regarded as the norm. However, the provisions of the CPR are intended to give the Court flexibility to reflect the differing circumstances in different cases. This is in my judgment an exceptional case, since the defence put forward is both speculative and difficult. I therefore order that the Defendants should pay into Court the full amount of the claim, inclusive of interest at the contractual rate as at the date of payment in, within 28 days of the date of this judgment being handed down. If the parties agree an alternative mode of security, then this alternative mode of security can be used; otherwise, payment in will have to be made.

41. Nor do I think that I should simply dismiss the current application, and allow the matter to proceed at large once payment in has been made or security given. Instead, in my judgment, the correct approach is to adjourn this application and make directions to enable the Defendants, once they have made payment in, to progress their investigations rapidly and replead their defence once they are able to do so.

42. In my judgment, an order for disclosure would however be appropriate, in order to enable the Defendant to plead its case out more fully. The Defendant has already, in its defence and in the witness statement of Mr Giles, set out the disclosure that it wishes to have. I order that this disclosure be given within 28 days of the date of payment in by the Defendant of the sums that I have ordered; and that within 28 days thereafter the Defendant plead its defence more fully.

43. I therefore order that:

    (1) The Defendants pay into Court the full amount of the claim inclusive of interest at the contractual rate up to the date of payment in within 28 days of this judgment being handed down.

    (2) The Claimant thereafter give disclosure of the documents requested in the Defence and in the witness statement of Mr Giles within 28 days of the payment in.

    (3) The Defendants produce a draft revised pleading within 28 days of the disclosure in (2) above being given.

    (4) This application be adjourned pending the taking of the above steps, to be restored once those steps are taken, unless the parties agree to the contrary.

44. I would be grateful if Counsel would draw up an Order reflecting what I have set out above.