Neutral Citation Number: [2019] EWHC 1952 (Comm)

Case No: CL-2018-000229

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 24/07/2019

Before :

CHRISTOPHER HANCOCK QC
(Sitting as a Judge of the High Court)

- -

Between :

Athena Capital Fund Sicav-Fis S.C.A	**Claimant**
- and -	
Crownmark Limited	**Defendant**

- -
- -

Mr Adam Johnson QC and Mr Gary Horlock (instructed by **Herbert Smith Freehills LLP**) for the **Claimant**
Mr Robert Weekes (instructed by **Brown Rudnick LLP**) for the **Defendant**

Hearing date: 14 March 2019

- -

Approved Judgment

- -

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

Introduction.

1. This is the first CMC in this matter. There are a number of matters which require to be dealt with, of which the most important are the Claimant's applications for partial summary judgment and the striking out of the Defendant's counterclaim.

The facts.

2. I take the following summary of the facts from the Defendant's ("**Crownmark's**") skeleton argument.

3. Athena is a Luxembourg company which is part of the Athena Capital Partners Group, which carries on the business of investment advice and wealth management. Athena acts on behalf of an investment fund, Athena Capital Balanced Fund 4 ("**Fund 4**").

4. Crownmark is a Cypriot company which at all material times has been controlled by a Russian businessman, Mr. Mikail Shishkhanov. Until 21 September 2017, he was the ultimate beneficial owner of the majority of shares in a Russian bank, Public Joint Stock Company B&N Bank ("**B&N Bank**").

5. In these proceedings, Athena claims a principal sum of US$50 million from Crownmark pursuant to a written "Facility Agreement" made on or around 7 December 2015 (the "**Facility Agreement**"), together with one instalment of interest of about US$900,000, plus default interest. At the same time as entering in the Facility Agreement, Athena assigned rights under two facility agreements with another Cypriot company, Larienta Management Limited ("**Larienta**" and the "**Larienta Facility Agreements**") to Crownmark, pursuant to a written "Deed of Debt Assignment". The amount due from Larienta under the Larienta Facility Agreements was identical to the amount due under the Facility Agreement (US$50 million) and the interest rate almost identical. Since around August 2015, Larienta had been in financial difficulty – its property developments having been subjected to a Russian insolvency regime.

6. The background to the entering into of these agreements is complicated and, according to Crownmark, is at the heart of this dispute. The reason why Crownmark says that it entered into the Facility Agreement and the Deed of Debt Assignment was, in short

summary, so as to seek to prevent Larienta defaulting on the interest payments that it had to make to Fund 4 under the Larienta Facility Agreements. The risk ultimately posed by Larienta's default was, for B&N Bank, very significant indeed – it could have resulted in the loss of B&N Bank's banking licence.

7. This was in short because (1) B&N Bank held bonds (issued by the Mediobanca Italian banking group) that were linked to the performance of Athena's funds; (2) similar bonds were held by another Russian bank, OJSC Probusiness Bank ("**Probusiness Bank**"); (3) the latter bank had lost its licence and was under the ownership and control of the Central Bank of Russia (the "**CBR**"); (4) if, by reason of Larienta's default, Fund 4 did not pay the coupon on the Mediobanca bonds to Probusiness Bank, then the CBR might review the other bonds issued by Mediobanca and might order B&N Bank to pay the value of its bonds to the CBR or make it subject to other penalties, including potentially the loss of its banking licence.

8. It appears to be common ground that a representative of Mr. Shishkhanov (Mr. Igor Bomonin), an intermediary (Mr. Maxim Tretiakov) and various representatives of Athena, including Mr. Leonidas Klemos, negotiated for three months, between October and December 2015, mostly by telephone, seeking a solution. Crownmark says that they orally agreed an arrangement whereby (in short summary) a special purpose vehicle, nominated by Mr. Shishkhanov, would pay the interest due under the Larienta Facility Agreements, but only for so long as Crownmark was seeking to recover assets from (the insolvent) Larienta or its estate (the '**recovery period**'). Crownmark would not be liable to pay the principal, (the sum of US$50 million), save to the extent recovered from Larienta. Such an arrangement would hold the position, avoiding the risk of Larienta's default and the potential domino effect that could lead to B&N Bank being penalised. The SPV so nominated was Crownmark. However, Athena denies that there was any such oral agreement.

9. Crownmark also says (again, in summary) that members of Athena's team represented that, in order to complete the transaction in time, Crownmark would have to enter into an agreement in Fund 4's standard terms and they would need to enter into another written agreement later, so as to document the agreement that they had actually made. Crownmark says that they thereby (1) made a collateral agreement not to enforce the Facility Agreement, to the extent that it was inconsistent with the oral agreement; (2)

impliedly represented that they would not enforce the Facility Agreement to the extent that it was inconsistent with the oral agreement (giving rise to an estoppel by representation); or (3) impliedly represented that the effect of this standard form agreement was that their oral agreement would take precedence over it (entitling Crownmark to rescind the Facility Agreement if that innocent representation were in fact wrong). Athena denies there were any such oral representations and therefore any implied representations.

10. On 15 March 2016, the Deposit Insurance Agency of the Russian Federation valued the property inventory of Probusiness Bank as being effectively worthless. Crownmark says that it then decided, in or around April 2016, to cease seeking to recover assets from Larienta and the recovery period came to an end. Athena denies that Crownmark had any such right.

11. Shortly afterwards, on 14 June 2016, Crownmark alleges that Mr. Tretiakov and Mr. Klemos agreed, on behalf of Crownmark and Athena respectively, to terminate the Facility Agreement. Athena denies that there was any such oral agreement. Crownmark says it nevertheless made two subsequent payments of the amount that would otherwise have been due in interest. These payments, it says, were made for the same reason as before, namely to prevent Larienta's default and the associated jeopardy for B&N Bank.

The applications.

12. The Claimant now makes two applications, as follows:

    (1) An application for summary judgment on part of its claim, that part being the amount that it says fell due in June 2017.

    (2) An application to strike out the Defendant's counterclaim.

The summary judgment application.

The two items of dispute.

13. Before turning to the applicable principles, I should say a few words about the ambit of the dispute in relation to this application. As I have already indicated, the application is

for summary judgment in relation to part only of the claim. That part is the interest payment which it is said was due in June 2017.

14. The defence put forward to this element of the claim is twofold, and is as follows:

(1) First, it is said that the obligation to pay interest only lasted during a period termed the "recovery period", which was the period during which Crownmark was making efforts to make a recovery from Larienta, and that this period ended in April 2016: see paragraph 31 of the Defence.

(2) Secondly, it is said that the Facility Agreement was terminated by consent during the course of the telephone conversation between Mr Klemos (acting on behalf of Athena) and Mr Tretiakov (acting on behalf of Crownmark) on 14 June 2016.

Applicable principles

15. At the outset of this hearing, Crownmark invited me not to proceed further, relying on the rule in *Williams and Humbert v W & H Trade Marks Ltd* [1986] AC 368, namely that if an application to strike out or for summary judgment involves a prolonged and serious argument the court should, as a general rule, decline to proceed with the argument unless it not only harbours doubts about the soundness of the pleading but, in addition, is satisfied that striking out will obviate the necessity for a trial or will substantially reduce the burden of preparing for trial or the burden of the trial itself. I rejected this application at the outset of the hearing, for the reasons set out at the time.

16. As regards the 'real prospect of success' test, in *EasyAir Ltd v. Opal Telecom Ltd* [2009] EWHC 339 (Ch) at [15], Lewison J provided a convenient summary of the leading authorities on its application:

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."

17. I accept this summary of the relevant principles, which has been approved on a number of occasions in subsequent cases[1].

18. Crownmark makes a number of further submissions, based on the above summary of principles:

    (1) First, to defeat an application for summary judgment, a defendant need do no more than show that his defence has a prospect of success which is real, as distinct from merely fanciful. 'Fanciful' connotes being devoid of substance or hopeless: see, eg, *ED&F Man Liquid Products v. Patel* [2003] EWCA Civ 472 at [5], [10], [53] per Potter LJ. As Lord Hobhouse held in *Three Rivers District Council v. Bank of England (No 3)* [2003] 2 AC 1 at [158], the "*criterion which the judge has to apply under Part 24 is not one of probability; it is absence of reality*".

    (2) Second, a party resisting a claim for summary judgment or strike-out is not under a general burden of proof in an evidential sense: see eg, *Green v. Hancocks (A Firm)* [2001] PNLR 10 at [21] per Ferris J.

    (3) Third, whether a party has a real prospect of success depends on an assessment of two distinct matters: (1) whether the party has a real prospect of success on the basis of the facts known at the time; and (2) whether there is a real prospect that some additional support for the party's case would emerge if the case followed the normal procedural route: see, eg, *Zuckerman on Civil Procedure* (3rd ed, 2013), §9.55. As May LJ held in *S v. Gloucestershire County Council* [2001] Fam 313, 342 (CA) for a summary judgment application to succeed where a strike out application would fail,[2] the court will need to be satisfied that:

        (a) It had before it all substantial facts that were reasonably capable of being before it;

[1] eg, in *AC Ward Ltd v. Catlin (Five) Ltd* [2009] EWCA Civ 1098; [2010] Lloyd's Rep IR 301 at [24]; *Global Asset Capital Inc v Aabar Block and others* [2017] EWCA Civ 37; [2017] 4 WLR 163.

[2] Ie, where it is accepted that the pleading discloses reasonable grounds for the claim to be brought and an application is made for summary judgment on the basis of disputed facts.

(b) These facts are undisputed or that there is no real prospect of successfully disputing them; and

(c) There is no real prospect of oral evidence affecting the court's assessment of the facts.

(4) Fourth, the injunction against the Court conducting a 'mini-trial' simply means that, if at the hearing of a summary judgment application, the court concludes that issues should be disposed of by a trial process, then it should not continue the hearing of the application as if it were a trial process: see, eg, *Zuckerman*, §9.60. The following guidance assists:

(a) The Court of Appeal has held that, where witness evidence on disputed issues of fact is tendered in opposition to an application for summary judgment, the court cannot grant the application unless it is satisfied that those witnesses are "*bound to be disbelieved*" or that their evidence is "*so obviously untrue that it is fanciful to suggest that it might be accepted*": see *Director of the Assets Recovery Agency v. Woodstock* [2006] EWCA Civ 74 at [14] per Hughes LJ.

(b) The Supreme Court has held that the documentary evidence must be "*effectively unanswerable*", in order to justify summary judgment on a disputed issue of fact. In *Gohil v. Gohil* [2015] UKSC 61, [2015] 3 WLR 1085 Lord Neuberger MR held that:

"49 The issue whether there has been non-disclosure is a question of fact which involves an evaluative assessment of the available admissible evidence. Such a question is, of course, common in civil and family litigation, and under our common law system the rule is that it can only be answered by a judge after hearing from live witnesses as well as looking at the documents. The most common exceptions to this rule are (i) cases where the evidence is so clear that there is no need for oral testimony and (ii) cases where neither party wishes, or alternatively is unable, to call any witnesses. Ignoring cases in the second category (which has no application here), attempts to seek summary judgment in relation to such disputed issues often fail even when the evidence appears very strong, because experience shows that a full investigation at a trial with witnesses occasionally undermines what appears pretty clearly to be the truth when relying on the documents alone: see eg per Sir Terence Etherton C in Allied Fort Insurance Services

> *Ltd v Creation Consumer Finance Ltd [2015] EWCA Civ 841 at [81], [89], [90] and the cases which he cites. Accordingly, in practice it is only when the documentary evidence is effectively unanswerable that summary judgment can be justified.*
>
> *50 There is also a principled reason behind this rule, namely that, at least where there is a bona fide dispute of fact on which oral testimony is available, a party is normally entitled to a trial where he and his witnesses can give evidence, and he can test the reliability of the other party and/or her witnesses by cross-examination. (I say "normally", because, in exceptional cases, there may be reasons, such as a sanction in the form of a debarring order, for not following the rule)."* [emphasis added]

(5) In *Three Rivers* (at [95]), Lord Hope referred to summary judgment being available where: "*It may be clear beyond question that the statement of facts is contradicted by all the documents or other material on which it is based*." In *Mentmore International Ltd v. Abbey Healthcare (Festival) Ltd* [2010] EWCA Civ 761 at [23], Carnwath LJ[3] held that it was only where factual assertions in a witness statement were contradicted by *all* the documents or other material that Lord Hope envisaged the possibility of rejecting such factual assertions. As Carnwath LJ held, it is therefore: "*important not to equate what may be very powerful cross-examination ammunition, with the kind of "knock-out blow" which Lord Hope seems to have had in mind*".

(6) Likewise, in *Three Rivers* (at [96]), Lord Hope held that the court's power under r.24.2 is not intended to be exercised by a minute and protracted examination of documents and facts of the case in order to see whether the defendant does indeed have a defence. To do that is to usurp the position of the trial judge and to produce a trial on paper without disclosure and without oral evidence tested by cross examination in the ordinary way.[4]

(7) Finally, the power to grant summary judgment is discretionary. If the court concludes that a defence appears to lack a real prospect of success, it is then necessary to consider whether to enter summary judgment. In this regard:

---

3 With whom Arden LJ and Morgan J agreed.

4 Approving a dictum in a pre-CPR case, *Wenlock v. Moloney* [1965] 1 WLR 1238 at p1244B-C.

(a) Where there is overlap between the issues raised in the summary judgment part and the remaining issues, the fact that there will be a trial in any event may be a compelling reason to have all those issues decided at the same time: see, eg, *Radiocomms Systems Limited v. Radio Communications Systems Ltd* [2010] EWHC 149 (Ch) at [5] per Floyd J.

(b) It may be appropriate to exercise the discretion where a strike out or summary judgment would not result in the saving of court time or relieve the winning party of the need to fund and participate in the trial. If, notwithstanding a strike out or summary judgment, there is still likely to be a trial in which, in substance, the same parties will be involved and substantially the same issues will need to be tried, then the court may exercise its discretion to refuse summary relief. This is so "*even when a party has a very weak claim or defence*" since it puts no significant additional burden on his opponent, nor adds significantly to the time to be taken up by the court in determining the dispute, imposes no significant hardship on the opponent and does not significantly inconvenience other parties waiting for an opportunity to come before the court: see, eg, *Barrett v. Universal-Island Records Ltd* [2003] EWHC 625 (Ch) at [47] per Laddie J.

19. I accept the above summary of the relevant principles.

The application of the principles to the facts.

20. Crownmark submitted that it has (at the very least) a real prospect of success in respect of the interest claim, and, in this regard, relied on the following matters, as set out in the remainder of this paragraph and in paragraphs 21-28 below.

(1) Athena and Crownmark orally agreed, in December 2015, that the SPV would meet the interest payments that would otherwise have been due for the duration of the recovery process, and here that process ended before June 2017;

(2) Athena orally represented, in December 2015, inter alia (and in summary) that a written loan agreement had to be executed in Fund 4's standard template but once executed, the parties would need to enter into a further written agreement, properly

documenting the agreement they had actually made and by reason of these representations, Athena is estopped from making its claim for the interest payment;

(3) Mr. Klemos and Mr. Tretiakov orally agreed, on 14 June 2016, that the Facility Agreement should be terminated with immediate effect;

(4) Alternatively, if there were no oral agreement, Crownmark rescinded the Facility Agreement for misrepresentation.

21. Athena denies that such agreements were made (in December 2015 and June 2016) and denies that such representations were made (in December 2015). Disputes as to what was said or agreed orally are paradigm examples of disputes that are generally unsuitable for summary determination.

22. Athena actually accepts, in all other respects, that the question of what (if anything) was agreed in October to December 2015 and what (if anything) was represented in December 2015 cannot be the subject of summary determination and must be resolved at trial. If this is so in respect of the loan, it must, Crownmark argues, apply equally to interest payments.

23. Moreover, Crownmark says, the Facility Agreement, on its face, would be an arrangement that for Crownmark would make no commercial sense. Thus (1) the total principal due under the Larienta Facility Agreements was also US$50 million; (2) the interest rate under the Facility Agreement was fractionally *higher* than the interest rate under the Larienta Facility Agreements; (3) from around 12 August 2015 (i.e. 4 months before Crownmark entered into the Facility Agreement), Larienta's property developments (as financed by a Russian bank, Probusiness Development LLC) were made subject to an insolvency regime under Russian law; (4) therefore, if the Facility Agreement were to represent the actual agreement between the parties, Crownmark would have purchased a very substantial distressed debt from Athena at full face value. The obvious lack of commercial sense in such an arrangement is a powerful factor in support of Crownmark's defence to the interest claim. Put shortly, it means that one cannot take at face value what is provided in the written Facility Agreement and that applies to both the alleged obligation to pay principal and to pay interest.

24. As applicant, Athena bears the overall burden of establishing that Crownmark has no real prospect of success and therefore it must establish (to a high threshold – no real prospect of the Court finding to the contrary at trial) what was orally represented and what was orally agreed. Yet, its only witness evidence in that regard is provided by Mr. Dinesh Surtani, a partner in Athena's firm of solicitors, Herbert Smith Freehills LLP. Such evidence does not provide any proper foundation for establishing those matters. It has the following features:

    (1) It is entirely hearsay. Moreover, it is provided by a witness who did not have any contemporaneous involvement in any of the events in question;

    (2) It is in fact unattributed hearsay – Mr. Surtani does not identify a single individual at Athena as having provided him with any information in his statement;

    (3) It is largely comprised of a commentary on certain items of contemporaneous correspondence, but without any indication that Mr. Surtani has ever even spoken to any of the authors or recipients of those documents; and

    (4) It is incomplete in many important respects. In particular, Mr. Surtani does not even say <u>what Athena says</u> was negotiated in December 2015 regarding the interest payment or what was discussed on 14 June 2016, let alone identify a source for such evidence and any reasons for believing such evidence to be true.

25. By contrast and without prejudice to the fact that Crownmark does not bear the burden of proving what was orally agreed or what was orally represented, it has adduced and relies upon on witness statements from Messrs. Tretiakov and Klemos. Therefore, Crownmark relies upon evidence from <u>both</u> those individuals whom it says agreed to terminate the Facility Agreement on 14 June 2016. Moreover, both Messrs. Tretiakov and Klemos were amongst the principal individuals involved in the negotiations in October – December 2015. Further, both Mr. Tretiakov and Mr. Klemos are independent witnesses, in that Mr. Klemos was employed in the Athena group at the material time and Mr. Tretiakov acted as a neutral intermediary.

26. As regards the issue of whether the parties agreed that interest would only be payable during the recovery period:

(1) Mr. Tretiakov says it was agreed in December 2015 that Crownmark would not be required to pay the interest if the recovery of the loan proved impossible.

(2) Mr. Tretiakov also says that once the written loan agreement had been executed, the parties would need to enter into a further written agreement which would replace the loan agreement and reflect the actual agreement of the parties. Mr. Klemos says the same.

(3) By contrast, Athena has acknowledged that it does not even know which of its own representatives participated in the negotiations with Mr. Bomonin and Mr. Tretiakov in November and December 2015. Mr. Surtani does not put forward any account of what Athena says was negotiated in December 2015. This makes untenable a summary judgment application based on what Crownmark said was agreed and represented orally in December 2015.

(4) Athena resorts to arguing that (1) Crownmark made two payments of interest (on 24 June and 22 December 2016) and that would be inconsistent with the recovery period having ended or alternatively there being such a term of the agreement; (2) some contemporaneous emails (that Athena only disclosed for the first time on 22 January 2019) are inconsistent with the recovery period having ended then; and (3) the end of the recovery period was not mentioned in some pre-action correspondence.

(5) Crownmark's response is as follows:

(a) The arrangement which Athena avers makes little or no commercial sense. It would involve Crownmark having to continue to make interest payments to Athena, in circumstances where Crownmark had concluded that it was impossible to recover any money from Larienta or Larienta's estate. Put alternatively, Athena's case may be characterised as being that it received a windfall benefit: when faced with a debtor whose assets were subject to an

insolvency regime and was at risk of default (Larienta), Crownmark agreed to assume its obligations to pay all the interest due, even if Crownmark could not make any recovery and without any right to terminate the arrangement.

(b) It is not possible to separate the alleged obligation to pay the loan (which Athena accepts could not be the subject of summary determination) from the alleged obligation to pay interest on that loan.

(c) Crownmark has explained the circumstances in which the two payments were made. In short, Crownmark made those payments for the same reason it says that it entered into the arrangement with Athena in the first place: so as to avoid Larienta defaulting on its obligations and thereby exposing B&N Bank to serious (and potentially catastrophic) consequences.

(d) The emails to which Athena now refers are inconclusive. In any event, it would be wrong to rely on some very limited correspondence, prior to proper disclosure (pursuant to the DRD) being provided.

(e) It does not follow from an omission to refer to an event in pre-action correspondence that the event did not take place. Such an omission is no basis for finding that witness evidence to the contrary, certified by a statement of truth, should be disbelieved, let alone "*bound to be disbelieved"* at trial: *Woodstock* applied.

27. As regards the issue of termination of the Facility Agreement:

(1) Mr. Klemos says that he was told specifically by John Cox, Athena's CEO, to offer cancellation or reversal of the Facility Agreement and debt assignment agreement to Mr. Tretiakov and did so. Mr. Klemos says that in the course of a telephone conversation, Mr. Tretiakov accepted the offer.

(2) Likewise, Mr. Tretiakov describes having several conversations with Mr. Klemos on 14 June 2016 concerning termination of the Facility Agreement and their agreeing to terminate it. He exhibits email correspondence between him and Mr.

Bomonin on that day, in which Mr. Tretiakov says Mr. Klemos has told him Athena "*are offering cancellation or reversing the deed"* and asks Mr. Bomonin "*What do you think? I have to give him the answer asap"*. Mr. Bomonin then says: "*Tell him that we are OK with cancellation or reversal and let them send us draft documents that they want to use for agreement"*.

(3) By contrast, Athena accepts that it does not even know what Messrs. Klemos and Tretiakov said to each other on 14 June 2016. In correspondence, HSF has acknowledged that they are seeking to infer from some email correspondence around the time what was said in that conversation. This is fatal to an application for summary judgment in respect of an alleged oral agreement.

(4) Athena nevertheless resorts to arguing that (1) Mr. Klemos lacked actual or ostensible authority to terminate the Facility Agreement; (2) the agreement between Mr. Klemos and Mr. Tretiakov must have subject to contract; or (3) the parties' subsequent conduct is inconsistent with the Facility Agreement having been terminated. Crownmark's response is that:

(a) The issue of actual authority can only be determined on the basis of disclosure, which is yet to be provided – and Athena has agreed to give disclosure on this very issue;

(b) In any event, Mr. Klemos (plainly) had ostensible authority. It does not appear to be in dispute that he was the individual given responsibility by Athena for negotiating the termination of the Facility Agreement;

(c) The issue of whether the oral agreement was 'subject to contract' must turn on what Mr. Klemos and Mr. Tretiakov said to each other. They have given evidence in this regard and Athena pleads that it cannot dispute those matters;

(d) If the Facility Agreement were terminated in the course of a telephone conversation on 14 June 2016, then it matters not what the subsequent conduct of the parties was or is alleged to have been. In any event, it is not

possible to make findings as to the subsequent conduct of the parties without full disclosure.

28. On this application, the Court does not have before it all the substantial facts that are reasonably capable of being before it. Disclosure pursuant to the DRD has not yet been given. The parties have now undertaken a comprehensive process of identifying the scope of such disclosure in accordance with CPR PD51U. In this regard:

(1) The agreed issues for disclosure include both the contents of negotiations in December 2015 and in June 2016.

(2) An electronic disclosure exercise will have to be conducted. Athena has identified that (in addition to 12 large A4 lever arch files of hard-copy documents concerning the relevant transactions), it will have to consider at collection centralised electronic file systems both on the London and Luxembourg servers and custodians' desktop device hard drives both in London and Luxembourg. The parties have agreed that Athena should conduct keyword searches and give disclosure in respect of email accounts of three custodians (Massimo Catizone, Michele Cerqua and Mr. Klemos) over a period of 8 months.

(3) For its part, Crownmark has identified five custodians: Mr. Michael Stylianou (the director of Crownmark), Mrs Louna Rotsa (Crownmark's auditor), Allila Consulting, and Messrs. Tretiakov and Bomonin, and intends to conduct keyword searches of the relevant email servers, as well as reviewing hard copy documents stored at Crownmark's office in Nicosia.

(4) It is apparent from the limited documents disclosed by Athena thus far that the relevant individuals engaged in email correspondence concerning the relevant transactions. The documents that would reasonably be available to the Court at trial therefore include contemporaneous correspondence concerning the central factual issues in dispute that is to say, what (if anything) was (1) agreed in December 2015; (2) the subject of express representations by Athena in December 2015; and (3) agreed on 14 June 2016.

29. The Claimant's submission was, in essence, very simple. It submitted that Crownmark had no real prospect of successfully establishing either of its defences, and that this was apparent from a review of the documents available at present, coupled with the reasonable certainty that nothing better would be forthcoming on disclosure.

30. I will deal with each of the two issues I have identified above in turn.

Had the recovery period terminated prior to June 2017?

31. Crownmark's pleaded case is that it was for Crownmark to determine when to cease attempts to recover money from Larienta; that such a decision had been taken by April 2016; and that accordingly the recovery period had ended before the obligation to make the June 2017 interest payment accrued. The Claimant contends that there was an obligation to notify it before the period could be said to have ended; but that even if this was wrong, the documents show that Crownmark were still making efforts to obtain monies from Larienta as at June 2017.

32. Crownmark, for its part, relied on the witness evidence of Mr Tretiakov and Mr Klemos in this regard. In paragraph 27 of his statement, Mr Tretiakov says that in April 2016, he was informed by Mr Bonomin that Crownmark had decided to cease seeking to recover assets from Larienta and that it wanted a written agreement which accurately reflected the parties' agreement, a request which led to Mr Bonomin sending on a draft Limited Recourse Agreement on 2 June 2016. Mr Klemos's evidence was that, following a report as to the property inventory of OJSC Probusiness Bank, Crownmark decided in or around May 2016 to cease seeking to recover assets from Larienta. Mr Klemos gives no source for that understanding. I have not seen any evidence from anyone other than Mr Klemos and Mr Tretiakov from Crownmark. It was Crownmark's case that I should not reject this evidence, since to do so would in effect amount to disbelieving Mr Tretiakov and Mr Klemos without cross examination.

33. The Claimant, for its part, contended that this case has no real prospect of success. In this regard, the Claimant pointed to a number of contemporaneous documents as wholly inconsistent with the notion that the recovery period had come to an end before June 2017. Those documents (and other indicia) were as follows:

(1) First, the Claimant emphasised that interest payments were made in June 2016 and December 2016, both of which fell due after the alleged end of the recovery period in April 2016. The Claimant also relied on the fact that, in its initial pleading, Crownmark had pleaded that these payments were made during the recovery period.

(2) Second, the Claimant relied on a number of documents which suggested that recovery efforts were clearly continuing after April 2016. In particular, the Claimant relied on the following documents:

(a) An email from Mr Bonomin to Ms Karin Winklbauer sent on about 16 June 2016, stating that *"we are currently undertaking actions to take control of Larienta, its assets and underlying projects and will be able to provide you with project information when we finalise the process".* That email, so the Claimant says, is not consistent with the proposition that recovery efforts have ceased.

(b) Emails from Mr Klemos of Athena to Mr Cox of Athena in which he sets out his current understanding of the position, as at 22 and 23 June 2016, where Mr Klemos states that B & N Bank is currently starting a procedure for obtaining information in relation to Larienta. That in turn, says the Claimant, is inconsistent with the idea that at this point Crownmark had given up the idea of recovering from Larienta.

(c) A letter from Crownmark dated 21 June 2017, in which Crownmark stated, under the heading of "Background" that *"new facts emerged in late 2016, as a result of which the directors of the assignee resolved to apply an impairment to the value of the term loan facilities".* That letter went on to state that *"It is premature to take a final view on the outcome of the recovery process."*

(d) The accounts of Crownmark, which showed that, as at 3 July 2017, when they were signed off, the loans to Larienta were still marked as due and owing, albeit impaired.

(e) A letter of 2 November 2017, in response to the demand for payment and acceleration sent by the Claimant to Crownmark, in which Crownmark say that they *"eventually determined that it was impossible to achieve a substantial recovery"*, but do not indicate when this was determined.

(3) Thirdly, the Claimant argued that the witnesses whose evidence had been produced did not have to be disbelieved. Neither witness was directly involved in the recovery efforts, and their evidence was as to their understanding at the relevant time, which might or might not be correct.

34. Had this issue stood alone, I would have concluded that the defence put forward had no real prospect of success.

(1) The documents that I have been shown to date seem to me to be only consistent with the attempts to make recovery continuing beyond June 2017 and certainly well beyond April 2016.

(2) Whilst there might be other documents that I have not yet seen, those documents would be expected to be in the possession of Crownmark, which was the party which was engaged in attempting to make recoveries. Accordingly, the suggestion that there may be further documents available on disclosure which would have a bearing on this point has a rather hollow ring.

(3) I accept the submission that this finding says nothing as to the veracity of the evidence given by Mr Klemos and Mr Tretiakov. Their statements make clear that their evidence on this point is as to their understanding during the period that they remained involved. However, Mr Klemos had no involvement after June 2016, and left in October 2016, and Mr Tretiakov seems to have had no involvement after June 2016. Neither gives firm evidence as to the recovery period, as I have indicated, since both give evidence as to their understanding derived from others, and I have not heard from those others, whose knowledge would be expected to be better.

35. However, this point does not stand alone. There is the further question of whether the Facility Agreement was validly terminated, orally, in June 2016. I turn to this second issue.

Was the Facility Agreement terminated in June 2016?

36. Under this head, it is Crownmark's case that the agreement was terminated in the course of a telephone conversation between Mr Klemos, on behalf of Athena, and Mr Tretiakov, on behalf of Crownmark. It is submitted that this gives rise to a dispute of fact, which it is necessary for a full trial to resolve.

37. The Claimant, for its part, contends that, even taking the witness evidence of Mr Tretiakov and Mr Klemos at face value, the correspondence at the time shows that there was no finalised agreement. Instead, the Claimant submits that:

    (1) Mr Klemos had no authority (of any kind) to terminate the Facility Agreement; and/or

    (2) Any such agreement as was made was, in effect, subject to contract, since it was anticipated that a further document was necessary to finalise the agreement.

38. In this regard, it is necessary for me to set out the relevant passages in the email correspondence that has been produced. The chronology was as follows:

    (1) There was an exchange of emails which, as Mr Johnson QC accepted, was "opaque", relating both to the BF4 fund and other funds.

    (2) By email dated 14 June 2016 timed at 7.28am, Mr Cox of the Claimant indicated that a limited recourse agreement that had been proposed was not in the best interests of the client. What was proposed was a cancellation or reversal of the Debt Assignment.

    (3) Mr Klemos responded to this on the same day at 1.46pm saying that the client was OK to proceed with the reverse/cancellation of the reassignment and asking for a draft asap.

(4) On the same day, at 4.55pm, Mr Cox responded to say that he saw no major issues surrounding trying to simplify the BF4 structure and getting the fund closer to the SPV. In this context, it would appear that the SPV was Larienta.

39. The oral conversations relied on by Crownmark would appear to have taken place on 14 June 2016, ie between the email messages referred to in paragraphs 38(2) and 38(3) above.

40. **After** these emails and telephone conversations, there would appear to have been further emails.

(1) On 15 June 2016, Mr Gates of WRM asked Mr Klemos when the interest due on 24 June 2016 would be received.

(2) Mr Klemos responded to say that Athena would receive the interest on 24 June 2016, so that Mediobanca would receive payment by 29 June 2016, with payment then to be made by Mediobanca by 6 July 2016.

(3) On the same day, Ms Winklbauer of WRM chased for the financial statements of certain SPVs, including Larienta.

(4) In response to this, Ms Winklbauer was told (on 16 June 2016) that Larienta was not an operating company any longer. Mr Bomonin said that B & N Bank were currently undertaking actions to take control of Larienta.

(5) Following receipt of this email, Ms Winklbauer emailed Mr Cox on June 17 2016 to say that WRM might wish to revisit the decision to simplify the BF4 structure because of the fact that she had been told that Larienta was not operating any more.

(6) Mr Cox confirmed this on the same day.

(7) Finally, on 22 and 23 June 2016, Mr Klemos, Mr Bomonin and Mr Cox exchanged emails again.

(a) On 22 June 2016, Mr Klemos sent on a summary of the situation to Mr Cox.

(b) On 22 June 2016, Mr Bomonin sent on a report from a Cypriot lawyer which suggested that there were problems with Larienta.

(c) That email was sent on by Mr Cox to Mr Klemos.

(d) Mr Klemos sent on a summary of the position to Mr Cox, copied to various others.

(e) On 23 June 2016, Mr Klemos asked Mr Bomonin to send on urgently copies relating to the discovery process in Cyprus and the "outstanding documents".

41. Dealing first with the question of Mr Klemos's authority, I have concluded that I cannot reach any final decision on this. It would seem from the correspondence that I have seen that Mr Klemos was authorised to pass on the decision of the Board, who clearly did have authority to enter into (and thus terminate) an agreement. Thus, he was, at least arguably, the messenger authorised to pass on a message which came from a party with the relevant authority. Quite what that message was, and the context in which it was to be sent, will only be apparent after disclosure.

42. As regards the allegation that any agreement was subject to contract, which was never finalised, here the documentation is not sufficient to enable me to reach any firm conclusions. It is quite true that whilst the parties seem to have anticipated that the oral agreement apparently reached on 14 June 2016 would be formalised, it does not follow that there was no concluded agreement at the time of the oral agreement. This is particularly so since the evidence suggests that it was for the Claimant to produce the written agreement; and the reason it did not may have been because the conclusion was reached that this was no longer in the best interests of the Claimant. Without a fuller investigation of the reasons why no written document was produced, I do not think it is safe to conclude that there was in fact no concluded agreement at the earlier stage.

43. Overall, therefore, I have concluded that this is not an appropriate case for the grant of summary judgment.

Some other reason for trial?

44. Finally, Crownmark submitted that even if I were to consider that their defence lacked a real prospect of success, then the appropriate course would still be that this claim should still proceed to trial, because:

    (1) First, there is almost complete overlap between the issues raised in the interest claim and the remaining issues. Both require consideration of the same negotiations in late November and December 2015 between a Mr. Igor Bomonin (on behalf of Mr. Shishkhanov), Mr. Tretiakov (as an independent intermediary), Mr. Klemos (on behalf of Athena) and the five other representatives of Athena;

    (2) Second, by reason of this overlap, there would be no significant additional burden if the claim in respect of the interest payment were to be resolved at trial. It is apparent from the parties' respective CMISs that they accept that the time to be taken up by the court in determining the dispute is the same, irrespective of the outcome of the summary judgment application.

45. I do not accept this submission. If there was in fact no defence to this part of the claim, then, in my judgment, this matter should not be allowed to continue to trial. However, since, for the reasons I have outlined, there is an arguable defence to this part of the claim, and, since, in addition, there are reasons for caution in granting summary judgment in relation to matters which may have a bearing on the remainder of the claim, then it is not necessary for me to say anything further.

Should I impose conditions?

46. This leaves the question of whether I should impose conditions, essentially because the defences put forward are very weak; and, if so, what those conditions should be. I invited submissions on this point at the end of the hearing, because this suggestion was made very late in the day by the applicant.

47. The relevant principles are not, in my judgment, in doubt. CPR Part 24 gives the Court the power to impose conditions where an application for summary judgment is refused. That is clear from the Practice Direction to CPR Part 24, which provides that:

> ***"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."*

48. The question is therefore what order, in the exercise of my discretion, I should make.

49. For its part, the Claimant submits that I should make the following orders:

(1) An Order that Crownmark pays the full amount of the allegedly outstanding instalment of interest into Court;

(2) An Order that Crownmark makes disclosure of its assets.

50. I deal first with the suggestion that a payment in should be ordered. Under this head, the form of relief that the Claimant seeks is payment in of the interest payment sought by way of summary judgment. Essentially, the ground of this application is that the defence to this claim is so weak that it would be appropriate to impose a condition on the grant of permission to defend the claim.

51. Crownmark submits that such a condition should not be imposed.

(1) First, if the Court were to conclude that Crownmark has a real prospect of successfully defending the interest claim at trial, then it is not possible simultaneously to conclude that Crownmark's defence is weak (let alone so weak that it is improbable it will succeed). This is because the same factors that mean Crownmark's defence has a real prospect of success preclude any proper evaluation of the relative strengths (or merits) of Athena's claim and Crownmark's defence. Thus, for example:

(a) There is direct evidence (from Mr. Tretiakov and Mr. Klemos) that they orally agreed to terminate the Facility Agreement. Athena seeks to infer

from its own internal correspondence that such an agreement was 'subject to contract'. Such inferences cannot be drawn in circumstances where Athena has not disclosed all its internal correspondence.

(b) In any event, even if such inferences could be drawn at this stage (and they cannot) they could not gainsay the direct evidence of Mr. Tretiakov and Mr. Klemos. How is the Court to identify a probability that the evidence of Mr. Tretiakov or Mr. Klemos will be accepted at trial? Or identify a probability that when Athena has conducted its disclosure exercise, there will be any documents supporting the inferences it currently seeks to draw? Or contradicting those inferences?

(2) Second, as Athena accepts in its written submissions, before exercising the power to make a conditional order, 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. However, Athena's purpose is said to be to "*provide Athena with security*" and so as "*to ensure that Athena is not litigating in vain"*. This is wrong in principle because:

(a) It is well-established that a conditional order cannot be used as a means of circumventing the requirements of a specific rule under the CPR.

(b) What Athena is thereby seeking to achieve is an order securing a sum in cash against which it might enforce a judgment at trial. This form of relief - and Athena's purpose in seeking it – is analogous to that of a freezing order, (in fact it is more onerous and exorbitant than such an order). Thus in order to seek such relief, Athena would (at least) have to meet the requirements of CPR, r.25.1(1)(f). Athena (rightly) does not suggest that it can bring itself within the scope of this rule.

(c) It would be wrong if a claimant in debt under a loan agreement, having failed to obtain summary judgment, were somehow able to obtain more extensive relief than if (1) it were bringing a claim in fraud; (2) that claim was reasonably arguable; and (3) there were a real risk of the respondent dissipating its assets.

(3) Third, and in any event, the relief sought by Athena is disproportionate. The possibility of making a conditional order would only arise if were the Court to hold that there was a real prospect of Crownmark successfully defending the claim. Yet, in these circumstances, Athena seeks payment into court not of a sum in respect of the *costs* of proceeding to trial on its claim, but of the full amount that it claims.

52. In my judgment, none of the points made by Crownmark is, on analysis, of any real force.

(1) It does not follow from the fact that I have concluded that summary judgment should not be granted that I have also concluded that the grounds of defence put forward are not weak. It is quite true that I have concluded that the oral defences need to be tested; but it is not the case that I have concluded that these defences are, on the face of things, strong – quite the reverse.

(2) The cases which the Claimant has put forward quite clearly demonstrate that it may be appropriate, where a Defendant has put forward a weak defence, to impose a requirement of a payment in. Thus, in Teare J's decision in ***Abbot*** *Investments (North Africa) Ltd v. Nestoil Ltd* [2017] EWHC 119 (Comm) ('***Abbot***'), the learned judge said that:

"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."

(3) In my judgment, although I accept, of course, that every case turns on its facts, in this case it is the case that the defence is improbable, since it is inconsistent with the documents produced to date.

(4) I, of course, accept that the condition imposed must have a purpose. The purpose identified is to provide security. Had I given summary judgment, then Crownmark would have had to pay the amounts claimed. Instead, as a precondition of being allowed to defend on the basis of what I regard as weak arguments, Crownmark are to be required to put up security. The purpose of the requirement is thus to ensure that the defence put forward, which I regard as weak, does not unduly prejudice the Claimant. I do not accept the analogy with a freezing order. There, there are a series of specific requirements which must be satisfied. In the case in front of me, there is a general discretion, to be exercised in the light of my views as to the likelihood of success of the proposed defences.

(5) Nor do I accept Crownmark's reliance on security for costs. Security for costs is ordered as a precondition of allowing a Claimant to bring a claim. Considerations such as stifling the claim are apposite for consideration in such cases; and it is also necessary to consider whether a Claimant is seeking to bypass the jurisdictional preconditions for such an order provided by the CPR. Security, on the other hand, is ordered to ensure that where a claim is brought, the Claimant will not be deprived of the fruit of its claims by reason of a sketchy and prolonged defence. The purposes of the two jurisdictions are entirely different.

(6) I do not accept that the relief sought – ie a payment in of the amount claimed by way of summary judgment – is in any way disproportionate. There is no necessary corollary between the costs of establishing that claim and the amount of the claim itself. It is the claim itself which forms the request for a condition. Since I take the view that the defence to the claim is a weak one, then it is this consideration which has primacy. I should say that I have not lost sight of the fact that courts

have said that the *mere* weakness of a defence is not sufficient ground to impose conditions on the right to defend: see for example *Olawatura v. Abiloye* [2002] EWCA Civ 998, [2003] WLR 275; *Optaglio v. Tethal* [2015] EWCA Civ 1002 at [70], EWCA Civ 998, [2003] 1 WLR 275 at [26], *Jordan Grand Prix Ltd v. Tiger Telematics Inc* [2005] EWHC 76 (QB) at [60] per Nelson J. However, where, as here, the defence is very weak, and was indeed close to being dismissed on this basis, then in my judgment the case is an appropriate one for the imposition of a condition of payment in of the entirety of the relevant tranche of interest.

Disclosure.

53. I turn next to the application for disclosure. The Claimant argued that I have the power to impose a condition requiring disclosure of certain financial information, as the price to be paid for allowing Crownmark permission to continue to defend the claim. The reason why, the Claimant said, it would be appropriate to require this information is that:

(1) It was contractually entitled to the information if there were amounts outstanding under the Facility Agreement, and, even if it was sufficiently arguable that there were not to allow Crownmark's defence to continue, then if it is only just arguable, then the Court should require the provision of the information;

(2) The most recent financial information available is significantly out of date;

(3) There were other amounts over and above the relevant interest payment which were claimed, totalling large amounts;

(4) The provision of that information now might aid settlement discussions;

(5) There is no prejudice to Crownmark in providing such information.

54. In this regard, Crownmark submitted that there were at least four reasons why this part of Athena's request is flawed.

(1) The first is that such disclosure orders are not within the scope of PD24, paragraph 5.2. It defines a conditional order as being an order which requires a party "*to pay*

a sum of money into court" or to "*take a specified step in relation to his claim or defence, as the case may be"*.

(2) Such an order could not, in any event, be made unless Athena complied with the requirements of the specific rule of the CPR governing such applications (and the common law principles applied under that rule), in accordance with the principles set out in ***Huscroft*** and ***Deutsche Bank***. In this case, Athena (rightly) does not seek to suggest (1) that it would be entitled to an order for asset disclosure under CPR, r.25.1(1)(g); (2) that it would be entitled to freezing order relief; or (3) that it has any proprietary claim against Crownmark (still less that it has a proprietary claim in respect of the assets to which it refers in Crownmark's 2016 audited financial statements). Therefore, Athena does not even seek to suggest that it can comply with the relevant rule of the CPR and the principles applied under that rule. Accordingly, Athena's application for an order for asset disclosure must fail on this ground too.

(3) Any condition imposed must be related to the relief sought on the summary judgment application (which the court has refused) and must be proportionate having regard to the relief sought: see ***Huscroft***. The condition sought here (asset disclosure) does not relate to the summary judgment application (payment of a debt).

(4) It is wrong in principle for Athena to seek an asset disclosure order, *in addition to* an order for the payment into court of the full sum claimed on the summary judgment application. The order that Athena is seeking would provide that, if Crownmark paid into court the full amount that Athena has claimed by way of its summary judgment application, Athena would *still* be entitled to judgment unless Crownmark also provided asset disclosure. This would offend against the principle that any condition must represent a proportionate and effective means of achieving the identified purpose, *having regard to the order to which it is to be attached*: ***Huscroft***. Here, the order to which the condition would be attached would be an order dismissing Athena's summary judgment application and granting Crownmark conditional leave to defend Athena's claim for that interest payment.

55. I have concluded that on this question Crownmark is correct and that I should not make an order for disclosure of assets. That is because I take the view that Crownmark is correct, essentially for the reasons that it gives. If I have a discretion on this, then I would exercise it against the Claimant.

The strike out application.

The pleaded counterclaim.

56. The relevant part of the pleading is paragraphs 15 to 23. Those paragraphs state as follows:

> *"15. In the course of various telephone conversations taking place in December 2015 between Mr Bonomin (acting for and on behalf of Mr Shishkhanov) and Mr Tretiakov, Messrs Catizone and Klemos (acting for and on behalf of Athena and the companies and entities within that group, including Fund 4, Athena SICAV and WRM), they made an agreement in this regard (the "**First Oral Agreement**"). The terms were in summary that:*
>
> *15.1 Fund 4 would assign all its rights and interests under the Larienta Facility Agreements to a special purpose vehicle nominated by Mr Shishkhanov (the "**SPV**");*
>
> *15.2 The SPV would seek to recover from Larienta (or its estate) the amounts that it owed under the Larienta Facility Agreements (the "**recovery process**");*
>
> *15.3 The SPV would meet all the interest payments that would otherwise have been due to Fund 4 under the Larienta Facility Agreements (the "**Interest Payments**"), for the duration of the recovery process; and*
>
> *15.4 The SPV would not be liable to pay, to Fund 4, the principal that would otherwise have been due under the Larienta Facility Agreements (the "**Loan**"). Rather, at the conclusion of the recovery process, the SPV would pay Fund 4 all the monies that it had recovered from Larienta (or*

*its estate), save that, if the total sum recovered by the SPV exceeded the total amount that would otherwise have been payable to Fund 4 under the Larienta Facility Agreements (the "**Cap**"), the SPV would then be entitled to retain the balance.*

16. The First Oral Agreement is evidenced by, amongst other things, a letter from Crownmark to WRM dated 21 June 2017.

17. Mr Shishkhanov decided that the SPV should be Crownmark and notified Athena accordingly.

…

*18. In the course of various telephone conversations taking place in December 2015, involving the individuals identified in paragraph 15 above, Messrs Catizione and/or Klemos (acting for and on behalf of Athena and the companies and entities within that group, including Fund 4, Athena SICAV and WRM) made several express representations to Mr Bonomin (acting for and on behalf of Mr Shishkhanov and Crownmark), as well as to Mr Tretiakov. These were in summary that (the "**Express Representations**"):*

18.1 It was necessary for Crownmark to execute a written loan agreement, which would provide for Crownmark to make payments of interest to Fund 4.

18.2 Such a written loan agreement was the only way that Crownmark could ensure that (i) the interest payments that would otherwise be due from Larienta (under the Larienta Facility Agreements) could be paid to Fund 4 before the end of the year; (ii) therefore that Larienta would not default on its loans; and (iii) therefore that Mediobanca would pay the coupon in respect of the Fund 4 notes.

18.3 The written loan agreement would have to be in the standard template used by Fund 4, even though such a template did not reflect the actual agreement that the parties had made. This was said to be because there

was insufficient time for a bespoke written agreement to be drafted and approved by Fund 4.

18.4 Once the written loan agreement had been executed by Crownmark, the parties would need to enter into a further written agreement, in order properly to document the agreement that the parties had made.

19. By reason of those Express Representations, Athena, (as well as Fund 4, Athena SICAV and WRM) also made an innocent implied representation. This was that the effect of such a written loan agreement (in Fund 4's standard template and not reflecting the terms of the First Oral Agreement):

19.1 Would not be to supersede the First Oral Agreement, or prevent it from having full force and effect; and

19.2 Therefore, would not (or could not) require (i) Crownmark to pay the Loan at all; or (ii) make the Interest Payments, other than during the recovery process.

*(collectively, the "**Implied Representation**").*

20. Athena (and the companies within the group, including Fund 4, Athena SICAV and WRM) made the Express Representations and the Implied Representation, intending that Crownmark would rely upon them in deciding to enter into the Facility Agreement. Further, those representations constituted an implied offer on the part of Fund 4 that:

20.1 If Crownmark entered into such a loan agreement, Fund 4 would not seek to and would not enforce its provisions, to the extent that they were inconsistent with the First Oral Agreement; and

20.2 If Crownmark entered into such a loan agreement, Crownmark would also be made a party to the First Oral Agreement.

21. On or around 7 December 2015, Crownmark accepted that offer by entering into the Facility Agreement and thereby:

*21.1 Crownmark made a collateral contract with Fund 4 and/or Athena SICAV, not to enforce the Facility Agreement to the extent its provisions were inconsistent with the First Oral Agreement (the "**Collateral Agreement**"); and*

21.2 Crownmark was made party to the First Oral Agreement (or alternatively a separate contract was implied between Fund 4 (and/or Athena SICAV) and Crownmark in the same terms as the First Oral Agreement).

*22. On 17 December 2105, Fund 4 (and/or Athena SICAV) and Crownmark entered into a written Deed of Debt Assignment (the "**Debt Assignment**"), providing, (in summary) that Fund 4 assigned to Crownmark all Fund 4's right, title and interest in and to the Larienta Facility Agreements. The Debt Assignment did not stipulate that Crownmark should provide any consideration for the assignment. The consideration that Crownmark agree to provide is set out in paragraphs 15.3 and 15.4 above.*

23. In entering into the Debt Assignment and/or the Facility Agreement Crownmark relied upon the Express Representations and the Implied Representation. But for those representations, (i) Crownmark would not have entered into those agreements and (ii) would have insisted on a written agreement that accurately reflected the First Oral Agreement. Crownmark thereby relied on those representations to its detriment and it would be inequitable now to permit Fund 4 (or Athena SICAV) to resile from those representations."

57. In support of its plea for rescission, Crownmark went on to plead as follows:

"43. If (which is denied) there is no Collateral Agreement between Fund 4 (and/or Athena SICAV) and Crownmark and if (which is also denied) the Facility Agreement has also not been terminated by consent, then:

43.1 The Implied Representation would be false and Crownmark would be entitled to claim and hereby claims rescission of the Facility Agreement for innocent misrepresentation;

43.2 Further or alternatively, Fund 4 (and/or Athena SICAV) would be estopped from (ie) denying the truth of the Implied Representation; and (ii) therefore, making any of its claims under the Facility Agreement.

Paragraphs 19,20 and 23 above are repeated in this regard."

58. The amount claimed by Crownmark, after an application for permission to amend which I allowed, was limited to the sum of EUR 809,814.39, paid on 24 December 2015. Although their pleaded case originally pleaded an entitlement to further sums, they amended to withdraw this element of their case, since it was their case that these sums were not paid pursuant to the Facility Agreement, since that agreement, on their case, had been terminated.

Applicable principles.

59. These were largely common ground. Thus, Crownmark submitted as follows:

(1) Under r.3.4(2)(a), the court may strike out a statement of case if it discloses "*no reasonable grounds for … defending the claim*". It follows that it would be wrong to strike out a statement of case containing an arguable defence. Moreover, in order to exercise this power, the court must be *certain* that the claim is *bound to fail*. Unless it is so certain, the case is inappropriate for striking out: see eg, *Richards (t/a Colin Richards & Co) v. Hughes* [2004] EWCA Civ 266, [2004] PNLR 35 at [22] per Peter Gibson LJ.

(2) Further or in any event, in an area of the law which is uncertain and developing, it is not normally appropriate to strike out. It is of great importance that such development should be on the basis of actual facts found at trial not on hypothetical facts assumed (possibly wrongly) to be true for the purpose of the strike out: see, eg, *Barrett v. Enfield London Borough Council* [2001] 2 AC 550 at p557 per Lord Browne-Wilkinson.

(3) Moreover, considerations as to the utility and proportionality of such an application, where if the application were successful there would still need to be a full trial on liability involving evidence and cross-examination make such

applications inapposite in such cases: see, eg, *Partco Group Ltd v. Wragg* [2002] EWCA Civ 594, [2002] 2 Lloyd's Rep 343 at [27],[28],[48] per Potter LJ.

(4) On the hearing of any such application, it must be assumed that the facts alleged by the respondent are true.

60. The Claimant, for its part, does not dispute these principles. Instead, it argues that the alleged representations, which are said to give rise to a right to rescind the contract and reclaim the payments made pursuant to it, do not make sense. Instead, says the Claimant, whilst the statements made might be relied on as promissory, or in order to found an estoppel, preventing the Claimant from resiling from them, they cannot amount to innocent misrepresentations; and there is no plea of fraudulent misrepresentation.

The parties' respective submissions.

61. Crownmark submitted, first, that Athena's argument should not be determined now. I heard argument on this point at the beginning of the hearing, as Crownmark invited me to, and ruled against Crownmark for the reasons set out at the time. Essentially, I was not persuaded that this application would require significant argument. In this I have concluded that I was correct to hear the application; but that the need for full argument and full examination of the facts is a relevant consideration in determining whether or not to strike the counterclaim out.

62. Second, Crownmark submitted that the Counterclaim is (at the very least) arguable. It is certainly not a claim which is bound to fail, still less a claim which the Court could be certain is bound to fail. Crownmark submitted as follows:

(1) The normal remedy for misrepresentation is rescission and it should be awarded if possible, see eg: *Salt v. Stratstone Specialist Ltd (t/a Stratstone Cadillac Newcastle)* [2015] EWCA CIV 745, [2015] 2 CLC 269 at [24] per Longmore LJ.

(2) The remedy of rescission lies for even wholly innocent misrepresentation: see, eg, *Derry v. Peek* (1889) 14 App Cas. 337 (HL) at p359 per Lord Herschell. This proposition has been clear beyond doubt since that decision: see, eg, *Cartwright, 'Misrepresentation, Mistake and Non-Disclosure'* (4th ed, 2017), §4-04, fn.15.

(3) Statements as to the purport, effect and objects of documents are representations for the purposes of the law of misrepresentation: see, eg, *Chitty* (33rd ed, 2018), §7-017. Thus, where a claimant seeks to rely on a written term in accordance with its objective meaning, the defendant may show that the claimant made a statement at or before the time of the contract that the term would not have the effect which the claimant now asserts and this misrepresentation is a defence to enforcement of the contract. This is so even though the misrepresentation may have been made wholly innocently and whether by words or conduct (and even if it only created a false impression about the scope of the term and might not be sufficiently precise and unambiguous to give rise to other remedies such as estoppel): see, eg, *Cartwright* at §10-14. A statement as to the legal effect of a document is likewise sufficient to create an estoppel: see, eg, *De Tchihatchef v. The Salerni Coupling, Ltd* [1932] 1 Ch 330, 342 per Luxmoore J.

(4) In this regard, Crownmark relied on the well-known case of *Curtis v. Chemical Cleaning and Dyeing Co.* [1951] 1 KB 805, in which the defendant made a misrepresentation as to the effect of an exemption clause in a dry cleaning contract. Lord Denning MR held that the plaintiff's consent to the contract was obtained by an innocent misrepresentation and that as a rule of law or equity the defendant was then disentitled to rely on the exemption. The Judge referred, *obiter*, to an alternative approach being that the contract could be rescinded for innocent misrepresentation: see pp 809-810.

(5) Likewise, Crownmark argued that in *Jacques v. Lloyd D George & Partners Ltd* [1968] 1 WLR 625 (CA), an estate agent was held to have misrepresented the effect of a clause requiring the seller to pay commission. Lord Denning MR held that as the agent had misrepresented the effect of the document, it can and should be avoided, leaving the agent to claim for commission on the usual basis: see p630. Edmund Davies LJ and Cairns J concurred in the decision but did so on different grounds.

(6) There is some scope for technical dispute, Crownmark accepted, as to the correct legal analysis where a representor misrepresents the effect of an agreement into

which the representee subsequently enters. Thus, in an obiter part of his judgment in *AXA Sun Life Services plc v Campbell Martin Ltd* [2011] EWCA Civ 133, [2012] Bus LR 203 at [105], Rix LJ held that the reasoning of the majority in *Curtis* differed from that of Denning LJ and so the case should be explained on the basis of incorporation of terms.

(7) In the instant case, Crownmark claims that (1) Athena made an implied representation that the effect of a written loan agreement in Fund 4's standard template would not be to supersede the terms of their oral agreement; (2) if (contrary to Crownmark's primary case) the standard form agreement (i.e. the Facility Agreement) did supersede the oral agreement then it would follow that Athena's representation was incorrect, albeit that misrepresentation was made innocently; and (3) in that circumstance, Crownmark would be entitled to rescission of the Facility Agreement. Alternatively, Crownmark says that Athena would be estopped from bringing its claim or in the further alternative, the same result would be reached on the basis of the relevant terms not being incorporated: and if necessary, Crownmark applies to amend its Defence in this regard.

63. For its part, the Claimant submits that Crownmark's case is mischaracterised by Crownmark. Instead, it is submitted that the case put forward by Crownmark is in truth as to Athena's intention, being that Athena did not intend to enforce the Facility Agreement in accordance with its terms; and that to the extent that the Facility Agreement was inconsistent with the oral agreement between the parties, it would be the oral agreement which would govern. Hence, says the Claimant, whilst these statements can be relied on as having contractual force, or in order to found an estoppel (the remedy for both of which would be to hold the Claimant to its word) they can only give rise to a misrepresentation claim if the Claimant did not in fact have the relevant intention. This would have to be put as a claim in fraudulent misrepresentation – since a party must know what it intends – and there is no claim in fraud.

64. I turn to analyse Crownmark's case in relation to misrepresentation.

65. First, it is important to note that it is only the case based on mispresentation that is of importance in this regard. That is because the cases based on estoppel and collateral

warranty simply prevent the Claimant from claiming on the basis that the Facility Agreement went further than the Oral Agreement. However, I was addressed on the basis that the case based on misrepresentation goes further and seeks positively to assert that the Facility Agreeement should be rescinded. This latter argument (and only this latter argument) would entitle Crownmark to recover the interest payment made during the recovery period.

66. Secondly, I turn to analyse the various representations said to have been made at various times:

(1) The starting point is the oral agreement, which must be taken to have been made for the purposes of this striking out application. The terms of the oral agreement must be taken to have been as pleaded.

(2) Turning then to the express representations:

(a) The first was that it was necessary for Crownmark to execute a formal written agreement. This would appear to have been a representation of fact, although the exact background would need to be investigated.

(b) The second is that this was necessary because it was only in this way that the relevant monies could be paid to Fund 4, so that Larienta would not default on its loans and Mediobanca would pay the coupon in relation to the Fund 4 notes. Again, this would seem to be a representation of fact.

(c) The third was that, because there was insufficient time to draw up a bespoke agreement, a standard form would have to be used which did not reflect the oral agreement. Again, this would appear to me to be a representation of fact.

(d) Once the written agreement had been entered into, there would need to be a further written agreement. This seems to me to be a representation of intention, or an agreement as to what would happen in the future.

(3) By reason of these express representations, as I have noted, Crownmark plead that there was an implied representation, namely that the effect of the interim agreement would not be to supersede the oral agreement and therefore could not be relied on so as to require Crownmark to repay the loan or interest other than during the recovery period. In short, the representation was that Crownmark's actual obligations would remain those provided for in the oral agreement, whatever the written agreement said.

(4) Crownmark also puts its case in alternative ways as a matter of law, relying both on arguments of estoppel and collateral oral warranty. However, if the argument based on misrepresentation is itself sound, then in my judgment it would not matter if the point can be put in other ways. The converse proposition is that the existence of these other legal mechanisms for achieving that which Crownmark really contends for, namely that the Oral Agreement would remain the governing agreement between the parties, means that it is less likely that a misrepresentation argument could succeed and still less likely that a misrepresentation argument which would have effects going beyond those which the estoppel and collateral warranty arguments would.

(5) Turning to falsity and rescission, as I have also noted, Crownmark argues that *if* there was no Collateral Agreement and *if* the Facility Agreement has not been terminated by consent, then the Implied Representation *would* be false and Crownmark *would* be entitled to claim rescission of the Facility Agrement for innocent misrepresentation (my emphasis). The claim is thus, on its face, a contingent one.

67. Crownmark contended that this was a representation of fact, or more specifically as to the legal effect of the Facility Agreement, relying on a number of cases in this regard. Conversely, as I have noted, the Claimant submits that, on its true construction, Crownmark's case is as to the Claimant's intention at the time that the Facility Agreement was entered into. It is the Claimant's case that, although such a representation as to intention may be false, it can only be false where it is said to have been made fraudulently (since a party knows what that party intends) and no such case has been made here (as

Mr Weekes very clearly and fairly accepted). Accordingly, says the Claimant, there is here no viable claim in misrepresentation.

68. I start from the general position, before turning to the cases on which Crownmark relies.

69. The general position is that, in order to be an effective representation, the representation must be one of fact: see, for example, *Chitty on Contracts*, 32nd ed, at 7-007. However, this rule has, over time, become heavily qualified, and so a representation of law may also qualify as a misrepresention if it would reasonably be understood by the representee that it was intended to be relied on: see *Chitty*, op cit, text at fn 90. A representation as to the legal effect of a document may, it is said, be a representation of fact.

70. In this regard, Crownmark relied on a number of cases, as I have noted above, which are also referred to in *Chitty*, at paragraph 7-017. I consider each in turn.

    (1) In the case of *Curtis v Chemical Cleaning*, ref supra, an employee who gave a receipt to a customer at the time some dry cleaning was put in said, in response to a question, that the terms on the back of the receipt only exempted liability for certain types of damage. The clothes were damaged in a different way and the customer sued. The Court held that the impact of the statement by the employee is that the exemption clause did not form part of the contract. Lord Denning MR said, *obiter*, that an alternative route to the result in that case might have been to hold that the misrepresentation as to the effect of the clause would lead to an entitlement to rescind the contract and sue in negligence; but in fact he went on to say that he preferred to base his decision on the same ground as the majority, namely that the term did not form part of the contract because of the misrepresentation.

    (2) This statement of Lord Denning was reiterated by that judge in the decision in *Jacques*' case, *ref supra*. As Mr Weekes very fairly noted, the majority in the Court of Appeal approached things differently from Lord Denning, but held again that on the facts of that case (where a commission agreement was signed in wholly unusual terms without the unusual nature of the agreement being made clear and in circumstances where there was a positive misrepresentation as to the ambit of the clause) no commission was payable. All three of the judges based their decision

on the vagueness of the clause in that case, although both Lord Denning and Edmund Davies LJ also relied on the fact of the misrepresentation as disentitling the Claimant from relying on the clause being put forward. Once again, however, there was no question of the entire contract being rescinded.

(3) The decision in *Curtis*' case was considered again in *Axa'*s case, ref supra, as Mr Weekes noted. There Rix LJ considered Lord Denning's reasoning, and doubted it, preferring to analyse the case as one where there had been an oral contract (without an exclusion) clause, followed by the tender of a receipt (which was an offer to vary, accepted by the signature of the receipt). The misrepresentation as to the contents of the receipt (which would be a matter of fact) meant that that variation could be rescinded. Again, I note that an alternative and more far reaching argument, to the effect that the alleged misrepresentation gave the representee a right to rescind the entire contract, was rejected by the Court of Appeal, Rix LJ saying this:

"99 In his judgment below, Judge Graham concluded, relying it seems in large part on Curtis v. Chemical and Dyeing Co [1951] 1 KB 805 (CA), that, since clause 24 did not exclude liability for misrepresentations, and because at least some of the pleaded misrepresentations were as to the "nature and effect" of the contract as a whole, therefore the whole of the contract was ineffective. None of the parties sought to uphold that latter aspect of his judgment."

71. Under this head, therefore, the question is whether Crownmark's case is clearly wrong, on the basis of an assumption that the pleaded facts are true, or whether there is a sufficient prospect of it succeeding for me to allow it to go further.

72. I have concluded that I cannot at this stage determine that Crownmark's case as pleaded is hopeless or indeed wrong. I have reached this conclusion for the following reasons:

(1) In my judgment, it is arguable that, in the light of the express representations (which I must assume were in fact made) there was an implicit representation of the type pleaded.

(2) The nature of that representation is also, in my judgment, clearly arguable. I certainly take the view that a representation to the effect that a party will not rely on a written agreement is more naturally characterised either as a promise, or as a representation of intention. However, I do not think, in the light of the judgments cited to me, that it can be said that the suggestion that the representation is one as to the legal effect of the Facility Agreement is one that can be ruled out. I also think that this question would benefit from fuller argument, and that the cases which have been relied upon should be revisited and full argument addressed to the Court.

(3) This latter consideration leads me to the further conclusion that the trial judge, who will have heard full evidence as to the various representations, will be in a much better position to pass judgment on the merits of Crownmark's arguments.

(4) Further, the fact that Crownmark's argument is a contingent one leads to the conclusion that it would be better not to rule on it unless and until the Court has reached a view on Crownmark's primary contentions.

(5) This consideration is reinforced by a consideration of what the actual legal impact of Crownmark's point would be. If the Facility Agreement were to be rescinded, but not the Oral Agreement, then the interest payment made prior to the end of the recovery period would remain payable, and no amounts would be repayable. It is therefore not clear what the effect of a strike out of the claim as pleaded would achieve. It is not clear to me (although I emphasise that I reach no final conclusion on this) that the basis on which I was addressed, namely that the argument would lead to the conclusion that the interest payment made before the expiry of the recovery period is repayable, is correct.

(6) Finally, I have also borne in mind a connected consideration, which is that allowing the counterclaim to proceed will have no immediate financial consequence. The relevant payment has been made. No application is made for the immediate repayment of that amount. The question is whether, in due course, there will or will not be the necessity to make such a repayment. I see no compelling reason to determine that question now, without the full factual background, and I accept

Crownmark's submission that it would be inappropriate, in the light of the considerations set out in the *Williams & Humbert* case, to do so.

73. Accordingly, I order that the application for summary judgment is to be dismissed, but I also order that this is to be on condition that payment in of the full amount of the interest instalment is to be made by Crownmark; and that the application to strike out Crownmark's counterclaim is also to be dismissed. I would be grateful if Counsel (to whom I am deeply indebted for the quality of their argument) would draw up an Order to give effect to my judgment.