Neutral Citation Number: [2023] EWHC 2862 (Comm)

Case No: CL-2021-000099

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
OF ENGLAND AND WALES
COMMERCIAL COURT
KING'S BENCH DIVISION

7 Rolls Building
Fetter Lane
London,
EC4A 1NL

Wednesday 15 November 2023

Before:

MRS JUSTICE COCKERILL DBE

- -

Between:

(1) DR MARCEL NORMANN **(2) MR JENS DINO STEINBORN**	**Claimants**
- and –	
(1) XIO (UK) LLP **(2) XIO CAYMAN LTD** **(3) XIO FUND 1 LP** **(4) XIO PLATINUM LP** **(5) LAGUNA NETHERLANDS COOPERATIEF UA**	**Defendants**

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- -

Nikki Singla KC and Stephen Brown (instructed by **Zimmers Solicitors)** for the **Claimants**
Luke Pearce KC (instructed by **Debevoise & Plimpton LLP**) for the **Third to Fifth Defendants**

Hearing dates 30 October 2023

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APPROVED JUDGMENT

I direct that no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

This judgment was handed down remotely by the judge and circulated to the parties' representatives by email and release to The National Archives. The date and time for hand-down is deemed to be Wednesday 15 November 2023 at 10:30am

Mrs Justice Cockerill:

INTRODUCTION

1. In these proceedings the Claimants are former senior executives of the XiO Group, a global alternative investments business operating in the UK and overseas. They claim sums totalling in excess of US$38 million from each of the Defendants, companies within that group, as "carried interest" said to be due to them in connection with certain private equity investments, together with related declaratory relief.

2. "Carried interest" is in general terms understood to denote a share of an investment fund's profits. In the context of employees of a private equity fund it is, in summary, a bonus calculated by reference to the profits made by the fund or its underlying investments.

3. Both of the Claimants were previously employed by the First Defendant ("XiO UK"). In addition, the First Claimant ("Dr Normann") was engaged as a senior advisor to the Second Defendant ("XiO Cayman"). As will appear below, those companies are now in liquidation. Any claims against them are pointless.

4. The Claimants therefore focus their fire on the Third to Fifth Defendants ("Ds 3-5"). The Claimants' primary case is that the claimed carried interest is due to them pursuant to a binding contract with each of the Defendants. In the alternative, the Claimants contend that the same sums are due on a variety of alternative bases. In addition, the Claimants bring claims for discretionary fees and bonuses said to be due to them from the First and Second Defendants ("D1-2") under their employment contracts. Those claims have not been opposed and judgment was entered against D1 on 31 October 2023.

5. Ds 3-5 say that the claims against them have no real prospects of success and apply for reverse summary judgment/strike out. That has been the main application before me. Also live at the hearing was an application dated 5 October 2023 by the Claimants for permission to re-amend their pleaded case, including by the addition of two new parties, and to serve the claim out of the jurisdiction on those new parties. However, it was common ground that that application stands or falls with the main application, and therefore requires no detailed separate consideration.

Factual Background

The Defendants and related entities

6. The background of the Defendants is given by Mr Johnson in his statement and is not contentious.

7. D3 ("XiO Fund") is an exempted limited partnership established in the Cayman Islands in August 2014. It was established on behalf of Mr Xie Zhikun ("Mr Xie"), a Chinese businessman who was the founder of the Zhongzhi Enterprise Group ("ZEG"), as a private equity fund whose purpose was to hold various off-

shore investments. The individual responsible for establishing XiO Fund on behalf of Mr Xie was Ms Athene Li ("Ms Li"), who was acquainted with Mr Xie through a company called Olympus Capital which had invested in one of ZEG's subsidiaries, and Mr Joseph Pacini ("Mr Pacini").

8. At all material times:

   i) The sole limited partner of XiO Fund was a company called Dorsey Ventures Limited ("Dorsey"), which provided an initial financing to XiO Fund of US$70 million. This funding was provided by Mr Xie, who was the ultimate beneficial owner of Dorsey;

   ii) The general partner of XiO Fund was a company called XiO GP Limited ("XiO GP", one of the proposed new defendants). Ms Li was a director of XiO GP at all material times up to 9 July 2020. Mr Pacini was a director of XiO GP from 12 October 2017 to 29 November 2018;

   iii) The Amended and Restated Partnership Agreement mentioned the possibility of a carry vehicle but stated that provisions related to carried interest would not apply until the carry vehicle became a party to the agreement.

9. XiO Cayman ("D2") is a company incorporated in the Cayman Islands in June 2014 (although subsequently redomiciled in Nevis) to act as the investment manager to XiO Fund. It carried out this role pursuant to a Management Agreement entered into with XiO GP. From July 2014 until May 2018, Ms Li was the sole registered shareholder and director of XiO Cayman. XiO Cayman is currently in liquidation in Nevis.

10. XiO UK ("D1") is a limited liability partnership established in the United Kingdom in August 2014. It was at all material times a subsidiary of XiO Cayman, and provided services to XiO Cayman under a Sub-Investment Advisory Agreement entered into on 1 August 2014. XiO UK is also in liquidation.

11. D4 ("XiO Platinum") is, like XiO Fund, a Cayman exempted limited partnership, which was established in July 2016. Its general partner is XiO Platinum GP Limited ("XiO Platinum GP" – the other proposed new defendant).

12. D5 ("Laguna") is a Dutch company and indirect subsidiary of XiO Fund, which was set up in June 2015 for the purposes of acquiring a company called Lumenis Ltd ("Lumenis"), as described further below.

Investments

13. In May 2015, XiO Fund completed the acquisition of a company called Compo Expert (a German fertilizer business). This acquisition was referred to internally as Project Camping.

14. In October 2015, XiO Fund completed the acquisition of Lumenis (an Israeli medical device company). This acquisition was referred to internally as Project Laguna.

15. Although both of these acquisitions were formally made on behalf of XiO Fund, the funding was provided by Shanghai Li Hong Investment Center (Limited Partnership) ("SLH"), an on shore Chinese limited partnership set up by Mr Xie in around March 2015. SLH's interest in the investments was reflected by two share subscription agreements, which provided that the shares in Projects Camping and Laguna would be transferred to SLH on the first anniversary of the acquisitions.

16. In September 2016, Ms Li and Mr Pacini caused XiO Fund to acquire a company called JD Power, using funds derived from Projects Camping and Laguna. This acquisition was known as Project Jefferson. This acquisition was apparently kept secret from Mr Xie, in breach of trust by Ms Li and Mr Pacini. This subsequently led to a raft of legal proceedings in various jurisdictions, the details of which do not matter for the purposes of this application.

17. Projects Camping, Laguna and Jefferson were all ultimately sold between 2018 and early 2020. Project Camping was sold at a loss (so no carry can arise in relation to this transaction, as Mr Zimmer's evidence makes clear), but Projects Laguna and Jefferson were sold for a profit. The Claimants' primary case is that they are entitled to 7% of each carried interest pool, amounting to USD 7,870,138 for Project Laguna and USD 11,241,761 for Project Jefferson.

18. There was a small issue as to for whose benefit the investments were obtained, though the point is immaterial on the issues which I have to decide. It is correct to say that there is no evidence in support of the case that they were obtained for the benefit of D3-5. To the extent that it is helpful to complete the picture, Mr Johnson's evidence indicates that Projects Laguna and Camping were for the ultimate benefit of SLH and that Project Jefferson was in part for XiO Fund and in part for profits to go to a nominee of SLH. D4 had no substantial interest in any of the projects. D5 was an intermediate holding company to which a portion of sale proceeds of the Project Laguna went.

The Claimants

Dr Normann

19. On 18 October 2014, Dr Normann was engaged by D2 under a Consulting Agreement to investigate opportunities in the insurance sector (the "Consulting Agreement"). The Consulting Agreement provided inter alia that:

    i) Dr Normann's position would be described as "Senior Advisor to XiO Group";

    ii) Dr Normann's compensation for his work would include:

        a) A per diem fee of EUR 2,000 per day for a minimum of 6 days per month, and an expected maximum of 10 days per month;

b) A success fee of 0.25% of the amount invested by a relevant company; and

c) A discretionary fee of up to 0.5% of the amount invested by a relevant company.

iii) "*XIO will constructively explore with you the possibility of a co-investment into the transaction… dependent on your role post the deal.*" There was therefore no provision for or right to carried interest, but the future possibility was flagged.

20. On 1 April 2017, and against the background to which I will come, the Consulting Agreement of 2014 was terminated and replaced by an Engagement Agreement, pursuant to which Dr Normann agreed to act as a Senior Advisor (on an independent contractor basis) to D2 (the "Engagement Agreement"). The Engagement Agreement contained the following material terms:

i) Schedule B set out the remuneration to be provided to Dr Normann for the services to be provided thereunder, made up of (a) a monthly rate of EUR 12,713.70, and (b) a discretionary fee for services rendered;

ii) Clause 10 provided inter alia that:

> "This Agreement constitutes the entire agreement between [XiO Cayman] and you and supersedes any prior oral or written communications, agreements and understandings with respect to the Engagement. This Agreement may not be amended except pursuant to a written consent duly executed by you and [XiO Cayman]."

21. In addition to the above contracts with D2, Dr Normann was also employed by D1 as a Managing Director from 1 April 2017 under a Service Agreement dated 25 April 2017 (the "Normann Service Agreement"). The Normann Service Agreement contained the following material terms:

i) Clause 6 provided that in consideration of Dr Normann's services under the agreement, he would be paid a fixed salary of £130,000 per annum, and that in addition to this, XiO UK may operate a separate discretionary bonus scheme;

ii) Clause 5.5 provided that:

> "The hours of work of the Employee are not fixed but are such normal working hours of the LLP and such additional hours as may be necessary to enable him properly to discharge his duties. For information, the normal working hours of the LLP are 9 a.m. to 6 p.m. The Employee will not be entitled to any additional pay for any overtime worked."

iii) Clause 21.4 provided that:

> "(a) this agreement constitutes the entire agreement and understanding between the Employee and the LLP in relation to the terms of employment of the Employee and supersedes any previous drafts, agreements, arrangements and understandings between them (if any, and whether written, oral or governed by a course of dealings) in relation to the employment of the Employee, which shall terminate with effect from the Commencement Date;
>
> (b) in entering into this agreement the Employee has not relied on any Pre Contractual Statement… (defined as: any undertaking, promise, assurance, statement, representation, warranty or understanding (whether written, oral, or governed by a course of dealings) of any person (whether party to this agreement or not) relating to the employment of the Employee which is not expressly set out in this agreement.")

iv) Clause 21.8 provided that:

> "No amendment, change or addition to the terms of this agreement shall be effective or binding on either party unless reduced to writing and signed by each party adversely affected by such amendment, change or addition."

Mr Steinborn

22. The Second Claimant ("Mr Steinborn") was employed by D1 as an Executive Director from 21 March 2016, pursuant to a Service Agreement dated 23 October 2016 (the "Steinborn Service Agreement"). The Steinborn Service Agreement was in materially similar terms to the Normann Service Agreement. It included clauses 5.5 (no entitlement to overtime), 21.4(a) (entire agreement) and 21.8 (no oral modification clause). There was no provision for carried interest. Differences included:

    i) Mr Steinborn's fixed salary was stated to be £230,000 per annum.

    ii) Clause 21.4 (d) provides "*the Employee may provide specific services to other Group Companies which are not covered by this agreement. The Employee may enter into other employment and / or consulting agreements with other Group Companies and be separately compensated for such services provided to these other Group Companies*."

23. Unlike Dr Normann, Mr Steinborn was at no stage employed by XiO Cayman.

24. So much for the contracts. However, the Claimants say that between 2015 and the execution of these 2016/2017 contracts there were dealings which relate to carry which give rise to claims against these Defendants.

Discussions as regards carried interest

25. It is common ground that the employment contracts entered into by the Claimants with D1-2 did not themselves give the Claimants any entitlement to carried

interest. However, it is also common ground that various statements were made by Mr Pacini and Ms Li, including in the run up to the signature of the 2016 and 2017 contracts, to the effect that the Claimants might at some point be granted a right to carried interest in connection with the investments.

26. The starting point, although not itself such a communication, is that there was an Amended and Restated Limited Partnership Agreement of 25 July 2015 i.e. the partnership agreement for D3 (the "Amended Partnership Agreement") which was between XiO GP Limited and the limited partner, Dorsey Ventures Limited. This includes a definition of the "Carry Vehicle" as the vehicle to be formed to which the Carried Interest will be allocated. Clause 17.1(e) then provides that, "*the General Partner will, to the extent that such Net Sale Proceedings are not retained by the Partnership for reserves in accordance with clause 16.2(a) or Reinvestment in accordance with clause 16.2(b), distribute 30% to the Carry Vehicle*". The definition of Carry Vehicle states that provisions of the agreement relating to the Carry Vehicle shall not become operative until the Carry Vehicle becomes a party to the agreement. XIO GP Limited executed the agreement as a deed. There was therefore no active provision for carry. However, as the Claimants say, this shows that D3 intended to create a carry vehicle, doubtless as part of a strategy to ensure retention of valued employees.

27. On 31 August 2015, Mr Pacini referred to deal carry being shared with a Quality Control Officer (the assumption being that this officer would additionally share in the carry) and stated that a 360 review would be implemented "in the coming days".

28. On 5 September 2015, Mr Pacini sent an email to Partners and Execution Officers which referred to an update on completion of carry letter documents and explanation of the 360 degreereview process. Dr Normann was being asked to conduct the 360 degree review.

29. On 6 September 2015, Ms Li sent an email to various people including Dr Normann (but not Mr Steinborn) which stated: "*for 365 degree review, please let the team know on global call that all their year end bonus and deal bonus are hugely 90% and only linked to the number of deals they close, number of deals exit and deal quality.*"

30. On 20 October 2015, Mr Pacini, emailing XIO All Staff and XIO Global mailing lists (i.e. all in the Group – but not Mr Steinborn who was not yet employed) referred to participation by employees in the "*changes and growth of the firm*" and that "*carry letters (for Projects Camping and Laguna) will be provided once the 360 reviews are completed*".

31. On 10 December 2015, Mr Pacini emailed to various people (including Dr Normann but not Mr Steinborn) a proposed agenda for a Town Hall meeting including reference to "Carry Model" with a sub-bullet point that "*our incentives are the best in the market and aligned for superior performance of our fund*". It also stated that there was to be an explanation to the team prior to handing out carry letters.

32. On 10 January 2016 Mr Xie issued a resolution, communicated to Ms Li as "instructions" for her to "promptly implement" and "*report the completion thereof to me*", that "*we are resolved to give 20% of the profits to the executives of the overseas team and 80% to the group as this would certainly show the contracting spirit of the group*" and "*…once we complete the first transaction, we will give the agreed 20% of the profits to the overseas team*" . Ms Li was told to implement these instructions.

33. On 3 February 2016, Mr Pacini sent an email to various people including Dr Normann (but not Mr Steinborn) attaching a "Presentation" for use in the Town Hall meeting that took place in February 2016 with employees. The critical section of this email stated:

> "Given the recent comp discussions with many of the juniors, it became quite clear that many of them do not understand what or how private equity works from a compensation perspective.
>
> As such, I wonder if we should explain to them some of the basics of private equity at an upcoming meeting. Some of the items I believe we need to explain include:
>
> • Salary/bonus differences with consulting, investment banking and private equity
>
> • Carry – what is it and how does it work
>
> • Carry structures – deal carry vs. fund carry.
>
> o the charts I have created assumes each deal is USD$350 million of equity, so approx 9-10 deals for the fund
>
> o if each junior does at least 3 deals over the life of the fund and each senior does at least 2 deals over the life of the fund it is more individually attractive than the upper 75% of the market today
>
> • XIO Group carry model better explained
>
> As such, I have included with this email some slides I have put together to address this topic.
>
> For the market, I am using the Heinrich and struggles recent 2015 EMEA PE Comp study"

34. Presentation slides were prepared for the meeting. These indicated a number of things. Specifically:

    i) It illustrated a model whereby the salary and bonus paid as part of a remuneration package in private equity firms was less than those paid in consulting or investment banking, but the overall benefits rapidly and dramatically overtook those packages because of the element of carry;

ii) It summarised (in fairly negative terms) the salary and bonus prospects in major investment banks, and in more positive terms returns in private equity (by reference to the Heidrick and Struggles (Global) 2015 EMEA Private Equity Compensation Study);

iii) It modelled (in various ways and across a number of slides) "highlights" of an example private equity carry structure against the proposed XiO Group structure and benchmarked XiO Group structure against upper median and lower elements of the market;

iv) The message of the final slide dovetailed with the email: if 2-3 deals were achieved each category of employee would be at or above 75% percentile of the private equity market.

35. On 16 February 2016, Mr Pacini, in reply to an email from Dr Normann, indicated he would be happy to speak to Mr Steinborn (and another) on "our carry model". This was around the time of Mr Steinborn's discussions ahead of joining D1. This discussion is itself relied on as a representation.

36. On or about 23 March 2017, it is to be assumed (though there is no evidence, since these were only found in the Defendants' files) that Indicative Carry Grant Award Notices and Indicative Deal Point Allocations were sent to Mr Steinborn in relation to Projects Camping and Laguna. The documents included the following passages:

> "This notice is to inform you that XIO Group will establish a Carried Interest Sharing Plan (the "Plan") for XIO Fund I LP (the "Fund"), the structure, terms and conditions of which are currently being finalized….
>
> The XIO Group Carried Interest Sharing Plan may be designed to deliver awards in a partnership or other entity ("carried interest plan") or may consist of a notional deferred profit allocation arrangement. The Plan is expected to be designed to allow participants to share, directly or notionally, in a portion of the carried interest earned by the Fund's general partner in specific portfolio company investments and align participants' interests with the financial results of such investments…
>
> Your participation in the Plan is expected to be subject to customary, industry standard terms and conditions, including those related to …, forfeiture upon the occurrence of certain events (including departure), …, clawbacks (and a guarantee thereof) in the event of an overpayment of carried interest and certain post-departure negative covenants such as … non-competition.
>
> The Firm expects to distribute a binding term sheet governing the Plan in 2017. The final Plan terms may differ than those described herein and are subject to all necessary approvals. You do not have any right to an award until a binding term sheet governing the Plan has been issued.

Please note that the final Plan documentation may contain provisions requiring certain mandatory and discretionary holdbacks affecting both the entire participant pool and distributions with respect to each participant's Carried Interest Sharing Percentage and may require payment equivalent to the unrestricted fair market value of the interest to receive the award. Each participant may also be required to make a capital commitment directly or indirectly in the Fund in a ratio that generally corresponds to such participant's Carried Interest Sharing Points…

The percentage of net distributable returns allocated to the Carried Interest Sharing Pool may increase based on the overall success of an investment upon monetization, as measured by the Multiple on Invested Capital ("MOIC") of the investment.

The size of the Carried Interest Sharing Pool for each investment will be determined by the MOIC, as follows:

Multiple on Invested Capital	**Percentage of net distributable returns allocated to … pool**
MOIC <=1.0x	5%
…	
MOIC>4.0x	7%

Distributions of the Carried Interest Sharing Pool will be done in accordance with the participant's respective Carried Interest Sharing Points (the "Deal Points") on an investment-by-investment basis. As of the date hereof, there are 100 Points in the Carried Interest Sharing Pool available to be distributed. The 100 Deal Points would equal the full allocation of Carried Interest Sharing Pool, i.e. 100 Points = 5.0% Carried Interest Sharing Pool for a MOIC <= 1.0x.

…

INDICATIVE DEAL POINTS ALLOCATION

Fund: XIO Fund I LP

…

Investment Name: Project Laguna

Deal Points: 2

You will not be obligated to accept this award and may be required to sign the final Plan documentation prior to your receipt of any distributions related to it. You do not have any

> right to an award until a binding term sheet governing the Plan has been issued."

37. These documents therefore confirmed that XiO Group intended in the future to offer Mr Steinborn some form of carried interest, and that the fund providing the carry was planned to be D3; but they made it clear that no such offer was yet being made. It is not clear whether any similar document was sent to Dr Normann.

38. On 21 June 2017, in relation to Project Jefferson, Mr Pacini wrote "*pretty freakin awesome – doubling equity in 9 months…. Just sayin': good to have carry in this deal (which will be provided at some point)*".

39. On 9 October 2018, D1 sent the Claimants draft agreements providing for carried interest in relation to Projects Laguna and Camping (the "Draft Bonus Agreements"). These documents set out terms on which D1 was prepared to offer the Claimants carried interest in the said projects. They were said to supersede and replace any indicative carry award letters and were said to be subject to various conditions - including acceptance of the new Service Agreement. That Service Agreement would terminate all previous agreements and provided for new salary (C1 US$260k; C2: US$250k), and a discretionary bonus scheme. In addition, Clause 6.5 indicates a separate agreement for carry:

> "For the avoidance of doubt, all co-invest arrangements and incentive plans (including with respect to carried interest from Funds) entered into between the Employee and the Employer, or a Group Company, will operate independently of, and not be affected in any way by, the terms of this Agreement."

The Service Agreements also had changed terms including as to employee duties, intellectual property and post termination duties.

40. The Draft Bonus Agreements included forfeiture provisions, clawback provisions and, at clause 6, extensive restrictive covenants. At or about the same time, a draft "waiver" agreement was sent to Mr Steinborn, on its face recording an agreement that by entering into the proposed Draft Bonus Agreements Mr Steinborn would waive any rights to carried interest he might otherwise have, including pursuant to the Indicative Carry Grant Award Notices. This was intended to be given by D2 in respect of any carry letters issued by it or any of its affiliates.

41. In the event, however, the Claimants were not happy with the offer of carried interest set out in the Draft Bonus Agreements. Mr Steinborn said he was "*beyond disappointment re Laguna*". That disappointment related to the carry formula which had been recast from the version in the indicative letter, to incorporate a scale where the bonus amount was calculated by reference to a percentage of the net carried interest which ranged from 25% for MOIC up to 1.0x and 35% above 4.0x.

42. Mr Steinborn then had discussions with Ms Li in mid-November when he suggested carry for Laguna should be US$85 million. On 17 November Ms Li contacted XiO's lawyer Mr Purrington, copied to the First Claimant, and said "*Hi Nick, Please copy and paste again the carry table showing 5-7% contribute to*

100 points. Should be in carry agreement but plase (sic) copy and paste that part to Marcel again"*;* and Mr Purrington replied "*It's in section 1 of the Carry Bonus Agreements. The table that Athene is referring to is below where the Investment Performance Percentage increases from 25% (25% of 20% Carried Interest = 5%) to 35% (35% of 20% Carried Interest = 7%). Hope this is helpful*."

43. Meanwhile receivers were appointed over D1 and D2 on about 10 December 2018. Liquidations were completed in 2021.

44. This led to revised drafts being circulated at least to (at least) Dr Normann on 24 December 2018. There was no change to the carry formula. The only relevant change is that the contracting party was XIO GP. That offer was said to be conditional on execution of the agreement by 26 December 2018. Ultimately it is common ground that the Draft Bonus Agreements were never agreed to by the Claimants in any form.

45. On 17 April 2019, Mr Pacini informed Richard Lewis of FFP (Cayman) Ltd (a receiver for D2) that each investment professional including the Cs, "*has 'deal points/carry' which will need to be discussed as part of any exit*" in Projects Camping, Laguna and Jefferson.

46. In June 2019 Dr Normann was informed that his employment by D1 would terminate at the end of the year. A month later he was informed by D2 that his Engagement Agreement would terminate in January 2020.

47. In November 2019 DWF for the Claimants sent letters before action to D1.

The test for summary judgment and strike out

48. The test for summary judgment is well known. The Defendants cited White Book, paragraph 24.2.3; the modern *locus classicus* of *Easyair Ltd v Opal Telecom* [2009] EWHC 339 (Ch) at [15]; and my own iteration in *King v Stiefel* [2021] EWHC 1045 (Comm), [15-22]. The Claimants cited *Attrill & Others v Dresdner Kleinwort Ltd and Another* [2011] EWCA Civ 229, a case concerning a bonus pool for the payment of discretionary bonuses to employees, paragraphs [22] and [23]. Nothing turns on these different citations.

49. In short:

    i) In summary judgment terms the hallmarks are the dividing line between "realistic" as opposed to "fanciful". A Micawber-esque attitude of "something may turn up" is not a good reason for a trial.

    ii) On strike out the test is similar – that of no reasonable grounds for bringing or defending the claim. As explained at paragraphs 3.4.1 and 3.4.2 of the White Book, a statement of case will be liable to be struck out on this basis if it is unreasonably vague, incoherent or obviously ill founded.

50. At the same time the court must, as Mr Singla KC emphasised in his focussed submissions on the law, bear well in mind the caution necessary before concluding that a party should be deprived of its *prima facie* entitlement to a trial,

including the inappropriateness of conducting a mini-trial (*Easyair* (iii)), and the need to reflect on what evidence which can reasonably be expected to be available for trial (*Easyair* (v)) and the benefit of fuller investigations (*Easyair* (vi)). I have with this in mind also re-read the judgment of Mummery LJ at [4-18] in *Doncaster Pharmaceuticals Group Ltd v The Bolton Pharmaceutical Company 100 Ltd* [2006] EWCA Civ 661, that being the best full statement of the points on caution.

51. To this one does however need to add the rider (*Easyair* (vii)) that broad statements as to what may turn up are not enough: the court will need to be shown – by evidence – that although material in the form of documents or oral evidence that would put the existing case in another light is not currently before the court, such material is likely to exist and can be expected to be available at trial.

52. Mr Singla also urged caution by reference to [23] of my judgment in *King* against any "salami slicing" in the form of allowing part but not all of the claim to proceed by reference to the *Dresdner Kleinwort* case [23].

The contract claim

53. The Claimants' primary case is brought in contract, and ultimately the remaining grounds were not suggested to be ones which did more than supplement the main ground. The question of whether the Claimants' case is one with real (as opposed to fanciful) prospects of success therefore turns on this part of the argument.

54. The Claimants contend that a series of promises were made by Ms Li and Mr Pacini to the Claimants on behalf of D3-5 (and the proposed new defendants) to the effect that the Claimants would be entitled to carried interest. To the extent necessary they also argue that the Claimants accepted by their conduct in commencing or continuing to work for D1-2, although in argument the need for any discernible acceptance at this stage was disclaimed.

55. It is fair to say that the approaches of the parties diverge considerably. D3-5 adopted a conventional and analytical approach to the facts. That approach as deployed by Mr Pearce KC was clear, tightly focused and compelling. It was hard to pick holes in it, and (realistically) Mr Singla KC for the Claimants did not really engage on this level.

56. The Claimants' case is essentially that there is enough deployed now, that when taken with the cautions about the evidence which may emerge, and the benefit of witnesses at trial, I should permit the case to proceed. In essence the argument works this way:

    i) The test for intention to create legal relations is objective;

    ii) The court assumes the position of a reasonable person with all the background knowledge reasonably available to the parties, even if not in fact known to them: *Dresdner Kleinwort v Attrill* [2013] EWCA Civ 394

iii) The facts here support the conclusion that the parties (both) intended there to be a carried interest scheme. In particular Mr Xie's position is made clear by his instruction to Ms Li;

iv) The Claimants would wish (and expect) to be able to deploy at trial evidence that carry is an industry standard such that people in this industry expect carry, and that this is supported by the terms of the Partnership Agreement;

v) There are many messages consistent with this, and at trial more detail and further exchanges could be adduced;

vi) The messages which we have are "bookended" by Mr Xie's instruction at the start of 2016 and at the other end by the correspondence following the sending of the draft agreements on 17 November 2018. Both bookends demonstrate an intent by Xio Group to award carry;

vii) The messages are incomplete and deployed in the context of a summary determination without the full context and testing of a trial;

viii) The evidence has to be assessed against a background where there are no absolutes:

a) *Chitty* 4-031-4-036 highlights the difficulty of discerning when an agreement has been made in the context of continuing negotiations or where acceptance may be by conduct;

b) *Dresdner Kleinwort v Attrill*: a case where there are similarities to the current case, in that there was dispute about whether there was an obligation to pay a bonus where at best the pool had been ascertained, but there was no decision on individual bonuses;

c) *Mamidoil-Jetoil Greek Petroleum v Okta Crude Oil* [2001] EWCA Civ *406*where the court highlighted the scope for a contract to exist even where terms, including as to price, remained to be agreed.

57. Taking all of this together it was submitted that I should conclude that it is not fanciful that the Claimants may establish at trial that Ms Li for the Defendants reached agreement with the Claimants as to their individual entitlement to carry, even though agreements were never executed.

58. As regards the parties to the contract, it was submitted that it was also not fanciful that, given the fact that Ms Li was apparently acting at large for the various entities within the XiO Group, at a trial it might be concluded that the agreement was with one or the other of the Defendants.

59. Finally I was urged to stand back from the very tight legal submissions and ask myself: if, as we can see, the beneficial owner of these companies says that 20% should go to executives by way of carry, on what basis is the 100% being swallowed up by someone else? If I give judgment, it is said, it does not reflect

what that beneficial owner wanted. By contrast, if I permit the case to proceed to trial, where is the unconscionability?

Discussion

Overview

60. Although the arguments were put with great skill by Mr Singla and although I bear well in mind the need for caution, this is a case which falls comfortably on the wrong side of the realistic/fanciful line. As such, were I to dismiss this application I would, in reality, be doing the Claimants a disservice.

61. The boundary which operates here is not simply designed to save the winning party from a longer wait for victory. It is one which is designed to save both parties from the time, expense and stress involved in taking a case to trial. It is, at least as much, designed to save the losing party from an inevitable loss which will involve them in greater cost and false hopes along the way.

62. Here there are two essential hurdles which the Claimants face: (i) is there a realistic case of a contract for carry? (ii) is there a realistic case that any such contract was with one or more of Ds3-5? I conclude that both are insuperable, for the reasons given below.

Linkage to Ds3-5

63. The main claim being advanced by the Claimants, the case in contract, posits a contract with one or more of D3-5. All the subsidiary claims involve an obligation owed by one or more of D 3-5. But the basis for this is completely lacking on the material before me; and there is nothing which is either dependent on witness evidence or which emerges as likely to be the subject of as yet unavailable evidence at trial which will affect this.

64. The bottom line is this: if there is a contract between either of the Claimants and any of D3-5 there will at some point need to be established an offer and acceptance. Regardless of what Chitty may say of the difficulties in complex situations, that fact remains. Without being excessively diligent or overanalytical the building blocks of that case are not present.

65. It is common ground that the Claimants' employment or independent contractor agreements were with D1 and (in the case of Dr Normann) D2. Neither of the Claimants had any legal relationship with D3-5 at all.

66. The fact that the Claimants have pleaded a case against all 5 Defendants cannot provide a basis for a finding that the case against D3-5 is better than fanciful. That case must be based on facts either pleaded or in evidence. The pleaded case is inadequate.

    i) No facts are pleaded beyond the group structure and authority of Ms Li.

    ii) The fact that the Defendants are a group is neither here nor there. English law respects corporate identity as *Salomon v A Salomon & Co Ltd* [1896] UKHL 1, [1897] AC 22 makes clear, as do endless authorities since. Direct

or indirect ownership, or receipt of funds, or commonality of personnel is not a sufficient basis to pierce the corporate veil. The Claimants do not argue for piercing the veil – rather they simply ignore it.

iii) As for authority, Ms Li and Mr Pacini may have had authority to act for any of D3-5 as well as D1-2, but that does not get the Claimants where they need to go; it does not mean that they were always acting for all Defendants or that any XiO Group company can be said to be party to a contract at the option of the counterparty.

iv) The only other fact pleaded is that Ds 3-5 received or controlled some or all of the proceeds of sale of the two relevant projects. However there is no link between them and the making of any of the promises relied on. It might be added that D4 was not even in existence at the time the first six Alleged Promises were made, and so the suggestion that it was a party to any of those Alleged Promises is obviously incoherent for this additional reason.

v) Normally in this situation one would expect to find a pleaded case as to the basis for the inference that Ms Li and Mr Pacini were acting for Ds 3-5. But there is simply no particularised case for how and why it should be inferred that Mr Pacini and Ms Li, when making the Alleged Promises, were purporting to act on behalf of D3-5.

67. Matters progress no further if one looks at the skeleton and evidence for this hearing.

68. The Claimants' main attempt to meet this point is by contending that Mr Pacini and Ms Li were, in making the Alleged Promises, purporting to act on behalf of the XiO Group as a whole and that the lines between the companies were blurred. However, the XiO Group is not itself a legal entity, but is rather a label used to describe a collection of associated companies operating under the XiO name. Even were there any indication of intent to do this (which is lacking) the idea that in making the Alleged Promises Mr Pacini and Ms Li were purporting to bind every single one of these companies to the alleged contract both ignores the distinct corporate personality of the various entities making up the XiO Group, and is contrary to any sense of business reality.

69. The Claimants also say that there is no reason why Ms Li would not have agreed to enter into an agreement on behalf of any of the other companies. That plainly is no basis for finding or even arguing that an offer was made for any of the companies which were not the previous contracting parties.

70. The only arguments of any substance offered are:

i) The Claimants were required by their contracts of employment to work for other entities in the XiO Group and say they were required and did work for other XiO Group entities including D3-5. At the same time they were (they say) promised carry, when the entitlement to carry was not a term of the written employment contracts with D1 and D2. However, this argument goes nowhere. The fact that the Claimants were required to work for other XiO Group companies does not mean that they even arguably gained any

entitlement from any other companies, when they were entitled to no overtime and that work was part of their employment contract with D1-2. This is still more so when (i) Mr Normann's contract contemplated carry within the contractual structure and (ii) the indicative carry letters and original offered drafts were with D1-2;

ii) The indicative carry letter was headed XiO Group and named D3 as the fund for the purposes of carry. But (i) this was expressed not to be a contract (ii) was expressly superseded and (iii) when terms emerged they were offered on behalf of D1.

iii) The final draft terms were with XiO GP. However (i) that is not any of D 3-5, so cannot support an argument that the agreement was with D3-5 and (ii) this occurred after D1-2 had entered the liquidation process.

71. The truth of the matter is that the Claimants had no relationship with D3-5 whatsoever, and there is simply no reason to suppose that Ms Li and Mr Pacini were purporting to act on behalf of those companies when making the Alleged Promises.

72. The Claimants had contracts with D1-2. The Claimants say (plainly correctly) that "*the private equity structure was that the first two defendants would be employee-facing or consultant-facing but had no other apparent purpose.*" The natural inference would be, and the Claimants themselves would doubtless have thought that any offer of carry came from them – unless there was some indication to displace that inference. In fact the Claimants did so assume – when they sent a letter before action it was aimed only at those Defendants. Such documents as did deal with carry came (prior to liquidation) from D1-2.

73. There is therefore no real prospect of the Claimants establishing that any contract or obligation in relation to carry was with D3-5.

Promises/Offers

74. There is also the question of whether, had there not been the insuperable problem of parties, the Claimants could establish a more than fanciful case of a contract. This is all about the "promises" relied upon by the Claimants; and it is perhaps not insignificant that despite the conventional approach of breaking contract down into offer and acceptance, these appear in the pleading as promises, not as offers.

75. I will deal first with the authorities on which reliance was placed. Properly analysed they do not help the Claimants.

76. *Dresdner Kleinwort:*. The Claimants rest heavily on this case. The court in that case upheld promises to create a specifically identified bonus pool, made to the group of employees so entitled, without descending to fix the level of each individual's bonus (although the Court did not rule out its having to do so if necessary). They submit that it is analogous because the mode of acceptance was held by implication to be the actual performance of the employees; where the employer had dispensed with the need for any response to the offer; and, in any

event, this was a promise without any disadvantage, actual or potential, of any kind to the employees.

77. There are, however, critical differences. In the *Dresdner Kleinwort* case what was in issue was not carry but discretionary bonuses. The employees were already in a contractual relationship with the same entity as they were now suing (not, like here, a separate entity with whom there was no previous legal relationship) and they also had a contractual right to discretionary bonuses - as [8-9] of the judgment makes clear. In addition, this was not a completely blank slate in terms of the critical question of certainty of price. The pool figure was clearly established (and communicated). There was then a system already established within the company's procedures for quantifying the distribution of the pool[11-12]. There was therefore no problem with identifying a sufficiently clear offer.

78. Here all is uncertain. The figure of 20% is relied upon as a carry pool but it is nowhere said how that figure was communicated to the Claimants for acceptance. In the pleading various other formulations of potential offers are made (eg via the slides), but they are contradictory and unclear. *Kleinwort Benson* is not an analogous case. While principles from it may be of use, it is not a simple route through.

79. This then leads to the case of *Mamidoil-Jetoil Greek Petroleum v Okta Crude Oil,* in relation to which I was asked to read paragraphs [50]-[69]. In particular I was directed during oral submissions to the following paragraphs:

> "63. In *British Bank for Foreign Trade v. Novinex* [1949] 1 KB 623 the court of appeal upheld an agreement to pay 'an agreed commission on any other business transacted with your friends'. The court approved this passage from the judgment of Denning J at first instance (at 629/630):
>
> 'The principle to be deduced from the cases is that if there is an essential term which has yet to be agreed and there is no express or implied provision for its solution, the result in point of law is that there is no binding contract. In seeing whether there is an implied provision for its solution, however, there is a difference between an arrangement which is wholly executory on both sides, and one which has been executed on one side or the other. In the ordinary way, if there is an arrangement to supply goods at a price 'to be agreed,' or to perform services on terms 'to be agreed,' then although, while the matter is still executory, there may be no binding contract, nevertheless, if it is executed on one side, that is, if the one does his part without having come to an agreement as to the price or the terms, then the law will say that there is necessarily implied, from the conduct of the parties, a contract that, in default of agreement, a reasonable sum is to be paid'….
>
> 69. In my judgment the following principles relevant to the present case can be deduced from these authorities, but this is intended to be in no way an exhaustive list:

> (i) Each case must be decided on its own facts and on the construction of its own agreement. Subject to that;
>
> (ii) Where no contract exists, the use of an expression such as "to be agreed" in relation to an essential term is likely to prevent any contract coming into existence, on the ground of uncertainty. This may be summed up by the principle that "you cannot agree to agree".
>
> (iii) Similarly, where no contract exists, the absence of agreement on essential terms of the agreement may prevent any contract coming into existence, again on the ground of uncertainty.
>
> (iv) However, particularly in commercial dealings between parties who are familiar with the trade in question, and particularly where the parties have acted in the belief that they had a binding contract, the courts are willing to imply terms, where that is possible, to enable the contract to be carried out.
>
> (v) Where a contract has once come into existence, even the expression "to be agreed" in relation to future executory obligations is not necessarily fatal to its continued existence.
>
> (vi) Particularly in the case of contracts for future performance over a period, where the parties may desire or need to leave matters to be adjusted in the working out of their contract, the courts will assist the parties to do so, so as to preserve rather than destroy bargains, on the basis that what can be made certain is itself certain. *Certum est quod certum reddi potest*.
>
> (vii) This is particularly the case where one party has either already had the advantage of some performance which reflects the parties' agreement on a long term relationship, or has had to make an investment premised on that agreement.
>
> (viii) For these purposes, an express stipulation for a reasonable or fair measure or price will be a sufficient criterion for the courts to act on. But even in the absence of express language, the courts are prepared to imply an obligation in terms of what is reasonable."

80. The Claimants submitted that a combination of the summary judgment test and *Mamidoil* means that it is not safe to regard the present situation as an incomplete agreement lacking certainty of terms. While there is uncertainty, *Mamidoil* says that that need not be fatal and that there may be an answer in terms of discoverability on disclosure or determination by the court as indicated in this case.

81. However, *Mamidoil* must be treated with a degree of caution. It is not a case remotely like the present. It concerns a continuation of a long-term oil supply and handling contract. The authorities which the court considered and which lead to the passage at [69] concern the ability of the courts to find a contract when a

traditional essential term such as price is missing in those very limited sorts of cases where a long term contract leaves a key provision undecided for some period of the contract. [69] must be viewed in that context. It does not detract from the orthodox proposition that where there is absence of agreement on an essential term there is no contract.

82. One therefore has to examine the promises relied upon against the relevant background. Here one must bear in mind that even assuming a general willingness to enter into a relationship at some point involving carry (and that does seem to be established on the documents) the starting point is that there was no agreement for carry expressed in the contracts which the Claimants entered, and that to establish a contract for carry they will have to show (at present to a real prospect of success standard) that they were at some point in receipt of a contractual offer – in other words an expression of willingness to contract on specified terms made with the intention that it is to become binding as soon as it is accepted by the person to whom it is addressed.

83. Simply going through the chronological run as I have done above in setting out the essentials of the story the problem here is apparent. The Defendants plainly intended at some point to put a carried interest arrangement into effect. They told employees about it and how good it would be. But the terms of that arrangement as described in the slides were not part of the contracts previously entered into, and the arrangements proposed were never finalised or agreed.

84. In the skeleton the Claimants' point is put thus: "*In January 2016, Ms Li had been instructed to pay 20% carry to certain employees including Cs. By 17 April 2019, Mr Pacini confirmed to Richard Lewis of FFP (Cayman) Ltd that the Cs "had "deal points/carry" which will need to be discussed as part of any exit" in Projects Camping, Laguna and Jefferson….Plainly, there had been acceptance by Cs sufficient to create a binding agreement.*"

85. This however seizes out of context on two communications at very different points in time neither of which involved the Claimants and completely fails to engage with the making of any promise by any of the Defendants to the Claimants. Obviously this cannot be enough. One must search for a promise by a Defendant to a Claimant which corresponds to what is here alleged. When one does so – whichever way one does so - it is plain that none exists. Indeed the pleaded case at [57] of the APOC does not even map onto the promises pleaded at [47].

86. The paucity of the case can be seen from the fact that the Claimants rely on the email from Ms Li to Mr Pacini dated 6 September 2015 addressed to "Execution Officers" which stated: "*for 365 degree review, please let the team know on global call that all their year end bonus and deal bonus are hugely 90% and only linked to the number of deals they close, number of deals exit and deal quality*." As to this:

    i) It could not in any event be a promise to Mr Steinborn, who was not party to it and not employed by D1 at this stage. As for Dr Normann, although he was a party to the email he was not the addressee of the statement which is relied on, which relates to the bonuses of other individuals;

ii) It is manifestly unclear ("hugely 90%"). At best it might be said to demonstrate an intent that there should be carry, but it goes no further than this. It says nothing of any entitlement to carry. It makes no offer. Indeed it is riven with qualifications – the "hugely 90%" is "only" linked to (i) number of deals they close (ii) number of deals exit and (iii) deal quality;

iii) The effect of this email was to ask the recipients of it (including Dr Normann) to pass on a message to other employees, in the context of a "360 degree review", about their expected bonuses. The substance of the message was simply that their bonuses would be linked to performance, and not influenced by what other members of the team thought of the employee in question.

87. Another "promise" relied upon which again is striking for its hopelessness is the email dated 21 June 2017 from Mr Pacini sent to various people including Mr Steinborn (but not Dr Normann) in connection with a valuation of JD Power. One really needs only set out the wording relied on: "*As an aside, it looks pretty freakin' awesome – doubling equity in 9 months, plus a refi? Just sayin' good to have carry in this deal (which will be provided at some point)*". This informal aside to one only of the Claimants says nothing at all about even a generalised existing entitlement to carry, still less to anything concrete or certain.

88. There is more seriousness at least in a statement by Mr Pacini in mid to late 2015 and early 2016. The case put is the statement that XiO Group provided some of the best potential remuneration which, deal dependent, was best in the market, "*more individually attractive than the upper 75% of the market today*" is another "promise" relied upon together with the presentation which forms the basis of that headline statement. But still this material is not even apt to ground a fanciful case in contract.

i) The Claimants suggest that this promises or represents that there was a scheme in place already, that the Defendants' employees were in the right place, that the carry model is the best in the market and they were doing better than their peers. However, neither the email nor the presentation says that. This email was headed "Junior team training", and was addressed to six individuals including Dr Normann (but not Mr Steinborn, who was not at this stage even working for XiO UK, so it cannot be any form of promise to him). In it Mr Pacini explained that he believed many of the juniors did not understand how private equity works from a compensation perspective, and suggested setting up a meeting to explain some of the basics. One of the items on the list of proposed agenda items was "*Carry structures – deal carry vs fund carry*", and in that context Mr Pacini made the statement relied on by the Claimants.

ii) It is plainly talking about a future scheme, yet to be even presented. It does not give any promise of better than 75% - it says, "*if you do this, based on this proposal you will be doing better than 75%*".

It is difficult to understand how this statement (which was one subpoint in a list of items Mr Pacini wished to discuss with junior employees) can possibly be said to be a contractual offer to the Claimants. It was, at most, no more than a

generalised statement as to how the remuneration provided by the XiO Group compared to the market. The suggestion that it constituted an expression by Mr Pacini of a willingness to contract with the Claimants (let alone Mr Steinborn, who was not a party to it) is fanciful.

89. Similar problems afflict the email dated 20 October 2015 from Mr Pacini (stating that "*carry letters (for Projects Camping and Laguna) will be provided once the 360 reviews are completed*".) and the email dated 10 December 2015 from Mr Pacini (the agenda "*Carry Model – Our incentives are the best in the market and aligned for superior performance of our fund – Explanation to the team prior to handing our carry letters*.") Again, these emails cannot possibly have been contractual offers to the Claimants (or anyone else). Further, Mr Steinborn was again not a party to the emails at all, or employed by XiO UK at this time.

90. Another pleaded "promise" is an alleged statement by Mr Pacini to Mr Steinborn in February 2016 to the effect that he would be paid carried interest if he became an employee of XiO UK. This (in contrast to the earlier statements) could assist only Mr Steinborn, not Dr Normann. But even if it were made, as I assume for present purposes it was, it was at most an expression of a general expectation that carried interest of some form may be offered to Mr Steinborn if he worked for XiO UK - and it was overtaken by events. That is because in October 2016 Mr Steinborn signed a written contract with XiO UK which (a) did not provide for carried interest; (b) made clear that it constituted the entire agreement between the parties which superseded any prior understandings; and (c) confirmed that Mr Steinborn had not, in entering the agreement, relied on any pre-contractual statement.

91. Then we turn to Mr Singla's "bookends", which were the high point of the oral submissions in this area. The first bookend is the indication by Mr Xie that 20% of the profits would be distributed and an instruction to Ms Li to implement this. But (as already noted) this is a document which never even makes it to either of the Claimants. It cannot be an offer. It is in a whole different ballpark to the declaration of the bonus pool in the *Dresdner Kleinwort* case.

92. The "promises" therefore, at least prior to the Draft Carried Interest Bonus Agreements, do (even making all possible allowances for the stage we are at) fall squarely into the category of being insufficiently certain to be given contractual effect; and thus even if agreed to (on which of course evidence was lacking) would get no more than to being an unenforceable agreement to agree. That cannot be affected by the size of the enterprise, nor the fact that any such carry would relate to efforts on the part of the Claimants which were at least substantially complete.

93. Despite repeated references to intention to create legal relations, the problem which the Claimants face is not really about intention to create legal relations per se; it is (to this point) about certainty of terms and intention to create legal relations on any particular terms. I have no difficulty with Mr Singla's submission that the parties may have thought of carry as something which fell outside of the strict four corners of the employment contract; the way the Indicative letter and Draft Bonus Agreement emerged suggest that this is a realistic submission. What

is not realistic is to jump from that to the suggestion that this can elude the basic requirements of certainty of terms.

94. If there were an offer capable of giving rise to a contract it comes in the vicinity of the other "bookend", the first Draft Carried Interest Bonus Agreements. No real stress was placed (rightly) on the Indicative letters (if sent). That was a correct decision because of (i) the terms of the letter which (as explained above) made it manifestly clear that it was no more than indicative and gave rise to no entitlement (ii) it was expressly supplanted by the Draft Bonus Agreements and (iii) they would have been excluded by the Entire Agreement clauses in the Employment Agreements.

95. The only real potential argument on contract therefore related to the Draft Bonus Agreements, and the correspondence which occurred thereafter, including Mr Steinborn's communications with Ms Li. However, the first and second Drafts were part of a package deal, including entry into other contracts. They also arrived in the context of the No Oral Modification ("NOM") clauses in the employment contracts. They therefore plainly and beyond the reach of even fanciful argument, could not have any effect unless accepted and concluded. But it is conceded and not remotely contentious that they were not accepted. These documents, despite their terms, therefore give rise to no real prospect of success of an argument that a contract was concluded.

96. The Claimants also suggested that the draft waiver sent to Mr Steinborn along with the Draft Bonus Agreements contemplated that Mr Steinborn may already have acquired rights to carried interest. However, for the reasons set out above, Mr Steinborn clearly had not already acquired such rights, and the waiver was therefore unnecessary. Any suggestion that the waiver document by itself provides the Claimants with a realistic prospect of showing that the Indicative letter, or any of the other "promises" constituted contractual offers is clearly wrong.

97. I should add that Mr Singla addressed a good deal of interesting and detailed argument to the reasons why the First Draft Bonus Agreements were rejected. It was said that the terms offered did not reflect the parameters earlier indicated, for example in the presentation slides. Whether that is correct or not (and I am not persuaded that it is correct) can make no difference if there was no earlier offer or agreement, as I have made clear there was not. The Draft Bonus Agreements were – whatever their merits or demerits – offers of real terms, sufficiently certain for acceptance. They could have given rise to contracts. They did not. They did not for one reason: because the Claimants chose not to accept them.

<u>The impact of disclosure and evidence at trial</u>

98. In the light of the thrust of the Claimants' argument I should deal with the suggestions that the Claimants' case will be materially assisted by disclosure or evidence at trial.

99. So far as disclosure is concerned the obvious point is that if the Claimants entered into a binding contract with D3-5 for carried interest, the vast majority (if not all) of the documents relevant to that issue will have crossed the line between the

parties and therefore be in the Claimants' possession and should already be in play. One can see from what has been before me that the shape of exchanges is relatively clear even if not all possible documentation is before me.

100. Therefore this is not a case where there is an obvious potential for further documentation. Nor is there evidence (as there should be) that such material is expected. That is because it is overwhelmingly likely that disclosure in this case would add next to nothing. It will do no more than provide further evidence of communications of a similar nature to the ones already in evidence. We are therefore in the territory of the possibility that something may turn up on disclosure; that, as the cases make clear, is not a sufficient reason to have a trial.

101. There was also some suggestion that oral evidence or expert evidence would add something and that the Claimants should be allowed to have a trial to enable this to be deployed. There were mentions of conversations in corridors – but this was not followed up by any explanation of how that could impact a case in contract, particularly against the background of the entire agreement and NOM clauses. As for the expert evidence as to the prevalence of carry in the business this adds nothing. I have proceeded on the basis of accepting that such a structure is usual and that the XiO Group intended to have such a structure. But expert evidence cannot (and was not suggested to) be capable of creating a contract or an entitlement to carry without agreement as to its terms. The evidence itself demonstrated the range of possible structures and add-ons which form part of a carry package which require a contractual agreement.

102. Accordingly, there is no real prospect of the Claimants establishing that there was any offer of carry before the Draft Bonus Agreements which was capable of creating a contract; and no acceptance of the offers which were made in the Draft Bonus Agreements.

103. Accordingly, this case is bound to fail for two reasons, and the application brought by D3-5 succeeds.

104. I appreciate that this will be a disappointment to the Claimants. However they must bear in mind that this is a decision that had the matter proceeded to trial they would have been bound to fail and bear the costs of the action to trial. In a case where the costs are each party to this stage of over £300,000 (before assessment) that is a not inconsiderable factor.

The other claims

105. For completeness I note that the other claims advanced were even more clearly bound to fail. In particular:

    i) Quantum meruit: The problem here is that the argument is so closely allied to the contractual analysis. The Claimants were employed to do the work they did. It is well established that where there is a subsisting contract relating to a benefit transferred, no claim in unjust enrichment will generally lie: see Goff & Jones, 10th ed, para 3-12; *Diamandis v Willis* [2015] EWHC 312 (Ch), para 84. Further any enrichment of D3-5 was not

at the Claimants' expense, but at that of D1-2 who paid the Claimants to do the work;

ii) Express Trust: the requirements are the so-called three certainties: (i) certainty of words (i.e. the imperative to create a trust); (ii) certainty of subject matter (i.e. the property subject to the trust); and (iii) certainty of objects (i.e. the beneficiaries) (Lewin 20th Ed 5-003). None of these existed here; the only document said to evidence the alleged declaration of express trust is the email from Mr Xie to Ms Li dated 10 January 2016. The email set out a list of six "instructions" to Ms Li, which it asked her to implement. It is, self-evidently, not a declaration of trust (or evidence of any such declaration), it does not identify objects (and Mr Steinborn was at this stage not even employed) and has no consideration at all of the subject matter – how the (evidently complex) details of the carry process would work;

iii) Constructive trust: this has never been particularised and appears to depend on the declaration of trust analysis already rejected. It may well only have been pleaded because of the appeal to conscionability which underpins the whole of the argument, as noted above;

iv) Proprietary estoppel: This is founded on the promises, which I have rejected. It would be a personal claim. There is also no real argument as to detrimental reliance.

The claim for declaratory relief

106. The APOC contains a claim for declaratory relief, on the premise that all of the other claims fail. Like the existing claim for a constructive trust, this plea has now been struck through in the draft RAPOC. It appears therefore that this point is not pursued.

107. In the circumstances, the claim for declaratory relief should be struck out and/or summary judgment should be given against the Claimants in relation to it.

The amendment application

108. It follows that the amendment application also fails.