IN THE HIGH COURT OF JUSTICE **CLAIM NO: ……..**
BUSINESS AND PROPERTY COURTS IN MANCHESTER BUSINESS LIST (ChD)

Issued pursuant to the consent of the Joint Administrators of FundingSecure Limited (in administration)

BETWEEN:

JC STARR HOLDINGS LIMITED

Claimant

and

FUNDINGSECURE LIMITED
(in administration)

Defendant

PARTICULARS OF CLAIM

INTRODUCTION

1. The current proceedings concern the Claimant's proprietary claim to monies held by the Defendant in its client account.

2. The Claimant is a company registered in the British Virgin Islands (company number 1675877).

3. The Defendant is a company registered in England (company number 08120200). The Defendant was placed into administration on 23 October 2019 following a resolution of its board dated 15 October 2019 and approval from the Financial Conduct Authority ("the FCA"). The administrators of the Defendant are Jonathan Avery-Gee, Daniel Richardson and Edward Avery-Gee ("the Administrators").

4. At all material times prior to entering administration, the Defendant conducted business as an online lending platform, providing short-term secured loans to borrowers. In or about March 2017 the Defendant acquired FCA authorisation to conduct the raising of capital through crowd funding in order to facilitate peer to peer lending, whereby investors placed money with the Defendant to fund secured loans to third party borrowers.

5. At all material times, pursuant to the rules in the FCA's Client Assets Sourcebook, the Defendant operated two segregated client accounts.

THE UNDERWRITING AGREEMENT

6. In or about early 2019 Spencer Tarring (on behalf of the Claimant) and Nigel Hackett (on behalf of the Defendant) discussed the Claimant underwriting loans on the Defendant's online platform through the provision of bridging finance for a maximum period of two months while the Defendant sought to obtain investors on those specific loans. The arrangement was to replace a previous agreement whereby Mr Tarring had provided such underwriting under similar terms.

7. On about 12 April 2019 the Claimant entered into a written agreement with the Defendant ("the Underwriting Agreement"). Properly construed, the Underwriting Agreement included express terms (*inter alia*) as follows:

   7.1. The Claimant promises to provide £500,000 ("the Monies") to the Defendant pursuant to the terms of the Underwriting Agreement and the Defendant agrees to repay the Monies with interest at the rate of 8% per annum, paid monthly.

   7.2. The Claimant shall provide the Monies for a minimum period of six months.

   7.3. At the end of the six months the Monies may be paid back to the Claimant, subject to a 30-day notice period by either party.

   7.4. Failure to repay the Monies at the end of the 30-day period will incur a penalty interest of 4% per annum accrued daily.

   7.5. Interest due will be paid on the final day of each month from the end of the month following the date of the Underwriting Agreement.

   7.6. Notwithstanding any term to the contrary in the Underwriting Agreement, if the Defendant defaults in the performance of any obligation thereunder, then the Claimant may declare the Monies and any interest owing at that time to be immediately due and payable.

7.7. The Monies will be held in the Defendant's client account to be used for the sole purpose of underwriting any loan being funded on the Defendant's platform (and thereby provide bridging finance for a maximum period of two months while the Defendant sought to find investors for the relevant loan). The Defendant shall have discretion as to (and only as to) when to use the Monies to underwrite a loan and how much of the Monies so to use on any particular occasion.

7.8. Any of the Monies used for the purpose of underwriting a loan will enjoy the benefit of the security provided by the borrower in respect of that loan.

7.9. In the event that a loan (which the Monies have underwritten in whole or in part) is not fully funded by investors on the platform within a period of two months, the Defendant will replace the Monies with its own funds.

7.10. The Underwriting Agreement is governed by the law of England and Wales.

7.11. All costs, expenses and expenditures (including the complete legal costs incurred in enforcing the Underwriting Agreement as a result of any default by the Defendant) will be added to the principal amount outstanding and will immediately be paid by the Defendant.

7.12. The Underwriting Agreement will pass to the benefit of and be binding upon the respective heirs, executors, administrators, successors and permitted assigns of the Defendant and the Claimant.

7.13. The provisions of the Underwriting Agreement are intended to be read and construed independently of each other. If any term or provision were to be found to be invalid, void or unenforceable then the parties' intent is that such provision would be reduced in scope by the court only to the extent deemed necessary to render the provision reasonable and enforceable and the remainder of the provisions would in no way be affected or invalidated.

8. Further, it was an express term of the Underwriting Agreement (alternatively, an implied term, by reason of obvious inference and/or business necessity) that the

Claimant would be party to the relevant loan documentation in respect of which the Monies might be applied pursuant to the Underwriting Agreement.

QUISTCLOSE TRUST

9. On about 12 April 2019 the Claimant paid the sum of £499,985 (the sum of £500,000 minus a transfer fee of £15) into a segregated client account (numbered 5380-7290) at Barclays Bank Plc in the Defendant's name pursuant to the Underwriting Agreement ("the Client Account"). In the premises, on a proper construction of the Underwriting Agreement:

9.1. The sum of £499,985 ("the Funds") was paid by the Claimant to the Defendant for the sole and exclusive purpose of application in the underwriting of loans pursuant to the terms of the Underwriting Agreement. On a proper construction of the Underwriting Agreement, the mutual intention of the parties was that the Funds would not be at the free disposal of the Defendant, but only for that limited purpose.

9.2. The Funds were paid by the Claimant into a segregated client account in the Defendant's name (namely the Client Account) and held by the Defendant in that account.

9.3. The mutual expectation was that the Funds would only be applied in the event that a particular loan required short-term bridging finance while the Defendant sought to raise funding over its platform.

9.4. The Funds were held by the Defendant pursuant to a Quistclose or resulting trust in favour of the Claimant.

9.5. The beneficial interest in the Funds remains in the Claimant until application of the sole and exclusive purpose of underwriting of loans (which is no longer possible).

EVENTS FOLLOWING TRANSFER OF THE FUNDS

10. At no stage after transfer of the Funds was the Claimant:

10.1. made party to any loan documentation; or

10.2. informed that the Funds had been or were being applied towards underwriting any loan pursuant to the Underwriting Agreement.

11. On about 8 September 2019 the Claimant (in an email sent by Mr Tarring on its behalf) gave notice to the Defendant under the Underwriting Agreement requiring repayment of the Funds in 30 days.

12. As set out above, the Defendant entered administration on 23 October 2019. The Administrators' proposals included: that the Administrators would continue to manage the affairs of the Defendant and (in particular) to effect redemptions and/or extensions of secured loans placed through the Defendant's lending platform; and the formation of a committee of creditors and investors ("the Creditors' Committee").

EVENTS FOLLOWING THE ADMINISTRATION ORDER

13. In about late 2019 and/or early 2020 the Claimant sent various emails to the Administrators in order to seek confirmation as to the status of the Funds and as to their position in respect thereof.

14. On 6 February 2020 the Administrators held a meeting of the Creditors' Committee. At that meeting:

14.1. The Administrators shared the conclusions of a report undertaken by forensic accountants (UHY Hacker Young) into a cross-section of 12 loans for the purpose of ascertaining whether monies might be traced through the lending platform into individual loans in order to demonstrate a valid trust in favour of investors. The Administrators explained that the report had been inconclusive and that (consequently) significant further work would have been involved in obtaining an opinion on the validity of the trust and that even then the position might have been inconclusive.

14.2. The Administrators confirmed that the Defendant's two debenture holders had agreed to a deed of waiver and indemnity in relation to the distribution of funds on the basis of the validity of the trust in favour of investors.

14.3. The Administrators stated that they were prepared to treat the trust as being valid and binding in respect of each individual investor and to facilitate distributions in accordance with such trust, subject to approval by the Creditors' Committee.

14.4. The Creditors' Committee resolved that the Administrators be irrevocably authorised to distribute:

14.4.1. the total value of the funds then held in the Defendant's client accounts;

14.4.2. all and any proceeds of redemptions (including those then made) in respect of all and any secured assets; and

14.4.3. all and any proceeds of future redemptions in respect of all and any secured assets

on the basis that the trusts claimed by investors in respect of all of those categories of assets were valid and binding on the Defendant and the Administrators. The Administrators were irrevocably authorised to allocate the funds realised from all categories of realisations (after the deduction of the costs of realisation, legal fees and expenses and the Administrators' approved costs and fees) on the basis that they were held on a valid and binding trust for the relevant investors.

15. On 19 May 2020 Drydensfairfax set out the Administrators' position on their behalf (*inter alia*) as follows:

15.1. The Claimant is an unsecured creditor in respect of the Funds.

15.2. The Defendant had (prior to entering administration) used the Funds:

15.2.1. to repay investors whose investment returns had been applied towards the operational costs of the Defendant (in other words, to repay losses created by the historic misapplication of client account monies); or

15.2.2. to meet operational costs of the Defendant.

15.3. The Administrators had conducted a review of the use of the Funds by the Defendant and that the entries in the Defendant's accounting records and bank statements showed (*inter alia*) that:

15.3.1. The Funds had been used to cover a shortfall in the Defendant's client account and to repay investors where the Defendant had insufficient funds to do so.

15.3.2. On analysis of account movements in respect of the Defendant's client account, the Funds were transferred into that account when there was a shortfall of funding.

15.3.3. The Funds had been used to repay the Defendant's operating account (which had previously funded the shortfall of funding in the client account).

15.4. The Funds were transferred into the Defendant's operating account upon receipt to fund the ongoing trading of the Defendant and (in effect) to repay monies which the Defendant "had lent" to the client account.

15.5. The Underwriting Agreement constituted an unsecured loan.

16. On 15 October 2020 the Court made an order extending the period of the administration to 22 October 2023.

17. On 20 December 2020 Boodle Hatfield LLP ("Boodle Hatfield"), solicitors acting on behalf of the Claimant, sent a letter to Drydensfairfax setting out the Claimant's claim to a Quistclose or resulting trust in respect of the Funds.

18. Following a chasing letter from Boodle Hatfield dated 8 February 2021, the Administrators responded in a letter from Occasio Legal ("Occasio") dated 15 April 2021 on their behalf. In that letter Occasio (on behalf of the Administrators):

18.1. Disputed the existence of the Quistclose/resulting trust in favour of the Claimant.

18.2. Stated that it appeared that part of the Funds was used by the Defendant to fund its continuing operations prior to its administration and that the rest was used for various "off-platform" loans made by the Defendant.

19. On 22 April 2021 the Administrators produced a progress report, in which they stated (*inter alia*) that following a review and reconciliation of the client accounts there were no concerns in relation to funds held, which matched those shown in the investors' "e-wallets" on the platform.

20. On 29 April 2021 Boodle Hatfield sought confirmation as to where the Funds were then being held and by whom.

21. On about 17 May 2021 the Administrators sent an email to investors informing them of the Claimant's claim to a Quistclose trust and of the suspension of further payments to investors by way of distribution from the Client Account or platform until further notice.

22. On 16 June 2021 Occasio sent a letter to Boodle Hatfield in which it stated that:

22.1. It would not provide Boodle Hatfield with a copy of the report produced by UHY Hacker Young.

22.2. The sum of £1,977,160.92 was held in the Client Account as at 23 October 2019.

22.3. The Defendant continued to use the Client Account after 23 October 2019 and that realisations from loans were paid into it.

22.4. From March 2020 payments had been made from the Client Account to investors in respect of realised loans.

22.5. No payments had been made out of the Client Account since 21 May 2021.

22.6. As at 7 June 2021 £795,042.59 was held in the Client Account.

22.7. Of the sum then (as at the date of the letter) held in the Client Account, an estimated £320,000 (confirmation of which amount would require further detailed analysis) represented monies which had not been claimed ("the Unclaimed Monies").

23. Under cover of the said letter, Occasio also enclosed bank statements in respect of the Client Account for the period of about 10 March 2019 to 24 October 2019.

24. Following further enquiries from Boodle Hatfield and responses from Occasio and a letter from Occasio dated 22 October 2021, Boodle Hatfield sent a further letter to Occasio on 4 November 2021. In that letter Boodle Hatfield (*inter alia*) expressed concern at the varying explanations provided by the Administrators as to the application of the Funds, expressed the Claimant's claim to the Unclaimed Monies in the Client Account and requested payment of those monies as the remaining identifiable product of the Funds (in which the Claimant continues to hold the beneficial interest).

25. Following letters from Occasio dated 2 December 2021 and Boodle Hatfield dated 30 December 2021, the Administrators continued to decline to recognise the Claimant's beneficial entitlement to the monies claimed (or otherwise to provide an account of the application of the Funds). Rather, in a letter dated 18 January 2022, Occasio stated that there were an estimated 2,148 investors who could have competing claims to the Unclaimed Monies. However, in a further letter on 25 March 2022 (in response to a letter dated 25 February 2022 from Boodle Hatfield enclosing a draft of these Particulars of Claim) Occasio confirmed that the Defendant is making no claim to the Unclaimed Monies being held in the Client Account and that the Defendant will take a neutral position in any proceedings and will stand by any determination of the Court.

THE CLAIM

26. The Defendant is liable to account to the Claimant for the Funds on the grounds that the Defendant held the Funds pursuant to a Quistclose or resulting trust, but has failed to do so (whether through the Administrators or otherwise).

27. It is averred that:

27.1. monies in the Client Account (including the Unclaimed Monies) represent the remaining traceable monies from the Funds in which the Claimant claims to hold the beneficial interest; and

27.2. the Defendant holds the said monies on a Quistclose or resulting trust for the Claimant.

28. The Claimant's entitlement arises as follows:

28.1. When received in the Client Account, the Funds were held by the Defendant under a Quistclose or resulting trust.

28.2. The Funds were mixed with other funds held under trust for the benefit of innocent investors in the Client Account. In the premises, there are evidential uncertainties as to the application of the various monies in the mixed fund. Paragraph 14 above is repeated.

28.3. The anticipated course under the Underwriting Agreement was that the Funds would not be applied until a particular appropriate unfunded loan arose in respect of which the Defendant resolved to use the Funds for bridging finance pursuant to the terms of that agreement.

28.4. Further and/or alternatively, the proper inference from the anticipated course, the absence of any loan documentation concerning the Funds and the absence of notification or record as to the application of the Funds for underwriting any particular loan (*inter alia*, for the Claimant to understand, and/or the Defendant to keep record of, the running of the period of two months) is that the Funds were not applied to underwrite any loan in accordance with the terms of the Underwriting Agreement.

28.5. The Funds were held under a specific Quistclose or resulting trust regarding the underwriting of loans. The nature of the Underwriting Agreement was inconsistent with any particular temporal sequence of payments from the Client Account and it would be unjust, impracticable, inconvenient and/or unjustifiably costly to apply any rule of "first in, first out" regarding the application of the Funds and other monies in the Client Account.

28.6. In the circumstances, the starting point is that gains and losses to the mixed fund should be shared rateably between the innocent contributors thereto (and any evidential uncertainty should be resolved against the Defendant).

28.7. The appropriate course, so as least unfairly to distribute any loss between the Claimant and other innocent investors who made payments into the Client Account, was to provide for each of the investors and the Claimant to be beneficially entitled to a sum in the Client Account rateably in proportion to their respective contribution to the mixed fund.

28.8. The investors (those other than the Claimant) claiming to have beneficial interests in the sums held in the Client Account have had their claims satisfied through distributions from realisations paid into the Client Account following the decision of the Administrators to make distributions on the basis of the validity of trusts in favour of the investors. Further and alternatively, those realisations had been paid into the Client Account in order to restore the trust monies in the Client Account.

28.9. The corollary of those distributions to investors, and the satisfaction of the claims of other investors thereunder, is that £499,985 of the monies in the Client Account (including the Unclaimed Monies) represent the Claimant's remaining rateable share of the monies in the Client Account (representing the remaining traceable monies from the Funds, to which the Claimant is beneficially entitled). The Claimant accordingly asserts beneficial ownership of £499,985 (including the Unclaimed Monies). It is averred that in all of the circumstances that is a result in accordance with justice and fairness between competing claims.

29. The Claimant seeks declaratory relief as to its beneficial ownership of the said monies (including the Unclaimed Monies), alternatively such other monies as represent the remaining traceable proceeds of the Funds which are held by the Defendant.

DIRECTIONS

30. Following the statements in Occasio's letter dated 25 March 2022 that the Company (and the Administrators) would take a neutral position in these proceedings, but that the Administrators required comfort as to how any competing claims to the monies in the Client Account would be represented, the Claimant has sought (through requests for information from the Administrators and circulars to potentially interested parties) to establish the identity of investors with competing claims and the nature and quantum of their respective claims (both to the Unclaimed Monies and to the other monies in the Client Account). The Claimant will refer to: letters from Boodle Hatfield dated 20 April 2022, 30 May 2022, 13 June 2022, 8 August 2022, 27 October 2022, 23 December 2022, 16 January 2023, 26 January 2023, 21 February 2023, 24 April 2023, 23 May 2023 and 30 June 2023 (as well as an email dated 7 July 2023); letters from Occasio dated 13 May 2022, 6 June 2022, 17 June 2022, 5 September 2022, 16 November 2022, 11 January 2023, 20 January 2023, 2 February 2023, 7 March 2023, 6 April 2023, 18 May 2023 and 20 July 2023; circulars to investors dated 8 and 9 August 2022 (enclosing a previous draft of these Particulars of Claim) 3 February 2023 and 19 June 2023; and various correspondence between Boodle Hatfield and individual investors.

31. In spite of the Claimant's attempts to clarify the extent and nature of competing claims and the identity of the various claimants:

    31.1. The Administrators have as a matter of general principle refused to provide details concerning claims (including the amount of the claim or the details of the party claiming) without the consent of the individuals concerned (as stated in letters from Occasio dated 6 June 2022, 17 June 2022 and 11 January 2023).

    31.2. Some 50 investors have asserted claims competing with the Claimant's to Boodle. Hatfield

    31.3. Many of the various individuals intimating claims in correspondence to Boodle Hatfield have refused to provide the nature, legal basis or quantum of their respective claims.

32. In the circumstances, and in accordance with the request from the Administrators set out in a letter from Occasio dated 5 September 2022, the Claimant will issue an

application for directions as to the proper conduct and case management of these proceedings upon receipt of a neutral defence filed on behalf of the Company. In that application, the Claimant will seek directions as to the case management in respect of the resolution of its claim herein and relevant competing claims.

AND THE CLAIMANT CLAIMS:

(1) A declaration that the Defendant holds the sum of £499,985 (alternatively £320,000) held in its client account with Barclays Bank Plc numbered 5380-7290 (or such other monies representing the traceable proceeds of the Funds as remain in the Defendant's hands) on a Quistclose (alternatively resulting) trust for the Claimant.

(2) Further and alternatively, a declaration that the Claimant is beneficially entitled to the said monies.

(3) An order for the Defendant to pay the said monies to the Claimant.

(4) Any further necessary declarations, accounts, inquiries, directions and/or other relief.

(5) Costs.

TIMOTHY COLLINGWOOD KC

STATEMENT OF TRUTH

The Claimant believes that the facts stated in these Particulars of Claim are true. The Claimant understands that proceedings for contempt of court may be brought against anyone who makes, or causes to be made, a false statement in a document verified by a statement of truth without an honest belief in its truth. I am duly authorised by the Claimant to sign this statement.

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Dated 4 September 2023