Approved Text
14.07.2014

IN THE ROYAL COURT OF GUERNSEY

(ORDINARY DIVISION)

Between:

EFG PRIVATE BANK (CHANNEL ISLANDS) LIMITED

Applicant

-AND-

(1) BC CAPITAL GROUP SA (IN LIQUIDATION)

(2) BC CAPITAL GROUP INTERNATIONAL SA (IN LIQUIDATION)

(3) BRICK KANE, KEVIN SEYMOUR AND KEVIN CAMBRIDGE IN THEIR CAPACITY AS JOINT OFFICIAL LIQUIDATORS OF THE 1st AND 2nd RESPONDENTS

(4) ROBB EVANS & ASSOCIATES LLC IN ITS CAPACITY AS RECEIVER OVER MR NIKOLAI SIMON BATTOO, BC CAPITAL GROUP SA, BC CAPITAL GROUP INTERNATIONAL LIMITED (ALSO KNOWN AS BC CAPITAL GROUP HOLDINGS LIMITED AND/OR BC CAPITAL GLOBAL), BC CAPITAL MANAGEMENT LLP AND BC CAPITAL GROUP HOLDINGS SA

(5) ANCHOR HEDGE FUND LIMITED (IN LIQUIDATION)

(6) FUTURESONE DIVERSIFIED FUND SPC LIMITED (IN LIQUIDATION)

(7) FUTURESONE INNOVATIVE FUND SPC LIMITED (IN LIQUIDATION)

(8) PHI R (SQUARED) INVESTMENT FUND SPC LIMITED (IN LIQUIDATION)

(9) HADLEY CHILTON AND JOHN GREENWOOD OF BAKER TILLY (BVI) LIMITED IN THEIR CAPACITY AS JOINT LIQUIDATORS OF THE FIFTH TO EIGHTH, TENTH TO SIXTEENTH AND EIGHTEENTH RESPONDENTS

(10) FUTURESONE DIVERSIFIED FUND LIMITED (IN LIQUIDATION)

(11) FUTURESONE F4 INVESTMENT LIMITED (IN LIQUIDATION)

(12) FUTURESONE F1 INVESTMENT LIMITED (IN LIQUIDATION)

(13) FUTURESONE A INVESTMENTS LIMITED (IN LIQUIDATION)

(14) GALAXY FUND, INC. (IN LIQUIDATION)

(15) GALAXY PE, LIMITED (IN LIQUIDATION)

(16) SILVER OAK FUND LIMITED (IN LIQUIDATION) (ceased to be a party on 11 April 2014)

(17) SILVER OAK INVESTMENT MANAGEMENT LIMITED (ceased to be a party on 11 April 2014)

(18) PHI R (SQUARED) MASTER SERIES INVESTMENT LIMITED (IN LIQUIDATION)

Respondents

Fifth to Eighteenth Respondents' application for summary judgment as against First to Fourth Respondents

Hearing dates: **9th and 10th June 2014**

Judgment delivered: **4th July 2014**

Reasons handed down: **14th July 2014**

Before: **Richard James McMahon, Esq., Deputy Bailiff**

Advocate for the Fifth to Eighteenth Respondents: **Advocate R A Field**

Advocate for the First to Fourth Respondents: **Advocate T W McGuffin**

The Advocate for the Interpleader Applicant/Bank was excused attendance

Cases & Materials referred to:

The Royal Court Civil Rules, 2007
The Evidence in Civil Proceedings (Guernsey and Alderney) Rules, 2011
Cherub Investments Ltd v The Channel Islands Aero Club (Guernsey) Limited (unreported, 13 January 1982)
Angenent v Pring [2005-06] GLR 1
Mayo Associates SA v Cantrade Private Bank Switzerland (CI) Ltd [1998] JLR 173
Raja v Van Hoogstraten (No 9) [2009] 1 WLR 1143
Jacob, "*The Inherent Jurisdiction of the Court*" [1970] Current Legal Problems 23
Dockray, "*The Inherent Jurisdiction to Regulate Civil Proceedings*" (1997) 113 LQR 120
The Royal Court Civil Rules, 1989
The Rules of the Supreme Court 1965
The Civil Procedure Rules 1998 (the *White Book*)
Sandwith v Falla (unreported, 5 June 2013)
SPL Guernsey ICC Limited v Moore Stephens (unreported, 13 January 2014)
Easyair Limited (t/a Openair) v Opal Telecom Limited [2009] EWHC 339 (Ch)
Tchenguiz v Investec Trust (Guernsey) Limited (unreported, 26 June 2013)
Scholes v Schroeder 744 F. Supp. 1419 (N.D. Ill.1990)
In the matter of Robb Evans and Associates LLC (unreported, 31 March 2014)
Westdeutsche Landesbank Girozentrale v Islington London Borough Council [1996] AC 669
Farah v British Airways plc (1999) The Times, 26 January 2000
Barrett v Enfield London Borough Council [2001] 2 AC 550
Underhill & Hayton, *Law relating to Trusts and Trustees*, 18th ed.
Panama & South Pacific Telegraph Company v India Rubber, Gutta Percha, and Telegraph Works Company (1874-75) LR 10 Ch App 515
El Ajou v Dollar Land Holdings plc [1994] 2 All ER 685
Foskett v McKeown [2001] 1 AC 102
OJSC Oil Company Yugraneft v Abramovich [2008] EWHC 2613 (Comm)
Three Rivers District Council v Bank of England (No. 3) [2001] 2 All ER 513
Global Marine Drillships Limited v Landmark Solicitors LLP [2011] EWHC 2685 (Ch)
Wrexham Associated Football Club Ltd v Crucialmove Ltd [2006] EWCA Civ 237
Antonio Gramsci Shipping Corporation v Recoltetos Ltd [2010] EWHC 1134 (Comm)

Introduction

1. By an Application dated 15 January 2014, among other things, the Fifth to Eighteenth Respondents, effectively acting through the Ninth Respondents, sought summary determination pursuant to rule 27(2)(a) of the Royal Court Civil Rules, 2007 of all issues arising or alleged to arise in the interpleader proceedings "*on the ground that there is no real prospect of the [First to Fourth] Respondents succeeding in any claim to the assets which are the subject of the proceedings*". The Application also referred to rules 1 and 38(2)(c). The interpleader proceedings had been commenced in March 2013.

2. Following hearings in the Interlocutory Court on 14 and 28 February 2014, it became clear that the Fifth to Eighteenth Respondents were not actually pursuing a final determination of the competing adverse claims, but were asserting that the adverse claims made on behalf of the First to Fourth Respondents could not properly be taken any further and so should be rejected without further ado. However, if they were wrong in that contention, they were not conceding that the claims of the First to Fourth Respondents inevitably defeated their own claims on behalf of the Respondents they represent to the Assets held at the Interpleader Applicant (hereafter referred to as "the Bank"), which would be the outcome following summary determination, but rather that the case should proceed to a trial in the usual way. Advocate Greenfield, who was representing the Fifth to Eighteenth Respondents at the hearing on 28 February 2014, acknowledged that what his clients were seeking was tantamount to summary judgment being entered against the First to Fourth Respondents. The ground advanced in the Application used language drawn from rule 19 of the 2007 Rules. Accordingly, I directed that this element of the Application should proceed to be determined as if it were an application for summary judgment of the claims of the Fifth to Eighteenth Respondents in the interpleader proceedings made pursuant to Part IV of the 2007 Rules. I gave further directions in respect of the procedural steps that should occur before the Application was heard by reference to the procedures set out in Part IV. On behalf of the First to Fourth Respondents, Advocate McGuffin reserved their position as to whether this course of action was legitimately open to the Court.

3. Some of the history of this case is set out in previous judgments I have given and I do not propose to repeat myself here. Developments in 2014 worth noting include the fact that, after a number of extensions of time, the First to Fourth Respondents set out the basis for their adverse claims in the form of the Fifth Affidavit of Brick Kane, who is the President and Chief Operating Officer of the Fourth Respondent and one of the Third Respondents, sworn on 13 January 2014, supplemented by a report in the field of forensic accountancy prepared by Penelope Cassell and exhibited to the Third Affidavit of Paul Clark Smith sworn on 10 January 2014. By its Order of 14 March 2014, the Court of Appeal allowed the appeal of the Fourth Respondent against the Royal Court's refusal to recognise its appointment as Receiver over the Entities (as that term was defined therein), albeit limiting that recognition to having standing and participating in these interpleader proceedings, for the reasons set out in its judgment of 31 March 2014. With effect from 11 April 2014, the parties to the interpleader proceedings agreed that the Sixteenth and Seventeenth Respondents could cease to be parties. Accordingly, although I have referred to the Application being made compendiously by the Fifth to Eighteenth Respondents, it has been pursued only by those continuing to be parties to the proceedings and, if only for ease of reference, recognising that the liquidators of the corporate entities concerned are the decision-makers, I will hereafter refer to the Application for summary judgment as being made by the Ninth Respondents.

4. Because the parties appeared before me on 4 July 2014, I was able to announce the decisions I had reached in respect of the Application on that occasion, indicating that full reasons would

follow shortly thereafter. The reasons for granting the Application only to the extent of the Eighteenth Respondent's claim are contained in this judgment.

Evidence

5. The material in support of the Application was principally contained in the Fifth Affidavit of Hadley Chilton as one of the Ninth Respondents sworn on 19 March 2014. In doing so, he exhibited his own First Affidavit in the interpleader proceedings, which he had sworn on 29 May 2013. That Affidavit had in turn exhibited a First Affidavit Mr Chilton had sworn on 13 November 2012 in proceedings in the Eastern Caribbean Supreme Court in the British Virgin Islands and his Second Affidavit in those proceedings sworn on 20 February 2013. Mr Chilton's Fifth Affidavit also exhibited the Second Affidavit of Michael Parton, sworn on 13 March 2014, which exhibited that gentleman's First Affidavit, sworn on 23 May 2013, both of which deal with the position of the Seventeenth Respondent, which is not in liquidation and so not represented through the offices of the Ninth Respondents. (As a result of the agreement that the Seventeenth Respondent cease to be a party to the interpleader proceedings, this aspect of Mr Chilton's evidence was redundant by the time of the hearing.) For the sake of completeness, Mr Chilton also exhibited Mr Kane's Fifth Affidavit and Ms Cassell's report, to both of which I have already referred, as well as a schedule setting out what the two competing sides claiming interests in the Assets held at the Interpleader Applicant Bank say about each account and some correspondence passing between the Advocates for the Respondents in February and March 2014. The schedule was a document I directed should be prepared earlier in the proceedings as a means of summarising the claims to the Assets and to which I will refer as "the Scott Schedule".

6. The Ninth Respondent's Application was also supported by a Sixth Affidavit of Mr Chilton, also sworn on 19 March 2014, which deals more specifically with a particular element of the way the Ninth Respondents put their case, and a Third Affidavit of William S. Sugden, who is US Counsel to the Ninth Respondents, sworn on 19 March 2014, in which he explains a little more about what has been happening in Illinois and the consequences flowing from those developments.

7. The position, in summary, of the Ninth Respondents is that Mr Chilton asserts that, having conducted a careful review of the evidence adduced on behalf of the First to Fourth Respondents, by which he means Mr Kane's Fifth Affidavit and Ms Cassell's report, he does not believe they have demonstrated that they have any adverse claims to the Assets held at the Bank and that there is no other compelling reason why the adverse claims should continue to trial.

8. The evidence adduced in response on behalf of the First to Fourth Respondents comprised the Sixth Affidavit of Mr Kane, sworn on 17 April 2014, and thirteen Affidavits from various investors, which were sworn between 7 and 17 April 2014. I will not list each of those deponents, in part because their relevance took on a reduced importance as a result of other evidence placed before me, but I will in due course touch on the evidence of Margaret Van Dyke. Her Affidavit was sworn on 15 April 2014. Mr Kane's Sixth Affidavit incorporated, but without repeating them, the contents of his five earlier Affidavits, the first four having been sworn on 28 May, 28 June, 19 July and 7 November 2013 respectively.

9. In reply, the Ninth Respondents lodged a First Affidavit of Suzanne Boyd, who works under the supervision of Mr Sugden, sworn on 30 May 2014. The reason for doing so was to exhibit a Statement of Undisputed Material Facts filed by the United States Commodity Futures Trading Commission in the Illinois Court, to which was attached as an exhibit a signed statement made on behalf of Mr Kane. The intention was to provide this Court with material that Mr Kane has provided to the Illinois Court which paints a slightly different picture from the Affidavits he has

sworn in the interpleader proceedings. The Ninth Respondents also lodged a First Affidavit of Laurent Keeble-Buckle, sworn on 30 May 2014 and which deals with similar matters to those covered in Mr Chilton's Sixth Affidavit and a Fourth Affidavit of Mr Sugden dealing with some principles of Illinois law, which was sworn on 28 May 2014.

10. On behalf of the First to Fourth Respondents, Advocate McGuffin objected to the inclusion of Mr Sugden's Fourth Affidavit in the evidence before the Court. As he noted, the procedural requirements under Part II of the Evidence in Civil Proceedings (Guernsey and Alderney) Rules, 2011 had not been complied with. On behalf of the Ninth Respondents, Advocate Field argued that what Mr Sugden was doing was not giving opinion evidence but rather seeking to explain factually what the consequences of the appointment of the Fourth Respondent entailed. The issue was, however, resolved by the First to the Fourth Respondents obtaining further clarification on the legal position of a US-court-appointed Receiver such as the Fourth Respondent overnight between the first and second days of the hearing. Once the First Affidavit of Alison C. Conlon, sworn on 9 June 2014, was also put before me, the First to Fourth Respondents' objections to Mr Sugden's Fourth Affidavit disappeared. I was grateful to Counsel for adopting a pragmatic solution to the issue as some guidance on the law applicable to Receivers such as the Fourth Respondent has been useful in my consideration of how to decide the Application.

11. As a result of the Affidavits I have just listed, there has been a considerable amount of material placed before the Court in support of and in opposition to the Application. I will not attempt to set it all out in any great detail and will confine myself to explaining those aspects that impact upon my decision. In brief overall summary, the Bank commenced its interpleader proceedings pursuant to Part V of the 2007 Rules because it had become aware of potential competing claims to the Assets it held in the various accounts in the names of the Respondents for which the Ninth Respondents now act (and others who are no longer party to the proceedings). The prima facie claims of those Respondents as the account holders are acknowledged by the First to Fourth Respondents. The Third Respondents are the joint official liquidators of the First and Second Respondents who, it is said, were central to the exercise of pooling the monies solicited from investors, a good number of whom were based in the United States of America, before some of the monies were transferred around the Group controlled by Nikolai Battoo and his associates and which have ended up in the accounts held at the Bank. The authorities in the United States of America have taken steps in Illinois to seek relief against Mr Battoo and a number of companies he controlled in different jurisdictions across the globe. One of those companies is the First Respondent. Judge Chang in the Illinois Court has given injunctive relief and appointed the Fourth Respondent as receiver in respect of Mr Battoo and the four other Group Entities (as defined in those proceedings), who are also known as the CFTC Defendants. There appears to have been slow progress in the interpleader proceedings because of the number of interlocutory applications that have been made, with the time taken by the First to Fourth Respondents to set out the basis of their claims being delayed until earlier this year.

Jurisdiction of Court

12. Before I can even consider the merits of the Ninth Respondents' Application, I need to address the jurisdictional issue raised on behalf of the First to Fourth Respondents by Advocate McGuffin. He submitted that there was no scope within the 2007 Rules for the Court to entertain the summary judgment Application because of the way interpleader proceedings under Part V operate distinctly from the usual type of action generally pursued before the Court. Further, he suggested that there could be no justification for the Court to depart from the procedures already available to parties to interpleader proceedings. Accordingly, without even considering the merits, the Application should be dismissed.

13. The principal contention Advocate McGuffin made was by reference to the words of rule 19(1) of the 2007 Rules:

> "*The Court may, at any time after inscription of the action on the Rôle des Causes à Plaider, on the application of a party to the action, give summary judgment against any other party on the whole of the claim or on a particular issue.*"

As Advocate McGuffin noted, and Advocate Field acknowledged, the way that interpleader proceedings are commenced and progressed in accordance with Part V of the 2007 Rules do not involve inscription on the *Rôle des Causes à Plaider*. Accordingly, if the wording of rule 19 is prescriptive, no application for summary judgment pursuant to Part IV of the Rules could ever be made in respect of interpleader proceedings.

14. Advocate McGuffin supported his submission by reference to the overall scheme of the 2007 Rules. He highlighted the fact that, in the present case to date, there has been no requirement for any party to formulate any pleading. In relation to an action, rule 10 requires that a Cause is tabled before the Court. It is only where the defendant intimates his intention to defend the action that the Cause is ordered to be *inscrite* on the *Rôle des Causes à Plaider* in accordance with rule 14. Accordingly until such an order is given by the Court, a summary judgment application is procedurally unavailable.

15. More particularly, Advocate McGuffin submitted that the availability of a summary determination by the Court in interpleader proceedings under rule 27(2) (and possibly rule 29(4)) of the 2007 Rules was indicative that the Rules had made adequate provision to bring interpleader proceedings to a swifter end than proceeding to a full trial and there was, therefore, no justification for departing from the structure of the Court's own Rules. He criticised the Ninth Respondents for cherry-picking from the Rules, making use of those they were prepared to comply with and ignoring others because the consequences of pursuing them appeared to present too stark an option for them.

16. Advocate Field pointed out that the overriding objective in rule 1 of the 2007 Rules applies to interpleader proceedings as well as the type of proceedings usually before the Court, and to which Part III applies. Moreover, when read in the light of the Court's duty to manage cases actively (rule 38(1)), which includes "*deciding promptly which issues need full investigation and trial and accordingly disposing summarily of the others*" (rule 38(2)(c)), it was clear that the Court was empowered to decide to entertain an application for summary judgment between adverse claimants in interpleader proceedings. The decision to do so fell within the ambit of the Court's powers to determine its own procedure, as explained in *Cherub Investments Ltd v The Channel Islands Aero Club (Guernsey) Limited* (unreported, 13 January 1982), where Hoffmann JA identified that the procedural rules with which the Court of Appeal was concerned in the Ordinance of 1851 "*was part of a set of general rules made by the Court to regulate its procedure but that the Court remains master of its own procedure and can allow a departure from those rules when justice requires this to be done*". Unlike in *Angenent v Pring* [2005-06] GLR 1, what the Ninth Respondents proposed in this case was not the creation of new rules of substantive law and the Court's procedure could properly be adapted in accordance with its inherent jurisdiction to act meaningfully as a court.

17. In the latter case, the Court had cited with approval the formulation given by Smith JA in the Jersey Court of Appeal in *Mayo Associates SA v Cantrade Private Bank Switzerland (CI) Ltd* [1998] JLR 173 (at pages 188 and 189):

> "*In our view, the vital clue to the nature of inherent jurisdiction in its procedural setting … is necessity. The Court has a particular procedural power because it has to have it in any meaningful sense. On this basis, the power to require the attendance of witnesses, whether to testify or to produce documents, the power to control abuse of the process of the court, the power to dismiss claims for want of prosecution, the power to issue practice directions, the power to decide who may or may not appear before the court, the power to correct errors in its own orders and many other powers may all be recognized as derived from a single pool, not of powers but of power drawn upon as necessity dictates.*
>
> *It will be observed that this approach is antithetical to a definition of inherent jurisdiction based simply on fairness or by reference to what is perceived in a particular situation to be just. If inherent jurisdiction exists to enable a court to order that a thing is done, fairness and justice will obviously be major factors to be taken into account when the court is deciding whether or not to exercise its discretion to so order; but the conclusion that it would be fair or just to order that that thing be done does not determine whether there is inherent jurisdiction to order it.*"

18. Advocate McGuffin emphasised the need for the Court to be cautious about over-extending its reliance on its inherent jurisdiction by referring to ***Raja v Van Hoogstraten (No 9)*** [2009] 1 WLR 1143. At para. 74 of the judgment, a short passage was quoted from Sir Jack Jacob's Hamlyn lecture "*The Inherent Jurisdiction of the Court*" [1970] Current Legal Problems 23, in which he said that the powers of the court under its inherent jurisdiction "*are complementary to its powers under rules of court; one set of powers supplements and reinforces the other … [W]here the usefulness of the powers under the rules ends, the usefulness of the powers under the inherent jurisdiction begins.*" That paragraph also approved as legally correct what Martin Dockray had written in "*The Inherent Jurisdiction to Regulate Civil Proceedings*" (1997) 113 LQR 120, 128 that "*the inherent jurisdiction may supplement but cannot be used to lay down procedure which is contrary to or inconsistent with a valid rule of the Supreme Court*". The court's conclusion is set out in para. 78:

> "*In our judgment, therefore, where the subject matter of an application is governed by rules in the CPR, it should be dealt with by the court in accordance with the rules and not by exercising the court's inherent jurisdiction. There is no point in exercising the court's inherent jurisdiction if that would involve adopting the same approach and would lead to the same result as an application of the rules. And it would be wrong to exercise the inherent jurisdiction of the court to adopt a different approach and arrive at a different outcome from that which would result from an application of the rules.*"

19. In summary, Advocate McGuffin's principal submission on this issue was that if the Court had intended to provide for summary judgment to be available in the context of interpleader proceedings it could and should have spelt that out expressly in the 2007 Rules. In the absence of an express power, it would be inconsistent with the power to determine the question at issue between the adverse claimants summarily to entertain an application for summary judgment.

Analysis

20. Interpleader proceedings did not feature in the Royal Court Civil Rules, 1989. Rule 55 of those Rules provided that:

> "*Notwithstanding the provisions of these Rules or of any other rule of Court or enactment, the Court may order that any proceedings or any stage thereof shall be dealt with summarily.*"

The breadth of that power would, it appears, have precluded any submission along the lines of those made on behalf of the First to Fourth Respondents at the time the 1989 Rules were operating. It is also notable that summary judgment under Part III was only available to a plaintiff and the grounds of such an application were different from the 2007 Rules, meaning that the Ninth Respondents' Application would have needed to have been presented in a different manner in any event, so little turns on what was, or was not, available under the 1989 Rules. I have referred to the 1989 Rules principally to point out that a formal process for interpleader proceedings did not exist prior to the 2007 Rules entering into force.

21. The scheme of Part V of the 2007 Rules appears to have been modelled on some of the provisions of Order 17 of the Rules of the Supreme Court 1965 (and corresponding provisions in respect of the County Court). Those Rules were preserved following the enactment of the Civil Procedure Rules in 1998 until they were replaced by Part 86 of the CPR (stakeholder claims and applications) earlier this year. Accordingly, I take the view that some guidance as to how matters may have been capable of being progressed can be gleaned from the previous and current regimes.

22. In terms of procedure, under the 1965 Rules an application for relief in interpleader proceedings previously had to be made by originating summons, unless made in a pending action, in which case it needed to be by way of summons in the action (O. 17, r. 3, RSC). One consequence of that rule appears to be that summary judgment pursuant to Order 14 was unavailable because no statement of claim had been served on the defendant and the power to entertain the application did not, therefore, arise. The power in Order 14A to determine questions of law or construction or to order any question or issue arising to be tried at a different time to the trial pursuant to Order 33, r. 3 might, however, have been capable of being exercised.

23. The position following the making of the Civil Procedure Rules was different. An application for relief had to be made by claim form unless made in an existing claim, in which case Part 23 would be used. Although nothing explicit was put into Order 17, unlike in relation to disclosure (see O. 17, r. 10), rule 24.3, CPR provided that summary judgment pursuant to that Part was capable of being given against a claimant in any proceedings and against a defendant in all but a handful of proceedings. Accordingly, were the present case being conducted in England and Wales, the Ninth Respondents' Application could not have been opposed in the way Advocate McGuffin has sought to oppose it on this basis. The position in respect of a claim under Part 86, CPR appears to be no different (see, in particular, the commentary in para. 8.0.2 of the *White Book* dealing with Part 8 claim forms, the usual way in which a stakeholder claim must be commenced) and r. 86.3(2) expressly acknowledges that the court's case management powers are not limited by the particular orders and directions that can be given for the progression and disposal of the stakeholder application.

24. The fact that an application for summary judgment under provisions similar to those in Part IV of the 2007 Rules would be possible in England and Wales is not, of course, a justification in itself for rejecting Advocate McGuffin's submission. However, I derive comfort from the fact that the CPR accommodate applications for summary judgment and, had the position been the opposite in England and Wales, it could have led to a different starting point for considering what can legitimately be done by this Court.

25. I have satisfied myself through considering the entirety of the 2007 Rules that there is nothing in them that precludes the Court entertaining an application for summary judgment. The fact that rule 27(2)(a) makes provision for a "*summary determination*" does not mean that that is the only means by which interpleader proceedings, whether in whole or in part, can be resolved summarily. It is, in effect, a means by which the Court can dispense with certain aspects prior to a trial that would otherwise have needed to be factored in. That conclusion is also consistent with the position under Order 17, RSC before its replacement earlier this year, because r. 5(2)(b) was in similar terms to rule 27(2)(a) of the 2007 Rules. The commentary at para. sc17.5.3 of the *White Book* explained:

> "*Summary disposal is the course usally taken in straightforward cases and in sheriff's interpleaders. However, if the goods are of considerable value and difficult questions of law may arise, summary disposal is not appropriate even if the parties consent (Fredericks and Pelhams Timber Buildings v Wilkins, Read (Claimant) [1971] 1 W.L.R. 1197; [1971] 3 All E.R. 545, CA).*
>
> *If the Master or district judge is to decide the case summarily it is usually necessary to adjourn to a fixed date giving all necessary case-management directions – e.g. as to evidence, disclosure or other interim steps. If the value of the goods justifies it, they may order the sheriff to prepare, file and serve an inventory (Fredericks and Pelhams Timber Buildings v Wilkins, Read (Claimant)). At the hearing the modern practice is for witness statements (or affidavits) to stand as evidence-in-chief upon which rival claimants can cross-examine. If supporting witnesses are to be called directions should be sought at the initial hearing as for filing and service of witness statements.*"

Accordingly, prior to earlier this year, within the context of interpleader proceedings, the Master or district judge managing the case could choose to move to summary determination but would also have to entertain any application made pursuant to Part 24 for summary judgment. The summary determination option was not the only option available and I do not construe the 2007 Rules as requiring such a strict interpretation that the inclusion of the option of summary determination excludes the possibility of other applications being made for a summary resolution of the whole or part of the dispute between the adverse claimants.

26. On the face of the 2007 Rules, rule 29(1) provides that:

> "*Subject to the preceding rules of this Part, the Court may, in or for the purposes of any interpleader proceedings, make such order as to costs or any other matters as it thinks just.*"

This is potentially a broad power. It is in similar terms to O. 17, r. 8, RSC. The commentary at para. sc.17.8.2 of the *White Book* does not express the possibility that this power could be exercised in the type of procedural matter under consideration, but that is unsurprising because the CPR, read as a whole, clarified that applications for summary judgment pursuant to Part 24 could be made, meaning that the power would not have been needed for this purpose.

27. It strikes me that when the 2007 Rules were in preparation some thought was given to how to reflect the provisions to be drawn from Order 17, RSC within the body of Guernsey's replacement procedural Rules. That is apparent from the procedure to commence an interpleader application set out in rule 26(1) and (2). However, I have not been persuaded by Advocate McGuffin that the absence of any explicit cross-reference between Part IV and Part V of the Rules is anything other than an oversight. The terminology used in Part V does not sit comfortably with the terminology in Parts II to IV, which refer to the pleadings associated with

the bringing of an action before the Court. In any event, there is a reference in rule 29(3) to the power to "*dismiss the action*". Quite how that paragraph operates alongside rule 27(3) remains unclear, but is perhaps indicative of there being some teething troubles associated with the insertion of Part V into the Rules. In the light of these issues, I am satisfied that there is nothing in Part V of the Rules that prevents the Court entertaining an application to resolve matters summarily.

28. I have further noted that rule 1 of the 2007 Rules refers generally to the Rules. It applies, therefore, to Part V as much as to any other rule contained therein. Similarly, in Part VII (case management), rule 38 is of general application, albeit that the case management conference covered in the rules following is dependent on inscription of an action on the *Rôle des Causes en Preuve*. Finally, the general powers in rule 50, especially the "catch-all" paragraph (2)(p), confer broad powers on the Court to make orders to ensure the just resolution of the case.

29. From a combination of all these powers under the 2007 Rules, I am satisfied that the Court has the ability to entertain an application for summary judgment in interpleader proceedings. The wording of rule 19 referring to the timing at which such an application can be made means that, strictly speaking the Application is not being made under Part IV and, with the benefit of reflection, it would have been more accurate to have case managed the position more explicitly to treat it as an application made as if under Part IV. The stage that these interpleader proceedings have reached is arguably already well beyond the early stage of a defendant to an action intimating his wish to defend the action, with the consequence that it is placed *inscrite*. In the present case, the Ninth Respondents and the First to Fourth Respondents have answered the Interpleader Applicant's summons, given their *élections de domicile* and formulated the claims they wish to make to the Assets in the evidence lodged. There are, as noted, no formal pleadings, but the nature of the competing claims has been sufficiently clear for me to have indicated that I would treat the First to Fourth Respondents as the Plaintiffs in the dispute with the Respondents represented by the Ninth Respondents being treated as the Defendants, with the issue between them being as to whether the Plaintiffs can establish title to the Assets in the various accounts at the Bank in the names of the Defendants. To that extent, these proceedings have been progressed further than the equivalent of inscribing an action on the *Rôle des Causes à Plaider*. Moreover, by making use of the procedure set out in Part IV of the 2007 Rules, I was ensuring that the First to Fourth Respondents had a full opportunity to show cause against the Ninth Respondents' Application.

30. Even if I were to be wrong to consider that the procedural order made fell within the powers conferred on the Court by the 2007 Rules, I would have concluded that this was a proper exercise of the Court's inherent jurisdiction. As I have said, there is nothing in the Rules that is inconsistent with a decision to seek to resolve matters between the competing parties to these proceedings without being forced to choose only between either a summary determination pursuant to Part V or a full trial. The primary argument of the Ninth Respondents is that the claims made by all of the First to Fourth Respondents are bad in law, with their alternative position being that some of those claims are bad in law. I take the view that it is a necessary aspect of the Court's role to dispense justice to be able to rule at an early stage in proceedings whether or not such an argument can be sustained. This may be regarded as comparable to the ability to strike out a pleading or to give summary judgment or simply to resolve a preliminary issue. However it is regarded, it is clear to me that the Court has the power to adopt an appropriate procedure to resolve such issues in the most cost-effective and timely fashion available, whilst always ensuring that the parties concerned have the full opportunity to be heard.

31. For these reasons, I reject the preliminary jurisdictional opposition to the Application raised by Advocate McGuffin on behalf of the First to Fourth Respondents and will proceed to determine its merits.

The law

32. Counsel were agreed about the legal principles to be applied to an application for summary judgment. The test as set out in rule 19(2) of the 2007 Rules has two limbs. The first is to satisfy the Court that "*the plaintiff has no real prospect of succeeding on the claim or issue*" and the second is that "*there is no other compelling reason why the claim or issue should not be disposed of at a trial*". If both limbs are satisfied, the Court has a discretion as to whether to give judgment against the other party on the whole of the claim or on a particular issue.

33. Because the test in rule 19 has been drawn from Part 24 of the CPR, reference can helpfully be made to the case law referred to in the commentary in the *White Book*. In the same way I did in *Sandwith v Falla* (unreported, 5 June 2013) and *SPL Guernsey ICC Limited v Moore Stephens* (unreported, 13 January 2014), I find that the summary given by Lewison J (as he then was) in *Easyair Limited (t/a Openair) v Opal Telecom Limited* [2009] EWHC 339 (Ch) (at para. 15) encapsulates the principles that the Court needs properly to consider before resolving the Application:

> "*The correct approach on applications by defendants is, in my judgment, as follows:*
>
> *i) The court must consider whether the claimant has a "realistic" as opposed to a "fanciful" prospect of success: Swain v Hillman [2001] 2 All ER 91;*
>
> *ii) A "realistic" claim is one that carries some degree of conviction. This means a claim that is more than merely arguable: ED & F Man Liquid Products v Patel [2003] EWCA Civ 472 at [8]*
>
> *iii) In reaching its conclusion the court must not conduct a "mini-trial": Swain v Hillman*
>
> *iv) This does not mean that the court must take at face value and without analysis everything that a claimant says in his statements before the court. In some cases it may be clear that there is no real substance in factual assertions made, particularly if contradicted by contemporaneous documents: ED & F Man Liquid Products v Patel at [10]*
>
> *v) However, in reaching its conclusion the court must take into account not only the evidence actually placed before it on the application for summary judgment, but also the evidence that can reasonably be expected to be available at trial: Royal Brompton Hospital NHS Trust v Hammond (No 5) [2001] EWCA Civ 550;*
>
> *vi) Although a case may turn out at trial not to be really complicated, it does not follow that it should be decided without the fuller investigation into the facts at trial than is possible or permissible on summary judgment. Thus the court should hesitate about making a final decision without a trial, even where there is no obvious conflict of fact at the time of the application, where reasonable grounds exist for believing that a fuller investigation into the facts of the case would add to or alter the evidence available to a trial judge and so affect the*

outcome of the case: Doncaster Pharmaceuticals Group Ltd v Bolton Pharmaceutical Co 100 Ltd [2007] FSR 63;

vii) *On the other hand it is not uncommon for an application under Part 24 to give rise to a short point of law or construction and, if the court is satisfied that it has before it all the evidence necessary for the proper determination of the question and that the parties have had an adequate opportunity to address it in argument, it should grasp the nettle and decide it. The reason is quite simple: if the respondent's case is bad in law, he will in truth have no real prospect of succeeding on his claim or successfully defending the claim against him, as the case may be. Similarly, if the applicant's case is bad in law, the sooner that it is determined the better. If it is possible to show by evidence that although material in the form of documents or oral evidence that would put the documents in another light is not currently before the court, such material is likely to exist and can be expected to be available at trial, it would be wrong to give summary judgment because there would be a real, as opposed to a fanciful, prospect of success. However, it is not enough simply to argue that the case should be allowed to go to trial because something may turn up which would have a bearing on the question of construction: ICI Chemicals & Polymers Ltd v TTE Training Ltd [2007] EWCA Civ 725.*"

34. Advocate Field highlighted the seventh and final paragraph, which is taken from the judgment of Moore-Bick LJ, encouraging the Court to "*grasp the nettle*" and avoid the "*something may turn up*" approach of Dickens' Mr Micawber. In addition, he referred to the "*bound to fail*" test used in *Tchenguiz v Investec Trust (Guernsey) Limited* (unreported, 26 June 2013) as summarising the approach to be adopted. Whilst noting that that case involved an attempt to strike out a pleading pursuant to rule 52(2) of the 2007 Rules, given the overlap between the principles of both regimes and the nature of the arguments, I accept that I can test my conclusions against the touchstone of whether the claims to the Assets held at the Bank advanced by the First to Fourth Respondent are bound to fail in order to decide whether to award judgment in favour of any Respondents represented by the Ninth Respondents.

35. As was noted by Advocate McGuffin, whatever the formulation of the test, the hurdle to be surmounted by the Ninth Respondents is a high one.

36. The burden of proving that none of the First to Fourth Respondents has a reasonable prospect of success and that the second limb of the test is satisfied lies on the applicant Ninth Respondents. I have also had regard to a passage in the commentary at para. 24.2.5 of the *White Book* dealing with the extent to which that burden might shift:

> "*If the applicant for summary judgment adduces credible evidence in support of their application, the respondent becomes subject to an evidential burden of proving some real prospect of success or some other reason for trial. The standard of proof required of the respondent is not high. It suffices merely to rebut the applicant's statement of belief. The language of r. 24.2 ("no real prospect … no other reason …") indicates that, in determining the question, the court must apply a negative test. The respondent's case must carry some degree of conviction: the court is not required to accept without question any assertion they make: Britannia Building Society v Prangley June 12, 2000, unrep., Ch D …*"

I have concluded that this principle applies equally to the summary judgment procedure under the 2007 Rules. However, unless a respondent to an application adduces no evidence as a means of

showing cause or the evidence adduced is of so limited effect, in which case the respondent's burden may not have been discharged, it remains the case that the applicant's evidence must be credible and support the application made so as to discharge the overall burden of proof placed upon it.

Primary contention

37. The Ninth Respondents have submitted that the First to Fourth Respondents have not articulated a legally recognisable claim to any of the Assets. In doing so, they refer to the way that Mr Kane, on behalf of those Respondents, had indicated the possibility of a variety of claims being advanced but, by the time of filing his Fifth Affidavit, confined himself to referring to a tracing claim. In that regard, Advocate Field has pointed out that this is not a cause of action in itself, but is an evidential process by which a claimant may identify the traceable proceeds of his property. In the absence of any legally recognisable claim, judgment should be entered against them and in favour of the Respondents represented by the Ninth Respondents in respect of all the Assets held at the Bank. The factual basis is set out in the evidence adduced on behalf of the Ninth Respondents, in which Mr Chilton, on behalf of Mr Greenwood and himself, provides the necessary statement that they believe that on the evidence submitted the First to Fourth Respondents have no real prospect of succeeding with their assertion to have a recognisable beneficial interest in the Assets.

38. In making that submission, Advocate Field pointed out that Mr Kane's Fifth Affidavit described the factual background against which the claims were presented by reference to the receivership order made in the Illinois Court by Judge Chang on 27 September 2012. The underlying basis for the interest of the First to Fourth Respondents was their claim that a total gross sum of US$340 million was paid direct to some of those for whom the Ninth Respondents are now responsible or to the First and Second Respondents and then on to a Bahamian company known as Alliance Investment Management Limited (hereafter referred to as "Alliance"). However, Advocate Field pointed out that the diagram showing the various relationships exhibited to that Affidavit at page 128 did not purport to show any flow of funds from the First or Second Respondent. Of the total sum, approximately US$122.9 million was routed directly, leaving approximately US$217.1 as having been passed through Alliance. Mr Kane indicated that some US$83 million, which equated to around 38.2% of those investor funds, was paid by Alliance into accounts held at the Bank by some of the Respondents now represented by the Ninth Respondents.

39. The role played by the First Respondent has been described as that of manager and managing company. A similar role appears to have been played by the Second Respondent. What they were managing were the schemes represented by the PIWM portfolios. Particular reliance has been placed by Advocate McGuffin on the description of the First Respondent as the "owner" of the investments placed into an account with Alliance, which is contained in a document dated 10 March 2004, to which I will return in more detail in due course.

40. Advocate Field further highlights that the allegations of wrongdoing advanced by Mr Kane are made against the Defendants in the Illinois proceedings (Mr Battoo and the four Entities to which reference was made, although one of those Entities has now been dismissed from those proceedings, albeit not the First Respondent, which remains a party to the Illinois proceedings) rather than against the Respondents for which the Ninth Respondents are responsible. Consequently, in his submission, Mr Kane has not provided any evidence supporting the assertion that the investors who paid US$122.9 million directly were induced to do that by reason of something said or done by those responsible for the so-called "BC Common Enterprise".

41. The Ninth Respondents are critical of the unwillingness or inability of Mr Kane to distinguish between whether the claims to the Assets are made on behalf of the First Respondent, the Second Respondent, the Third Respondents on behalf of either or both of the First and Second Respondents or the Fourth Respondent (and, if the latter, on whose behalf). During the course of the hearing, the focus was directed more particularly by Advocate McGuffin on the First Respondent with the consequence that both the Third Respondents and the Fourth Respondent could advance a representative role.

42. In response, Mr Kane's Sixth Affidavit summarises that the Fourth Respondent's claims are based on demonstrating that the property, being the funds deposited, was taken unlawfully, that those funds can be followed and/or traced and that there is an unbroken chain of property leading to the Assets held at the Bank over which it asserts its claim. The starting point for these assertions is that Mr Battoo and those acting on behalf of the BC Common Enterprise acted fraudulently by unlawfully causing investors to part with their money. In this regard, Mr Kane draws no distinction between the different categories of investor. The basis for those allegations of fraud are that some of the investors solicited were based in the United States of America, secret commissions were paid to financial advisers, the investor funds were used improperly, conflicts of interest arose from the financial interest in the hedge funds into which the investors' funds found their way, and there were misrepresentations about the extent of losses sustained, in particular in relation to the level of exposure to the Madoff scheme.

43. Mr Kane drew attention to the extent of Mr Battoo's ownership of the Respondents now represented by the Ninth Respondents. (These were voting shares and Advocate Field drew a distinction between such shares being consistent only with management decisions and the shares that represented the beneficial financial interest in each of the companies, in which Mr Battoo has not been shown to have any such interest.) Mr Kane also highlighted how the various accounts held at the Bank were subjected to inter-fund transfers, showing they were operated as a common investment pool. In short, the comingling of funds in the accounts is such that any tainting of those funds taints the rest and a detailed analysis of them, along the lines undertaken on a sample by Ms Cassell, will be able to show at trial how the tracing exercise can cover everything still there.

Alternative contention

44. In the event that the Court would not enter judgment against the First to Fourth Respondents in respect of the entirety of the Assets, the Ninth Respondents have sought judgment in part based on the different position of those investors who invested directly with the hedge funds, including those represented by the Ninth Respondents. This category of investors has been referred to as "the Direct Investors". In doing so, they have used the position of two entities, UCA Ventures Limited (hereafter referred to as "UCA") and Oxford Fund Limited (hereafter referred to as "Oxford") as indicative of how to approach the position of Direct Investors. The involvements of these entities are explained in Mr Chilton's Sixth Affidavit and more detail was provided in Mr Keeble-Buckle's Affidavit. A further example of a Direct Investor is Mrs Van Dyke. In the case of these Direct Investors, the submission of the Ninth Respondents is that there is no evidence that any of the monies invested by them passed through either of the First or Second Respondents (meaning that the Third Respondents cannot assert any claim on behalf of either of them), nor through the hands of any of the Defendants in the Illinois proceedings (meaning that the Fourth Respondent cannot assert a claim on behalf of any of them).

UCA

45. Mr Keeble-Buckle's detailed explanation sets out the movements of the funds representing the investment made by UCA. Mr Chilton confirmed in his Sixth Affidavit that the ultimate beneficial owner of UCA is a trust, "*the trustees and beneficiaries of which I can state categorically are not Nikolai Battoo, any R1 or R2 entity, PIWM or Alliance*".

46. On 29 September 2008, US$20 million was deposited into account numbered 718680 at the Bank from UCA. That account relates to Galaxy Fund Inc Class MCF in the name of the Fourteenth Respondent. The explanation given for this deposit is that an account in respect of Class MM had not on that date been opened. US$15,000,045.09 was transferred out on 30 September 2008 and used to purchase underlying investments in Galaxy Class MM, namely Xanthos SPC investment certificates linked to Phi R (Squared) Series II Segregated Portfolio. US$5 million was transferred out of account 718680 on 1 December 2008 into an account numbered 790400 in the name of the Fourteenth Respondent that had been opened on that day in respect of Class MM. The bank statements in respect of Galaxy Class MCF over this period show that other monies were in the account throughout and there was a healthy positive balance on the account. The Investor Transaction Report in respect of Galaxy Class MM shows that UCA acquired 20,000 shares in Galaxy Class MM on 1 October 2008. The purchase price was US$20 million. No other investor is recorded on the Galaxy Class MM Investor Transaction Report. UCA is, therefore, the sole investor interested in Galaxy Class MM.

47. The Series II investment certificates were redeemed on 1 May 2009. The net cash settlement of US$1,703,096.15 was credited on that day to a bank account numbered 797550 in the name of the Eighteenth Respondent. As shown on the Settlement Agreement set out in a letter dated 23 April 2009 from Credit Suisse International, there was also an *in specie* distribution given an estimated value of US$13,355,233.43. Those securities were also transferred to the Eighteenth Respondent, but with a reduced book value of US$7,580,263, which arose as a result of the impact of the Madoff fraud.

48. Also on 29 September 2008, US$15 million was deposited into account numbered 749550 at the Bank from UCA. That account relates to Anchor Hedge Fund Limited Class C in the name of the Fifth Respondent. The explanation given for this deposit is again similar in that an account in respect of Class C2 had not then been opened. US$10,000,045.09 was transferred out on 30 September 2008 and used to purchase investments in Xanthos SPC investment certificates, albeit on this occasion linked to Phi R (Squared) Series I Segregated Portfolio. US$5 million was transferred out on 1 December 2008 into an account numbered 790510 in the name of the Fourteenth Respondent that had been opened on that day in respect of Class C2. The bank statements in respect of Anchor Class C over this period show that other monies were in the account throughout and there was a healthy positive balance on the account. The Investor Transaction Report in respect of Anchor Class C2 shows that UCA acquired 15,000 shares in Anchor Class C2 on 1 October 2008. The purchase price was US$15 million. No other investor is recorded on the Anchor Class C2 Investor Transaction Report.

49. Those Series I investment certificates were redeemed on 1 May 2009. The net cash settlement of US$1,243,945.43 was credited on that day to the account numbered 797550 in the name of the Eighteenth Respondent. As shown on a separate Settlement Agreement set out in a letter also dated 23 April 2009 from Credit Suisse International, there was similarly an *in specie* distribution given an estimated value of US$8,808,355.53. Those securities were also transferred to the Eighteenth Respondent, but with a reduced book value of US$5,622,844, similarly attributable to the impact of the Madoff fraud.

50. On 1 January 2009, as shown on the Investor Transaction Report, the 15,000 shares in Anchor Class C2 were transferred out and a corresponding entry on the Investor Transaction Report of Galaxy Class MM, showing the acquisition of shares with an identical book value down to the last cent, was made. On 25 February 2009, US$4,989,765.20 was transferred from account 790510 to account 790400. Account 790510 was then closed on 9 November 2011 with US$3,817.15 similarly being transferred to account 790400.

51. On 1 March 2009, 9,504.25 shares in the Eighteenth Respondent were acquired on behalf of Galaxy Class MM. This is shown in the first entry on the Investor Transaction Report in respect of that Respondent. The purchase price of US$9,504,250 came from two sources. US$7.5 million was transferred from account 790400 on 24 March 2009. That sum formed the opening balance of account numbered 797550 in the name of the Eighteenth Respondent. In Mr Keeble-Buckle's Affidavit, he explains that the balance of US$2,004,250 was used to acquire investments in the name of the Eighteenth Respondent, with payments being made directly from the same account. What is clear from the bank statement exhibited in respect of account 790400 is that there were two payments into it, to which I have just referred, being the transfer of US$5 million on 1 December 2008 and the transfer of US$4,989,765.20 on 25 February 2009. The only other credits to the account during the relevant period are cancellations of payments made out on 2 March 2009. These are either in the amount paid or produce credits at a lower figure than is shown for the payment out. On the same date, Galaxy Class MM transferred ownership of shares in the Eighteenth Respondent to the Eighth Respondent as an in specie subscription to the latter, as shown on the respective Investor Transaction Reports. However, Mr Keeble-Buckle did not seek to draw any specific conclusion about the Eighth Respondent.

52. The conclusion about the Eighteenth Respondent reached by Mr Keeble-Buckle is contained at paragraph 27 of his Affidavit:

> "*The only credits in the bank account of R18 were the $7,500,000 credit from the Galaxy MM bank account on 24 March 2009, the cash settlements from the Xanthos SPC investment certificates as detailed above and various redemption proceeds from the investments made from the R18 account (using only the funds transferred by UCA and the investment certificate redemption proceeds); no further credits were made. Therefore, all of the funds in R18's account number 797550, derive from UCA alone, being the cash balance of GBP5,198,793 along with the securities, holding a value on the Scott Schedule of GBP8,445,243, belong to R18, of which UCA is the ultimate beneficial owner*."

53. The conclusion reached by Mr Keeble-Buckle about the monies in the Fourteenth Respondent's account in respect of Galaxy Class MM followed in paragraph 28:

> "*The only credits ever made into the bank account of Galaxy MM (a share class of R14) were the $5,000,000 credit from the Galaxy MCF bank account on 1 December 2008, the credit of $4,989,765 from the Anchor C2 bank account and the various redemption proceeds from the investments made from the Galaxy MM account (using only the funds transferred by UCA); no further credits were made. Therefore, all of the funds in Galaxy MM's account derive from UCA alone and the current balance of account number 790400 – US$97,573 belongs to Galaxy MM, of which UCA is the sole and only shareholder. There have been no other investors into the Galaxy MM share class.*"

54. The material relating to these investments by UCA provided by Mr Kane does not descend into the same level of analysis. However, there is nothing directly challenging the sequence of events described by Mr Chilton and Mr Keeble-Buckle. By reference to the statement provided by Mr Kane in the Illinois proceedings, and which was used to prepare the Statement of Undisputed

Material facts filed on behalf of the CFTC, the emphasis on behalf of the First to Fourth Respondents is on comingling. For example, at para. 42:

> "*When investor funds were sent from Alliance accounts to the accounts of BVI Funds at EFG, the funds were comingled with the funds within the accounts of BVI Funds at EFG. Then, the funds were sent to either (1) other accounts of BVI Funds at EFG, (2) third-party investments or hedge funds, (3) other investors, or (4) paid to Battoo's account at Folio Administrators Ltd. ("Folio").*"

More specific reference to the position of the Eighteenth Respondent was contained at paragraphs 70 and 71 of Mr Kane's statement.

55. In Mr Kane's Sixth Affidavit he referred to payments totalling US$2.4 million made to UCA using investors' funds at Alliance. These payments were made pursuant to limited investment guarantees given by Mr Battoo and the Hong Kong entity covered by the receivership order. A fuller explanation is contained in an e-mail dated 15 May 2013 exhibited by Mr Kane, which also mentions that UCA sued in Hong Kong for the balance of the contractual payments due to it and obtained judgment. Judgment was given against the Hong Kong entity on 28 September 2012 as a result of no Defence having been served. Judgment in the same amount was given on 29 November 2012 against Mr Battoo personally as a result of no Notice of Intention to Defend having been given. Mr Kane suggests that "*The investment guarantees paid to the sole investor of a hedge fund using PIWM Portfolio investors' monies at Alliance demonstrates, by way of example, that Mr Battoo controlled the BVI Hedge Funds and the relevant accounts at Alliance*".

Oxford Fund Limited

56. The details of the investments made by Oxford are set out in Mr Chilton's Sixth Affidavit. He similarly confirms that the ultimate beneficial owner of Oxford is a company, the owner of which is an individual, and that he "*can categorically state he is not Nikolai Battoo, any R1 or R2 entity, any of the CFTC Defendants or Alliance*".

57. Oxford's investment was into Anchor Hedge Fund Class G and FuturesOne Diversified Fund Class L. The accounts for these funds are held at the Bank in the names of the Fifth and Tenth Respondents respectively. Both investments were made through BNP Paribas Bank and Trust Cayman Ltd. There were no other investors into the Class G fund and when the investment in the Class L fund was transferred into Oxford's own name on 1 November 2010, there was only one other investor in that fund, with Oxford having a 76.5% share of the fund. The Scott Schedule shows £52,521 in cash in the Fifth Respondent's account numbered 769170 and that there was cash of £960,523 in the Tenth Respondent's account numbered 769280 in respect of Class L.

58. Oxford's subscription for shares in both Classes were in accordance with the terms of a Private Placement Memorandum in respect of each Class. The bank statements for the two accounts show that on 22 February 2008, US$13 million and US$20 million respectively were deposited. Both narratives record the source of the incoming funds as being Oxford. In a similar way to the assertion on behalf of UCA in respect of account numbered 790400, Mr Chilton believes that the entirety of account 769170 of the Fifth Respondent belongs to Oxford and, on a similar basis, so does 76.5% of account 769280 of the Tenth Respondent.

Mrs Van Dyke

59. In Mr Kane's Sixth Affidavit, he gives as an example of how the First to Fourth Respondents can trace into the accounts at the Bank the case of Margaret Van Dyke. Mrs Van Dyke has also sworn her own Affidavit on 15 April 2014. The Ninth Respondents have indicated their

preparedness to accept that evidence at face value for the purposes of this Application for summary judgment. They point out that Mrs Van Dyke is one of the Direct Investors.

60. Mrs van Dyke and her husband invested in Anchor Hedge Fund Class A. They did so on the advice and recommendation received from Larry Grossman of Sovereign International Management, Inc. Mrs Van Dyke gave testimony to the United States District Court in Florida in proceedings against Mr Grossman, and his successor, Gregory Adams, brought by the United States Securities and Exchange Commission and a transcript of that evidence is exhibited to Mr Kane's Sixth Affidavit.

61. Mrs Van Dyke transferred US$35,302 from her individual retirement account to Anchor Hedge Fund Class A. (Her Affidavit says this was on 18 April 2004 whereas the account information shows that she was mistaken about the year, with the transactions taking place on the days of the year she mentions, but in 2008.). On the same day, her husband, Thomas, transferred US$203,501 from his individual retirement account in the same manner. On 24 April 2008, a further US$617,773 was transferred from the couple's joint savings account to Anchor Hedge Fund Class A. Mrs Van Dyke's initial transfer was to Anchor Holdings LLC into its account at Everbank, the statement showing such a credit on 23 April. The same statement shows credits in the amounts stated from her husband and their savings account. Mr Kane points out that MrsVan Dyke's investment was wired out as part of a larger sum of US$1,512,414 to the Anchor Class A account held at the Bank numbered 755820.120.9 on 29 April 2008, being credited the next day, as shown on the statement. The account in question is one of the Fifth Respondent's accounts and it has since always had a positive balance greater than the amount of Mrs Van Dyke's initial investment.

62. Mrs Van Dyke and her husband received comparatively small recoveries from Sovereign International Management, Inc. They commenced proceedings against Sovereign International Management, Inc. and Messrs Grossman and Adams, which were settled. The terms of that settlement remain confidential.

Position of Fourth Respondent

63. Before proceeding to discuss the merits of the Ninth Respondents' Application, I can deal briefly with some issues surrounding the Fourth Respondent. In particular, through Mr Sugden's Fourth Affidavit, issue has been taken with the content of Mr Kane's Sixth Affidavit in which he considered it appropriate for the Fourth Respondent "*to continue its claims to the Assets on behalf of investors*" and confirmed that the Fourth Respondent "*is so authorised under United States law*" to do so and that it "*acts as trustee of recovered sums for the benefit of the investors*".

64. By reference to case law of the Seventh Circuit binding in Illinois (and so binding the Fourth Respondent's appointment as receiver), Mr Sugden explained that "*an equity receiver, such as the 4th Interpleader Respondent, may only pursue the claims of the person and entities over which it is appointed. It may not properly pursue the claims of third parties, such as investors in the entities over which it has been appointed*". He also quoted from the judgment in <u>Scholes v Schroeder</u> 744 F. Supp. 1419, 1422 (N.D. Ill. 1990):

> "*Fraud on <u>investors</u> that damages those investors is for those investors to pursue – not the receiver. By contrast, fraud on the receivership entity that operates to its damage is for the <u>receiver</u> to pursue (and to the extent that investors as the holders of equity interests in the entity may ultimately benefit from such pursuit, that does not alter the proposition that the receiver is the proper party to enforce the claim). And as stated earlier, to the extent that the orders that appointed Scholes as receiver have purported to*

> *confer power on him to sue directly on behalf of investors, rather than in accordance with the just-stated principles, those orders exceed the power of the judiciary and will not be enforced in this action.*"

65. On behalf of the Fourth Respondent, Ms Conlon's Affidavit did not dispute those general statements, but suggested that they were "*not relevant to the current proceedings because the Receiver is not pursuing claims on behalf of individual investors. Instead, the Receiver is identifying and marshalling assets that have been controlled by Battoo, as it is authorized to do by the Preliminary Injunction Order consistent with United States law. Holland, 777 F. 2d at 1291."*

66. In this context, I consider it important to remember the recognition afforded to the Fourth Respondent by its successful appeal to the Court of Appeal on that question. It is limited to having standing and participating in these interpleader proceedings until they are finally determined. From that Court's judgment (*In the matter of Robb Evans and Associates LLC* (unreported, 31 March 2014)), it is clear that any proprietary claim will be made on behalf of the Entities over which the receivership order extends. The focus, therefore, must be on what claim to any of the Assets could be made by Mr Battoo, the First Respondent, the Hong Kong entity or the Swiss entity. The Fourth Respondent is not advancing any claim on behalf of any investor.

67. During the course of the hearing Advocate McGuffin confirmed that Mr Kane had not been using technical legal language and that the Fourth Respondent was not asserting that its claims were directly on behalf of investors. Instead, the claims being advanced were those of the Entities in respect of which it had been appointed and, once the position was analysed, it became clear that it was the First Respondent's claims that were central to the Fourth Respondent's position. In turn, this applied to the position of the Third Respondents as liquidators of the First Respondent, although in that instance their position as liquidators of the Second Respondent distinguished them from the Fourth Respondent. However, in simple terms, if there was a claim to the Assets on behalf of the First Respondent, that meant that both the Third Respondents and the Fourth Respondent potentially had an interest in pursuing that claim on its behalf. Quite how the Third and Fourth Respondents would reconcile their interests in any Assets would potentially need to be resolved in due course, but it was not necessary to consider that question further in relation to the Ninth Respondents' Application.

68. Although Advocate Field had, as part of his alternative contention, sought summary judgment in favour of all those Respondents for which the Ninth Respondents are responsible as liquidators against the Fourth Respondent, which was akin to seeking that the Fourth Respondent be removed as a party, he acknowledged that this would be dependent on a finding that the First Respondent was unable to assert any interest in the Assets held at the Bank. Accordingly, if the primary submission that judgment be entered against all of the First to Fourth Respondents failed, there was no scope for a distinct order in respect of the Fourth Respondent. To that extent, the Ninth Respondents no longer pursued any relief against the Fourth Respondent distinct from that sought against the First to Third Respondents.

Discussion

69. It has been acknowledged on behalf of the First to Fourth Respondents that the Respondents for whom the Ninth Respondents are responsible have a *prima facie* entitlement to the Assets in the accounts in their names at the Bank. This is consistent with the understanding of the Court of Appeal (at para. 14 of its judgment):

> "*On the face of it, the Assets belong to the BVI funds in whose name they stand but it is understood that the appellant, as Receiver, intends to plead a proprietary claim alleging that the Assets in fact belong beneficially to one or more of the Entities and therefore fall within the definition of 'the Receivership Assets'.*"

The basis of their assertion that they have proprietary rights to those Assets, or an equitable interest in them, is that a fiduciary or trust relationship was owed to the investors or to any of the First to Fourth Respondent (although Advocate McGuffin conceded that this really meant only the First or Second Respondents or, in the context of the Fourth Respondents, any of the Entities subject to the receivership order), that there had been a breach of that fiduciary or trust duty and misapplication of funds, and that a tracing exercise could be conducted in respect of those misapplied funds into the Assets.

70. It is being alleged on behalf of the First to Fourth Respondents that the Entities controlled by Mr Battoo represented by implication to potential investors that the BC Group was a bona fide and lawful investment business. That representation was false because the persons within the Group were engaged with Mr Battoo in conducting a conspiracy to defraud. Advocate McGuffin relied on what Lord Browne-Wilkinson stated in *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* [1996] AC 669 (at page 716C):

> "*… when property is obtained by fraud equity imposes a constructive trust on the fraudulent recipient: the property is recoverable and traceable in equity*".

Immediately preceding that passage, His Lordship indicated "*Although it is difficult to find clear authority for the proposition*" and the context in which he set out this principle was to draw a distinction between tracing stolen monies in law and in equity and whether the equitable interest arose under a resulting or constructive trust. Furthermore, because his speech ranges broadly over a number of issues that might need to be argued more fully in the context of Guernsey law, I regard this as an example of where Advocate McGuffin submits the Court should exercise caution on a summary judgment application where an area of developing jurisprudence is concerned (see, eg, the cases where that principle has been applied to applications to strike out *Farah v British Airways plc* (1999) The Times, 26 January 2000 and *Barrett v Enfield London Borough Council* [2001] 2 AC 550.

71. It is the case of the First to Fourth Respondents that all parties who received the proceeds of investor funds were on notice of the fraud and that, for this reason, it is possible to trace the funds into the Assets. In doing so, there needs to be a distinction drawn between the actual funds of the investors, because none of the investors assert any proprietary claim in the context of these interpleader proceedings, and those of the persons into whose hands those funds passed. Further, in order to establish a claim on behalf of the First or Second Respondent (which can be made on their behalves by the Third Respondents or, in the case of the First Respondent, the Fourth Respondent) or any of the Entities for which the Fourth Respondent can act, it will be necessary to establish that another person received any funds to which any of those persons has a claim with notice of the fraud. In that regard, Advocate McGuffin relies on the passage in Underhill & Hayton's *Law relating to Trusts and Trustees*, 18th ed., para. 99.27:

> "*A purchaser has constructive notice of matters which would have come to his knowledge if such inquiries and inspections had been made as ought reasonably to have been made by him.*"

Quite how this principle applies to a situation where there was no purchaser as such and quite what enquiries would be appropriate in a case such as this remains unclear. These issues will inevitably require careful consideration if the claims are to be continued.

72. The First to Fourth Respondents also rely heavily on the fact that Mr Battoo was the directing mind of the recipient Hedge Funds. The consequence of that fact is that those Respondents for which the Ninth Respondents are now responsible are imputed with the knowledge of the fraud at every level within Mr Battoo's mind.

73. In relation to the alleged breach of duty or trust, the First to Fourth Respondents suggested that the First Respondent, as manager, owed fiduciary duties to investors to ensure that the monies invested were only applied to bona fide investments. The receipt of management fees in respect of the Hedge Funds was a conflict of interest and so a breach of duty, thereby entitling the investors to rescind their investments and claim a proprietary interest (see, eg, *Panama & South Pacific Telegraph Company v India Rubber, Gutta Percha, and Telegraph Works Company* (1874-75) LR 10 Ch App 515). The difficulty for them in that formulation of the breach is that they are not acting on behalf of the individual investors.

74. Their alternative approach is to point to the usual fiduciary duties owed by the company directors of each company involved. They allege that Mr Battoo was a director or shadow director, although that status does not appear to be conceded on behalf of the Ninth Respondents. If so, the First to Fourth Respondents assert that all the transfers made out of the companies forming the BC Group to the Hedge Funds, whether directly or through Alliance, were made in breach of director's fiduciary duty and were held on a constructive trust for the benefit of the Group or, perhaps more accurately whichever entity within the Group for which the director or directors were acting. In particular, relying on Mr Battoo's knowledge, this was to be imputed to each such entity because he was the directing mind of each company or was the agent of it responsible for authorising or, as the case may be, directing the payments made across the Group (see, eg, *El Ajou v Dollar Land Holdings plc* [1994] 2 All ER 685). Various e-mails have been exhibited to Mr Kane's Sixth Affidavit from Andrew Keuls. The most relevant are those dated 26 September 2012 in which it can be seen *inter alia* that Mr Battoo was given a general power of attorney by both the First and Second Respondents and that Mr Keuls never received any information about either company or its activities. Mr Keuls also indicates his belief that Alliance acted on Mr Battoo's instruction to invest the funds received from investors. I recognise that this is not, of course, sworn evidence but rather material produced by Mr Kane.

75. Against that background, the First to Fourth Respondents claim to be entitled as beneficiary of any constructive trust or breach of trust situation to trace into the Assets held at the Bank. In doing so, they rely on the analysis undertaken by Ms Cassell in her Report of 10 January 2014. They argue that this approach is consistent with what Lord Millett said in *Foskett v McKeown* [2001] 1 AC 102 (at page 127):

> "*The process of ascertaining what happened to the plaintiffs' money involves both tracing and following. These are both exercises in locating assets which are or may be taken to represent an asset belonging to the plaintiffs and to which they assert ownership. The processes of following and tracing are, however, distinct. Following is the process of following the same asset as it moves from hand to hand. Tracing is the process of identifying a new asset as the substitute for the old. Where one asset is exchanged for another, a claimant can elect whether to follow the original asset into the hands of the new owner or to trace its value into the new asset in the hands of the same owner. In practice his choice is often dictated by the circumstances. In the present case the plaintiffs do not seek to follow the money any further once it reached the bank or*

> *insurance company, since its identity was lost in the hands of the recipient (which in any case obtained an unassailable title as a bona fide purchaser for value without notice of the plaintiffs' beneficial interest). Instead the plaintiffs have chosen at each stage to trace the money into its proceeds, viz, the debt presently due from the bank to the account holder or the debt prospectively and contingently due from the insurance company to the policy holders.*"

76. Advocate McGuffin submitted that the evidence adduced on behalf of the Ninth Respondents was insufficient to establish that the First to Fourth Respondents have no realistic prospect of succeeding. At this stage of the proceedings, it is not necessary for the First to Fourth Respondents to do more than rebut that contention. The position is different from a summary determination where the Court would be considering on the balance of probabilities whether the claims advanced by the Ninth Respondents are made out. The hurdle the Ninth Respondents have to surmount is higher than that and what is required from the First to Fourth Respondents to show cause under the terms of rule 23 of the 2007 Rules against the Application is comparatively low.

77. Advocate Field has also drawn attention to a passage in the speech of Lord Millett in *Foskett v McKeown* (*supra*, at page 128) to draw a distinction between the tracing exercise itself and the remedy that might be advanced by any of the First to Fourth Respondents:

> "*Tracing is thus neither a claim nor a remedy. It is merely the process by which a claimant demonstrates what has happened to his property, identifies its proceeds and the persons who have handled or received them, and justifies his claim that the proceeds can properly be regarded as representing his property. Tracing is also distinct from claiming. It identifies the traceable proceeds of the claimant's property. It enables the claimant to substitute the traceable proceeds for the original asset as the subject matter of his claim. But it does not affect or establish his claim. That will depend on a number of factors including the nature of his interest in the original asset. He will normally be able to maintain the same claim to the substituted asset as he could have maintained to the original asset. If he held only a security interest in the original asset, he cannot claim more than a security interest in its proceeds. But his claim may also be exposed to potential defences as a result of intervening transactions. Even if the plaintiffs could demonstrate what the bank had done with their money, for example, and could thus identify its traceable proceeds in the hands of the bank, any claim by them to assert ownership of those proceeds would be defeated by the bona fide purchaser defence. The successful completion of a tracing exercise may be preliminary to a personal claim (as in El Ajou v Dollar Land Holdings plc [1993] 3 All ER 717) or a proprietary one, to the enforcement of a legal right (as in Trustees of the Property of F C Jones & Sons v Jones [1997] Ch 159) or an equitable one.*"

78. More specifically, reference was also made to para. 349 of the judgment of Christopher Clarke J (as he then was) in *OJSC Oil Company Yugraneft v Abramovich* [2008] EWHC 2613 (Comm):

> "*In order to be able successfully to trace property it is necessary for the claimant, firstly, to identify property of his, which has been unlawfully taken from him ("a proprietary base"); secondly, that that property has been used to acquire some other new identifiable property. The new property may then have been used to acquire another identifiable asset ("a series of transactional links"). Thirdly the chain of substitutes must be unbroken.*"

In Advocate Field's submission, the First to Fourth Respondents are unable to satisfy the first limb of this test. The Third Respondents and the Fourth Respondent clearly cannot assert that any

property of theirs has been taken because they appear as representatives of the persons in respect of which they hold their respective offices. Accordingly, it is necessary for them to be able to identify some property of the First or Second Respondent or the other Entities subject to the Illinois Court's receivership order in order to start any tracing exercise from that proprietary base. It was for this reason that Advocate McGuffin concentrated on the position of the First Respondent and the relationship with Alliance. However, on the Ninth Respondents' case, Advocate Field submitted that there is no evidence suggesting any realistic prospect that any such property can be identified by the First to Fourth Respondents and so the Application for summary judgment should be granted.

Eighteenth Respondent

79. From the way in which Advocate Field advanced the case of the Ninth Respondents, it is clear that if the Application cannot succeed in respect of the Eighteenth Respondent, then the entirety of the Application falls to be dismissed. This is because it is claimed that the Eighteenth Respondent holds only monies and securities that have their source in the investments made by UCA. It is what might be regarded as the most straightforward claim made by any of the Respondents in respect of which the Ninth Respondents act. Accordingly, if the First to Fourth Respondents are unable to persuade me that they have a realistic prospect of establishing any adverse claim and that there is no other compelling reason why the claim made by the Ninth Respondent on behalf of the Eighteenth Respondent needs to proceed to trial, judgment can properly be entered in favour of that Respondent.

80. Whilst focusing on the position of the Eighteenth Respondent, I have reminded myself not to conduct a mini-trial. I have taken into account what evidence can reasonably be expected to be available at any trial. I have also had regard to the evidence adduced to date, including the analysis in Ms Cassell's Report and considered carefully whether the First to Fourth Respondents would have access to material that would put matters in a different light come any trial. However, because the documents available have already been exhibited and analysed on behalf of both competing sides, I doubt that there is more that can be said in support of either case.

81. Further, I consider it important to remember that each of the claims made by the Respondents for which the Ninth Respondents are acting is distinct from the others. Whilst there may be a temptation to aggregate the positions on what might be perceived to be the two sides of this contest in respect of the Assets, there are dangers in doing so. The proper approach should be to consider whether each Respondent on the one side, ie, those represented by the Ninth Respondents, is entitled to judgment against any or all of the First to Fourth Respondents. It is for that reason that I have decided to deal with the Eighteenth Respondent separately and first.

82. There does not appear to be any real challenge on behalf of the First to Fourth Respondents to the evidence given by Mr Chilton and Mr Keeble-Buckle in respect of the position of the Eighteenth Respondent and to which I have referred in some detail above. Only one account is involved, numbered 797550. The fact that this account represents a little over half of the total Assets held at the Bank is purely coincidental and has no bearing on the outcome. The same conclusions would follow even if the account contained the smallest portion of the Assets.

83. I have noted what Ms Cassell's Report says about one of the four alternative methodologies that can be considered when tracing funds (at para. 4.3.1):

> "*Matching – may apply in circumstances where a withdrawal can be identified that matches, or nearly matches, a corresponding deposit to trace the flow of an entities [sic] money through a mixed pool of funds. The deposit and corresponding withdrawal must*

> *occur within close sequence of each other with minimal "unmatched" transactions occurring between each respective matched, or near matched, deposit and corresponding withdrawal. The unmatched deposits and withdrawals comprised in the final balance of the mixed fund are then attributed to each respective beneficiary.*"

84. In my judgment, this principle deals with the main argument advanced by Advocate McGuffin relating to the comingling in the accounts into which the funds from UCA were first deposited. The explanations about why those monies were deposited into accounts already containing funds and the fact that the deposits were matched almost identically with withdrawals consistent with the intention of UCA to be the sole investor in what has ended up being held in the name of the Eighteenth Respondent satisfies me that the Eighteenth Respondent falls into a special category. Whether one starts with the deposits made by UCA or the part of the Assets now held in account numbered 797550, I reach the conclusion that a tracing exercise on behalf of UCA would show that these funds are being held by that Respondent on behalf of UCA. There may be other creditors of the Eighteenth Respondent with claims against that company in the liquidation being carried out by the Ninth Respondents, but I am not persuaded that the argument about initial comingling in the other accounts provides any of the First to Fourth Respondents with any real prospect of succeeding in their claims that one or more of them can assert ownership to those particular Assets now held in account 797550.

85. I derive support for this conclusion from the content of Ms Cassell's Report. For example, at para. 5.12 she wrote "*We have identified two Participants (Oxford Funds Limited and UCA) as having a potential claim in the Material Accounts under both the FIFO and PR analysis methods.*" Her team undertook specific work in relation to the return on an investment in Parallax Offshore Investors Fund Limited, which is shown in diagrammatic form at para. 5.18, where it is also recorded that "*The original source of funds can be traced to UCA.*" The detail of the analysis is set out in Appendix O to the Report. Her conclusion (at para. 5.20) is that "*The detailed tracing of the UCA transactions indicates that UCA may retain an interest in $1.1m (as detailed on the diagram above) of the final balance of the Phi R EFG Bank Account.*" I take the view that I can properly extrapolate from this conclusion in relation to this transaction where the First to Fourth Respondents have not challenged the evidence relating to UCA, especially as it concerns the Eighteenth Respondent, given on behalf of the Ninth Respondents. Had a similar detailed analysis been undertaken in respect of the other investments made that now account for the funds held in the name of the Eighteenth Respondent, I am satisfied that the same conclusions would be reached. Accordingly, the evidence put before the Court on behalf of the First to Fourth Respondents appears to support the contention of the Ninth Respondents.

86. Advocate McGuffin further argued that the Eighteenth Respondent was controlled by Mr Battoo and his participation in the fraud was sufficient to taint the Eighteenth Respondent in the same way as all the other entities controlled by Mr Battoo. Advocate McGuffin also highlighted that US$2.4 million had been returned to UCA through Alliance, suggesting that this meant that the First to Fourth Respondents (although probably concentrating more particularly on the Fourth Respondent) would have a claim that could be traced into the monies held in the name of the Eighteenth Respondent. He submitted that that was something that should be explored further at a trial. He added that it would be an odd outcome for the Court to permit one party to be in a position to extract more out of the proceedings than the others.

87. At this stage of the exercise, I have concentrated on the test in rule 19(2)(a) of the 2007 Rules as to whether any of the First to Fourth Respondents has a real prospect of succeeding in a claim to own some or all of account 797550. From all the evidence adduced in relation to the Application, I am quite satisfied that UCA's investments did not pass through the hands of either the First or Second Respondents. Further, there has been no evidence to suggest that either of those

Respondents can now make a proprietary claim to that account. Accordingly, the Third Respondents, as the joint official liquidators, also have no claim to make. That leaves only the Fourth Respondent to consider.

88. The definition of "Receivership Assets" in para. 41 of the order of the Illnois Court on 27 September 2012 is potentially wide ("*all the funds, properties, premises, accounts, businesses, partnerships, sole proprietorships and any other kinds of assets directly or indirectly owned, beneficially or otherwise, managed or controlled by the Defendants, whether held in their own names or in the names of others*"). In Advocate McGuffin's submission, because there is an argument that Mr Battoo controlled the Eighteenth Respondent, there is also an argument that account numbered 797550 falls within the definition of "Receivership Assets". However, there is nothing in the evidence that persuades me that UCA was a victim of the fraud being conducted by Mr Battoo and his associates. Indeed, I consider the position is actually the opposite. In reaching that conclusion, I do not think that I have conducted any mini-trial of a type I have to avoid, but rather have looked at Mr Kane's factual assertions in the light of all the material available about UCA and the Eighteenth Respondent and have decided this is the type of situation where it is appropriate to "*grasp the nettle*". The evidence given on behalf of the Ninth Respondents satisfies me that UCA was making a bona fide investment. Some of the funds it invested in September 2008 are now represented, through an unbroken chain, in account numbered 797550 in the name of the Eighteenth Respondent. In my judgment, the Fourth Respondent cannot assert any ownership claim on behalf of Mr Battoo or any of the other CFTC Defendants. The role of the Fourth Respondent is to stand in the shoes of the CFTC Defendants, which is different from spreading its net as widely as might be the case if there were proceedings seeking the forfeiture of all the proceeds of Mr Battoo's offending, whether through the criminal or civil law processes available. Accordingly, by reference to the first limb of the test in the *OJSC Oil Company* case (*supra*) I am satisfied that the Fourth Respondent is unable to assert a proprietary claim over account numbered 797550.

89. For these reasons, I have concluded that the test in rule 19(2)(a) of the 2007 Rules has been met by the Eighteenth Respondent. I will return to the question of whether there is any compelling reason why that claim should proceed to trial once I have considered the position of the other Respondents and whether they have also demonstrated that the First to Fourth Respondent have no real prospect of succeeding on their claims.

Position of Direct Investors

90. The next category of claims made by the Ninth Respondents relate to those investors they have called "Direct Investors". This covers all those who invested otherwise than through Alliance. It extends to the remainder of the investments made by UCA, those made by Oxford and investors such as Mrs Van Dyke who transferred funds directly rather than them passing through an Alliance account. Because Advocate Field drew a distinction between this category of investors and the rest, I will also deal with them separately.

91. The analysis undertaken by Mr Keeble-Buckle of the movement of UCA's funds into what is now account numbered 790400 in the name of the Fourteenth Respondent shows that the only investments resulting in the current balance on that account derive from UCA. To that extent, the basis for any of the First to Fourth Respondents asserting any proprietary claim to those monies is potentially no different from that of the Eighteenth Respondent and its account numbered 797550. Advocate Field therefore submits that this account can properly be ring-fenced and that judgment in respect of it could be entered in favour of the Fourteenth Respondent against the First to Fourth Respondents.

92. A similar process of analysis of the other accounts where it can be shown that the First to Fourth Respondents have the same difficulty of someone else being able to present an unbroken chain of substitutions from the making of their investment into the whole or an ascertainable percentage of the balance of the account in question potentially leads to a similar conclusion, namely that the First to Fourth Respondents are unable to make any recognised claim to those particular amounts. This is, of course, clearest in relation the Tenth Respondent's account numbered 769280 in respect of part of the investment made by Oxford, where Mr Chilton's Sixth Affidavit explained that there was no apparent connection to, or involvement in that investment by, Mr Battoo.

93. The highest that Advocate McGuffin is able to put the case on behalf of the First to Fourth Respondents is to point to the fact that these Direct Investors' monies have been comingled with those from other investors and that the accounts in question into which those original investments can be traced are just part of the overall assets of each of the Respondents in question. Putting it another way, a distinction can be drawn between the position of the Eighteenth Respondent and the other Respondents because the only source of the entirety of the assets of the Eighteenth Respondent was UCA and, in the hands of the Eighteenth Respondent, there has been no comingling. Accordingly, for this reason, he submits that the First to Fourth Respondents can show sufficient cause for the summary judgment Application to be dismissed.

94. Without in any way underestimating the likely difficulties the First to Fourth Respondents will have in maintaining a proprietary claim in respect of those elements of the Assets held in accounts in the names of the other Respondents that came from Direct Investors, I have concluded that Advocate McGuffin's submissions have sufficient merit that the Application cannot be granted in the fashion advanced by the Ninth Respondents. The difficulty I perceive at this stage is that there appears to have been insufficient analysis of whether the competing claims inevitably mean that there is some overlap or no overlap. That is something that can only be resolved through the type of detailed consideration that has been given to the positions of investors such as UCA and Oxford. Even in respect of them, on the material provided and the submission made I cannot conclude that there is only a fanciful prospect of any of the First to Fourth Respondents succeeding.

95. In that regard, I have reminded myself that I am not being asked to reach a summary determination using the normal civil standard of proof on a balance of probabilities. As it was put by Lord Hobhouse of Woodborough in *Three Rivers District Council v Bank of England (No. 3)* [2001] 2 All ER 513 (at para. 158), "*The criterion which the judge has to apply under CPR Pt 24 is not one of probability; it is absence of reality*". On the evidence adduced in support of the Application and in opposition to it, simply on the balance of probabilities, I would have been minded to decide that all of the First to Fourth Respondents had failed to persuade me to the requisite standard that any of them has a valid claim to any part of the Assets shown to have been derived from Direct Investors. For example, applying the balance of probabilities, I would have been satisfied that the credit balance on the account numbered 769280 in the name of the Tenth Defendant is not a part of the Assets over which the First to Fourth Respondents are able to assert any claim. However, I am not currently engaging in an exercise of summary determination pursuant to rule 27 of the 2007 Rules, but the Application for summary judgment on the basis of the test in rule 19. There may be more that the First to Fourth Respondents would be able to say on a final determination of the proceedings, whether summarily or otherwise, and it would be wrong for me to deprive them of the chance to articulate that case. It is important that I remind myself that on a summary judgment application, all they have to do is show cause and not to defeat the claim by establishing that the balance of probabilities tips in their favour.

96. In that regard, I consider the guidance offered in the speech of Lord Hope of Craighead in the *Three Rivers* case (*supra*, at para. 95) to be useful to follow:

> "*… it may be clear as a matter of law at the outset that even if a party were to succeed in proving all the facts that he offers to prove he will not be entitled to the remedy that he seeks. In that event a trial of the facts would be a waste of time and money, and it is proper that the action should be taken out of the court as soon as possible. In other cases it may be possible to say with confidence before trial that the factual basis for the claim is fanciful because it is entirely without substance. It may be clear beyond question that the statement of facts is contradicted by all the documents or other material on which it is based. The simpler the case the easier it is likely to be take [sic] that view and resort to which is properly called summary judgment. But more complex cases are unlikely to be capable of being resolved in that way without conducting a mini-trial on the documents without discovery and without oral evidence. As Lord Woolf MR said in Swain's case [2001] 1 All ER 81 at 95, that is not the object of the rule. It is designed to deal with cases that are not fit for trial at all.*"

97. Although I can see a clear line of reasoning and analysis on the evidence thus far in favour of treating the funds clearly identified as coming from sources such as UCA and Oxford, and the other investors to whom the label of Direct Investor has been applied, as being beyond the reach of any of the First to Fourth Respondents, I cannot at this stage say with confidence that the factual basis on which the First to Fourth Respondents collectively assert proprietary claims to those parts of the Assets in the accounts of the Fifth to Eighth and Tenth to Fifteenth Respondents is without substance. Even on the clearest examples, from the Scott Schedule I can see that account numbered 769280 is one of five accounts at the Bank in the name of the Tenth Respondent and account numbered 790400 is one of three accounts in the name of the Fourteenth Respondent. The Eighth Respondent does have only a single account with the Bank numbered 702344 and, from his analysis, Mr Keeble-Buckle says that the balance in that account can be traced to UCA. However, unlike in the case of the Eighteenth Respondent (and even the Fourteenth Respondent), the documents exhibited do not include any bank statement, meaning that I am left wondering if the matching exercise works in the same way. Any suggestion that the position of the Eighth Respondent was distinct was not highlighted in Advocate Field's written and oral submissions and only arose subsequently. Advocate McGuffin has indicated that the First to Fourth Respondents will assert an entitlement to the entirety of the assets of each of those Respondents on the basis that they represent the residue of the investments fraudulently taken.

98. What remains unclear to me at this stage is whether the mathematics entitle them to do so. At face value, Mr Kane has referred to some US$83 million of the investors' monies having been paid through the First or Second Respondent to Alliance and on to the Respondents now represented by the Ninth Respondents. Once an allowance is made for the contents of the account of the Eighteenth Respondent, the remainder of the Assets are now less than £13 million. If I have understood the claims of the First to Fourth Respondents properly, if they can show that all of those funds remaining represent funds tainted by the fraud perpetrated by Mr Battoo and his fellow conspirators, they are in a position to argue that there can be tracing or following into the accounts at the Bank.

99. Further, the evidence adduced on behalf of the Ninth Respondents does not satisfy me to the high level required that it is clear beyond question that the First to Fourth Respondents are unable to claim to be entitled to pursue these claims. If the scale of the fraud can be shown, for example, to have infected the assets in the accounts of the Tenth and Fourteenth Respondents, and even the Eighth Respondent, to the extent that the full amounts credited to them might be subject to such claims, further argument will be needed to resolve whether the tracing exercise of whichever of the First to Fourth Respondents it is that can pursue that route prevails over the type of tracing being conducted in respect of any investor who falls into the category of the Direct Investors.

These matters have not been addressed in Mr Kane's evidence or in Advocate McGuffin's submissions because the Application for summary judgment is not the place in which to tackle those issues. All the First to Fourth Respondents have been required to do is to point out why the high barrier for summary judgment has not been crossed by the Ninth Respondents.

100. In reaching this conclusion, I acknowledge that the position of the First to Fourth Respondents has only just moved above what I would regard as "merely arguable" and that I have adopted a negative approach to the question of whether the prospects of success are real or not. In effect, I have tested my conclusions against the alternative test from the ***Tchenguiz*** case (*supra*) and decided that I cannot say that the Ninth Respondents have persuaded me that the claims made by the First to Fourth Respondents are "*bound to fail*". I have already expressed my reservations about the precarious position of the First to Fourth Respondents in respect of the investments made by the Direct Investors but have decided that the Application in respect of them cannot be granted in the way suggested by Advocate Field for the reasons just given. I cannot properly conclude that individual accounts or percentages of those accounts can be ring-fenced and removed from the potential reach of the First to Fourth Respondents without first giving them a better opportunity than they are afforded on a summary judgment application to advance their claims more fully than they have been.

101. The position of the First to Fourth Respondents, however, has not been assisted by the apparent unwillingness of Mr Kane to descend into detail in respect of this category of investor. His Sixth Affidavit singularly failed to address the detail given in Mr Chilton's Sixth Affidavit about UCA and Oxford. Instead, Mr Kane chose to highlight that payments totalling US$2.4 million were made to UCA through Alliance, but without responding to the facts given by Mr Chilton about the payments in made by either UCA or Oxford. Because Mr Kane, on behalf of the First to Fourth Respondents, did not challenge the evidence of Mr Chilton (or the additional analysis given in Mr Keeble-Buckle's Affidavit) I have treated it as having been accepted. If Mr Kane had agreed with it, then it would have been of more assistance to the Court if he had said so in his evidence expressly. I regard it as unsatisfactory in a case of this nature, where there are competing claims being made by persons who are representing the interests of others rather than their personal interests, for the Court to be left guessing at what factual position is being adopted by any party.

Other investors

102. Having reached the conclusion I have about the Direct Investors, it follows that I have also concluded that I must dismiss the Application in respect of all but the Eighteenth Respondent for similar reasoning. The only difference here is that the First to Fourth Respondents potentially have an easier route towards identifying that the property to be traced passed through the ownership of the First Respondent (or possibly the Second Respondent). This is a consequence of the terms of the arrangement with Alliance.

103. Those terms are set out in a document dated 10 March 2004 exhibited to Mr Kane's Fifth Affidavit (at pages 727-729 of the exhibit). This appears to be an agreement between the First Respondent and Alliance under which the former establishes with Alliance an Investment Services Account for the investment management of the assets of the First Respondent. The implication, therefore, is that the funds placed into an account of the First Respondent with Alliance are prima facie owned by the First Respondent. For the purposes of this summary judgment Application, I have to accept that inference. Accordingly, there is the potential for the First to Fourth Respondents to develop a case with prospects that are more than fanciful or merely arguable, and so real, that the First Respondent can show ownership of the funds passing through Alliance, thereby satisfying the first limb of the test in the ***OJSC Oil Company*** case (*supra*).

Once the First Respondent does this, the positions of the Third and Fourth Respondents crystallise. Although less clear on the evidence adduced thus far, there is a suggestion that the Second Respondent's position can be equated to that of the First Respondent, with similar consequences for the Third Respondents. When combined with the general submission of Advocate McGuffin that the fact of comingling taints the funds that remain in the accounts at the Bank, these facts are sufficient to defeat the Ninth Respondents' Application in respect of all but the Eighteenth Respondent.

Compelling reason for trial

104. Having concluded that the only element of the Application pursued by the Ninth Respondents to satisfy the requirement that the First to Fourth Respondents all have no real prospect of succeeding is in respect of the Eighteenth Respondent, I now need to consider the second limb of the test in rule 19 of the 2007 Rules.

105. In summary, the submission of Advocate McGuffin on this question is that, because of the overwhelming spectre of a substantial international fraud hanging over the entirety of the Assets at the Bank, there must be a compelling reason for the whole of the case to go to trial. He further suggests that the Court can properly take into account that sophisticated fraudsters tend to hide matters of evidence meaning that a full investigation at trial is required. However, in relation to the evidence of what has happened in respect of the investment of UCA into what is now in the Eighteenth Respondent's account numbered 797550, I take the view that I can disregard that submission because there is and has been such a close and careful analysis of the movement of funds that satisfy me that this part of the Assets is not tainted in the same way as other elements of the Assets may be.

106. In this regard, I have taken into account the guidance offered in cases from England and Wales, which I consider can properly be followed in Guernsey. I accept that I should be alert to whether in respect of this case, or this particular claim, in the words of Henderson J in *Global Marine Drillships Limited v Landmark Solicitors LLP* [2011] EWHC 2685 (Ch) (at para. 56), "*there may be a good deal more to it than meets the eye*". I also accept that in cases involving allegations of serious fraud or dishonesty, obvious caution ought to be exercised before giving summary judgment and that, generally, conclusions on such issues ought to be reached at trial (see, eg, *Wrexham Associated Football Club Ltd v Crucialmove Ltd* [2006] EWCA Civ 237, as explained by Gross J (as he then was) in *Antonio Gramsci Shipping Corporation v Recoltetos Ltd* [2010] EWHC 1134 (Comm)).

107. As those cases also demonstrate, each case coming before the Court on an application for summary judgment has to be determined in the light of its own facts and by having regard to all the relevant material put before the Court in support of and opposition to the application. It has not passed unnoticed that the First to Fourth Respondents eventually agreed to the removal of the Sixteenth and Seventeenth Respondents as parties to these interpleader proceedings. Albeit rather a slow process, this indicates that the First to Fourth Respondents are able to recognise that they cannot assert claims broadly over every aspect of what might or might not have been touched by Mr Battoo's dealings. I have, therefore, asked myself whether, in the cool light of day, the First to Fourth Respondents would realise that the Eighteenth Respondent falls into that category. In doing so, I have considered carefully the evidence given by Mr Kane on behalf of the First to Fourth Respondents in opposition to the Application pursued by the Ninth Respondents in order to decide whether the Ninth Respondents have satisfied me that there is no compelling reason why this claim should only be disposed of at trial rather than summarily.

108. As I have already indicated, I take the view that it is important to consider each claim made by a Respondent now represented by the Ninth Respondents distinctly from each of the other claims. It has only been through that process that I have concluded that the claim of the Eighteenth Respondent satisfies the test in rule 19(2)(a) of the 2007 Rules. Had I adopted the approach that Mr Kane seems to wish to take, I would have treated all the Respondents represented by the Ninth Respondents indiscriminately and dismissed the Application in its entirety. In my judgment, Mr Kane, and so each of the Third and Fourth Respondents, is wrong to approach matters in that broadbrush way. Mr Kane had the opportunity to respond more fully than he chose to in relation to the evidence given by Mr Chilton in his Sixth Affidavit. The evidence setting out the transactions that have resulted in the balances in the Eighteenth Respondent's account numbered 797550 given in Mr Keeble-Buckle's Affidavit could have been commented on if it were suggested on behalf of the First to Fourth Respondents that there are flaws in what is contained in that Affidavit. In the absence of any adverse comment, I have accepted them at face value. Because they demonstrate that the origins of the funds is traceable from UCA into what is now in the account in question, all of which has been shown to be as a result of bona fide investments made by UCA outside the ambit of any fraudulent activity of Mr Battoo or his associates, I do not regard the circumstances as establishing a compelling reason for a trial. There are no grounds for denying the Eighteenth Respondent summary judgment in its favour. If there is more to this series of transactions than meets the eye, I take the view that Mr Kane should have explained what those other matters are. It is not sufficient for him to rely on the possibility of something turning up. These proceedings have been in train for over a year and anything that might turn up should have been discovered and disclosed by him by now. Instead, Advocate McGuffin has been forced to rely on generalisations when the evidence on behalf of the Ninth Respondents paints a different picture. Accordingly, the full test in rule 19(2) has been satisfied by the Eighteenth Respondent.

Conclusion

109. Although rule 19 of the 2007 Rules leaves the Court with a discretion as to whether or not to grant summary judgment, it is clear to me that I should exercise that discretion in favour of awarding judgment against the First to Fourth Respondents and in favour of the Eighteenth Respondent's claim to the funds in account numbered 797550 for the reasons set out above. However, that is the only element of the Application I will grant and the claims of the remainder of the Respondents will proceed to trial.

110. The Application of 15 January 2014, which I directed on 28 February 2014, should be determined as if it were an application for summary judgment, therefore, is granted in part. Judgment in respect of the entirety of account numbered 797550 at the Bank in the name of the Eighteenth Respondent is given in favour of the Ninth Respondents in their capacity as liquidators of the Eighteenth Respondent, and so also in favour of the Eighteenth Respondent. Aside from any costs consequences, including those relating to the costs of the Bank, that will mean that the Eighteenth Respondent will cease to be an active party in the interpleader proceedings. I would ask Counsel to attempt to resolve those issues between themselves or to make any application considered to be needed as soon as possible.

111. Unless either side wishes to apply now for a costs order in respect of the remainder of the Application where the Ninth Respondents have been unsuccessful, I would be minded to reserve those costs to await the conclusion of the proceedings.

112. Having decided that summary judgment cannot be entered as sought on behalf of the other Respondents represented by the Ninth Respondents, it is important that progress is made towards a trial. I am conscious that other interlocutory applications still fall to be determined but would

encourage all Counsel to address their minds as to how to progress the competing claims to a conclusion. If there were to be agreement to use the summary determination route under rule 27(2) of the 2007 Rules for any of the claims then, following the approach set out in the commentary to Order 17, r. 5 at para. sc17.5.3 of the *White Book*, to which I have already referred, there would still need to be some case management directions given. I would therefore hope that a procedural timetable for the way forward can be agreed or further directions given within a reasonably short period of time and ideally so as not to lose impetus over the Court's vacation period.