



Neutral Citation Number: [2024] EWHC 445 (Comm)

Case No: CL-2022-000688

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

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

Date: 04/03/2024

Before :

**Dame Clare Moulder DBE**  
**sitting as a Judge of the High Court**

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Between :

- 1. NTT Limited
- 2. NTT Ltd Group Services United Kingdom Limited
- 3. Dimension Data Facilities (Pty) Limited
- 4. Dimension Data Middle East and Africa (Pty) Ltd
- 5. Dimension Data (Pty) Limited
- 6. NTT Ltd Management Services South Africa (Pty) Ltd
- 7. Dimension Data Global Management Services Limited

**Claimants/**  
**Respondents**

- and -

**Jason Goodall**

**Defendant/**  
**Applicant**

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**James Willan KC and Kajetan Wandowicz (instructed by Farrer & Co) for the Applicant**  
**Lord Wolfson KC and Tom Foxtan (instructed by Enyo Law LLP) for the Respondents**

Hearing date: 19 February 2024

**Approved Judgment**

This judgment was handed down remotely at 10.00am on 04 March 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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## **Dame Clare Moulder DBE :**

### **Introduction**

1. This is the Court's judgment on the application of the Defendant, Mr Jason Goodall dated 3 March 2023 (the "Application") for a stay of all claims under the inherent jurisdiction of the Court and/or pursuant to s.49(3) of the Senior Courts Act 1981 and/or CPR 3.1(2)(f).
2. Insofar as the Application also sought a stay of all claims pursuant to Section 9 of the Arbitration Act 1996 (the "Act") this is no longer pursued: by a consent order dated 9 February 2024 it was ordered that the proceedings in relation to the First, Second and Sixth Claimants will be stayed pursuant to section 9 of the Act. Accordingly the Application is now limited to the proceedings in relation to the claims of the Third, Fourth, Fifth and Seventh Claimants (the "Respondents").
3. Further the Defendant no longer pursues a stay pursuant to Section 9 of the Act in respect of the Respondents and has withdrawn the part of his Application relying on the ground of *forum non conveniens*.

### **Background**

4. The First Claimant ("C1") is a global technology services company registered in England and Wales. C1 is the wholly owned subsidiary of The Nippon Telegraph and Telephone Corporation, incorporated in Japan. The Second to Seventh Claimants are all wholly owned subsidiaries of C1 (together with C1, the "NTT Group").
5. The Second Claimant ("C2") is a company registered in England and Wales and provides management services to the NTT Group.
6. The Third to Seventh Claimants are all part of the Dimension Data Group.
7. The Sixth Claimant ("C6") is a company registered in South Africa providing management services to the Dimension Data Group.
8. The Fifth Claimant ("C5") is a company registered in South Africa and is the main South African operating company. The Third Claimant ("C3") is a company registered in South Africa and is a facilities management company. The Fourth Claimant ("C4") is a company registered in South Africa and is an intermediate holding company.
9. The Seventh Claimant ("C7") is a company registered in the Isle of Man and is a group services company providing management services to certain companies in the NTT Group.
10. In June 2016, Mr Goodall became Group CEO of the entire Dimension Data Group. This appointment was formalised in a written Executive Employment Agreement dated 28 September 2016 (the "2016 Employment Agreement") between C2, C6 and Mr Goodall. A further Executive Employment Agreement in materially the same terms was then signed in 2017 (the "2017 Employment Agreement"). Following a restructuring of the NTT group in

June 2019, Mr Goodall became Global CEO of the (newly formed) C1. This change was subsequently formalised by a Deed of Novation dated 9 October 2020 between Mr Goodall, C2 and C1 (the “Deed of Novation”).

11. Clause 18 of the Employment Agreement contained a provision for disputes to be referred to mediation failing which they would be referred to arbitration:

*“18.1 Any disputes arising from or in connection with this agreement or the termination thereof shall if so required by either Party by giving written notice to that effect to the other Party be resolved by mediation, and failing which finally by arbitration, by an arbitrator or arbitrators appointed by the Group’s auditors...*

*18.2 the dispute shall be determined initially by mediation and, failing which, finally by arbitration on the following terms and conditions-*

*...*

*18.2.2 the mediator and arbitrator in the dispute shall be determined by agreement between the Parties within a period of forty eight hours of the giving of notice of a dispute by any Party as set out in 18.1, in the case of the mediator and forty eight hours after the mediator has advised the Parties in writing that he is unable to resolve the dispute, in the case of the arbitrator...*

*18.2.3 the arbitrator shall finalise and deliver to the Parties an award, which award shall be final and binding on the Parties and shall not be subject to appeal, in writing within seven days from the date of completion of the arbitration proceedings*

*...”.*

12. Pursuant to an agreement dated 11 October 2019, C3 sold a commercial property known as ‘The Campus’ together with its associated assets and contracts (the “Campus Transaction”) to Identity Property Co Proprietary Limited (“ID Propco”), a subsidiary of the Identity Property Fund (the “Identity Fund”), a Black Economic Empowerment (“BEE”) fund.
13. The Defendant was a member of the sub-committee of C1’s board to which authority was delegated to consider and approve the sale of The Campus property to BEE investors.
14. It is alleged (in summary) that:
- a. The Defendant together with certain other former executives of C1 and/or its subsidiaries, and an independent contractor, (collectively the “Executives”) deliberately concealed their identities as investors behind the Identity Fund and failed to disclose their conflict of interest in the Campus Transaction to the Claimants and any other entity in the NTT Group.
  - b. In failing to disclose to the Claimants his interest and the other Executives’ interests in the Campus Transaction, the Defendant breached his fiduciary and/or contractual duties.
15. On 26 November 2020, C1 and Mr Goodall entered into a termination agreement (the “Termination Agreement”), pursuant to which Mr Goodall’s employment by C1 terminated on 30 June 2021 and C1 agreed to pay a ‘Termination Payment’ to Mr Goodall as well as certain

other amounts as set out in the agreement. Save for the obligations contained in the Termination Agreement, the agreement was expressed to be in full and final settlement of all and any claims which either party might have against the other.

16. It is alleged that had the facts of the conflict of interest or his breaches of fiduciary duty been disclosed C1 would not have concluded the Termination Agreement. C1's case is that it has therefore rescinded it, and C2, alternatively C1, seeks restitution of the payments made under it, alternatively damages in the sum of USD 17,592,010.
17. C2 and C4 also seek damages for the value of other payments that would not have been made to Mr Goodall but for his breaches of his fiduciary and/or contractual duties, including (i) salary, (ii) bonuses, and (iii) settlement of long term incentives.
18. C2 and C5-C7 seek damages in the sum of USD 11,029,004 and ZAR 326,985,772 for payments made under the other Executives' termination agreements and certain other payments that would not have been made to the other Executives absent the Defendant's breach.
19. C6 seeks damages for incurred fees relating to the investigation conducted into potential conflicts of interest by former employees and directors.
20. C3 and C5 seek damages for losses arising from the Campus Transaction.
21. Although no Defence has yet been filed and the merits of the allegations are not relevant to the issues before this Court on this Application, I note for completeness, from the witness statement of Mr Heyes referred to below, that Mr Goodall denies that his investment in the fund was tainted by any impropriety and that Mr Goodall considered that the Campus Transaction was in the best interests of Dimension Data.

## Evidence

22. The Defendant has filed two witness statements in support of his Application from Mr Gerard Heyes, a partner in the firm of Farrer & Co LLP acting for the Defendant, and the Claimants have filed a witness statement in response from Mr Andrew McGregor who at the time was a partner in Allen & Overy, the solicitors then acting for the Claimants. However given the narrowing of issues on this Application, the evidence has only limited relevance to the issues now for determination.

## Relevant law

23. The principles to be applied on this Application were said to be common ground: the test as set out by the Court of Appeal in *Athena Capital Fund v Holy See* [2022] EWCA Civ 1051 is whether it is in the interests of justice for a stay to be granted. However the Claimants placed emphasis on the statements in the case law that such a stay is only likely to be granted in "*rare and compelling*" circumstances. The Claimants also pointed to illustrations of the application of the test in various cases and whilst accepting that the Court has to apply the test in the

circumstances of this case nevertheless relied on certain authorities to support their argument that the circumstances of this case were not rare and compelling.

24. I propose to deal with the individual cases referred to by the parties (so far as necessary) when dealing with the various factors identified by the parties. At this stage it is sufficient to set out the relevant principles by reference to the judgment in *Athena Capital* which also considered the earlier authorities.

25. At [48] of the judgment Males LJ set out the test as follows:

*“The court has power to stay proceedings “where it thinks fit to do so”. This is part of its inherent jurisdiction, recognised by section 49(3) of the Senior Courts Act 1981. The statute imposes no other express requirement which must be satisfied. This is a wide discretion. The test is simply what is required by the interests of justice in the particular case.”*

26. At [49]-[59] Males LJ considered the relevant case law and explained the significance of the references in the authorities to “*rare and compelling circumstances*”.

27. At [49] he said:

*“...Cases which speak of “rare and compelling circumstances” (or similar phrases) being necessary have nothing to do with these kinds of commonplace example. They have generally been concerned with stays which have been imposed in order to allow actions in other jurisdictions to proceed, the usual assumption being that the outcome of the foreign proceedings will or may render the proceedings here unnecessary.” [emphasis added]*

28. Males LJ then referred to the case of *Reichhold Norway ASA v Goldman Sachs International* [2000] 1 WLR 173 as an example of such a case:

*“50 That was the position in Reichhold Norway ASA v Goldman Sachs International [2000] 1 WLR 173. The claimant had two possible claims by which to obtain compensation for loss allegedly suffered as a result of purchasing a business. The first was a relatively straightforward claim against the seller of the business, which was subject to arbitration in Norway. The second was a much more complex but overlapping claim against the defendant for negligent mis-statement. Moore-Bick J decided to stay the English proceedings against the defendant pending the final determination of the Norwegian arbitration. He did so on case management grounds, in particular because the claimant had a straightforward remedy in the arbitration which, if its claim was good, would enable it to recover in full for the loss which it had suffered and which would be achieved more quickly and cheaply.*

*51 This court upheld Moore-Bick J’s exercise of discretion...”*

29. In the context of the written submission that was made to this Court by the Claimants that the “starting point” for the Court should be that the Respondents are “entitled” to pursue their claims against the Defendant, it is relevant to set out that Males LJ did not accept this approach:

*“...Despite dicta in Abraham v Thompson [1997] 4 All ER 362, a claimant does not have an unfettered right to pursue a claim to judgment, subject only to considerations of abuse of process, on a timetable of its own choosing; rather, the court has power to control its own business and there may be circumstances in which it is in the interests of justice for the pursuit of a claim to be deferred until something else has happened.”*

30. I note that Males LJ did refer to the fact that Lord Bingham of Cornhill CJ (with whom Otton and Robert Walker LJ agreed) recognised that the Court would need to bear in mind Article 6 ECHR. However Males LJ is clear that the test approved in *Reichhold* was whether a stay was in the interests of justice:

*“52 However, the test which Moore-Bick J had actually applied, and which this court held to be correct, was not whether there were rare and compelling circumstances, but whether a stay was in the interests of justice...”*

31. In his judgment Males LJ dealt with the decision in *Amlin Corporate Member Ltd v Oriental Assurance Corpn (The Princess of the Stars)* [2013] 1 All ER (Comm) 495, an authority relied on in particular by the Respondents for the proposition that:

*“the circumstances in which the Court will grant a case management stay are so rare and exceptional that, even where the parallel action will be determinative of the outcome of the English proceedings, the English courts may nonetheless refuse to grant a stay.”*

32. However Males LJ at [53] made it clear that the test was not whether there were “rare and compelling circumstances” and that “the question whether to grant a stay in [Amlin] is concerned with the order in which decisions should be made”. He said:

*“53 The expression “rare and compelling circumstances” has been taken up in later cases and sometimes treated as if it were in itself the applicable test in such cases: e.g. Konkola Copper Mines plc v Coromin [2006] 1 All ER (Comm) 437, para 63, a reinsurance claim where a stay of Part 20 proceedings was refused: it would have been unfair to leave the defendant insurer unable to seek to pass on the claim being made against it in the English proceedings until after the conclusion of proceedings against other insurers in Zambia; and Amlin Corporate Member Ltd v Oriental Assurance Corpn (The Princess of the Stars) [2013] 1 All ER (Comm) 495, where a stay of a reinsurer’s claim for a declaration of non-liability until after the conclusion of proceedings against the insurer in the Philippines was refused. As Flaux J explained in Standard Chartered Bank (Hong Kong) Ltd v Independent Power Tanzania Ltd [2016] 1 All ER 233, para 128, the question whether to grant a stay in such cases is concerned with the order in which decisions should be made.” [emphasis added]*

33. Males LJ said where the Judgments Regulation or an exclusive jurisdiction clause applies, this would be a “weighty factor” against the grant of a stay:

*“54. ...In cases where the English court has jurisdiction under the Regulation, it cannot be a sufficient ground to impose a stay that the dispute would be more conveniently decided in another Regulation jurisdiction. So to decide would circumvent the Regulation, as Lawrence Collins J explained in Mazur Media Ltd [2004] 1 WLR 2966. That would be so a fortiori in a case where the English court has jurisdiction under article 25 by virtue of an exclusive jurisdiction clause. In such a case it is a very weighty factor that a stay of English proceedings in favour of a foreign jurisdiction would be contrary to the terms of the Regulation and the parties’ agreement...”*

34. However I note that (unlike the position in some of the cases) this is not such a case.

35. It is also in my view relevant to the circumstances of this case to note the formulation of the principle by the Supreme Court in *Unwired Planet International Ltd v Huawei Technologies (UK) Ltd* [2020] Bus LR 2422 as set out by Males LJ at [56]:

*“56 The Supreme Court discussed briefly the court’s power to order a stay where there are parallel proceedings in another jurisdiction in Unwired Planet International Ltd v Huawei Technologies (UK) Ltd [2020] Bus LR 2422:*

*“99. We therefore turn to case management. The English courts have wide case management powers, and they include the power to impose a temporary stay on proceedings where to do so would serve the Overriding Objective: see CPR rr 1.2(a) and 3.1(2)(f). For example, a temporary stay is frequently imposed (and even more frequently ordered by consent) in order to give the parties breathing space to attempt to settle the proceedings or narrow the issues by mediation or some other form of alternative dispute resolution. A temporary stay may be ordered where there are parallel proceedings in another jurisdiction, raising similar or related issues between the same or related parties, where the earlier resolution of those issues in the foreign proceedings would better serve the interests of justice than by allowing the English proceedings to continue without a temporary stay: see *Reichhold Norway ASA v Goldman Sachs*. But this would be justified only in rare or compelling circumstances: see per Lord Bingham CJ at pp 185—186, and *Klockner Holdings GmbH v Klockner Beteiligungs GmbH* [2005] EWHC 1453 (Comm).”* [emphasis added]

36. Males LJ summarised the approach in his conclusion at [59]:

*“59 There is, as it seems to me, no reason to doubt that it is only in rare and compelling cases that it will be in the interests of justice to grant a stay on case management grounds in order to await the outcome of proceedings abroad. After all, the usual function of a court is to decide cases and not to decline to do so, and access to justice is a fundamental principle under both the common law and article 6 ECHR. The court will therefore need a powerful reason to depart from its usual course and such cases will by their nature be exceptional. In my judgment all of the guidance in the cases which I have cited is valuable and instructive, but the single test remains whether in the particular*

*circumstances it is in the interests of justice for a case management stay to be granted. There is not a separate test in “parallel proceedings” cases. Rather, considerations such as the existence of an exclusive English jurisdiction clause and the danger of circumventing a statutory scheme for the allocation of jurisdiction (such as the Judgments Regulation) will be weighty and often decisive factors pointing to where the interests of justice lie”. [emphasis added]*

### Respondents’ submissions

37. Turning then to consider the submissions for the Respondents. In their written submissions the Respondents advanced five main reasons why the Court should decline to grant a stay of the proceedings.

The “starting point” is that the Respondents are entitled to pursue their claims

38. In their written submissions the Respondents submitted that the “starting point” is that the Respondents are entitled to pursue their claims against Mr Goodall. The Respondents relied on a passage from *Abraham v Thompson*:

*“In my view, the starting point in any case where a stay is sought in circumstances which are not provided for by statute or rules of court, should be the fundamental principle that in this country an individual (who is not under a disability, a bankrupt or a vexatious litigant) is entitled to untrammelled access to a court of first instance in respect of a bona fide claim based on a properly pleaded cause of action, subject only to the sanction or consideration that he is in peril of an adverse costs order if he is unsuccessful, in respect of which the opposing party may resort to the usual remedies of execution and/or bankruptcy if such order is not complied with. This principle is of course subject to the further proviso that, if the court is satisfied that the action is not properly constituted or pleaded, or is not brought bona fide in the sense of being vexatious oppressive or otherwise an abuse of process then the court may dismiss the action or impose a stay whether under the specific provisions of the rules of court or the inherent jurisdiction of the court.”*

39. In his oral submissions Lord Wolfson KC submitted:

*“The way I would put it is that when you look at *Abraham v Thompson* and when you look at it in *Athena*, certainly the starting point, the starting point is that if a litigant has a properly pleaded cause of action, it’s entitled to pursue that claim in a court with jurisdiction. And it will therefore take, necessarily we would say, rare and compelling circumstances to deprive the litigant of that right.”*

40. In light of the observations of Males LJ in *Athena*, this submission in my view puts the right of the litigant too highly. Males LJ said:

*“...a claimant does not have an unfettered right to pursue a claim to judgment, subject only to considerations of abuse of process, on a timetable of its own choosing”.*



41. What can be accepted, if that was the import of the submission for the Respondents, is that as Males LJ said:

*“the usual function of a court is to decide cases and not to decline to do so, and access to justice is a fundamental principle under both the common law and article 6 ECHR. The court will therefore need a powerful reason to depart from its usual course and such cases will by their nature be exceptional.”*

42. However ultimately there is a single test: *“whether in the particular circumstances it is in the interests of justice for a case management stay to be granted.”* The Court is mindful of Article 6 of the ECHR but the effect of a stay is not to put an end to the claim in this jurisdiction but to cause a delay to the resolution of the proceedings. Adopting the language of Flaux J (as he then was) the question whether to grant a stay is concerned with the order in which decisions should be made.

The Respondents should not be compelled to surrender their rights to litigate in Court in favour of an arbitral tribunal.

43. It was submitted for the Respondents that the effect of a case management stay would be effectively to prevent the Respondents from proceeding to recover their losses in any forum until the stay is lifted. It was submitted that this was different from the position in *Reichhold* in which the Buyer was already proceeding with an action in arbitration to recover the same loss.
44. Whilst this was a factor in the reasoning in *Reichhold*, it was only one of the factors as is evident from the judgment of Males LJ at [50] (set out above).
45. Further the effect of a stay is not to remove the rights of the Respondents to recover their losses (assuming that the Respondents are successful in the proceedings as to which I express no view) but to delay the recovery. I note that the judge at first instance in *Reichhold* took the view that any delay could be compensated by an award of interest:

*“It is important to emphasise that the question which has to be decided on this application is not whether Reichhold should be required to pursue a claim which it does not wish to pursue at all, but whether it should be required to pursue its pending claim against Jotun before it proceeds further with this action. If Reichhold had abandoned or compromised its claim against Jotun this application would not have been made, or if made, would have had no prospect of success. But the fact is that the claim against Jotun is still pending. Reichhold wishes to maintain its claim against Jotun and will pursue it if necessary. In the absence of any explanation for its desire to pursue this action in preference to the arbitration, the most recent exchange of correspondence between the parties' Norwegian lawyers looks like nothing more or less than a tactical move on Reichhold's part. Viewed objectively there is, on the material before me, no advantage to Reichhold in taking that course; on the contrary, it appears to be the less favourable option. In those circumstances the only prejudice which Reichhold is likely to suffer if this action is stayed is a delay of about a year. Since delay of that kind can be*

compensated by an award of interest if Reichhold is ultimately successful, that might be considered a small price to pay for the prospect of avoiding complex and costly litigation.” [emphasis added]

46. Further if a stay were granted, it would be open to the Respondents to bring an application in the future to lift the stay should the arbitration not be pursued with expedition on the part of the Defendant.
47. It was submitted for the Respondents that they should not be compelled to surrender their rights to litigate in open Court in favour of an arbitral tribunal. However in my view this is not the necessary effect of a stay. As discussed below, in my view there are good reasons why it would be in the interests of justice for the issues between the Defendant and C1, C2 and C6 to be resolved before the Court proceedings determine the claims brought by the Respondents and it is not necessary for the Respondents to participate in the arbitration in order to achieve this.
48. It was also submitted for the Respondents that it was open to Mr Goodall to submit to the jurisdiction of the English courts in respect of C1, C2 and C6’s claims and thus any “inefficiency” caused by the resulting parallel proceedings is therefore of his own making.
49. It seems to me that it is not unreasonable for Mr Goodall to seek to follow the contractual process agreed between him and his employer in the event of a dispute, namely mediation failing which arbitration. As discussed below, the other claims brought by the Respondents follow from the core claims made by C1, C2 and C6.

#### No arbitration has yet been commenced

50. It was further submitted for the Respondents in their written submissions that no arbitration has yet been commenced which it was submitted, suggested that it would be inappropriate to grant a stay. The Respondents relied on several authorities including *Reichhold* and *Autoridad del Canal de Panamá v Sacyr SA and others* [2017] EWHC 2228 (Comm) at [162]-[163]. It was submitted that in *Reichhold* the parallel arbitration was already on foot. In the latter case Blair J considered two cases where different approaches were taken by the Court to the issue of a stay and noted that the stage of the proceedings weighed with the Court:

*“[162] A recent authority is Stemcor UK Ltd v Global Steel Holdings Ltd [2015] EWHC 363 (Comm), [2015] All ER (D) 271 (Feb), where a stay of a claim against guarantors under guarantees with exclusive jurisdiction clauses was granted pending the outcome of an arbitration as to the underlying debt. The court distinguished Classic Maritime Inc v Lion Diversified Holdings Bhd [2010] 1 Lloyd’s Rep 59 which went the other way.[163] It is clear that each case depends on its facts. One of the points that weighed with the court in Stemcor was that the arbitration proceedings were more advanced than the court proceedings—directions up to and including the final hearing had been made, including a detailed timetable for disclosure and factual and expert evidence, and the hearing date had been fixed ([2015] EWHC 363 (Comm), [2015] All ER (D) 271 (Feb) at [50]). In Classic Maritime on the other hand, the arbitration had yet to be instituted” [emphasis added].*

51. In oral submissions for the Respondents Lord Wolfson KC submitted that:

*“If the other proceedings are significantly more advanced than the court proceedings, that would normally be a factor pointing to a stay. But if the other proceedings are yet to be instituted, that would tend against granting a stay.”*

52. As far as the Court proceedings are concerned, the Claimants issued the Claim form and served the Particulars of Claim on 21 December 2022 (deemed date of service 29 December 2022). No defence was served in light of the challenge to jurisdiction by the Defendant. Further the Claimants now intend to file an amended Particulars of Claim to reflect the fact that the parties have agreed (as recently as 9 February 2024) that the proceedings brought by C1, C2 and C6 should be stayed under s9 of the Arbitration Act. The Court proceedings are therefore at a very early stage and no disclosure has taken place and no evidence filed other than in support of the interim applications.

53. As far as the arbitration is concerned, the Defendant triggered the application of Clause 18.1 of the Employment Agreement as early as January 2023 by a letter (dated 25 January 2023) from his solicitors:

*“Please take this letter as formal notice pursuant to cl.18.1 of the Employment Agreement that Mr Goodall requires all the claims subject to the Proceedings to be submitted to mediation and, should compromise not be reached at the said mediation, to arbitration, in accordance with the provisions of the Employment Agreement. For the avoidance of doubt, if your client (wrongfully) fails to mediate, he nevertheless requires that the claims be submitted to arbitration.”*

54. The letter noted that pursuant to Clause 18.2 *“the parties now have 48 hours to agree on a mediator, failing which the mediator shall be appointed by the Group’s auditors.”*

55. Although the Claimants’ solicitors sent a holding response on 27 January 2023, no substantive response was provided until 12 May 2023 (in the witness statement of Mr McGregor filed in response to the Defendant’s Application). In that witness statement Mr McGregor challenged the validity of the arbitration notice and whether the clause had any application beyond C1.

56. Given the consent order of 9 February 2024 that the proceedings brought by C1, C2 and C6 should be stayed under s9 of the Arbitration Act, it is now accepted by the Claimants that an arbitration will take place, although the parties have yet to appoint an arbitrator and set out their cases.

57. The Defendant submitted that what is important is that the arbitration is an expedited procedure and that it was almost certain to come to a decision first: Clause 18.3 of the Employment Agreement provides that each party to the Agreement *“expressly consents to any arbitration in terms of the aforesaid rules being conducted as a matter of urgency”*.

58. I am told by the Defendant that in terms of the Commercial Court listing as at the date of the hearing of the Application, a two-week trial already has a lead time of 4 May 2025 and I accept that by the time this gets to a CMC in, say, three months, that is likely to be during the Michaelmas term in 2025. It was submitted for the Defendant that an expedited arbitration is almost certain to get on before that.

59. Lord Wolfson KC for the Respondents doubted whether the provisions in the Employment Agreement that the arbitration would be expedited would in reality make a difference. He submitted that:

*“The reality is in arbitration it is no quicker than court.”*

60. Whether or not the contractual provision has any real bearing on the progress of the arbitration may be doubted. However as to the practical reality, and without evidence on this point but based on the timescales in the Commercial Court, it seems to me that depending on the choice (and thus the availability) of the arbitrator, it is likely that an arbitration could be resolved before proceedings were concluded in the Commercial Court.

61. Even if I were wrong on that, it cannot be said that this is a case where the court proceedings are significantly more advanced such that it militates against a stay. The Claimants accepted in oral submissions that there will be an arbitration. In response to a question from the Court, Lord Wolfson replied that:

*“[The Court] should certainly proceed on the basis that there will be an arbitration, because it would be unrealistic of me to submit otherwise”.*

62. Thus in circumstances where on the one hand it is (largely) the actions of the Claimants that until the start of this month have operated to prevent the commencement of the arbitration and the Claimants now accept an arbitration will happen, and on the other the court proceedings are at a very early stage (with the Particulars of Claim to be amended and a Defence yet to be filed), I do not accept that the fact that the arbitration has not yet commenced is a factor to be given any weight in this case.

The parties to any arbitration will not be the same as the parties to the English litigation/ the arbitration will not give rise to any issue estoppel

63. There are two related points made by the Respondents. The Respondents submitted that it is “*generally inappropriate*” to grant a stay where the parties to the arbitration will not be the same as the parties to the litigation. The Respondents also submitted that the arbitration will not give rise to any issue estoppel and the outcome of the arbitration will not determine the outcome of the proceedings.

64. The Respondents rely on *Klockner Holdings GmbH v Klockner Beteiligungs GmbH* [2005] EWHC 1453 (Comm) at [21] (subparagraphs (iv) and (v)):

“21. In my judgment, relevant factors which guide the court in the exercise of its discretion to stay proceedings include (in the circumstances of the present case) the following:

...

iv. A stay will not, at least in general, be appropriate if the other proceedings will not even bind the parties to the action stayed, let alone finally resolve all the issues in the case to be stayed.

v. A stay will not, at least in general, be appropriate if the parties to the other proceedings are not the same.

...”

65. The relevance of the same parties goes to the question of whether the outcome of the arbitration will determine the outcome of the proceedings. For the purposes of this Application (and without precluding or prejudging any arguments that may be made in the future), I accept that there is no issue estoppel. I also accept that the Respondents are each suing in respect of their own loss, which is separate from the losses suffered by C1, C2 and C6 and thus recovery by C1, C2 and C6 against Mr Goodall will not make good the Respondents’ losses.
66. However I do not accept the submission for the Respondents that the recovery by C1, C2 and C6 will not “*otherwise impact*” the Respondents’ losses. It seems to me that as submitted for the Defendant (and as further discussed below) the practical effect of an award in the arbitration may well be that the court proceedings do not proceed.
67. In my view the fact that the parties to the arbitration will not be the same as the parties to the proceedings is a factor which on the authorities “in general” militates against a stay but it is not an absolute bar. In the circumstances of this case, as discussed below, even absent an issue estoppel, it may resolve the issues as a practical matter.

#### Defendant’s submissions

68. In its written submissions the Defendant advanced seven main reasons why it submitted the interests of justice lay in favour of avoiding parallel proceedings which I address under the subheadings below.

It is relevant that C1 agreed that disputes relating to Mr Goodall’s employment would be determined in arbitration/ the English court does not easily lend itself to being an instrument of undermining arbitration agreements

69. These two submissions were in my view overlapping and can be taken together.
70. It was submitted for the Defendant that a solution which “*respects the intention of [the Employment Agreement]*” is preferable to one which see the Court determining what are in substance disputes about the Defendant’s performance as NTT Group CEO and the termination of that employment. This appears to verge on a submission that the Respondents should be subject to the arbitration which must be rejected since the Respondents bring independent claims which are not subject to the contractual provisions for arbitration.

71. Further the fact that C1, C2 and C6 agreed that disputes would be determined in arbitration does not bind the Respondents and as a consequence s9 of the Arbitration Act does not apply to the Respondents. There can therefore be no question of the Court “*undermining*” the arbitration agreements in determining the non-arbitrable claims even though the matters to be considered may be matters which will also be considered and determined (as between the parties to the arbitration) by the arbitral tribunal.
72. As free standing factors I therefore give these factors no weight.

#### There is no apparent advantage to concurrent proceedings

73. It was submitted for the Defendant that it is difficult to identify any “*proper reason*” why the Claimants should wish to pursue concurrent proceedings. It was accepted for the Defendant that refusal of a stay would result in a “*slightly earlier determination*” of the totality of the claims. It was submitted that there was limited prejudice compared with the significant benefits of a stay.
74. As discussed above, the Court cannot be certain as to whether the arbitration will lead to a quicker resolution of the claims of C1, C2 and C6 nor can it estimate with any precision the time that the arbitration will take but there will be a delay in the Respondents recovering their claims if a stay is granted. As referred to above the delay can be compensated in an award of interest.
75. However, the absence of any “*advantage*” to concurrent proceedings does not really assist the determination of whether it is in the interests of justice to grant a stay: as Males LJ said in *Athena*:

*“the usual function of a court is to decide cases and not to decline to do so, and access to justice is a fundamental principle under both the common law and article 6 ECHR. The court will therefore need a powerful reason to depart from its usual course and such cases will by their nature be exceptional”.*

#### It would be undesirable and inefficient to have parallel proceedings

76. It was submitted for the Defendant that it would be a waste of effort and money to have two sets of pleadings, disclosure/document production, witness statements and hearings.
77. In response it was submitted for the Respondents that this submission could be made in any case of multiple proceedings and given that Court proceedings will only be stayed in rare and compelling circumstances, additional cost alone cannot be a sufficient justification for a stay.
78. I accept that this factor “*alone*” cannot justify a stay but in my view it is a factor which I take into account.
79. It was submitted for the Respondents that if Mr Goodall succeeds in the Court proceedings he can seek his reasonable costs of the proceedings.



80. However that seems to me to ignore the duty of the Court to ensure that proceedings are conducted fairly and at proportionate cost. It is no answer for the Court to allow costs to be incurred on the basis that they may (to an extent) ultimately be recoverable from the losing party, if such costs could be avoided or significantly reduced whilst still allowing for the proceedings to be resolved fairly.
81. It was submitted for the Respondents that because the arbitration will not bind the Respondents the court proceedings “*may well have to be heard in full at a later date anyway in which case all the same costs will need to be incurred*”. That issue is discussed below.

#### The risk of inconsistent decisions

82. It was submitted for the Defendant that the Court should do everything possible to avoid the risk of inconsistent decisions.
83. It was submitted for the Respondents that, as noted by Andrew Smith J at first instance in *Amlin*, the risk that courts will have different evidence before them is an “*inevitable*” risk of proceedings in different courts.
84. However as is clear from the passage in the judgment of the Court of Appeal in *Amlin* where this statement is referred to, the judge did not merely accept the risk of different evidence but assessed the risk to be modest in that case:

“[25] ... *When he came to deal with the possibility of inconsistent decisions the judge dealt with the risk that evidence might not be available in England which might be available in the Philippines and said this (at [37]):*

*‘Some risk of this kind, that different courts will have different evidence adduced before them, is inevitable where there are to be proceedings in different courts. However, only one specific illustration of this concern was given, that the master might have told his employers or the port authorities or some other person before sailing what his intended route was and that the likelihood of such evidence being available in the English proceedings was slight. If there is such evidence, it would appear that the probability is that this will emerge in the judicial affidavits of Sulpicio’s witnesses and cross-examination thereon, which, according to the pleaded defence, will start in about March 2012 and is likely to take several months. Any evidence is likely to emerge before these proceedings would come to trial in the normal course of events and it seems to me that the claimants can have no real objection to some modest deceleration in the progress of these proceedings to make it the less likely that they will. The risk of different evidence leading to different results is to be assessed in light of these circumstances and seems to me a relatively modest one.’*

*[26] It is therefore clear that the judge had the risk of different evidence and inconsistent decisions well in mind and his assessment of the risk as relatively modest was well within his discretion...*” [emphasis added]

85. By contrast, as further discussed below, in this case it seems inevitable that in both the arbitration and the Court proceedings the factual evidence will focus on the same acts of the Defendant and the other Executives.
86. Further I note that this passage in *Amlin* does not address the risk of inconsistent decisions. It was submitted for the Respondents that the consequences of inconsistent decisions “*is substantially lessened*” by the fact that the decisions will not be between the same parties and so will not give rise to any issue estoppel.
87. However that submission appears to accept by inference that it does not preclude the risk of inconsistent decisions and the difficulties which the Defendant identifies in this regard are discussed below.

The arbitration will resolve substantially all of the significant factual and legal issues between the parties and the bulk of the value of the Cs’ claims/likely to be dispositive of the dispute as a whole as a matter of practical reality

The arbitration should be determined first as a matter of good case management

88. It was submitted for the Defendant that the arbitration will resolve “*substantially all of the significant factual and legal issues between the parties and the bulk of the value of the Cs’ claims*” and is likely to be dispositive of the dispute as a whole as a matter of practical reality.
89. In response to these submissions, the Respondents submitted that because the Respondents are not parties to the arbitration agreements any arbitration award would have no binding legal effect on the English court proceedings.
90. The Respondents further submitted that the arbitration will not resolve the “*bulk of the value of Cs’ claims*” because it will only resolve the claims of C1, C2 and C6 and not the claims of the Respondents.
91. The Respondents submitted that it is clear on the authorities that what justifies a case management stay is that the parallel proceedings will finally resolve the issues in the case to be stayed either by creating an issue estoppel between the same parties (*Klockner* at 21(iv)) or by enabling the claimant to recover in respect of the same loss as is sought to be recovered in the English proceedings (*Reichhold*).
92. As discussed above, I accept for the purposes of this Application that there is no issue estoppel. However as also referred to above, in my view the fact that the parties to the arbitration will not be the same as the parties to the proceedings is a factor which on the authorities, is a factor which “*in general*” militates against a stay but it is not an absolute bar. As to reliance on *Reichhold* it is clear that there were a number of factors which were taken into account and no one factor is decisive.



93. As to good case management the Respondents submitted that this is based on a “*misapprehension*” that the arbitration will be determinative of the issues between the Respondents and Mr Goodall.
94. As discussed below, in my view, in the circumstances of this case, even absent an issue estoppel it may resolve the issues between all the Claimants (including the Respondents) as a practical matter.

## Discussion

95. Following the approach of the Court of Appeal in *Athena* the single test is whether in the particular circumstances of this case it is in the interests of justice for a case management stay to be granted.
96. I bear in mind that the usual function of a Court is to decide cases and not to decline to do so, and access to justice is a fundamental principle under both the common law and article 6 ECHR and thus as Males LJ said, the Court will need a “*powerful reason*” to depart from its usual course. However it is a test to be applied by reference to all the circumstances of the case.
97. This is not a case where there is an exclusive English jurisdiction clause which applies nor is there the danger of circumventing a statutory scheme for the allocation of jurisdiction (such as the Judgments Regulation) and thus there are no such “*weighty*” or “*decisive*” factors.
98. In order to determine whether it is in the interests of justice for a case management stay, the Court must evaluate the circumstances of this case. The decisions in the various cases relied on by the parties whilst they may be illustrative or provide guidance in relation to particular factors, nevertheless depend for their outcome on an evaluation of the totality of the factors in that particular case. I have addressed above the cases relied upon by the parties in the context of the submissions made by the parties but it is important to stress that addressing the factors individually risks arriving at the wrong result as what is required is an evaluation of the interests of justice having regard to all the circumstances. I now therefore bring together what I regard as the key factors in the circumstances of this case to determine whether it is in the interests of justice to grant a stay.
99. One of the key points on this Application is that the Claimants are related parties in the sense that C1 is the “*Topco*” of the NTT group of companies outside Japan and C2-C7 are all wholly owned subsidiaries of C1. Whilst I acknowledge that the Respondents each have separate legal personality and bring claims for separate losses, given the group structure in this case, it would be unrealistic to assume that the interests of the Respondents in these proceedings are distinct from the interests of the other Claimants or that the Claimants will pursue the two sets of proceedings and any settlement other than in the interests of the NTT Group as a whole.
100. Insofar as reliance is placed by the Respondents on the fact that the cases where a stay have been granted have dealt with parallel claims involving the “*same parties*”, it seems to me that this case has an unusual fact pattern where not only are claims brought by a number of companies in the same group to be split between two sets of proceedings but also in

circumstances where that clearly was not the intention of the Claimants (even though they now submit that they should be allowed to continue with both sets of proceedings). The original proceedings were brought in this claim against the Defendant by all the Claimants and as referred to above, it is only shortly prior to the hearing of this Application that C1, C2 and C6 have accepted that they are bound by the Employment Agreement in relation to the dispute and that they cannot pursue the Court proceedings but are obliged to arbitrate. It is not a fact pattern which has arisen in the authorities to which I was taken in argument.

101. When considering whether a stay of these proceedings is in the interests of justice the Court is therefore faced with the question of whether it is in the interests of justice to allow companies which are linked and managed together to bring parallel proceedings against a single Defendant. It seems to me to be relevant that the allegations of breach of duty that underlie the claims in this case by the Respondents depend (in large part) on establishing that the Defendant's duties extended beyond his contractual duties to companies in the group with which he had no contractual relationship. Their claims are all based on the actions of the Defendant who is described by the Claimants in the Particulars of Claim as the "*Group's Global CEO*" and who it is alleged "*as a result of his position as NTT Group CEO... was responsible for acting for or on behalf of the entities in the NTT Group.*"
102. Further the claims brought by the Respondents rely on the Defendant's actions as part of the committee of the Board of Directors of C1 (the "Approval Committee") of which the Defendant was a member and to which the decision to enter into the Campus Transaction was delegated by the Board of Directors of C1. It is alleged that as a result of Mr Goodall's position on the Approval Committee of C1, Mr Goodall undertook to act for or on behalf of C3 in circumstances which gave rise to a relationship of trust and confidence and/or in circumstances which involved the assumption of responsibility by Mr Goodall in respect of the affairs of C3.
103. Thus not only is this a case where the parties to the two sets of proceedings are related and managed together but the factual basis for the claims by the Respondents of breach of fiduciary duty are dependent on the same factual circumstances as will be determined in the arbitration and it could be said stem from the Defendant's position as a Director of C1.
104. I accept that the Respondents' claims are legally separate claims and brought under different laws from the claim in the arbitration which is governed by English law. The claim by C3, C5 and C6 for breach of fiduciary duty is a claim under South African law and the claim by C7 is a claim for breach of fiduciary duty under Manx law, those claimants being incorporated in South Africa and the Isle of Man, respectively. However in the Particulars of Claim it is said that those fiduciary duties are (in relation to South Africa) "*identical*" and (in relation to the Isle of Man) "*materially identical*" to the statutory duties owed to C1 and C2.
105. As to the losses which the Respondents claim in these proceedings these are separate losses but also losses which arise out of that core central factual case.
106. Whilst I proceed on the basis that there is no issue estoppel which will arise by reason of the arbitration proceedings, the Court has to consider the reality of what is happening and is likely to happen. In this regard I have in mind that Males LJ at [49] said that the authorities did not

require the parallel proceedings to be dispositive of the Court proceedings in order to justify a stay but said that the assumption was that the outcome “*will or may render the proceedings here unnecessary*” [emphasis added]:

*“...Cases which speak of “rare and compelling circumstances” (or similar phrases) being necessary have nothing to do with these kinds of commonplace example. They have generally been concerned with stays which have been imposed in order to allow actions in other jurisdictions to proceed, the usual assumption being that the outcome of the foreign proceedings will or may render the proceedings here unnecessary.”*

107. The claims which are subject to the arbitration are valued in the region of £38 million. The total quantified amount of the claims brought by the Claimants (prior to their recent change of heart) amounted to £45 million. It can be seen therefore that the bulk of the value of the quantified claims brought in these proceedings and which will now go to arbitration are dependent on the outcome of the contractual claims pursuant to the Employment Agreement.
108. Whilst I accept that if C1, C2 and C6 obtain an award in the arbitration this will not compensate the Respondents for their separate losses, if one considers the reality of the claims brought by this group of companies against this Defendant, an award against this individual defendant for £38 million under the arbitration may well end the litigation. I note that in his submissions the Defendant submitted that if C1, C2 and C6 have succeeded in their claims, the Defendant is likely to face “*a ruinous liability*”. Whilst I have no evidence as to the Defendant’s means, I note that there was no submission to the contrary on behalf of the Respondents. On the assumption that any award against the Defendant may well not be capable of being satisfied, the likelihood of the Respondents pursuing the proceedings in this Court seems greatly diminished (assuming the Claimants take the decision whether to pursue the litigation having regard to the likelihood of recovery and not for other reasons).
109. Conversely if the Defendant is successful in the arbitration this may well lead to a settlement of the Court proceedings given that the Claimants are related parties, the interrelationship of the factual basis for the claims and the pleading that the duties under South African and Manx law are “*[materially] identical*”.
110. If both sets of proceedings proceed in parallel it seems to me that there is a risk of inconsistent decisions and even though there may not be an issue estoppel, this could result in undesirable practical consequences. The Defendant in its submissions gave as an example the situation where the Court issued judgment on the basis that the Termination Agreement had been validly rescinded but the arbitral tribunal found that the claim to rescind had not been made out. No satisfactory answer was evident in the Respondents’ submissions to this point.
111. The obvious additional disadvantage in refusing a stay is that the costs of both sets of proceedings will be incurred. As referred to above, the Respondents submitted that this is inevitable where there are parallel proceedings and that this is not sufficient on its own to justify a stay.

112. Whilst I accept that parallel proceedings will always incur costs in both proceedings, I cannot see how it is in the interests of justice in this case for both sets of costs to be incurred. Although the Court is under a duty as part of the Overriding Objective to seek to determine cases expeditiously, the Overriding Objective is to deal with cases justly and at proportionate cost.
113. It was not the intention of the Claimants to bring two sets of proceedings so it cannot be said that there was an original rationale which justified a bifurcation of the claims and thus the additional costs. Other than the delay in resolution of the Respondents' claims, it is difficult to discern any reason from the Respondents' submissions as to why the Claimants would want to incur the additional costs of parallel proceedings.
114. By contrast it was submitted for the Defendant that concurrent proceedings will oppress the Defendant who is less able to manage the burden of two sets of heavy proceedings than a well-resourced multinational corporation. In the absence of any submissions or evidence to the contrary by or on behalf of the Respondents, it is difficult to infer anything other than the parties would not be on an equal footing so far as resources are concerned.
115. The Respondents' main argument is that they are entitled to proceed with their claim before this Court but as discussed above, that is clearly not the test in the light of *Athena*. The Court has to decide what is in the interests of justice in the circumstances of this case.
116. There will clearly be a delay if the stay is granted insofar as the claims brought by the Respondents are concerned but there is no evidence before the Court of any other prejudice which would result from a stay in this case. In this case there is no suggestion that any delay will cause any financial detriment to the Claimants or to the Respondents which could not be compensated by an award of interest on any judgment sum. The fact that the arbitration has not yet started is in my view not a factor in this case for the reasons set out above.
117. The Respondents argue strongly that the jurisdiction to grant a stay can only be exercised in "*rare and compelling*" circumstances. Whilst as the judgment in *Athena* makes clear, this is not the test which the Court should apply, I acknowledge that in *Athena* Males LJ said that courts are there to determine cases and a powerful reason would be needed to depart from that.
118. In my view the interests of justice in the circumstances of this case lie in the grant of a stay for the reasons discussed above which taken together amount to a "*powerful reason*" and a "*rare and compelling*" case.

## Conclusion

119. In my view for all the reasons discussed above this is a case where (adopting the language of the Supreme Court in *Unwired Planet* as referred to by Males LJ in *Athena*):

*“there are parallel proceedings in another jurisdiction, raising similar or related issues between ... related parties, where the earlier resolution of those issues in the foreign proceedings would better serve the interests of justice than by allowing the English proceedings to continue without a temporary stay”.*

120. The Application for a stay of the Respondents' claims under the inherent jurisdiction of the Court and/or pursuant to s.49(3) of the Senior Courts Act 1981 and/or CPR 3.1(2)(f) therefore succeeds. The precise terms of the order for a stay will be a matter for the consequential hearing if not agreed between the parties.