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Case No: 2010 Folio 328

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 15/04/2011

Before :

MR. JUSTICE TEARE

Between :

KARIM FREDERICK DHANANI

Claimant

- and -

SERGE CRASNIANSKI

Defendant

Marcus Smith QC and Simon Atrill (instructed by **Charles Fussell & Co. LLP**) for the **Claimant**

Roger ter Harr QC and Daniel Shapiro (instructed by **Lewis Silkin LLP**) for the **Defendant**

Hearing dates: 14-17, 21-24 February and 25 March 2011

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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MR. JUSTICE TEARE

Mr. Justice Teare :

1. The Claimant, Mr. Karim Dhanani, is a Belgian national who resides in London. He has worked in the world of private equity, in particular, investing in distressed companies, “turning them around” and selling them for profit. The Defendant, Serge Crasnianski, is a resident of Switzerland who is a successful scientist and inventor. In November 2006 they met on the Eurostar and by the end of March 2007, after a very few meetings, they had signed a letter and term sheet pursuant to which it was envisaged that the Defendant would provide the Claimant with €50m. which he would invest in a private equity fund to be managed by the Claimant. But by the end of June 2007 they had fallen out and the Defendant no longer wished to give the Claimant the opportunity to invest €50m. of his personal wealth. The Claimant alleges that the Defendant is liable to him in damages for breach of contract in the sum of over £11.3m. The Defendant denies that he is liable to the Claimant in damages for breach of contract and counterclaims for the repayment of €12,500 advanced to the Claimant.

Witnesses of fact

2. The Claimant gave oral evidence to the court. He did so with a degree of exuberance and theatricality. He was particularly anxious to explain his point of view rather than simply answer the questions put to him. He was in many ways an advocate for his cause and had plainly studied the documents in the case. That, together with own admitted practice of “embellishing the reality” when it came to providing potential investors or employers with his c.v., meant that I did not feel able to accept all that he said. I considered it safer to rely upon the contemporaneous documents where they existed and the probabilities where they did not.
3. The Defendant also gave evidence but he did so, it appeared to me, rather more calmly than the Claimant. However, he gave evidence through an interpreter and I must therefore be wary of relying upon the manner in which he gave evidence. A better guide is the content of what he said. From time to time he could not resist the opportunity to emphasise what he regarded as weaknesses in the case against him and his recollection was at times at odds with the documents. So, as with the Claimant, though for somewhat different reasons, I considered it safer to rely upon the contemporary documents and the probabilities.
4. There were two additional witnesses of fact who gave oral evidence. The Defendant’s daughter, Tania Crasnianski, answered the questions put to her concisely and clearly. However, she did not have a clear recollection of the discussions in which she participated and so again it is necessary to have regard to the contemporary documents and the probabilities. Mr. Adams of S.J. Berwin gave evidence in a straightforward manner. Much of his evidence was reflected in the documentary evidence reflecting the work done by his firm.
5. Certain statements were read and were not subject to cross-examination.

Events leading up to the signing of the letter and term sheet.

6. The Claimant and the Defendant had first met in about 2001, when the Claimant was a vice-president at Deutsche Bank Capital Partners, in connection with a sale of part

of Photo-me International Limited of which the Defendant was the main shareholder and CEO. They had also met on business trips to the US and Japan. In addition there were one or two social meetings. The Claimant and the Defendant were at most acquaintances rather than friends.

7. In November 2006 they met by chance on the Eurostar train travelling from Paris to London. The Defendant, who had an economy class ticket, chose to upgrade his ticket to join the Claimant. They had slightly different accounts of their conversation, which was in French. The Claimant professed little recollection of their conversation, particularly with regard to what he said about his discontent at Platina, the private equity firm where he worked at the time. This chance meeting led to a most significant opportunity for the Claimant and I find it surprising that he had so little recollection of it. For that reason, and because I consider that the Defendant's account is the more probable, I prefer the Defendant's account of this meeting. In response to a question from the Defendant the Claimant told him that he worked in private equity for a fund known as Platina. He said that investing in private equity was preferable to investing in the shares of listed companies. He said that his boss, Mr. Rottner, took the credit for the Claimant's hard work and gave the Claimant the impression that he was not happy at Platina. He had plans for his own fund. It is very probable that the Defendant expressed a polite interest in what he was being told. On parting the Defendant gave the Claimant his telephone number and asked to be kept informed of his progress.
8. In January 2007 the Claimant telephoned the Defendant and in consequence was invited to the Defendant's house in Cheyne Walk on Saturday 27 January 2007. The Defendant was interested to know what the Claimant had in mind because he thought it might represent an opportunity to acquire companies and assist them to recover.
9. The Claimant had prepared a presentation of what he had in mind. He showed the Defendant a 16-page document in English which, in the form of bullet points, described what he intended to do through a fund entitled Zoji La Capital. (Zoji La was the name of an existing company which had been established by the Claimant.) The fund was described as having a target size of €70m. with a minimum of €50m. There was to be one core investor and two additional investors. The investment period was described as 5 years and the exit period as 5 years from the end of the investment period. Manuscript notes of the Defendant indicate, as do the Claimant's own notes, that the Claimant explained how the investors and the fund managers would benefit from the Fund. If, on the sale of an investment, the price achieved was more than 6% of the investment ("the hurdle") the investor would retain 80% of the profit and the fund managers would retain 20% of the profit ("the carried interest"). The management fees were described and a projected time table was set out running from February to April 2007 (commitment from investors and legal documentation) to January-March 2008 (first investment). Information as to the Claimant's experience and his achievements in private equity were summarised. The Claimant's speaking notes indicate that he said that he envisaged the Defendant being the main investor in the fund, that he intended to use but improve upon a tested model (that which he had used at Platina) and that he intended to leave Platina so that he could manage the fund himself. The main investor would, in addition to providing funds and paying the management fees, provide an office. The Defendant was reluctant to accept that the Claimant had him in mind as the main investor but it seems to me likely that he did.

His speaking notes and his manuscript notes of the meeting suggest that he did. The Defendant was impressed by the presentation and said that the Claimant could discuss the subject further with his colleague Jean-Luc Peurois. The meeting lasted, according to the Defendant's recollection, about 45 minutes to one hour.

10. The Claimant met Mr. Peurois the next day, Sunday 28 January, at the Claimant's house. The only witness to this meeting was the Claimant because Mr. Peurois has since died. The Claimant said that Mr. Peurois was very supportive of the project.
11. On 2 February the Claimant wrote to a potential investor stating that he hoped to launch his own fund in 2007. He said that he was in "the advanced stage of discussions with a first investor ... who would contribute 50 million Euros to the new fund." I myself would not describe the discussions with the Defendant as "advanced" at this time. They had only just begun. The use of the adjective is an illustration of the Claimant's tendency, as he would put it, "to embellish the reality" where he thought that was desirable in order to advance his own interests.
12. On 8 February the Claimant and the Defendant met at the Gare de Lyon in Paris. The Defendant's recollection was that the meeting lasted about 35 minutes. The Claimant thought somewhat longer, between 45 and 75 minutes. The Claimant produced a one-page document entitled "Zoji La – Business Plan." It referred to the investments totalling €72m., including one of €50m., and to the fees which would be charged per annum based upon such investments. It also referred to the expenses of the fund, including salaries. It is likely that this document was the focus of the parties' discussions. Manuscript notes of both the Claimant and the Defendant on the document suggest that there was discussion of salaries, bonuses and possibly travel expenses. The Defendant gave evidence that he indicated to the Claimant that he wanted control over investments and expenses. The Claimant did not accept that he did. It is, however, probable that he did. They were discussing an investment of €50m. of the Defendant's money. It is to be expected that he would wish to have control over the companies into which his money was to be invested. The Defendant appeared to me to be someone who expected that the expenses of any business should be properly controlled. Since he was to pay the greater part of the expenses of the fund it is to be expected that he would want control over the expenses.
13. After this meeting the Claimant, whilst on a skiing holiday in Verbier, drafted the first version of the letter and term sheet. It was dated 12 February 2007 and was in English.
14. The parties next met on Sunday 18 February 2007 at the Defendant's house in Cheyne Walk. It appears from the terms of an email sent later that evening by the Claimant to the Defendant and Mr. Peurois that at the meeting the Claimant had provided the Defendant with a draft of the letter and term sheet dated 15 February 2007 and another version of the Business Plan. The Defendant recollected that the meeting lasted 45 minutes to one hour. A third document illustrating investors' returns was sent with the email. It referred to actual and assumed returns for the four investments made by the Platina fund and illustrated how they would work on the basis of the structure proposed by the Claimant.
15. On 12 March the Claimant had a meeting with Mr. Peurois which, according to an email sent by the Claimant the next day, lasted some two and half hours. They

discussed the draft term sheet in some detail. His email referred to the need to draft a “contract based on the term sheet.”

16. On 22 March the Claimant and the Defendant again met on the Eurostar and the following day they met in Cheyne Walk with Mr. Peurois. The Claimant had prepared a further draft of the letter and term sheet dated 23 March 2007. This draft made provision for the Defendant to reduce his commitment to €30m. This suggests that the Defendant had told the Claimant that he wished to commit to only €30m. on 22 March. The Defendant gave evidence that he had made this clear earlier but it is more likely that he did so on 22 March.
17. On or about 25 March the Defendant and Mr. Peurois were busy with a particular problem in the Defendant’s own company. The Defendant asked his daughter Tania to look over the draft letter and term sheet. She was a French criminal lawyer although she had worked as a fund analyst and had some involvement with Stratford Capital, a “family” investment company. Although she was not familiar with either English law or private equity deals she agreed to help out her father “as a daughter would do.” This was her first involvement in this matter. The Defendant did not send her any documents but the Claimant did so, early on 26 March. She met the Claimant in Paris on 27 March at her office for about an hour. She raised a few points on the term sheet which seemed to her to be prejudicial to her father’s interests. She did not have a clear recollection of the meeting. Later that day, when she had time she looked at the term sheet more closely, she telephoned the Claimant to discuss further points. Her recollection was that the Claimant agreed to make the amendments for which she asked. The Claimant’s recollection was that whilst he agreed some points, others were not agreed and others were the subject of a compromise. The Claimant’s recollection seems to me the more probable. (Tania Crasnianski gave evidence that the Claimant did not accurately record the agreed amendments. However, it is not necessary to decide whether her evidence in that regard is likely to be correct.)
18. Tania Crasnianski reported back to her father. He mentioned to her that he had been asked by the Claimant to send him some money. She was concerned that if the Claimant proved to be “unsatisfactory” there would be no evidence of the payment and her father would be unable to recover the money. She therefore called the Claimant and said that she had advised her father not to pay any money unless the Claimant acknowledged receipt of the money by way of an advance and that it would be repayable on demand. She dictated an appropriate clause over the telephone. The Claimant accepts that she did so and that he added the clause in manuscript to the end of the term sheet.
19. The manuscript clause added to the term sheet, unlike the rest of the term sheet, is in French. The manuscript clause provides, in translation, as follows:

“I, the undersigned Karim-F. Dhanini, acknowledge that all and any payment made by SC before the start of the soft launch is so by way of an advance. In the event of non-take off of the soft launch by 1st. September 2007, this advance will be reimbursable on demand to SC.

Done at London, 1st. May 2007.

This contract is strictly confidential between the parties.”

20. There is a dispute as to whether the last two lines were dictated by Tania Crasnianski or had been added by the Claimant on his own initiative. She said that she did not dictate them. The Claimant said that she did.
21. There is evidence that the Claimant faxed Tania Crasnianski a copy of the letter and term sheet bearing the manuscript amendment at 20.09 on 27 March and that the receipt was “OK”. His telephone records show that he called her at 20.03, shortly before sending the fax to her, and at 20.23. On behalf of the Claimant it is said that Tania Crasnianski would have immediately complained had any part of the manuscript not been as agreed. She however says that she did not receive the fax. The number to which it was sent was her phone number on which she can only receive a fax if she changes the plugs which she rarely does. The fax and telephone records relied upon by the Claimant render it more probable than not the Claimant, at the very least, sought to fax the letter, term sheet and manuscript amendment to her. The evidence that the receipt was “OK” is evidence that the fax was received. However, Tania Crasnianski gave clear evidence that she had not received it. I was not persuaded that she was lying or mistaken when giving that evidence. Whilst I cannot explain why the fax receipt was said to be “OK”, I am unable, having regard to her clear evidence, to accept the fax receipt as convincing evidence that it was in fact received.
22. The Claimant said that immediately after sending the letter and term sheet to Tania Crasnianski, he faxed the letter and term sheet to the Defendant at 20.13. He had initialled each page of the letter and term sheet. The Defendant accepts that he received the letter and term sheet but does not recollect receiving the draft by fax that evening. He pointed out in his oral evidence that it bears no fax details and says that he believes that it must have been delivered to his home. However, no particulars of who delivered it or when were given. In his statement he simply said that he “received” the final version. Whilst I cannot explain the absence of fax details on the letter and term sheet it seems more likely than not that it was faxed. That is supported by the evidence of the fax transmission sheet to the Defendant’s number. It is not displaced by the Defendant’s evidence that he did not receive the fax because that evidence owed everything to reconstruction and nothing to recollection.
23. The next morning, at 08.24 on 28 March, the Defendant initialled each page and signed the term sheet before faxing the documents back.
24. In circumstances where the letter and term sheet bearing the manuscript amendment were signed by the Defendant it probably does not matter whether the final two sentences were dictated by Tania Crasnianski or added by the Claimant. But it seems to me unlikely that they were dictated by Tania Crasnianski. There was no obvious reason for her to dictate that the agreement was dated 1 May or that the agreement should remain confidential. On the other hand the Claimant did have a reason for adding those matters. He did not wish his employers to know that he had signed the term sheet on 27 March before he had resigned. So it is more probable than not that they were added by the Claimant. However, he did not seek to hide them from Tania Crasnianski because he sought to fax the manuscript amendment to her.

25. Thus, by 28 March 2007 the position was that the Claimant and the Defendant had signed both the letter and term sheet. I have appended the signed letter and term sheet as an appendix to this judgment.
26. The Defendant gave evidence that he and the Claimant referred to the term sheet as a “lettre d’intention” or letter of intention. However, no document in evidence uses that description for the term sheet. On the contrary the documents use the description “term sheet”. I am unable therefore to accept the Defendant’s evidence in this regard. For the same reason I am unable to accept Ms. Crasnianski’s evidence that the document was referred to by her and the Claimant as both a term sheet and a letter of intention. The probabilities are that it was referred to by its actual description, namely, a term sheet. The question whether it and the accompanying letter amount to an enforceable contract is a separate question.

Events after signing the letter and term sheet.

27. On 29 March 2007 the Claimant informed Mr. Peurois that he was about to go away on holiday until 9 April whereafter he would negotiate the terms of his departure from Platina. He requested payment of €150,000 to an account in Luxembourg. An accompanying table of fees indicated that this was part of the sum of €312,500 which was one quarter of the annual fees provided for in the term sheet, namely, 2.5% per annum on the €50m. which was committed to the fund. The term sheet provided for these to be paid in advance and the accompanying letter stated that there would be an advance of the “first quarter of fees” in April.
28. On 30 March the Claimant resigned from Platina. He referred to having done so on the morning of 30 March in an email to his friends sent that day.
29. On the same day the Claimant sent a further copy of the business plan to the Defendant by email to his hotel in Courcheval. The Defendant’s manuscript markings on it suggest that he was still concerned with the matter of the Claimant’s salary and bonus. They also suggest that he was concerned with the advance of fees to be paid to the Claimant. The Defendant telephoned the Claimant and later that evening the Claimant sent an email to the Defendant purporting to confirm an agreement they had made during that telephone call concerning the fees payable by the Defendant in respect of the soft launch and the hard launch. The Defendant was recorded as having agreed to pay the initial advance “for the first quarter of the hard launch” and that £50,000 was payable for the soft launch “at the start of the hard launch”. Certain other matters relating to fees and bonuses were also agreed. A manuscript note of the Defendant suggests that he was concerned as to the circumstances in which a bonus was payable. In his statement the Defendant said that whilst the letter confirms some of the matters they discussed it did not confirm them all. However, in circumstances where there was no reply from the Defendant protesting as to the terms of the letter it is more probable than not that it recorded that which the Claimant and the Defendant had agreed on the telephone.
30. On 6 April the Defendant arranged for payments of £110,000 and €150,000 to be made to the Claimant. I was informed that these totalled the advance of €312,500.

31. The Defendant liaised with S.J. Berwin with regard to the drafting of the legal documents required for establishing the fund. He spoke to Mr. Adams of that firm on 18 April and met him on 20 April.
32. On 26 April the Claimant met Mr. Peurois in Chelsea Harbour and discussed the next steps. On 27 April the Claimant and the Defendant met in Cheyne Walk. The Claimant had prepared an agenda for the meeting which suggested that he advised the Defendant of the progress he had made with regard to the legal structure of the fund, the brand and image, the investment team, IT and other matters.
33. On 30 April S.J. Berwin provided the Claimant with a draft Structure Note.
34. On 9 May the Claimant emailed S.J. Berwin regarding his “deal” with the Defendant. He said that he hoped that S.J. Berwin would be able to structure the concepts of the “deal” within an LLP (presumably a Limited Liability Partnership). He said “the closest to the “deal” the better. I certainly do not want him [the Defendant] to see the LLP structure as a way to come back on our “deal”.”
35. On 10 May the Claimant provided S.J. Berwin with the letter and Term Sheet, though in a redacted form. His email to S.J. Berwin of 10 May suggested that the structure of the fund as set out in the Term Sheet might be altered. The structure was said to be “old and wrong.” The email drew a distinction between what the term sheet provided, namely, that the General Partner was to be controlled by the Defendant and what S.J. Berwin’s structure provided, namely, something “closer to the spirit of 50-50”. The reference to “the spirit of 50-50” would appear to be a reference to the provision in the term sheet that, whilst the General Partner was to be “majority owned and/or controlled by” the Defendant, the Advisor was to “owned and/or controlled 50-50 between” the Claimant and the Defendant. It seems that S.J. Berwin were concerned to minimise VAT and therefore envisaged the General Partner being a wholly owned subsidiary of the Advisor. Whilst this minimised VAT it meant that the General Partner would not be “majority owned and/or controlled by” the Defendant. On the same day the Claimant emailed the Defendant and said that on 24 May he and Ms. Crasnianski would be meeting S.J. Berwin. No mention was made that the structure in the term sheet might be altered.
36. A revised structure note was provided by S.J. Berwin to the Claimant on 10 May and on 11 May the Claimant passed it on to Mr. Peurois and Ms. Crasnianski.
37. On 11 May the Claimant met with Mr. Peurois for about 40 minutes. In his statement the Claimant said that this concerned the Defendant’s “obsession with my expenses”.
38. On 21 May the Claimant again met Mr. Peurois. The structure note was discussed. After the meeting the Claimant advised S.J. Berwin by email that Mr. Peurois had spotted “a potential risk” with the structure in that the General Partner was only controlled 50% by the Defendant. It therefore appears that Mr. Peurois had noted the change in structure between that contemplated by the term sheet and that proposed by S.J. Berwin. The Claimant asked S.J. Berwin to address the point. A VAT issue was also mentioned.
39. On 24 May the Claimant and Ms. Crasnianski met S.J. Berwin to discuss the propose structure of the fund. Notes of that meeting kept by S.J. Berwin show that there was

discussion as to the respective merits of English or Luxembourg vehicles, the structure of the General Partner and other matters. Thereafter S.J. Berwin commenced work on drafting the limited liability partnership agreement which would form the Advisor and on producing a more detailed structure paper. Mr. Adams of S.J. Berwin, who gave evidence, said in his statement that “one of the key issues we had to take on board in the draft LLP agreement was to shift Mr. Crasnianski’s controls and economic rights as anticipated in the term sheet from the General Partner to the LLP and elsewhere in the Fund documentation...[such rights were now to be] similarly exercisable by him in and through the LLP and/or by giving him veto or consent rights in his capacity of investor before certain decisions could be exercised by the LLP.” These changes were required because, in order to make the Fund more cost effective the General Partner was to be wholly owned by the Advisor, contrary to the scheme set out in the term sheet. Although Mr. Adams had certain ideas as to how he would give the Defendant the desired control (eg by giving him the casting vote on the investment committee so that he could veto investment decisions) and had started to “construct” them they were never in the event finalised.

40. On 11 June the Defendant rang the Claimant to ask what was happening and for details of the expenses. The Defendant said that he wanted a meeting.
41. On 13 June the Claimant discussed arranging a meeting with the Defendant, his daughter and Mr. Peurois to take place towards the end of June. On the same day he emailed Daljit Singh, a friend and advisor of his, to report on his discussions. He told Mr. Singh that he found the Defendant “hard to handle”. He described his goal as being to “push the documentation through along our agreement (TS). And more importantly to get another investor.” He said that he had met a serious candidate for the investment team but did not wish to cause him to leave his current employment “before I am sure that [the Defendant] will sign the LP and LLP docs in line with the Term Sheet – he seems to have signed it without reading it, probably knowing that he could impose any change afterwards.”
42. On 15 June the Claimant had a meeting with S.J. Berwin. The notes of the meeting suggest that the make up of the Investment Committee was considered and that the Claimant may have been reluctant to give the Defendant the casting vote.
43. On the Defendant’s side arrangements were being made to enable the offices of Stratford Capital to be renovated so that they could be used as offices for the fund.
44. However, by 16 June it was clear that the relationship between the Claimant and the Defendant was under strain. The Claimant was so concerned as to the attitude of the Defendant that he had a meeting with him to discuss their relationship. He said in his statement that a one-to-one meeting was suggested by Mr. Peurois. A note which the Claimant prepared for the meeting indicated that unless he received certain assurances he felt himself unable to commit to other investors and to the proposed investment team. The note suggests that the Claimant was concerned that the Defendant did not view them both as “50-50 associates” in the management of the fund and that he, the Claimant, still needed to win the trust of the Defendant. The reference in the note to a need for confirmation that the fund was separate from Stratford Capital supports the Claimant’s evidence that the Defendant appeared to regard the Claimant as part of his own office. These concerns appeared to have been prompted by “exchanges” between the parties though it is not clear on the evidence what they were. They may have been

telephone calls from the Defendant or his daughter in which the Claimant was asked to do things for the Defendant not associated with the fund.

45. It seems likely that at the meeting on 16 June the Claimant sought assurances from the Defendant that they were still proceeding on the basis of the term sheet and that such assurances were given. It is also likely that the Defendant asked what had been done with his money. He said he asked such questions and the Claimant accepts that there was some discussion about the Claimant's intention to buy a classic Aston Martin. It is also likely that the Defendant asked about progress. He said he was surprised that the Claimant had come "without any presentation to tell me what was happening" and that he was "worried that we did not have any document at all from S.J. Berwin." This evidence is supported by the fact that on 18 June, with reference to the projected next meeting, the Claimant advised S.J. Berwin that it was "important that I can present some progress" and asked for a detailed structure note and other documents.
46. On 20 June the Claimant was able to send the Defendant, Ms. Crasnianski and Mr. Peurois S.J. Berwin's Structure Memorandum. It concluded that a number of key documents would need to be reviewed from a tax perspective.
47. A diagram of the fund structure was attached to S.J. Berwin's Structure Memorandum. There are many manuscript notes on it. The Defendant agreed that these notes were very possibly in the handwriting of Mr. Peurois. They evidence a reasonably detailed understanding of the fund structure. Thus, the manuscript notes referred to the 100% ownership of the General Partner by the Advisor, the 50/50 ownership of the Advisor between the Claimant and the Defendant and the membership of the Investment Committee, namely, three members in the Defendant's camp and two members in the Claimant's camp. When the notes were placed on the diagram is not known. However, Mr. Peurois had the document from 18.27 on 20 June and so could have studied the document and made notes on it at any time thereafter.
48. The Defendant gave evidence that after receipt of this document Mr. Peurois advised him that the proposed structure was different from the one initially proposed by the Claimant and that it appeared that the Defendant would have no control over investments. The Defendant said that this made him suspicious.
49. On 26 June the Claimant and the Defendant met. Mr. Peurois was also present. Although the Defendant had no recollection of being presented with an agenda and notes for the meeting it seems that he was provided with them by the Claimant because a copy of them was disclosed in this action by the Defendant. The agenda and notes were in the form of a progress update by the Claimant.
50. The Claimant did not say in his statement that the diagram of the fund structure was discussed at the meeting. However, the Defendant said in his statement that the memo on the proposed structure was discussed and that this took time. It was suggested to him that it was during this meeting that Mr. Peurois made the manuscript notes on the diagram of the fund structure. The Defendant had no recollection of that.
51. If there had been discussion of the diagram of the fund structure in such detail that all the comments on it were made during the meeting I would have expected the Claimant to have mentioned that discussion in his witness statement. On the other

hand the note to the effect that the investment committee would be made up of three from the Defendant's camp and two from the Claimant's camp did not come from the structure note and must have been advised to Mr. Peurois in some other way. The Claimant said that there was a telephone call between himself and Mr. Peurois on 22 June but made no mention of discussing the structure note. It is possible therefore that the information about the investment committee was imparted during the meeting on 26 June.

52. It is difficult to make a firm finding as to the extent to which the diagram of the fund structure was discussed on 26 June. It is more likely than not that Mr. Peurois studied the structure note and diagram sometime after receiving the structure note and diagram on 20 June but before the meeting. That is because the meeting had been arranged and I would expect that Mr. Peurois would study the note and diagram before that meeting. Some of the notes may therefore have been made by him before the meeting. For example the note that the General Partner is 100% owned by the Advisor was mentioned in the structure note and Mr. Peurois had "spotted" that point before. But the structure was probably discussed at the meeting on 26 June (because the Defendant recollected such a discussion) and some of the notes may have been made at that time. For example the note about the make-up of the investment committee may have been made then.
53. It was suggested that the Defendant's recollection that before the meeting Mr. Peurois advised him that the proposed structure was different from the one initially proposed by the Claimant and that it appeared that the Defendant would have no control over investments was unreliable because there was no support for that in the contemporary documents. However, that evidence is consistent with the probabilities. Mr. Peurois had appreciated the difference as early as 21 May. He would have noted from the 20 June structure note that the difference remained. In those circumstances it is more probable than not that he would have advised the Defendant of the point. It is to be expected that the matter would have been discussed at the meeting and the Defendant, in his statement, recollected that it was, though not to his satisfaction.
54. What is clear is that the meeting did not go well. It is common ground that there was a discussion about expenses. It is also likely that there was a discussion about bonuses. There is a difference of recollection as to whether the Claimant brought a detailed list of his expenses (as opposed to a short summary) to the meeting or whether he left the meeting to collect it after the question of expenses had been raised. It probably does not matter which is correct but the Defendant's account appears to me to be the more likely. I would not have expected the Claimant to have brought such a detailed list to the meeting because the matter of expenses was much less important to him than the progress update which he saw as the purpose of the meeting. When the discussion turned to expenses he left the meeting to collect the detailed schedule of expenses. Discussion of that schedule led to a heated row about the purchase of a first class Eurostar ticket to which the Defendant objected.
55. There was also a difference of recollection as to how the meeting ended. The Claimant's recollection was that when he left the second part of the meeting the Defendant said that he was "still going ahead with the fund." The Defendant's recollection was that the second part of the meeting ended when he said that they needed to reflect on matters. He said that he said that "to avoid further unpleasant exchanges".

56. The Claimant's recollection is supported by his letter dated 28 June. It therefore seems to me likely that the Defendant said that as at 26 June they were still going ahead but that it was necessary to reflect on what had happened.
57. On 27 June the Defendant telephoned the Claimant to inform him that the deal was off. Before doing so he had spoken to Mr. Peurois and Tania Crasnianski. Neither the Defendant nor his daughter suggested that there was any discussion between them as to whether he was legally free to walk away from the deal.
58. The Defendant gave evidence that he had lost trust in the Claimant and that he told him that on 27 June. He was unhappy as to the Claimant's attitude to expenses and bonuses and concerned as to the disparity between the structure of the fund in the term sheet and in the S.J. Berwin memorandum. He concluded that the Claimant was not someone whom he could continue to trust with a large part of his assets.
59. Counsel for the Claimant advanced an alternative reason for the end of the venture. He submitted, as he had put to the Defendant in cross-examination, that the question of expenses was raised because he wished to show "who was really in charge". He wanted to show "who was boss". However, he found that he could not bend the Claimant "to his will" and so brought the venture to an end. It was suggested that the Defendant did not in fact lose trust in the Claimant and did not doubt his integrity. That was why he was uncertain in his evidence as to precisely when he lost trust in the Claimant, was willing to contemplate investing later in an investment called Clermont on which the Defendant was working with others and why Ms. Crasnianski suggested to the Claimant in a conversation after 28 June that the Claimant might "try to start again".
60. I am unable to accept this alternative explanation for the ending of the venture. Expenses and bonuses had been discussed when the business plan was first produced at the Gare de Lyon in Paris on 8 February. They led to the amendments of the agreement regarding advances on 30 March. The matter of expenses and bonuses were raised on 11, 16 and 26 June. On the latter occasion there was a particularly heated discussion about the Defendant's purchase of a first class Eurostar ticket. It seems likely that the Defendant's view as to what expenses were acceptable, particularly when they were being funded by him, was very different from the Claimant's view. It is also clear that there was a difference between the structure in the term sheet and the structure proposed by S.J. Berwin. That had been a concern to Mr. Peurois and it is understandable that it was a concern to the Defendant. Clear thinking about the make up of the investment committee might have alleviated his concerns but in the event either the Defendant did not think clearly about that or, if he did, his concerns were not alleviated. My finding is that the Defendant had concluded that the difference between the structure of the term sheet and the structure proposed by S.J. Berwin and their different views on expenses and bonuses were such that he no longer wished to trust the Claimant with a large part of his assets. I do not consider that his expressed willingness to consider investing in Clermont if the funds he had advanced to the Claimant were returned is necessarily inconsistent with that conclusion. His willingness indicated his desire to get his money back rather than trust in the Defendant. Nor do I consider that the Defendant's uncertainty as to when he began to lose trust in the Claimant or the evidence of Ms. Crasnianski that she may have said to the Claimant that he may "try to start again" justifies rejection of the Defendant's evidence that he lost trust in the Claimant.

61. I therefore accept the Defendant's evidence that he told the Claimant on 27 June that they needed to trust each other and that he no longer trusted him. The Defendant had in fact concluded that he had lost in trust in the Claimant and so it is likely that that is what he told him.

The claim in contract

62. The case of the Claimant is that the signed letter and term sheet evidenced a binding agreement on each party to do its part to set up such a fund. The object to which both parties were obliged to work was the setting up of a fund with defined characteristics (as to its scale, investment profile, fund manager, and anchor investor, management fees and profit distribution). There were outstanding matters of detail but that they could either be agreed, or failing agreement, resolved by the Claimant during the soft launch. It was accepted that the letter and term sheet did not themselves set up or create a fund.
63. The case of the Defendant is that the letter and term sheet do not evidence a binding agreement, save as to the repayment of advances. There was no intent to create legal relations and the agreement was too vague to be enforceable. It was no more than an agreement to agree. There was no express or implied term that failing agreement the Claimant could resolve matters of detail.
64. The general principles to be applied by the courts when determining whether the parties have made an enforceable agreement have recently been summarised by the Supreme Court in *RTS Ltd. v Molkerei Alois Muller GmbH* [2010] 1 WLR 753. At para. 45 Lord Clarke said:

“Whether there is a binding contract between the parties and, if so, upon what terms depends upon what they have agreed. It depends not upon their subjective state of mind, but upon a consideration of what was communicated between them by words or conduct, and whether that leads objectively to a conclusion that they intended to create legal relations and had agreed upon all the terms which they regarded or the law requires as essential for the formation of legally binding relations. Even if certain terms of economic or other significance to the parties have not been finalised, an objective appraisal of their words and conduct may lead to the conclusion that they did not intend agreement of such terms to be a precondition to a concluded and legally binding agreement.”

65. It was a striking feature of the evidence and cross-examination of the Claimant and of the Defendant (and indeed of other witnesses) that they gave and were asked to give their subjective views on whether the letter and term sheet were legally binding. But that question is to be determined objectively, as has long been established; see *Pagnan SpA v Feed Products Limited* [1987] 2 Lloyd's Rep. 601 at p.610 per Bingham J, *Trentham Ltd. v Archital Luxfer* [1993] 1 Lloyd's Rep. 25 at p.27 per Steyn LJ and *Maple Leaf Marco Volatility Master Fund v Rouvroy* [2009] EWCA Civ 1334 at para. 17 per Longmore LJ. The yardstick has been described as the reasonable expectations of sensible businessmen.

66. I was referred to other passages in well known authorities in support of the proposition that the court should not be astute to find defects in what the parties have agreed but should seek to give effect to what they have agreed. Thus, in *Hillas and Co.Ltd. v Arcos Ltd.* (1932) 147 LT 503 Lord Wright said at p.514:

“Business men often record the most important agreements in crude and summary fashion; modes of expression sufficient and clear to them in the course of their business may appear to those unfamiliar with the business far from complete or precise. It is accordingly the duty of the court to construe such documents fairly and broadly, without being too astute or subtle in finding defects; but, on the contrary, the court should seek to apply the old maxim of English law, *verba ita sunt intelligenda ut res magis valeat quam pereat*. That maxim however, does not mean that the court is to make a contract for the parties, or to go outside the words they have used, except in so far as there are appropriate implications of law, as for instance, the implication of what is just and reasonable to be ascertained by the court as a matter of machinery where the contractual intention is clear but the contract is silent on some detail. Thus in contracts for future performance over a period, the parties may neither be able nor desire to specify many matters of detail, but leave them to be adjusted in the working out of the contract. Save for the legal implication I have mentioned, such contracts might well be incomplete or uncertain; with that implication in reserve they are neither incomplete nor uncertain. As obvious illustrations I may refer to such matters as prices or times of delivery in contracts for the sale of goods, or times for loading or discharging in a contract of sea carriage. Furthermore, even if the construction of the words used may be difficult, that is not a reason for holding them too ambiguous or uncertain to be enforced if the fair meaning of the parties can be extracted.”

67. In *Nea Agrex SA v Baltic Shipping Co.Ltd.* [1976] 1 QB 933 the argument that a clause in a contract was too vague to be enforceable was regarded as a counsel of despair; see Lord Denning at p.943 C-E and Goff LJ at p.948 F-H. Relying upon the statement of principle by Lord Wright in *Hillas v Arcos* it was said that the court should strive to give effect to what the parties have agreed.

68. In *Maple Leaf Macro Volatility Master Fund v Rouvroy* [2009] 1 Lloyd’s Rep. 475 at para. 235 Andrew Smith J said:

“The courts are reluctant to conclude that what the parties intended to be a contractual agreement is too uncertain to be of contractual effect, the more where a party has acted upon it.”

69. One of the authorities relied upon by Andrew Smith J was *Trentham Ltd. v Archital Luxfer* [1993] 1 Lloyd’s Rep. 25 where Steyn LJ observed at p.27:

“The fact that a transaction has been performed on both sides will often make it unrealistic to argue that there was no intention to argue that there was no intention to enter into legal relations. It will often make it difficult to submit that the contract is void for vagueness or uncertainty. Specifically, the fact that the transaction is executed makes it easier to imply a term resolving any uncertainty, or, alternatively, it may make it possible to treat a matter not finalised in negotiations as inessential. ...Clearly, similar considerations may sometimes be relevant in partly executed transactions.”

70. However, it is clear that Steyn LJ should not be regarded as saying that it follows from the fact that work has been performed that the parties must have entered into a binding contract. Rather, it is a very relevant factor pointing in that direction. Whether the court will conclude that a binding contract was made will depend upon all the circumstances of the case; see *RTS Flexible Systems Ltd. v Molkerei Alois Muller* [2010] UKSC 14 [2010] 1 WLR 753 at para. 54 per Lord Clarke.

71. In *Pagnan SpA v Feed Products Limited* [1987] 2 Lloyd’s Rep.601 Lloyd LJ at p.619 outlined and explained the several positions which parties might take.

“(2) Even if the parties have reached agreement on all the terms of the proposed contract, nevertheless they may intend that the contract shall not become binding until some further condition has been fulfilled. That is the ordinary “subject to contract” case.”

“(3) Alternatively, they may intend that the contract shall not become binding until some further term or terms have been agreed; see *Love and Stewart v. Instone*, where the parties failed to agree the intended strike clause, and *Hussey v. Horne-Payne*, where Lord Selborne said at p.323:”

... The observation has often been made, that a contract established by letters may sometimes bind parties who, when they wrote those letters, did not imagine that they were finally settling the terms of the agreement by which they were to be bound; and it appears to me that no such contract ought to be held established, even by letters which would otherwise be sufficient for the purpose, if it is clear, upon the facts, that there were other conditions of the intended contract, beyond and besides those expressed in the letters, which were still in a state of negotiation only, *and without the settlement of which the parties had no idea of concluding any agreement.* [My emphasis].

“(4) Conversely, the parties may intend to be bound forthwith even though there are further terms still to be agreed or some further formality to be fulfilled (see *Love and Stewart v. Instone* per Lord Loreburn at p. 476).”

“(5) If the parties fail to reach agreement on such further terms, the existing contract is not invalidated unless the failure to reach agreement on such further terms renders the contract as a whole unworkable or void for uncertainty.”

“(6) It is sometimes said that the parties must agree on the essential terms and that it is only matters of detail which can be left over. This may be misleading, since the word “essential” in that context is ambiguous. If by “essential” one means a term without which the contract cannot be enforced then the statement is true: the law cannot enforce an incomplete contract. If by “essential” one means a term which the parties have agreed to be essential for the formation of a binding contract, then the statement is tautologous. If by “essential” one means only a term which the Court regards as important as opposed to a term which the Court regards as less important or a matter of detail, the statement is untrue. It is for the parties to decide whether they wish to be bound and, if so, by what terms, whether important or unimportant. It is the parties who are, in the memorable phrase coined by the Judge, “the masters of their contractual fate”. Of course the more important the term is the less likely it is that the parties will have left it for future decision. But there is no legal obstacle which stands in the way of the parties agreeing to be bound now while deferring important matters to be agreed later. It happens every day when parties enter into so-called “heads of agreement”.”

72. In the present case it is not necessary to consider whether the parties have agreed on the essential terms for the creation of a private equity fund because it is not said that the letter and term sheet themselves created a private equity fund. By contrast what is said is that each party agreed to do his part to set up a private equity fund with certain defined characteristics. It is therefore necessary to consider whether the parties agreed on the essential terms for such a contract to be enforced.
73. Counsel for the Claimant submitted that the obligation of each party to do his part to set up the fund was not so uncertain that it could not be enforced. He referred to *IBM UK Ltd. v Rockware Glass Ltd.* [1980] FSR 335 in which Goff LJ said that an obligation to use best endeavours is sufficiently certain to be enforceable so long as the object to be achieved is clear. A similar observation was made in *Insurance Corporation of the Channel Islands Ltd. v McHugh* [1997] LRLR 94 at p.136 by Mance J where the need for an “objective end” was stressed.
74. Counsel for the Defendant submitted that the suggested agreement that each party do his best to set up the fund was in fact an agreement to agree and that any such agreement, like an agreement to negotiate or to negotiate in good faith, lacks sufficient certainty to be enforceable. Reliance was placed on the decision of the House of Lords in *Walford v Miles* [1992] 2 AC 128. Counsel for the Claimant said that the present case was distinguishable from *Walford v Miles* because in the present case the objective to be achieved had been defined, namely, setting up a fund with defined characteristics. The obligation of each party to do his part to set up that fund was therefore sufficiently certain to be enforceable. Counsel for the Defendant said

that there was no express or implied term that each party would do his best to set up the fund but that in any event *Walford v Miles* showed that any such term would be too uncertain to be enforceable. An obligation to do one's best to agree is no different from an undertaking to agree and cannot give rise to an enforceable obligation; see *Little v Courage* [1995] CLC 164 at p. 169 per Millet LJ.

Intention to create legal relations

75. I shall consider this question first and separately from the further question, namely, whether the letter and term sheet were too uncertain to be enforceable and were no more than an unenforceable agreement to agree. However, it may be that, since matters of intention are to be assessed objectively, the questions overlap with each other. Thus the circumstance that an agreement is no more than agreement to negotiate and agree may show objectively that the parties to it cannot objectively have intended it to be legally binding, notwithstanding that it had certain characteristics which otherwise might have evinced an intention to agree, for example, that it was signed by each party. However, in view of the court's reluctance to conclude that what the parties intended to be a contractual agreement is too uncertain to be of contractual effect, it is probably appropriate that I should consider the questions separately and first decide whether the parties had an intention, assessed objectively, to create legal relations before considering whether the agreement they made is too uncertain to be enforceable.
76. In this case the letter and term sheet were indeed signed. The fact of signing the term sheet and accompanying letter is a cogent indication that each party intended to be bound by so doing. However, it is not conclusive. The contents of the term sheet and the letter must also be examined. For they may lead to the conclusion that, objectively, the parties did not intend to create legal relations notwithstanding that they signed the term sheet and accompanying letter.
77. Both parties relied on the terms of the letter. Thus counsel on behalf of the Claimant relied upon the reference in the third paragraph to "main terms" and suggested that they were clearly contractual terms. Reliance was also placed on the final sentence of the letter which ends as follows:

"...we can crystallise our partnership by both signing the agreed version of the Term Sheet."

The reference in the manuscript addendum to "*ce contrat*" ("this contract") was said to evince an intention that the term sheet was intended to create legal relations.

78. Counsel on behalf of the Defendant subjected the terms of the letter to a detailed textual analysis in support of the submission that the letter included express representations that the letter was a letter of intent anticipating the possibility of future contracts. Further, the calendar of events was said to represent that the letter was only a letter of intent. Many points were made but particular reliance was placed on the third sentence of the letter which states as follows:

"The exact structure of the fund and the form and location of its various entities would be defined during the first three months

of the Fund (a period referred to below as “Soft Launch”); therefore some names and entities appear in brackets.”

79. In the calendar of events from March to October 2007 reliance was placed in particular on the reference to the “drafting of the first legal documents” in April-June.
80. Whether the parties intended to enter a contract, that is to create legal relations, depends not upon a detailed textual analysis but upon “how a reasonable man versed in business would have understood the exchanges between the parties” (per Andrew Smith J in *Maple Leaf Macro Volatility Master Fund v Rouvroy* [2009] 1 Lloyd’s Reports 475 at para. 223).
81. In my judgment the reasonable businessman would have understood the signed letter and term sheet as being legally binding. He would have understood that the signing of each page of the letter and term sheet indicated an intention that the signed documents were intended to be legally binding. It is difficult to envisage what else the signing of the documents, after they had been considered in draft by both parties, was intended to convey. The wording of the letter acknowledged that the exact structure of the fund remained to be defined and that several legal documents remained to be drafted and agreed but the reasonable businessman would have understood that the main terms of the fund had been agreed in the term sheet and that each was obliged to do his part to bring about the formation of that fund. In particular, the Defendant was to make an advance for payment of legal fees and management fees to fund the Claimant during the soft launch period when he was “dedicating his professional time” to setting up the fund. The reference in the letter to the soft launch period “giving us the proper time to structure the Fund optimally” indicated that each was to do his part to set up the fund. Shortly after signing the letter and term sheet the Claimant resigned from Platina, as contemplated by the letter, and the Defendant made an advance of the first quarter of fees, as provided by the letter and term sheet. Those events are consistent with both parties intending to be legally bound by signing the letter and term sheet.
82. I have reached that conclusion without needing to rely upon the words “*ce contrat*” in the manuscript amendment to the term sheet. However, those words support my conclusion. To restrict them to the agreement to repay does not appear to make sense because there is no reason why that agreement should be confidential but not the rest of the letter and term sheet.
83. A particular point was made on behalf of the Defendant with reference to the provision made for a Temporary Service Agreement. It was said that the express term in the term sheet providing for such an agreement to govern the work of the Claimant during the soft launch showed that the letter and term sheet themselves could not have been intended to be a binding contract. I do not accept that submission. The term sheet, section 7, set out what the Claimant was to do during the soft launch and, together with the letter, provided for an advance of management fees to be made by the Defendant to finance the soft launch. The parties contemplated that there would be a Temporary Service Agreement but I do not consider that, in its absence, the parties intended that the letter and term sheet would not be legally binding. It is, in my judgment an example illustrating the following comment of Lloyd LJ in *Pagnam SpA v Feed Products Limited* [1987] 2 Lloyd’s Rep. 601

“Conversely, the parties may intend to be bound forthwith even though there are further terms still to be agreed or some further formality to be fulfilled (see *Love and Stewart v. Instone* per Lord Loreburn at p. 476).”

84. That that must have been so is indicated by the circumstance that although the Claimant began the tasks contemplated by the term sheet and the Defendant paid the advance neither party suggested that such tasks could not be commenced unless and until a Temporary Service Agreement was made.
85. Another point was made as to the manuscript amendment. It was said that it evidenced that the letter and term sheet were not intended to be legally binding. The argument went as follows. The letter contemplated that the Defendant would make an advance in April but that the soft launch period would not commence until July. Thus, if the Claimant did not resign from Platina and did not commence the soft launch, the Defendant would be unable to recover the advance. The manuscript amendment was necessary to provide that obligation. The amendment therefore shows that the letter and term sheet were not intended to be legally binding. I am not persuaded by this argument. There was no express provision for repayment of the advance in the event that the Claimant did not commence work on the soft launch. Rather than rely upon arguments based upon an implied term or on a claim in restitution the Claimant required an express remedy. The addendum provided an express remedy. But it does not follow from the provision of an express remedy that the parties cannot have intended to be legally bound by the letter and term sheet. The addendum is consistent with there being such an intention but with the Defendant requesting and getting the comfort of an express remedy to recover the advance.
86. Counsel on behalf of the Defendant submitted that, whatever the parties’ objective views were, the Claimant’s subjective view was that the letter and time sheet were not binding and that he appreciated that that was also the subjective view of the Defendant. In support of that submission he relied upon the Claimant’s email to SJ Berwin on 9 May 2007 (see above), his email to Daljit Singh on 13 June 2007 (see above) and an email to Mr. Reckinger, a banker, on 1 January 2008 in which the Claimant said that he would never have drawn down the €150,000 “before finishing his discussions with” the Defendant. These emails were said to evidence a recognition by the Claimant that the letter and term sheet were not binding and an appreciation that the Defendant was of the same view. This submission was made in order to rely upon the following passage in the judgment of Andrew Smith J in *Maple Leaf Macro Volatility Master Fund v Rouvroy* at para. 288:

“However, there are circumstances in which the parties to what would objectively be held to be contractual are not legally bound by it under English law. If the other parties actually and reasonably believed that the defendants intended to make a contract, there would be a concluded contract, but not if the other parties knew or would reasonably have believed that that was not the defendants’ intention and not, in my judgment, if the other parties had simply formed no view one way or the other as to whether the defendants so intended. That is the opinion expressed by Professor Sir Gunter Treitel in *Chitty on Contracts*, 30th Edition, 2008, at para 2-004, and I agree with

it. The defendants submit that they are not contractually bound even if on an objective assessment they and the claimants evinced an intention to be bound.”

87. The Defendant rarely committed his thoughts to paper. There is no contemporaneous document evidencing his subjective view of the letter and term sheet. His oral evidence that the parties referred to the term sheet as a “lettre d’intention” is unreliable. The correspondence referred to it as a term sheet. I am not therefore able to base a finding as to his subjective intention on his oral evidence. The best guide to his intention is his conduct. Shortly after signing the letter and term sheet, and renegotiating the terms as to expenses, he paid the Claimant the reasonably significant sum of €12,500. It seems to me probable that he did so because he thought he was legally bound to make such an advance. However, the manner in which he informed the Claimant that their collaboration was over (a telephone call) and his stated reason for doing so (a loss of trust) make it unlikely that he thought that he was legally bound to do all that was necessary to set up the fund.
88. For his part the Claimant probably considered that he was bound by the letter and term sheet to resign from Platina and to commence the soft launch of the fund. He resigned very shortly after signing the letter and term sheet and in mid-April contacted S.J. Berwin with a view to drafting the required documents. The fact that the Defendant made the advance of €12,500 no doubt indicated to the Claimant that the Defendant recognised that he was bound to do so. However, the emails upon which reliance is placed by counsel for the Defendant demonstrate, at the very least, a nervousness on the part of the Claimant that the Defendant might not agree to sign the legal documents which would be necessary to constitute the fund. The email dated 13 June 2007 expressly recognises that the Defendant might not sign the required documents. That might be inconsistent with a subjective understanding on the Claimant’s part that the Defendant was legally bound to sign the required documents, though it may be that it simply indicates a fear on the part of the Claimant that, notwithstanding the letter and term sheet, the Defendant might be reluctant to sign the required documents. My conclusion is that whilst it is unlikely that the Claimant thought that he and the Defendant were legally bound to sign the required documents, he probably thought that they were bound to do their best in good faith to bring about the formation of the fund.
89. I do not consider that my findings as to the subjective intentions of the parties bring into play the statement of principle by Andrew Smith J on which reliance is placed or require me to put to one side my findings as to the parties’ intentions, objectively assessed.

Certainty and enforceability of terms

90. It was submitted on behalf of the Defendant that whilst the letter and term sheet set out the broad commercial basis for negotiations between the parties they were incomplete, uncertain and plainly anticipated further negotiations. In essence the submission was that certain aspects of the fund structure required subsequent resolution (those which appeared in brackets in the term sheet and those which appeared as alternatives in the term sheet) and others required further definition. More generally, the agreement that each party do his part to set up the fund was no more

than an agreement to negotiate. It is well established that such an agreement is not enforceable.

91. The response to this argument on behalf of the Claimant was, firstly, that the main, essential, terms had been agreed such that the agreement was workable and, secondly, that although details required to be finalised, they could, in the absence of agreement be finalised by the Claimant so long as he did so in a manner which was consistent with the term sheet.
92. In order to resolve these arguments it is necessary to have in mind what is involved in setting up a private equity fund. A private equity fund (in the sense in which that phrase is used in this case) is a series of interlocking structures and agreements. They may include a Limited Partnership forming “the Fund”, made up of a General Partner of the Fund and a Carry Partner (often a Scottish Limited Partnership which “carries” the interest or profit earned by the fund managers) and a Limited Liability Partnership forming the “Fund Advisor”. Those structures are supported by agreements governing the relationships between the entities forming the private equity fund and include a service agreement between the Fund Advisor and the General Partner and a management agreement between the members of the Carry Partner and the General Partner.
93. In the present case the nature of certain of the component parts of the fund had been agreed. Thus, the fund was to be a Limited Partnership. It was to be managed by its General Partner which was to be an entity “majority owned or controlled” by the Defendant. The Carry Partner was to be a limited partnership and the Advisor was to be a UK entity owned or controlled 50-50 between the Claimant and the Defendant. But certain matters in the term sheet were in brackets which meant that they remained to be defined, that is, agreed; see the third paragraph of the letter. Thus the domicile of the Limited Partnership forming the fund and the domicile of the General Partner were described as “[non-UK]” which meant that they remained to be defined. Whether the Advisor was to be a UK limited company or a UK partnership was also expressly left “to be defined”. These outstanding matters explain why the letter provided that the “exact structure of the fund and the form and location of its various entities” remained to be defined. The Service Agreement between the General Partner and the Advisor also remained to be drafted and agreed. It was not suggested that either the letter or the term sheet indicated any objective criteria by reference to which the parties were to determine such matters or by reference to which the court could determine such matters in the absence of agreement.
94. Thus, although the Claimant’s case is that each party had an obligation to do his part “to set up” the fund, that obligation is in truth an obligation on each party to do his part to agree upon the structures and other agreements which together would form the private equity fund, in so far as such matters had not already been agreed. Without such further agreement the fund could not be set up, notwithstanding that “the main terms of our partnership” had been defined in the term sheet.
95. In my judgment the agreement into which the Claimant and Defendant entered by signing the letter and term sheet was in essence an agreement to agree upon the exact structure of the fund and the form and location of its various entities together with the other necessary agreements, notwithstanding that much of the structure and form had already been agreed and that a timetable for agreeing the exact structure, form and

location had been agreed. The Claimant and the Defendant agreed that each would do his part to agree or “define” the exact structure form and location of the entities forming the fund but such an agreement is no different from an agreement to agree; see *Little v Courage* [1995] CLC 164 at p.169 per Millett LJ. I accept that the object to be achieved was not wholly or completely indefinite and indeed that much of the structure and characteristics of the fund had been agreed. But sufficient remained to be agreed that the agreement evidenced by the letter and term sheet was in reality an agreement to agree with no indication of any objective criteria by reference to which agreement was to be reached on those matters which had not been agreed. Such an agreement is not recognised by the law as giving rise to enforceable obligations; see *Walford v Miles* [1992] 1 AC 128 and *Multiplex Constructions v Cleveland Bridge* [2006] EWHC 1341 (TCC) at paragraphs 634-637 per Jackson J.

96. It is to be expected that the Defendant, who resides in Switzerland (but who also has a house in London) would wish to be advised as to the fiscal consequences of making choices as to the domicile and nature of the various entities, in so far as they were not already defined in the term sheet. S.J. Berwin’s structure memorandum dated 20 June 2007 expressly contemplated (see para. 7.1) that the key documents would need to be reviewed from a tax perspective. Thus a reasonable businessman would understand that, before the Fund was set up, the Defendant would have had to agree to the domicile and nature of the structures (in so far as they had not already been defined and agreed in the term sheet).
97. Counsel for the Claimant sought to answer this point by saying that since the term sheet contained no obligations or stipulations as to tax efficiency the Defendant was not entitled to reject any structure on such grounds. However, the determination of the domicile and nature of the structures of the fund (in so far as not defined by the term sheet) would be largely dependent upon fiscal considerations. The suggestion that because the term sheet made no provision with regard to fiscal matters the Defendant had lost the opportunity to negotiate questions of domicile and structure (in so far as these had not already been agreed) with a view to optimising his tax position seems to me to be wholly unrealistic.
98. Mr. Adams gave evidence that he could have drafted a structure consistent with the term sheet. He referred to “implementing something which had already been set out in a businessmen’s short form of contract.” However, whilst this is no doubt true to the extent that matters had been agreed it is difficult to see how he could implement that which had not been agreed. For example, in the absence of agreement as to the domicile of the General Partner, he would not know where to establish the entity which would form the General Partner. He could no doubt have advised as to where it might be domiciled but before establishing such an entity he would have had to await the parties’ agreement on that matter.
99. On behalf of the Claimant it was accepted that “certain matters of detail remained outstanding at the time of signing the term sheet.” Whilst it was not suggested that the letter and term sheet contained or indicated any objective criteria by which such matters could be agreed by the parties or, in the absence of agreement, determined by the court it was submitted that, if and in so far as those matters were not settled by negotiation and agreement, the Claimant was entitled to determine them unilaterally, so long as he did so in a manner which was not inconsistent with the term sheet. This therefore, on the Claimant’s case, was the intended and agreed method by which the

outstanding matters could be made certain. The fact that this submission was made reflected the non-enforceability of an agreement to agree. It was the “essential” term which was required to make the agreement workable.

100. In support of this submission reliance was placed on part 7 of the Term Sheet, entitled “Soft Launch Period” which provided as follows:

“SC [the Defendant] and KFD [the Claimant] will enter into a Temporary Service Agreement under which KFD, acting as a consultant, will dedicate his professional time to:

-structure the Fund, the Partnership(s) and the other relevant entities;

-set-up the General Partner and the Advisor;

-finalise the Service Agreement between General Partner and Advisor;

-launch the recruitment process the investment team members, ...

-more generally to do all that is necessary to successfully achieve a Full Launch within the agreed timeframe”

101. In my judgment the Claimant’s suggested construction of part 7 of the Term Sheet does not give the Term Sheet the meaning which it would reasonably be understood to bear. A provision enabling the Claimant to decide upon the structure, form and location of the fund could be agreed but very clear words would be required to achieve such a meaning. That is because the parties would reasonably expect such matters to be subject to agreement rather than fixed by one party against the wishes of the other party. That is especially so where the matters remaining to be agreed include questions of domicile which would be known to have fiscal consequences. There are no such clear words in part 7. The words relied upon in part 7 envisage that the Claimant will be obliged to devote his time to the stated tasks. That does not mean that he can himself determine the detail of the fund structure, merely that he should do whatever he can to ensure that the parties reach agreement on such matters as remain to be agreed. The letter contains the phrase “giving *us* the proper time to structure the Fund optimally” (emphasis added) which contemplates agreement rather than a binding unilateral decision.

102. In support of his submission counsel for the Claimant relied upon the decision of Andrew Smith J in *Maple Leaf Macro Volatility Master Fund v Rowvroy* [2009] 1 Lloyd’s Rep. 475. In that case the claimant agreed to provide funding to the defendants to enable them to finance the purchase of warrants in a company. The warrants were to be transferred to a special purpose vehicle (SPV) or a share acquisition vehicle (SAV) and to stand as security for repayment of the funding. One of the defendants’ arguments was that the agreement was too uncertain to be enforceable because it did not specify how key aspects of the agreement were to be implemented, in particular about the SPV: who its members were to be; who its directors were to be; and so forth. Andrew Smith J. did not accept that argument. He

held that in circumstances where the defendants were “to take all steps to establish the SAV” the defendants were afforded discretion as to the nature of the SPV that they established and that they were obliged to establish a SPV that would give effect to the agreement.

103. It seems to me that the circumstances of the present case are materially different. The creation of the structures and agreement forming the private equity fund required the consent of the Defendant. In *Maple Leaf Macro Volatility Master Fund v Rouvroy* the defendants were able to set up the SPV or SAV themselves.
104. I have given particular consideration to the question whether, in circumstances where the parties objectively intended that the letter and term sheet were binding documents the court should construe section 7 of the term sheet in the manner suggested as a means of giving effect to the parties’ intentions. To do so would prevent the law being used to declare unenforceable an agreement into which the parties have deliberately entered; see the views of Longmore LJ *Petromec v Petroleo Brasileiro* [2006] 1 Lloyd’s Rep. 121 at paragraphs 115-121. However, I do not consider that this is possible when the aim and object of the letter and term sheet, namely, the setting up of the fund, requires the subsequent agreement of the parties on matters which have not been agreed and which are not the subject of objective criteria and where the matters to be agreed concern matters of form and domicile which can be expected to affect each party in different fiscal ways and so to require their agreement.
105. I therefore conclude that the agreement contained in the letter and term sheet that each party would do his part to set up the fund is unenforceable because it did not contain the terms which were essential for such an agreement to be enforced. Although many aspects of the fund had been agreed the agreement was an agreement to agree in respect of those matters which remained undefined.

The claim in Partnership

106. The Claimant had an alternative claim that he and the Defendant had entered into a partnership. However, it does not appear to me that this adds anything to the claim. If there was an enforceable contract between the parties to “set up” the fund the partnership argument is unnecessary. If there was no enforceable contract to “set up” the fund because it was in reality an agreement to agree then I do not understand how there could be an enforceable partnership to “set up” the fund. It would not be enforceable for the same reasons. I will therefore say nothing more about the alternative claim in partnership.

Repudiatory breach

107. It is unnecessary to consider the question whether the Claimant committed a repudiatory breach such that the Defendant was entitled to terminate the agreement but I shall do so in case I am wrong as to the non-enforceability of the agreement evidenced by the letter and term sheet. Counsel for the Defendant accepted that the core of his case on repudiation was that the Claimant was unwilling to give the Defendant the control of the General Partner to which he was entitled under the letter and term sheet. This is based upon the circumstance that the structure outlined by S.J. Berwin provided for the General Partner to be wholly owned by the Advisor which in turn was owned or controlled 50/50 by the Claimant and the Defendant. This change

had been suggested in order to make the structure more cost effective with regard to VAT. However, whilst the Claimant was willing to accept such change I do not accept that he was willing to accept such change in circumstances where it was not accepted by the Defendant or that he was unwilling to give the Defendant control of the General Partner. The Claimant's email of 21 May 2007 to S.J. Berwin shows that when Mr. Peurois raised the point the Claimant required it to be addressed. Mr. Adams of S.J. Berwin appreciated that a way had to be found of providing control to the Defendant and Mr. Peurois' manuscript notes on the diagram of the structure forming part of S.J. Berwin's memorandum dated 20 June showed that one suggestion, giving the Defendant control of the Investment Committee, had been communicated to him, notwithstanding that the Claimant, at his meeting with S.J. Berwin on 15 June, may have been reluctant to give the Defendant the casting vote. I therefore do not accept that the Claimant repudiated the letter and term sheet by being unable or unwilling to grant the Defendant control of the General Partner in accordance with the letter and term sheet even though an acceptable way of doing so had not been identified by 27 June. Thus if there were an enforceable agreement the Defendant would not have been entitled to terminate it on 27 June.

Damages

108. If the letter and term sheet were enforceable (contrary to my view) and the Defendant repudiated that agreement on 27 June when he brought it to an end it would be necessary to consider what, if any damages, were recoverable for that breach. I shall set out my views on this in case they are required. The Claimant has advanced a claim for damages in the sum of £11,351,519. The claim was not advanced on the basis of identifying the companies in which the fund would have been invested and predicting how such investments would have turned out. The claim was put on the basis that, by reason of the Defendant's (assumed) breach, the Claimant lost the chance of earning "carry interest" on the private equity deals that he would have done with the Defendant's €50m. The claim assumes that in the years from 2008-2010 two deals would have been done each year at €7.5m. each and that, on average, they could be expected to give a return of 2.5 times the capital invested in the years 2012-2014. In reality the returns could be very much greater or very much less than the capital invested. However, a return of 2.5 times was said to be a fair reflection of the value of the chance which the Claimant had lost.
109. On behalf of the Defendant it was submitted that no such damages could be proved because, in circumstances where the Defendant had lost trust in the Claimant, he would be expected to exercise his right (which he had by reason of controlling the General Partner) to veto the investments suggested by the Claimant. There would therefore be no carry interest. This submission was based upon the "minimum performance" principle recently discussed by the Court of Appeal in *Durham Tees Valley Airport Limited v BMIBaby Limited* [2010] EWCA Civ 485. It was summarised by Patten LJ at paragraph 79 (with which Toulson LJ agreed at para. 147 and Mummery LJ at para. 150) in these terms:

"The court, in my view, has to conduct a factual inquiry as to how the contract would have been performed had it not been repudiated. Its performance is the only counter-factual assumption in the exercise. On the basis of that premise, the court has to look at the relevant economic and other

surrounding circumstances to decide on the level of performance which the defendant would have adopted. The judge conducting the assessment must assume that the defendant would not have acted outside the terms of the contract and would have performed it in his own interests having regard to the relevant factors prevailing at the time. But the court is not required to make assumptions that the defaulting party would have acted uncommercially merely in order to spite the claimant. To that extent, the parties are to be assumed to have acted in good faith although with their own commercial interests very much in mind.”

110. Thus the question is, had the Defendant not brought the venture to an end, how would the Defendant have acted when asked by the Claimant to approve the investment of the Defendant’s money in companies selected by the Claimant. By reason of controlling and/or owning the majority of the General Partner he would have had the right to veto any investment. It seems to me more likely than not that the Defendant, having decided that he could not trust the Claimant for the reasons which I have described, would not have been willing for his money to be invested on the advice of the Claimant or for those investments to be managed by the Claimant. In so acting the Defendant would be acting in what he perceived to be his best commercial interests and would not be acting to spite the Claimant or otherwise in bad faith.
111. I therefore consider that the Claimant is unable to prove that he has made a loss calculated by what he might have earned from investing the Defendant’s money. The Defendant would have exercised his right to veto the Claimant’s investment proposals.
112. The Claimant had an alternative claim to damages based on the reliance measure of loss. This claim sought to assess what he had lost by resigning from Platina, namely, £7,551,309, being his assumed share of the carry interest at Platina had he remained there.
113. However, an award of damages based upon the reliance measure of loss cannot put the claimant in a better position than that in which he would have been in had the contract been performed; see *Omak Maritime Limited v Mamola Challenger Shipping* [2010] EWHC 2026 (Comm) and [2011] 1 Lloyd’s Rep. 47. Had the contract been performed, and had, as is more likely than not, the Defendant chosen to veto the investments suggested by the Claimant as would have been his right under the term sheet, the most that the Claimant would have obtained from the agreement evidenced by the letter and term sheet would have been his salary for 3 years. (The Defendant was entitled to terminate the agreement if no investment was made for 3 years.)
114. It is unclear which version of the business plan formed part of the agreement. One version provided for a salary inclusive of bonus of £200,000 per annum; the other provided for a salary of £150,000 plus a bonus dependent upon performance of 33% (or 30% according to the term sheet). Since the term sheet provided that day to day decisions were to be managed by the Claimant and that matters relating to compensation and bonus were to be disclosed to the Defendant it perhaps does not matter which version was incorporated because it is plain that the Claimant would

have awarded himself a bonus bringing his compensation plus bonus to £200,000 per annum.

115. It was suggested that the Claimant had failed to mitigate his loss. He certainly acted unreasonably by including untrue statements in his c.v. However, it was not suggested to him in cross-examination that there were particular opportunities open to him which were lost by reason of such statements. Indeed there was very little if any cross-examination on the subject of mitigation. It appears that he may have turned down a job at Clermont in late July 2007 on the grounds that it was too like the role he had at Platina but I am not persuaded that he was unreasonable in declining it for those reasons so soon after the collaboration with the Defendant had come to an end. By the time of the worldwide financial crisis in late 2007 job opportunities must have been limited. Whilst I am surprised that someone of the Claimant's ability did not find some alternative employment in the financial world before the expiry of three years no particular opportunity was identified in evidence. In those circumstances I do not consider that I can properly hold that he unreasonably failed to mitigate his loss. The burden of proving that lies on the Defendant. So if it had been necessary to assess damages I would have assessed them in the sum of £600,000, that is, three years' salary at £200,000 per annum.
116. Had I held, contrary to my finding, that the Defendant would have approved the investments proposed by the Claimant (and would not have limited his investment to €30m. as was his right) it would have been necessary to quantify damages on that basis. The Claimant did not seek to identify particular investments which he would have made and what their return would have been. Rather, he said that he lost the opportunity or chance of making profitable investments and that that lost opportunity or chance had a value which could be assessed by reference to the average returns of similar investments. His damages schedule assumed an average return of 2.5 times the original investment over a period of 4 years.
117. The Claimant wished to invest the Defendant's money in distressed companies and turn them around. It was investment with a high degree of risk, but also the chance of substantial reward. When at Platina he had been involved in the running of a fund which, on the evidence available to me, produced sale or "exit" proceeds of 2.9 times the initial investment in four companies. Two were successful (with exit proceeds of 5.7 and 4.9 times the initial investments) and the results of the other two were unknown so that a total loss was assumed.
118. The Claimant's expert, Mr. Gresh, referred to statistical evidence concerning small private equity funds from 1980-2004 which showed average exit proceeds of 1.78 times the initial investment. Having regard to the Claimant's track record he thought that exit proceeds of 2 to 2.5 times the initial investment were realistic and therefore thought that the assumption in the Claimant's schedule of 2.5 times the investment was "entirely reasonable and defensible." The Defendant's expert, Mr. Ascott, also referred to statistical evidence concerning small MBOs from 1996 to 2009 which showed average exit proceeds of 1.78 times the initial investment. However, when regard was had to the reduced number of investment opportunities since 2007, to the fact that Platina made only two investments in 2008-2010 and to the fact that identifying good opportunities would be difficult for a recently formed fund he thought that 2.5 times the investment was an unrealistic assumption to make. He thought that the likely exit proceeds would be "much lower" than 1.78. Mr. Gresh was

unmoved by these concerns. He agreed that private equity activity had declined since 2007 but pointed out that there was still sufficient “turnaround activity”, that “investment vintages in difficult times produce higher returns than during boom years” and that new funds were experiencing less competition in 2008-2010 as existing funds were concentrating on managing their exposure during the downturn.

119. So far as market conditions post-2007 for a small private equity fund are concerned I preferred the views of Mr. Ascott. The willingness of Mr. Gresh to support the assumption of a multiple of 2.5 when it was so much higher than the statistics suggested and when full details of what had happened to all four Platina investments were not available made me wary of accepting his opinion. Although the economic and financial conditions might provide opportunities for new funds untroubled by the havoc caused in financial markets in 2007 it seems to me that there was sense in Mr. Ascott’s opinion that the effects of the recession and economic downturn will be, or may be, felt for some years to come and that exit multiples are likely to be depressed for some time.
120. So far as the Claimant’s track record at Platina is concerned it is difficult to make a judgment because, although two out of four investments were very successful, the exit results of the other two are not known. However, the CEO of one of the successful investments (in a statement which was not challenged) spoke highly of the Claimant. The Claimant worked at Platina from 2002 to 2007 as the Investment Director where his responsibilities included origination, valuation, structuring, negotiation, financing, monitoring and exiting. Before that he had worked in 2001 for Deutsche Bank Capital Partners, from 1998-2000 for a private equity backed holding of food businesses in Pakistan and the UAE and from 1993 to 1998 in the private equity arm of JP Morgan. He could therefore claim to be an experienced private equity professional, although it does not appear that he had ever had ultimate responsibility for initiating and running a private equity fund. I consider that he would have worked diligently, and perhaps with a degree of flair, to seek out appropriate investment opportunities and manage them successfully.
121. In being deprived of the loss of the opportunity to invest the Defendant’s money I consider that the Claimant lost “something of value” (to use the expression of Fletcher Moulton LJ in *Chaplin v Hicks* [1911] 2 KB 786 at p.796). Although the value of that which has been lost cannot be assessed with certainty or precision the court must do its best to estimate the value of that which has been lost.
122. I am not satisfied that the lost opportunity can be assessed on the assumption that the investments made by the Claimant could be expected to result in average exit proceeds of 2.5 times the investment. That would be a result substantially greater than the statistical evidence would suggest is likely. It is not made likely by the circumstance that the Claimant is an experienced private equity professional. No doubt many of the funds whose results are included in the statistics were run by experienced private equity professionals. I am also not persuaded that an average exit return of 1.78 times the investment is likely to have been achieved. First, that was an average over many years and yet the funds would be invested at a time when there were fewer investment opportunities than before and when market conditions suggest that exit returns may be depressed, although I accept that there is evidence that superior results can be obtained by investing during a downturn. Second, the damages calculation assumes that the exits would take place between 2012 and 2015 and so a

degree of crystal ball gazing is required. It is not known what the economic or financial climate will be like then. Some attention was given to the exit return of 1.05 for the recessionary period of 2000-2004 in the statistics relied on by Mr. Gresh. Whatever the explanation for that very low figure Mr. Ascott did not suggest, although he referred to it, that it indicated the sort of return likely in the recessionary period post-2007. Rather, he suggested that the likely return in such conditions would be lower than 1.78.

123. Doing the best I can on the evidence available to me I consider that the value of the chance lost by the Claimant should be assessed on the basis that the average exit proceeds are no better than 1.5 times the average investment. I also consider that the period of return should be 5 years rather than 4 years for the reason given by Mr. Ascott, namely, the deteriorating economic environment after 2007. Having regard to market conditions and the fact that Platina only made two investments post-2007 the assumption of two investments per year appears to be optimistic. I consider that one investment per year of the size assumed should be used. Finally, a deduction should also be made to reflect the benefit of an accelerated payment. This has not been calculated but should be allowed for at the rate of base rate plus 1%. (The Defendant suggested it should be allowed at a higher rate but there seems to me force in the Claimant's contention that it should be allowed at base rate plus 1% because that rate is the corollary of the interest rate usually allowed in this court.) I will leave the parties to calculate the value of the resultant loss, should the figure be required. I was told that it could be easily calculated once I had made my decision as to the appropriate multiple and other variables.

Counterclaim

124. The Defendant counterclaimed the return of his advance payment of €12,500 pursuant to the manuscript amendment to the term sheet on the basis that the soft launch had not begun or "taken off". However, the soft launch had begun, albeit rather earlier than contemplated by the calendar in the letter. I therefore do not order the return of any money on that account.
125. The Defendant's alternative claim was for the return of the monies paid to the Claimant in so far as they were not reasonably expended on the soft launch.
126. Little attention was paid to this counterclaim during argument but it was submitted on behalf of the Claimant that the addendum provided an exclusive code for the recovery of the advance by the Defendant. I approach this matter as follows. In the absence of the addendum there would have been a claim in restitution for repayment of the advance if it had not been expended on the purposes for which the advance had been made. Such a claim could only be lost by clear words. I do not consider that the words of the addendum are clear enough for that purpose. They are consistent with giving an additional express remedy.
127. Pursuant to the agreement of 30 March the sum of €12,500 had been advanced for the first quarter of the hard launch. The hard launch was never achieved and so that sum was never expended on the purposes for which it had been advanced. In principle it is repayable.

128. However, the Claimant was to receive £50,000 by way of fees for the soft launch. Although the sum was payable at the start of the hard launch (which event never occurred) the Claimant worked on the soft launch and incurred £9,347 in expenses in so doing. No express provision was made for the expenses of the soft launch but the Claimant accepted that the effect of the 30 March agreement was that the fee of £50,000 was to cover both compensation for his work and reimbursement of expenses. There was no dispute that legal expenses were to be paid by the Defendant though in the event the Claimant paid the fees of S.J. Berwin in the sum of £18,038 plus VAT.
129. In my judgment the amount of the advance which the Claimant must reimburse to the Defendant in restitution ought in fairness take account of the Claimant's fee for the soft launch (on which he worked from about 10 April until 27 June 2007, that is a little under 3 months, and about the length of the anticipated soft launch) and the sum he paid in respect of legal fees.
130. In the result the Claimant must repay what is left of the advance after deducting £50,000 and £18,038 plus VAT. I will ask the parties to calculate and agree the resulting figure.

Conclusion

131. The Claimant's claim is dismissed and the Defendant's counterclaim succeeds in part.

Appendix

KARIM-FREDERICK DHANANI

Mr. Serge Crasnianski
20 Cheyne Row
Chelsea

London, 23 March 2007

Dear Serge,

Following our recent discussions, this letter confirms my interest to set up a private equity fund (the "Fund") of which you would be the main sponsor. I strongly believe that there is a great opportunity to create long term value for a few involved investors by pursuing a focused strategy in selected markets.

The fund would be a partnership between you and me, reflected in a 50-50 ownership of [Aramis Advisors], the UK entity entrusted to advise the Fund and which would employ the investment team (the "Advisor"). [Aramis Advisors] would enter into a service agreement with the Fund, represented by its General Partner, an [off-shore] entity controlled by you.

The exact structure of the fund and the form and location of its various entities would be defined during the first three months of the Fund (a period referred to below as "Soft Launch"); therefore some names and entities appear in brackets (" "). In the attached Term Sheet, I define the main terms of our partnership.

The objective would be to fully launch the fund in September 2007. A calendar could be as follows:

- March Signature of Term Sheet
- April Advance for legal set-up costs
Advance of first quarter of fees
Start of notice period KFD (assumed 3 months)
Start of non-compete period (assumed 6 months)
- April-June Notice period KFD
Drafting of first legal documents, such as Service Agreement between General Partner and Advisor, and a Temporary Service Agreement between you and I, covering the Soft Launch period (giving us the proper time to structure the Fund optimally)
- July-September Soft Launch period
Fees start running (they were advanced in April)
Work performed under Temporary Service Agreement
Structuring of the Fund, the Partnership(s) etc.
Set-up of the General Partner and the Advisor
Signing of the Service Agreement between General Partner and Advisor
Recruitment process launched for investment Director, Investment Manager and team assistant
- October Full Launch
Team on-board
Marketing target markets for deal flow
Fund raising (additional commitments), until April 2008

7 Admiral Square - Chelsea Harbour - London SW10 0UU
Tel: +44 7786 921 530 - email: karim.dhanani@mobilemail.vodafone.net

I am truly excited at the opportunity to work with you, Jean-Luc and a team of strong professionals and build a recognized private equity brand, over the long run.

Together with the Business Plan provided separately, this letter and its attached Term Sheet are drafts for discussion. I would be very happy to review these documents with you at your best convenience so that we can crystallise our partnership by both signing the agreed version of the Term Sheet.

Yours sincerely,



Karim Dhanani



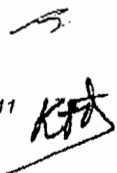
**[ARAMIS] CAPITAL LIMITED PARTNERSHIP
TERM SHEET**

1. Parties

Fund	:	[Aramis] Limited Partnership, a [non-UK] partnership, managed by its General Partner <i>Please refer to Appendix for a chart of all parties</i>
General Partner	:	[Aramis Equity] Ltd., a [non-UK] entity, majority owned and/or controlled by SC, advised by Advisor Other LPs who, alone or jointly, represent a commitment of at least €10m may be represented at the Board of General Partner and hold a minority stake in General Partner, proportionally to their commitment to the Fund
Limited Partners	:	The investors in the Fund, including SC and KFD
Team LPs	:	KFD and other investment team members (and their families) who commit to the Fund
Other LPs	:	Limited Partners other than SC and Team LPs
Carry Partner	:	[Aramis Equity Partners] Limited Partnership, a special limited partner in the Fund, a [UK / Scottish] partnership, entitled to receive the carried interest distributions, and whose partners shall be the members of the investment team or trusts of which they are the beneficiaries
Advisor	:	[Aramis Advisors], a UK limited company or a UK partnership including a limited company (to be defined), which will advise General Partner under a Service Agreement; Advisor will be owned and/or controlled 50-50 between SC and KFD
SC	:	Serge Craenlanski, a Swiss resident, or, in some cases, any entity 100% controlled by him
KFD	:	Karim Dhanani, a Belgian citizen, resident at 7 Admiral Square, London SW10 0UU, or, in some cases, any entity controlled by him, subject to SC approval

2. The Fund

Investors	:	SC, main sponsor, with a commitment of €50m; after a first tranche of €30m has been invested, SC and KFD will review the Fund's performance to date, following which review, SC will have the right to reduce his commitment to €30m or more KFD, with a commitment of €2m
Full Launch	:	[1 October 2007]



- Fund raising** : Open until April 2008 for third-party investors, subject to a minimum investment of €3m;
Open until October 2008 for investment team members (and their families)
- Fund Maximum Size** : The maximum size of the Fund is such that SC's commitment will represent at least 51% of total commitments
- General Partner** : General Partner will manage the Fund on behalf of the Limited Partners;
its role includes raising funds, looking for investment opportunities, deciding to proceed with investments, executing the deals, monitoring investee companies, seeking exits for portfolio companies, and more generally all Fund related operations;
General Partner may contract out all or part of its role to Advisor under a Service Agreement;
however General Partner retains the power to make all decisions regarding the Fund
- One-time Fund** : Monies drawn down from the Limited Partners reduce their remaining commitment ("Drawdowns");
once returned – by way of exits or income from investments – the monies cannot be drawn again (monies returned to the Limited Partners are called "Distributions");
the only exception is when General Partner approves a Bridge Loan
- Bridge Loan** : In some cases, the Fund could consider an investment where the final equity is not fully known: sale of shares to management after closing, finalisation of debt finance after closing, refinancing planned within months of closing, etc.;
in such cases, Advisor can recommend and General Partner may approve that part of the drawdown be labelled as Bridge Loan for a defined period;
monies returned to the Limited Partners within this period remain part of their commitments and can be drawn again;
the maximum period a Bridge Loan facility may be approved is one year from Drawdown
- Fund Life** : Investment Period:
Initially five years from Full Launch;
General Partner may extend Fund Life for two periods of one year
Exit Period:
Five years from the end of Investment Period;
during this period, no new investments can be made;
further drawdowns for add-on equity to existing investments are subject to SC approval
- Amendments to Fund documents** : Changes to Fund documents shall only be possible with the approval of all Limited Partners, unless it has been foreseen in such documents that General Partner may approve the decision

3. The Advisor

- Service Agreement** : General Partner and Advisor will enter into a Service Agreement under which General Partner will contract out part

	<p>of its role to Advisor (for example, raise funds, seek investment opportunities, recommend investments, execute approved deals, monitor and report on portfolio companies and seek exit routes for investee companies); under the Service Agreement, Advisor is expected to make recommendations to General Partner, but in no instance can it make a decision in place of General Partner with matters relating to the Fund; decisions made by General Partner can then be executed by Advisor, provided Advisor receives the appropriate Power of Attorney from General Partner</p>
Term	<p>The Service Agreement is entered into for a period equal to the Fund Life; if General Partner wishes to terminate the Service Agreement before its Term without Cause, then Management Fees until the end of the Term will be due to Advisor; In case General Partner terminates the Service Agreement With Cause, no further Management Fees are due</p>
Termination With Cause	<p>General Partner may terminate the Service Agreement With Cause, <u>subject to a 45-day notice period</u>, if one of the following events occurs:</p> <ul style="list-style-type: none">- no investment made by the Fund in the first 3 years;- market value of the Fund shows a loss of 20% of total Fund commitments;- Advisor no longer able or allowed to perform its role for regulatory or legal reasons;- violation of Service Agreement by Advisor;- departure of KFD from Advisor
Ownership of Advisor	<p>SC and KFD will jointly own Advisor in a 50-50 partnership; SC will contribute £100k to Advisor, which will be used to fund the set-up legal costs</p> <p><u>Call option in favour of SC:</u> SC will have the right to buy-out KFD's shares of Advisor for £1 in the following cases:</p> <ul style="list-style-type: none">- market value of the Fund shows a loss of 20% of total Fund commitments;- departure of KFD from Advisor and KFD is a Bad Leaver <p><u>Call option in favour of KFD:</u> KFD will have the right to buy half of SC's shares of Advisor, representing 25% of Advisor's equity, for £100k in the following cases:</p> <ul style="list-style-type: none">- after a period of 5 years, provided market value of the Fund shows a realised or unrealised capital gain, above the hurdle rate (see below);- before 5 years, if aggregate Distributions to the Limited Partners are equal or higher than commitments to the Fund (i.e. if no matter what happens next, the Limited Partners can no longer lose money in the Fund) <p>KFD will have the right to buy-out SC's shares of Advisor for £1 only in the following cases:</p> <ul style="list-style-type: none">- should SC elect to leave the Fund <u>fail to pay the Management Fees and/or fail to respond to a Drawdown approved by General Partner;</u>- should SC not invest in successive funds advised or managed by Advisor, after he no longer has a net exposure to

KFD

- the Fund.
- Exclusivity of Advisor** : Advisor can initially only advise the Fund, unless expressly authorised by General Partner
- Once, 2/3 of the Fund commitments have been invested, Advisor may raise a new fund, provided that it offers a first right to SC to invest in such new fund, and that it continues to dedicate the appropriate amount of time and resources to fulfil its obligations under the Service Agreement
- Management of Advisor** : Investment related decisions will be submitted to Advisor's Advisory Board (see below); day to day operations of Advisor will be managed by KFD, under a clear delegation of authority schedule, and subject to a principle of Transparency
- Transparency** : All matters within Advisor relating to KFD, such as compensation, bonus, allocation of carried interest, will be disclosed to SC, as long as SC holds 50% of Advisor
- Hiring of investment team members with a gross compensation of £100k or more are subject to approval by SC, as long as SC holds 50% of Advisor
- Exclusivity of investment team members** : Members of the investment team will be subject to a 6-month non-compete and non-solicitation clause in their employment contract

4. The Investment Process

- Investment related decisions** : Decisions that commit the Fund and its Partners to a Drawdown, whether to make an investment, to increase an investment, to pay fees to third party advisors, or that lead to sell or substantially change a portfolio company or other similar decisions, require each time the approval of General Partner
- By opposition, non-binding offers to acquire or invest in a company, for example in order to obtain an exclusivity period, may be made by Advisor under the Service Agreement
- Normal representation of the Fund at the Board of Investee companies and services rendered to the Investee companies can be also covered by the Service Agreement
- Advisory Board** : Advisor's Advisory Board must approve recommendations on investment related decisions, before they are made to General Partner – such recommendations usually taking the form of a Heads-Up Memo or an Investment Memo
- The Advisory Board will consist of a minimum of 6 and a maximum of 9 members:
SC will nominate 3 members;
KFD will nominate 3 members;
Other LPs who, alone or jointly, represent a commitment of at least €10m may nominate 1 member (up to a maximum of 3 members)
- To vote validly, at least 3 members must be present, including at least one representing SC; votes require a simple majority of 51%



- Departure of a Limited Partner** : Should a Limited Partner fail to respond to a Drawdown notice, he could, after due warnings, be considered as departing from the Fund and forfeit all his entitlements in the Fund, which would be shared between the remaining Limited Partners;
he would still be liable for his share of Management Fees
- Heads-Up Memo** : After an initial review of an investment opportunity, Advisor will draft a detailed Heads-Up Memo, to be submitted to the Advisory Board first, than to General Partner

This Memo shall present Advisor's current understanding of the opportunity, covering the business, management, the market, deal terms and exit, aim to validate interest from the Advisory Board, request opinions and areas for specific review and seek authorisation to spend Fund money on due-diligence and drafting of legal documentation

In the case of an exit, the Heads-Up Memo will seek approval to mandate third-party advisors and possibly to commit to fees and retainers for such advisors
- Investment Memo** : After approval of the Heads-Up Memo and subsequent due-diligence, Advisor will draft a detailed Investment Memo, to be submitted to the Advisory Board first, than to General Partner

This Memo shall present due-diligence findings, answers to earlier questions from the Advisory Board, an update on the deal terms and deal financing, and seek authorisation to commit to the investment, i.e. to close the deal and issue Drawdown notices

In the case of an exit, the Investment Memo will seek approval to close the deal with the preferred bidder and to sell the portfolio company
- Industry Panel** : It is proposed to have a Panel of individuals drawn mainly from managers of businesses, industry leaders, deal introducers and third-party advisors

Panel members are expected to introduce deals and ideas, provide insight in the due-diligence phase, act a sounding board on specific opportunities and be a source of managers and non executive directors
- Co-investment** : Members of the Advisory Board and, when appropriate, of the Industry Panel, will be allowed to co-invest, *pari passu* with the Fund, on a deal by deal basis, up to 10% of the Fund's investment, provided that such co-investment does not jeopardise the investment or its expected returns

Investment team members will be allowed to co-invest, *pari passu* with the Fund, on a deal by deal basis, up to 10% of the Fund's investment, provided that such co-investment does not jeopardise the investment or its expected returns and that the remaining investment by the Fund represents at least 10% of the Fund's total commitment
- Quarterly Reporting** : Advisor will provide the Advisory Board, General Partner and the Limited Partners will quarterly reviews of the Fund performance and of the individual performances of the portfolio companies

The form and level of detail of the Quarterly Reporting will be

agreed between SC and KFD and defined in the Service Agreement

5. Carried Interest

- Carried Interest** : Carry Partner will be entitled to 20% of capital gains and investment returns realised by the Fund, subject to a 6% annual hurdle rate (the Preferred Capital Distribution)
- In case of the expulsion of a Limited Partner, Carry Partner will be entitled to 40% of capital gains by that expelled Limited Partner on existing investments
- Cash Waterfall** : Distributions made to the Partners in the Fund, in case of an exit (whether total or partial) or income received from a portfolio company, are made in the following order:
- all Drawdowns not yet repaid to the Limited Partners at the time of Distribution are repaid (including Drawdowns for other investments);
 - the Preferred Capital Distribution, representing the hurdle rate on all Drawdowns, is paid to the Limited Partners;
 - a first Distribution to Carry Partner until it has received an aggregate amount equal to 20/80 of the Preferred Capital Distribution;
 - to the Limited Partners and Carry Partners in 80-20 proportion
- Claw Back** : A claw back clause will apply in case Carry Partner has received a Distribution and subsequently the Limited Partners incur a loss, such that in aggregate Carry Partner has received too much carried interest
- Allocation of Carried Interest** : KFD will be free to allocate and, as the case may be, reallocate the Carried Interest amongst the investment team members;
- under the Transparency clause, the allocation or reallocation of the Carried Interest will be disclosed to SC
- Bad Leaver** : KFD will grant Carried Interest rights to investment team members and subject these to good leaver/bad leaver provisions
- With respect to himself, KFD will be a Bad Leaver and forfeit all his future entitlements to Carried Interest if:
- KFD resigns from or unilaterally chooses to leave Advisor, except following his death or permanent disability;
 - KFD competes directly with Fund within one year of leaving Advisor;
 - KFD is responsible of gross misconduct or gross negligence (equivalent to "faute grave ou lourde" under French Law) or is convicted by a court of a serious offence;
 - KFD is no longer authorised to perform his duties (for example, loss of SFA authorisation)

6. Fees and Expenses

- Management Fees** : 2.5% per annum on commitments to the Fund, payable quarterly in advance;
- in case of Other LPs joining during the Fund Raising period,

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they will have to pay Management Fees as if they had joined on Full Launch; a rebate equal to 0.5% of Other LPs commitments will be granted to SC; Team LPs will not pay Management Fees

Management Fees will be due on the commitments to the Fund for the whole investment Period; during the Exit Period, Management Fees will be due on the remaining commitments and on the cost of existing investments but not on the cost of exited investments

- Deal Fees** : Subject to General Partner approval, an arrangement fee equal to the lower of 1% of the deal value (enterprise value) and 2% of the equity invested by the Fund may be charged by Advisor to the Fund or preferably to the Investee Company
- Deal expenses** : Deal specific expenses, such as out of pocket travel expenses and third party professional fees, incurred by Advisor, may be recharged at cost to the Fund or preferably to the Investee Company, provided that:
- on deal completion, all deal specific expenses can be recharged;
 - in case of an aborted deal (a deal which was approved but does not complete), only deal specific expenses incurred after approval of the Heads-Up Memo by the Advisory Committee can be recharged
- Monitoring Fees** : Advisor may invoice up to €100k per annum (adjusted annually for inflation), to each investee companies as a fee for services to such investee companies (monitoring, strategic advice, help with M&A and financing, definition of budgets, role on the Board etc.)
- Part of the monitoring fees may be paid to members of the investment team who act as Board members in the investee company – typically £10k per annum for each Board role
- In case a situation justifies a higher level of re-invoicing between Advisor and an investee company, General Partner will need to approve such re-invoicing
- Profits of Advisor** : Management Fees charged by Advisor will pay for Advisor's expenses and the investment team's salaries
- It is expected that a bonus representing 30% of annual salary be paid to team members, subject to performance
- Additional fees resulting in a surplus for Advisor will be allocated by KFD and disclosed to SC under the Transparency clause:
- to increase the team member bonus pool;
 - to create some reserves within Advisor;
 - only accessorially to pay dividends to Advisor's shareholders

7. Soft Launch Period

- Soft Launch Period** : As soon as possible, under KFD's current employment obligations, and until Full Launch
- Temporary Service Agreement** : SC and KFD will enter into a Temporary Service Agreement under which KFD, acting as a consultant, will dedicate his professional time to:

- structure the Fund, the Partnership(s) and the other relevant entities;
- set-up the General Partner and the Advisor;
- finalise the Service Agreement between General Partner and Advisor;
- launch the recruitment process the Investment team members, initially likely to consist of an Investment Director, an Investment Manager and a team assistant;
- more generally to do all that is necessary to successfully achieve a Full Launch within the agreed timeframe

Fees : SC will pay KFD Fees during the Soft Launch Period at the rate of 2.6% annually on his commitment, it being understood that Fees in excess of expenses will be contributed to Advisor

Je, soussigné Karim-F. Shanani, reconnais que tout paiement fait par SC avant le début du Soft launch le soit à titre d'avance. En cas de non-démarrage du Soft launch avant le 1er septembre 2007, cette avance sera remboursable à première demande à SC.

Fait à Londres, le 11 mai 2007

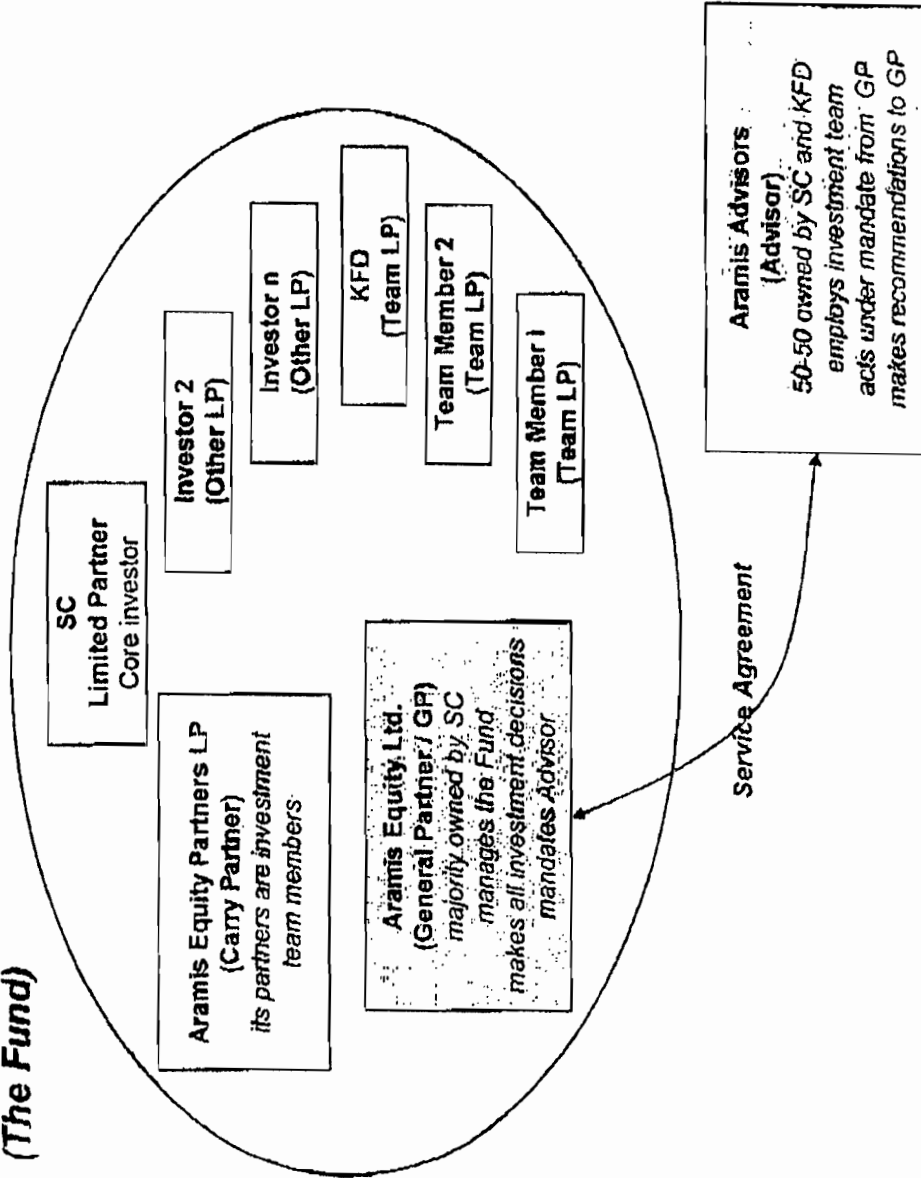
KF Shanani

Ce contrat est strictement confidentiel entre les parties.

[Signature]

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Aramis Limited Partnership (The Fund)



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