Neutral Citation Number: [2022] EWHC 863 (Ch)

Case No: BL-2021-000434

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

Rolls Building, 7 Rolls Building
Fetter Lane, London, EC4A 1NL

This judgment was handed down by the judge remotely by circulation to the parties' representatives by email.
The date of hand-down is deemed to be as shown opposite: Date: 11/04/2022

Before:

MASTER KAYE

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Between:

DAVID IAN PENROSE RICHARDS	**Claimant**
- and -	
(1) DOMINIKA KULCZYK	**Defendants**
(2) SEBASTIAN KULCZYK	
(3) KULCZYK INVESTMENTS S.A	
(a company incorporated under the laws of Luxembourg)	
(4) KI ONE S.A	
(a company incorporated under the laws of Poland)	
(5) ARTEMIS TRUSTEES LIMITED	
(in its capacity as trustee of the Phoenix Trust)	
(a company incorporated under the laws of Guernsey)	

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Mr Paul Adams and Mr Tim Benham-Mirando (instructed by **Lewis Silkin**) for the **Claimant/Respondent**
Mr Andrew Holden and Mr Sparsh Garg (instructed by **Stewarts**) for the **Fifth Defendant/Applicant**

Hearing dates: 25 November 2021

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Approved Judgment

I direct that 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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MASTER KAYE

Master Kaye :

1. The Fifth Defendant ("**D5**") applies to set aside service out of the jurisdiction on it in Guernsey on the grounds that the claimant ("**C**") has not established that he has a real prospect of success against D5. D5 does not say that C has not made out a jurisdictional gateway under CPR PD 6B 3.1 nor does it seek to say that England is not the proper forum for the claim. Whatever the outcome of D5's application the claim will proceed against D1 to D4 in this jurisdiction.

2. I have had the benefit of detailed written and oral submissions on behalf of both C and D5 and I am grateful to counsel for their assistance. Although I do not set out each and every submission made by counsel, I have taken all of their written and oral submissions into account.

3. D5's application is supported by the witness statement of Mr Kertesz dated 21 July 2021 ("**Kertesz 1**"). C's application for service out was supported by the first witness statement of Mr Greenwood dated 28 May 2021 ("**Greenwood 1**"). Mr Greenwood's second witness statement dated 8 October 2021 was served in response to this application ("**Greenwood 2**"). I have read the evidence with care and have taken it into account even if I do not make reference to all of the detail contained in it.

Dramatis Personae

4. The late Dr Jan Kulczyk ("**Dr K**") was a successful Polish businessman, who died on 29 July 2015.

5. Dr K founded and ran what is described as the Kulczyk group of companies which included D3 and D4 and which formed part of what is described as his business empire. Stefan Krieglstein was the CFO of the Kulczyk group of companies and Dr K's personal adviser. C has defined the Kulczyk Group as D3 and D4 ("**the Kulczyk Group**"). However, the phrase Kulczyk Group has been used within the documents, evidence and indeed the particulars of claim ("**POC**") to also mean something wider than just D3 and D4.

6. D1 and D2 are Dr K's adult children and the heirs to his estate. D2 is now Chairman and CEO of the Kulczyk Group. Karl Schleinzer is an Austrian lawyer who was Dr K's attorney and subsequently the sole executor of his estate. Wolfgang Fritz is an Austrian lawyer and Mr Schleinzer's assistant.

7. D5 is a Guernsey professional trust company and the trustee of a Guernsey law discretionary trust, known as The Phoenix Trust (the "**Trust**"), established by a declaration of trust dated 23 February 2005. The economic settlor of the Trust was Dr K who was also a discretionary beneficiary and a Protector. D5 has conventional powers to distribute Trust assets to one or more of its discretionary beneficiaries which included Dr K. At the relevant times Ian Domaille was D5's director who acted in relation to the Trust and Keren Bowen was an employee.

8. C is a successful tax barrister. Between 2006 and 2014, he provided legal services to Dr K and parts of his business empire which he says included D3 to D5. During the period 2006 to 2009 C provided ad hoc legal and tax advice to D5 as trustee of the Trust for which invoices were rendered to D5 and paid by them.

The 2009 Agreement

9. C says that he gave up part of his successful practice in 2009 to work for Dr K. He entered into a part oral part written agreement with Dr K, (who entered into the agreement on behalf of himself and/or the Kulczyk Group), to set up and run the Kulczyk Private Office and provide legal advice and services for which C says he agreed with Dr K that he would be paid £1m per annum ("**the 2009 Agreement**"). C says the scope of the work he was to undertake pursuant to the 2009 Agreement included providing services to D5 or for D5's benefit.

10. The written part of the 2009 Agreement consists of a document headed "Agreement Outline of a proposed agreement between the Kulczyk Group and [C] for the provision of a range of services to the Kulczyk Group". In this context C says that the Kulczyk Group is not limited to D3 and D4. There is no definition within the 2009 Agreement setting out what the Kulczyk Group was intended to encompass. C says that the 2009 Agreement was for the provision of services to Dr K and the various companies and structures associated with him and his business empire which C says would have included the Trust and D5.

11. The written part of the 2009 Agreement described itself as setting out general overarching terms to be reduced to a formal contract by 1 April 2009 but no further written agreement was entered into by 1 April 2009 or at all.

12. Although the written part of the 2009 Agreement refers to C receiving payment of £750,000 per annum for his services, C says he had orally agreed the higher figure of £1m per annum with Dr K. The written part of the 2009 Agreement provides for a 3-year term to 31 December 2012 and a rolling 2-year contract thereafter.

13. C says that had the arrangements between the parties been reduced to a single formal written contract as originally envisaged, and since the Trust was part of the broader Kulczyk business empire intended to be covered by the 2009 Agreement both it and D5 would have been likely to have been included. It is not said by C that D5 was in terms one of the counterparties to the 2009 Agreement.

14. The POC having defined the Kulczyk Group as D3 and D4 at [4] sets out the terms of the 2009 Agreement at [14] also referring to the Kulczyk Group but which phrase is intended to be a reference to the undefined term in the 2009 Agreement.

15. C pleads at POC [16]:

> "Between 1 January 2009 and 31 March 2014, [C] provided legal advice and services pursuant to and in accordance with the 2009 Agreement to and for the benefit of: [Dr K] personally and/or [D3] and/or [D4] and/or [D5] as trustee of [the Trust]. The services provided were provided principally in London. The services provided to and for the benefit of [D5] as trustee of [the Trust] were freely accepted."

16. D5 accepts that C provided it with legal and tax advice between 2009 and 2014 and that it made some payments to C but says that such services were provided pursuant to the 2009 Agreement to which it was not a party and that any payments it made

were for the benefit of Dr K (who was a party to the 2009 Agreement) as beneficiary of the Trust.

17. At POC [17] C pleads:

> "In or about March 2014, [Dr K] (on his own behalf and/or on behalf of the Kulczyk Group) renunciated the 2009 Agreement and, in breach of contract, purported to terminate forthwith." (This again appears to be a reference to the undefined broader meaning of Kulczyk Group referred to in the 2009 Agreement).

18. C says that between 1 January 2009 and 31 March 2014 he only received payments totalling £1.990m from the Kulczyk Group and/or D5 substantially less than the sum of £1m pa he agreed with Dr K in 2009.

19. Whilst the terms and scope of the 2009 Agreement will primarily be a matter for trial as between C and D1 to D4, the existence and scope of the 2009 Agreement is likely to affect C's unjust enrichment claims.

Vienna Agreement ([20]-[22] POC)

20. Following the renunciation of the 2009 Agreement C entered into discussions with Dr K and/or the Kulczyk Group with a view to reaching a settlement of their debts and liabilities to him for his outstanding remuneration under the 2009 Agreement, remuneration for other services, and damages for what he considered to be wrongful termination/renunciation.

21. C pleads that at a meeting in Vienna, at the offices of Schleinzer & Partner, on 16 March 2015, between C, Dr K, Karl Schleinzer and Wolfgang Fritz, an oral agreement was entered into between C and Dr K (and/or Dr K on behalf of the Kulczyk Group (as defined in the POC)) ("**the Vienna Agreement**").

22. The Vienna Agreement provided for payment to C of £8m less any sums already received by C in settlement of his claims for fees, expenses, damages for wrongful termination and restitution pursuant to the 2009 Agreement and/or otherwise in respect of the services provided by him between 2009 and 2014.

23. D5 was not a party to the Vienna Agreement. The existence, scope and terms of the Vienna Agreement will primarily be a matter for trial as between C and D1 to D4.

The 2015/16 Agreement ([23]-[32] POC**)**

24. Dr K died on 29 July 2015. Karl Schleinzer administered the estate as executor for Dr K. The assets of the estate were distributed to D1 and D2 as Dr K's heirs and beneficiaries in about 2018. In late 2015 C entered into discussions with Karl Schleinzer who C says had authority to represent Dr K's estate and to communicate on behalf of D2 who in turn had authority to represent the Kulczyk Group (as defined in the POC). C says that an exchange of emails and conversations between November 2015 and 11 January 2016 amount to a further agreement between C, Karl Schleinzer (as executor of Dr K) and D1 and D2 and/or the Kulczyk Group (as defined in the POC) ("**the 2015/2016 Agreement**").

25. The terms of the agreement were that the amounts said to be due under the Vienna Agreement would be paid in accordance with the terms of that agreement or alternatively if the Vienna Agreement was not a binding agreement the same terms were agreed between the parties to the 2015/2016 Agreement.

26. D5 was not a party to the 2015/2016 Agreement. The existence scope and terms of the 2015/2016 Agreement will primarily be a matter for trial as between C and D1 to D4.

The 21 January 2016 Agreement ([33]-[36] POC)

27. On 21 January 2016 C met with Karl Schleinzer, Wolfgang Fritz and Stefan Krieglstein in Vienna. Keren Bowen joined part of the meeting by phone.

28. By 21 January 2016, C considered that he had reached an agreement that he would be paid in accordance with either the terms of the Vienna Agreement or the 2015/2016 Agreement. The only outstanding matter to be resolved was the manner of implementation which was the primary purpose of the meeting.

29. C's alternative case is that a new oral agreement was entered into on 21 January 2016 either for payment of the amounts due pursuant to the Vienna Agreement and/or the 2015/2016 Agreement or if those agreements were not binding a new agreement on the same terms. This new agreement was said by C to be made between C, Karl Schleinzer (as executor of Dr K and on behalf of D1 and D2), alternatively the Kulczyk Group (as defined in the POC) (acting by Stefan Krieglstein), further or alternatively with D5 as trustee of the Trust (acting by Stefan Krieglstein).

30. C therefore pleads that on this alternative basis D5 became contractually bound to make payment to him in accordance with the terms set out above as well as the other Defendants.

31. C says that Stefan Krieglstein was, together with Dr K when he was alive, the principal decision maker on behalf of D5 and that this meant he had authority to bind D5. C says that Dr K used the Kulczyk Group in its broadest definition including his companies and structures, which included the Trust to meet his commitments and did not readily distinguish between the different legal entities treating them all as funds to which he had access and could use for his own purposes.

32. C says that Dr K would incur or commit to expenditure and leave Stefan Krieglstein to work out from where to source the funds for a particular financial commitment. Stefan Krieglstein's authority was evidenced by his ability to source funds from the Kulczyk business empire including directing D5 to make payments to C. C's case is that during the time he worked with Dr K, Stefan Krieglstein and D5, Mr Domaille and Ms Bowen had no substantive executive decision making role on behalf of D5. C says that Stefan Krieglstein had express or implied actual or apparent authority to bind D5 and did so at the meeting on 21 January 2016.

33. D5 does not accept this characterisation of the relationship between it and Stefan Krieglstein, nor that Stefan Krieglstein had nor was held out to have (implied) actual or apparent authority to bind D5 whether in relation to the 21 January Agreement or at all nor that he purported to do so. D5 does not accept that any agreement was or could have been reached with D5 on 21 January 2016.

34. Following the 21 January 2016 meeting there was further correspondence in relation to the settlement of C's claims including with D5. C says that correspondence reinforces his position that an agreement was reached on 21 January 2016 and that D5 had accepted liability for payment to C and was taking steps to implement the payment of the amounts agreed in the 21 January Agreement (and/or the Vienna Agreement and/or the 2015/2016 Agreement). D5 disputes C's characterisation of the correspondence which D5 says to the contrary demonstrates that D5 did not believe it had any binding contractual obligation itself to make any payments.

35. C says that the sums due to him under the Vienna Agreement and/or the 2015/2016 Agreement and/or the 21 January Agreement have not been paid by any of the Defendants.

36. Unknown to the other participants, the 21 January 2016 meeting was recorded by C. Transcripts have been prepared and although there may be disputes at a later stage in these proceedings as to the accuracy of the different versions, D5 was prepared to accept C's transcript for the purposes of this application. It is therefore that transcript to which this judgment refers.

Proceedings:

37. Greenwood 1 explains that C contacted Karl Schleinzer and D1 in February 2021 about his claim. At a meeting on 5 March 2021, Karl Schleinzer and Wolfgang Fritz met C's Austrian lawyers. They denied that any agreement had been reached with C.

38. The Claim Form was issued on 10 March 2021. An Amended Claim Form and POC dated 28 May 2021 were filed in support of an application for service out together with Greenwood 1 and a skeleton argument. The order for service out was made on paper and is dated 1 June 2021.

39. D1, D2, D3 and D4 all acknowledged service in July 2021 and did not challenge jurisdiction. Their defences were not due to be served until after the hearing of D5's application.

40. D5's application supported by Kertesz 1 was issued on 21 July 2021.

41. Greenwood 2 exhibited unsigned voluntary particulars of claim ("**VPOC**") in relation to the claim against D5 which C had confirmed were true.

42. The POC having pleaded the terms of the Vienna Agreement, the 2015/2016 Agreement and the 21 January Agreement set out the Relief Sought. No claim for relief is made against D5 in relation to either the Vienna Agreement or the 2015/2016 Agreement. C claims £6,010,000 as a debt or alternatively damages for breach of the 21 January Agreement on a joint and several basis against all five Defendants (POC [44]-[48]).

43. C makes a restitutionary claim in unjust enrichment in respect of the services provided by him to Dr K, and/or the Kulczyk Group and/or D5 as trustee of the Trust. C says Dr K, and/or the Kulczyk Group and/or D5 as trustee of the Trust were enriched by the provision of his services which were provided at his expense. Alternatively, he forwent his claims as a result of the Agreements which was a benefit

that also enriched Dr K, and/or the Kulczyk Group and/or D5 as trustee of the Trust again at C's expense. C says that the enrichment was unjust because he either provided the services expecting to be paid under the 2009 Agreement or otherwise and/or he gave up his claims on the basis that he would be paid in accordance with the Agreements and both bases failed. He therefore seeks restitution at common law against all the Defendants in a sum of not less than £6,010,000 (POC [54]-[56]).

The Legal Test

44. The three-stage test that an applicant must meet on any application for permission to serve out of the jurisdiction was recently confirmed by the Supreme Court in *FS Cairo (Nile Plaza) LLC v Brownlie* [2021] UKSC 45 at [25]:

> "a claimant must establish (1) a good arguable case that the claims fall within one of the gateways in CPR PD 6B, paragraph 3.1; (2) a serious issue to be tried on the merits; and (3) that England is the appropriate forum for trial and the court ought to exercise its discretion to permit service out of the jurisdiction."

45. On this application the court is only concerned with the second part of the test, whether the claimant can establish that there is a serious issue to be tried on the merits.

46. In *Altimo Holdings and Investment Ltd v Kyrgyz Mobil Ltd* [2012] 1 WLR 1804 at [71] ("**Altimo**") Lord Collins confirmed that on an application for service out of the jurisdiction it is necessary to show that claim has a reasonable prospect of success. This is sometimes viewed at this early stage as whether there is a plausible evidential basis for the claim.

47. The test is essentially the same as that for resisting summary judgment and therefore the principles identified in *Easyair Ltd (t/a Openair) v Opal Telecom Ltd* [2009] EWHC 339 (Ch) at [15] ("***Easyair***") as subsequently approved in the Court of Appeal in *AC Ward & Sons Limited v Catlin (Five) Limited* [2009] EWCA Civ 1098 and more recently in *Athena Capital Fund Sicav-Fis SCA v Crownmark* [2019] EWHC 1952 (comm), at [16]-[19] ("***Athena***") would apply equally to whether there was a serious issue to be tried on an application for service out of the jurisdiction. However, the burden is reversed, and it is for C to satisfy the court that he has a real as opposed to fanciful prospect of success in relation to each cause of action he relies on.

48. D5 relying on *Easyair* argues that the court has all the evidence necessary to grasp the nettle and decide what D5 says can be considered to be short points of law or construction.

49. Although D5 accepts that the court should assume that C would establish the facts he contends for, D5 argues that where it can demonstrate that those factual assertions were obviously untrue and/or contradicted by contemporaneous documents, the court could still summarily determine that there was no serious issue to be tried. D5 says that the court should consider carefully whether in reality there was more evidence that would or may turn up in witness statements and disclosure relevant to the issues

to be determined. In any event if there was evidence which C could have brought forward but did not, the absence of that evidence should weigh against C.

50. Conversely, C says that where there are difficult issues of law those are best resolved once all facts had been ascertained at trial and not on the abbreviated and hypothetical basis of the statements of case or assumed facts (*Altimo* at [83]-[85]). This was particularly so where the issues of law to be determined were in a developing area of law such as unjust enrichment.

51. In *Okpabi v Shell* [2021] 1WLR 1294 ("*Okpabi*") Hamblen JSC having emphasised the need to observe proportionality in relation to the litigation of jurisdiction issues and referring to Briggs JSC in *Lungowe v Vendanta Resources Plc* [2020] 1045 ("*Lungowe*") said at [22]:

> "Where, as will often be the case where permission for service out of the jurisdiction is sought, there are particulars of claim, the analytical focus should be on the particulars of claim and whether, on the basis that the facts there alleged are true, the cause of action asserted has a real prospect of success. Any particulars of claim or witness statement setting out details of the claim will be supported by a statement of truth. Save in cases where allegations of fact are demonstrably untrue or unsupportable, it is generally not appropriate for a defendant to dispute the facts alleged through evidence of its own. Doing so may well just show that there is a triable issue."

52. And at [107]

> "The factual averments made in support of the claim should be accepted unless, exceptionally, they are demonstrably untrue or unsupportable."

53. In *Lungowe* Briggs JSC confirmed the applicability of the summary judgment test to jurisdiction challenges, but observed the need for judicial restraint and the need to avoid mini-trials pointing to the early stage in proceedings that such applications take place at [45]:

> "This poses a familiar dilemma for judges dealing with applications for summary judgment. On the one hand, the claimant cannot simply say, like Mr Micawber, that some gaping hole in its case may be remedied by something which may turn up on disclosure. The claimant must demonstrate that it has a case which is unsuitable to be determined adversely to it without a trial. On the other, the court cannot ignore reasonable grounds which may be disclosed at the summary judgment stage for believing that a fuller investigation of the facts may add to or alter the evidence relevant to the issue."

54. Finally, C argues that it is well established that where there are disputes about the existence of an oral agreement such as here, those are unsuitable for summary determination. Indeed, he takes support for that proposition from *Athena* at [21]:

> "Disputes as to what was said or agreed orally are paradigm examples of disputes that are generally unsuitable for summary determination."

55. Generally, where there is a dispute about the terms of an oral agreement such a dispute is singularly unsuitable for summary determination. Here however, D5 argues that in light of the existence of a transcript the position is different.

56. In *Parsadoust v Hanging Gardens Ltd* [2021] EWHC 1594 (Comm), the defendant alleged that the parties had entered into an oral contract to vary an option agreement. The Court had a transcript of the calls during which the oral contract was said to have been entered into. Calver J having considered the transcripts, summarily dismissed the allegation that an oral contract had been formed holding at [62]-[63] that the court should not hesitate to determine whether an oral agreement had been reached summarily in circumstances where the conversations between the relevant persons had been recorded, as the Court knew "*the exact words spoken by the parties at the time when the oral agreement is said to have been reached*" to assist the court in its objective assessment as to the existence of the alleged oral agreement.

57. He continued at [63] and [64]

> "…Here, the Court can examine the transcripts of the three calls to see precisely what was communicated between the parties in order to determine whether in fact, objectively, an agreement was reached on the terms alleged by the Defendant, which was intended to be legally binding (for the correctness of this approach, see Leggatt J (as he then was) in Blue v Ashley [2017] EWHC 1928 at [64]). I should record the fact that the Defendant in this case did not ask the Court to listen to the three calls and did not suggest that there was anything to be gained or added (in terms of tone or emphasis of any of the speakers) by doing so. 64. It follows that, as Leggatt J stated in Blue v Ashley (supra) at [63]: "As with all questions of meaning in the law of contract, the touchstone is how the words used, in their context, would be understood by a reasonable person. For this purpose the context includes all relevant matters of background fact known to both parties."

58. D5 argues that the transcript enables the court to reach a summary determination about the existence of the 21 January Agreement.

59. Thus, when considering whether there is a serious issue to be tried whilst the court should be cautious, at this early stage, it is not barred from evaluating the evidence and concluding where appropriate that there is no real prospect of success. However, considering whether there is a serious issue to be tried the court needs to exercise some judicial restraint to avoid conducting a mini-trial whilst still critically considering the claim as advanced. It should not be making any findings but focus on whether the claims are arguable. It needs to keep in mind the limited information available and the potential for other evidence becoming available which is likely to bear on the issues to be determined. The real prospect of further evidence or documents becoming available has a particular resonance at this early stage. Whilst

the court should grasp the nettle on points of law where they are narrow short points of apparently settled law a court is much less likely to consider it appropriate to reject a claim at an early stage when the arguments turn on novel, unsettled and/or developing areas of law.

60. C's contract claim and the two unjust enrichment claims need to be considered against those broad principles.

61. Before addressing those issues, I should briefly address the overriding duty of full and frank disclosure on a without notice application for permission to serve out of the jurisdiction which requires the applicant to give a fair presentation of the evidence available. The transcript was not mentioned or included in the material before the court on the application for permission to serve out of the jurisdiction. D5 says it was incumbent on C to identify it and point to any inconsistencies between it and the case being put forward by C.

62. Any allegation of non-compliance with the duty of full and frank disclosure should be made on notice given the seriousness of such a complaint and the potential consequences. Here it was raised by D5 for the first time in their written submissions without any notice, application, or evidence in support.

63. D5 seeks to argue that since they do not say that C had misstated the position but only that it was a central piece of evidence at least for the contractual claim which should have been put before the court that the lack of notice to C is not material.

64. I am not persuaded. Whether it is a good or bad argument it would not be consistent with the overriding objective to manage cases justly and fairly as between the parties to allow such a submission to proceed without the respondent having been given notice, and an opportunity to respond. I do not therefore consider it further on this application.

65. Before turning to the substance of the application I note that the evidence in support and opposition to the application is from legal representatives. The statements include analysis of the documents and argument. There is no direct evidence from Stefan Krieglstein, Mr Domaille, Ms Bowen, Karl Schleinzer, Wolfgang Fritz, D1 or D2. C's solicitors have signed the POC on his behalf. I was told that the VPOC had recently been signed by C with a statement of truth. There is no direct evidence from the participants of the 21 January meeting other than the VPOC. Whilst the authorities direct the inquiry to the pleaded case, the evidence of what occurred on 21 January 2016 is central to at least the contract claim.

66. C's claim should be defined in the POC for which permission to serve out was sought. However, C says the VPOC were an appropriate response to the specific concerns raised by D5 and are focussed on those concerns alone. D5 complains that the VPOC are not reflected in the existing POC. It seems to me that the use of the VPOC is unhelpful and that to ensure a proper focus for the inquiry as to whether there is a serious issue to be tried it would have been preferable for the VPOC to have been incorporated into an amended POC. However, the VPOC cannot be ignored when considering whether there is a serious issue to be tried.

67. Both parties sought to engage the court in an evaluative analysis of the evidence in circumstances where unless demonstrably untrue or unsupportable the factual averments made by C in support of its claim should be accepted.

68. D5's overarching submission is that the claims against it are legally and factually spurious and there is no proper basis for them. They say that a foreign company should not be forced to litigate in England without a proper basis.

69. C's overarching submission is that all the Defendants including D5 are just manifestations of Dr K or his heirs and Dr K's business empire and that the Defendants do not have separate interests. He argues that it is therefore necessary for the court to have a full understanding of the facts as C understood them to determine the claims he makes.

70. There may be a broad idea of Dr K's business empire, however, as a matter of law, each Defendant and the Trust are separate entities, and it is necessary to establish a proper basis for any claim against each of them. Equally an apparent looseness to the arrangements between C and the other parties does not itself make his claim hopeless or unarguable. The question is whether as against D5 there is a serious issue to be tried in respect of the contract claim and the two unjust enrichment claims.

Contract Claim

71. At POC [34] C pleads:

> "At the 21 January 2016 meeting, it was accepted by all parties that the Vienna Agreement, alternatively the 2015/16 Agreement, had been reached and the manner of implementation was the primary reason for the meeting."

72. The primary pleaded purpose of the 21 January 2016 meeting was therefore to discuss the terms of implementation of the Vienna Agreement and/or the 2015/2016 Agreement to which D5 was not a party.

73. At POC [35] C sets out what C says were the express terms of the alternative oral agreement, the 21 January Agreement entered into with all the Defendants. Those express terms were:

> "35.1 The amounts provided for by the Vienna Agreement would be paid pursuant to and in accordance with that agreement.
>
> 35.2 Alternatively, the amounts provided for by the 2015/2016 Agreement would be paid pursuant to and in accordance with that agreement.
>
> 35.3 Alternatively (if for any reason it is determined that the Vienna Agreement or the 2015/16 Agreement was not a binding agreement), in consideration of the compromise of [C's] claims for fees, expenses, damages for wrongful termination and restitution (1) under the 2009 Agreement, and

> (2) otherwise in respect of the services provided by him between 2009 and 2014, [C] would be paid £8,000,000 less what [C] had already received."

74. C relies not merely on the express terms in POC [35] but also on a consensus he says was reached at the 21 January meeting saying in VPOC [12]:

> "The words used at the meeting are apparent from a recording, which has been disclosed. [C] relies upon the entirety of the recording as indicating the consensus which was formed and repeatedly confirmed during the meeting. One example of such a confirmation is a statement by Mr Krieglstein to [C] that "whatever you agreed with [Mr Schleinzer], I'm fine". Another is a statement by Mr Krieglstein that "everybody agrees to everything". Another is a statement by Mr Krieglstein that "we will tell [D1 and D2] we have settled in accordance with your father's request, 7 and a quarter years, a million a year, that is 7 and a quarter plus costs of 750, that is 8 million. This is the total so far paid… And then we've settled and we're done, close the book". [C] will refer to the recording at trial for its full contents."

75. D5 says that this contractual claim has no prospect of success. It does not stipulate the contractual words used in reaching the oral agreement and those shortcomings are not cured by the VPOC [12] which is too general and does not appear to give rise to the express contractual terms set out in POC [35].

76. D5 argues that the transcript enables the court to consider the words relied on in the VPOC in context. I note, however, that C's version of the transcript runs to fifty-nine pages and C relies on the entire transcript overall to evidence that a consensus was formed during the course of the 21 January meeting despite the plea of express terms in POC [35]. C argues that a fair reading of the transcript overall demonstrates that a consensus had been reached. D5 maintains that the POC and VPOC do not give a fair or full representation of what was in fact discussed and agreed on 21 January and that closer analysis of the transcript makes it clear there was no agreement. D5 is critical of the lack of clarity in C's claim and the interaction between POC [35] and VPOC [12].

77. D5 has identified the snippets of conversation referred to in VPOC [12]. In each case they form part only of a larger section of the text. D5 says that in context and when other parts of the transcript are taken into account it is clear that they do not support an oral contract on the express terms set out in POC [35] as between C and D5. For example, D5 argues that even if the snippets relied on amounted to a promise to pay £8m, on D5's analysis of the transcript there is no evidence of an oral promise to waive C's claims as pleaded in POC [35]. D5 argues that on analysis even on their face the snippets relied on by C do not amount to a contract in the terms pleaded. When considered in its entirety D5 says it is clear that there was no intention to contract with D5 and there was no consensus as to the terms of the alleged oral contract. There is therefore no binding agreement.

78. D5 says that the transcript demonstrates that at some points Mr Krieglstein was trying to understand what C claimed had been agreed with Mr Schleinzer and at other times demonstrates a disagreement between Mr Krieglstein and C about what he had already been paid. D5 points to phrases such as *"For so long as we have not settled…"* as evidence that there was no consensus between Mr Krieglstein and C about an agreement having been reached. D5 says that a reference in the transcript to *"everybody agrees to everything"* when read in context is a joke and not evidence of agreement. D5 says that the phrase *"we've settled"* relied on in the VPOC is quoted out of context and that when the full passage is considered it is clear that Mr Krieglstein is saying that there is a need for a written waiver or release from C before any agreement can be finalised. D5 points to other references in the transcript which suggest a need for an exchange of documents to finalise matters.

79. D5 rejects C's argument that the transcript confirms D1 and D2 had agreed to C being paid and that written confirmation was just a formality. D5 points to inconsistencies in the transcript such as Mr Krieglstein saying that the approval of D1 and D2 is required and that any payment "*has to come out of [Dr K's] estate one way or the other*". Finally, D5 argues that from the transcript it is clear that Mr Krieglstein and Mr Fritz made it clear that there would only be a transfer of cash to C in return for an acceptable form of waiver.

80. D5 says that it is clear from any analysis of the transcript that D1 and D2's agreement was still required, and the issue of the written waiver remained outstanding. D5 argues that the failure to resolve those outstanding issues was fatal to the contractual claim against D5.

81. D5 says that C has to establish as against D5 that the 21 January Agreement was made in the terms set out in POC [35] and that he cannot rely on unpleaded conduct. They argue that the pleaded terms cannot be discerned from the transcript and so the court can safely conclude on a summary basis that no new contract was expressly agreed with D5 at the 21 January meeting. This says D5 is not surprising given it is accepted that the purpose of the meeting was to implement the previous agreements.

82. Against all of those points C simply says that on the information available even with a transcript a summary determination of whether there was an oral contract reached on the terms he says in respect of D5's liability on 21 January 2016 remains inappropriate and a matter for trial. It cannot be determined summarily even with the assistance of an incomplete transcript.

83. The only evidence about the meeting is C's and whilst that is limited to the POC, VPOC and Greenwood 2 for the purposes of this application I have to accept C's evidence and the case set out in his POC and VPOC unless demonstrably untrue or unsupportable (see *Okpabi*). If C's evidence is true an agreement was reached for which he says the court needs to consider the totality of the transcript of the 21 January meeting.

84. C says the court does not have evidence from any of the other participants at the 21 January meeting which he says will shed considerable light on whether the 21 January Agreement was reached. The court will have to consider the whole of the parties' negotiations as this was not an isolated event. That latter point is however, less

compelling in respect of D5 since it is not said that D5 was a counterparty to either the Vienna Agreement or the 2015/2016 Agreement.

85. C sought to address some of the points of detail raised by D5. He says that prior to the 21 January meeting D1 and D2 had already agreed that C was to be paid, consequently there was no need for further agreement from them before any binding agreement could be reached on 21 January 2016.

86. He points to the evidence that there was no subsequent discussion about the written waiver or the requirement for approval from D1 and D2 which he says supports his contention that neither the written waiver nor the agreement of D1 and D2 were necessary for there to be a concluded agreement. He argues that the court cannot conclude on a summary basis that the parties would not have been content to be immediately bound.

87. C argues that it is clear from both C's evidence and the transcript that all the important terms of the agreement had been concluded, there was he says a meeting of minds and consideration passing.

88. However, C says even if it were possible to argue that Mr Krieglstein intended to impose additional requirements for approval from D1 and D2 as third parties, for example, that would not prevent a binding agreement being concluded with D5. Although since on C's case D1 and D2 are also parties to the 21 January Agreement that does not appear to help C. Further that D5's involvement in implementing arrangements after the 21 January meeting support his contention that D5 was a party to the 21 January Agreement.

89. D5 argues that the very issue to be determined is whether there was objectively any evidence at all of a meeting of minds or a passing of consideration. They submit that C's evidence that he had a clear understanding that a deal had been done is entirely subjective when the court has to approach the question objectively. D5 says it is clear from the transcript and the court can conclude that objectively there was no concluded agreement.

90. However, C firmly resists that analysis on the basis that here the court is ultimately considering an oral contract and C's evidence is both relevant and admissible and is substantially uncontradicted and has to be accepted unless demonstrably untrue or unsupportable.

Mr Krieglstein's Authority:

91. Even if C can demonstrate that the 21 January Agreement was reached, he still has to persuade the court that Mr Krieglstein had (express or implied) actual or apparent authority to bind D5. Although Ms Bowen joined the meeting on 21 January 2016 for a short period of time it is common ground that none of D5's directors or employees were said to have entered into the 21 January Agreement. D5 says none of the evidence relied on by C provides any contemporaneous evidence that D5 had ever represented to C that Mr Krieglstein had authority to and was able to bind it to an agreement such as the 21 January Agreement not merely to negotiate on its behalf.

92. D5 argues that the Krieglstein Contract (disclosed in these proceedings) which regulated the relationship between D5 and Mr Krieglstein makes clear that he did not have actual authority although it was not accepted by C that the Krieglstein Contract excluded the possibility of Mr Krieglstein having express or implied actual authority or apparent authority. C in addition relies on a letter from Dr K dated 17 June 2013 which authorises D5 to accept instructions from Mr Krieglstein. D5 says the 17 June 2013 letter simply authorised Mr Krieglstein to give instructions to D5 on Dr K's behalf not to enter into contracts on behalf of D5. It is the wrong way around.

93. In the VPOC, C sets out why he says that Mr Krieglstein had actual or apparent authority and argues that such documentary evidence as is currently available supports that argument. Again, for the purposes of this application I have to assume those facts to be true unless it is clear that they are demonstrably untrue. There is, of course, no evidence from Mr Krieglstein. D5 argues that the impressions and views that C formed are contradicted by the documents available. However, the documents which D5 relies on seem to me to go primarily to the issue of actual authority not apparent authority. Further there is evidence that Mr Krieglstein had authority to authorise some types of payment by D5 which at least raises an issue about the extent of his authority to bind D5 which it seems to me it is not possible to determine on a summary basis.

94. D5 argues that even if C could establish that Mr Krieglstein had apparent authority in some respects, it is clear from the transcript that Mr Krieglstein knew he did not have authority to bind D5 to the 21 January Agreement without further instructions or confirmation. However, this argument assumes in D5's favour that there is only one reading of the transcript and no room for doubt.

95. C argues that when assessing whether Mr Krieglstein had apparent authority it is necessary to consider the totality of the dealings and conduct between C, D5, and Mr Krieglstein. It seems to me that argument has merit and that the question of whether Mr Krieglstein in fact had actual or apparent authority is not limited to a consideration of the 21 January meeting and is unsuitable for summary determination. Mr Krieglstein, Dr K, C and D5 had been working together since 2009. From the evidence available on this application it is clear that Mr Krieglstein had considerable high-level involvement in Dr K's business empire and worked with both C and D5 on Dr K's behalf. Whether Mr Krieglstein had actual or apparent authority involves a much broader factual enquiry into the relationships, conduct and ways of working between D5, Mr Krieglstein, Dr K and C and their respective involvement in Dr K's affairs including consideration of any relevant documentary evidence.

Conclusion on Contract and Authority:

96. It is of course important to bear in mind that both parties are focussed on a meeting that on C's case was both a discussion about the implementation of pre-existing agreements to which D5 was not a party and also a meeting at which C says that the 21 January Agreement was reached with all the Defendants. It is hardly surprising therefore that there are alternative ways of analysing those events on the basis of incomplete factual evidence and an incomplete transcript.

97. In order to be satisfied that C did not overcome the low bar of serious issue to be tried I would have to be satisfied that C's contractual claim and authority argument were

hopeless and unarguable. Improbable is not enough. I have to be satisfied that the terms of an oral contract could not be derived from the evidence in any circumstances and that any suggestion that Mr Krieglstein was held out as having authority to bind D5 was hopeless.

98. Whilst there is a transcript it is incomplete; C says that much is lost in translation or lack of translation. Although those parts on which C relies as forming the express terms of the 21 January Agreement are in English, they are selective, as D5 says, however, the VPOC seeks to rely on the entire transcript to provide support for the consensus C says was reached. I accept D5's criticisms that the VPOC and the POC may not completely align in this regard.

99. However, it is clear that there are gaps in the transcript both because some of the recording appears to have been inaudible and because some of it has yet to be translated from German. I am, however, also cautious and take into account that how words are used, and their tone and content may affect their meaning. In this case C not only submits that much is lost in translation but that parts of the transcript reflect jokes, which coupled with the untranslated parts or inaudible parts mean that unlike in *Parsadoust* the court does not have the full effect of the transcript. In *Parsadoust* the court was considering four short phone calls between two people focussed on a particular issue not a wide-ranging meeting with multiple participants in more than one language over, it appears, nearly an hour which is said to give rise to not only discussions on implementation but the 21 January Agreement. As Calver J notes no one suggested in *Parsadoust* that there was anything to be gained from listening to the recordings. That is not the position here.

100. Whether hearing the recording or having a full transcript will change the court's understanding of the words used bearing in mind the express words relied on at POC [35], I cannot exclude that possibility and I cannot say it is unarguable. I note the warnings given in the authorities of the occasions on which something that seemed clear on an interim application turned out to be entirely contrary when the full evidence and documents were available. That is why the court has to observe some judicial caution when the parties seek to engage it in a mini trial on a summary basis.

101. Ultimately, despite the transcript, the 21 January Agreement is an oral contract and a fuller factual enquiry including evidence from the participants including C, Mr Krieglstein, Mr Schleinzer, Mr Fritz, and potentially the other defendants, is likely to assist the court in determining whether the 21 January Agreement can be made out at all and if so its terms and who were the parties to it.

102. The evidence that the court will need to consider to determine the question of authority will require an even broader factual enquiry, not just focussed on the 21 January meeting. As set out above on the evidence currently available it is not possible to say it is entirely hopeless. The authority arguments depend on Mr Krieglstein, D5's and C's evidence and potentially evidence from the other defendants or third parties given Dr K's seemingly complex business arrangements. Although D5 says that even if Mr Krieglstein had authority more generally the transcript demonstrates that he knew he did not have authority on 21 January. For the reasons I have given the transcript in its current form cannot be viewed as conclusive.

103. The question for the court in relation to authority is not what D5 says the position is but on the basis of a broad factual enquiry whether Mr Krieglstein had actual authority or was held out as having such authority. For the purposes of this application, I must assume that C's evidence in the VPOC is true unless demonstrably untrue and I am not able to conclude that it is demonstrably untrue.

104. The parties' submissions amply demonstrate the caution with which the court should approach detailed arguments on factual issues when being asked to summarily determine an application. Although both counsel spent time going through the 59-page transcript with a view to persuading me of their analysis, it seemed to me the determination by the court of whether in context the incomplete transcript could be said to demonstrate that a consensus was reached or whether Mr Krieglstein had actual or apparent authority is precisely the exercise which this court should guard against on a summary basis. It would require the court to conduct a detailed factual analysis itself based on the limited evidence available and to make findings of fact. That would be to conduct a mini trial. I have to proceed on the basis that whatever D5 may eventually demonstrate after disclosure and witness evidence or at trial, that unless there is the clearest contemporaneous evidence demonstrating that what C says is simply unarguable or implausible it has to be accepted.

105. It seems to me that whether the parties intended objectively to be bound to the terms of an oral agreement, even if said to be evidenced by the transcript, before it was reduced to writing still depends on an objective analysis of the parties' words and conduct for which a fuller factual enquiry is necessary (see Males J in *Air Studios (Lyndhurst) Limited v Lombard North Central Plc* [2013] 1 Lloyds Rep 63 at [5]). Despite D5's submissions and analysis which appear to me to identify some difficulties with C's contract claim I am not satisfied that I can conclude that there can be no plausible basis for either the contract or authority claims. It seems clear to me that there are reasonable grounds to conclude that a fuller investigation of the facts may add to or alter the evidence relevant to the contract and authority issues.

106. On that basis it seems to me that C overcomes the low bar of serious issue to be tried on both the contract and authority claims at this stage and should be allowed to proceed. However, C needs to amend the POC to incorporate the VPOC. It is unsatisfactory having some of the contractual claim in the POC and some in the VPOC particularly where, arguably, there may be inconsistency between the two. D5 and indeed all the Defendants are entitled to know with clarity the claim they have to meet on the 21 January Agreement.

Unjust Enrichment

107. There are two separate parts to C's restitutionary claims. The first relates to the services provided pursuant to the 2009 Agreement and the second to C giving up claims under the 21 January Agreement. The broad thrust of the first unjust enrichment claim is that C provided services to D5 which D5 accepted. D5 was thereby enriched and had the benefit of those services. C provided those services on the basis that he would be paid. He was not. In the second unjust enrichment claim C argues that giving up his claims in the 21 January Agreement and the subsequent failure to honour that 21 January Agreement gives rise to a further claim in unjust enrichment. The second unjust enrichment claim is parasitic on the contract claim and/or first unjust enrichment claim.

108. Unjust enrichment is not itself a cause of action but a term to describe a category of rights. The court has to be satisfied that D5 has been enriched at C's expense and that that enrichment was unjust. These broad headings provide a framework for the factual enquiries which the court needs to undertake before it can conclude that D5 has been enriched at C's expense, and that such enrichment was unjust not simply that C entered into a bad bargain. C would have to show that the "unjust factor" he relies on falls within or is close to an established category or factual recovery position in unjust enrichment. As a consequence, unjust enrichment claims are not an exercise of a general discretion. In this case C says that both unjust enrichment claims are said to be failure of basis claims. The broad factual enquiry required to establish an unjust enrichment claim does not appear to make them an obvious type of claim for summary determination.

109. C submits that in respect of the first unjust enrichment claim the services provided to and accepted by D5 under the 2009 Agreement to which D5 was not a party enriched D5 unjustly because those services were provided on the basis that C would be paid and he was not. C says he understood that he was providing services to D5 on the basis that they were paying at least some of his fees.

110. C says that the failure of basis occurred in about 2018 when it became clear that the Vienna Agreement, 2015/2016 Agreement and 21 January Agreement were not going to be honoured. C points to Mr Domaille's email of May 2018 as both evidence of D5's involvement in the implementation of the 21 January Agreement and the failure of basis for the unjust enrichment claims.

111. D5 argues that the first unjust enrichment claim is legally and factually misconceived. For there to be a failure of basis there must be a jointly understood basis that can be objectively ascertained. Here that basis does not exist. C was to be paid by the parties to the 2009 Agreement for the services he provided even if they were provided to D5.

112. D5 says that where, as here, there is a contact between C and a third party a claim in unjust enrichment cannot succeed where it would contradict the express terms of that contract or interfere with the rights and obligations and risk assumptions made between C and those third parties. The court should not bypass the provisions of that contract or rewrite a bad bargain.

113. Etherton LJ said in *Costello v MacDonald* [2011] EWCA Civ 930 ("*Costello*") that as a general rule the courts should uphold such contractual arrangements even if it was clear that the party against whom the claim was made had received a benefit for which the claimant had not been paid. The court should uphold the primacy of contract as a matter of legal policy. A claim for unjust enrichment cannot be used to circumvent such contractual arrangements. This was further supported by Asplin LJ and Males LJ in *Barton v Gwyn-Jones* [2019] EWCA Civ 1999 ("*Barton*") where a claim for unjust enrichment succeeded despite the existence of a contract because the contract was silent about the allocation of risk in respect of the particular events that occurred. Asplin LJ concluded in *Barton* that the claim in unjust enrichment would not disturb the allocation of risk agreed between the contracting parties. There was space left for it.

114. C says that whether the 2009 Agreement excludes C's claim in unjust enrichment depends on the precise scope and terms of the 2009 Agreement and whether C's

unjust enrichment claim is inconsistent with the contract terms. This requires a detailed factual analysis about the dealings between all parties to determine the basis on which there was a conferral of benefit and whether there is space for the unjust enrichment claim. C relies on *Barton* where despite the existence of a contract the particular events were not accounted for by the allocation of risks between the parties in the contract.

115. C explains that he provided services for the benefit of D5. He raised invoices addressed to D5, D5 included provision for payment of C's fees by the Trust in its budget and had separately ring fenced an amount in relation to C's fees. It had identified C as an outstanding creditor from March 2013. D5 knew C knew this.

116. C argues that here the benefit conferred on D5 was conditional on payment by someone (*Barnes v Eastenders Cash & Carry plc* [2015] AC 1). He argues that it is enough that D5 benefited, and the counterparties did not pay. He submits that the situation in this case is like a three-party case and the requirement for the joint acceptance between C and D5 is uncertain (*Menelaou v Bank of Cyprus UK Ltd* [2016] AC 176) making the unjust enrichment claim at least arguable as against D5.

117. D5 argues that the primary obligation to pay for C's services under the 2009 Agreement remained with the counterparties even if D5 received the benefit of the services. C voluntarily accepted the risk allocation in the 2009 Agreement by contracting with Dr K and the Kulczyk Group and not D5. D5 argues that C's claim in unjust enrichment would ignore D5's separate legal identity and circumvent the risk allocation in the 2009 Agreement.

118. Despite C's evidence D5 argues that even if there were actual payments by D5 on C's own evidence it was Dr K or the Defendants procuring payment by D5. Unlike *Barton* where the contract was silent on the relevant issue the 2009 Agreement provided for payment of £1m per annum from parties other than D5. There was nothing in the 2009 Agreement to stipulate where any monies to pay for the services should be sourced from. The obligation to pay still remained with Dr K or the other contracting parties. Procuring that D5 paid C did not create any primary obligation on D5 to pay. Such an obligation would fatally undermine any unjust enrichment claim.

119. Thus, D5 says where there are contractual arrangements as to payment and the allocation of risks, even if it received a benefit there is simply no space left for the unjust enrichment claim (*Costello*). The unjust enrichment claim would be contrary to the terms of the 2009 Agreement.

120. Further, the liabilities C seeks to recover accrued before the renunciation/termination and C's remedies for non-payment remain solely against the counterparties to the 2009 Agreement, now D1 to D4 and this is not unjust (see *Rowe v Vale of White Horse* [2003] 1 Lloyds Rep 422). C argues that *Rowe* can be distinguished as being a case about free acceptance not failure of basis. Here he says that D5 knew that C had to be paid for his services, accepted those services, benefited from them, and made provision for payment.

121. The second unjust enrichment claim relies on D5 having been unjustly enriched by C foregoing his claims arising from the renunciation/termination of the 2009 Agreement

and for restitution in respect of services provided to D5 between 2009 and 2014 as a consequence of entering into the 21 January Agreement.

122. D5 argues: (i) that this claim is entirely parasitic on the first unjust enrichment claim. D5 cannot have received any benefit by C giving up his claim to restitution if that claim was misconceived and had no prospects of success in the first place. (ii) there was no benefit or financial value to D5 by C compromising his claims when they had no liability to C. D5 argues that it would be necessary for C to demonstrate that both D5 and C understood that C was foregoing something of value. (iii) since D5 argues that there is no prospect of establishing that D5 was party to the 21 January Agreement C would not be able to establish he forewent his previous claims as against D5.

123. C says these arguments assume in D5's favour that the first unjust enrichment claim is excluded by the 2009 Agreement and/or that C will not be able to make out the 21 January Agreement. However, if the first unjust enrichment claim is arguable then the second unjust enrichment claim is also arguable as there was benefit to D5 in C foregoing his claims against D5. Even if D5 considered that C's claim was doubtful foregoing it would amount to good consideration. On C's case D5 received a benefit from C's services and D5/the Trust was one of the entities who C expected to pay at least part of the outstanding fees for services. Foregoing those claims was therefore of benefit to D5 because C had a potential claim against D5.

Conclusion on unjust enrichment

124. The authorities to which both C and D5 referred clearly demonstrated the scope for competing legal arguments and the need for a factual enquiry where the court was considering the difficult, complex, and developing law on the interaction between claims in contract and unjust enrichment.

125. Carr LJ in *Dargamo Holdings Ltd v Avonwick Holdings Ltd* [2021] EWCA Civ 1149 recently considered that interaction between contract and unjust enrichment at [65] to [76] identifying both that the law was not settled in this area and that it was problematic:

> 65. The relationship between liability in contract and liability in unjust enrichment has been, and continues to be, problematic. In my analysis, the two play distinct but complementary roles in the private law of obligations.
>
> 66. It was thought at one time that a prerequisite to a claim in unjust enrichment was that any relevant contract must, if initially valid, have been discharged for breach or frustration or be void, unenforceable or incomplete (see Goff & Jones , *The Law of Restitution* (7th ed, 2007) at 1-063 to 1-067; *An Introduction to the Law of Restitution* at 464 and *Chitty on Contracts* (30th edn, 2008) at 29-058). This may have been a consequence of the fact that in almost all cases where a claimant seeks restitution for a failure of basis, any relevant contract will be ineffective. And where a contract has been discharged for repudiatory breach or frustration, the legal

enforceability of the contract and the failure of basis are two sides of the same coin.

67. However, as demonstrated by *Roxborough* (considered further below), invalidity of a relevant contract is not a necessary prerequisite to a successful claim in unjust enrichment. That is not to say that claims in unjust enrichment must not respect contractual regimes and the allocations of risk agreed between the parties. On the contrary, as explained by Professor Burrows in *The Restatement* (at 3(6)), an "often overlooked but crucial" element of the unjust factors scheme is:

> "…that an unjust factor does not normally override a legal obligation of the claimant to confer the benefit on the defendant. The existence of the legal obligation means that the unjust factor is nullified so that the enrichment at the claimant's expense is not unjust…"

68. This orthodox position in England was articulated in *Kleinwort Benson (*at 407-408). Lord Hope identified that a third question for consideration was *"Did the payee have a right to receive the sum which was paid to him?"* That question was relevant as follows:

> "The third question arises because the payee cannot be said to have been unjustly enriched if he was entitled to receive the sum paid to him. The payer may have been mistaken as to the grounds on which the sum was due to the payee, but his mistake will not provide a ground for its recovery if the payee can show that he was entitled to it on some other ground."

69. The principle is not confined to contractual obligations. By way of example, there may have been a statutory obligation to pay tax (*Test Claimants in the FII Group Litigation v Revenue and Customs Commissioners [2008] EWHC 2893 (Ch); [2008] 11 WLUK 717; [2009] STC 254 at [257]*) which would similarly nullify an unjust factor.

70. I describe this principle, namely that an unjust factor will not override a valid and subsisting legal obligation of the claimant to confer the benefit on the defendant, as the "Obligation Rule". It has been reaffirmed recently at the highest level by the Privy Council in *Fairfield Sentry Ltd (in liquidation) v Migani [2014] UKPC 9; [2014] 1 CLC 611 (JCPC) at [18]* and *DD Growth Premium x2 Fund v RMF Market Neutral Strategies (Master) Limited [2017] UKPC 36* ; *[2017] 11 WLUK 567 ("DD Growth Premium")* . As stated in *DD Growth Premium* by Lord Sumption (at [62]):

> "It is fundamental that a payment cannot amount to an enrichment if it was made for full consideration; and that it cannot be unjust to receive or retain it if it was made in satisfaction of a legal right… The proposition is supported by more than a century and a half of authority…

71. For the Taruta Parties it was suggested that these statements should in some way be read as limited to their specific factual context: these cases were not contemplating a failure of basis. (By way of example, *Kleinwort Benson* was a case involving the unjust factor of mistake.) However, Mr Crow was unable to identify any principled reason why this should be so, and I can see no good basis for not treating them as being of more general application

72. The Obligation Rule is not absolute (as evidenced by Professor Burrows' use of the word "normally" at the passage in 3(6) of *The Restatement* quoted above). There will be exceptions, albeit limited. Thus, as explored further below, in *Roxborough* a claim in unjust enrichment succeeded despite the existence of a valid contract. The rationale behind these exceptions is difficult to pinpoint. In *The Restatement* it is suggested (again at 3(6)) that:

> "one might say that they are situations where there is no underlying conflict between the reason for allowing restitution and the defendant's legal entitlement (for example, because allowing restitution does not conflict with the allocation of risk in the contract or does not conflict with the contract as there is a good reason for the contract not to be enforced because it is unenforceable or has been validly terminated). It might help to think of the legal entitlement as being easily outweighed by the unjust factor."

73. *The Law of Restitution* (at 328) indicates that the exceptions could be rationalised as follows:

> i) On the basis that there may be no undermining of the risks undertaken by the parties and so no inconsistency between contract and unjust enrichment;
>
> ii) The very need to establish failure of consideration is sufficient to prevent unwarranted subversion of the contract, because if all parties had known that the consideration would fail, the benefit would never have been conferred.

74. In "*Failure of Consideration and its Place on the Map*" (2002) 2 Oxford University Commonwealth LJ 1, in the immediate aftermath of *Roxborough*, Professor Birks emphasised (at 4) that it would be "a very rare" case in which

> failure of consideration could be made out despite the existence and performance of a valid contract.
>
> 75. The Gaiduk Parties submitted that a claim in unjust enrichment functions as a "gap-filling" device which is in some way subsidiary to the law of contract, echoing remarks made by Australian judges in the past (see *Pavey* at 256; *Roxborough* at [75] and *Mann* at [22]). Provided that what is meant by this is properly understood, it can be seen to make sense: the claim in unjust enrichment is not allowed to contradict the terms in the contract. However, it should not be treated as meaning that the claim in unjust enrichment is in some way inferior or subsidiary to a claim in contract. Frederick Wilmot-Smith advances a sound criticism of the terminology in *Contract and Unjust Enrichment in the High Court of Australia* 136 LQR (April) 2020, 196-201 stating:
>
> > "Since a court can… always let gains and losses lie where they fall, there is never a true "gap": it follows that there is only ever a "gap" if (for independent reasons) one concludes that there should be a restitutionary claim."
>
> 76. Asplin LJ may have expressed the true meaning of the phrase "gap-filling" with the greatest clarity during the course of the hearing: it is not gap-filling "in the sense of seniority or a minority, or being junior". It is because there is no "space" for the law of unjust enrichment in particular claims. In this way, the law of unjust enrichment can be seen as complementary, though not subsidiary, to the law of contract.

126. As Carr LJ identified in the passage above the determination of whether there remains space for an unjust enrichment claim will be fact sensitive. As she says at [76] the law of unjust enrichment can be seen to be complementary to the law of contract.

127. D5 argues that *Dargamo* is only about a contractual claim and unjust enrichment claim between the same two parties and that following *Costello* where there are contractual rights against a third party a claim in unjust enrichment is not available. However, it seems to me that where the claim in unjust enrichment is not inconsistent with a contract it may still be permissible (see for example *Barton*) but that must depend on mixed questions of fact and law particularly in a three-party case. The fact sensitive nature of the analysis is clear from Goff & Jones section 3-60 and 3-71 in particular in a three-party case "*it is always necessary to take into account the wider history of the dealings between all three parties*."

128. An unjust enrichment claim should not be allowed to contradict the terms of the contract but that does not exclude the possibility, even in a three-party case, of there remaining space for it. It may be that the allocation of risks is clear, and the remaining space or lack of space was intended. In such a case there would be no real space left for the unjust enrichment claim. It would not in those circumstances seem to me to be unjust for the risks and liabilities to lie where they fall consistent with the contractual allocation of risks. There would not seem to me to be a failure of basis merely an

agreed allocation or risk or a bad bargain. However, to ascertain the answer save in the clearest case would require a factual enquiry. Here that would seem to me to involve a wide-ranging factual enquiry looking at the wider history of the dealings between C, the Defendants, Dr K, and others.

129. Further the 2009 Agreement is partly oral and partly written and on C's case not contained within the four walls of the written 2009 Agreement. It seems to me that in such circumstances a factual investigation of the terms of the contract and whether the conditions have been met may allow space for an unjust enrichment claim. Where the terms of the contract are oral in whole or in part there is more likely to be scope to argue whether there is space for an unjust enrichment claim and, on that basis, alone it would be impossible to say that C's claim was entirely fanciful or hopeless on a summary basis. I am not persuaded that on the state of the authorities that it can be said that the one automatically excludes the other, only that there needs to be an examination of whether there remains space for an unjust enrichment claim where there is a contract that may cover the relevant risks. That is a mixed question of law and fact.

130. The 21 January Agreement is oral albeit that there is an incomplete transcript of the 21 January meeting. The second unjust enrichment claim is parasitic on the contract and first unjust enrichment claim. The success or failure of the contract claim, and the authority arguments will affect the strength of the first and particularly the second unjust enrichment claim.

131. Depending on the outcome of those claims it will be either be a stronger claim or it will fall away but it is not possible to say at this stage that is unarguable given its role in the claim overall. Again, given the uncertainties around the scope of the 21 January Agreement or indeed on D5's case whether there was any agreement with it at all, it cannot be said at this early stage without a factual enquiry whether there is space for the second unjust enrichment claim.

132. The documents and evidence available on this application are plainly incomplete. C has provided some evidence to support his argument that D5 received the benefit of his services and was making arrangements to pay him. Unless that evidence is demonstrably untrue it has to be accepted on this application. His POC and VPOC provide a sufficient basis to believe that a fuller investigation of the factual matrix is necessary.

133. There are four other Defendants each of whose evidence, disclosure and defences may affect the strength of C's and D5's positions on each of the claims in question. Those Defendants and the participants in the 21 January meeting are all likely to have valuable evidence to contribute about the relationships between the parties and the existence and enforceability of any contractual arrangements, and the role and authority of Mr Krieglstein. The contractual claim and the unjust enrichment claims cannot in that sense be considered in a vacuum.

134. Although D5 considers C's position to be micawberesque I do not agree. It seems to me that further relevant evidence or documents are likely to come to light in the course of these proceedings that may substantially alter the court's understanding of the issues.

135. Claims in unjust enrichment by their very nature cannot, at least on the present state of the law, be contained within narrow propositions for which there is only one answer given the broad themes the court has to consider when undertaking its factual enquiry. However, that is exacerbated in this case because it is clear from the limited evidence available that much of the communication and interaction between C, Dr K, Mr Krieglstein, and others, including it appears D5, was informal and/or oral. That leaves open a wide range of possibilities and outcomes when the evidence is tested at trial.

136. D5 asks me to make nuanced fact sensitive decisions determining that the claims are hopeless on a summary basis and by reference to the authorities in a developing area of law. I am not persuaded that the current state of the authorities is as stark as D5 seeks to suggest for the reasons set out above but, in any event, how they are to be applied will need to be considered against the facts as they emerge.

137. D5 has some forceful legal arguments about why it says that the unjust enrichment claims should fail which may turn out to be right. However, D5 seeks to achieve that outcome on a summary basis and without the wider factual enquiry which I consider necessary.

138. It seems to me not only is it necessary to determine the basis of the transfer of benefit and whether it has failed but it is necessary for the court to consider that against the relevant factual background (see for example Goff & Jones at 3.71 and Carr LJ in *Dargamo*). Where the court has to grapple with the interaction between a contractual claim and an unjust enrichment claim and determine if there is space for the latter on the current state of the law a summary determination is unlikely to be appropriate.

139. Some elements of the claims may be more improbable than others and it may be that after disclosure and witness statements the balance will tip more clearly in favour of D5. But the question on this application is not which of D5 and C is right but whether it can be said that C overcomes the low bar necessary to satisfy me that there is a serious issue to be tried. Can I be satisfied at this early stage that C will not in any circumstances be able to make out the claims for unjust enrichment, that there is no plausible basis for them?

140. C has satisfied me that his unjust enrichment claims are unsuitable to be determined against him at this early stage and that there are grounds for believing that a fuller investigation of the facts may add or alter the position not only on the unjust enrichment claims but also on the contract and authority issues. Further that the relative strengths and weaknesses of the different claims may alter as against each other and/or depend on the position adopted by the other defendants which adds to the overall need to observe judicial restraint at this early stage. C's claims are not entirely hopeless or entirely fanciful at this stage and there is a serious issue to be determined which overcomes the low bar required. D5's application fails.

141. Since this hearing D1 to D4 will have served their defences. That may affect when or how the POC should be amended to incorporate the VPOC. Subject to those issues I would propose to direct C to amend the POC to include those parts of the VPOC on which he intends to rely as matters of pleading.

142. The parties should seek to agree the terms of an order to reflect this judgment. It is my intention to hand down this judgment remotely and on a non- attendance basis. If a consequentials hearing is required any order should address any need for an extension of time.