Neutral Citation Number: [2020] EWHC 1247 (Ch)

Case No: BL-2020-00576

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION

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

Date: 20/05/2020

Before :

MR MICHAEL GREEN QC

(sitting as a Deputy Judge of the Chancery Division)

- -

Between :

CPOD SA **(a company incorporated in Portugal)**	**Claimant**
- and -	
(1) CHRISTIANO NOGUEIRA DE HOLANDA JUNIOR **(2) UPCITY LIMITED** **(3) BURGUIMEXIS UNIPESSOAL LDA** **(4) LUIS MENEZES** **(5) CNH ASSOCIATES LIMITED** **(6) AIRTOWN LIMITED**	**Defendants**

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Ms Ming-Yee Shiu (instructed by **Withers LLP**) for the **Claimant**
Mr Edward Bennion-Pedley (instructed by **gunnercooke LLP**) for the **First and Sixth Defendants**

Hearing date: 13 May 2020

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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.

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email, release to BAILII and other websites. The date and time for hand-down is deemed to be 10.30am on 20 May 2020.

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MR MICHAEL GREEN QC

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Introduction

1. This is an application by the Claimant (**CPOD**), which is a Portuguese company and part of a group ultimately owned and controlled by a wealthy Brazilian family, the Dias family, headed by Mr Carlos Dias. The application is for disclosure of bank statements and an interim account against the First Defendant (**Mr Holanda**) and the Second and Sixth Defendants (respectively **Upcity** and **Airtown**), which are companies incorporated in England and Wales and owned by Mr Holanda. Upcity went into creditors' voluntary liquidation on 29 January 2020 and the liquidator has indicated through his solicitors that he adopts a neutral stance towards this application. He also said that if the Court grants the disclosure sought in the application he would only immediately be able to deliver up bank statements that are in his possession as liquidator of Upcity.

2. The application is resisted by Mr Holanda and Airtown and they are both represented by Mr Edward Bennion-Pedley of Counsel. CPOD is represented by Ms Ming-Yee Shiu of Counsel.

3. The proceedings are at an early stage. In broad terms CPOD alleges that there was a fraudulent scheme operated by Mr Holanda through a number of companies that he owns to extract substantial funds from CPOD by the false creation and doctoring of supplier invoices. CPOD claims to have lost at least some £1.43 million as a result of this alleged fraud.

4. On 1 April 2020, CPOD obtained a freezing order against Mr Holanda from Morgan J on a without notice application. That freezing order was over specific assets and was given a short return date of 7 April 2020. On the return date, Mr Holanda offered undertakings in similar terms to the freezing order which was discharged by consent. This application had been issued by CPOD at the same time as the freezing order application, and Morgan J directed that it be heard between 12 and 14 May 2020, that the application be amended to include Airtown and for the filing of evidence by both sides. Morgan J also directed, by consent, that the time for service of the Particulars of Claim be extended until after this hearing.

5. In support of this application (and the freezing order application), CPOD has filed a witness statement dated 1 April 2020 from Mr Jose Sampaio Correa Sobrinho (**Mr Sampaio**). He is the Chief Executive Officer of CPOD. CPOD has also filed two witness statements from Mr Stephen Ross: one dated 16 April 2020; the other 7 May 2020. Mr Ross is a partner of Withers LLP, CPOD's solicitors.

6. Mr Holanda has filed one affidavit and a witness statement: the affidavit dated 9 April 2020 was in compliance with his undertaking to disclose assets in England and Wales over £5000 in value; and the witness statement dated 30 April 2020 was in answer to this application.

Background

7. Mr Holanda began working for the Dias family in 2014 and he became a trusted individual with extensive knowledge of their affairs and those of CPOD which was incorporated in order to purchase and develop property in Portugal on behalf of the Dias family. Mr Holanda is a Brazilian national but he resides in England and has done for some time. He has operated his business through a number of companies that he owns, including Upcity and the Third Defendant (**Burguimexis**) which is a Portuguese company that he incorporated in 2015. Mr Holanda and his companies are involved in renovation and construction. He is also involved in what he calls a "*concierge*" business which is a sort of personal service he provided to members of the Dias family when in London, assisting them with shopping trips, travel and booking tickets. His companies are collectively known as "*CNH Global*" and this includes Upcity, Burguimexis, Airtown and the Fifth Defendant.

8. In 2015, CPOD acquired a substantial residential property in Lisbon, Portugal which required extensive redevelopment. CPOD engaged a project management company, Jones Lang LaSalle Portugal, to assist with the works. CPOD also engaged two of Mr Holanda's companies, Upcity and Burguimexis, to provide management services in respect of the project on behalf of CPOD and the Dias family. Mr Sampaio described the involvement of Mr Holanda and the companies as being their "*eyes and ears*" on the ground in Lisbon.

9. For such purpose CPOD entered into service agreements with both Upcity and Burguimexis (the **Service Agreements**). By the Service Agreements, Upcity and Burguimexis were entitled to 5% commission on materials and services expenditure on the project. The Service Agreements were entered into on 5 December 2016 in similar terms. The Service Agreement with Burguimexis was subject to two amendment agreements: one on 26 September 2019 (with retrospective effect to 29 April 2017); and the other on 27 September 2019 (with retrospective effect from 18 September 2018); both of which adjusted the payment provisions and included payments to be made direct to Mr Holanda in respect of some of the services to be provided.

10. The Service Agreements included the following material terms (translated from the original Portuguese):

    (1) Clause 1.1 described the services to be provided and included:

    > *"(*i) supervision of labour, supplier supervision and payments; (ii) tracking and verification of delivery of materials at the Property…"

    (2) By clause 6.1 the parties acknowledged:

    > "that the relationship between them established in this Agreement is of independent contracting parties and nothing contained in this Agreement shall be interpreted as establishing a relationship of employment, association, partnership, joint venture or similar relationships"

    (3) Clause 6.3 contained an entire agreement clause and stated:

> "This Agreement constitutes the entire agreement between the parties and replaces and cancels all agreements and understandings maintained until then between the parties, whether written or oral, in relation to the subject matter of this Agreement."

(4) By clause 6.5 any modifications or changes to the Service Agreements:

> "shall be valid through a written instrument signed by the parties";

(5) Clause 6.9 stated that the Service Agreements:

> "shall be governed by and interpreted in accordance with the laws of Portugal"

(6) Clause 6.10 provided for the exclusive jurisdiction of the Courts of Lisbon:

> "The Parties elect the jurisdiction of Lisbon, Portugal to settle any disputes arising from this Agreement, waiving any other jurisdiction, however privileged it may be."

11. Mr Bennion-Pedley relied on these terms of the Service Agreements principally to demonstrate that it was arguable that the dispute was essentially concerned with the operation of the Service Agreements and that there was no room for suggesting that there were any fiduciary or equitable relationships involved (clause 6.1) or any collateral agreements (clauses 6.3 and 6.5). This was directed at a possible argument on jurisdiction, given the exclusive jurisdiction clause (clause 6.10). I will come on to deal with these arguments below. Ms Shiu's position is that CPOD does not rely on the Service Agreements in these proceedings and so the jurisdiction clause does not apply. In any event, it is not material, she submitted, to whether the Court should grant the relief on this application.

12. It is CPOD's case, although this has not yet been pleaded but appears from Mr Sampaio's witness statement, that there was a separate agreement to the Service Agreements whereby Upcity's and Burguimexis' commission would be added to supplier invoices which were then charged to CPOD. This has been called "the **Invoice Arrangement**" by CPOD and it was something that developed over time, as Mr Sampaio says, at the instigation of Upcity and Burguimexis purportedly for the mutual benefit of them and CPOD. Mr Sampaio now believes, however, that "*it was instigated in order to pursue a fraudulent scheme against CPOD*". According to Mr Sampaio it worked as follows:

(1) Upcity or Burguimexis would receive a supplier invoice, normally from one of the main suppliers: Tetrapod Construcao Civil (**Tetrapod**); or Viterbo Interior Design (**Viterbo**);

(2) Upcity or Burguimexis would then prepare an invoice from them to CPOD, referring to the supplier invoice and adding their commission to it;

(3) Upcity or Burguimexis would then upload their invoice, together with the supplier invoice to a Dropbox account accessible to CPOD; Mr Menezes, the Fourth Defendant, who was an employee of Mr Holanda or his companies,

would normally email CPOD to notify it that the invoices had been uploaded and were now ready for payment;

(4) CPOD would pay Upcity or Burguimexis the value of their invoice and then they in turn would either pay the supplier the amount of the supplier's invoice or use the funds to reimburse themselves if they had paid the supplier in advance;

(5) If a credit note was provided by a supplier and Upcity or Burguimexis had been reimbursed by the supplier, such reimbursements would be passed on to CPOD.

13. This system of invoicing and recharging seemed to be operating reasonably well until 2019. Most of the payments by CPOD were being made to Upcity's bank account, even if many of the supplier invoices were addressed to Burguimexis. In or around April 2019, Mr Sampaio says that they received a tip off from a former employee who wished to remain anonymous. The employee informed them that Upcity was defrauding the Dias family of a great deal of money. Further in August 2019, Mr Sampaio says that he received an anonymous email which also alleged that they were being defrauded by Upcity. Mr Sampaio went to meet that individual who was apparently a former partner of Mr Holanda and he was told that CPOD was being overcharged through "*false/doctored invoices, even in small amounts*".

14. Mr Sampaio decided to engage an audit company in Portugal to investigate the matter. They contacted the main suppliers, Tetrapod and Viterbo, and they and CPOD were sent all original invoices relating to the project. They also asked Mr Holanda for all his companies' invoices and he provided these, although CPOD says that he did not provide the actual invoices that had been sent to CPOD. The report prepared by the auditors identified the method they say was used by Upcity and Burguimexis to defraud CPOD and this was explained by way of three categories of invoices presented to CPOD for payment on the basis of:

(a) purported supplier invoices which had never been issued by the supplier and did not actually exist (called "**Category A Invoices**");

(b) purported supplier invoices which had been inflated by doctoring or recreating the original invoice to show a higher liability to the supplier (called "**Category B Invoices**");

(c) supplier invoices but where subsequent credit notes were issued by the suppliers in respect of those invoices but these were not passed on to CPOD (called "**Category C Invoices**").

15. CPOD and the auditors have identified 18 sets of invoices and/or undisclosed credit notes in the following categories: 8 are Category A Invoices; 5 are Category B Invoices; and 5 are Category C Invoices (credit notes). These total approximately £1.378 million (approximate because it is converted from Euros to GBP). The following table of invoices was helpfully prepared by or on behalf of CPOD:

No.	Date of transfer	Amount	Invoice	(Purported) supplier invoice

				[and credit note]
1.	06-Nov-17	€173,902.86	UP 498	FT F/380
2.	06-Nov-17	€131,038.50	UP 499	FT F/382
3.	06-Nov-17	€63,960.00	BURG 032	VITERBO2017/109
4.	01-Dec-17	€36,900.00	BURG 036	VITERBO2017/129
5.	17-Jan-18	£52,578.44	UP 521	FT J/399
6.	08-Feb-18	£100,988.51	UP 528	FT F/434
7.	14-Mar-18	£25,424.89	UP 535	FT F/446
8.	16-Apr-18	£109,125.58	UP 542	FP VITERBO2018/2 [NC 2018/9]
9.	16-Apr-18	£238,904.78	UP 543	FT F/409
10.	18-May-18	£112,542.31	UP 549	FT F/417
11.	20-Jul-18	£11,198.08	UP 569	FT VITERBO2018/88 [NC 2018-15]
12.	20-Aug-18	£104,531.84	UP 585	FT VITERBO2018/100 [NC 2018-14]
13.	07-Aug-18	£8,256.04	UP 580	FT J/399 and J/417
14.	15-Oct-18	£86,950.80	UP 599	FT F/443
15.	23-Nov-18	£68,539.15	UP 614	2018/FP/401
16.	18-Dec-18	£56,566.62	UP 626	2018/FP/405
17.	26-Feb-19	£184,577.24	UP 801	FT 2019/7 [NC 2019/1]
18.	27-Feb-19	£179,776.38	UP 802	FT 2019/8 [NC 2019/2]

16. It is an unusual feature of this case that the alleged fraudster, Mr Holanda, admits that there were the above-mentioned irregularities in respect of the invoicing in relation to the project. He denies, however, that there was any dishonesty involved on his part because he says that this was all done at CPOD's request and/or with its express or tacit approval in order to allow it to organise money transfers into and out of Portugal and to keep the project on track. He says that in the period to May 2019 there was a different culture within the Dias family's businesses and financing and that all the manipulated invoices and credit notes would have been credited back into CPOD's "*running account*" when a reconciliation was performed. It had to be done in this way to ensure that there was sufficient cash in Portugal to enable day to day expenditure to be met.

17. Mr Sampaio explains in his witness statement that he confronted Mr Holanda on 17 October 2019 with the discrepancies they had unearthed. Mr Holanda was given some time to investigate this and he met again with Mr Sampaio and other representatives of CPOD on 19 November 2019 in London. Mr Holanda was insisting that he had acted for the benefit of CPOD. There was a further meeting on 9 December 2019 in Sao Paolo at which Mr Holanda produced a spreadsheet that showed that his companies were owed a total of £1,079,971 by the Dias family. CPOD has admitted that it owes the CNH Group £334,070.01. At another meeting on 19 December 2019 in Lisbon, Mr Sampaio asked Mr Holanda to repay the amount overcharged in the allegedly fraudulent invoices less the amount admittedly owed to the CNH Group.

18. In text messages from Mr Holanda to Mr Dias on 1 February 2020, Mr Holanda said as follows:

> "I tried many times to defend myself and explain what happened but unfortunately they were not willing to listen. I met with Sampaio more than 3 times to explain and prove that things did not happen the way he was trying to present…"
>
> "I had issues with some invoices but it was something related to my company, of tax related adjustments. I know I was wrong but at the time I thought it was the easiest way to solve the money issues to meet payment deadlines. But I have explained each invoice and it was never to take advantage. In the end, they were all reconciled and I had sent all invoices to the auditors because I didn't think they would take into consideration the invoices altered and would only take into consideration the invoices sent to CPOD."

19. This explanation does not quite square with what Mr Holanda is now saying that this was all done at CPOD's request or with its approval. It is clear that this was a sophisticated operation to create supplier invoices from nothing or to doctor actual invoices. It was deliberate. I am obviously not in a position to determine whether this was dishonest and fraudulent or was a practice agreed upon by the parties and just needs a reconciliation to be done. Those are issues for the trial. For the purposes of the application, and as was accepted by Morgan J on the without notice application for the freezing order, CPOD has a good arguable case that this was a fraudulent operation.

20. As stated above, Upcity went into creditors' voluntary liquidation on 29 January 2020. CPOD relied on this fact as part of its evidence as to risk of dissipation for the purposes of the freezing order. It also relied on the fact that Mr Holanda had been seeking to dissolve another company of his called Hauser Real Estate Ltd. Mr Sampaio described this as a "*second dissolution of one of his companies*" and they were both put forward as examples of how Mr Holanda would seek to evade his responsibilities by removing assets from solvent companies and then liquidating or dissolving them to make it difficult for CPOD to enforce its claims. Mr Holanda alleges that there was a lack of candour in the way this matter was presented to Morgan J at the without notice hearing. I will deal with this submission below.

21. The position of Airtown is explained in Mr Ross' first witness statement. Airtown was not a party to the Service Agreements or the Invoice Arrangement. Its bank details did however appear in respect of two of the transfers in the name of Upcity but this was apparently not drawn to CPOD's attention. It has since been confirmed that Airtown actually received those funds. In or around June 2019, CPOD noticed that certain invoices were coming from Airtown rather than Upcity and Mr Holanda said that Airtown had acquired Upcity or its business. Airtown has therefore been added as a Defendant and Respondent to this application for the purposes of tracing and enforcement.

22. CPOD also relies on an aspect of Mr Holanda's disclosure of assets to cast aspersions on his honesty and his ability to hide assets. The process servers who personally served the freezing order on 1 April 2020, saw parked on Mr Holanda's residential driveway a black Ferrari California with his initials in a personalised number plate

"*G8 CNH*". Although, a number of other vehicles were listed in his disclosed assets on 4 April 2020, the Ferrari was not. Withers on behalf of CPOD asked about this in correspondence and both gunnercooke for Mr Holanda and his witness statement say that the Ferrari had been transferred to a business associate in March 2020 linked to an involvement in the renovation of a golf club. Mr Holanda explained this in his witness statement by saying:

> "I appreciate that CPOD's solicitors are suspicious of that but since the loss of the Dias Family as a client, I have limited liquidity and must trade with what I have."

And in a letter of 16 April 2020, gunnercooke provided further details as to the date, price and purchaser of the Ferrari. I am not in a position to decide whether Mr Holanda is telling the truth about this or not and I do not see that it can have any bearing on the outcome of this application.

23. Mr Holanda has asserted that the assets frozen by the undertakings he has now given exceed by a substantial margin the value of CPOD's claims. One of the assets, Mr Holanda's residential property which is unencumbered and registered in his sole name, is worth £1.4 million. It is said on his behalf that it is most unusual to find an alleged fraudster with substantial assets in his own name. In any event, Mr Holanda says that CPOD has the benefit of his undertakings, effectively a freezing order, and that that is the only relief he should have at this time. Instead of pursuing this application, Mr Holanda suggests that CPOD should proceed to plead its claim and for the proceedings to follow their natural course.

The Substantive Claims

24. Without any Particulars of Claim, there is only the Claim Form as elaborated on by Ms Shiu in her submissions as to the substantive claims being made. The Amended Claim Form reads as follows:

> "The Claim is for damages or an account of profits, declarations, an account and inquiry and interim relief arising out of a fraudulent scheme in relation to the recharging of supplier invoices:
>
> (1) against all the Defendants, damages or an account of profits for deceit and conspiracy to injure by unlawful means;
>
> (2) against the Second and Third Defendants, damages or an account of profits for breach of fiduciary duties and/or breach of contract;
>
> (3) against the First, Second and Third Defendants, restitution of payments made under mistake giving rise to unjust enrichment and declarations of constructive trust and an account and inquiry;
>
> (4) against the First Defendant, damages or an account of profits for knowing receipt and procuring or instigating breach of contract, asset preservation orders and/or freezing injunctions;
>
> (5) against the First and Fourth Defendants, damages for dishonest assistance;

…"

25. At the forefront of the claim is an allegation of a conspiracy to injure CPOD by unlawful means. Ms Shiu sought to emphasise, for obvious reasons, the proprietary claims that CPOD is pursuing. She said in her skeleton argument that because "*Upcity and Burguimexis acted in breach of fiduciary duties owed to CPOD and contrary to the purpose for which the Transfers were made…the assets which were transferred were and are subject to a constructive trust*" which she called the "*CPOD Trust*". Insofar as such assets said to be subject to the CPOD Trust ended up in the hands of Mr Holanda personally, he would be liable for knowing receipt and, if they are still within his control, he will be a constructive trustee of them. CPOD also wishes to know if such assets have found their way to other third parties or companies controlled by Mr Holanda and whether it would be able to trace into such assets. This is the basis of this application.

26. However, it should be noted that part of the final relief sought is an account. That will ultimately be dependent on CPOD establishing that Mr Holanda or the other Defendants are in fact and law accounting parties. That in turn depends on CPOD proving its proprietary claims, which, as Mr Bennion-Pedley submitted, is dependent on there being an equitable or fiduciary relationship that has been broken. That in turn may fall into the trap of being contrary to clause 6.1 of the Service Agreements which seem to imply, although this is subject to Portuguese law, that there are no fiduciary relationships between the parties.

27. In any event, I think the main point that Mr Bennion-Pedley was making is that it is far too premature for there to be consideration of these issues and what is needed is for CPOD to set out the basis of its claim in Particulars of Claim which can then be tested and defended. At this stage, it is merely speculation as to how CPOD will be putting its case on these and other matters. I understand the desire of CPOD to trace what it considers to be stolen assets but that has to be balanced against the risk of prejudice and potential unfairness in forcing such disclosure before the Defendants even know the case they have to meet.

The Application

28. In the disclosure application, CPOD seeks copies of bank statements relating to the period in which the identified transfers took place to date, including a permission for CPOD to obtain the bank statements from the relevant banks. CPOD says that it is very likely that Mr Holanda has withdrawn from Upcity and Airtown its traceable assets for his own benefit and they want to follow the money. It says that it cannot properly plead its claims on constructive trust and knowing receipt without having this information. It also may want to take protective measures against CPOD Trust assets traced to third parties.

29. In relation to the interim account, CPOD asks that the Respondents provide such an account of the impugned transfers as set out in the table in paragraph [15] above, "*in particular what steps were taken by the Respondents in respect of the amounts received pursuant to the Transfers*". It is not clear to me precisely what CPOD

expects the Respondents to do in this respect and I can see that it may be quite an onerous exercise. CPOD is asking for this to be done within 7 days of the Order.

Relevant Legal Principles

30. Neither the application notice nor CPOD's evidence in support identify the jurisdiction or power of the Court by which disclosure is sought. In Ms Shiu's skeleton argument, she said that "*the jurisdiction under CPR 31.16 for pre action disclosure is applicable*" and she set out how the requirements of CPR 31.16 were satisfied. However, at the hearing, Ms Shiu no longer relied upon CPR 31.16. Once proceedings have started, there is no jurisdiction for the Court to order pre-action disclosure under CPR 31.16 – see *Personal Management Solutions Ltd v Gee 7 Group Wealth Ltd* [2016] 1 WLR 2132.

31. Instead Ms Shiu relied on her alternative basis set out in her skeleton argument and developed in her oral submissions. This was a combination of an extended form of the discovery jurisdiction originating in *Norwich Pharmacal Co. v Customs and Excise Commissioners* [1974] AC 133 and the equitable jurisdiction to trace trust property. Even though there was mention of the power under CPR 25.1(1)(g) as being analogous to this jurisdiction, Ms Shiu confirmed that she was not relying on this power. Again this is clearly correct as that power is expressly tied to information about assets that are the subject of a freezing order (see also *Parker v CS Structured Credit Fund Ltd and anor* [2003] 1 WLR 1680 which confirms that CPR 25.1(1)(g) contains no free-standing jurisdiction to order disclosure of information).

32. The analysis of the equitable/discovery jurisdiction begins with the unreported Court of Appeal decision in *Mediterranea Raffineria Sicilliana Petroli SpA v Mabanaft GmbH* (unreported, 1 December 1978). The case concerned a shipment of 29,000 tons of gas oil from a Sicilian company to a German company but with a string of sellers and buyers in between. In the usual way payment under letters of credit was to be against shipping documents, however the German company paid its seller, a Panamanian company, the sum of $3,500,000 but the relevant bills of lading had not been produced. The upshot was that the original Sicilian supplier company was not paid and it was seeking to trace what had happened to the $3.5 million which was thought to be in a bank in Geneva. It is unclear from the short report what cause of action was being asserted but Ms Shiu says that there was no fraud alleged and the claim was in respect of mistaken payments (this is what Lord Denning MR said in *Bankers Trust Co v Shapira* [1980] 1 WLR 1274, at 1280H and he was one of the judges in the *Mediterranea* case). There seems to me to be the whiff of fraud about this case but in any event Lord Denning MR said that "*it seems to me pretty plain that the plaintiffs have a case for following the money: and the order made by the judge is a very good and effective order so as to ascertain where the money has gone*". The judge had required the directors and an employee of a defendant company to make full disclosure of certain specified facts about the $3.5 million. In an oft-quoted short judgment, Templeman LJ (as he then was) said:

> "As my Lord said, it is a strong order, but the plaintiff's case is that there is a trust fund of $3,500,000. This has disappeared, and the gentlemen against whom orders are sought may be able to give information as to where it is and who is in

> charge of it. A court of equity has never hesitated to use the strongest powers to protect and preserve a trust fund in interlocutory proceedings on the basis that, if the trust fund disappears by the time the action comes to trial, equity will have been invoked in vain. That is why orders of this sort were made long before the recent orders for discovery and they are at the heart of the Chancery Division's concern, and it is the concern of any court of equity, to see that the stable door is locked before the horse has gone."

33. This seems to me to be very much based on the Court's view that the $3.5 million constituted a trust fund of some sort, or at least that it was arguably a trust fund. The equitable jurisdiction is clearly founded on there being a trust or proprietary claim. Nowadays, a proprietary freezing order would likely be obtained together with disclosure orders in relation to the identified assets over which a beneficial interest is being asserted. I agree with Mr Bennion-Pedley's submission that there is a strong element of urgency involved as the matter went to the Court of Appeal within days of the first instance judge making his disclosure order.

34. In *A v C* [1981] QB 956 (Note) a decision of Robert Goff J (as he then was) there was again a sense of extreme urgency involved in the application for a freezing order and the disclosure that was ordered was really ancillary to that. This was in the early days of freezing order relief being granted by the Courts. Part of the relief sought by the plaintiffs was a proprietary claim to a sum of £383,872.44 that the plaintiffs had paid into a bank account at the Sixth Defendant and they obtained an order requiring the Defendants to disclose what had happened to that sum if it was no longer in the bank account. Robert Goff J made that order *ex parte* but it was discharged two days later by Peter Pain J. The following week, Robert Goff J restored the disclosure order. After referring to Templeman LJ's judgment in *Mediterranea*, he said:

> "Now these case provide ample authority that, in an action in which the plaintiff seeks to trace property which in equity belongs to him, the court not only has jurisdiction to grant an injunction restraining disposal of that property; it may in addition, at the interlocutory stages of the action, make orders designed to ascertain the whereabouts of that property. In particular, it may order a bank (whether or not party to the proceedings) to give discovery of documents in relation to the bank account of a defendant who is alleged to have defrauded the plaintiff of his assets; and it may make orders for interrogatories to be answered by the defendants or their employees or director."

It actually appears from the end of the note of the judgment that the disclosure sought in relation to the sum in the bank account at the Sixth Defendant was, as against the Sixth Defendant, which was the innocent third party bank against whom there was no allegation of fraud, limited to "*discovery of documents*". This was what essentially became the *Bankers Trust v Shapira* type of Order.

35. In *Bankers Trust v Shapira* [1980] 1 WLR 1274, decided later in 1980, the above cases were reviewed and a third party bank was ordered to provide disclosure in respect of the operation of a bank account that had been used by fraudsters to launder the proceeds of forged cheques. Lord Denning MR referred to the *Norwich Pharmacal* jurisdiction and said at p. 1281 F:

> "In order to enable justice to be done – in order to enable these funds to be traced – it is a very important part of the court's armoury to be able to order discovery."

And at p.1282B, Lord Denning MR continued:

> "It should only be done when there is a good ground for thinking the money in the bank is the plaintiff's money – as, for instance, when the customer has got the money by fraud – or other wrongdoing – and paid it into his account at the bank. The plaintiff who has been defrauded has a right in equity to follow the money."

36. Ms Shiu next referred me to the judgment of Neuberger J (as he then was) in *Re Murphy's Settlements; Murphy v Murphy* [1998] 3 All ER 1 for his explanation of the two different jurisdictions that emerge from the above cases: the discovery jurisdiction derived from *Norwich Pharmacal*; and the equitable jurisdiction derived from the above cases. This was not a fraud case but Neuberger J had to consider the jurisdiction of the court to order disclosure against third parties who were not otherwise appropriate parties to the proceedings. At p.9, he concluded that:

> "Where, as in those three cases, the defendant against whom an order is sought is, albeit wholly innocently, 'mixed up in' the wrongdoing of other defendants, there is a risk of some conflation of the two types of jurisdiction…However, this does not seem to me to alter the fact that there are, in reality, two separate jurisdictions, albeit that in many cases they will overlap."

37. The context for Neuberger J's discussion about the two jurisdictions was whether innocent third parties, such as banks, should be subject to a disclosure order. There was no consideration of the position of the actual defendants to the proceedings accused of fraud.

38. The final case relied upon by Ms Shiu in this respect was *Kyriacou v Christie Manson & Woods Ltd* [2017] EWHC 487 (QB) which was also concerned with innocent third parties who may have had information concerning the misappropriation of the Claimant's assets. In his judgment Warby J said as follows:

> "12. The *Bankers Trust* jurisdiction arises where there is strong evidence that the claimant's property has been misappropriated. The case decided that where there is such evidence the court will not hesitate to make strong orders to ascertain the whereabouts of property and to prevent its disposal, and those orders may intrude into what would otherwise be confidential customer information."

39. Mr Bennion-Pedley submitted that it is important to be clear as to which power of the Court is being invoked. In such respect he distinguished between the discovery/*Norwich Pharmacal* jurisdiction and the equitable jurisdiction, as Neuberger J did in *Murphy's Settlement*. Insofar as CPOD relies on the discovery jurisdiction, he said that this is a remedy of last resort when the claimant needs the "*missing piece of the jigsaw*" in order to bring its claim. He referred me to *Nikitin v Richards Butler LLP and ors* [2007] EWHC 173 (QB) in which disclosure was being sought from various parties before the substantive proceedings had begun. In paragraph 30, Langley J said:

> "In my judgment it remains the basic principle that disclosure of information occurs by the familiar procedures applicable to proceedings commenced between the relevant parties. Rule 31.16 provides for the exceptional circumstances to which it refers, but again in an adversarial or potentially adversarial context between applicant and respondent. Norwich Pharmacal relief is the third and last port of call restricted in its application in the respects I have sought to summarise."

40. The fact that disclosure of the documents sought in this application will happen in due course as part of standard disclosure provides no reason for such disclosure being accelerated to before pleadings have been served. As was said by Mr Gabriel Moss QC, sitting as a deputy High Court Judge in *Parker v CS Structured Credit Fund Ltd* (supra) it is irrelevant that such disclosure will not be prejudicial to the person ordered to provide it:

> 26 …In my judgment, it is not possible to make an application for disclosure, either standard disclosure or specific disclosure, ahead of its proper time, merely because it will cause no damage to the defendants. The claimant has to have some proper basis for invoking the powers and discretion of the court."

41. This theme was picked up in a case concerned with "team poaching" called *Aon Limited v JCT Reinsurance Brokers Limited and ors* [2009] EWHC 3448 (QB). In this case Mackay J emphasised the adversarial, as opposed to inquisitorial, system of litigating disputes in England and Wales that requires the claimant, generally, to set out its case before the defendant has to answer it and provide disclosure. In paragraph 26.1 of his judgment, Mackay J said the following:

> "26.1 Inability of the claimant to plead a case without this relief
>
> This is the main purpose of this application, says Mr McGregor. As a matter of fact I am not able to accept that that is the case. The 24 witness statements already exchanged, the exhibited documents and the summaries that I have already referred to in the claimant's two skeleton arguments suggest to me that there is already a case, and after all the claimants themselves currently call it a good one, against these defendants which could be pleaded now. It would, of course, be incomplete and partial, but it would serve to set in motion the proceedings within which, dependent on the terms of any defences forthcoming, disclosure and further information can be sought in the normal way. I see no reason here to subvert the normal accusatorial basis of our litigation, where the horse precedes the cart, into an inquisitorial one starting from an assumption that guilt has been proved, and saying to the defendants, "Tell us everything you and others have done which was wrong." I remind myself that all that has been shown to date is a good arguable case, no more no less."

42. Ms Shiu submitted that none of the above cases, the *Parker* case, *Nikitin* and *Aon*, were proprietary claims in which the equitable jurisdiction was being invoked. That is correct and I bear very much in mind that CPOD has a good arguable case in fraud against the Defendants and that the Court should assist a claimant in such

circumstances to trace what it says are its assets. However I think that there is an important principle to emerge from those cases which is equally applicable to the equitable jurisdiction and that is that the normal process of adversarial litigation in this country requires a claimant to set out its case and for the consequent pleadings to establish the disputed issues between the parties. Those disputed issues shape the course of the proceedings from then on as they determine the extent of the disclosure obligations and the breadth of the evidence. If that order of events is to be disturbed and a defendant required to disclose documents or provide information at a time even before the claimant has pleaded its case, there must be a very good reason for that.

43. Pulling the above threads together, I do not consider that I have power under the discovery jurisdiction to order disclosure in this case. I do not think that CPOD is unable to plead its case or that it requires any further information with which to do so. It has acquired a lot of information through the audit process it conducted over 8 months ago and it has effectively questioned Mr Holanda about this on four occasions. One can see from Mr Sampaio's witness statement how extensive its investigation has been. While there may need to be some amendment to the pleadings after disclosure is given at the normal time, that is not unusual and I do not believe that CPOD is in any way prejudiced by that.

44. The only jurisdiction left is therefore the equitable jurisdiction, which Ms Shiu says is preserved by CPR 25.1(3) despite it not being referred to in CPR 25.1(1). I accept that I do have the power under the equitable jurisdiction of this Court to make an order against a defendant for disclosure at this stage of the proceedings but I will need to be satisfied of the following:

    (a) it is necessary for such an order to be made now in order to assist CPOD in tracing its assets or money, so as to protect such assets;

    (b) it is otherwise just and convenient for such an order to be made now.

45. As to the application for an interim account, CPOD relies on CPR 25.1(1)(n) and (o) enabling the Court to make an order directing a party to prepare and file accounts relating to the dispute and/or for an account to be taken or inquiry to be made by the court.

46. I do not see that it would be appropriate, before even Particulars of Claim have been served, for the Court to conduct an account or inquiry. As to whether the Respondents should be required to provide an account of their dealings with the money transferred by CPOD, as I have said above, it seems to me that that could be an onerous task at this stage and it would be one which might well turn out to be futile, given that it would likely be done in accordance with the "*running account*" defence theory that Mr Holanda has indicated he will be relying on and so will not be accepted by CPOD. In other words, it will not progress the case but rather allow it to get bogged down in arguments as to whether a proper account has been provided. Be that as it may, I do not believe that I could order an interim account without first being satisfied that I should order disclosure and I now turn to consider that.

Necessity for a disclosure order at this stage

47. Ms Shiu submitted that Mr Holanda has sought to hide his assets and there has been a serious lack of transparency from him as to what he has done with CPOD's money. If Mr Holanda's explanation of the "*running account*" is correct and the invoices were "*created"* or "*doctored*" to ensure that sufficient funds were in Portugal to pay expenses on the project, Ms Shiu says that CPOD should at least have proof of the whereabouts of the "*surplus*" on the running account that is admittedly due to CPOD. In his witness statement, Mr Holanda said that he had "*checked and each supplier invoice created for this purpose was cancelled and credited back to CPOD's account after it had served its purpose*"; and in relation to the inflated invoices he said they had "*been cancelled off the Claimant's account and the correct invoice applied in its place.*" Not unreasonably, Ms Shiu submitted that, if he had already taken these actions, it should not be difficult to provide the account because he had already effectively done this. Also, she submitted that the reason why he does not want to disclose bank statements showing what has happened to the money is that it will be clear that he has taken the benefit of substantial sums himself. The fact that Upcity is now in liquidation with no assets and only one small related party creditor, whereas in its accounts for the year ended 30 September 2018 it apparently had over £1.3 million of current liabilities, shows that the transfers of money from CPOD have all been dissipated in one way or another, probably for Mr Holanda's benefit.

48. Mr Bennion-Pedley submitted that Mr Holanda had provided an explanation as to why there were "*irregularities*" in the invoicing and he recognised that he will, in due course, have to substantiate that explanation. Mr Holanda had said that, until there was a cultural shift in May 2019 when a Ms Philipetti joined the staff of CPOD/the Dias family, there was a particular way of conducting the business in Portugal that was agreed to by him and Mr Sampaio and this gave rise to the "*irregularities*" in the invoicing. While Mr Holanda's evidence as to this is strenuously disputed by CPOD, it is of note that Mr Sampaio himself did not respond to these allegations and it was left to the second witness statement of Mr Ross to deny them based on the instructions of his "*client*" who is unnamed.

49. The main point in Mr Holanda's defence is that there was a commercial relationship established for the benefit of both parties, based on the Service Agreements which included the "*supervision of suppliers and payments*", and which it was expected and accepted that there would be some irregular conduct. Mr Bennion-Pedley said that this was not done to allow Mr Holanda to steal CPOD's money but rather to facilitate cash flow and the transfer of cash into Portugal to fund the project.

50. Mr Bennion-Pedley also submitted that, for the purposes of this application, CPOD had had to elevate its proprietary claim in order to engage the equitable jurisdiction but that that claim was "*flimsy*". In order for there to be a proprietary or constructive trust claim, the "*CPOD Trust*" as Ms Shiu called it, there has to have been, at some stage, a breach of an equitable relationship. Saying that Mr Holanda was in a "*position of trust*", as CPOD does say, is not good enough; and it appears that the terms of the Service Agreements might have excluded the formation of any sort of fiduciary relationship.

51. While I recognise that it is likely, if CPOD has good evidence that a fraud has been committed here, that it will be able formulate some sort of proprietary claim, this comes back to the problem identified throughout this judgment, that before Particulars of Claim have been served, neither the Defendants nor the Court can be sure as to the

way CPOD's case, in particular as to its proprietary/constructive trust claim, will be put. It did not ask for a proprietary freezing order, unlike the plaintiffs in *A v C* for example, and there was no real urgency demonstrated in making the application for the freezing order or indeed in respect of this application. So far as I can tell from the authorities, it is normally only when a proprietary freezing order is sought that it may be coupled with an ancillary disclosure order requiring information to be provided by the defendants as to what has happened to the assets claimed to be beneficially owned by the claimant.

52. Ms Shiu submitted that defendants in the position of these Defendants will always seek to muddy the waters and try anything to avoid having to disclose what they have done with the claimant's money. I think she was warning me not to be taken in by the explanations offered by Mr Holanda and to treat anything that he says with extreme caution. She further submitted that as there is no real prejudice to him in disclosing what he has done with CPOD's money if it was, as he says, all perfectly innocent, the Court should not desist from helping CPOD to trace assets that it is likely to have been defrauded of.

53. I have not been taken in by Mr Holanda's explanation and I accept that what Mr Holanda says should be treated with caution. However, it does seem to me that CPOD has not demonstrated a good enough reason for accelerating the Defendants' disclosure obligations to before the Particulars of Claim have been served. I think it is important for CPOD to set out its properly pleaded case on all aspects of its claim and for disclosure to be provided by the Defendants in the normal course of events. Otherwise, there will be a certain amount of pre-judging of the merits of the proprietary claim without knowing its basis. CPOD has not shown that there is such urgency for this information in order for it to be able trace the money now and that other protective measures need to be taken as a result of that information being provided. It had the first indication that there might have been misconduct by Mr Holanda over a year ago now.

54. Furthermore, it has the undertakings in place freezing Mr Holanda's assets for more than its claimed sum and, although this does not provide security to CPOD for its claim, it does go quite a long way to ensuring that assets will be available to meet its claim, even if it is unable actually to trace what it claims are its assets.

55. Accordingly, I do not think that CPOD has shown that it is necessary at this stage of the proceedings for such an order to be made in order to assist CPOD to trace its assets or money and so as to protect such assets.

Just and Convenient

56. I also do not think that it would be just and convenient for such an order to be made now. Mr Bennion-Pedley submitted that there were four aspects in relation to whether it would be just and convenient to make an order for disclosure pursuant to the equitable jurisdiction and I will consider them under those four headings:

    (1) Jurisdiction of this Court to try the claim;

(2) Pre-judging the substantive dispute;

(3) Prejudice to the Defendants;

(4) CPOD's conduct in obtaining the freezing order.

(1) Jurisdiction of this Court

57. There was a debate before me in relation to the jurisdiction of this Court in the light of the exclusive jurisdiction clauses in the Service Agreements. This was properly and fairly raised by CPOD at the without notice hearing for the freezing order before Morgan J and he was sufficiently satisfied to make the order. Ms Shiu's main point is that all three Respondents to this application are based in England and it has been held, in *JSC BTA Bank v Ablyazov* [2010] EWHC 2219 (QB), that a defendant must comply with a disclosure order made alongside a freezing injunction even if that defendant has a pending challenge to the court's jurisdiction.

58. Mr Bennion-Pedley submitted that it may be that the Defendants will not contest jurisdiction but that it is too early for them to be able to assess whether there would be a sufficient benefit in being sued in Portugal rather than here. Their argument will of course be that the claim is so bound up with the Service Agreements, of which the process of invoicing was a part, that it shows that the parties intended any such disputes, including the tortious claims for fraud and conspiracy, should be litigated in Portugal. Again, he submitted that they needed to see how the claims were pleaded, from which they might need to get Portuguese law advice and then they could make a decision as to whether to challenge jurisdiction.

59. Clearly I cannot decide the jurisdiction issue one way or the other. Ms Shiu cited *Kitechnology v Unicor GmbH* [1994] ILPr 568 and *Bank of Tokyo-Mitsubishi v Baskan Gida and others* [2004] 2 Lloyd's Rep 295 and I can see that there may be difficult issues to decide should the point be taken. But I do think it is crucial for any such challenge, if it is taken, that the case be pleaded and I understand why the Defendants cannot commit to making such an application before then. If I was otherwise persuaded that disclosure should be ordered, I do not think that this factor would have prevented me doing so. But I do think that it is a factor and that the Court should be wary of taking a further substantive step in these proceedings, after the freezing order, while its jurisdiction is potentially under threat.

(2) Pre-judging the substantive dispute

60. Mr Bennion-Pedley submitted that an account is one of the main forms of final relief sought in the Amended Claim Form. If it is ordered now alongside disclosure it would be pre-judging, at a very early stage, that the Defendants, and in particular Mr Holanda, are accounting parties liable to account to CPOD. At the moment, Mr Holanda is not an accounting party because CPOD still has yet to establish that he has a fiduciary obligation to account perhaps by virtue of him being a constructive trustee or liable for knowing receipt. Interim accounts are normally only ordered where there is no doubt about the duty to account, such as between a mortgagee and a mortgagor.

61. Ms Shiu submitted that Mr Holanda's disclosure of assets shows that he must be hiding what he has done with the money transferred by CPOD to Upcity and Airtown.

That, in my view, is an insufficient basis for establishing a liability to account at this preliminary stage of the proceedings. I agree with Mr Bennion-Pedley that this element of pre-judging the substantive issues in the case is a factor that is relevant in whether it would be just and convenient to order disclosure or an account at this stage.

(3) Prejudice

62. CPOD is obviously well-resourced by the Dias family and able to take aggressive steps in this litigation against an individual it accuses of fraud. It obtained the freezing order and disclosure of assets and Mr Holanda says that he has fully complied with all his obligations under the freezing order and his undertakings given on the return date. CPOD has made much of the non-disclosure in relation to the Ferrari but if it was concerned that Mr Holanda had not complied with his undertaking then there are steps that it could have taken to enforce compliance.

63. Mr Bennion-Pedley submitted that the disclosure of assets by Mr Holanda shows both that he has no liquidity and needs to concentrate on spending his money on responding to the substantive case that has yet to be put by CPOD but also the unusual position where the alleged fraudster has disclosed substantial unencumbered assets in his own name. To provide an account and disclosure of bank statements would be an expensive exercise because it would not be a one-off process and it would be likely to lead to a continuing dispute over each and every aspect of the transactions and transfers that the bank statements and an account discloses.

64. I agree that this is also a relevant factor to take into account in the exercise of my discretion.

(4) Conduct of CPOD

65. Mr Bennion-Pedley submitted that the conduct of CPOD in obtaining the freezing order is relevant to whether the Court should grant it any further interim relief. In this respect, he submitted that the way the evidence as to an alleged risk of dissipation was presented to Morgan J was less than candid. This was specifically by reference to the fact that Upcity's liquidation was not described as a creditors' voluntary liquidation and the learned Judge was left with the impression that it was a form of solvent liquidation. He also submitted that the description of the intended dissolution of Hauser Real Estate as a similar process to that which Upcity was put through was misleading.

66. I do not accept that Morgan J did not understand the true position in relation to these two companies. What is clear from the transcript of the hearing before him on 1 April 2020 was that he was most concerned about the fact that the application was being made without notice when Mr Holanda had been tipped off many months before when the discussions began with him in the light of the auditor's findings in October 2019. Morgan J said that it was a "*very borderline case*" but I think that Ms Shiu is correct that this related principally to the risk of there being some dissipation of assets taking place in the time between the without notice hearing and the return date.

67. Nevertheless, the obtaining of the freezing order gave a huge tactical advantage to CPOD. There is no doubt that Morgan J was concerned about the delay from the time that CPOD had conducted the investigation and confronted Mr Holanda with its

findings. Apart from the liquidation of Upcity and the intended dissolution of Hauser Real Estate there is no evidence that Mr Holanda has done anything to dissipate his or his companies' assets after being confronted with CPOD's evidence in relation to the invoicing. In saying that I do not find that the steps taken in relation to Upcity and Hauser Real Estate were in order to dissipate assets. While Morgan J was satisfied that there was sufficient risk of dissipation to make the order, I remain concerned that this application is being made after so much delay from when CPOD was aware of its claim and had had some sort of explanation from Mr Holanda. If there was such a pressing need to trace its assets in order to try to secure them in the hands of third parties, I would have expected CPOD to have taken such steps many months ago.

68. Even though a certain amount of delay seems to have been tolerated in *Bankers Trust v Shapira* (supra – see p.1283C), in all the cases concerned with the equitable jurisdiction, in particular *Mediterranean* and *A v C*, there was extreme urgency exercised by the plaintiffs and that context was, in my view, important for the Court in granting the disclosure orders. Having obtained the freezing order in this case despite that delay, I think that it is a powerful factor against CPOD being entitled to any further interim relief before it has at least pleaded its case.

69. Weighing the above factors in the balance, I do not think it would be just and convenient to exercise my discretion in favour of making the orders sought.

Conclusion

70. For the reasons set out above, I am not going to make the orders for disclosure and an interim account sought in the application, and I hereby dismiss the application. I should say that it is also dismissed as against Upcity as it would not be right to make an order against Upcity where it has not been made against Mr Holanda and Airtown, even though the liquidator was neutral on it.

71. This judgment will be handed down remotely in accordance with the Covid-19 Protocol. Mr Holanda and Airtown are entitled to their costs of defending the application. Both solicitors filed Statements of Costs before the hearing (which I note came out at virtually identical figures) but I did not receive submissions in relation to them. I am prepared to make a summary assessment of the costs. If the parties are unable to agree this, we can either have a further remote hearing to sort out this and any other consequential matters, or the parties can file short written submissions and I will decide it without an oral hearing.