Neutral Citation Number: [2024] EWHC 495 (Comm)

Claim No. LM-2022-0000258

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
LONDON CIRCUIT COMMERCIAL COURT (KBD)

Date: 11/03/2024

Before :

John Kimbell KC
(sitting as a Deputy High Court Judge)

- -

Between :

(1) KIRIL KLATUROV **(2) KMKH EOOD**	**Claimants**
- and –	
(1) REVETAS CAPITAL ADVISORS LLP **(2) ERIC ASSIMAKOPOULOS**	**Defendants**

- -

James Weale (instructed by **Willkie Farr & Gallagher LLP**) for the **Claimants**
Jonathan Cohen KC (instructed by **Fox Williams LLP**) for the **Defendants**

Hearing dates: 5,6,7 December 2023
Closing Submissions in writing 10 and 17 January 2024
Draft Judgment Circulated: 1 March 2024

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APPROVED JUDGMENT

This judgment was handed down remotely at 1pm on 11 March 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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John Kimbell KC sitting as a Deputy High Court Judge:

A. INTRODUCTION

RCA

1. Revetas Capital Advisors LLP ('**RCA**') is a limited liability partnership registered in London. RCA was founded in 2012 by the Second Defendant ('**Mr Assimakopoulos**').

2. RCA provides advice to private equity funds in relation to real estate projects in Central and Eastern Europe. RCA and its affiliates have offices in London, Luxembourg and Vienna.

RHL

3. RCA is a subsidiary of Revetas Holding Limited ('**RHL**'), a company registered in Guernsey. In June 2012 RHL entered into an investment agreement ('**the Investment Agreement**') with a group of 'seed investors', including the JRJ Group ('**JRJ**').

4. Under the terms of the Investment Agreement:

    a. The seed investors provide funding in the form of loan notes worth £1,500,000, in exchange for interest of 8% p.a.

    b. Until RHL had repaid all the loan notes, the remuneration of the management of RHL would not be increased above the levels set out in a Completion Business Plan.

    c. Once the loan notes had been repaid, the management of RHL could be remunerated in accordance with 'market standards'.

Mr Klaturov

5. The First Claimant ('**Mr Klaturov**') is a lawyer. He studied law at Sofia University, the University of Vienna and at Georgetown University, Washington DC. He was admitted to practise law both in Austria and New York.

6. Mr Klaturov originally joined RCA in 2012 on secondment from his then Austrian law firm, Schoenherr. He then joined RCA full time, initially as General Counsel and then subsequently as Chief Operating Officer.

7. From 2016, Mr Klaturov was employed as the managing director of RCA's Austrian subsidiary Revetas AM GmbH ('**RAM**'). He ceased being managing director of RAM on 17 February 2022.

KMKH

8. The Second Claimant ('**KMKH**') is a company based in Bulgaria which is owned and controlled by Mr Klaturov. It also became a member of RCA in December 2019.

The 2013 LLPA

9. The first LLP Agreement was entered into in 2013 ('**the 2013 LLPA'**). At this time the individual members were Mr Jones and Mr Assimakopoulos.

The MOUs

10. In June 2015 RCA entered into three memoranda of understanding ('**the MOUs'**). There was one for each of Mr Assimakopoulos, Mr Jones and Mr Klaturov. At the time Mr Klaturov was not yet a member of RCA. He was an employee. The function and effect of the MOU signed by Mr Klaturov is a matter of dispute.

The 2016 LLPA

11. Mr Klaturov became a member of RCA in December 2016 by signing a deed of adherence to the Amended and Restated Limited Liability Partnership Agreement for RCA ('**the 2016 LLPA**').

The 2020 LLPA

12. The 2016 LLPA was replaced in 2020 by a new LLP agreement when two further members joined RCA ('**the 2020 LLPA'**). The 2020 LLPA was entered into on 9 December 2020 but took effect from 6 April 2019, Mr Klaturov was not personally a member of RCA after 6 April 2019. His interest in RCA under the 2020 LLPA was via KMKH.

Mr Jones

13. Stephen Ian Jones ('**Mr Jones**') was the chief financial officer at RCA from February 2012 until 6 April 2019 when he ceased to be a member of RCA. The financial terms of his departure from RCA are contained in a settlement agreement dated 10 June 2020.

Mr Klaturov's resignation

14. In August 2021, Mr Klaturov gave notice of his intention to leave RCA. It is common ground for the purposes of his claim for unpaid compensation that KMKH ceased to be a member of RCA on 16 March 2022. Mr Klaturov and RCA have not been able to agree the financial terms of his and KMKH's departure from RCA.

The Profit Share Claim

15. By a claim form issued in July 2022, the Claimants claimed a total of EUR1,034,183 in "unpaid compensation for services rendered" to RCA between 1 January 2018 and 16 March 2022. By means of an amendment made in May 2023, the Claimants also now claim a share of RCA's profits under clause 8 of the 2020 LLPA ('**the Profit Share Claim'**).

The Buy Out Claim

16. A further claim relating to the valuation and purchase of the Claimant's interest in RCA pursuant to clause 21.4 of the 2020 LLPA ('**the Buy Out Claim'**) was also added by amendment but by an order made by Paul Stanley KC on 3 November 2023 that claim is to be tried separately at a later date.

The terms of the 2020 LLPA

17. In paragraph 12 of the Amended Particulars of Claim ('**APC**'), the Claimants plead that the relationship between RCA and its members is "governed by" the 2020 LLPA. This is admitted by RCA.

18. Part C of the APC, headed "the LLP Agreement", makes express reference to only four clauses of the 2020 LLPA: clause 16.2 (obligation on each Member to devote substantially all of his working time, skills and expertise to the Business), clause 1.1 (which defines the business of RCA), clause 33 (Governing law and dispute resolution) and clause 21.4 (Good Leaver clause).

19. Clause 8 of the 2020 LLPA, which is not referred to by the Claimants in Part C of the APC, describes how and by whom profits and losses are determined as being available for distribution by RCA to the Members as follows:

> **8.** Profits and Losses
>
> "**8.1** The Managing Member may from time to time determine that all or part of any profits of the LLP available for distribution between the Members be retained in a reserve account as a reserve against liabilities of the LLP, and any such retained amounts shall be treated as an asset of and belonging to the LLP. In the event that the Managing Member determines that the amount retained in the LLP exceeds the amount of working capital required, the excess shall be distributed to the Members in accordance with clause
>
> *Allocation of profits*
> **8.2** The profits of the LLP reasonably determined by the LLP to be in the nature of income profits or operating profits shall be allocated:
> (a) first to the Members in proportion to (but so as to not exceed) their Fixed Shares in the relevant Accounting Period as set out against their names in Schedule 1; and
> (b) second profits of the LLP remaining after Members have been allocated such profits pursuant to clause 8.2(a) shall be allocated to the Members (other than a Former Member or Member who has given notice pursuant to clause 18) in proportion to their Voting Percentages.
>
> *Drawings on account of profits*
> **8.3** On the penultimate Business Day of each month, the LLP shall pay, or cause to be paid, to the designated bank account of each Member on account of the profits to be allocated to them under clause 8.2, one twelfth of his Fixed Share (unless the relevant Member and the Managing Member agree otherwise).
>
> **8.4** If during any Accounting Period the aggregate amount paid to any Member under clause 8.3 (the "Aggregate Drawing") exceeds the profits allocated to such Member for that Accounting Period under clause 8.2, then the Managing Member shall at its discretion be entitled to satisfy or set off such excess (the "Excess Drawing") against any entitlement to distributions of profits (including any Fixed Share) to the Member that has received the Excess Drawing, save that the LLP may not charge any interest in respect of such receivables due to it.
>
> *Distributions of profits*
> **8.5** To the extent that the share of profits allocated to any Member in respect of any Accounting Period pursuant to clause 8.2 exceeds the aggregate amount in respect of drawings paid to such Member by the LLP during that Accounting Period pursuant to clause 8.3, the LLP shall distribute such excess profits to the relevant Member as soon as reasonably practicable provided that:

(a) if the Managing Member determines that any profits in respect of any Accounting Period in excess of the aggregate Fixed Sharers should not be distributed, then such amounts shall be retained within the LLP; and
(b) no distribution shall be made by the LLP to its Members if, as a result of such distributions, the LLP would not have sufficient capital to meet the Regulatory Capital Requirement from time to time.

Distribution of losses
8.6 Losses shall be allocated between the Members in proportion to their Voting Percentages at the time of allocation of the losses."

20. The 2020 LLPA also contained the following clauses:

"**21 Entitlements of Former Members**

21.1 From his Leaving Date, a Former Member shall cease to be entitled to share in the profits of the LLP (other than as expressly specified in this Clause 21), and shall cease to be entitled to make drawings on account of profits pursuant to clause 8.3. On or promptly after the Leaving Date, the Voting Percentage of the Former Member shall be allocated by the Managing Member on a pro rata basis to all Members who were Members of the LLP at the respective Entry Date (as defined in clause 9.3 (c)) of such Former Member.

21.2 As soon as reasonably practicable after the Accounting Reference Date following the Former Member's Leaving Date, the LLP shall calculate the amount of profit ("the Allocated Profit") that would have been allocated to the Former Member under clause 8.2 in respect of the Accounting Period ending on that Accounting Reference Date (the "Relevant Accounting Period") had he not ceased to be a Member, and shall apportion the Allocated Annual Profit on a time basis between:

(a) the period from and excluding the previous Accounting Reference Date to and including the Former Member's Leaving Date ("the Apportioned Profit"); and

(b) the period from and excluding the Former Members' Leaving Date to and including the Accounting Reference Date following the Former Member's Leaving date ("the Reserved Profit")

21.3 …[*Bad Leaver clause*]…

21.4 Save as otherwise expressly agreed between the LLP and any Member or any Former Member, in the event that the Former Member is a Good Leaver and so long as the Former Member remains a Good Leaver:

(a) if the Aggregate Drawings paid to any Former Member during the Relevant Accounting Period exceeds the Apportioned Profits, the Former Member shall, within one month after the annual accounts for the Relevant Accounting Period are approved by the Members, repay such excess to the LLP together with interest on the excess at an interest rate equal to the base lending rate from time to time of the Bank;

> (b) if the Apportioned Profits exceed the Aggregate Drawings paid to any Former Member during the Relevant Accounting Period, such excess shall be distributed to the Former Member as soon as reasonably practicable after the annual accounts for the Relevant Accounting Period are approved by the Members;
>
> (c) such Former Member shall be entitled to receive the amount of such Former Member's Capital Contribution other than his Regulatory Capital Contribution, which shall be paid in accordance with clause 6.4) made pursuant to clauses 6.1 and 6.2 within 12 months from the relevant Leaving Date.
>
> (d) .. [*Interest Buy Out Clause*] …
>
> (e) save as aforesaid, the Former Member (or his personal representatives) shall not be entitled to any share in the profits of the LLP or distributions made by LLP, and shall not have any right, interest or entitlement in the LLP"
>
> **25. Variation**
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> **25.1** Subject to clause 14, this agreement may be varied only an agreement in writing signed by or on behalf of each Member."
>
> **29. Entire Agreement**
>
> **29.1** This agreement and the documents referred to or incorporated in it constitute the entire agreement between the parties relating to the subject matter of this agreement and supersede and extinguish any prior drafts, agreements, undertakings, representations, warranties and arrangements of any nature whatsoever, whether or not in writing, between the parties in relation to the subject matter of this agreement…"

21. The clauses set out above are in essentially the same terms in the 2016 LLPA and the 2020 LLPA ('**the LLP Agreements'**) Mr Assimakopoulos was the Managing Partner under both of the LLP Agreements.

The voting and profit shares in RCA

22. In the 2016 LLPA, Mr Assimakopoulos' personal share was 40.375% and that of his wholly owned company, Paxylalen, was the same. So, his combined effective interest in any excess profits just over 80%. Mr Jones' voting share was 14.5% and Mr Klaturov's share was 5%.

23. In the 2020 LLPA, following Mr Jones' departure, Mr Assimakopoulos' share increased slightly to 41.33% personally and that of Paxylalen to 41.33%. Mr Klaturov ceased to be a member of RCA personally. His personal interest was replaced by that of KMKH with a share of 8.67%.

B. THE PLEADED CASE

24. The Claimants' claim for "unpaid compensation" is pleaded as a contractual debt which arises entirely outside and is independent of the terms of both the 2020 LLPA and the 2016 LLPA. The Claimants do not allege that the "unpaid compensation" constitutes a breach of clause 8 by RCA because it represents a profit which ought to have been distributed but has not been. In paragraph 19 of the APC, the Claimants plead as follows (with emphasis added by me):

> "While the LLP Agreement required the parties to perform services for [RCA], **it did not specify the compensation for each year** that each partner was entitled to receive in return for the services rendered. **Instead**, the partners **from time to time agreed defined compensation** packages for each partner and for each calendar year **for the services provided pursuant to the LLP Agreement**. Each compensation package comprised (i) an annual base salary (also described as current pay); (ii) an annual deferred salary and (iii) a specified bonus for the relevant year."

25. Paragraph 19 of the APC is denied by the Defendants. Paragraph 20 in their Amended Defence pleads (again with emphasis added) as follows:

> "[The 2016 LLPA] and the [2020 LLPA] **did in fact specify the method of calculation of the remuneration** for members as explained in paragraph 9 of this Defence. For the reasons given in paragraph 14 of this Defence, base compensation reflected the Claimant's Fixed Share and **anything other than base compensation required a determination of sufficient profit for distribution**."

26. In paragraph 9 of the Amended Defence the Defendants deny that any remuneration for members of RCA could arise independently of the LLP Agreements and in particular they deny that any such entitlement could arise independently of a determination that there was a profit to be distributed:

> "The very essence of the LLP was therefore typical to an 1890 Act partnership i.e. persons carrying on a business in common with a view to profit. **Members would only receive remuneration in the event of profit and in accordance with the level of profit.**"

If the Defendants pleas in paragraphs 9 and 20 of the Amended Defence as to the nature and effect of the 2016 and 2020 LLP Agreements that would be a complete answer to the Claimants claim for unpaid compensation.

The agreed compensation packages

27. It was common ground on the pleadings that on an annual basis, the members of RCA would meet discuss and agree "final compensation packages". The table below was included by the Claimants in paragraph 21 of the APC. The figures for 2018 – 2021 were admitted by the Defendant. The figures for 2022 were disputed.

Year	2018	2019	2020	2021	2022 (pro rata)	Total
Base	€ 150,000.00	€ 150,000.00	€ 130,000.00	€ 120,000.00	€ 24,657.53	€ 574,657.53
Deferred	€ 120,000.00	€ 220,000.00	€ 248,333.00	€ 270,000.00	€ 55,479.45	€ 913,812.45
Bonus	€ 170,000.00	€ 125,000.00	€ 125,000.00	€ 125,000.00	€ 25,684.93	€ 570,684.93
Total	€ 440,000.00	€ 495,000.00	€ 503,333.00	€ 515,000.00	€ 105,821.92	**€ 2,059,154.92**

28. It was also not in dispute that compensation figures under the same headings were agreed for all the partners and were recorded in numerous contemporaneous documents, in particular spreadsheets and budgets, which were circulated. What is denied by the Defendants is that any of these documents support or give rise to an unconditional claim for deferred compensation or bonus payments against RCA.

29. The main issue between the parties was thus whether the deferred compensation and bonuses ever became unconditionally due to Mr Klaturov (and, if so, when).

The Claimants' unconditionality case

30. The Claimants' pleaded case on the lack of any conditions was clear and simple. Paragraph 24 of the APC states: "none of the components of the compensation package was agreed to be subject to any conditions.".

The Defendant's conditionality case

31. The Defendants' pleaded case in response was equally clear and simple: both the deferred compensation and all bonuses were conditional. They were payable only when a "discretion was exercised to do so" and when "there sufficient profits" to justify a distribution – see paragraphs 9, 20 and 23 of the Amended Defence referred to above.

The Claimants' case on when compensation became due

32. In paragraph 29 of the APC the Claimants set out three alternative cases as to when and how RCA became liable to pay the agreed figures for deferred compensation and bonus set out in the table above:

> "On a proper construction of the partners' agreements alternatively as an implied term of the same (such term to be implied by reason of its obviousness and/or to give efficacy to the agreements), alternatively as a matter of law, the Claimants' entitlement to deferred compensation and/or bonuses for each year crystallised:
>
> a. Upon Mr Assimakopoulos' approval of the Claimants' compensation package (which incorporated such deferred compensation and bonuses) for the relevant year; and/or
>
> b. Immediately, or alternatively within a reasonable period, following a demand by the Claimants for payment; and/or
>
> c. By 16 March 2022 at the latest i.e. the date the First Claimant ceased being a partner in the First Defendant."

The Defendant's case in response

33. In paragraph 28 (ii) of the Amended Defence, the Defendant denied that compensation became due on any of the dates or circumstances alleged by the Claimants and alleged that the agreed deferred compensation and bonus "were **never** payable unless and until there was distributable profits available to pay them" (emphasis added).

Mr Jones

34. In relation, to the last of the alleged dates for the crystallisation of the alleged compensation debt Mr Weale relied heavily on the documentary and other evidence as to how RCA approached the settlement package with Mr Jones when he left RCA. The Defendants disputed that anything could be gleaned from the terms which were agreed with Mr Jones.

The Supporting Documents

35. Critical to the Claimants' case are six documents ('**the Supporting Documents'**). These according to the Claimants both "evidence the Parties compensation agreements" and demonstrate that they were "legally binding". Mr Weale submitted that the Supporting Documents were replete with language which one would only expect to see if what was being recorded was an existing liability to pay. He referred to the following examples: "outstanding payments", "unpaid" sums, and "arrears due to RCA partners". He also relied heavily on the agreed application of "late payment interest" of 9% to "outstanding amounts".

36. One of the Supporting Documents is set of minutes of a meeting which took place in October 2021. This was attended by a number of senior advisers to RCA, in addition to Mr Klaturov and Mr Assimakopoulos. The minutes refer to the schedule of outstanding payments to partners and said this: "The current schedule (as of 20 September 2021) shows that as of end of 2021 [Mr Klaturov] will be owed EUR 1,257,028".

The Defendant's response to the Supporting Documents

37. The Defendants' pleaded response to the Supporting Documents (in paragraphs 30 and 31 of the Amended Defence) was:

    a. They did not evidence an unconditional obligation on the part of RCA to pay deferred compensation or a bonus and were not legally binding.

b. At best they showed that a record was kept of unpaid sums which RCA might have paid if and when it was determined that there were sufficient profits to do so.

c. Where a sum is showed in arrears or carrying interest this is because RCA anticipated that it might be able to pay the sum in the future.

Nor oral contract but rather an agreement by conduct

38. In a response to a Part 18 Request by the Defendants, the Claimants clarified their case about the manner in which the agreement to pay compensation and bonuses arose as follows:

a. The Claimants placed particular emphasis on the 2019 Budget Overview dated 19 June 2019 which was signed off as "approved" by each of the RCA partners. It was therefore said to "record the contractually agreed compensation packages.

b. The Claimants clarified that they do not rely on an oral contract.

c. The agreement relied upon was made by "conduct" each year following the partners periodic negotiation of their compensation packages. Paragraph 17 in the Part 18 Response summarised the conduct relied upon by the Claimants as constituting the annually agreed compensation packages

d. The Claimants declined to give a precise date on which any agreement by conduct was formed in reliance on the following passage from Maple Leaf Macro Volatility Master Fund v Rouvroy [2009] EWHC 257 (Comm) at [242] (Andrew Smith J):

> "Although the formation of contract is conventionally analysed in terms of whether a contractual offer was accepted, the law does not require rigorous compliance with an analysis along these lines. Nor does it require that any particular communication or act must in itself manifest that the party intends to contract: the court will, if appropriate, assess a person's conduct over a period and decide whether its cumulative effect is that he has evinced an intention to make the contract."

The Claimants' Reply

39. In response to the Defendants' case that any liability to pay was conditional on a determination that there was sufficient profit to do so, the Claimants pleaded as follows in their Reply:

    a. If contrary to their primary case, liability to pay was conditional on RCA determining that there were sufficient profits to justify a distribution to Members under clause 8 any such discretion had been exercised when RCA entered into compensation agreements with the Claimants.

    b. They were entitled to rely on a "general principle" that a partner's deferred compensation and unpaid bonuses would fall due on his or her exit from the LLP.

    c. Partners' remuneration was in fact not tied to the profits made by RCA.

    d. The purpose of the partners' deferral of compensation and bonuses was temporarily to fund the growth of RCA's business in return for late payment interest, akin to an investor loan.

    e. RCA's reliance on Mr Klaturov's MOU was misplaced because:

        i. It was only intended to record Mr Klaturov's compensation for 2015 and not beyond.

        ii. It was intended to memorialise Mr Klaturov's path to partnership but was not intended to govern the relationship between Mr Klaturov and RCA once he became a partner.

        iii. It was "superseded" by subsequent agreements between the parties, including the LLPA 2016, the LLPA 2020, the 2019 Budget Overview "and the other compensation agreements evidenced by the Supporting Documents".

The summary judgment application

40. On 5 December 2022, RCA applied for summary judgment against the Claimants, alternatively for an order striking the claim out.

41. In response to that application, the Claimants filed a witness statement dated 9 January 2023 by Mr Klaturov. In paragraph 26 of that witness statement, the following appeared:

> "Mr Assimakopoulos, Mr Jones and I had numerous conversations both in person and over the phone, where we agreed that these amounts were contractual entitlements and that the agreed amounts were unconditionally owed. We did not, however, insist on immediate payment. We shared the understanding that RCA would pay the deferred amounts by the earlier of (i) RCA receiving additional income, which would be used to discharge the deferred liabilities by way of pro-rata payments to partners; or (ii) a partner leaving RCA in which case he would be entitled to all of his outstanding compensation on his departure date"

42. In his skeleton argument for the summary judgment application, Mr Cohen KC complained that this evidence amounted to an illegitimate attempt to introduce a new unpleaded case based on an oral agreement. Mr Weale relied on the paragraph in resisting the summary judgment / strike out application. The judgment of Simon Tinkler refusing the Defendant's application does not deal specifically with this complaint. However, in dismissing an application for permission to appeal, Popplewell LJ said this about the Claimants' pleaded case:

> "Despite some imprecision and infelicity in the language of the pleading, the P/C and RFI response are sufficiently clear in setting out the factual basis for the allegation that there was a consensual contractual agreement reached that the claimed amounts would be paid. P/C paras 19-20 and RFI Response to request (e) set out the factual allegations with clarity as to how and when agreement was reached. Although the RFI Response to Request (d) disavowed an oral agreement, the averments of an agreement by conduct might as easily have been characterised in law a oral agreements subsequently evidenced in writing because the conduce alleged involved oral agreements… Subject to arguments on when the payment was due and whether it was subject to profitability, there was no proper room for argument that the basis of the contractual claim was sufficiently identified in the pleading and supported by factual evidence which could not be rejected on a summary basis"

43. The substance of paragraph 26 from Mr Klaturov's first witness statement was incorporated into Mr Klaturov's fourth (trial) witness statement (as paragraphs 27 and 28) and the Claimants made no application to amend the Particulars of Claim to plead specific reliance on an oral contract or any orally agreed terms. The Claimants' claim thus remained exclusively based on an alleged agreement between Mr Klaturov and RCA which was entered into by conduct and evidenced by the Supporting Documents which was entirely independent of the LLP Agreements.

C. THE LEGAL CONTEXT

44. LLPs are a creature of statute. Section 1(1) of the Limited Liability Partnerships Act 2000 ('**the LLP Act'**) provides: "There shall be a new form of legal entity to be known as a limited liability partnership" ("**LLP**").

45. An LLP is brought into existence by two or more persons ('the first members') incorporating themselves as an LLP for the purpose of carrying on a business. Thereafter, members are able to join or leave in accordance with whatever contractual terms are agreed between them. The members of an LLP do not need to be individuals. The members may all be or may include other companies or other LLPs.

46. An LLP is a corporate entity with its own legal personality which is separate from its members and with its own rights and liabilities distinct from those of its members – Whittakar & Machell, *The Law of Limited Liability Partnerships* 5th Edition (2021) para. 1.3 (hereafter '**W&M'**).

47. The LLP Act does not define what constitutes a member's share in an LLP. In Reinhard v Ondra LLP [2015] EWHC 26 (Ch) at [53] – [56] Warren J said this:

> [53] …an LLP is a separate legal entity and it owns all the firm's assets, both legally and beneficially. The members have no direct legal or beneficial interest in those assets. Instead, the members have only those rights which their membership confers, rights which are ascertained in accordance with the relevant LLP agreement coupled with the statutory default provisions....
>
> [55] ...so far as a `share' in an LLP is concerned, the position is different. It makes perfectly good sense for members of an LLP to describe themselves as having `shares' in the LLP. And the same goes for an `interest' in the LLP itself in contrast with a direct interest in the assets of the LLP. Indeed, s 7(1)(d) of the LLP Act speaks of a member having assigned the whole or any part of his share and there are other statutory provisions taking the same approach...

> [56] However, what rights such a `share' carries with it can only be ascertained by reference to the agreements referred to in s 5(1) of the LLP Act and to the default provisions of the Regulations...
>
> ...I agree with the way the nature of the share is succinctly put in *Whittaker and Machell The Law of Limited Liability Partnership* (3rd edn) at 8-18:
>
> `... the "share" of a member is the totality of the contractual or statutory rights and obligations of that member which attach to his membership; and that an "interest" of a member is one or more components of his share.'

48. Commenting on this passage from Reinhard v Ondra LLP, W&M at para 8.18 say this:

> "It follows from this that (absent a contrary agreement) the rights of a member, such as the rights to share in the profits of the LLP, come to an end when he ceases to be a member; and this cessation of rights applies just as much to the right to share in capital profits or a member's 'equity', as it does to the right to share in annual trading profits."

49. There was a suggestion in pre-action correspondence that Mr Klaturov may have had the status of a worker in relation to RCA. However, no such allegation found its way into the Particulars of Claim. Mr Klaturov was an employee of RAM and received a salary from RAM. His claim against RCA is based solely on his status as a member of RCA.

The importance of the LLP Agreement

50. Section 5(1) of the LLP Act provides:

> "Except as far as otherwise provided by this Act or any other enactment, the mutual rights and duties of the members of a limited liability partnership, and the mutual rights and duties of a limited liability partnership and its members, shall be governed—
>
> (a)by agreement between the members, or between the limited liability partnership and its members, or
>
> (b)in the absence of agreement as to any matter, by any provision made in relation to that matter by regulations under section 15(c)."

51. There is no requirement for an LLP agreement to be in writing. Terms may be agreed by conduct and the terms may be varied in the usual way, subject to any express term imposing conditions for any variation to be valid and binding.

The LLP Regulations

52. The Limited Liability Partnership Regulations 2001 ('**the LLP Regulations**') contain certain default rules. These rules apply to all LLPs. In substance they represent the application of some the rules in the Partnership Act 1890 to LLPs.

53. Regulation 7 of the LLP Regulations provides as follows

> **"7.** The mutual rights and duties of the members and the mutual rights and duties of the limited liability partnership and the members shall be determined, subject to the provisions of the general law and to the terms of any limited liability partnership agreement, by the following rules."

54. Among the default rules which are applied to LLPs by Regulation 7 of the LLP Regulations are the following:

> (1) All the members of a limited liability partnership are entitled to share equally in the capital and profits of the limited liability partnership.
>
> (4) No member shall be entitled to remuneration for acting in the business or management of the limited liability partnership.
>
> (7) The books and records of the limited liability partnership are to be made available for inspection at the registered office of the limited liability partnership or at such other place as the members think fit and every member of the limited liability partnership may when he thinks fit have access to and inspect and copy any of them.
>
> (8) Each member shall render true accounts and full information of all things affecting the limited liability partnership to any member or his legal representatives.

55. The LLP can and often will employ people and pay them a salary in the same way as a company does. Those salary costs will be part of the cost of the LLP doing business. However, the essence of being a member as opposed to an employee of an LLP is that the members carry on the business of the LLP with a view to sharing in its profits. The flip side of that is that, as Default Rule 4 says, members are not entitled to receive remuneration for acting in the business or managing it.

56. Default Rule (4) is based on section 24(6) of the Partnership Act 1890. Even before that Lord Lindley stated the general rule as follows:

> "Under ordinary circumstances the contract of partnership excludes any implied contract for payment for services rendered for the firm by any of its members. Consequently, under ordinary circumstances and in the absence of an agreement to that effect, one partner cannot charge his co-partners with any sum for compensation, whether in the shape of salary, commission or otherwise on account of his own trouble in conducting the partnership business" (Lindley & Banks on Partnership 21st ed para 20-63)

57. Although I was not referred to this passage by counsel, I note that the editors of Lindley & Banks observe that it is open to partners to agree fixed remuneration. However, if this is done, the editors suggest that partnership agreement should clearly establish whether the remuneration is payable irrespective of the firm's profitability. The editors express the view that fixed remuneration in the case of a "true partner" will be "rare if not unknown" (citing David Mackie QC sitting as a Deputy High Judge in Avis v Balfour unreported 29 July 1999 at [19]).

58. In Tait v RGM [2016] CSIH 56 it was held at first instance that a partner share clause in a partnership agreement in the form "John Fraser Tait £36,000 per annum reviewable annually and 20% of the net profit of the Court Department" did create an entitlement to receive a fixed amount regardless of the profits of the firm. On appeal this was overturned. The appeal court held that on the true construction of the partnership agreement the obligation to pay £36,000 was subject to the condition that there were sufficient net profits available to pay it.

59. Neither Avis v Balfour nor Tait v RGM [2016] CSIH 56 were cited to me in argument. I mention them only as examples of how the courts have approached allegations of fixed remuneration for partners in the context of partnerships.

D. THE EVIDENCE

The documentary evidence

60. From the disclosure provided, the parties had agreed a trial bundle and supplementary trial bundle. Shortly before closings submissions were exchanged it was agreed that some further documents should be added. Given that the members were split between at least two sites (London and Vienna), it is unsurprising to find that much of the communication between the senior management team was carried out by email.

The oral evidence

61. In terms of the oral evidence, I heard from the following witnesses:

    a. Mr Klaturov
    b. Mr Jones
    c. Mr Bukovsky
    d. Mr Assimakopoulos
    e. Ms Inga Heynen

Mr Klaturov

62. In his witness statement Mr Klaturov said that when he joined RCA, the whole of the senior management team comprising, himself, Mr Jones and Mr Assimakopoulos all worked for "below market" salaries.

63. Mr Klaturov described what he recalled about the context for the MOUs, which he drafted. He referred to his MOU as memorialising his "path to partnership". He said that the terms of the MOU were "supplemented" by the 2016 LLPA, the 2020 LLPA, the 2019 Budget Overview and the "partners' periodic compensations agreements". He said he regarded the MOU not as a "definitive legal instrument" but rather as a "high level document" which would set out our broad objectives.

64. Mr Klaturov described how he, Mr Jones and Mr Assimakopoulos "in or around 2015" discussed their deferred compensation in terms analogous to a seed investor who has invested money in return for interest. His evidence was that he thereby accepted the risk of non-payment should the business fail but "we never agreed that RCA or Mr Assimakopoulos could, at their discretion, withhold the deferred amounts indefinitely".

65. He referred in his witness statement to a shared "expectation and understanding" that the deferred compensation would be "deferred for no more than a few years". He said "It was never a question of if but when the deferred amounts (including bonuses) would be paid". He referred to a "shared understanding" that:

> "RCA would pay the deferred amounts by the earlier of (i) additional income being received, which would be used to discharge the deferred liabilities by way of a pro-rata payments to the partners or (ii) a partner leaving RCA, in which case he would be entitled to all of his outstanding compensation."

66. Mr Klaturov described how he led the negotiations on behalf of RCA with Mr Jones and that throughout those negotiations "the partners understood and accepted that Mr Jones deferred compensations … would fall due on his departure". He added: "I understood from our consensual treatment of Mr Jones's entitlements that if, one partner leaves' he is entitled to all his outstanding amounts" and "The partners understood and agreed that these amounts were unconditionally due to Mr Jones on his departure".

67. He also referred in his witness statement to "numerous conversations" both in person and over the phone where "we agreed that these amounts were contractual entitlements and that the agreed amounts were unconditionally owed".

68. He explained how he had received the entirety of his agreed compensation package for the years 2013 – 2017 but not thereafter, notwithstanding the profits made by RCA in 2019 – 2021.

69. He described how he corresponded with Mr Bukovsky, in his capacity as Finance Director, about the sum due to him in the form of deferred compensation and how the figure was adjusted between 7 September 2021 and 20 September 2021 by Mr Bukovsky so as to include interest. Finally, he described a meeting in October 2021 in which Mr Bukovsky's schedule was discussed and was not disputed by Mr Assimakopoulos.

70. In relation to the Profit Share claim, his witness statement contained calculations for the years 2016 – 2021 as follows, even though the pleaded claim was not for any specific sums but was rather for an order that an account be taken and for payment of such sums as may be found to be due to the Claimants:

Year	**2016**	**2017**	**2018**	**2019**	**2020**	**2021**
Share	5%	5%	5%	8.67%	8.67%	8.67%
Figure	£2891.65	£6,323.45	£2,485.75	£42,011.79	£148,000	£52,680.48

71. In relation to 2022, Mr Klaturov referred to an email from My Bukovsky dated 26 September 2023. This mentioned a likely profit share for 2022 of £64,000.

72. His witness statement also referred to a claim for a share in the profit made by a subsidiary of RCA, Ceres of EUR 19,594.20. No such claim is pleaded and it is unclear on what basis it could be recovered from RCA.

Mr Klaturov's fifth witness statement

73. In a further witness statement dated 6 November 2023, Mr Klaturov responded to some of the assertions made by Mr Assimakopoulos and Mr Bukovsky in their witness statements:

    a. He repeated his assertion that the LLP Agreements did not provide for partner compensation and that the agreed compensation he is claiming is "external" to the 2016 LLPA and 2020 LLPA.

    b. He repeated his assertion that during the negotiation of Mr Jones' departure package no partner disputed Mr Jones' entitlement to accrued deferred compensation and bonus amounts.

    c. He asserted that the terms of settlement with Mr Jones showed that the pari passu principle did not apply to leaving partners.

d. He stated that the draft waterfall proposal discussed in 2019 was never finally agreed and was the subject of substantial comments in 2020 by E+H, an Austrian law firm.

74. In cross examination Mr Klaturov did not waver from his firm belief that the deferred compensation and bonuses he claimed were due to him unconditionally and that the only risk he bore was if RCA itself became bankrupt. He did, however, accept that the following two statements about compensation for the members of RCA made in 2017 and 2018 which were intended to be sent to investors (or their advisers) were broadly true:

> 2017
>
> "Separately, the senior team of Revetas has made significant sacrifices by accepting compensation packages paid at 50%, since joining the firm in 2012. These unpaid compensation amounts are deferred until such time as the business is able to make these payments. This provides significant alignment with the investors of the Fund"
>
> 2018
>
> "The three founding partners of Revetas (ENA, SJJ and KMK) have since joining the firm, been remunerated on a partial deferment basis. Under this deferment, 50% of the salary that is owed to each partner is deferred indefinitely, on the basis that the deferred amount will only be paid should the firm be successful in its management of investor money. In 2017 part of this deferred amount was paid out the gains arising on the partial divestment of the Project Gaudi assets"

75. The two statements, in particular the use of "will only be paid" in the 2018 statement, in my judgment, support the Defendants' contention that deferred compensation was understood to be conditional (rather than unconditional).

Mr Jones

76. Mr Jones is a qualified accountant. In his witness statement, he said that "Mr Assimakopoulos, Mr Klaturov and I always understood that RCA was unconditionally

required to pay the deferred amounts and bonuses. He said that the partners agreed to defer parts of their compensation packages "in practice until RCA generated further income". Like Mr Klaturov he said that "it was never expected, intended or agreed that our entitlement to these amounts was conditional or subject to a discretion on the part of Mr Assimakopoulos". It was also not agreed or intended, he said, that any deferral of parts of the compensation packages would continue for more than a few years and "certainly not once a partner had left RCA".

77. He said this in relation to the deferred compensation "Provided that the business continued to operate, we were …certain that we would eventually receive the full amounts due to us. In the meantime, our deferrals allowed the business to grow more rapidly than it would have if we had received our full market rate immediately". He was not challenged on his assertion that the deferred compensation corresponded to the sum required to bring compensation up to a "full market rate".

78. He added:

> "In my MoU, the monthly salary I received (i.e. the amount of my base compensation that was paid immediately) was referred to as a "fixed profit share" of GBP120,000 per annum. In reality, however, this amount simply represented cash drawings that did not vary according to the profitability of the business. As members of the LLP, Mr Klaturov and I were entitled to an actual share of RCA's profits, but we never received any such payments: the partners' compensation package were never trued up to reflect RCA's recorded profits, even though RCA made a profit throughout my tenure as its CFO".

79. He described the process by which the appropriate bonus payments were agreed each year and a record kept by him.

80. He was also not challenged on his evidence as to why none of the agreed deferred compensation was included as a debt of RCA in RCA's accounts. This was he said was for two reasons: (1) to avoid the risk that the partners might be taxed on the sums (2) to maintain flexibility about the mechanism and source of payment.

81. He said that the interest was added to "reflect the fact that each of the partners had effectively made a personal loan to, or an investment in, RCA".

82. In relation to the terms on which he left RCA, he stated that at no stage in the negotiations was it suggested that his deferred payments would not be included. He explained that he had reluctantly agreed to accept payment of the final amount in instalments over several years.

Mr Bukovsky

83. Mr Bukovsky is a chartered accountant. He worked for Deloitte in Slovakia for six years before joining Mr Assimakopolous first at a company called Bifrost and then RCA. He jointed RCA initially as a consultant and then became a full member in April 2019.

84. He described RCA's business in some detail including its income streams. His evidence was that payroll, office rental and partners' base compensation had historically been covered predominantly from recurring management fees whereas transaction-based fees were used to cover the deferred and bonus part of partner compensation. His evidence was that whether a transaction-based fee was distributed to the partners or retained by RCA was ultimately for the Managing Member (i.e. Mr Assimakopoulos) to decide.

85. He was involved in the 2019 Budget and to some extent in the negotiation of Mr Jones departure terms. His evidence was that the payments to Mr Jones had to be staggered because there was not enough liquidity in the business.

86. Mr Bukovsky gave evidence that he was the person who drafted the proposed waterfall discussed in Budapest in June 2019.

87. Mr Bukovsky described how he took over the monitoring of RCA's performance and how much it was paying to employees in 2019 – 2020. His evidence was that the purpose of the spreadsheet of deferred compensation was to keep track of the "targeted allocations and the actual distributions made to partners". In his view, "All the spreadsheets did was record what partner distributions may become receivable in the event there was sufficient profits and a distribution was made".

Mr Bukovsky's table

88. Mr Bukovsky produced a table as part of his oral evidence headed "Reconciliation of Reported Profits vs Partner Distributions 2019 – 2022. It is dated 16 November 2023 and was originally attached to the Defendant's opening submissions. This table he said showed when and to whom profits had been distributed in the period 2019 – 2022. This directly contradicted Mr Jones' evidence that no such distributions had been made. It showed he said that only £83,428 of profit available for distribution remained in fact undistributed.

Inga Heynen

89. Ms Heynen, has a degree in Business Administration from the Caucasus University in Georgia. She joined RCA in September 2018 after working for nine years for the European Bank for Reconstruction and Development ("**EBRD**"). In her witness statement she referred to meetings with Mr Assimakopolos over a number of years in which he was inviting the EBRD to invest in RCA managed funds.

90. Her evidence (which was not challenged) was that one of the points he made during those meetings was that he and the other partners in RCA were not "paid highly as regular pay but instead are aligned with investors and incentivised through promote, carried interest and the success of [RCA]". EBRD ultimately become a co-investor in one of the Revetas projects (Project Keystone).

91. She also gave evidence about staff pay and bonuses but I could not see what the relevance of this evidence was.

Mr Assimakopoulos

92. Mr Assimakopoulos was called as RCA's second witness. He described the background to the founding of RCA on which he was not challenged:

    a. He started a painting and construction company on leaving High School and later started an investment firm called Bifrost. Bifrost found real estate investment opportunities in Europe and investors.

    b. RCA emerged out of Bifrost. RCA was different to Bifrost in two respects. First, instead of investing directly alongside investors RCA would manage and advise private equity funds. Secondly, RCA was to be UK based. To that end

£1.2 million of seed capital was acquired in the form of loan notes from investors. This capital was held by Revetas Holding Limited ('**RHL**').

c. He described the business model of RCA as follows:

> "We go out and raise capital from investors to enable us to build a portfolio of different real estate assets. A successful investment would involve us acquiring an asset, then effectively managing and creating value (by for example investing in building, ESG and tenant improvements, repositioning and refinancing) developing select assets, and then ultimately disposing of the asset at a higher price than we acquired it. This is how we make a profit on an initial investment"

d. Each fund has a general partner which oversees the administration and decision making based on advice received from RCA. Some of the funds had joint venture partners. One fund had direct investment from personal contacts and members of Mr Assimakopoulos' family.

93. Mr Assimakopoulos was not challenged on his description of RCA's sources of income, which is a combination of (i) recurring and more or less predictable fees (ii) variable deal by deal fees and (iii) income arising from two broad types of profit participation ('variable promote' and 'variable carry'). Mr Assimakopoulos went on in his evidence (on which he was challenged) to link these income streams to the business model of RCA in the following way:

> "With these fixed and variable sources of income in mind the model for Revetas is simple: our costs (i.e. employee salaries and partners' base compensation) are covered by discretionary capital fees and management fees that RCA receives, as these are fixed and recurring and more predictable fees, and any additional deferred compensation or bonuses are funded by extraordinary fess (i.e. acquisition fees, disposition fees and promote) because those fees demonstrate that we have been successful in acquiring/disposing of assets, have managed to create value for investors, and are therefore appropriately rewarded for our success through these extraordinary fees…. The partners have skin or sweat equity in the game to ensure that we are motivated to receive these extraordinary fees by virtue of our performance".

94. Mr Assimakopoulos also described what he would typically say about the alignment between the investor's interest and the partners' own, terms which were very similar to the evidence given by Ms Heynen:

> "When I am raising capital for Revetas, every investor wants to know about (and expects to be told about) the alignment of interest between the partners and them. When this question inevitably comes up, I tell them we align with them by investing alongside with them and by having a deferred (i.e. contingent element) to our compensation so that parts of our compensation are only unlocked when we create value and achieve success for our investors."

95. As to how historically sums were paid, Mr Assimakopoulos's evidence was that:

> "historically we have never paid deferred compensation or bonuses to partners using our recurring fees to RCA, and we have only ever made payments through the extraordinary acquisition and/or promote fees (with the exception of one time in 2019 which I discuss at paragraph 55) because that is the model that I ensured Revetas was founded on"

96. Mr Assimakopoulos said that there was a period in 2019 when he agreed to both base and deferred compensation being paid out of regular fee income. His explanation was that he used his discretion to authorise the payments because he wanted to "keep up morale and momentum off the back of the partnership discussions." This was later stopped, he said, because an updated version of the budget showed that there was not sufficient funds available to continue.

97. Mr Assimakopoulos' evidence on the October 2019 budget was that it was just that – a forecast of business performance. His evidence was that the amounts set out in the budget under the heading of deferred compensation and bonuses were "aspirational".

98. In cross-examination he was unable to give an explanation as to why the language strongly suggestive of sums being due such as "arrears" had been used if the figures were merely aspirational.

99. Mr Assimakopoulos' evidence was that since 2019 the business of Revetas has not grown and has seen "a drop" in its profitability. Covid has played a role in this and he claimed that it was not until the end of 2021 that there was "distributable" cash.

E. APPROACH TO THE EVIDENCE

100. In response to what was perceived to be an invitation by Mr Cohen KC in his oral opening for me to follow and apply the guidance in *Gestmin SGPS SA v Credit Suisse (UK) Ltd* [2013] EWHC 3560 by concentrating on the contemporaneous documents in preference to oral witness evidence, Mr Weale made the following submissions:

a. In *Kogan v Martin* [2019] EWCA Civ 1645, the Court of Appeal made clear that *Gestmin* was not authority for the proposition that a judge should place no reliance on the recollections of witnesses and does not relieve the judge of the responsibility to make findings of fact based on all of the evidence:

> "We start by recalling that the judge read Leggatt J's statements in Gestmin v Credit Suisse and Blue v Ashley as an 'admonition' against placing any reliance at all on the recollections of witnesses. We consider that to have been a serious error in the present case for a number of reasons. First, as has very recently been noted by HHJ Gore QC in CBX v North West Anglia NHS Trust [2019] 7 WLUK 57, Gestmin is not to be taken as laying down any general principle for the assessment of evidence. It is one of a line of distinguished judicial observations that emphasise the fallibility of human memory and the need to assess witness evidence in its proper place alongside contemporaneous documentary evidence and evidence upon which undoubted or probable reliance can be placed. Earlier statements of this kind are discussed by Lord Bingham in his well-known essay The Judge as Juror: The Judicial Determination of Factual Issues (from The Business of Judging, Oxford 2000). But a proper awareness of the fallibility of memory does not relieve judges of the task of making findings of fact based upon all of the evidence. Heuristics or mental short cuts are no substitute for this essential judicial function. In particular, where a party's sworn evidence is disbelieved, the court must say why that is; it cannot simply ignore the evidence." (per Floyd LJ at §88):

b. At §89, Floyd LJ *Kogan v Martin* emphasised that the reasoning in *Gestmin* was in the specific context of a document-heavy commercial case. By contrast, in *Kogan*, the relevant witnesses were private individuals who lived together for much of the time such that it was inherently improbable that their communications would be fully recorded. Mr Weale submitted that the same principles apply to business partners who share offices.

c. In *NatWest Markets v Bilta* [2021] EWCA Civ 680, the Court of Appeal emphasised (at §51-52) that in some cases there will be critical events which are undocumented and that: "*Faced with documentary lacunae of this nature, the judge has little choice but to fall back on considerations such as the overall plausibility of the evidence; the consistency or inconsistency of the behaviour of the witness and other individuals with the witness's version of events; supporting or adverse inferences to be drawn from other documents; and the judge's assessment of the witness's credibility, including his or her impression of how they performed in the witness box, especially when their version of events was challenged in cross-examination.*" In the present case, Mr Weale submitted there were a number of relevant conversations which are both disputed and which are not (at least not fully) documented.

101. As to these submissions:

a. I fully accept the first submission. Martin v Kogan is clear authority for the proposition that *Gestim* does not lay down a new or general principle for the assessment of evidence.

b. As to the second submission, the present case is, in my judgment, neither a document heavy case like *Gestim* nor is it a case like Martin v Kogan involving two private individuals in a close relationship. The present case involves a professional business partnership albeit one with only a small number of partners. Although the there are no minutes of formally convened meetings of the LLP Members, many of their decisions and/or discussions were recorded in full or in part in contemporaneous emails or minutes. Where this happened, these are inherently more reliable than witness memory.

c. I am not convinced that there were in fact any genuinely critical events or conversations which were not recorded in this case. The Claimants' pleaded case is based firmly on an agreement by conduct said to be evidenced in supporting documents and any reliance on an oral agreed terms is specifically eschewed by the Claimants in the Part 18 Response dated 25 April 2023.

102. As to the consequences of any failure to challenge witness evidence, I accept Mr Weale's submission made by reference to *Tui UK Ltd v Griffiths* [2023] 3 WLR 1204. In that case at §42-43 and §70, Lord Hodge endorsed the following statement from *Phipson on Evidence* (20th ed.) and discussed the scope of *Browne v Dunn* (1893) 6 R 67 (as developed in subsequent case law)

> "*In general, a party is required to challenge in cross-examination the evidence of any witness of the opposing party if he wishes to submit to the court that the evidence should not be accepted* ***on that point****. The rule applies in civil cases … In general, the CPR does not alter that position.*
>
> *This rule serves the important function of giving the witness the opportunity of explaining any contradiction or alleged problem with his evidence. If a party has decided not to cross-examine on a particular important point, he will be in difficulty in submitting that the evidence should be rejected.*"

F. ASSESSMENT OF THE ORAL EVIDENCE

103. Both Mr Klaturov and Mr Assimakopoulos were cross examined at length and at times both were aggressively cross-examined in an attempt to impugn their credibility.

104. In my judgement, these attacks bore little if any fruit. Mr Klaturov and Mr Assimakopoulos struck me as being intelligent, astute and tough businessmen. They both gave me the impression of people who once they have taken a decision or view on something would be very reluctant to consider that they might be mistaken about it.

105. In an e-mail sent in 2017, Mr Klaturov said he agreed with the following description by Mr Jones of Mr Assimakopoulos, which struck me as being broadly consistent with the evidence I had about how he conducted himself in relation to RCA:

> "I think it reflects a sense of generosity and fairness in Eric's character, which I believe is genuine and on balance is acceptable… It's also a slightly old fashioned sense of 'largesse' he has, which is consistent with his repeated use of the word 'family' to describe the team (including you and me)"

106. My impression of both men is that they have both become somewhat entrenched in their own views in the course of this litigation. Both had obviously prepared thoroughly for the hearing. Both were on top of the documents. Both were clearly aware where

most if not all lines of questioning were going. They were to that extent obviously weighing their answers somewhat carefully. However, in my judgment, neither was consciously seeking to pull the wool over my eyes about anything and neither gave evidence which was knowingly false.

107. I reject Mr Weale's submission that Mr Assimakopoulos was dishonest in any of the answer he gave in cross examination. Neither his reluctance to be drawn into a debate about the meaning of the word "arears" (which is any event a matter for submission) nor his comments about the minutes of the meeting which took place on 14 October 2021 came anywhere near to persuading me that I should treat his evidence with caution. Similarly, whether he was right or wrong to believe he had a discretion about one or more parts of the remuneration for members and the scope of that discretion was not a matter which in my judgment impugned his credibility.

108. I do, however, accept that Mr Assimakopoulos evidence proffered for the first time in cross examination that during partner discussions he specifically linked each type of compensation (base / deferred / bonus) to the tag words: "good", "great" and "awesome" or "survive", "good" and "great". There was no trace of this vocabulary in any of the many contemporaneous emails, projections or budgets. These tag words were not even referred to in his witness statement in which he instead linked the types of compensation with sources of income. He may have thought at some level in this way but I reject his evidence that he used these tags in discussions with Mr Klaturov to distinguish the types of compensation.

109. I accept his evidence as to what he told investors about deferred compensation representing an alignment of risk between partners and investors such that deferred partner compensation was only "unlocked" when RCA created "value and achieved success." His evidence on alignment was unchallenged and supported by the two contemporaneous statements drafted in 2017 and 2018 by Mr Jones and which Mr Klaturov accepted in cross-examination were broadly accurate. It was also corroborated Ms Heynen's unchallenged evidence about what Mr Assimakopoulos said to the EBRD about RCA partner compensation and alignment of risk.

110. I also reject Mr Weale's attack on Mr Bukovsky's credibility and honesty. He answered questions put to him in a measured and careful way. I accept that he was well prepared and knew the documents well. I accept that at times rather keen to make points or reference them in his answers but I am not persuaded that he was in any way dishonest or seeking to deceive me.

111. I accept he became confused whether the distribution waterfall was agreed or confirmed at the meeting in Budapest in June 2019 but I do not accept that this was due to him seeking to mislead me. He was called as a witness because he produced some of the documents relied upon by the Claimant. When points were put to him about the meaning of words used in those documents, it was not surprising that he responded with his own view of why things were done or written down as they were. When specific points of fact were put to him, he gave straightforward answers. I am not persuaded that the similarity between the language in paragraphs 28 of Mr Bukovsky's witness statement and paragraph 48 of Mr Assimakopoulos. There are only so many ways of saying that the Mr Jones settlement did not create a precedent.

112. I reject the submission that I should read anything into the fact or draw an adverse inference from the fact that Mr Cohen KC chose to call Mr Bukovsky first rather than Mr Assimakopoulos. It is a fundamental rule of an adversarial trial that it is for the party with a number of witnesses to call to decide what order to call them in. The timetable agreed before this trial did not specify the order in which either party's witnesses were to be called and instead simply divided the time equally between the parties.

113. I reject Mr Cohen KC's submission that Mr Klaturov knowingly gave false evidence or sought to mislead me. I am satisfied that he has come to believe that he is entitled to be paid the sums he is claiming in deferred compensation and as bonuses for the years 2018 – 2021.

114. Putting to one side for one moment, how as a matter of legal analysis a 'shared understanding' or 'conversation' can give rise to a contractual claim, I do not accept in any event accept Mr Klaturov's evidence in the first sentence of paragraph 27 and the second sentence of paragraph 28 of his fourth witness statement (or that of Mr Jones to the same effect) that there was a "shared understanding" between him and the other partners of RCA that these sums were unconditionally owed or that there were "numerous conversations" in which it was accepted that these "were contractual entitlements" which were independent of the LLP Agreements for the following reasons:

    a. The contemporaneous email exchanges before Mr Klaturov became a member in RCA clearly that show that he understood that his compensation package and contractual entitlement was going to comprise a base salary element and a profit share element- see:

        i. The email 10.02.16 from Mr Jones to Mr Klaturov; "you will receive your base comp from the GmbH and then when you are a partner in RCA you are entitled to profit share (5%) from that entity but not fixed share (because you already be receiving the equivalent of the fixed share from the GmbH)"

        ii. The email 10.02.16 from Mr Klaturov to Mr Jones: "The way it should work is that I receive my salary at the GmbH level and I don't have a fixed share at the LLP, but only profit participation"

        iii. The email 09.02.16 from Mr Jones to Mr Klaturov: "We all receive a fixed share out of the available profit and then any residual profit is allocated in the profit-sharing percentages"

    b. When RCA's reviewed the proposed LLP membership deed she explained to Mr Klaturov that "…anything you are paid from RCA is paid as an ownership interest rather than as some form of recompense for services so if you are happy to proceed on this basis then the Deed looks ok to us". This is the very opposite of the way the Claimants now put their case which is as a claim for compensation for services rendered.

c. Mr Klaturov saw the statements in 2017 and 2018 made to investors about partner compensation being aligned with investor risk and deferred compensation only being payable if investments were successful. It is highly implausible that RCA would have told investors about such alignment of risk and then agree that all compensation (base, deferred and bonus) was unconditionally due regardless of profits generated by RCA.

d. Mr Klaturov's evidence about conversations and shared understandings emerged for the first time in response to an application for summary judgment. It vague and self-serving. If Mr Klaturov had a firm recollection of significant conversations or shared understandings, they would have been pleaded. In cross-examination he frankly that he could not remember any particular instances or the words used.

e. Even if Mr Klaturov came to believe subjectively as a result of the circulation of budgets or other documents that deferred compensation and bonuses were unconditionally due, I do not accept that Mr Assimakopoulos ever shared that understanding. On the contrary, I have accepted his evidence that he believed that the risk of investors and members was aligned which is what he told any investors who asked about it.

Adverse inferences

115. Mr Weale submitted that I should draw an adverse from the absence of two witnesses: Mr Boitan, who became a member of RCA at the same time as Mr Bukovsky, and Mr Schneeweiss who became general counsel to RCA. He referred me to *Royal Mail Group Ltd v Efobi* [2021] 1 WLR 3863 on the principles to be applied to adverse inference. In that case the Supreme Court said (at §41):

> "The question whether an adverse inference may be drawn from the absence of a witness is sometimes treated as a matter governed by legal criteria, for which the decision of the Court of Appeal in Wisniewski v Central Manchester Health Authority [1998] PIQR P324 is often cited as authority. Without intending to disparage the sensible statements made in that case, I think there is a risk of making overly legal and technical what really is or ought to be just a matter of ordinary rationality. So far as possible, tribunals

> should be free to draw, or to decline to draw, inferences from the facts of the case before them using their common sense without the need to consult law books when doing so. Whether any positive significance should be attached to the fact that a person has not given evidence depends entirely on the context and particular circumstances. Relevant considerations will naturally include such matters as whether the witness was available to give evidence, what relevant evidence it is reasonable to expect that the witness would have been able to give, what other relevant evidence there was bearing on the point(s) on which the witness could potentially have given relevant evidence, and the significance of those points in the context of the case as a whole. All these matters are inter-related and how these and any other relevant considerations should be assessed cannot be encapsulated in a set of legal rules."

116. Applying those principles, I reject the submission that I should draw any adverse inference from the absence of either Mr Boitan or Mr Schneeweiss.

117. It was said that Mr Boitan could have given an account of events and discussions which took place between partners in the period 2019 – 2022. However, to the extent that Mr Boitan contributed to discussions for example in relation to the waterfall and 2019 budget, I have ample documentary evidence as well as his comments and views in the emails sent by him. I also heard evidence from four full members of the LLP. Mr Weale did not identify any particular event or meeting about which Mr Boitan was in a better position than any of the four members who did give evidence about the remuneration arrangements.

118. As to Mr Schneeweiss, he was not a partner but was general counsel. It was said that he was involved in the discussions about the waterfall and their potential incorporation of that provision in a new LLP Agreement. Insofar as any of this was relevant, I had his comments directly on the draft document exhibited to Mr Klaturov's fifth witness statement. I do not consider that I would have been assisted by hearing oral evidence from him.

119. I also do not consider it prima facie unreasonable for an LLP to refuse to release its general counsel or a member from its duty of confidentiality it may owe. Everything depends on the circumstances. If the result of that decision was that a crucial witness was unable to give evidence on a central factual issue in a case, it might support the submission that an adverse inference ought to be drawn. But here for the reasons set out

above neither of the witnesses who did not appear in my judgment had anything of crucial importance to say. It is for the court to form this view in light of all the circumstances of the case. I do not accept Mr Assimakopoulos rather surprising acceptance in cross examination that they would have had "important evidence" which might have assisted me.

G. FINDINGS OF FACT AND THE MAIN ISSUE

120. At the conclusion of the evidence, I asked both parties to identify in their closing submissions (in writing) what findings of fact they sought and the evidence on which they relied. The Claimants' Closing Submissions set out in Section E a number of the findings which they sought the form of numbered propositions and made submissions as to why they matter. The Defendant's closing submissions were regrettably more opaque in this respect. I will address the factual propositions on which the Claimants placed particular emphasis under the headings used by Mr Weale in his closing submission below and then address the main issue.

Mr Klaturov commenced employment at RCA in 2012

121. I accept that Mr Klaturov was employed by RCA for four years from 2012 until 2016.

122. However, I reject the submissions that this finding is anyway significant. Mr Weale submitted as follows:

> "This factual proposition is important, because it establishes that Mr Klaturov must have reached an agreement in respect of his remuneration that was entirely independent of any rights which he later acquired *qua* partner. It follows that such agreement must have been independent of the LLP Agreement"

123. This in my judgment is a non-sequitur. Before Mr Klaturov joined RCA as a partner, he was as an employee of RCA and as such he would have received a salary and possibly a bonus. That prior arrangement does not assist in any way with establishing the terms which applied when he became a member of RCA. Prima facie, the terms and conditions as to payment of Mr Klaturov's salary would be expected to be set out in his contract of employment. As a member of RCA, it is the 2016 LLPA and the 2020 LLPA which would contain the relevant terms. Furthermore, the emails I have referred

passing between Mr Jones and Mr Klaturov and RCA's lawyer show that he understood that by transitioning from employee to member his status was changing and that his remuneration as member was to be in the form of a profit-share.

Until April 2019, Ian Jones had been the CFO of RCA from February 2012 and a partner from May 2013

124. I accept that the evidence is clear that Mr Jones initially joined RCA as CFO but did not become a partner until May 2013. I reject the submission that this fact somehow "reinforces the conclusion that the remuneration agreement was independent of the LLP Agreements". Mr Jones' remuneration package prior to becoming a partner was no doubt governed by either a contract of employment or a consultancy agreement.

Prior to Mr Jones's departure, Mr Klaturov and Mr Jones would initially discuss each partner's compensation package for the relevant year and prepare a spreadsheet reflecting the proposed figures. Mr Klaturov, Mr Jones and Mr Assimakopoulos would then meet in person or hold conference calls to discuss and agree final compensation packages. The final compensation packages for each year were recorded in RCA's budgets, quarterly reporting packs and internal spreadsheets.

125. The Claimants correctly point out that this factual allegation admitted in §21 of the Amended Defence. I accept the submission that it is not important for the purposes of the claim whether the bonus for each year was agreed prospectively or retrospectively.

126. I do not accept the submission that in light of this admission, the Defendants bear the burden of establishing an express term or an agreement that such payment was conditional. In my judgment, it is entirely open to the Defendants to point, as they do, to clause 8 of the 2016 and 2020 LLP Agreements and say that it is this term which exhaustively defines the Claimants' rights to financial rewards qua members of RCA.

The final compensation packages for Mr Klaturov which RCA agreed were as set out in the table at paragraph 21 of the APOC

127. The base, deferred and bonus figures for the years 2018 – 2021 are I accept admitted. The pro rata figures for 2022 are in fact denied.

128. I reject Mr Weale's submission that "there is no dispute that RCA in fact agreed to pay the sums which the Claimants now claim". This is a mischaracterisation of the pleaded case.

129. I accept that the Claimants can point to some documents including proposals and budgets in which current and deferred compensation are referred to collectively as base compensation and that there are other documents where they are combined into a single total figure. I am not persuaded, however, that this assists the Claimants very much. It is common ground that various figures for base compensation, deferred compensation and bonuses were agreed for 2018 – 2020 for all the partners. The issue I have to decide is whether by agreeing (or having agreed) these figures under these headings, it was agreed that those sums became unconditionally due and payable by RCA to the Claimants (and if so when).

130. I am not persuaded that there is anything striking about that fact that Mr Assimakopoulos' base compensation rose in the period 2018 – 2021 whereas Mr Klaturov's fell slightly. It is the Claimants' own pleaded case that the base compensation agreed with RCA was €150,000 for 2018 and 2019, €130,000 for 2020 and €120,000 for 2021. Pointing to an increase in the base compensation for Mr Assimikopoulos over the same period, in my judgment, takes Mr Weale nowhere.

The agreed compensation packages for the years 2018-2021 were recorded in numerous contemporaneous documents circulated among the partners (including those referred to in section E of the APOC)

131. The above proposition is admitted. I address the issue of whether these Supporting Documents evidence a contract by conduct below.

The Claimants' compensation packages for the years 2018-2022 were substantially similar to those for previous years

132. The above proposition is substantiated by the evidence but does not in my judgment assist the Claimants. The Claimants correctly point out that the Amended Defence also expressly admits the two further facts:

    a. the Claimants' full remuneration package (i.e. base compensation, deferred compensation and bonus) for 2016 (together with late payment interest) had been paid by 4 October 2017; and

    b. the Claimant's full remuneration package for 2017 (together with late payment interest), in addition to an extraordinary bonus of €100,000, had been paid by 15 July 2019.

However, the fact that these agreed figures were paid is consistent both with the Claimants' case that they were unconditionally due and payable when they were agreed and the Defendant's case that they only became due and payable when RCA decided that it had sufficient distributable profits to pay the agreed sums and decided to make the distribution (under clause 8).

Since 1 January 2018, the Claimants have received payments totalling €1,024,971 in the amounts and from the sources identified in Annex 1 of the APC

133. The above proposition appears to be substantiated. The total sum received by the Claimants since 1 January 2018 is admitted to be €1,024,971. Annex 1 shows the dates and source of payments totalling €450,313. From 28 August 2020 the money is paid by RCA. Mr Weale's submission was that the admission by RCA that the date, source and amount of payments as shown in Annex 1 was "crucial" because it gave "the lie to the assertion by Mr Assimakopoulos and Mr Bukovsky in their evidence that payment of deferred compensation were not made from recurring income." I do not accept that submission.

134. Mr Cohen KC submitted, that what the evidence established was that base compensation (i.e. monthly drawings) for all the partners was set at a level so that it broadly corresponded to what RCA expected to receive in recurring fees and any sums beyond would have to come from profit generated by from success particular investments.

135. Annex 1 to the APC if anything tends to support RCA's case. There are irregular large lump sums budgeted and paid in 2019 in respect of deferred compensation which coincides with the receipt of a one-off profit made on one deal (Project Gaudi). Mr Bukovsky was not challenged on his evidence that the profit generated in 2019 Project Gaudi was used to pay deferred compensation and bonuses from 2017 and 2018. Annex 1 shows that from 25 September 2020 until 25 March 2022 there only small sums distributed. This is consistent with the submission that it was only insofar as RCA generated profits in excess of the monthly drawings (i.e. base compensation), that there were further distributions. I do not accept Mr Jones' evidence that no such distributions were made, not least because Annex 1 shows that they were made. This is consistent with clause 8 of the 2020 LLPA being the term which governed partner remuneration with the Defendants' case that sums in excess of base compensation only became payable (and were in fact paid) only as and when profits permitted.

136. It appears that deferred compensation was paid on occasion from recurring income source and at other times (and in larger sums) from one off fee income. The decision making seems to have been at times quite informal and the precise source for distributions is not always easy to identify. An example from 2017, is an email from Mr Jones to Mr Klaturov reporting a decision of Mr Assimakopoulos:

> "We will use the residual cash in Luxembourg to pay for the car, my bike and a gift to Eric. This leaves around €269,000 in Luxembourg which will be paid to us some of the deferred comp pro rata so your share will be around €54,000."

The main issue

137. The main issue is whether or not the Claimants have satisfied me on the balance of probabilities that there was an agreement between them and RCA under which the Claimants are unconditionally entitled to be paid the deferred compensation and bonuses for the years 2018 – 2021 in the sums pleaded in paragraphs 21 and 35 of the APC.

138. In the very first paragraph of his closing submissions, Mr Weale suggested that the agreement he contended for might be said to either be a series separate annual agreements or one overarching agreement. His submission was that the more 'natural construction' of the parties' arrangements was that "there was a single overreaching agreement in which governed Mr Klaturov's remuneration from the introduction of deferred compensation and bonuses in 2015 until his exit from the partnership in 2022."

139. Having considered the oral and written evidence and the submissions of both parties, I am not persuaded that that there was at any time an agreement between the Claimants (or either of them) on the one hand and RCA on the other under which the sums claimed became unconditionally due for the reasons set out below. On the contrary, in my judgement, the Defendants' case pleaded in paragraphs 9 and 20 of the Amended Defence is made out: the only contractual terms governing the remuneration of the Claimants are those contained in 2016 LLPA and the 2020 LLPA, in particular clause 8 thereof and member remuneration was at all times conditional on there being sufficient distributable profits to make a payment and a decision being made by RCA to make such a distribution of profits under clause 8.

140. Whilst some of the language used in the Supporting Documents when viewed in isolation from the 2016 LLPA and the 2020 LLPA might in another context be strongly indicative of an existing debt, when the Supporting Documents are viewed, in their proper context, in particular against the background of the LLP Agreements, it is clear that the sums claimed are not unconditionally due and payable on any of the dates contended for by the Claimants.

Mr Weale's question

141. Mr Weale in his closing submissions invited me to ask myself whether it is possible to articulate a clear answer to the following fundamental question (which goes to the core

bargain reached between the parties): precisely how and when did the agreed deferred compensation and bonus transform from a sum which was not payable into a sum which was payable? In my judgement, the answer to that question is 'Yes it is'. The sums agreed for all members (not just the Claimants) became due and payable as and when RCA's operating profits were large enough to permit some or all of the deferred compensation and bonuses to be paid and RCA made a decision to distribute those profits (as happened in 2019 when the profits from Project Gaudi were distributed). My reasons for dismissing the Claimants' claim for "unpaid compensation" are as follows

Reasons

142. The starting point must be the terms of the 2016 LLPA and the 2020 LLPA. They both contain clear express terms defining the interest of each Member in terms of a "right to receive profits". Clause 8 contains a series of steps by which the LLP was required to determine how and when each Member was entitled to drawings and how and when excess profits were to be distributed. Even the fixed drawings were subject to a claw back provision if the profits were not sufficient to cover them.

143. I accept the Defendants' submission that clause 8 of the LLP Agreements represents a conventional structure for an LLP and that it was implemented by the members of RCA, for example, in 2019 when a large profit was made on Project Gaudi. The Members agreed how much to distribute under clause 8. To hold, that any one of them or all of them could demand immediate payment of deferred compensation and bonuses unconditionally and outside the terms of the LLP Agreements is (a) not something which is reflected in any way in the terms of the LLP Agreements and (b) could potentially push the LLP into insolvency.

144. Clause 25 (no variation save by an agreement signed by each member), clause 29 (entire agreement) and clause 30 (on waiver) of the LLP Agreements set out in paragraph 20 above all serve, in my judgement, to emphasise that the shared and expressed intention was for the LLP Agreements alone to determine the rights and obligations of the Members both between each other and between themselves and RCA itself.

145. Clause 29 in particular is intended to prevent what the Claimants have attempted to do in this case, namely to hunt around in emails, spreadsheets, budgets, conversations, meeting minutes and other documents to try to conjure up an agreement by conduct which is said to give rise to claims against RCA outside the express terms of the LLP Agreements.

146. The entire agreement clause in clause 29 is in conventional form. The general purpose of such a clause is as explained by Moore-Bick LJ in Ravennavi SpA v New Century Shipbuilding [2017] 2 Lloyd's Rep 24 generally to "preclude a party from asserting that something outside the four corners of the contract was a term of the contract or a contract collateral to it." The decision in Deepak Fertilisers and Petrochemical Corp v Davy McKee [1999] 1 Lloyd's Rep 387 is to similar effect. Although the Claimants did not put their case in these terms, they were in reality seeking to prove the existence of a contract by conduct which was collateral to both the 2016 and the 2020 LLP Agreements.

147. Clause 25 was similarly a significant obstacle in the path of any argument that the contract by conduct relied upon by the Claimants varied either the 2016 LLPA or the 2020 LLPA. The Claimants did not contend that the agreement alleged to be evidenced in the Supporting Documents amended any term of the 2016 LLPA or the 2020 LLPA. However, in my judgment, the Claimants side-stepped that issue but contending that the Court could just ignore the LLP Agreements and instead just decide whether or not an agreement to pay compensation and bonuses had come into existence. That was, in my judgment, not a legitimate approach because an agreement which provided for fixed sums to be claimable as a debt instead of in addition to a share of profits necessarily involved amending or qualifying the terms of both of the LLP Agreements, in particular clause 8 thereof. This was particularly so given that most of the documents relied upon by the Claimants referred to all members and not just the Claimants. No explanation was ever provided by the Claimants as to why the members of RCA would have signed an LLP agreement in very similar terms three times (2013, 2016 and 2020) but actually have their remuneration governed by completely separate agreement in uncertain terms not written down anywhere and agreed by conduct alone. If they had decided to be

bound by such an agreement at any time in the period 2016 – 2019, it is perplexing why they should not refer to such an agreement or provide for it is in some way in the 2020 LLPA.

The Supporting Documents

148. The Claimants' pleaded case was based entirely on the Supporting Documents and the contract by conduct that they were said to evidence. However, whether taken cumulatively or individually, and applying the approach relied upon by the Claimants taken from Maple Leaf Macro Volatility Master Fund v Rouvroy [2009] EWHC 257 (Comm) as set out in paragraph 38 above in my judgment, they did not evidence the agreement contended for by the Claimants.

    a. The first document is a 'Group Cash Resource Projection' dated 14 February 2019. This sets out predicted income for the year to 2019 and, based on those assumptions, it lists potential payments / outgoings including "Partner deferred compensation 2018" and 'partner bonus 2018'. Whilst some of the language if taken in isolation is consistent with an already crystalised obligation such as 'outstanding payments' and 'contracted partner compensation', the overall tenor of the document is of financial planning. It also distinguishes between salaries in the sense of employment costs on the one hand and partner bonuses and compensation on the other. Partner bonuses to be determined "subject to groups performance".

    b. The second document is a Group Reporting Pack dated 28 February 2019. It contains some documents which look backward e.g. by reporting on Q4 of 2018 and other documents which look forward e.g the Business Plan for 2019. Page 25 of the documents shows partner deferred pay for 2019 and partner bonuses for 2019 being accounted for below the profit / loss line. This is consistent with them being conditional. The budget suggests they will only be sufficient funds to pay them if three 'carry payments' are received from projects Gaudi, Postage and Gurkha. Whilst p. 26 refers to "outstanding payments" of partner bonuses from 2017 and deferred compensation from 2018 as two of the projected 'payables' for 2019, pages 36 and 37 clearly

show the members of RCA consistently being allocated shares of taxable profits in exactly the way a distribution under clause 8 of the 2016 LLPA would be expected to look. Whilst page 56 refers to "arrears due" to RCA partners in respect of 2017 bonuses and adds interest to give a total for 2017 and 2018, the pre-approved business plan contains target "distributions to partners" and a waterfall for distribution. It is noteworthy that deferred partner compensation and bonuses are not treated in the same way as staff salaries.

c. The third document is a Budget and Cash Overview. It is dated 7 June 2019 and was signed and approved by each of the partners on 19 June 2019. The document is 41 pages long. Page 1 is an updated version of the first Supporting Document discussed above. Page 3 contains a "draft waterfall" divided into two sections: A.an "operating waterfall" and B a "partnership waterfall". Although the document uses the language of debt in relation to deferred pay and bonuses for partners such as "total due/from partners" and "accrued", the structure of the document tends to support the Defendants' case in that whereas partner base salaries (and all other staff salaries) are treated as an operating expense all partner deferred pay and bonuses from 2017 – 2019 are beneath the line which says "cash available for distribution to partners". While partner base compensation is treated as a sum unconditionally due and payable and something to be accounted for before profits are distributed, partner deferred pay and bonuses are not. They come further down the waterfall and would thus appear to be accounted for out of operating profit. The sensitivity package on page 4 refers to each partner's financial package and the extent to which it has "already been distributed" which again tends to support the Defendant's case that while figures were agreed for deferred pay and bonuses for 2017 – 2019 whether they became payable depended on their being profit being available for distribution. Page 7 contains a budget summary projected forward to 31.12.19. It also deducts base (partner) salaries as a cost before the operating profit is calculated whereas partner deferred pay and bonuses are treated separately. Page 13 contains a "proposal" for 2018 and 2019 partner remuneration. Although the table refers

to 2018 as "contracted" whereas 2019 is just proposed, there is no date for when the sums set out are payable.

d. The fourth document relied upon is a spreadsheet from 20 September 2021. It is headed "Revetas Partners Compensation Overview". It gives for each year from 2018 – 2021 the sums in compensation and bonus which have been 'allocated', 'paid' and 'deferred'. All allocated sums which have not been paid are shown as carrying interest as 9%. The fact that in 2021 money from all of the previous three years has been deferred is a strong indication that it was not all immediately due and payable in the year in which the figures themselves were agreed. It suggests that the LLP was deciding how much it could afford to pay. The adding of interest is usually a strong sign that the principal sum on which it is applied is due and in arrears. The spreadsheet shows all the partners have accrued interest with effect from the end of the calendar year. However, neither the deferred compensation nor the interest ever appeared in the accounts of RCA as a debt for the unchallenged reasons given by Mr Jones. The table is consistent with the partners deciding that believe they deserve to receive more in drawings and remuneration than the RCA can currently afford. The overview document is not, in my judgment, in itself sufficient to show that the compensation and interest was all unconditionally due at 20 September 2021 or would become due at 31 December 2021.

e. The fifth document is a spreadsheet of drawings. The Claimants point out that by reference to a later document, the Claimants base and deferred compensation increased from €370,000 to €390,000 but this seemed to me to be neutral in relation to the conditionality issue. The two documents show the partners regularly updating figures but does not assist very much with the issue of whether and if so when any particular sum became unconditionally due and payable by RCA to any individual partner.

f. The final document relied upon is a minute of a meeting which refers to the schedule of partner drawings which Mr Bukovsky maintained and regularly updated. The Claimants rely on the comment in the document as follows: "The current schedule shows that as of end 2021 [Mr Klaturov] will be owed

> €1,257,028." That use of language is consistent with the language of "arrears" or sums being "outstanding". Looked at in isolation they appear to be a clear recognition of a present debt. But in the context of the clear words of the 2020 LLPA, I cannot accept that this minute should be read as evidence of an agreement by conduct to replace a system of ascertaining profits and distributing profits as per clause 8 of the LLP Agreements which depended on the actual performance of the LLP with one in which annual fixed sums were agreed to be due regardless of the profit or loss made in any year.

Interest

149. Mr Weale understandably place a great deal of weight on the fact that the partners included in their various spreadsheets and budgets late payment interest. Mr Assimakopoulos did not seek to deny that late payment interest had been agreed. I also accept Mr Klataurov's evidence to the effect that the rate chosen related to the rate of return that investors received from RCA.

150. In my judgment the key to the payment of interest and to the maintenance of detailed running account of agreed deferred compensation is that the partners believed that they were not receiving market remuneration. A draft presentation to investors from March 2016 (which predated KK's admission as a member) said this (with emphasis added):

> "*ENA, SIJ and KMK have <u>always been paid at below market rates</u>, as agreed with the founder RHL shareholders in the original business plan. <u>The underpayments are being accrued</u> and <u>might</u> be paid at a future date.*"
>
> As noted in paragraph 77 above, Mr Jones was not challenged on his evidence that the deferred compensation corresponded to the sum required to bring compensation up to a "full market rate".

151. The passage cited above from the 2016 is clear in describing the deferred compensation as "accrued". However, the deferral is indefinite and the sum might (or might not) be paid depending on whether the firm is successful or not.

152. The payment of interest on the sum deferred sum carried over from one year to the next recognised that each partner had in effect invested the difference between his perceived

market rate and sums received. Each member had in that sense 'lent' RCA the value of his labour at the time the advice was given and work done to set up a fund but the full fruit was deferred and conditional on the fund performing and generating a profit.

153. I accept Mr Bukovsky's evidence to the following effect (with emphasis added):

> *"We also agreed to include interest on deferred portion of partners' compensation (i.e. deferred and bonuses) to recognise the time value of pay, as we work on deals with a lifecycle spanning many years."*

154. If the investments are not profitable not only will the deferred compensation not be paid but nor will interest either. If on the other an investment generates significant profit for RCA, there was nothing to prevent the partners from describing their distribution in terms of paying or clearing sums accrued in compensation and/or interest from previous years as they did in 2019.

155. Whilst I fully accept that in any other context, the application of interest would be a strong indicator of an underlying existing debt which is due and payable, the one context in which that does not follow is the context here where members of an LLP have agreed to carry on business and to share profits. If the underlying principal sum was as I have held always contingent on such profits, then the fact that interest was also treated as having accrued cannot affect the overall contingency.

Conclusion on the contents of the Supporting Documents and interest

156. For all those reasons, I accept Mr Cohen KC's submission that whatever figures may have been agreed as between the Members in budgets, spreadsheets, projections or other documents from time to time and expressed as 'deferred compensation', 'bonuses' and 'interest', the only form of financial reward which was due and payable to a member from RCA in return for being engaged in the business of RCA and/or providing services to the RCA was a periodic share of profits in the form of (a) monthly drawings in advance and (b) a distribution of any excess profits pursuant to clause 8 of the LLP Agreement. RCA's pleaded defence in the first half of paragraphs 9, 20 and 23 (set out above) therefore succeeds.

157. That is sufficient to dispose with the main issue. However, I will briefly deal with some of the other matters raised by both sides on which I heard argument before addressing the Profit Share Claim.

H. THE MOUs

158. In 2015, each of the then two Members (Mr Assimakopoulos and Mr Jones) signed a Memorandum of Understanding. The MOU for Mr Assimakopoulos begins with:

> "The purpose of this Memorandum of Understanding ('MOU') is to set out the terms agreed between ENA and RCA under which ENA is to be compensated by RCA"

159. These words indicate clearly that it is intended to be a legally binding agreement between RCA and Mr Assimakopoulos. The MOU then goes on to refer to the terms of the 2013 LLPA in the following terms:

> 1 Under the terms of the partnership agreement ENA is entitled to a fixed profit share from RCA of £120,000 payable in equal monthly instalments at the end of each month …"
>
> 2 ENA's aggregate compensation will be increased to market rate, being a base compensation of EUR400,00 excluding bonuses, after the earlier of :[three trigger events] (hereinafter the "Trigger Events").
>
> After a Trigger Event, any performance related, incentive or other bonus and any other benefits in addition to ENA's base compensation will be payable at the sole discretion of the management of RCA, or by any properly constituted remuneration committee acting on behalf of RCA in line with market rates.
>
> 5 ENA will be entitled to 85% of any profits of RCA, only if such share of profits is in excess of the fixed profit share for that year…"

160. The MOU thus preserves and confirms two of the key features of clause 8 of the 2013 LLPA: a fixed share payable in monthly instalments (advance drawings) and the right to a profit share only if distributable profits exceed the fixed share. It adds a conditional increase in base compensation and the possibility of additional performance related or bonus "payable at the sole discretion of the managing member of RCA".

161. The terms of the MOU for Mr Jones in clause 2, 3 and 7 were identical to clause 1, 2 and 5. The terms of the MOUs for Mr Jones and Mr Assimakopoulos are in my judgement inconsistent with partner compensation beyond base compensation being due and payable independent of profits.

162. For as long as these two MOUs remained in place, it is clear that for the then partners there was a distinction between base compensation payable monthly which were not conditional and additional or other compensation which was both dependent on profits and subject to an express discretionary power.

163. The MOU entered into by Mr Klaturov with RCA in 2015 was in somewhat different terms. This was because he was not yet a member. The base compensation as referred to in clauses 1 and 2 of his MOU is clearly a reference to his then salary as an employee. This was paid by RCA in the same was any other salary or operating expense. Any bonus referred to in his MOU must be a bonus received in the same way as any other employee i.e. as part of RCA's operating expenses. However, his MOU also set out a pathway to membership of the LLP as follows:

> "Within six months of the date of this MOU, RCA will use its best endeavours to make amendments to the Partnership Agreement of RCA such that KMK is admitted as a Member. KMK will, on the date of admission and on a pro rata basis, be entitled to the greater of 5% of the annual audited profits of the LLP and the current compensation received by KMK for that year/period including any bonus or performance payments made or applicable for that year/period"

164. Mr Klaturov was finally admitted to the membership on 6 December 2016. In my judgment, the Claimants are right to say that at this point his MOU was superseded by the 2016 LLPA. By that I meant that his rights to a salary and/or bonus qua employee under his contract of employment with RCA and as supplemented by the MOU was completely replaced by the terms of the 2016 LLPA. Clause 29 of the 2016 LLPA strongly suggests that it was intended to supersede any prior agreement but more fundamentally Mr Klaturov's MOU defined his then rights and expectations as an employee hoping to become a partner whereas the 2016 LLPA defined his rights and expectations as a partner / member from the moment he signed it.

165. I therefore reject the Defendant's attempts to rely on cluse 3 of Mr Klaturov's MOU as representing an ongoing discretionary power in relation to remuneration once he

became a member as pleaded in paragraph 8 of the Amended Defence. When asked about the MOU in cross examination, Mr Bukovsky said he was not even aware of its existence until late 2021 and Mr Assimakopoulos said that his recollection was the MOU had only come into existence because restrictions imposed by outside investors.

166. I reject Mr Klaturov's evidence that the 2016 and 2020 LLPAs "supplemented" the MOU. In my judgment his MOU ceased to be relevant the moment Mr Klaturov became a member.

167. It is not necessary to decide whether the MOUs for Mr Jones and Mr Assimakopoulos continued alongside the 2016 LLPA or whether clause 29 meant that they ceased to have any effect. The two main points I draw from the MOUs in respect of Mr Jones and Mr Assimakopoulos are:

    a. When the LLP members wished to amend or supplement their rights as members of the LLP they used formal language and made it clear that that was what they were intending to do.

    b. The MOUs for Mr Assimakopoulos and Mr Jones for as long as they did exist alongside the 2013 LLPA did distinguish between unconditional monthly drawings and conditional additional compensation.

I. THE WATERFALLS

168. I accept Mr Weale's submission that were a number of waterfall proposals between 2018 – 2021:

    a. Draft Proposal dated 4 December 2018

    b. February 2019 Group Plan

    c. 2019 Budget

    d. Draft Proposal dated 15 January 2019

    e. Draft Proposal dated 3 July 2019

    f. The waterfall proposals discussed for the purposes of incorporation in a new partnership agreement commented on by Mr Schneeweiss in September 2021

169. The Defendant's case centred on (e) the proposal 3 July 2019. This was referred to by them in the Amended Defence as the proposal for partnership allocation ('**PPA**'). The evidence of Mr Klaturov and Mr Bukovsky taken together was that the distribution waterfall in the PPA as at 3 July 2019 was either substantially reflected the oral agreement that has been reached in Budapest in June 2019 (Bukovsky) or accurately reflected the understanding of the partners at that time (Klaturov).

170. Mr Bukovsky accepted in cross-examination that the PPA was a "rough sketch" which was supposed to be incorporated into a formal agreement at a later date. For various reasons, the incorporation of the waterfall into a new partnership did not happen before Mr Klaturov resigned.

171. In my judgement, taking the documentary and oral evidence together: (i) in June / July 2019 the members of RCA reached an agreement in principle about the order in which distributions ought to be made ('**the Waterfall**') (ii) the Waterfall provided for deferred compensation, bonuses and interest to come out of distributable profit whereas base compensation for partners was treated as an operational cost (iii) the Waterfall was intended to be the subject of further discussion and to be incorporated formally into the LLP Agreement but this did not happen.

172. The Waterfall was consistent with the terms of the LLP Agreements. However, the Waterfall in itself was not an answer to the Claimants' case for two reasons: (1) it only provided an order in which sums were to be paid; and (2) it is not at all clear how the Waterfall applied to a departing Member.

173. As to (1) even if the Waterfall were accepted as being contractually binding on Mr Klaturov, it is common ground that each year in the period 2019 – 2021 new deferred compensation and bonuses were added to the existing sums. The fact that the Waterfall prevented most of the deferred compensation being paid out in 2020 and 2021 (as

Annex 1 to the APC shows) did not prevent the total figures for deferred compensation and bonuses continuing to increase. Sums were simply carried forward.

174. As to (2) Mr Cohen KC did not offer any explanation as to how the Waterfall was intended to operate in the case of a departing member. In cross examination Mr Bukovsky accepted that neither he nor anyone else at RCA had ever given any thought to whether or how the Waterfall might apply to a departing member.

J. THE ARGUMENT BASED ON AN IMPLIED TERM

175. The Claimants' alternative case was based on there being an implied term that any agreed unpaid deferred compensation, bonus and interest would become payable on the date a departing member left or within a reasonable time of being demanded.

176. There was no real dispute about the relevant legal principles governing implied terms generally or in particular in relation to the time of performance.

177. In Marks and Spencer Plc v BNP Paribas Securities Service Trust Co (Jersey) Ltd [2016] A.C. 742 Lord Neuberger summarised the law in the form of six principles for the implication of terms as a matter of fact:

> "**First**… the implication of a term was 'not critically dependent on proof of an actual intention of the parties' when negotiating the contract… one is not strictly concerned with the hypothetical answer of the actual parties, but with that of notional reasonable people in the position of the parties at the time at which they were contracting. **Secondly**, a term should not be implied into a detailed commercial contract merely because it appears fair or merely because one considers that the parties would have agreed it if it had been suggested to them… **thirdly**, it is questionable whether Lord Simon's first requirement, reasonableness and equitableness, will usually, if ever, add anything **Fourthly**… I would accept that business necessity and obviousness, his second and third requirements, can be alternatives in the sense that only one of them needs to be satisfied… **Fifthly**, if one approaches the issue by reference to the officious bystander, it is 'vital to formulate the question to be posed by [him] with the utmost care'… **Sixthly**, necessity for business efficacy involves a value judgment. It is rightly common ground on this appeal that the test is not one of 'absolute necessity', not least because the necessity is judged by reference to

> business efficacy. It may well be that a more helpful way of putting Lord Simon's second requirement is, as suggested by Lord Sumption JSC in argument, that a term can only be implied if, without the term, the contract would lack commercial or practical coherence."

178. In addition, it is trite law that a term will not be implied which contradicts the express terms of the contract – see the many authorities cited in *The Interpretation of Contracts* 6th edition (2015) at §6.11. As Lord Parker of Waddington in Tampine (FA) Steamship Co Ltd v Anglo Mexican Petroleum Products Co Ltd [1916] 2 AC 397 at 422 put it:

> "It is of course impossible to imply a contract any term or condition inconsistent with tis express provisions, or with the intention of the parties as gathered from those provisions. The first thing, therefore, in every case is to compare the term or condition which it is sought to imply with the express provisions of the contract and with the intention of the parties as gathered from those provisions and ascertain whether there is any inconsistency"

179. Independently of the above principles, Mr Weale submitted that it is well-established that where a contract is silent (or ambiguous) as to the time for performance, the court will imply as a matter of law a term that provides for performance within a reasonable time. In support of that proposition, he cited the following text from *The Interpretation of Contracts* 6th edition(2015) at §6.16 *which has been approved by* Henderson J (as he then was) in Rennie v Westbury Homes (Holdings) Ltd [2007] 20 E.G. 296:

> "Where a contract does not expressly, or by necessary implication, fix any time for the performance of a contractual obligation, the law usually implies that it shall be performed within a reasonable time."

Application to the facts

180. In my judgment, the Claimants' case fails the test of inconsistency described by Lord Waddington. Clause 21.1 of the 2020 LLPA states very clearly that with effect from his or her leaving date, the former member shall cease to be entitled to share in the profits of the LLP and shall cease to be entitled to make drawings on account. It makes provision for an apportionment of the profits in the year in which the member leave. Clause 21.4 contains a buyout provision and crucially, in my judgment, clause 21.4 (e) provides that the Former Member "shall not be entitled to any share in the profits of the

LLP or distributions made by LLP and shall not have any right, interest or entitlement in the LLP."

181. The implied term contended for by the Claimants would contradict clause 21.4 (e) of the 2020 LLPA because it would create a right to an immediate distribution in the sum equivalent to the then total deferred compensation, bonus and interest regardless of whether there was sufficient profit to do so. The intention of the parties was that they should be entitled to drawings, excess profits for so long as they were members and when they cease to be members to lose the right and to receive a final apportionment and have their share purchased.

182. Furthermore, the 2020 LLPA works perfectly well without the implication of the term proposed by the Claimants. It certainly cannot be said that without it the agreement lacks commercial or practical coherence without it. On the contrary, clause 21 is clear, coherent and practical. It might be said in some broad sense that the express terms are rather harsh in that if the unpaid deferred compensation and bonuses represented something approximating to the difference between the market value of the partners' work for RCA and the sums distributed to date, Mr Klaturov has 'lost' something which he might potentially earned elsewhere. However, it seems to me that this is a commercial risk that a member of an LLP takes by agreeing to be remunerated by reference to a profit share. If Mr Klaturov had remained a member, there was a chance that there would have been another success like Project Gaudi – that is an investment provides high profits and a distribution occurs which permits most or perhaps even all of the deferred compensation and bonuses from previous years to be paid. On the other hand, it is possible that RCA's performance may have been such that the deferred compensation, bonuses and interest might never be fully paid. The value of the leaving member's share in RCA would necessarily reflect this contingency of future distributable profits.

183. I accept Mr Cohen KC's submission that it is not remotely nonsensical for a member to lose the right to unpaid sums on retirement. If the condition for payment (sufficient profits to enable a distribution and a decision to distribute) had not then been satisfied

by the time the member leaves, there is no basis to imply a right to be paid absent satisfaction of the condition.

184. As to the submission that it is appropriate to imply a term that deferred compensation should be paid within a reasonable time or alternatively a reasonable time after a demand, I accept Mr Cohen KC's submission that this principle only applies to an unconditional right to performance but where the time for performance is not specified. I agree that as he put it, " It has no relevance at all to a situation where performance is conditional". There is, as he put it, no question of an implied time for performance before the condition is satisfied, and to imply a date for performance without the condition having been first satisfied would be to imply in a way which conflicts with the express term, which is not permissible.

185. Having held that the only remuneration that the Claimants had a legal right to are those set out in clause 8 of the LLP Agreements i.e. an annual distribution of any excess profit there is no question of forbearance on the part of the Claimants in respect of a contractual right. Mr Weale was right to concede that the *Zippy Stitch Limited v Scicluna* UKEAT/0122/16/DA; [2018] EWCA Civ 1320 is of limited assistance in resolving the issues in this case (a) in that case the term implied by the employment judge was consistent with the express term which she had identified on the specific facts of that case and (b). the case in any event turned on a failure by the Defendants properly to identify their case in the list of issues. Mr Weale did not take me to any authority or textbook in support of the pleaded 'general principle' pleaded in paragraph 9 of the Reply.

K. THE EXIT NEGOTIATIONS

Mr Jones

186. Given my rejection of the Claimants' case that there was a contract by conduct evidenced in the Supporting Documents, whatever was said or not said in the negotiations for the terms of Mr Jones' exit from RCA is in my judgment irrelevant. Either such a contract came into existence before Mr Jones left RCA or it didn't.

187. The Claimants' case in relation to the negotiations conducted by RCA with Mr Jones was based on the following two negative propositions from Mr Jones' evidence:

> "At no point in my discussions was there any suggestion that the deferred amounts or bonuses would not be included, nor that they were not contractual liabilities owed to me"

188. Whilst it is correct that this assertion was not challenged in cross-examination, it does not take the Claimants very far. There are messages, sent by Mr Jones in 2009 in which he broke down his proposed settlement into two distinct categories comprising the "500k in bonus and deferred comp" which he said was due to him and then a balance representing the value of his 14.25% share in RCA, but Mr Jones did not actually ever go as far as Mr Klaturov in these proceedings. He did not say to RCA that as as a leaving partner he was entitled as a matter of a contract to an immediate payment of deferred compensation, unpaid bonus and interest and was only prepared to negotiate in respect of the value of share in RCA. Rather, the negotiations always proceeded on the basis of a global sum which was initially €1 million but which reduced to €900,000 payable over three years and in return for consultancy services. The most that can be said is that a significant portion of his overall settlement figure was referrable to deferred compensation and bonuses.

189. However, the partners at RCA and in particular Mr Assimakopoulos were entitled to take account of whatever factors they liked in deciding what retirement package to agree for Mr Jones. The member were entitled to take a stricter or more legalistic line with Mr Klaturov. The issue for me is whether RCA is entitled as a matter of law to say to Mr Klaturov "Your entitlement as a leaving partner is limited to what is set out in the 2020 LLPA and no more". Whatever the subjective thought processes that occurred during the negotiation of Mr Jones' exit package, they have little or no bearing on that issue.

Mr Klaturov

190. Mr Weale also seeks to rely on what was said and not said in 2021 when the issue of Mr Klaturov's resignation first arose. Mr Klaturov's evidence was to the effect that both he and Mr Bukovsky took it as given that he would receive the deferred compensation and bonus. Mr Weale can point, for example, to contemporaneous documents such as the "*Partnership Exit Considerations*" document sent by Mr Bukovsky by email on 7 September 2021 as evidence of this.

191. However, even if there was some sort of common understanding or assumption between Mr Klaturov and Mr Bukovsky (or for that matter between Mr Klaturov and all of the other members) to the effect that the deferred compensation and bonuses would be included in any settlement package, the fact is that any such assumption did not endure. RCA's position hardened and no such agreement was reached. The court has to determine whether the Claimants have a contractual right to the sums claimed or not. What was said or not said in negotiations in relation to a potential resignation settlement is in my judgment of little, if any, relevance to that issue.

L. THE GUERNSEY PROCEEDINGS

192. The Claimants relied on passages in a Defence filed in May 2021 made in proceedings brought against Revetas GP ('**RGP**') by one its investors, JRJ, concerning payments made by RCA to its members in 2017. The dispute concerned the relationship between terms of the 2015 MOUs on the one hand and the terms of the partnership agreement between JRJ and RGP, referred to in the pleadings as the "Founder LPA", on the other. Part of JRJ's case was that EUR1.8 million and which had been distributed in 2019 from the profits made by RCA and described as "deferred compensation" was not a fee cost or expense properly incurred by RCA for the purpose of clause 5.1.2 of the Founder LPA.

193. RGP's case was that MOUs were binding on RCA and described financial consequences if certain trigger events occurred which RCA was bound to honour and that sums paid as a result of the terms of the MOUs out of the profits of RCA by way of a distribution to members were properly and reasonably incurred under the Founder LPA and ought to be brought into account in determining the profit share between JRJ and RGP.

194. The Claimants rely in particular on the fact the Defence does not refer to deferred compensation being conditional upon profit or on the exercise of a discretion and pointed to some of the language used in the Defence was consistent with the Claimants' case. The Claimants referred to the following passages (with emphasis added by Mr Weale):

> *"81.5. ... the Deferred Compensation payments* ***were a contractual liability*** *of RCA…*
>
> *81.6.* ***… Such compensation formed part of the Revetas Management Team's remuneration payable by RCA and, therefore, was a fee, cost and/or expense of RCA*** *for the purposes of clause 5.1.2 of the Founder LPA…*
>
> ……
>
> *81.10. The Deferred Compensation payments were a* ***fee, costs and/or expense reasonably and properly incurred by RCA*** *for the purposes of clause 5.1.2 of the Founder LPA…*
>
> *81.15. ... the Revetas Management Team agreed to defer part of their compensation each year until there was sufficient distributable funds from Fund I Investments to pay it.* ***The Revetas Management Team were under no obligation to do so, and could have been paid their deferred compensation from the remaining amounts available to be drawn down on the RHL Loan notes****, but agreed to the deferral in line with their commitment to investments and investors. Those deferred amounts constituted the Deferred Compensation Payments.*
>
> *81.16. RCA agreed with the Revetas Management that 8% per annum interest would accrue on the Deferred Compensation Payments. As the RHL Loan Notes would have accrued 8% per annum interest if further drawn upon the pay the Deferred Compensation Payments, it was considered commercially reasonable for that rate of interest to apply to the Deferred Compensation Payments.*"

195. I reject the submission that anything in the Defence filed in the Guernsey Proceedings assists the Claimants in these proceedings for the following reasons:

a. The complaint made by JRJ concerned sums which RCA had decided to distribute to partners out of its profits, in particular the profit made on Project Gaudi. The issue of whether sums agreed under the heading 'Deferred Compensation' were due and payable to the partners regardless of profit or was conditional on sufficient profit being made and declared simply did not arise in the Guernsey Proceedings.
b. RGP's defence in the Guernsey Proceedings was that sums payable under the terms of the MOUs were properly payable. The Claimants in these proceedings do not seek to claim sums under the terms of Mr Klaturov's MOU.
c. The main issue in the Guernsey Proceedings was whether sums distributed to partners fell within clause 5.1.2 of the Founder LPA which is not an issue which has not relevance at all to the Claimants claims in these proceedings.
d. The reference in paragraph 81.15 of the Defence to compensation being deferred until there were sufficient distributable funds to pay is consistent with RCA's case on conditionality in these proceedings.
e. The assertion in paragraph 81.15 of the Defence that the Revetas Management Team could have paid themselves from remaining amounts drawn on the RH loan does not assist the Claimants.
f. The explanation in paragraph 81.16 of the Defence as to the origin of the 8% figure for interest is common ground in these proceedings.
g. The quotation from paragraph 81.5 of the Defence omits the critical words "As set out in the MoUs". It was RGP's case in the Guernsey Proceedings that sums payable by reason of the MOUs and paid out of distributed profits were properly incurred under the Founder LPA. It was not RGP's case that deferred compensation was unconditionally payable independently of the MOUs or the 2016 or 2020 LLPA.
h. In short, in my judgment, on proper analysis there was no inconsistency between RGP's case in Guernsey and RCA's case in these proceedings.

M. THE PROFIT SHARE CLAIM

196. The pleaded profit share claim has three components, which appear in identical form in the Claim Form and Particulars of Claim as amended in May 2023: (a) a claim for a declaration that the Second Claimant ceased to be a Member of RCA on 16 February 2022 or such other date as the Court shall determine and (b) a claim for the "taking of all necessary accounts and enquires" (c) an order for payment of any such sum as may be found due upon taking that account.

197. The first component is not in issue for me. The date on which the Claimants ceased to be members is as a matter for trial as part of the Buy Out Claim.

198. The third component is a standard form of order made if the Court orders an account or an enquiry.

199. It is only the second component which was in issue before me.

200. Paragraph 34A of the APC says: "Further, the Claimants are entitled to, and hereby seek: (i) a determination of the amount (if any) payable to them by way of their entitlement to profit share pursuant to clause 8 … ; (ii) and payment of such as is determined"

201. The response to paragraph 34A of the APC the Amended Defence is as follows with numbers in [ ] inserted by me for ease of reference:

> "Paragraph 34A of the POC is denied. [1] The Claimants are not entitled to a profit share unless and until, pursuant to clause 8 of the 2016 LLPMA and the 2020 LLPMA, there are "profits of the LLP reasonably determined by the LLP to be in the nature of income profits or operating profits" that were greater than the Fixed Share payments. [2] There is no identification of any time period in paragraph 34A, nor any allegation of breach by abuse of discretion. [3] There is no entitlement to a "determination" absent an allegation of breach. [4] In any event, there are no such profits for the time periods in issue in this action, which is precisely why Deferred Compensation and Bonus have not been paid"

202. The Claimants in their Amended Reply: (1) denied that any determination as referred to in [1] had been made (2) Indicated that in response to point [2] the entire period of the Claimants' membership from 2016 – 2022 was in issue and (3) denied the assertion that there were no profits available. On the contrary the Claimants alleged that substantial profits were declared as being "available" for division among members. In addition, paragraph 19 of the Amended Reply pleaded a table showing a broad pattern of increasing profits measured against 2016.

203. Prior to the amendment of the claim form and Particulars of Claim to add the profit share claim, the Claimants had asked the Defendants to supply information about how and when any discretion in relation profits had been exercised for the years 2018 – 2020 and when and how it had been communicated to the Claimants. The Defendant declined to provide this information on the ground that it was not relevant to the case (as then pleaded by the Claimants).

204. As described above, Mr Klaturov in his fourth witness statement stated that was profit which had not been distributed and even went as far as to quantify his profit share claim for the years 2016 – 2019. Mr Bukovsky's table, produced initially as an appendix to the Defendants' skeleton, sought to prove that all but a small residual had been distributed.

205. CPR 25.1(1)(o) gives the Court power to direct an account to be taken or inquiry to be made. As with any power excisable under the CPR, it must be exercised in accordance with the overriding objective. PD40A contains provisions concerning the directions the Court may make for the conduct of the account or inquiry. These two provisions replaced RSC O.43 rules 1 and 2. Rule 1 provided that "Where a writ is endorsed with a claim for an account or a claim which necessary involves taking an account, the plaintiff may … apply for an order". Rule 2 was somewhat wider and gave the Court a power to order an account or enquiry "in any cause or matter".

206. In his submissions Mr Cohen KC rightly did not seek to persuade me that an order for an account should only be made where a breach was alleged. It is clear to me that the power under the CPR to order an account is a general case management power. The

Court must be satisfied that there is a genuine dispute between the parties in relation to which an order for the taking of an account would be an appropriate and proportionate response.

207. I have no doubt that this is the case in the circumstances of this case for the following reasons:

a. Clause 16.5 in the LLP Agreements contains an obligation on each member to "render true accounts and full information of all things affecting the LLP to the LLP and each other member"
b. Clause 8 of the LLP Agreements contains a number of obligations on the Managing Member and the LLP in relation to the determination, allocation and distribution of profits of the LLP.
c. Based on the pleadings and evidence, there is a clearly a genuine dispute as to how profits have determined as being available for distribution and whether they have been properly distributed.
d. In particular, there is an issue between the parties as to whether, when and how any discretion was exercised by Mr Assimakopoulos in relation to the determination, allocation, retention, distribution of profits for the full period of both Claimants' membership of RCA and whether this was ever communicated to the Claimants.
e. The evidence filed to date is not such as to permit the court to form a view on whether profits have or have not been properly determined to be available for distribution or whether they have or have not been properly distributed.

    i. Questions 5(e) and (f) Request for Information dated 5 October 2022 were not answered at the time or following the addition of the Profit Share Claim.
    ii. My Bukovsky's table of figures and distributions was served on the eve of trial leaving Mr Weale with insufficient time to investigate and forensically examine them.
    iii. In a number of communications / documents prepared by RCA between 19 December 2021 and 26 September 2023 (as set out in

paragraph 274 of the Claimants' closing submissions), it has been acknowledged that some significant sums by profit share may be due to the Claimants: £148,000 in respect of the year ended 2020 and £64,000 for the part-year 2022. These communications are impossible to reconcile with Mr Assimakopoulos' assertion in paragraph 69 of his witness statement that "there are no such profits available for distribution"

iv. The main focus of the litigation to date has been the Claimants' claim for payment of deferred compensation and bonuses independent of any right to a profit share. As a result, whilst some aspects of Mr Assimakopoulos' approach as Managing Partner to the retention / distribution of profits emerged in the course of trial (e.g. his decision in relation to allocation of profit realised from Project Papa described in paragraph 43 of Mr Bukovsky's witness statement) this evidence was fragmentary and was adduced to counter the Claimants' claim that sums referred to in the Supporting Documents were unconditionally due and payable rather than as a full explanation of how profits were distributed.

v. No full account of how in each accounting period profits were determined as being available for distribution, how they were distributed and the extent to which the decision on either determination or distribution involved the exercise of a discretion by Mr Assimakopoulos or RCA has been provided. An order for an account would be an appropriate mechanism for this information to be provided.

208. It follows that I am satisfied that this is a proper case for an order for an account to be taken. I will invite submissions from the parties on the directions to be made under paragraph 1.1 of PD40A after this judgment has been handed down. However, in light of RCA's stated position that all profits during the period in which the Claimants were members have been properly determined and properly distributed, it seems to me that RCA ought to be the accounting party within the meaning of paragraph 2 of PD40A and the Claimants should be the objecting party within the meaning of paragraph 3.

209. I will also invite the parties to consider whether it would be appropriate for there to be a stay for NDR. It seems to me that it would. It may well be the case that a one-day mediation (possibly with the assistance a forensic accountant) might be a more cost effective way to resolve the profit share claim. If the parties do not agree, then any directions for an account will obviously need to take account of and proceed in parallel with the directions already given in respect of Claimants' Buy Out claim.

N. CONCLUSION

210. In summary, for the reasons set out above, my conclusions are:

a. The Claimants' claim in respect of deferred compensation and bonuses in the sum of €1,199,918 or for damages in like sum is dismissed.

b. An account is to be taken of what, if any, share of the profits is due to the Claimants (or either of them) under clause 8 of the 2016 LLP Agreement or the 2020 LLP Agreement arising from their membership of RCA.