Neutral Citation Number: [2022] EWHC 1378 (Comm)

Case No: CL-2021-000208

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 9 June 2022

Before:

MR JUSTICE PICKEN

- -

Between:

ARCELORMITTAL NORTH AMERICA HOLDINGS LLC — **Claimant**

- and -

(1) RAVI RUIA
(2) PRASHANT RUIA
(3) SUSHIL BAID
~~**(4) ANDREW WRIGHT**~~
~~**(5) JOSEPH SEIFERT**~~
(6) UDAY KUMAR GUJADHUR
~~**(7) NIGEL BELL**~~
(8) ESSAR GLOBAL FUND LIMITED
(9) ESSAR CAPITAL LIMITED
~~**(10) ESSAR CAPITAL SERVICES (UK) LIMITED**~~ — **Defendants**

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Lord Falconer, Harish Salve QC, Peter Head and **Timothy Lau** (instructed by **Gibson, Dunn & Crutcher UK LLP**) for the Claimant.
Ben Valentin QC and **Ruth den Besten** (instructed by **Lewis Silkin LLP**) for the Sixth Defendant.

Hearing dates: 13 April 2022.
Judgment provided in draft: 26 May 2022.

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JUDGMENT

Mr Justice Picken:

Introduction

1. The Sixth Defendant, Mr Uday Gujadhur ('Mr Gujadhur'), applies to strike out, alternatively for summary judgment on, the claim brought against him by the Claimant, ArcelorMittal North America Holdings LLC ('ArcelorMittal Holdings'), as assignee, seeking damages for the tort of unlawful means conspiracy of up to US$1.5 billion.

2. The application is made either on the basis that the claim as pleaded in the Re-Amended Particulars of Claim is insufficiently pleaded, given the stringent requirements applicable to a claim in conspiracy, and does not disclose a claim in unlawful means conspiracy against him, or on the basis that the claim has no realistic prospect of success and there is no other compelling reason for it to go to trial.

Background

3. ArcelorMittal Holdings is a Delaware company which formerly owned the shares in ArcelorMittal USA LLC ('ArcelorMittal') until they were transferred to Cleveland-Cliffs Inc (a North American producer of flat-rolled steel). ArcelorMittal assigned its rights in these proceedings to ArcelorMittal Holdings on 8 December 2020.

4. Essar Steel Limited ('Essar Steel'), a Mauritian company which is now in administration, is part of the Essar Group, a multinational group with interests in various industries including metals and mining. Other companies in the Essar Group include: Essar Global Fund Ltd ('EGFL'), the Eighth Defendant and the ultimate holding company in the group; the Ninth Defendant ('Essar Capital'), a subsidiary of EGFL which acts as its investment manager; and Essar Capital Services (UK) Ltd ('ECS'), the former Tenth Defendant and a subsidiary of EGFL based in England.

5. Mr Gujadhur, along with the First, Second and Third Defendants, are individuals who are, or were, involved in the business of the Essar Group. The First and Second Defendants, Mr Ravi Ruia and Mr Prashant Ruia respectively, are members of the Ruia family and are the ultimate beneficial owners of the Group.

6. The claim concerns an alleged conspiracy by the Defendants to put Essar Steel in a position where it lacked the financial resources to be able to meet its liability to ArcelorMittal under an ICC arbitration award dated 19 December 2017 (the 'Award') in the sum of approximately US$1.5 billion.

7. The liability under the Award arises out of the breach of an iron ore supply contract known as the Amended Pellet Sale Agreement, which was entered into on 10 January 2014, specifically the failure of Essar Steel Minnesota LLC (which is a subsidiary of Essar Steel and was also a party to the agreement) to deliver iron ore pellets as it had contracted to do. On 27 May 2016, AMUSA served notice to terminate on grounds of material breach. On 9 August 2016, ArcelorMittal issued a request for arbitration against Essar Steel seeking damages for Essar Steel's failure to comply with its obligations under the Amended Pellet Sale Agreement, Essar Steel Minnesota LLC having filed for relief under Chapter 11 of the US Bankruptcy Code shortly after the Amended Pellet Sale Agreement was terminated.

8. No part of the Award has been paid.

9. The background to these proceedings is conveniently set out in Henshaw J's March 2020 Judgment ([2020] EWHC 740 (Comm)) dismissing ArcelorMittal's application for on notice freezing relief against certain of the Defendants, at [2]-[12], and in Butcher J's December 2020 Judgment ([2020] EWHC 3349 (Comm)) dismissing the claim against Mr Seifert, at [2]-[9]. I do not repeat everything that has there been set out. However, in summary, ArcelorMittal Holdings's case in these proceedings is that Essar Steel's inability to make the payment due under the Award is the result of a conspiracy unlawfully to strip Essar Steel of assets and render it a worthless shell. This is in circumstances where Essar Steel's net assets reduced from around US$3 billion to around US$2 million between September 2015 (when, so it is alleged, it was clear that Essar Steel would be liable to pay substantial damages to ArcelorMittal) and September 2016 (a month after the ICC arbitration had started).

10. As originally pleaded, ArcelorMittal had alleged a wide-ranging conspiracy by the Defendants involving wrongdoing said to have been engaged in between 2012 and 2016. However, Henshaw J held that ArcelorMittal's pleaded claim failed to disclose a good arguable case and so refused to grant freezing relief, whilst also requiring that, in order to continue with its claim, ArcelorMittal should provide draft amended Particulars of Claim to the Defendants.

11. This was done. One of the then Defendants, Mr Seifert, did not consent to the proposed amendments. The other Defendants, however, did, apart from in relation to three small categories of amendments, which were considered and determined by Butcher J in his judgment on 7 December 2020 at the same time as he considered the position of Mr Seifert.

12. The reasons for refusing permission to amend and dismissing the claim against Mr Seifert are set out in that same judgment at [26]-[36]. He had this to say, in particular, at [29]-[34]:

> *"29. In my judgment, the APOC does not plead an adequate factual basis for a case that Mr Seifert was party to the conspiracy alleged. Further, and to put the matter another way, I do not consider that a case that he is liable in conspiracy based only on the matters pleaded is one which stands a realistic prospect of success.*
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> *30. In this regard, the starting point is that: (i) no particulars are given as to when, with whom, or the means by which Mr Seifert entered the conspiracy; (ii) there are no particulars of any action which it is said that Mr Seifert took which was unlawful, nor is there an allegation that he was in a position in which he was able to procure anyone else to act unlawfully; (iii) the only pleading as to the actions which Mr Seifert took is that it is 'reasonable to infer that Mr Seifert will have advised' on the failure to call in the US$1.5 billion, the Waiver and the UAE Disbursements, without any allegations as to what advice Mr Seifert might have given; and (iv) there is no particularization as to how Mr Seifert could have procured ESL [Essar Steel] or its board to act unlawfully, or how, even if he knew of or acquiesced in the conspiracy that rendered him an active participant therein.*

> *31. As to the specific matters which are relied upon in relation to Mr Seifert, AMUSA [ArcelorMittal] places considerable weight on Mr Seifert's role and responsibilities in the Essar Group, and in particular his role at ECL. However, the fact that Mr Seifert held the roles pleaded does not of itself give rise to the inference that he advised on the transactions which are said to form part of the conspiracy or procured, knew of or acquiesced in the unlawful means alleged. Moreover, Mr Seifert has put in evidence denying any role in relation to those transactions, and, while that cannot itself be taken as conclusive, AMUSA [ArcelorMittal] has adduced no documentary or other evidence to contradict what Mr Seifert has said.*
>
> *32. As to the allegation involving Algoma, I do not accept that the pleaded reference to Mr Seifert's involvement in the recapitalization of that company in 2014 gives rise, in itself, to an inference that Mr Seifert advised on the transactions alleged to form part of the conspiracy now alleged.*
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> *33. The position is similarly in relation to the reference to Mr Seifert having been the board sponsor of the assignment of the Second Promissory Note. The assignment of the Second Promissory Note is no longer relied upon as part of a conspiracy against AMUSA [ArcelorMittal]. I do not consider that Mr Seifert's having been the board sponsor in relation to this matter in 2013, of itself gives rise to the inference that Mr Seifert advised on a different transaction in late 2015 or 2016 or that he procured, knew of or acquiesced in any unlawful means in relation thereto.*
>
> *34. I am mindful of Mr Peto's exhortation that I should consider what evidence might reasonably be expected to be available at trial, and form some judgment about that. It is in this context that Mr Seifert has an apparently strong point that, given that he was planning to leave Essar and then left Essar during the period of the alleged conspiracy, he had no motive to involve himself in any action against AMUSA [ArcelorMittal]. That militates against the view that more evidence of involvement in the conspiracy is reasonably to be expected at trial."*

13. Before me, it was Mr Valentin QC's submission, on behalf of Mr Gujadhur, that the Court should reach a similar conclusion as to Mr Gujadhur and so, like Butcher J did in relation to Mr Seifert, put a halt to the proceedings insofar as they concern Mr Gujadhur. As will appear, I am not persuaded that this would be the right thing to do. However, continuing with the relevant background and focusing on the reformulated case advanced by ArcelorMittal Holdings, the claim entails the allegation that there was an agreement or combination entered into *"on a date or dates unknown in the period between approximately 29 September 2015 and 29 September 2016"* between the remaining Defendants and any two or more of them *"with a common intention to injure or cause loss to AMUSA [ArcelorMittal] by disabling ESL [Essar Steel] from being able to meet its liabilities towards AMUSA [ArcelorMittal]"*.

14. It is, then, alleged that the Defendants acted in furtherance of the conspiracy by doing two things. First, it is alleged that the Defendants caused or permitted Essar Steel not to call in a US$1.5 billion obligation owed to Essar Steel by its parent company, EGFL, said to have arisen by the assignment of promissory notes from Essar Steel to EGFL, to waive the alleged US$1.5 billion obligation (the so-called 'Waiver' aspect). Secondly, the allegation is made that the Defendants dissipated a sum of US$200

million by selling Essar Steel's shares in Essar Steel UAE Limited ('Essar Steel UAE') to EGFL and a related company, Peak Trading Overseas Limited ('Peak Trading'), for no consideration or at an undervalue (the so-called 'UAE Disbursements' aspect). I will return very shortly to these matters but suffice to say that they are each said to have been unlawful because they entailed a breach of fiduciary duty by Essar Steel's directors and/or a breach of the Mauritius Companies Act 2001.

15. Lastly by way of background, it is necessary to explain what has happened within these proceedings since December 2020. First, on 24 March 2021, ArcelorMittal Holdings took over from ArcelorMittal as the Claimant, following the assignment which I have mentioned took place on 8 December 2020. Secondly, on 31 March 2021, Mr Gujadhur and the First, Second and Third Defendants filed their Defence (the '1236 Defence'), denying the claims on various grounds. Thirdly, on 3 September 2021, ArcelorMittal Holdings discontinued against Mr Bell. Fourthly, on 23 February 2022, ArcelorMittal Holdings discontinued against Mr Wright, the Fourth Defendant, who had been Senior Legal Counsel at ECS from September 2011 to 2016. Lastly, on 4 April 2022, ArcelorMittal Holdings discontinued against ECS, the Tenth Defendant.

The Waiver in more detail

16. As to the Waiver specifically, as Lord Falconer explained, ArcelorMittal Holdings's case is based on the fact that by 2013 Essar Steel was recording a receivable on its accounts owing from EGFL in the sum of c.US$1.4 billion, which by 2015 had increased with interest to c.US$1.5 billion only, as Lord Falconer put it, for that to have *"disappeared"* in Essar Steel's 2016 accounts.

17. More specifically still, Essar Steel owned c.72% of the shares in Essar Steel India Ltd but, as part of an intended restructuring, Essar Steel transferred those shares to Essar Steel Asia Holdings Limited ('Essar Steel Asia', an indirect subsidiary of EGFL) between 30 June 2012 and 26 August 2013.

18. In consideration for the transfers, Essar Steel Asia issued promissory notes to Essar Steel for approximately US$1.38 billion on 29 June 2012 and approximately US$99 million on around 26 August 2013. Essar Steel then assigned those promissory notes to EGFL on around 23 March 2013 and 5 November 2013, the contemporaneous board minutes of Essar Steel, as will appear, describing these assignments as having been made in return for a *"future buyback"* of shares and a document recording the transaction referring to the assignment as having been *"in consideration of future capital reduction"*.

19. At the same time as this 'future buyback' transaction occurred, Essar Steel's accounts included for the first time a receivable in the value of the promissory notes being owed to it by EGFL.

20. Lord Falconer pointed out that the US$1.5 billion receivable remained on Essar Steel's books until 2016, when, as he put it, it disappeared with the 2014 and 2015 accounts (but not the 2013 accounts) being restated to remove it. ArcelorMittal Holdings' case, in the circumstances, is that the Defendants caused Essar Steel to waive its claim against EGFL for US$1.5 billion and, furthermore, that the Defendants acted unlawfully by failing to take any steps (prior to the Waiver) to have the debt repaid at a time when the Defendants knew that ArcelorMittal was a major contingent creditor of Essar Steel. The

inference, Lord Falconer submitted, is that, in combining and carrying out an unlawful dissipation of Essar Steel's assets, the Defendants' intention was to harm ArcelorMittal by rendering its debtor a worthless shell.

21. The Defendants' case is that the recording of the receivable had always been a mistake. That is why, they say, in the 2016 accounts, under the heading *"prior year adjustment"*, it was stated that the US$1.5 billion *"should have been classified under equity"*. Lord Falconer observed, however, that that makes no sense given that it is common ground that the buyback of shares never actually took place.

The UAE Disbursements in more detail

22. As for the UAE Disbursements, ArcelorMittal Holdings's case is that on 30 September 2015, by which time it would have been obvious to the Defendants that Essar Steel would be exposed to a substantial claim in damages by ArcelorMittal, Essar Steel transferred its 100% shareholding in Essar Steel UAE to Essar Middle East FZE for US$200 million, only for Essar Steel, then, immediately, as Lord Falconer put it, to *"dissipate"* those sale proceeds by paying US$50 million to EGFL and by making two further payments of US$90 million and US$60 million to a related company, Peak Trading.

23. ArcelorMittal Holdings contends that this was done in order to render Essar Steel judgment-proof.

The law

24. There was no real controversy as to the applicable legal principles on applications such as those before the Court.

25. Accordingly, under CPR 24.2, the Court may give summary judgment against a claimant on the whole or part of a claim or on a particular issue if it considers that the claimant has no real prospect of succeeding on the claim or issue, and there is no other compelling reason why the case or issue should be disposed of at trial.

26. The principles in relation to a defendant's summary judgment application were set out in ***Easyair Ltd v Opal Telecom Limited*** [2009] EWHC 339 (Ch) at [15]. Those principles have been recited in many subsequent cases, including perhaps most recently by me in ***JJH Holdings Ltd v Microsoft*** [2022] EWHC 929 (Comm) at [11]:

> *"(i) the Court must consider whether the claimant has a 'realistic' (as opposed to a 'fanciful') prospect of success; (ii) a 'realistic' claim is one that carries some degree of conviction, which means a claim that is more than merely arguable; (iii) in reaching its conclusion the Court must not conduct a 'mini-trial', albeit this does not mean that the Court must take at face value and without analysis everything that a claimant says in statements before the court; and (iv) the Court may have regard not only to the evidence before it, but also the evidence that can reasonably be expected to be available at trial. Furthermore, where a summary judgment application turns on a point of law and the Court has, to the extent necessary, before it 'all the evidence necessary for the proper determination of the question,' it 'should grasp the nettle and decide it' since the ends of justice are not served by allowing a case that is bad in law to proceed to trial."*

27. As to (iv), the Court will *"be cautious"* in concluding, on the evidence, that there is no real prospect of success; it will bear in mind the potential for other evidence to be available at trial which is likely to bear on the issues and it will avoid conducting a mini-trial: ***King v Stiefel*** [2021] EWHC 1045 (Comm) at [21] (per Cockerill J).

28. Furthermore, as Fraser J also recently put it in ***The Football Association Premier League Limited v PPLive Sports International Ltd*** [2022] EWHC 38 (Comm) at [25], on a summary judgment application the Court must *"always be astute, and on its guard"* to an applicant maintaining that particular issues are very straightforward and simple, and a respondent attempting to dress up a simple issue as very complicated and requiring a trial.

29. As to strike-out applications, under CPR 3.4(2)(a), the Court may strike out a statement of case if it appears that it discloses no reasonable grounds for bringing the claim. When considering an application to strike out, the facts pleaded must be assumed to be true and evidence regarding the claims advanced in the statement of case is inadmissible (***King*** at [27]; and ***Allsop v Banner Jones Limited*** [2021] EWCA Civ 7 at [7]); consideration of the application will be *"confined to the coherence and validity of the claim as pleaded"* (***Josiya v British American Tobacco plc*** [2021] EWHC 1743 (QB)).

30. Nor is there any dispute as to the legal principles which apply to the tort of unlawful means conspiracy. Thus, as explained in ***Kuwait Oil Tanker Co SAK v Al-Bader (No 3)*** [2000] 2 All ER (Comm) 271 at [108] and echoed in ***Marathon Asset Management LLP v Seddon*** [2017] 2 CLC 182 at [132] and [135] (as cited by Henshaw J in his March 2020 Judgment at [212]):

> *"A conspiracy to injure by unlawful means is actionable where the claimant proves that he has suffered loss or damage as a result of unlawful action taken pursuant to a combination or agreement between the defendant and another person or persons to injure him by unlawful means, whether or not it is the predominant purpose of the defendant to do so."*

31. As Butcher J noted in the December 2020 Judgment dismissing the claim against Mr Seifert, while dishonesty is not a necessary element of the tort, some reasonable basis needs to be pleaded to support an allegation that an individual was involved in the conspiracy, and where the conspiracy is said to have involved deception, then all the strictures that apply to pleading fraud are directly engaged. As Leggatt J (as he then was) put it in ***ED&F Man Sugar Ltd v T&L Sugars Ltd*** [2016] EWHC 272 (Comm), a case relied upon by Butcher J, at [33] (and a case to which I will return):

> *"I think it is going too far to equate a case of unlawful means conspiracy with an allegation of fraud as a general matter. Dishonesty is not a necessary element of the tort. However, some reasonable basis needs to be pleaded to support an allegation that an individual was involved in such a conspiracy; and where, as here, the conspiracy is said to have involved deception, all the strictures that apply to pleading fraud are directly engaged."*

32. These strictures include, as Henshaw J noted in the March 2020 Judgment at [212], requirements that an allegation of conspiracy to harm by unlawful means *"must be clearly pleaded and clearly proved by convincing evidence"*, that all specific facts and matters relied on in support of any inferences of dishonesty must be pleaded and that,

where parties may have joined the conspiracy at different times, they will only be liable for loss caused after their involvement, so as to mean that knowing when it is alleged they became knowing participants in an alleged conspiracy is critical to understanding the claim made against them.

33. That said, as Lord Falconer submitted and as pointed out in ***King*** at [25], summarising what Stuart-Smith J (as he then was) had to say in ***Portland Stone Firms Ltd v Barclays Bank plc*** [2018] EWHC 2341 (QB) at [25]-[29], whilst pleadings of fraud should be subjected to close scrutiny and it is not possible to infer dishonesty from facts that are equally consistent with honesty, in view of the common feature of fraud claims (involving secret unlawful conduct) that the defendant will, if the underlying allegation is true, have tried to shroud his conduct in secrecy, the Court should adopt a *"generous"* approach to pleadings given that, where the nature of the conspiracy is shrouded in secrecy, it is difficult until after disclosure of documents fairly to assess the strength or otherwise of an allegation that a defendant was a party to, or aware of, the alleged conspiratorial conduct.

34. Otherwise, Lord Falconer also submitted and I accept, that a defendant may be party to a combination and liable in unlawful means conspiracy but not himself carry out any of the unlawful acts pursuant to that combination (***Barclay Pharmaceuticals Ltd v Waypharm LLP*** [2012] EWHC 306 (Comm) at [222] per Gloster J (as she then was)), that a defendant may be liable in unlawful means conspiracy even where he was not aware of each act carried out pursuant to the conspiracy provided the conspiratorial act fell within the scope of the conspirators' common design (***Kuwait Oil Tanker*** [2000] 2 All ER (Comm) 271 at [133]) and that a defendant may be liable in unlawful means conspiracy even where he is not aware that the means by which the conspiracy was furthered were unlawful (***The Racing Partnership Limited v Sports Information Services Ltd*** [2020] EWCA Civ 1300).

The submissions made in support of the applications

35. It is with these principles in mind that I come on to address the submissions which Mr Valentin QC made in support of the applications.

36. He observed, first, that, as he put it, Mr Gujadhur makes only *"fleeting appearances"* in the Re-Amended Particulars of Claim. Thus, he is identified in paragraphs 15, 18.3, 20.3 and 24.1 as having been a director of Essar Steel from 3 November 1992 to 1 April 2017, a director of Essar Capital from 22 March 2013 and a director of EGFL from 3 July 2009 to 23 March 2013.

37. This is, then, followed by the following at paragraph 49.2:

"It is to be inferred that each of the Defendants knew between around September 2015 and around September 2016, or was wilfully blind, that AMUSA was a major contingent or potential creditor of ESL [Essar Steel] and would be harmed if ESL [Essar Steel] was disabled from meeting its liabilities. AMNAH will rely, inter alia, on the following: …

(f) Mr Gujadhur's role as director of ESL [Essar Steel] and Essar Capital; …

(i) Essar Capital's responsibility for transactions between EGFL portfolio companies, and the attribution to Essar Capital of the knowledge of its directors at the relevant time, namely Prashant, Mr Baid, and Mr Gujadhur…".

38. The core allegations of conspiracy all being said to be matters of inference, Mr Valentin QC submitted that it is incumbent upon ArcelorMittal Holdings to plead all specific facts and matters relied on in support of that inferential case. This, he observed, has not been done by ArcelorMittal Holdings in this case.

39. Nor, Mr Valentin QC added, have the necessary facts and matters been adequately set out in the witness statement dated 31 January 2022 which ArcelorMittal Holdings's solicitor, Mr Philip Rocher, prepared in response to the applications, which Mr Valentin QC characterised as containing little more than speculative comment as to what Mr Gujadhur *"must have"* or *"would have"* known or done by reason of his appointment and role as a director.

40. For example, Mr Valentin QC submitted, Mr Gujadhur's role as a director of Essar Capital is relied upon by Mr Rocher in support of assertions that *"it seems reasonable to infer, given the materiality of the transactions (in the context of the Essar Group), that Essar Capital would have advised on the $1.5 Billion Waiver and the UAE Disbursements"* and that *"Mr Gujadhur … is likely to have advised on those transactions"* and *"must have been aware of and closely acquainted with the $1.5 Billion Waiver"*. However, Mr Valentin QC pointed out, nowhere in the Re-Amended Particulars of Claim is this stated, paragraph 56.2 (which deals specifically with advice provided by Essar Capital) alleging only that Mr Wright *"will have advised"* on various matters, in circumstances, moreover, where the claim against Mr Wright has now been discontinued.

41. Another example given by Mr Valentin QC concerns Mr Rocher's description of Mr Gujadhur as a *"key professional of Essar Capital"*, who would in his role as such have been *"required to have been fully aware of and understand the rationale for the accounting change, as well as the fairness of the terms and conditions of such change"*. Not only is this not pleaded, Mr Valentin QC observed, but, in addition, the *"accounting change"* to which Mr Rocher refers was described by Newey LJ, when refusing leave to appeal against Henshaw J's March 2020 Judgment, as being incapable of founding *"a good arguable case that there was a conspiracy causing it to lose US$1.5 billion, as alleged"*.

42. Nor, Mr Valentin QC submitted, is the allegation in paragraph 23 of Mr Rocher's witness statement that Mr Gujadhur *"would have known about the originally planned restructuring and, therefore, the departure from that plan that culminated in the $1.5 Billion Waiver"* anywhere pleaded.

43. The same also applies, Mr Valentin QC observed, to the allegation in paragraph 24.4 of Mr Rocher's witness statement that Mr Gujadhur *"would have participated in board meetings (and it is to be inferred voted affirmatively on any resolutions) relating to"* various matters. In any event, even if true, Mr Valentin QC submitted, it is irrelevant, given that control of Essar Steel is said to have been vested in EGFL and in the First and Second Defendants – and not Mr Gujadhur. As Mr Valentin QC put it, in such circumstances, how Mr Gujadhur may or may not have voted at any board meeting cannot have been causative of any loss.

44. More fundamentally, as to Mr Gujadhur's role as a director as a particular of conspiracy, Mr Valentin QC submitted that this does not assist given that, so he submitted, board membership alone is insufficient to infer involvement in an alleged conspiracy. As to this, Mr Valentin QC prayed in aid certain observations made by Leggatt J in ***Man*** at [35] to the effect that relying upon the fact that an individual was a director of a company at the time it entered into an impugned transaction is *"a wholly inadequate basis on which to plead an allegation of involvement in a conspiracy to defraud".*

45. Mr Valentin QC, furthermore, highlighted how it is ArcelorMittal Holdings's case, as set out in the Re-Amended Particulars of Claim at paragraph 17, that EGFL *"was able to control all major transactions and decisions of ESL [Essar Steel], in particular, those relating to ESL's [Essar Steel's] material assets"* and the only particulars given at paragraph 56 in support of the inference that the Defendants *"procured, knew of or acquiesced in the unlawful means"* are at paragraph 49.2, which is confined, so far as Mr Gujadhur is concerned, to the fact that he was a director of Essar Steel and Essar Capital. Mr Valentin QC also drew attention to the fact that it is the First and Second Defendants (not Mr Gujadhur) who are said by ArcelorMittal Holdings to have controlled EGFL (see paragraph 49.3).

46. Moreover, Mr Valentin QC submitted, no particulars are given as to when, with whom, or the means by which, Mr Gujadhur is alleged to have entered into the conspiracy. All that is said, as previously mentioned, in paragraph 47 of the Re-Amended Particulars of Claim, is that it is to be inferred that *"the Defendants or any two or more of them"* did so *"between around 29 September 2015 and around 29 September 2016"*. Nothing is, therefore, stated, Mr Valentin QC submitted, which supports the necessary allegation that Mr Gujadhur agreed with others to injure ArcelorMittal by unlawful means.

47. Mr Valentin QC noted in this last respect that ArcelorMittal Holdings concedes in paragraph 48 that, pending disclosure, it *"cannot specify with certainty when or by what means the Defendants, or any of them, entered into the combination or agreement".* It is not, however, for Mr Gujadhur, Mr Valentin QC observed, to have to provide disclosure that might enable ArcelorMittal Holdings to plead such a case. The more so, he added, in view of the fact that, given the length and range of the interlocutory proceedings in the arbitration, the documents already in evidence in these proceedings are extensive. Any lack of detail in the pleaded case is, accordingly, Mr Valentin QC submitted, not attributable to the need for disclosure, but the lack of available support for the claim alleged in the documents already available.

48. Similarly, as for Mr Gujadhur's alleged intention to harm ArcelorMittal and motive, the only particulars that are specific to Mr Gujadhur are the fact of his appointment as a director of Essar Steel and Essar Capital (paragraph 49.2(f)) and the contention that his knowledge as a director is to be attributed to Essar Capital (paragraph 49.2(i)). However, Mr Valentin QC submitted, neither of these particulars supports the serious allegation that Mr Gujadhur intended to harm ArcelorMittal.

49. Mr Valentin QC concluded his submissions by questioning why ArcelorMittal Holdings is pursuing Mr Gujadhur *"in the context of the wider legal and commercial disputes"* between the ArcelorMittal group and the Essar group. He observed in this context that there is no prospect of any material financial recovery of US$1.5 billion from an individual such as Mr Gujadhur. He suggested that, in truth, it is not that prospect which is driving ArcleorMittal Holdings's pursuit of Mr Gujadhur but, instead,

the prospect of Mr Gujadhur appearing as a witness at trial. Mr Valentin QC pointed in this regard to Mr Rocher having, in paragraph 24.7 of his witness statement, referred to Mr Gujadhur having "*probative evidence to give of the matters complained of*". Mr Valentin QC submitted this is not a sufficient basis for including Mr Gujadhur as a defendant, adding that there would be no prejudice to ArcelorMittal Holdings in Mr Gujadhur no longer being a defendant whereas in Mr Gujadhur's case he will have to continue as a defendant *"with all the burdens that that imposes"*.

Discussion

50. As previously indicated, I am not persuaded by these submissions. On the contrary, I have reached the clear conclusion that, applying the relevant legal principles applicable, respectively, to summary judgment and to strike-out applications, and having regard to the necessary ingredients of a claim in unlawful means conspiracy, the claim against Mr Gujadhur is a claim which it would be inappropriate not to allow to proceed. I say this for two core (but closely connected) reasons.

51. First, I do not accept that there is anything approximating to an overarching prohibition on a claimant being able to rely upon the fact that a defendant is a company director in support of the unlawful means conspiracy case which that claimant seeks to advance. Butcher J did not proceed on the basis that there was any such blanket bar. He merely made the point that *"the fact that Mr Seifert held the roles pleaded does not of itself give rise to the inference that he advised on the transactions which are said to form part of the conspiracy"* (see [31]).

52. In any event, as Lord Falconer pointed out, Mr Seifert was in a very different position to Mr Gujadhur in several ways. In this respect, what Butcher J had to say about Mr Seifert at [27(6)] is important:

> *"There is no dispute about the positions which Mr Seifert formally held. He ceased to be employed by the Essar Group on 31 March 2016. He was a part time consultant to EGFL until 30 June. By the time that ESL's [Essar Steel]'s accounts were restated in September 2016, he had ceased to work for the Essar Group even on a consultancy basis. He has put in evidence in his First Witness Statement that his work while at the Essar Group did not encompass the impugned transactions, and transactions of that type were not within his areas of expertise or within his purview. His role at Essar had, consistently with his prior investment banking experience at JP Morgan, been concentrated on disputes, fundraising, mergers, disposals and acquisitions, especially in dealing with advisors and providers of capital based in Western Europe and North America. AMUSA had not put forward any evidence, documentary or otherwise, to contradict anything Mr Seifert had said about these matters."*

53. It follows that not only was Mr Seifert never a director of any of the relevant Essar Group companies (unlike Mr Gujadhur) but nor was he an accountant (unlike Mr Gujadhur); he was merely a part-time consultant (again unlike Mr Gujadhur who was both full-time and a member of more than one board of directors). Moreover, (once again unlike Mr Gujadhur) Mr Seifert had ceased to work for the Essar Group in any capacity (in June 2016) by the time that Essar Steel's accounts had been restated (in September 2016). Mr Gujadhur was, in short, rather more likely to have had a level of involvement in the alleged conspiracy (if there was a conspiracy) than Mr Seifert.

54. In addition, there was evidence before Butcher J from Mr Seifert stating, in terms, that he had nothing to do with the impugned transactions. There is no such evidence from Mr Gujadhur before the Court on the present applications. That is Mr Gujadhur's prerogative; it is not something which necessarily counts against him. However, the consequence is that there is nothing from Mr Gujadhur denying the involvement which has been alleged. As Lord Falconer pithily put it, *"being a director gets you on the pitch in this sort of case"*, although *"Maybe you can get off the pitch by saying: actually, I had nothing whatsoever to do with it, but if you're a director and you're signing the accounts or the accounts are being signed on your behalf, then you've got to explain something to say the normal duties won't apply"*. There is, however, nothing from Mr Gujadhur to explain what he himself did or what he himself knew.

55. On the contrary, Mr Gujadhur has chosen to file a statement of case (the 1236 Defence) jointly with the First and Second Defendants, in which he has not suggested that he had nothing to do with the transactions but has instead sought to suggest (along with the First and Second Defendants) that the relevant debt was never due because it was an advanced payment against a buyback and that this is why there was nothing wrong with the corrections made to Essar Steel's accounts in 2016. As Mr Andrew Wanambwa, Mr Gujadhur's solicitor, put it in in paragraph 13 his second witness statement dated 9 December 2021, made in support of the applications, Mr Gujadhur's case (along with that of the other 1236 Defendants) is that *"(a) there was no $1.5 Billion Obligation; (b) accordingly, the 1236 Defendants could not have caused or procured ESL [Essar Steel] not to recover the sum, or caused ESL [Essar Steel] to waive the obligation; and (c) the UAE Disbursements were transfers for value in the ordinary course of business of ESL [Essar Steel] and Peak Trading"*. In other words, Mr Gujadhur has aligned himself with others whose involvement in the alleged conspiracy (if there was one) is not disputed and whose case is that there was nothing wrong with what was done. It would have been open to Mr Gujadhur to have advanced a case alongside what he and the other 1236 Defendants have put forward to the effect that, in any event, he did not himself have the involvement alleged. Mr Gujadhur has chosen, however, not to do this.

56. It follows that Mr Gujadhur's and Mr Seifert's positions are, therefore, not remotely comparable. The fact, therefore, that Butcher J decided as he did in respect of Mr Seifert has no bearing on matters which arise on the present applications. However, even what Leggatt J had to say in ***Man*** itself is, on analysis, of little assistance to Mr Valentin QC in the context of the present applications.

57. ***Man*** was a case in which a company (T&L Sugars Ltd) and two of its directors (Mr Bacon and Mr Widmer) were being sued on the basis that they each conspired with the buyer of a consignment of raw sugar to injure the claimant buyer by unlawful means, namely by inducing the claimant to provide the cargo to T&L Sugars Ltd's refinery in London on the basis that the buyer would nonetheless still pay the seller. That deception was pleaded in paragraph 89 of the Particulars of Claim in this way (see [20]):

> *"The Conspiracy involved the deliberate deception of [the claimant] by inducing [the claimant] to believe that SRB intended to and would pay the Sale Contract Price in the normal contractual way and thus to part with control of the cargo. It was not just a case of deception by silence. Mr Massaro's email of 19 February 2014, which stated that the claimant should send all documents, except the invoice, to Silvertown and the invoice should be sent to SRB's address in Cesena, Italy, contained a clear implied*

representation that, as at 19 February 2014, SRB intended to pay the claimant for the Antonia shipment."

58. Leggatt J had the following to say at [35]:

"The facts that SRB had decided that it was not going to pay the claimant and the defendants were aware of this are said to be inferred from facts pleaded earlier in the particulars of claim. No specific facts are identified in paragraph 89, however, and I am unable to see how that inference can properly be drawn from anything which has previously been pleaded. Still less can I find any facts alleged in the particulars of claim from which it could reasonably be inferred that Mr Bacon or Mr Widmer knew that this email was being sent, that it was being sent for a dishonest purpose and connived in the sending of it. So far as can I see, the sole basis for this serious allegation amounts to nothing more than the fact that Mr Bacon and Mr Widmer were directors of both T&L and SRB, and had been involved in some discussions with the claimant about other matters. That is a wholly inadequate basis on which to plead an allegation of involvement in a conspiracy to defraud."

59. Leggatt J was, therefore, merely making the point that the fact that Mr Bacon and Mr Widmer were directors of T&L Sugars Ltd is not sufficient to infer their knowledge of the email sent by Mr Massaro, and so participation in the alleged unlawful means conspiracy. He was not making any more general a point. He was not, in particular, suggesting that being a director cannot provide support for an unlawful means conspiracy case. It will inevitably, at least as I see it, always depend on the particular facts of the particular case whether being a director provides such support or not.

60. Secondly, although it will be appreciated that the point flows from the previous point, it can hardly be overlooked that, as pleaded in the Re-Amended Particulars of Claim and as acknowledged by Mr Gujadhur in the 1236 Defence, Mr Gujadhur was a director of EGFL from 3 July 2009 to 23 March 2013, a director of Essar Steel from 3 November 1992 to 1 April 2017 and a director of Essar Capital since 22 March 2013. It is in these various director capacities, Lord Falconer explained by reference to paragraph 49 of the Re-Amended Particulars of Claim, that it is ArcelorMittal Holdings's case that Mr Gujadhur (along with the other remaining Defendants) knew between around September 2015 and around September 2016 that ArcelorMittal was a major contingent creditor of Essar Steel and would be harmed if Essar Steel was disabled from meeting its liabilities (paragraph 49.2) given what was happening in relation to the Amended Pellet Sale Agreement in that period (culminating in the Request for Arbitration on 9 August 2016).

61. I agree with Lord Falconer that Mr Gujadhur's directorship of Essar Steel is particularly significant (or is at least potentially so) because not only was he a director at a time when the US$1.5 billion obligation arose, but he was also a director of this company when Essar Steel's assets were restated in 2016. In the meantime, at least on ArcelorMittal Holdings's case, he was also a director when the US$1.5 billion ought to have been recovered but was not, and when the alleged Waiver happened. He was, in addition, still a director of Essar Steel when the UAE Disbursements were made. In these circumstances, it seems to me that there is a sufficiently arguable case for Mr Gujadhur to meet that he was aware of the US$1.5 billion obligation as well as the change in accounting treatment of it. Put differently, such a case has, in my view,

realistic prospects of success for summary judgment purposes. It is also a case which overcomes the CPR 3.4(2)(a) hurdle.

62. It should be borne in mind in this respect that each of the 2013-2016 accounts record that they have been approved and authorised for issue by the board of directors of Essar Steel. Mr Gujadhur was the most longstanding member of that board. He appears, indeed, to be one of the two signatories on each of the sets of accounts, hence Lord Falconer's point about being a director getting him *"on the pitch"*.

63. It is neither necessary nor even especially helpful to deal with the accounts relating to Essar Steel for each of the years from 2013 to 2016. However, looking at the 2013 accounts, it can be seen (and it is not in dispute) that Mr Gujadhur is recorded as being the longest serving director, having apparently been appointed as long ago as 3 November 1992; indeed, the next longest serving director, Sonia Lutchmiah, was only appointed some 16 years later, on 26 November 2008.

64. On the next page, Deloitte (the then auditors of Essar Steel) report and, in doing so, say this (amongst other things) under the heading *"Directors' responsibilities for the separate financial statements"*:

"The directors are responsible for the preparation and fair presentation of these separate financial statements in accordance with International Financial Reporting Standards and in compliance with the requirements of the Mauritius Companies Act 2001 in so far as applicable to Category 1 Global Business Licence companies. They are also responsible for such internal control as they determine is necessary to enable the preparation of separate financial statements that are free from material misstatement, whether due to fraud or error."

65. Two pages later, the *"Statement of Financial Position At 31 March 2013"* includes, under *"Current assets"*, a reference to *"Other receivables"* which for 2013 are identified as being US$1,435,882,342. At the foot of that page is a statement that *"These financial statements were approved and authorised for issue by the Board of Directors on 27 September 2013"*. This is followed by two signatures, one of which (although nothing turns on this) seems pretty clearly to be that of Mr Gujadhur.

66. A few pages later, *"Note 10. Other Receivables"* refers to the same US$1,435,882,342 figure but breaks it down into US$1,435,809,163 which is described as being *"Receivable from related parties*"* and US$73,179 which is described as being *"Other receivables and prepayments"*. Under the table is this:

"Receivable from related parties are unsecured, non-interest bearing and repayable on demand.

**Receivable from related parties includes receivable as per Promissory Note (see note 6*)"*.

67. The bracketed reference is a reference back to Note 6, described as being in relation to *"Investments in subsidiaries"*, which states as follows:

"On 29th June 2012, a share purchase was entered between Essar Steel Asia Holdings Limited (a fellow subsidiary) and the Company where the Company has disposed

1,910,255,183 equity shares of INR 10 each of Essar Steel India Limited to Essar Steel Asia Holdings Limited at a consideration of USD 1,388,530,158. In this respect, Essar Steel Asia Holdings Limited had issued a Promissory Note in favour of the Company.

The Company has assigned the Promissory Note in favour of Essar Global Fund Limited (holding company), who in turn has assigned it in favour of Essar Steel Mauritius Ltd (a fellow subsidiary) in consideration that the Essar Steel Mauritius Ltd has issued 1,388,530,158 ordinary shares of USD 1 each in favour of Essar Global Fund Limited. Upon receipt of the Promissory Note from Essar Global Fund Limited, Essar Steel Mauritius Ltd has assigned the Promissory Note in favour of Essar Steel Asia Holdings Limited in consideration that Essar Steel Asia Holdings Limited has issued 1,388,530,158 ordinary shares of USD 1 each in favour of Essar Steel Mauritius Ltd. The above transactions were approved in the Board meeting held on 28th June 2012 and the 19th February 2013. The Investment in Essar Steel India Limited which was previously shown as investment in subsidiary has been reclassified as available-for-sale investment."

68. As Mr Salve QC demonstrated when making follow-on submissions after Lord Falconer, the 2013 accounts were prepared several months after a board meeting of Essar Steel held on 19 February 2013, which was attended by Mr Gujadhur. The minutes of that meeting include the following under the heading *"6.3 ASSIGNMENT OF PROMISSORY NOTE"*:

"Mr. Soni informed the Board that pursuant to the share purchase agreement entered into between Essar Steel Asia Holdings Limited ('ESAHL') and the Company, the Company has disposed of 1,910,255,183 equity shares of INR 10 each of Essar Steel India Limited to ESAHL at a consideration of USD 1,388,530,158. He added that in this respect, ESAHL has issued a promissory note (the 'Promissory Note') in favour of the Company.

Mr Soni further informed the Board that it was now proposed to assign the Promissory Note in favour of Essar Global Limited, the sole shareholder of the Company ('EGL') and in consideration, EGL will dispose of 1,388,530,158 ordinary shares of USD 1 each held in the Company to the Company. He added that all the issued share capital of the Company are currently pledged in favour of the Raceview lenders and the latter's approval will be required to buy back the 1,388,350,158 ordinary shares of USD 1 each from EGL. He further added that in this connection, EGL is in the process of obtaining the Raceview lenders' consent.

Mr Soni also informed the Board that since the consent of the Raceview lenders will take some time, it was proposed that the Promissory Note be assigned to EGL as advanced against future share buy back.

After due consideration, IT WAS RESOLVED as follows:

a) THAT the Company be and is hereby authorised to assign a promissory note received from Essar Steel India Holdings Limited to Essar Global Limited for a consideration as advance against future share buy back.

b) THAT any one Director or Mr. Sushil Kumar Baid be and are hereby authorised to execute any necessary documents in connection with the above, on behalf of the Company."

69. There are also minutes relating to an EGFL board meeting which took place on 23 March 2013. Although this is not a meeting which appears to have been attended by Mr Gujadhur, presumably since that was the very day when he ceased to be a director of EGFL, it is to be noted that the minutes have this to say under the heading *"Assignment of Promissory note from Essar Steel Mauritius Limited to Essar Global Limited (EGL) and then by EGL to Essar Steel Asia Holdings Limited"*:

"At the request of the Chairperson, Mr Balajee informed the directors that Essar Global Limited, vide a Committee meeting held on 30th March 2012, had approved a change in the corporate structure of entities under the Steel vertical (Project Marvel).

As part of the implementation process, Essar Steel Asia Holdings Limited (ESAHL) has issued a Promissory Note for an amount of USD 1,388,530,158 to Essar Steel Limited (ESLM) as consideration for acquisition of a part of the shares of Essar Steel India Limited (ESIL) subject to approval from the Raceview lenders.

Further to the above, ESLM is required to assign the Promissory Note to EGL towards reduction of its equity capital. EGL in turn will assign this Promissory Note in favour of Essar Steel Mauritius Ltd (ESML) in consideration that ESML issues ordinary shares in favour of EGL.

EGL is being requested to accept the Promissory Note from ESLM against advance towards future capital reduction of ESLM and contribute the same to ESML for capitalising its subsidiary as per the approved step plan earlier.

A copy of the Promissory notes to be accepted from ESLM and to assigned to ESML was tabled at the Meeting.

After due deliberation and consideration of the various matters, the Committee RESOLVED that:

1. The Company be and is hereby authorised to accept the assignment of the Promissory Note;

2. The Company be and is hereby authorised to assign the Promissory note to be received from ESLM to ESML;

3. the terms and conditions of the Promissory Notes be and are hereby approved;

4. any one Director and Mr Sushil Bail or Ganesan V Iyer be and hereby severally authorised to sign the Promissory Notes for and on behalf of the Company."

70. It was, in fact, on 23 March 2013 itself that the first of the assignments of the promissory notes took place: involving US$1,388,530,158. These were signed by Mr Baid on Essar Steel's behalf and by Mr Gujadhur on EGFL's behalf (as well as on Essar Steel Asia's behalf). This is instructive since Mr Gujadhur appears to have been authorised to sign on EGFL's behalf notwithstanding that he had by this stage ceased to be a director of that company, as well as on behalf of Essar Steel Asia on whose behalf he also signed

the assignments. He was, however, also authorised to sign on Essar Steel's behalf given that he remained a director of that company and given what is stated in the minutes, albeit that it was Mr Baid who, in fact, signed the assignments.

71. Subsequent assignments followed later in (there are references both to 26 August 2013 and to 5 November 2013). These were again signed by Mr Gujadhur on EGFL's behalf (as well as by him on behalf of Essar Steel Asia) and by Mr Baid on Essar Steel's behalf. Those later assignments followed a meeting of Essar Steel's board on 26 August 2013, in relation to which the minutes have this to say under *"ANY OTHER BUSINESS"*:

"6.1 Share Purchase Agreement

Mr Doorbiz informed the Board that in June 2012, the Company had disposed of 1,910,255,183 equity shares of Essar Steel India Limited (ESIL) which represent about 68% of current share capital as of June 2013 of ESIL to Essar Steel Asia Holdings Limited ('ESAHL') for a total consideration of USD 1.388 billion. He added that ESAHL had issued promissory note ("PN No. 1) in favour of the Company and the Company had assigned the aforesaid PN No. 1 in favour of Essar Global Fund Limited ('EGFL') against future share buy back.

Mr Doorbiz further informed the Board that the Company had acquired a further 118,678,842 equity shares capital which represent about 4.23% of the equity share capital of ESIL and it is now proposed to enter into a share purchase agreement with ESAHL and dispose of the shareholding in ESIL to ESAHL for a total consideration of USD 99,450,000 which will be settled by issuance of a promissory note ('PN No. 2) by ESAHL. He added that PN No. 2 will also be assigned in favour of EGFL against future share buy back of the Company.

A copy of the share purchase agreement was tabled at the meeting for the Director's consideration.

After due deliberation, IT WAS RESOLVED as follows:

a) THAT the company be and is hereby authorised to enter into a share purchase agreement with Essar Steel Asia Holdings Limited and dispose of 118,678,842 equity shares of INR 10 each held in Essar Steel India Ltd for a total consideration of USD 99,450,000.

b) THAT the Company be and hereby authorised to assign promissory note received from Essar Steel Asia Holdings Limited in favour of Essar Global Fund Limited as advance against future share buy back.

c) THAT any one Director or Mr. Sushil Kumar Baid be and is hereby authorised to execute share purchase agreement and any other necessary documents in connection with the above on behalf of the Company."

72. Mr Gujadhur was, in addition, of course, a director of Essar Capital. Indeed, in that latter capacity it is likely that he attended a board meeting held on 29 October 2013 (I say likely only because there is no list of attendees) at which this is recorded as having been reported and approved under the heading *"Review and (if deemed appropriate)*

recommend EGFL to consider and approve notice of assignment of Promissory Note to Essar Steel Asia Holdings Limited":

"At the request of the Chairperson, Mr Baid informed the directors that EGFL vide a meeting held on 23rd March 2013, had received and approved assignment of a Promissory Note for an amount of USD 1,388,530,158 from Essar Steel Limited, Mauritius (ESLM) towards reduction of its equity capital and which in turn EGFL assigned in favour of Essar Steel Mauritius Ltd (ESML) in consideration that ESML issues ordinary shares in favour of EGFL.

EGFL accepted the Promissory Note from ESLM against advance towards future capital reduction of ESLM and contribute the same to ESML for capitalising its subsidiary as per the approved step-plan that had been submitted and agreed earlier.

In connection with the same restructuring plan of the steel portfolio, EGFL has been requested to receive and assign a Promissory Note an additional amount of USD 99,450,000 (4.23% of the shareholding).

A copy of the Promissory Note to be accepted by EGFL from ESLM and to be assigned to ESML was tabled at the Meeting.

After due consideration and deliberation, the Board considered this matter to be in the interests of the EGFL portfolio for which is it responsible and therefore APPROVED the transaction and agreed to recommend the same to the Board of EGFL."

73. It can be seen, therefore, that Mr Gujadhur's role was what might be described as multi-faceted. It appears, as such, that, at a minimum, he was aware of what was happening as regards the promissory notes from three perspectives: as a board member of Essar Steel, as a board member of Essar Capital and if not as a board member also of EGFL then as EGFL's authorised signatory in respect of the assignments which were taking place.

74. Indeed, Mr Gujadhur remained a signatory on behalf of EGFL as late as November 2013 since one of the second set of assignments (as between EGFL and Essar Steel Mauritius Ltd) has next to his signature the date of 5 November 2013. That is consistent with minutes relating to a board meeting of EGFL held on 5 November 2013, in which this is recorded under the heading *"Assignment of Promissory note to Essar Steel Asia Holdings Limited"*:

"At the request of the Chairperson, Mr Wright informed the directors that the Company, vide a Committee meeting held on 23rd March 2013, had received and approved assignment of a Promissory note for an amount of USD 1,388,530,158 from Essar Steel Limited, Mauritius (ESLM) toward reduction of its equity capital and which in turn the Company assigned in favour of Essar Steel Mauritius Ltd (ESML) in consideration that ESML issues ordinary shares in favour of EGL.

EGFL accepted the Promissory Note from ESLM against advance towards future capital reduction of ESLM and contribute the same to ESML for capitalising its subsidiary as part of the approved step plan earlier.

In connection with the same restructuring plan of the Steel vertical, the Company is being now requested to receive and assign a Promissory note an additional amount of USD 99,450,000 (4.23% of the shareholding).

A copy of the Promissory notes to be accepted from ESLM and to be assigned to ESML was tabled at the meeting.

After due deliberation and consideration of the various matters, the Board RESOLVED THAT:

1. The Company be and is hereby authorised to accept the assignment of the Promissory Note;

2. The Company be and is hereby authorised to assign Promissory note to be received from ESLM to ESML;

3. The terms and conditions of the Promissory Notes be and are hereby approved;

4. any one of Uday Kumar Gujadhur and Sushil Baid or Ganesan Iyer be and are hereby authorised to sign the Promissory Notes for and on behalf of the Company."

75. The similarity of the wording of the various minutes is notable, although hardly surprising. What it underlines, however, is the fact that what was happening must have been the subject of considerable thought and co-ordination. Given his role in each of the companies, whether as a director of EGFL throughout or not, and given his financial expertise (a matter to which I will return shortly), Mr Gujadhur's involvement is obvious.

76. This was an involvement, moreover, which continued since I turn now to the 2016 accounts relating to Essar Steel. By this stage Deloitte had been replaced as auditors by Nexia Baker & Arenson. That had, in fact, happened two years previously since Nexia Baker & Arenson were the auditors in respect of both the 2014 and the 2015 accounts. In their independent auditors' report for 2016, they stated (amongst other things) as follows (under the heading *"Emphasis of matter"*):

"Without qualifying our opinion, we draw attention to note 25 of the financial statements concerning the Company's ability to continue as a going concern. The Company incurred a loss of USD1,605,709,681 during the year ended 31 March 2016 and, as at that date the Company's total liabilities exceeded its total assets by USD618,382,212. The directors believe that continued financial support from the shareholder will be forthcoming over the next twelve months and therefore the financial statements have been prepared on the going concern basis."

77. Two pages later, the *"Statement of Financial Position At 31 March 2016"* includes, under *"Current assets"*, a reference to *"Other receivables"* which for 2016 are identified as being US$393,005, with total assets (including the *"Other receivables"*) identified as being US$8,458,195. As Lord Falconer pointed out, this is to be contrasted with an equivalent *"Other receivables"* figure in the 2015 accounts amounting to US$1,511,388,333 and a total assets figure (including the *"Other receivables"*) of US$3,166,283,758. At the foot of that page and the equivalent page for 2015 are statements which echo the wording in respect of the 2013 accounts but as at 29

September 2016 and 29 September 2015 respectively. Again, the accounts appear to be signed in each case by Mr Gujadhur.

78. Under the Notes, the explanation for this sizeable reduction is given as follows:

"26. PRIOR YEAR ADJUSTMENT

In 2013, the Company disposed of 2,028,934,025 equity shares held in Essar Steel India Limited (ESIL) to Essar Steel Asia Holdings Limited (ESAHL) and as consideration, the latter issued promissory notes for the amount of USD1,487,980,158. Subsequently, under a future buyback agreement, the promissory notes were assigned to Essar Global Fund Limited (EGFL), the sole shareholder of the Company, as an advance against future buyback of 1,487,980,158 equity shares at USD 1 each. This amount should have been classified under equity. Accordingly, the financial statement for the years ended 31 March 2014 and 2015 have been restated to reflect the correct account in treatment. The Company will have to satisfy the solvency test to finalise the shares buyback."

79. Earlier, on a page headed *"Statement of Changes in Equity for the Year Ended 31 March 2016"*, this was stated by reference to an entry described as *"Prior year adjustment"* which had next to it *"(1,487,980,158)"* under a column headed *"Advance against future buy back"*:

*"*Advance against future buyback represents the consideration paid to the sole shareholder in 2013 towards future buy back of 1,487,980,158 equity shares at par value. Under the buyback arrangement, the Company has right for gross physical delivery of its own equity shares. The sole shareholder has no contractual obligation to refund the cash or provide another financial asset and hence, it is to be classified as equity. However, this has been wrongly classified as an asset in the previous years. Accordingly, the financial statements of 2014 and 2015 have been restated to reflect the accounting treatment."*

80. All of this material is, in my view, instructive. It appears to show Mr Gujadhur to have been closely involved in the events which, at least on ArcelorMittal Holdings' case, entailed an unlawful means conspiracy. Whether he was involved and whether there was actually a conspiracy are, of course, matters which have yet to be established. However, it is at least arguably the case, based on the matters put forward by ArcelorMittal Holdings at this stage, that he was aware both of the existence of the US$1.5 billion obligation and, to use Lord Falconer's terminology, *"its subsequent disappearance"*. To repeat, this was the single largest asset on the balance sheet of Essar Steel. As such, any change in the nature of its accounting treatment is likely only to have been made by and with the approval of the Essar Steel board. That board included Mr Gujadhur. It was Mr Gujadhur, indeed, who (along with another director) signed the accounts with the explanations set out above, including the explanation that there had been an accounting error (albeit without an explanation as to how the error had come about).

81. Moreover, although Lord Falconer acknowledged that this has not been pleaded and that it should have been, Mr Gujadhur had a particular expertise in accountancy matters – and, specifically, accountancy as practised in Mauritius, the place where Essar Steel was incorporated. Mr Gujadhur is a Fellow of the Association of Chartered Certified Accountants and is described in an Essar web profile as having *"over 40 years of*

experience in the fields of auditing, taxation, consulting and structuring" and *"extensive experience of advising both local and international firms across business sectors including investment funds seeking listing on the Mauritius Stock Exchange"*. I agree with Lord Falconer that this provides further support for the inference that he would have been closely involved in relevant matters and not only in his role at Essar Steel since there is also Mr Gujadhur's directorship of Essar Capital to consider.

82. Lord Falconer made the point that he was a director of that company (Essar Capital) at a time when it would have been responsible, in *its* capacity as investment adviser to EGFL in respect of intra-group transactions, for advising on the structuring of the intra-group transaction between Essar Steel and EGFL giving rise to the US$1.5 billion obligation, the Waiver and the transactions that constitute the UAE Disbursements. It is inconceivable, he submitted, that Essar Capital would not have advised on those transactions given their materiality (both in terms of size and value) to the Essar Group. I tend to agree but what is, in any event, clear is that this is realistically arguable. Although Mr Valentin QC complained that there is nothing to indicate that Mr Gujadhur himself gave such advice (an allegation that Mr Wright would have done so was pleaded but the case against him has, of course, subsequently been dropped), Lord Falconer's submission is nonetheless one which, in my view, should not be discounted at this stage because its focus is on *Essar Capital* having given the relevant advice with Mr Gujadhur, as a board member of that company, thereby involved in the giving of that advice even if, as an individual, he did not himself give the advice.

83. Nor, in my view, should Lord Falconer's submission based on Mr Gujadhur's directorship of EGFL be too readily dismissed because, as Lord Falconer pointed out and as can be seen from the material to which I have referred, he was a director of that company when it resolved to participate in the restructuring which ultimately led to the creation of the US$1.5 billion obligation. He was, indeed, again as Lord Falconer pointed out, a director of *both* EGFL and Essar Steel, the two counterparties to the US$1.5 billion obligation or, if no longer a director of EGFL, then, nonetheless a person who was authorised to sign the assignments on their behalf. The material to which I have referred bears this out. As such, I agree with Lord Falconer that there is a realistic prospect of it being determined at trial that he would have been aware of the terms on which that obligation arose, namely through the assignment by Essar Steel of promissory notes in exchange for a 'future buyback'.

84. I am clear that it is no answer for Mr Valentin QC to say at this pre-trial stage that Mr Gujadhur's involvement as a director of EGFL or as an authorised EGFL signatory substantially predated the conspiracy which ArcelorMittal Holdings alleges. This is because I agree with Lord Falconer that knowledge on the part of Mr Gujadhur acquired as a director of EGFL and/or as an authorised EGFL signatory is potentially significant given that Mr Gujadhur remained a director of Essar Steel in 2016 when the accounts were restated. As Lord Falconer explained, this enables ArcelorMittal Holdings to say not only that, at a minimum, he would have known in 2013 that the shares had been transferred giving rise to a debt payable by EGFL to Essar Steel and that the accounts reflected this transaction, but also that he would have known in 2014 and 2015 that the debt continued to be on the balance sheet and remain payable. This knowledge, acquired before the accounts came to be recast in 2016 (by which time Mr Gujadhur had ceased to be a director of EGFL), is knowledge which Mr Gujadhur would necessarily still have had in 2016 when the accounts were recast; it does not matter that

the knowledge was acquired in his capacity as a director of another company and at an earlier stage. What matters is that, if such knowledge is established, then, it enables Lord Falconer to advance a case, as he put it, that the recasting was done in order to *"hoodwink creditors"*.

85. In short, in the present case (unlike in ***Man***), Mr Gujadhur's roles as a director in the companies alleged to have participated in the alleged conspiracy (as well as the company whose assets were allegedly unlawfully stripped) is not easily dismissed. Mr Gujadhur was on the board of Essar Steel from 2013 to 2016, as well as on the board of Essar Capital and EGFL at various times. He was involved in board meetings where matters relied upon by ArcelorMittal Holdings were discussed and agreed. He, therefore, was in a good position to see what was being done. As an expert in finance and auditing in particular, Mr Gujadhur was likely to have understood what was happening in a way which a non-expert perhaps would not. He would have known, specifically, what a 'future buyback' meant and, if Lord Falconer and Mr Salve QC are right in their submissions, that it made no commercial sense. These are all matters which it is appropriate are explored at trial. They raise a case which, in my view, stands at least a realistic prospect of success.

86. Turning to the other ingredients of the tort of unlawful means conspiracy, it is also in Mr Gujadhur's various directorial capacities, Lord Falconer explained, that it is later alleged in the Re-Amended Particulars of Claim, in paragraph 52, that *"the Waiver was unlawful in that it released ESL's [Essar Steel's] sole shareholder from a $1.5 billion liability for nothing in return, and in effect converted the EGFL Assignments into an unlawful return of capital"*, constituting a *"breach by ESL [Essar Steel] of sections 61(2), 62(5)(b) and/or 68(4) of the Mauritius Companies Act"* (paragraph 52.1) and a *"breach by ESL's [Essar Steel's] directors of their fiduciary duties, in particular their duty under section 143(1)(c) of the Mauritius Companies Act to exercise their powers honestly in good faith in the best interests of the company"* (paragraph 52.2).

87. In this last respect, Lord Falconer drew particular attention to paragraph 52.2(b), which states that:

> *"To date, neither the Defendants nor ESL [Essar Steel] have provided to AMUSA [ArcelorMittal] or AMNAH (ArcelorMittal Holdings] any evidence that ESL's [Essar Steel's] directors decided that the Waiver would be in the best interests of ESL [Essar Steel] and/or ESL's [Essar Steel's] creditors. No honest director acting rationally could have so decided in the circumstances set out above; and it is to be inferred that ESL's [Essar Steel's] directors did not so decide."*

It was Lord Falconer's submission that by 29 September 2016 (when the accounts were finalised for the financial year ended 31 March 2016) it would have been apparent to Essar Steel and its directors (including, therefore, Mr Gujadhur) that Essar Steel was of doubtful solvency, such that it was in the best interests of Essar Steel or Essar Steel's creditors to call in the obligation and/or not to waive it. It seems to me, again, that this is a case which has both been pleaded and which meets the realistic prospects of success test.

88. I am clear also that the case as pleaded in respect of intention to harm is sufficient to withstand the present applications: it has realistic prospects of success for summary judgment purposes and is also a case which meets the CPR 3.4(2)(a) test. I agree with

Lord Falconer, in essence, that there is a sufficiently arguable case that it is reasonable to infer that Mr Gujadhur knew that, in combining to disable Essar Steel from satisfying its liabilities under the ICC Award, he (along with the other Defendants) intended to cause harm to ArcelorMittal. As previously explained, this is based on the facts that between September 2015 and September 2016, ArcelorMittal was a major contingent or potential creditor of Essar Steel and that, as a director of Essar Steel and Essar Capital at this time, Mr Gujadhur must have been aware of Essar Steel's significant potential liability to ArcelorMittal in light of the amounts involved and the fact that the counterparty was ArcelorMittal, Essar Steel's (and the Essar Group's) major steel competitor. It follows that, in my view, there is a properly pleaded case in unlawful means conspiracy against Mr Gujadhur. The strike-out application must, accordingly, be dismissed. So, too, must the summary judgment application since, although certain particular further points were taken in the witness evidence filed in support of that application, Mr Valentin QC did not press those points in oral argument and instead focused on the matters which I have already addressed.

89. I would add three points really only out of completeness. First, I have made no reference to it being ArcelorMittal's case that the First and Second Defendants had control over Essar Steel and to the same not also having been alleged in respect of Mr Gujadhur. The reason why this has been alleged against the First and Second Defendants but not also Mr Gujadhur is straightforward: Mr Gujadhur was an actual director, whereas the First and Second Defendants were not. As Lord Falconer explained, it is, accordingly, unnecessary for ArcelorMittal to allege control as against Mr Gujadhur. It follows also that, contrary to the submission which was advanced by Mr Valentin QC, the fact that control is not alleged in Mr Gujadhur's case is irrelevant; it certainly does not mean that he cannot himself also have participated in the alleged unlawful means conspiracy.

90. Secondly, in arriving at the conclusion which I have, I have not placed any reliance on Mr Rocher's reference to Mr Gujadhur having once written, in March 2017, to the ICC Tribunal in support of an assertion that *"Mr Gujadhur's actions in communicating with the Tribunal leads to the inference that his role extended beyond that of an ordinary director"* and so that it *"is likely that Mr Gujadhur was actively involved in the day to day affairs of ESL [Essar Steel]…"*. This has not been adequately pleaded as against Mr Gujadhur; on the contrary, whilst this letter once formed a specific part of ArcelorMittal's original Particulars of Claim, it was subsequently deleted. In any event, I am somewhat sceptical as to the weight which can really be put on this matter since I tend to agree with Mr Valentin QC that it is difficult to see how the fact that a single letter was written to the arbitral tribunal in March 2017 provides any support to an inferential case in respect of a conspiracy which is said to have taken place in 2015-2016.

91. Thirdly, in relation to Mr Valentin QC's submission concerning ArcelorMittal Holdings's motives in pursuing Mr Gujadhur, I am wholly unpersuaded that it would be appropriate to prevent ArcelorMittal Holdings from pursuing the claim against Mr Gujadhur, even if ultimately Mr Gujadhur is unlikely to have to meet it out of his own pocket, in circumstances where I have determined that that claim ought not to be struck out or summarily dismissed on its merits. It would be wrong, in principle, were an order to be made on this basis.

Conclusion

92. For the reasons which I have sought to give in this judgment, both applications are, therefore, dismissed.