Neutral Citation Number: [2019] EWHC 1747 (Comm)

Case No: CL-2016-000108 & CL-2018-000516

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
OF ENGLAND AND WALES
COMMERCIAL COURT (QBD)

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

Date: 05/07/2019

Before:

THE HONOURABLE MRS JUSTICE MOULDER

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Between:

(1) LIC TELECOMMUNICATIONS SARL
(2) EMPRENO VENTURES LIMITED

Claimants

-and-

(1) VTB CAPITAL PLC
(2) DELTA CAPITAL INTERNATIONAL AD
(3) MAZE SARL
(4) MILEN VELTCHEV
(5) VIVA LUXEMBOURG (LUXEMBOURG) SA
(6) SPAS ROUSSEV
(7) V TELECOM INVESTMENT SCA
(8) V2 INVESTMENT SARL

Defendants

-and-

V2 INVESTMENT SARL

Claimant

-and-

(1) VTB CAPITAL PLC
(2) DELTA CAPITAL INTERNATIONAL AD
(3) MAZE SARD
(4) MILEN VELTCHEV
(5) VIVA LUXEMBOURG (LUXEMBOURG) SA
(6) SPAS ROUSSEV

Defendants

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Mr S Rubin QC, Mr A Milner & Mr M Kasriel (instructed by **Gresham Legal Ltd**) for the **Claimants**
Mr T Howe QC & Mr D Caplan (instructed by **White & Case LLP**) for the **1st Defendant**
Mr C Orr QC & Mr S Lemer (instructed by **DAC Beachcroft LLP**) for the **2nd & 4th Defendants**
Mr J Nadin (instructed by **Mishcon de Reya LLP**) for the **3rd Defendant**
Mr G Chapman QC & Mr M Gregoire (instructed by **CMS Cameron McKenna Nabarro Olswang LLP**) for the **5th Defendant**

Hearing dates: 7, 8, 9, 13, 14 and 15 May 2019

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APPROVED JUDGMENT

Mrs Justice Moulder :

Introduction

1. This is the judgment on a number of applications in the context of Part 20 and Part 7 proceedings brought against a number of the defendants to the original proceedings on the basis that the decision to bring those proceedings was not duly authorised on behalf of the relevant company and/or the court has no jurisdiction and/or the proceedings are an abuse of process.

Background

2. The original claimants in claim no CL-2016-000108 are LIC Telecommunications SARL ("LICT") and Empreno Ventures Limited (together the "Original Claimants").

3. LICT holds a 43.3% interest in V Telecom Investment SCA ("V Telecom") and V Telecom's general partner, V Telecom Investment General Partner SA ("V Telecom GP"). An SCA is a limited partnership.

4. The remaining shares are owned as to 33.3% by Crusher Investment Limited ("Crusher") and 23.4% by third party minority shareholders.

5. V Telecom owns V2 Investment SARL ("V2"). V2 is a *société à responsabilité limitee* ("SARL"), a private limited company, comparable to a private company limited by shares under English law. It appears to be common ground that SARLs have comparatively greater flexibility than the form of public limited liability company (*société anonyme* ("SA")) in that the regulation under Luxembourg law is less detailed.

6. V2 is managed by a board of managers comprising:

   i) nominated by Crusher, Delta Capital International A.D. ("Delta") represented by Mr Veltchev and Maze SARL ("Maze") represented by Mr Bryan-Orr;

   ii) nominated by LICT, Coselux SARL ("Coselux") represented by Ms Cipriano and Europim SA ("Europim") represented by Mr Picco (together the "LICT Managers");

   iii) nominated by the minority shareholders, Mr Reitsma.

7. Maze acts as a manager of V2 pursuant to a directorship agreement dated 26 May 2015 (the "Directorship Agreement").

8. V Telecom is a Luxembourg limited partnership managed by the general partner, V Telecom GP which is a Luxembourg company. The directors of V Telecom GP are the same as the managers of V2.

9. V2 owned InterV Investments SARL ("InterV"). As part of a loan transaction (the "Bridge Loan") entered into between InterV and amongst others VTB Capital plc ("VTBC"), V2 pledged its shares in InterV as security. Following a default, VTBC enforced the pledge (the "Pledge") and sold the shares in InterV to Viva Luxembourg (Luxembourg) SA ("Viva Luxembourg").

10. The original proceedings (the "Original Proceedings") were commenced in February 2016. VTBC was the first defendant, Delta and Maze were the second and third defendants, Mr Veltchev was the fourth defendant, Viva Luxembourg the fifth defendant and Mr Roussev, a director of Viva Luxembourg, the sixth defendant, the Sevenths and Eighth Defendants are not relevant to the application before the court.

11. The Original Claimants alleged that the process by which VTBC sold the InterV shares was a sham designed to enable the 1st to 6th defendants' preferred bidder to acquire the shares at an undervalue.

12. A trial of certain preliminary issues was held before Waksman J (as he is now) in December 2017 (the "Preliminary Issues Trial"). Waksman J held inter alia that:

    i) the Original Claimants were precluded from bringing their claim for damages by reason of the rule of Luxembourg law preventing recovery by a shareholder of loss which is reflective of loss suffered by the company;

    ii) the Original Claimants were not precluded from bringing their claim for damages for the loss of a chance or opportunity to participate in the process for the sale of the InterV shares.

13. In July 2018 the LICT Managers, purportedly acting in the name of V2, issued an application (the "Part 20 Application") in the Original Proceedings for permission to bring Part 20 proceedings. In those Part 20 proceedings the LICT Managers allege (in the name of V2) that the process by which VTBC sold the InterV shares was a sham and the LICT Managers seek damages (in the name of V2) equal to the alleged undervalue at which the InterV shares were sold. In this judgment references to the "Claimants" are to the Original Claimants and/or as the context may require, the LICT Managers.

14. In August 2018 VTBC issued an application seeking the removal of V Telecom and V2 as defendants in the Original Proceedings (the "Removal Application").

15. The LICT Managers purportedly acting on behalf of V2 initiated Part 7 proceedings (the "Part 7 Proceedings") by which they sought the same relief as is sought under the Part 20 proceedings. The LICT Managers also made an application in the name of V2 seeking to have the Part 7 Proceedings consolidated with the Original Proceedings (the "Consolidation Application").

16. On 9 November 2018 Delta and Mr Veltchev, Maze, and Viva Luxembourg respectively, all issued applications (the "November Applications") seeking an order that:

    i) the Part 20 Application, the Part 7 Proceedings and the Consolidation Application be dismissed and/or struck out on the basis that:

        a. the Proceedings have not been properly authorised by V2; and

        b. the application constitutes an abuse of the court's process because it could and should have been brought in the Original Proceedings

ii) the court has no jurisdiction (or will not exercise its jurisdiction) over the claims made against Delta and Mr Veltchev, Maze and Viva Luxembourg respectively.

17. On 15 January 2019 the LICT Managers purported to pass resolutions on behalf of V2 and V Telecom GP to approve and/or ratify the commencement of the Part 7 Proceedings and the Part 20 Proceedings (together the "Proceedings").

18. Mr Roussev has not been served with the Part 20 Application or the Part 7 claim form or any of the applications and therefore did not appear before the court.

Evidence

19. The defendants relied on the evidence of Dr Kinsch, a practising lawyer in Luxembourg and an honorary professor of the University of Strasbourg. Dr Kinsch prepared a report dated 9 November 2018, and three supplemental reports dated 27 March 2019, 18 April 2019 and 30 April 2019.

20. The claimants relied on the evidence of Mr Thewes, a practising lawyer in Luxembourg and a lecturer at the University of Luxembourg. Mr Thewes prepared a report dated 18 January 2019 and two supplemental reports dated 27 March 2019 and 18 April 2019.

21. The experts also produced a joint memorandum dated 6 March 2019.

22. In order to resolve certain of the issues where there is a conflict in the evidence of the experts, it is necessary for the court to make some observations about the approach of Mr Thewes. Mr Thewes referred at one point in cross examination to being an advocate; it seemed to me that Mr Thewes was inclined to put forward arguments in defence of a proposition even if such proposition appeared to be contradicted by objective evidence and thus Mr Thewes appeared to be acting on occasions as an advocate for a particular position rather than providing objective evidence to assist the court. One particular example was his evidence as to whether the Luxembourg court would hold that a conflict of interest under Article 441-7 of the Luxembourg Company Law (the "LCL") applied only to a director having a "financial interest" or whether it would also apply to a functional conflict. It was difficult to follow Mr Thewes' arguments for a broader interpretation notwithstanding the clear language of Article 441-7 which refers expressly to a "financial interest", and his conclusion that he did not know what position the Luxembourg court would take. His response was lengthy and appeared to obfuscate rather than elucidate. Another example was his consideration of the Luxembourg and French law authorities on asymmetric jurisdiction clauses where he had failed to refer in his reports to certain cases even though he was aware of them, in circumstances where these were decisions which ran contrary to the opinions which he was expressing. Given the lengthy expert evidence which both experts had provided with extensive cross referencing to source material, I do not accept the explanation which Mr Thewes gave in cross examination that he sought to avoid burdening the court. As a result of the apparent approach taken by Mr Thewes, the court will exercise particular caution in evaluating the evidence of Mr Thewes. No such concerns arose in the evidence of Dr Kinsch and for this reason where the court has to resolve conflicts in the expert evidence the court is inclined to prefer the evidence of Dr Kinsch.

23. The parties referred to various commentators. In particular reference was made to the view of Professor Steichen in various editions of his book "Summary of Corporate Law". In cross examination Dr Kinsch described Professor Steichen as "an author of great authority which is indisputable given the number of court cases which cite him, an author who generally is logical and therefore rather trusted". Dr Kinsch also described him as "the best authority on Luxembourg company law". In the joint memorandum (paragraph 5) Mr Thewes described his book as giving "a good overview of the law". He accepts that it is "quite likely" that he (and another author, Winandy) will be cited by the Luxembourg courts but he states that it is not an indication that the judges feel bound in general to follow the views of Professor Steichen. He says that only the quality of the reasoning developed by an author to support his opinions is decisive.

Issues for the court

24. The hearing before me was to determine the Part 20 Application, the Removal Application, the Consolidation Application and the November Applications. As a result, the following issues arise for determination:

    i) Authority to commence the Proceedings;

    ii) Ratification of the Proceedings;

    (These raise a number of sub-issues set out in the Agreed List of Issues and dealt with below.)

    iii) Whether the court has jurisdiction in respect of the Proceedings;

    iv) Whether the Proceedings should be struck out as an abuse of process under the principle in Henderson v Henderson; and

    v) In relation to the Original Proceedings, the Removal Application and the Consolidation Application.

25. I have been greatly assisted by the detailed written submissions of the various parties. To the extent that some of the defendants were content to adopt the submissions for the second and fourth defendants, and I refer in this judgment to such submissions as being by counsel for the second and fourth defendants, it should be understood that I have dealt with them as submissions in common. Further to the extent that the judgment has not dealt with particular submissions I would stress that it is not necessary or practicable for a judge to deal with every submission and the fact that a trial judge has not expressly mentioned some piece of evidence does not lead to the conclusion that he overlooked it: *Staechelin v ACLBDD Holdings Limited* [2019] EWCA Civ 817 at [31] and [39].

November Applications - the legal test

26. The November Applications raise the issue of authority to commence/ratify the Proceedings.

27. In counsel's opening skeleton argument for the claimants, counsel appeared to acknowledge, without disputing, the proposition that this court would make a final

determination in relation to the authority issues (paragraph 30). However in oral submissions counsel for the claimants submitted that where there is a factual issue, such as abuse of a minority, it has got to be "clear" that the claimants were not right, in other words the court should take the claimant's evidence at its highest. Counsel submitted that if clause 32 of the SHA was found not to apply to the Proceedings so that prima facie one of Delta or Maze had to be present at the meeting at which the Proceedings were purportedly ratified in order for it to be quorate, the claimants' position is that there would have been a valid quorum had Delta and Maze not left the meeting abruptly. It was therefore submitted that the court should take the claimants' evidence at face value and infer that Delta and Maze left the meeting in a deliberate attempt to scupper the proposed resolutions by making the meeting inquorate and that was a clear abuse of rights.

28. Counsel for the second and fourth defendants submitted that the proceedings were unauthorised when commenced and were not validly ratified. As a result, the Proceedings are improperly constituted and should be brought to an end; they constitute an abuse of process and should be struck out or dismissed (*Aidiniantz v The Sherlock Holmes International Society Ltd* [2018] BCC 110 at [50] and *Airways Ltd v Bowen* [1985] BCLC 355 at 359). It was submitted that the issue of authority is effectively being determined as a preliminary issue and falls to be determined on the balance of probabilities, even though the issue is being determined before trial (*Zoya Ltd v Ahmed* [2017] Ch 127 at [65]):

> "it also does not mean that in dealing with the contention that the proceedings amount to an abuse of process in these grounds, the court approaches the evidential issues in the same way that it would approach a standard application to strike out a claim or a statement of case without a full trial. Where the issue is whether the proceedings are an abuse for want of authority the court must determine all relevant issues on the balance of probabilities, even though the questions are being determined before trial..".

29. It was submitted for the second and fourth defendants that on their case, the court did not need to resolve any questions of fact beyond those involved in determination of the content of Luxembourg law. The court heard oral evidence from the respective experts on Luxembourg law and disputed issues of law can be resolved in the usual way. The factual background so far as relevant is substantially agreed or otherwise clear from the documents.

30. For the reasons set out below, it has not been necessary to decide any disputed factual issues, other than matters of Luxembourg law. The issue raised by counsel for the claimants does not therefore arise and the court can determine the issue of authority on the balance of probabilities even though it is being determined before trial.

Authority to commence the Proceedings

Does clause 32 of the SHA apply to the Part 7 Proceedings and the Part 20 Proceedings in respect of each of the Part 20/Part 7 Defendants? (Issue 1)

31. It is common ground that the management of V2 and V Telecom is governed by their respective Articles of Association and by a shareholders' agreement dated 31 October 2012 (the "SHA").

32. The SHA is governed by English law.

33. Clause 32 provides:

> "Subject to applicable law and regulation, any right of action which a Group Company or the General Partner may have in respect of any breach or purported breach of any obligation owed to it by a Shareholder or any member of its Shareholder Group, and any action which a Shareholder or any member of its Shareholder Group may have in respect of any breach or purported breach of any obligation owed to it by a Group Company or the General Partner, may be prosecuted or defended by the members of the board of directors of the relevant Group Company or the General Partner other than those appointed by the Shareholder in question. Those directors shall have full authority to elect to pursue, not to pursue or to defend any such claim or to negotiate, litigate and settle any claim, or to exercise any right of termination, arising out of the breach or purported breach, and the Shareholders shall use their best endeavours to give effect to this clause 32 (Enforcement of Company's Rights)". [emphasis added]

34. It is common ground that under the SHA, V2 is a "Group Company", Crusher is a "Shareholder" and VTBC is a member of Crusher's "Shareholder Group".

35. Counsel for the second and fourth defendants submitted that Clause 32 does not apply to the Proceedings:

    i) None of the claims in the Proceedings are claims "in respect of" breaches of obligations owed to V2 by a shareholder or any member of its shareholder group. VTBC is not a defendant to the Proceedings and clause 32 does not apply where the shareholder or member of the shareholder group alleged to have breached an obligation is not a defendant to the proceedings and none of the defendants are themselves a shareholder or member of a shareholder group.

    ii) The claims against Delta and Mr Veltchev are claims "in respect of" obligations alleged to have been owed to V2 by Delta and Mr Veltchev, neither of whom is a shareholder or member of a shareholder group. They are not claims that can be characterised as claims "in respect of" an obligation owed by VTBC to V2.

36. Counsel for the claimants submitted that the right to bring the proceedings belongs to a "Group Company", namely V2, and those rights of action arise in respect of VTBC's breach of its duty under the Pledge in respect of the sale of the InterV shares.

37. I agree with the submission for the claimants that Clause 32 on the language is not limited to claims "against" shareholders or members of the relevant shareholder group but extends to any claim which is made "in respect of" a breach of an obligation by a shareholder.

38. The language used in clause 32 is "any right of action which a Group Company … may have in respect of any breach …of any obligation owed to it by a Shareholder or any member of its Shareholder Group." There is nothing in that language which would limit the clause to actions where the shareholder or member of the shareholder group alleged to have breached an obligation is a defendant to the proceedings.

39. Testing that interpretation against the other provisions of the contract and commercial common sense, it was submitted by counsel for Delta and Mr Veltchev that clause 32 must be given a narrow interpretation otherwise the fundamental principle whereby the group is to be managed by the boards of various companies appointed and operating in accordance with clauses 4 to 7 of the SHA, would be undermined.

40. Clause 4 of the SHA provides for the board to be responsible for the supervision and management of the general partner and its operations, for five directors to be on the board with two nominated by VTB (in effect Crusher), two nominated by LICT and one director nominated by the minority shareholders. I accept the claimants' submission that the purpose of clause 32 is to ensure that group companies which have suffered loss are able to obtain redress without being prevented from so doing by the shareholder which is at fault. It seems to me that this does not undermine the fundamental structure of the group being managed by the board of the relevant company. It provides a limited qualification to the operation of the board of the company in certain circumstances. Further there is no logic or commercial rationale for limiting clause 32 to actions against shareholders; it seems consistent with the commercial rationale behind clause 32 that a shareholder should not be able to block a claim against a third party where that arises out of a breach of an obligation owed by that shareholder. This is clearly demonstrated in the circumstances of this case where the third parties include the corporate director and the natural person representing that corporate director.

41. Accordingly, it seems to me that the natural meaning of the language used when considered in the factual context leads to a conclusion that clause 32 applies to the proceedings in respect of Delta and Mr Veltchev.

42. It was submitted for Viva Luxembourg that clause 32 does not empower the LICT Managers to bring proceedings against it. For the reasons set out above as to the meaning of clause 32, it is irrelevant in my view, whether the third party is a party to the SHA or itself a "shareholder" or "member of the shareholder group" where the claim arises out of a breach of an obligation owed by the shareholder and thus falls within the broad language "in respect of" any purported breach of an obligation owed by a shareholder.

Conclusion on clause 32

43. Accordingly, for these reasons, I find that clause 32 of the SHA does apply to the Proceedings in respect of each of the Part 20/Part 7 defendants.

Can claims against Maze and Delta by V2 only be authorised and initiated by the shareholder of V2? (Issue 4)

44. As far as the claims brought against Delta and Maze are concerned, it was submitted for the second and fourth defendants that these claims required authorisation from V2's shareholder, V Telecom, on the basis that:

    i) a claim by a company against its manager for breach of the manager's mandate may only be authorised by the company's shareholders, acting in general meeting;

    ii) this is a rule of Luxembourg public policy which cannot be derogated from by agreement (whether in the company's Articles of Association or otherwise).

45. It was submitted for the claimants that:

    i) In an SA an *actio mandati* can only be authorised by the shareholders but this rule does not extend to an SARL; the decision in *Azilis* does not form part of the reasoning and would not be followed by a Luxembourg court;

    ii) If it is a rule of public policy, it can be waived and this has been done in clause 32 of SHA permitting proceedings to be brought unilaterally and without shareholder approval.

46. It is common ground between the experts that the claims against Delta and Maze are properly characterised as *actiones mandati* as a matter of Luxembourg law (paragraph 11 of the joint memorandum). As agents, directors and managers are contractually liable towards the company for breaches of the reasonable standard of care that they owe to the company as well as for any misconduct in the management of the company's affairs. The action for such breaches is known as the *"actio mandati"*. Liability of directors and managers to the company is governed solely by the principles of contractual liability, governed by the rules of Article 444-9 (as applied to SARLs by Article 710-16) of the Luxembourg company law ("LCL").

47. It is also accepted by the claimants that in an SA, an *actio mandati* can only be authorised by the shareholders (paragraph 16.1 of the claimants' closing submissions). The issues which fall to be determined are therefore in essence:

    i) Does the rule that an *actio mandati* can only be authorised by the shareholders apply to SARLs as well as SAs?

    ii) If such rule does exist, is it a rule of public policy?

    iii) If it is a rule of public policy can it be waived by the SHA?

Does the rule apply to SARLs as well as SAs?

The Luxembourg authorities

48. In *Cegelec* (7 March 2007) the plaintiff company, an SA, brought an action against its former director. The defendant in that case submitted that the claim was inadmissible on the grounds that there was no decision by the general meeting which authorised the company to exercise the *actio mandati*. The court held the claim inadmissible as there was no decision of the general meeting authorising such action. The District court of Luxembourg said:

> "the general meeting [of shareholders] controls corporate action for damages against directors, either to initiate them, or to settle them… In fact, the general meeting is the most direct emanation of the company, and is conflated with it; it is the meeting which appoints the directors, and it is to the meeting they must report, at specific times, regarding their management."

49. The court also said that if the decision to bring an *actio mandati* against the company's present directors fell within the competence of the directors themselves it would in all probability run into practical difficulties on the basis that "it is hardly conceivable that a management organ acts against itself".

50. In *AAA v BBB* (26 October 2011) the company, an SA, brought an action against the former director of AAA. In its appeal AAA submitted that the board of directors acted in the interests of the company and consequently had no need for a special deliberation of the general meeting of shareholders in order to initiate the action. The Luxembourg Court of Appeal stated:

> "it is a matter of principle that the company gives mandate to its directors to represent it and act on its behalf. It is to the principal, and the principal alone, that the representative must report for the execution of his mandate… and in principle the *actio mandati* belongs to the principal."
>
> "It is incumbent upon the general meeting of shareholders to decide whether to institute liability action against the directors. It is the most direct expression of the company, it can be said to be one with it, and it is moreover to the general meeting that the representatives have to report for their management at determined periods. The intervention of the general meeting is therefore necessary to authorise the institution of the action" [emphasis added]

51. In a decision of 26 February 2015, the Luxembourg district court declared a claim by a SA against its former CEO inadmissible on the basis that an *actio mandati* was only admissible where a decision of the shareholders' annual general meeting authorised the company to execute it. The court stated:

> "the company is free to choose whether or not to execute *actio mandati*. It has the right to proceed with it or renounce it as it sees fit, on the sole condition that renunciation is not to the detriment of its creditors. Whatever its decision, the involvement of the shareholders annual general meeting is required; it can decide to take legal action or decide to renounce it."

52. The decision in *Sudinvestments* (17 February 2016) concerning another SA contains statements to similar effect.

53. In *Azilis* (20 December 2017) the action was brought by the sole shareholder of the company, a SARL, against its managers for mismanagement. The defendants asserted that the plaintiff did not have standing to bring the action as the shareholder no longer had the voting rights. The plaintiff argued that it was bringing an *actio mandati* and thus the action was brought by the company itself. The plaintiff submitted that the right of shareholders to implement the corporate action constituted a fundamental right. However the court held that Luxembourg law did not make the bringing of the corporate action by a sole shareholder deprived of his voting rights a fundamental principle. The court concluded that the claim was inadmissible by the sole shareholder following its loss of voting rights.

54. The Luxembourg district court stated:

> "the action for liability against directors for faults committed under their management lies in the hands of the company alone. It is in fact the company that confers a mandate on its directors to represent it and act in its name. It is to the principal and the principal alone that the agent must report on the execution of its mandate; the *actio mandati* therefore belongs to the principal…
>
> It is the general meeting that is in control of the corporate action for damages against the directors, either in order to initiate that action or to settle…
>
> The shareholders general meeting has the monopoly on the corporate action and decides on its initiation following a vote at a meeting passed on an ordinary majority, since the general meeting is the company's most direct emanation, it is merged with it and it is the general meeting that appoints the directors; and it is to the meeting that the latter must, at specific moments, report on their management."

55. In his Summary of Corporate Law (page 307) Professor Steichen states:

> "The annual general meeting, <u>which alone in a company has the power to take legal action</u>, may resolve to do so following an absolute majority vote. In the absence of such a resolution adopted by the AGM, the legal action will be inadmissible, because only the person who has suffered the loss may take action. "

56. Professor Steichen cites as authority for this position the decision of the Luxembourg court of 26 February 2015. In a footnote to that paragraph he states:

> "the mandate contract exists between the company and the management, not between the shareholders and the management. The fact that the decision to take legal action rests with the general meeting is part of public policy concerning companies. Therefore, one may not contractually make the taking of corporate legal action subject to prior authorisation by specific category of shareholders. The same applies to clauses which waive in advance the exercise of legal action."

57. In a footnote in his Summary of Corporate Law (page 307) Professor Steichen dealing with the *actio mandati*, also states:

> "There is no equivalent provision on this subject concerning either [SARLs] or unlimited liability companies. It is however necessary to generalise the scope of the rule, extending it to all forms of companies."

58. Counsel for the claimants submitted that the latter translation is incorrect and that the literal translation is "there is however space for generalisation" or as translated in a previous edition "it is however possible to generalise".

59. In their commentary (2015), the writers, Sabatier and Herat, dealing with the liability of company directors note that they will not draw a distinction between the rules governing the joint-stock company (a SARL) and the public limited liability company (a SA) stating that the distinction "has limited relevance in this regard."

Submissions

60. Counsel for the claimants submitted that:

i) the footnote in Steichen (cited above) merely states that there is no equivalent provision concerning SARLs; and

ii) the comments in *Azilis* are no more than obiter dicta and would not be followed by a future Luxembourg court.

61. Counsel for the second and fourth defendants submitted that they relied on the extract from *Steichen* quoted above and the *Azilis* case as well as:

i) a consistent line of case law, albeit on SAs, but the reasoning of all of those cases applies to SARLs;

ii) Luxembourg and Belgian commentary confirming that the *actio mandati* rule is one of general application to companies;

iii) the acceptance under Luxembourg law that the rules concerning liabilities of directors of an SA and the managers of a SARL are assimilated; and

iv) the lack of any coherent rationale for distinguishing between SAs and SARLs as regards authorisation of the *actio mandati*.

62. Counsel for the second and fourth defendants accepted that the decisions (other than *Azilis*) concerned an SA but submitted that none of the reasoning in those cases turned on any peculiarity of an SA as opposed to a SARL. The reasoning was based on the logic underlying the rule, in particular that:

i) the power to bring a claim for breach of a director's mandate logically lies with the general meeting of shareholders by whom the director is appointed and to whom he is obliged to report;

ii) it is logical to vest the power to bring claims for liability against a director in the same organ that has power to discharge the director from liability;

iii) vesting power in the general meeting of shareholders ensures that the incumbent management cannot impede the institution of claims against current or former colleagues;

iv) Article 444-1 gives the general meeting of shareholders the power to appoint special agents to bring the *actio mandati* against a director and confirms that the power to decide upon the action is vested in the general meeting of shareholders; and

v) vesting exclusive competence in the general meeting of shareholders accords with a clear separation of powers under Luxembourg company law.

Discussion

Does it apply to SARLs? Is it the law that only the shareholders can authorise an action?

63. Dr Kinsch states that the "rationale" for the rule giving the power to exercise the *actio mandati* to shareholders is expressed in various cases as being inherent in the structure of a company with the collectivity of shareholders giving mandate to the directors or managers to manage the company. He states:

> "from this it is deduced that only the shareholders can decide whether or not to bring an action for mismanagement on behalf of their company"

64. Mr Thewes expressed the view (paragraph 70 of his report) that the decisions in *Cegelec*, *AAA* and *Sudinvestments* were wrong, however he accepted that "given the consistent line of decisions to the effect that actions against the directors of an SA are admissible only if they are brought at the initiative of the general meeting of the shareholders" the rule exists. However, he was of the view (paragraph 76 of his report) that this "judge made rule" restricting the authority to initiate proceedings to the general meeting did not apply to SARLs. His reasoning was that there was no statutory basis for the rule and Article 444-1 does not state that the right to initiate proceedings belongs exclusively to the shareholders. He did not accept that the *Azilis* judgment confirmed that the rule reserving the authority to bring proceedings to the general meeting was applicable to SARLs and stated that the judgment did not

address the question of a "monopoly" of the general meeting. Mr Thewes stated (paragraph 15 of the joint memorandum) that the paragraphs now relied upon in the *Azilis* judgment were of "no relevance" to the case before the Luxembourg district court and his "suspicion" was that the sentences were copied from a judgment given in an unrelated case.

65. Mr Thewes suggested in his report that the Luxembourg courts had erroneously relied on Belgian case law, unaware of a change in Belgian statute in 1991 expressly attributing the authority to initiate corporate actions to the general meeting. However, Mr Thewes acknowledged in cross examination that the Court of Appeal in *AAA v BBB* made reference to the criticism of commentators Van Ryan and Ommeslaghe of the Belgian law case law in its statement that:

> "the board of directors would not have sufficient powers to make a similar decision with regard to former directors; it represents the company before third parties, but does not represent it before itself"

Mr Thewes said that the court did not say that they were aware of the controversy and balanced the arguments. However, in my view his opinion as to any error on the part of the Luxembourg courts in this regard was not made out.

66. I accept that there is no general rule according to which the organisation of an SARL is modelled after the organisation of a SA and SARLs are more flexible corporate forms, however this does not determine the issue as to whether or not this particular rule applies equally to SARLs. In my view there is no basis for drawing a distinction between SAs and SARLs when one looks at the rationale as expressed in *Cegelec* for the action lying in the hands of the shareholders. The court stated:

> "the liability action against the directors for faults committed in their management is in the hands of the company alone. It is in fact the company which authorises its directors to represent it and act in its name. It is to the principal and the principal alone who the representative must report on the fulfilment of his mandate; consequently the *actio mandati* is the responsibility of the principal…" [emphasis added]

67. There is nothing in the flexibility inherent in SARLs which would contradict or negate the analysis in *Cegelec* of the company as the principal and the directors (or managers) as its representative. The rationale for requiring a decision of the shareholders, namely that it is the general meeting that appoints the directors and to whom the directors report, would appear to be of equal application to the constitution of a SARL.

68. I accept that the paragraphs now relied upon in the *Azilis* judgment were not part of the ratio and were therefore obiter but I do not accept that they were of "no relevance" to the case before the Luxembourg district court such that this court should disregard them. I further note the approach of the commentators Sabatier and Herat (referred to above). As a civil law jurisdiction it is common ground that Luxembourg does not have the doctrine of precedent that exists under English law. However the evidence of Dr Kinsch is that cases are regarded as "authoritative" to the extent they are in

accordance with the general principles of Luxembourg law and with applicable legislation (paragraph 12 of his first report). In his report Mr Thewes (at paragraph 13) states that:

> "the status of case law is similar to that of legal doctrine. Both influence judges without binding them."

However he accepted (at paragraph 14) that there was:

> "nevertheless …a certain continuity in case law; if a given issue has been addressed in a certain manner by a court, down the line other judges may refer to and be influenced by it."

On balance it seems to me that on this issue a Luxembourg court would adopt the approach taken by the Luxembourg courts in relation to a SA, and in relation to a SARL, in *Azilis*.

69. As to whether, if the power to bring the action is vested in the general meeting in a SARL, the power to exercise the *actio mandati* is vested exclusively in the shareholders, it was accepted for the claimants that such power is vested exclusively in the shareholders in a SA.

70. Article 444-1 states:

> "The general meeting which has resolved to exercise the corporate action provided for by Articles 441-9, 442-10,442-16 and 443-2, subparagraph 3, against the directors, the members of the management …may entrust the implementation of their resolution to one or more agents."

71. This therefore gives the general meeting of shareholders of a SA the power to appoint special agents to bring the *actio mandati* against a director. Whilst it does not state expressly that the power to decide upon the action is vested only in the general meeting of shareholders, it provides support for that proposition and appears to have been the view taken by the court in *AAA v BBB* (dealing with the preceding provision Article 63 which is now Article 444-1).

72. Article 444-1 does not by its terms apply to a SARL and in my view provides little assistance on that issue.

73. However, I see no good reason why that power would not be exclusive in the case of a SARL: the reasoning in the judgments that it is inherent in the structure of the company that the company is the principal and only the shareholders on behalf of the principal can decide whether or not to bring an action for mismanagement against the company's representatives i.e. its directors or managers holds good for a SARL. Vesting power in the general meeting of shareholders ensures that the incumbent management cannot impede the institution of claims against current or former colleagues.

74. Whilst I accept that the court in *Azilis* was concerned with the question of whether a sole shareholder of a SARL deprived of his voting rights could bring an action, and

not with whether or not there could be a concurrent decision by the board or by individual managers, it seems to me that the statements of that court are clear that the shareholders in general meeting "has the monopoly" on the corporate action. It would in my view be inconsistent with the analysis of principal and the directors/managers as agents reporting to the principal to find that there was scope for an action to be brought by the board or individual managers.

75. Further the view advanced by Mr Thewes that the decision in relation to the *actio mandati* may be taken either by the company's managers or by the shareholders is according to the evidence of Dr Kinsch contrary to a "fundamental principle of Luxembourg company law". The evidence of Dr Kinsch was that Luxembourg company law is based on "the clear attribution of powers among the various corporate organs, not on the confusion of powers which may indifferently be exercised by different organs" (paragraph 15 of his supplemental report). Dr Kinsch said that, apart from cases where the LCL provides, there is no flexibility in the rule of company law governing the attribution of powers among the company's organs. Dr Kinsch said that the existence of the separation of powers is reflected in legal provisions including Article 710-15 (1) which provides:

> "Each manager may take any actions necessary or useful to realise the corporate object, with the exception of those reserved by law or the articles to be decided upon by the shareholders…" [emphasis added]

76. This view of the separation of powers is supported by Professor Steichen in his Summary of Corporate law (Sixth edition) at page 292 where he stated:

> "directors cannot grant themselves the powers granted by law to shareholders meetings or to another entity (such as an auditor). There is a clear limitation; where the law itself grants exclusive competence to another corporate entity, it follows that the action in question is unrelated to the management of the company in a broad sense…"

Is it a rule of public policy? If it is a rule of public policy can it be waived by the SHA?

77. In *Cegelec* the court held that the fact that the general meeting decides to bring the company action formed part of company public policy and referred to Professor Steichen's "*Summary of Corporate Law*".

78. In *Azilis* the court observed that:

> "Luxembourg law considers the fact that the decision to bring the corporate action belongs to the shareholders meeting, forms part of corporate public policy"

and referred to Professor Steichen's "*Summary of Corporate Law*" (fourth edition).

79. Mr Thewes accepted in cross examination that the courts have stated in very clear terms that the fact the shareholders have the power to decide upon the *actio mandati* forms part of corporate puvivblic policy.

80. It was submitted for the claimants that it is a rule of "protective" public policy which can be waived by the group which it is intended to protect i.e. the shareholders. Accordingly, it was submitted that it does not apply in this case because the shareholders agreed in clause 32 that the Proceedings could be brought by the managers unilaterally and without further shareholder approval.

81. It was put to Dr Kinsch in cross examination that there are different types of public policy and that public policy which is designed to protect the shareholders and the company can be waived by agreement on the basis that the public policy is to protect the company from boards of directors who will not sue themselves. Dr Kinsch rejected this on the basis that there is an organisational rule of the company which is there to define the powers of various organs and those rules are considered rules of public policy because companies are business organisations which must work according to predictable rules. Dr Kinsch said that this was a notion that was in Steichen and in all the cases.

82. It was also put to Dr Kinsch in cross examination that there is a distinction between "directive" public policy and "protective" public policy (a submission repeated in closing submissions for the claimants). Dr Kinsch said that protective public policy is essentially the protection of weaker parties and he did not consider that rules such as *actio mandati* being attributed to shareholders is a matter of protective public policy. Dr Kinsch was asked whether there was any section of Professor Steichen's work which he relied on to show that it was not feasible for the shareholders in the company together to allow the board in addition to the shareholders to take action. Dr Kinsch referred to Steichen's Summary of Corporate Law (6th edition) at pages 24 to 26 in particular where it stated:

> "public policy can also derive from the general principles of company law. These principles are not fixed by law but by case law: the hierarchy of bodies and the separation of powers…"

Dr Kinsch said that "the hierarchy of bodies" was a strange English translation but should be understood to mean separation of powers which is a general principle of corporate law.

83. In the joint memorandum (at paragraph 19) the experts stated that a shareholders' agreement could not override public policy/public order rules of Luxembourg company law. If a clause of the shareholders agreement is incompatible with the rule of public policy/public order then the clause becomes invalid.

84. Mr Thewes has since sought to resile from that position. In cross examination Mr Thewes said that although he was aware that Luxembourg court decisions on the *actio mandati* have confirmed that the rule is one of corporate public policy, he said that none of the cases was about shareholders agreements. He therefore said that there was no case law on the specific question.

85. Mr Thewes provided nothing of substance to support his change of position and in considering his evidence, I take into account the general observations which are made above in this judgment about the court's approach to his evidence.

86. Accordingly, in my view, based on the case law and the views expressed by Professor Steichen, a Luxembourg court would hold that the rule (that the *actio mandati* is attributed to shareholders of a SARL exclusively) is a rule of public policy and that it is a principle of public policy relating to the corporate separation of powers which cannot be waived by the shareholders.

Conclusion

87. For the reasons discussed I find that:

i) in a SARL the power to exercise the *actio mandati* is vested exclusively in the shareholders;

ii) the rule that the *actio mandati* is attributed to shareholders of a SARL exclusively is a rule of Luxembourg public policy which cannot be waived; and

iii) the claims against Maze and Delta by V2 can only be authorised and initiated by the shareholder of V2, V Telecom.

Can claims against Mr Veltchev by V2 only be authorised and initiated by the shareholder of V2? (Issue 5)

88. It was submitted for the second and fourth defendants that:

i) The rules for a SA are clear that the same rules as govern claims for liability directly against a corporate director apply to the permanent representative;

ii) Whilst there is no express provision in the LCL which extends the rule to SARLs the courts could do so;

iii) There is good reason to apply the same rule so that managers cannot impede claims against other managers or circumvent the requirement for shareholder authorisation of claims against corporate managers;

iv) By analogy with the decision of the court in *Hellas Telecommunications* (Lux DC 23.12.2015) where the court held that a discharge of the corporate manager of an SCA also discharged the representatives of the corporate manager, one should conclude that the power to authorise proceedings against the representative of the corporate manager should lie with the shareholders; and

v) If shareholders have the power, it must be exclusive given the separation of powers under Luxembourg law.

89. It was submitted for the claimants that:

i) there is no Luxembourg authority on the question of which corporate organs have power to authorise a claim against permanent representatives of an SA and the courts have not considered the position in relation to a SARL;

ii) an action against a representative of a corporate manager of a SARL should be treated as permitted applying the principle that "all that is not forbidden is permitted"; and

iii) the case of *Hellas Telecommunications* is about the effect of a discharge of liability to a corporate manager in relation to tort claims brought against the permanent representatives of that corporate manager and is irrelevant to the facts of this case because there has been no discharge of liability.

90. The evidence of Dr Kinsch (paragraph 44 of his report) is that although a permanent representative of a corporate director of an SA is subject to the same liability as if he exercised the mission of the director in his own name, the rule in question does not apply to SARLs. The fact that there is no such reference is not due to a "legislative oversight" but to a conscious decision of Parliament not to extend the obligation to appoint a representative to corporate managers of SARLs. The Parliamentary materials (which the experts agree are an admissible aid to construction of the LCL) show that the regime for the official appointment of permanent representatives was not extended to SARLs to avoid burdening SARLs with the obligation to appoint a permanent representative, it was not motivated by any consideration of which of the SARL's corporate organs had the power to initiate claims against a representative of a corporate manager.

91. I accept the submission that there would appear to be good reason to apply the same rule to SARLs so that managers cannot impede claims against other managers or circumvent the requirement for shareholder authorisation of claims against corporate managers and there was nothing in the legislative background which militates against this conclusion.

92. Mr Thewes' evidence was that the decision of the court in *Hellas Telecommunications* was not relevant in this case because Delta, the corporate manager, is a Bulgarian company. I do not accept this evidence. In my view (as stated by Dr Kinsch (paragraph 64 of his supplemental report)) the issue of which organ of the Luxembourg company has power to bring proceedings against the representative of the corporate manager is a matter of Luxembourg law which is independent of the internal organisation of the corporate manager.

93. Mr Thewes also sought to distinguish the position of the corporate manager and the representative on the basis that the relationship to the company in the former was contractual and in the latter, was tortious. However, in his evidence in cross examination dealing with the decision in the *Hellas* case, Dr Kinsch pointed out that the question for the Luxembourg court in that case was whether the natural persons, the representatives of the corporate manager, could rely on the waiver which was given to the corporate manager. Dr Kinsch said that if you were to take a "technical analysis" the answer would be that the representatives could not rely on it because the mandate existed only between the company which had granted the waiver and its corporate manager. However, the court decided otherwise and decided that the natural persons could also rely on the waiver granted to the corporate manager which they merely represented. Dr Kinsch said that:

> "that is something that, in my view is important because it shows that it's not a matter of strictly legal analysis between which persons does the mandate exist."

Conclusion

94. For the reasons discussed, I find that the claim against Mr Veltchev can only be authorised and initiated by V2's shareholder, V Telecom.

The decision by the LICT Managers in July 2018 to bring the Proceedings: Claims against Viva Luxembourg and Mr Roussev

95. The validity of the decision by the LICT Managers falls to be determined:

    i) in order to determine the validity of the Proceedings against Viva Luxembourg and Mr Roussev; and

    ii) if I am wrong in relation to the requirement for shareholder approval for the actions against Delta and Maze and/or Mr Veltchev, in relation to the validity of the Proceedings against those defendants.

96. This raises various sub-issues namely whether the managers of the company must act unanimously, whether it was necessary to convene a meeting of the board and for a resolution to be passed by the board, and the involvement of Mr Reitsma.

Does clause 32 require that the directors or managers who are designated by the clause as having "full authority to elect to pursue, not pursue or to defend" a claim, must act unanimously in order for the proceedings to be brought? (Issue 2)

97. It was submitted in opening submissions (paragraph 51) for Delta and Mr Veltchev that clause 32 gives authority to commence a claim to "those directors" which means that the directors other than those appointed by the relevant shareholder whose breach is in issue (the "Impugned Shareholder"), must act unanimously in deciding to bring the claim. Alternatively, it requires that all such directors (other than the director(s) appointed by the Impugned Shareholder) be involved and participate in the decision whether to commence the clause 32 claim.

98. It was submitted for the claimants (paragraphs 45 – 48 opening submissions) that there is no basis in the language of clause 32 for the decision to be the unanimous decision of the non-conflicted managers. If it had been the intention to require unanimity that would have been so provided.

99. In my view the natural meaning of the language of clause 32 does not require a unanimous decision of the managers other than the managers representing the Impugned Shareholder. Clause 32 comprises two sentences which have to be read together:

> "… any right of action which a Group Company … may have in respect of any breach … of any obligation owed to it by a Shareholder or any member of its Shareholder Group… may be prosecuted…by the members of the board of directors of the relevant Group Company … other than those appointed by the

> Shareholder in question. Those directors shall have full authority to elect to pursue, not to pursue … any such claim…"

100. Contrary to the submission of counsel for the second and fourth defendants (paras 51-53 of D2 opening), in my view it would strain the language of clause 32 to interpret the words "those directors" in the second sentence as meaning the directors have to act unanimously. The meaning of clause 32 has to be interpreted by reading the clause in its entirety. The first sentence makes it clear that the director(s) representing the Impugned Shareholder is excluded from the decision to bring an action which is reserved to the directors other than those appointed by the Impugned Shareholder; the second sentence makes it clear that it is those same directors who have the power to elect whether to pursue the claim. There is no express requirement for unanimity and the natural meaning of the language of clause 32 does not suggest that any variation to the simple majority provision which would otherwise apply under clause 6.7 of the SHA is to be implied.

101. This interpretation is consistent with the other provisions of the SHA. Clause 6.7 provides:

> "… All resolutions of the directors shall be decided by a simple majority of the votes of the participating eligible directors. Each director shall have one vote."

102. It is significant in my view that the phrase "participating eligible directors" is used in this regard which underlines the concept that in certain circumstances certain directors are not eligible to participate in a vote.

103. It is also consistent with clause 8 of the SHA. This provides that no decision can be taken in relation to certain matters defined as "Board Reserved Matters" unless it is approved by the director nominated by the minority shareholders. However, the initiation of proceedings in respect of a shareholder's breach under clause 32 is not a Board Reserved Matter. It is thus clear that pursuant to clause 8, Mr Reitsma, as the representative of the minority shareholders, did not have to approve the Proceedings under the terms of clause 32, and it supports a conclusion that clause 32 does not require a unanimous decision of the managers (excluding the manager who represents the Impugned Shareholder).

Conclusion on Issue 2 - unanimity

104. For these reasons I find that insofar as the decision to bring the Proceedings is a matter for the managers of V2, clause 32 did not require the managers (other than the representative(s) of the Impugned Shareholder) to act unanimously in order for the Proceedings to be brought.

Was it nevertheless necessary as a matter of Luxembourg law for a meeting of V2's board of managers to be called and a resolution passed by the board in order for the claims made in the Proceedings to be validly commenced? (Issue 6)

105. Although I have found that the managers did not have to act unanimously in order for the proceedings to be brought, the next issue is whether it was nevertheless necessary as a matter of Luxembourg law for a meeting of V2's board of managers to be called

and a resolution passed by the board in order for the claims made in the Proceedings to be validly commenced against Viva Luxembourg and Mr Roussev, and (if I am wrong in relation to the requirement for shareholder approval) for the actions against Delta and Maze and/or Mr Veltchev.

106. It was submitted for the claimants (paragraphs 45 – 48 opening submissions and 21-24 of closing submissions) that:

i) there was no requirement to convene a board meeting given that decisions could be adopted by a simple majority of the managers present and represented and thus any resolution could pass notwithstanding the objections of the minority representative;

ii) on the proper construction of V2's Articles (in particular Article 11), V2's Articles permit managers to act unilaterally in accordance with the default position under Article 710 -15 of the LCL; and

iii) if, however it is implicit in the Articles that there is a requirement for a resolution of the board, the Articles are subject to the shareholders agreement and clause 32 permits unilateral action in the circumstances of this case.

107. On the construction of Article 11 it was submitted for the claimants that:

i) there was no express provision in Article 11 of the Articles which requires corporate decisions to be taken by a board and that whilst subparagraphs (4) – (8) set out the conditions required to convene a board meeting, the Article is silent on the question whether a board meeting is required; and

ii) the default rule is that Luxembourg law permits unilateral decision-making by each the managers of an SARL under Article 710–15 of the LCL and there is no reason to imply into Article 11 a requirement that decisions be taken by the board of managers: the SHA already provides in clauses 4.1 and 7.6 that V2 shall be managed by its board.

108. It was submitted for the second and fourth defendants that:

i) it is evident from V2's articles (in particular Article 11) that they establish a board that is intended to have exclusive power to take management decisions on behalf of the company;

ii) if clause 32 applies, that requires the quorum requirements in clauses 6.5 and 6.6 of the SHA to be amended so as to remove the need for the shareholder appointees to be present and participate in the board meeting at which the clause 32 claim is considered; however the convening requirements were not modified and a board meeting was still necessary; and

iii) on this basis there is no conflict between the SHA and V2's Articles.

109. It is common ground that by virtue of Article 1156 of the Luxembourg Civil Code, in interpreting the Articles of Association, the court is required to identify the common intention of the contracting parties, rather than stop at the literal meaning of the words. To find out the common intention of the parties, judges can consider the

remainder of the terms of the contract, the context in which it was made and how the parties applied the terms of the contract before the dispute arose (Thewes 2 paragraph 68).

110. The decision of the Court of Appeal in *BNP Paribas S.A. v Trattamento Rifiuti Metropolitani S.P.A.* [2019] EWCA Civ 768 at [45]-[46] is relevant in this regard:

> "45. The role of foreign law experts in relation to issues of contractual interpretation is a limited one. It is confined to identifying what the rules of interpretation are.
>
> 46. It is not the role of such experts to express opinions as to what the contract means. That is the task of the English court, having regard to the foreign law rules of interpretation."

111. Thus, to the extent that the experts expressed a view on how a Luxembourg court would interpret the Articles and what he considered them to mean, that is inadmissible and irrelevant evidence (*Paribas* at [49]).

112. Article 710 – 15 (1) of the LCL states:

> "Each manager may take any actions necessary or useful to realise the corporate object, with the exception of those reserved by law or the Articles to be decided upon by the members. Subject to subparagraph 4, the Articles may however provide that in case of several managers, these shall form a board…." [Emphasis added]

Subparagraph (4) reads (in material part):

> "the day-to-day management of the business of the company and the power to represent the company with respect thereto may be delegated to one or more managers, officers and other agents, who may but are not required to be shareholders, acting either alone or jointly…"

113. Article 11 of V2's Articles reads (so far as relevant to this issue):

> "(1) The company is administered by five managers…they are appointed and removed from office by simple majority decision of the general meeting of the shareholders…
>
> (2) Except as otherwise provided by the general meeting of shareholders, in dealing with third parties the manager or managers have extensive powers to act in the name of the company in all circumstances and to carry out and sanction acts and operations consistent with the company's object.
>
> (3) The company will be bound in all circumstances by the signature of the sole manager or, if there is more than one, by the single signature of one manager…

> (4) One or more managers may participate in a meeting by means of a conference call… Such participation shall be deemed equal to a physical presence at the meeting…
>
> (5) Meetings of the board of managers ("Board Meetings") may be convened by any manager. A Board Meeting shall be held at least once every three months.
>
> (6) At least five business days' notice in writing of a Board Meeting shall be given to all managers entitled to receive notice…
>
> (7) A shorter period of notice of a Board Meeting… may be given if all managers, entitled to attend and vote agree in writing to a shorter period of notice…
>
> (8) The board of managers may validly debate and take decisions (subject to any shareholders' agreement entered into by the shareholders of the company) at a Board Meeting without complying with all or any of the convening requirements and formalities if all the managers have waived the relevant convening requirements and formalities…
>
> (9) The board of managers can only validly debate and take decisions (subject to any shareholders agreement entered into by the shareholders of the company) with the following quorum:
>
> -one class V manager and one class C manager and the class E manager (if any), if any of the Board Reserved Matters is to be considered at the meeting; or
>
> -one class V manager and one class C manager, in all other cases …
>
> (12) Decisions of the board managers shall be adopted by simple majority of the managers present or represented…
>
> (13) Any manager may act at any meeting by appointing in writing by letter… another manager as his proxy.
>
> (14) A written decision, signed by all the managers, is proper and valid as though it had been adopted at a meeting of the board of managers, which was duly convened and held… " [emphasis added]

114. I accept there is no express provision in Article 11 of the Articles which requires corporate decisions to be taken by a board. It was submitted for the claimants that Article 11 is "perfectly coherent" without implying the requirement for a board meeting. In this regard the claimants rely on the default position under Luxembourg law that permits unilateral decision-making by each of the managers of a SARL under

Article 710-15 of the LCL. However Article 710-15 of the LCL expressly states that the Articles of Association "may however provide" [emphasis added] that in the case of several managers, these shall form a board. The issue therefore turns on the construction of Article 11 and the Articles as a whole rather than Article 710-15 of the LCL.

115. This does not seem to be inconsistent with the evidence of Mr Thewes (at paragraph 139 of his supplemental report) where he states that:

> "[the] management board set up by the articles of association of SARLs function strictly in accordance with the rules contained in the articles of association. If these rules are lacking, the default rule in a SARL is that "each manager may take any actions necessary or useful to realise the corporate object."" [emphasis added]

116. However Dr Kinsch is clear (paragraph 15 of his supplemental report) that Article 710-15 does not mean that a given decision may be taken either by a company's managers or by its shareholders as this would be contrary to a fundamental principle of company law which is based on the clear attribution of powers.

117. Article 11(1) of V2's Articles which states that the company will be "administered by five managers" would appear as a matter of language, to be dealing with their appointment as it refers to their appointment and removal by the general meeting. I accept the submission that subparagraphs (2) and (3) by their terms are concerned with the powers of representation externally vis-à-vis third parties and not with internal decision-making. Subparagraph (4) to (14) set out detailed mechanics for board meetings and there is nothing to indicate any intention that what appear to be comprehensive provisions, should be subject in addition to a right for decisions to be made by individual managers outside a meeting.

118. The court is required to identify the common intention of the parties and does not stop at the literal meaning of the words. The interpretation of Article 11 as a matter of Luxembourg law, does not depend on whether such an implication is regarded as "necessary" but rather on ascertaining the common intention of the parties having regard to the context in which it was made.

119. In this regard I note Articles 11(8) and 11(9). Article 11(8) states:

> "The board of managers may validly debate and take decisions (subject to any shareholders' agreement entered into by the shareholders of the company) at a Board Meeting without complying with all or any of the convening requirements and formalities if all the managers have waived the relevant convening requirements and formalities…"

Article 11(9) provides:

> "The board of managers can only validly debate and take decisions (subject to any shareholders agreement entered into

> by the shareholders of the company) with the following quorum…"

It seems to me that it would defeat the effective operation of the board if individual managers retained the power to take decisions which potentially could conflict with or reverse decisions of the board. In particular it would arguably make provisions such as Article 11(8) unnecessary and nullify the protection of the quorum requirements of Article 11(9). In the context of these particular proceedings, as pointed out to Mr Thewes in cross examination by counsel for the second and fourth defendants, the proposition that individual managers retained the authority to authorise proceedings would mean that Delta could immediately stop the Proceedings because it has the power to take that decision outside the board. The consequence of such an argument is in my view relevant when the court seeks to establish the common intention of the parties being illustrative of the effect of this alternative construction referred to above.

120. A further aspect of the context is the relationship with the SHA. It was submitted that a conclusion that Article 11 was intended to require decisions to be taken by a board would render clause 4.1 and 7.6 of the SHA "surplusage".

121. Clause 4.1 of the SHA states:

> "the Parties agree that the Board [of Directors of the General Partner] shall be responsible for the supervision and management of [V Telecom GP] and its operations…"

Clause 7.6 of the SHA states:

> "each of the parties shall procure that the board of managers of each of [V2, InterV and Viva Luxembourg Bulgaria] shall be the same size as the Board [of Directors of V Telecom GP] and shall include directors nominated in the same proportion as provided in clauses 4.2 and 4.3. The provisions of clauses 4 (Director Appointments), 5 (Directors' Interests) and 6 (Proceedings of Directors) shall apply equally (with appropriate changes) to the appointment, interests and proceedings of managers, of each of [V2, InterV and Viva Luxembourg Bulgaria] in addition to those of the General Partner"

In my view the SHA is dealing with matters as between the shareholders (including the appointment of the individuals to represent the shareholders) and the Articles deal with the operation of the company including the board of managers so it is neither surplusage nor conflicting.

122. Therefore even though Article 11 is silent on the question of whether corporate decisions must be made by the board, I do not accept the interpretation of Mr Thewes that this means that they can also be made by other organs of the company e.g. a manager acting unilaterally. I note that in the joint report at paragraph 23 when dealing with the authorisation of claims by the board of managers, Mr Thewes stated that:

> "if clause 32 of the SHA does not apply to the proceedings, the board of managers has the authority to authorise any claim, ..."

In cross examination it was put to Mr Thewes that it was implicit in what he said that the power to authorise proceedings was vested in the board of managers. Mr Thewes said that the joint memorandum whilst important was a short version of much longer reports and the court should consider his reports in their entirety.

123. In my view for the reasons discussed above, the common intention of the parties is that under the Articles of V2, decisions are to be made by a meeting of the board and there is no residual or additional power for a manager to take decisions unilaterally.

124. In the alternative it was submitted for the claimants that the Articles are subject to the SHA and to the extent necessary, Clause 32 modifies clauses 4.1 and 7.6 of the SHA and permits unilateral action in the circumstances of this case.

125. It was submitted for Delta and Mr Veltchev that:

i) if clause 32 applies, that requires the quorum requirements in clauses 6.5 and 6.6 of the SHA to be amended; it does not require all the other rules in the SHA concerning the proceedings of the board to be abrogated; and

ii) the quorum requirements in V2's Articles (Article 11(9)) are expressly stated to be "subject to any shareholders agreement entered into by the shareholders of the company" whereas the convening requirements (Article 11 (5) – (7)) are not so qualified. It follows that as a matter of Luxembourg law clause 32 can only take precedence over the quorum requirements in V2's Articles. It cannot derogate from the convening requirements because that would amount to an impermissible amendment of the Articles (Dr Kinsch's report at paragraphs 63 – 64 and second report at paragraphs 20 – 30).

126. In response it was submitted for the claimants that there was no inconsistency between Article 11 and clause 32 because there is no requirement in Article 11 that corporate decisions must be taken by a board. Accordingly there was no requirement to resolve any inconsistency by reference to any hierarchy of corporate documents.

127. As to whether clause 32 modifies clauses 4.1 and 7.6, this is a question of construction of the SHA and is therefore a matter of English law, applying English law principles of construction.

128. As set out above, Clause 4.1 of the SHA states:

> "the Parties agree that the Board [of Directors of the General Partner] shall be responsible for the supervision and management of [V Telecom GP] and its operations…"

129. Clause 4.2 then provides for five directors to be on the board with two directors nominated by LICT, two directors nominated by Crusher and one director nominated by the minority shareholders. Clause 7.6 (set out above) provides for a similar board composition for V2.

130. There is nothing express in clause 32 which would suggest that it modifies clauses 4.1 and 7.6:

> "…any right of action which a Group Company … may have in respect of any breach or purported breach of any obligation owed to it by a Shareholder or any member of its Shareholder Group, …, may be prosecuted … by the members of the board of directors of the relevant Group Company … other than those appointed by the Shareholder in question. Those directors shall have full authority to elect to pursue, … any such …arising out of the breach or purported breach,"

131. As discussed above, the language suggests that it has the effect of excluding the alleged perpetrator from the decision but not that the directors will proceed otherwise than by a decision of the board. When this interpretation is tested against the other provisions of the SHA, this seems consistent with Clause 5.5.

132. Clause 5.5 of the SHA reads:

> "Subject to Clause 32 (Enforcement of company's rights), applicable law and the Directors' fiduciary duties, a director shall be entitled to vote and be counted in the quorum at a meeting of the Board in relation to, or any resolution of the Board in respect of, a matter in which he has a direct or indirect interest." [Emphasis added]

133. Clause 5.5 makes it clear that the right of a director to vote on a resolution and be counted in a quorum at a meeting of the board is subject to clause 32.

134. Clause 6.5 provides:

> "No business shall be transacted at any meeting of directors unless a quorum is present at the beginning of and throughout each meeting. The quorum for transacting at a meeting of directors shall be [1 LICT director, one Crusher director and the minority representative director] if any of the Board Reserved Matters is to be considered at the meeting or [one LICT director and one Crusher director] in all other cases.

135. Clause 6.5 makes no express reference to clause 32 but in my view has to be read with the other provisions of the SHA and in particular clause 5.5.

136. Accordingly, in my view the objective interpretation of clause 32 is that it does not modify clauses 4.1 and 7.6 and does not dispense with the requirement for a board meeting to be convened.

137. Further in my view, as stated above, no conflict between the Articles and the SHA arises and thus the effect of any such conflict as a matter of Luxembourg law does not have to be resolved: Article 11(9) is expressed to be subject to the SHA but in my view this ties in with the provisions in clause 6.5 which correspond to Article 11(9) in effect, subject to the qualifications in clause 32.

Involvement of Mr Reitsma

138. It was submitted for the claimants (paragraph 49 of claimants' opening) that it would be a "hopeless and vague" construction of clause 32 to conclude that Mr Reitsma had to be involved and participate in the decision to bring the Proceedings. I do not accept the submission. It is the consequence of a finding that decisions had to be taken by the board of managers and could not be taken by individual mangers and the only effect of clause 32 was to exclude Delta and Maze from the decisions. There should have been a meeting of the board convened; given my finding above that it was not required to be a unanimous decision, Mr Reitsma did not have to authorise the proceedings but a board meeting should have been convened and (subject to the issue of conflict discussed below) Mr Reitsma was entitled to vote at the meeting of the board of managers as to whether to bring proceedings. The fact that a decision could be adopted by a simple majority and thus a resolution could pass notwithstanding any objection of Mr Reitsma does not render a board meeting pointless or an "exercise in pure formalism" where the Articles and the SHA provide for the company to be managed through decisions of a board of managers rather than by individual managers.

Conclusion on Issue 6

139. I find for the reasons discussed that it was necessary as a matter of Luxembourg law for a meeting of V2's board of managers to be called and a resolution passed by the board in order for the claims made in the Proceedings to be validly commenced against Viva Luxembourg and Mr Roussev, and (if I am wrong in relation to the requirement for shareholder approval) against Delta and Maze and Mr Veltchev.

What are the consequences of the failure to convene a shareholder meeting (in the case of the Proceedings against Delta, Maze and Mr Veltchev) and a meeting of the board of managers to commence the Proceedings against Viva Luxembourg and Mr Roussev?

140. It is an agreed fact (paragraphs 23 and 27 of the Agreed list of Agreed Issues) that the Proceedings were commenced by the LICT Managers without convening a meeting of V2's board.

141. Article 100-22 of the LCL provides (so far as material):

> "(1) Any decision adopted by a general meeting referred to in this law shall be void:"
>
> 1. where the adopted decision is flawed as a result of a formal irregularity, if the applicant proves that this irregularity may have influenced the decision;
>
> 2. in the event of a breach of the rules relating to its operation or in the event of deliberation on an issue which was not on the agenda where there is fraudulent intent;
>
> 3. where the adopted decision is flawed by any other abuse of power or misuse of power;

> 4. In case of the exercise of voting rights which are suspended pursuant to a legal provision not included in this law and where, without such unlawfully exercised voting rights, the quorum and majority requirements for decisions by a general meeting would not have been met;
>
> 5…
>
> (2) The nullity of a decision by general meeting must be declared by court order.
>
> …
>
> (3) The actions for nullity shall be brought against the company…
>
> (4) Where the avoidance is likely to prejudice rights acquired in good faith by a third party towards the company based on the meeting's decision, the court may declare the avoidance not to have any effect vis-à-vis those rights, subject to the applicant's right to damages, as the case may be." [emphasis added]

142. It is common ground between the experts that Article 100-22 of the LCL extends by analogy to the decisions of a board of directors or a management board.

143. Counsel for the second and fourth defendants submitted that:

i) Article 100-22 applies to decisions which are actually taken but cannot be applied to a resolution of a board (or general meeting of shareholders) which has never taken place. This is plain from the wording of Article 100-22(1) which (in subparagraphs (1)-(2)) refers to breaches of rules concerning the convening and conduct of such meetings;

ii) The evidence of Dr Kinsch was that the Article does not apply to "inexistent decisions" it applies to "existent decisions which have at least a semblance to board decisions"; and

iii) If it does apply to the commenced Proceedings, the wrongful authorisation of the claims would comprise an "excessive power" within Article 100-22 (1) subparagraph 3. Sub- paragraph (3) applies where the relevant decision was taken by the wrong organ such that it follows that the Proceedings are automatically void.

144. The evidence of Mr Thewes is that if the claims were unauthorised they can only be invalidated by applying the rules of Article 100-22. In his second supplemental report, Mr Thewes stated (at paragraph 48) that there was a "judicial unwillingness to annul corporate decisions (as reflected in Article 100 – 22 of the LCL which had the effect of limiting the circumstances where resolutions (of general meetings and, by extension, boards) can be declared void)."

145. At paragraph 49 Mr Thewes stated:

> "… Just like for any other corporate decision, the validity of the LICT Managers decision to initiate proceedings must be assessed by applying the principles contained in Article 100 – 22 of the LCL.…" [emphasis added]

146. Mr Thewes expressed the view (paras 50 and 51) that the first two criteria, a formal error having an influence on the outcome of the decision or a breach of the rules governing the company's operation were not made out as the Crusher directors were conflicted and "so convening a board meeting would not have had a likely effect on the outcome". Regarding the third criterion, and an excess of powers due to the fact the decision was not taken by the proper corporate organ, Mr Thewes was of the view that each individual manager is an organ and can act on the company's behalf even if a board has been implemented.

147. In his third supplemental report, Dr Kinsch responded to the second supplementary report of Mr Thewes in which he raised the points set out above. At paragraph 13 Dr Kinsch rejects the opinion of Mr Thewes that Article 100-22 applies. Dr Kinsch states that Article 100-22 applies to decisions actually taken by the general meeting of shareholders (or, by analogy, a board of directors or managers) at a meeting which has in fact taken place but is argued to have been irregularly held. In his opinion "it cannot be applied to an inexistent resolution of a meeting of a board of managers which has never taken place".

148. I prefer the evidence of Dr Kinsch that Article 100–22 does not apply to a resolution of a board of managers which has never taken place for the following reasons:

i) The view of Dr Kinsch on this point has been consistent since his original report in November 2018; a contrary view was only raised by Mr Thewes in April 2019 in his second supplemental report;

ii) The view of Dr Kinsch appears to me to be a logical conclusion on the wording of Art 100-22; the suggestion by Mr Thewes that Art 100-22 (1)(2) in referring to a "breach of the rules relating to its operation" is referring to the rules governing the operation "of the company" rather than the board does not appear to me to be supported by the language of the Article when taken as a whole: in my view the words "its operation" refer back to the decision adopted at the meeting and thus to the operation of the meeting. The relevant section is as follows:

> "(1) Any decision adopted by a general meeting referred to in this law shall be void:
>
> 1. where the adopted decision is flawed as a result of a formal irregularity, if the applicant proves that this irregularity may have influenced the decision;
>
> 2. in the event of a breach of the rules relating to its operation or in the event of deliberation on an issue which was not on the agenda where there is fraudulent intent;…"

That narrower interpretation is reinforced by the second half of subparagraph 2 which refers to deliberation on an issue which was not on the agenda-clearly a reference to the meeting at which the decision was taken; and

iii) The general concern noted above regarding the approach which Mr Thewes took to the evidence.

Conclusion

149. For the reasons discussed above, on the basis of the evidence, I find that Article 100-22 did not apply to the decision by the LICT Managers to commence the Proceedings.

150. Having concluded that Article 100-22 does not apply, the consequence is that (insofar as a decision of the board was required) this is not a case of a decision by the wrong organ of the company but a case where no decision has been taken by the board.

151. Since the power to exercise the *actio mandati* is vested exclusively in the shareholders, insofar as the actions against Delta, Maze and Mr Veltchev are concerned, the managers had no power to grant themselves powers which are granted to shareholders.

152. For these reasons I find that:

i) the decision taken by the LICT Managers in July 2018 to commence the Proceedings against Delta, Maze and Mr Veltchev did not comply with the requirement of Luxembourg law for a resolution of shareholders; and against Viva Luxembourg and Mr Roussev, did not comply with the requirements of the Articles and the SHA for a meeting of the board to be convened; and

ii) the decision taken by the LICT Managers to bring the Proceedings against Delta, Maze and Mr Veltchev, Viva Luxembourg and Mr Roussev is invalid as a matter of Luxembourg law unless validly ratified.

Was Mr Reitsma conflicted from voting in relation to the commencement of the Proceedings by reason of the fact that he is a director of InterV and some of the minority shareholders that he represents as manager of V2 are also minority shareholders in Viva Luxembourg? If so, what is the consequence upon the operation of clause 32? (Issue 3)

153. The issue concerning whether Mr Reitsma was conflicted from voting in relation to the commencement of the Proceedings does not arise given the court's finding that the claims made in the Proceedings were unauthorised when commenced because they required authorisation by V2's shareholder and/or authorisation by V2's board at a duly convened meeting of the board. However for completeness, I will deal with it shortly.

154. It was submitted by counsel for the second and fourth defendants that Mr Reitsma was not conflicted because:

i) Luxembourg company law expressly provides that only financial interests create a conflict of interest for board members under Luxembourg law;

ii) Functional conflicts, whereby a director or manager is said to be conflicted by reason of being a representative of companies on both sides of the transaction matter, do not count;

iii) That is the plain and obvious meaning of the Article 441-7.

155. It was submitted by counsel for the claimants that a Luxembourg court would have to approach the issue afresh because there is no specific Luxembourg case law on this issue. Counsel for the claimants relied on the opinion of Dr Steichen at paragraph 960 of his work *Summary of Corporate Law* (Fifth edition 2017).

156. Dr Steichen at paragraph 960 states (in material part):

> "the interest must be "financial in nature"… The interest must be financial i.e. be likely to procure the relevant director of material advantage subject to economic valuation….
>
> The question of indirect interest of a patrimonial nature presents difficulties if someone is director of two companies and plans to participate in resolutions enabling these two companies to conduct transactions between them. Does the opposed interest targeting the director in a transaction with the company also include this assumption of conflict functions? Strictly speaking, this should not be the case, since the purely functional interest is by itself not financial nature. Therefore the situation be covered where the director would have a personal financial interest in seeing the two companies enter into a transaction, or because their remuneration depends on it, or because the value of shares may increase due to this fact… This interpretation of the law seems too restrictive. The aim of Article 57… Is to prevent situations where the board of directors would be influenced in its decision-making by the personal interests of a director in the conclusion of a specific transaction with the company; as this risk also exists when a director sits in two companies, Article 57… should apply equally in this situation…" [emphasis added]

157. Counsel for the claimants also relied on another writer, *Koch*, referred to in the first report of Mr Thewes at paragraph 143. The relevant passage of *Koch* reads:

> "the question still arises of determining whether the mere fact that the person is acting in his capacity as a director for two contracting companies in a transaction between them constitutes a conflict of interest resulting in the application of Article 57 of the LSC. In a strict sense, such a purely functional interest is not of a pecuniary nature and thus would not be considered sufficient to fall within the field of application of Article 57 of the LSC; it would moreover be necessary to require a personal financial interest…"

158. Accordingly, it was submitted for the claimants (paragraph 52 of the claimants' opening) that a Luxembourg court would prefer the view of Steichen and Koch and rule that functional conflicts of interest are indirect conflicts within the meaning of Article 441–7.

159. In my view, properly read, Professor Steichen is expressing the view that the Luxembourg law is too restrictive in this regard but nevertheless he is clear that the present state of Luxembourg law is that being a director of two companies is a "functional interest" and not of a financial nature and therefore does not fall within Article 441-7. (The comparable text which appears in the 6th edition of his work is set out below in the context of the discussion of the LICT Managers' conflict of interest). Koch also appears to take the view that functional conflicts are not caught.

160. Accordingly had it been necessary to decide the point, I would have held that Mr Reitsma was not conflicted from voting in relation to the commencement of the Proceedings.

Ratification

161. It is agreed that on 8 January 2019, the LICT Managers served purported notices seeking to convene board meetings of V2 and V Telecom GP on 15 January 2019, for the purpose of approving and/or ratifying the commencement of the Proceedings (paragraph 29 of the Agreed List of Agreed Issues).

162. It is also agreed that (paragraphs 30 – 33 of the Agreed List of Agreed Issues) all of the managers/directors of V2 and V Telecom GP joined a telephone conference call on 15 January 2019. However after the validity of the purported notices and the respective managers' conflict positions had been discussed for more than 1 ½ hours, Mr Veltchev, Mr Bryan-Orr and Mr Reitsma left the call. After Mr Veltchev, Mr Bryan-Orr and Mr Reitsma left the call, Mr Picco representing Europim and Ms Cipriano representing Coselux purported to pass the resolutions.

Were the purported notices valid and effective? (Issue 7)

163. Although the second and fourth defendants contend that the convening notices were irregular because they did not comply with the requirement in the relevant companies' Articles for at least five business days' notice to be given of meetings, this was not pursued at the hearing before me (paragraph 111 of the closing submissions for the second and fourth defendants footnote 55) and accordingly I do not intend to consider this issue.

Are Delta and Maze conflicted from voting on resolutions in relation to ratification of the Proceedings? (Issue 8a)

164. The experts agree that Delta and Maze are conflicted from voting in relation to a resolution approving and ratifying V2's claims in the Proceedings (Joint Memorandum paragraph 28).

Are the LICT Managers conflicted from voting on resolutions in relation to ratification of the Proceedings? (Issue 8b)

165. It was submitted for the second and fourth defendants that the LICT Managers had a financial interest in the resolutions and were conflicted from voting for them because, prior to the ratification, they faced a potential liability to pay costs by reason of having commenced the Proceedings without authority. In particular it was submitted that they faced a potential liability for a non-party costs order and/or costs from an action by the solicitors for commencing an un-authorised action.

166. Article 441-7 provides:

> "Any director having a direct or indirect financial interest conflicting with that of the company in a transaction which has to be considered by the board of directors, must advise the board thereof and cause a record of his statement be included in the minutes of the meeting. He may not take part in these deliberations…" [emphasis added]

167. It was submitted for the claimants that the LICT Managers were not conflicted for the following reasons:

i) the argument was "nonsensical" because it would mean that proceedings could never be ratified;

ii) the LICT Managers did not have a financial interest in the ratification that was sufficiently certain to engage Articles 441-7 and 710-15 (6) of the LCL; and

iii) any financial interest that the LICT Managers had in relation to the ratification was not opposed to the interests of V2.

168. It was submitted for the claimants that the LICT Managers did not have a "sufficient" financial interest to engage Article 441-7 and that it was not sufficiently "certain":

i) non-party costs orders are in the discretion of the court and it is therefore uncertain whether and to what extent the court might make non-party costs orders against the LICT Managers;

ii) the ratification of the Proceedings might still leave the LICT Managers with liability to pay costs incurred before the date of the ratification and potentially even after the ratification. Therefore, the ratification will not influence the court's order on costs; and

iii) there was no prospect of a claim by the solicitors for breach of warranty of authority since this was an issue from the outset of the Proceedings.

169. It is clear on the evidence that as a matter of Luxembourg law, a "potential" financial interest is sufficient for these purposes. Dr Kinsch stated in his supplemental report (paragraphs 110 and 111):

> "…if…:

> (1) as at the date when the resolutions were passed, the LICT Managers were facing potential liabilities to pay substantial costs to the defendants and/or to Gresham by reason of having commenced the English proceedings without V2's authority; and
>
> (2) ratifying the English proceedings would have the effect, with a not insignificant degree of probability, of extinguishing or reducing the LICT Managers exposure to such liabilities, whether in whole or part;
>
> then in my view, the LICT Managers had an interest of a financial nature in ratifying the original decision to bring the English proceedings that was opposed to the interests of V2, as a matter of Luxembourg law.
>
> "… A conflict would exist if, by voting on the ratification of previously commenced and possibly irregular proceedings, a manager could acquire for himself a reduction of the risk of being exposed to an order to pay costs in connection with the proceedings.…" [emphasis added]

170. Steichen says (page 697 – 698) of his *Summary of Corporate Law* (Sixth edition):

> "The interest must be "financial in nature".… The interest must be financial, i.e. be likely to procure the relevant director a material advantage subject to economic valuation.… It is reasonable to think, even if the law does not specify the question, that if the director only obtains an insignificant benefit, the procedure does not apply either. In fact, in this case, the interest that the director and the transaction will be sufficiently immaterial so as not to risk having an influence on his decision." [emphasis added]

171. In the footnote to that paragraph, the fact that the law is concerned with a "potential" conflict is evident from the following:

> "The question of the indirect interest of the nature of an asset presents difficulties if a person is a director of two companies and plans to participate in resolutions that allow these two companies to make transactions between them. Does the opposing interest referring to the director in a transaction with the company also include this hypothetical conflict of duties that? Strictly speaking, this should not be the case, since the purely functional interest is not in itself of the nature of an asset. As a consequence, only situations where the director would have a personal financial interest specifically the two companies entering into a transaction, either because his compensation depends on it, or because the value of shares might increase due to this … This reading of the law, appears, however to be too restrictive. The purpose of Article 441-7… is

> to prevent situations where the board of directors would be influenced in its decision-making by the personal interests of a director in entering into a specific transaction with the company; since this risk also exists when a director sits in two companies, Article 441-7… should also be applied in this situation…" [emphasis added]

172. It is submitted for the claimants that the risk of a costs order is not sufficiently certain. However, it seems to me that as a matter of Luxembourg law provided that the risk of costs cannot be dismissed as sufficiently immaterial or (as stated by Steichen) an "insignificant benefit", the potential risk of an adverse costs order is sufficient to fall within Article 441-7.

173. This appeared to be accepted by Mr Thewes in cross examination when it was put to him that the conflicted directors were required to abstain from any deliberation about the matter in respect of which they were conflicted, on the assumption that:

i) the LICT Managers were personally exposed to liabilities in respect of the costs of the English proceedings;

ii) the liabilities included liabilities both to the defendants and Gresham;

iii) the amount of those liabilities was potentially substantial; and

iv) by validly ratifying the Proceedings, the LICT Managers would reduce or extinguish their exposure to liabilities in respect of the costs of the Proceedings whilst at the same time increasing V2's exposure to costs.

174. As to the nature of the risk, under section 51 of the Senior Courts Act the court has a discretion in relation to non-party costs orders. Although non-party costs orders have been described as exceptional, this has been held to mean "no more than outside the ordinary run of cases". The ultimate test was whether the making of the order was just: *Dymocks Franchise Systems (NSW) Pty Ltd v Todd (Costs)* [2004] UKPC 39. There are two broad reasons that may justify a costs order against a non-party: a non-party may be ordered to pay costs if he controlled the proceedings for his own benefit or where the non-party has helped a party to bring or sustain proceedings by providing finance or other assistance. Where it is the responsibility of a non-party to manage litigation on behalf of another, the non-party would be liable for costs only if the non-party acted improperly. In the absence of any impropriety, a director would be held liable to pay a costs order against the company only if he initiated and controlled the litigation wholly or principally for his own benefit. The key consideration is whether the company director acted in good faith in the discharge of his duty to the company rather than entirely in his own personal interest (*Zuckermann on Civil Procedure* paras 27.241 and 27.247).

175. The court would have to conclude that the directors caused the company to bring or defend proceedings improperly and the court would look at whether the director had a bona fide belief that the Proceedings were in the interests of the company. In the circumstances of this case where two out of five managers acted unilaterally without the agreement of the manager representing the minority shareholders (as well as without the agreement of the managers of the shareholders whose actions are

impugned) in my view a court could conclude that the managers were not acting in the interests of the company but were pursuing the interests of the shareholders that they represented and were such a finding to be made, there is a risk of a non-party costs order being made. As to the quantum of any such costs order that could encompass the entirety of the costs of the Proceedings if they were not authorised when commenced, as the Proceedings would have been improperly and unreasonably caused by the LICT Managers and/or LICT. Accordingly, in my view such a risk of costs cannot be dismissed as sufficiently immaterial such that the decision to ratify could be said to give rise to only an insignificant benefit.

176. As to the submission for the claimants that any financial interest that the LICT Managers had in relation to the ratification was not "opposed" to the interests of V2, it seems to me that Mr Thewes accepted in cross examination (on the assumption that the LICT Managers would reduce or extinguish their exposure in respect of the costs of the Proceedings whilst at the same time increasing V2's exposure to liabilities in respect of those costs) that the financial interest was opposed to the interests of V2 because the advantage to the LICT Managers of procuring ratification would operate to the detriment of V2.

177. The evidence of Dr Kinsch (paragraph 107 of his supplemental report) was that if the LICT Managers had an interest of a financial nature in ratifying the original decision to bring the Proceedings, their interest would have been "opposed" to the interest of the company for which they were acting because the company's interest may have been to discontinue. Dr Kinsch stated that for a manager's interest to be "opposed to that of the company" it is sufficient that the opposition exists potentially; whether or not the company would in fact have decided to discontinue the Proceedings is not relevant in this respect. The company's interest was in ensuring "a conflict free assessment".

178. It was submitted for the claimants in closing (paragraph 33.2 of closing submissions) that an opposition of interest cannot arise from the mere fact that the company has an interest in the vote taking place without the influence of a director with a personal financial interest in its outcome, otherwise the second limb that the interests are "opposed" is rendered nugatory. I do not follow that submission: it is clear that a distinction is drawn as a matter of Luxembourg law between the situation where both the director and the company have the same kind of interest for example the director has shares and the company has shares and both of them sell to the same buyer. In that case the interest is aligned and not antagonistic or opposed. That is not the situation here where there is a financial interest and the financial interest of the LICT Managers in ratifying the Proceedings is not aligned with the interests of the company.

179. I accept the submission for the second and fourth defendants that there is nothing "nonsensical" about ensuring that decisions to ratify proceedings are not taken by managers whose interests are in conflict with the company's. The fourth paragraph of Article 441-7 provides:

> "where, because of conflicts of interest, the number of directors required by the Articles to decide and vote on the relevant matter is not reached, the board of directors may, unless otherwise provided for by the Articles, decide to refer the decision on that matter to the general meeting of shareholders."

There is therefore an express mechanism to deal with the position if as a result of conflicts, the board is inquorate, namely to refer the matter to a general meeting of the shareholders.

Conclusion

180. For the reasons discussed above I find that the LICT Managers were conflicted from voting on resolutions in relation to ratification of the Proceedings.

Does clause 32 affect the quorum requirements in relation to board meetings for V2 and/or V Telecom GP, in particular by excluding any manager who is conflicted from the quorum requirements? (Issue 9)

181. Article 11 (9) of V2's Articles of Association which sets out the quorum requirements is expressly stated to be subject to the SHA:

> "(9) The board of managers can only validly debate and take decisions (subject to any shareholders agreement entered into by the shareholders of the company) with the following quorum:
>
> -one class V manager and one class C manager and the class E manager (if any), if any of the Board Reserved Matters is to be considered at the meeting; or
>
> -one class V manager and one class C manager, in all other cases …"

182. However, there is no such statement in Article 15.6 of the Articles of Association of V Telecom GP. The issue which arises therefore is whether clause 32 which the court has held to apply to the Proceedings, thereby excluding, in the circumstances of these Proceedings, Delta and Maze from being counted in the quorum for a meeting of the board of V2, also applies to V Telecom GP.

183. It was submitted for the claimants that Article 15.6 was clearly intended to be subject to the SHA notwithstanding the omission of any express qualification: there is no reason why the parties should have intended the position to be different in relation to V Telecom GP and the suggestion that it was the intention of the parties to have different quorum provisions at the level of V Telecom GP and V2 is commercially absurd. The composition of the two boards is and was identical. Further it is submitted for the claimants that it is clear that the parties' intentions were that clause 32 should modify the quorum requirements of V Telecom GP because clause 27 of the SHA provides that in the event of a conflict between the SHA and the articles, the SHA shall prevail.

184. It was submitted for the second and fourth defendants that:

i) the words of Article 15.6 are clear;

ii) there are references elsewhere in the articles of V Telecom to the SHA but not in Article 15.6 so it cannot have been overlooked; and

iii) reading the words "subject to any shareholders agreement" into Article 15.6 would amount to an extra statutory amendment of the articles in breach of Articles 100-4 and 100-12.

185. As set out above, the construction of the Articles of Association is a matter for the court applying the Luxembourg rules of construction that is to "ascertain the common intention of the parties as derived from the terms of the contract, read as a whole, in the context in which the contract was made."

186. I accept that the SHA formed part of the relevant context in which V Telecom GP's Articles of Association were adopted; in particular the SHA was executed on 31 October 2012 and V Telecom GPs Articles of Association were adopted shortly thereafter on 9 November 2012. I also accept that no rationale has been advanced which would support a conclusion that the parties intended to have different quorum provisions at the level of V Telecom GP and V2; that would appear to be contrary to the commercial reality of how the companies were structured including the fact that the composition of the two boards was at all material times identical.

187. I do not find it persuasive that the SHA is a defined term in the Articles of Association of V Telecom GP or that it is referred to on numerous occasions in those Articles. In my view this does not exclude the possibility that there was an error and a conclusion that the parties intended Article 15.6 to be subject to the SHA.

188. However, I accept the evidence of Dr Kinsch that reading the words "subject to any shareholders agreement" into Article 15.6 would amount to an extra statutory amendment of the articles in breach of Articles 100-4 and 100-12. The evidence of Dr Kinsch is that where the articles contain a quorum requirement which is formulated as an absolute and unqualified requirement, a shareholders' agreement cannot stipulate that the quorum requirement never applies or does not apply under certain circumstances. Dr Kinsch states that if a clause contradicting the articles were to be recognised as valid and effective, and as prevailing over the articles, this would be equivalent to considering that the articles have been (expressly or implicitly) amended on that point. Dr Kinsch states that articles cannot be amended simply by agreement: Article 100-12 of the LCL provides that:

> "any contractual amendment to the instrument of the company must, on pain of nullity, be made in the form required for the constitutive instrument of the company."

That means a special notarial deed and the amendment must be adopted at a duly convened extraordinary general meeting of shareholders.

189. In cross examination Dr Kinsch said:

> "In that sense, if the shareholders' agreement means that nonetheless decisions can be taken otherwise, there is a contradiction and in that sense, the Luxembourg courts will not be as pragmatic as to say, well, the article of the company law which prescribes the articles to be amended by a special notarial deed is used as formalism, we dispense the parties with that. No, the courts would insist upon that article ."

190. The evidence of Mr Thewes is that Luxembourg law allows shareholders agreements to exist alongside the Articles of Association and there is no prohibition against shareholders agreements derogating from the provisions of the articles and thus there is clearly the "potential for conflict". Mr Thewes said that such conflicts are not resolved through "abstract predetermined rules" but in a "pragmatic manner" using a case-by-case approach.

191. In cross examination it was put to Mr Thewes:

> "But until and unless the articles are amended, they must be complied with by the managers, by the directors, must they not?"

192. Mr Thewes responded:

> "They must be complied to just as much as the contract, the shareholders' agreement the company entered into. The company is bound at two different levels and I would add, the incompatibility between those provisions is really limited because if clause 32 has the effect of avoiding deadlock, of essentially avoiding most of the issues we've now been discussing for three days and the fights that have been going on for three years by allowing the merits, the case to be brought before a judge, and the judge will then impartially hear everybody and impartially decide what is right. Isn't that a positive outcome instead of this very tiring discussion about which of the provisions is stronger than the other, …?"

193. I do not find Mr Thewes' "pragmatic" approach to be a satisfactory answer to the objection based on Luxembourg law raised by Dr Kinsch. Notwithstanding the contextual arguments raised in favour of concluding that the absence of a reference to the SHA in Article 15.6 was an omission, in my view there is no answer to the issue of Luxembourg law which arises if such a reference were to be implied.

<u>Conclusion -does clause 32 affect the quorum requirements in relation to board meetings for V2 and/or V Telecom GP by excluding any manager who is conflicted from the quorum requirements? (Issue 9)</u>

194. For the reasons discussed I find that clause 32 had the effect of modifying the quorum requirements for V2 by excluding any manager who is conflicted from the quorum for the meeting but did not modify the quorum requirements for V Telecom GP.

If Delta and Maze were conflicted from voting in relation to the approval or ratification of the Proceedings does that mean that no quorate board meeting was held for V2 and/or V Telecom GP on 15 January 2019 with the effect that the purported resolutions are invalid and of no effect? (Issue 10a).

If the LICT Managers were conflicted from voting in relation to the approval or ratification of the proceedings, does that mean that no quorate board meeting was held for V2 and/or V Telecom GP on 15 January 2019, with the effect that the purported resolutions are invalid and of no effect? (Issue 10b).

195. It is convenient to consider both these issues together as they both raise two issues:

i) whether a quorum only has to be met at the outset of the meeting or whether it is required throughout the meeting for each resolution and the effect of a conflict of interest of the relevant managers on the quorum of a meeting; and

ii) if a meeting is inquorate, what effect that has under Article 100-22 on the resolutions that were passed.

Whether a quorum only has to be met at the outset of the meeting or whether it is required throughout the meeting for each resolution and the effect of a conflict of interest of the relevant managers on the quorum of a meeting

196. It was submitted for the claimants (paragraph 42 of closing submissions) that any conflict did not prevent a conflicted manager from attending or being represented at the meeting:

i) there is no requirement in the articles of V2 or V Telecom for a particular number of directors and accordingly Article 441-7 is not relevant;

ii) Article 11 (9) of V2's articles provides different quorum requirements depending on whether any of the "Board Reserved Matters" is to be considered at the meeting and this indicates that the quorum requirement applies to the meeting as a whole and not to individual resolutions; and

iii) Clause 6.5 of the SHA makes it clear that the quorum requirement relates to attendance not participation or voting: it provides that "no business shall be transacted at any meeting of directors unless a quorum is present at the beginning of and throughout each meeting".

197. Article 441-7 provides:

> "(1) Any director having a direct or indirect financial interest conflicting with that of the company in a transaction which has to be considered by the board of directors, must advise the board thereof and cause a record of his statement be included in the minutes of the meeting. He may not take part in these deliberations… [emphasis added]
>
> (4) Where, because of conflicts of interest, the number of directors required by the articles to decide and vote on the relevant matter is not reached, the board of directors may,

> unless otherwise provided for by the articles, decide to refer the decision on that matter to the general meeting of shareholders."

Evidence of experts

198. Counsel for the claimants submitted that the quorum requirement only needs to be met at the beginning of the meeting.

199. In his supplemental expert report Mr Thewes said:

> "[83] the quorum requirements were met at the beginning of the board meetings held on 15 January 2019 since all the board members of V2 and the GPs board were able to join the conference call…
>
> [84] when the representatives of Delta and Maze both left the meeting, the quorum requirements ceased to be met. The fact that Mr Reitsma also left the meeting is irrelevant because no "Board Reserved Matter" was on the agenda and his presence was therefore not required.…
>
> [85] the representatives of Europim and Coselux then continued with the meeting "considering that the quorum required by article 15-7 of the articles of association of the company… was met. They were entitled to proceed on that basis if the quorum requirements were changed by clause 32 of the shareholders agreement…Otherwise however they were mistaken. The quorum must be met at any time the board "debates and takes decisions". In other words the board must constantly be quorate and if the quorum ceases to be met, the meeting must be suspended or end.
>
> [86] Once Delta and Maze both left the meeting, the quorum required by the articles of incorporation for the board of managers of V2 and the board of directors to be able to debate and take decisions was no longer met." [emphasis added]

200. In the joint memorandum (paragraph 38), both experts were asked whether (assuming that clause 32 did not apply) the boards of V2 and/or V Telecom GP were quorate if Delta and Maze were conflicted and/or if the LICT Managers were conflicted. The evidence of Dr Kinsch was that the boards were not quorate if either Delta and Maze or the LICT managers were conflicted and "*a fortiori*" if all four managers/directors were conflicted. The evidence of Mr Thewes was that the quorum requirements "cannot be met" if Delta and Maze are both conflicted or if both LICT Managers are conflicted but said that it should be ignored on the grounds either that conflicted board members do not count for the quorum because they do not have a voting right or because Delta and Maze's departure from the meeting constituted an abuse of the minority.

201. However in his second supplemental report Mr Thewes said:

> "[37]… Mr Kinsch's evidence is that Delta's and Maze's conflict of interest meant that it was "legally impossible to meet the quorum requirement on 15 January 2019"…
>
> [38] I disagree with this view. The rule in article 441-7, para 1 of the LCL is that conflicted board members "may not take part in these deliberations. It does not say that the presence of conflicted members of the board does not count towards the quorum. Attendance (required to meet quorum) and participation in the discussions and votes… are separate legal concepts, as is noted by T Tilquin who writes that the "the quorum is not related to an effective participation in the deliberation".
>
> [39] It would be entirely irrational if a rule intended to protect the corporate interest by preventing conflicted board members from influencing board decisions led to a deadlock where decisions that are in the corporate interests can no longer be taken at all.…
>
> [40] For this reason, "in order to avoid a deadlock in decision-making, directors confronted with a conflict of interest must be taken into account to determine the quorum" even though they do not physically participate in the deliberation and vote. It is appropriate "to regard the directors with a conflict of interest, for practical reasons, as being fictionally "present" with a view to fulfilling the quorum requirement"
>
> [41]..if Delta and Maze had done what article 441-7, para 1 of the LCL required of them (i.e. declare their conflict so it could be recorded in the minutes, then abstain from taking part in the deliberations and votes) a board meeting with the quorum required in V2's and the GP's articles of association could have been held. In a normal boardroom setting this would have meant leaving the room (so they could not be accused of influencing the discussions and vote) whilst remaining in attendance at the venue with the board meeting takes place. In the context of a board meeting held by conferencing system, the appropriate conduct would have been to declare their conflict, then to mute their microphones until the discussions and votes have concluded…
>
> [42] Delta and Maze did not do this, but that does not prevent them from being counted towards the quorum for the reasons explained.

202. The evidence of Dr Kinsch is that Article 441-7 which allows a board which is unable to decide or vote because of conflicts of interest to refer the decision to the general meeting "provides the answer" to the problem of conflicts of interest preventing directors from participating in a decision while their presence is necessary under a provision of the articles. (paragraph 123 of his supplemental report). In his third

supplemental report in response to the final report of Mr Thewes, Dr Kinsch deals with the Belgian authors relied upon by Mr Thewes. Dr Kinsch says that in Belgium there has been no unanimity on the "solution" to the problem posed by conflicts of interest of counting the conflicted members of the board for the purpose of calculating the quorum. He says however that the Luxembourg legislature introduced in 2016 a rule that specifically addresses this issue, namely Article 441-7 (4). This "provides expressly for the solution proposed by the Belgian authors… to refer the matter to the general meeting of shareholders". Dr Kinsch states (paragraph 6 of his third supplemental report) that the solution "is entirely appropriate and satisfactory."

203. I accept that in the joint memorandum (paragraph 1.7), it is noted that the issues concerning the validity of the resolutions made on 15th January 2019 only arose after the filing of Dr Kinsch's report and shortly before the service of Mr Thewes' report. Therefore, the experts state that they provide only "preliminary comments" to be amended and supplemented in their supplemental reports. However, the position of Mr Thewes adopted in his supplemental report did not appear to be substantiated. Contrary to what is asserted by Mr Thewes, in the light of Article 441-7(4), the view of Dr Kinsch does not have an irrational result leading to a deadlock. In my view Mr Thewes failed to deal with the "solution" namely Article 441-7 (4) satisfactorily: his response to this in his report is only that Delta and Maze did not acknowledge that conflict and therefore Article 441-7(4) was not triggered.

204. Counsel for the claimants advanced a different argument in relation to Article 441-7(4) namely that it did not apply because there was "no number of directors" which was "required by the articles to decide …on the relevant matter". Article 441-7 was amended in 2016 to allow the decision to be deferred to the general meeting. I note that the Luxembourg Parliamentary report dealing with the proposed amendment to this provision (referred to in Mr Thewes' report at paragraph 148 and footnote 110) states:

> "in order to cover all possible blocking situations, it is proposed to rephrase the fourth paragraph by adding a supplementary rule allowing the board of directors to refer the decision to the general meeting of shareholders."

I do not therefore accept the submission that Article 441-7(4) is to be narrowly construed and limited to a situation where the articles require a particular number of directors to decide on a matter.

205. It was submitted for the claimants that "you don't dip in and out of quorum" and to the extent that this was accepting that until they left the meeting Delta and Maze were part of the quorum (disregarding the effect of the conflict of interest) this seems to be correct. However, to the extent that this was a submission that the quorum only needs to be met at the start of the meeting that was contrary to the evidence of Mr Thewes (set out above) who said that:

> "The quorum issue at the board meetings of 15 January 2019… was a consequence of Delta and Maze leaving the call…"

It is also contrary to the provision in the Articles (Article 15.7 of V Telecom GP and 11.10 of V2) which states that:

> "if a quorum is not present within half an hour from the time appointed for the board meeting, or if during a board meeting a quorum ceases to be present, the meeting shall be adjourned…" [emphasis added]

206. In relation to the conflict of interest it was submitted for the claimants that there was no provision of Luxembourg law which makes the presence of a manager "non-existent" on the basis of their conflict. However, as set out above, the evidence of the experts was clear, until the final report of Mr Thewes, that in order for a board meeting to be quorate, the quorum needed to be present throughout the meeting and that a conflict of interest would (subject to the issue of abuse of minority rights) exclude those managers from being counted in the quorum. In relation to the submission for the claimants that the conflict of interest does not prevent the manager from attending the meeting I accept that a manager will attend in order to declare his conflict but after he has done that it seems to me clear on the evidence that the manager has to leave the meeting. Steichen in his Summary of Corporate law (sixth edition) at page 699 says that:

> "the director, after having indicated the conflict of interest, should excuse himself from the discussions and subsequent resolutions by the board…"

207. Koch writing in 2015 said:

> "[8.3] in the event of a conflict of interest, the law obliges the director in question to notify the board of directors (or the management board) of the latter and to mention this statement in the minutes of the meeting.
>
> Furthermore this director may not take part in the deliberations and must refrain from voting on the items on the agenda affected by the conflict of interest. He must leave the room before deliberations begin."[emphasis added]

208. To the extent that Mr Thewes suggested that the managers withdraw from the meeting but stay in the building or if on a conference call, mute the phone, this seemed to be a proposition of Luxembourg law which was not supported by the authorities or the law.

209. Finally, the claimants sought to rely on clause 5.5 of the SHA which provided:

> "subject to clause 32…, applicable law and the directors' fiduciary duties, a director shall be entitled to vote and be counted in the quorum at a meeting of the board in relation to, or any resolution of the board in respect of, a matter in which he has a direct or indirect interest."

This is clearly expressed to be "subject to applicable law" and it cannot therefore override Luxembourg company law rules about conflicts of interest.

Did Delta and Maze's departure from the meeting constitute an abuse of the minority?

210. Article 6-1 of the Luxembourg civil code provides that:

> "any act which, by the intention of its author, by its purpose or by the circumstances in which it is carried out, manifestly exceeds the normal exercise of the right, is not protected by the law, renders the originator liable and may give rise to a prohibitory injunction in order to prevent the ongoing breach."

211. The evidence of Mr Thewes who raised this in his supplemental expert report (paragraph 93) is that Luxembourg company law recognises two main types of abuse of rights in the context of decisions by organs of companies: the "abuse of majority" if the majority shareholders take a decision which goes against the interest of the company and aims at favouring the majority to the detriment of the minority and the "abuse of minority" which occurs if a decision that would be in the corporate interest cannot be taken because the minority blocks it either by absenteeism or by refusal to vote for the proposed resolution.

212. Mr Thewes said in his report that if the court was convinced that Delta and Maze left the meeting with the intention of blocking the board's operation by rendering it inquorate, thereby committing an abuse of rights, the effect of Article 6-1 of the Luxembourg civil code is that Delta and Maze can then no longer rely on the lack of quorum created by their departure from the meeting.

213. The evidence of Dr Kinsch in response (paragraphs 24 – 30 of his second supplemental report) is that Delta and Maze were legally conflicted from participating at the meeting where the question of ratification of an action brought against Delta and Maze was to be decided on. The LCL itself obliges them not to participate in the decision and thereby obliges them to render the board inquorate under Article 15.6. Since Delta and Maze were conflicted from voting on resolutions to ratify the Proceedings, they could not have participated in deliberations about resolutions even if they had stayed; they therefore had no relevant "right" that they were capable of abusing. They therefore had no ability to "block" resolutions by voting against them because they were not entitled to vote. A conflicted director must, according to Steichen, excuse himself from deliberations and, according to Koch, should leave the room. Therefore Maze and Delta were acting entirely lawfully by withdrawing from the meeting. For those reasons the evidence of Dr Kinsch is that the conduct of Delta and Maze cannot be said to constitute an abuse of rights.

214. In cross examination Mr Thewes accepted that unless Delta and Maze are able to count towards quorum even though they were conflicted, abuse of rights will fail. The following exchange took place:

> "Q. If Dr Kinsch is correct, and conflicted board members cannot count for the purposes of a quorum requirement, then a number of things follow, as a matter of Luxembourg law…
>
> The second consequence that would have followed would have been that Delta and Maze would have been acting lawfully by withdrawing."

215. Mr Thewes responded:

> "If the law instructs them to leave completely the building or, in this case, the conference call, then they would have acted lawfully."
>
> "Q. The third point is that by withdrawing in those circumstances, Delta and Maze would not have been blocking any resolution that could otherwise have been passed."
>
> "A. … The resolutions would effectively have been blocked, but it's not through deliberate action of Delta and Maze, but through an effect of a rule in the law, which I don't agree exists, but a rule in the law that forces them to abandon ship and leave the meeting."
>
> "Q. Exactly. The fourth point is that the consequence of all of that is that they would not have been abusing any rights by withdrawing."
>
> "A. Again, if the law instructs them to do that, they are not abusing rights." [emphasis added]

216. It was submitted for the claimants that Delta and Maze should not be able to say that because of their own conflict of interest, they should be entitled to obtain a complete block on the ratification. The flaw in this submission seems to me to be that identified by Dr Kinsch which is that Delta and Maze were prevented from voting and forming part of the quorum because of the conflict of interest rules and not from any "blocking manoeuvres". Further according to Steichen and Koch (as referred to above) a conflicted director must, according to Steichen, excuse himself from deliberations and, according to Koch, should leave the room. Therefore, Maze and Delta were acting entirely lawfully by withdrawing from the meeting. Accordingly, it is not necessary for the court to make any findings in relation to the motives of Delta and Maze in withdrawing from the conference call as they were required in any event to withdraw.

If a meeting is inquorate, what effect does that have under Article 100-22 of the LCL on the resolutions that were passed?

217. Article 100-22 of the LCL provides (so far as material):

> "(1) Any decision adopted by a general meeting referred to in this law shall be void:"
>
> 1. where the adopted decision is flawed as a result of a formal irregularity, if the applicant proves that this irregularity may have influenced the decision;
>
> 2. in the event of a breach of the rules relating to its operation or in the event of deliberation on an issue which was not on the agenda where there is fraudulent intent;

> 3. where the adopted decision is flawed by any other abuse of power or misuse of power;
>
> 4. In case of the exercise of voting rights which are suspended pursuant to a legal provision not included in this law and where, without such unlawfully exercised voting rights, the quorum and majority requirements for decisions by a general meeting would not have been met;
>
> 5…
>
> (2) The nullity of a decision by general meeting must be declared by court order.
>
> …
>
> (3) The actions for nullity shall be brought against the company…
>
> (4) Where the avoidance is likely to prejudice rights acquired in good faith by a third party towards the company based on the meeting's decision, the court may declare the avoidance not to have any effect vis-à-vis those rights, subject to the applicant's right to damages, as the case may be."

218. It was common ground that Article 100-22 applies by analogy to decisions of board of directors or managers.

219. The evidence of Dr Kinsch is that [supplemental report:

> "[137] A breach of quorum requirements constitutes a breach of fundamental rules relating to the formation of the collective will of a corporate organ composed of several members, whether this be the general meeting of shareholders or a board of directors or board of managers functioning collegially under the company's articles of association. Therefore, such a breach does not fall under the relatively lenient regime which applies to violation of formalities… On the contrary, a violation of a quorum requirement is automatically sanctioned by the invalidity of the decision taken by an inquorate corporate body.
>
> [138] In terms of analysis under article 100-22 of the LCL, the breach of quorum requirements falls under subparagraph 3. These are cases "where the adopted decision is flawed by any other abuse of power or misuse of power".…
>
> [139] It is recognised that irregularity by reason of the "misuse of power" (subparagraph 3 of article 100-22(1)) includes, in particular, violation of the rules on quorum or of majority applying to a general meeting of shareholders… Dr Steichen adopts the same view… in the context of his discussion of the

> consequences of breaches of requirements of the articles of association as to the quorum for general meetings of shareholders.
>
> [140] For these reasons, breach of the quorum requirements of the articles of V Telecom GP… will result in automatic invalidity of the resolutions purportedly passed by the LICT managers on 15 January 2019. In the case of such a breach, no further conditions for invalidation are required by law." [emphasis added]

220. Mr Thewes appears to accept that both Steichen and Willermain regard a resolution passed at a general meeting without the required quorum as an example of an excess of powers. He seeks to analyse it in a different way however stating that subparagraph 3 of Article 100 – 22 (1) applies if the wrong organ takes the decision following a violation of the law or articles.

221. In response Dr Kinsch stated that this explanation was "confusing and unnecessary" (paragraph 16 of his second supplemental report). Dr Kinsch stated:

> "Both in the case of general meetings of shareholders and meetings of boards of managers or directors, making a resolution in breach of quorum requirements will constitute a violation of the law or of the articles of association and therefore an excess of power within the meaning of article 100-22 (1) subparagraph 3."

222. The evidence of Dr Kinsch is that "excessive power" such as a breach of the quorum requirements leads to automatic invalidation of resolutions made by a general meeting of shareholders or a board of directors or managers (paragraph 14 of his second supplemental report).

Conclusion

223. Insofar as the decision to ratify the Proceedings against Delta, Maze and Mr Veltchev was a decision for the shareholders of V2, I have found that clause 32 does not apply to modify the quorum in the Articles of V Telecom GP and the meeting of the board of directors of V Telecom GP. For the reasons discussed above, I find that:

i) the meeting of the board of managers of V Telecom GP held on 15 January 2019 was inquorate by reason of the absence of Delta and Maze and if they had been present, they would have been obliged to leave the meeting and the meeting would have been inquorate by reason of their conflict of interest;

ii) the meeting of the board of directors of V Telecom GP was inquorate by reason of the LICT Managers' conflict of interest; and

iii) as a consequence of the breach of the quorum requirements identified under (i) and/or (ii) the purported resolutions of the board of directors of V Telecom GP were invalid under subparagraph (3) of Article 100-22(1) and subject to a court order being made, a nullity.

224. Insofar as the decision to ratify the Proceedings against Viva Luxembourg and Mr Roussev (and if I were wrong in relation to Delta, Maze and Mr Veltchev) was a decision for the board of managers of V2, and I have found that Delta and Maze were excluded from the quorum for the meeting of the board of managers of V2 by virtue of the operation of clause 32 (as found above), the meeting of the board of managers of V2 was therefore not inquorate by reason of the absence of Delta and Maze. For the reasons discussed above, I find that:

    i) the meeting of the board of managers of V2 held on 15 January 2019 was inquorate by reason of the LICT Managers' conflict of interest; and

    ii) as a consequence of the breach of the quorum requirements identified under (i), the purported resolutions of the board of managers of V2 were invalid under subparagraph (3) of Article 100-22(1) and subject to a court order being made, a nullity.

If the LICT Managers were conflicted from voting in relation to the approval or ratification of the proceedings, would the fact that they were conflicted mean that the purported resolutions are invalid and of no effect? (Issue 10c)

225. It was submitted for the second and fourth defendants that by reason of the LICT Managers' conflict of interest, Article 100 – 22 (1) subparagraph 2 applies and the resolutions should be invalidated.

226. The evidence of Dr Kinsch (paragraphs 141-154 of his supplemental expert report) is that the position on the basis of Belgian and Luxembourg case law, in relation to an irregularity is more complex than breach of quorum: the case law concerns contractual transactions entered into with third parties and not court proceedings brought by the conflicted directors. The Luxembourg position as derived from the case law, is that there is no invalidity except potentially in cases of collusion or bad faith on the side of third parties. However Steichen is of the view that decisions taken in a situation of conflict of interest may be annulled. Thus Dr Kinsch is of the view:

> "there should be nothing to prevent a court from declaring inadmissible an action …relying on the conflict of interests of the directors …who have taken it upon themselves consciously to pass a resolution …despite their conflict of interest…. In addition, and depending upon the court's assessment of the facts, the LICT Managers could be considered to have acted with "fraudulent intent" if they acted with "the intention to harm rights that [they] must respect..."

227. The relevant passage in Steichen (Sixth edition 2018 pages 700 – 701) reads:

> "Prior to the 2016 reform, it was felt that non-compliance with section 441-7 was only a matter of managerial responsibility; it did not entail the nullity of the resolution adopted by the management body (except in the case of fraud). Since the reform of 2016, however, it must be admitted that the company may act in nullity for transactions carried out if the procedure in Article 441-7 has not been respected, because nullity is

> involved from having been able to influence the adoption of a resolution by the board of directors and breach of rules for the conduct of the board of directors… The invalidity cannot, however, prejudice the rights of bona fide third parties." [emphasis added]

228. Dr Kinsch concludes (paragraph 154 of his supplemental report) that in this case a Luxembourg court would not conclude that the only sanction for the LICT Managers' breach of the conflict of interest rules was damages because there are no third parties in the present case who might be adversely affected by the resolutions being declared invalid.

229. Mr Thewes disagreed with Dr Kinsch. In his supplemental expert report (paragraphs 47 – 60). He stated that the Luxembourg court had consistently decided that the participation of the conflicted board member exposed the board member to possible liability claims but did not impact the validity of the decision. He acknowledged the view of Professor Steichen but stated that it did not appear to be shared by other legal commentators: Corbisier and Spang. His view was that the court could continue to follow the prior case law.

230. Corbisier stated that:

> "the sanctions regime has not been substantially amended and will essentially consist of the liability of the bodies in question (action for damages). Contrary to Belgian law and despite a provision to this effect in the initial draft, the possibility of an action for annulment was not finally adopted"

231. Spang wrote:

> "…the question also arises of the validity of the decisions adopted in infringement of the rules relative to conflicts of interest. Traditionally it is accepted that such decisions are not declared null and void. Draft law number 5730 envisaged the possibility of providing for a nullity action, drawing inspiration from the Belgian legal reforms, but this solution was not chosen in the end."

232. In his second supplemental report (paragraphs 19 – 23), Dr Kinsch addressed specific objections raised by Mr Thewes. He accepted that the approach of Dr Steichen could be described as "novel" but stated that it had considerable merit and was a logical application of the new statutory provision of Article 100-22 which for the first time introduced a general statutory basis for the invalidation of resolutions of general meetings of shareholders and by extension, of boards of managers. Before the law of 2016, the position in Luxembourg was that there was no provision expressly foreseeing nullity on the ground of conflicts of interest. However, Dr Kinsch is of the view that today there is a general legal provision and the necessary protection of innocent third parties is provided for by Article 100-22 (4) under which:

> "where the avoidance is likely to prejudice rights acquired in good faith by third party towards the company based on the

> meeting's decision, the court may declare the avoidance not to have any effect vis-à-vis those rights, subject to the applicant's right to damages, as the case may be."

233. Dr Kinsch also takes the view that Dr Steichen's approach is compatible with the decision of the Parliamentary Commission not to introduce into the law a provision under which it is sufficient that the third party had or should have had knowledge of the violation of the conflicts of interest rules for the transaction to be set aside.

234. Dr Kinsch is of the view that sub paragraphs 1 and 2 of Article 100-22 are to be read together so that an irregularity falling within either subparagraph invalidates a resolution if it may have influenced the decision or if there has been fraudulent intent. Mr Thewes appears to agree with this (paragraph 32 of his supplemental report). Therefore, the fact that directors or managers in a situation of conflicts of interest have breached the legal prohibition will render the resolution irregular, even in the absence of fraud, where the breach may have influenced the content of the resolution.

235. In my view the defendants have not established as a matter of Luxembourg law that the fact that the LICT Managers are conflicted from voting in relation to the ratification of the Proceedings, means that the purported resolutions are invalid and of no effect. The highest that it can be put is that as acknowledged by Dr Kinsch and Professor Steichen, there is nothing to prevent a Luxembourg court declaring the resolution a nullity but that falls short in my view from establishing (on a balance of probabilities) that this is the current position under Luxembourg law.

Standing

236. It was submitted for the second and fourth defendants that the issue of standing to bring the proceedings is a matter of procedure which is governed by English law and the defendants relied on an Australian text (Garnett: Substance and Procedure in Private International Law) which takes the view that it is "likely" that Commonwealth courts would take the view that standing was a procedural matter governed by the law of the forum.

237. In so far as it is a matter of Luxembourg law, the evidence of Dr Kinsch is that a defendant to an action brought by a company can always argue that the proceedings are inadmissible where the action needed the prior approval of the company's shareholders and such approval was not obtained or the decision to initiate the action was within the competence of the board of directors or managers but no such decision was taken by the board (paragraph 12 of his third supplemental report).

238. It was only in his second supplemental report that Mr Thewes suggested that Delta and Maze could not challenge the decision of the board on the grounds that there was "an irregularity in the functioning" of the board meeting where the decision was taken. He described the "suggestion" of Dr Kinsch to the contrary as "absurd". In that report Mr Thewes relied on a decision of the Luxembourg District Court in *Flator Finance Holding* in 2006 that:

> "the question of the composition of the board of directors and its ability to deliberate is a purely internal issue and does not affect the representation of the company vis-à-vis third parties

> through its legally competent body. A decision of this organ cannot therefore, be called into question by third parties for reasons related solely to the internal functioning of the company."

239. At the start of his oral evidence Mr Thewes corrected that section of his report by stating that he "lost sight of" the fact that *Flator Finance* is about former directors of the company whereas Delta and Maze are current directors. He therefore stated that the decision did not apply to Delta and Maze as current directors. However, he said that it was still relevant in relation to the third parties involved in the case.

240. In cross examination it was put to him that the case was concerned only with rules of representation towards third parties and not with internal decision-making. Mr Thewes did not accept this.

241. However, in my view it is clear from the report that the court was concerned with representation of the company and not with authorisation. I also take into account the evidence of Dr Kinsch who represented the defendant former directors in that case. Dr Kinsch stated that the point before the court was not the decision to bring the *actio mandati* but the implementation of the decision. Dr Kinsch states (paragraph 10 of his third supplemental report) that the court decided that the former directors had no standing to raise an irregularity in the composition of the board of directors that represent the company in implementing the decision to bring the *actio mandati* against them but that did not contradict the view of Dr Kinsch that the current directors have standing to rely on an irregularity.

242. Given the original error in the analysis by Mr Thewes of this case and the other matters already referred to by the court in its approach to the evidence generally of Mr Thewes, I prefer the evidence of Dr Kinsch on this point.

243. Insofar as it is a matter of Luxembourg law, I therefore find that the defendants do have standing to challenge the Proceedings on the basis that they are unauthorised.

Jurisdiction

244. Given my conclusion on the issue of authority, it is not necessary for me to decide the issues relating to jurisdiction. I therefore propose to deal with them shortly. I note that the court is not concerned in this section with the question of jurisdiction in relation to the Original Proceedings where there was an anchor defendant, VTBC (the first defendant) which was domiciled in England but with the Part 20 proceedings, to which VTBC is not a party, and the Part 7 proceedings which have not been served on VTBC.

Are the claims against Maze subject to the exclusive jurisdiction of the Luxembourg court pursuant to Article 25 of the Recast Brussels Regulation (EU) No 1215/2012 (the "Regulation")? (Issue 11)

245. Maze relies on the effect of clause 19 of the Directorship Agreement and submitted that claims against Maze are subject to the exclusive jurisdiction of the courts of Luxembourg pursuant to Article 25 of the Regulation.

246. Clause 19 provides:

> "for the benefit of the Manager, the Shareholder and the Company hereby irrevocably, specially and expressly agree that the courts of Luxembourg city have jurisdiction to settle any disputes in connection with this Agreement and accordingly submits to the jurisdiction of the courts of Luxembourg city. Nothing in this clause limits however the rights of the Manager to bring proceedings against the Company in connection with this Agreement in any other court of competent jurisdiction or concurrently in more than one jurisdiction."

247. Article 25 of the Regulation provides, so far as material, that:

> "If the parties, regardless of their domicile, have agreed that a court or the courts of a Member State are to have jurisdiction to settle any disputes which have arisen or which may arise in connection with a particular legal relationship, that court or those courts shall have jurisdiction, unless the agreement is null and void as to its substantive validity under the law of that Member State. Such jurisdiction shall be exclusive unless the parties have agreed otherwise…"

248. It is common ground that clause 19 is a "hybrid" or "asymmetric" clause because while it obliges V2 to bring any claims which falls within the substantive scope of the clause in the courts of Luxembourg city, it grants to Maze the right to bring any claims against V2 in any court of competent jurisdiction.

249. In oral closing submissions, counsel for the claimants took the position that the only issue for the court in this regard is whether or not this court should refer the matter to the CJEU on the basis that there is a sufficient degree of controversy attaching to asymmetric jurisdiction clauses such as that in clause 19, bearing in mind that French law as expressed by the Court of Cassation is at odds with English law as to their effect. Counsel for the claimants stated that the claimants did not pursue the argument that the clause is null and void as a matter of Luxembourg law.

250. Counsel for the claimants acknowledged that the English courts have taken the view that it is not a case that requires a reference. It was submitted for the claimants that notwithstanding the English authority, the court should not ignore the position of the Luxembourg courts and if the court concludes that the position has developed differently in Luxembourg, should refer the question of the validity of the clause to the CJEU under Article 267 TFEU.

251. Mr Thewes in his second expert report expressed the view that a Luxembourg court would hold clause 19 to be null and void because (in essence) "any other court of competent jurisdiction" does not include sufficiently objective factors to identify the courts in which Maze is permitted to sue. In his report he referred to the decision of the French Court of Cassation in 2012 in *Rothschild* rejecting the validity of asymmetric jurisdiction clauses and then a line of French cases from 2015 starting with *Apple v eBizcuss* and a decision in 2018, *Credit Suisse II*. He referred to a

decision of the Luxembourg courts in 2016 (*Banque Internationale a Luxembourg*) which validated a clause which did not contain any objective element to identify the jurisdictions in which a claim could be brought, but said that this decision would not have passed the test laid down in *Credit Suisse II*. He said that the Luxembourg court thought it was correctly applying the position adopted by the French courts.

252. In cross examination Mr Thewes accepted that the Luxembourg courts have upheld asymmetric jurisdiction clauses and there were no commentaries that suggested that the decisions were wrong. However, his evidence was that a Luxembourg court would follow the latest decision of the French courts (rather than its previous decisions).

253. Mr Thewes acknowledged that he had not referred in his reports to a Luxembourg decision in 2014 which upheld a clause providing for proceedings to be brought in any competent court. It was a case where the Luxembourg court refused to follow the decision in *Rothschild* but Mr Thewes said he had not wanted to "burden" the court with a decision where it had declined to follow an approach which had now been abandoned. He also accepted in cross examination that in the *Banque Internationale a Luxembourg* case the Luxembourg court had considered the decision in *Apple* but had declined to follow it. As to the decision in *Credit Suisse II* it was put to Mr Thewes said the decision was inconsistent with the decision of the Commercial Section of the French Court of Cassation in *Diemme.* Mr Thewes said that the French commentators were of the view that the French courts should refer the question to the European court and the Luxembourg courts would follow the evolution of the case law in France.

Discussion

254. The issue in relation to the clause is whether such asymmetric clauses are valid as a matter of EU law. It is now common ground that it is a question of autonomous EU law and not a question of national law. (It was I believe accepted that the proviso "unless the agreement is null and void as to its substantive validity" refers to issues such as capacity, fraud and mistake, not whether particular kinds of "choice of court" agreements are permitted under the Regulation).

255. There have been a number of English cases (identified in the written opening submissions of counsel for Maze) all of which have upheld asymmetric jurisdiction clauses. The most recent authority to which I was referred was the decision of Cranston J in *Commerzbank Aktiengesellschaft v Liquimar Tankers Management Inc.* [2017] EWHC 161 (Comm). The relevant clause in that case provided:

> "Nothing contained in this Clause shall limit the right of the Lender to commence any proceedings against the Guarantor in any other court of competent jurisdiction nor shall the commencement of any proceedings against the Guarantor in one or more jurisdictions preclude the commencement of any proceedings in any other jurisdiction, whether concurrently or not." [emphasis added]

256. The issue which fell to be considered was whether the asymmetric jurisdiction clauses in the agreements between the Bank and the defendants were not compatible with Article 25 of Brussels 1 Recast on the basis that Article 25 requires the parties to have

designated the courts of a Member State to enable the law applicable to the substantive validity of a jurisdiction clause to be identified and to provide certainty as to the forum in which a putative defendant can expect to be sued. Notably *Liquimar* invoked the French decisions referred to by Mr Thewes, including the *Rothschild* case.

257. Cranston J at [79]-[81] said:

> "[79] In what it entitled a subsidiary argument, Liquimar contended that the asymmetric jurisdiction clauses in the agreements between the Bank and the defendants are not compatible with Article 25 of Brussels 1 Recast and therefore cannot trigger Article 31(2). Article 25 requires the parties to have designated the courts of a Member State to enable the law applicable to the substantive validity of a jurisdiction clause to be identified and to provide certainty as to the forum in which a putative defendant can expect to be sued. That is not achieved by a clause which designates the courts of all other competent states, including those of non-Member States, outside the territorial competence of the EU, which could mean suits in multiple jurisdictions. The French cases considered earlier in the judgment, in particular Mme X v. Société Banque Privé Edmond de Rothschild 13 , First Civil Chamber, 26 September 2012, Case No. 11-26022, were also invoked.
>
> 80. This argument seems to overlook that in these asymmetric jurisdiction clauses the parties have designated the English court as having exclusive jurisdiction when the defendants sue. There is nothing in Article 25 that a valid jurisdiction agreement has to exclude any courts, in particular non EU Courts. Article 17, penultimate paragraph, of the Brussels Convention recognised asymmetric jurisdiction clauses. To my mind it would need a strong indication that Brussels 1 Recast somehow renders what is a regular feature of financial documentation in the EU ineffective.
>
> [81] Any assistance which the defendants might garner from the decision of the French case, Mme X in 2012, comes up against the legal justification which the Cour de cassation in that case offered, the French concept of potestativité, not an autonomous concept in EU law. Quite apart from that there are the later French cases, and those in other European jurisdictions, outlined earlier in the judgment, which have taken a supportive approach to asymmetric jurisdiction clauses. I reject Liquimar's so called subsidiary argument." [emphasis added]

258. As to the approach of the Luxembourg courts, the evidence of Mr Thewes was very unsatisfactory on this issue: in particular he failed to refer to a decision of the Luxembourg court of 29 January 2014, even though he said in cross examination that he was aware of it, and it contradicted his evidence that a Luxembourg court would

follow the latest decision of the French courts; Mr Thewes also failed to mention a case in 2017, *Diemme v Chambon,* in which the French courts apparently upheld a clause which was similar to clause 19 (on the basis that he said there were differing views as to what was decided).

259. In the decision of the Luxembourg District Court dated 29 January 2014 in the context of a similar jurisdiction clause to clause 19, the court specifically considered the decision of the French Court of Cassation in *Rothschild* but rejected the argument and held that the clause was valid.

260. In the further decision of 7 December 2016 (the *Banque Internationale a Luxembourg* case) the Luxembourg Court of Appeal upheld a jurisdiction clause in full knowledge of the reasoning of the French Court of Cassation in *Apple*.

261. As a result, both of the unsatisfactory way in which his evidence was presented and the evidence of the decisions of the Luxembourg courts, in my view the evidence that Luxembourg courts, applying EU law, would not uphold such clauses was not made out on the evidence.

Conclusion

262. In my view in the light of the English and Luxembourg authorities as to the position as a matter of EU law, there is no need for a reference to the CJEU and I decline to exercise my discretion to do so.

Are the claims against the Part 20/Part 7 defendants subject to Article 7(1) or alternatively Article 7(2) of the Regulation? (Issue 12)

263. It is not disputed that the burden of proof is on the LICT Managers who must demonstrate to the standard of a good arguable case that the English court has jurisdiction over the claims made in the Proceedings. The precise nature of the test and its application has been addressed in several recent cases: *Brownlie v Four Seasons Holdings Inc* [2018] 1 WLR 192 at [7]; *Goldman Sachs International v Novo Banco SA* [2018] 1 WLR 3683 at [9] and *Kaefer v AMS Drilling Mexico* [2019] EWCA Civ 10 at [57]-[80].

264. It had been argued in *Goldman Sachs* that the formulation of the requisite test by Lord Sumption in *Brownlie* (and referred to below) was obiter: Green LJ in *Kaefer* addressed this at [70]:

> "70. An opportunity to clarify the test arose in *Goldman Sachs* . Lord Sumption (giving a judgment with which Lord Hodge, Lady Black, Lord Lloyd-Jones and Lord Mance agreed), essentially repeated his formulation in *Brownlie.* To the extent that there was disagreement in *Brownlie* about the reformulation of the *Canada Trust* test the Supreme Court has now spoken with a single voice and the route forward lies with that reformulation. In paragraph [9] Lord Sumption stated:
>
> "9. This is, accordingly, a case in which the fact on which jurisdiction depends is also likely to be decisive of the action

> itself if it proceeds. For the purpose of determining an issue about jurisdiction, the traditional test has been whether the claimant had "the better of the argument" on the facts going to jurisdiction. In *Brownlie v Four Seasons Holdings Inc* [2018] 1 WLR 192 , para 7, this court reformulated the effect of that test as follows:
>
> "… (i) that the claimant must supply a plausible evidential basis for the application of a relevant jurisdictional gateway; (ii) that if there is an issue of fact about it, or some other reason for doubting whether it applies, the court must take a view on the material available if it can reliably do so; but (iii) the nature of the issue and the limitations of the material available at the interlocutory stage may be such that no reliable assessment can be made, in which case there is a good arguable case for the application of the gateway if there is a plausible (albeit contested) evidential basis for it."
>
> It is common ground that the test must be satisfied on the evidence relating to the position as at the date when the proceedings were commenced."
>
> 71. Any dispute about whether the three-limbed test is obiter has accordingly now vanished. The test has been endorsed by a unanimous Supreme Court…" [emphasis added]

265. In *Kaefer* the court then considered how the test works in practice as well as what is meant by " plausible " and how it relates to " good arguable case ":

> "73. It is in my view clear that, at least in part, the Supreme Court confirmed the relative test in *Canada Trust*…The reference to " a plausible evidential basis " in limb (i) is hence a reference to an evidential basis showing that the Claimant has the better argument…
>
> 74. What is the correct name for the test? …It is notable that in *Goldman Sachs* the Court does not use the terminology of " good arguable case " save in respect of limb (iii) where it is combined with plausibility. In limb (i) – which is the basic test – the test is plausibility alone... In my view, provided it is acknowledged that labels do not matter, and form is not allowed to prevail over substance, it is not significant whether one wraps up the three-limbed test under the heading " good arguable case " and since this was the understanding in *Aspen* there remains currency in this rubric.
>
> …
>
> [78] Limb (ii) is an instruction to the court to seek to overcome evidential difficulties and arrive at a conclusion if it " reliably" can. It recognises that jurisdiction challenges are invariably

> interim and will be characterised by gaps in the evidence. The Court is not compelled to perform the impossible but, as any Judge will know, not every evidential lacuna or dispute is material or cannot be overcome…
>
> [79] The relative test has been endorsed " in part " because limb (iii) is intended to address an issue which has arisen in a series of earlier cases and which has to be grappled with but which as a matter of logic cannot satisfactorily be addressed by reference to a relative test: …This arises where the Court finds itself simply unable to form a decided conclusion on the evidence before it and is therefore unable to say who has the better argument.
>
> 80. What does the Judge then do? Given that the burden of persuasion lies with the claimant it could be argued that the claim to jurisdiction should fail since the test has not been met. But this would seem to be unfair because, on fuller analysis, it might turn out that the claimant did have the better of the argument and that the court should have asserted jurisdiction. And, moreover, it would not be right to adjourn the jurisdiction dispute to the full trial on the merits since this would defeat the purpose of jurisdiction being determined early and definitively to create legal certainty and to avoid the risk that the parties devote time and cost to preparing and fighting the merits only to be told that the Court lacked jurisdiction... The solution encapsulated in limb (iii) addresses this situation. To an extent it moves away from a relative test and, in its place, introduces a test combining good arguable case and plausibility of evidence. Whilst no doubt there is room for debate as to what this implies for the standard of proof it can be stated that this is a more flexible test which is not necessarily conditional upon relative merits. [emphasis added]

266. Art. 7(1) of the Regulation provides (so far as relevant) that:

> "A person domiciled in a Member State may be sued in another Member State:
>
> (1) (a) in matters relating to a contract, in the courts for the place of performance of the obligation in question;
>
> (b) for the purpose of this provision and unless otherwise agreed, the place of performance of the obligation in question shall be: …
>
> - in the case of the provision of services, the place in a Member State where, under the contract, the services were provided or should have been provided;
>
> (c) if point (b) does not apply then point (a) applies"

267. Art. 7(2) of the Regulation provides (so far as relevant) that:

> "A person domiciled in a Member State may be sued in another Member State: …
>
> (2) in matters relating to tort, delict or quasi-delict, in the courts for the place where the harmful event occurred or may occur;"

"Matters relating to a contract"

268. It was submitted for the second and fourth defendants that the relevant contract for the purposes of Article 7(1) is the relationship between Delta and V2 under which Delta acts as a manager of V2. It was submitted that it also applies to the claim by V2 against Mr Veltchev. Although he was not himself a director, the claim was "founded on obligations that he is alleged to have owed to V2 by reason of his acting as Delta's representative".

269. It was common ground that if the court were to find that the claims fall within Article 7(1) as constituting "matters relating to a contract", then the place of performance was not England.

270. It was submitted for the claimants that its claims are claims in tort within the meaning of Article 7 (2) and are not "matters relating to a contract" within Article 7 (1) of the Regulation. (It was common ground that Article 7(1) and Article 7(2) are mutually exclusive.)

Relevant law

271. The court was referred to the decision in *Bosworth v Arcadia Petroleum Ltd* [2016] EWCA Civ 818 in which the Court of Appeal reviewed both the English authorities and the EU authorities including the authority of *Brogsitter* on which the defendants relied and *Holterman.*

272. In *Arcadia* the court held that the claims in conspiracy did not relate to the defendants' contract of employment, the key to the alleged fraud did not lie in the defendants' contract of employment but in their de facto roles as CEO and CFO of the group as a whole. The conspiracy claims could have been pleaded as breaches of contractual duties but the contracts simply formed part of the history and provided the opportunity for the nefarious activity.

273. Gross LJ said at [65] and [66] of the judgment in *Arcadia*:

> "[65] Thirdly, as a matter of English law, *Alfa Laval* does not oblige us to adopt that mechanistic test. As already discussed, Longmore LJ was anxious to reject the "legal relevance" test adopted in *Swithenbank* (supra) and, for very good reason, to discourage "pleaders' games". It simply does not follow from Longmore LJ's approach that, merely because a matter could be pleaded as a breach of contract, therefore Art. 18 applies. Instead, Longmore LJ favoured, as we have seen, sticking with

> the actual words of Art. 18.1 and asking whether the claims made against the employee relate to individual contracts of employment. That is a broad test and involves a broad inquiry, not a mechanistic approach; the wording of Art. 18.1 does not require any gloss. For his part, Davis LJ likewise focused on the words of Art. 18.1 , saying that they were broad and unqualified words of nexus, not requiring artificial limitation. However, the nexus needed to be material and it was "…necessary to have regard to the substance of the matter". So far as concerns the observation of Sir Andrew Morritt C in argument (recorded at [25]), the important point is that it was not proposed as "a test of any kind". In many cases, it might, with respect, indeed be helpful to ask the question of whether the acts complained of by the employer constituted a breach of the contract of employment by the employee. But it would be wrong to elevate that question into a test or touchstone – and nothing in Alfa Laval requires us to do so. For my part, the correct approach as a matter of English law is to consider the question whether the reality and substance of the conduct relates to the individual contract of employment, having regard to the social purpose of Section 5: ..]."
>
> "[66] Fourthly, the ECJ authorities do not require the adoption of the mechanistic test. With respect to Mr Foxton's argument to the contrary, I am unable to accept that the ratio of *Brogsitter* is to be found (in effect) solely in paragraphs [24] and [29]. There is more to it than that, as appears from the discussion in *Holterman*, set out above, especially the reference by the Court in *Holterman* to paragraphs [24] – [27] of *Brogsitter*. To my mind, the true ratio of *Brogsitter* appears from the entirety of the passage at [24] – [27]; there can be no good reason to look at paragraphs [24] and [29] in isolation. It may be remarked that the point is even clearer if regard is had to the German language text but I do not rest my conclusion on that consideration. Accordingly, it does not suffice to pose the – literal – question as to whether the conduct complained of "may be considered a breach of contract". Instead, the requirement that the legal basis of the claim "can reasonably be regarded" as a breach of contract, assists in directing the focus of the inquiry to the substance of the matter, with the result that it is "indispensable" to consider the contract in order to resolve the matter in dispute. This is a test and an approach indistinguishable to my mind from that adopted in *Alfa Laval*, so that (in Davis LJ's words) there will be a material nexus between the conduct complained of and the individual contract of employment." [emphasis added]

274. Following the conclusion of the hearing, including closing submissions, I was referred to the decision of the Court of Appeal in *Merinson v Yukos International UK BV* [2019] EWCA Civ 830 where the court considered the meaning of the term

"matters relating to" in the context of the Regulation. However that case merely applies the test as formulated in *Arcadia* so is of little assistance.

Discussion

275. As is clear from the judgment in *Arcadia* it is the substance of the matter and the facts of the particular case which determine its proper characterisation.

276. The Part 20 claim is that the purported auction and sale of the InterV shares was unlawful and conducted in fraud on V2. It is alleged that VTBC and the Part 20 defendants all participated or colluded in that fraud. In the draft particulars of the Part 20 claim (paragraph 10) the claim is described as "a tortious conspiracy conceived and implemented by VTBC and the Part 20 defendants with a view to misappropriating V2's shares in InterV and thus the business and assets of the Vivacom group".

277. It is alleged (paragraph 51) that Viva Luxembourg knew of and/or participated in VTBC's breaches of duty under various agreements including the subordination agreement which provided for the enforcement of security for the Bridge Loan and the Luxembourg law on financial collateral.

278. It is also alleged (paragraph 53) that VTBC and the Part 20 defendants combined to use unlawful means with the intention of acquiring ownership or control of the InterV shares.

279. The particulars of unlawful conduct in relation to Viva Luxembourg and Mr Roussev are that they "wrongfully colluded and conspired" with VTBC to ensure the shares were sold to Viva Luxembourg (paragraph 53.2).

280. The particulars of unlawful conduct in relation to Delta and Maze and Mr Veltchev, are set out in paragraph 53.3. This states that:

> " …Delta and Maze as directors of V2, InterV and V Telecom and Mr Veltchev as a director and representative of Delta owed duties to the Vivacom Group companies which they represented, (including in particular V2) to act in good faith in the best interests of the companies themselves pursuant to Articles 59…the Luxembourg law on Commercial Companies and Articles 1382-1384 of the Civil Code.."

It is then alleged that they were in breach of duty and colluded with VTBC by permitting it to dispose of the shares through a sham auction process.

281. It was submitted for the second and fourth defendants in closing that the claim "relates to the relationship which is considered to be contractual".

282. It was further submitted by counsel for the second and fourth defendants that the "key question" is whether the legal basis of the claims can reasonably be regarded as a breach of the relevant contractual relationship so that examining that relationship is indispensable in order to resolve the matter in dispute. However, as is clear from the

passage in *Arcadia* cited above, the legal basis of the claim merely "assists in directing the focus of the enquiry to the substance of the matter".

283. In my view the claimant has the better of the argument that in the case of Delta, this is not a claim of "matters relating to a contract" for the following reasons:

i) as in *Arcadia*, the "key" to the alleged fraud lies not in the contract of employment; the reality or substance of the matter is that the overarching claims concern Delta acting outside any contract;

ii) although the conspiracy allegations are pleaded as breaches of their statutory duties as directors, the pleaded case relies on statutory breaches not on contractual obligations and as in *Arcadia*, in my view, their role as directors/managers provided "the opportunity" for the alleged fraud but the claims are in reality about the alleged dishonesty of a number of alleged conspirators acting in combination; and

iii) whilst it was accepted in *Arcadia* that there was no special rule for conspiracy such that every conspiracy must be outside individual contracts of employment, nevertheless some of the alleged conspirators were not party to any contract with V2 namely Mr Veltchev, Mr Roussev, Viva Luxembourg and VTB.

Mr Veltchev

284. As to Mr Veltchev, it is pleaded that as a director and representative of Delta he owed duties to the Vivacom Group companies, including V2. There is no contractual relationship between Mr Veltchev and the Vivacom companies including V2. Thus, even though the claim can be described as "founded on obligations that he is alleged to have owed to V2 by reason of his acting as Delta's representative" the conclusions reached in relation to Delta and Maze as to whether the reality and substance of the conduct are "matters relating to a contract", apply with more force in the case of Mr Veltchev.

Viva Luxembourg

285. It is alleged that that Viva Luxembourg knew of and/or participated in VTBC's breaches of duty under various agreements. That in my view is not a sufficient material nexus to establish an arguable case that the claim falls within the scope of "matters relating to" a contract within the meaning of Article 7(1).

Conclusion on Article 7 (1)

286. For the reasons set out above I find that the claimants have a good arguable case that the claims against Delta, Mr Veltchev and Viva Luxembourg fall outside Article 7(1) on the basis that the claims are not matters relating to a contract within the meaning of Article 7(1).

To the extent that the claims against the Part 20/Part 7 defendants are subject to Article 7 (1) of the Regulation, is England the place of performance of the obligation in question? (Issue 13)

287. In the light of my finding above this does not arise (although as noted above it would appear to have been common ground that England was not the place of performance of the obligation in question).

To the extent that the claims against the Part 20/Part 7 defendants are subject to Article 7(2) of the Regulation is England the place where the harmful event occurred? (Issue 14)

288. It appeared to be common ground that the place "where the harmful event occurred" is either the place where the damage occurred or the place of the event which gives rise to the damage.

289. It was submitted for the claimants that it was London because that was the place where the sham auction took place and was organised by VTBC. It was also the place where the conspiracy took place. It was submitted for the claimants that it was plausible on the evidence that they conspired in London: there were meetings in London and VTBC was the "puppetmaster" organising the conspiracy, selling the shares, lending the money and blocking the claimants from buying the shares.

290. In the alternative, it was submitted for the claimants that the damage occurred in London when the shares in InterV were sold to Viva Luxembourg in November 2015 which was effected by way of a sale and purchase agreement between VTBC and Viva Luxembourg under a contract subject to English law and jurisdiction. Completion took place in London.

291. The court was referred to the decision of the Supreme Court in *JSC BTA Bank v Ablyazov (no 14)* [2018] UKSC 19. At first instance the judge held that the event giving rise to the damage was not the conspiracy but its implementation. The Court of Appeal held that the event giving rise to the damage was the conspiratorial agreement in England. That conclusion was upheld by the Supreme Court. At [41] of the judgment of the Supreme Court, the court held:

> "41. We consider that the Court of Appeal correctly identified the place where the conspiratorial agreement was made as the place of the event which gives rise to and is at the origin of the damage. As Sales LJ explained (at para 76), in entering into the agreement Mr Khrapunov would have encouraged and procured the commission of unlawful acts by agreeing to help Mr Ablyazov to carry the scheme into effect. Thereafter, Mr Khrapunov's alleged dealing with assets the subject of the freezing and receivership orders would have been undertaken pursuant to and in implementation of that agreement, whether or not he was acting on instructions from Mr Ablyazov. The making of the agreement in England should, in our view, be regarded as the harmful event which set the tort in motion." [emphasis added]

292. Prior to the trial, in opening written submissions, it was submitted for the second and fourth defendants that there was no suggestion in the pleadings or any evidence before the court that Delta or Mr Veltchev were involved in any conduct or discussions in England. Further to an application made in the course of the trial by V2 to rely on the witness statement of Miss Jocelyn Bennett dated 3 May 2019, the court, whilst refusing the application to admit the witness statement, stated that it would proceed on the basis (proposed by the defendants in response to the application to admit the witness statement) that in 2015 in the period leading up to the auction, several meetings were held in London with Mr Roussev, VTBC and Mr Veltchev to discuss the sale of Vivacom.

293. Delta is a Bulgarian company and Mr Veltchev and Mr Roussev are Bulgarians, involved in the management of Luxembourg companies. However, given modern communications this is of no great weight in determining the location of the agreement.

294. The key evidence in relation to the making of the agreement in England is therefore as follows:

i) on the one hand, VTBC was based in England and meetings at which the sale of Vivacom was discussed are accepted to have occurred in London; and

ii) on the other hand, there is no reference in the pleadings to the conspiracy having been agreed in England and no such allegation in the witness statement of Mr Kakaad (solicitor for the claimants) of 31 July 2018 dealing with jurisdiction under Article 7(2).

295. As is clear from the authority cited above, it is not sufficient that there are meetings in England to implement the conspiracy, it is the making of the agreement in England which is to be regarded as the harmful event.

296. In my view the claimants have not supplied a plausible evidential basis that the agreement was made in England. Their evidence is consistent with a case that the conspiracy was implemented in England but that is not sufficient.

297. The alternative case advanced by the claimants is that the place of the damage was in London. No authorities were relied upon to support the submissions of either party. I note however that in the defence to their Original Proceedings it was the position of the second and fourth defendants that in relation to any claim to reverse the sale of the InterV shares the relevant damage was the acceptance of Viva Luxembourg's offer for the InterV shares which took place in England. (The position of the claimants at that stage was that the damage occurred in Luxembourg). However, the damage as pleaded in the Part 20 particulars (paragraph 10) is that:

> "V2 has suffered significant loss and damage including the loss of its 100% interest in the Vivacom group. V2 accordingly seeks an order for the return of the InterV shares and/or the payment of appropriate compensation."

Whilst not defined, the Vivacom group is stated to be a group of companies, owned by InterV, which own and operate one of the largest telecommunications networks in Bulgaria.

298. Even though the share purchase agreement was under English law, it is the loss of the shares in the Luxembourg company which is the pleaded damage not the agreement to sell or the auction. The Vivacom group consists of Bulgarian telecommunications companies which were held by InterV through Viva Luxembourg Bulgaria EOOD (paragraph 3 of the Agreed List of Agreed Issues).

299. It seems to me therefore that the defendants have the better of the argument on the place of damage.

Conclusion

300. To the extent that the claims against the Part 20/Part 7 defendants are subject to Article 7(2) of the Regulation, I find, for the reasons discussed above, that the claimants have not established an arguable case that England is the place where the harmful event occurred.

Should V Telecom and/or V2 be removed as defendants to the Original Proceedings with the effect that in the case of V2 that the Part 20 proceedings cannot continue? (Issue 17)

301. The Removal Application by VTBC relates to the Original Proceedings and therefore falls to be determined notwithstanding my findings on authority in relation to the Proceedings (issues 1-10 above).

302. CPR 19.2(3) provides:

> "The court may order any person to cease to be a party if it is not desirable for that person to be a party to the proceedings."

303. It was submitted for VTBC that:

i) There is no good reason for V2 to continue being a defendant in the Original Proceedings. No relief is sought against it and it was only joined to the Original Proceedings for the purposes of ensuring that it was bound by the judgment. That rationale no longer applies because the only claim that the Original Claimants can now bring is a claim for alleged loss of opportunity;

ii) It undermines an exclusive jurisdiction clause in the Pledge which should be respected; and

iii) It is being used to bring the Part 20 claim and circumvent the exclusive jurisdiction clause.

304. In closing submissions counsel for the claimants accepted that whilst the original basis for including V2 as a defendant was on the basis that it would be bound by the findings in the action, it was correct that this purpose has fallen away following the court's decision in the Preliminary Issues Trial and the only claim that is remaining is the personal claim and not something that affects V2 "in the sense of binding its

affairs". However, counsel for the claimants submitted that it was not desirable or appropriate to remove V2 for the following reasons:

i) (assuming that the claimants were successful on the issue of authority) in order to bring the Part 20 claim, V2 has to be a defendant in the existing action and V2 does not wish to be removed; it is therefore in V2's interests to remain a party to the Original Proceedings because it will then be able to pursue its Part 20 claims; and

ii) VTBC is not a defendant to the Part 20 claim so there is no claim by V2 against VTBC and the Part 20 claim does not result in the determination of any claims which fall within the scope of the Luxembourg jurisdiction clause because there is no action between V2 and VTBC; the findings between V2 and the defendants in the Part 20 claim will not give rise to any *res judicata* in relation to VTBC merely because they are party to the main action.

305. The Pledge was entered into between V2 and VTBC. By that Pledge, V2 pledged its shares in InterV. The Pledge is governed by Luxembourg law and contained an exclusive jurisdiction clause (clause 15(b)) which provided that:

> "Each party hereto agrees that the courts of Luxembourg, judicial district of Luxembourg city, are to have the exclusive jurisdiction to settle any claims, disputes or matters (the "Proceedings") arising out of or in connection with this Agreement (including a dispute relating to any non-contractual obligations arising out of or in connection with it) and that accordingly any suit, action or proceedings arising out of or in connection with this Agreement (including any proceedings relating to any non-contractual obligations arising out of or in connection with this Agreement) shall be brought in such courts."

306. Although the construction of the Pledge is a matter of Luxembourg law there is nothing to suggest that the broad language of "claims, disputes or matters… arising out of or in connection with" should not be construed as broadly as the language would suggest.

307. By the Part 20 proceedings V2 seeks an order requiring Viva Luxembourg to return the shares to V2 or restore their value to V2.

308. In my view it is not desirable for V2 to be a party to the Original Proceedings and the court should exercise its discretion to order that V2 should cease to be a party to the Original Proceedings for the following reasons:

i) In the light of my findings on authority there is no reason for V2 to remain a party;

ii) The reason why the application was brought (allegedly to frustrate the Part 20 Proceedings) does not affect the exercise of the court's discretion when the Part 20 Proceedings have been found to have been commenced without authority;

iii) The alleged wish of V2 to remain a party cannot be said to have been expressed by V2 in the light of the absence of authority on the part of the LICT Managers; and

iv) The Original Proceedings advance claims which are within the scope of the exclusive jurisdiction clause in the Pledge which should not be allowed to be pursued in the English courts by V2 against VTBC: in particular paragraph 55(3) which refers to VTBC acting in breach of the Pledge. If authority for this proposition is necessary then I refer to Eder J in *Nomura International v Banca Monte dei Paschi di Siena* [2013] EWHC 3187 (Comm) where, dealing with whether to grant a stay where there was an exclusive jurisdiction clause, he said at [80]:

> "...the court should so, far as possible, give effect to the parties' bargain and be very slow indeed to exercise such a discretion in a manner the effect of which would be to destroy such bargain"

309. Further, even if I were wrong on the issue of authority and the Proceedings were validly commenced, the Part 20 claim would become part of the Original Proceedings and there would be a claim which would lead to the determination of "claims, disputes or matters" as between VTBC and V2 which is contrary to the exclusive jurisdiction clause in the Pledge. The relief sought in the Part 20 Proceedings must involve matters arising out of the Pledge given the relief sought which seeks the return of the shares to V2 which were the subject of the Pledge.

Conclusion

310. For the reasons set out above the application to remove V2 is granted.

Is it open to the court to decline jurisdiction under Article 8 (2) of the Regulation on any of the following grounds and if so, should it do so?

i) The LICT managers have initiated the Part 20 proceedings in circumstances in which there is no basis for V2 to be a defendant to the Original Proceedings;

ii) the effect of the Part 20 proceedings is to circumvent the jurisdiction agreement contained in clause 15(b) of the Pledge; and/or

iii) the bringing of the Part 20 proceedings is an abuse (Issue 15)

311. Article 8(2) of the Regulation applies to third party proceedings. It provides (so far as relevant) that:

> "A person domiciled in a Member State may also be sued: …
>
> "(2) as a third party in an action on a warranty or guarantee or in any other third-party proceedings, in the court seised of the Original Proceedings, unless these were instituted solely with the object of removing him from the jurisdiction of the court which would be competent in his case;"

312. In the light of my conclusion on the Removal Application, this Issue does not need to be determined. (This appeared to be accepted for the claimants: paragraph 98(1) of the claimants' opening skeleton.)

Should permission be granted for the Part 20 proceedings and if not should the Part 7 Proceedings be consolidated with the Original Proceedings (Issue 18)

313. In the light of my findings on authority this issue does not fall to be determined.

Should the Proceedings be struck out as an abuse of process on the basis that:

i) the Part 20 Proceedings seek to determine issues between VTBC and V2 which fall within the scope of an exclusive jurisdiction clause in the Pledge in favour of the Luxembourg courts;

ii) following the Preliminary Issues Trial, the Original Claimants are now trying to advance the same claims that they brought in the Original Proceedings, which claims could and should have been brought together with the Original Proceedings? (Issue 16)

314. In the light of my findings on authority it is not necessary to determine whether the Proceedings should be struck out as an abuse of process.

315. However, I will consider the issue raised by paragraph (ii) as it was a matter on which I heard full argument.

Relevant law

316. It was common ground that the principle of Henderson v Henderson abuse was set out by Lord Bingham in *Johnson v. Gore Wood* [2002] 2 AC 1 at page 31:

> "Henderson v Henderson abuse of process, as now understood, although separate and distinct from cause of action estoppel and issue estoppel has much in common with them. The underlying public interest is the same: that there should be finality in litigation and that a party should not be twice vexed in the same matter. This public interest is reinforced by the current emphasis on efficiency and economy in the conduct of litigation, in the interests of the parties and the public as a whole. The bringing of a claim or the raising of a defence in later proceedings may, without more, amount to abuse if the court is satisfied (the onus being on the party alleging abuse) that the claim or defence should have been raised in the earlier proceedings if it was to be raised at all. I would not accept that it is necessary, before abuse may be found, to identify any additional element such as a collateral attack on a previous decision or some dishonesty, but where those elements are present the later proceedings will be much more obviously abusive, and there will rarely be a finding of abuse unless the later proceeding involves what the court regards as unjust harassment of a party. It is, however, wrong to hold that

> because a matter could have been raised in earlier proceedings it should have been, so as to render the raising of it in later proceedings necessarily abusive. That is to adopt too dogmatic an approach to what should in my opinion be a broad, merits-based judgment which takes account of the public and private interests involved and also takes account of all the facts of the case, focusing attention on the crucial question whether, in all the circumstances, a party is misusing or abusing the process of the court by seeking to raise before it the issue which could have been raised before. As one cannot comprehensively list all possible forms of abuse, so one cannot formulate any hard and fast rule to determine whether, on given facts, abuse is to be found or not." [emphasis added]

317. The claimants also relied on the following passage in the judgment of Lord Millett (at pp.59-60) that:

> "It is one thing to refuse to allow a party to relitigate a question which has already been decided; it is quite another to deny him the opportunity of litigating for the first time a question which has not previously been adjudicated upon. This latter (though not the former) is prima facie a denial of the citizen's right of access to the court conferred by the common law and guaranteed by article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. While, therefore, the doctrine of res judicata in all its branches may properly be regarded as a rule of substantive law, applicable in all save exceptional circumstances, the doctrine now under consideration can be no more than a procedural rule based on the need to protect the process of the court from abuse and the defendant from oppression."

318. Counsel for the claimants also relied on Lord Neuberger MR in *Henley v. Bloom* [2010] 1 WLR 1770 at [25]-[26]:

> "…However desirable it may be for a party to bring all his claims forward in one go, the abuse principle...does not bar a claim simply because someone fails to raise a claim when he could have done so. The facts must be such that the second action amounts to an abuse of process before it can be struck out.
>
> The importance of the general principle that every person with an arguable claim should be able to pursue it in court is enshrined in Article 6 of the European Convention. As Sir Anthony Clarke MR indicated in [*Stuart v Goldberg Linde*], at paragraph 98, if the court is not satisfied that a claimant's attempt to raise his claim is actually abusive in the light of his previous failure to raise it, the claim cannot be barred from proceeding however desirable it might have been for the claimant to have raised it earlier."

Submissions

319. It was submitted for the claimants that:

i) the LICT Managers did not deliberately hold back their claims until after the Preliminary Issues Trial. The reason why the LICT Managers did not take steps to bring proceedings in the name of V2 earlier is because neither they nor anyone associated with them was aware of the potential for such claims until June 2018;

ii) there is no particular prejudice to the Defendants (let alone "oppression") in allowing V2 to bring the proposed new claims. The Original Proceedings are still ongoing, and at an early stage, and are proceeding to trial in any event. There is an almost total overlap between the subject matter of the two sets of claims. Thus the introduction of V2's claims will have only a marginal impact on the cost, complexity and duration of the proceedings;

iii) the Defendants are wrong to say that the costs of the Preliminary Issues Trial (or this hearing) would have been avoided if the present claims had been brought at the time of the Original Proceedings; and

iv) there is no question of the "finality" of the Preliminary Issues Trial judgment being undermined. The judgment remains final as against the Original Claimants and between the present parties for the purposes of the issues which it determines.

320. Counsel for VTBC submitted that:

i) *Henderson v Henderson* abuse can exist despite the claimants in the two relevant claims being different;

ii) the question of whether a claimant was aware that it could have brought its claim at the time of the Original Proceedings is highly relevant, not least to the question of whether the guidelines in *Aldi Stores Ltd* [2008] 1 WLR 748 have been complied with;

iii) the claimants and/or the LICT Managers and/or those standing behind them knew about their "plan B" (i.e. their recourse to clause 32 of the SHA) but held it back until "plan A" had failed (when permission to appeal the outcome of the Preliminary Issues Trial was finally refused);

iv) even if those standing behind the claimants and the LICT Managers did not know about clause 32 of the SHA and what they now say is its effect before 25 June 2018, nevertheless they plainly should have done; and

v) the time, costs and effort involved in the Preliminary Issues Trial, both on the part of the parties and the Court, were considerable: if "plan B" were allowed to be deployed now, all of that would be completely wasted.

321. Counsel for the second and fourth defendants submitted that:

i) the LICT Managers could have commenced the Proceedings earlier because they could have commenced proceedings in reliance on clause 32 (or otherwise procured V2's authorisation of the Proceedings) at any time. The second and fourth defendants submit that this is not a case where the LICT Managers were only able to bring the Proceedings due to new events occurring after the Preliminary Issues Trial;

ii) the LICT Managers should have commenced the clause 32 proceedings earlier: the Original Defendants' position was that LICT was the wrong party to bring the claims rejected by Waksman J at the Preliminary Issues Trial so LICT and the LICT Managers should have considered whether they had any response to that argument and they should have taken steps to address the point at that stage;

iii) the Preliminary Issues Trial, which took over a year and a half (including three interim applications, a five day trial and a consequentials hearing), and cost the Defendants nearly £5 million, will have been a waste of time;

iv) allowing the LICT Managers to continue with the Proceedings would undermine the finality of the judgments in the Preliminary Issues Trial;

v) the institution of the Proceedings by the LICT Managers has delayed the determination of the outstanding claim in the Original Proceedings;

vi) if it was the case that clause 32 was known about before the Preliminary Issues Trial then the LICT Managers or the Original Claimants should have informed the Defendants and the court about the prospect of their using clause 32 to procure the commencement by V2 of its own claim; and

vii) even if the LICT Managers, the Original Claimants and those standing behind them were not aware of clause 32 (or its alleged effect) until after the Preliminary Issues Trial, they should have been so aware. They have had the benefit of legal advice and the extent to which those claims could be brought by or through V2 was an obvious issue that should have been examined.

Discussion

322. The test is not whether the claimants could have brought the case earlier. As Lord Millet said in *Johnson v Gore Wood* at 59G:

> "There is, therefore, only one question to be considered in the present case: whether it was oppressive or otherwise an abuse of the process of the court for Mr. Johnson to bring his own proceedings against the firm when he could have brought them as part of or at the same time as the Company's action. This question must be determined as at the time when Mr. Johnson brought the present proceedings and in the light of everything that had then happened. There is, of course, no doubt that Mr. Johnson could have brought his action as part of or at the same time as the Company's action. But it does not at all follow that he should have done so or that his failure to do so renders the

> present action oppressive to the firm or an abuse of the process of the court. As May L.J. observed in Manson v Vooght at p. 387, it may in a particular case be sensible to advance claims separately. Insofar as the so-called rule in Henderson v. Henderson suggests that there is a presumption against the bringing of successive actions, I consider that it is a distortion of the true position. The burden should always rest upon the defendant to establish that it is oppressive or an abuse of process for him to be subjected to the second action." [emphasis added]

323. As to whether they "should" have brought the case earlier, counsel for VTBC "invited the court to infer" that the claimants and/or the LICT Managers or those behind them in fact knew about what VTBC referred to as Plan B, but held it back and kept it "up their sleeve" until Plan A had definitively failed. (On 18 June 2018, the claimants' application for permission to appeal against the judgment in the Preliminary Issues Trial was refused.) The evidence of Mr Kakkad, the solicitor at Gresham Legal responsible for the proceedings on behalf of V2, in his second witness statement, was that he was informed by the LICT Managers that they did not "alight" upon Clause 32 until after the Preliminary Issues Trial. There was then a request made in March 2019 which asked how and from what natural persons the LICT directors "alighted" upon clause 32 and the answer was that it was privileged. In his third witness statement (paragraph 16) Mr Kakaad states in response to criticism from the defendants of his earlier explanations, that he was informed by Mr Picco that:

> "no-one who represents the Claimants or the LICT Managers, or has any involvement in their decision making or whose knowledge can be attributed to them was aware of clause 32 or the possibility of bringing claims based on it prior to June 2018."

324. It was submitted for the LICT Managers that this evidence covers the barristers and the solicitors engaged in these proceedings and that the proposition that the lawyers would make assertions of fact in the knowledge that they were untrue was an "extraordinary" one.

325. The court is not prepared on the evidence to make the very serious inference that in effect counsel and the solicitors are allowing statements which they know to be untrue to be put before the court. Accordingly, in my view, this is not a situation where the party is aware of the possibility of a second claim such that the *Aldi* guidelines (which requires the party to raise the potential second claim with the court and seek directions) are relevant. More significantly, this means that I find on the evidence before the court that this is not a case where the claimants have kept the second claim "up their sleeve".

326. It was submitted for the second and fourth defendants in reliance on dicta of Sir Anthony Clarke MR in *Stuart v Goldberg Linde* [2008] EWCA Civ 2 at [79] that there may be harassment:

> "if a party fails to rely upon a point which properly belonged to the first litigation and which with reasonable diligence he might reasonably have brought forward at the time."

327. I note that this was a view expressed only by Sir Anthony Clarke MR and was obiter. Even if it represents the law, the court is still required to consider all the circumstances. In particular I take into account that, although the Preliminary Issues Trial has been concluded, the trial of the remaining issue has still to take place. The remaining issue seeks to recover damages for the loss of opportunity to acquire the InterV shares. The Preliminary Issues Trial proceeded on the basis of agreed facts and determined only specific issues of Luxembourg law. The merits of the case including the factual allegations as to the conduct of the defendants on which the claim to damages for lost opportunity depends has yet to be decided. I therefore reject the submission that the Proceedings would undermine the finality of the judgments in the Preliminary Issues Trial or render it a waste of time.

328. In relation to the issue of costs "wasted" by the Preliminary Issues Trial, this is arguably irrelevant given my conclusion that it was not a waste of time. However, I note that in determining the issue of costs, Waksman J described the costs of the first defendant at £3 million as "eye watering" and reduced them to a starting point of £2 million before making an order that the claimants should pay 40% of such costs. In relation to the second and fourth defendants it is notable that the judge ordered that there be no order for costs, given the relative success of the parties on the issues.

329. The Proceedings have caused some delay to the progress of the Original Proceedings but the defendants have not in my view demonstrated any particular prejudice such as disruption to their business which might contribute to a finding that the Proceedings were oppressive.

Conclusion on Abuse of Process

330. In my view in the circumstances of this case, and for the reasons discussed above, I find that the claimants were not acting oppressively or otherwise abusing the process of the court in bringing the Proceedings.