



Neutral Citation Number: [2021] EWHC 3355 (Ch)

Case No: BL-2021-001695

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

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

Date: 13 December 2021

Before :

HHJ PAUL MATTHEWS
(sitting as a Judge of the High Court)

Between :

(1) MANSARD MORTGAGES 2007-2 PLC
(2) VISTRA CAPITAL MARKETS (IRELAND)
LIMITED

Claimants

- and -

(1) BEYAT HOLDINGS LIMITED
(2) DIGITAL ASSET PARTNERS LIMITED
(3) MICHAEL JOHNSON
(4) USMAN AHMAD
(5) ANNABEL WATSON
(6) PETER MORROW

Defendants

Catherine Cooke (instructed by **Fieldfisher LLP**) for the **Claimants**
The defendants did not appear and were not represented

Hearing date: 7 December 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.

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HHJ Paul Matthews :

Introduction

1. On 7 December 2021, this Part 8 claim was listed before me for disposal or directions. The defendants were neither present nor represented at the hearing, although they had been notified of it in due time, and indeed had previously made a number of witness statements, and provided the court with several lengthy and complex written submissions. After hearing argument from Catherine Cooke, counsel for the claimants, I announced that I would grant the declarations sought, and at least some of the injunctions sought, but that I would hand down a written judgment as soon as possible, together with my decision on the remaining matters. This is that written judgment.
2. In essence, this claim concerns the question who controls the first claimant. The unchallenged evidence is that the first claimant is a company, incorporated in the UK on 31 August 2007, which in the same year issued Notes to investors with a value of £550 million, which funds were then used to acquire a portfolio of residential mortgages. Those Notes are governed by a trust deed dated 12 December 2007, of which the trustee is Deutsche Trustee Co Ltd. In the trust deed, the addresses given for the registered offices of both the first claimant and Deutsche Trustee Co Ltd are the same, namely “Winchester House, 1 Great Winchester St, London EC2N 2DB”. This is also the address of the London branch of Deutsche Bank AG. The second claimant is an Irish company which holds the 50,000 issued shares in the first claimant as a trustee. It is said by the defendants in their written submissions that the shares are held on charitable trusts, but so far as I can see nothing turns on this and I say no more about that.
3. The first defendant is a company which is, or at least was, incorporated in the Marshall Islands, in the Pacific Ocean. The first witness statement of Mr Julius Bozzino, on behalf of the claimants, exhibits what purports to be a certificate of the “annulment” of that company on 4 August 2020. Nevertheless, it appears that those acting, or purporting to act, on behalf of the first defendant claim that it has a significant, even a controlling, beneficial interest in the Notes. (It is asserted to be over 50% of the aggregate “Principal Amount Outstanding of the Most Senior Class” and over 50% of the aggregate “Principal Amount Outstanding of the Notes”.)
4. Moreover, they claim that, by virtue of that interest it was and is entitled to require the appointment of the second, third and fourth defendants as directors of the first claimant, and thereby gain day-to-day control of that company. The defendants further claim that the first claimant under their control has entered into a valuable consultancy agreement with the first defendant. For this purpose they made a demand upon Deutsche Bank to pay an initial invoice for consultancy fees in the sum of £300,000 (which was, however, not paid). The pre-existing directors of the first claimant and the second claimant reject all these claims. They have raised their opposition to the defendants’ claims in this claim under CPR Part 8.

5. The second defendant is a UK registered company. According to documents filed at Companies House, a “person with significant control” of this company is Highbury Investments Ltd, and that a former such person (and former director) is one Rajnish Kalia. Those documents also show that a lady called Amanda Watson is a director of the second defendant, giving a correspondence address in the Marshall Islands.
6. Later in this judgment I shall refer to a decision of the High Court in a case called *Clavis Securities plc v Rizwan Hussain and others*, CR-2021-001057, which has some similarities to this case. The second defendant in this case is also the second defendant in the *Clavis* case, Highbury Investments Ltd is the third defendant in the *Clavis* case, Amanda Watson is the fourth defendant in the *Clavis* case, the fifth defendant in the present case (Annabel Watson) is also the fifth defendant in the *Clavis* case, and Rajnish Kalia is the sixth defendant in that case. I shall come back to Mr Rizwan Hussain later on in this judgment, but I mention now that he is currently subject to a general civil restraint order dated 9 July 2020, effective for two years, a copy of which was in the bundle before me.
7. There was little information before me about the third defendant. In his acknowledgment of service (to which I refer later), he intimated an intention to challenge the jurisdiction, which suggests that he is not resident in this country, and gave as his address an accommodation address at 33 Queen St in the City of London.
8. Similarly, there was not much before me about the fourth defendant. In his acknowledgment of service (to which I also refer later) he gave as his address the registered office of the second defendant, which is an accommodation address in City Road, London EC1.
9. The fifth defendant gave the same address in her acknowledgment of service as the second and fourth defendants. However, in her witness statement of 24 November 2021 (to which I will refer further later in this judgment) she gives her address as the same address as the registered office of the first defendant, in the Marshall Islands. In that witness statement she also confirms (as is shown also by documents filed at Companies House) that she is a director of the second defendant. Her email address has the domain name “clifden.group”. The claimants say in their evidence that there is no company registered at Companies House under that name. However, they also say that a company called Clifden IOM No 1 Ltd was a defendant in a case decided by the High Court in August 2018 (to which I shall refer later) and according to a notice in the Official Gazette of 17 July 2019 that company was put into liquidation by order of the Isle of Man High Court on 11 July 2019.
10. The sixth defendant also intimated in his acknowledgment of service an intention to challenge the jurisdiction, and gave us his address for service the same accommodation address as the first and third defendants. His email address has the domain name “beyatholdings.com”.
11. The Part 8 claim form was issued on 21 September 2021, by solicitors Fieldfisher LLP, acting (as they say) on behalf of both claimants. It was

supported by a witness statement of Julius Bozzino dated 17 September 2021, with one exhibit. In that witness statement Mr Bozzino says that he is a director of the first claimant together with Sunil Masson. In support of that, he exhibits a copy of a print-out from the online service of Companies House relating to the first claimant. This appears to show that he was appointed a director on 16 July 2018, that Mr Masson was appointed a director on 9 April 2013 (when he was also appointed secretary), and that at the date of the download no other person was a director. The correspondence address for both is stated to be “3rd floor, 11-12 St James’s Square, Suite 2, London, England SW1Y 4LB”.

Background events

12. The initial sequence of events leading to this litigation, according to Mr Bozzino (and, except where otherwise stated, unchallenged by the defendants) was as follows. On 1 September 2021, the sixth defendant wrote to Mr Bozzino, among others, by email “for and on behalf of” the first defendant attaching a letter addressed to Mr Masson, Mr Bozzino and the second claimant. This letter is headed “Investor Notice and Direction”, and is stated to be sent by the first defendant. Amongst other things, it says that the first defendant writes “to you in your capacity as the present directors of the Issuer [the first claimant] and in the case of [the second claimant] in its capacity as Share Trustee and one of the two members of the Issuer”.
13. It says that the first defendant has “an economic interest in the Notes and our interest is a controlling interest. Proof of our interest and its form can be provided to you, acting reasonably, upon the co-signature and return of the enclosed nondisclosure agreement”. It also confirms that the first defendant is not actually the Noteholder. Then it goes on to “direct, instruct and compel” the addressees to “take all necessary steps and actions forthwith to appoint” the second, third and fourth defendants “as *de jure* directors of the” first claimant. This letter was accompanied by letters of consent apparently by those defendants to act as such directors.
14. On 2 September 2021, the fifth defendant sent two emails to Mr Bozzino, both stated to be sent “for and on behalf of” the second defendant. The first was sent at 8:36 AM, and attached what was said to be an agenda for a meeting of the Board of Directors of the first claimant to take place that day at 16:00 hours at 25 Belgrave Rd, London SW1V 1RB. (I was told during the hearing that this is the address of the St George’s Hotel.) Item 1 on that agenda was “the governance and direction of the Company”.
15. At 17:42 hours on the same day, the fifth defendant sent a further email to Mr Bozzino, attaching what was said to be minutes of a meeting of the Board of Directors of the first claimant held at 16:00 hours that day. Those minutes purport to show that those present at such meeting were the second, third and fourth defendants in their capacities as directors (the fourth defendant also as chairman), but that neither Mr Bozzino nor Mr Masson was present. The business said to have been transacted was to approve the entry by the first claimant into a consultancy agreement with the first defendant in consideration

of an initial fee of £300,000 and thereafter £150,000 (in each case exclusive of any applicable taxes) per month for a minimum period of 18 months.

16. The following day, the fifth defendant sent a further email, stated to be “for and on behalf of Mansard Mortgages 2007-2 plc” to Mr Bozzino and to Mr Masson, attaching what was said to be a signed copy of the consultancy agreement “for your records”. The front page of this document bore the name “K & L Gates LLP, One New Change London EC4M 9AF”. (As an aside, Mr Bozzino has exhibited an exchange of emails with Sean Crosky, a partner at K & L Gates LLP in London, in which Mr Crosky apparently confirms that this document was not prepared by his firm. I do not see anywhere that this is accepted by the defendants. But I do not need to resolve that question for the purposes of this judgment.)
17. On 3 September 2021, Mr Masson wrote to Companies House to report what he called “unauthorised activity which may also include unauthorised filings at Companies House”. On the same day, Fieldfisher LLP wrote to various addressees by email, being either parties to the securitisation process concerning the first claimant or persons having provided services to such a party. These emails said that the second, third and fourth defendants were not and have never been directors of the first claimant, that no meeting of the Board of Directors was validly held on 2 September 2021, and that therefore no decisions purportedly taken by them were valid as against the first claimant. On 7 September 2021 Companies House responded to the email from Mr Masson to say that no new appointment form had been accepted as of 08:20 hours on that day.
18. It was also on 7 September 2021 that the fifth defendant sent a further email, also “for and on behalf of” the first claimant, this time to Deutsche Bank AG. This attached a letter to the bank in what was stated to be its “capacity as the present Cash Manager” to ask that payment be made to the first defendant of the sum of £300,000 said to be due under a purported invoice dated 6 September 2021 relating to the purported consultancy agreement. It required payment to be made to a bank account with National Westminster Bank plc in the name of a company called Balliol Chatsworth Ltd. It was signed by the fourth defendant “for and on behalf of” the first claimant. This payment was not however made, as Deutsche Bank AG was no longer the cash manager in relation to the first claimant and the Notes.
19. On the same day, Fieldfisher LLP wrote to the first to fifth defendants. The letter noted that the first defendant had provided no evidence of its economic interest in the Notes, that instrument holders did not have the power to appoint directors, and that therefore the “Investor Notice and Direction” was invalid, as was the “Notice of a Board Meeting”, any meeting purportedly held pursuant to that, and any resolution purported to have been passed. The letter also said that the first claimant did not enter into the consultancy agreement, because the fourth defendant, not being a director, had no authority to sign it. It also said that K & L Gates LLP had confirmed that the purported agreement was not their document.

20. It therefore sought undertakings from the addressees that they would not hold themselves out as having any beneficial or economic interest in the first claimant, would not hold themselves out or act as if they were a director, secretary or other officer of the first claimant or as having any authority to act on its behalf, and would not threaten any legal claim or commence any legal proceedings against the first claimant or any other party or provider of services to the first claimant in relation to the securitisation transaction. As I understand it, no such undertakings have ever been offered.
21. On the same day the fifth defendant sent an email, once more “for and on behalf of” the first claimant, attaching a letter to Fieldfisher LLP, replying to the letter from that firm earlier the same day. It stated that that firm did not act for the first claimant, and that the letter of 7 September 2021 had not been authorised or agreed to by the first claimant. It purported to terminate any subsisting retainer with Fieldfisher LLP. It sought in turn an undertaking from that firm that it would not hold itself out as being authorised to act or purport to act on behalf of the first claimant. The letter was signed by the fourth defendant. Again, as I understand it, no such undertaking has been offered, either.

The claim form

22. As I have said, the claim form in this matter was issued on 21 September 2021. It claims the following relief:

“The Claimants seek:

1. Declarations that:

- a. The purported “Investor Notice and Direction” dated 1 September 2021 is invalid, of no effect and not authorised or accepted by the Issuer
- b. The purported “Notice of a Board Meeting” dated 2 September 2021 was invalid, of no effect and not authorised by the First Claimant.
- c. The purported “Signed minutes of board meeting” dated 2 September 2021 and the purported resolutions it contains, are invalid, of no effect and not authorised by the First Claimant.
- d. The Second to Fourth Defendants are not and never have been directors of the First Claimant.
- e. The only directors of the First Claimant are Julius Bozzino and Sunil Masson.
- f. The purported “Consultancy Agreement” dated 3 September 2021 is invalid, of no effect and not authorised by the First Claimant.

2. Injunctions restraining the Defendants from (whether acting alone, or in combination with any other individual or entity):

- a. Taking steps to appoint directors of the First Claimant;
- b. Making or attempting to make (or cause, procure or permit any other person to make) any filing at Companies House in respect of the First Claimant;
- c. Holding any person other than Julius Bozzino and Sunil Masson out as a director of the First Claimant;
- d. Taking any steps to enforce the purported consultancy agreement;
- e. Issuing or continuing (or causing or encouraging anyone else to issue or continue) any legal proceedings arising out of or relating to these proceedings and/or the affairs of the Claimants in any jurisdiction against Fieldfisher LLP, any solicitor in the firm of Fieldfisher LLP and Counsel for the Claimants, unless at least one of the Defendants has applied for and obtained permission from a High Court Judge to bring such proceedings (having given at least 14 days' notice to the proposed defendant(s) of any such application).

3. Injunctions restraining the Second to Fourth Defendants (including in those Defendants which are corporate persons, employees or agents) from (whether acting alone or in combination with any other individual or entity):

- a. Holding themselves out as directors of the First Claimant or as having any authority to act on the First Claimant's behalf;

4. Costs.”

23. On 23 September 2021 the claimants obtained permission from Deputy Master Teverson to serve the proceedings out of the jurisdiction and by an alternative means on the defendants, at email addresses for each of them. Paragraph 3 of the order provided that service would be deemed effected on the second business day after sending each of the emails. Paragraph 4 of the order required each of the defendants to file and serve an acknowledgment of service by 14 days after the deemed date of service. The claim was served on each defendant by means of a letter sent by email by the claimants' solicitors, Fieldfisher LLP, on 27 November 2021. Accordingly the deemed date of service was 29 September 2021, and the last day for filing an acknowledgment of service in each case was 13 October 2021.
24. By close of business on that date, none of the defendants had filed an acknowledgment of service. That meant that the provisions of CPR rule 8.4(2) thereafter applied:

“The defendant may attend the hearing of the claim but may not take part in the hearing unless the court gives permission.”

The application to strike out the claim

25. On 4 October 2021, the fourth defendant, Usman Ahmad, signed and issued an application notice for an order to strike out the Part 8 claim under CPR rule 3.4(2) or alternatively for summary judgment pursuant to CPR rule 24.2. He claimed to do so *also* on behalf of the first claimant itself, describing himself in the application notice (which asks if the applicant is signing on behalf of the company to give the office held) as “director”. He gave his postal address (it is not clear whether it was also supposed to be the address of the first claimant) as 152-160 City Rd, London EC1, which as I have said is a well-known accommodation address. He gave his email address as “legal@mansardmortgages.com”. The application was supported by a witness statement made by the fourth defendant dated 1 October 2021 together with one exhibit.
26. The application was heard by Deputy Master Marsh on 23 November 2021. At that hearing the claimants appeared by Catherine Cooke, counsel instructed by Fieldfisher LLP, but none of the defendants was present or (legally) represented. However, Mr Rizwan Hussain (the first defendant in *Clavis Securities plc v Rizwan Hussain and others*, a case which I mentioned earlier) also attended the hearing, saying that he was a director of the second defendant. (According to documents filed at Companies House, he was appointed a director of the second defendant only on 22 November 2021.) In these circumstances, Deputy Master Marsh heard and dismissed the application, awarding indemnity costs against the fourth defendant. I have not seen an approved transcript of the judgment, but it appears from Ms Cooke’s skeleton argument before me that the “strike out application was dismissed on the basis that no acknowledgments of service (which should have been filed by 13 October 2021) had been filed and there was, therefore no entitlement to make the application”.

Acknowledgments of service

27. On the day after the hearing, 24 November 2021, the second, fourth and fifth defendants filed acknowledgments of service. They indicated an intention to contest the claim, and to object to the use of the Part 8 procedure, but not to challenge the jurisdiction of the court. All three acknowledgments gave the same accommodation address as the address to which documents could be sent, namely, 152-160 City Rd, London EC1. The fifth defendant filed a witness statement dated 24 November 2021 with the acknowledgment of service. In that witness statement she gave as her address the same address as apparently of the first defendant, in the Republic of the Marshall Islands. She stated that she too was a member of the Board of Directors of the second defendant.
28. In her witness statement she explained why she and the second defendant objected to the use of the Part 8 procedure. Firstly, she said that the claimants had “raised a number of substantial disputes of fact”, including questions as to the interests and standing of the first defendant and the serious allegations of fraud which had been

made on behalf of the claimants against the defendants. Secondly, she said that Deputy Master Marsh on 23 November 2021 had made “a clear finding ... that the claim involves substantial disputes of facts ... It is respectfully submitted that it is not now for this court to displace, interfere with or go behind that extant ruling”. Thirdly, she also objected that the claim form did not identify either “(i) the question of questions which the Purported Claimants want the Court to decide; or (ii) the legal basis for the claim to the remedies that were sought”. She said that this defect was fatal, relying on comments made by Jefford J in *Merit Holdings Limited v Michael J Lonsdale Ltd* [2017] EWHC 2450 (TCC). I will come back to this decision.

29. The final point made by the fifth defendant was to rely on CPR rule 8.8(2), which provides:

“When the court receives the acknowledgment of service and any written evidence it will give directions as to the future management of the case”.

She therefore invited the court to give directions as to the future management of the case by directing that the claim should continue as a Part 7 claim and give further appropriate directions, including the service of particulars of claim as an initial step.

30. On Friday, 3 December 2021 the fifth defendant sent an email to Fieldfisher LLP, stating that as the defendants were acting in person and as their “officers” were not in the jurisdiction, they “required” the hearing on 7 December 2021 to be a remote hearing. Fieldfisher LLP emailed the court on the same day to state that their preferred position was for a hearing in person, but that they would be content for it to be listed as hybrid. On 6 December 2021, having looked at the papers, I invited detailed submissions on the question whether the hearing should be remote, in person or hybrid. A detailed written submission was received from the defendants. Having considered this, and a further email from Fieldfisher LLP, I decided, for reasons then given in writing, that the hearing would be held in person rather than remote or hybrid. I should add that, this decision having been communicated to the parties, I received a further detailed written submission from the defendants. In the event, none of the defendants was either present or represented at the hearing, although of course any of them could have been represented by a lawyer had the relevant party so wished.
31. Also on the day before this hearing, that is, 6 December 2021, the first, third and sixth defendants filed acknowledgments of service in this claim. In each case, the relevant defendant gave the same address for service of documents, namely, 33 Queen St, London EC4, another well-known accommodation address. Each of the acknowledgments of service not only contested the claim, but also challenged the jurisdiction of the English court. On the other hand, none of these three defendants challenged the use of the CPR Part 8 procedure.

The hearing of 7 December 2021

32. As I have said, there were nevertheless a number of detailed written submissions put forward on behalf of the defendants. In addition to the several witness statements filed by the fourth defendant, Mr Ahmad, there was a witness statement from the fifth defendant, Ms Watson, a written submission of the second defendant (covering some 35 pages), signed by Ms Watson “as director” on behalf of the second defendant, and a supplemental submission of four pages, similarly signed by Ms Watson on behalf of the second defendant. By virtue of CPR rule 8.8(2), the defendants were not entitled to do this, not having filed their acknowledgments of service in time. Nevertheless, I have read and taken into account all of this evidence and all of these written submissions. In substance I have permitted this degree of participation.
33. One of the submissions made was that the court could not deal with the claim at the hearing *at all*, because the jurisdiction had been challenged in the acknowledgments of service of the first, third and sixth defendants, filed on 6 December 2021, and, under CPR Part 11, those defendants have 14 days after filing such acknowledgments to make their application to contest jurisdiction. So nothing could happen until the challenge was disposed of, some time after 20 December 2021. The first point to make in dealing with that submission is that it can apply only so far as concerns the first, third and sixth defendants. The second, fourth and fifth defendants have intimated no such challenge to jurisdiction, and the disposal hearing in relation to the claims against *them* cannot be prevented from going ahead on that basis. I turn therefore to consider the argument made from the point of view of the first, third and sixth defendants.
34. CPR Part 11 consists of a single rule, which relevantly provides:
- “(1) A defendant who wishes to –
- (a) dispute the court’s jurisdiction to try the claim; or
- (b) argue that the court should not exercise its jurisdiction
- may apply to the court for an order declaring that it has no such jurisdiction or should not exercise any jurisdiction which it may have.
- (2) A defendant who wishes to make such an application must first file an acknowledgment of service in accordance with Part 10.
- [...]
- (4) An application under this rule must –
- (a) be made within 14 days after filing an acknowledgment of service; [...].”
35. However, CPR rule 10.1 relevantly provides that
- “(1) This Part deals with the procedure for filing an acknowledgment of service.

(2) Where the claimant uses the procedure set out in Part 8 (alternative procedure for claims) this Part applies subject to the modifications set out in rule 8.3.

[...]

36. CPR rule 8.3 relevantly provides that:

“(1) The defendant must –

(a) file an acknowledgment of service in the relevant practice form not more than 14 days after service of the claim form; ...

[...]”

37. As I have said, Deputy Master Teverson’s order provided in effect that service of the claim form would have to be carried out by 13 October 2021. None of the defendants filed an acknowledgment of service by that date. The disposal hearing was listed well before the first, third and sixth defendants filed their acknowledgments on 6 December 2021. CPR rule 11(2) is mandatory: there must be compliance with Part 10 in filing the acknowledgment of service before a challenge can be made. Here, rule 10.1(2) refers on to rule 8.3. In my judgment, those defendants cannot on the one hand ignore the time limit for filing an acknowledgment of service, and yet claim the benefit of CPR rule 11.4(a) as if they had complied with that time limit, in order to prevent the listed disposal hearing from going ahead. In my judgment they should at the least have applied for an extension of time in which to file their acknowledgments. Then the court could have decided whether the benefits that would accrue from granting such an extension should indeed be conferred.

38. My conclusion is supported by the decision of Popplewell J (as he then was) in *Taylor v Giovani Developers Ltd* [2015] EWHC 328 (Comm), another case on a jurisdictional challenge where the acknowledgment of service had been filed out of time. The judge said:

“14. The first question which arises is whether the First Defendant can apply for an extension of time of nine days within which to mount the jurisdiction challenge without also seeking an extension of time for entering an acknowledgment of service. Rule 11(2) provides:

‘A defendant who wishes to make such an application [to dispute the court’s jurisdiction or argue that the court should not exercise its jurisdiction] must first file an acknowledgment of service in accordance with Part 10.’

15. On behalf of the First Defendant, Mr. Harding argued that an acknowledgment of service which complied with the formalities of Part 10 satisfied Rule 11(2), whether or not it had been served timeously. On behalf of the Claimants, Mr. Davies submitted that in order to qualify under Rule 11(2), an acknowledgment of service must comply in all respects with Part 10, and an acknowledgment of service

which does not comply with the time provisions set out in Part 10 is not an acknowledgment of service in accordance with Part 10.

16. The Claimants' submissions are to be preferred on this question. The wording of Rule 11(2) is clear. The acknowledgment of service must be "in accordance with Part 10". There is no reason to treat that as requiring compliance with only some parts of Part 10 and not others.

17. If an acknowledgment of service is not served within time, then there must be some means by which a Claimant can have that acknowledgment of service treated as ineffective unless the Court grants an extension of time. The effect of the submissions advanced on behalf of the First Defendant by Mr. Harding was that if a defendant entered an acknowledgment of service, albeit out of time, that was sufficient to trigger the right to defend the claim, the right to challenge jurisdiction and the right to resist a judgment in default of acknowledgment of service. He was unable to point to any provision of the Rules under which a Claimant would be entitled to have the acknowledgment of service set aside for being out of time. That seems to me to point clearly towards a need on the part of the defendant to seek an extension of time if the acknowledgment of service is to be treated as effective for its main purposes, which are to enable the claim to be defended or to enable a challenge to jurisdiction to be advanced, and to prevent judgment being entered in default of acknowledgment of service.

18. I am fortified in that analysis by the judgment of Flaux J in *Talos Capital Ltd. & Ors. v. JSC Investment Holdings XIV Ltd.* [2014] EWHC 3977 (Comm) in which he had to consider an application for an extension of time both for acknowledgment of service and for time in which to mount a Part 11 jurisdiction challenge, in circumstances which are analogous to the present case. He treated an application for extension of time in relation to the acknowledgment of service as being necessary because otherwise the acknowledgment of service would be treated as a nullity and would be capable of being set aside as such: see in particular paras. 30, 33 and 44 of that judgment.”

39. For these reasons, in my judgment, the argument fails.
40. A second argument is based on the fact that the second, fourth and fifth defendants indicated in their acknowledgments of service, also filed well out of time, but on 24 November 2021, that they objected to the use of the Part 8 procedure. The argument relies on rule 8.8, which relevantly provides:

“(1) Where the defendant contends that the Part 8 procedure should not be used because –

(a) there is a substantial dispute of fact; and

(b) the use of the Part 8 procedure is not required or permitted by a rule or practice direction,

he must state his reasons when he files his acknowledgment of service.

[...]

(2) When the court receives the acknowledgment of service and any written evidence it will give directions as to the future management of the case.”

41. The argument is that the disposal hearing cannot proceed, because the court must first “give directions as to the future management of the case”, and it has not yet done so. I reject this argument too, for reasons similar to those given in relation to the first argument. It cannot be right that the defendants, having failed to file acknowledgments of service in time, and being thus subject to the effect of CPR rule 8.4(2) (set out above) can in effect hold up the hearing of disposal claim by insisting that the court first give directions for the future management of the case.
42. But there is a further point. One of the important case management powers conferred upon the court by the CPR is the power to decide in what order to deal with questions which arise. CPR rule 3.2 relevantly provides that the court may:
 - “(j) decide the order in which issues are to be tried;
 - (k) exclude an issue from consideration; ... ”
43. In *Clavis Securities plc v Hussain* [2021] EWHC 2003 (Ch), David Halpern QC, sitting as a deputy High Court judge, heard a Part 8 claim in which the claimants said that the defendants had purported to remove some of the claimants as directors and secretary of the first and second claimants and appoint some of their number as directors and secretary of those companies. I note that counsel for the claimants in that case was Catherine Cooke, who is counsel for the claimants in this case. One question which the judge had to consider was whether he should hear the claim in the absence of the defendants and in circumstances where they were disputing the court’s jurisdiction.
44. The deputy judge said this:

“20. In the present case Ms Cooke asks me to go further than Mr Males QC went [in *Moloobhoy v. Kanani* [2012] EWHC 1670 (Comm)] in two respects. Firstly, she asks me to hear these Part 8 proceedings, as distinct from a summary judgment application, and secondly she asks me to hear these proceedings ahead of any jurisdictional challenge, and not merely at the same time. I am satisfied that I have jurisdiction to do so. Four of the five Defendants have filed acknowledgments of service under CPR r. 8.3, thereby giving the court jurisdiction to decide these proceedings. One defendant has failed to file an acknowledgment of service, as a result of which she has no right to take part in the hearing: r. 8.4. The acknowledgments all dispute the court's jurisdiction, but the

court has power under r. 3.1(2)(j) and (k) to decide the order in which issues are to be tried and to exclude an issue from consideration.”

45. The deputy judge accepted that it would be a rare thing for the court to press on and hear the claim rather than (in that case) consider a jurisdictional challenge. Nevertheless he decided on the facts of that case to go on and hear the claim. I should add that this decision has been appealed, and I understand that the appeal has been fixed for hearing in March 2022. The case before me however presents less difficulty, because all that the relevant defendants argue for is that the court should give case management directions. It seems to me that the court can quite properly decide that there is no need for any other case management directions, but to proceed to the hearing, at which the defendants’ various objections to both the procedure adopted and the relief sought can be dealt with.

CPR part 7 or CPR Part 8?

46. The first question that was argued before me at the hearing was whether the proceedings should continue in the Part 8 procedure will be dealt with under Part 7. In this connection, CPR rule 8.1 relevantly provides:

“(2) A claimant may use the Part 8 procedure where –

(a) he seeks the court’s decision on a question which is unlikely to involve a substantial dispute of fact; or

(b) paragraph (6) applies.

[...]

(6) A rule or practice direction may, in relation to a specified type of proceedings –

(a) require or permit the use of the Part 8 procedure; and

(b) disapply or modify any of the rules set out in this Part as they apply to those proceedings.”

47. In her witness statement, the fifth defendant objects to the Part 8 procedure on a number of grounds. The first of these is that there are substantial disputes of fact in the case. She says this:

“15. Firstly, the Purported Claimants, on their own case, have raised a number of substantial disputes of fact, including (but not limited to) the following:

a) The facts and matters that are said to give rise to the interests and standing of [the first defendant] (“Beyat”) as an Ultimate Account Holder (as defined in [the fourth defendant’s first witness statement] and, furthermore, as a controlling Ultimate Account Holder, on or around 01 September 2021.

b) The facts and matters that are said to give rise to the purported de jure appointments of Julius Manuel Bozzino and Sunil Masson as purported directors of the First Claimant, the fact that they were not the original directors of the First Claimant and strangers when it issued its securities; and as such the facts and matters which is [sic] said to give Mr Bozzino and Mr Masson actual authority from the First Claimant to (i) purportedly join the First Claimant as a claimant to these proceedings and to seek the whole of the relief there to, and (ii) to purportedly engage and instruct Fieldfisher and Mr Black, as purported solicitors and agents of the First Claimant, to purportedly act on the First Claimant's behalf with respect to these proceedings.

16. Secondly, the Purported Claimants have made several wide-ranging and very serious allegations of fraud (all of which are yet to be fully particularised and will be disputed by the Relevant Defendants). I refer to the following examples in the Bozzino Statements (which should be seen as illustrative and by no means exhaustive):

a) at paragraphs 18-31 of Bozzino1 entitled '*fraudulent invoice and other invalid actions*', Mr Bozzino intimates or intends to insinuate serious allegations of fraud and wrongdoings with respect to the demand for payment by Beyat;

b) at paragraph 35 of Bozzino1, Mr Bozzino submits that "*[n]one of the actions taken by the 1st to 6th defendants above are legitimate and the submission of the Invoice for payment is in my view an attempt to obtain payment by fraud [emphasis added]*";

c) paragraph 26 of Bozzino2, Mr Bozzino submits that "*[the fourth defendant's first witness statement] sets out in detail the invalid actions taken by him and associates in purporting to appoint directors and purporting to cause the [first claimant] to enter into a fraudulent consultancy agreement [emphasis added]*" and repeats his allegation that the Fourth Defendant and/or "*his associates attempted fraudulently to obtain payment of £300,000 from Deutsche Bank AG on 7 September 2021*";

d) at paragraph 28 of Bozzino2, Mr Bozzino denies that the materially false and/or misleading public announcement that he released or caused to be released on 6 September 2021 was "*fraudulent*"; the diametrically opposite to what was said by the Fourth Defendant in paragraphs 50 and 51 of his evidence in [his first witness statement]."

48. A second point which the fifth defendant makes is to rely on what is said to be "a clear finding" by Deputy Master Marsh in his *ex tempore* ruling on 23 November 2021, dismissing the application to strike out the claim. In her witness statement the fifth defendant puts it this way:

“18. ... Deputy Master Marsh made a clear finding ... that the claim involves substantial disputes of facts (which, in that instance, precluded any furtherance of the application). It is respectfully submitted that it is not now for this Court to displace, interfere with or go behind that extant ruling. Moreover, any maintenance or continuation of the proceedings within the Part 8 framework would be a direct contravention of the substance of the ruling of Deputy Master Marsh.”

49. As I have already said, I have not seen an approved transcript of Deputy Master Marsh’s judgment. On the assumption that the fifth defendant has correctly stated what the master said, I observe that the application before him was to strike out the claim and not for the claim to be treated as proceeding under CPR part 7. Moreover, and as I have already said, counsel who appeared on behalf of the claimants on that occasion (Ms Cooke) is the same counsel who appeared before me at the hearing on 7 December 2021, and what she said in her skeleton argument was that the application “was dismissed on the basis that no acknowledgments of service ... had been filed and there was, therefore no entitlement to make the application”. There is no reference there to any part being played by the question of disputes of fact. In the circumstances, I cannot treat the master’s decision as in any way binding the court on this occasion in deciding whether the case is suitable to be tried under Part 7 or Part 8.

50. I also note, in passing, that in his decision in *Gavriel v Davis* [2019] EWHC 2446 (Ch), Chief Master Marsh (as he then was), in considering whether the hearing listed in a Part 8 claim should be a disposal hearing or not, said this:

“6. I heard submissions from counsel concerning whether today's hearing should proceed as a disposal hearing. I gave an indication at the outset that I was minded to do so, unless I was satisfied that there were conflicts on the evidence that would make it impossible or improper for the hearing to proceed. What emerged from the submissions is that, and this is common ground between counsel, if the Court is able to undertake an evaluation of the evidence on a similar basis to that under CPR Part 24, and to conclude that the evidence does not meet the Part 24 threshold, in other words the evidence is fanciful, then the Court is entitled to proceed, notwithstanding that on the face of it there are issues of fact between the parties. I heard full and, as is to be expected, careful submissions from Mr Edwards, who appeared for the Defendant, seeking to persuade me that the case should go to a trial and the Court could not safely conclude his client's evidence was fanciful. I will deal with those submissions in a moment.”

51. So, it does not automatically follow that, merely because there are some disputes of fact, the Part 8 procedure is inappropriate. Where the evidence on one side is cogent and on the other side is fanciful, the fact that there is apparently a dispute between them will not prevent the matter from being decided under the Part 8 procedure.

52. However, in the present case it is argued by the claimants that it is not necessary to consider this aspect of the matter any further. Although there are a number of disputes of fact between the parties, it is said not to be necessary for the court to resolve any of them in order to decide this claim. In other words, even if the defendants are right, and the first defendant does have a beneficial interest in some of the Notes issued by the first claimant, or even a controlling interest, the defendant's case that the second to fourth defendants have been appointed directors of the first claimant, and that they held a meeting at which they resolved to commit the first claimant to the consultancy agreement with the first defendant is clearly wrong as a matter of law.
53. As I have already said, the defendants claim that as at 1 September 2021 the first defendant held "an ultimate beneficial (or equitable) interest in the Notes and, as such, had absolute and uncontrolled discretion and control of all rights (including, voting rights) attaching to the Notes held by the Instrumentholder; fixed by reference to the face value of the Notes comprising of their ultimate beneficial interests ... " They therefore claim that the first defendant was "a contingent creditor" of the first claimant, relying on authorities such as *Re Castle Holdco 4 Limited* [2009] EWHC 3919 (Ch), when Norris J said:
- "22. ... As I have indicated, the notes are in each case held by a nominee for a common depository. The common depository is not of course the owner of the notes. The notes are in fact held through two electronic book entry systems operated by Euroclear and Clearstream, by ultimate owners. Those ultimate owners, the account holders, may themselves be beneficial owners or, alternatively, they may themselves hold for clients sometimes directly or sometimes through intermediaries such as banks and brokerage houses.
23. ... Castle Holdco itself is not generally concerned with who is the ultimate beneficial owner. Indeed the security documents themselves contain a provision that Castle Holdco shall treat the common depository or its nominee as the absolute owner of the global security for all purposes. However, the security documentation does contain a mechanism whereby the beneficial owner can upon request become a direct creditor of Castle Holdco."
54. I have not been asked to decide whether the notes in the present case are subject to a similar analysis, and I was not addressed on this question. So nothing I say here can be taken as a decision on the point., For present purposes, however, I shall simply assume that the analysis is appropriate, and that a beneficial owner of Notes can properly be regarded as a contingent creditor of the first claimant.
55. In the present case the rights of Noteholders arise under the terms of the trust deed of 12 December 2007, and of the Notes themselves, both of which are governed by English law. The parties to the trust deed were the first claimant "as Issuer" and Deutsche Trustee Co Ltd "as Trustee". This deed provides for the holders of not less than 25% in aggregate of the most senior class of Notes in certain circumstances to require the Trustee to take proceedings, actions or steps or to exercise any discretion in connection with the note issuance. But it

nowhere provides for Noteholders, or those having beneficial interests in the Notes to have any power to appoint directors of the first claimant, or to require those having such power to do so as directed.

56. The articles of association of the first claimant are in the form of Table A, of which paragraph 73 deals with the appointment of directors. The power to appoint directors is given to the members of the company, and also to the directors themselves. There is no such power given in the articles of association to creditors of the first claimant, holders of its debt securities or anyone else. There is no claim, or even suggestion, that any of the defendants is a member of the first claimant, or has the benefit of any shareholders' agreement which would justify appointment as a director.
57. Over and above this point, it is also to be noted that the claim of the defendants is based upon the notice attached to the email of 1 September 2021, which did not itself claim that some power given to the defendants had been exercised by them so as to appoint the second to fourth defendants as directors of the first claimant. Instead, the notice purported to require *the existing directors* to appoint them as further directors. The evidence of Mr Bozzino is that they have not complied with this demand, and the evidence of the defendants does not assert that the directors of the first claimant have actually complied with their demand. Accordingly, as a matter of fact, there simply is no evidence that the second to fourth defendants have ever been appointed directors of the first claimant. On the face of it, therefore, there is thus no relevant dispute of fact which prevents this claim from being determined under CPR Part 8.
58. The next point which has been put forward by the defendants is that the claim form was defective, because it did not identify either "(i) the question or questions which the Purported Claimants want the Court to decide; or (ii) the legal basis for the claim to the remedies that were sought". They rely on comments made by Jefford J in *Merit Holdings Limited v Michael J Lonsdale Ltd* [2017] EWHC 2450 (TCC). That was the case of a dispute about the construction of an office block in the City of London, where a claim form had been issued under CPR Part 8 seeking a declaration "as to the correct interpretation of the contract". The judge had a number of misgivings about the use of the Part 8 procedure on the facts of that case.
59. Jefford J said this (*italics in the original*):
- "21. Secondly, and more generally, subject to CPR Part 8.1(6), the Part 8 procedure is to be used where the claimant seeks the Court's decision on a question which is unlikely to involve a substantial dispute of fact. Part 8.2 provides that the Part 8 Claim Form must state '*the question which the claimant wants the court to decide; or the remedy which the claimant is seeking and the legal basis for the claim to that remedy*'. It is, therefore, an express requirement of the use of the Part 8 procedure that the question for the Court is one that is unlikely to involve a substantial dispute of fact and it is, it seems to me, to be implied in the rules that the question should be framed with some degree of precision and/or be capable of a precise answer.

22. The experience of this Court shows that there is a real risk of the Part 8 procedure being used too liberally and inappropriately with the risks both of prejudice to one or other of the parties in the presentation of their case and of the court being asked to reach ill-formulated and ill-informed decisions.

23. In this case, MJL's Acknowledgment of Service took issue with the Court's jurisdiction on the basis that the Claim involved substantial issues of fact. That was an unsurprising stance given that Merit's pleaded case turned substantially on what it said were the consequences of or inferences to be drawn from the conduct of the parties rather than, for example, from words used. By the time of the hearing before me, MJL's position had shifted. MJL no longer maintained a jurisdictional objection as such and considered that it may be useful for the Court to reach decisions which could resolve issues between the parties. MJL recognised, however, that the Court might still have reservations about that approach.

24. I did indeed have such reservations and it remains, of course, a matter for the Court's discretion whether to grant declaratory relief at all.

25. Despite the characterisation of the question for the Court as the correct interpretation of the contract, this is not a case in which the Court is being asked to construe the written terms of the contract. On the contrary, the Court is being asked to determine the very nature of the contractual relationship between the parties, both parties accepting that there is some contractual relationship. It is highly unusual for the Court to be asked to do so, in effect, on documents only with a short hearing. My concerns were allayed to a large extent by Mr Mort QC's submission that the relevant facts were short and uncontentious and that MJL had not identified any other factual issues on which it might wish to rely. This is important: it is only in such cases that it is appropriate to issue Part 8 proceedings.

26. I remained concerned, nonetheless, about the scope of what the Court was being asked to do and I heard this Claim on the basis that I would not reach a conclusion until giving judgment as to how far I should go in terms of findings or declarations. There were a number of unsatisfactory aspects of these proceedings which did not make this task easier and serve to emphasise why the Part 8 procedure should not be over liberally deployed.

[...]

31. Had a Part 7 procedure been adopted, then on the face of the pleadings, the parties' positions would have been fully set out and, if not, further information could have been sought. If there were no need for factual evidence, there would have been mechanisms available (in the discretion of the court) to resolve the issue of the contractual relationship between the parties promptly — for example, by the

hearing of a preliminary issue or an expedited hearing — and on a surer footing than is offered by the Part 8 procedure in circumstances such as this.

32. All these issues seem to me to illustrate why care should be taken by the parties and the Court in the deployment of the Part 8 procedure.”

60. Earlier in this judgment I set out the relevant parts of the claim form in the present case. It stated that the claimants seek certain declarations and injunctions concerned with the claim of the defendants that the second third and fourth defendants are directors of the first claimant and that a certain specified meeting and business transacted at that meeting were valid. There can be no doubt that this claim form concisely states the remedies which are sought by the claimants. Moreover, because those remedies include both declarations and injunctions, which are stated in precise terms, the claim form also states the questions which have to be decided by the court. I therefore conclude that this claim form complies with CPR rule 8.2.
61. The written submissions lodged on behalf of the defendants include a submission that the claim is doomed to fail on the basis that Mr Bozzino and Mr Masson had no authority to include the first claimant in this claim, and the second claimant has no stand-alone cause of action itself. This submission is hopeless. The emails sent by various of the defendants to Mr Bozzino and Mr Masson in early September plainly recognise that they were the then directors of the first claimant. The “Investor Notice & Direction” sent on 1 September 2021 to Mr Bozzino and Mr Masson said “We write to you in your capacity as the present directors of the Issuer”, that is, the first claimant. The first email from the fifth defendant dated 2 September 2021 Mr Bozzino attached a “notice of a Board Meeting”, and the second a “copy of the signed minutes of the Meeting held today”. The email from the fifth defendant dated 3 September 2021 sent a copy of “attached the signed consultancy agreement” to Mr Bozzino and Mr Masson “for your records”.
62. Moreover, the defendants’ case depends on their having required *the correct persons* to appoint the second third and fourth defendants as directors of the first claimant. Pursuant to Table A, only the company itself and the directors could do this. If therefore Mr Bozzino and Mr Masson were the directors of the first claimant as at 1 September 2021, they had the authority to cause the first claimant to issue these proceedings when it did, unless something had happened in the meantime to take away that authority. But there is no suggestion on the part of the defendants (much less of the claimants) of any such thing having occurred. On the materials before me I find that they continued to have the authority to cause the first claimant to instruct Fieldfisher LLP to issue and prosecute these proceedings on its behalf.
63. So, I turn at last to the principal question at issue in these proceedings, which is whether the second, third and fourth defendants have been validly appointed as directors of the first claimant. On the materials before me, the answer must be No. It is clear from the documents in evidence that beneficial owners of the Notes have no power to appoint directors of the Issuer (the first claimant), nor

indeed power to require others (for example, the present directors of the first claimant) to do so at their direction. There is no evidence before me of any other basis upon which the second, third and fourth defendants could have been appointed as directors of the first claimant.

64. However, in their written submissions the defendants say that the second, third and fourth defendants are nevertheless directors of the first claimant, because they “assumed the status and function of a director so as to make themselves responsible as if they were directors and were in fact part of and/or had the right to be part of its corporate governance system”. They say that accordingly they are “directors” within the definition of director in section 250 of the Companies Act 2006:

“In the Companies Acts ‘director’ includes any person occupying the position of director, by whatever name called.”

65. I reject this submission. This section is concerned only with the *name* being given to a person occupying the position of director. This means that a person might be appointed to a position called “governor” or “member of the governing body” or something similar, in the constitutive documents of the company, but yet, as long as a person occupying that office is in fact occupying the position of a director of a company in English law, then the occupant of that office will be treated as a director for the purposes of the Companies Acts. It does not do away in any respect with the need for a valid appointment to that office (by whatever name known). It would be absurd to suppose that a person who had no connection with the company but merely *asserted* that he or she was a director, and *assumed* the responsibilities of a director, thereby *became* a director of the company for the purposes of exercising the powers of directors of the particular company so as to bind that company. That is simply not what the section is concerned to do.

66. The defendants refer to a number of judicial decisions in which the concept of a “de facto director” is discussed. One of these is *Holland v HMRC* [2010] 1 WLR 2793, in which it was argued that the human director of a corporate director of another company was a de facto director of that other company, for the purposes of being subject to the same liabilities as a properly appointed director. The defendants refer in particular to what Lord Walker of Gestingthorpe said:

“115. ... A de facto director is not formally invested with office, but if what he actually does amounts to taking all important decisions affecting the relevant company, and seeing that they are carried out, he is acting as a director of that company. It makes no difference that he is also acting as the only active de jure director of a corporate director of the company.”

67. In fact, Lord Walker was in the minority on the question whether the human director was a de facto director of the second company. The decision of the majority was that he was not. But, even if Lord Walker’s statement is accepted at face value, and even if (which I doubt) it went beyond making the de facto director liable for things that a director is liable for, to the point of conferring

powers, it does not apply here. It applies only to cases where the de facto director is acting with the agreement of the de jure directors. Once again, a person does not become a de facto director merely by “muscling in” on the administration of the company, against the wishes of the other directors.

68. The defendants also refer to the definition of “shadow director” in section 251(1) of the 2006 Act:

“In the Companies Acts ‘shadow director’, in relation to a company, means a person in accordance with whose directions or instructions the directors of the company are accustomed to act.”

In my judgment this does not assist the defendants either. Again, it is important to bear in mind that, in the 2006 Act, the use of the term “shadow director” is generally negative rather than positive, in the sense that it treats the shadow director as liable to the same liabilities (often criminal) as a director. It does not invest shadow director with powers given to a director. So, for example in section 260(5)(b) of the 2006 Act a shadow director is treated as a director, for the purposes of derivative claims. Again, in section 272(6) of the Act, a shadow director is treated as an officer of the company for the purposes of criminal liability for not appointing a secretary.

69. A further, separate submission by the defendants was that Mr Bozzino and Mr Masson owed fiduciary duties, not only to the first claimant (as its directors), but also to the Noteholders. Therefore Mr Bozzino and Mr Masson had no “discretion to act contrary to the wishes, desires, or instructions of the Instrumentholders”. Hence, it is said, they are “bound to ... take steps to ratify and confirm all the action and steps” of the second to fourth defendants as directors, “including taking steps to appoint and confirm them as de jure directors ... ”

70. I reject this submission also. The Noteholders are at best, as the defendants in fact submit elsewhere, “contingent creditors” of the company, not its members or owners. There is no authority for saying that a company which owes money obligations to its creditors is thereby constituted a trustee or other fiduciary for them, and much authority against that proposition. For example, in *Henry v Hammond* [1911] [1913] 2 KB 515, 521, Channell J said, in an often cited passage:

“It is clear that if the terms upon which the person receives the money are that he is bound to keep it separate, either in a bank or elsewhere, and to hand that money so kept as a separate fund to the person entitled to it, then he is a trustee of that money and must hand it over to the person who is his cestui que trust. If on the other hand he is not bound to keep the money separate, but is entitled to mix it with his own money and deal with it as he pleases, and when called upon to hand over an equivalent sum of money, then, in my opinion, he is not a trustee of the money, but merely a debtor.”

71. That is this case. The first claimant issued Notes and borrowed money from investors, which it used to buy a portfolio of investments. The company’s

(contingent) obligation is in certain circumstances to repay the debts, assuming that the security is insufficient. So, the first claimant is not a trustee for the Noteholders, any more than my bank, in collecting a payment for my account, is my trustee. And even if I were wrong, and the first claimant *were* a trustee for the Noteholders, the *directors* of the first claimant, even though they owe fiduciary duties to the first claimant, do not thereby come under fiduciary duties owed *to the Noteholders*. As Sir Herbert Cozens-Hardy MR said (with the concurrence of Buckley LJ) in *Bath v Standard Land Company Ltd* [1911] 1 Ch 618, 625-626

“Directors stand in a fiduciary relation to the company, but not to a stranger with whom the company is dealing. It is of course true that a company acts through its directors. But that does not involve the proposition that if a breach of trust is committed by a company, acting through its board, a beneficiary can maintain any action against the directors in respect of such breach of trust.”

72. In their written submissions, the defendants rely on a number of citations from decided cases in order to support their case that here a fiduciary relationship arises outside the “settled categories” of “trustee and beneficiary ... solicitor and client, agent and principal, director and company ... and the relationship between partners”. These include

(1) the statement by Millett LJ (as he then was) in *Bristol & West Building Society v Mothew* [1998] Ch 1, 18, that “A fiduciary is someone who has undertaken to act for or on behalf of another in a particular matter in circumstances which give rise to a relationship of trust and confidence...”

(2) the statement by Mr Justice Henry (of the New Zealand Court of Appeal), giving the advice of the Privy Council in *Arklow Investments Ltd v Maclean* [2000] 1 WLR 594, 598, that “In the present context, the concept encaptures a situation where one person is in a relationship with another which gives rise to a legitimate expectation, which equity will recognise, that the fiduciary will not utilise his or her position in such a way which is adverse to the interests of the principal.”

(3) the statement of Sales J (as he then was) in *F&C Alternative Investments (Holdings) Ltd v Barthelemy* [2011] EWHC 1731, [225], that “Fiduciary duties are obligations imposed by law as a reaction to particular circumstances of responsibility assumed by one person in respect of the conduct of the affairs of another ...”

(4) the reference of Briggs J (as he then was) in *Ross River Ltd & Anor v Cambridge City Football Club Ltd* [2007] EWHC 2115 (Ch), [198], to “well known badges or hallmarks of a fiduciary relationship, such as: ‘Whenever the plaintiff entrusts to the defendant a job to be performed, for instance, the negotiation of a contract on his behalf ...’”

73. In these statements, however, the judges are referring to an assumption of responsibility to others, or an existing relationship giving rise to an expectation, to carry out specific functions for their benefit. But although there is a bare allegation in the defendants' written submissions that Mr Bozzino and Mr Masson "have *effectively* undertaken to act for and on behalf of" the first defendant (emphasis in original), there is simply no evidence that they ever assumed any such responsibility towards Noteholders, or did anything to create such an expectation. Essentially the case put forward by the defendants is one of mere assertion of a fiduciary relationship without any underlying basis.
74. Moreover, and even if, contrary to the view I have just expressed, the directors of the company somehow *did* owe fiduciary duties to the Noteholders, that would not automatically mean that either the company or the directors would have to act as directed by the Noteholders. With one modern statutory exception, a trustee (a paradigm fiduciary for his or her beneficiaries) is not obliged to act as the beneficiaries direct in the administration of the trust, even if the beneficiaries are unanimous and able to put an end to the trust under the rule in *Saunders v Vautier*: see *Re Brockbank* [1948] Ch 206; *Napier v Light* [1975] 2 EGLR 44, CA. (The one exception is created by the Trusts of Land and Appointment of Trustees Act 1996, section 19, where the beneficiaries are entitled to put an end to the trust, but instead direct a trustee to retire or appoint a new trustee.)
75. The only way in which a trustee or other fiduciary becomes obliged to follow the directions of its beneficiaries is if it *agrees* to become their nominee or agent, and undertakes to act on their instructions (*eg* as to voting shares): see for example *Kirby v Wilkins* [1929] 2 Ch 444. But there is no evidence to support such an allegation here.
76. My conclusion accordingly is that there is no juridical basis for the Noteholders (let alone those holding beneficial interests in the Notes) to have power to appoint, or to direct others to appoint, additional directors of the first claimant. Having reached that conclusion, it follows that, even if any such meeting as that alleged by the defendants took place on 2 September 2021, and even if the second, third and fourth defendants were present at it and resolved in the sense set out in the alleged minutes sent by the fifth defendant on that day to Mr Bozzino and Mr Masson, the meeting was not a meeting of the Board of Directors of the first claimant, and any such resolution is not binding on the first claimant.
77. I note with interest the similar conclusion of David Halpern QC, sitting as a deputy judge of the High Court, in *Clavis Securities plc v Hussain* [2021] EWHC 2003 (Ch), a case in which a somewhat similar attack was made on a different securitisation structure. Having reviewed the evidence and heard submissions, the judge said:

"22. The starting point is the resolution of 15 April by Highbury as Noteholder removing C4 as Share Trustee. No evidence has been filed by the Claimants as to who are the Noteholders; I am told that this is for reasons of confidentiality. The Claimants say that, even if Highbury

were a Noteholder (and it has produced no evidence to that effect), this would not entitle Highbury to remove C4 as Share Trustee holding the issued share capital in C1 and C2. This is because Noteholders have no power to remove and appoint the Share Trustee under clause 9 of the Share Trust Deeds (see paragraph 5 above). That is plainly correct. Without the valid appointment of Highbury as the holder of the shares in C1 and C2, the Defendants' entire house of cards collapses."

But I make clear that my own conclusion in this case has been reached independently of the judgment of Mr Halpern QC.

Remedies

Declarations

78. I turn therefore to the question of remedies. As to the jurisdiction of the court to make declarations, CPR rule 40.20 says:

"The court may make binding declarations whether or not any other remedy is claimed".

79. In *Bank of New York Mellon, London Branch v Essar Steel India Ltd* [2018] EWHC Ch 3177 (Ch), Marcus Smith J said:

"21. ... When considering the exercise of the discretion, in broad terms, the court should take into account justice to the claimant, justice to the defendant, whether the declaration would serve a useful purpose and whether there are other special reasons why or why not the court should grant the declaration. More specifically:

(1) There must, in general, be a real and present dispute between the parties before the court as to the existence or extent of a legal right between them. However, the claimant does not need to have a present cause of action against the defendant. A present dispute over a right or obligation that may only arise if a future contingency occurs may well be suitable for declaratory relief and amount to a real and present dispute.

(2) Each party must, in general, be affected by the court's determination of the issues concerning the legal right in question.

(3) The fact that the claimant is not a party to the relevant contract in respect of which such a declaration is sought is not fatal to an application for a declaration, provided that the claimant is directly affected by the issue. In such cases, however, the court ought to proceed very cautiously when considering whether to make the declaration sought.

(4) The court will be prepared to give declaratory relief in respect of a 'friendly action' or where there is an 'academic question', if all parties so wish, even on 'private law' issues. This may be particularly so if the

case is a test case or the case may affect a significant number of other cases, and it is in the public interest to decide the point in issue.

(5) The court must be satisfied that all sides of the argument will be fully and properly put. It must, therefore, ensure that all those affected are either before it or will have their arguments put before the court. For this reason, the court ought not to make declarations without trial. In *Wallersteiner v. Moir*, Buckley LJ said this:

‘It has always been my experience and I believe it to be a practice of very long standing, that the court does not make declarations of right either on admissions or in default of pleading. A statement on this subject of respectable antiquity is to be found in *Williams v. Powell* [1894] WN 141, where Kekewich J, whose views on the practice of the Chancery Division have always been regarded with much respect, said that a declaration by the court was a judicial act, and ought not to be made on admissions of the parties or on consent, but only if the court was satisfied by evidence. If declarations ought not to be made on admissions or by consent, *a fortiori* they should not be made in default of defence, and a fortissimo, if I may be allowed the expression, not where the declaration is that the defendant in default of defence has acted fraudulently...’

(6) In all cases, assuming that the other tests are satisfied, the court must ask: is this the most effective way of resolving the issues raised? In answering that question, the court must consider the other options of resolving the issue.”

80. I am satisfied that in the present case there is a real and present dispute between the parties who are before the court as to the existence of legal rights between them. Each party will be affected by the court’s decision, as indeed will third parties, including others claiming to be Noteholders and holders of beneficial interests in Notes as well as the wider market. Both sides in this dispute have had the opportunity to present their arguments. The claimants have put forward a skeleton argument which has been elaborated upon by counsel on their behalf at the disposal hearing. The defendants have chosen not to take part in the disposal hearing, although they have had due and full notice of it. But they have placed before the court a number of detailed written submissions, which I have read and taken into account. In this judgment I have dealt with the points that seemed most material to the decision I have to make. Of course, a court must give reasons for its decisions. But judges are not obliged to deal in their judgments with every single point that is argued, or every piece of evidence tendered.
81. Finally, I am satisfied that it would be appropriate to grant declarations regarding the legal validity and effect of the events of early September 2021, claimed by the defendants to result in the appointment of the second third and fourth defendants as directors of the first claimant and the entry by the first claimant into a consultancy agreement with the first defendant. The main argument made by the defendants in their written submissions against the

grant of declarations is that they “would not serve a useful purpose and there are no other special reasons why the court should grant them as sought”. On the contrary, in my judgment, declarations will make these matters clear not only to the parties themselves, but also to the wider world. This is particularly important where, as here, third party investors in the London capital markets are involved. The defendants also object to the declaration that the only directors of the first claimant are Mr Bozzino and Mr Masson. But in my judgment in the circumstances of this case it is necessary to make that crystal clear, and it is amply justified by the evidence and the legal conclusions to which I have come. Accordingly, I will grant the declarations set out in the claim form.

Injunctions

82. I turn now to consider the question of the injunctions sought by the claimants. Section 37(1) of the Senior Courts Act 1981, repeating provisions from predecessor statutes, provides:

“The High Court may by order (whether interlocutory or final) grant an injunction or appoint a receiver in all cases in which it appears to the court to be just and convenient to do so.”

83. It is settled that the court may grant a final injunction to prevent the occurrence of an actionable wrong or to prevent repetition of an actionable wrong. In *Proctor v Bayley* (1889) 42 Ch D 390, a case about patent infringement, Cotton LJ said (at 398):

“It does not follow that because a man has done a wrongful act an injunction will be granted against him, though he is liable to damages for the wrong. The Court of Chancery said, ‘Where a man threatens and intends to do a wrongful act, we will, before it is done, grant an injunction to prevent his doing it, and we will grant it where the act has been done and is likely to be repeated’—the jurisdiction is simply preventive.”

84. A more recent discussion of the relevant principles is contained in the judgment of Miles J in *Business Mortgage Finance 4 Limited v Hussain* [2021] EWHC 171 (Ch), where the judge said this:

“169. The principles may be summarised in the following way:

i) The invocation of this jurisdiction requires proof that, unless the court intervenes by injunction, there is a real risk that an actionable wrong will be committed (see e.g. *Coflexip SA v Stolt Comex Seaway MS Ltd* [1999] 2 All E.R. 593, at [7]–[10]).

ii) There is no fixed or absolute standard for measuring the degree of apprehension of a wrong which must be shown in order to justify quia timet relief: see *Hooper v Rogers* [1975] Ch. 43 at 50. The more serious the consequences and the risk of wrongdoing, the more likely the court will be satisfied that relief is appropriate.

iii) If the court decides to grant a final injunction, the width of that injunction is a matter for the court's discretion and can be tailored according to the circumstances: see *Gee* [2-045], citing *Microsoft Corp v Plato Technology Ltd*, unreported, 15 July 1999). The court has a discretion to order mandatory steps to be taken for the purpose of avoiding the commission of any wrong and preventing any harm to the applicant, though this power will be exercised with caution: See [*Gee on Commercial Injunctions* (7th ed.)] [2-046].

iv) Whether a case is an appropriate one for the grant of *quia timet* relief has to be considered in the light of all the relevant circumstances known at the time of the hearing of an application for an interim injunction, or at the time of trial: *Proctor v Bayley* (1889) 42 Ch D 390, 398 (injunction against infringement of a patent refused when the last infringement had been four years previously and there was no intention to infringe in the future).

v) The relevant factors include whether there is a threat of imminent wrongdoing, the seriousness of the damage which might be done imminently, whether the defendant is actively seeking to prevent wrongdoing, or is himself threatening to commit a wrong, and whether if damage were done, it would be rectifiable: see *Gee* [2-046].”

85. It is clear from the correspondence that I have seen in the present case and also the vigorous submissions made in writing on behalf of the defendants, that, unless restrained, the defendants will continue to assert that they are entitled to be involved in the affairs of the claimants, thereby causing immediate damage to the claimant’s business by their unlawful interference, as well as significant legal costs. I am also satisfied that in the circumstances the damage thereby caused is likely to be serious rather than trivial and is likely to be uncompensable, in the sense that, firstly, it is not known *what* resources the defendants have, secondly, it is not known *where* those resources are, and, thirdly, since all communications with the defendants have been by email and by accommodation addresses, and moreover three of the defendants have sought to challenge the jurisdiction, it is likely that these defendants or some of them will not be capable of being found in order to recover any compensation awarded.
86. In my judgment it is appropriate for the court to restrain the defendants in the various ways sought, with one exception. That exception is the fifth potential injunction dealing with the issue of legal proceedings against the lawyers involved on behalf of the claimants. I have seen no credible evidence of any threat to take separate legal action against lawyers involved in this case, and nor have I seen any such evidence of legal action having been taken against lawyers involved in other cases which appear similar to this one. Any such action would of course be likely to be struck out as a collateral attack on the decision of the court. The only suggestion I have seen of action against lawyers relates to an application for costs under section 51 of the Senior Courts Act 1981. Moreover, I am doubtful about either the wisdom or the propriety of granting an injunction to restrain future legal proceedings, subject to an exception where permission has been given by a High Court judge. This

seems to me to be a kind of private civil restraint order regime. I am not satisfied that it is appropriate to do any such thing, which would mean burdening busy judges with further work in circumstances that did not meet the criteria for the usual civil restraint order regime.

Envoi

87. That is the end of the case, but I should add a few words on a matter on which I was addressed by Ms Cooke on behalf of the claimants. This is that, in the last few years, there have been a number of decisions of the High Court dealing with attacks on the corporate structures and governance of valuable companies, in order to gain control of such companies.
88. The first in time that I am aware of is a decision of HHJ Kramer, sitting as a judge of the High Court, in *Fairhold Securitisation Ltd v Clifden IOM No 1 Ltd*, decided on 10 August 2018. This was an attempt to take control of a note issuing company based in the Cayman Islands by the appointment of administrators in the UK by the first defendant, Clifden IOM No 1 Ltd. The attempt failed because the judge held that the purported appointments of administrators were void. I have already noted the similarity of the name of this company to the domain name used in the email by the fifth defendant in this case. I also note that the fifth defendant in that case was Mr Hussain, who appeared as a director of the second defendant on the hearing of the application to strike out the claim before Deputy Master Marsh. HHJ Kramer noted in his judgment that Mr Hussain appeared during the hearing of that case to be giving instructions to counsel instructed on behalf of the first defendant.
89. The second case is a decision of David Halpern QC, sitting as a deputy judge in *Kilimanjaro AM Ltd v Mann Made Corporate Services (UK) Ltd* [2020] EWHC 1804 (Ch). In that case, Mr Hussain was the third defendant, and Mr Rajnish Kalia was the sixth defendant. That case was in fact about whether the court should grant the general civil restraint order against Mr Hussain and a Mr Alfred Olutayo Oyekoya following striking out of an earlier claim against the first three defendants by the claimant. The court made the two general civil restraint orders sought.
90. A third case is one to which I have already referred, namely *Business Mortgage Finance 4 Limited v Hussain* [2021] EWHC 171 (Ch). Mr Hussain was the first defendant. Mr Oyekoya was the second defendant. Mr Kalia was the third defendant. Highbury Investments Ltd was the ninth defendant. Miles J described the claim in these terms:
- “1. ... In very broad terms the Claimants say that there has been a sustained and determined assault by the principal Defendants on a group of securitisation structures in which the Claimants are the issuers of publicly traded notes.”
91. The judge concluded:

“252. The Defendants have targeted these securitisation structures relentlessly. One or other of them have pretended to occupy the roles of directors of the Issuers, trustees for the noteholders, receivers of the underlying assets, Servicers, advisers to the Issuers, and other positions. They purported (in their assumed role of directors) to forfeit the shares held by BMFH in the Issuers and sell them to Highbury. They managed to change important company filings at Companies House and made misleading announcements to investors over the RNS. None of this is legitimate. The Defendants have never occupied any of these roles. They are, for legal purposes, strangers to the Securitisations. The reasons they have given for their actions are spurious. The corporate assault has been going on for the best part of two years, in the teeth of earlier orders of the courts and the Claimants’ reasoned protests. It must now stop. I shall grant relief in respect of both claims.”

92. A fourth case is one which I have already mentioned in this judgment, namely *Clavis Securities plc v Rizwan Hussain and others* [2021] EWHC 2003 (Ch). In that case Mr Hussain was the first defendant, the second defendant was the second defendant in the present case, the third defendant was Amanda Watson, the fourth defendant was the fifth defendant in the present case, and the fifth defendant was Highbury Investments Ltd. The claimants in that case were a note issuer and associated companies in the securitisation transaction. The first defendant had written to them purporting to be the beneficial owner of more than 50% of the Notes and claiming to have passed resolutions altering the corporate governance of the structure. The fourth defendant, purporting to be an officer of the first two claimants, filed various notices with Companies House purporting to terminate directors appointments change registered offices and make similar changes to the corporate governance. As I have already said, earlier in this judgment, the deputy judge held that the attack failed.
93. A fifth case is referred to in a notice issued by the Regulatory News Service of the London Stock Exchange on 12 August 2021, concerning a “spurious” claim made by certain persons against a company called Hurricane Energy plc. According to the notice, the High Court struck out the claim, making declarations that various persons, including Rizwan Hussain, Annabel Watson Clifden, Clifden Group, Highbury Investments Ltd Beyat Holdings Ltd and Balliol Chatsworth Ltd, were not officers or advisers of Hurricane Energy plc and its subsidiaries, and had no authority to act for the company.
94. There are other cases referred to in the above decisions in which it appears that Mr Hussain and Mr Alfred Oyekoya have been involved, including *Business Mortgage Finance 6 plc v. Greencoat Investments Ltd* [2019] EWHC 2128 (Ch) and *Business Mortgage Finance 6 plc v. Roundstone Technologies Ltd* [2019] EWHC 2917 (Ch), but these were not specifically referred to before me and I say nothing more about them. What I say more generally is that I have not relied on any of these cases to which I was referred in coming to the conclusions that I have reached in the present case. It was not therefore necessary to consider the principles set out in *O’Brien v Chief Constable for*

South Wales [2005] 2 AC 534, HL. Whilst there are some striking similarities between those cases and this one, I have not treated any of those cases as any kind of ‘similar fact evidence’.