



**EFG Private Bank (Channel Islands) Ltd v BC Capital
Group SA (In Liquidation)**
Royal Court
25th February 2016

**JUDGMENT
5/2016**

Application for summary judgment

**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 AND TENTH TO FIFTEENTH 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)

Respondents

Fifth to Fifteenth Respondents’ application for summary judgment as against First to Fourth Respondents

Hearing date: 20th October 2015
Judgment delivered: 20th October 2015
Reasons handed down: 25th February 2016

Before: Richard James McMahon, Esq., Deputy Bailiff

Advocate for the Fifth to Eighteenth Respondents: Advocate R A Field
The First to Fourth Respondents were not represented and did not attend
The Advocate for the Interpleader Applicant/Bank was excused attendance

Cases & Materials referred to:

The Royal Court Civil Rules, 2007
The Civil Procedure Rules 1998 (the *White Book*)
Easyair Limited (t/a Openair) v Opal Telecom Limited [2009] EWHC 339 (Ch)
Musa Holdings Limited v Newmarket Holdings (Guernsey) Limited [2013-14] GLR 445
Credit Suisse Intl v Ramot Plan OOD [2010] EWHC 2757 (Comm)
Three Rivers District Council v Bank of England (No. 3) [2001] 2 All ER 513

Introduction

1. By an Application dated 9 April 2015, the Fifth to Fifteenth Respondents, effectively acting through the Ninth Respondents, sought summary judgment pursuant to rule 19 of the Royal Court Civil Rules, 2007 to be entered in their favour “*in respect of the accounts identified in the affidavits of Laurent Keeble-Buckle*”. At the hearing of this Application on 20 October 2015, Advocate Field appeared on behalf of the Fifth to Fifteenth Respondents but no one attended on behalf of the First to Fourth Respondents. There had been correspondence received before that date from Brick Kane, one of the Third Respondents and the principal of the Fourth Respondent, explaining that the Advocates previously representing the First to Fourth Respondents were no longer instructed and he was not in a position to attend or to arrange for anyone else to appear on their behalves. In those circumstances, I considered it appropriate to permit the Fifth to Fifteenth Respondents to pursue their Application in the absence of the First to Fourth Respondents. I was satisfied that the First to Fourth Respondents had been given ample opportunity to show cause against the Application. There was also no application made for any adjournment. I had excused the attendance of the Interpleader Applicant on the basis that the primary dispute as to who owns the assets in the accounts held with it has always been between the two groups of Respondents.
2. At the conclusion of the hearing, I was satisfied that the Fifth to Fifteenth Respondents were entitled to the summary judgment they sought and so granted the Application. I outlined my reasons for doing so and indicated that I would, when time permitted, provide those reasons in written form, particularly because the First to Fourth Respondents should understand the basis for the decision I had taken. This judgment now sets out those reasons.

Background

3. The interpleader proceedings were commenced in March 2013. I have given a number of judgments in the matter which set out the history at the various stages that the proceedings had reached. I do not need to repeat that background here because this judgment must be read in the light of those previous decisions. In particular, on 14 July 2014 I gave detailed reasons for granting in part a previous application for summary judgment made against the First to Fourth Respondents. That judgment can, I think, be regarded as the springboard from which this further Application has been mounted and there is a high level of read-across from the approach I set out in that decision to what followed in relation to this Application. That previous decision resulted in the Eighteenth Respondent being released from the proceedings. The original Sixteenth and Seventeenth Respondents had also ceased to be parties before then, which is why the interpleader proceedings now only have 15 Respondents.
4. Advocate Field referred to the passages in that previous decision where I had declined to award summary judgment in respect of assets emanating from investors who were given the description “*Direct Investors*” because I was not satisfied that the evidence adduced at that time was sufficient. At para. 100, having noted that the position of the First to Fourth Respondents had only just taken them above having a merely arguable case, I stated that:

“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.”

Instead of awaiting the trial to see whether that could be done, the Fifth to Fifteenth Respondents have chosen to re-visit and develop the evidence adduced through more detailed analysis of the position of the accounts of some of these Respondents. That was an option that was available to them. It was the approach that had been taken previously in respect of the account of the Eighteenth Respondent, which was the element of the previous application for summary judgment that I had granted.

5. The evidence adduced by the Fifth to Fifteenth Respondents in support of the present Application was contained in the First Affidavit of Nathan Stubing sworn on 16 April 2015 and the Second to Eighth Affidavits of Laurent Keeble-Buckle. The Second and Third Affidavits were sworn on 14 April 2015. (The Second Affidavit complies with the technical requirements of rule 21 of the 2007 Rules.) The Fifth, Seventh and Eighth Affidavits were sworn on 24 April 2015. The Fourth Affidavit was sworn on 28 April 2015. The Sixth Affidavit was sworn on 1 May 2015. Mr Keeble-Buckle’s Second Affidavit helpfully offered a summary of the position of the Fifth to Fifteenth Respondents and explained generally the approach that he had taken to the accounts, which he then dealt with in detail in his Third to Eighth Affidavits. I will return to this evidence in due course. Advocate Field also referred to the material that had been provided to the Court previously, in particular by Hadley Chilton, one of the Ninth Respondents. Mr Chilton had initially set out the entitlement of the Fifth to Fifteenth Respondents (and also the Sixteenth to Eighteenth Respondents who were at the time parties to these proceedings) to the assets held at the Interpleader Applicant. His Fifth Affidavit sworn on 19 March 2014 in support of the previous application for summary judgment was also relied on.
6. Advocate Field reminded me of the way in which the First to Fourth Respondents had articulated their adverse claims in the evidence of Mr Kane and also how, in accordance with the Court’s directions, the First to Fourth Respondents had been required to plead their case as if they were the Plaintiffs seeking to wrest away ownership of the assets from the Fifth to Eighth and Tenth to Fifteenth Respondents, who, it had been accepted, had prima facie established legal ownership of them. Because the First to Fourth Respondents had not adduced any evidence against that adduced in support of the Application, Advocate Field submitted that the Court should assess the prospects of success against the way the First to Fourth Respondents’ adverse claims to the assets had been set out in this material.
7. One issue that arose at the outset of the hearing on 20 October 2015 was how to deal with the First Affidavit of Mr Stubing. That Affidavit contained material relating to an account of the

Fifteenth Respondent. The analysis undertaken was very much the same as had been undertaken by Mr Keeble-Buckle in respect of other accounts of other Respondents. It purported to explain that the account had been operated in such a way that any claim to the balance of US\$111,279.09 made by any of the First to Fourth Respondents had no real prospect of success. The difficulty faced by Advocate Field, though, was the express wording of the Application, which referred only to “*the accounts identified in the affidavits of Laurent Keeble-Buckle*”. When Advocate Field applied to amend the Application, I declined to permit him to do so in the absence of anyone from, or on behalf of, the First to Fourth Respondents. Albeit that this outcome may appear harsh, I took the view that I should be scrupulously fair to the First to Fourth Respondents. They were aware of the terms of the Application and had chosen not to attend in the knowledge that the Application could be pursued in their absence. However, even though a copy of the First Affidavit of Mr Stubing had been supplied, this was outside the terms of the Application with which the First to Fourth Respondents had been served and I took the view that any amendment to that Application would have to be notified to them before it could be pursued in their absence. In my view, to have acted differently would have offended against the principles of natural justice. In those circumstances, Advocate Field did not push the matter recognising that if the Application succeeded, it would be simple enough to bring a further application in a similar way referring to the evidence relating to this account of the Fifteenth Respondent.

The law

8. In the judgment of 14 July 2014 I had addressed the jurisdictional argument raised on behalf of the First to Fourth Respondents by Advocate McGuffin. In the absence of any argument suggesting that I had erred in my conclusions that this Court had jurisdiction to entertain a claim couched in terms of an application for summary judgment, I am content that the Court could properly consider the Application in the same way as it would an application pursuant to rule 19 of the 2007 Rules.
9. The test in that rule requires an applicant to demonstrate that the respondent has no real prospect of succeeding on the claim or issue and that there is no other compelling reason why the claim or issue should be disposed of at trial. The burden lies on such an applicant and it is a high threshold to surmount. The consistent approach taken by this Court has been to refer to the guidance offered in *The White Book* on the equivalent provision in Part 24 of the *Civil Procedure Rules*. I still regard it as helpful to refer to how Lewison J (as he then was) summarised the applicable considerations in *Easyair Limited (t/a Openair) v Opal Telecom Limited* [2009] EWHC 339 (Ch) (at para. 15):

“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."*

10. I am conscious, however, that in Musa Holdings Limited v Newmarket Holdings (Guernsey) Limited [2013-14] GLR 445 (at para. 14) Beloff JA quoted similar guidance offered by Hamblen J in Credit Suisse Intl v Ramot Plan OOD [2010] EWHC 2757 (Comm) (at para. 24), albeit that this is said to be applicable where there are disputed issues of fact, which is not the case here. In those circumstances, whether this summary from the Easyair case is the most appropriate to cite might be open to question. In any event, the principles for this Court to apply are now well-established and the summaries are, in my view, substantively no different, at least as to how to approach the present Application. I have also reminded myself that Lord Hobhouse of Woodborough in Three Rivers District Council v Bank of England (No. 3) [2001] 2 All ER 513 (at para. 158), succinctly points out that "*The criterion which the judge has to apply under CPR Pt 24 is not one of probability; it is absence of reality*".

Facts

11. As Mr Keeble-Buckle explains in his Second Affidavit, since mid-2014 he had been asked by the Ninth Respondents to analyse fully the flow of funds into and out of other accounts held at the Interpleader Applicant in a similar fashion to the exercise he had undertaken in his First Affidavit in respect of the Eighteenth Respondent (the details of which I gave in the judgment of 14 July 2014). In doing so, he had been able to identify for certain of the individual share classes all of the investments made into that share class; the investors who made those investments; the amounts transferred from and to other share classes and within the various accounts, which he terms "*inter-fund and intra-fund transfers*"; all redemptions made and who has the ultimate entitlement to the assets of that particular share class. He was able to draw a distinction between those investors who had invested through Alliance Investment Management Limited (hereafter referred to as "*Alliance*") and all other investors, to whom he has continued to give the description "*Direct Investors*". Those Direct Investors had invested into the hedge funds either directly or through an intermediary. However, none of the intermediaries is any of the First to Fourth Respondents or the Defendants in the action

brought in the United States of America by the Commodity Futures Trading Commission (hereafter referred to as “the CFTC Defendants”). He suggested that his analysis demonstrated that none of the Direct Investors had utilised what Mr Kane had referred to as PIWM and PIWM-I, whether that was as an international wealth management concept, a service mark or a trade mark. Accordingly, the investments made were capable of being shown to be entirely separate from any investors who had invested under the auspices of PIWM or PIWM-I.

12. By way of further general explanation, Mr Keeble-Buckle explained that most of the Hedge Funds had been separated into sub-funds, which were also known as share classes. Each share class was found to contain a separate group of individual investors who benefit from the investments made by that particular share class in accordance with the relevant private placement memorandum associated with that share class. A share class would have its own bank account. He infers that this was done to ensure that investors’ money and financial transactions were kept segregated. The fund administrator would periodically reconcile transactions on the bank account to the financial records of the share class concerned. Mr Keeble-Buckle also concluded that the detailed analyses he had undertaken had not shown any evidence that the investments made by the Direct Investors were ever owned by any of the First to Fourth Respondents or any of the CFTC Defendants. As such, he suggests that the Ninth Respondents, on behalf of the companies in liquidation in the British Virgin Islands, are the only persons to have a claim to the portion of the assets held at the Interpleader Applicant which is attributable to the Direct Investors and so distributable to them.
13. Each of Mr Keeble-Buckle’s other Affidavits explains that he has had information from Folio Administrators Limited (hereafter referred to as “Folio”) detailing the process by which funds were paid in and out of the bank accounts of the various share classes. Mr Keeble-Buckle has exhibited the relevant bank statements for each account with which he deals and the various investor transaction reports in respect of each share class. He has conducted an analysis in considerably more detail than the briefer summaries that follow. I had full regard to the entirety of each Affidavit and the materials exhibited. However, because of the similarities between the approaches taken in respect of each share class, I do not feel it necessary to descend into the level of detail provided in the judgment of 14 July 2014 in respect of each account.
14. Mr Keeble-Buckle’s Third Affidavit deals with an account numbered 769280.120.7 in the name of the Tenth Respondent, FuturesOne Diversified Fund Limited (in liquidation), with the identification that it relates to share class L (abbreviated to “FODF-L”). Each of the share classes of the Tenth Respondent contained its own investors and investments in accordance with a private placement memorandum associated with the respective class. The sole investor in FODF-L was Oxford Fund Limited, an entity mentioned in the previous application in Mr Chilton’s Sixth Affidavit, in which he had confirmed that he could “*categorically state that [the owner] is not Nikolai Battoo, any R1 or R2 entity, any of the CFTC Defendants or Alliance*”. This investment of US\$20 million is shown on the bank statements exhibited to Mr Keeble-Buckle’s Third Affidavit. The funds were received into the account on 22 February 2008. The funds received were invested into Santa Clara II Fund. The analysis of Mr Keeble-Buckle demonstrates that a final distribution was received from the liquidators of the Santa Clara II Fund on 1 September 2010. There was a significant loss on this investment. The shares acquired cost US\$19,751,100 and the return was only US\$1,746,062. The other movements on the bank account relate to the costs of this fund and inter-fund payments made within the Tenth Respondent’s other share class accounts, also in respect of costs. All the transactions have been accounted for and related to the normal course of business for a hedge fund. Mr Keeble-Buckle further confirms that none of the recipients was any of the First to Fourth Respondents or Mr Battoo. The costs paid to others amounted to US\$341,925, which equates to 1.7% of the subscription received into FODF-L. The costs incurred relate to payments to lawyers, the fund administrator, the fund’s custodian, a financial services firm providing specialist advice and the operational costs, including the annual licence fee paid to the Guernsey Financial Services Commission. The net amount in costs paid to the other share classes of the Tenth Respondent was US\$61,199. The initial investment is also shown on the Tenth Respondent’s investor transaction report dated 13 November 2013 as having been made

via the custodian used by Oxford Fund Limited, BNP Paribas Bank and Trust Cayman Limited. The investment had initially been pledged to BNP Paribas Securities Corp, but was transferred by that entity in the name of Oxford Fund Limited on 1 November 2010.

15. Mr Keeble-Buckle’s conclusion was (at para. 22):

“FODF-L only ever had one investor, Oxford Fund, as evidenced by the subscriptions detailed in the EFG statements [and the investor transaction report]. It is clear from the bank statements that FODF-L held only one investment (Santa Clara), which performed extremely poorly, losing 91% of its value. The receipts into and payments out of FODF-L have been accurately accounted for and demonstrate that FODF-L was operating in a bona fide manner.”

16. Mr Keeble-Buckle’s Fourth Affidavit deals with two accounts numbered 718680.121.8 and 718680.122.6 in the name of the Fourteenth Respondent, Galaxy Fund, Inc. (in liquidation), with the identification that they relate to share class MCF. Each of the 16 credit entries on account numbered 718680.122.6 has a corresponding debit on the same date, except for a debit to Deloitte on 22 August 2007 which was credited on 18 and 20 September 2007. This suggests the account was not used for trading purposes. Each of the transactions is a duplicate of the same transaction in account numbered 718680.121.8. The balance at the date of the Affidavit was nil. There were two original investors into share class MCF. One was Silver Oak Fund Limited, the original Sixteenth Respondent, which ceased to be a party to these proceedings with effect from 11 April 2014, and the other was a person (referred to as “Investor 1”) in respect of which Mr Keeble-Buckle confirms that none of the ultimate beneficial owners/investors are any of the First to Fourth Respondents or the CFTC Defendants. Their respective investments of US\$520,000 and US\$488,000 were made on 1 September 2006. They received 520 and 488 shares respectively.

17. Between August 2006 and September 2008, the total subscriptions into the MCF share class were US\$25,207,421. Redemptions of just US\$1,056,464 (ie, around 4%) were made. Mr Keeble-Buckle’s analysis shows that some of the credits received into the account in respect of class MCF shares do not appear to have come directly from the investor. However, each of the other situations has been explained. One such category of the source of funds was when an investor redeemed an investment in another share class and reinvested the proceeds into the MCF class. The cash value of the redemption was simply transferred across and Mr Keeble-Buckle has verified the information from the details relating to the other share classes to identify the corresponding redemption. Because Investor 1 is the majority shareholder of Galaxy Capital Management, rather than take dividends, it used accumulated dividends in Galaxy Capital Management to make investments into certain share classes, including the MCF class. The Sixteenth Respondent was represented by Gallup International LLC and cash was transferred from that company into the account. In relation to redemptions, each investor save for one has been paid directly. The one investor who has been dealt with differently requested that the redemption payment be made to the fund administrator, Folio. UCA Ventures Limited (to which I referred in the judgment of 14 July 2014 and is hereafter referred to as “UCA”) is the second largest investor in share class MCF. Mr Keeble-Buckle has exhibited the bank statements on which credit and redemption figures are highlighted and has reconciled these with the investor transaction report relating to this share class.

18. There is an entry on the bank statement dated 7 June 2007 in respect of incoming funds of US\$32,400 from BC Capital Group Limited. Folio has explained that this was a contractual fee rebate from BC Capital Group Limited to investors who invested in the Phi R Squared Series II Fund Linked Certificates. This is set out in note 4 to the Financial Statements of the Fourteenth Respondent for the year ended 31 December 2007:

“During the period ended December 31, 2007, the Subfund received investment advisory fee rebates totaling [sic] \$32,400 from the investment advisor of its investment in the underlying fund. This amount is presented as other income in the income statement.”

19. The majority of the subscriptions received into the account were used to purchase Phi R Squared Series II Fund Linked Certificates. The total amount invested in those Certificates was US\$20,394,475. 1,666,000 shares in those Certificates were acquired in late 2007 from class C of the Tenth Respondent. A transfer payment of US\$2,137,478 was made on 15 January 2008. The Tenth Respondent's class C acquired 177,132 shares in the Certificates for US\$200,000 with the transfer being made on 27 May 2008. At the end of 2008, the Fourteenth Respondent decided to transfer its investment in the Certificates to class C of the Tenth Respondent and received 18,580.2139 shares in class C in exchange. Subscriptions and redemptions from class MCF were suspended with effect from 18 December 2008. This is a further example of an investment that performed poorly.
20. Mr Keeble-Buckle has identified payments that the Fourteenth Respondent made to other funds/share classes totalling US\$209,756 and that it received credits amounting to US\$31,996. Folio has explained that these relate to payments of operational costs by one share class and the reimbursement of those costs by other share classes in the fund. This was a common practice across the various share classes. One payment of US\$33,295 to lawyers was in respect of litigation seeking to recover the value of the investment in the Certificates, which resulted in a settlement with the proceeds having been paid out to the Fourth Respondent. The Ninth Respondents are still pursuing that issue through litigation elsewhere. He also notes that the class MCF account was used to receive a deposit of US\$20 million from UCA (as was described at para. 46 of the judgment of 14 July 2014) because an account in respect of class MM had not at that time been opened. The costs paid to others amounted to US\$487,770, which equates to 2% of the subscription received into class MCF. The costs incurred relate to payments to lawyers, the fund administrator, the fund's custodian and the fund's investment manager, the last of which charged fees in accordance with the offering memorandum for the share class.
21. Mr Keeble-Buckle's conclusion was (at para. 33):

“... whilst Galaxy MCF had a number of investors, the investment into which their subscriptions was placed performed very badly and indeed was the subject of subsequent legal action. The receipts into the share class and payments out have been accurately accounted for and demonstrate that Galaxy MCF was operating in a bona fide manner.”
22. Mr Keeble-Buckle's Fifth Affidavit deals both with the Tenth Respondent and with FuturesOne Innovative Fund SPC Limited (in liquidation), the Seventh Respondent. It explains the flow of funds into share class B (abbreviated to "FODF-B") of the Tenth Respondent and how the investments therein were transferred to its successor, Series B of the Seventh Respondent. Mr Keeble-Buckle explains that the Seventh Respondent is a Segregated Portfolio Company, which is akin to a protected cell company in Guernsey. In accordance with the corresponding private placement memorandum, FODF-B and Series B are made up of redeemable shares issued by each fund to its investors. An account numbered 702509.120.0 was opened at the Interpleader Applicant in May 2010 in the name of Series B. Previously, FODF-B held its own account numbered 763080.120.3. The bank statements in respect of it show a closing balance of nil in August 2010.
23. FODF-B received subscriptions of US\$3,943,013. This amount came from six investors identified by Mr Keeble-Buckle using numbers, together with Alliance. (There was also a previous custody account, which operated prior to the opening of the account for FODF-B in May 2005, from which approximately US\$700,000 came. However, the details of that previous custody account are no longer available.) Payments out of the account of FODF-B totalling US\$9,103,479 were made in respect of an investment in Efficient Diversified Fund SPC, an unrelated party. Redemptions of US\$3.5 million were received from Efficient Diversified Fund SPC. FODF-B also received subscriptions from related hedge funds. This operated in such a way that the investor of record was allotted the appropriate number of shares as was the case with any other investor. FODF-B also invested US\$1,100,144 into class ECM of the Fourteenth Respondent. There were investments of UCA in Phi R Series certificates where, as a result of *in specie* distributions, shares in FODF-B were held by Citco

Global Custody. Whilst FODF-B was operative, it incurred various costs, which Mr Keeble-Buckle suggests are in line with the ordinary course of business for a hedge fund. The total amount concerned was US\$746,016. FODF-B also made payments to other share classes or related hedge funds in respect of its shares of the operating costs and received payments from other hedge funds or share classes on a similar basis. The amount paid was US\$49,258 and the amount received was US\$84,897.

24. Prior to 1 May 2010, the directors of FODF-B decided to restructure so as to become part of a Segregated Portfolio Company. This restructuring was intended to provide additional protection for shareholders with the conversion of the share classes into legally segregated portfolios. As a result, FODF-B was closed on 1 May 2010 and all of its assets, liabilities and shareholdings were transferred to Series B. The persons holding FODF-B shares received a proportionate *in specie* subscription of shares in Series B. This is shown on the investor transaction report. Thereafter, an additional investor subscribed US\$350,000. The investment in Efficient Diversified Fund SPC performed relatively well. A total of US\$9,548,848 was received into FODF-B and transferred to Series B. The investor transaction report shows that some investors made gains. There were three redemptions of the investment relating to Alliance (in July and November 2010 and June 2011), which show that Alliance was one of those investors enjoying a gain. The final redemption meant that there was no longer any interest of Alliance in Series B. The costs of Series B were similarly affected by receipts and outgoings reflecting the arrangement under which costs would be invoiced and then shared among those share classes or hedge funds affected. The payments made out of the Series B account and the monies received were US\$33,812 and US\$15,883 respectively. Other costs incurred included payments made to Folio and also to Folio Corporate Services Limited in respect of administration services, payments to directors and auditors, and to the fund's investment manager and its banker and custodian. These aggregated to US\$383,421. The records for Series B show that there are three investors who wished to redeem, but have not been paid as well as the ongoing position of the custodian account of the former Eighteenth Respondent on behalf of UCA.
25. Mr Keeble-Buckle's conclusion was (at para. 47):
- “To assist with viewing the [sic] all the transactions within FODF B and FOIF SPC Series B as a whole, the consolidated receipts and payments account at page 34 illustrates that all cash has been accounted for, the majority of the subscriptions were used to fund the acquisition of investments which made a reasonable 27% return on investment and operating costs of 8% of subscriptions are reasonable. As a result I believe FODF B and FOIF SPC Series B were operating in a bona fide manner and I have not seen any evidence from the First to Fourth Interpleader Respondents or otherwise to the contrary.”*
26. Mr Keeble-Buckle's Sixth Affidavit deals with share class A of the Tenth Respondent (abbreviated to “FODF-A”) and its subsequent transfer to Series A, being one of the segregated portfolios of FuturesOne Diversified Fund SPC Limited (in liquidation), the Sixth Respondent. The Thirteenth Respondent, FuturesOne A Investment Limited (in liquidation) is a special purpose vehicle company and is a wholly owned subsidiary of Series A, as its register of shareholders demonstrates. It was set up for the purpose of holding investments of Series A. The Thirteenth Respondent opened account numbered 705941.120.8 at the Interpleader Applicant in July 2008. The Series A account of the Sixth Respondent is numbered 702498.121.0 and was opened in September 2011. Consistent with the approach Mr Keeble-Buckle has explained, the Tenth Respondent was established for the purpose of investing participant shareholder funds into diversified funds and was made up of different share classes as described in the private placement memoranda. Each share class has its own bank account and class A was no different. Its account was numbered 762970.120.9.
27. Subscriptions of US\$22,667,707 were made into FODF-A between August 2005 and June 2010. Just over half of this amount came from Alliance. There were six other sources of funds. Subscriptions of approximately US\$4.7 million had been received prior to August 2005, as shown on the investor transaction report exhibited. The investments came from four

sources, including Alliance. US\$24,422,719 was paid out of the FODF-A account for the acquisition of investments. That account received a total of US\$19,964,449 in redemptions. Once again, there were costs payments made to other share classes and receipts from other share classes relating to the operating costs of the funds. The amounts paid and received aggregated to US\$12,429 and US\$282,693 respectively. The total of other costs paid, the bulk of which went to Folio, was US\$2,215,779.

28. On 1 June 2010, FODF-A was closed and all of its assets and liabilities were transferred to Series A. At that time, Alliance received a redemption of US\$500,039. Following the transfer of shareholders' funds from FODF-A to Series A, which had a value of US\$13,154,740, the *in specie* subscriptions into Series A comprised five sources, one of which was Alliance. There were further subscriptions into Series A from one of those five investor sources (though not Alliance) in the autumn of 2010. Following the transfer of assets and liabilities from FODF-A to Series A, account numbered 702498.121.0 received from the FODF-A account numbered 762970.120.9 two transfers, as a result of which the FODF-A account balance reduced to zero. The Series A account received payments arising from disposals of assets between October 2010 and July 2012. Of the five investor sources, two of them, as well as Alliance, have redeemed their investments in Series A. The final redemption in respect of Alliance occurred in May 2012. Mr Keeble-Buckle notes that all but one of the redemptions to Alliance is also recorded as a corresponding cash debit entry from account numbered 702498.121.0. The sole outstanding redemption for Alliance was the result of Alliance gaining an *in specie* investment in the Sixth Respondent's Series A Special Situations, which was a new Series arising from the collapse of MF Global, Inc. The directors' resolution to establish this Special Situations class was, at least in part, designed to segregate illiquid assets so that the company could lift the suspension on the Series A net asset value, which had previously been a monthly exercise. As a result of this transfer, Alliance became a shareholder in the Special Situations class and was no longer interested in the shares that would otherwise have been in Series A. Once again, there are other details of transactions on the account summarised by Mr Keeble-Buckle, including intra-group investments that occurred after the transfer from FODF-A to Series A in 2010, each of which was subsequently redeemed. There were also inter-fund transactions, eg, the Thirteenth Respondent made a distribution to Series A as its sole shareholder of US\$1,699,585, and there were payments made from Series A as part of its share of the operating costs. The operating costs of Series A were US\$557,178 and those payments were similarly made *inter alia* to lawyers, the fund's administrator, its banker and custodian and in respect of directors' fees. The Thirteenth Respondent paid US\$2,300 to the company's banker and custodian.
29. After having explained through a table summarising the position in relation to the matters set out in his Sixth Affidavit that "*the majority of receipts were used to acquire investments which produced a net return of around 15% with the balance of cash used to meet the usual operating costs*", Mr Keeble-Buckle concluded (at para. 57):

"The transactions entered into by FODF-A, FODF SPC Series A and FOA have been properly accounted for and the in-depth analysis I have carried out demonstrates that they were all operating in a bona fide manner. I have not seen any evidence from the First to Fourth Interpleader Respondents or otherwise to the contrary."

30. Mr Keeble-Buckle's Seventh Affidavit deals with one of the segregated portfolios of the Seventh Respondent, FuturesOne Innovative Fund SPC Limited (in liquidation), known as Series F1. This segregated portfolio contains redeemable shares issued by the Seventh Respondent to its investors in accordance with a private placement memorandum. Four accounts were opened with the Interpleader Applicant in respect of Series F1. They are numbered 704258.121.0, 704258.220.9, 704258.131.8 and 704258.132.6. Of these accounts, the first was the fund's main account and the second appears to have been used alongside it, containing just three credits and three corresponding debits, resulting in Mr Keeble-Buckle describing its appearance as a form of "*suspense account*". The other two accounts had little activity and the fourth one appears to have been for currency trading. Series F1 received subscriptions in both US Dollars and Euros. Two investors, plus Alliance, participated. The subscription of Alliance was US\$950,000. Some of the shares of the two investors were held

through share class Series A of the Seventh Respondent. The majority of the subscriptions received were transferred to brokerage accounts with NewEdge USA LLC for the purpose of trading derivatives such as options, forwards and futures. The amounts standing in the accounts at NewEdge USA LLC at the end of October 2012 were seized by the Fourth Respondent and are now the subject of a dispute between the Ninth Respondents and the Fourth Respondent in the United States of America. Alliance redeemed its position in Series F1 by two redemptions. The first was in the amount of US\$750,000 on 1 October 2011 and the second related to the balance, being US\$134,374, on 1 January 2012, following which Alliance is no longer a participating shareholder in Series F1.

31. The position in relation to intra-fund transactions and costs resembles that of other funds covered in Mr Keeble-Buckle's evidence. For example, Series F1 paid a total of US\$36,945 to the Seventh Respondent's Series O in respect of operational costs of the Seventh Respondent as a whole. The costs paid by Series F1 amounted to US\$120,602 and these costs related to investment management fees, banking and custody charges, administration fees and annual fees payable to the Guernsey Financial Services Commission.
32. Mr Keeble-Buckle's conclusion was (at para. 25):

“In summary, as detailed above FOIF SPC Series F1 had only three investors, and of these Alliance's investment has been fully redeemed. All intra-fund transactions and costs have been accounted for, leaving only funds attributable to 'Direct Investors'. It is clear from the information I have received and reviewed that none of the ultimate beneficial owners of the Direct Investors in FOIF SPC Series F1 are any of the First to Fourth Interpleader Respondents, and neither are they Mr Battoo or indeed any of the CFTC Defendants.”

33. Mr Keeble-Buckle's Eighth Affidavit deals again with the Fourteenth Respondent, but this time in respect of share class MM. The sole investor into share class MM was UCA. An account numbered 790400.120.9 was opened in December 2008. As was touched upon in the judgment of 14 July 2014 (at para. 46), UCA invested US\$20 million on 29 September 2008, which was received into the account for share class MCF. US\$15 million, plus bank charges, was used to purchase the underlying investments of class MM on 30 September 2008. Those underlying investments comprised of a subscription into Phi R Series II investment certificates. The balance of the US\$20 million investment was transferred into the class MM account when it was opened on 1 December 2008. Class MM redeemed the Phi R Series II investment on 1 May 2009 for a cash settlement of US\$1,933,662, less the costs of US\$230,565, plus an *in specie* distribution of the securities that had been held in Phi R Series II. The book value of that distribution had been US\$13,355,233, but this was reduced upon receipt into class MM to US\$7,580,263 as a result of the investment's exposure to the Madoff fraud (see para. 47 of the previous judgment). Taking the *in specie* distribution avoided the necessity of cashing in those securities.
34. UCA also acquired shares in class C2 of the Fifth Respondent (as described at para. 48 of the judgment of 14 July 2015), which was dealt with in a similar fashion (see para. 49). When class C2 of the Fifth Respondent was closed, the sole shareholder, UCA, acquired a corresponding number of shares in class MM. The cash balance of almost US\$5 million in the class C2 bank account was transferred to account numbered 790400.120.9 in two tranches (US\$4,989,765 on 25 February 2009 and US\$3,817 on 9 November 2011). The fund's operating costs of US\$6,418 were settled from the account.
35. Once again, costs totalling US\$162,189 have been paid out of the class MM account, primarily to the administrator, Folio. There have also been intra-fund transactions, during which class MM received US\$9,990 and made payments to other share classes of US\$49,419.
36. As Mr Keeble-Buckle explains in his conclusions, this account numbered 790400.120.9 can be viewed similarly to the way I dealt with the Eighteenth Respondent in the judgment of 14 July 2014. His analysis of the class MM account has shown that there was a single investor and that *“The receipts into Galaxy MM and payments out have been accurately accounted for and demonstrate that Galaxy MM was operating in a bona fide manner”* (para. 33).

Discussion

37. When considering the explanations given by Mr Keeble-Buckle in his Affidavits, I have taken into consideration the way in which the First to Fourth Respondents have put their claims to these accounts and also how the analysis carried out by Penelope Cassell in her expert report dated 10 January 2014, on which those Respondents have been given leave to rely, corresponds to what Mr Keeble-Buckle has done. On Ms Cassell's own analysis, if it is possible to identify an investor whose funds have not been tainted in any way, the type of tracing claim on which the First to Fourth Respondents have to rely cannot be shown. The exercise involves looking at the source of funds, seeing if all the transactions on the account match and are explicable, eg, an investor paid in and took out monies, so that what is left in an account can properly be regarded as the remains of a legitimate investment by those investors who have not yet redeemed. In such a case, it is legitimate for the investor in question to argue that this exercise shows that that person is ultimately the only person with an interest in the asset in question. Accordingly, Advocate Field submitted that even on the material of the First to Fourth Respondents, the evidence now adduced by the Fifth to Fifteenth Respondents in the form of the analyses of Mr Keeble-Buckle, which has not been challenged, demonstrates that there is no real prospect of the adverse claims of the First to Fourth Respondents succeeding.
38. In each case, the question I have asked myself is whether the evidence defeats the suggestion on which the First to Fourth Respondents' claims are founded that the asset in question falls to be treated as an asset of the First Respondent or the Second Respondent because it has passed through Alliance. The way this was put is set out in the judgment of 14 July 2014 and I do not propose to repeat in these reasons the legal analysis I gave previously. It can be read into this judgment and, as Advocate Field accurately put it, the position of the First to Fourth Respondents has been even further clarified through the way in which they have pleaded their adverse claims in what became the Re-Amended Cause. The focus is very much on the alleged conspiracy claim. There was, therefore, a need for the First to Fourth Respondents to show that some property of the First or Second Respondent had somehow been taken from them. Accordingly, if I was satisfied that the link to Alliance could not be shown (or, perhaps more accurately and so as to reflect the burden of proof, that it did not exist at the time the interpleader proceedings commenced), that would mean that the comingling argument being used by the First to Fourth Respondents to assert their adverse claims had no prospect of success. Because each analysis undertaken by Mr Keeble-Buckle corresponded to the methodology Ms Cassell had used in her report, I accept the submission of Advocate Field that the First to Fourth Respondents could not argue that more evidence would be available at trial than has already been provided by Mr Keeble-Buckle.
39. I was satisfied to the requisite standard from Mr Keeble-Buckle's evidence that none of those who have an ongoing interest in the accounts with which he has dealt is associated with the CFTC Defendants.
40. I felt I could properly draw an initial distinction between the evidence where there was no mention at all of the spectre of Alliance and those share classes where Alliance was one of the sources of investment funds. In Mr Keeble-Buckle's Third, Fourth and Eighth Affidavits, there was no mention at all of Alliance. In those circumstances, it was easier to reach the conclusion that the way the First to Fourth Respondents were putting their claims had no impact on the future ownership of the assets in the accounts in question. This evidence satisfied me that Mr Keeble-Buckle had performed the type of analysis that had been commended in Ms Cassell's expert evidence to show that the various transactions on the accounts matched. Accordingly, I could safely infer that the First to Fourth Respondents had no real prospect of succeeding with the adverse claims they had advanced in relation to each of the accounts in question.
41. In respect of the Fourteenth Respondent's account to which reference was made in Mr Keeble-Buckle's Fourth Affidavit to the receipt of US\$32,400 from BC Capital Group Limited, I am satisfied this was a bona fide rebate in respect of investment advisory fees and so does not represent monies coming from an entity that might otherwise be regarded as tainting the balance sitting on that account. Just because there is a reference to "BC Capital

Group Limited” on the bank statement does not, of itself, mean that there is a real prospect (in the sense of there being more than a merely arguable case) that any of the First to Fourth Respondents could claim this amount as being their own or representing their property through a tracing exercise. There is a further question as to whether the Fourth Respondent has actually been appointed by the US court to act as receiver in respect of BC Capital Group Limited in any event. I was persuaded by the entry in the Financial Statements of the Fourteenth Respondent for the year ended 31 December 2007 and Mr Keeble-Buckle’s approach to this, that this receipt should not affect my conclusions about the reality associated with the prospects of success of the First to Fourth Respondents on their adverse claims.

42. Reference was made to Alliance in Mr Keeble-Buckle’s Fifth, Sixth and Seventh Affidavits. I reminded myself about how I had approached the submissions made on behalf of the First to Fourth Respondents by Advocate McGuffin, which I had taken into consideration before delivering the judgment of 14 July 2014 because, in the absence of any further representations made on behalf of those four Respondents, I considered it incumbent on the Court to put the Fifth to Fifteenth Respondents to proof as to their assertions that the adverse claims made had no prospect of succeeding. If the adverse claim was founded on showing that the First and/or Second Respondent had had property taken from it which can now be regarded as being in any of the accounts at the Interpleader Applicant, as I understood the case to be, and further that evidence demonstrating that funds had come into any of the accounts from Alliance, I was satisfied that the Fifth to Fifteenth Respondents could meet that case by showing that the persons with an ongoing interest in the assets still in the accounts were only persons who fitted into Advocate Field’s description of them as Direct Investors. Advocate Field submitted that, in a case where the detailed analysis of the transactions on a given account showed that the interest of Alliance (or those behind those funds having come through Alliance) had ceased, because the amount invested by, or through, Alliance, had been fully redeemed, the methodology adopted by Ms Cassell (and used by Mr Keeble-Buckle) was sufficient to prove that no one associated with the First to Fourth Respondents, or more widely the CFTC Defendants, could legitimately assert that the assets in the account could be claimed on behalf of either or both of the First and Second Respondents or by the Fourth Respondent in its capacity as Receiver appointed by the US court. I accepted that submission on the basis that the matching of transactions and the explanations contained in Mr Keeble-Buckle’s Affidavits persuaded me that each of the accounts in question could be shown not to have been tainted through the comingling to which Advocate McGuffin had previously referred. In particular, the transactions involving the investments sourced through the involvement of Alliance had been matched with returns made through the redemptions requested. Consequently, the investors with an ongoing interest in each of the accounts could make the same assertions as had been described by Ms Cassell to demonstrate that they were the only persons interested in the funds in each of these accounts. There was, therefore, no real prospect of the First to Fourth Respondents succeeding in their adverse claims.
43. I was satisfied from the seven Affidavits of Mr Keeble-Buckle that the Fifth to Fifteenth Respondents had satisfactorily demonstrated that the first limb of the test in rule 19(2) of the 2007 Rules had been met. In reaching that conclusion, because there had been no evidence from the First to Fourth Respondents, I was not engaging in any mini-trial. I had proceeded to consider what additional evidence might be capable of being adduced at trial and concluded that the analyses undertaken by Mr Keeble-Buckle were consistent with how Ms Cassell had suggested the facts could properly be analysed and that there was no reasonable expectation that further evidence would be available to the Court at trial. In those circumstances, I was prepared to accept that the first limb of the test had been passed, so I proceeded briefly to consider the second limb.
44. Because the First to Fourth Respondents had adduced no evidence, I needed to assess from the way the Fifth to Fifteenth Respondents had put their case whether I was satisfied that there was indeed no other compelling reason why the adverse claims should not be disposed of at trial. In that regard, I re-visited the submissions of Advocate McGuffin on the previous application for summary judgment to see whether anything said then could still apply now. At para. 105 of the judgment of 14 July 2014, I mentioned his submission that there was an *“overwhelming spectre of a substantial international fraud hanging over the entirety of the*

Assets at the Bank” as being a compelling reason for the whole case to go to trial. In respect of the Eighteenth Respondent, I concluded that, “*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*”, I was not minded to find that the second limb had not been satisfied by the Fifth to Eighteenth Respondents. I take the view that I can adopt a similar approach now.

45. What Mr Keeble-Buckle has done in his seven Affidavits is to explain how he has mirrored what he did in respect of the Eighteenth Respondent to cover additional accounts held at the Interpleader Applicant by other Respondents of which the Ninth Respondents are the liquidators. In doing so, he has demonstrated to my satisfaction that the hedge funds involved should properly be regarded as outside of the alleged international fraud perpetrated by Mr Battoo and his associates, whoever they may be. I accept the evidence of Mr Keeble-Buckle that the accounts he has analysed in his Affidavits have been operated in a bona fide fashion. It would, in my view, be asking too much to suggest that just because Mr Battoo has played some part in these matters it necessarily means that only a trial will unearth the truth. The bank account statements that have been exhibited and the investor transaction reports relating to each share class demonstrate that these particular funds were being offered to investors through the private placement memoranda and that the only investors who have positions in respect of them now that need to be resolved are persons who fall within the description given to them of Direct Investors. In those circumstances, I considered it appropriate to make decisions that resulted in the assets in each of the accounts so analysed being paid away to the Ninth Respondents to be dealt with in the liquidations they are conducting in the British Virgin Islands. In my view, there simply was no reason why such an outcome needed to await determination at trial. This was the type of case where I could properly grasp the nettle and resolve matters, thereby further reducing those aspects of the interpleader proceedings being left for determination after a trial.

Conclusion

46. For the reasons I gave at the time and which are set out in more detail in this judgment, I granted paragraph 1 of the Application and reserved the costs so as to enable the First to Fourth Respondents to make any representations, no doubt through Mr Kane, that they wished to make. Further, by reserving the costs it would enable the Interpleader Applicant’s position to be clarified before the assets contained in the accounts in issue were themselves finally released to be dealt with by the Ninth Respondents.
47. What that decision meant was that judgment was entered against the First to Fourth Respondents in favour of:
- (a) the Sixth Respondent in relation to the assets held in account numbered 702498.121.0;
 - (b) the Seventh Respondent in relation to the assets in the accounts numbered 702509.120.0, 704258.121.0, 704258.131.8 and 704258.132.6;
 - (c) the Tenth Respondent in relation to the assets in the account numbered 769280.120.7;
 - (d) the Thirteenth Respondent in relation to the assets in the account numbered 705941.120.8; and
 - (e) the Fourteenth Respondent in relation to the assets in the accounts numbered 718680.121.8 and 790400.120.9.