



Neutral Citation Number: [2021] EWHC 3072 (Ch)

Case No: BL-2020-001757

**IN THE HIGH COURT OF JUSTICE**  
**BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES**  
**BUSINESS LIST (ChD)**

Rolls Building, 7 Rolls Buildings  
Fetter Lane, London, EC4A 1NL

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Date: 19/11/2021

**Before:**

**MASTER KAYE**

**Between:**

**CHARTERHOUSE ASSET MANAGEMENT  
LIMITED**

**Claimant**

**- and -**

**LATCHWORTH LIMITED**  
**(a company incorporated in Jersey)**

**Defendant**

**Mr Timothy Polli QC** (instructed by **Lancasters Solicitors**) for the **Claimant/Respondent**  
**Mr Peter Shaw QC** (instructed by **Wedlake Bell LLP**) for the **Defendant/Applicant**

Hearing dates: 5 August 2021

**Approved Judgment**

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

.....

MASTER KAYE

**Master Kaye :**

1. This is the hearing of the defendant's application to set aside an order dated 4 December 2020 which permitted the claimant to serve its Part 8 claim out of the jurisdiction on the defendant in Jersey.
2. The claimant issued a Part 8 Claim on 14 October 2020 by which it sought a declaration that £1 million ("**the Fund**") presently held in Volksbank SA ("**Volksbank**"), a Swiss bank, in an account in the name of Comptoir de Jerusalem SA (a Swiss company) ("**CDJ**") ("**CDJ Account**") is held on a Quistclose-type resulting trust ("**Quistclose trust**") for the benefit of the claimant, who in turn is said to hold the money on trust for Mr Peter Lawrence and Mr Stephen Walsh ("**the Investors**").
3. The claimant's claim to the Fund arises pursuant to contractual arrangements entered into on 21 October 2014 involving the Investors, the claimant, Stephen Dryer, and an English company, Mythology 500 Management Limited ("**M500**"). M500 was struck off and dissolved in late 2018 and its assets now vest bona vacantia in the Crown.

**Background**

4. Pursuant to the 21 October 2014 contractual arrangements the Investors loaned the claimant the sum of £1m. This was in turn loaned to M500 for the purposes of a short-term investment which was intended to produce a substantial return.
5. TLT LLP ("**TLT**") acted for the claimant in 2014 and were involved with drafting the documents to record the contractual arrangements between the parties. Teacher Stern represented the Investors. The documents executed on 21 October 2014 included an Investment Agreement between the Investors and the claimant, a Facility Agreement between the claimant and M500, Personal Guarantees and a Side Letter. The 21 October 2014 documents were governed by English law with a relatively broad definition of disputes which included non-contractual claims arising out of or in connection with the subject matter or formation of the various documents, but the jurisdiction clause was non-exclusive.
6. After execution TLT received the monies which would constitute the Fund into their client account from the Investors and remitted them to the CDJ Account on behalf of the claimant on 31 October 2014, where the monies became the Fund.
7. The signatories to the CDJ Account were Mr Lawrence, Mr Dryer, and a director of the claimant. On receipt of the Fund CDJ confirmed that whilst the account was in its name it could only be withdrawn on the joint signatures of the signatories.
8. On 5 November 2014 CDJ completed a Form A, as required by Swiss law, by which they confirmed to Volksbank that the beneficial owner of the Fund was Mr Dryer. There is a dispute between the parties as to whether the contents of the Form A are binding or conclusive on the question of beneficial ownership as a matter of Swiss Law. However, even based on the Swiss law advice the claimant has received the Form A, even if not conclusive, has "enhanced credibility" and is considered true unless the contrary is established. The claimant seeks to argue that the contrary can be established. Whether or not the Form A is binding and conclusive on the question of

beneficial ownership of the Fund, it would seem to have some considerable force as evidence of intention as a matter of Swiss law. It is certainly something which has to date influenced the approach taken by the Swiss criminal prosecutor (“**the Swiss Prosecutor**”) who has not been prepared to release the Fund to the claimant.

9. On 6/7 November 2014 TLT wrote to Volksbank explaining that they acted for the claimant and had made the payment of £1m on 31 October (“**the TLT letter**”). The letter not only identifies that the correct reference should have been an M500 reference but also confirms as follows:

“As these funds have now been advanced by [the claimant] to [M500] under the Facility Agreement, [M500] is the legal and beneficial owner of these funds.”

10. Given the intention of the parties as evidenced by the 21 October 2014 documents that the Fund could be used as collateral by M500 to assist it in raising further funds, a statement to Volksbank as set out in the TLT letter was far from surprising. Again, there is a dispute about the significance of the TLT letter on the question of beneficial ownership.
11. Mr Polli seeks to distance the claimant from the Form A and the TLT letter and to minimise their significance to the question of beneficial ownership. Mr McDonnell QC had been retained to advise the claimant and in his 2018 advice, on which the claimant relied in support of its application for service out, suggested that the TLT letter demonstrated a misunderstanding of Quistclose trusts. Mr Shaw argues that the TLT letter was part of the overall CDJ Account opening process, demonstrating and consistent with the intention of the parties in relation to the beneficial ownership of the Fund at the time the CDJ Account was set up.
12. By early November 2014 the Fund was held in the CDJ Account for M500 and the Form A identified Mr Dryer as the beneficial owner whilst TLT had identified M500 as the beneficial owner.
13. In this claim, the claimant asserts that the Fund was transferred for a specific and exclusive purpose and the beneficial ownership of the Fund was retained by the claimant and the Investors. The claimant says that the Fund was always the subject of a Quistclose trust in favour of the claimant who in turn held it on trust for the Investors.
14. The defendant was not involved in the events that resulted in the Fund being held in the CDJ Account. They were and are a stranger to the contractual arrangements between the claimant, the Investors, Mr Dryer and M500. Not only were they not a party to any of the contractual arrangements entered in October 2014 but they knew nothing about them at the time.
15. The defendant’s interest in the Fund arises from entirely unconnected English proceedings. Unknown to the claimant, in about October 2014 M500 and Mr Dyer were embroiled in a dispute with the defendant. The defendant obtained a freezing injunction against both Mr Dryer and M500. Pursuant to it, M500 and Mr Dyer disclosed their interest in various accounts at Volksbank which included the CDJ Account. Thus, between October and December 2014 M500 and Mr Dyer considered

that they had a sufficient interest in the Fund that it was disclosable asset under the terms of an English freezing injunction. The Swiss Prosecutor was notified of the freezing injunction and the disclosures. On 7 December 2014 the identified accounts at Volksbank which included the CDJ Account were frozen. The Fund has remained frozen since December 2014.

16. The Swiss law advice that the parties have obtained indicates that although the Fund remains frozen, the Swiss Prosecutor's criminal proceedings are presently suspended or stayed pending the outcome of English criminal proceedings involving Mr Dryer. It is only after the conclusion of those proceedings that the Swiss Prosecutor will determine the question of forfeiture of the Fund in accordance with the Swiss criminal code.
17. HHJ Pelling QC's judgment at [2016] EWHC 3424 (Ch) sets out the details of defendant's proceedings. The defendant obtained a judgment of approximately £10m against M500 and Mr Dryer (and others). It seems likely that but for the intervention of the defendant's freezing injunction the Fund may have suffered a similar fate to that suffered by the defendant's funds.
18. On 27 March 2020 the defendant commenced Swiss civil enforcement proceedings to enforce its judgment against the Fund on the basis that (as a matter of Swiss law) the Fund was to be treated as beneficially owned by either Mr Dryer or M500. That is a claim that the defendant can only make and pursue in Switzerland. A Swiss attachment order was made on 16 April 2020.
19. On 31 March 2021 CDJ, as the account holder, filed an Objection and has intervened in those Swiss civil enforcement proceedings to claim entitlement to the Fund. CDJ says that Mr Dryer was the beneficiary of the Fund and that CDJ has suffered reputational damage arising from the freezing of the accounts and seeks to set off the Fund against its losses. Again, that is a claim CDJ can only make in Switzerland. The Swiss civil courts will therefore determine who is entitled to the Fund as a matter of Swiss law in the enforcement proceedings.
20. Initially in 2015/2016 the claimant sought to persuade the Swiss Prosecutor to release the Fund. They corresponded with CDJ's lawyers who were themselves in contact with the Swiss Prosecutor. On 27 January 2016 TLT confirmed that they had not received any monies from Mr Dryer and provided evidence that the monies they transferred to the CDJ Account came from the Investors. However, TLT did not retract the statement in the TLT letter which asserted M500's beneficial ownership.
21. The Swiss Prosecutor was not persuaded that the claimant was the true beneficial owner of the Fund. Based on the evidence available he took the view that Mr Dryer and/or M500 were the beneficial owners of the Fund. He considered that the lender, the claimant, had no more than a personal claim against the borrower, M500, for repayment.
22. From at least November 2016 Mr Baeriswyl, a Swiss lawyer who represented Mr Dryer in the criminal proceedings in Switzerland appears to have been assisting the claimant. He explained that to progress matters further with the Swiss Prosecutor an opinion from a UK lawyer was needed and suggested what that advice might encompass.

23. In January 2017 Mr McDonnell provided his first written advice to the claimant. He identified the conflicting indications as to the parties' intentions in respect of beneficial ownership but was unable to reach a firm conclusion about whether the Fund was subject to a Quistclose trust or indeed any other form or resulting trust. Based on the evidence available he concluded that an English lawyer would have come to the same conclusion as the Swiss Prosecutor.
24. A second advice in February 2017 was in substantially the same terms as the first advice. Mr McDonnell remained unable to reach a firm conclusion that there was a Quistclose Trust and did not consider it an easy question. He had now seen the defendant's judgment and was able to conclude that the Fund had never belonged to the defendant.
25. He considered that the simplest way to obtain a release of the Fund from the Swiss Prosecutor would be to persuade the defendant to confirm to the Swiss Prosecutor that the Fund should be released. However, he recognised that the defendant might look to the Fund as a source against which they could enforce their judgment. And indeed, that is what the defendant did in 2020 when it commenced the Swiss civil enforcement proceedings.
26. In June 2017 Mr Baeriswyl had a meeting with the Swiss Prosecutor who it appears had either been provided with or had been told about the contents of Mr McDonnell's advice. The outcome of the meeting was that the Swiss Prosecutor was not persuaded to release the Fund based on Mr McDonnell's inconclusive advice. However, Mr Baeriswyl reported that good progress had been made and was keen that Mr McDonnell firm up his opinion.
27. By an email of 14 August 2017 Mr McDonnell identified a series of factual questions which should be asked of the directors of the claimant, Mr Dryer, and the Investors.
28. The Investors and a director of the claimant provided responses to the questions setting out what they said about their intentions at the time the Fund was loaned to M500. Mr Polli relies on these statements as strong evidence in favour of a Quistclose Trust whilst Mr Shaw argues that they are not. It seemed to me that these brief statements in answer to a list of questions 3-years after the events in question were far from conclusive of the Investors or directors' intentions at the time and were capable of different interpretations to the extent that either party considered them relevant to the Quistclose trust analysis.
29. Mr Dryer also provided a response, but his statement appears to me to be unhelpful to the claimant. At paragraphs 4 to 7 he describes the transaction in terms that appear at least at this stage more consistent with a loan arrangement although he does say that the effective control of the Fund remained with the lenders because of the signatories. However, at paragraph 8 he said:

"I considered [the claimant] to be the immediate lender and the loan to M500 was made for its benefit so the funds would have remained its property during the lifetime of the loan."
30. The defendant argues that from this it appears that Mr Dryer did not consider that the loan remained the claimant's property during the life of the loan and that this

appeared to be more consistent with there not being a Quistclose trust. I note that Mr Dryer did not say that the Form A was incorrect and further that he had disclosed the CDJ Account as an asset belonging to either him or M500 on asset disclosure under the freezing injunction. It was the claimant that approached Mr Dryer for evidence in the knowledge of the defendant's judgment and his evidence cannot be entirely ignored just because the defendant has a judgment against him. However, the interpretation and analysis of these brief statements including Mr Dryer made 3-years after the events in question without more seems to me to be of value only in identifying that the evidence is inconclusive and capable of different interpretations, to the extent that it is of value at all in determining objectively whether a Quistclose trust arose.

31. Mr McDonnell provided his third advice in July 2018. There is no explanation for the delay in obtaining that advice. By this stage Mr McDonnell felt able to conclude that the Fund was held on a Quistclose trust for the benefit of the claimant. However, the first 50 paragraphs of the advice are in substantially the same terms as the first two advices. There is no evidence of Mr McDonnell's instructions, what additional evidence or information was provided to him and what additional considerations or factors he took into account. The advice does not explain what caused him to change his view.
32. Mr McDonnell's advice concludes:

“51. Accordingly I have no doubt that the funds held by Volksbank in the account which they originally called CDJ Mythology and which represent the £1 million transfer to them by TLT LLP as solicitors for [the claimant] under the original reference “Peter Lawrence/Stephen Walsh” are and always have been held under a Quistclose-type resulting trust for [the claimant] and (through [the claimant]) for [the Investors].

52. I should also add that it is quite clear that that money does not directly or indirectly represents funds which have ever belonged to either [M500] or [the defendant] and it should therefore be released from the Swiss proceedings. There is no rational basis on which it could be treated as available to satisfy any claims which [the defendant] (or anyone else) may have against [M500] or Mr Dryer.”
33. Despite Mr Baeriswyl's suggestion in 2017, the evidence in support of the application to serve out does not explain whether the July 2018 advice was ever given to or discussed with the Swiss Prosecutor and what the Swiss Prosecutor's response was. It does not explain what the claimant did between July 2018 and October 2020 when the claim was issued.
34. In addition to the shortcomings in the evidence referred to below, there is no explanation as to whether Mr McDonnell was asked to revisit his advice after the commencement of the Swiss civil enforcement proceedings and/or in light of the dissolution of M500 in late 2018 prior to the issue of the claim in October 2020.

35. The claimant's application for permission to serve out was supported by a witness statement from a director of the claimant, Mr Hanlon dated 9 October 2020. Mr Hanlon was a director of the claimant at all relevant times and a signatory to the 21 October 2014 documents. His witness statement was brief and relied on the July 2018 advice. He said that although the investment was structured as a loan the terms of the loan itself made it clear that in fact the Fund was held on a Quistclose trust. He explained that because the Fund had never belonged to M500 he had not considered it necessary for M500 to be notified of the claim. He referred in passing to the Swiss authorities still needing to be satisfied that M500 and Mr Dryer had no beneficial interest in the Fund. He further relied on the contents of the Part 8 claim form itself and his exhibit.
36. Mr Hanlon's exhibit contained the July 2018 advice and the 21 October 2014 contractual documents including the TLT letter but not the Form A. Otherwise, it included a very limited selection of documents from 2016 but not 2017.
37. Mr Hanlon's witness evidence did not explain that since the July 2018 advice Swiss civil enforcement proceedings had been commenced by the defendant. He did not address any questions of forum that might arise.
38. He did not explain that there had been two previous equivocal advices nor did he explain what additional evidence, documents or factors had been considered by Mr McDonnell in reaching his firm conclusion in 2018. He did not address the witness evidence obtained from the Investors, directors, and Mr Dryer.
39. Despite the reference in Mr McDonnell's advices to the Form A it was not exhibited. There was no explanation of the potential argument that it was conclusive as to the beneficial interest in the Fund. Mr Hanlon did not address the view expressed by the Swiss Prosecutor in 2017 as to effect of the Form A and its effect on the merits of the claimant's claim to beneficial ownership. Mr McDonnell's 2018 advice suggested that TLT were negligent in wrongly asserting that M500 were the beneficial owners of the fund but no explanation of the relative merits of that assertion were explored. Indeed, there does not appear to be any evidence at all as to why the TLT letter was written in the terms it was or what if anything they said about it nor any reference to their later correspondence. It is not clear how by July 2018 Mr McDonnell was able to form such a firm view on the merits.
40. As the evidence in support of the claimant's application did not identify the earlier equivocal advice or the Swiss civil enforcement proceedings it did not explain whether Mr McDonnell had been asked to reconsider his advice in light of either the dissolution of M500 or the Swiss civil enforcement proceedings. As set out above it did not explain whether the Swiss Prosecutor had been shown the July 2018 advice given that was its ostensible purpose.
41. Thus, at the time the claimant's application for service out of the jurisdiction was considered the court was basing its determination on what appears to be unsatisfactory and a substantially incomplete explanation of the basis for the application and without any fair presentation or disclosure of any of the counter arguments.
42. The defendant's application dated 24 May 2021 is supported by a witness statement of Frances Coulson of the same date. This witness statement is substantive and sets

out in detail the background to the claimant's claim identifying significant shortcomings in the claimant's application some of which I have already identified. It was accompanied by a substantial exhibit. Other than those documents relating to the CDJ Objection and some very recent Swiss legal advice, the exhibits were either the claimant's own documents or documents such as the judgment in favour of the defendant which were in the claimant's possession in advance of making their application. It seems to me that for a fair presentation of the application for permission to serve out, the majority of the documents exhibited should have been referred to and/or included in the evidence in support. This would inevitably have resulted in a more detailed witness statement that fully engaged with the matters identified by Ms Coulson. Ms Coulson exhibited amongst other things Mr McDonnell's earlier advices, Form A, correspondence with the Swiss lawyers in 2017, the statements in 2017 referred to above, the defendant's judgment, the Swiss civil enforcement proceedings and the CDJ Objection.

43. Mr Lancaster provided a witness statement in response dated 29 July 2021, less than a week before the hearing. Mr Lancaster explained that his firm were instructed in October 2019. At that time, the claimant was in dispute with its previous solicitors. Their file was not released until April 2021, after the claimant had issued and served the claim. He says the file was itself incomplete, but it was provided to the defendant once received. Mr Lancaster does not explain why it took 18 months to obtain the file nor why the claimant was not able to provide him with many of the documents exhibited to Ms Coulson's witness statement when some were the claimant and the Investors own documents. He exhibits some additional emails from 2017 which do not appear to add much to Ms Coulson's evidence. In addition, he includes a letter from Mr Baeriswyl, dated 29 July 2021 to which I refer below.
44. The underlying issue which will ultimately need to be determined is the competing claims to beneficial ownership of the Fund. The claimant claims that the Fund is held on a Quistclose trust for it and ultimately for the Investors. The defendant seeks to enforce its properly obtained English judgment debt over the Fund in the Swiss civil enforcement proceedings. CDJ's claims the Fund as compensation for reputational damage and loss in the same Swiss civil enforcement proceedings. M500/the Crown and Mr Dyer may also have competing claims to the Fund although in light of the defendant's unpaid judgment debt against them it seems unlikely they would assert them in the Swiss civil enforcement proceedings as against the defendant.

### **The Application**

45. It is against that background that I come to consider the defendant's application to set aside the order for service out of the jurisdiction.
46. To serve a claim form out of the jurisdiction when permission is required (CPR 6.36) a party must satisfy the court of the following:
  - i) that there is a good arguable case that the claim falls within one of the jurisdictional gateways set out in PD 6B 3.1;
  - ii) that there is a serious issue to be tried on the merits of the claim. This is essentially the same test as for summary judgment sometimes viewed at this



early stage in a claim as whether there is a plausible evidential basis for the claim;

iii) that England is clearly and distinctly the appropriate forum for the trial of the action.

47. The claimant argues that it can meet all three of the criteria but if I am not persuaded on jurisdiction, since the claimant would want to take further action in Switzerland, I am asked not to make any determination on the merits of the Quistclose trust claim unless I am persuaded it is entirely bad.
48. The defendant argues that the claimant has failed to establish any of the requirements for permission to serve out of the jurisdiction and further that the failure to give full and frank disclosure was sufficiently serious to justify setting aside the service out order in its own right.

**Gateway:**

49. The claimant relies on PD 6B paragraph 3.1 (6) (a) and (d) (the relevant grounds for a contractual claim at the time the application was issued) on the ground that the claim was in respect of a contract made in the jurisdiction. Mr Polli had sought to rely on an additional gateway (12) but did not pursue that in argument. It did not appear to me that it would have assisted him in any event.
50. The gateways set out in CPR PD 6B establish the courts' jurisdiction as a question of law. The court needs to consider on the material available whether the claimant has much the better of the argument. Is there a sufficient relevant connection with England and does the claimant have a good arguable case that the claim falls within the gateway?
51. Mr Polli says that the contractual arrangements between the claimant, Investors and M500 in October 2014 which underpin the creation of the Quistclose trust were made in this jurisdiction and are governed by English law. The dispute clause in the contractual documents is sufficiently broad to encompass the Quistclose trust claim.
52. Although the defendant was not a party to the 21 October 2014 documents, the claim is still in respect of the contract because of the nature of the Quistclose trust claim asserted by the claimant. Thus, he argued that it was still possible to pursue the claim against the defendant who was not a party to the contractual documents that underpinned the claim. Further that in any event the claimant, M500, the Investors and the solicitors who drafted the contractual documents in 2014 were all based in England. Although of course other than the claimant they are not parties to the claim.
53. Mr Shaw says that even if the contract was made within the jurisdiction for which he argues there is no evidence before the court, the contract was with M500 and was not a contract to which the defendant was a party. Thus, the defendant was a stranger to the contract and has no connection with the contract whatsoever. He argues that on the facts of this claim that is fatal to the claimant.
54. Both parties relied on passages from the judgment of Tomlinson LJ in *Alliance Bank JSC v Aquanta Corp* [2012] EWCA Civ 1588:

“63... I am intuitively resistant to the notion that gateway (6) can be used to justify service out of the jurisdiction by reference to a contract to which the intended defendant is not party. In such circumstances there is, as it seems to me, likely to be no sufficient link between the conduct of the intended defendant and this jurisdiction so as to justify the English court assuming an extra-territorial jurisdiction....

67. ...Longmore LJ in *Greene Wood and McLean v Templeton* spoke in broad terms of a claim having a connection with a contract as rendering it, for these purposes, a claim in respect of that contract, but he was speaking only in the context of a contract to which the intended Defendant was a party.

68...Nonetheless, in the two contract situation, Rix LJ, as I have already noted above, drew attention to the anomaly of obtaining jurisdiction against a defendant not within the jurisdiction by reference to a contract to which he is not a party.

69. It would I think be similarly anomalous were jurisdiction here to be established [under para 3.1(6)] against Ds 6–9 in reliance upon contracts to which they are not party. The nature of the required connection between the claim and the contract in respect of which it is made is the more elusive in circumstances where the intended defendant is not party to the relevant contract.

70. Furthermore, like Rix LJ in *Global 5000*, at paragraph 64 of his judgment, I wonder what is the relevance of sub-rule (d) of paragraph 3.1(6) of the Practice Direction unless it is implicit that the intended defendant is bound by that term and that agreement. Indeed I would go a little further, in that I wonder what is the relevance, for the purpose of founding jurisdiction, of the circumstance that the contract has been made within the jurisdiction, or made by or through an agent trading or residing within the jurisdiction, unless it is the intended defendant who has “come into” the jurisdiction to make the contract, or has used the services of an agent trading or residing within the jurisdiction for the purpose of making the contract.

71. ...I am for my part attracted by the argument that a claim is not for that purpose properly described as “made in respect of a contract” where the contract in question is not one to which the defendant is party. For my part I see great force in the argument that it is implicit in the rule that the contract upon which reliance is placed must be one to which the intended defendant is party....the required connection between the claim and the contract must inevitably be the more difficult to establish in a case where the intended defendant is not party to the contract

upon which reliance is placed than in a case where he is a party to it”

55. Tomlinson LJ recognised that an overseas defendant who is not party to a contract might be brought within the gateway in paragraph 3.1(6) where there was a close connection, proximity or nexus between that defendant and the contract. However, the remoteness of the connection would be significant factor in the court’s discretion to set aside any service out order and would be relevant to the proper forum issues.
56. Mr Polli argued that although the nexus may be more elusive *Alliance* did not preclude a claim against an overseas defendant who was not a party to the underlying contract. He argued that because this was a Quistclose trust claim over the Fund which therefore created restrictions on the use of the money, there was a sufficient nexus to join the defendant, an overseas non-party, who was seeking to enforce against the Fund. The claimant does not seek to argue that the defendant has assumed any contractual right or obligation or ever had one in relation to the Fund. The connection, proximity or nexus is simply that the defendant is seeking to enforce against the Fund in another jurisdiction.
57. Mr Shaw had relied not only on *Alliance* but *Global 2000 Ltd v Wadhawan* [2012] EWCA Civ 13 at [64] as referred to by Tomlinson LJ in *Alliance* where as set out above Rix LJ had stated that he considered it anomalous that jurisdiction could be obtained against a defendant not within the jurisdiction by reference to a contract to which he was not a party. Mr Polli sought to distinguish *Global* on the basis that this was a one contract not a two-contract case as analysed by Rix LJ and that the claim arose in relation to one contract even though it was a non-contractual claim. However, Mr Shaw relied on *Global* only in the context in which it was referred to by Tomlinson LJ in *Alliance* which appeared to me to simply reinforce the need for there to be a necessary connection between the claim, the contract, and the overseas non-party.
58. Ordinarily one would expect a defendant to be a contacting party to be able to meet the requirements of the gateway. Although following *Global* and *Alliance* the fact that the defendant was not a party to the 21 October 2014 documents is not an absolute bar to the claimant’s claim, the proximity, connection, nexus hurdle Mr Polli needs to overcome in this case seems to me to insurmountable.
59. The defendant was not a party to the 21 October 2014 documents, knew nothing about the transaction or the contractual documents at the time. The claim may arise in connection with the contractual documents, but it did not involve the defendant. The claimant’s contractual relationship was with M500. The defendant had a separate relationship with M500 and Mr Dryer entirely unrelated to the relationship between M500, Mr Dryer and the claimant. The claimant and the defendant were strangers to each other. The only connection is that they are both victims of M500 and Mr Dryer and that the defendant is now seeking to enforce its judgment against the Fund in Switzerland over which the claimant now seeks to assert its Quistclose trust claim.
60. The defendant has done nothing to interfere with the claimant’s contractual rights. The defendant is not making any proprietary or beneficial claim to the Fund. It is seeking to enforce its own rights arising from its properly obtained English judgment. It is seeking to enforce an unpaid judgment debt of Mr Dryer and M500 against the

Fund in another jurisdiction. The claimant and defendant have competing but unrelated claims to the Fund in Switzerland. There is simply no connection or nexus or proximity. It is pure happenstance.

61. The claimant is unable to persuade me on the material available that they can pass through the jurisdictional gateway in PD 6B 3.1 (6) and satisfy me that there is a sufficient connection, proximity or nexus between the 21 October 2014 documents and the defendant. The defendant was and is a non- contracting overseas stranger to the 21 October 2014 documents upon which the claimant relies to found its Quistclose trust. The connection here is not simply elusive or remote; there is plainly no such connection at all. The gateway has not been made out and on this basis alone service out should be set aside.
62. In case there were to be any doubt about the claimant's inability to bring the claim within PD6B 3.1 (6) I consider below both whether there is a serious issue to be tried and forum before considering full and frank disclosure.

### **Serious Issue to be Tried**

63. When considering whether the claimant overcomes the merits test on an application to serve out the court has to consider whether the claim as constituted has a reasonable prospect of success. The facts and matters referred to above in relation to the gateway so far as they relate to the constitution of the claim and the defendant's role have equal applicability to this issue.
64. Mr Shaw argued that not only did the claim fail to overcome the merits test on substantive grounds in relation to the Quistclose trust claim but as it was improperly constituted it failed the reasonable prospect of success test as against this defendant even before the court had to consider the merits of the Quistclose trust claim.

### **Improperly Constituted**

65. This claim was issued against the defendant alone. The claimant is asserting beneficial ownership of the Fund based on a Quistclose trust. Although CDJ's Objection in the Swiss civil enforcement proceedings was only filed after the claim was issued, the Fund was held in an account in the name of CDJ. The claimant did not join CDJ who are the account holder, nor did they join M500/the Crown to whom the Fund was loaned nor Mr Dryer despite the Form A and the TLT letter, the Swiss Prosecutor's view about the beneficial entitlement to the Fund, and disclosure of the CDJ Account as an account in which M500 and Mr Dryer said they had an interest.
66. Where the court is being asked to determine the competing claims to a beneficial interest or rights to a Fund, all those with a potential interest or claim should be made parties to the claim or given notice of it. Mr Shaw says that the Crown and CDJ are necessary parties to the claim and without them the claim is improperly constituted and claims relief against the wrong party. It seems to me that is an unanswerable point.
67. Mr Hanlon in support of the application to serve out asked the court to tell the claimant if it thought anyone else should be joined to the claim but said that the claimant did not consider it necessary to join M500. It is of course for the claimant to

issue a properly constituted claim. History does not relate whether any consideration was given to joining CDJ as the account holder or Mr Dryer.

68. This does seem to me to be a further fundamental difficulty for the claimant. It is difficult to see how the claimant can pursue the claim in its present form. At the time the application was considered it was considered on the basis of the claim as then constituted not as it might be constituted at a later stage. This application is considered on the same basis. Whilst it might be possible as a matter of procedure to apply to add parties to a claim at a later date that does not cure the improper constitution of the claim at the time when the claimant sought permission to serve out. If that improper constitution goes to the very basis of the claim it has to be taken into account when considering an application to set aside an order for service out.
69. The parties against whom the claim ought properly to have been made seem to me to be M500/the Crown who received the Fund as a loan and whom TLT said were the beneficial owner of the Fund, CDJ as the account holder and potentially Mr Dryer given the apparent assertion of beneficial ownership in the Fund and the Form A. As set out above the defendant asserts no proprietary claim against the Fund. They seek to enforce their own judgment debt against the Fund in Switzerland.
70. It seems to me that the absence of M500/the Crown, CDJ and/or Mr Dryer would be fatal to the merits of the claim on their own. There can be no real prospect of success against this defendant as the claim is currently constituted.
71. The focus of Mr Polli's submissions was on a detailed analysis of what constitutes a Quistclose trust and why on the evidence presently available he could overcome the merits test and satisfy me that he had a real prospect of success. Mr Shaw argued that none of the essential building blocks necessary to establish a Quistclose trust could be made out on the evidence which he said was contradictory.
72. Both parties relied on the same passages in *Bellis v Challinor* [2015] EWCA Civ 59 Briggs LJ at [56]-[59].

“56. Quistclose -type trusts are a species of resulting trust which arise where property (usually money) is transferred on terms which do not leave it at the free disposal of the transferee. That restriction upon its use is usually created by an arrangement that the money should be used exclusively for a stated purpose or purposes: see *Twinsectra* at paragraph 74.

57. There must be an intention to create a trust on the part of the transferor. This is an objective question. It means that the transferor must have intended to enter into arrangements which, viewed objectively, have the effect in law of creating a trust: see *Twinsectra* at paragraph 71.

58. In this respect, Quistclose -type trusts are no different from any other trusts. In particular, they are not presumed to exist unless a contrary intention be proved, as in the case of the traditional type of resulting trust where a person makes a gratuitous transfer of property to an apparent stranger.

59. To. His subjective intentions are, as Lord Millett said, irrelevant. In the *Twinsectra* case, a Quistclose trust was established despite the transferor having no subjective intention to create a trust. But the objectivity principle works both ways. A person who does subjectively intend to create a trust may fail to do so if his words and conduct, viewed objectively, fall short of what is required. As with the interpretation of contracts, this process of interpretation is often called the ascertainment of objective intention. In the contractual context the court is looking for the objective common intention, whereas in the trust context the search is for the objective intention of the alleged settlor.”

73. I was also referred to Patten J in *Bieber v Teathers* [2013] 1 BCLB 248 at [15] as setting out the relevant principles for establishing a Quistclose trust.
74. There was no dispute that to determine whether there was an intention to create a Quistclose trust the court must objectively construe the arrangements entered into by the parties. It is for the claimant asserting the existence of the Quistclose trust to prove there was an intention to create such a trust.
75. The parties’ subjective thoughts are not relevant but their words and their conduct at the relevant time would need to be construed to prove intention. It was no doubt for this reason that Mr McDonnell asked the questions he did in 2017. However, as set out above the answers he received were clearly open to different interpretations.
76. Mr Polli argues that the 21 October 2014 documents were effective to restrict what could be done with the Fund and that consequently objectively a Quistclose trust was created. The Fund was not at the free disposal of M500 and remained the property of the claimant. However, whilst to establish a Quistclose trust there would have to be evidence that the Fund was not at the free disposal of M500 that is not sufficient or conclusive without more.
77. There was a difference of approach between the claimant and defendant as to what could be considered when construing the objective intention of the parties in 2014. Mr Polli relied primarily on Mr McDonnell’s July 2018 advice and the fact that the Form A was not conclusive of beneficial interest. He argued that other evidence such as the TLT letter or the Investors and Mr Dryer’s evidence were not relevant to the objective assessment the court had to undertake. It was for the court to consider the objective question about the intention of deemed settlors. However, it seems to me that the real issue between Mr Shaw and Mr Polli was what constituted the contemporaneous evidence that the court should consider when construing the objective intention of the parties.
78. Mr McDonnell had his own view of what evidence he needed to be able to firm up his opinion on the question of a Quistclose trust and that gave rise to the statements referred to above. He clearly considered that some evidence about the subjective intention of the parties and or their words or conduct at the time the 21 October 2014 documents were entered into would be helpful. I agree that hindsight or reconstruction after the event would not assist, and it may well be argued that some or all the content of the subsequent statements by Mr Dryer and the Investors risk straying over the line.

However, that is not something for me to determine on this application. It is not possible to say that because the exercise that the court has to undertake is objective that evidence of the parties' words or conduct at the time, even if provided at a later stage, cannot be relevant. Inevitably in that process one has to be cautious to ensure that later subjective views with the benefit of hindsight do not infect the exercise the court has to undertake.

79. Mr Shaw argued that when objectively construing whether there was a Quistclose trust one has to look at the contemporaneous documents and consider both what they say but also what they do not say. He argued that even if the Fund were not at the free disposal of M500 there needed to be more for the Fund to be the subject of a Quistclose trust. It was for the claimant to prove that the arrangements around the CDJ Account were intended to preserve the claimant's rights and the control of the Fund. He points to what he says are inconsistencies in the underlying documents now available including CDJ and TLT's respective understanding of who was the beneficial owner of the Fund in 2014 when the Fund was created and the Form A. He says those are relevant words and conduct to the objective assessment of whether a Quistclose trust arose. He points to the absence of any evidence to address those inconsistencies.
80. Were the only issue on the merits test the argument about when one carries out the objective assessment and what can be taken into account when determining if a Quistclose trust has arisen it would appear to me that, given the low bar that applies when considering whether a claim has a more than merely fanciful prospect of success, that although Mr Shaw makes some forceful points about those issues it would be difficult to conclude that there was no prospect of success. It seems to me that despite the objective nature of the assessment there are mixed questions of law and fact which it would not be possible to determine as entirely hopeless or entirely fanciful at this stage.
81. However, as the claim is improperly constituted the claimant is unable to persuade me that there is serious issue to be tried against this defendant on the merits of the claim as presently constituted. Beyond identifying some of the competing issues it was not necessary to determine even on a provisional basis the relative merits of the Quistclose trust claim and it is more appropriate for that to be left to the Swiss civil court if the claim is pursued there.
82. The order for service out should also be set aside on this ground as well.

### **Forum**

83. The court must consider whether on the material available it is more appropriate for the claim to be resolved elsewhere. The question of whether the court should decline jurisdiction even if the claimant has the better of the argument on a gateway and there is a serious issue to be tried is an exercise of discretion. In exercising that discretion, the court is carrying out a balancing exercise having considered the various competing factors. Thus, the court has to determine how the interests of justice can be best served, avoiding a multiplicity of proceedings, and balancing, so far as possible, any prejudice as between the parties. This includes considering the overriding objective in its broadest sense including what is just, efficient, reasonable, and proportionate.

84. It seems to me that many of the factors already considered come back into focus when considering that balancing exercise which includes the connection between the claimant and defendant and the position of other non-parties to these proceedings who have an interest in the Fund.
85. Mr Polli argues that the fact that the Quistclose trust claim had arisen out of the October 2014 documents, which provided that English law governed disputes including non-contractual disputes was a strong factor in favour of the claim being determined in England (*VTB Capital Plc v Nutritek International Corp* [2012] 2 AC 337). However, although the October 2014 documents are governed by English law, the jurisdiction clause is non-exclusive. To my mind this is a factor which significantly weakens the force of the claimant's argument in this case. The parties to the 21 October 2014 documents clearly contemplated the possibility of any dispute being determined elsewhere but subject to English law. The contractual documents were negotiated and drafted by English solicitors and had the parties intended the English courts to have exclusive jurisdiction they would have said so.
86. Mr Polli argues that as the concept of Quistclose trusts does not exist under Swiss law it would be difficult for a Swiss court to evaluate and understand the concept even if they are considering the question of beneficial interest. Mr Baeriswyl in his letter of advice dated 29 July 2021 says that the concept of a Quistclose trust has no equivalent in Swiss law and thus it would be preferable for that issue to be resolved in England. He suggests that if the claimant can establish the existence of a Quistclose trust as a matter of English law (in England) they can then take their judgment to Switzerland and seek to unfreeze the Fund by action in relation to the Swiss criminal proceedings and if successful challenge the Swiss civil enforcement proceedings by which the defendant has attached to the Fund. This multi-phased approach seemed to me to be cumbersome and likely to be costly and inefficient.
87. Whilst the concept of Quistclose trusts may be unfamiliar to Swiss Law it is clear that there is a concept of legal and beneficial interest and that the Swiss Court will be considering the division between legal and beneficial ownership as part of the Swiss civil enforcement proceedings.
88. The correspondence from the defendant's Swiss lawyers Des Gouttes & Associates, unsurprisingly explained that the Swiss courts are able to consider and apply foreign law in much the same way as English courts would consider and apply foreign law. The Swiss civil courts could therefore receive expert evidence on English law to the extent that was considered necessary to assist in any determination of the claims to the Fund.
89. The Swiss civil courts are of course already seized with the Swiss civil enforcement proceedings and will be determining the question of beneficial interest as between the defendant and CDJ in respect of the Fund in any event. Those proceedings cannot be undertaken in the English courts. It seems to me to be very unsatisfactory for a non-contracting overseas defendant to be forced to participate in two separate sets of proceedings in different jurisdictions in relation to the Fund.
90. As set out above it appears that the claimant's own Swiss legal advice confirms that a determination in England would be only the first step in any claim and the claimant



would still have to participate in one possibly two separate processes in Switzerland even if they obtained an English judgment in relation to the Quistclose trust.

91. Mr Polli argued that all the material witnesses were based in England. Yet he also submitted that the consideration of whether there was a Quistclose trust relied on an objective assessment and in making submissions on the question of serious issue to be tried sought to suggest that what the witnesses and TLT subjectively considered to be the position was not relevant to the court's consideration of whether a Quistclose trust had arisen. Whilst I am not persuaded that the witness evidence would have no place in any determination of whether a Quistclose trust arose it does not seem to me that where the witnesses are based is a determinative factor in this case. Indeed, I hazard to suggest the one of the few benefits to come from Covid-19 has been the expansion of the use of remote hearings, hybrid hearings and the ability to give evidence remotely although I cannot say the extent to which that is possible in Switzerland if required.
92. Finally, Mr Polli relied on the need for a determination of the Quistclose trust position before the claimant could make a claim to the Fund in Switzerland. This did not seem to me to be a factor in favour of the Quistclose trust claim proceeding as a free-standing claim in England – indeed it appeared to be quite the reverse as set out above.
93. It appeared that Mr Polli accepted that there was always going to be a two-stage process since a determination in England would leave the claimant still having to persuade the Swiss Prosecutor to release the Fund to them. There would still be competing claims to the Fund if the Swiss civil enforcement proceedings had been determined by then. Of course, there must be a risk that the Swiss civil enforcement proceedings would be determined in advance of the trial of a Quistclose trust claim in England leaving the defendant or CDJ to also seek to release the Fund from the Swiss Prosecutor before the claimant's Quistclose trust claim had been resolved. This seemed to me to be a powerful factor in favour of having all the claims resolved together in the interests of all parties.
94. None of Mr Polli's arguments seemed to me to make England clearly and distinctly the appropriate forum for the claim. Indeed, the competing arguments that the court should decline jurisdiction appeared to me to be much stronger.
95. The overriding issue to be determined is who is entitled to the Fund held by Volksbank in Switzerland. There are existing contested Swiss civil enforcement proceedings in respect of the Fund to which the defendant and CDJ are parties. Des Gouttes & Associates unsurprisingly say that the entitlement to the Fund in those proceedings will be determined as a matter of Swiss law.
96. As Mr Shaw argues, there is considerable benefit to all the related claims to the Fund being determined in one forum. The claims to the Fund by the defendant and CDJ are only justiciable in Switzerland as part of the Swiss civil enforcement proceedings. Neither CDJ nor the defendant can bring a claim to the Fund in England.
97. The risk of a multiplicity of proceedings with irreconcilable judgments is significant. If the claimant does not engage with the Swiss enforcement proceedings but pursues only the English proceedings against this defendant whilst this defendant and CDJ

continue to dispute who is entitled to the Fund as a matter of Swiss law in the Swiss civil enforcement proceedings, it appears there must be a real risk of irreconcilable outcomes and parallel proceedings in respect of the same Fund.

98. It also seems to me that even leaving to one side the fact that the defendant is a stranger to the claimant, it risks both the claimant and the defendant incurring additional potentially duplicative and unnecessary costs across two jurisdictions at the same time which cannot be consistent with the overriding objective of dealing with cases justly, efficiently and at proportionate cost.
99. Mr Shaw's submission that the fact that the defendant is not a party to any contract with the claimant and has no connection with those contractual arrangements is a further factor that weighs against England being the appropriate forum.
100. As set out above the defendant is an overseas company with no contractual or indeed any relationship with the claimant. The defendant is a stranger to the claimant and its contract and dispute with Mr Dryer and M500. The defendant's only fault is to be the victim of a similar scheme to the claimant. The defendant having taken proactive steps between 2014 and 2016 now has the benefit of a judgment in its favour which it is seeking to enforce through the Swiss civil enforcement proceedings.
101. The claimant does not explain why it only sought to pursue its claim in October 2020 nor why it did not take any steps in Switzerland after being rebuffed by the Swiss Prosecutor in 2017. There is no explanation as to why it did not pursue its claim in Switzerland where there were existing proceedings. There is as I set out above no explanation as to what was done after receipt of the updated advice from Mr McDonnell in 2018. I do not know if it was provided to the Swiss Prosecutor and rejected.
102. The claimant should have made the court aware of the Swiss civil enforcement proceedings when making its application to serve out. The existence of ongoing civil proceedings in Switzerland by the defendant which would determine beneficial ownership of the fund would have been a significant factor when determining whether to grant permission to serve out of the jurisdiction. Having now considered that issue and the addition of the CDJ Objection it is plainly not consistent with the overriding objective, reasonable, efficient, or proportionate to permit the claimant's claim to proceed in England whilst the pre-existing civil enforcement proceedings in Switzerland are ongoing. These factors all firmly weigh against England as being clearly and distinctly the more appropriate forum for this dispute.
103. It seems to me that in fact England is clearly not the natural or appropriate forum for the claim the claimant wants to bring. It is more consistent with the overriding objective in its broadest sense to manage cases proportionately, efficiently and at proportionate cost to avoid overlapping proceedings in two jurisdictions.
104. England is not clearly and distinctly the proper forum for this claim, and for the reasons set out above this is plainly not a case where justice requires the court to nonetheless exercise its discretion to allow this claim to proceed in England against this defendant.
105. The order for service out should be set aside on this basis too.

## Full and Frank Disclosure

106. I have set out above what was included in Mr Hanlon's evidence and what appear to me to be its shortcomings. I have identified the additional evidence that ought to have been available to the claimant at the time of the application and which may have been relevant to a greater or lesser extent on the claimant's application.
107. Mr Polli accepted that the claimant's application was not a model application and frankly accepted it was not how he would have set about it. However, he focussed on the fact that Mr Hanlon had exhibited Mr McDonnell's 2018 opinion and that that opinion did mention both the Form A and the TLT letter. He refers to Mr Hanlon's reference to the Swiss Prosecutor not having been persuaded. However, Mr Polli's primary position was that the factual background was irrelevant because the court has to carry out an objective assessment to determine whether there was a Quistclose trust and consequently the failure, if any, to disclose information was not material.
108. He relies on *MRG (Japan) Ltd v Engelhard Metals Japan Ltd* [2003] EWHC 3418 (Comm) arguing that the duty on an application for service out of the jurisdiction was different to that required on a freezing injunction. The claimant need only provide disclosure of material facts that might reasonably be taken into account when considering the application that is whether the court should assume jurisdiction over a dispute. Thus, he argues that if the non-disclosure did not affect the question of whether there was a serious issue to be tried, whether there was a good arguable case for jurisdiction and forum the court does not need to be concerned about any failure of disclosure on the merits themselves.
109. In any event he argues that if the non-disclosure was neither deliberate nor intentional it should not compel the setting aside the order for service out if it the order was otherwise properly made. The court should consider whether it was in the interests of justice to get on with things.
110. Mr Polli says that there was no need to provide the earlier advice from Mr McDonnell but that even if there had been, those earlier advices had subsequently been provided to the defendant. This appeared to me to miss the point that there is an obligation on the claimant to provide sufficient information to the court on an application without notice to enable the court to decide the application based on a fair presentation of the material available even if the full stringency of the obligations on a freezing injunction are said not to apply.
111. Providing that further information to the defendant after the order has been made is the wrong way round and does not after the event cure a failure to provide a fair presentation of the potential counter arguments at the time of the application. The claimant's obligation to provide a fair presentation requires them to provide the counter arguments or possible counter arguments even if they consider them to be weak or without merit so that they present both sides of the argument in a fair way enabling the court to determine whether the order for service out should be made.
112. It appears from Mr Lancaster's witness statement that the claimant's solicitors may not have had access to all the information now available prior to making the application for permission to serve out. However, that is no excuse since it appears some or all the information was known to and accessible by the claimant and/or there

is no evidence that the claimant took any steps to acquire that additional material which they will have known existed until after they obtained the order. The claimant did not explain to the court that the application and evidence proceeded on a limited evidential basis.

113. In circumstances where the application relied on Mr McDonnell's robust July 2018 advice to support it, the fact that the earlier equivocal advices had been insufficient to satisfy the Swiss Prosecutor seems to me to be relevant to the court's consideration of the application and the weight to apply to that advice which was the support for the argument that there was a serious issue to be tried. The reason for the change in position would also seem to me to be relevant if Mr McDonnell's advice was being put forward as the primary basis for the claim and the application. I have highlighted above other evidence that was or should have been available to the claimant which was not drawn to the attention of the court and do not repeat it here.
114. It may be that Mr Polli is right and not every piece of information/evidence which the defendant complains about would have been relevant to the court's consideration, but it seems to me that there are very significant shortcomings in the information provided to the court on the original application. Mr Lancaster's after the event explanation that the solicitors for the claimant only obtained that information much later is nothing to the point. It is Mr Hanlon who provided the evidence for the claimant and he was involved at all material times. Even if the solicitors file had not been obtained there is no explanation as to how the claimant's director who had been involved throughout came to make such a short and bland witness statement which does not address numerous of the issues which are now apparent.
115. Mr Shaw identified many of the shortcomings in the evidence provided to the court as set out above. He argues that these are serious omissions which gave a misleading impression of the evidence. It was not sufficient to say that if you looked very carefully at Mr McDonnell's advice you could tease out from it that there might be counter arguments.
116. It seems clear to me in light of the information now available that Mr Hanlon's evidence provided a wholly misleading impression of the evidence, its strength and the claimant's case. He failed to provide a fair presentation of the evidence available or to tell the court of the existence of the Swiss civil enforcement proceedings in which the very issue of the beneficial interest in the Fund was to be considered.
117. When an application is made without notice the claimant should draw to the attention of the court matters that are adverse to its position and/or which the prospective defendant might want to bring to the attention of the court. To my mind it is clear as set out in this judgment that the claimant did not do that. It may not have been deliberate but in this case that does not salvage the position.
118. It seems to me that for the reasons set out in this judgment had the claimant provided a fair presentation of the material which should have been available to them and or known to them it is very unlikely that an order would have been made on the without notice application. Those shortcomings therefore add significantly to the overall weight of the factors in favour of the defendant's application. I consider that the non-disclosure in this case was serious and sufficient in and of itself to justify setting aside

permission to serve out of the jurisdiction even if there had been no other basis for doing so.

119. For all these reasons the order for service out should be set aside. The judgment will be handed down remotely by email. I invite the parties to seek to agree a form of order to reflect the terms of this judgment.