



Neutral Citation Number: [2022] EWHC 1872 (Comm)

Case No: CL-2020-000869

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 19 July 2022

Before :

Nicholas Vineall QC
Sitting As A Deputy Judge Of The High Court

Between :

- (1) G I GLOBINVESTMENT LIMITED
- (2) MATTEO CORDERO DI MONTEZEMOLO
- (3) LUCA CORDERO DI MONTEZEMOLO

Claimants/
Respondents

- and -

- (4) VP FUND SOLUTIONS (LUXEMBOURG) SA
- (5) VP FUND SOLUTIONS (LIECHTENSTEIN)AG

Defendants/
Applicants

- and -

- (1) XY ERS UK LIMITED
- (2) SKEW BASE INVESTMENTS SCA RAIF
- (3) SKEW BASE SARL
- (6) TWINKLE CAPITAL SA
- (7) DANIELE MIGANI
- (8) FEDERICO FALESCHINI
- (9) LEADER LOGIC HOLDING AG
- (10) LEADER LOGIC AG

Defendants

Richard Blakeley (instructed by **Cooke Young and Keidan**) for the **Applicants**
Daniel Saoul QC and Ian McDonald (instructed by **Milberg London LLP**) for the
Respondents

Hearing dates: 28 and 29 June 2022
Draft circulated to parties: 13 July 2022

Approved Judgment

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

.....

NICHOLAS VINEALL QC SITTING AS A DEPUTY JUDGE OF THE HIGH COURT

This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to The National Archives. The date and time for hand-down is deemed to be Tuesday 19 July 2022 at 10:30.

Nicholas Vineall QC :

1. In this action some wealthy Italian investors seek to recover losses which they suffered when investments they had made into a fund, which I shall call the Skew Base Fund (D2), plummeted in value at the outset of the COVID pandemic. The Defendants are in various jurisdictions. Most have accepted the jurisdiction of this Court but two of them, D4, VP Fund Solutions (Luxembourg) SA, whom I shall call VP Lux, and D5, VP Fund Solutions (Liechtenstein) AG, whom I shall call VP Liecht, challenge jurisdiction. VP Liecht also seeks to set aside the Order of Butcher J of 10 June 2021 which granted the Claimants permission to serve the claim form out of the jurisdiction.
2. The only claim brought against VP Lux and VP Liecht is a claim brought by C1 and C2 which alleges an unlawful means conspiracy in which all the Defendants are said to have been conspirators.

BACKGROUND AND THE PARTIES' ROLES

3. C1 (“GIG”) is a company through which the di Montezemolo family invests its wealth. C2 (“MDM”) is Matteo Cordero di Montezemolo who is member of that family and is also the chairman, co-founder and CEO of a private equity firm with over \$1bn under management. He is resident in England. C3 (“LDM”) is another member of the same family. A company called Emmediemme Tre SRL (“Emmediemme”) is a company wholly owned and controlled by MDM.
4. D1 (“XY”) is a company owned by D3, Mr Migani, through which Mr Migani gave the Claimants investment advice, including advice to invest in the Skew Base Fund. There are Advisory Agreements between XY and GIG and MDM. Mr Faleschini (D8) is the CFO of XY.
5. The Skew Base Fund has a general partner, D3 (“Skew Base GP”).
6. The Skew Base Fund is, according to the relevant offering documents, run by the investment fund business of VP Bank. It is an “Alternative Investment Fund” and as such its manager is styled an “Alternative Investment Fund Manager” or AIFM (“alternative” describing the nature of the investments, not the manager). VP Lux (D4) is the AIFM of the Skew Base Fund.
7. VP Liecht (D5) was the investment manager of the Skew Base Fund, engaged by VP Lux to perform the task of managing investments made by the fund.
8. There is evidence to suggest close links between VP Lux and VP Liecht: they are part of the same group and Mr Saoul QC, for the Claimants, showed me (without objection) the LinkedIn profile of Mr von Kymmel who was at one stage the Chairman of both VP Lux and VP Liecht.
9. The Skew Base Fund had various “compartments”, each with a different investment strategy and risk profile. The Claimants made some very successful investments into a real estate compartment of the Fund, but the investments which form the subject matter of the claim are those where a loss was made, and are as follows:

- 9.1. Emmediemme invested €10m in the HFPO Centaurus compartment, which was absorbed into the HFPO compartment in May 2018. I was told that HFPO stands for High Frequency Pricing Opportunity. The Fund’s objective was “to generate a positive return by investing in structured products close their maturity on the secondary markets”. The Claimants say that in 2019 MDM elected for his entitlement to a dividend from Emmediemme to be satisfied by a transfer of the shares held by Emmediemme in the HFPO compartment to himself, by way of a dividend in specie.
- 9.2. In October 2018 GIG invested €27m in each of the Skew Base Fund’s HFPO and MIN compartments. GIG then invested a further €5m in each of the HFPO and MIN compartments.
- 9.3. In October 2019 MDM invested US\$1.5m in the Fund’s MIN (USD) compartment.
10. The Claimants contend that when they invested into the Skew Base Fund they knew nothing more about the relationships between the various Defendants than I have set out above, and they say that it was represented to them by XY, Mr Migani and Mr Faleschini, and they believed, that the Skew Base Fund was entirely independent of XY, Mr Migani and Mr Faleschini.
11. The central point in the Claimants’ cases is that they further contend, that in fact, but unknown to them when they invested:
 - 11.1. there was a Tripartite Services Agreement between VP Liecht, VP Lux and a very recently incorporated Swiss company, D6, called Twinkle Capital SA (“Twinkle”), under which Twinkle was retained to provide “technological system and portfolio management services” for VP Liecht and VP Lux in return for substantial fees;
 - 11.2. Twinkle was also retained directly by Skew Base GP (D3) under a services agreement;
 - 11.3. Twinkle is 100% owned by Mr Migani;
 - 11.4. Mr Migani is also the 100% owner of D9 and D10, Leader Logic Holding and Leader Logic AG, who were also retained under further services agreements by Skew Base GP;
 - 11.5. in practice, Twinkle decided what investments would be made by the fund.
12. In terms of money flows the Claimants contend that:
 - 12.1. between them they invested a little over €75m in the Skew Base Fund. Other investors will also have invested, but the total sums invested are not yet clear;
 - 12.2. the Skew Base Fund paid total management fees of €22.5m to Skew Base GP;
 - 12.3. of that €22.5m, Skew Base GP paid €5m direct to Twinkle under another “services agreement”; Skew Base GP paid €10m to the Leader Logic

Defendants under another “services agreement”; and Skew Base GP paid VP Lux €7.5m under the AIFM Agreement;

- 12.4. of the €7.5m paid by Skew Base GP to VP Lux, €7m was paid out to Twinkle under the Tripartite Services Agreement;
- 12.5. so the upshot is that out of the total management fees of €22.5m, all but €500,000 ended up in the hands of entities 100% owned by Mr Migani.

The Claimants’ claims

13. The Claimants say that, had they known that they were being advised by Mr Migani and XY to invest in an investment vehicle which was not independent of Mr Migani, they would not have invested in it.
14. The Claimants claim against XY, Mr Migani and Mr Faleschini in the tort of deceit. It is said they made a series of false representations as to the independence of XY (the “Independence Representations”) and a series of false representations about the nature and suitability of the Skew Base Funds as an investment for the Claimants (the “Investment Representations”).
15. The Claimants also claim against XY for breaches of the terms of the advisory agreements, breach of duties arising under COBS, and breach of fiduciary duty, and against Mr Migani for dishonest assistance in XY’s breaches of fiduciary duty.
16. I express no view on the merits of those claims, which are the subject of strike out applications by the other defendants, but I note that the position of the VP Defendants in relation to those claims is simply that they do not know whether there is anything in the claims of deceit, breach of contract, breach of fiduciary duty and dishonest assistance brought against XY and Mr Migani.
17. The only claim advanced against the VP Defendants is a claim in unlawful means conspiracy. It is advanced against all ten Defendants. In the Amended Particulars of Claim (AmPOC) it is alleged that the Defendants combined or acted in concert with a common intention of maintaining the façade that the Skew Base Fund was independent of XY and managed by the VP Defendants without any connection to or involvement from XY or persons connected to the VP Defendants, and that pursuant to this combination the Defendants used unlawful means with the intention of injuring GIG and/or MDM. Paragraph 102 of the AmPOC pleads the facts from which it is said the combination is to be inferred, and paragraph 103 pleads the unlawful means, namely (a) the fraudulent Independence Representations (but not the Investment Representation), (b) the breaches of fiduciary duty by XY, and (c) the dishonest assistance by Mr Migani in facilitating XY’s breaches of fiduciary duty. Under a heading “Intention to injure, causation, loss and damage”, paragraph 104 of the AmPOC alleges that the Defendants realised that by combining as they did

... they exposed GIG and MDM to harm or alternatively a risk of harm because GIG and MDM (i) engaged the services of XY without knowledge of the Connections [between Migani and the various defendants]; and/or (ii) were deprived of the benefit of independent investment advice prior to deciding whether to invest in the [fund], in circumstances where such investments stood

to benefit the Defendants with directly or indirectly, through the payment of the [various payments received by the Defendants]. In the premises, it is to be inferred that the Defendants acted with the requisite intention to injure GIG and MDM.

One of the issues I need to decide is whether this particular allegation is sufficient to disclose a cause of action in unlawful means conspiracy.

The Procedural History

18. The Claim Form was issued protectively on 30 December 2021, before Implementation Period completion day. By regulation 92(1)(a) of the Civil Jurisdiction and Judgments (Amendment) (EU Exit) Regulations 2019, the Court's permission is not required to serve proceedings out of the jurisdiction where Brussels Recast applies to determine questions relating to the Court's jurisdiction to hear proceedings of which it was seized before IP completion day.
19. On 30 April 2021, Cockerill J made an order extending the deadline for service of the Claim Form and Particulars of Claim on Defendants outside the jurisdiction to 30 September 2021.
20. On 28 May 2021, the Claimants made an *ex parte* application for permission to serve the Claim Form, Particulars of Claim and other claim documents out of the jurisdiction on (1) VP Liecht, a Liechtenstein company; and (2) Twinkle (the Swiss company), pursuant to CPR r.6.36 (the "**Service Out Application**"). Permission was not required to serve out on the Luxembourg companies, VP Lux, the Skew Base Fund and/or Skew Base GP.
21. On 10 June 2021, Butcher J granted the Service Out Application, on a paper application.
22. On 5 July 2021 and 10 September 2021 respectively VP Lux and VP Liecht filed acknowledgments of service indicating an intention to challenge jurisdiction.
23. None of the other Defendants has sought to challenge jurisdiction.
24. On 22 October 2021, the VP Defendants filed the Jurisdiction Challenge and Set-Aside Application which is before me. The VP Defendants filed Mr Burbeary's first witness statement in support of the applications. On 28 January 2022, the Claimants filed Mr Oldnall's fifth and Mr Nuzzo's first witness statements in response. On 1 April 2022, the VP Defendants filed Burbeary 2 in reply to the Claimants' evidence and also raised an additional ground of alleged material non-disclosure. On 27 April 2022, the Claimants filed Oldnall 6 addressing the additional ground of alleged material non-disclosure.

THE COMPETING CONTENTIONS IN RELATION TO JURISDICTION AND SERVICE OUT

25. Common law rules apply to service out against VP Liecht, but VP Lux is governed by the regime under the Recast Brussels Regulation, Regulation (EU) No 1215/2012 ("BRR").

26. As against VP Liecht the Claimants say that their pleading discloses a serious issue to be tried against VP Liecht, that they have a good arguable case that that case falls within either the tort or necessary or proper party (NPP) gateway under CPR PD6B, and that England and Wales is clearly and distinctly the appropriate forum for that claim. VP Liecht disagrees with each of those contentions. Even if there is jurisdiction VP Liecht say that permission to serve out should be set aside because of a breach by the Claimants of their duty of fair presentation in the materials placed before Butcher J on the service out application.
27. As against VP Lux the Claimants say that MDM is a consumer for BRR purposes and so is entitled to sue VP Lux here because MDM is resident here. If that is wrong, and in any event in relation to the claim by GIG (which, being a corporate, is clearly not a consumer) VP Lux, which accepts the burden on this issue falls on it, seeks to rely on what it says are exclusive jurisdiction clause (“EJCs”). VP Lux relies, as against MDM, on an EJC in a letter, between Emmediemme, Skew Base GP, and VP Lux. VP Lux also relies, against both C1 and C2 on what it says is an EJC contained in the Subscription documents under which the investments were made. If either of those EJC arguments prevail, as to which the parties agree that the standard is simply whether VP Lux has the better of the argument, the EJCs mean that this Court can have no jurisdiction. If not, the question is whether an exception to BRR applies. The Claimants rely on BRR Art 8(1), saying that the claim against VP Lux is so closely connected with the claim against XY and/or Mr Migani that is expedient to hear and determine them together; and/or on BRR Art 7(2) on the basis that the damage occurred, or alternatively say that the place of the event which gave rise to the damage is England.

THE ISSUES

28. The fact that different regimes are applicable requires particular care to be exercised in defining the issues which arise for decision, but by the close of the hearing the parties were agreed that the following list of issues and route map accurately captures the issues which might arise for decision, although of course some outcomes on certain issues would obviate the need to decide other issues, and for reasons which I shall explain I do not need, in the event, need to decide every one of these issues in order to deal with these applications. It is also important to note that the VP Lux and VP Liecht issues are to some extent interdependent since (for instance) the decision whether to exercise discretion to permit service out on VP Liecht might be exercised differently depending on whether VP Lux were going to be sued here.

VP Liecht – common law rules

1. As against VP Liecht, is there a serious issue to be tried? In particular, do the following allegations fail to meet that threshold:
 - 1.1. the allegation of combination?
 - 1.2. the allegation of knowledge of unlawful means?
 - 1.3. the allegation of intention to injure the Claimants?

If no – there is no jurisdiction. If yes, go to Issue 2.

2. Is there a good arguable case the claim falls within a CPR PD6B Gateway, in particular either:

- 2.1. the tort gateway or

- 2.2. the necessary or proper party gateway

If no – there is no jurisdiction. If yes, go to Issue 3.

3. Is England and Wales clearly and distinctly the appropriate forum, and if so should the court exercise its discretion to permit service out?

If no – no jurisdiction. If yes, there is jurisdiction but go to Issue 4.

4. Was there a breach by Cs of their duty of fair presentation and if so should permission to serve out be set aside?

VP LUX – Brussels Recast

5. Is MDM a consumer for BRR purposes?

If yes, there is jurisdiction for the MDM claim, but the remaining issues must be addressed for the GIG claim, and if no the remaining issues must be addressed for both Claimants.

6. In relation to the Letter Agreement EJC (for the MDM claim in respect of the €10m originally invested by Emmediemme) and in relation to the Subscription EJC (for all the claims) can VP Lux show that it has the better of the argument that

- 6.1. there is a formally and materially valid EJC (applying autonomous BRR principles); and

- 6.2. that claims against it fall within the scope of the clause (applying Luxembourg law)

If yes – no jurisdiction. If not, Q7

7. Do either of the following exceptions apply:

- 7.1. BRR Art 8(1) – expedient to hear together

- 7.2. BRR Art 7(2) – place of harm

If either applies – jurisdiction. If not, no EW jurisdiction because Luxembourg is VP Lux’s court of domicile

VP LIECHT

29. As explained by the Supreme Court in Brownlie v FS Cairo [2021] UKSC 45 at [25], in a non-BRR case the common law rules require that in order to obtain permission to serve out of the jurisdiction a Claimant must establish (1) a good arguable case that the claims fall within one of the gateways in CPR PD 6B para 3.1; (2) a serious issue to be

tried on the merits; and (3) that England is appropriate forum for trial and the court ought to exercise its jurisdiction to permits service out of the jurisdiction.

30. I begin with Issue 1 which concerns the requirement of a good arguable case. Mr Blakeley, who appeared for the VP Defendants, acknowledged that this was in effect an application for strike out or reverse summary judgment on the claim against VP Liecht.
31. There was no dispute between the parties about the elements of a claim for conspiracy to injure by unlawful means. There must be (1) a combination, (2) to use unlawful means, (3) with the intention to injure and (4) actual injury. Cockerill J described these elements in FM Capital v Marino [2018] EWHC 1768 (Comm) at #94 thus:

“The elements of the cause of action are as follows:

(1) A combination, arrangement or understanding between two or more people. It is not necessary for the conspirators all to join the conspiracy at the same time, but the parties to it must be sufficiently aware of the surrounding circumstances and share the same object for it properly to be said that they were acting in concert at the time of the acts complained of: Kuwait Oil Tanker at [111].

(2) An intention to injure another individual or separate legal entity, albeit with no need for that to be the sole or predominant intention: Kuwait Oil Tanker at [108]. Moreover:

a) The necessary intent can be inferred, and often will need to be inferred, from the primary facts – see Kuwait Oil Tanker at [120-121], citing Bourgoin SA v Minister of Agriculture [1986] 1 QB: “[i]f an act is done deliberately and with knowledge of the consequences, I do not think that the actor can say that he did not 'intend' the consequences or that the act was not 'aimed' at the person who, it is known, will suffer them”.

b) Where conspirators intentionally injure the claimant and use unlawful means to do so, it is no defence for them to show that their primary purpose was to further or protect their own interests: Lonrho Plc v Fayed [1992] 1 AC 448, 465-466, [1991] B.C.C. 641 ; see also OBG v Allan [2008] 1 AC 1 at [164-165].

c) Foresight that his unlawful conduct may or will probably damage the claimant cannot be equated with intention: OBG at [166].

(3) In some cases, there may be no specific intent but intention to injure results from the inevitability of loss: see Lord Nicholls at [167] in OBG v Allan, referring to cases where:

“The defendant's gain and the claimant's loss are, to the defendant's knowledge, inseparably linked. The defendant cannot obtain the one without bringing about the other. If the defendant goes ahead in such a case in order to obtain the gain he seeks, his state of mind will satisfy the mental ingredient of the unlawful interference tort.”

[...]

(5) Use of unlawful means as part of the concerted action. There is no requirement that the unlawful means themselves are independently actionable: Revenue and Customs Commissioners v Total Network [2008] 1 AC 1174 at [104].

(6) Loss being caused to the target of the conspiracy.”

This summary has been adopted and applied since by Butcher J in Iranian Offshore v Dean Investments [2019] EWHC 472 (Comm) and by Calver J in ED&F Man Capital Markets v Come Harvest Holdings [2022] EWHC 229 (“Come Harvest”) and I do likewise.

32. I highlight two features.

32.1. First, that formulation contains no requirement that the loss or injury intended by the defendant be the same, either in kind or in extent, as the loss in fact sustained by the Claimant. The parties were agreed that it is not an essential element of this tort that the injury intended and the injury sustained should be the same. But there must be loss or damage that was as a matter of fact caused by the unlawful acts, otherwise there would be no causal connection between the wrong and the loss for which compensation is sought. In this respect I accept Mr Saoul QC’s submission, for the Claimants, that it should not be surprising that, in an intentional tort which connotes a high degree of reprehensibility, the losses recovered do not need to align with the losses that were intended, in broadly the same way that damages in the tort of deceit extend to all losses flowing directly from the tort, whether or not foreseeable.

32.2. Second, this formulation contains a reminder that, even at trial, there may be elements of the tort for which there is no direct evidence, and the Claimant is reliant on the drawing of inferences. Mr Saoul submitted, and I accept, that in approaching Issue 1 I must be mindful of the fact that, especially at this early stage, before the VP Defendants have pleaded a defence, let alone given disclosure, it ought not to be surprising if direct evidence of the existence of a combination, or of intent, were lacking.

33. To that formulation two further points can be added.

34. First, it is not necessary for a Claimant to demonstrate that the conspiring Defendant knew that the unlawful acts relied upon were unlawful, but it is necessary to demonstrate that the conspirator knew of all of the facts which make the acts unlawful: see per Arnold LJ (with whom Phillips LJ agreed, Lewison LJ dissenting on this point in relation to cases where the unlawful means was some violation of a private law right): Racing Partnership v Done Bros Ltd [2020] EWCA Civ 1300 at [139-144].

35. Second, and as Mr Blakeley accepted, it is sufficient to establish intention if the Claimant can show that the defendant conspired with an intent to injure a class of people of whom the Claimant is one. Intent to injure the specific Claimant does not need to be established.

36. I can now turn to the three areas where Mr Blakeley submitted the Claimants fail to establish a serious issue to be tried.
37. The first submission was that there was no proper pleading, nor any evidence sufficient to support a serious issue to be tried, that VP Liecht was a party to a combination to “maintain the façade that the Skew Base Fund was independent of XY”.
38. Mr Blakeley observed, and I accept, that it is not enough that the VP Defendants and the other defendants worked together in some general way. The Claimants will have to demonstrate at trial that there was an agreement to use unlawful means.
39. But I am not satisfied that at this early stage I can be confident that there is no real prospect of the Claimants doing so.
 - 39.1. The Claimants point out that XY’s website held XY out as an entirely independent adviser, and say that it can be inferred that VP Liecht must have known that XY was so holding itself out.
 - 39.2. The Claimants also rely on the fact that correspondence shows that the VP entities had discussed whether the offering documents should disclose the relationship with Twinkle under the Tripartite Services Agreement and had decided that there was no need for it to do so.
 - 39.3. The Claimants rely more generally on what they submit to be a deeply unattractive state of affairs in which the impression given to investors is that XY is advising them to invest into an entirely independent fund, whereas the truth is that the adviser has a very considerable personal interest in the investors doing so, because fees earned in the first instance by the VP entities almost entirely find their way back to Mr Migani.
 - 39.4. The Claimants say, and I accept, that it might at trial be a reasonable inference from all the pleaded facts that there was a combination as alleged.
40. I accept that submission. I do not have to assess how strong that inference might be, but need merely consider whether there is a serious issue to be tried. In my view there is.
41. The position on Mr Blakeley’s second attack is similar. He submits that there is no properly pleaded case, and no serious issue to be tried, in relation to the allegation that VP Liecht had knowledge of the facts constituting the unlawful means, that is to say the facts constituting the fraudulent making of the independence representations, and the breaches by XY of its fiduciary duties and Mr Migani’s knowing assistance in those breaches.
42. Although I accept that there is no direct evidence of knowledge by VP Liecht of these matters I do not consider that I can say that there is no real prospect of the trial judge inferring such knowledge. The facts prayed in aid at this stage by the Claimants are essentially the same as those they rely on in relation to the existence of the combination. I stress that I accept that it is perfectly possible that the VP Defendants had no knowledge, nor even any suspicion, that Mr Migani and XY might have been presenting the Skew Base Fund as independent when in fact it was not; but I do not consider that

I can be so confident that those allegations will fail that I can say that there is no serious issue to be tried.

43. It seems to me that if this case proceeds to trial the judge may or may not draw the inferences against the VP Defendants upon which the Claimant seek to rely. Whether he or she does so will depend on what has happened on disclosure and on what evidence the VP Defendants chose to call. But it seems to me there is amply sufficient material pleaded against the VP Liecht at this stage for me to be able to say that as things stand there is a serious issue to be tried as to whether or not VP Liecht was party to a combination to use the unlawful means alleged, and as to VP Liecht's knowledge of the facts constituting those unlawful means.
44. Mr Blakeley's third line of attack is that there is no serious issue to be tried on the intent to injure element of the tort of unlawful means conspiracy. I have found this point more difficult. He says that as a matter of law the pleaded case on injury is unsustainable because the harms alleged at #104 of the POC are incapable of satisfying the requirements of the tort; and he says that in any event there is no serious issue to be tried in relation to inferred intention to injure.
45. Mr Blakeley relies on the judgment of Lord Nicholls in OBG v Allan [2007] UKHL 21 dealing with intent in the torts of inducing breach of contract and unlawful interference, comments which have been held, most recently by Calver J in Come Harvest, to apply equally to unlawful means conspiracy.

164. I turn next, and more shortly, to the other key ingredient of this tort: the defendant's intention to harm the claimant. A defendant may intend to harm the claimant's business either as an end in itself or as a means to an end. A defendant may intend to harm the claimant as an end in itself where, for instance, he has a grudge against the claimant. More usually a defendant intentionally inflicts harm on a claimant's business as a means to an end. He inflicts damage as the means whereby to protect or promote his own economic interests.

165. Intentional harm inflicted against a claimant in either of these circumstances satisfies the mental ingredient of this tort. This is so even if the defendant does not wish to harm the claimant, in the sense that he would prefer that the claimant were not standing in his way.

166. Lesser states of mind do not suffice. A high degree of blameworthiness is called for, because intention serves as the factor which justifies imposing liability on the defendant for loss caused by a wrong otherwise not actionable by the claimant against the defendant. The defendant's conduct in relation to the loss must be deliberate. In particular, a defendant's foresight that his unlawful conduct may or will probably damage the claimant cannot be equated with intention for this purpose. The defendant must intend to injure the claimant. This intent must be a cause of the defendant's conduct, in the words of Cooke J in Van Camp Chocolates Ltd v Aulsebrooks Ltd [1984] 1 NZLR 354, 360. The majority of the Court of Appeal fell into error on this point in the interlocutory case of Miller v Bassey [1994] EMLR 44. Miss Bassey did not breach her recording contract with the intention of thereby injuring any of the plaintiffs.

167. I add one explanatory gloss to the above. Take a case where a defendant seeks to advance his own business by pursuing a course of conduct which he knows will, in the very nature of things, necessarily be injurious to the claimant. In other words, a case where loss to the claimant is the obverse side of the coin from gain to the defendant. The defendant's gain and the claimant's loss are, to the defendant's knowledge, inseparably linked. The defendant cannot obtain the one without bringing about the other. If the defendant goes ahead in such a case in order to obtain the gain he seeks, his state of mind will satisfy the mental ingredient of the unlawful interference tort.

46. In Come Harvest Calver J analysed four categories of case, based on the possible type of intent which I summarise as follows:

46.1. The ends (Category 1): where the harm to the claimant is the end itself, usually because of some *animus*.

46.2. The means (Category 2): where the harm to the claimant is itself the means to a particular end, which particular end will usually be some financial benefit.

46.3. The consequences #1 (Category 3): where harm to the claimant is neither the end nor the means but merely a foreseeable consequence, then, even where the defendant is reckless, there is no requisite intention and any claim must fail.

46.4. The consequences #2 (Category 4): as a gloss on consequences #1, if harm to the claimant was the necessary consequence (i.e. the obverse side of the coin) of the defendant's actions and the defendant knew this then, although the purpose of the defendant's action was not to harm the claimant, he/she will be considered as having intended to harm the claimant.

47. Mr Blakeley also relies on British Airways v Emerald [2015] EWCA Civ 1024 where it was held that:

“An intention to harm the claimant cannot properly or sensibly be described as a cause of the defendant's conduct if the defendant is not even sure that the Claimant will suffer loss at all. In this context, as Lord Nicholls said in terms, it is not enough that the defendant foresees that the claimant will probably suffer harm”.

48. I will repeat how the Claimants plead their case on the VP Defendants' intent:

“they exposed GIG and MDM to harm or alternatively a risk of harm because GIG and MDM (i) engaged the services of XY without knowledge of the Connections [between Migani and the various defendants]; and/or (ii) were deprived of the benefit of independent investment advice prior to deciding whether to invest in the [fund], in circumstances where such investments stood to benefit the Defendants with directly or indirectly, through the payment of the [various payments received by the Defendants]. In the premises, it is to be inferred that the Defendants acted with the requisite intention to injure GIG and MDM.”

49. Mr Blakeley submits that what is pleaded cannot, even if established as a matter of fact, satisfy the requirements of intent. He submits that this cannot be a Category 1 case since there is no possible animus between VP Liecht and the Claimants, indeed he notes that the only interest of the VP Defendants was that the investors *made* money – not that they lost it - for then the VP Defendants’ fees would be higher. He says that this cannot be a Category 2 case where the harm to the Claimant is the means to the end of financial benefit to the conspirator. He goes on to submit that if this is merely a Category 3 case that is insufficient, and it cannot be category 4 case because gain to the VP Defendants is not the obverse of loss to the Claimants.
50. I am doubtful about the wisdom of attempting at this early stage to submit the pleadings to close forensic analysis against particular formulations, derived in cases with different facts, as to what precisely is required by the tort. The economic torts are notoriously difficult areas where it is hard to strike the right balance between imposing liability for improper behaviour and not imposing liability where behaviour is acceptable in a competitive marketplace. Drawing those lines precisely and appropriately, and deciding whether the facts satisfy the required legal ingredients, is likely to be much easier when all the facts are known than it is at an early stage.
51. I also accept Mr Saoul’s submission that where the viability of a claim depends on a substantial issue of law, the general rule is that it is not normally appropriate in a summary procedure to decide a controversial question of law in a developing area, it being desirable that “*any further development of the law [is] on the basis of actual and not hypothetical facts*” and it being no part of the court’s function “*to decide difficult questions of law which call for detailed argument and mature consideration*”: Altimo Holdings and Investment Ltd v Kyrgyz Mobil Tel Limited [2012] 1 WLR 1804 at [84]. Similarly in Vedanta Resources v Lungowe [2019] UKSC 20 at [48], Lord Briggs observed that:
- “It might be thought that an assertion that the claim against Vedanta raised a novel and controversial issue in the common law of negligence made it inherently unsuitable for summary determination. It is well settled that difficult issues of law of that kind are best resolved once all the facts have been ascertained at a trial, rather than upon the necessarily abbreviated and hypothetical basis of pleadings or assumed facts.”*
52. On the other hand, it is important that claims which disclose no serious issue to be tried are stopped before Defendants are put to the expense of defending and giving disclosure.
53. In applying the four-fold categorisation as Mr Blakeley invites me to do, I am unpersuaded by his submission that this cannot be a Category 2 case. Here the harm to the Claimant which it is alleged that the Defendants intended is that the Claimants did not know that they were not getting, and did not in fact get, independent advice. As a result of that – it is said – they invested when they otherwise would not have done so. That inevitably brings financial benefit to the VP Defendants, for they will inevitably receive benefits by way of fees as a result of the decision to invest, whether that investment prospers or fails.
54. In other words it seems to me important to remember that the loss ultimately sustained (loss of the value of investments) is not the same as the loss or injury that the

conspirators need to have intended, which, here, was the loss of the ability to be independently advised.

55. A similar point arose in Hotel Portfolio v Ruhan [2022] EWHC 383 (Comm), where Foxton J also had cause to consider the dictum in Emerald Airways relied on by Mr Blakeley. Foxton J said this:

Intention to injure

245. *Both Defendants deny that the necessary intention to injure is made out. They contend that, in the absence of evidence that the price paid for the Hyde Park Hotels under the Cambulo Madeira Transaction was less than their market value, or that HP11 could have realised the development opportunity itself, there is no basis for concluding that they intended to cause any harm to HP11, as opposed to gain for themselves.*

246. *In the present case, I am satisfied that the purpose of the agreement or combination between the Defendants was to use unlawful means for the purposes of avoiding a potential obstacle to the acquisition of the Hyde Park Hotels from HP11, and to deprive HP11 (and its stakeholders, acting through it) of the opportunity to seek more advantageous terms on the sale. To this extent, I am satisfied that the object of the conspiracy was to interfere with HP11's rights in and relation to the Hyde Park Hotels, but I am unable to find that, in so doing, the Defendants intended that HP11 should be paid less for the Hyde Park Hotels than they were then worth, or that they had concluded that HP11 would be able to realise the development opportunity itself but for their intervention.*

247. *The decision of the Court of Appeal in Emerald Supplies Ltd v British Airways (No 1) [2015] EWCA Civ 1024, [167]-[168] provides support for the view that there is no intention to injure in these circumstances. The issue in that case was whether the requisite intent to injure could be established, in circumstances in which the defendants had operated an unlawful cartel for airfreight services, but any increased costs might well be passed on by the claimants to their customers. The Court observed:*

“167. The critical point, in our view, is whether Mr Milligan is right to say that the possibility of laying off the cost goes solely to damage and not to intent ... As to the legal merit of the submission, in our judgment the authorities demonstrate clearly that the possibility of passing on the loss goes to intent ... An intention to harm the claimant cannot properly or sensibly be described as a cause of the defendant's conduct if the defendant is not even sure that the claimant will suffer loss at all”.

248. *However, in Lonrho Plc v Fayed the claim advanced by Lonrho Plc was that the defendants' unlawful actions were “directed as the plaintiff's business by depriving the plaintiff of the business asset of the opportunity to bid for House of Fraser” ([1990] QB, 495) or “the right to bid for House of Fraser undisturbed by wrongdoing” (ibid, 497), and the action was permitted to proceed to trial once the House of Lords had confirmed that it need not be the defendant's predominant intention to injure the claimant if unlawful means were used ([1992] 1 AC 448). The argument that someone who wishes to obtain an asset from the claimant, and who uses unlawful means to keep the claimant in ignorance of a basis for refusing to entertain the offer or asking for more favourable terms, does not intend to injure is one which I do not find attractive, particularly given the recognition that “negotiating damages”, when awarded,*

represent compensation for a real loss in One Step (Support) Ltd v Morris-Garnier [2019] AC 649 . In the present case, however, there is an element of artificiality in considering the issue of intention to injure independently of the issue of whether HP II has suffered loss as a result of the unlawful means conspiracy alleged. I turn to that issue now.

56. Foxton J went on to consider loss and found that the Claimant, HP II, had sustained no loss. So what he said about intent to injure is obiter. But the critical point is his observation that he considered it unattractive to argue that someone who wishes to obtain an asset from the claimant, and who uses unlawful means to keep the claimant in ignorance of a basis for refusing to entertain the offer or asking for more favourable terms, does not intend to injure.
57. In a similar way, in the instant case it seems to me to be highly unattractive to contend that the relevant intent to injure is lacking when someone who wishes to enjoy the benefit of an investment from the claimant uses unlawful means to keep the investor in ignorance of some fact about his adviser which might very well be expected, if the investor knew of it, either to put the investor off the package altogether, or at least to cause the investor to seek better terms (including perhaps a rebate of the monies circling back to the adviser).
58. It is not necessary for me to decide that this is sufficient to constitute intention to injure, but it seems to me to be strongly arguable that it is, and I am therefore satisfied that there is a serious issue to be tried as to whether it is sufficient.
59. For these reasons I find that the Claimants have demonstrated a serious issue to be tried against VP Liecht.
60. I turn to issue 2, which is whether there is a good arguable case that the VP Liecht claim, falls within either the tort or NPP gateway. The VP Defendants sensibly accept that the NPP gateway is met if the claim against VP Lux is to proceed in this Court, and also accept that, if that is so, England and Wales is clearly and distinctly the most appropriate forum and discretion should be exercised to permit service out.
61. For reasons which I shall explain later I am satisfied that the VP Lux claim should continue in this court, and in those circumstances the only remaining point for decision on the VP Licht claim is the application to set aside service out for material non-disclosure. But I will deal with this at the end of my judgment because some of the heads of nondisclosure relate to issues which are more readily understood after I have dealt with the VP Lux issues.

VP LUX

62. I begin with Issue 6, which considers VP Lux's contentions that the claims against it must be litigated in Luxembourg because there are exclusive jurisdiction clauses to that effect, relying on Art 25 of the BRR which provides, so far as relevant:

1. If the parties, regardless of their domicile, have agreed that a court or the courts of a Member State are to have jurisdiction to settle any disputes which have arisen or which may arise in connection with a particular legal relationship, that court or those courts shall have jurisdiction, unless the

agreement is null and void as to its substantive validity under the law of that Member State. Such jurisdiction shall be exclusive unless the parties have agreed otherwise. The agreement conferring jurisdiction shall be either:

(a) in writing or evidenced in writing;

63. VP Lux says that all of the investments are subject to an EJC because, properly construed, the subscription terms contain an EJC. In addition VP Lux says that the investment made by MDM in relation to the 26 April 2017 investment is subject to an EJC contained in a letter dated 2 March 2017.
64. It is common ground that the burden is on VP Lux to persuade me it has the better of the argument that the requirement of Art 25 are satisfied and that the claim falls within the scope of the EJCs. The law on formal and material validity was set out by the Court of Appeal in Public Institution for Social Security v Banque Pictet & Cie SA [2022] EWCA Civ 29. The parties agree that, in summary:
- 64.1. On formal validity, the question is whether there has been an actual consensus between the parties, clearly and precisely demonstrated.
- 64.2. On material validity, the question is whether the dispute between the parties arose or originated from the particular legal relationship in connection with which the EJC was concluded.
- These questions are to be answered by reference to the autonomous principles applicable to the BRR.
65. As to whether the claim falls within the scope of the EJCs, that question is to be answered according to Luxembourg law, and the parties agree that the relevant Luxembourg law is as set out by Henshaw J in PIFSS [2020] EWHC 2979 (Comm) at [273], subject to some minor exceptions identified in the Claimant's skeleton.
66. The material facts are as follows.
67. On 2 March 2017, MDM, on behalf of Emmediemme and following XY's recommendation, was asked to and did sign a letter addressed to VP Luxembourg and SB GP. The subject line of the Letter Agreement was "*Request for documentation and conditional subscription commitment for shares to be issued by Skew Base Investments SCA RAIF.*" Clause 5 (the "**Letter Agreement EJC**"), was headed "*Governing Law and Jurisdiction*". I shall set out its terms later.
68. VP Lux submits that the Letter Agreement contains an EJC in favour of the Luxembourg courts which extends to the claim in relation to (only) the first investment.
69. That first investment was made shortly afterwards when, on 26 April 2017, Emmediemme subscribed for €10 million worth of shares in HFPO Centaurus Compartment (the "**April 2017 Subscription Form**"). The terms of the investment were set out in the Offering Document of the HFPO Centaurus Compartment of the Skew Base Fund dated March 2017 (the "**March 2017 HFPO Offering Document**").
70. GIG subscribed for €27 million worth of shares in each of the HFPO and MIN Compartments on 18 and 25 September 2018 respectively. The subscription forms and

offering documents were in materially identical terms to the April 2017 Subscription Form and the March 2017 HFPO Offering Document.

71. GIG invested a further €5 million in each of the HFPO and MIN compartments of the Fund on 26 November 2018 and MDM subscribed for US\$1,499,990 in the MIN (USD) compartment. The subscription form and offering document were in the same form as before.

The Letter Agreement EJC

72. I begin with a consideration of the Letter Agreement EJC. It is critical to understand what that Letter was about. It took the form of a letter from Emmediemme to VP Lux and Skew Base GP, in which Emmediemme said that it was “interested in an investment programme addressed to a few investors” and said that Emmediemme “would be grateful if you could send us the Offering memorandum and subscription documentation.” At clause 1.3 Emmediemme declared that it was willing to subscribe for shares in the HFPO Centaurus compartment of the Fund, and Emmediemme committed to do so, subject to a series of conditions precedent which were then set out. Then Emmediemme said:

[1.4]¹ We understand that the subscription of Emmediemme Tre Srl shall, once the Conditions are met, be formalised in a subscription agreement, to be delivered by Emmediemme Tre Srl and that such subscription, upon acceptance by the General Partner, will then be subject to the terms and conditions described therein as well as in the articles of association of the Fund and in the Offering Memorandum of the Fund, and agreed therewith.

1.5 We set forth below the terms and conditions of the subscription commitment in the HFPO compartment of the Fund.

73. Section 2 identified the level of participation, being €10m, Section 3 set out various Investor declarations, and Section 4, entitled Undertakings contained the central commitment made by Emmediemme which was, subject to the provisions in section 2 and 3, to subscribe for shares on the terms set in the Letter Agreement.

74. Finally Section 5 provided as follows:

Governing Law and Jurisdiction

5.1 We confirm that the Commitment and this letter agreement shall be governed by and construed in accordance with Luxembourg law.

5.2 We confirm that any dispute or conflict arising from the Commitment and this letter agreement, their execution, enforceability or interpretation shall be submitted to the exclusive jurisdiction of the Courts of the district of Luxembourg, Grand-Duchy of Luxembourg.

75. It is clear that the Letter Agreement contains jurisdiction clause which is formally and materially valid, but the question is whether it extends beyond disputes about the

¹ the numbering has been omitted in the Letter Agreement but this sentence is clearly intended to have been numbered 1.4

commitment given in the Letter Agreement. Of course Emmediemme complied with the commitment it gave in the letter agreement, and in the event no dispute arises in relation to that.

76. This question falls to be answered under Luxembourg law. I have been shown the relevant principles of contractual construction identified by Henshaw J in PIFSS at [273], which are as follows:
- 76.1. The interpretation of contracts is covered by Articles 1156-1164 of the Luxembourg Civil Code, and in particular by Article 1156, which requires the court to seek to identify the parties' subjective intention, in the absence of which an objective interpretation will be adopted. This is a question of fact.
- 76.2. An objective interpretation requires the court to ascertain the common intention of the parties from the words of the contract or any other relevant contract.
- 76.3. There are no special rules of interpretation for jurisdiction clauses.
- 76.4. Luxembourg law has both a *contra proferentem* rule and a principle of “*effect utile*” a presumption of construction that prefers to construe a contractual term in a way which makes it lawful. The former is only applied in cases of “*otherwise insuperable doubt*”: and, as far as Professor Cuniberti is aware, neither rule has ever been applied by the Luxembourg courts to construe a jurisdiction clause.
- 76.5. Whether and to what extent a given contractual clause covers pre-contractual conduct or post-contractual conduct or both is a matter of interpretation of the clause.
- 76.6. Whether tort claims fall within the scope of a jurisdiction clause is to be determined by construing the clause.
77. Adopting that approach in my view the answer is clear (and that is so whether or not the Claimant's minor reservations in relation to Henshaw J's formulation are right or wrong): the EJC in the Letter Agreement extends only to disputes arising out of Emmediemme's commitment to subscribe for the investment, and does not extend to disputes arising out of the subscription once made. Once the investment has subscribed for, the letter agreement becomes history, and going forward the parties' obligations depend on the terms of the Subscription Agreement. Clause 1.4 of the Letter Agreement makes this point explicitly.
78. Accordingly the Defendants must look to the subscription agreement terms if they are to find an EJC to assist them.

The Subscription Agreement Terms

79. The investments were each made pursuant to a Subscription Form and Offering Document. The Subscription Form expressly incorporated the Offering Document.
80. The Subscription Form is defined in clause 3 of the Offering Document as:

“the forms and other documents, as issued or accepted by the Fund from time to time, which the Fund requires the investor or the person acting on behalf of the investor to complete, sign, and return to the Fund or its agent, with the supporting documentation, in order to make an initial and/or additional application for subscription to Shares.”

81. Clause 10.3 of the Offering Document is headed “*Investors’ rights*” and in its second paragraph it said:

The Subscription Form is expressed to be governed by, and construed in accordance with, the laws currently into force in Luxembourg, and contains a choice of international competence of the courts of Luxembourg.

82. The Subscription Form did contain a Luxembourg choice of law clause in these terms:

Notwithstanding the place where this Application Form may be executed or the citizenship, domicile or residency of applicants or Shareholders, the rights and obligations of applicants and Shareholders of the Fund shall be governed and construed in accordance with the laws of the Grand-Duchy of Luxembourg.

83. But the Subscription Form did not, contrary to the assertion in clause 10.3 of the Offering Document, contain a choice of international competence of the courts of Luxembourg, nor indeed did it contain any jurisdiction clause.

84. Mr Blakeley submitted that, notwithstanding the absence of any jurisdiction clause in the Subscription Form, the true effect of the Subscription Form, read together with the Offering Document, was that the parties had submitted to the exclusive jurisdiction of the Luxembourg Courts.

85. I remind myself that the relevant authorities tend to suggest that the party seeking to rely on an EJC carries the burden on that point: PIFFSS [2022] EWCA Civ 29 at para [55(iii)];

86. The first question is the formal requirement under Art 23. This is a question to be answered applying the autonomous principles of EU law. The leading case is Case 24/76 Estasis Salotti v RUwA Polstereimaschinen GmbH (“Salotti”). In Salotti the court held as follows:

“The way in which that provision [Article 17(1)(a), being the forerunner of what is now Art 23 of BRR] is to be applied must be interpreted in the light of the effect of the conferment of jurisdiction by consent, which is to exclude both the jurisdiction determined by the general principle laid down in Article 2 and the special jurisdictions provided for in Articles 5 and 6 of the Convention. In view of the consequences that such an option may have on the position of the parties to the action, the requirements set out in Article 17 governing the validity of clauses conferring jurisdiction must be strictly construed. By making such validity subject to the existence of an “agreement” between the parties, Article 17 imposes on the court before which the matter is brought the duty of examining, first, whether the clause conferring jurisdiction upon it was in fact the subject of a consensus between the parties, which must be clearly and precisely demonstrated. The purpose of the formal requirements imposed by

Article 17 is to ensure that the consensus between the parties is in fact established.”

87. The question I must ask is therefore whether or not the agreement to the jurisdiction of the Luxembourg Courts on which Mr Blakeley relies was the subject of a consensus which is clearly and precisely demonstrated. I am not satisfied that it was. The position seems to me to have been, on any objective view, confusing. The Subscription Form contained a choice of law clause but no accompanying choice of jurisdiction clause. That is an unpromising start. The most that Mr Blakeley can say is that the Subscription Form incorporated the Offering document by reference, and the Offering Document stated that the Subscription Form contained a “choice of international competence” of the Court of Luxembourg. But in fact it didn’t. Mr Blakeley points to the provision at the end of the Subscription Form which says that in the case of “differences between the information in the Application Form and the Fund’s Offering Documents the latter shall prevail.” I am not satisfied that what is in issue here is properly characterised as a difference in “information” between the two forms.

88. In my view the correct analysis here is that

88.1. There is no EJC in the in the Subscription Agreement, although there is choice of law clause;

88.2. There is no EJC in the Offering Document;

88.3. The Offering Document wrongly asserts that there is a jurisdiction clause in the Subscription Agreement;

88.4. That is insufficient to establish a clearly and precisely demonstrated consensus;

88.5. Indeed, in my view, no consensus as to jurisdiction is demonstrated: the result of the conflicting documents is a muddle.

I therefore find that there is no exclusive jurisdiction clause on which VP Lux can rely.

Issue 5

89. Issue 5 was the question of whether MDM is a consumer for BRR purposes. That issue does not seem to me to be entirely straightforward and since it is not necessary to resolve it in the light of my conclusions about EJCs, I prefer not to decide it.

Issue 7

90. The final issue which I have to decide in relation to VP Lux is Issue 7, which asks whether either BRR Art 8(1) (expedient to hear together) or BRR Art 7(2) (place of harm) applies. But Mr Blakeley realistically agreed that if the conspiracy claims against XY and Dr Migani were going to proceed in this court (as, on the basis of my findings, they are) it would indeed be expedient for the conspiracy claims against VBP Lux to be tried here alongside those claims arising from the same alleged conspiracy.

Material non-disclosure

91. The application for permission to serve out on VP Liecht was made ex parte. Mr Blakeley relies on three heads of non-disclosure:
- 91.1. Failure to disclose the existence of the EJCs, including a failure to disclose even the existence of the Letter Agreement;
 - 91.2. Failure to disclose the existence of emails between Mr Nuzzo on behalf of the Claimants that reveal that he (and therefore the Claimants) considered that XY actively managed the funds and controlled the funds. That being a point going to the existence of the alleged combination;
 - 91.3. Failure to disclose the fact that there were other investments made by the Claimants in the real estate compartment of the Fund which were profitable, a point said to go to the intention to harm the Claimants.
92. In MRG (Japan) Ltd v Engelhard Metals Japan Ltd [2003] EWHC 3418 (Comm) Toulson J set out the following guidance (I have removed the some of the internal citations):

23. The starting point is that an applicant for an order on a without notice application must make full and frank disclosure of all material facts, that is, facts known to the applicant which might reasonably be taken into account by the judge in deciding whether to grant the application.

24. It is for the court to determine what is material according to its own judgment and not the assessment of the applicant. This means that if the court considers there to have been material non-disclosure, it is not an answer that the applicant in good faith took a different view, although that may affect the court's exercise of its discretion in deciding what to do in the light of the non-disclosure. It does not mean that an applicant is under a duty to disclose facts which could not reasonably have a bearing on the decision which the judge has to make.

25. Materiality therefore depends in every case on the nature of the application and the matters relevant to be known by the judge when hearing it. I was referred to a number of statements on the duty of disclosure in the context of applications for freezing injunctions. In such cases the court is being asked to make an order of an exceptional kind, prohibiting or restricting a defendant's use of its own assets before any adjudication has been made against it. Because of its draconian nature, it is a jurisdiction which requires great caution and a wide range of factors may have a bearing on the court's decision.

26. An application for permission to serve out of the jurisdiction is of a very different nature. The general principles about disclosure on without notice applications still apply, but the context is different. The focus of the inquiry is on whether the court should assume jurisdiction over a dispute. The court needs to be satisfied that there is a dispute properly to be heard (i.e. that there is a serious issue to be tried); that there is a good arguable case that the court has jurisdiction to hear it; and that England is clearly the appropriate forum. Beyond that, the court is not concerned with the merits of the case.

27. Authority supports this approach. In BP Exploration Co (Libya) Limited v Hunt [1976] 3 AER 879 (which concerned an application for leave to serve out of the jurisdiction) Kerr J said at 893: In my view, a failure to refer to arguments on the merits which the defendant may seek to raise in answer to the plaintiff's claim at the trial should not generally be characterised as a failure to make a full and fair disclosure, unless they are of such weight that their omission may mislead the court in exercising its jurisdiction under the rule and its discretion whether or not to grant leave.

93. Bryan J adopted and applied that approach in LIA v JP Morgan [2019] EWHC 1452 (Comm) at [97] and it seems to me to remain good law and usefully to identify the slightly different context and potential consequences of nondisclosure in a freezing order application and in a service out application.
94. The first alleged head of non-disclosure relates to the failure to alert the court to what the EJC in the Letter Agreement, and to what the Offering Document said about jurisdiction. Whilst these issues are highly material to VP Lux, they seem to me to be of only very passing relevance to VP Liecht and in my view, Mr Blakeley was right not to press this point with any vigour. I find there was no breach of the duty of fair presentation on this point.
95. The second alleged non-disclosure relates to some emails from March and April 2020, written in Italian, English translations of which have since been disclosed. The English translations suggest that Mr Nuzzo knew that XY or its officers were controlling the Skew Base Funds, a point which if correct would be relevant to the strength of the claims in deceit, and therefore of some relevance to the strength of the claim against VP Liecht. But Mr Nuzzo says that the true meaning of the Italian he used was simply that XY was monitoring or watching the Skew Base Funds. In those circumstances it seems to me that there is – in terms of non-disclosure - nothing in this point.
96. The third alleged non-disclosure is that the Claimants did not disclose to Butcher J the fact that, at the time that application was made, that they had also invested in the real estate compartment of the Fund and that that investment was up by some 11%. Mr Blakeley says that these facts were and are relevant to the question of whether or not the VP defendants intended to injure the Claimants. He further submits that the non-disclosure is aggravated by the way the claim was pleaded which suggested that the investments about which complaint is made were the only investments made. I agree that the POC at least gives the impression that the only investments made were those that sustained heavy losses.
97. The Claimants say the existence of their successful investments is not material and give two arguments in support of that submission.
 - 97.1. First, they say that they did not know whether the investment would continue to rise in value. This seems to me to be no answer at all and irrelevant. The complaint is that it was misleading not to disclose the investments that were at that stage “in the money” and it is no answer to say that they might subsequently have fallen in value before they were able to realise it.
 - 97.2. Second, they say that the performance of the successful investments is not relevant to whether or not the Defendants intended that the Claimants would

suffer injury, because the nature of the harm alleged to have been intended is confined to the detriment of not being independently advised.

98. As to this second point, I have already held that the Claimants' distinction between intended harm and the damage in fact sustained is a valid distinction, and it follows from that that the non-disclosure is not in fact material.
99. It would have been much better had the Claimants disclosed their profitable investments, because the failure to do so inevitably left the court on the ex parte application with an incomplete view of the overall factual matrix, but given that the non-disclosure was in fact irrelevant and given that, even if it ought to have been disclosed the disclosure would have made no difference, it does not seem to me that VP Liecht is entitled to have the order for service out set aside.

CONCLUSION

100. I have decided that:
- 100.1. There is a serious issue to be tried on the conspiracy claim against VP Liecht; there is a good arguable case that the claim falls within the NPP Gateway; this is clearly and distinctly the appropriate forum; and permission was appropriately granted for service out;
- 100.2. There was no material non-disclosure on the service out application;
- 100.3. There is no EJC which requires the VP Lux claims to be brought in Luxembourg, and it is expedient to hear the VP Lux claims here.
101. It follows that I dismiss the VP defendants' applications fail and the claims against them will continue in this Court.
102. It will be noted that I have referred to the AmPOC even though the version in fact served out on the VP Defendants was the original unamended POC. The parties were not agreed as to which version I ought to focus on. It seems to me the pragmatic approach is to consider the AmPOC because even if the technically correct version to use were the original POC, and even if differences between the two versions were to give rise to a different outcome in terms of the applications, there is no imminent limitation issue in this case and the Claimants would then just start again with their amended pleading. In the event I am not satisfied that using the original POC would have made any difference to the outcome of this application. Jurisdiction applications should not turn on very fine points of pleading because the court ought to be concerned with the substance of the claims that the Claimants wish to advance. The substance of the claim is clearly the same in the original and the amended pleading.