Neutral Citation Number: **[2022] EWHC 867 (Ch)**

Case No: BL-2022-000345

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 11/04/2022

Before :

THE HONOURABLE MRS JUSTICE JOANNA SMITH DBE

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Between :

(1) BRG NOAL GP S.à r.l.
(2) NOAL SCSp

Claimant

- and –

(1) STEFAN KOWSKI
(2) BASTIAN LUEKEN

Defendant

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Mr Philip Marshall QC, Mr Gareth Tilley and Adil Mohamedbhai (instructed by **McDermott Will & Emery**) for the **Claimants**
Mr Ben Strong QC and Ms Patricia Burns (instructed by **Humphries Kerstetter LLP**) for the **First Defendant**
Mr Daniel Hubbard and Ms Sabrina Nanchahal (instructed by **Keystone Law Limited**) for the **Second Defendant**

Hearing dates: **18, 21 & 22 March 2022**
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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.

This judgment has been handed down by the judge remotely by circulation to the parties' representatives by email and released to Bailii. The date for hand-down is deemed to be 11 April 2022.

Mrs Justice Joanna Smith:

1. The Claimants seek an interim injunction to restrain alleged ongoing breaches of contractual undertakings on the part of the Defendants. The evidence is voluminous, contested on all sides and has been expanding over the course of the hearing but, in summary, the essential facts are as follows.

2. Since 27 August 2021, the First Claimant ("**NOAL GP**") has been the General Partner of the Second Claimant, NOAL SCSp (formerly known as Novalpina Capital Partners I SCSp) a Luxembourg Limited Partnership that operates a private equity fund ("**the Fund**") focusing on mid-market European investments.

3. The Fund was established pursuant to a Limited Partnership Agreement dated 23 August 2017, as subsequently amended ("**the LPA**"). The LPA is governed by Luxembourg law and contains an exclusive jurisdiction clause in favour of the courts of Luxembourg. As General Partner, NOAL GP has unlimited liability and is responsible for the management of the Fund. The investors in the Fund are its **Limited Partners**, each of whom agrees to contribute up to the amount of their respective Commitment when called upon to do so by the General Partner. They have no rights in respect of the management of the Fund.

4. Prior to 27 August 2021, the General Partner of the Fund was Novalpina Capital Partners I GP S.à r.l. ("**Novalpina GP**"). As General Partner to the Fund, Novalpina GP was entitled to a **Priority Profit Share** in priority to returns to Limited Partners. As required by Luxembourg regulations, it appointed an authorised alternative investment fund manager (the **"AIFM**"). The LPA provided for two English limited partnerships (the "**English LLPs**") to be appointed investment advisers ("**IAs**") to provide investment advice to Novalpina GP and the AIFM in respect of the Fund.

5. The Defendants are two of the three founders of the Fund, together with Mr Stephen Peel ("**Mr Peel**") (together, the **"Founders**"). The Founders put in place the structure under which the fund management business was established through Luxembourg entities. They and their team acted (through the English LLPs) as IAs delivering advice based on their investment experience in the form of non-binding recommendations.

6. The structure of the entities created by the Founders is extremely complex, but for present purposes suffice to say that each of the Founders owns a one third share in Novalpina Capital Group Sar ("**Novalpina Topco**"), which in turn owns 100% of the shares in Novalpina Capital Partners 1 Group GP S.à. R.l ("**Group GP**"). Novalpina GP, the original General Partner of the Fund, is a wholly owned subsidiary of Group GP. These entities in the Novalpina group of companies are all established under Luxembourg law.

7. The Founders' economic interest in the Fund was represented by Novalpina GP, Novalpina Capital Partners I FP SCSp (the "**Carried Interest Partner**", a Luxembourg law limited liability partnership whose General Partner is Group GP and whose limited partners are the Founders and other members of the investment advisory team) and the Trustee of the Clarendon Trust (the "**Trust**"), a Guernsey trustee company and Mr Peel's family trust. These three entities were the initial Limited Partners in the Fund and were called **Special Limited Partners**. Together they committed a total of EUR 78.862 million to the Fund on establishment (the "**Sponsor Commitment**").

8. The Fund investments (the "**Portfolio Companies**") were held primarily through a holding company originally called Novalpina Capital Partners 1 Luxco S.à.r.l. ("**Master Luxco**"), a Luxembourg private limited liability company. Master Luxco's shareholders are the Fund itself, Novalpina GP and three Luxembourg companies owned 100% by the Fund.

9. Following differences between the Founders arising in about December 2020, the Limited Partners voted overwhelmingly for removal "without cause" of Novalpina GP as General Partner at a meeting on 9 July 2021.

10. Specific provisions in clause 20 of the LPA governed the removal of the General Partner and were triggered by the vote to remove Novalpina GP without cause. In summary these included that a new General Partner could be elected by Special Consent of the Limited Partners but that the removal of the existing General Partner would not be effective until the new General Partner was appointed; absent approval of a new General Partner, the Fund would be wound up by the existing General Partner. Where the removal was without cause (i) the outgoing General Partner was to be paid its Priority Profit Share within 20 business days of the Special Consent for its removal and its removal was not effective until that payment was made; (ii) the Carried Interest Partner was entitled to be paid a **Removal Entitlement**, the value to be determined by an independent valuer appointed by the outgoing General Partner and approved by the Advisory Committee of Limited Partners ("**LPAC**"); and (iii) if the Fund continued, any Novalpina company was entitled to elect that the new General Partner acquire or procure the acquisition of the Sponsor Commitment at a value to be determined by a valuer appointed by the outgoing General Partner with the approval of the LPAC. In the event of such an election, it was a condition of the appointment of the new General Partner that it would acquire or procure the acquisition of the Sponsor Commitment on or before the date on which it was appointed the new General Partner.

11. In addition, pursuant to clause 19 of the LPA, a new General Partner had to be approved within the period of 20 days (i.e. by 6 August 2021) to avoid termination of the Fund.

12. By letter dated 23 July 2021, Novalpina GP availed itself of the option to request that the new incoming General Partner should purchase the Sponsor Commitment. A Third Amended and Restated LPA was put in place on 5 August 2021 to extend time for the payment of the Priority Profit Share and the approval of a new General Partner to 35 business days from the removal of Novalpina GP.

13. On 6 August 2021, NOAL GP was nominated by the Limited Partners by Special Consent to replace Novalpina GP as General Partner. On 18 August, the LPAC's lawyers (Proskauer Rose (UK) LLP ("**Proskauer**")) proposed that NOAL GP should take over as General Partner without any valuer being appointed "on agreed terms asap", with promissory notes issued in respect of the Sponsor Commitment. This would permit a "decoupling" of the effective date of removal/replacement of the General Partner from the requirement to make cash payments pursuant to the provisions of clause 20 of the LPA.

14. In the early hours of the morning of 25 August, Proskauer confirmed by email that "the limited partners have no interest in having the removed Novalpina GP remaining responsible for the day to day management of the portfolio pending the determination of the valuations by the independent expert" (a reference to the requirements of the LPA).

They proposed (i) that NOAL GP should step into the role as General Partner on or before 27 August; (ii) the Fund should issue the Special Limited Partners with promissory notes in respect of the Sponsor Commitment; (iii) NOAL GP would, at the same time, enter into a pledge/security agreement in respect of the promissory notes; and (iv) "valuer engagement and process is agreed promptly – aim to have made material progress in next 48 hours".

15. Also on 25 August 2021, the Priority Profit Share, which did not depend on a valuation of the Fund, was paid to Novalpina GP.

16. It is the Claimants' case that Novalpina GP's replacement by NOAL GP then took effect on 27 August 2021, at which time the interests of the Special Limited Partners in the form of the Sponsor Commitment were acquired by the Fund by issuing promissory notes to each ("**the Promissory Notes**") (pursuant to a fourth LPA, amended by NOAL GP to permit this new mechanism on the same day). NOAL GP also executed a pledge in favour of the Special Limited Partners securing their claims under the Promissory Notes by pledging the right of NOAL GP as General Partner of the Fund to call down unpaid investment commitments from Limited Partners ("**the Pledge**").

17. The Defendants' perception of events is rather different. They say that in circumstances where the LPAC was unwilling to implement the terms of the LPA (and in particular the payments required on a termination without cause) it permitted NOAL GP effectively to force its way in to the position of General Partner by purporting to execute a new amended LPA (which it did purporting to act as General Partner, even though it was not the existing General Partner) providing for the issue of the Promissory Notes and for the Fund (rather than any incoming General Partner) to buy out the Sponsor Commitment. None of the Special Limited Partners agreed to this "coup" and the Defendants point out that the Claimants' Luxembourg law experts do not anywhere suggest that it was valid. In the circumstances, the Defendants say that the Promissory Notes are not worth the paper they were written on.

18. At the same time, negotiations were taking place as to the valuation principles to be applied in determining the Removal Entitlement and the Sponsor Commitment and it was in the context of these negotiations (and further to the amendments by NOAL GP to the LPA referred to above) that the Founders, Group GP and the Carried Interest Partner provided executed undertakings on 28 August 2021 ("**the Undertakings**"). White & Case, acting for Mr Peel, commented that NOAL GP and LPAC saw this "as a package deal so we have a better chance of agreeing the valuation points if I can say we accept this confirmation as written", the confirmation being a reference to the Undertakings.

19. The Undertakings given by Messrs Kowski and Lueken were in the following form:

> "I, [name], hereby acknowledge that [NOAL GP] is the managing general partner ("General partner") of [the Fund] with effect from 27 August 2021 and unconditionally and irrevocably undertake (a) not to assert otherwise, or to induce or procure an assertion to the contrary or otherwise challenge or question the validity of its appointment or induce or produce such challenge or question, in any applicable forum and (b) to cooperate with and assist the General Partner in completing a full, orderly and

> timely transfer of the control of the Partnership and all of its assets and any obligations to the General Partner".

20. The Undertakings provided by Group GP, the Carried Interest Partner and (on 31 August 2021) the Trust, were in exactly similar form save that they included reference to the fact that each of these entities had been offered the Pledge of 27 August 2021. I shall refer in this judgment to the two separate parts of the Undertakings as "**Limb (a)**" and "**Limb (b)**".

21. The Defendants' Undertakings, together with the Undertakings from Group GP and the Carried Interest Partner, were sent by White & Case to Proskauer and DLA Piper ("**DLA**") (acting for NOAL GP) under cover of an email of 28 August 2021 ("**the 28 August Email**") in the following terms:

> "Please note that these documents should not be considered released and should be held strictly to our order pending (a) the confirmation by each of the FPs, the two Novalpina Sponsor Commitment vehicles, and BRG that they undertake in the terms of the valuation email we are discussing separately and (b) your circulation of the fully signed pledge".

22. On 30 August 2021, White & Case circulated to all relevant parties an email setting out the final text of the principles on which a valuation of the Fund was to be carried out ("**the Valuation Email**"). White & Case sought confirmation from the Founders, the Carried Interest Partner, Group GP and NOAL GP (but not Novalpina GP) that they agreed to the terms of the Valuation Email, which, amongst other things recorded that:

> "This will take effect once all have replied with the confirmation, following which the pledge and letters confirming the change of GP are released. We will seek the same confirmation from the Trust tomorrow.
>
> In consideration of an equivalent undertaking from the other respondents to this email, we agree to use all reasonable efforts to enter into an Engagement Letter within 5 Business Days with one of KPMG, A&M or Houlihan Lokey to perform the valuation to be used for the valuations required pursuant to Clause 20.3.3/20.3.4 and 20.3.5 of the LPA on the terms as set out below, to the extent that an independent valuer is willing to engage in the valuation process as set out in that email and can agree their engagement terms within such 5 Business Days."

23. It appears to be common ground that the reference in the Valuation Email to the "letters confirming the change of GP" was a reference to the Undertakings. As I have already indicated, the Undertaking from the Trust was provided on 31 August 2021. The Valuation Email went on to set out the agreed engagement terms for the proposed valuer, including that the valuation date was to be 1 August 2021 and that the deadline for the provision of the report was to be 75 days.

24. Emails providing the relevant confirmations were circulated, although there is a dispute between the parties to which I shall return in respect of one of these confirmations. The

Defendants have referred throughout the hearing to the agreement reached between the relevant parties on or about 30 August 2021 as "**the 30 August Agreement**", contending that the Undertakings formed part of that agreement. However, it is the Claimants' case (of particular importance in the context of its arguments as to the governing law of the Undertakings), that the Undertakings are capable of being viewed alone as a binding contractual commitment.

25. Despite agreeing in principle to the appointment of KPMG as valuer, there appear to have been delays in signing off on the engagement letter (the circumstances of which are in dispute between the parties). However, by 3 November 2021 the engagement letter was ready for signature and KPMG had confirmed it did not foresee any independence challenges.

26. On 9 November 2021 NOAL GP wrote to Novalpina GP and the Founders raising an objection to the valuation principles and saying that it had become "unfeasible" for an independent valuer to conduct a valuation process as envisaged by the valuation principles. The Claimants say that there were genuine reasons for this objection, whereas the Defendants say it is illustrative of the Claimants' desire to avoid the need to satisfy the obligations to make payment on termination under the terms of the LPA. They contend that the failure to appoint a valuer is a clear and obvious breach of the 30 August Agreement. To date, there has been no further progress in the appointment of a valuer although the Fund contends (through its skeleton argument) that it remains willing and able to discharge its outstanding obligations arising from the removal of Novalpina GP (a contention which is disputed by the Defendants).

27. Between 15 and 25 February 2022, Novalpina GP, Group GP and the Carried Interest Partner filed four separate Summonses before the Courts of Luxembourg ("**the Luxembourg Proceedings**"), seeking the following relief:

    i) By the first Summons, (filed by Novalpina GP) a declaration that a series of decisions by the board of Master Luxco be nullified;

    ii) By the second Summons, (filed by Novalpina GP, Group GP and the Carried Interest Partner) on a summary basis, the reinstatement of Novalpina GP as General Partner of the Fund, and other relief;

    iii) By the third Summons, (filed by Novalpina GP) on a summary basis, the suspension of all decisions taken by the boards of Master Luxco and its subsidiaries pending the outcome of the first Summons; and

    iv) By the fourth Summons, (filed by Novalpina GP, Group GP and the Carried Interest Partner) declarations of Novalpina GP's status as the General Partner of the Fund, on the basis that conditions precedent for the appointment of NOAL GP have not been fulfilled, albeit that the reinstatement of Novalpina GP is sought only pending payment of the amounts due to Group GP and the Carried Interest Partner, following which such reinstatement will end and the appointment of NOAL GP will then become effective.

28. It is the Claimants' submission that the Defendants are behind the issue of the Luxembourg Proceedings and that those proceedings amount to a breach of their Undertakings. Furthermore, the Claimants contend that the Defendants have the power

to stay the Luxembourg Proceedings pending the outcome of these proceedings and indeed, that a failure to take steps to achieve this end is itself in breach of the Undertakings. The Claimants say that, by the Luxembourg Proceedings, the Defendants wish to threaten the position of NOAL GP as General Partner to the Fund (with potentially very significant damage to the Fund) and that this is being done in order to create leverage in respect of the claim for payment said to be due by reason of the removal of Novalpina GP. Mr Marshall QC, acting on behalf of the Claimants, described the Luxembourg Proceedings on more than one occasion as a "nuclear option", suggesting that a more proportionate course of action would be to bring proceedings for recovery of the sums owing on grounds of breach.

29. In the circumstances, the Claimants have commenced substantive proceedings in this jurisdiction seeking final prohibitory and mandatory injunctions designed to enforce the Undertakings, including orders that each Defendant (i) procures and causes Novalpina GP, the Carried Interest Partner and Group GP to discontinue the Luxembourg Proceedings; and (ii) procures and causes Novalpina GP, the Carried Interest Partner, Group GP and Novalpina Topco not to pursue or commence any other claim or proceedings or take steps to challenge the validity of the appointment of NOAL GP as managing General Partner of the Fund. I observe that the Claimants in these proceedings have chosen not to seek an order against the claimants in the Luxembourg Proceedings.

30. In the meantime, the Claimants seek interim relief to restrain the continuing prosecution of the Luxembourg Proceedings, including orders that each of the Defendants takes no further steps in the Luxembourg Proceedings save that they shall take all necessary steps to cause, alternatively shall each use his best endeavours to procure and cause, the Luxembourg Proceedings to be stayed until judgment in this claim or further order of the Court.

31. The application for interim relief first came on before Meade J on 28 February 2022, at which point it appeared that there was considerable urgency in obtaining a ruling in light of an imminent decision of the Luxembourg Court. In the circumstances he imposed a very tight timetable for the service of evidence leading to a one day hearing on 14 March or as soon as possible thereafter. In the event, I was informed during the course of submissions that a substantive hearing is not now due to take place before the Luxembourg Court in the Luxembourg Proceedings until 25 April 2022, such that the original urgency has diminished somewhat. However, it is the Claimants' wish that this court should rule on its application in advance of that hearing.

32. Relief was originally sought by the Claimants against Mr Peel, but in circumstances where he appears to have satisfied the Claimants that he will voluntarily comply with his undertakings (which were in similar form to those provided by Messrs Kowski and Lueken), the Claimants discontinued their claim against him. No evidence has been filed from Mr Peel, but it is clear from the first statement of Ms Murray that she has received input from him in preparing her statement.

33. In broad summary, it is the Defendants' case that the Luxembourg Proceedings are unsurprising given that they aim to overturn NOAL GP's position as General Partner and return matters to the *status quo* that existed prior to the date on which NOAL GP seized control, in circumstances where there has been clear and obvious non-compliance with the provisions of the LPA. They say this is obviously in the interests of the Special Limited Partners. However, they assert that they gave no instructions for the

commencement of the Luxembourg Proceedings, that they have no control over them and that the existence of those proceedings does not therefore evidence a breach of the Undertakings. In any event, they also say that the Undertakings are unenforceable, whether as a matter of English or Luxembourg law, and that under Luxembourg law no injunction would be granted. They raise various grounds on which, as a matter of discretion, the court should refuse to grant interim relief.

34. In addition, the Defendants say that the English court is not the natural forum for the relief sought and that it should be refused on *forum non conveniens* grounds. Applications to this effect were issued by the Defendants on 15 and 17 March 2022 respectively. At the outset of the hearing, the Claimants objected to these applications being heard together with the application for interim relief, but for reasons set forth in a short *ex tempore* judgment, I permitted all matters to be dealt with together. In the circumstances, the Claimants also seek to run an alternative case based on section 25 of the Civil Jurisdiction and Judgments Act 1982 ("**CJJA 1982**").

35. Before turning to the law, I should record that in parallel with the events to which I have referred above, the differences between the Founders led to disputes being played out before the Luxembourg Courts between March and December 2021, primarily as to Mr Peel's voting rights at Novalpina Topco, and in particular his rights in relation to the appointment and removal of directors on Novalpina group company boards. This led to changes to the board of managers of Group GP and Novalpina GP, on which the Claimants rely in inviting the court to draw inferences as to the levels of control exerted by the Defendants over the various entities which have brought the Luxembourg Proceedings. In particular, the Claimants say that at a time when Mr Peel's voting rights were suspended by order of the court, Messrs Kowski and Lueken took the opportunity to appoint their desired officers at Novalpina Topco (and thence of other entities down the chain), namely Messrs Zini and Pileri (referred to in the evidence as "**the July Managers**" owing to their appointment on 7 July 2021).

36. The present position is that the July Managers remain in place. On 28 December 2021 the Founders, acting unanimously, amended the articles of association of Novalpina Topco and placed it into voluntary solvent liquidation. The Claimants assert that the liquidator has been chosen by Mr Kowski and that this is yet another indication of the extent of (at least) his control over the companies in the Novalpina group. This is denied by the Defendants. In a Note provided on the second day of the hearing, the Claimants contended for the first time that the court could draw adverse inferences from the fact that on 21 January and 24 January 2022 respectively, Messrs Lueken and Kowski resigned as managers of Group GP. The Claimants point out that this was a matter of weeks prior to the issue of the Luxembourg Proceedings and that it is to be inferred that the Defendants were involved in the preparation of the Summonses referred to above and then resigned in order to seek to distance themselves from the Luxembourg Proceedings.

37. The Defendants reject this characterisation of events in witness statements served following the provision of the Claimants' Note, explaining that their resignations were the natural consequence of the winding up of the Novalpina structure.

The Hearing and the Evidence

38. Although the time estimate for the hearing in the Order of Meade J of 28 February 2021 was one day, the hearing in fact continued for three days, with it being necessary for the court to sit outside normal hours on the final day of the hearing in order to avoid it going into a fourth day.

39. I received further evidence from both sides during the course of the hearing, together with an additional Note from the Claimants on the morning of the second day, as mentioned above. Although the Claimants initially sought to object to fresh evidence being served by the Defendants, the ultimate position, as I understood it, was that none of the parties objected to my having regard to any of the additional evidence that was served, on the basis that each party had had a proper opportunity to address that evidence.

40. In general terms, however, I observe that it is highly unsatisfactory, and potentially unfair, for new points to be raised against defendants during a hearing of this sort at a time when the focus of all parties (and of the court) should be on the existing evidence, together with the arguments arising out of that evidence. Defendants are entitled to know in advance of the hearing the case they must meet and to have a proper opportunity to serve evidence responding to that case.

41. In support of their application for interim relief, the Claimants rely upon the following statements and expressions of expert opinion, together with exhibits:

    i) two statements from Mr Finbarr O'Connor, Chief Investment Officer of BRG Asset Management LLC, the 100% shareholder of NOAL GP, and director of NOAL GP;

    ii) two statements from Ms Dorothy Murray of Proskauer, solicitors to the Fund;

    iii) one statement from Mr Mark Fennessy, a partner in the firm of McDermott Will & Emery UK LLP ("**MWE**");

    iv) two letters from Mr Paulo Lopes Da Silva of Molitor, Luxembourg legal counsel to the Fund and NOAL GP dated 26 February 2022 and 21 March 2022 respectively. The first of these letters was referred to in the evidence as "**the Lux Law Letter**";

    v) an expert report on Luxembourg law from Professor Dr. Denis Philippe, an academic and published author on, amongst other things, civil and business law in Luxembourg and the founder and managing partner of the law firm Phillipe & Partners dated 10 March 2022.

42. The Defendants rely upon:

    i) four statements from Mr Kowski;

    ii) three statements from Mr Lueken;

    iii) two expert reports on Luxembourg law from Mr Fabio Trevisan, a Luxembourg attorney and partner in the law firm Bonn Steichen Partners in Luxembourg, dated 7 March 2022 and 16 March 2022 respectively, on behalf of Mr Kowski;

iv) a letter from Mr Fabio Trevisan provided to the court on the 20 March 2022;

v) two legal opinions from Isabelle Corbisier, a professor at the University of Luxembourg, dated 4 March 2022 and 11 March 2022 respectively, on behalf of Mr Lueken.

43. Insofar as is necessary for the purposes of the applications before me, I have regard to all of this evidence in arriving at my decision.

The Stay Application

44. The logical place to begin in addressing the arguments presented by the parties is with the Defendants' application to stay these proceedings on grounds of *forum non conveniens*.

Applicable Legal Principles

45. The applicable legal principles are, for the most part, not in dispute. They appear in the well-known speech of Lord Goff of Chieveley in *Spiliada Maritime Corp v Cansulex* [1987] AC 460 (HL) at 476-478 and may be conveniently summarised as follows:

i) The basic principle is that a stay will only be granted on the ground of *forum non conveniens* where the court is satisfied (the burden resting with the defendant) that there is some other available forum, having competent jurisdiction, which is the appropriate forum for the trial of the action "i.e. in which the case may be tried more suitably for the interests of all the parties and the ends of justice" (476).

ii) The burden on the defendant is not just to show that England is not the natural or appropriate forum for the trial, but to establish that there is another available forum which is "clearly or distinctly" more appropriate than the English forum. Thus, in a case where no particular forum can be described as the natural forum for the trial of the action, there will be no reason to grant a stay where jurisdiction has been founded as of right (477C-G).

iii) If the court is satisfied that there is another available forum which is *prima facie* the appropriate forum for the trial of the action, the burden will shift to the claimant to show that there are special circumstances by reason of which justice requires that the trial should nevertheless take place in England (476E-F).

iv) The court will look first to see what factors there are which point in the direction of another forum as being the natural forum, i.e. "that with which the action [has] the most real and substantial connection". These factors include factors affecting convenience or expense, such as availability of witnesses, factors such as the law governing the relevant transaction and the places where the parties respectively reside or carry on business (477G-478B).

v) If the court concludes that there is some other available forum which *prima facie* is clearly more appropriate, it will ordinarily grant a stay unless there are special circumstances by reason of which a trial should nevertheless take place in England. In looking at the question of special circumstances, the court will consider all the

circumstances of the case, including circumstances which go beyond those taken into account when considering connecting factors with other jurisdictions (478C-E).

vi) A stay will not be refused simply because the claimant will thereby be deprived of "a legitimate personal or juridical advantage", provided that the court is satisfied that substantial justice will be done in the available appropriate forum (482F).

46. In opposing the Defendants' application for a stay, Mr Marshall points out that the Defendants have been served as of right; they are long-time residents in the jurisdiction. Accordingly, he submits in his skeleton, with reference to *Lekoil Limited v Olalekan Akinyanmi* [2022] EWHC 282 (Ch), that the court must start from "the presumption" that England is the appropriate forum.

47. *Lekoil* concerned an application to set aside an order for service out of the jurisdiction on the grounds that England was not the proper place in which to bring the claim (the burden in such a situation being on the claimant to establish that England is the appropriate forum). At [37], in finding that the centre of gravity of the dispute was not England, HHJ Hodge QC observed that "there is nothing to displace the presumption that the defendant should be sued in the place where he resides, and where he has the closest connection and where any judgment will fall to be enforced".

48. During the course of his oral submissions, Mr Marshall acknowledged the distinction between the proceedings with which I am concerned and the proceedings before HHJ Hodge QC, but still submitted that a long-time residence in England "almost creates a presumption in favour of that location as being the appropriate place". As I understood his submissions, he was thereby highlighting that it will often be more difficult (as was expressly recognised by Lord Goff in *Spiliada* at 477F-G) for a long-time resident to discharge the burden of showing that another forum is more clearly appropriate.

49. However, insofar as I was being invited to find that the decision in *Lekoil* has in some way added an additional gloss to the *Spiliada* test (which itself requires an assessment of the interests of <u>all</u> the parties), I reject that submission. There is nothing in *Spiliada* to indicate that residency within the jurisdiction creates a "presumption" in favour of the English court being the appropriate forum. Instead, the significance of residence within the jurisdiction is given effect to in *Spiliada* with the need for the defendant to establish "clearly and distinctly" that another forum is more appropriate. As Lord Goff said at 477E-F,

> "In this way, proper regard is paid to the fact that jurisdiction has been founded in England as of right."

50. Against that background, the question for me on this application is whether the Defendants have established that Luxembourg is "clearly and distinctly" more appropriate than the English forum.

Discussion

51. By the time of the hearing, it was common ground that proceedings in the Luxembourg court are "available" to the Claimants and both Defendants have confirmed that they would be prepared to submit to the jurisdiction of the Luxembourg Court. It is only

possible for the Claimants to advance an alternative case on the basis of section 25 CJJA 1982 in circumstances where they accept that their claim may be brought in Luxembourg.

52. It was also common ground that, in the event of the Defendants satisfying their burden that the Luxembourg Court is the appropriate forum for the trial of this action, the Claimants do not advance any special circumstances in support of the proposition that the trial should nevertheless take place in England.

53. In seeking to satisfy the burden that rests with them, the Defendants rely upon a number of factors which they say point to these proceedings having "the most real and substantial connection" with the Luxembourg Court. One of those factors is that the 30 August Agreement is governed by Luxembourg law. Accordingly, I must first consider that argument before turning to look at the additional factors on which they rely.

The Governing Law

54. It is common ground that the governing law of the Undertakings and/or the 30 August Agreement (assuming they came into effect) turns on the application of the Rome 1 Regulation (Regulation (EC) 593/2008) ("**Rome 1**"), Article 4: "Applicable Law in the absence of choice", which continues to have effect following Brexit pursuant to section 3 of the European Union (Withdrawal) Act 2018.

55. Both parties are agreed that the 30 August Agreement/the Undertakings do not fall within the various contracts specified in Article 4(1), however, I must set out the remaining provisions of Article 4:

> "2. Where the contract is not covered by paragraph 1…, the contract shall be governed by the law of the country where the party required to effect the characteristic performance of the contract has his habitual residence.
>
> 3. Where it is clear from all the circumstances of the case that the contract is manifestly more closely connected with a country other than that indicated in paragraphs 1 or 2, the law of that other country shall apply.
>
> 4. Where the law applicable cannot be determined pursuant to paragraphs 1 or 2, the contract shall be governed by the law of the country with which it is most closely connected".

56. Mr Marshall relies for his primary submissions on Article 4(2) of Rome 1, and submits simply that, whether approached from an English law perspective or otherwise, the characteristic performance of the Undertakings is the carrying out of those Undertakings by the Defendants and that, in circumstances where the Defendants reside in England, English law must be the governing law.

57. Central to this submission is Mr Marshall's case that the Undertakings are capable of giving rise to a discrete, stand-alone contractual commitment which must be viewed in isolation. It was for this reason, as I understood it, that he made submissions to the effect that (i) as a matter of English law, there was no difficulty over consideration in respect of the stand-alone Undertakings; and (ii) the autonomous concept of contractual

obligations applicable to Rome 1 is not limited to obligations which are regarded as contractual by the domestic law of the forum (see Dicey & Morris at 32-60 and *Jakob Handte & Co v Societe Traitements Mecano-Chimiques Des Surfaces (TMCS)* [1993] I.L.Pr. 5 at para [10]). He contended that the Undertakings fell within the concept of an "obligation freely entered into by one party to the other" (*Jakob Handte* at [15]) and that in a unilateral contract there is only one party with a legal obligation such that "it is performance of that obligation which is characteristic of the contract" (See *Ark Therapeutics Plc v True North Capital Ltd* [2005] EWHC 1585 (Comm), per Mr Nigel Teare QC, sitting as a Deputy High Court Judge at [55], a case in which the judge held that there was a unilateral contract whose applicable law was English law in circumstances where the party who was to effect performance of the obligation and its central administration was in England).

58. I do not accept Mr Marshall's submissions on this point, which appear to me to ignore the Claimants' own evidence. First, from Mr O'Connor, to the effect that the Undertakings were given "in return" for the Pledge and the agreement recorded in the 28 August Email, and that "they were part of a package of agreements" (evidence which is entirely consistent with the White & Case email of the 28 August 2021 commenting on the "package deal" and the terms of the 28 August 2021 email itself). Second, from Ms Murray, that the Undertakings were "part of the package under discussion" and "given in return for the Valuer Principles". Third, from Mr Da Silva in the Lux Letter that "[t]hese undertakings were taken at the request of, and accepted by, the GP as part of a wider agreement between the GP and the Founders (amongst others) that included agreement on matters relating to a pledge securing the payment of sums due to Novalpina entities and a reasonable endeavours undertaking on certain matters relating to a valuation". Fourth, Mr Da Silva's evidence is echoed by Professor Philippe, who opines that a "cause to conclude" exists because the "objective cause" of the Undertakings was the Pledge given to the Novalpina entities and the agreement on valuer principles (an opinion which appears to render his view that it would be possible to view the Undertakings as unilateral undertakings somewhat otiose in circumstances where it is his own evidence that "the unilateral undertaking has first of all a subsidiary character and applies only when other legal techniques prove to be inadequate to provide a satisfactory solution").

59. Mr Marshall did not explain how his case as to the independent nature of the Undertakings was sustainable in light of this evidence (or indeed consistent with his skeleton argument at paragraph 25 which also referred to the Undertakings having been given "in return" for the Pledge together with the entry into an agreement as to the valuation principles). Further, I fail to see how his references to Dicey or to *Jakob Handte* (which was concerned with whether product liability claims were to be treated as contractual claims or tortious claims) take matters any further. Mr Marshall did not provide me with any authority for the proposition that where an agreement between parties exists, it is permissible for the court to ignore its true nature as identified in the evidence and contemporaneous documents and instead to set to one side various elements of that agreement so as to treat only one part of it as the contract for the purposes of Rome 1. The position on the facts was distinguishable in *Ark Therapeutics* owing to the clear finding in that case that there was a "unilateral contract".

60. I agree with Mr Strong QC, on behalf of the First Defendant, that it does not matter that an undertaking, viewed in isolation, could in principle fall within the autonomous concept

of contract under Rome 1, because the evidence in this case is clear that these Undertakings were part of a wider agreement and I must have regard to that agreement in considering the provisions of Rome 1. Furthermore I note the curious consequence of Mr Marshall's argument on the facts of this case: if he is right that the Undertakings are to be seen in isolation, then the habitual residence of the parties required to effect the characteristic performance of the Undertakings would govern the applicable law such that (i) English law would apply to the Founders who reside in England; (ii) Luxembourg law would apply to Group GP and the Carried Interest Partner owing to their status as Luxembourg companies and (iii) Guernsey law would apply to the Trustee of the Trust. This would be the case irrespective of the fact that the wording of the Undertakings is almost identical and that they were provided in the same circumstances in the context of a wider deal involving all of these parties.

61. Once the Undertakings are viewed as part of a wider contract (which I too shall refer to as the 30 August Agreement), then the question of the characteristic performance of that contract is seen from a different perspective. The Defendants submit, and I agree, that there is no characteristic performance of the 30 August Agreement. I accept Mr Hubbard's submissions on behalf of the Second Defendant that the 30 August Agreement is not a standard form reciprocal contract, where the performance by one of the parties takes the form of monetary payment, and the performance for which the payment is due generally constitutes the centre of gravity and the socio-economic function of the commercial transaction, i.e. the characteristic performance of the contract. It is not possible to isolate the obligation incumbent on one of the parties which is peculiar to the type of contract in issue, or which marks the nature of the contract. The Defendants' and NOAL GP's respective obligations under the 30 August Agreement are very different and are equally substantive such that it cannot be said that the performance of one or the other is the centre of gravity of the contract or defines the socio economic function of the contractual transaction.

62. In the circumstances, I accept the Defendants' primary submission that the applicable law cannot be determined by looking at either Article 4(1) or (2), and so must be determined having regard to Article 4(4) by reference to the country with which the contract is "most closely connected". Even if I am wrong, and the performance of the Undertakings alone does amount to the characteristic performance of the Contract, as the Claimants contend, the Defendants say that, alternatively, the contract that the Claimants are seeking to enforce is manifestly more closely connected to Luxembourg such that the so-called "escape clause" in Article 4(3) would apply.

63. Mr Strong drew my attention to Recitals 20 and 21 of Rome 1 which make it clear that in order to determine whether a contract is "manifestly more closely connected" for the purposes of Article 4(3) (Recital 20), or alternatively is "most closely connected" for the purposes of Article 4(4) (Recital 21), the test is the same: "account should be taken, *inter alia*, of whether the contract in question has a very close relationship with another contract or contracts". Mr Strong submits, and I agree, that the application of this test points clearly towards Luxembourg on the facts of this case.

64. In particular:

    i) The 30 August Agreement was a multi-party agreement entered into in the context of resolving a dispute about the ultimate control of a Luxembourg limited partnership – the Fund; i.e. which of two Luxembourg companies, Novalpina GP

or NOAL GP, was entitled to be General Partner, controlling the Portfolio Companies through Luxembourg entities holding shares in Master Luxco.

ii) An important aspect of this dispute concerned the entitlement of the Special Limited Partners (two of which were Luxembourg entities) to receive the Sponsor Commitment that was owing to them further to the exercise of the entitlement to require the incoming General Partner to acquire the Sponsor Commitment, together with the entitlement of the Carried Interest Partner to receive payment of its Removal Entitlement on a change of control pursuant to the terms of the LPA, an agreement governed by Luxembourg law.

iii) The provision of the Undertakings was accordingly part of a wider deal to facilitate the smooth transition between Novalpina GP and NOAL GP (both Luxembourg entities) pursuant to the provisions of the LPA. As the evidence shows, they were given in return for a reasonable endeavours undertaking in relation to the valuation exercise that would be needed to determine the value of the sums due, together with the Pledge. Even if the Undertakings are to be considered in isolation, it is impossible to get away from this accepted context.

iv) The Valuation Email set out the principles by which a valuation of the assets of a Luxembourg partnership would be carried out, making it clear that the valuation would be "in respect of the value of the Fund interest (i.e. not just the portfolio company valuations but any assets/liabilities at the level of the Fund itself)". The valuation would determine both the value of the Sponsor Commitment interest and the value of the investments in relation to the Removal Entitlement, as required by the LPA.

v) Insofar as it also forms an integral part of the wider deal, the Pledge is expressly governed by Luxembourg law in circumstances where it granted security over draw down rights in the Promissory Notes.

65. In my judgment, the above factors establish that the 30 August Agreement has a very close relationship with (i) the LPA, an agreement governed by Luxembourg law; and (ii) the Pledge, also governed by Luxembourg law and provided to secure payments due under the Promissory Notes. Of course these are not the only factors to be taken into account in considering close connection, but I also consider that the underlying factual matrix to which I have referred points strongly in favour of the "most close connection" (alternatively the "manifestly more close connection") being with Luxembourg. I note in this regard the existence of the litigation between the Founders before the Luxembourg Court which itself precipitated the decision of the Limited Partners to remove Novalpina GP as the General Partner, together with the changes in management of the Luxembourg holding companies consequent upon those court proceedings.

66. I reject Mr Marshall's oral submission that the purpose of the 30 August Agreement was to "get away from" or to "override" the LPA. On the contrary, the 30 August Agreement was, in my judgment, plainly designed to resolve issues arising out of the terms of the LPA and to facilitate the swift engagement of a valuer to determine the sums due under the LPA. Indeed, Mr Marshall's skeleton argument appeared to acknowledge this purpose describing the agreement reached between the parties as involving the "mechanics" of carrying out the valuation required for calculating the sums due in

relation to the Sponsor Commitment and the Removal Entitlement – both sums due pursuant to the provisions of the LPA.

67. Mr Marshall sought to contend that the Undertakings were most closely connected to the valuation process, a process formulated by English solicitors and involving an English valuer. However, that submission again seeks to view the Undertakings in isolation without reference to their proper context. When one stands back and considers the agreement of which the Undertakings form but one part, it seems to me to be incontrovertible that it was intended as a means of resolving the dispute over control arising under the LPA, such that the close relationship for which the Defendants contend between the 30 August Agreement (including the Undertakings), the LPA and the Pledge is made out. The Claimants themselves acknowledge that the Undertakings were given in return for the Pledge and it was the Claimants' case at the hearing that the Pledge formed part of the consideration for the Undertakings (albeit moving to a third party). Indeed it was the Claimants' contention in their skeleton for the hearing before Meade J that the Pledge was governed by Luxembourg law because it "related to rights under agreements governed by Luxembourg law". This is correct and to my mind reinforces the close connection of the 30 August Agreement (including the Undertakings) with the LPA and with Luxembourg law.

68. Further, I do not consider the identity of the solicitors acting for the various parties to be of any particular significance, albeit I note that whilst the Claimants and Mr Peel were represented by English solicitors, Mr Kowski and Novalpina GP were represented by Luxembourg firms. As for the identity of the valuers, whilst the English arm of KPMG had been identified as the potential valuer, it was never engaged.

69. Mr Marshall also sought to rely upon the fact that (i) the Fund's Investment Advisers were the English LLPs; (ii) the Defendants reside in England; (iii) according to Mr O'Connor "the Founders had previously pressed for all documents to be governed by English law"; and (iv) that the Promissory Notes were governed by English law. However, on analysis, I do not consider that these points undermine the Defendants' case as to a close connection.

70. The fact that the Fund's investment advisers were English LLPs has nothing whatever to do with the dispute which spawned the change of control of the Fund, which is not concerned with investment advice, past, present or future. Further, the fact that the Defendants reside in England (and form part of the team providing investment advice) does not itself establish a manifestly more close connection to England. In any event, the other parties to the agreement were all Luxembourgish (with the exception of the Trust). Mr Kowski disputes the suggestion that he ever pressed for documents to be governed by English law, but in any event (as Mr Strong points out) what a party may have wished or intended (rather than agreed) takes matters no further.

71. As for the Promissory Notes, I accept Mr Strong's submission that they have no real relevance to this question; they were issued unilaterally by the Fund and NOAL GP on 27 August 2021, further to the amendments to the LPA. They were not agreed to by the Defendants or by the entities to whom they were directed. Although they form part of the background dispute and so precipitated the need for the 30 August Agreement, they formed no part of that agreement – the Valuation Email makes no reference to the Promissory Notes. In any event, the Promissory Notes did no more than restate an entitlement to payment pursuant to clause 20.3.5 of the LPA (as described by Mr

O'Connor, they entitled the Special Limited Partners to "payment once a valuation had taken place pursuant to the LPA"). The validity of the Promissory Notes is in dispute, but even assuming them to be valid, they did no more than provide an English law promise to pay what was already due under Luxembourg law.

72. In summary, having regard to the factors identified by the Defendants, I consider that, for the purposes of Article 4(4) of Rome 1, the 30 August Agreement is most closely connected to Luxembourg and so should be governed by Luxembourg law.

73. Alternatively, even if the Claimants are right about the characteristic performance of the Undertakings, then I take the view that having regard to the operation of Article 4(3) of Rome 1, the Undertakings are manifestly more closely connected with Luxembourg than with England. In short, that is because, even assuming that it is correct to treat the Undertakings as independent and discrete, it is impossible to ignore their factual context as set out above (including their very close connection with the LPA and the Pledge), all of which, to my mind, point strongly in favour of Luxembourg as the governing law.

The Appropriate Forum

74. In circumstances where I have found that Luxembourg law is the governing law of the 30 August Agreement (of which the Undertakings formed part), I accept that this is obviously a relevant consideration in determining the issue of appropriate forum. Mr Strong drew my attention to the fact that "if the legal issues are complex, or the legal systems very different, the general principle that a court applies its own law more reliably than does a foreign court will help to point to the appropriate forum, whether English or foreign" (see Dicey, Morris & Collins *Conflict of Laws* at 12-034). Mr Marshall accepts that the proper law of the Undertakings is a factor, particularly "if the proper law is different from English law in a significant way".

75. In this case I have little doubt that the legal issues are likely to be complex and further, I accept Mr Strong's submission that, in light of the expert reports I have seen, it is clear that Luxembourg law regarding (at least) the enforceability of the Undertakings is governed by a very different analytical framework from that which would apply under English law. The explanation in the expert reports of the approach taken by the Luxembourg courts to the analysis of "cause", including their disagreement as to what the true "cause" of the agreement is and their views on when that cause would "disappear" such that the contract would become void ("caduc") plainly cannot readily be mapped onto the English law concept of consideration for contractual performance.

76. In addition to governing law, the Defendants rely on the following further factors in support of the proposition that there is a real and substantial connection with the Luxembourg Court.

77. First, that the proceedings which the Claimants seek to halt by injunction before this court are Luxembourg proceedings, brought by Luxembourg entities against other Luxembourg entities in relation to (a) the management of the Fund (a Luxembourg limited partnership) and (b) the payment of sums due under a Luxembourg law LPA and subject to an exclusive jurisdiction clause in favour of Luxembourg.

78. Second, that Group GP and the Carried Interest Partner, claimants in the second and fourth summonses in the Luxembourg Proceedings, also gave the Undertakings which

form the basis of the Claimants' application for injunctive relief. Where the experts on both sides confirm that these were part of a wider agreement between NOAL GP and the Founders, Mr Strong submits that accordingly, the claim against the Founders depends on Group GP's and the Carried Interest Partner's Undertakings being valid and enforceable, since none of the Undertakings could come into effect until they had all been validly released. Group GP is the direct parent company of Novalpina GP, the third claimant in the second and fourth summonses and the only claimant in the first and third summonses in the Luxembourg Proceedings. In the circumstances, say the Defendants, the claim against the Defendants in England is artificial and unnecessary because the Claimants' case that the Undertakings are valid and enforceable will have to be determined in the context of the Luxembourg Proceedings.

79. Furthermore, say the Defendants, if the Carried Interest Partner's and Group GP's Undertakings are valid and enforceable, those entities could more directly be ordered to stop the second and fourth summonses by the Luxembourg Court, just as an order against Group GP, Novalpina GP's parent company, could more directly stop Novalpina GP's pursuit of all four summonses.

80. During the course of Mr Marshall's submissions, I asked him whether the Claimants' defence to the Luxembourg Proceedings would be based on the Undertakings (i.e. the very issue arising in these proceedings) to which he responded "potentially, yes, if those proceedings are allowed to continue". In my judgment there can be very little doubt (in light of the expert evidence) that the defence that the Claimants will seek to advance in Luxembourg will be that the Undertakings were valid and enforceable such that there is no basis whatever for any challenge to their control of the Fund.

81. This is further supported by a letter sent by MWE to Brucher Thieligen & Partners (lawyers for the claimants in the Luxembourg Proceedings), on 3 March 2022 inviting them to discontinue the proceedings on grounds (i) that the Undertakings were given for good consideration and are enforceable and binding, and (ii) the Luxembourg Proceedings are in "clear breach" of the terms of the Undertakings ("at a fundamental level there can be no doubt that the commencement of the Proceedings on its face contravenes the terms of the Undertakings"). I note also that Mr Trevisan's evidence that NOAL GP could start proceedings in Luxembourg against all of the Carried Interest Partner, Group GP and the Founders to enforce their Undertakings was not disputed by the Claimants' experts.

82. In a nutshell, therefore, Mr Strong submits that in bringing proceedings before the English court, the Claimants are trying to persuade the English court to prejudge the outcome of the Summonses and to interfere in a dispute that is quintessentially Luxembourgish in nature, of which the Luxembourg courts are already seised. The Claimants invite the English court to make a decision by reference to an English standard and against individuals who are not even party to those Luxembourg Proceedings and who, it is said, have no power to instruct the entities who have brought those proceedings. He points out that unlike most anti-suit injunctions, the Claimants do not here rely on an exclusive jurisdiction clause to found their argument; there is no such agreement and no contractual reason why the dispute between the parties should be brought in England. Instead, the question arising before this court is the validity of the Undertakings and <u>where</u> that issue should be resolved in the absence of any indication in the 30 August Agreement.

83. Third, the Defendants point out that the editors of Dicey, Morris & Collins, *Conflict of Laws* note at 12-034 that, while the weight to be given to governing law as an indication of natural forum is case-specific, a number of "rules of thumb" have emerged, including that, in cases concerned with the internal management of foreign companies, there is a strong tendency to see the place of incorporation as the natural forum (see also *Konamaneni v Rolls Royce (India) Ltd* [2002] 1 WLR 1269 per Lawrence Collins J at [55]).

84. In response, Mr Marshall referred to the decision of the Privy Council in *Nilon Ltd v Royal Westminster Investments SA* [2015] B.C.C. 521, a case in which the Privy Council rejected (*obiter*) any suggestion that the appropriate forum for the proceedings was the BVI, essentially on the grounds that the dispute concerned an oral agreement to which Nilon was not a party (notwithstanding that there was a claim for rectification of Nilon's share register). Having referred to the fact that the Court of Appeal thought it relevant that matters concerning the organisation and administration of a company are generally treated as matters ideally suited to be determined in the location in which the company was formed (which in this case was the BVI), and having referred to a relevant extract from Dicey, Morris and Collins, Lord Collins said at [60]:

> "But this is not a case involving any of the domestic issues referred to. The relevant principles have been developed in the context of such issues as those arising between members, or issues relating to the powers of organs of a company, the appointment of directors, the extent of members' liabilities for debts of the company, or the right of shareholders to bring derivative actions…The issues in this case are not about the organisation or administration, or the internal management of a company. They are about the terms of an alleged contract to which it is not suggested Nilon was a party".

85. Mr Marshall submitted that the facts of the present case are similar, in that they concern, in his words, "battle of the interpretation and implementation of a contract", such that it would be inappropriate to apply a rule of thumb.

86. In my judgment, the facts of this case cannot be compared with the facts of *Nilon* with a view to escaping from the "rule of thumb". *Nilon* involved a contractual dispute between joint venture partners as to the entitlement to shares; it did not involve any issues of internal management, and there was, in any event, almost no connection to the BVI beyond the fact that Nilon had been incorporated there. Here, on the other hand, the Claimants are seeking to obtain orders from the court which would require the Defendants to cause or procure steps to be taken by the managers of the various Luxembourg holding companies, together with (or via) the Liquidator of Topco, by the exercise of their rights as shareholders. To my mind, this plainly involves interference in the internal management of Luxembourg companies and is obviously distinguishable from *Nilon*. In the circumstances, I accept that the nature of these proceedings is relevant to the question of *forum non conveniens*, although I also observe that, on its own, it is certainly not decisive (as Dicey, Morris & Collins also make clear).

87. Fourth, the Defendants address the points raised by way of response by the Claimants. Insofar as I have not already addressed these points above, I can deal with them now relatively briefly.

88. First the Claimants contend that the Undertakings are drafted in English, but the Defendants respond that they are short and that their translation (even if necessary) will cause no difficulty. By contrast the Luxembourg summonses (which are highly relevant to the relief sought by the Claimants) are lengthy and are drafted in French. Second, the Claimants say that the breach of the Undertakings is likely to have taken place in England, to which the Defendants say that the breach of Undertakings on which the Claimants rely is the institution of the Luxembourg Proceedings, which self-evidently took place in Luxembourg. Third the Claimants contend that it would be easier to enforce the Undertakings by committal proceedings in England, to which the Defendants respond that it is common ground that the Luxembourg Court is capable of making an appropriate order. Fourth, the Claimants say that the Fund's investments are global, to which the Defendants respond that the dispute is not about the investments.

89. In summary I do not consider any of the points raised by the Claimants as set out above to affect the Defendants' ability to satisfy their burden of proof. At best the points appear to me to be neutral and certainly do not undermine the Defendants' case.

90. The fifth and final point raised by the Claimants provoked a letter from Mr Trevisan which was provided to the court on the second day of the hearing, together with a letter in reply provided by Mr Da Silva on the third day of the hearing. In short, the Claimants submit in their skeleton argument that the principal witnesses in this case are located in England and places other than Luxembourg and that they are English speaking. They also point out that a great deal of documentary evidence is located in England and that virtually all of that evidence is in English. During his oral submissions, Mr Marshall therefore contended that all of this evidence would have to be translated if the proceedings were to continue in Luxembourg.

91. Having considered the letters from both experts with care, I do not consider that there is much between them on the essential issue. They agree that it is normal for the Luxembourg Court to receive documents in English without translation and that this is confirmed by case law. They also agree that where an issue arises as to the meaning of a document in English, the Court can order that the document or a relevant part of it be translated, but that the touchstone for translation will be doubt over meaning or interpretation. Mr Trevisan confirms that this has never happened in the course of his career, while Mr Da Silva has had experience of the court requiring a translation (although the example he provides from October 2020 concerns the re-opening of a debate to enable "one of the documents which had been submitted in English" (emphasis added) to be translated). As for witnesses, Mr Da Silva did not contest Mr Trevisan's view that where a witness's first language was English it was usual for his or her statement to be prepared in English, although there is a dispute between the experts over the likelihood that witnesses in this case would in fact be required to give evidence in the Luxembourg Court.

92. Having regard to all of the factors relied upon by the Defendants and set forth above, I consider that the Defendants have satisfied their burden of establishing a real and substantial connection to Luxembourg.

93. The obvious place for the issue of the validity of the Undertakings to be resolved is in the Luxembourg Court where it inevitably arises as a defence to the proceedings that have already been commenced there. In my judgment, it would be artificial to permit the Claimants (both Luxembourg entities) to proceed in England against the Defendants for

all of the reasons articulated by the Defendants. Furthermore, the 30 August Agreement is governed by Luxembourg law and the Luxembourg court would be much better placed to apply its own law on the particular facts of this case, which I have found also involve a claim concerning matters of internal management of a Luxembourg limited partnership in the form of the Fund.

94. I do not understand the expert evidence to suggest that the practicalities of litigating in Luxembourg are likely to be significantly different from the practicalities of litigating in England and therefore I regard arguments around documents and witnesses as a neutral factor; I would have thought (from the evidence that I have already seen) that the vast majority of the documents will be electronic, in any event. Whilst I acknowledge that the Defendants are resident in England I do not consider that the fact of their residence here (whether alone, or taken together with any of the other factors identified by the Claimants) is sufficient to undermine the extent of the connection to the Luxembourg Court, which, in my judgment, the Defendants have shown is clearly and distinctly the more appropriate forum. As I have already said, the Claimants do not seek to advance any special circumstances by reason of which justice requires that the trial should take place in England.

95. Before making a final decision on the stay application, I must however turn briefly to address the Claimants' submissions as to the application of section 25 CJJA 1982.

Section 25 CJJA 1982

96. In response to the grant of permission to the Defendants to argue the stay application, the Claimants wish to make out an alternative case by reference to section 25 CJJA 1982, in the event that the Defendants are successful in that application. The Claimants have provided an amended claim form and draft Order setting out the relief that they would seek if the existing claim were to be treated as an application for section 25 relief.

97. Section 25 CJJA 1982 provides as follows:

> "25.-Interim relief in England and Wales and Northern Ireland in the absence of substantive proceedings.
>
> (1) The High Court in England and Wales or Northern Ireland shall have power to grant interim relief where-
>
> (a) proceedings have been or are to be commenced in a 2005 Hague Convention State other than the United Kingdom or in a part of the United Kingdom other than that in which the High Court in question exercises jurisdiction; and
>
> (b) they are or will be proceedings whose subject-matter is within the scope of the 2005 Hague Convention as determined by Articles 1 and 2 of the 2005 Hague Convention (whether or not the 2005 Hague Convention has effect in relation to the proceedings).
>
> (2) On an application for any interim relief under subsection (1) the court may refuse to grant that relief if, in the opinion of the

> court, the fact that the court has no jurisdiction apart from this section in relation to the subject-matter of the proceedings in question makes it inexpedient for the court to grant it."

98. Mr Marshall's submissions may be briefly summarised as follows: in the event that the Claimants are wrong that England is the most appropriate forum, then they should be permitted to convert the proceedings into section 25 proceedings, just as occurred in *Fox v Taher* [1997] I.L.Pr.441. Although the Claimants have no ongoing proceedings in Luxembourg, it would be their intention in such circumstances to commence proceedings seeking equivalent relief in Luxembourg and so satisfying the conditions of section 25 – they would be prepared to provide an undertaking to the court to commence such proceedings, if required. Assuming the facts warrant the relief sought if substantive proceedings had been brought in England, the only question that would then arise would be whether there are grounds on which the court could find that an order would be "inexpedient" (see *Refco Inc v Eastern Trading Co* [1999] 1 Lloyd's Rep 159, per Morritt LJ at 171). As to that, the Claimants submit that an order would be expedient and they rely upon the guidance given by Millett LJ in *Credit Suisse Fides Trust SA v Cuoghi* [1998] QB 818 at 825H-829E.

99. In my judgment, as I observed in the short judgment I gave on the first day of the hearing, it is not open to the Claimants to ride these two horses at once; they must decide whether they wish to pursue the English proceedings or, alternatively, whether they wish to discontinue the English proceedings and commence fresh proceedings in Luxembourg. The purpose of section 25 is quite plainly to enable the English court to grant relief which is ancillary to, supportive of and in aid of proceedings on the merits elsewhere; it is not designed as a fall-back position in circumstances where substantive proceedings are already on foot in this jurisdiction. Whilst Mr Marshall says that it is possible for him to run a section 25 argument as an alternative, to operate only if I find against the Claimants on *forum non conveniens*, I fail to see how that works unless the Claimants (at the same time) relinquish any right they may have to appeal. While the Claimants continue to pursue substantive proceedings before the English court (or while there is a prospect that they will continue to pursue proceedings in the English court), they cannot at the same time assert that they intend to commence proceedings in Luxembourg.

100. The case of *Fox v Taher* does not, in my judgment, assist the Claimants. In that case, Mr Fox, a solicitor, claimed that he was owed a substantial sum by way of fees from former clients (the Taher defendants), many of whom were resident in Ireland. As a protective measure he brought proceedings against the Taher defendants' firm of solicitors (Orchards) in England claiming a lien on funds paid into their account, but he also applied for protective measures against the Taher defendants in Ireland and thereafter issued proceedings against them there. The Taher defendants sought an order that they be joined to the English proceedings, which was granted by the judge at first instance. When the matter came before the Court of Appeal, Brooke LJ observed that although the English proceedings against the solicitors had not originally been brought under section 25 CJJA 1982, there was:

> "nothing to prevent them from being treated thenceforth as proceedings for interim relief in the absence of substantive proceedings which that section permits. Whatever the original intention of Mr Fox he had made plain to the Taher defendants…that he wished the dispute to be determined in

> Ireland and to that end would apply…for leave to amend his summons…to seek an order staying all further proceedings in England pending the outcome of the proceedings commenced that day in Ireland. Thus there was no danger of conflicting decisions in England and Ireland for Mr Fox did not intend to pursue his proceedings in England and there was nothing and no defendant to compel him to do so."

101. I accept that this case is supportive of the proposition that, in appropriate circumstances, an application for relief may be converted into a section 25 application. However, contrary to Mr Marshall's submissions, *Fox v Taher* does not support the proposition that a claimant is entitled to advance a section 25 application whilst at the same time continuing to pursue an application in England. Mr Fox had expressly decided that he did not wish to pursue the proceedings in England, a decision that the Claimants in this case have not yet made. Mr Marshall showed me no authority supportive of the approach he invited the court to adopt in response to the Claimants' alternative application under section 25.

102. Even if I am wrong about that (and assuming for these purposes that the Claimants are able to get over the first hurdle of establishing an entitlement to relief if the substantive proceedings had been commenced in England – which in fact they are not, for reasons to which I shall turn briefly in a moment), I would not have exercised my discretion to grant relief under section 25 CJJA 1982, as I consider that it would be inexpedient to do so.

103. Unlike the *Cuoghi* case, the Claimants are not here inviting me to exercise my discretion so as to provide ancillary support to existing foreign proceedings; instead they are inviting me to make an order that would potentially have the effect of bringing the existing Luxembourg Proceedings to a standstill. Furthermore, as Mr Strong points out, the experts on both sides are agreed that while the Luxembourg Court has jurisdiction to grant interim relief, it would be unlikely to do so on the facts of this case, not least because it would only grant such relief in circumstances where there is no serious dispute on the merits. While the English court is not limited to exercising the jurisdiction available to the Luxembourg Court, I nevertheless consider this to be a significant factor militating against an order in the circumstances of this case. In Luxembourg the threshold for relief is set to a higher level than is the case in England and I have regard to the need for comity and to the fact that it is undesirable for the Claimants to be encouraged to engage in "forum shopping".

104. Furthermore, I consider that the interim relief sought by the Claimants would not give due weight to the fact that the role of this court on any application under section 25 (as Lord Bingham made clear in *Credit Suisse Trust v Cuoghi* at 832B) "is subordinate to and must be supportive of that of the primary court". As Millett LJ observed in the same case (at 827D-E) an ancillary jurisdiction "ought to be exercised with caution, and…care should be taken not to make orders which conflict with the court seised of the substantive proceedings".

105. In my judgment, the order sought by the Claimants would conflict with the progress of the Luxembourg Proceedings (which is already seised of summonses which will require consideration of the merits of the arguments as to the validity of the Undertakings) and thereby potentially create jurisdictional disharmony. That does not appear to me to be a legitimate application of section 25 and nor did Mr Marshall show me any authority in

which section 25 had been used to achieve similar ends. I should add that whilst it is, as yet, unclear whether any proceedings to be brought by the Claimants against the Defendants in Luxembourg would be fresh proceedings, or would be joined to the existing Luxembourg Proceedings, I do not consider that it makes any difference to the conclusions that I have reached, one way or the other.

106. In all the circumstances, I propose to order that the current proceedings be stayed. I dismiss the Claimants' application (made during the course of the hearing) for the proceedings to be converted into an application for relief under section 25 CJJA 1982.

The Application for Interim Relief

107. In light of my decision on the stay application, there is strictly no need to deal with the application for interim relief. However, in circumstances where it has been fully argued before me over the course of three full days, I shall nevertheless deal with it as succinctly as I can.

108. The Injunction sought is in both prohibitory and mandatory form, and I have summarised its proposed terms earlier in this judgment.

109. The parties were in dispute over the test to be applied to the application for interim relief, and a reading of Thomas Raphael's book *The Anti-Suit Injunction* at paras 13.37-13.56 explains why: the authorities themselves do not always appear to speak with one voice as to the test to be applied in any given case.

110. The Claimants submit that where the application is in substance one for an interim anti-suit injunction, designed only to stay the existing Luxembourg Proceedings rather than bring them to an end, the well-known test articulated in *American Cyanamid Co v Ethicon Ltd* [1975] AC 396 is to be applied, namely whether there is a serious issue to be tried. The Defendants, on the other hand, contend that, at least the validity and scope of the Undertakings in respect of which breach is alleged (and on which the application for relief is based) must be subject to "a high degree of probability".

111. Having considered the many authorities to which I was referred during the hearing with care, I agree with the Defendants that the appropriate test on the facts of this case is whether there is a high probability that the Undertakings are valid and enforceable such that the Luxembourg Proceedings were brought in breach of those Undertakings. I say that for the following main reasons:

    i) An application for an anti-suit injunction "always requires caution because by definition it involves interference with the process or potential process of a foreign court" (see *Deutsche Bank AG v Highland Crusader Partners LP* [2010] 1 WLR 1023, per Toulson LJ at [50(5)]). Particular caution is required in single forum cases, where the foreign proceedings which it is sought to prevent could not be brought in England (as it is common ground is the case here) – see *Oceanconnect UK Ltd v Angara Maritime Ltd* [2010] EWCA Civ 1050 per Gross LJ at [43].

    ii) The claimant in a case involving an exclusive jurisdiction clause or arbitration agreement must ordinarily demonstrate "a high degree of probability" that there is a clause governing the dispute in question. This is "a test of long standing and

boasts an impeccable pedigree going back to Colman J in *Bankers Trust Co v PT Mayora Indah* (unreported) 20 January 1999 and *American International Specialty Lines Insurance Co v Abbott Laboratories* [2003] 1 Lloyd's Rep 267" (see *Catlin Syndicate Ltd v Amec Foster Wheeler USA Corp* [2020] EWHC 2530 (Comm) per Jacob J at [33(vi)] relying on principles summarised by Cockerill J in *Times Trading Corporation v National Bank of Fujairah (Dubai Branch)* [2020] EWHC 1078 (Comm) at [38]). The test of high degree of probability was adopted in *Transfield Shipping v Chiping Xinfua Huaya Alumina* [2009] EWHC 3629 by Christopher Clarke J at [52]-[54] and affirmed by the Court of Appeal in *Ecobank v Tanoh* [2016] 1 WLR 2231 at [89]-[91] by Christopher Clarke LJ.

iii) The justification for the grant of the injunction in cases involving an exclusive jurisdiction clause and in cases involving an arbitration provision is the same: without the injunction, the claimant will be deprived of its contractual rights in a situation in which damages are manifestly an inadequate remedy (*The Angelic Grace* [1995] 1 Lloyd's Rep 87 at 96, per Millett LJ). But it is only where "the English court can point with confidence to a contractual promise not to litigate elsewhere that it can be justified in interfering with a party's right to bring its claim in such other place as might accept jurisdiction" (per Christopher Clarke J in *Transfield Shipping* at [53]). Borrowing from Christopher Clarke J's analysis at [52] in *Transfield*, it is one thing to enforce a clear agreement not to sue or one which on an interlocutory basis can be seen to be highly likely to be established, it is another to restrain a party from litigating in a foreign country where the position is less clear than that.

iv) If the "high probability" test can be satisfied, then the court will ordinarily exercise its discretion to restrain the pursuit of proceedings brought in breach of the exclusive jurisdiction or arbitration clause unless the defendant can show "strong reasons" to refuse the relief (see *The Angelic Grace* [1995] 1 Lloyd's Rep 87, and *Catlin* at [33(vii)]). Contrary to the Claimants' submissions, the principle in *The Angelic Grace* does not appear to come into play absent a high probability that there is a contractual promise (see Raphael, *The Anti-Suit Injunction* at 13.53 and *Catlin* at [36] per Jacob J to the effect that strong reasons "should be required once the court is satisfied, to a high degree of probability, that there is a valid English jurisdiction clause to which the parties have agreed").

v) Where a matter is justiciable in an English and a foreign court "the party seeking an anti-suit injunction must generally show that proceeding before the foreign court is or would be vexatious or oppressive" (see *Deutsche Bank AG* per Toulson LJ at [50(2)]).

vi) On the face of things, there is no reason to treat an agreement not to sue (in this case in the form of the Undertakings) as giving rise to a lower threshold test than applies to cases involving exclusive jurisdiction or arbitration clauses. An application for injunctive relief is brought in such a case to enforce the contractual entitlement and, absent confidence in its validity, it is difficult to see how the court can be justified in interfering with the right to bring a claim in another jurisdiction. As Clarke LJ observed in *National Westminster Bank v Utrecht-America Finance Company* [2001] CLC 1372 at [37] (an observation subsequently repeated by Cresswell J in *American International v Abbott Laboratories* [2004] Lloyds IRR 815 at [37]), it would be inappropriate to grant an interlocutory injunction to

restrain foreign proceedings at a time when it is "no more than arguable" that they were brought in breach of contract, because it could not be said that such proceedings were vexatious or oppressive.

vii) This appears to me to be particularly so where there are many factors connecting this case to Luxembourg and where there is no provision in the contract requiring proceedings to be brought in any particular jurisdiction – the Claimants do not suggest that England is the natural forum for these purposes. As Toulson LJ pointed out in *Deutsche Bank AG* at [50(v)] (albeit with reference to cases not involving an exclusive jurisdiction clause): "the principle of comity requires the court to recognise that, in deciding questions of weight to be attached to different factors, different judges operating under different legal systems with different legal policies may legitimately arrive at different answers, without occasioning a breach of customary international law or manifest injustice, and that in such circumstances it is not for an English court to arrogate to itself the decision how a foreign court should determine the matter. The stronger the connection of the foreign court with the parties and the subject matter of the dispute, the stronger the argument against intervention".

viii) There is authority for the proposition that where an interim anti-suit injunction is sought only to "hold the ring" for a short period of time pending a further hearing or trial of the injunction such that the grant of the injunction will not be practically determinative of the question of forum, the *American Cyanamid* test may be applicable. This would appear to explain the decision in *Apple Corps Ltd v Apple Computer Inc* [1992] RPC 70, on which the Claimants placed substantial reliance; Hoffman J held that the grant of the interlocutory injunction in that case would do no more than delay the foreign proceedings for 9 or 10 months. However, insofar as it might be suggested that *Apple* is authority for any wider proposition, then in my judgment it must be approached with considerable care; it was decided well before the first in the line of cases to which I have referred in (ii) above and so without the benefit of their collective analysis. Further it does not appear to have received any real recognition in those cases. Whilst I accept that the facts of *Apple* are in various ways similar to the facts of this case (involving, as it did, an agreement not to seek the cancellation of trade marks), unlike the Claimants in this case, the claimants in *Apple* had a contractual right to have the validity of the agreement determined in England and the English court had a juridical interest in deciding the issue. *Apple* is plainly distinguishable on the facts on these grounds alone.

ix) In addition to *Apple*, the Claimants relied upon the *obiter* observations of Males J in *Dreymoor Fertilisers v EuroChem* [2018] 2 CLC 576 at [48] and the cases of *Golden Ocean Group v Humpuss Intermoda* [2013] EWHC 1240 (Comm) per Popplewell J at [73] and *Youell v Kara Mara Shipping Co Ltd* [2000] 2 Lloyd's LR 102 per Aikens J at [93], albeit that in the latter two authorities there appears to have been no specific argument as to the appropriate test to be applied. In *Dreymoor*, there was no discussion of the appropriate standard, or why it might be limited in any particular case to the *American Cyanamid* test. Given the analysis I have set out above, I do not consider that these authorities affect the position.

x) In circumstances where the proposed injunction in this case is designed to achieve a stay of the Luxembourg Proceedings rather than their discontinuance, the

Claimants say that it falls within the "holding the ring" group of cases. However, I agree with the Defendants that the effect of an injunction in favour of the Claimants in this case would be finally to decide where the issue of the validity and enforceability of the Undertakings is to be determined. It would have the effect of interfering with the process of the foreign court, removing that issue (which would otherwise inevitably arise in defence to the Luxembourg Proceedings and so fall to be determined in those proceedings) from its purview, pre-empting its ability to examine the validity of the Undertakings and preventing the continuation of the proceedings on the merits of the Undertakings. These considerations appear to me to be similar to those identified by Christopher Clarke J in *Transfield* at [52] in determining that "the effect of the order" in that case was likely to be final in the sense that, "if granted until after an arbitral hearing, it will preclude the enjoined party from contending that there was no such agreement otherwise than before the arbitral tribunal and, if the tribunal rules that there was such an agreement, from disputing its existence". Accordingly I reject the submission that the grant of injunctive relief would do no more than delay the Luxembourg Proceedings. *Apple* is clearly distinguishable on this ground alone and, as I have already said, in *Apple* there was no issue over where the matter should fall to be determined: there was an exclusive jurisdiction clause and there was in any event no question that the trade mark proceedings could not be brought in England.

xi) In my judgment, anything less than the "high probability" test on the facts of this case would not give proper weight to the need for comity, nor would it address the need to establish that the foreign proceedings are in some way oppressive or vexatious.

112. In circumstances where I find in the Defendants' favour as to the test to be applied on the facts of this case, I did not understand Mr Marshall to contend that the Claimants' evidence meets the higher test. Accordingly, that is an end to the application.

113. I am in any event satisfied that the evidence does not establish a high probability of the existence of a valid agreement not to sue. The Defendants raise three grounds for maintaining that the Undertakings are unenforceable:

i) First, that they could only have come into force on each of the relevant parties providing the Undertakings confirming that they agreed the terms set out in the Valuation Email (whatever the governing law of the Undertakings). No valid confirmation was provided by the Carried Interest Partner (which acts by Group GP and requires a signature from an A Manager and a B Manager). The only email confirmation of the terms in the Valuation Email was from Mr Dumont, a B Manager at the time. Accordingly the Undertakings never came into effect because the conditions to release them did not occur. The expert evidence from Mr Trevisan supports this proposition. Although Professor Philippe suggests the potential for tacit ratification, he does so in circumstances where he has been instructed that the Pledge and Undertakings were released, an instruction which pre-supposes the very state of affairs which is in issue. Professor Philippe also identifies the potential for the Undertakings to be regarded as unilateral undertakings, but that is inconsistent with the evidence of Mr Lopes Da Silva to the effect that the Undertakings were part of a wider agreement. As I have already said, Professor Philippe expressly acknowledges that a unilateral undertaking analysis "only applies when other legal techniques prove to be inadequate to provide a satisfactory solution", but does not

explain why that might be the case here or why Mr Trevisan's analysis is inadequate. In light of the various expert issues in play, I certainly cannot determine that there is a high probability that this argument as to invalidity is wrong and that the Defendants are bound by the Undertakings.

ii) Second, that in any event the Undertakings are governed by Luxembourg law (which I have found to be the case) and are unenforceable under that law. The Defendants raise three separate reasons in their expert evidence as to why the Undertakings are not binding under Luxembourg law which may briefly be summarised as (a) lack of "cause", thereby rendering the agreement void; (b) failure of a condition subsequent; and (c) (if the agreement is not void on either of the first two grounds) then the failure by NOAL GP to comply with its obligations under the 30 August Agreement has the effect of suspending the Defendants' obligation to perform ("*exception d'inexécution*"). I need not address these in any detail, but suffice to say that they raise various issues of Luxembourg law on which the experts disagree or in respect of which, to date, the Claimants' experts have not sought to deal directly. The Claimants certainly cannot establish, to a high degree of probability that, under Luxembourg law, the Defendants are presently bound by the Undertakings, even if (contrary to their case as set out in (i) above) the Undertakings became binding in the first place.

iii) Third that if governed by English law, the Undertakings are unenforceable. This ground falls away in light of the findings I have already made.

114. Aside from the question of the validity of the Undertakings, the Defendants each raised arguments as to the issue of breach of the Undertakings, appearing to acknowledge in so doing that the threshold test on breach was likely to be "serious issue to be tried" (albeit on Mr Hubbard's submissions, still requiring some assessment of the Claimants' prospects of success). Whilst there were lengthy arguments from the parties on this issue, for present purposes, I can deal with it quite shortly.

115. The Claimants' case on breach is inferential (relying primarily upon the assertion that the Defendants are behind the Luxembourg Proceedings) and is hotly disputed by both Defendants in their various witness statements. I accept Mr Hubbard's submission that the assertion in Mr Marshall's skeleton to the effect that the Defendants have "shown a pattern of breaching undertakings and equivalent commitments elsewhere" does not appear to be made out on the evidence.

116. Insofar as the Claimants' case depends on breach of Limb (a) of the Undertakings (as set out in paragraph 82.1-82.2 of the Claimants' skeleton), I presently find it difficult to see how (a) the appeal of an order made in the context of the dispute between the Founders (to which Mr Lueken was merely "joined") or (b) the decision by the Founders to place Topco into voluntary liquidation, could possibly amount to a breach – whatever the appropriate test. At best these are allegations that steps are being taken to "set up the means" by which Limb (a) can be breached. However, I note that the Claimants rely on these factors in combination with the next allegation in paragraph 82.3, namely that of "causing / instructing / encouraging" the Luxembourg Proceedings to be issued. The high point of the Claimants' case on this, as described during Mr Marshall's submissions, was that the Defendants were allies in putting the July Managers in place and that without their input, the Luxembourg Proceedings would not have been commenced.

117. Both Defendants deny that they gave instructions for the commencement of the Luxembourg Proceedings and both say that they took proper steps to ensure a sufficient handover of control to NOAL GP.

118. Having considered the evidence carefully, I am satisfied that (although heavily reliant upon inference) there is a serious issue to be tried on this issue as against Mr Kowski. On the Claimants' view of events, as set out in Mr O'Connor's and Ms Murray's evidence, Mr Kowski initiated proceedings in the Luxembourg Court over Mr Peel's voting rights, removing those rights and thereafter installing the July Managers and directing their actions. Although the managers of the claimant entities in the Luxembourg Proceedings could in theory have commenced those proceedings without his input – and might well have done so in the best interests of those entities - there is a rather striking lack of evidence from any of them (or indeed from the Liquidator of Topco) as to the circumstances in which they chose to embark upon the Luxembourg Proceedings.

119. The Claimants' evidence from Mr O'Connor is that various activities of Mr Kowski identified in his statement "are entirely consistent with him being the driving force behind the recent Luxembourg proceedings" (emphasis added), evidence which appears to be supported by assertions made by Mr Peel to the Luxembourg Court and set out in the evidence of Ms Murray (albeit there is a dispute between the parties as to the weight I should give to that evidence). I note that much of Ms Murray's first statement places greater focus on Mr Kowski's conduct than on that of Mr Lueken, including his refusal to allow managers of Novalpina GP to act as they wished to, his pursuit of the Founders' proceedings involving Mr Peel, his silence on the issue of influence over the July Managers at the 9 July 2021 meeting (which he attended in person with the July Managers), his refusal to agree steps required for transition and the pressure he sought to assert over managers favoured by Mr Peel, including threats in relation to the outcome of the Founders' proceedings. Mr Strong did not make any submissions as to Mr Kowski's position on breach beyond those set out in his written submissions, which (whilst obviously contesting breach for various reasons) did not assert in terms that there was no serious issue to be tried.

120. However, I accept Mr Hubbard's submissions that I cannot be so satisfied in relation to Mr Lueken. Mr O'Connor's evidence appeared to soften once he had seen Mr Lueken's evidence. In Mr O'Connor's second statement he acknowledged Mr Lueken's "fulsome denials" of involvement in the Luxembourg Proceedings and he did not express the view that Mr Lueken was the driving force (or even a driving force) behind the Luxembourg Proceedings. On the contrary, his evidence in his second statement was that "I simply do not know what involvement Mr Lueken had at any particular point"; evidence which appears to relate to Mr Lueken's involvement in the appeal in the Founders' proceedings but (I agree with Mr Hubbard) goes far wider. Mr O'Connor focused in that statement on the approach of Mr Kowski "in particular" and I note that even Mr Peel's case in the Luxembourg Proceedings as recorded by Ms Murray, apparently focussed to a much greater extent on the conduct of Mr Kowski.

121. The high point of the case against Mr Lueken on Mr O'Connor's evidence appears to be that Mr Lueken "was aligned with Mr Kowski" such that, for example, he voted on 10 January 2021 to suspend Mr Peel's voting rights, that he was never willing to remonstrate with Mr Kowski or take a constructive tone in discussions about the July Managers or the proceedings between the Founders and that in November 2021 he "voluntarily joined"

Mr Kowski's appeal in the Founders proceedings (an appeal commenced several months previously). However, in my judgment this is insufficient to give rise to a serious issue to be tried that Mr Lueken was behind the instigation of the Luxembourg Proceedings. Equally insufficient is Mr Marshall's contention (i) that Mr Lueken was "an ally" of Mr Kowski in putting the July Managers in place and (ii) his very late reliance upon the inferences to be drawn from Mr Lueken's resignation on 21 January 2022. I agree with Mr Hubbard that Mr Lueken's support for a vote cannot support an inference that he caused, instructed or encouraged the Luxembourg Proceedings. Absent more concrete evidence, I also fail to see that adverse inferences can be drawn from his resignation in January 2022.

122. I observe that Mr Marshall's skeleton appeared to acknowledge this weakness as against Mr Lueken in paragraph 31 where it asserted that there were strong grounds to conclude the Defendants were responsible for issuing the Luxembourg Proceedings "at the very least in respect of Mr Kowski".

123. Insofar as the Claimants' case depends upon Limb (b) of the Undertakings and asserts a failure on the part of the Defendants "to stop" the Luxembourg Proceedings, I consider there to be a serious issue to be tried in relation to both Mr Kowski and Mr Lueken (albeit I accept Mr Hubbard's submission that where there is no issue to be tried against Mr Lueken on Limb (a) the hypothesis on Limb (b) must be that it is wide enough to include an obligation to stop proceedings that Mr Lueken has not himself started or procured). Mr Hubbard pointed to issues around the interpretation of Limb (b), in particular whether the obligation in Limb (b) concerned a once and for all process involving the transfer of control which had been completed, thereby bringing the Defendants' obligations to an end, an argument which appeared to me, on the terms of the Undertakings and the evidence to which my attention was drawn, to have force. However, whilst Professor Philippe's report was not entirely satisfactory on this point, he appears to be of the view that the Undertakings require cooperation "in the broadest possible sense" in order to allow the transfer of control of the Fund. Although very general and unsupported by reasoning, I am just about persuaded that this is sufficient to raise a serious issue to be tried under Limb (b). I was not persuaded that any of Mr Hubbard's additional submissions on breach of Limb (b) (whatever their ultimate prospects may be of succeeding at trial) undermined the existence of a serious issue to be tried.

124. In circumstances where I am now a long way from the central decision that I have made to grant a stay of these proceedings, I shall not go on to address the additional points raised by the Defendants as to whether an injunction would be granted under Luxembourg law (a question which is hotly disputed) the factors to be taken into account in the exercise of my discretion and the impossible or uncertain nature of the terms of the proposed Order. Those points have all been overtaken by the decisions I have already made. I would not have granted an injunction in the circumstances of this case where the "high probability" test has not been satisfied and the question of damage and balance of convenience does not, in any event, arise in relation to that test.

125. I dismiss the Claimants' application for interim relief.