Neutral Citation Number: [2020] EWHC 1904 (Comm)

Case No: Claim No. CL-2019-000113

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 15/07/2020

Before :

SIR ROSS CRANSTON
Sitting as a judge of the High Court

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Between :

(1) PRASHANT MANEK **(2) SANJAY CHANDI** **(3) EAGM VENTURES (INDIA) Pvt Ltd**	**Claimants**
- and -	
WIRECARD AG	**Defendant**

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- -

STEPHEN MIDWINTER QC (instructed by Cleary Gottlieb Steen & Hamilton LLP) for the Claimants
JEFF CHAPMAN QC & SAMUEL RITCHIE (instructed by **Fieldfisher**) for the **Defendant**

Hearing dates: 16 June 2020

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Approved Judgment

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

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Covid-19 Protocol: This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to Bailii. The date and time for hand-down is deemed to be 15 July 2020 at 10:30 am.

SIR ROSS CRANSTON:

Introduction

1. This is an application made by the defendant, Wirecard AG ("Wirecard"), for summary judgment to be entered against the claimants and for their particulars of claim to be struck out pursuant to CPR Part 24 and CPR 3.4(2)(a).

2. In brief the claimants' case is that Wirecard participated in a conspiracy to injure them by unlawful and fraudulent means in relation to a sale at an undervalue of their minority shareholding in an Indian payments and travel company, Hermes i-Tickets Private Limited ("Hermes"). Wirecard obtained ownership of Hermes in 2015. In broad terms, the claimants allege that Wirecard knew in fact, or as a result of constructive (blind eye) knowledge, about the fraud and consequently is liable for the losses they suffered, €10,692,131.34 in direct loss if they had been paid the correct price for their shares, and €15,833,399.91 in consequential losses. In its defence Wirecard contends that there is no basis in fact or law to allege that it ever joined the conspiracy or had any idea about the position of the claimants prior to its purchasing the Hermes shares.

3. In this application Wirecard contends that since the claimants' case is fanciful it ought to be struck out and judgment entered against them. The claimants' position is that this is plainly not a case for summary judgment.

4. The claimants have launched other proceedings in this court against those who held the majority shares in Hermes ("the IIFL proceedings"). The defendants in those proceedings are IIFL Wealth (UK) Ltd, Ramu Ramasamy and his brother Palaniyapan ("Palani") Ramasamy, and Amit Shah. In the IIFL proceedings the claimants contend that Ramu and Palani Ramasamy made a series of misrepresentations and threats, including that the ultimate buyer was EMIF, which induced them to sell their Hermes shares at an undervalue. They always intended to on-sell to Wirecard at a much higher price. The defendants in the IIFL proceedings deny these allegations but contend that, in any event, any claim should proceed by way of arbitration in India: see HHJ Pelling QC's judgment in *Manek v IIFL Wealth (UK) Ltd* [2019] EWHC 3361 (Comm).

5. Since the hearing the media have reported that Wirecard is insolvent and that its former chief executive has been arrested and others, including the former chief operating officer, Jan Marsalek, are also sought in relation to fraudulent accounts.

Background

The parties

6. The first two claimants are cousins and residents of the United Kingdom and Kenya respectively. The third claimant is an Indian company, owned by the second claimant and his brother. The defendant, Wirecard AG, has been an international payment services company, with its head office in Munich but is now being wound up.

The sale of Hermes shares to Wirecard

7. The three claimants sold their minority shareholdings in Hermes for €2.2 million (€480 per share) pursuant to two Share Purchase Agreements ("SPAs") signed in Abu Dhabi on 9 September 2015. (The agreements were re-signed 20/24 September 2015). The shares were sold to Great Indian Retail Private Limited ("GIR"), a company controlled by Ramu and Palani Ramasamy. (There is an associated company to GIR, "GIT", GI Technology Private Limited.) The claimants' shareholding represented 4628 shares, some 5.98 percent of Hermes. GIR already held almost 90 percent of the shares in Hermes. The claimants had acquired their Hermes shares in 2008 and 2015.

8. The GIR shares in Hermes, along with other Hermes shares, 99.9 percent in total, were then transferred to an investment vehicle in Mauritius, Emerging Markets Investment Fund 1A ("EMIF"), which was incorporated on 10 February 2015. The price was approximately US$42 million (€480 per share). That share transfer was approved by the Hermes board on 18 September 2015, pursuant to a share purchase agreement of 7 September 2015.

9. It was from EMIF that Wirecard obtained the Hermes payment business under a SPA signed on 27 October 2015. A condition precedent of the Wirecard purchase was that the Hermes travel business would be carved out so that Wirecard was only purchasing the payment business. That was done. The price was €326 million (approximately €4,150 per share). As part of the EMIF-Wirecard SPA, Wirecard also obtained three other, minor businesses related to the Hermes business. One of these was in Malaysia, another in Indonesia.

10. The various parties had lawyers representing them in the course of the sale of Hermes to Wirecard. Wirecard was represented by Osborne Clarke in Germany and BTG Legal ("BTG") in India. (BTG has a referral relationship with Osborne Clarke.) EMIF was represented by Linklaters in London and Moscow.

Events leading to Hermes' sale to Wirecard

11. In outline, the claimants' case is that in a series of conversations between July and September 2015, Ramu and Palani Ramasamy, with the involvement of Amit Shah, told them that an offer had been received to acquire Hermes for US$42 million; that this was an extremely attractive price and a super-premium over the real value of the shares; that the end purchaser was EMIF; and that nothing was being concealed from them. Concerned that Ramu and Palani Ramasamy should sell their stake in Hermes at the same price, the claimants requested and received a copy of the SPA for the sale of Hermes shares to EMIF.

12. Again in outline, Ramu and Palani Ramasamy have stated in the IIFL proceedings that they never knew that EMIF was planning to sell the Hermes shares on to Wirecard and only learnt of this unwelcome development on 26 October 2015, when the matter became public. They did nothing about it because they continued to work with Wirecard in relation to GIT.

13. Wirecard's account of the purchase of the Hermes shares is that after an email introduction by a third party, Mr Marsalek, Wirecard's chief operating officer, met Ramu and Palani Ramasamy in Vienna on 10 December 2014. The acquisition became viable at some point before June 2015 when the brothers informed him that

EMIF was to acquire all the Hermes shares and that the travel side of the business would be carved out with a possible onward sale of the payment side.

14. Mr Helms, head of mergers and acquisitions at Wirecard, began the due diligence process on a possible Wirecard purchase of Hermes from EMIF. Discussions as to the possible purchase price were carried on with EMIF and the brothers in parallel with the due diligence inquiries. Due diligence was conducted through Osborne Clarke and BTG, in particular through BTG's lawyer, Vikram Jeet Singh.

15. There is an agenda for a "kick-off" meeting in Chennai on 8-9 July 2015 between, on the one side Wirecard, and on the other, (i) Hermes (the brothers and the CEO); (ii) the EIFML Group (including Amit Shah, founder and managing partner, and Vivek Anand, a partner of CNGSN & Associates ("CNGSN"), accountants and advisers to EIFML); and (iii) KPMG. Wirecard was represented by (i) Burkhard Ley, its chief financial officer, Mr Helms and Carlos Häuser (EVP payment and risk); (ii) legal advisers (Dr Terlau and Dr Hürten of Osborne Clarke, and Prashant Mara of BTG Legal); and (iii) financial and tax advisers (two representatives of Baker Tilly).

16. In an email to Vivek Anand on 14 July 2015 on the due diligence process, Mr Helms mentioned that Mr Marsalek would begin discussing the commercial terms with the brothers in parallel. In a further email on 7 August 2015 Mr Helms recorded that those discussions on the commercial terms were ongoing.

17. That day, 7 August, Mr Helms sent to Mr Marsalek a sheet with the key terms for the purchase of the Hermes shares. It stated that 100 percent of the Hermes shares would be acquired, along with 25 percent of GIT. Hermes' travel business would be carved out, with the payment business remaining. The acquiring companies were undergoing clarification. The sheet stated that the shareholding structure of Hermes was that 95 percent was held by private equity (IIFL and EMIF) and 4 percent by the founders. Valuation was currently under negotiation, but the figure for Wirecard to purchase Hermes was around €250-300 million and for GIT around €12-15 million.

18. On 28 August 2015 Dr Terlau sent Mr Singh an email explaining that the acquisition of shares in Hermes by IIFLW had not occurred and could he, Mr Singh, find out when it would take place. That was a reference to what had been said at the kick-off meeting. This is referred to in a BTG note, "List of initial issues", which had been prepared for the due diligence inquiries. That stated that IIFLW owned 96 percent of the stock in Hermes. Dr Terlau's concern was that he had not seen IIFLW's supposed shareholding reflected in any board resolutions, share transfer forms, filings made under Indian foreign exchange laws, or the relevant entries into Hermes' statutory registers, so it was not possible to confirm if these investments by IIFLW have been consummated (i.e., the monies brought in and shares issued/transferred).

19. Dr Terlau pursued this issue of IFLW's acquisition of shares in Hermes with Mr Singh on 1 September 2015. Mr Singh replied that BTG had tried to clarify the matter with Ramu Ramasamy, but at that point to no avail.

Wirecard's due diligence

20. In his statement Mr Helms, in charge of mergers and acquisitions at Wirecard, explains that EMIF's title to the shares it was selling was one of the areas of inquiry,

since it was known that the sale from GIR to EMIF had not been completed when negotiations began. He relied on Wirecard's Indian lawyers to be satisfied as to EMIF's title to sell the shares. Mr Helms explains that more significant for Wirecard than the title issued in the process of sale, however, and the cause of delay in the signing of the 27 October 2015 SPA, were other issues: delays on the part of EMIF in providing documents; concerns that Hermes was carrying on "retail business" under the Indian foreign investment regulations; and the need to dematerialise the shares to avoid attracting stamp duty.

21. Mr Singh of BTG, who had the carriage of the due diligence inquiries, says in his witness statement that on 8 and 9 July 2015 there were high level discussions when his firm were informed of Wirecard's intention to acquire Hermes' payment business from EMIF, which was to be through GIR, controlled by Ramu and Palani Ramasamy. He sets out his instructions, which were to advise on matters of Indian law, but not to advise on valuation or to lead on drafting the SPA. BTG's primary role was to review documents, identify any red flags and raise them with Osborne Clarke as appropriate.

22. On 8 September 2015, Mr Singh emailed EMIF a "requisition list" of items needed as part of the legal due diligence. Item 1 was marked as "critical for completion". It required (i) the share purchase agreement, (ii) resolutions of the company, (iii) foreign exchange filings, including forms FC-TRS, FIRC, (iv) duly executed share transfer forms, (v) share certificates duly endorsed with the name of the purchaser, and (vi) updated statutory registers. Then marked as desirable were documents and official filings relating to the original issuance of shares to the claimants in 2009. Marked as important were the minutes of the board and the shareholders from 1 July 2015 to date.

23. A draft of BTG's interim due diligence report was sent under cover of an email on 11 September 2015 to Dr Terlau and Dr Hürten of Osborne Clarke. The draft used a colour coded system: red, to be addressed commercially before completion or otherwise requiring immediate attention; orange, to be dealt with in the deal documentation or at completion; and green. Over many pages the report contained a range of matters (some redacted) and a considerable number which were colour coded needing to be addressed.

24. In the discussion of corporate structure, the report set out the interim shareholding of Hermes post-EMIF, which was to be accomplished by 3 September 2015. It commented that this was according to information provided by the company, which had yet to be confirmed by review of the documentation, but that it was understood that EMIF was to acquire a 100 percent stake in Hermes as a condition precedent to the transaction. The report then set out, "for completeness", the shareholding structure of Hermes prior to any acquisition by EMIF. The table referred to the shareholdings of the second and third claimants in the current litigation, but added that it had not been provided with documents relating to the transfer of shares to EMIF.

25. Following this table BTG commented: "We have not been provided with the documents related to the transfer of shares to [EMIF] including (i) the share purchase agreement, (ii) resolutions of the company, (iii) foreign exchange filings, (iv) duly executed share transfer forms, (v) share certificates duly endorsed with the name of the purchaser, and (vi) updated statutory registers. We will not be able to verify the

validity of the title of the shares to be purchased by the Buyer/Purchaser and whether there are any liabilities attached to the same." Later the report noted that BTG was seeking the Bank of India forms for the GIR-EMIF transfer.

26. In his witness statement, Mr Singh states that although BTG had requested documents on 28 August 2015 and 8 September 2015, at the date of that interim report (11 September 2015) these were not available. Thus, he continues, the interim report did not identify the date at which the second or third claimants ceased to be shareholders, or whether their shares had been transferred to GIR or EMIF directly or at what price. However, Mr Singh adds: "There was nothing in what I had seen at this stage to suggest anything out of the ordinary or to raise questions." He then goes on to describe the various documents he wanted to see, including the share transfer forms so as to be 100 percent certain of EMIF's ownership of the Hermes shares.

27. On 15 September 2015 EMIF emailed CNGSN, copying in Wirecard – an email forwarded to Mr Singh the same day – stating that it would not be sharing the GIR-EMIF share purchase agreement, which was a confidential document, but it would provide all other items shortly, including the most recent GIT- Hermes agreement. Mr Helms says in his witness statement that the non-disclosure of the GIR-EMIF SPA was not unusual and that the main concern was to be satisfied about EMIF's title to the shares.

28. Since there were still missing documents for the purposes of BTG's due diligence, on 23 September 2015 Mr Singh sent a further email requesting the documents he had asked for on 8 September 2015, including the share transfer forms. The following day, 24 September 2015, CNGSN sent the Hermes share certificates, register of members and register of transfers, but not the share transfer forms or board resolutions, which would have demonstrated EMIF's ownership of the shares.

29. When Mr Terlau emailed asking whether it was possible to work around the problem – it was hoped that the sale would complete on 30 September 2015 – Mr Singh replied on 27 September 2015 that normally BTG would insist on seeing the prior share transfer forms and SPA, to ensure that the previous transaction was fully consummated, but "given the price sensitivity" – Mr Singh explains that this was a reference to the EMIF-CNGSN email of 15 September – "we are not hopeful of getting these documents", and that it might be possible to obtain a suitable representation from the seller and EMIF.

30. The same day – 27 September 2015 - Mr Terlau replied that BTG should ask Ramu and Palani Ramasamy for the missing documents, including the board minutes; that Wirecard already had a warranty; that given that Wirecard was paying some €350 million it should be assured about the prior transfers; and that an email confirmation was insufficient.

31. In response Mr Singh emailed on 28 September 2015 stating that there were four things it needed to be 100 percent sure in relation to EMIF's ownership of shares in Hermes: (a) share transfer forms in its favour; (b) share certificates in its name; (c) board resolutions approving such transfer; and (d) the register of members recording it as the owner of such shares. Items (b) and (d) had been received, but they should push for, and receive the board minutes, item (c), to ensure the company had duly approved the transfers. As to item (a), they carried about 30-35 percent weight and an

opinion or representation was needed that the share transfers had been completed as per the applicable law.

32. In his statement Mr Singh says that BTG was not inquiring about share price – he considered that it was a possible reason that certain documents were not made available – and that his only concern was to establish the title to shares, which he did by reviewing the other documents available. That did not create any suspicion, he explains, and it was not unusual that a seller might want to keep the commercial terms of any earlier share transfer confidential.

33. On 29 September 2015 Mr Singh visited Hermes' offices in Chennai, where he inspected the board minutes, including those of 18 September 2015. He did not take copies, but his notes summarise the EAGM share certificate split, the 628 EAGM shares being transferred to GIR, along with the 4,060 shares belonging to the first two claimants in these proceedings. There is the note to himself in relation to the latter, namely, was there an "FC-TRS form [foreign exchange form] for this?" His notes continued: "74,997 shares transferred from GI Retail to 1A fund @ Rs.35,067 per share totalling Rs. 262 crores (approx) pursuant to SPA dated September 7, 2015." In his statement Mr Singh states that although he had taken this note of the price, he did not flag it to Osborne Clarke since it had no relevance to BTG's task, which was ensuring title to the shares. For the same reason he did not take a note of the price at which the claimants' shares were transferred to GIR which, we will see, were in the minutes. Mr Singh now says he cannot even recall seeing it.

34. That same day, 29 September 2015, Mr Singh provided BTG's due diligence report to Dr Terlau. Certain issues of non-compliance were flagged, but none relating to ownership of Hermes shares by EMIF. The following day, 30 September 2015, Mr Singh sent a slightly revised due diligence report to Dr Terlau. Neither report contained the GIR-EMIF price information of which Mr Singh had taken a note.

The share transfers

35. There was a board meeting of Hermes on 18 September 2015. The minutes recorded that a resolution was passed that the EAGM share certificate should be split, which was carried, as was a resolution approving the transfer of EAGM's 628 shares in Hermes to GIR at the price of Rs.35,566.39 per share, totalling Rs.2,23,35,690.33. That was pursuant to a SPA of 3 September 2015 between EAGM, Hermes and GIR.

36. Similarly, the minutes recorded that pursuant to a SPA of 3 September 2015 between the first two claimants in these proceedings, 4060 shares in Hermes were to be transferred to GIR at Rs.34,990 per share, totalling Rs.14,20,59,400. There was a resolution approving that transfer. The minutes recorded that GIR was to be entered in Hermes' share register as the owners of all these shares.

37. The minutes further recorded that pursuant to the SPA of 7 September 2015 between GIR, Ramu and Palani Ramasamy, Hermes and EMIF, some 74,997 shares in Hermes held by GIR were transferred to EMIF at a price of Rs.35,067.21 per share, and that this was approved by the board.

38. Pursuant to a SPA dated 27 October 2015, Wirecard agreed to obtain the Hermes shares from EMIF. That was through Wirecard Sales International GmbH purchasing some 99.9 percent of the Hermes shareholding.

39. Before completion BTG sent its final due diligence report dated 17 November 2015. It ran to 151 pages. There were still outstanding matters to be addressed. As in previous versions the report set out the interim structure shareholding and management structure in which EMIF owned 95.77 percent of the 78,420 shares. Then again, "for completeness", there was the shareholding structure of Hermes pre-EMIF acquisition with a list of minority shareholders, including the second and third claimants.

40. The report then noted the board resolutions of 18 September 2015 authorising the transfer of shares to GIR, including those from the claimants, and of 74,997 shares from GIR to EMIF. Later the report contained the notes of the board minutes of which Mr Singh had taken a note. There was also in tabular form details of foreign exchange filings, with historical references to the first and second claimant and also a note on what appears to be a discrepancy in one of the filings. The final reference to the claimants was one under the head of regulatory compliance, where a letter in 2009 is listed.

M&A evidence

41. The claimants have introduced the evidence of Harsh Pais, a partner at Trilegal, an Indian law firm, who considers that Wirecard should have asked a series of questions about the earlier transactions that had led to EMIF acquiring title in the shares to Hermes, especially in relation to the price which EMIF paid and the terms on which the shares were acquired, including representations and encumbrances. Compliance with regulatory conditions were obvious issues for inquiry, Mr Pais continues, as was the consideration payable to senior management, especially where the Ramasamy brothers were being retained in the business. Mr Pais opines that Wirecard should have been interested in the earlier transactions from an M&A perspective, in particular the price because, for one, it would indicate whether there was a dispute with minority shareholders.

42. There is also evidence from Dr Hürten, a corporate M&A Partner at Osborne Clarke in Germany. As we have seen he was involved in the transaction. He states that there is no binding international standard of M&A due diligence and due diligence will be tailored to the transaction in question but that, in a share deal, the focus is on title. He adds that title is governed by the effectiveness of the actual transfer rather than the earlier sales. From Osborne Clarke's point of view, he states that he can see nothing about the transaction that should have led to further inquiries. He also gives evidence of how the price paid by a bidder can be based on strategic considerations, such as access to a market like India.

The law

43. As either a strike out application under CPR r.3.4 or an application for summary judgment under CPR r.24.2 the test is whether the claim has a realistic prospect of success. That was explained in an authoritative passage by Lewison J in *Easyair v Opal Telecom Ltd* [2009] EWHC 339 (Ch), [15]. There is no need to restate this at length, but in summary the court must consider whether the claimant has a "realistic"

as opposed to a "fanciful" prospect of success. In other words, the claim must be more than merely arguable. There must be no "mini-trial". It may be clear that there is no real substance in factual assertions made, particularly if contradicted by contemporaneous documents, although the court must take into account evidence that can reasonably be expected to be available at trial, and there may be reasonable grounds for believing that a fuller investigation into the facts of the case would affect its outcome.

44. The cause of action advanced against Wirecard is unlawful means conspiracy. Over the years its elements have been enunciated in a number of authorities, including *Lonrho v Shell Petroleum No 2* [1982] AC 173, 188, per Lord Diplock, and *Kuwait Oil Tanker v Al Bader* [2000] 2 All ER (Comm) 271, [108]. The elements are neatly summarised by Thomas Grant QC, David Mumford QC and their co-authors in *Civil Fraud: Law, Practice and Procedure*, London, Sweet & Maxwell, 2018, 2.006-2.007 as follows:

> "The essence of a conspiracy claim is a combination between two or more persons to harm another…
>
> The ingredients of a claim in unlawful means conspiracy can be summarised as follows:
>
> (1) A combination or agreement between a given defendant and one or more others;
>
> (2) An intention to injure the claimant;
>
> (3) Unlawful acts carried out pursuant to the combination or agreement as a means of injuring the claimant;
>
> (4) Causing loss suffered by the claimant."

45. Whether persons had the necessary intention to cause harm and therefore had joined the combination turns on whether they knew about the alleged conspiracy. Knowledge includes "blind eye" or "Nelsonian" knowledge as well as actual knowledge. That requires a suspicion that certain facts may exist, and a conscious decision to refrain from taking any step to confirm their existence: *Group Seven & Ors v Nasir* [2019] EWCA Civ 614; [2020] Ch 129, [59]-[60].

46. All this was common ground. However, there was some debate about a person's liability before he had joined or after he had left an unlawful means conspiracy. In *Kuwait Oil Tanker v Al Bader* [2000] 2 All ER (Comm) 271 the Court of Appeal held that while one of the conspirators was liable for the losses when he was present in Kuwait, there was no evidence that the agreement either expressly or impliedly contemplated that the various conspirators would continue to take part once they had ceased to be engaged or employed by the claimants: [143], [164]. As to that person's liability for the period before he joined the conspiracy, the Court of Appeal upheld the decision of Moore-Bick J that, as a late joiner, he was not liable for losses already caused before he joined: [106], [164]. Flaux J acknowledged this point at first instance in *Erste Group Bank AG v JSC 'VMZ Red October'* [2013] EWHC 2926 (Comm), [103].

The applications

47. In my view the claimants' case lacks a realistic prospect of success. Before me Mr Midwinter began with the allegations in the IIFL proceedings, and that the falsity of the Ramasamy brothers' account was patent given the documents Wirecard had lodged in these proceedings. However, there is no allegation that Wirecard itself was a party to the misrepresentations and intimidation alleged against the Ramasamy brothers or knew about them. Rather, the claimants allege that Wirecard had actual knowledge of the price EMIF paid GIR (and thus of the undervalue in what the claimants were paid) and therefore should have known of the alleged fraud. Alternatively they contend that Wirecard chose not to make enquiries because it could see that the sale to EMIF was suspect and wished to avoid having that suspicion confirmed. Wirecard thus acted dishonestly and became a party to the conspiracy.

48. Earlier in these proceedings the claimants alleged that Wirecard's knowledge came in "late September". Possibly because of the late joiner problem raised by citation of *Kuwait Oil Tanker v Al Bader* [2000] 2 All ER (Comm) 271 [106], [164] – the harm occurred in the first part of September when the claimants sold their shares – they now allege that Wirecard had the knowledge by September "at the latest". In my view the late joiner issue does not arise and Mr Midwinter's critique of the reach of the *Kuwait Oil Tanker* late joiner principle does not need deciding.

49. As regards actual knowledge, the claimants have not advanced any basis to support Wirecard's knowledge as regards either date. There is no specific allegation that Wirecard was told by the defendants in the IIFL proceedings (or anyone else) of the undervalue sale. Rather the case is that Wirecard would have found out the price of the previous sales since (i) one of the most reliable ways to value a company is by reference to comparator sales; (ii) the earlier sales of Hermes' shares to EMIF was only a few weeks prior to Wirecard's own purchase of them; and (iii) Wirecard conducted extensive due diligence and would have wanted to know whether earlier sale agreements carved out interests for the previous shareholders, contained onerous conditions subsequent, placed ongoing obligations on Hermes, did not meet regulatory conditions or were susceptible to being set aside.

50. To my mind the inherent probability is that Wirecard did not know the price of the GIR-EMIF sale of Hermes shares separately from the due diligence inquiries. Had it done so it would most likely have used it to negotiate on price, but it did not do that, paying what it did because of its assessment of what was needed to gain the strategic access Hermes provided to the Indian market. It paid an amount along the lines it had accepted it would need to pay much earlier, €250-300 million, indicated in the key terms document of 7 August 2015, rather than an amount around the US$42 million EMIF agreed to pay GIR in early September.

51. There is an additional point: if Wirecard knew the price earlier, it would have appreciated that Osborne Clarke and BTG might learn about this during their due diligence inquiries and that any conspiracy would have been exposed. To my mind it is inherently improbable that Wirecard would have joined a conspiracy when reputable lawyers were to conduct detailed due diligence since if there was something suspicious the lawyers might likely uncover it and take steps to prevent it.

52. As to knowledge arising from the due diligence inquiries, there is in my view no realistic prospect of success in the claimants proving the foundational facts of that knowledge. The inquiries were carried out by reputable lawyers. The claimants have made clear that they do not make any allegations that either Osborne Clarke or BTG Legal were dishonest. If the claimants accept that BTG's lead lawyer on the due diligence inquiries, Mr Singh, was not a party to the conspiracy when he learnt about the price information said to lie at its foundation, it seems difficult to say that about Wirecard.

53. Regarding the conduct of the due diligence inquiries, I cannot see how Mr Singh's conduct and BTG's can found a case of knowledge (actual or blind-eye) on the part of Wirecard. Mr Singh visited the Hermes offices on 29 September 2015 and saw the information on the transfer prices for the first time in the board minutes of 18 September 2015. His contemporaneous notes record the GIR-EMIF price, but he did not flag it to Osborne Clarke or include it in the draft due diligence reports of 29 and 30 September 2015, since in his view it had no relevance to his task, which was to ensure title was in EMIF to the Hermes shares. He did not take a note of the price at which the claimants' shares were transferred to GIR. There is no allegation of Mr Singh suppressing any information; he saw it but did not record it or flag it because he did not regard it as relevant to his inquiries. The price of the previous transfers of the Hermes shares did not raise his suspicions that the claimants might have been defrauded. There is no case for blind-eye knowledge.

54. The documents available show that the lawyers including Mr Singh had sought information about previous share transfers in Hermes. On 11 September the GIR-EMIF transfer documents were regarded as essential. There was the reference to "price sensitivity" in the refusal to provide the GIR-EMIF sale agreement. The various draft due diligence reports contain details of the second and third claimants as previous shareholders in Hermes, concern about liabilities attaching to the Hermes shares being transferred and a reference to considering the Reserve Bank of India requirements of a May 2015 transfer of Hermes shares from GIR to EMIF at Rs.34,220.

55. None of this in my view advances the claimants' case on inherent probabilities. Information on previous share transfers in Hermes was slow in coming. From experience Mr Helms and Mr Singh accepted that price information on previous sales of the Hermes shares might not be disclosed. Eventually Mr Singh inspected the board minutes in Chennai on 29 September 2015 but, as we have seen, did not regard the price information about those transfers as relevant. BTG's focus, and that of Osborne Clarke, was on title to the shares. The price information on the GIR-EMIF sale was not in the draft due diligence reports sent on to Wirecard of the 29 and 30 September 2015. There were a few references in the September draft due diligence reports to the claimants, but they were incidental to the reports' essential thrust and, in respect of the listing of previous shareholders, included only "for completeness". They were not flagged for consideration. In a lengthy report the reference to the May 2015 sale was in the context of regulatory requirements.

56. There is the report of Mr Pais about the information which in his view one would ordinarily expect a purchaser in Wirecard's position to obtain. While this did not of itself prove that Wirecard obtained the information, Mr Midwinter QC submitted, it supported the inference that it was likely to have done so.

57. Mr Pais has produced an impressive report about what M&A practice should be; Dr Hürten takes a different line. Rightly or wrongly the important point is that Mr Singh was not concerned with these other matters Mr Pais covers, but with the issue of the title to the shares alone. For example, he did not consider in the event that inquiries should be made about restrictions or conditions on the shares. What he was concerned with was EMIF's title. The basis on which BTG was finally satisfied as to EMIF's title was summarised in the final November report.

58. A further submission concerned the introduction of EMIF, an offshore vehicle, into the transaction. Mr Midwinter'contended that it gave rise to an obvious risk that there was some sort of tax benefit to be gained, and that Wirecard must have realised that it was likely that EMIF was paying the previous shareholders a significantly lower price than Wirecard was paying to generate the offshore profit for that benefit. In his submission there would have been the need to investigate, for example, for money-laundering purposes whether EMIF was a politically exposed person and that relevant tax laws were being complied with to make sure that Wirecard was not being implicated in some tax fraud. Wirecard might have paid less because of the tax saving to GIR.

59. In my view it is fanciful to suggest that because EMIF was a Mauritian entity that Wirecard should have blind eye knowledge that should have suspected fraud and made inquiries. First, there is no evidence of the tax position of GIR in having a Mauritian entity entered in the transaction. Secondly, Wirecard paid nearer what it had anticipated all along, compared with the GIR-EMIF price. Thirdly, and crucially in my view, EMIF was been advised by Linklaters. As a reputable law firm they would have investigated EMIF's position and been satisfied as to matters such as EMIF's beneficial ownership, compliance with money-laundering and terrorist financing laws, and the absence of tax and other fraud. If any of these matters were in prospect the inherent probabilities are that Linklaters would not have been involved. In my view the claimants have no prospect of succeeding in making out this allegation.

60. Finally, there are Mr Midwinter's points about Wirecard's recent reputation and current fate. He referred to the KPMG report, *Concerning the Independent Special Investigation,* April 27, 2020, which as one aspect investigated the purchase of Hermes shares but was unable to identify the beneficial owner of EMIF. As I have already observed, Linklaters would have been satisfied about that. The report also refers to the price paid and the objective to acquire 100 percent of the Hermes shares to avoid minority interests. There is nothing exceptional in that. The report records that Wirecard regarded the price to be justified because of the strategic advantage of entering the Indian market and that even if the previous price had been known that would not have influenced the board. That leads nowhere in this context.

61. Then there is the current position of Wirecard. At the hearing reports were emerging about problems in the company and were followed in greater detail afterwards. In an email on 22 June 2020 Mr Midwinter drew my attention in particular to the position of Mr Marsalek and how that raised important issues about what he submitted was the weight now to be given to Mr Marsalek's assertion that he did not have knowledge of fraud that the claimants contend he had. None of this was evidence in the applications. In any event, for the reasons I have given, his evidence has had no bearing on my conclusion on the case before me as to the inherent probabilities of Wirecard's alleged

knowledge of the price the claimants were paid for their shares and of its complicity in any wrong done to them.

62. In summary, the claimants' case does not have a realistic prospect of success. There is no real substance in their allegations vis-à-vis Wirecard, which are contradicted by the contemporaneous documents and Mr Singh's evidence. Mr Midwinter produced a long list of further documents he would need to examine, but in light of the material which Wirecard has disclosed I am satisfied that this additional material would not change the analysis at trial. In my view there is no basis to believe that a fuller investigation of the facts of the case advanced before me would alter the evidence to affect the outcome. There are no novel points of law to decide, nor any other compelling reason why this claim should be tried.