Neutral Citation Number: [2020] EWHC 2123 (Comm)

Case No: CL-2019-000785

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

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

Date: **24 July 2020**

**Before** :

**Mr Justice Jacobs**

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**Between :**

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| **Macquarie Global Infrastructure Funds 2 S.a.r.l. (in liquidation)** | **Claimant** |
| **- and -** | |
| **(1) Fernando Rodina Gonzalez** | **Defendant** |
| **(2) Amitjugoett AB** | |

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**Andrew Scott** (instructed by **Jones Day**) for the **Claimant**
**Richard Slade QC** (instructed by **Hunters Law**) for the **Defendant**

Hearing dates: **24th July 2020**

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# JUDGMENT

**Mr Justice Jacobs** **Friday, 24 July 2020**
(**4.30** pm)

Judgment by **MR JUSTICE JACOBS**

*Introduction*

1. This is an application brought by Mr Fernando Rodiño Gonzales ("D1" or "Mr. Rodiño") and Amitjugoett AB ("D2") to have service of the present English action, brought by the claimant, Macquarie Global Infrastructure Funds 2 S.a.r.l. ("C" or "Macquarie"), set aside, or the proceedings stayed. The claim in the present proceedings has arisen because of proceedings brought by D1 and D2 in Luxembourg. C says that those proceedings are in breach of a jurisdiction clause contained in a Shareholders Agreement agreed between the parties. The relief sought in the Particulars of Claim comprises, in summary: (i) damages for breach of the jurisdiction clause; (ii) a declaration that the proceedings in Luxembourg, insofar as brought against C and a related company known as, "FSS", is a proceeding which falls within the exclusive jurisdiction clause in the Shareholders Agreement; and (iii) a declaration that C has no liability to D1 and D2 as alleged in the Luxembourg proceedings which were commenced by a summons.
2. The present claims therefore concern, and are directed towards, the claims brought by D1 and D2 in the Luxembourg courts. Although there are a number of additional arguments, the central question here, as it was in the decision of mine in *Etihad Airways PJSC v Flother* [2019] EWHC 3107 (Comm), is whether C has a good arguable case that the claim commenced by D1 and D2 in Luxembourg falls within the scope of the jurisdiction clause relied upon in the present case.
3. If there is a good arguable case to that effect, then there is a proper jurisdictional basis for all the claims which C has brought. Jurisdiction would, on that hypothesis, be established under Article 25 of EU Regulation 1215/2012 ("the Brussels Recast", or, "the regulation"), and the English court would then be entitled to continue with the present proceedings.

4. It is now well-established that the English court no longer has to wait for the Luxembourg court to rule since what was impolitely termed the "Italian torpedo" was changed with the addition of Article 31.2 and 31.3 to the Brussels Recast.

5. It follows that if jurisdiction is established, the English court can continue with the present proceedings and the Luxembourg court is required and should stay its own proceedings insofar as it concerns the present parties.

6. If, by contrast, there is no good arguable case, then there would be no jurisdictional basis for the present proceedings; since no other jurisdictional basis for the present claims can be identified or is relied upon. The defendants in this case are Spanish and Swedish and it is only via the jurisdiction agreement relied upon that jurisdiction can be established against them. Also, if there were no jurisdiction agreement, then this court would in any event be second seised of the relevant proceedings, because there is no dispute that proceedings were started in Luxembourg before they were started here. On that hypothesis, therefore, it would be for this court to stay its proceedings in favour of the Luxembourg court under Article 29.1.

7. Although it was argued by Mr Scott on behalf of the claimant that the good arguable case threshold only applies to some aspects of the claims in the Particulars of Claim (for example, the claim for a declaration of non-liability) and did not apply to others (for example, C's claim for a breach of clause 18) I was not persuaded that that was correct. When the issue of the application of Article 25 arises, on which this court's jurisdiction depends, there is a requirement that jurisdiction should be demonstrated clearly and precisely. The court is required to examine the factors which are alleged to give rise to the court's jurisdiction. That is clear from the decision in *JSC Aeroflot Russian Airlines v Berezovsky* [2013] EWCA Civ 784 to which I was referred, and as has been identified in a number of other cases, where the standard has been identified as being good arguable case: see e.g. *Airbus SAS v Generali Italia Spa* [2019] EWCA Civ 805 and the discussion in *Etihad* at paragraphs [32] – [36] and [55]. I therefore agree with Mr Slade QC on behalf of the defendants that the main issue,

or the principal issue, is whether there is a good arguable case that the present Luxembourg proceedings fall within the jurisdiction clause.

8. I say that this is the main issue, or the central issue, but it is right to point out that the defendants also contend that even if this is a case where the English court does have exclusive jurisdiction over the present claim, the proceedings here should, nevertheless, not be allowed to continue for three reasons which were in some respects related. Mr Slade relied upon Article 31.1 of the Brussels Recast and contended that the actions fell within the exclusive jurisdiction of a number of courts – in the present case England and Luxembourg – and he seeks a stay, a mandatory stay on that basis.
9. He also contends, independently, that the court should stay the present proceedings in any event, pursuant to Article 30 because there are closely related actions in England and in Luxembourg and there would be undesirable consequences if both were allowed to continue together. Those consequences would include the risk of irreconcilable judgments of the two courts. He therefore invokes Article 30 of the Brussels Recast. Finally, although largely related to the argument about Article 30 and not advanced on truly separate grounds, he contends that, as a matter of case management or discretion, the court should stay its proceedings, although, as I have said, that was very much tied up with his argument based on Article 30.
10. So those are the broad arguments in the case, and I need to briefly set out the factual background against which those arguments and applications arise.

*Factual background*

11. C, the claimant, is a Luxembourg company owned by various investment funds managed by the Macquarie Group which is a well known Australian financial services group. C itself is now in voluntary liquidation, and its assets are destined to be distributed between the funds that make up its shareholders. Mr Scott has pointed out that the proceedings in Luxembourg have meant that that

distribution and liquidation is held up because of the very substantial claims that are being made against the claimant there.

12. The first defendant, D1, is the founder of a business which operated across Spain providing vehicle safety and gas emissions inspections which are the equivalent of MOTs in this country. That business was operated by the Itevelesa Group and D1 was the chief executive officer of the group until 1 August 2016.

13. D2 is a Swedish company which is owned and controlled by D1 and was, as I understand it, the corporate vehicle which he used for the purposes of the investment transaction which I will now describe.

14. C, along with other entities in the Macquarie Group and D2, invested in the Itevelesa Group and they did so by buying shares in a company which is referred to in these proceedings by its acronym "MEVSH1". The chain of ownership between MEVSH1 and the Itevelesa Group was as follows: MEVSH1 held shares in another company known as "MEVSH2", both of those companies being Luxembourg companies. MEVSH2 held shares in a company called EVSS1 which was a Spanish company and EVSS1 held shares in the companies which made up the Itevelesa Group.

15. C was a 38.8 per cent shareholder and another company within the Macquarie Group known as FSS was a 31.7 per cent shareholder. D2 was a 15.9 per cent shareholder. All of those shareholdings were held in the top company, which was MEVSH1. This meant that the interests of the Macquarie Group was as majority shareholder, and that D2 was a minority shareholder.

16. The parties entered into a Shareholders Agreement the latest version of which was dated 2006. There were a number of parties to this agreement. They included C, FSS and D2, along with D1, MEVSH1, MEVSH2 and EVSS1.

17. It is this Shareholders Agreement which contains the jurisdiction clause on which C relies for the purposes of its action in England. Clause 18 is headed, "Governing law, jurisdiction and service of process". Clause 18.1 provides for English law to govern. Clause 18.2 provides:

> "The Courts of England shall have exclusive jurisdiction in relation to any Proceeding and any matter arising therefrom".

Clause 18.3 provides that:

> "Each party irrevocably waives any right that it may have to object to an action being brought in those Courts of England, to claim that the action has been brought in an inconvenient forum, or to claim that those Courts of England do not have jurisdiction".

18. The capitalised word "Proceeding" in Clause 18.1 was defined in the definitions section of the Shareholders Agreement. The definition was as follows.

> "Proceeding" means, for the purposes of clause 18, any proceeding, suit or action arising out of or in connection with this Agreement".

19. In 2013, refinancing arrangements were put in place for the Itevelesa Group. By way of security, MEVSH1 granted a pledge over its shares in MEVSH2 to a Spanish entity which was part of the Bank of Scotland, known as Bank of Scotland Sucursal en Espana, acting in its name and for other secured parties and for its successors and assigns. That pledge agreement was dated 28 June 2013.

20. None of the present parties to these proceedings were party to that pledge agreement. But, as I will describe, it is an important if not central part of the facts giving rise to the proceedings in Luxembourg.

21. By clause 22 of the pledge agreement there was a governing law provision which provided for Luxembourg law, and clause 23 was an exclusive Luxembourg jurisdiction clause.

22. As I have said, none of the present parties was party to that pledge which was between MEVSH1 and those who provided debt, but D2 now claims via a Luxembourg law doctrine to be able, in substance, to enforce that pledge against the group of companies that became assignees of the pledgee. That group of companies is known as the Hayfin group of companies. It came into the picture because, shortly after the pledge agreement was entered into, the Bank of Scotland entity assigned its rights under the pledge agreement to entities within the Hayfin group.

23. The origin of the present proceedings, and the proceedings in Luxembourg, are events which took place in late 2015. The Hayfin group purported to enforce the pledge agreement. They took ownership of the MEVSH2 shares and thus deprived MEVSH1 of its assets. On 23 November 2016 this led to MEVSH1 being declared insolvent by the District Court of Luxembourg.
24. The enforcement of the pledge and the subsequent insolvency of MEVSH1 has, on the defendants' case, had disastrous financial consequences for them. It has resulted in the loss of their interest in the Itevelesa Group which, as I have already described, sat below MEVSH1 and MEVSH2.

*The Luxembourg proceedings*

25. In 2019 proceedings were begun in Luxembourg by the service of a summons to which I have been referred in detail. The proceedings were brought by D1 and D2 as well as D1's son, Mr Fernando Rodiño Sorli. The substance of the complaint is that they believed that the Hayfin group and members of the Macquarie Group were to blame for the losses arising from the enforcement of the pledge agreement. There are a large number of defendants in Luxembourg, and they include MEVSH2 which is now owned by the Hayfin group. They include C and the associated Macquarie company FSS, whose full title is FSS Infrastructure Funds S.a r.l.
26. There are a number of other defendants who are members of the Hayfin group together with some individuals. The Defendants contend that all of the defendants to the Luxembourg proceedings have their domicile or registered office in Luxembourg.
27. The claim in Luxembourg has its origin in the pledge agreement. It is not necessary to describe the claim in detail, but it is part of the Defendants' case there that there was a breach of relevant Luxembourg law, the Law on Financial Guarantee Agreements, when the pledge agreement was enforced.

28. As I have said, none of the present parties was party to the pledge agreement, and it is important to note that the only contract to which all of the present parties were party was the Shareholders Agreement.

29. It is also important to note that the claim in the Luxembourg proceedings against C is not advanced expressly on the basis that there was a breach of the Shareholders Agreement. I have been referred in detail to the summons. One paragraph, perhaps more, could be read on the basis that an allegation of breach of the Shareholders Agreement was being made. I accept, however, that the case there advanced is not that there was a specific breach of the Shareholders Agreement, but rather that the conduct of Macquarie and others relied upon gave rise to adverse consequences in terms of the rights which D2 had under the Shareholders Agreement.

30. The basis of the claim made against C and FSS is not articulated in any real detail in the Luxembourg summons. But it does not seem to me that that is a matter of any particular relevance to the issues which I have to decide. It is obviously for claimants in foreign proceedings to articulate their claim in a way which is compliant with whatever rules apply in the context of that jurisdiction. Although complaints have been made that the case is inadequately particularised, I do not consider that that advances the arguments which I need to resolve on the present application. What is in substance clear, whether particularised or not, is that the Defendants' case is that C amongst others, was acting in collaboration with the Hayfin parties when the pledge was enforced. Thus, in section (ii).C.1 of the summons the Defendants allege:

> "The Macquarie Group in fact collaborated with the Hayfin Group to the detriment of the minority company Amitjugoett which is clearly shown by the fact that the Macquarie Group refused to carry out procedures to avoid the Pledge Agreement being realised despite the insistence of the claimant parties".

31. Later on, in section 2(d) of the summons the Defendants allege:

> "The realisation of the Pledge Agreement which was made in November 2015 was the final manoeuvre of the Hayfin Group to gain control of the Spanish group to the detriment of the claimants, and in collaboration with the Macquarie Group".

32. It is therefore alleged that the Macquarie Group refused to carry out procedures to avoid the pledge agreement being realised. Mr Slade said that this failure to carry out the appropriate procedures was unrelated to the Shareholders Agreement itself. He accepted that the conduct relied upon was a criticism of C's conduct in its capacity as majority shareholder of MEVSH1. The case is therefore that, as majority shareholder, Macquarie should have taken action but wrongfully failed to do so, and in fact collaborated with the Hayfin Group. Mr Scott places emphasis on those allegations, and the fact that Macquarie is being sued in its capacity as majority shareholder. He argues that since there is no dispute that the conduct relied upon concerns C's conduct as majority shareholder, that conduct cannot sensibly be divorced from the parties' rights and obligations under the Shareholders Agreement itself. It follows, in his submission, that the claims made in Luxembourg fall within the ambit of the jurisdiction clause in the Shareholders Agreement.

33. The summons goes on to set out the losses claimed. As far as D2 is concerned, these losses all or mainly arise in one way or another under the Shareholders Agreement, the substance of the case being that it was deprived of various benefits under that agreement that would have accrued if the pledge had not been wrongly enforced. D2 therefore claims the value of its ordinary and preference shares in MEVSH1, non-repayment of a loan which it made to MEVSH1, its right to a ratchet benefit under the Shareholders Agreement and its right to a priority dividend upon repayment of its loan. It may be right to say that not all of those claims relate to its rights under the Shareholders Agreement, because one of them relates to a loan agreement. It is clear, however, that the majority of the claims which are put at around €68 million are concerned with benefits that would have accrued under the Shareholders Agreement if only the business had remained intact and the pledge had not been enforced.

34. The position of D1 and indeed his son is somewhat different. D1 was not himself personally a shareholder in MEVSH1, but he held his interest in that company via D2. He therefore does not claim any personal loss of benefits and rights under the Shareholders Agreement, but he does claim

that, as a result of the wrongful actions leading to the enforcement of the pledge, he was deprived of rights under a management incentive plan. His son claims the same thing.

35. Although the Shareholders Agreement is mentioned in the summons, there is, as I have said, no specific allegation that the Shareholders Agreement has been breached.

36. The substance of the case is, therefore, that the realisation of the pledge and the bankruptcy of MEVSH1 has meant that D2 will never receive benefits under the Shareholders Agreement. D2's case is, therefore, that the terms of the Shareholders Agreement are of some relevance, but would only need to be referred to on what Mr. Slade describes as limited issues of quantum. Mr Scott says that the issues cannot be described as limited, bearing in mind that the value of the claim is around €68 million. Irrespective of the size of the claim, the distinction which is drawn, and which was drawn throughout Mr Slade's submissions, was between liability and quantum; the point being made throughout was that there was no allegation of breach of the Shareholders Agreement as far as liability was concerned.

37. There is a pending application to strike out the claim in Luxembourg. That application was made both by C and by FSS which is not a party to the present proceedings. There is also an application in Luxembourg to stay the proceedings there. The evidence before me, from C's solicitor Mr Sion Richards, is that that application will not be determined for some time, although it was issued some time ago in 2019. It appears that the jurisdictional and strike out challenge will not be resolved until May 2021.

38. It is also the evidence of Mr Richards, and not disputed in any evidence that I have been shown by the Defendants, that the merits determination of the Luxembourg proceedings is some considerable distance away, possibly the second semester of 2022 or 2023 at the earliest.

*The English proceedings*

39. I have already described in broad terms the English proceedings. They are in one respect the mirror image of the proceedings in Luxembourg, because a claim is directly made by C for a declaration of non-liability. The Defendants therefore say that the English court will, therefore, be invited to traverse all of the same ground as will be considered by the Luxembourg court. I consider that where there are proceedings in one country where a party seeks to establish liability, and in another country where a party says that there is no liability in respect of claims which have been brought in that other country, it is not difficult to see that the proceedings are related and, indeed, closely connected.

*The Shareholders Agreement*

40. I will now describe some other provisions of the Shareholders Agreement, before turning to the particular arguments in the case. The Shareholders Agreement contains a large number of clauses providing for such matters as corporate governance, share transfers, restrictions on transfers and the issue of shares. It also contains in clause 10, general undertakings of the parties to secure the agreed benefits of the investment and its structure. Clause 10.3.7, on which some reliance was placed byC, is headed "Economic Value Principle" and provides as follows:

> "Save as set out in clauses 12.2 and 12.3, to ensure compliance with the Economic Value Principle, each Investor, LuxCo and HoldCo, will procure that no action is taken which will, may or could prejudice the Economic Value Principle without the consent of each Investor and without prejudice to the foregoing, shall at all times ..."

41. The Economic Value Principle is set out in the definitions section, and provides:

> "Economic Value Principle means that for economic purposes each of the Investors will always be entitled to their Relevant Proportion of any dividend, distribution or other method of repatriating cash proceeds made from LuxCo to the Investors".

42. There are other provisions to which I was referred and whose broad effect is to provide for the distribution of dividends and other funds in accordance with the agreement set out in the Shareholders Agreement. Clause 17.13 provides as follows:

> "Each of the parties agrees to take all such action or to procure all such action is taken, as is reasonable in order to implement the terms of this Agreement or any transaction, matter or thing contemplated by this Agreement".

43. There was argument as to whether or not – even though no case for breach of the Shareholders Agreement has in fact been pleaded in Luxembourg – there is a pleadable case which could be advanced that the conduct ofC, in collaborating with the Hayfin Group in the way that is alleged, would be a breach of the Shareholders Agreement.

44. The parties' positions on this, no doubt influenced by the present application, are the reverse of what one might ordinarily expect. On behalf of C, Mr Scott contends that if the facts are as alleged in general terms by the Defendants, and if it were correct that there was some serious wrongful conduct and collaboration with Hayfin in order to deprive the other shareholder of rights, then there would be no difficulty in putting forward a pleadable cause of action under the Shareholders Agreement. This would include reference to the terms to which I have referred and others. He submitted that, if the factual premise was correct, there was a perfectly pleadable case for breach. On behalf of the Defendants, Mr Slade takes the contrary position and says that such a case would be a far-fetched case of breach. The relevant clauses referred to by Mr Scott are concerned with the manner of distribution of dividends or assets and matters of that kind, and would not enable a case of breach properly to be pleaded.

45. It does seem to me that if the conduct of C was as alleged by the Defendants, there is in practice no difficulty in putting forward under English law a pleadable claim for breach of the express or implied terms of the Shareholders Agreement. Whether or not that claim would be ultimately successful is not a matter I need to consider. But in terms of the possibility of pleading such a case, I have no doubt that it could be pleaded, whether by reference to express provisions such as: clause

10.3.7; clause 12 (which is concerned with distribution and repayment of interest free loans); and clause 15 (which is concerned with the exit from the investment); and clause 17.3. Reliance could also be placed on well known implied terms which arise under English law, the substance of which is that the parties can expect co-operation and should not act so as to prevent performance of contractual obligations which are created by the contract in which they are embedded.

46. That is a matter of some relevance when it comes to the question of the application of the jurisdiction agreement relied upon although, as will become clear, I consider that the claims in Luxembourg are sufficiently closely connected to the Shareholders Agreement to come within the exclusive jurisdiction clause even if those claims could only be advanced as extra-contractual claims.

47. I have already quoted clause 18 of the Shareholders Agreement and the definition of "Proceeding". It is right to note that the jurisdiction clause, when coupled with the definition of "Proceeding", is in wide terms. I agree with Mr Scott that if a proceeding is brought arising out of or in connection with the Shareholders Agreement, then it does not matter that no specific claim for damages is made in relation to that action. The position is that even if a claim for damages is not made, nevertheless if there is a Proceeding which falls within the jurisdiction clause, which should have been brought in England, there is a breach if such proceedings are brought elsewhere. It follows that D1 is not in a stronger position than D2 simply because, unlike D2, he does not specifically bring a claim for damages against C, in circumstances where he is a claimant in Luxembourg and has joined with D2 in making the allegations of wrongful collaboration against C.

*Legal Principles*

48. With that background I turn to the legal principles which relate to jurisdiction clauses and their enforcement. There was no substantial dispute as to the principles which apply. These are set out in

some detail in my judgment in the *Etihad* case. Those principles, as summarised by the claimant, and not substantially disputed by the defendants are as follows.

49. First, it is now clearly established that the standard of proof to be applied in determining whether the English court has jurisdiction under Article 25 of the Brussels Recast is that of good arguable case, and that the burden is on the claimant to show that it has the better of the argument on the materials available. As I have already indicated, I consider that this applies generally to the various claims which the claimant is bringing.

50. Secondly, it is for the national court, in this case the English court, to interpret the clause conferring jurisdiction which has been invoked, in order to determine which disputes fall within its scope. In other words, the exercise of construction is a matter for English law.

51. Thirdly, the English law principles that apply to the construction of dispute resolution clauses are well established. It is not necessary to look beyond the well known passages in the House of Lords decision in *Fiona Trust v Privalov* [2007] UKHL 40. The court should

> "start from the assumption that the parties, as rational businessmen, are likely to have intended any dispute arising out of the relationship into which they have entered or purported to enter to be decided by the same tribunal".

52. That is an important starting point. In certain cases it may give rise to difficulties, particularly in situations where there may be competing jurisdiction clauses in other contracts between the same parties, or where, as in *Etihad* itself, there may be one relevant contract between the parties which contains a jurisdiction clause, but another relevant contract does not. The present case is a more straightforward one, because the only contract between the parties who are before me today is the contract contained in the Shareholders Agreement, and there are no other competing jurisdiction clauses or contracts between those parties. It is true that other contracts exist between other parties involving different jurisdiction clauses, most notably the pledge agreement to which I have referred, and to which none of the present parties were, themselves, party. However, that does not affect the relevant starting point in this case, namely the assumption that these businessmen (i.e. C, D1 and

D2) did not intend disputes under the same relationship to be decided by different tribunals, generally speaking.

53. Fourthly, the dispute resolution clause in the present case is widely worded. It refers to any dispute arising out of, or in connection with, the Shareholders Agreement. There used to be, as is well known, case-law which drew narrow distinctions between words such as, "arising under", and, "arising out of", and matters of that kind. But all that was swept away in *Fiona Trust*, and the starting point is as I have indicated it, and I must take into account the wide wording that has been used. Such wording will ordinarily extend not simply to claims which are contractual and allege breach of express or implied terms of the contract, but also to non-contractual disputes, provided that there is a sufficient connection with the contract. That connection may be established even if no claim based on the contract is pleaded. The reason for this is that rational businessmen would not expect the clause to be capable of circumvention by simply omitting to plead a pleadable claim. That was a point which was made by Marcus Smith, J at paragraph [72] of his decision in *Microsoft Mobile Oy (Ltd) v Sony Europe Ltd* [2017] EWHC 374 (Ch).

54. Fifthly, issues sometimes arise as to whether or not, in addition to those requirements of English law, the requirements set out in Article 25 of the Brussels Recast have also been met. In the *Etihad* case there was a separate argument which arose under Article 25, as to whether or not the particular dispute there arose in connection with a particular legal relationship. But in the present case it has not been suggested that an analysis of Article 25 and the particular legal relationship would lead to any different conclusion to the conclusion which would be reached by applying ordinary principles of English law as derived from *Fiona Trust*. Indeed, Mr Slade indicated that the requirement of Article 25, and that set out in Fiona Trust, were, in some ways, very similar. It is therefore not necessary for me to consider separately any issues of EU law as to how to interpret "particular legal relationship".

*Discussion*

55. With that background I then turn to the first and what I regard as the main issue which was argued before me, namely whether or not the jurisdiction clause in the present case applies to the claims which have been brought in the Luxembourg proceedings, applying the good arguable case standard to that question.

56. There is, I note, at the start, and recognise, a difference between D1 and D2. Both were, of course, parties to the Shareholders Agreement. Both have brought proceedings in Luxembourg alleging wrongful collaboration by the claimant with the Hayfin Group, but the consequences alleged are different. D1 does not claim in respect of the loss of any direct benefits to be conferred under the Shareholders Agreement, no doubt because he was not personally a shareholder himself. D2 does so claim.

57. Mr Slade submits that it is important to look separately at the position of each defendant, thereby recognising implicitly in his submission that there may be a stronger case for jurisdiction involving D2 than D1. I agree that it is appropriate to do so. He submits that as far as D1 is concerned, the premise for C's case is that D1 has brought a proceeding in Luxembourg within clause 18 of the Shareholders Agreement, and he contends that there has been no such proceeding brought in Luxembourg. That is because D1's claim is for loss of rights under a management incentive plan, and that is not the same as the Shareholders Agreement, which forms the basis of the second defendant's claim for damages. He also says that if one looks carefully at the Luxembourg summons, no claim for damages has in fact been brought in Luxembourg against C by D1. Therefore, whatever claims have been made by D1 in Luxembourg, they do not arise out of the Shareholders Agreement and are not in connection with it.

58. As far as D2 is concerned, that particular point is not available to Mr Slade because it is clear that D2 claims for losses which are referable to benefits which would have been gained under the Shareholders Agreement. He submits, nevertheless, that the claim is not sufficiently closely

connected with the jurisdiction agreement and the Shareholders Agreement itself. He draws attention, in particular, to the fact that no breach of the Shareholders Agreement is alleged, and that the claims which are made are extra contractual in nature and do not arise under the terms of the Shareholders Agreement.

59. Mr Scott, on behalf of C, disputes those various propositions, and contends in substance that the Luxembourg claim clearly comes within clause 18.

60. In my view this case can be looked at very simply. C, D1 and D2 were all parties to the Shareholders Agreement. The conduct in issue in the present case clearly relates to the actions of C as a shareholder in MEVSH1. The summons itself expressly refers C as having been sued in its capacity as shareholder. It is plainly the case that, as a matter of substance, such action as C either took or failed to take, and which had the effect of allowing Hayfin to take control of the shares, was in its role as shareholder. The case is that, as majority shareholder, C should have acted differently, and acted improperly in the way that it did.

61. As I have said, I do not consider that there would be any real difficulty in pleading that such action as alleged, amounting to wrongful collaboration with Hayfin thereby depriving the minority shareholder of direct rights under the Shareholders Agreement and the owner of the minority shareholder of the substance of his economic interest in the business, was a breach of the Shareholders Agreement. This was an agreement which regulated the rights and obligations of the parties and which contained obligations in express terms which were designed to ensure that benefits flowed to all of the parties, both directly to D2 but thereby indirectly to D1 whose corporate vehicle in the transaction was D2.

62. It seems to me that whether one looks at those claims contractually, or purely extra contractually, the claims are intimately connected with the Shareholders Agreement or arise out of it. That was the only agreement which created any relationship between the parties at all. It is plain that the basis of the claim is not that there was no relationship between the parties and that the claimant was a

stranger to the defendants who nevertheless had an obligation "to carry out procedures to avoid the Pledge Agreement being realised". Such an obligation, if it arose at all, could only arise because of the relationship between the parties of majority shareholder and minority shareholder, and (in D1's case) as owner of the minority shareholder. That relationship was created or regulated by the Shareholders Agreement between them.

63. If one stands back and reverts to the *Fiona Trust* approach, it is clear to me that rational businessmen would not have supposed that a claim of the present kind, if they had known about it at the start, would be resolved under anything other than the dispute resolution clause in the contract. That is so whether or not the claim is contractual or purely non-contractual. Put another way, the parties are likely to have intended that any dispute arising about the parties' non-contractual obligations, in relation to the losses which are alleged to flow from the wrongful conduct such as that alleged, would be determined in the same forum as express breaches of contractual obligations.

64. That conclusion applies, in my view, to both of the Defendants. But I consider that it applies with particular force to D2, whose case for damages is directly concerned with the deprivation of his rights under the Shareholders Agreement and the benefits which would have flowed but for the wrongful conduct of the claimant. It is difficult to see in my view how there could be a much closer connection with the Shareholders Agreement than a case where a party alleges that a co-shareholder has taken actions wrongly to deprive a minority shareholder of rights and benefits which he would otherwise have enjoyed under that very agreement. Furthermore, as Mr Scott submitted, any issue as to the rights that the minority shareholder would have enjoyed under the Shareholders Agreement, and the quantification of those rights, is a dispute arising out of or in connection with the Shareholders Agreement.

65. It is nothing to the point in my view that a breach of the agreement as such has not been alleged. That is not essential for reasons which I have already given and which were explained by Marcus Smith, J. in *Microsoft.* As I have said, even if the liability is only a tortious or extra contractual

liability, in my view there is a sufficiently strong connection, more than sufficient to meet the good arguable case standard that the claim in Luxembourg comes within the jurisdiction clause.

66. Mr Slade relied upon the decision of the Court of Appeal in *Ryanair Ltd. v Esso Italiana Srl* [2013] EWCA Civ 1450. That was a case involving very different facts. It was not a case where one shareholder had deprived another of benefits under an agreement. It was a case arising out of a cartel arrangement which would not have been contemplated at the time of the supply contract for fuel that was entered into between the parties. The Court of Appeal in that case considered that there was no sensible pleaded case of a breach of contract to which a tortious claim could be ancillary. But in my view the case is very different here where, for reasons which I have given, the defendants would be in a position to put forward a pleadable case that there were breaches of the agreement, because of the misconduct of the claimant in failing to protect the joint investment. But even if that were not so, an extra-contractual claim arising from the facts alleged in Luxembourg is sufficiently closely connected with the Shareholders Agreement for reasons already given.

67. That means that the court does have jurisdiction and exclusive jurisdiction over the present claim which the claimant has brought. I then need to turn to the Defendants' arguments which, if accepted, would lead to the conclusion that for one reason or another the court should not exercise that jurisdiction or should stay the present proceedings. I will deal with these relatively briefly because in my view there is no substance to any of those points.

68. The first argument arises under Article 31.1 of the Brussels Recast. That provides as follows:

> "Where actions come within the exclusive jurisdiction of several courts, any court other than the court first seised shall decline jurisdiction in favour of that court".

69. The Defendants submit that the jurisdiction of the Luxembourg court arises exclusively in this case as well as the jurisdiction of the English court. The basis of the argument is that the pledge agreement itself contains an exclusive jurisdiction clause. Mr Slade then submits that since there is an exclusive jurisdiction clause which confers jurisdiction upon the Luxembourg court, and an

exclusive jurisdiction clause which, in accordance with what I have said, confers jurisdiction on the English court, the Luxembourg court prevails because the Luxembourg court was first seized.

70. Mr Scott submits that this argument is wrong, and that there is no power to stay. He says that in respect of the dispute with which I am concerned between C and D1 and D2 , the claim arises exclusively under the jurisdiction clause in the Shareholders Agreement, and no other court has exclusive jurisdiction in relation to that.

71. There are a number of ways in which this can be analysed, and I intend no disrespect to Mr Scott's four arguments by not referring to all of them. In my view the simplest way to look at this issue is as follows. This claim, as brought in this court, does not fall within the exclusive jurisdiction of any court other than England. There are no conflicting jurisdiction agreements between these parties, and in my view it is nothing to the point that a jurisdiction agreement may exist between different parties to a different contract and which may provide for the jurisdiction of the Luxembourg court.

72. Any other approach would lead to the most startling consequences, in my view. It would mean that a party could, in effect, negate an agreed jurisdiction clause with his counterparty by taking steps to sue another party pursuant to a different contract with a different jurisdiction clause. The effect would be that the party with the English jurisdiction clause would be powerless to enforce it, simply because proceedings happen to have been first commenced against another party on a different contract with a different clause.

73. In my view, that is not consistent with the scheme of the Brussels Recast. I refer in particular to recital (22) in the preamble, which sets out the basis for the amendments which were made to Article 31 and which were intended to ensure that exclusive jurisdiction clauses should be upheld. That series of amendments negated prior authority which indicated that where proceedings were brought in the correct jurisdiction, the correct jurisdiction nevertheless had to wait for the decision of the incorrect jurisdiction to decline jurisdiction or otherwise.

74. Mr Slade then relied upon Article 30 and various case management considerations. He referred to Article 30.1 which provides:

> "Where related actions are pending in the courts of different Member States any court other than the court first seised may stay its proceedings".

75. He relied upon a number of arguments as to why either pursuant to that Article, or general case management considerations, the present proceedings should be stayed. He said that the actions were clearly related, as indeed they are. He said, again, correctly, that the English action had only started recently, and again that is true. He said that there were other defendants in Luxembourg and the claim is based in Luxembourg on showing that the laws of Luxembourg had been breached. He submits that that is a matter for the Luxembourg court to decide and that is the court best placed to decide that. He says that an issue arises in Luxembourg as to whether or not enforcement of the pledge can be annulled. Issues arise as to whether D2 can step into the shoes of the pledgor, MEVSH1, by way of what is known as an "action oblique". If D2 can step into those shoes, then the Luxembourg jurisdiction clause would apply. He submitted that it is appropriate for the Luxembourg court to decide the concepts of action oblique, and also the impact of Article 11 of the 2005 law which is the foundation of the claim. He also says that there are multiple parties to the Luxembourg proceedings, not justC, but also the related party FSS who are not party to the present English proceedings.

76. His submission overall is that even if there is an exclusive jurisdiction clause in the present case, it is not a weighty factor, because there are other far more important and central aspects of the Luxembourg proceedings which militate in favour of allowing proceedings to continue there.

77. I agree with C that there is no jurisdictional requirement under the Brussels Recast for me to stay these proceedings. The effect of Article 31.2 and 31.3 in my view is that it is the duty of this court to continue with the proceedings and it is the corresponding duty of the Luxembourg court to stay

the proceedings insofar as they concern the present parties, and it would be, in my view, very odd if that position was somehow to be reversed by Article 30.

78. Even if, however, there were a discretion which existed, and it is common ground that there is a discretion which does arise under English practice because an English court always has a discretion to impose a case management stay, I would decline to exercise any discretion in favour of a stay of the proceedings in the present case.

79. The approach of the English courts to case management stays has recently been helpfully summarised by Bryan, J in *Mad Atelier International BV v Manes* [2014] EWHC 1014 (Comm). At paragraph [82] he sets out the principles relevant to the exercise of discretion. One of those principles is that exceptionally strong grounds are required to justify a stay on case management grounds where the parties have conferred exclusive jurisdiction on the English court. The danger of inconsistent judgments is not a legitimate consideration amounting to exceptional circumstances and does not justify a stay where the court has jurisdiction under the Brussels Recast, especially exclusive jurisdiction.

80. With those principles in mind I consider it would be inappropriate to order a stay. The starting point is that the court should give effect to the parties' contractual bargain. There are good reasons why C wishes to bring this matter to resolution in order to wind up the fund. Even if there were no good reasons, and even if there is likely to be some delay in doing that because of the on-going proceedings in Luxembourg, it is nevertheless appropriate for the court to resolve the issues between these parties in accordance with their contractually agreed mechanism. This is particularly so where the evidence indicates that if this matter were to go to Luxembourg, there would be greater delay in resolution of the parties' rights and obligations than there is likely to be in the English court.

81. I do not consider that any of the matters which were raised by Mr Slade amount to exceptionally strong grounds for justifying a stay on case management grounds, or, if applicable, under Article 30 of the Brussels Recast.

82. So, for those reasons I dismiss the Defendants' application.