Neutral Citation Number: [2019] EWHC 17 (Ch)

Case No: HC-2017-000156

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

Rolls Building, Fetter Lane,
London EC4A 1NL

Date: 16/01/2019

Before:

CHIEF MASTER MARSH

- -

Between:

(1) Michael Ashley **(2) St James Holdings Limited**	**Claimants**
- and -	
(1) Tony Michael Jimenez **(2) South Horizon Trading Limited**	**Defendants**

- -
- -

Richard Lissack QC, James Cutress QC and Joseph Farmer (instructed by **Lawrence Stephens Solicitors**) for the **Claimants**
Adam Johnson QC (of **Herbert Smith Freehills LLP**) for the **Defendants**

Hearing dates: 2 and 3 October 2018

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Approved Judgment

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

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CHIEF MASTER MARSH

Chief Master Marsh:

1. This is my judgment dealing with three applications issued by the defendants that were heard together on 2 and 3 October 2018. They concern whether service of the claim has been validly effected on the defendants and whether this court has jurisdiction to hear the claim.

2. The claimants ("Mr Ashley" and "St James") allege that £3 million has been misappropriated by the defendants ("Mr Jimenez" and "South Horizon"). In summary the claimants say that:

    (1) Mr Ashley and Mr Jimenez orally agreed in early 2008 that upon payment of the euro equivalent of £3 million, Mr Ashley would acquire, via a shareholding in Les Bordes (Cyprus) Limited, a holding of approximately 5% in the ownership of a golf course in France called Les Bordes and that the shares would be registered in the name of St James.

    (2) On 13 May 2008, Mr Ashley instructed his bank to transfer the requisite sum to the bank account specified by Mr Jimenez and the transfer was made. In breach of the agreement, the shares were never registered in the name of St James.

    (3) The agreement and/or the payment were induced by fraudulent misrepresentations made by Mr Jimenez. The claimants say that Mr Jimenez knew South Horizon did not hold the shares and was not in a position to transfer, or procure transfer, upon payment of the agreed sum and that, in representing that South Horizon held the shares, or could procure transfer, Mr Jimenez acted dishonestly.

    (4) In the alternative, the payment of £3 million gave rise to a Quistclose trust because the payment was made for an agreed purpose that only permitted use of the money for securing transfer of the shares.

3. The claimants seek remedies that include:

    (1) Recission of the agreement and/or restitution of the £3 million.

    (2) Damages in the sum of £3 million for breach of contract and/or in deceit and/or under the Misrepresentation Act 1967 and/or equitable relief for dishonest assistance or knowing receipt.

    (3) Repayment of the £3 million in vindication of their rights under the Quistclose trust or equitable compensation for breach of trust.

4. The claim was issued on 19 January 2017. Service was effected on South Horizon on 22 February 2017. The claimants initially relied upon service of the claim on Mr Jimenez at an address in Oxfordshire in early 2017. However, they obtained an order on 26 May 2017 extending the time for service and giving permission to serve Mr Jimenez out of the jurisdiction. He was served in the UAE on 14 July 2017.

5. The three applications comprise:

(1) An application by South Horizon issued on 24 March 2017 to set aside the claim form and service and for a declaration that the court has no jurisdiction to hear the claim. South Horizon is domiciled in Cyprus and therefore Regulation (EU) No.1215/2012 ("BRR") applies.

(2) An application by Mr Jimenez issued on 18 August 2017 to set aside the claim form and service and for a declaration that the court has no jurisdiction to hear the claim on the ground that he is not resident in the jurisdiction and the claimants are unable to show that permission to serve out of the jurisdiction should be granted.

(3) An application made by both defendants issued on 12 April 2018 for similar relief relying, for the first time, upon clause 18 of an agreement dated 17 September 2008 ("the 17 September Agreement") under which the defendants say disputes concerning the payment of £3 million are to be referred to the exclusive jurisdiction of the UAE courts.

6. The applications have some unusual features. As will be clear from the date of issue of the claim, the dates of the applications and the dates of the hearing, the process leading up to the hearing has been lengthy. Between them, the parties have produced thirty witness statements relating to the applications in various phases. 17 witness statements have been filed on behalf of the defendants and 13 witness statements have been filed on behalf of the claimants. More significantly, however, the claimants challenge the authenticity of the 17 September Agreement. They say that Mr Ashley's signature on it is a forgery. They rely upon a report from Mr Robert Radley, an expert handwriting examiner, dated 16 August 2018. Service of Mr Radley's report led the defendants to serve a translation of a report they had obtained previously in February 2018, prior to authenticity being made an issue, from Mr Ahmed Obaid Al Bah, who is registered as an expert at the UAE Ministry of Justice and at the courts in Dubai. Mr Radley has provided observations about Mr Al Bah's report in an addendum report dated 3 September 2018. The approach the court should adopt where the document purporting to provide exclusive jurisdiction to a foreign court is said to be a forgery occupied a significant portion of the hearing.

7. The parties have, very helpfully, agreed a list of issues the court must determine and a chronology. The issues for the court are:

(1) Have Mr Jimenez and South Horizon shown a sufficient case that the exclusive jurisdiction clause in favour of the UAE courts at paragraph 18 of the 17 September Agreement was executed and is to be given effect, and the proceedings stayed or dismissed as regards Mr Jimenez and/or South Horizon?

(2) If not, then on Mr Ashley and St James' application to serve Mr Jimenez out of the jurisdiction:

(a) Have the claimants shown a serious issue to be tried on the merits of their claims?

(b) Have they shown a good arguable case that:

(i) Under PD 6B 3.1(3) Mr Jimenez is a necessary or proper party to a claim against South Horizon if the court has jurisdiction against South Horizon?

(ii) Under PD 6B 3.1(4A), insofar as any claims against Mr Jimenez are shown to fall within sub-paragraphs 3.1 (6), (9), (12), (15) or (16), further claims are made against Mr Jimenez which arise out of the same or closely connected facts?

(iii) Under PD 6B 3.1(6) they have a claim or claims in respect of a contract which was (a) made within the jurisdiction and/or (b) governed by English law?

(iv) Under PD 6B 3.1(9) they have a claim or claims in tort where (a) the damage was sustained within the jurisdiction and/or (b) the damage sustained results from an act committed within the jurisdiction?

(v) Under PD 6B 3.1(12) their claim or claims made in respect of the Quistclose trust is or are in respect of a trust created orally and evidenced in writing, and which is governed by the law of England and Wales?

(vi) Under PD 6B 3.1(15) they have claims against Mr Jimenez as constructive trustee or as trustee of a resulting trust which arise out of acts committed or events occurring within the jurisdiction?

(vii) Under PD 6B 3.1(16) they have a claim for restitution (a) where Mr Jimenez' liability arises out of acts committed within the jurisdiction or (b) the claim or claims are governed by the law of England and Wales?

(c) Have Mr Ashley and St James shown that England is clearly the appropriate forum for the trial of the claim?

(3) As regards South Horizon, have the claimants shown:

(a) Under BRR Art 7(2) a good arguable case as regards their claim for breach of trust that the "… place where the harmful event occurred" (meaning either the place where the damage occurred or the place where the event giving rise to the damage occurred) was England and Wales?

(b) Under BRR Art 7(6) is there a good arguable case that any of their claims relating to the Quistclose trust claims are claims brought against "… the trustee … of a trust … created orally and evidenced in writing" and which is domiciled in England and Wales?

8. The 17 September Agreement did not surface until long after the first application was made in March 2017 and it will be necessary to summarise the chronology of events that followed service of the claim. As already noted, the application based on that

agreement was made more than a year after South Horizon's application was issued in March 2017 and 8 months after Mr Jimenez' application was issued in August 2017.

9. Mr Ashley is a well-known businessman and investor with interests in Newcastle United Football Club ("NUFC"). St James is his property investment company. Mr Jimenez is also a well-known businessman and property investor and South Horizon is a property consultancy company domiciled in Cyprus that is or was associated with him. South Horizon was incorporated in Cyprus on 31 December 2007. That date is of some importance and only emerged after the evidence was complete. Mr Ashley and Mr Jimenez had business dealings together in 2007 and 2008 and Mr Jimenez became a director and vice-president of NUFC in January 2008. He resigned on 9 October 2008. The date and place of the first occasion when they discussed the possibility of Mr Ashley investing in two property projects being promoted by Mr Jimenez is disputed. Mr Jimenez puts the date at 26 September 2007 and says they met in New York. He says they discussed on that occasion the possibility of Mr Jimenez using his contacts in the Middle East to produce a buyer for NUFC and at the same meeting they discussed two investment opportunities, one being Les Bordes and the other a development in St Lucia. The deal according to Mr Jimenez was that Mr Ashley would provide £6 million straight away (£4.5 million for Les Bordes and £1.5 million for St Lucia) so that the funds were in place when the two deals were ready to complete. It is common ground that no money was provided by Mr Ashley until early 2008 by Mr Ashley investing £1.5 million in the St Lucia project which completed in early February 2008. There is no issue about that project. Mr Ashley later provided an additional £3 million by a transfer to South Horizon that took place on 16 May 2008.

10. Mr Ashley places the initial discussions with Mr Jimenez in England. The particulars of claim say the meeting took place either at the offices of NUFC, or in London, in early 2008. However, in a witness statement made subsequently, Mr Ashley settles on the meeting having taken place in London. According to Mr Ashley's version of events, he does not recollect meeting Mr Jimenez in New York in September 2007 and he is adamant that he did not meet Mr Jimenez there to discuss a sale of NUFC. He says it was not until January 2008, about the time Mr Jimenez was appointed a director of NUFC that he considered selling his interest in the club. It is common ground that Mr Jimenez became involved in the process of looking for a buyer on the basis that he would be paid for his services.

11. Two lawyers played a role in the dealings between Mr Ashley and Mr Jimenez. Christopher Mort, who is a partner with Freshfields Bruckhaus Deringer LLP, worked on secondment to St James between June 2007 and June 2008 and, up to 5 May 2008, he was also chairman of NUFC. Graeme Muir was the managing partner of the Dubai office of Norton Rose until September 2007. He says in his witness statement that "… since then I have worked with [Mr Jimenez] on a number of projects." Both of their statements are brief and principally deal with the question of whether or not Mr Jimenez had an office in London during the relevant period. Mr Mort also deals with the circumstances in which his secondment came to an end. He says he informed Mr Ashley in April 2008 that he intended to return to Freshfields at the end of his secondment. Derek Llambias succeeded him at NUFC on 5 May 2008 with the title of managing director. He says Mr Jimenez, Kevin Keegan and Dennis Wise were informed on 5 May 2008, if not before, that he was returning to Freshfields on

completion of his secondment. This evidence is significant in relation to the authenticity of the 17 September Agreement.

12. Mr Jimenez relies on statements from three associates to place the initial meeting with Mr Ashley in New York and the date in September 2007. Mr Carmine Bonacci's first statement is dated 8 December 2017 and was served shortly after the defendants had issued a claim against Mr Ashley and St James in Dubai under the 17 September Agreement. He says he was working in Cyprus for South Horizon in late 2007 and he dealt with the St Lucia and Les Bordes projects. He says he can recall a telephone conversation with Mr Jimenez while Mr Jimenez was in New York and he produces two versions of a handwritten note he made at the time which he later located in rooms he used at one time at Les Bordes. One note is dated "27/7/07" and the other "27/9/07". They are nearly identical save for the date. Mr Bonacci says he wrote the first note by hand and then realised the date was wrong. Instead of correcting his note by altering "7" for "9" to correct the month, he says he adopted the very laborious process of writing out the note from beginning to end, including the diagrammatic elements. His note records what he says he was told by Mr Jimenez in that conversation and includes a note that Mr Ashley had agreed to provide £6 million, £4.5 million for Les Bordes and £1.5 million for St Lucia. "Will send shortly" is noted against these figures.

13. One other point arises from this note. It records Mr Jimenez as saying that he had met both Mr Ashley and Mr Mort the previous day. Mr Jimenez' first statement says he met Mr Ashley without anyone else being present.

14. Mr George Papadopoulos made a statement on 8 December 2017. He says he was Chief Operations Manager for South Horizon in 2007 and can recall Mr Jimenez' trip to New York and a conference call with him the following day when he reported on the agreement he had made with Mr Ashley to invest in the Les Bordes and St Lucia projects.

15. Maria Christos who worked for South Horizon dealing with accounts and administration also recalls Mr Jimenez' trip to New York and she participated in a conference call with him the following day when the agreement by Mr Ashley to invest in Les Bordes and St Lucia was discussed. She produces a letter she sent to Mr Ashley on 14 December 2007 by post from Cyprus:

> "Dear Mr Ashley
>
> Reference; Property Investments – Les Bordes and Saint Lucia
>
> As recently agreed with Mr Tony Jimenez, would you please send the £6m investment funds for the above projects as soon as possible.
>
> Do not hesitate to contact us if you need any further information."

16. Mr Bonacci recalls a telephone call with Mr Jimenez on 21 January 2008 when he was told that Mr Ashley had not provided the money for his investment and Mr Ashley had decided not to invest in Les Bordes. He spoke to both Mr Jimenez and Mr Muir on 31 January 2008 when he was told Mr Jimenez was expecting funds from Mr Ashley for St Lucia soon and in a conversation on 6 February 2008 with Mr Muir he

was told the £1.5 million investment for the St Lucia project had been received from Mr Ashley.

17. Mr Bonacci also says he spoke to Mr Jimenez and Mr Muir on 2 March 2008 about Les Bordes and was told Mr Ashley now wished to invest in that project and he would be providing £4.5 million "immediately". There are hand-written notes made by Mr Bonacci of each of these conversations.

18. It is possible to have greater certainty about events from this point onwards because some documents from that era have been retrieved, including emails passing between advisers acting for Mr Ashley and Mr Jimenez and written agreements made between St James and South Horizon. The two principal strands of their joint business activity, Mr Ashley investing in Mr Jimenez' property projects and Mr Jimenez acting as agent for the sale of NUFC, were the subject of oral discussions in early 2008 and their respective advisers took steps to document what had been agreed. This was achieved in the case of arrangements concerning NUFC but not in the case of the Les Bordes development.

19. The first email exchange between Mr Muir and Mr Mort is dated 5 March 2008. Mr Muir refers to the "revised Profit Share Agreement" which is likely to be a draft version of the agreement made on 28 April 2008 between St James and South Horizon. In the same email Mr Muir says:

> "Also, although I am due to send you some more information on the other investments, we are almost ready to go on the golf course in particular. We are now asking Mike to put £3 million into the golf and £1.5 million into a Cyprus development that has just come into our hands. Just wanted to give a heads up that we like [sic] to draw down the remainder of the £6 million Mike has pledged fairly shortly."

20. To my mind the manner in which Mr Muir expresses himself points against a commitment to invest £4.5 million in the Les Bordes investment more than 5 months previously. Mr Muir sent a chasing email on 17 March 2008 saying amongst other things:

> "(b) we need to get Mike's investment in Les Bordes in France and Cyprus:
>
> …".

21. On 31 March 2008 Mr Muir sent an email to Mr Mort that clearly followed a meeting between them.

> "Further to our discussions, I attach the final form of the Shareholders' Agreement that was signed between the shareholders of the Cypriot holding company. As I stated, Mike would be a shareholder in Les Bordes (Cyprus) Limited, which is one of three shareholders in Les Bordes (Holdings) Limited. As you will see, Les Bordes (Cyprus) Limited effectively controls the company.
>
> I will get you the form of Trust Deed that Mike will need to enter into regarding his shares. in [sic] the meantime, his shares are being held on trust for a company

> controlled by Tony. We just need to change the existing trust deed and get Mike to enter into a new one with the nominees."

22. In separate agreements dated 26 and 28 April 2008, St James appointed South Horizon to act as sole agent to find a buyer for NUFC. The exclusive term of the appointment was until 21 August 2008 and provided a minimum agent's fee of £6.25 million. Other provisions dealt with the lower fee that was payable in the event of a sale taking place prior to 31 December 2008 pursuant to a contract to which South Horizon was not a party. Both agreements are in the form of letters from St James to South Horizon signed by Mr Ashley and countersigned by Mr Jimenez. They contain a clause applying English law to the agreement and submitting to the exclusive jurisdiction of the English courts.

23. There is an additional joint business activity that is dealt with only in passing in the evidence but is worthy of mention. An agreement was made in February 2008 between St James and South Horizon for South Horizon to provide consultancy services (through Mr Jimenez) in relation to the St James property portfolio. There is no evidence about the nature or location of the property portfolio. The commitment was not to exceed 8 working days in each month at an annual fee of £450,000. The effective date of the agreement was 1 December 2007 although that pre-dated South Horizon's incorporation. The agreement suggests that dealings between Mr Ashley and Mr Jimenez may have commenced at the beginning of December 2007, but it does not necessarily follow that discussions about property investment took place then.

24. On 29 April 2008 Mr Muir sent an email to Mr Mort. After referring to getting signatures on the "long form letter" (probably a reference to the letter dated 28 April 2008) he said:

> "Also, apparently Tony and Mike have agreed to turn back the clock on the Les Bordes deal – Mike says that there was a misunderstanding and he wants to invest the £3 million. Will you still be dealing with this?"

25. Mr Mort replied:

> "I am in London on Thursday, so could meet up.
>
> I would do Les Bordes for Mike. Do I have all the papers?"

26. The reference to turning the clock back alludes to a disputed issue of fact. Mr Jimenez says that Mr Ashley kept changing his mind about investing in Les Bordes. There are no documents about the acquisition of Les Bordes. Mr Jimenez merely says the purchase was completed on 14 March 2008. However, Mr Ashley was asked to contribute £3 million subsequently. This is clear from the emails dated 17 and 31 March between Mr Muir and Mr Mort. He says he was not aware of any pressure to make the investment. On 2 May 2008, Mr Muir said in an email to Mr Mort that £3 million was needed "early next week" and provided details of the bank account with Hellenic Bank to which the money was to be sent. He asked for the payment to be made in euros "… currently being €3,840,000, which will get Mike a 5.76% stake in Les Bordes." He ends the email by asking Mr Mort to say "… if you have any problems sending the cash." Mr Jimenez says that email gave Mr Ashley a final

deadline for his investment and when the money was not paid "early next week", Mr Jimenez assumed that Mr Ashley did not propose to invest. It is not explained, however, why a deadline was needed given that, apparently, the purchase had been completed in mid-March. I observe that the tone and language of Mr Muir's email do not appear to be that of a final request for the investment sum.

27. On 12 May 2008 there was a further exchange of emails between Mr Muir and Mr Mort. Nothing is said in the exchange about the deadline having been missed. After an exchange concerning the correct bank account for the transfer, Mr Mort asked in whose name the account was held and asked "… what will Mike get in return for the £3 million and when?". Mr Muir replied:

> "It's in Tony's name. I will arrange for a trust deed to be drawn up in his name for his shares. I will need a copy of his passport and his address for the Cypriot lawyers."

28. The following day, Mr Ashley gave instructions to his bank to transfer the euro equivalent of £3 million to the account at Hellenic Bank in Cyprus. A statement produced by Hellenic Bank, which has been heavily redacted, appears to show that €3,829,176.39 was credited to an account in the name of South Horizon on 15 May 2008, although the date of receipt could be the following day.

29. On 21 May 2008, Mr Mort wrote on St James's letterhead to Hellenic Bank to say that the payment related to the purchase by St James of shares in Les Bordes (Cyprus) Limited and that the payment had been addressed to Mr Jimenez in error. (In fact, it appears the payment was credited to an account in the name of South Horizon). On 10 June 2008 Mr Mort pressed for the signed trust deed for the shares relating to the Les Bordes investment. Mr Muir replied saying he was waiting for the document from Cyprus. Mr Mort pressed again on 24 June 2008 asking Mr Muir to explain the delay in the trust deed being provided and saying he would be away for four months from the end of the week. Mr Muir replied:

> "I am as frustrated as you on this one. I am still waiting for the Cypriot lawyer to send me the Trust Deed regarding Mike's shares. They always take ages, but I will chase again …".

30. On 27 June 2008 a variation to the agreements dated 26 and 28 April 2008 between St James and South Horizon was signed. It brings forward the date upon which South Horizon's mandate lasted to 31 July 2008 rather than 31 August 2008.

31. Emails after 24 June 2008 were sent by Bob Mellors on behalf of Mr Ashley. On 27 June 2008 he asked whether there was any news about Les Bordes. He does not appear to have received a reply to that query, despite email traffic passing between him and Mr Muir under the heading "Les Bordes". However, on 2 July 2008, Mr Muir said the lawyers in Cyprus had prepared the trust deed but needed a copy of Mr Ashley's passport. There is no indication that it was ever provided.

32. From emails exchanged on 3 September 2008 it appears that Mr Muir and Mr Mellors planned to meet the following day. In advance of the meeting, Mr Muir provided what he described as a "… very brief synopsis of the two investments that Mike has already made and the proposed third investment to make up the remaining £1.5 million that

Mike said he would invest with Tony." The attachment to the email is described as "TRANSACTION OVERVIEW2.doc". The document describes the Les Bordes Golf Resort and its corporate structure. Mr Muir says: "Mike invested €3 million [sic] into the project, which gave him an indirect 4.99% ownership in Les Bordes." He then sets out a structure diagram showing the investment having been made into Les Bordes (Cyprus) Limited which held a 43.74% interest in Les Bordes (Holdings) Limited (described as the Cyprus purchasing company) which in turn held 100% of Les Bordes Golf International SAS (described as the French operating company). Mr Muir further explains that:

> "Mike's investment is held through his beneficial ownership of shares in Les Bordes (Holdings) Limited, which are held on trust by Les Bordes (Cyprus) Limited. The trustee is our law firm in Cyprus.
>
> Les Bordes (Cyprus) Limited holds 2,187 shares in Les Bordes (Holdings) Limited, of which 250 has been designated for Mike. As we have previously discussed, we need to execute a Trust Deed to formally move these shares into St James Holdings Limited's name."

33. The document also describes the investment made in St Lucia and a prospective investment of £1.5 million in a development in Cyprus. It is notable that the language used by Mr Muir about the investment in Les Bordes is unequivocal: "Mike invested" and "Mike's investment is held".

34. Mr Jimenez' case is that he spoke to Mr Ashley on 19 May 2008, after the transfer had been made. He says he told Mr Ashley that the payment had missed the deadline and the money was not "in the Les Bordes investment". He describes Mr Ashley as being not particularly fussed as he had not been totally convinced by the opportunity to invest. In his statement dated 24 March 2017, at paragraph 16(p) Mr Jimenez goes on:

> "Given the serious concerns I now had about Mr Ashley's failure to keep to his promises or honour agreements, I raised the work I had been doing in relation to the proposed sale of NUFC. … I told Mr Ashley that if he wanted me to continue to work on this and in recognition of the efforts and progress I had already made then he would now need to now pay an advance. Mr Ashley agreed and told me that South Horizon should retain the £3,000,000 he had sent as an advance against the payment South Horizon would receive when the club was sold. That was also the end of the agreement that Mr Ashley would invest £6,000,000 in property. He never transferred the remaining £4,500,000."

35. Mr Jimenez says he agreed with Mr Ashley that they would not tell Mr Mort or Mr Muir about this arrangement "… because if Mr Mort found out he would start asking for money to reflect parity with what South Horizon was receiving" and he was planning to sack Mr Mort as Chairman shortly. It was agreed according to Mr Jimenez that if Mr Mort or Mr Muir asked about the payment of £3 million, they would be told that it related to the Les Bordes investment. Mr Ashley is dismissive of this evidence. He describes the conversation referred to in Mr Jimenez' statement as a "complete fabrication" and says that had he been told the £3 million was not in the Les Bordes development he would have asked for his money back. He describes Mr Jimenez' assertion that the £3 million was to be retained by South Horizon as

"complete fantasy on Mr Jimenez's part." As noted above, Mr Mort says he had told Mr Ashley prior to 19 May 2008 that he planned to return to Freshfields.

36. Mr Bonacci says he received a telephone call from Chryso Christofidou on 19 May 2008 enquiring about the payment of £3 million received from Mr Ashley and Mr Bonacci spoke to Mr Jimenez later that day. His recollection of the conversation and his note is consistent with Mr Jimenez' version of events.

37. It is common ground that Mr Ashley travelled to Dubai in September 2008 with Derek Llambias, John Irving and Dennis Wise with the intention of discussing terms to sell NUFC. He stayed with Mr Jimenez whilst there. Up to the date of this visit, three agreements had been entered into between St James and South Horizon dated respectively 26 and 28 April as amended by the agreement dated 27 June 2008. On 16 September 2008, while in Dubai, a new agreement was entered into between the parties, again in letter form, which stated that it superseded all previous agreements. It provided a fresh sole agency to South Horizon for the period up to 31 December 2008 on the basis of a revised fee structure of 25% of the sale proceeds over £260 million. As with the earlier agreements, it was expressed to be subject to English law and the parties submitted to the exclusive jurisdiction of the English courts.

38. The 17 September Agreement is dated the following day. It provides that St James agreed to pay South Horizon a fee of £10 million, taking into account the sum of £3 million already paid, regardless of success and a fee of 25% of the proceeds of sale in excess of £250 million. The agreement is stated to supersede "all previous letters on the matter made between the parties". Paragraph 18 provides that:

> "This letter shall be governed by and construed in accordance with UAE law and the parties submit to the exclusive jurisdiction of the UAE courts."

39. Mr Ashley says the 17 September Agreement is not genuine and its terms are a commercial nonsense. Although Mr Jimenez says it is based on the agreement entered into the previous day, it is more similar to the agreement dated 28 April 2008. Mr Ashley points to two further matters which suggest the agreement is not genuine:

> (i) Mr Muir is nominated in the agreement as an authorised point of contact representing Mr Jimenez whereas Mr Jimenez' case is that the agreement was to be kept secret from Mr Muir, and;
>
> (ii) the improbability of Mr Ashley agreeing to a UAE jurisdiction clause when he is alleged to have upset the Royal Family in Dubai the previous day.

40. Before examining the evidence about the events that took place in Dubai that, on Mr Jimenez' case, led to the signing of the 17 September Agreement, I will complete the chronology by reference to documents that are not disputed. On 22 October 2008, Mr Muir sent an email to Mr Mellors (copied to Mr Jimenez):

> "Further to your discussion with Tony the other day, I attach a proposed draft letter to be entered into between South Horizon and St James' Holdings. As you can see, it terminates all previous letters and simply states that South Horizon will get 25% of the net profits of a sale prior to 31 December.

> On another note, we still need to finalise the remaining £1.5 million that Mike has committed to Tony's property transactions. As stated, we have ear-marked a plot of land in Cyprus for this money and would like to conclude this as soon as possible."

41. The draft letter was signed by Mr Ashley but there is no version signed by Mr Jimenez and he denies having seen it. It is notable, however, that the draft agreement is consistent with the undisputed agreements by providing for English law and submission to the exclusive jurisdiction of the English courts.

42. On 22 November 2008, Mr Muir sent an email to Mr Mellors and Mr Llambias (copied to Mr Jimenez) referring to a possible sale of NUFC. His email also refers to the agreement dated 16 September 2008. The email does not mention the 17 September Agreement or the agreement dated 22 October 2008, but on Mr Jimenez' case Mr Muir was unaware of the former.

43. Finally, on 8 May 2009, Mr Muir sent an email to Mr Mort in response to a request for a report about Mr Ashley's property investments. Mr Muir provided a generalised reply saying little progress had been made at Les Bordes. Mr Muir's email was copied to Mr Jimenez. It must follow that, on Mr Jimenez' version of events, Mr Muir was still unaware of the agreement that had been made under which Mr Jimenez was entitled to keep the sum of £3 million for the services he had rendered.

44. There are no further contemporaneous documents relating to the investment in Les Bordes. Mr Ashley took no further steps to, on his case, perfect his investment. He says he was unaware that his investment in Les Bordes may not have resulted in a holding of shares held in his favour until he was made aware of a judgment obtained by Dennis Wise against Mr Jimenez in 2013 in connection with an investment of £500,000 made by Mr Wise in Les Bordes. In her judgment in *Wise v Jimenez*, Penelope Reed QC, sitting as a Deputy High Court judge, remarked that Mr Jimenez' evidence on some issues was "unconvincing and at times impossible to follow" and that she had treated his evidence "with extreme caution".

45. An enquiry made by Mr Ashley's solicitors in February 2015 established that neither Mr Ashley, St James nor South Horizon was, nor had ever been, a shareholder in Les Bordes (Cyprus) Limited.

46. The events that took place in Dubai on 16 and 17 September 2008 are dealt with very briefly in Mr Jimenez' first witness statement dated 24 March 2017, made in support of South Horizon's application of the same date:

> "16 (s) From 13 to 18 September 2008, Mr Ashley came to Dubai (along with various other people) to meet some other potential buyers of NUFC that I had lined up. I invited him to stay in my apartment. On 16 September 2008, Mr Ashley got into some trouble at the Bahri Bar in Dubai. I helped him to minimise the impact of this, but it was clear that the situation had ruined the potential sale of NUFC that I had lined up. On 17 September 2008, Mr Ashley and I discussed the issue and he acknowledged that it was likely to have ruined the potential sale of NUFC. He thanked me for helping to save his skin and we agreed that, even if the sale of NUFC did not go ahead, South Horizon was to keep the £3,000,000 paid by way of an advance and that he/St James would pay the remaining

> £7,000,000 that South Horizon would have received if the sale of NUFC had proceeded. Mr Ashley stated that it was the least that he could do in the circumstances."

47. The other witness statement provided at that stage was made by Iosif Frangos, who is a director of South Horizon, dated 23 March 2017. It is based on what Mr Jimenez told him and he merely says that Mr Ashley and Mr Jimenez agreed that South Horizon could retain the £3 million it had received as an advance payment for the work that South Horizon was undertaking to find a buyer for NUFC.

48. Neither Mr Jimenez nor Mr Frangos mention the 17 September Agreement or the letter from Ms Christos to Mr Ashley dated 14 December 2007.

49. Mr Jimenez made a further statement on 18 August 2017 in support of his application issued that day. Paragraph 43(g) deals with the agreement made on 17 September 2008 in a similar way to his first statement and without referring to the written 17 September Agreement.

50. Mr Ashley and Mr Mort made witness statements on 6 October 2017. Mr Ashley's statement is succinct where he deals with paragraph 16(s) of Mr Jimenez' first statement. He states that Mr Jimenez' fabrications continued and that the sum of £3 million had already been allocated to the Les Bordes project by September 2008. He goes on:

> "The suggestion that I also agreed to gift £7 million to Mr Jimenez for 'saving my skin' is pure fantasy and wishful thinking on his part."

The events in Dubai in September 2008

51. Mr Jimenez provided additional evidence in his fifth witness statement about the events of 16 and 17 September 2008 in response to Mr Ashley's second witness statement dated 31 August 2018. Mr Jimenez suggests that Mr Ashley was emboldened by Mr Radley's report and felt able deny the validity of the 17 September Agreement having received a report which is expressed in forthright terms.

52. On 26 November 2017, lawyers based in the UAE acting for Mr Jimenez and South Horizon wrote to Mr Ashley giving notice of their intention to make a claim for £7 million under the 17 September Agreement. This was the first occasion when the agreement was mentioned. Mr Ashley's solicitors asked for a copy of the agreement on 29 November 2017 and one was supplied on 6 December 2017. On the following day, a claim was issued in Dubai seeking payment of £7 million. Subsequently a default judgment was obtained in that claim and an application has been made to set aside the judgment on the basis that the claim was not served.

53. A considerable volume of evidence has been provided by the defendants concerning the discovery of the 17 September Agreement. Five witness statements were served on 8 December 2017, including a third statement from Mr Jimenez and the statements from Mr Bonacci and Ms Christos to which I have already made reference. Subsequent batches of statements were produced in May, August and September 2018. A further nine statements have been served on behalf of the claimants. This plethora of witness statements is deeply unsatisfactory.

54. Mr Jimenez' third statement produces the 17 September Agreement. He puts it in context by claiming again that Mr Ashley behaved badly in a bar in Dubai on 16 September 2008 which ruined any chance of a sale of NUFC going ahead. Mr Jimenez does not describe the event in any detail. As to the September Agreement he says this:

> "Although I knew that Mr Ashley signed the September 2008 Agreement it have not previously produced a copy as it had not been located. The document has now been located recently in South Horizon's archives in Cyprus during a search for documents for the purposes of replying to the Claimants' evidence. I went to Cyprus shortly after Mr Ashley's visit to Dubai and I had provided South Horizon with its copy of the September 2008 Agreement at the time as it was of key importance to South Horizon."

55. Curiously neither Mr Bonacci nor Ms Christou mention the 17 September Agreement in their statements dated the same day as Mr Jimenez' third statement. They only deal with it in their statements made on 4 September 2018 when both say they can recall seeing the document in 2008. Mr Bonacci recalls a conversation with Mr Jimenez in 2008 when he recounted to him the events in Dubai a few days after they took place. He speaks of the jubilation in the office when Mr Jimenez brought the 17 September Agreement to the office in Cyprus in late October 2008. Ms Christou produces letters sent to Mr Ashley (again by post from Cyprus) on 31 October and 28 November 2008 asking him to pay £7 million to South Horizon under the Newcastle United Sale Agreement and £225,000 due under the consultancy agreement.

56. Further evidence about the 17 September Agreement was provided in statements by Michalis Michael who is an accountant with CFA Auditors in Cyprus and Chrysovalanto Christofidou who is a lawyer with I Frangos Associates LLC in Cyprus. Mr Michael says he recalls seeing the 17 September Agreement in 2012 or 2013 when he discussed with Mr Frangos (South Horizon's director) and Mr Christofidou the possibility of taking legal action to recover the money due under the agreement. The exclusive UAE jurisdiction clause was noted and they concluded that a claim could not be commenced in Cyprus. Mr Michael also says he was asked to search for the 17 September Agreement "towards the end of November 2017" and he carried out a search and located it in "early December 2017". It was found by him in an archived file for the 2012 audit which had been put in store in 2013.

57. Mr Christofidou recalls the meeting to which Mr Michael refers and also says he recalls many meetings over the years with Mr Bonacci when the 17 September Agreement was discussed and consideration was given to taking steps to recover the debt due under it.

58. Mr Michael's evidence about the time he carried out the search for the 17 September Agreement does not fit with other elements of the case. The agreement was referred to by Al Tamimi & Co in their letter of claim dated 26 November 2017. It is plain from what they say that the agreement was in their possession when they wrote the letter and they were able to supply a copy of it to Mr Ashley's lawyers on 6 December 2017. It is also very surprising that the defendants have not produced accounts for South Horizon (whether audited accounts or management accounts) showing how the debt claimed to be due was treated. If it does not appear in the accounts because the debt was written off, there would be an accounting recording of this.

59. There is one important item of evidence about the date when the 17 September Agreement may have been discovered. At one time Mr Ashley's lawyers were considering appointing Mr Al Bah to examine the agreement. Lawrence Stephens sent an email to Mr Al Bah on 22 February 2018 after having seen his curriculum vitae. They supplied him with a copy of the agreement and asked him to say what tests he would be able to carry out and what it would cost. Mr Al Bah replied on 25 February 2018:

> "During our correspondents [sic], regarding your issue I have received so many cases and inquiries related to signatures analysis from individuals and law firms as well. One of them was a woman who contacted my office while I was on annual leave back in July last year. She requires a document to be analysed, ink analysis and handwriting to determine the authenticity of an original document but did not release any information about her client neither the document need to examine. This woman disappeared for some time and recently began to contact me for the same signature subject brought before and yesterday only when I found out that she was talking about the same case. Let me know your feedback."

60. This email from Mr Al Bah strongly suggests that he was approached in July 2017 and asked to analyse the 17 September Agreement some months before the defendants and their witnesses say it was located and it casts doubt on the veracity on their evidence. Mr Al Bah was not instructed by Mr Ashley's solicitors and later he received instructions addressed in entirely improper terms direct from Mr Jimenez by letter dated 28 February 2018:

> "As previously discussed, your report should include confirmation that:
>
> 1. The document you have examined is an original, with an original signature.
>
> 2. That the signature of Mike Ashley on the agreement you tested is the same and has been written by the same hand as those on the sample documents you have been provided with (that are attached herewith)."

61. It is not at all clear why Mr Jimenez felt it was necessary to obtain a report from a handwriting examiner. The challenge to the authenticity of the 17 September Agreement came from Mr Ashley's side and it was he who was seeking to have the document examined. According to Mr Jimenez' evidence he knew the document was authentic. In any event, subsequently, Mr Ashley instructed Robert Radley to examine the agreement and he has produced a report dated 16 August 2018. Mr Radley's report, which is in CPR compliant form, is thorough and is based upon a comparison between Mr Ashley's signature on the original of the 17 September Agreement and a large number of his known signatures covering a period of years. His conclusions are unusually robust. The principal statement of his opinion states:

> "(iii) I am of the opinion that there is conclusive evidence to support the proposition that the questioned signature on the Agreement was not written by Mr Ashley. I consider it is either a tracing of the signature from the Particulars of Claim Form dated November 2016 or is a free hand simulation of a genuine signature from the same time period/same document. Of these two propositions I consider the former most likely."

62. Mr Al Bah is a consultant expert and is registered with the UAE Ministry of Justice and the Dubai Court. In addition to handwriting and signature examination he is an expert with a wide range of claimed expertise including Fire Causes Examination, Trade Marks Examination and Infringements Examination. It appears his first language is Arabic. His report is provided in translation. It seems likely that he is at a disadvantage in expressing an opinion about handwriting in English given the substantial differences between Arabic and English. In addition, he was provided with just three samples of Mr Ashley's known signature. However, he expresses the opinion that the signature on the 17 September Agreement is written "… in a normal manner, using a black ballpoint pen. The signature is an original and not photocopied." He goes on to express the slightly puzzling view, which may have lost something in translation, that:

> "Based on the outer and general appearance, it is likely that the document was executed a while ago, mostly on the date of the agreement."

He considers that the signature is consistent with the known signatures "throughout the years" and there is limited natural variation in the signatures.

63. Mr Radley has considered Mr Al Bah's report and says he wholly disagrees with his methodology and conclusions. Furthermore, Mr Radley's researches cast doubt on Mr Al Bah's claimed affiliation with several professional organisations. He also criticises a failure to consider differences between the signature on the 17 September Agreement and the known signatures. Mr Radley says a consideration only of the similarities between signatures contravenes internationally accepted principles of forensic examination.

Principles of law

64. There is no direct guidance in the authorities about the approach the court should adopt where a party relies on a document with an exclusive jurisdiction clause and the authenticity of the document is disputed. The 17 September Agreement is also highly relevant to the merits of the claim due to the support it provides to Mr Jimenez' case about South Horizon's entitlement to retain the £3 million as agent's commission.

65. I do not consider there is any real doubt about the test that the court must apply both as to the standard and burden of proof. Guidance is provided in *Aeroflot v Berezovsky* [2013] EWCA Civ 784 at [48] – [50] per Aikens LJ and in *Goldman Sachs International v Novo Banco SA* [2015] EWHC 2371 (Comm) at [77] per Hamblen J. Further support can be found in the following passage in *Dicey, Morris and Collins: The Conflict of Laws* (15th ed.) at 12-114:

> "… where an English court is called upon to exercise jurisdiction in circumstances in which the material jurisdictional facts are not agreed, the party who wishes to invoke the jurisdiction will be required to have the better of the argument that the facts which support its invocation of the jurisdiction are satisfied. It is likely that the same principle applies in mirror image when a party challenges the exercise of jurisdiction by pointing to an agreement providing for the jurisdiction of the courts of a foreign country. If the court is required to decide who, on the material before it, has the better of the argument on the facts and matters relevant to the existence and exercise of jurisdiction, the question of who

> has the burden of proof will be the ordinary one, that the party who seeks to establish a fact bears the burden of establishing it."

66. The validity of the 17 September Agreement is a "material jurisdictional fact" which is not agreed, albeit one of very great significance. I do not accept, as Mr Johnson who appeared for the defendants submitted, that they need only show that their case is "sufficiently plausible in light of both sides' case". It seems to me that the defendants are required to have the better of the argument about the validity of the 17 September Agreement and in applying that test the burden of proof lies on them.

67. Mr Johnson referred to the decision of the Court of Appeal in *Konkola Copper Mines v Coromin Ltd* [2006] 1 Lloyds Rep 410 as being the authority that provided the greatest assistance. However, in that case jurisdiction had been established and the court was considering whether a clause derogating from that jurisdiction applied. The facts are therefore some distance from those in this case.

68. If the defendants have the better of the argument on validity, there is a further issue concerning the proper construction of the 17 September Agreement. The claimants submit that the jurisdiction clause is not wide enough to sweep up the issues that arise in their claim. Although the agreement applies the law of the UAE neither side has suggested that there are any relevant differences between the law of the UAE and English law. Mr Johnson submits that the correct approach to construction can be seen in Lord Hoffmann's speech in *Fiona Trust & Holding Corp v Privalov* [2007] UKHL 40: that a pragmatic approach should be adopted shorn of time-honoured technicalities which assumes that commercial people are likely to have intended to confer jurisdiction over all disputes arising out of their relationship to the courts of one place. However, there is no reason consider that contractual interpretation in relation to jurisdiction clauses has been left entirely unaffected by the decisions of the Supreme Court in *Rainy Sky SA v Kookmin Bank* [2011] UKSC 50, *Arnold v Britton* [2015] UKSC 36 and *Wood v Capital Insurance Services Ltd* [2017] UKSC 24. It suffices to say that the issue of construction falls to be dealt with in accordance with the well-established principles for construing written agreements.

The 17 September Agreement

69. The defendants' case is reliant on two principal elements. First, Mr Jimenez' evidence is that in light of the events that took place in the Bahri Bar, which resulted in the proposed sale of NUFC falling through, and Mr Jimenez' efforts to resolve the difficulty that had been created, Mr Ashley was willing to be very generous. It is said that a significant change to the terms they had agreed the day before, including a change to the choice of law and jurisdiction, was a consequence of the balance of bargaining power having shifted. Secondly, Mr Jimenez points to a body of witnesses all of whom are able to recall the agreement and say steps were taken to consider its terms. There are documents that are said to be contemporary in the form of the letters Ms Christos says she sent to Mr Ashley in 2008. Mr Michael is an accountant at CFA Auditors and Mr Christofidou is a Cypriot lawyer. Mr Bonacci is able to recall Mr Jimenez' triumphant return to South Horizon's offices with the agreement.

70. The defendants fairly submit that Mr Ashley was slow to engage with the allegations about the events on 16 September 2008 and that his initial account was guarded. He now says that he may have made a regrettable remark in the Bahri Bar, directed

towards those with whom he had been in negotiation earlier that day, and that undercover journalists were present. Mr Jimenez says Mr Ashley made remarks that were much more widely directed and included insults to the Dubai Royal Family and the Islamic faith and its followers, and to Kevin Keegan. It is common ground that steps were taken by Mr Ashley to manage the way in which the event was reported. There are, however, significant differences of recollection about the effect of the events on Mr Ashley and Mr Llambias. Mr Jimenez says Mr Ashley was shaking and saying he and his business empire faced ruin. Mr Jimenez says Mr Ashley came to see him at 4am on 17 September 2008 in a panic worried about being locked up in Dubai and facing adverse press reporting in the UK. This was the context for the 17 September Agreement being drafted by Mr Jimenez later that day and, he says, being signed by them both.

71. Mr Ashley's account of events is completely different. He says he was relatively unconcerned about the incident in the bar and its consequences and more worried about the collapse of Lehman Bros on 15 September 2008 and the risk that HBOS, in which he had substantial holdings, might fail.

72. One significant gap in the defendants' case is that although South Horizon had an immediate entitlement to recover £7 million under the 17 September Agreement, no accounts or financial records of any sort for South Horizon have been produced. Furthermore, it took no steps to pursue the claim until long after these proceedings were commenced.

73. When considering Mr Jimenez' evidence, the court is entitled to have some regard to the view taken of him in other claims against him. I have already referred to the conclusions about him reached by the Deputy Judge in *Wise v Jimenez*. In *Khakshouri v Jimenez* [2017] EWHC 3392 (QB), a claim in deceit, Green J made findings that are critical of Mr Jimenez including that: "Mr Jimenez' evidence has thus been inconsistent on this key issue throughout the litigation" [85]; Mr Jimenez' evidence was not "remotely convincing" [86]; and the representation had been made untruthfully and he had deliberately lied [98] and [116]. Nevertheless, some caution is needed and the court must be careful to avoid being over-influenced by the findings in these two cases. The fact that Mr Jimenez has told lies on previous occasions, and his evidence has been found to be unreliable, does not mean he is lying in this case. He has a substantial body of evidence from other witnesses that supports parts of his case. The remarks made about him in *Wise* and *Khakshouri* are, however, useful matters to take into account at this stage before the evidence in this case has been tested. Put another way, if it is necessary to consider relative plausibility between Mr Jimenez' evidence and the evidence of the claimants' witnesses, these judicial views are helpful pointers.

74. It is helpful, as suggested by the claimants, to evaluate the evidence about the 17 September Agreement under six headings.

(1) **Handwriting evidence**

The handwriting evidence is unusually strong. Mr Radley, who has enormous experience in the field, speaks of there being 'conclusive evidence' that Mr Ashley did not sign the 17 September Agreement. By contrast, Mr Jimenez relies on a report from Mr Al Bah which is not compliant with the requirements of the

CPR and whose credentials as an expert in this field are in doubt; and the scope of Mr Al Bah's enquiry is much more limited than Mr Radley. Although Mr Al Bah's report was obtained before Mr Radley's report, Mr Jimenez has not attempted to respond with an additional report from Mr Al Bah or another expert despite having had an adequate opportunity to do so.

(2) **Timing of the production of the 17 September Agreement**

The 17 September Agreement was not mentioned by Mr Jimenez in his first statement or in pre-action correspondence. It is surprising that searches for the document, which a number of South Horizon's staff and professional agents were aware of, were not commenced much earlier. Furthermore, evidence about the date of discovery of the document is not consistent. Lawyers acting for Mr Jimenez and South Horizon wrote on 26 November 2017 putting forward a claim based upon the agreement. This was the first mention of it. They must have had the document in their possession for at least several days before writing and in all likelihood longer. Mr Jimenez says the agreement was located in late 2017. Mr Michael says it was found in early December. Mr Michael must be wrong on this point. In addition, Mr Al Bah says he was asked in July 2017 to produce a report about the 17 September Agreement, albeit that the document was not delivered to him until later.

(3) **Inconsistency with Mr Jimenez' previous position**

The original case put forward by Mr Jimenez in a letter dated 24 April 2015 alleged that the £3 million was to be an advance on the fee due to South Horizon. On 8 May 2015 it was said there was an oral agreement that South Horizon would receive £10 million for its work and the payment of £3 million would be the first instalment of the £10 million due and owing. Then on 24 March 2017, Mr Jimenez said that Mr Ashley agreed on 19 May 2008 that South Horizon should retain the £3 million as an advance against the payment it would receive when NUFC was sold. Throughout this period, Mr Jimenez and others were aware of the 17 September Agreement and its terms although they say the document had not been found.

(4) **Contemporaneous documents**

The 17 September Agreement does not fit with undisputed documents created both before and after its date. It is far-fetched to accept that Mr Ashley and Mr Jimenez agreed to keep Mr Mort and Mr Muir in the dark about the agreement and Mr Jimenez' explanation for that agreement, that Mr Ashley was intending to sack Mr Mort, does not make sense in light of Mr Mort already having said he intended to return to Freshfields.

It is implausible that Ms Christos sent letters to Mr Ashley in 2008. Mr Jimenez and Mr Ashley were in regular contact and it is unlikely he would ask someone in the accounts department to send such correspondence. And there is no explanation about why the letters (again apparently sent by post from Cyprus to the UK) on 31 October and 28 November 2008 were not produced at a much earlier stage. It is not said they, unlike the agreement had been lost. Furthermore, the view taken of the 2008 letters is influenced by Ms Christos claiming to have

sent a letter on behalf of South Horizon in December 2007 before it was incorporated.

As to Mr Bonacci's manuscript notes, they are obviously helpful to Mr Jimenez if they are authentic. However, the neatness with which they fit the defendants' case raises questions about whether they are truly a contemporaneous record of the conversations they purport to record.

(5) **Inherently improbable terms**

The 17 September 2008 Agreement is remarkably generous to Mr Jimenez, even if his evidence about Mr Ashley's state of mind is accepted. £10 million was to be paid regardless of success; (i) an additional £6.25 million if the sale price was above £275 million; and (ii) 25% of the proceeds above £250 million if a sale was agreed by a third party.

It is also inherently improbable, assuming that Mr Ashley's behaviour had included insults to the Dubai Royal Family that Mr Ashley, even in a highly-charged emotional state and having lost his negotiating hand, would have agreed to the courts of the UAE having exclusive jurisdiction.

(6)**Inconsistent evidence about the timing of execution of the 17 September 2008 Agreement**

Mr Jimenez' fifth statement provides a good deal of detail about the Bahri Bar incident and its aftermath. According to him, he was instrumental in Mr Sturman QC being approached and Mr Cadman of Russell-Cooke being instructed. By 4am on the morning of 17 September 2008, they had managed to prevent publication. As a result, Mr Ashley agreed to sign the 17 September 2008 Agreement. However, this version of events simply does not fit with the evidence provided by Mr Sturman QC and Mr Cadman. Mr Sturman was not contacted until 6-6.30pm UK time on 17 September 2008 corresponding to 9-9.30pm UAE time and Mr Cadman did not contact the Daily Mirror until 8.32pm (11.32pm UAE time) that day. It was only towards the end of the evening, by then the morning of 18 September 2008 in Dubai that Mr Cadman received confirmation that the story would not be in the first edition. In short, if Mr Sturman and Mr Cadman are right, the agreement cannot have been signed on 17 September 2008 because the aftermath of the Bahri Bar incident did not unfold on that day.

75. There are also significant gaps in the evidence provided by the defendants. It is here that the burden of showing they have the better of the argument bites. It is of particular note that the defendants have not provided any documents to show what happened to the £3 million South Horizon received. Mr Jimenez says that is irrelevant. I disagree. If the 17 September Agreement is valid, its financial terms would be reflected in South Horizon's accounts and working papers for the relevant financial year. £3 million would be shown as a trading receipt and £7 million as a debt due. Clearly, it would have been very straightforward for Mr Michael of CFA Auditors Ltd, who are auditors to South Horizon, to provide documents from his firm's working papers and the accounts. The failure to produce the accounts is a matter to which the court is entitled to have regard and to draw the inference that the accounts would not assist the defendants.

76. The defendants bear the burden of establishing that the 17 September Agreement was executed and that on a proper construction of its terms, the exclusive jurisdiction clause is applicable to this claim. In light of the analysis that I have summarised, I consider that the claimants have the better of the argument on the first of these issues. Furthermore, even if the test proposed by Mr Johnson were to be applied, I do not consider that the defendants' evidence about the 17 September Agreement is sufficiently plausible when regard is had to all the evidence.

77. If it were necessary to do so, I would also hold that on a proper construction of the 17 September Agreement, the agreement to submit to the jurisdiction of the UAE Courts does not apply to the agreement which is the subject of this claim. It is common ground that Mr Ashley paid £3 million to South Horizon and the payment when made related to property investment and was not agent's commission concerning the proposed sale of NUFC. On Mr Jimenez' case, there was a subsequent agreement made orally on 19 May 2008 that ended the property investment agreement and reconstituted the sum of £3 million as an advance of commission that would be payable on the sale of NUFC. This is the essential context in which the 17 September Agreement must be construed.

78. The 17 September Agreement itself relates only to the appointment of South Horizon as sole agent for NUFC and Mr Ashley relating to the sale of NUFC and remuneration payable to South Horizon. It refers not to the sale of the business but of the company, NUFC. No mention whatever is made of the agreement to invest in Les Bordes or any other property deal. The terms of the 17 September Agreement are detailed. Paragraph 8 contains the provisions that are directly relevant:

> "8. In consideration of the Agent seeking purchasers of the Company on the Owner's behalf and in acknowledgement of all the work done by the Agent already, the Owner and the Ultimate Shareholder agree to immediately pay the Agent £10,000,000 regardless of success. The Agent acknowledges that it has already been paid £3,000,000 and is therefore still due to receive an additional £7,000,000. In addition, if the Owner receives the Guaranteed Return, the Agent will receive £6,250,000 out of the Guaranteed Return (the Agent's Alternative Fee)." [my emphasis]

79. Looking at the 17 September Agreement as a whole in its relevant context, the words I have emphasised are merely evidence of payment of £3 million having been made in advance of the agreement being entered into. It is not part of Mr Jimenez' case that when £3 million was paid to South Horizon the payment related to agent's commission. The basis upon which the money was held only changed with the later oral agreement made on 19 May 2008 which ended Mr Ashley's investment in property. There is no obvious reason why the agreement in paragraph 18 of the 17 September Agreement to submit to the jurisdiction of the UAE courts could have been intended to apply to the investment in St Lucia or to the intended investment in Les Bordes. Neither were the subject matter of that agreement. Equally, I can see no reason to construe the agreement so that it applies to funds that were reconstituted, according to Mr Jimenez' case, as a payment on account of commission that would become due when NUFC was sold. As at 19 May 2018 there was no certainty that a sale would take place. All the 17 September Agreement does in relation to the sum of £3 million is to acknowledge that South Horizon has received it and by virtue of the new agreement to pay £10 million by way of commission acknowledge that it can be

retained. It is most unlikely that the parties to that agreement intended that issues relating to property investment including Les Bordes were to be caught by the exclusive jurisdiction provision.

80. It follows that the defendants' application dated 12 April 2018 will be dismissed.

Service out of the jurisdiction on Mr Jimenez

81. The legal principles are not controversial. The claimants must satisfy the court of three things:

> (1) That there is a serious issue to be tried on the merits of the claim. The test is whether the claimant has a real as opposed to a fanciful prospect of success and equates to the first limb of the test under CPR 24.2.
>
> (2) That there is a good arguable case the claim falls within one or more of the gateways set out in Practice Direction 6B paragraph 3.1. Lord Sumption JSC, with whom Lady Hale PSC agreed, in *Brownlie v Four Seasons Holdings Inc* [2018] 1 WLR 192 said this about the approach the court should adopt where there is disputed evidence:
>
> "What is meant is (i) that the claimant must supply a plausible evidential basis for the application of a relevant jurisdictional gateway; (ii) that if there is an issue of fact about it, or some other reason for doubting whether it applies, the court must take a view on the material available at the interlocutory stage if it can reliably do so; but (iii) the nature of the issue and the limitations of the material available at the interlocutory stage may be such that no reliable assessment can be made, in which case there is a good arguable case for the application of the gateway if there is a plausible (albeit contested) evidential basis for it. I do not believe that anything is gained by the word "much", which suggests a superior standard of conviction that is both uncertain and unwarranted in this context."
>
> (3) That England is clearly or distinctly the appropriate forum for the trial of the dispute and that in all the circumstances the court should exercise its discretion to permit service of the proceedings out of the jurisdiction.

Merits of the claim

82. The claim relies upon three principal strands. Putting them in chronological order (rather than the order in which they are pleaded) they are: (1) representations were made by Mr Jimenez to Mr Ashley to induce him to invest in Les Bordes which he relied on; (2) an oral contract was made between Mr Jimenez and Mr Ashley in early 2008 under which Mr Ashley invested £3 million in Les Bordes; and (3) the creation of a Quistclose trust relating to the investment. It is necessary to examine each of these elements briefly.

83. The particulars of claim give no indication when or where the representations were made. They state:

> "6. In order to induce Mr Ashley to enter into the agreement and to remit the investment sum to South Horizon … Mr Jimenez orally represented to Mr Ashley

> (i) that South Horizon held shares … in Cyprus and (ii) South Horizon was in a position, as beneficial owner of the shares, to effect or otherwise procure the transfer of the beneficial interest therein to Mr Ashley (for registration in the name of St James) and (iii) that if Mr Ashley remitted the investment sum to South Horizon such shares would be duly transferred to Mr Ashley for registration …".

84. The claims as to reliance, falsity and the allegation that Mr Jimenez knew the representations were false are pleaded out subsequently.

85. The claim in contract is pleaded on the basis that there was an oral agreement made "in about early 2008". It is not clear what the temporal relationship between the representations and the oral agreement is said to be. In Mr Ashley's evidence he says that conversations about investing in Les Bordes took place "… on several occasions over a period of weeks in early 2008". [my emphasis] He refers to meetings with Mr Jimenez on 7 and 16 January 2008 and puzzlingly, in light of having said that discussions took place on several occasions, he goes on to say:

> "12. It was at one or both of these meetings in London … that Mr Jimenez and I discussed property investments including the Les Bordes investment and I agreed to invest." [my emphasis]

86. He goes on to say the representations were made in the course of his conversations (plural) with Mr Jimenez which led him to invest in Les Bordes. It seems likely therefore on Mr Ashley's case that there were at least two meetings during the course of which the representations were made and the terms were agreed.

87. The terms of the agreement are said to be:

> "4. …
>
> (1) that the sum invested would be £3 million which would be remitted as the euro equivalent sum ("the investment sum");
>
> (2) that the Les Bordes investment would, in fact, constitute a shareholding in Les Bordes (Cyprus) Limited ("Cyprus") which, by virtue of Cyprus' shareholding in Les Bordes (Holdings) Limited ("Holdings") and by virtue of Holdings' 100% ownership of Les Bordes Golf International SAS, would amount, in effect, to the 5% or thereabouts investment hereinbefore referred to (the precise investment constituting 5.76%). [sic]
>
> (3) that the investment sum would be remitted to Mr Jimenez's company, South Horizon, which owned, or was otherwise in a position to provide, the shares in Cyprus which were to be acquired on payment of the investment sum and held for that purpose;
>
> (4) that the investment, once effected and formalised, would be registered in the name of St James."

88. Paragraph 5 of the particulars of claim refers to emails from Mr Muir to Mr Mort dated 31 March and 2 May 2008 as being evidence of the agreement between Mr Ashley and

Mr Jimenez. Curiously the heading to the paragraph says what follows is: "Written evidence of the agreement and of the trust thereby created". However, the reference to the trust must be to the Quistclose trust which is the third key element of the claim.

89. The trust is explained in paragraph 23 of the particulars of claim:

> "The investment sum, on receipt by South Horizon, was, as agreed, held by Mr Jimenez and/or South Horizon upon trust for Mr Ashley to apply the same for the agreed purpose of securing to Mr Ashley or St James a 5.76% holding in Les Bordes. Unless and until that purpose was fulfilled (which it was not) Mr Ashley retained and retains beneficial ownership of the said investment sum and is, in the circumstances, entitled as against South Horizon and/or Mr Jimenez to repayment thereof by way of vindication of his continuing property rights in the same." [my emphasis]

90. The position concerning the creation of a trust is of some importance to both service out of the jurisdiction and whether the court has jurisdiction to deal with a claim against South Horizon. It is not said that South Horizon is a party to the agreement or that the agreement created an express trust. The words I have emphasised do not follow from the terms of the agreement pleaded in paragraph 4 of the particulars of claim. It is not pleaded that Mr Ashley and Mr Jimenez agreed a trust would be created and since South Horizon is not said to have been a party to the agreement there could be no agreement with it to create a trust. Any trust must be a consequence of implementing what was agreed, not an express trust. The agreement between Mr Ashley and Mr Jimenez was that £3 million would be paid to South Horizon, as a third party, which would transfer or procure transfer of shares into the name of St James. At one point, later in the chronology, Mr Muir suggested that a trust agreement needed to be executed in respect of the shares that had been allocated to Mr Ashley's investment. However, that never happened and, in any event, the trust he is referring to is unrelated to the agreement that shares would be held in St James' name.

91. A Quistclose trust can arise either under an agreement or as a matter of law where the freedom of the recipient of money to dispose of it is restricted to a purpose that has been stipulated. In this case, the restriction on use of the investment is not placed upon Mr Jimenez, with whom Mr Ashley entered into a contract, but a third party, South Horizon. It is implicit in the claimants' case that South Horizon was fixed with knowledge of the agreement between the principals and became subject to the Quistclose trust. In any event, it seems to me that the trust cannot be said to arise under the terms agreed between Mr Ashley and Mr Jimenez, because South Horizon was not a party to that agreement. If a Quistclose trust arose it could only be as a matter of law by South Horizon being put on notice of the agreement.

92. There is a fundamental difference of approach between the parties about the date and place of their discussions concerning property investment and it is important to note that, in addition, they are not focussing in their evidence on the same agreement. The claimants' pleaded case relates to an investment of £3 million in Les Bordes. They do not rely on the wider agreement about which Mr Jimenez and his witnesses give evidence concerning the investment of £6 million in a number of projects. I can see nothing in Mr Jimenez' evidence to suggest that the agreement he refers to was intended to be a binding commitment on the part of Mr Ashley in September 2007 to invest £6 million, in the sense that had he failed to provide that total sum Mr Jimenez

could have sued him for breach of contract. Mr Jimenez describes an arrangement under which Mr Ashley stated a willingness to invest £6 million but no contract is spelled out. Since South Horizon was not incorporated until 31 December 2007, an agreement on its behalf could not have been reached in September 2007.

93. I observe that the date of South Horizon's incorporation is not a fact that featured in the minds of Mr Jimenez and his witnesses when preparing their evidence. Mr Jimenez refers in his first statement to a meeting with Mr Ashley in New York on 26 September 2007 when they discussed the appointment of South Horizon as agent for Mr Ashley and NUFC. In his third statement he provides further details of these discussions concerning South Horizon some three months before it was incorporated. Mr Bonacci says he began working for South Horizon "in about late 2007" but he does not explain in his evidence his reference to a company that had not been incorporated in his note dated 27 September 2007 (also dated 27 July 2007). He says in his evidence that by 27 September 2007 he, Mr Muir, Ms Christos and Mr Papadopoulos were all working for South Horizon. And Ms Christos claims to have written to Mr Ashley on South Horizon's letterhead on 14 December 2007, before the company was incorporated. Overall, it appears to me that Mr Jimenez' case about the timing of the property investment discussions lacks plausibility. It is far more likely that discussions took place after South Horizon had been incorporated. This fits with the investment monies being payable to South Horizon. There is no evidence at all about the discussions having taken place pre-incorporation and an agreement being ratified.

94. It is common ground that Mr Jimenez was involved in a number of meetings in England with Mr Ashley in the early part of 2008. This fits with the timing of Mr Jimenez' appointment as a director of NUFC. It is inherently unlikely, contrary to Mr Jimenez' evidence, that the subject of property investment did not come up in any of those meetings; and it is also unlikely that when discussing an investment of £3 million in Les Bordes, the manner in which the investment was to be held was not raised. It is telling that in the first email between Mr Muir and Mr Mort he says: "… we are <u>almost ready to go</u> on the golf course in particular. We are <u>now</u> asking Mike to put £3 million into the golf and £1.5 million into a Cyprus development …". The words I have emphasised suggest that the arrangement to invest in Les Bordes, including the amount of the investment, only solidified much later than Mr Jimenez suggests.

95. There is evidence from Mr Ashley to support the representations and he also signed the statement of truth on the particulars of claim. It is plausible to think that they were made in negotiations between two experienced businessmen. Mr Ashley was unlikely to have agreed to invest £3 million in a property development in France without having some idea of what he would obtain; and if they were made it is understandable that they were relied on.

96. It is clear from the contemporaneous documents that both Mr Mort and Mr Muir believed the investment had been made and that Mr Ashley was entitled to a holding of shares in Les Bordes (Cyprus) Limited. Mr Muir's "transaction overview" records his understanding that 250 out of Les Bordes (Cyprus) Limited's holding of 2,187 shares in Les Bordes (Holdings) Limited had been designated for Mr Ashley leaving outstanding only the execution of a declaration of trust.

97. It would be a surprising approach for two businessmen dealing with an investment of £3 million to agree, as Mr Jimenez suggests was the case, that neither of them would tell their lawyer about the investment in Les Bordes being converted to an advance payment of commission due under an entirely separate arrangement.

98. In addition to the three principal claims, the claimants rely on dishonest assistance by Mr Jimenez to South Horizon (alternatively dishonest assistance by South Horizon to Mr Jimenez), as against Mr Jimenez for knowing receipt and against both defendants for restitution. There is also a subsidiary claim under which it is said the claimants are entitled to draw back the corporate veil of South Horizon.

99. The claim is not without its difficulties given the elapse of time and the reliance on oral representations and an oral agreement. However, I am satisfied that there are serious issues to be tried on the claim because (a) it finds support in contemporaneous documents that are not disputed and (b) the claimants' version of events is far more plausible than the defendants' version.

Service grounds - deceit

100. The claimants rely on ground 9(a) that "damage was sustained … within the jurisdiction" and/or ground 9(b) that "damage … results from an act committed … within the jurisdiction." The claimants have to show a good arguable case for the claim in deceit and satisfy the damage criterion.

101. There are difficulties with the claim in deceit due to the reliance on oral representations in relation to which there is only limited support in the contemporaneous documents. However, some reflection of the representations can be seen in the documents and I am satisfied that the claimants have made out a good arguable case on all the elements of the claim in deceit. There is also a good arguable case that the dealings between Mr Ashley and Mr Jimenez concerning an investment of £3 million in Les Bordes took place in England in the early part of 2008. Loss was sustained in England because the payment was made by Mr Ashley from an account held in England: see *VTB Capital plc v Nutritek International Corp* [2013] UKSC 5 at [7] and [201].

102. As to ground 9(b), the tort is committed where the misrepresentation is received and acted upon. Here there is a good arguable case that the misrepresentations were made in England and acted upon by the payment being made from an account in England.

103. The defendants have relied upon limitation, but it does not alter the view I have come to. The claimants say they are entitled to rely on section 32 Limitation Act 1980 and that time only started to run when they became aware of the fraud or could with reasonable diligence have become aware of it. The claimants' case is that it was not until Mr Ashley had knowledge of the decision in *Wise v Jimenez* he considered he should take action about his investment and it was not until 2015 that he knew he did not hold any shares in Les Bordes (Cyprus) Limited. The possibility of a limitation bar in these circumstances is not sufficient to turn the analysis against the claimants.

Service grounds – breach of contract and recission

104. Under ground 6(a) the court may give permission to serve out where the claim is in respect of a contract that was made in the jurisdiction. This ground has been widely construed such that a claim for recission of a contract, although not made under the contract, is regarded as being in respect of it. For the reasons I have already given, particularly having regard to the date of incorporation of South Horizon, the claimants have a good arguable case that the contract was made in England.

105. Ground 6(c) applies where the contract is governed by English law. Whether this is so involves a consideration of Articles 4(1), 4(2) and 4(5) of the Rome Convention. Article 4(1) applies where the applicable law has not been chosen in accordance with Article 3 and provides that the contract will be governed by the law of the country with which it is most closely connected. Article 4(2) contains a presumption that the contract is most closely connected with the country "… where the party who is to effect the performance which is characteristic of the contract has, at the time of conclusion of the contract, his habitual residence, or, in the case of a body corporate or unincorporate, its central administration". This presumption is subject to the proviso that where the contract is entered into in the course of a party's trade or profession (which must be the case in respect of both Mr Ashley and Mr Jimenez) the applicable law shall be the law of the country "… in which the principal place of business is situated…". Under article 4(5), the presumption in article 4(2) does not apply "… if it appears from the circumstances as a whole that the contract is more closely connected with another country."

106. There is a great deal of contested evidence about Mr Jimenez' principal place of business. The claimants' evidence, supported by evidence from Mr Mort, is that at the time of the contract Mr Jimenez conducted his business from an office in Mayfair. Mr Jimenez says he was resident in Cyprus at the time and operated his business from Dubai. He has support in relation to the very limited use of offices in Mayfair from Mr Muir. Despite having reservations about the veracity of Mr Jimenez' evidence concerning the 17 September 2017 Agreement and other matters, if Article 4(2) is applicable, I do not accept that the claimants have a good arguable case on this point. Mr Jimenez had strong connections with England and undoubtedly conducted some business from England. His directorship of NUFC is an important example of this. However, it seems likely he was active in business in both Cyprus and Dubai, as well as France.

107. However, Article 4(5) requires the court to look at the circumstances as a whole and to consider whether the contract is most closely connected with a country other than the country that would result from an application of article 4(2). The connections are many and varied. The investment was intended to be in a property and business in France. The investment vehicle was a Cypriot company. The amount to be invested was measured in pounds sterling and paid from an account in England (but paid into an account in Cyprus to a Cypriot company in euros). Mr Ashley and St James are based in England. Mr Jimenez was born in London, he holds property registered in his name in England, is on the electoral roll together with his wife at an address in Orpington and visited England regularly. He was a director of NUFC and a number of other companies. He has contracted to provide services to St James for up to 8 working days each month. Added to these factors, both Mr Mort and Mr Muir are English solicitors and the shares in Les Bordes (Cyprus) Limited were to be held by

or on trust for St James. However, I am satisfied that the contract is most closely connected with England, rather than Cyprus, Dubai or France and that Article 4(5) applies. Thus the claimants have a good arguable case that the contract upon which they sue is subject to English law.

108. Limitation does not present a difficulty at this stage in light of the claim that there was deliberate concealment.

Service grounds – claims in trust

109. The claimants next rely on grounds 12 and 15.

110. Ground 12 applies where a claim is made in respect of a trust which is (a) created orally (b) evidenced in writing and (c) is governed by English law. It seems to me that reliance on this ground is misconceived. A Quistclose trust may arise from an agreement but may also arise as a matter of law. The claimants do not plead in the particulars of claim that a trust was created by the Les Bordes Agreement and the agreement cannot naturally be seen as an agreement to create a trust. No doubt the claim is pleaded as it is because South Horizon was not a party to the agreement made between Mr Ashley and Mr Jimenez. Furthermore, the documents the claimants rely upon do not evidence the creation of a trust that binds South Horizon. The Quistclose trust does not in this case arise from the contract, but as a matter of law from the payment of the euro equivalent of £3 million for a specific purpose such as to restrict South Horizon's power to deal with the money.

111. Ground 15 applies where a claim is made against the defendant as constructive trustee or the trustee of a resulting trust "… where the claim arises out of acts committed or events occurring within the jurisdiction or relates to assets within the jurisdiction." For the purposes of this service ground, I consider a Quistclose trust is properly seen as a sub-species of resulting trusts for these purposes – see *Lewin on Trusts* (19th ed.) at 8-052. It is inherently unlikely that Mr Ashley having agreed to invest £3 million in Les Bordes through the medium of South Horizon, it was to be entitled to apply the money for any other purpose. The money was paid not as a loan but as an investment in the project in return for a holding of shares in Les Bordes (Cyprus) Limited. South Horizon held the money transferred to it as a trustee.

112. The claimants say Mr Jimenez became a constructive trustee as a consequence of the claims for knowing receipt or knowing assistance. Their case is that Mr Jimenez procured that South Horizon transferred the funds to himself. Mr Jimenez of course says he was entitled to do so (he accepts he received the funds) due to the private agreement he made with Mr Ashley that the £3 million was to be treated as an advance on commission due. His analysis ignores the fact that South Horizon was entitled to the commission, rather than him.

113. If ground 15 is to apply, the claim must arise out of acts committed or events that occur within the jurisdiction. However, it is not necessary that all the conduct occurs within the jurisdiction: see *Briggs, Civil Judgments and Jurisdiction* (6th ed.) at [4.80] and Lawrence Collins J in *Nabb Brothers Ltd v Lloyds Bank International (Guernsey) Ltd* [2005] EWHC 405 (Ch) at [83] and [86]. The claimants say Mr Ashley agreed with Mr Jimenez that he would obtain shares in return for his investment. The Quistclose trust arises from the payment by Mr Ashley to South Horizon that was

made in the context of the agreement with Mr Jimenez. The claimants have the better of the argument about the place where the contract was made and it is common ground the payment was made from an account in England by Mr Ashley. It seems to me that these are sufficient links with this jurisdiction for the purposes of the Quistclose trust claim.

114. In the case of the constructive trust claim, the wrongful acts all take place, as far as is known, in Cyprus by the money transferred to the Hellenic Bank being removed by Mr Jimenez.

115. The claimants have made out a good arguable case under ground 15 but not ground 12.

Service grounds - restitution

116. Grounds 16(a) and 16(c) relate to the claim in restitution. In the case of the former, it applies where the liability arises out of acts committed within the jurisdiction and the latter ground applies where the claim is governed by English law.

117. The claim to restitution arises from the claim in deceit which is based on the fraudulent misrepresentations. In accordance with the previous analysis the claimants have made out a good arguable case about the claim in deceit and the place where the discussions occurred and this is sufficient to satisfy ground 16(a). And if the contract that has been, or is to be, rescinded is subject to English law, which is the case here, it must follow that there is a good arguable case that the claim to restitution is also subject to that law.

Other service grounds

118. Ground 3 is dependent upon the court having jurisdiction against South Horizon and needs to be considered when that issue has been dealt with. Ground 4A adds nothing in light of the conclusions I have reached on the other grounds. The only remaining element that needs to be considered regarding service out on Mr Jimenez is the question of forum conveniens.

Forum conveniens

119. Although in different circumstances considerable weight would be given to the existence of proceedings between the same parties in Dubai under the 17 September 2008 Agreement, in light of the view I have formed about the authenticity of the agreement those proceedings barely register on the scales. The evidence points to the late production of that agreement and the commencement of the claim in Dubai with minimal prior notice in late 2017, a year after this claim was issued, as a ploy. It would be wrong to pay more than minimal regard to the Dubai proceedings.

120. When considering whether England is clearly the appropriate forum for this claim, it is inevitable that a list of factors pointing in this direction, and a list of countervailing factors are considered. But ultimately, the court is required to make a value judgment and in doing so not all factors have equal weight.

121. The claimants point in particular to the following factors:

(1) The claimants are both based in the jurisdiction and Mr Ashley is the key witness. The other witnesses who have provided statements for the claimants are also based in the UK.

(2) It is likely that the agreement under which claim is made is governed by English law and English law will apply to the other elements of the claim. The agreement and representations were made in England and the payment of £3 million was paid from an account in England.

(3) The language of the claim (all the documents are in English) and of the witnesses on both sides is English.

(4) Both sides have instructed English solicitors in London.

(5) Mr Jimenez has previously defended two similar claims in England without any apparent difficulty.

(6) Regardless of the disputed evidence about Mr Jimenez' residence in England, he is a UK national and was born in the UK. He is a regular visitor to the UK and has, and has had, significant business connections with the UK. He was a director and Vice-President of NUFC. At the time of the claim made by Mr Wise, he was a director of Charlton Athletic FC. His evidence is that he spent 55 nights in the UK in 2014, 49 nights in 2015 and 30 nights in 2016. He is the registered proprietor of two properties in England and on the electoral roll at one of the properties.

122. The defendants say the claimants are unable to show that England is clearly the convenient forum. They point to either Cyprus or Dubai and rely on the following considerations:

(1) None of the defendants' witnesses are resident in England. Mr Jimenez and Mr Bonacci are resident in Dubai. Mr Muir is based primarily in Dubai. Mr Frangos, Ms Christos and Mr Papadopoulos are resident in Cyprus.

(2) The investment related to a French property.

(3) An investigation will be needed into how the interests in Les Bordes were held and Mr Jimenez' ability to control Les Bordes (Cyprus) Limited. This, together with the payment of £3 million having been made to a bank in Cyprus, point to Cyprus.

(4) South Horizon is a Cypriot company. A subsidiary claim is made on the basis that the court is entitled to pierce the corporate veil of South Horizon. This will involve Cypriot law and a factual enquiry about the governance of a Cypriot company.

(5) The defendants rely on events that took place in Dubai in September 2008. It is likely that some additional witnesses from Dubai will be required.

(6) Mr Jimenez says any electronic documents he has are likely to be stored on his laptop which he keeps in Dubai and any hard copy documents will be there.

123. Although it is not a point that was made on behalf of the defendants, it seems to me that it will be necessary to see whether receipt of £3 million and the claimed debt of £7 million were recorded in South Horizon's books and records, and its accounts. That enquiry will involve the production of documents from the company's records in Cyprus.

124. I am satisfied that the claimants are well able discharge the burden on them with regard to forum. Unsurprisingly, there are factors which point to Cyprus and Dubai. The connection would appear to be stronger with Cyprus, if the court has jurisdiction over South Horizon, than with Dubai. However, overall, the factors relied upon by the defendants are of limited significance. Witnesses may have to travel to England from Dubai and Cyprus for the trial but they all speak English (or may be presumed to do so because their statements were provided without the aid of an interpreter). The fact that Mr Jimenez has documents on his laptop (as opposed to a server) if anything is unhelpful to his case on jurisdiction because they are readily portable. And I consider the events in Dubai that took place in September 2008 are subsidiary to the main issues in the claim.

Jurisdiction against South Horizon

125. South Horizon is domiciled in Cyprus and the question of jurisdiction falls to be considered under the BRR. Article 7 provides that a person domiciled in a Member State may be sued in another Member State in a number of circumstances. The application of the BRR does not involve the exercise of a judicial discretion or a consideration of forum conveniens.

126. The claimants rely on two grounds under the BRR, articles 7(2) and 7(6).

127. Article 7(2) provides for jurisdiction "in matters relating to tort, delict or quasi-delict, in the courts for the place where the harmful event occurred or may occur." Article 7(6) provides for jurisdiction "as regards a dispute brought against a … trustee… of a trust… created orally and evidenced in writing, in the courts of the Member State in which the trust is domiciled."

128. It is common ground for the purposes of the applications that a breach of trust is properly seen as a tortious claim for the purposes of the BRR. The question of where the harmful event occurred is less straightforward. The claimants rely on South Horizon having paid away the investment money it received in breach of the Quistclose trust. That event took place in Cyprus where the bank account is based. However, the claimants rely on their pleaded case in paragraph 24 of the particulars of claim where it is said, inter alia, that by failing to restore the investment sum to Mr Ashley, South Horizon committed a breach of trust. However, it seems to me that the breach of trust is paying away the investment which then gave rise to an obligation to restore the money. The claimants rely on a decision of Christopher Clarke J in *Dolphin Maritime & Aviation Services Ltd v Sveriges Angartygs Assurans Forening* [2010] 1 All ER (Comm) 473 at [60]. The court was there considering a tortious claim under Article 5(3) of BRR but nothing turns on the distinction. The court held that for the purposes of a claim under the BRR where but for the tortious act the claimant would have received payment in England under a contract, the harmful event occurred in England. It seems to me, however, that the claimants in this case are seeking to conflate the remedy they seek with the tortious act which was paying away the

investment. The obligation to make good the loss is the result of the wrong, not a separate wrong. It follows that the *Dolphin Maritime* case does not assist.

129. Article 7(6) does not assist the claimants. They need to show that there is (a) a dispute brought against a trustee of a trust (b) the trust was created orally and was evidenced in writing and (c) the claim is made in the place where the trust is domiciled. The difficulty for the claimants concerns the manner in which the trust came into being. As I have indicated previously, although the oral agreement between Mr Ashley and Mr Jimenez gives rise to the circumstances in which the Quistclose trust could come into being, there was (i) no express agreement that the investment would be held on trust and (ii) South Horizon was not a party to the agreement. The trust came into being only upon the payment being made by Mr Ashley to South Horizon at which point, and assuming South Horizon was fixed with knowledge of the agreement, the investment was held upon a restricted basis.

130. I also have real difficulty with the notion of the Quistclose trust having a domicile in England. It seems to me more likely that the domicile is the place of receipt of the money, because that is where the trust came into being, rather than the place from which the funds were despatched.

Conclusions

131. I consider that the claimants have established grounds for service on Mr Jimenez out of the jurisdiction but have failed to establish that the court has jurisdiction as against South Horizon. It is unnecessary to deal with the additional ground under 3.1(3) of PD6B for giving permission to serve out of the jurisdiction on Mr Jimenez.

132. I will make a declaration concerning the absence of jurisdiction against South Horizon but otherwise dismiss the three applications before the court. The terms of the relief to be granted will be considered when this judgment is handed down or on a subsequent date that is convenient to the parties.