

Neutral Citation Number: [2011] EWHC 976 (Comm)
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 14/04/2011

Before:

THE HONOURABLE MR JUSTICE BEATSON

Between :

Baker Abdullah Saed Mohammed Al-Sadi, Hani Abdullah Said Mohammed Al-Sadi, Soraya Naboulsi	<u>Claimants</u>
- and -	
Dolores Al-Sadi, Kareem Abdullah Saed Mohammed Al-Sadi, Sameer Abdullah Saeed Mohammed Al-Sadi, Jender Stiftung (a Liechtenstein Foundation)	<u>Defendants</u>

Gilead Cooper QC and Andrew Child (instructed by **Herbert Smith**) for the Claimants
Nigel Eaton (instructed by **Berwin Leighton Paisner**) for the Fourth Defendant

Hearing dates: 9 - 10 March 2011

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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Mr Justice Beatson :

Introduction:

1. The underlying dispute in these proceedings is between the claimants, the three children of the late Mr Abdullah Saeed Mohammed Al-Sadi by his first wife (referred to as “the first family”), and the first three defendants, his second wife and the two sons of that marriage (referred to as “the second family”). It is as to the distribution of Mr Al Sadi’s estate. The Commercial Court is not the appropriate location for the determination of the underlying dispute and, the parties (save for the fourth defendant which has played no part in this lest it be taken to have submitted to English jurisdiction) agree that the proceedings should be transferred to the Chancery Division.
2. I have before me three applications. The first is an application made as long ago as 4 December 2009 by the fourth defendant, Jender Stiftung, a Liechtenstein Foundation (hereafter “Jender”) connected to Mr Al-Sadi, to set aside service out of the jurisdiction, pursuant to an Order made by me on 29 August 2009. The without notice application to serve out relied on a number of the jurisdictional gateways in CPR Part 6 PD6B, all of which in some way stemmed from the fact that the proceedings concern a dispute between the two families about the construction and effect of a contract concluded in England and subject to English law *inter alia* on assets which Jender holds. At that stage, and for some considerable time thereafter, the claimants considered the Commercial Court to be appropriate because the dispute was said to concern the interpretation of a contract.
3. The second and third applications are made by the claimants, respectively on 1 March 2010 and 2 March 2011, five working days before the hearing. The claimants applied to join Mr Al-Sadi’s executors as defendants and to amend the pleadings. The most recent application, to make further amendments to the pleadings, followed a change in the claimants’ legal team in January 2011.
4. The executors have consented to being joined provided they are given an indemnity for their reasonable costs and the claimants have agreed to give such an indemnity. During the hearing Mr Gilead Cooper QC, who appeared on behalf of the claimants, handed me an order recording this and making other directions as to the service of statements of case and copies of pleadings on the executors.
5. The first, second and third defendants had previously consented to the draft amended Particulars of Claim contained in the 1 March 2010 application, and have served a draft amended defence. During the hearing Mr Cooper also handed me an order signed by the first, second and third defendants’ solicitors consenting to the amendments in the 2 March 2011 application and to the transfer to the Chancery Division. Accordingly, the only remaining live issue in the second and third applications is the claimants’ application to serve the new pleadings out of the jurisdiction on Jender and also at its solicitors’ address in England.
6. The delay of over twelve months in listing Jender’s challenge to jurisdiction has been due to disputes about: (a) the need to translate Liechtenstein legal materials

exhibited to the witness statements, and (b) whether Jender's application should be heard before or at the same time as the claimants' 1 March 2010 application. Jender is only before the court to challenge its jurisdiction to make the Order of 4 December 2009, and has played no part in the consideration of the other applications lest it be taken to have submitted to English jurisdiction. Jender and the claimants did not agree, as the parties in *Grupo Torras SA v Al-Sabah* [1995] 1 Lloyd's Rep. 374 at 381 had done, that I should decide on the applications to amend and to serve out on the basis of the new pleadings without prejudice to Jender's jurisdiction challenge; i.e. without any suggestion that Jender would thereby have submitted to the jurisdiction. Accordingly, after summarising the factual background, I first deal with Jender's application.

Factual background:

7. In 1924 Mr Al-Sadi was born in Gaza, then part of British Mandatory Palestine. He moved to Kuwait in 1950, and obtained Kuwaiti nationality in about 1959. He married his first wife in 1961. They moved to London in the late 1960s, and he divorced his first wife in December 1980. The claimants are the children of that marriage. Mr Al-Sadi married the first defendant on 17 February 1983. The second and third defendants are the children of that marriage. Mr Al-Sadi subsequently made two wills which made no provision for the first family. His English will, made on 23 January 1992, stated that he had made no provision for them because, in broad terms, he had previously provided for them. His Canadian will, made on 11 August 1993, left his Canadian estate to the second family.
8. Jender is one of two Liechtenstein Foundations connected to Mr Al-Sadi. It was established in 1998. The other foundation is the Taleem Foundation ("Taleem"), established in 1982, with a fund of 3 million Swiss Francs. Taleem's Board was authorised by its original Byelaws to designate the beneficiaries and issue supplementary Byelaws. In May 1982 it designated the beneficiaries as Mr Al-Sadi for life and, if he re-married, his widow and the children of that marriage. The Byelaws stated that the first family was not to benefit from Taleem. After Mr Al-Sadi remarried further Byelaws were issued naming the beneficiaries as Mr Al-Sadi for life and, after his death, the second family. Again, the Byelaws expressly stated that the first family was not to benefit from Taleem.
9. In June 2002 Mr Al-Sadi orally instructed Taleem's Board *inter alia* that Taleem's assets should be transferred to Jender on his death. Mr Al-Sadi died on 18 January 2003. On 24 March 2003 Taleem's Board issued new Byelaws. The designated beneficiaries included the second family and any foundation of which they were the beneficiaries. The next day Jender's Board issued new Byelaws which were in substance identical to Taleem's Byelaws. From May 2003 US\$1 million was transferred from Taleem to Jender. The funds are in Jender's bank account with the Union Bancaire Privée in Switzerland. After Taleem had transferred all its assets to Jender, in August 2004 it was wound up.
10. Notwithstanding Mr Al-Sadi's English and Canadian wills, the extent of his testamentary freedom over his moveable property depended on his domicile at the time of his death. The possibilities were Gaza or Kuwait, where Sharia law, which does not permit testamentary freedom, applies, or England.

11. In December 2003, in the belief that when Mr Al-Sadi died he was domiciled in Kuwait, or at any rate not domiciled in England, the second defendant obtained a certificate from the Court in Kuwait. This listed the claimants and the second family as Mr Al-Sadi's heirs. In March 2004 a Sharia Court in Kuwait held that the estate was to be divided in accordance with Sharia law. By Sharia law a share of $9/72$ went to the widow, $14/72$ to each of his four sons, and $7/72$ to his daughter. In total the share allocated to the first family was $35/72$ and that to the second family was $37/72$.
12. Both families were dissatisfied with the result, *inter alia* because the English will was not efficient in using available reliefs from inheritance tax. As a result of this, on 17 January 2005 they entered into an agreement ("the Letter Agreement") to vary the distribution of Mr Al-Sadi's estate. It is common ground that the Letter Agreement was concluded in England and is subject to English law. Only paragraphs 3 and 5 are material for present purposes. They state:-
 - “3. All other assets anywhere in the world (including personal estate in the United Kingdom) will devolve in accordance with Sharia Law and the Sharia Succession Certificate annexed to this letter
...
 5. Gifts made by the deceased during his lifetime will stand.”
13. The first family's claim to be entitled to a $35/72$ share of the assets held by Jender arises in the following way. They claim that Mr Al-Sadi's funds had not been validly transferred to Taleem. Accordingly, the funds now in Jender's hands had not been validly gifted during Mr Al-Sadi's lifetime. The result, it is said, is that the funds remained his and are thus part of his personal estate, and within paragraph 3 of the Letter Agreement so that the distribution under Sharia law applies to them. The second family claim that Mr Al-Sadi validly disposed of the funds now held by Jender for their benefit during his lifetime. They claim that the funds do not form part of his estate because they are lifetime gifts and thus within paragraph 5 of the Letter Agreement, so that the distribution under Sharia law does not apply to them. On 26 January 2009 the first family successfully applied to the Court of First Instance in Geneva for an Order freezing the assets in Jender's bank account. An appeal by the second family was allowed, but on 17 June 2010 the Swiss Federal Tribunal allowed an appeal by the first family so the funds remain frozen.
14. The first family has made similar claims and the second family has made similar responses in respect of bearer shares in Sanmar Real Estate SA, a Panamanian company which is the registered owner of the property in which the second family live, and the contents of two bank accounts in Monaco. Those claims are not relevant to Jender or to the application by Jender.

The evidence:

15. The evidence on behalf of the claimants consists of two statements of Mathieu Doublet, respectively dated 18 August and 4 November 2009, two statements of Adam Greaves, respectively dated 1 and 4 March 2010, and statements of Robert

Hunter dated 28 February 2011 and Benjamin Cameron dated 2 March 2011. Messrs Doublet and Greaves are respectively a senior associate and a partner of McGuire Woods, the claimants' former solicitors. Mr Hunter and Mr Cameron are respectively a partner and an associate at Herbert Smith LLP, the claimants' present solicitors. The evidence on behalf of the defendant consists of two statements of Michael Polonsky, respectively dated 4 December 2009 and 21 June 2010, and a statement of Friedrich Wohlmacher, dated 21 June 2010. Mr Polonsky is a partner in Berwin Leighton Paisner, and Dr Wohlmacher is a Liechtenstein lawyer and partner at the firm of Wohlmacher Hirn Kaiser Becker. During the hearing, a statement of Lucy Westwood, a solicitor at Herbert Smith, dated 8 March 2011, was added to the bundle. There are also before me two expert reports, one dated 4 December 2009, on behalf of Jender, is by Dr Wohlmacher; the other, dated 26 February 2010, on behalf of the claimants, is by Dr Bernhard Lorenz, also a Liechtenstein attorney of the firm LNR Lorenz Nesensohn Rabanser.

The claim and the application to serve out

16. Mr Doublet's witness statement in support of the without notice application to serve out stated that under Liechtenstein law the foundation of Taleem was invalid but at that stage no particulars of Liechtenstein law were pleaded. The draft amended Particulars of Claim plead three grounds upon which the first family claim that funds were not validly transferred by Mr Al-Sadi to Taleem. First, it is said that Taleem is not capable of being the recipient of a gift because it was not properly constituted as a foundation under Liechtenstein law. Secondly, it is contended that Mr Al-Sadi's motive in setting up Taleem, to deprive the first family of their inheritance rights under Sharia law, was an improper motive which, as a matter of Liechtenstein law, invalidated either the foundation or the purported gift to it. Thirdly, it is argued that the transaction with Taleem was a sham and Mr Al-Sadi continued to own and control all of Taleem's assets.
17. I have stated that permission to serve out was sought on the basis of a number of the gateways to jurisdiction, all of which were said to be founded on the dispute between the two families as to the effect of the Letter Agreement. I have also stated (see [13]) that the dispute is whether the assets Jender holds fall within paragraph 3 or paragraph 5 of the Letter Agreement. The principal grounds upon which permission to serve out were sought were that (a) the second family is domiciled within the jurisdiction so that the claim against them falls within CPR Part 6 PD 3.1(1) and, see CPR Part 6 PD 3.1(3), Jender is "a necessary or proper party" to that claim; and (b) the claim against Jender is a claim "in relation to" a contract (the Letter Agreement) concluded in England and subject to English law, and is thus within CPR Part 6 PD 3.1 (6).
18. The first family's claim has been put in a number of ways. One of the issues is whether it is permissible for the claimants to rely on any of the ways they have put the claim since the without notice application, an issue referred to by Mr Eaton as the *Parker v Schuller* point (see (1901) 17 T.L.R. 299). Mr Eaton submitted that it is illegitimate for the claimants to try to meet Jender's jurisdictional challenge by relying on later amendments to the pleadings and that the question whether or not the order giving permission to serve out was properly made must be answered by

reference only to the claims upon which the claimants relied at the time of their without notice application.

19. The leading modern case on this is *Metall und Rohstoff AG v Donaldson Lufkin and Jenrette Inc* [1990] 1 QB 391, in which the judgment of the Court of Appeal was given by Slade LJ. That case considered the position under the Rules of the Supreme Court. But in *E D and F Man Sugar Ltd v Lendoudis* [2007] 2 Lloyd's Rep. 579 at [27] Christopher Clarke J stated that the principles established in *Parker v Schuller* and the *Metall und Rohstoff* case remain applicable under the CPR: see also *AES UST-Kamenogorsk Hydropower Plant LLP v UST-Kamenogorsk Hydropower Plant JSC* [2010] 2 Lloyd's Rep. 493 at [16] *per* Burton J. This issue overshadows the others in the case. But, since it will be necessary to consider whether the way in which the claimants now wish to put the case falls within or outside the principles in these cases, after setting out the requirements for service out, I will first summarise the ways in which the case has been put at different times.
20. The effect of CPR 6.36 and 6.37(1) and (3) is that a claimant wishing to serve out of the jurisdiction must satisfy three requirements. The first is to meet one of the jurisdictional gateways set out in CPR 6B PD 3.1. The second is the merits requirement in CPR 6.37(1)(b), that the applicant must satisfy the court "that the claim has a reasonable prospect of success". The third is the *forum conveniens* requirement in CPR 6.37(3), that the claimant must satisfy the court that England and Wales "is the proper place in which to bring the claim".
21. In respect of the gateway requirement, the standard to be applied in considering the matter is that of "good arguable case" (see *Seaconsar Far East v Bank Markazi Iran* [1994] 1 A.C. 438, 454-455). This has been explained in a number of cases, most recently *Astrazeneca UK Ltd v Abermarle International Corp* [2010] EWHC 1028 (Comm), as meaning who has the "better" or "much the better" of the argument. Hamblen J in that case (see [28]) understood that what was required is that claimants show "not merely that on balance they have the better of the argument, but that they clearly do so".
22. In respect of the gateway in paragraph 3.1(1) there must (a) be a claim between the first family and the second family which gives rise to "a real issue which it is reasonable for the court to try", and (b) Jender must be "a necessary or proper party" to that claim. In relation to the gateway in paragraph 3.1(6) it is insufficient that the claim has a mere factual connection with the contract governed by English law; there must (see e.g. *Cecil v Bayat* [2010] EWHC 641 (Comm) at [49]) be a "relevant legal connection" between the two. I am, however, not concerned with paragraph 3.1(6). In a letter dated 23 October 2009, McGuire Woods, then the claimants' solicitors, stated that the claimants intended to resist Jender's challenge to jurisdiction only on the general ground set out in CPR Part 6 PD 3.1(1) and (3).
23. At the time of the without notice application for permission to serve out, the pleaded case was that the transfer to Taleem was invalid so that Jender holds the funds it received from Taleem on trust and holds 35/72 of the funds on trust for the first family. The application to serve out was premised on English law applying either because (see Mr Doublet's first witness statement, paragraph 87) Mr Al-Sadi

“may well” have died domiciled in England or because the claim in relation to the Jender assets was one under the Letter Agreement: see the letter dated 21 July 2009 from the claimants’ then solicitors, McGuire Woods, and paragraphs 11, 21, and 94 of Mr Doublet’s first witness statement. It was still put in this way at the beginning of March 2010: see Mr Greaves’s first statement at paragraphs 22.1 and 62.

24. Jender’s application to set aside permission is based on the submission that even if Taleem held the assets now held by Jender on trust for Mr Al-Sadi at his death, it does not follow that after his death, Taleem and subsequently Jender held the assets on trust for the claimants because any beneficial interest which belonged to Mr Al-Sadi at his death would have vested in his executors. Since the only basis advanced for a claim in relation to the assets of Mr Al-Sadi’s estate was under the Letter Agreement, and neither Jender nor the executors were party to that agreement, the agreement cannot give the claimants a proprietary claim to estate assets or a personal claim against Jender. It only gives rise to a personal claim in contract against the beneficiaries under the estate, the first three defendants: see Polonsky, second witness statement, paragraph 30. For this reason, Mr Eaton submitted that there is no serious issue to be tried between the claimants and Jender on the merits and there is no good arguable case that the claimants’ claim against Jender falls within CPR Part 6B PD 3.1(3), the “necessary or proper party” gateway. He also submitted that, even if that submission is rejected, since the claimants’ case against Jender depends on and raises a number of complex questions of Liechtenstein law which were not sufficiently brought to my attention in the without notice application, England is not the *forum conveniens*.
25. Since my Order the claim against Jender has been formulated in a number of different ways in the draft amendments to the Particulars of Claim which were the subject of the application notices dated 1 March 2010 and 2 March 2011. The second way in which the claim was put is that the claimants have standing under English law to bring a “derivative action” against Jender for the enforcement of the executors’ rights “for the benefit of the estate”. It was in connection with this case that the claimants first sought to join the executors as defendants. It is not necessary to consider this further because, as appears from the application notice dated 2 March 2011 and the new draft pleadings, it is no longer pursued.
26. The third way in which the case is put, originally in the draft pleadings with the application notice dated 1 March 2010 but maintained in those with the more recent application, is based on Swiss law. It is claimed that under Swiss law the funds now held by Jender did not vest in Mr Al-Sadi’s executors, that the second family acquired a *droit economique* in them and hold 35/72 of this *droit economique* on trust for the claimants. This way of putting the claim is as a proprietary claim against the first to third defendants to which Jender is a “necessary or proper party”.
27. The fourth way in which the case is put is premised on the application of Sharia law to Mr Al-Sadi’s English estate because he died domiciled in either Kuwait or Palestine so that his personal estate, under English private international law, devolves according to Sharia law. This way of putting the case was first raised in the draft pleadings annexed to the application notice dated 2 March 2011.

28. The final way in which the claimants' case is put was also first raised in the draft pleadings annexed to the 2 March 2011 application. It is that the Letter Agreement took effect as an assignment by the defendants to the claimants of the relevant proportion of the defendants' interests in Mr Al-Sadi's estate. The result under English law is said to be that the claimants are entitled, as assignees, directly to enforce the executors' obligation to administer the estate.
29. Although Mr Cooper submitted that the case as pleaded at the time of the without notice application for leave to serve out justified the order made, his principal arguments to justify the Order were based on the proposed amendments to the pleadings. He submitted that the draft amendments do not introduce a new cause of action and the court can take them into account in considering whether the order granting permission to serve out was properly made. He maintained that this case falls outside the principles established in *Parker v Schuller* and the *Metall und Rohstoff AG* case, and the other cases relied on by Mr Eaton: see [19] and [34]. Before considering whether that is so or whether the principle in those cases is applicable in the circumstances of this case and precludes reliance on the proposed amendments, I deal with whether the Order granting permission to serve out was properly made on the basis of the case put before me at that time.
30. Mr Cooper submitted that, although the original pleading did not expressly plead that Sharia law applied, there was one route under the original pleaded claim by which the order can be justified. He argued (see Day 1, pages 117 and 128) that by pleading the Sharia certificate in connection with the Letter Agreement, the original pleading in effect pleaded that Mr Al-Sadi died domiciled in Kuwait so that, if the assets that went into Taleem were not lifetime gifts, they fell within clause 3 of the Letter Agreement. He also observed that, although it was not properly in evidence before me, the English grant of probate stated that Mr Al-Sadi was domiciled in Kuwait.
31. I do not consider that pleading the Sharia certificate in the context of the Letter Agreement is the same as pleading that Mr Al-Sadi was domiciled in Kuwait. The paragraphs of the original pleading and Mr Doublet's statement, to which I have referred, do not suggest that the Sharia certificate is the ground for the claim. The reference to the Sharia certificate is in the context of a claim founded on the Letter Agreement, rather than a freestanding claim based on Sharia law as the applicable law of Mr Al-Sadi's domicile at the time of his death.
32. Accordingly, I do not consider that the Order giving permission to serve out can be justified by reference to the original Points of Claim. I accept Mr Eaton's submission that the original Points of Claim do not disclose a claim against Jender that has a reasonable prospect of success. Jender is not a party to the contract in the Letter Agreement, and so a claim against it cannot be based on or generated by that agreement. Moreover, while Jender may, in respect of the funds held, be subject to a proprietary claim, that claim would be a claim by the executors and not one by the claimants. The original pleaded case (see Particulars of Claim, paragraph 40.5) does not plead that Jender holds the funds on trust for Mr Al-Sadi's estate but that it holds them on trust for the claimants and (the Prayer, paragraph I.3) seeks an Order for payment of the same US\$1 million frozen in Jender's bank account with the Union Bancaire Privée. Although Mr Doublet's first statement refers (paragraph 47)

to Jender holding the funds on trust for the estate, in determining the legal basis on which the claim is put the court has regard to the pleaded case (see *Metall und Rohstoff* at 436C) and, while it is permissible to look at the affidavit evidence as well if an alternative basis has been specifically referred to, it is the claim form and statement of case which is primary and to which one must look: *Excess Insurance Co Ltd v Astra SA Insurance and Reinsurance Co* [1996] 5 Re LR 471 at 476 per Neill LJ, using the pre-CPR terminology of “writ” and “pleading”.

33. On the assumption that English law applies, which, for the reasons I have given, is the basis on which the claim as originally pleaded proceeds, until the estate has been administered, the beneficiaries have no title to the assets and the personal representatives do not hold them on trust for those in the position of the claimants. Mr Cooper relied on the fact that the right enjoyed by a beneficiary under a will before the will has been administered is a chose in action which is capable of being assigned (skeleton argument, paragraph 29(2)). The claimants may have a right against the personal representatives that the estate will be properly administered, but this is a personal right, not a proprietary claim to any assets in the estate. Moreover, the original Particulars of Claim plead the asset as the amount in the Union Baricaire Privée account (see paragraphs 45.4 and 45.8, and the Prayer, paragraph I.3), not the equivalent chose in action. There is, accordingly, on the original pleaded case, no serious issue to be tried that Jender holds 35/72 of the funds on trust for the claimants or that it is under an obligation, based on the Letter Agreement, to the claimants. It is therefore necessary to consider the *Parker v Schuller* point.
34. It is well-established that a claimant who has been given permission to serve out cannot resist an application challenging the jurisdiction by pleading a new cause of action: *Parker v Schuller* (1901) 17 T.L.R. 299, 300; *In re Jogia (a Bankrupt)* [1988] 1 W.L.R. 484, 491; *Metall und Rohstoff AG v Donaldson Lufkin and Jenrette Inc* [1990] 1 QB 391, at 436; *Grupo Torras SA v Al-Sabah* [1995] 1 Lloyd’s Rep. 374 at 392; *Excess Insurance Co Ltd v Astra SA Insurance and Reinsurance Co* [1996] 5 Re. L.R. 471, 475 – 476; *E D and F Man Sugar Ltd v Lendoudis* [2007] 2 Lloyd’s Rep. 579 at [17] – [22] and [25] – [28].
35. In *ISC Technologies Ltd v Guerin* [1992] 2 Lloyd’s Rep. 430, Hoffmann J stated that, while in determining whether to discharge an Order giving leave to serve out the question was whether that Order was rightly made at the time it was made, the court could receive evidence which was not before (in that case the Master) and that subsequent events may throw light upon what should have been relevant considerations at the time. Mr Cooper (skeleton argument, paragraph 48) submitted that it was clear that the principle in *Parker v Schuller* and the subsequent authorities does not preclude a party from advancing his best case against a proposed foreign defendant. While that may be so, Hoffmann J’s judgment shows that it is the best possible case on the grounds as they were at the time the Order was made.
36. A number of reasons have been given for the principle in the *Parker v Schuller* line of cases. First, the jurisdiction to serve out on a foreign defendant is an exorbitant one. Caution is needed in exercising it and (see *Metall und Rohstoff* at 435C, citing *The Hagen* [1908] P 189 at 201) any doubt ought to be resolved in favour of the

foreign defendant. The second and third reasons concern the purpose of the rules governing service out, formerly in RSC Order 11 and now in CPR 6.36 and 6.37. These rules are (see *Metall und Rohstoff* at 436E-F) “designed to ensure that both the court is fully and clearly apprised as to the nature of the legal claim with which it is invited to deal on the *ex parte* application and the defendant is likewise apprised as to the nature of the claim which he has to meet, if and when he seeks to discharge an order for service out of the jurisdiction”. In *Excess Insurance Co Ltd v Astra SA Insurance and Reinsurance Co*, Neill LJ, with whom the other members of the court agreed, emphasised that it was not only the court which must be apprised but also the defendant. Mr Cooper submitted that the principle behind the rule is the need by a person who makes a without notice application to make full and fair disclosure. That may be so as far as the need to inform the court is concerned, but it is not so as far as the need to inform the defendant is concerned.

37. The need to inform the defendant is, as Mr Eaton submitted, in order to enable the defendant to decide whether to submit to the jurisdiction, to challenge jurisdiction, or to ignore the Order. A defendant who makes a limited submission to jurisdiction for the purpose only of his own jurisdictional challenge would, if Mr Cooper is right, be drawn into the merits of a new claim for which no permission has been given. Mr Eaton submitted that, if a defendant is so drawn in, he risks being held to have submitted to English jurisdiction on the merits. Although the English courts may respect an agreement between the parties such as that entered into in the *Grupo Torras* case (see [6]), it does not follow that courts in other jurisdictions will do so.
38. The thrust of Mr Cooper’s submissions are that the *Parker v Schuller* jurisprudence was a product of the pre-CPR age. He in effect submitted that it would be a triumph of formalism if a defendant who has been served out is entitled to have the Order set aside only for the claimant to be immediately given permission to serve him again with an amended claim. He submitted that the appropriate approach is to allow the amended claim but to make an appropriate order for costs. I have noted ([19]) that the *Parker v Schuller* principle has been applied in the context of the CPR and thus reject the first part of Mr Cooper’s submission.
39. Mr Cooper, however, also relied on the indication given by Christopher Clarke J in *E D and F Man Sugar Ltd v Lendoudis* [2007] 2 Lloyd’s Rep. 579. After setting out the principles stated by the Court of Appeal in *Metall und Rohstoff* and confirmed in *Grupo Torras* and *ABCI v Bank Franco-Tunisienne* [2003] 2 Lloyd’s Rep. 146 and stating that it did not seem to him to be right to ignore those principles on account of the CPR regime and the overriding objective in CPR 1.1(1) and 1.2(b), Christopher Clarke J stated (at [28]) that “the position might be different if there was no basis upon which the defendant could hope to resist the grant of permission”. The *E D and F Man Sugar* case was not such a case because there was or may well have been a limitation point available to the defendant. Christopher Clarke J considered the limitation point was a point of substance and upon which more evidence was needed. In those circumstances he concluded (at [30]) that there was nothing unjust in applying the principle in *Metall und Rohstoff*. He therefore declined to allow the amendment sought, or to grant retrospective permission to serve the amended claim form out of the jurisdiction.

40. Mr Eaton submitted that Christopher Clarke J's suggestion was tentative and is not based on anything in the previous case law. Indeed, it may be inconsistent with it because the case law states that it is not legitimate for a claimant to reformulate its claim in response to a jurisdiction challenge. Moreover, his Lordship recognised (at [27]) that the rules in the CPR did not reduce the desirability of preventing any circumvention of the proper procedure for serving out. One function of that proper procedure is to apprise a defendant of the nature of the claim he has to meet so that he can decide whether or not to challenge jurisdiction. I have referred (see [37]) to the risks to a party such as Jender should it respond to a new way the claimant seeks to put its claim even if it does so "without prejudice" to its jurisdictional challenge. The only case Mr Cooper was able to show me to suggest that the risks could be eliminated was *Grupo Torras*. However, as I have noted, in that case the matter came before the court in the way that it did by the agreement of the parties. The indications from the more recent decision in *AES UST-Kamenogorsk Hydropower* do not suggest a departure from the basic approach in the *Parker v Schuller* and *Metall und Rohstoff* line of cases. Burton J ([2010] 2 Lloyd's Rep. 493 at [16]) contemplated that, if the claimant was unsuccessful in resisting the challenge to jurisdiction on the original gateway, "the well established principles in *Parker v Schuller*" would prevent retrospective permission to serve out on an alternative gateway. This was so where the ground for serving out under the alternative gateway was "not in doubt" but permission had originally not been sought under that gateway.
41. I have observed that, in the present case, the substantive amendments upon which the claimants rely were made only five working days before the hearing. The new case relies in an entirely new way on Sharia, Swiss and Liechtenstein law. There are three experts' reports on different aspects of Sharia law served on behalf of the claimants and conflicting reports about Liechtenstein law. Even if the difficulties that Christopher Clarke J's suggestion poses to a defendant who wishes to preserve his jurisdictional challenge can be overcome in other circumstances, this is not a case in which it is unjust to rely on the principle in *Parker v Schuller*, *Metall und Rohstoff* and the other cases.
42. The question therefore is whether the amendments now relied on by the claimants do introduce a new cause of action or whether, as Mr Cooper submitted in paragraph 45 of his skeleton argument "there is and only ever has been a single cause of action against Jender, namely that it holds the bank account on resulting trust for the estate". I reject this submission. The resulting trust pleaded in paragraph 40.5 of the Particulars of Claim is a resulting trust for the first family, i.e. the claimants. The estate has been brought into the picture by the draft amendments to the pleadings; see, for example, paragraphs 41A – 41D of the draft with the application of 1 March 2010 and paragraphs 4A – 4Z, 4AA, 12C – 12G and paragraphs 1.2 – 4 of the Prayer in the draft with the application dated 2 March 2011. The original pleading does not state that the first family is to be equated to the estate. Although Mr Doublet's statement (paragraph 47) refers to Jender holding the funds in the bank account on trust for the estate, it is not open to the claimants to rely on that because, as I have stated at [32], the pleadings take priority.
43. In the *Excess Insurance Co* case Neill LJ stated ([1996] 5 Re LR 471 at 476 column 2 at (7)) that "where a defendant is sued who was not a party to the original contract

the steps by which his liability is said to exist form essential ingredients of the cause of action". Neill LJ stated that in such a case the liability may arise by an assignment, by operation of law, or in some other manner, and that "in each case the links in the chain are part of the cause of action and in my judgment must be set out in the writ". It cannot be said that the Swiss law "*droit economique*", Sharia law *qua lex domicilii*, or assignment routes to or links in the chain to liability on the part of Jender are set out in the original pleaded claim.

44. These routes put the claimants' case against Jender on three entirely new legal bases. Those legal bases have also led to new facts being pleaded. Thus there is now extensive pleading showing where Mr Al-Sadi lived from time to time to support the contention that Sharia law governs as the *lex domicilii*, and, since foreign law is a question of fact to be proved, there is pleading as to what Sharia law and Swiss law is on these matters.
45. For these reasons, the Order made by me on 29 August 2009 must be set aside. Mr Cooper invited me to grant the 2 March 2011 application to serve the re-amended Particulars of Claim on Jender out of the jurisdiction and on its solicitor's address in England. Mr Eaton, as I have stated, played no part in the consideration of this, save for stating that Jender had no objection to the court considering this as a without notice application to serve out.
46. Since the claimants, the first three defendants, and the executors agree that these proceedings should be transferred to the Chancery Division, I have concluded that the application to serve out should be considered by a Judge or a Master of that Division. Now that the focus of the proceedings is not the construction and interpretation of a contract concluded in England and subject to English law, but the application of Sharia law to the distribution of Mr Al-Sadi's estate, and of Swiss and Liechtenstein law in relation to the validity of gifts by him, it is also appropriate for a Judge or Master of the Chancery Division to consider whether the claimants have a "good arguable case", i.e. have either "the better" or "much the better" of the argument in the light of the way the case is now put. In these circumstances it is not appropriate for me to express a view on either the merits of the claim or the rival submissions as to whether England or Liechtenstein is the appropriate forum.