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Case No: BL-2020-001417

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES

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

Date: 17/06/2024

Before :

MR JUSTICE FREEDMAN

- -

Between:

MATRIX RECEIVABLES LIMITED

Claimant/Respondent

- and –

MUSST HOLDINGS LIMITED

Defendant/Applicant

- -

Mr Peter Knox KC and Ms Katherine Bailey (instructed by **Taylor Wessing LLP**) for the **Defendant/Applicant**

Mr Nicholas Gibson and Mr Anirudh Mathur (instructed by **Mills & Reeve LLP**) for the **Claimant/Respondent**

Hearing dates: 3 and 7 May 2024
Date of hand-down of judgment in draft: 24 May 2024

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Approved Judgment

This judgment was handed down remotely at 11.15am on 17 June 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

MR JUSTICE FREEDMAN:

I Introduction

(a) The Claims

1. In this action, Matrix Receivables Limited ("MRL") as assignee from Matrix Money Management Limited ("MMM") makes claims as follows:

    (i) that there was an agreement that Musst would pay MMM 80% of its fees in the event MMM introduced a client for Mr Mathur's fund to the fund ("the 80/20 contractual claim"); alternatively

    (ii) that there was an agreement that Musst would pay over to MMM a percentage of such fees, such percentage to be agreed later ("the alternative contractual claim").

2. In the event that the 80/20 contractual claim or the alternative contractual claim fail, MRL makes a claim for unjust enrichment/a quantum meruit ("the restitutionary claim").

(b) The Applications

3. In respect of the 80/20 contractual claim and the alternative contractual claim, Musst seeks reverse summary judgment under CPR 24.2 on the basis that the claims have no real prospect of success.

4. In respect of the restitutionary claim, Musst seeks that it be struck out, or that it be the subject of reverse summary judgment, on the footing that (a) on a proper construction of s.5 and s.23 of the Limitation Act 1980, the primary limitation period has expired, and (b) it is now too late for MRL to plead deliberate concealment, and in any event, the proposed plea (received on Friday 26 April 2024) is unsustainable.

5. In the alternative, in respect of the 80/20 contractual claim, Musst seeks that the claim should be struck out as an abuse of process of the court under CPR rule 3.4(2)(b), on the footing that it involves a collateral attack on the Judgment in the Astra proceedings given on 17 December 2021 ("the Astra Judgment"), and/or to allow such an attack to be made would, in the circumstances of this case, be manifestly unfair. There was previously alluded to a different form of attack, namely of or analogous to a *Henderson v Henderson* challenge, that the subject matter of these proceedings ought to have been brought in the *Musst v Astra* claim, and that by the time that it was sought to be brought, it was too late. That has not been pursued.

6. However, there has been a new challenge, namely that there has been collateral use of the documents disclosed in the *Musst v Astra* action in these proceedings in breach of the obligations under CPR 31.22 and/or at common law with the consequence that there should be a sanction, the most draconian of which is the striking out of these proceedings as a whole. In the face of this recent challenge, there is a responsive application on behalf of MRL retrospectively to seek permission to use the documents disclosed, which application is opposed by Musst.

7. There is an inherent logic in dealing with the abuse of process points first. The reason for this is that if the abuse of process argument is correct, it makes consideration of the underlying merits of the 80/20 contractual claim unnecessary Despite this, Musst has chosen, as it is entitled to do, to postpone the abuse of process argument until after consideration of the reverse summary judgment. MRL has retained the more purist approach of starting with abuse of process. The Court has followed Musst's order in the analysis. Although this also reflects the order of Musst's case, the abuse argument has not been treated as relegated in order of importance.

(c) The volume of material

8. It should be noted at the outset that the application has become very heavy for a 2-day application. The material before the Court comprises two skeleton arguments from Musst each of about 25 pages and a chronology of 43 pages, and a skeleton argument from MRL of 25 pages. The three central witness statements (and there are others) comprising the second witness statement of Mr Viegas and the first and second witness statements of Mr Davison comprise a total of about 80 pages without exhibits. There is what is called a "core bundle" comprising 1140 pages (including the above arguments, chronology and evidence).

9. It has not been necessary to refer to every argument in the course of this judgment, but the above documents and the material highlighted in the skeletons and in the oral argument have been fully considered.

II Background

10. The sole director of MRL is Mr Luke Reeves ("Mr Reeves"). He was formerly a director of MMM until 1 February 2011, which company entered a members' voluntary liquidation on 3 December 2012, and remains in liquidation. There was a group of companies known as the Matrix group which comprised financial services businesses and is said to have managed over £3 billion of assets with 230 professionals employed in four divisions including asset management and specialist finance. Ms Alexandra Galligan ("Ms Galligan") was employed by Matrix Securities Limited from 1 December 2008 as institutional business development manager, reporting to Mr Reeves. She was and is married to Mr Saleem Siddiqi ("Mr Siddiqi"), who is the beneficial owner of Musst.

11. MMM and another company in the group traded as Matrix Asset Management ("MAM") and were in the business of finding investors to invest in hedge funds in return for fees paid by the managers of those funds. MAM had a network of relationships with potential investors.

12. Mr Reeves first met Mr Siddiqi in 2008 or 2009 through Ms Galligan. His expertise was to advise pension funds and other investment entities in relation to their selection of hedge funds into which to invest. Mr Reeves wanted MMM or Matrix to be introduced to managers of high-quality hedge funds to which Mr Siddiqi had access. Musst says that it successfully introduced Matrix to about nine different hedge funds from about 2009 to 2012.

13. In 2009 or 2010 (Matrix says in 2011), Mr Reeves discussed with Mr Siddiqi and Ms Galligan a concept under which MMM or Matrix would provide for reward office space and legal and administrative services to new hedge funds. In about January 2012, Mr Siddiqi introduced Mr Reeves to Mr Mathur, then of Deutsche Bank, who was about to set up his own hedge fund business. In 2012, Mr Siddiqi was working for Tapestry Asset Management Limited ("Tapestry"), and during the year, he acquired Tapestry and by the end of the year, he operated through various Musst entities. From November 2012, he was joined by Ms Galligan.

14. It is unnecessary in this summary to refer to the numerous meetings involving Mr Siddiqi and/or Mr Reeves and/or Mr Mathur. Mr Mathur had an investment strategy focussing on synthetic asset-based securities which were trading at low sums and was expected to increase substantially. There is controversy between the parties as to what then occurred about the level of remuneration between the parties. In the course of emails (particularly 15 and 16 February 2012), there was reference to Mr Reeves expecting that 25% should be paid to Musst of which the salespeople including Matix would expect 80%. Mr Reeves in a statement had said that there was an 80/20 sharing arrangement that was made, but Mr Siddiqi denies that this was ever agreed, and says further that the emails do not evidence any such understanding.

15. Musst accepts that the role of Matrix would be to act on behalf of Musst by (a) suggesting potential investors to Musst, (b) making initial contact with potential investors when Mr Siddiqi agreed to this, (c) helping set up meetings and to attend those meetings if Musst wished, and (d) providing administrative and operational support. Since the findings in the Astra Judgment (paras. 88-90), Musst now accepts that the role of MMM went beyond being an administrator or secretary. Musst says that no agreement was made as to fees with Mr Mathur until after agreement in principle between Musst and Octave in November 2012 resulting in an Introduction Agreement on 13 April 2013 between Musst and Octave. Musst's case is that thereafter there was no concluded agreement between Musst and Mr Reeves for sharing of Musst's fees.

16. Mr Reeves gave evidence in the *Musst v Astra* action. The case then pursued by Astra was that there was a tripartite agreement made in November 2012, a part of which was that there would be a sharing of the sums received by Musst whereby Mr Reeves/Matrix would receive 80% on the basis of Musst receiving 25% of the fees on introductions, the sharing was said to be 80% Matrix and 20% Musst. The Judgment contained critical remarks about Mr Reeves' evidence which was rejected as *"not satisfactory"*. It was said that it *"lacked precision about what agreement there was as regards Commission at any stage and between whom"*. The instant claims were not brought in the *Musst v Astra* action, and the case of Musst is that it is an abuse of process amounting to a challenge on the Judgment in that action for the instant claims to be brought in this action.

17. The principal fees which form the subject of MRL's claim are fees received by Musst from two customers, namely 2B and Crown. It was principally by reference to these fees that Musst sued Astra in the *Musst v Astra* action for fees from these introductions. Musst succeeded in its claim, and the Astra Judgment was dated 17 December 2021, and an order was made for an interim payment of US$3,826,952.20 on 18 March 2022. The claims made in this action are for a share of 80% of that sum or some other percentage which was to be agreed or for a restitutionary sum by reference to the value of the services rendered by MMM.

III Summary judgment – the procedural law

Grounds for summary judgment

"24.2 The court may give summary judgment against a claimant or defendant on the whole of a claim or on a particular issue if –

(a) it considers that –

(i) that claimant has no real prospect of succeeding on the claim or issue; or

(ii) that defendant has no real prospect of successfully defending the claim or issue; and

(b) there is no other compelling reason why the case or issue should be disposed of at a trial."

(Rule 3.4 makes provision for the court to strike out a statement of case or part of a statement of case if it appears that it discloses no reasonable grounds for bringing or defending a claim)"

18. In *EasyAir Ltd v Opal Telecom Ltd* [2009] EWHC 339 (Ch), Lewison J said the following about summary judgment applications:

"The correct approach on applications by defendants is, in my judgment, as follows:

i) The court must consider whether the claimant has a "realistic" as opposed to a "fanciful" prospect of success: Swain v Hillman [2001] 2 All ER 91;

ii) A "realistic" claim is one that carries some degree of conviction. This means a claim that is more than merely arguable: ED & F Man Liquid Products v Patel [2003] EWCA Civ 472 at [8]

iii) In reaching its conclusion the court must not conduct a "mini-trial": Swain v Hillman

iv) This does not mean that the court must take at face value and without analysis everything that a claimant says in his statements before the court. In some cases it may be clear that there is no real substance in factual assertions made, particularly if contradicted by contemporaneous documents: ED & F Man Liquid Products v Patel at [10]

v) However, in reaching its conclusion the court must take into account not only the evidence actually placed before it on the application for summary judgment, but also the

evidence that can reasonably be expected to be available at trial: Royal Brompton Hospital NHS Trust v Hammond (No 5) [2001] EWCA Civ 550 ;

vi) Although a case may turn out at trial not to be really complicated, it does not follow that it should be decided without the fuller investigation into the facts at trial than is possible or permissible on summary judgment. Thus the court should hesitate about making a final decision without a trial, even where there is no obvious conflict of fact at the time of the application, where reasonable grounds exist for believing that a fuller investigation into the facts of the case would add to or alter the evidence available to a trial judge and so affect the outcome of the case: Doncaster Pharmaceuticals Group Ltd v Bolton Pharmaceutical Co 100 Ltd [2007] FSR 63 ;

vii) On the other hand it is not uncommon for an application under Part 24 to give rise to a short point of law or construction and, if the court is satisfied that it has before it all the evidence necessary for the proper determination of the question and that the parties have had an adequate opportunity to address it in argument, it should grasp the nettle and decide it. The reason is quite simple: if the respondent's case is bad in law, he will in truth have no real prospect of succeeding on his claim or successfully defending the claim against him, as the case may be. Similarly, if the applicant's case is bad in law, the sooner that is determined, the better. If it is possible to show by evidence that although material in the form of documents or oral evidence that would put the documents in another light is not currently before the court, such material is likely to exist and can be expected to be available at trial, it would be wrong to give summary judgment because there would be a real, as opposed to a fanciful, prospect of success. However, it is not enough simply to argue that the case should be allowed to go to trial because something may turn up which would have a bearing on the question of construction: ICI Chemicals & Polymers Ltd v TTE Training Ltd [2007] EWCA Civ 725."

19. There can be added that in *Partco v Wragg [2002] 2 BCLC 323* at para. 27, Potter LJ referred to the following cautionary principles:

(i) The purpose of summary relief is to help resolve the litigation.

(ii) The court must have regard to the overriding objective. The court should be slow to deal with single issues in cases where there will need to be a full trial on liability involving evidence and cross-examination in any event and/or where summary disposal of a single issue may delay (because of appeals) the ultimate trial of the action.

(iii) The court should consider whether the objective of dealing with cases justly is better served by summary disposal or by letting matters go to trial so that they can be fully investigated, and a properly informed decision reached.

20. At para. 28 in *Partco*, Potter LJ said the following:

> *"...Summary disposal will frequently be inappropriate in complex cases. If an application involves prolonged serious argument, the court should, as a rule, decline to proceed to the argument unless it harbours doubt about the soundness of the statement of case and is satisfied that striking out will obviate the necessity for a trial or will substantially reduce the burden of the trial itself: see the Three Rivers case per Lord Hope at 94–98 (pp.542–544), considering the Williams & Humbert case….It is inappropriate to deal with cases at an interim stage where there are issues of fact involved, unless the court is satisfied that all the relevant facts can be identified and clearly established: see Killick v Price Waterhouse at 20, Col.2 and 21 Col.1….It is inappropriate to strike out a claim in an area of developing jurisprudence. In such areas, decisions should be based upon actual findings of fact: see Farah v British Airways The Times, January 26, 2000 (CA) per Lord Woolf MR at para.35 and per Chadwick LJ at para.42, applying Barrett v Enfield London Borough Council [2001] 2 AC 550 and X (Minors) v Bedfordshire CC[1995] 2 AC 633 at pp.694 and 741 ."*

21. In *Opkabi v Royal Dutch Shell plc* [2021] WLR 1294 , Lord Hamblen said at [109] that the focus for the inquiry at the summary judgment stage at [109] should be "*the arguability of the claim which should have been fully set out in the particulars of claim, rather than the weight of the evidential case"* and at [107] *"the court should not be drawn into an evaluation of the weight of the evidence and the exercise of a judgement based on that evidence... The factual averments made in support of the claim should be accepted unless, exceptionally, they are demonstrably untrue or unsupportable."*

22. In *Okpabi* [110], Lord Hamblen cited Carnwath LJ's judgment in *Mentmore International Ltd v Abbey Healthcare (Festival) Ltd* [2010] EWCA Civ 761 at [23]. This made clear that where, in *ED & F Man Liquid Products Ltd v Patel* [2003] CP Rep 51, Potter LJ had said factual assertions do not have to be accepted by the court if it is *"clear"* that there is *"no real substance"* in them, *"particularly if contradicted by contemporary documents",* this was to be read consistently with Lord Hope's speech in *Three Rivers*. Thus, *"Lord Hope had spoken of a statement contradicted by all the documents or other material on which it is based. It was important not to equate what may be very powerful cross examination with the kind of knockout blow which Lord Hope seems to have had in mind".*

23. By way of contrast, in a summary judgment application which lasted 6 days, in *King v Steifel [2021] EWHC 1045 (Comm)*, Mrs Justice Cockerill said the following at [21]:

> *"The authorities therefore make clear that in the context of summary judgment the court is by no means barred from*

evaluating the evidence, and concluding that on the evidence there is no real (as opposed to fanciful) prospect of success. It will of course be cautious in doing so. It will bear in mind the clarity of the evidence available and the potential for other evidence to be available at trial which is likely to bear on the issues. It will avoid conducting a mini-trial. But there will be cases where the Court will be entitled to draw a line and say that even bearing well in mind all of those points - it would be contrary to principle for a case to proceed to trial."

24. At [22], the Judge added *"So, when faced with a summary judgment application it is not enough to say, with Mr Micawber, that something may turn up…"*

IV Reverse summary judgment on the 80/20 contractual claim

(a) The case of Musst

25. The reasons why Musst submits MRL has no reasonable prospect of success on the 80/20 allegation are set out at paragraphs 58 to 73 of Mr Viegas's second witness statement.

26. Musst's reasons can be summarised as follows:

(i) the vagueness of the pleading at para. 12c (i) of the Amended Particulars of Claim, namely that *"between February and March 2012, a series of meetings and calls between Mr Reeves and Mr Siddiqi at which the AMCO project was discussed, and it was agreed…"*;

(ii) likewise, the vagueness of Mr Reeves' evidence in his witness statement at para. 18 and at the trial as to precisely how and when the 80/20 contractual claim was made;

(iii) the failure to make this allegation for a period over 8 years after the event until August 2020 or to explain this delay;

(iv) the absence of a specific internal document within MMM evidencing the alleged 80/20 contractual claim or a document from Mr Reeves to Mr Siddiqi to confirm the agreement. It is not an answer that in Mr Davison's witness statement, it is now reported that Mr Reeves believed that there would be one or more documents which would emerge to that effect;

(v) when no agreement was drawn up, there is no explanation as to why absent an agreement as to commission between MMM and Musst, there was no attempt to chase for an agreement. In cross-examination, Mr Reeves said " *"I think, with the benefit of hindsight, that would have been a good thing to do"*.

27. This action is at odds with the claim in the trial which gave rise to the Astra Judgment. In the action of *Musst v Astra*, the relevant agreement was a tripartite agreement made in November 2012 between Musst, Astra and MMM, whereas the contemporaneous documents e.g. paras 91(2) to (3) of the Astra Judgment, showed

that the intention was to have two deals, first between Musst and Mr Mathur, and after that one between Musst and MMM/Mr Reeves.

28. Musst also prays in aid that the only witness statement of Mr Reeves is from the *Musst v Astra* action when his original evidence at para. 18 was that the agreement was made on 15 February 2012 and was a bipartite agreement made between MMM and Musst (80/20), whereas at trial in cross-examination, his evidence was that it was a tripartite agreement between MMM, Musst and Astra. There has not been a further witness statement of Mr Reeves or other explanation as to how the MMM case about a bilateral 80/20 agreement is sustainable through Mr Reeves, given that his evidence in cross-examination in the Astra Proceedings was about a tripartite agreement. It is therefore said that no basis for the current case has been set out, and that for all these reasons, it is demonstrably a false case.

(b) The case of MRL

29. MRL emphasises the following features, namely that:

(i) The case of MMM/MRL has never before been independently articulated. They were not before the Court during the Trial. They had no input into the pleading. They did not take the statement of Mr Reeves. They did not appear at the trial, albeit that there was some representation of their interests by way of a watching brief of parts of the trial. They had no right to re-examine Mr Reeves, and they did not do so.

(ii) In any event, MMM/MRL is not bound by the result of the trial or by the Astra Judgment. The decision is inadmissible by reason of the decision in *Hollington v Hewthorn* [1943] 2 All ER 35 and *Secretary of State for Trade and Industry v Bairstow* [1998] EWCA Civ 601. This point is conceded at least for the purpose of this application by Musst, who say that the objective factors on which they rely apply independently of the Astra Judgment or its reasoning.

(iii) There is not a major difference in principle between a tripartite 80/20 case and a bilateral 80/20 case. They both come to the same thing in the end, however the agreement was formed. The only question now is whether there was an 80/20 agreement of some sort.

(iv) The principles of interpretation of an oral contract allow more leeway that in the case of a written contract. The test remains objective, but evidence of the subjective understanding of the parties and evidence of subsequent conduct are admissible: see *Blue v Ashley* [2017] EWHC 1928 at [64].

(v) The absence of contemporaneous documents is a matter for cross-examination at trial, but no more than that. Having regard in particular to the law as set out above, and especially the quotations from Lord Hamblen in *Okpabi*, the Court must not determine the case without a knock-out blow or a case where it was clear that it has no real substance.

30. MRL also submits that full disclosure is awaited, and that it might be that this will turn up documents which have not been produced by MMM/MRL which might be

adverse to Musst's case. Whilst many documents were shared by them through solicitors in the action between Musst and Astra, it is possible that there were other documents which were not disclosed. The only way to test this is in this action to which MRL is a party. However extensive the disclosure thus far, it is possible that only disclosure in this action will reveal such a document.

(c) The response on disclosure of Musst

31. Musst submits that it is pure conjecture that such a document will be thrown up by disclosure. Against the background of the previous action in which there was an alignment between the interests of MRL and Astra, it is inconceivable that a document of this kind did not emerge. Mr Reeves had said that lawyers instructed by MRL had gone through the documents believed to be relevant and had provided documents to Payne Hicks Beach for Astra. He had not gone through all of the emails, but Stewarts had done so: see T9/99/18-T9/101/9 and at T9/211/13-25 in the *Musst v Astra* trial. Examples of the documents which were revealed including additional documents added to the trial bundle were identified. There is no reason to believe that the process of producing documents, which involve solicitors instructed for that purpose, would have misled the Court by concealing such documents.

(d) Discussion

32. The points made by Musst are forceful and carry weight. The question is whether looked at cumulatively, they are so forceful that the 80/20 contractual claim has no real prospect of success or that there is no other compelling reason for the matter to go to trial. In my judgment, the arguments raised by MRL are sufficient to justify a refusal of summary judgment. Despite the contradictory nature of the case now being advanced from the case presented in the *Musst v Astra* trial, various points reduce the force of that point at least at the stage of an application where the bar to resist it is not set high. There are the following features, namely:

    (i) in respect of the bilateral agreement for payment of 80% of the receipts from Astra/Octave, that is a feature both of the tripartite agreement and the bilateral agreement. It does not follow from the rejection of the tripartite agreement as regards the 80/20 split, that the bilateral agreement will be rejected.

    (ii) the fact that in the *Musst v Astra* trial, Mr Reeves supported the tripartite agreement and he has not provided further evidence in this action to show how he will support the case as pleaded are matters on which Musst is able to place reliance: see para. 28 above. Nevertheless, MRL is able to rely upon the statement of truth of MRL in the current case in which he supports the current case, and to point to the fact that even if Mr Reeves got wrong the tripartite agreement, that does not mean that there was no profit-sharing agreement between MMM and Musst.

    (iii) The various points about the absence of contemporaneous documents stand heavily in the way of the case now being put by MRL. Whilst there is reason to doubt that MRL will be able to overcome these points in the course of the trial, there is nonetheless sufficient force in the points made under the heading of "the case for MRL" to determine that a summary judgment in this case is inappropriate.

33. In addition to these points, the Court regards as particularly forceful the case of MRL to the effect that the restitutionary claim will still be before the Court at the trial of this action in the event that (a) the limitation point is not suitable for summary judgment, and (b) the collateral attack abuse defence is rejected at least at the summary judgment stage. On these premises, there will be a trial where evidence overlapping with the evidence required for the 80/20 contractual claim will have to be considered. The overlap will be about the same witnesses of fact, the same underlying documents and expert evidence about the proper remuneration.

34. The overall issues will be very similar as the Court will consider the business sense of the cases, the nature and extent of the benefit conferred and any understandings about remuneration. The services and the benefit will be very similar in both instances. The issues will not be identical in a contractual claim and a claim in restitution, but the overlap of evidence and the similarity of some of the issues will be very substantial.

35. The consequence of the foregoing is that if summary judgment were given in respect of the 80/20 contractual claim in favour of Musst, it would not save the time of the calling of all or most of the underlying evidence which would be required for the restitutionary claim in any event. It would also be required for the alternative contractual claim if summary judgment were not given in that regard. There would therefore not be a saving of court time. That, by itself, would give rise to some other compelling reason to refuse summary judgment.

36. There is an additional point, namely that the testing of a case at a trial might give rise to proving the 80/20 contractual claim in a way that did not seem apparent from the papers at the interim stage. Thus, there is the real prospect that due to the case going to trial on the restitutionary claim that a case would emerge and succeed in respect of the related case about the 80/20 contractual claim. It does not matter whether it is described as a case with a real prospect of success or a case with any other compelling reason for a trial: in either event, it merits a trial. I shall return to an expansion of the foregoing after considering the 80/20 contractual claim, the alternative contractual claim and the restitutionary claim, and as to the impact of having such closely related claims heard all together. If summary judgment is given in respect of the 80/20 contractual claim, there is a danger that the trial judge will rue the moment of the summary judgment when an option had been shut off on the basis of the incomplete case at the summary judgment stage, and in circumstances where the complexion was different at trial.

37. I do not regard this as Micawberism. That is a case where there is no reason to believe that anything will emerge at trial save for speculation. In this case, where on the premises identified above, there will be a trial in respect of at least the restitutionary case, the prospect is that the same evidence will throw up a case either about the 80/20 contractual claim or the alternative contractual claim. These points are greater still when considering the evidence of an oral agreement with a broader range of admissible evidence than in the case of construction of a written agreement.

V Reverse summary judgment on the alternative contractual claim

38. It is to the alternative contractual claim that this judgment now turns. The source of the alternative claim is pleaded in the Amended Particulars of Claim for the first time at para. 12c. ii. It reads as follows:

"as to MMM's Commission for providing its distribution services in respect of the amco fund the matrix Commission:...Alternatively, MMM would receive a proportion of the fees received by Musst Holdings from the AMCO fund to reflect the value of the services provided by MMM, with the exact percentage (the "Relevant Percentage") to be confirmed between MMM and Musst Holdings promptly once Musst Holdings had agreed on the proportion of the annual management and performance fees which Musst Holdings would receive in respect of MMM's and Musst Holdings' work relating to the AMCO fund: see Astra Judgment 91(4)-(5), 196."

(a) The case of Musst

39. The case of Musst is that this claim suffers from the same defects as the 80/20 contractual claim of (a) vagueness, (b) failure to articulate it for so many years, (c) absence of documentary evidence to support it, and (d) failure to press for the case at the time. There is no reason to believe that undisclosed documentation or witness evidence may cast a different light on the matter. In addition to these same criticisms, there are additional failings in respect of this new claim, namely:

(i) this claim is a late invention by way of amendment to the Particulars of Claim as late as August 2023. If it had been a real claim, it would have been there if not within the 8 years prior to the action, in the original Particulars of Claim. It is not even a claim which was pursued in the *Musst v Astra* action, nor was it mentioned by Mr Reeves, in that there was no claim other than for the 80/20 claim (and then as part of a tripartite agreement). This claim is predicated upon the opposite, namely that there was no 80/20 agreement.

(ii) this claim is at best an agreement to enter into an agreement, namely to be confirmed when Musst had agreed a proportion of management and performance fees which Musst would receive in respect of MMM's and Musst's work relating to the AMCO fund. Such an agreement is not enforceable, and it cannot be construed as an agreement to negotiate in good faith and fails for uncertainty: see *Walford v Miles* [1992] 2 AC 128 and Chitty on Contracts 35th Ed. para. 4-169.

(iii) the analysis of MRL that paras. 91(4)-(5) and 196 of the Astra Judgment support the existence of an agreement is fallacious. A proper understanding of the communications there referred to is that any agreement between Musst and MMM remained to be negotiated at some time in the future. This is supported by the wording of para. 196 which states that *"the primary agreement would be as between Musst and Octave and Musst would agree with Mr Reeves some sharing of money received by Musst with Mr Reeves for himself and/or LGBR and/or those behind Matrix."* There is no contemporaneous document which supports the existence of a concluded agreement that Musst would pay over a percentage of its receipts. This was a matter to be discussed later.

40. Musst also sought to refute suggestions of Mr Davison to the effect that various communications supported the case of MRL. The email of Mr Reeves of 15 February 2012 was that Mr Reeves had suggested that Musst should go for 25% fees on the basis that 80% would go to the salespeople i.e MMM. There is reliance on Ms Galligan's evidence which is said to support this. It is set out in detail at para. 24 of the skeleton of Musst [from T2/138/14]. Musst submits in response that Ms Galligan is simply agreeing with various propositions about what is suggested in the email without agreeing any proposition as to what actually occurred.

41. For all these reasons, Musst submitted that there was no alternative agreement which was capable of existing, or which had any real prospect of success.

(b) The case of MRL

42. MRL's answer in respect of the alternative contractual claim echoes some of the answers in respect of the 80/20 contractual claim. There is a further answer. Whilst there is a dissonance between the findings in the Astra Judgment (albeit that they are not evidence for the purpose of the second action) and the 80/20 contractual claim, there is less of a dissonance between those findings and the alternative contractual claim. That is because the Astra Judgment contained findings supportive of the concept that there was to be a sharing of monies between Musst and MMM of the fees received by Musst. It should be emphasised that the point is not that the findings of the Astra Judgment are evidence in another action, but at this summary stage, they indicate that there is a real prospect that the findings in this action will be similar to those in the *Musst v Astra* action.

43. Musst's argument was summarised in part in the Astra Judgment as follows:

> *[91.4-91.5]*
>
> *"(4) It was agreed that Musst would come to an arrangement with Matrix for its assistance, but only after Musst had agreed fees with Mr Mathur; and so the matter was left to be discussed later.*
>
> *(5) The witness statements of Ms Galligan and Mr Siddiqi respectively in this regard read as follows:*
>
> *(a) "Mr Reeves said we would see how it went and then discuss what terms MUSST and Matrix should work together on, which would also account for the help Saleem had already given Matrix and continued to do. Mr Reeves accepted that MUSST would direct Matrix with respect to AMCo/Astra and which potential investors MUSST wanted Matrix to contact.": Ms Galligan's third witness statement para. 54*
>
> *(b) "Because the whole arrangement was rather provisional and it was unclear how it would go (Mr Mathur had not even left Deutsche Bank yet), there was no deal between MUSST and Matrix about any payment or cut of potential future fees. MUSST did not have anything agreed firmly with Mr Mathur/Astra either (he was still at Deutsche Bank). It was all too early and we were all agreed that MUSST and Matrix would talk about a potential agreement once the arrangement*

> *and work scope had become clearer and MUSST had formally agreed terms with Astra. We also wanted any future terms to be discussed with Matrix to include my separate work helping with Matrix. In particular, I needed to know where MUSST stood (with Astra) before thinking about what deal might be appropriate between MUSST and Matrix.":* see Mr Siddiqi's fourth witness statement para. 35.
>
> [196]
>
> *"Musst contends that by November 2012, there had been agreed in principle between Musst by Mr Siddiqi and Octave by Mr Mathur an arrangement whereby Musst would be paid 20% of any monies Mr Mathur received both in respect of management and performance fees whilst the monies sat there without limitation in time (that is contrary to the three-year limit contended for by Astra). This agreement was with the consent of Mr Reeves with whom there would be sharing of the moneys received by Musst. The primary agreement would be as between Musst and Octave, and Musst would agree with Mr Reeves some sharing of moneys received by Musst with Mr Reeves for himself and/or LGBR and/or those behind Matrix…"*

44. MRL submits that this goes some way to setting up a real prospect of success about the alternative contractual claim or some other compelling reason for there to be a trial. The difference may be nuanced between (a) an agreement to be made about profit sharing between Musst and MMM once an agreement has been made between Musst and Octave/Astra, and (b) an agreement having been made between Musst and MMM with the amount of the commission to be fixed at a later stage. That is particularly the case where the services of introduction had been performed and were continuing to be performed by MMM either pursuant to an existing agreement or in anticipation of a future agreement. It might be that the agreement was in being and what remained was the fixing of a commission. MRL submits that absent agreement between the parties thereafter as to the precise amount, the Court would imply a reasonable sum.

45. MRL also relies on findings made in the first Judgment (not as evidence, but giving an indication as to where the Astra Judgment in a second action about similar facts may go) to the effect that the services provided by MMM were not administrative or secretarial, but were effective causes of introductions jointly with Astra: see the Astra Judgment at paras. 45, 88-89, 237, 278, 281-282 and 296-298. Specific details of work were set out at 98-99, 103-106, 129, 133, 141-142, 144-147, 151 and 264.

(c) Discussion

46. I am satisfied that despite compelling points made by Musst, the points in response are sufficient to raise a real prospect of success in the alternative contractual claim. There is a closer cross over here between the alternative contractual claim and the restitutionary claim than as regards the 80/20 contractual claim and the restitutionary claim. The real difference between the two was whether there was a concluded

agreement with the precise amount to be fixed or simply an expectation that there would be a concluded agreement in the future. In my judgment, that is far too similar to be resolved at this stage by reference to evidence given by a witness and not a party in the *Musst v Astra* litigation and where MRL did not appear as a party and could not have re-examined or made submissions about the impact of the evidence. There is a real risk of inconsistent adjudications in the event that there is a summary judgment in respect of the alternative contractual claim and a judgment at trial on the restitutionary claim.

47. The objection of an agreement to agree is one which might succeed at trial at least in respect of the contractual claims. There is a significant difference in this regard between a case of a wholly executory agreement and a case of an executed or a partially executed agreement. In the case of the latter, where services have been performed on the basis of an agreement, a court is more inclined to find that there has been an agreement. The courts are reluctant to reach such a conclusion [that the agreement is void for uncertainty], particularly where the parties have acted on the agreement: see Chitty 35th Ed. para. 4-187 and footnote 834.

48. To that end, the Courts have developed techniques to save a contract. Where the matter which has not been agreed is the percentage share or the price, then provided that there are sufficiently objective ways of calculating the same, if necessary, with the assistance of experts, the Court may be prepared to imply such a term: see Chitty para. 4-189. It is also useful to refer to the analogy of a contract for the sale of goods where the statute imposes an obligation to pay a reasonable price in the event that there is no agreement and the goods have been delivered: see Sale of Goods Act 1979 sections 8(2) and 9(1).

49. In the instant case, it is unsafe to assess whether this was a case where there was simply no agreement which cannot be made good by the courts or whether in fact there was an agreement where the Court is able to make good by assessing a reasonable percentage of sum. The distinctions are finely balanced in the assessment, and this is a further reason for not deciding the point summarily.

50. The cases talk about a reluctance of the Court to strike down an agreement for uncertainty, especially where the agreement has been executed wholly or in part. That reluctance is, in my judgment, made the greater at a summary judgment stage, still more so, in a case where a restitutionary claim is still to be adjudicated upon, and where there is such an intense cross-over of the relevant evidence.

51. It therefore follows that the analysis of Musst about an agreement to agree and an agreement with an obligation to negotiate in good faith are subject to the above arguments which provide an argument to the contrary with a real prospect of success. The only forum in which these arguments can be satisfactorily determined is a trial following full disclosure, written and oral evidence and full argument. It would infringe the principles of procedural law cited above to seek to arrive at a conclusion one way or the other based on the materials currently before the Court.

(d) Limitation in respect of the alternative contractual claim

52. There has not yet been factored in the effect of the argument of Musst that the alternative contractual claim is statute barred. It is possible that it is barred, subject to arguments about section 32 concealment, in respect of some of the early receipts, but that is a small part of the claim as a whole. The arguments on limitation depend on

hearing the evidence about the nature of the contract. Only when all of the evidence in respect of the contract and the alleged breach will it be possible to assess when the cause of action accrued, and so when it became statute barred. One of Musst's submissions is that the cause of action would accrue at the time when the first payment was received. I do not rule that out as a possibility at trial, but a first reaction is that it seems more likely that it would accrue on each receipt rather than on the first receipt. This is to reflect the fact that it was a sharing of moneys received.

53. It is not necessary to decide which argument is correct because the Court accepts the argument that it is premature until the precise nature of the alleged agreement has been adjudicated upon to decide when the causes of action accrued. That is not to say that the arguments including limitation cannot be decided at the same time. It is simply that limitation is a matter to be decided at a trial. It therefore follows that limitation does not affect the outcome of the summary judgment application as regards the alternative contract claim.

VI Reverse summary judgment in respect of the restitutionary claim

(a) The case of Musst

54. The sole basis of the reverse summary judgment application in respect of the restitutionary claim is that it is statute barred. It is accepted that the claim would have had a real prospect of success if it had been brought in time, but it is said that the limitation defence is such that MRL has no real prospect of success at trial because the claim is statute barred.

55. The position as regards limitation is more complicated in respect of the restitutionary claim than in respect of the alternative contractual claim. The case of Musst is that the time limit was the point in time when either the benefit was provided by the provision of the introductions or at latest the first payment. By that time, any request and any benefit had been conferred. It was at that point that the unjust enrichment took place. Musst became enriched once it acquired the benefit of the introductions. At that point, or at latest, the point in time when the first payment was made, it became unjust for Musst not to compensate MRL for the benefit conferred. That latter time is based on a recognition of a possibility that it would not be unjust if no payments came from this.

56. The argument is that whereas in contract there was an agreement to share commissions, and that might arise at the time of the receipt of the moneys, this is not so in restitution. The benefit came from the introduction and the question of when money would arrive from it may have been the relevant time between Musst and Octave/Astra, but it was not the relevant time in restitution.

57. To this end, Musst has quoted case law about the time of the accrual of the cause of action in restitution being from the time when the defendant receives a benefit. By way of example from case law:

(i) in *Surrey CC v. NHS Lincolnshire Clinical Commissioning Group* [2020] EWHC 3550, Thornton J held, at para 89:

"Goff & Jones [The Law of Unjust Enrichment, 9th ed (2016) on "Limitation") provides at para 33-11 that: "Limitation periods generally run from the date when the claimant's cause of action in unjust enrichment normally accrues at the date when the defendant receives a benefit from the claimant."

(ii) in *Moorgate Capital (Corporate Finance) Ltd v. Sun European Partners LLP* [2020] EWHC 593 (Comm), Mr Peter MacDonald Eggers QC, sitting as a deputy judge of the High Court at para 145 said:
"The cause of action for a quantum meruit accrued when all the elements of a claim for unjust enrichment had materialised, namely the enrichment of the defendant at the claimant's expense and the rendering of that enrichment unjust ..."

(iii) See also to the same effect by the same deputy judge in *Sixteenth Ocean GmbH & Co KG v. Societe Generale* [2018] EWHC 1731 (Comm); [2018] 2 Lloyd's Rep 465, para. 96

58. Applying the above to the instant case, irrespective of the time of the introductions, whether the cause of action accrued at the time of the acquisition of the right to be paid for the introduction or the later time of the first receipt referable to the introduction, it was more than 6 years before proceedings were issued. The submission of Musst is that it received a tangible benefit from work in respect of 2B from 18 April 2013, when it acquired the right to be paid for this introduction under the Octave Contract (2B having already invested by then). Alternatively, the benefit accrued from the time of the first payment being received, namely 13 May 2013. In respect of Crown, Musst submits that the cause of action accrued on 13 June 2013 (when Crown agreed to invest $40 million). In the alternative, the right accrued when the first payment came through, from Crown on 19 November 2013.

59. The submission was that in unjust enrichment the cause of action was then complete because the benefit had been obtained at MMM's expense and it was unjust for Musst to retain the benefit for paying the value of the work. Musst had received the benefit of the introduction and not only the benefit of the first payment, but the right to the future income stream. Thereafter, the payments were not future unjust enrichments, but simply a consequence of the original unjust enrichment. The cause of action was therefore said to be barred under section 5 of the Limitation Act 1980 or, if the right was to an account, it was barred under section 23 of the same Act.

60. Musst relies on the case of *Benedetti v Sawiris* [2014] AC 938 about the object of a remedy in a case in unjust enrichment as opposed to a claim in contract. At para. 99, Lord Clarke said the following:

> *"The object of the remedy in a case of the present kind [an unjust enrichment claim] is therefore to correct the injustice arising from the defendant's receipt of the claimant's services on a basis which was not fulfilled. That injustice cannot be corrected by requiring the defendant to provide the claimant with the reward which either party might have been willing to agree. That is because, in the absence of a contract, neither party's intentions or expectations can be determinative of their mutual rights and obligations. Nor can the court make the parties' contract for them: a contract which might have included many other terms and conditions besides a price. In such circumstances, the unjust enrichment arising from the defendant's receipt of the claimant's services can only be corrected by requiring the defendant to pay the claimant the monetary value of those services, thereby restoring both*

parties, so far as a monetary award can do so, to their previous positions."

61. Musst also relies on other types of claim whose object is to resist stale claims. Thus, there is a whole string of cases to the effect that a cause of action will usually accrue at the time of the completion of the service, even if an invoice is required as a condition precedent of a claim: see *Consulting Concepts International Inc v Consumer Protection Association (Saudi Arabia)* [2022] EWCA Civ 1699. Clear words are required to displace this starting point. It is said that similar reasoning should apply here.

(b) The case of MRL

62. There is no established case to make out this proposition. The law is therefore not established. It is undesirable to seek to establish such law without a detailed scrutiny of the facts in an area which is very fact specific. It can also be said that the law in respect of unjust enrichment is an area of law in development where the principles are not settled such as again makes it appropriate not to order summary judgment.

63. There are difficulties in identifying the point of benefit and the timing of the unjust factor. As regards the time of the benefit, it depends whether the enrichment is to be identified by reference to the service itself (as happens in a pure services case) or the end product where the benefit is the product of the services: see *Gray v Smith* [2022] EWHC 1153 (Ch) in which Mr Richard Smith as he then was, sitting as a Deputy Judge of the High Court said:

> *"440. According to Benedetti (at [15]-[16]), whether the defendant has been enriched is an objective test, ascertained by asking whether the reasonable person would consider the defendant to have received something of value. As Goff & Jones notes (at [5-39]), where the provision of services is in issue, considerable debate can arise as to whether the 'enrichment' is properly characterised as the services themselves or their 'end-product'. In this case, the Defendants contend for the latter, saying that the purpose of Mr Gray's involvement in Blackmoor was the raising of capital. Goff & Jones suggests (at [5-39]) that, in deciding the proper characterisation of the relevant benefit:- " The best approach is for the court to keep an open mind, and to take all the circumstances into account, including whether the parties themselves thought that the benefit being transferred was the services or their end-product ."*

64. The process of characterising the end benefit is intensely factual. In *Gray v Smith*, the Court had to evaluate expert evidence, the nature of the fund in question and industry dynamics, the understandings of the parties and risks undertaken between the parties: see paras. 444-451. These are matters which cannot be evaluated satisfactorily without a trial.

65. As regards identifying the "unjust factor", that might be the failure of basis. That is one specific unjust factor. Goff & Jones specifically define it consistently with the UK Supreme Court in *Barton v Morris* [2023] AC 684 (per Lady Rose, with whom Lord Briggs and Lord Stephens agreed at [81] and Lord Burrows at [232] dissented, but not on this issue). The definition was that *"the core underlying idea of failure of basis is simple: a benefit has been confirmed on the joint understanding that the recipient's right to retain it is conditional. If the condition is not fulfilled, the recipient must return the benefit. The condition might take one of a variety of forms. For instance, it might consist in the recipient doing or giving something in return for the benefit (hereafter referred to as counter-performance)."*

66. In that event, it may be necessary to identify the basis and/or to characterise the benefit. An example is that *"when one is considering the failure of consideration [basis]... it is, generally speaking, not the promise which is referred to as the consideration [basis], but the performance of the promise"*: per Lord Simon LC in *Fibrosa Spolka Akcjyna v Fairbairn Lawson Combe Barbour Limited* [1943] AC 32 at 48.

67. In other words, it is necessary to identify the promised non-performance which turns on factual analysis of the parties' arrangements to be tested against a notion of unconscionability. One type of promise which does not materialise is an anticipated contract. It is clear that the failure of basis may post-date the receipt of the benefit: see Goff & Jones at para. 4-67. In those circumstances, the cause of action will accrue at the later date when the basis fails rather than the day when the defendant is enriched.

(c) Discussion

68. The battleground for trial is clear as regards the restitutionary claim. There are powerful arguments on both sides. However, it is premature to make even a provisional assessment. First, there has to be an intense fact-finding exercise. It will consider the parties' intentions. It will analyse the basis which has failed. It will consider the benefit conferred, and when that arose. Second, there will be an analysis of the injustice of the retention of the benefit. That is far from an easy exercise of testing arrangements against a notion of unconscionability.

69. In order for that evaluation to take place, it is essential to consider the evidence as a whole in the way which can only take place at trial. It will be with the benefit of as complete discovery as reasonably possible. The witnesses need to be heard, and their evidence will be directed to the issues in this case rather than the issues in the *Musst v Astra* case. It is difficult for MRL who have not adduced evidence from Mr Reeves in addition to his statement in the earlier case. Although this does not augur well for their case, it is on the other hand wrong at this summary stage to draw an inference that his evidence will not support a restitutionary claim.

70. It is apparent from the recitation of the facts of the case that the expectation of Mr Siddiqi and his wife and of Mr Reeves was that the parties would agree something with Octave/Astra and would then move on to an agreement with MMM. That which was proposed by MMM in the 15 and 16 February 2012 emails referred to above was a much higher percentage for MMM than for Musst. (Musst's case was to different effect that there would be some sharing with MMM: see para. 43 above. It is also apparent from the evidence that introductions were made jointly by MMM and Musst.

71. In these circumstances, there is at least a case with a real prospect of success that a benefit was received by Musst and that there was an expectation that there would be a sharing of any moneys received. There is at least a real prospect of success that it would be unjust for that benefit then to be received by Musst without being shared with MMM.

72. It is also apparent particularly from the detailed submissions of MRL, some of which have been set out above, that the law of restitution is a developing area of law. Whilst it has been developing for many decades, the recent case law discusses the failure of basis and when benefits arose and when it was unconscionable for there not be a restitution. As noted above, the case law is that whilst a point of law can be decided summarily, in an area of developing jurisprudence, it may be important to decide the point only when the points of fact and policy have been clarified in the way in which a trial does.

73. For all these reasons, in my judgment, either there is a case with a real prospect of success to answer the limitation point or the above comprise some other compelling reason why the case should go to trial.

(d) Concealment

74. It therefore follows from the foregoing that the limitation points do not require a plea of concealment in order to raise a triable issue, albeit in the event that there is a limitation defence found at trial based on primary limitation periods, the Court will have to consider an argument that the primary limitation periods are to be extended due to concealment. This depends in the first instance upon permission being granted to plead concealment (section 32 of the Limitation Act 1980). The Court will consider the application to amend to plead concealment towards the end of this judgment.

VII Conclusions in respect of reverse summary judgment

75. In compartmentalising the analysis to consider each of the three claims separately, it is easy to lose sight of the big picture. The Court is entitled in addition to the detailed analysis above to consider certain big picture points which are entirely consistent with the decision to reject the reverse summary judgment application. They include the following:

(i) In addition to overlapping skeleton arguments comprising about 50 pages for MRL, there is a chronology of 43 pages.

(ii) The core bundle is in excess of 1100 pages. Even if the word “core” is inapposite, the garments of this case are very bulky.

(iii) There were 5 volumes of authorities comprising well over 50 authorities and long citation from numerous authorities.

(iv) Many of the points of law were not crisp, for example, in identifying the applicable limitation period in the unjust enrichment claims.

(v) The level of detail of cross-reference to the evidence in the trial and to points about what had and had not been disclosed in the case between Musst and

Astra was often dense. The trial itself had lasted for about 3 weeks and the Astra Judgment, much of which was cited as being relevant to the action between MRL and Musst was about 90,000 words in length.

(vi) The submissions of the parties before replies were about 4 hours each, and it was striking how from time to time, they felt pressed for time. One might make an allowance for the fact that some of the time was devoted to the collateral attack and collateral abuse submissions. However, this was not entirely an answer because there was considerable cross-over between those submissions and the reverse summary judgment applications.

(vii) The factual analysis was far from a series of crisp points, but involved detailed analysis of evidence which straddled years and straddled a consideration of agreements of some complexity.

76. Applying the above law in respect of summary judgment, it is confirmed that:

(i) Especially about the case relating to the 80/20 contractual claim, Musst has raised points which cumulatively raise real questions as to whether the claim has a substantial basis. They at least provide considerable material for cross-examination of the witnesses.

(ii) The contradictory nature of the instant case to the case run at the Trial between the tripartite agreement and the bilateral agreement is troublesome by itself. It is more troublesome because the only evidence of Mr Reeves, written and oral, does not support the 80/20 contractual claim or indeed the alternative claim. There is no explanation from Mr Reeves by way of a further statement to the effect of how he will get over this.

(iii) The lengthy argument of solicitors is not a substitute for this evidence, because they have no direct knowledge of the events in question and are ultimately dependent on taking instructions.

77. Despite the foregoing, the Court ultimately comes to the following conclusions, namely:

(i) There were findings made in the Astra Judgment, which are accepted by Musst for the purpose of this application, about very substantial benefit conferred on Musst by reason of the services of MMM (part of which was through Ms Galligan at the time when she was employed by MMM).

(ii) Even if it were the case that the evidence before the Court is so contradicted by the matters raised above such as to put into question the ability of MRL to prove that their case as regards the 80/20 contractual claim has a real prospect of success, the same considerations do not apply to the restitutionary claim and the alternative contractual claim. They are deliberately mentioned in that order, because absent the limitation defence, it is accepted at this stage by Musst that a triable issue arises in respect of the restitutionary claim. In other words, if the limitation defence does not cause a knock-out blow, and if the collateral abuse/collateral attack allegations do not lead to a strike out, the restitutionary claim is good to go to trial.

(iii) The restitutionary claim is not as limited in its ambit as is suggested on behalf of Musst. Musst does not challenge in these proceedings the finding in the Astra Judgment that the services of MMM were not merely secretarial or administrative, contrary to the case advanced by Musst in the case of *Musst v Astra*. It will be necessary in the restitutionary claim to analyse more precisely the nature and extent and value of such services which went beyond secretarial or administrative in nature. It might be necessary to adduce expert evidence in this regard, albeit that Musst's case oscillated between accepting and rejecting the need for expert evidence.

(iv) That detailed analysis will, contrary to the submissions on behalf of Musst, involve a very significant cross-over between the case in respect of the restitutionary claim and the alternative contractual claim. As regards the latter, there will be a need to prove that the parties had it in mind that they would agree a commission in due course. That would entail considering for the purpose of the alternative contractual claim, just as in respect of the unjust enrichment claim, a consideration of the nature and extent and value of the services, and here too also expert evidence as to how such services are valued in the market.

(v) Likewise, there will be a very significant cross-over between all three claims. The contention that they are discrete is not accepted. On the contrary, there is a more than fanciful possibility that the evidence as a whole which might be adduced on the alternative contractual claim and on the unjust enrichment claim may indicate that there was an 80/20 agreement even if the indicators make that at present unlikely. It is simply too dangerous at the moment to exclude that possibility. More likely is that in considering the evidence of unjust enrichment, there may be found an agreement under which Musst was to pay MMM out of the proceeds which it received, and that a percentage was to be fixed in due course. There are therefore real dangers in giving partial reverse summary judgment in respect of certain causes of action. The danger is that the Court at trial might rue the moment that that occurred. The correct approach is to refuse summary judgment, and to return to the decision after a full consideration of the overlapping claims.

(vi) The authorities above refer to the possibility of evidence emerging at a later point whether due to disclosure or to related claims down the line, and that having to be factored in a decision as to whether or not to give summary judgment. The position in this case is stronger still. Here there are overlapping claims in respect of the same subject matter between the same parties in the same action. The possibility that the claim for unjust enrichment will reveal material of assistance to the contractual claims is real.

(vii) The Court rejects the notion that there will be a significant saving of time in the action by dismissing the contractual claims. The consideration is likely to be of the same factual and expert witnesses and the same documents. Further, the notion that summary judgment on the 80/20 contractual claim will inevitably reduce the expectations of MRL in negotiations is not necessarily a good point. It might be that the mention of 80% in the documents will inform in respect of the extent of the alternative contractual claim or in respect of the restitutionary claim. The suggestion that the restitutionary claim will be limited to evaluating the value of the service provided such as to lead to a much smaller claim in amount is possible, but it is not possible at this stage to exclude the interlinking of the claims in value as well as evidentially. If the parties were discussing 80/20, it is possible that this informs the amount of the

alternative contractual claim as well as the restitutionary claim.

78. It is convenient to start with the restitutionary claims. In that regard, Musst only seek summary judgment on the basis of limitation. But for limitation, it does not seek to say that there is no real prospect of success. Before addressing limitation, general observations must be made about the nature of the restitutionary claim. In the Astra Judgment upon which Musst attaches such prominence for the purpose of the applications before this court, the court made observations that the substantive work provided by MMM had been substantial, and greater than the way characterised by Musst, namely secretarial or administrative. The Court found that there was an understanding that moneys received by Musst from Octave/Astra would be shared, but this was for further discussion. In the restitutionary claim, the Court will have to decide the value of the substantive work, and whether as a matter of law, there is a basis for MMM to claim recompense.

79. In the event that the limitation argument does not lead to summary judgment but is a matter for trial, then the restitutionary claim as a whole will traverse the same or substantially the same area as the contractual claim and the alternative contractual claim. There will be considered inter alia:

(i) the precise nature and extent of the work undertaken by MMM;

(ii) the benefit derived from such work for Octave/Astra and Musst respectively;

(iii) the value of such work;

(iv) the conversations between Mr Reeves and Mr Siddiqi and Mr Mathur or any of them in respect of how it was intended that MMM/Mr Reeves would be remunerated for the work undertaken by MMM/Mr Reeves;

(v) the documents generated at the time (a) evidencing such work, and (b) how, who and in what amounts MMM or Mr Reeves would be remunerated for such work and by whom;

(vi) the conversations and negotiations as regards how MMM might receive remuneration at the time and thereafter.

80. In that regard, it will be necessary to consider matters which were not directly within the purview of the action of *Musst v Astra* including the following:

(i) outside a tripartite arrangement (which was rejected), specifically a contractual agreement or alternative contractual agreement as between MMM/Mr Reeves and Musst to which Octave/Astra was not a party;

(ii) a consideration of the evidence of Mr Reeves not by reference to Astra's case of a tripartite arrangement, but a bilateral agreement between MMM/Mr Reeves and Musst, whether in the nature of the contractual claim or the alternative contractual claim, or a restitutionary claim of the kind claimed in this action;

(iii) any documents which have not been disclosed in the *Musst v Astra* action or any documents disclosed in that action which have not yet been considered by Mr Reeves, particularly because the purview is now not by

reference to Astra's case, but to MRL's case as formulated for MRL by its lawyers.

81. There are points which are relied upon both in respect of the abuse of process and the summary judgment arguments. They are not identical, but they must not be ignored in respect of summary judgment because they have been considered in respect of abuse of process. This is an action by MRL (as assignee of MMM) with independent lawyers acting for them. They are not privies of Astra, and Mr Reeves' role in the *Musst v Astra* claim was as a witness for Astra. Thus, not only are they not bound by the findings in that action, but they are considering matters for themselves for the first time with independent lawyers crafting new arguments, raising new issues, considering disclosure themselves and adducing evidence of their own.

82. It follows that there are inherent dangers in assuming from the fact that Mr Reeves' evidence through the prism of Astra's case was in large part rejected that there was nothing in his evidence and potential evidence. That is because it was supporting a different case, and he was appearing not as a party but as a witness. It is not a good start for MMM's case in which Mr Reeves is likely to be a central person. Further, it is not apparent at this stage how the particular points in the Astra Judgment against Mr Reeves will be dealt with in this action and the extent to which such points are likely not necessarily to create a res judicata, but to be points of difficulty for Mr Reeves' evidence and credibility in this action. This does not mean that there is no real prospect of success for MMM/Mr Reeves.

83. These points become of central importance if the starting point is the restitutionary claim, and assuming at this stage that limitation is not decided summarily against MMM. Given that the restitutionary claim is to proceed to trial on that basis, then there is a serious danger in giving reverse summary judgment at this stage in respect of the contractual claims. As expressed above, the Court may rue the day it did that in circumstances were the contractual claims may blossom in the face of the evidence as a whole.

84. The effect of the foregoing analysis is as follows:

(i) it confirms and adds to the finding of a real prospect of success in respect of each of the claims;

(ii) if there is no real prospect of success, there is at least some other compelling reason for the case to go to trial.

VIII Abuse of process

85. As noted above, there are two limbs of the abuse of process argument. The first is that this action is a collateral attack on the Astra Judgment such that it would be manifestly unfair and bring the administration of justice into disrepute to permit the claim to proceed. It appeared at one point that it was also being said that the second action ought to have been brought in the first action, but that is no longer pursued. There is instead a second abuse of process argument which emerged as recently as 24 April 2024, namely that there has been collateral use of the documents in the *Musst v Astra* action in breach of the provisions of CPR 31.22. It is said that the consequence

of this is that there should be sanction, the most severe of which is the striking out of the instant claim. This has led to a responsive application for retrospective permission to use the documents if there has been a breach. This application is opposed by Musst.

IX Collateral attack

(a) The case of Musst

86. The argument of Musst is that in the Astra Judgment, it was found that there was no tripartite agreement whereby Musst was to pay to MMM 80% of the moneys received from Astra. Further, there was no allegation of a bipartite agreement under which such moneys were to be paid. It was submitted that it was a collateral attack on those findings (a) to run a subsequent case in which it was said that there was nonetheless an 80/20 contract between Musst and MMM, and (b) to run a subsequent case that there was a bilateral contract. Having been unable to establish the 80/20 contractual claim through the case of Astra, which was then closely allied to the position of MMM/Mr Reeves, it was an abuse of process to run a case that there was such an agreement after all, whether bipartite or tripartite.

87. Musst has a difficulty in establishing a collateral attack where MMM was not a party to the *Musst v Astra* action. When subsequent litigation does not involve an issue previously decided between all of the same parties or their privies, that subsequent litigation will rarely be an abuse of process: *Kamoka and another v Security Service and another* [2017] EWCA Civ 1665 at [71-72], citing *In re Norris* [2001] 1 WLR 1388 at [26]. There is no general rule preventing a party inviting the court to arrive at a decision inconsistent with that arrived at in an earlier case, even where the earlier case had been fairly conducted and argued: *Gazprom Export v. DDI Holdings* [2020] EWHC 303 (Comm) at [37(vi)].

88. Musst seeks to meet this in the following way. The relevant law is that whilst it is usually a pre-requisite that the second action should be between the same parties (or their privies) as the first action, there are unusual circumstances in which it will still amount to a collateral attack. The way in which it was expressed by Sir Andrew Morritt VC at para. 38 was as follows:

> *"If the parties to the later civil proceedings were not parties to or privies of those who were parties to the earlier proceedings then it will only be an abuse of the process of the court to challenge the factual findings and conclusions of the judge or jury in the earlier action if (i) it would be manifestly unfair to a party to the later proceedings that the same issues should be relitigated or (ii) to permit such relitigation would bring the administration of justice into disrepute."*

89. In further citations, Musst has referred to *"the intense focus on the facts of the particular case"* per Buxton LJ in *Laing v Taylor Walton (a firm)* [2007] EWCA Cid 1146; [2008] PNLR 11. It has also referred to the case of *Michael Wilson v Sinclair* [2017] 1 WLR 2646 per McCombe LJ at para. 48(3*): "to determine whether proceedings are abusive the Court must engage in a close merits-based analysis of the facts. This will take into account the private and public interests involved, and*

will focus on the crucial question: whether in all the circumstances a party is abusing the court's process..."

90. The submission of Musst is that despite the fact that this is not a case between the same parties or their privies, there is unfairness and disrepute because Musst would now be forced to relitigate the same allegations which it had already litigated in the first trial with a view to a different result being reached. The interests of Mr Reeves/MMM had been aligned with those of Astra. To the extent that it was not a party to the proceedings, that was caused by its inexplicable failure not to seek the joinder of its claim until a very late stage which would, if it had succeeded, disrupted and postponed the trial. It would be a collateral attack against the decision in *Musst v Astra* to allow this action to proceed and urge a wholly different and contradictory result from the *Musst v Astra* action.

(b) The case of MRL

91. To opposite effect, MRL submits that there is nothing to take this case outside the norm that absent an action between the same parties or their privies, there is no collateral attack. There is no injustice in Musst having to face the allegations in the second action because Musst opposed the joinder of the two actions. In any event, there is no injustice to face a different way of the case being put in that it comes from a person who was a witness and not before the Court in the first trial, even assuming for this purpose, but not deciding, that MMM was at that stage closely aligned to Astra. Further, it would not bring the administration of justice into disrepute to allow the second action to proceed, not least because the agreement put forward in the second action was a different one from the agreement run in the case of *Musst v Astra.*

(c) Discussion

92. The issue at this stage is not to resolve the issue of collateral attack one way or the other. It is whether the Court is satisfied that there has been a collateral attack such that the Court should at this stage impose sanction against the Claimant, and if so whether that sanction should be to strike out the 80/20 contractual claim, and, if not, what other sanction.

93. I am satisfied on the basis of the information before the Court that there is at lowest a real prospect that MRL will be able to resist the argument that the second action is a collateral attack on the judgment in the first action. The reasons for this are as follows:

(i) The issues are not the same issues because the agreement in the second action is sufficiently different from the issues in the first action. It is not an issue as to whether there was a tripartite agreement as pleaded in the first action. On the contrary, each of the formulations in the second action are predicated upon there being no tripartite action. The 80/20 contractual claim is on the basis that an agreement has been or will be made between Musst and Octave/Astra, that there will be sharing of the commission in the proportions of 80% to MMM and 20% to Musst.

(ii) In any event, even if they were the same issues, the parties are not the same parties or privies in the two actions. Vitally, MMM/MRL were not parties in

the first action. It is not sufficient that Mr Reeves was a witness in the first action or that there may have been a commonality of interest between MMM/MRL and Astra in the first action. The commonality may have been that if the agreement was established, then that would assist MMM/MRL in its claim against Musst. The reason for this is that that was not the same as being a party or a privy.

(iii) Without being a party or a privy to the agreement, MMM/MRL did not have the right to appear in the first action. On the contrary, when they did seek to appear, that was opposed by Musst, and the application to appear by the joinder of the two actions was dismissed by Chief Master Marsh. The consequence was that MRL could not advance its case as a party including by ensuring that all of the disclosure which it required was before the Court, by adducing evidence of its own and in its own way, and by appearing at trial including being able to cross-examine witnesses and by re-examining Mr Reeves, and finally by making written and oral submissions.

(iv) Assuming for this purpose as I do that there was delay in this regard on the part of MMM/MRL which cannot be explained satisfactorily (Chief Master Marsh seems to have regarded the delay as deliberate), that does not, in my judgment give rise to MRL being treated as if it had been a party or a privy. It simply means that MRL was deprived of the advantage of being a party at the first action, and therefore being unable to conduct its action on the coattails of Astra. It does not mean that it was bound by the decisions in the first action.

(v) The position of Musst that it should be treated as bound or unable to run a case at odds with anything found in the first action (if that is what is happening) is inconsistent. Before Chief Master Marsh, the opposition to joinder was on the basis that MMM should conduct its action separately. It was not that it should suffer a double penalty, namely (a) not to be able to have its action heard at the same time as the *Musst v Astra* case, and (b) to be bound by the findings in the first action. That would either be plainly unjust, or there is a real prospect that it would be unjust.

(vi) In respect of the two requirements referred to Morritt V-C in the *Bairstow* case, there is no injustice in Musst having to meet the allegations of MRL in a separate action. If it was keen to avoid this happening, it could have brought the issue before the Court itself and sought that the two actions be heard at the same time, or it could have agreed to the request about the two actions be heard at the same time. The Court understands why it did not consent, and its position was vindicated by the approach of Chief Master Marsh. However, if it wanted MRL to be bound and not to suffer the injustice of contrary findings (assuming for this purpose only if that is what was entailed), then it should itself have sought an order that the two actions be heard together. The real injustice would be if MRL should be bound by the findings in an action to which it was neither a party nor a privy. On the basis of the information at this stage, it is not manifestly unfair for Musst to have to face the second action.

(vii) Likewise, it does not bring the administration of justice into disrepute for these matters to be considered in the second action. That is simply the effect of MRL not being a party in the first action. That would be the case if the issues in the two actions were the same. In the event, they are not the same, albeit that they are closely related. Most of the cases where the parties are

different are by the civil proceedings coming after criminal proceedings: e.g. *Hunter v Chief Constable of West Midlands Police* [1982] AC 529. There is no general rule preventing a party inviting the court to arrive at a decision inconsistent with that arrived at in an earlier case: see *Gazprom* at [37(vi)].

94. In any event, there is a further overriding point. At this stage, the application is to strike out the 80/20 contractual claim. The argument of MRL as regards the law is that such an argument requires detailed scrutiny. Having given it detailed scrutiny at this stage and applied a broad merits approach taking into account the competing public and private interests, it is not appropriate to strike out the claim. Absent an application to strike out this part of the Defence, which does not exclude this defence being run at trial, on the information at this summary stage, there is no reason to strike out the 80/20 contractual claim for abuse of process due to a collateral attack. I should add for the purpose of completeness that whilst not excluding it, there is no expectation that the argument will become better at a later stage.

X Abuse of process/use of disclosed documents from the first action without the consent of the Court or the parties in the first action

(a) The breach

95. In recent correspondence, it has been elicited that MRL has been in breach of the obligations by making use of collateral use of disclosure in the *Musst v Astra* action for the purpose of this second action. The relevant rule is CPR 31.22 which provides as follows:

> *"Subsequent use of disclosed documents…*
>
> ***31.22***
>
> *(1) A party to whom a document has been disclosed may use the document only for the purpose of the proceedings in which it is disclosed, except where –*
>
> *(a) the document has been read to or by the court, or referred to, at a hearing which has been held in public;*
>
> *(b) the court gives permission; or*
>
> *(c) the party who disclosed the document and the person to whom the document belongs agree."*

96. Since the facts are supported by the recent correspondence, it is unnecessary to go through the correspondence at length. Suffice it to say that early this year and in the run up to the application, the solicitors for Musst were asking Mills & Reeve LLP, solicitors for MRL what use they had made of the trial bundles in the first action which had been provided to Mr Reeves/MRL in the context of preparation for giving evidence. At the time of the trial in the first action, the firm Stewarts was advising Mr Reeves/MRL and indeed instructed Counsel to attend parts of the trial in the first action. Thereafter, Mills & Reeve LLP replaced Stewarts. Although the same junior Counsel has appeared in this action as attended parts of the trial, it should be made clear that it is not alleged that he was in any way involved in collateral use of the

documents. The allegation is made against the solicitors who were preparing this case for trial. They had not separated the documents in the trial bundle such as to ensure that documents obtained in the first action from the disclosure were not restricted in their use to the documents which had been read to or by the court, or referred to at a hearing which has been held in public. There had been no application to the Court for permission. Nor had the consent of the parties to the action been sought.

97. It was suggested that Mills & Reeve LLP were being less than frank in correspondence in not confessing clearly to what they had done. They could have been clearer at first, but it is apparent that they did not understand the point. They assumed that they had done no wrong, and that there was nothing to explain. The assumption at all times until the matter was more recently spelled out was that they were entitled to refer to the trial bundles because they had been provided with the same and they had all been before the Court in the *Musst v Astra* action. That was a mistake because the law is that the presence of the documents in the bundles is not sufficient. The documents must have been read to or by the court, or referred to, at a hearing in order to come within the exemption for use in a different action.

98. It might be thought that the bundles being before the Court would suffice on the basis that it is difficult to know what the Judge did or did not read, and an interrogation of the Judge (even where the Judge is the same Judge in both actions) is neither permitted or realistic. In any event, it is very common for a large majority of the documents in the bundles not to be read out or referred to in court or read by the Judge. It follows that it is necessary either to seek the consent of both parties or the permission of the Court. This was not done in this case.

(b) The character of the breach

99. That establishes the breach. MRL has apologised to the extent that there was a breach. Further, it has also sought retrospective permission to use the documents. The Court is very reluctant to permit the use of the documents retrospectively because of the danger, if this were allowed as a matter of routine, of diluting the rule and of not providing the protection of the Court screening the use of the documents in advance of this taking place. The word "protection" is not to overstate the matter. The rule exists for an important purpose, namely so that those who are making the disclosure do so frankly and without concern about the possibility of collateral use other than in the events set out in CPR 31.22(1). To that end, Nicklin J in *Lawrence v Associated Newspapers Ltd* [2023] EWHC 2789 (KB) described at [274] the restriction as being *"principally to protect the administration of justice"*. It is to this end that a claim based on misused documents will be dismissed as an abuse of process: see *Riddick v Thomas Board Mills Ltd* [1977] QB 881 in which Lord Denning MR said (then by reference to an implied undertaking understood in a similar way to the subsequent CPR 31.22) at 896 *"In order to encourage openness and fairness, the public interest requires that documents disclosed on discovery are not be made use of except for the purposes of the action in which they are disclosed."*

100. The next question is how serious the breach is. The breach would be very serious if MRL was seeking to steal a march by a deliberate misuse of the documents in the trial bundle. That does not mean that it is not a serious breach even without deliberate intent. I am satisfied that there has not been a deliberate intent, but there has been a mistaken use.

101. In considering the breach, the Court was concerned to establish whether any documents have been deployed by MRL in the second action which were documents which had not been read to or by the Court, or referred to, at a hearing. This has elicited the response that there are no documents which can be identified as such or that there is no specific prejudice from any documents which might have been used In submissions which were made on 3 May 2024, the Court asked to be shown specific prejudice from any breach, and none was identified: see Transcript 3 May 2024 at 53-54. The extent of the use has been that there are likely to be documents which have been read in this action without being deployed whether in the pleadings or in the lengthy statements in preparation for the strike out application.

102. Since the hand-down of this judgment, Musst has sought to identify three instances of breach of specific documents and to have pointed to the evidence, albeit recognising that this was not highlighted in the oral submissions despite the Court wishing to have specifics pointed out: see Transcript 7 May 2024 at 34B-36E and the absence of reference thereafter by Musst in reply submissions. The first is an email chain to which Mr Reeves may have been copied in an LGBR email and to which he would have had access, irrespective of disclosure in the *Musst v Astra* action, but Musst says that it cannot be inferred that Mr Reeves would have seen an LGBR email. As to the second, there was a disagreement as to whether the relevant document had been deployed in the *Musst v Astra* trial. In any event, even if it was mentioned as a breach in any of the evidence, it was not highlighted as a breach in argument despite the Court stating its belief that there was no specific breach (at 7 May 2024 at 36A), and there was no suggestion to the contrary either at that point or in the subsequent reply submissions of Musst. As to the third, it was said that there was an inference to be drawn from Mr Davison's statement at para. 54 of other examples, but MRL did not accept that there were other inferences.

103. It is too late at this stage after the hand-down of the draft judgments to micro-analyse these points and to resolve any controversies. In any event, it is unnecessary. The reason for this is that the Court wanted to have evidence of specific prejudice arising out of these matters and Musst accepted that the point did not go to specific prejudice: see Transcript 3 May 2024 at 53-54. It follows that if there was any specific breach, there was no question of any practical effect from it. In the circumstances, even if it were not too late to re-open these matters at this stage, the points are not of such a nature as would require a sanction, let alone a striking out of all or part of the case.

104. In my judgment, there is an important feature. The fact that they were not deployed, assuming that they were not deployed, is not a complete answer because there is an advantage in having access to the documents without obtaining their disclosure in the second action. Nonetheless, the harm, if any, which has occurred, has been more ephemeral than would be the case if documents which should have been returned had been deployed. The attempt to open this matter at the post-draft stage has led at highest to the possibility that there was deployment to a minimal extent and without causing any specific prejudice. In the event, even if the points now raised by Musst had been done clearly in the course of the hearing, and even they had been resolved in favour of Musst, it would not have altered the overall position in respect of the alleged abuse of process.

105. In fairness to Musst, reference should be made to an email to the Court dated 30 May 2024 from Musst. It says that it simply wished to draw the Court's attention to these matters without contending that different conclusions should necessarily be reached. It was intending that the record be straight, and it was not seeking to re-argue its case.

106. There is a further mitigating feature. The case of Musst is that there has been a very substantial overlap between the documents and evidence in the *Musst v Astra* action and in this action. That is evident from a reading of this judgment thus far as it has considered the overlap between the 80/20 contractual claim with the contractual tripartite claim in the *Musst v Astra* action. It is evident from a discussion of the alternative contractual claim. The overlap was such that it was suggested that without further disclosure there should be summary judgment against MRL, and this application was made before the discovery on the part of Musst of illegitimate collateral use on the part of the MRL. This was an implied recognition at that stage that the primary information appeared in the documents which had been read to the Court or the Judge or otherwise referred to in the *Musst v Astra* action. The same reasoning also flows from the analysis above of the restitutionary claim as having an overlap with the contractual claims. Likewise, the overlap is at the heart of the collateral challenge argument because that is predicated upon the findings in this second action being in respect of the same or substantially the same matters as in the first action.

107. The importance of the above points is that it indicates that the key documents in the second action are those documents which have been read to the Court or by the Judge in the first action or referred to in the course of the hearings in the first action. It makes the practical consequences of the breach having occurred far less serious than would otherwise be the case.

(c) Evaluation of points made by Musst

108. Against the above, Musst has made a large number of points in a further skeleton argument which the Court has considered in its entirety. It is not necessary to extend this judgment by setting out every point, but the Court will consider some of the key points in the paragraphs which follow.

109. First, the concept of collateral use is not limited to use in the sense of deployment of or reliance on documents. The review of documents in order to review whether another action should be brought would be a form of collateral use. The wider meaning was discussed in *Tchenguiz v Grant Thornton UK LLP* [2017] EWHC 310 (Comm); [2017] 1 WLR 2809 at [21] and [31] per Knowles J.

110. In *Lakatamia Shipping Co Ltd v Su* [2020] EWHC 3201 (Comm); [2021] WLR 1097 at [54-60, esp.54 and 59]. At para. 54, Cockerill J said the following:

> *"Secondly, what constitutes "use" of a document for the purpose of CPR 31.22 is very broad – perhaps more so than most litigators might think. On one view the Court's permission is required even to review the documents. In truth this is an aspect of the drafting which is difficult. However the courts have not reacted to that difficulty by adopting a laissez faire attitude. In IG Index v Cloete [2014] EWCA Civ 1128, Christopher Clarke LJ emphasised that the restriction extended not only to the documents but to the information contained therein, and (at paragraph 40), that the restriction extended to: "(a) use of the document itself e.g. by reading it, copying it, showing it to somebody else (such as the judge); and (b) use of the information contained in it. I would also regard "use" as extending to referring to the documents and any of the*

characteristics of the document, which include its provenance." (emphasis added).

111. The emphasis has been added because this is what has happened in this case, namely that the solicitors concerned are among the litigators who did not appreciate how broad was the concept of "use" of the document.

112. Second, the test for retrospective permission is restrictive, albeit that all cases depend on their own facts. The main considerations the court must weigh are (i) the cogency of the reasons provided; (ii) whether permission would have been granted had it been sought prospectively; (iii) whether breach of the rules was deliberate or reckless; (iv) prejudice to the parties (including the overriding obligation to deal with cases justly). In *Miller v Scorey* [1996] 1 WLR 1122, Rimer J (as he then was) said that retrospective permission would be rare because it involved wiping away the abuse of process which a party had committed. In that case, a party had sought retrospective justification of using the documents for fresh proceedings and thereby depriving the defendant of a limitation defence. In other words, there was specific prejudice. In another case, where there was no prejudice and it never occurred to the parties that there was a breach, retrospective permission was granted: see *IG Index v Cloete* [2014] EWCA Civ 1128 and see also *Notting Hill Genesis v Ali* [2020] EWHC 1194 (QB) per Nicol J. In another case, although retrospective permission was granted, an undertaking was required that the solicitors should not be instructed again in connection with the same subject matter of the proceedings.

113. Third, six pages are dedicated to an analysis of the chronology of how the collateral use of the documents emerged. It is relevant because it enables the reader to know why the point emerged so late in the day. It is apparent from the responses that the trial bundles were received by Mills & Reeve in May 2023 from Stewarts, and that certain section of the trial bundle had been reviewed by Mills & Reeve: see a letter of 18 April 2024 to Taylor Wessing. It is apparent from that letter that they believed that the fact that the trial bundles were referred to in Court meant that therefore they were able to use the documents under CPR 31.22. It is apparent that they did not consider that it did not suffice that the trial bundles were in court: they had to be read or referred to in court. If in fact they believed that the documents could be read provided that they were not deployed in the second action, that too would be a misunderstanding of the broad meaning of the word "use".

114. None of this indicates a deliberate or a reckless breach, but a misunderstanding of the relevant law. This misunderstanding was at the root of the correspondence in February 2024 not spelling out that Mills & Reeve had had access to the trial bundles. I do not read the correspondence referred to especially at para. 29 of Musst's skeleton argument in response to the retrospective permission application as evidencing that Mills & Reeve was dissembling and covering up a wrong on its part. It was not understanding the point about its having documents which it ought not to have used.

115. There is also no evidence of prejudice in the sense that this second action would not have been brought but for the perusal of the trial bundles. It is consistent with there being no prejudice that no documents of importance have been identified other than those which were referred to in the *Musst v Astra* action. In its skeleton argument in answer to the application for retrospective permission, Musst contends, as it did in a letter of its solicitors dated 25 April 2024 that there has been prejudice in that MRL has had the advantage of seeing the trial bundles in order to answer the strike out application and in order to proceed with the claim in its action. This is still not evidence of any specific or tangible prejudice.

116. It is then said that there is an asymmetry in that MRL has seen these additional documents whilst Musst has not seen the internal documents of MRL. The asymmetry is not as clear as suggested. Musst has a greater advantage than MRL in having been a party to the *Musst v Astra* action and endured the trial. Against this, MRL may not have provided its own internal documents at this stage, but MRL has not been a previous actor at trial. That could have been avoided by an earlier application by Musst to have the two actions heard together or (as they did not do for the understandable reason in order to preserve the trial date) by agreement to the MRL application for hearing the two cases at the same time. Without this, it is inevitable that there would be some asymmetry going both ways. On the basis of the matters set out above, there has not been a significant addition to the asymmetry by the parts of the trial bundle which were not referred to in the *Musst v Astra* trial.

(d) Application of MRL for retrospective permission

117. There is also material before the Court about whether consent would be given by the parties in the *Musst v Astra* action. On 9 May 2024, Astra said that they would only give consent if there was a release of all claims against Astra from the Matrix companies, which was not acceptable to the Matrix companies. Musst in turn was not prepared to grant consent without the consent of Astra. It follows from this that the retrospective application to the Court for permission is defective in the sense that it has not been sought with Astra being before the Court.

118. In the circumstances, it is necessary to consider whether an application for retrospective permission is required. Absent any identification of a benefit obtained to date beyond what is an unspecific objection to the possibility that there was something of relevance in the bundles that had not been read or referred to in the first action, there is nothing about the past that requires a correction. The same would be the case even if the matters contended for after the hand-down of the judgment were found to be specific breaches because of their minimal nature and the absence of specific prejudice resulting from the same. For example, the second action does not need to be struck out to remove a benefit of MRL to which it was not entitled. The benefit of MRL was to know about the Judgment in the first action and the arguments and documents and oral evidence in the *Musst v Astra* action. Further, this is not a case where Mills & Reeve need to come off the record because they are benefitting from the collateral use in a tangible or specific way. Nor is it a case where there is a real possibility that Stewarts had obtained a benefit in a tangible or specific way. None is to be inferred simply because the correspondence had not elicited information from Stewarts. If the contrary had been the case, by now Musst would be expected to have identified some specific documents or other benefit.

119. It is necessary for the trial bundles and what has become of them to be returned or perhaps destroyed so that no future use of them save for filleting out what is identified as having been used or read in the *Musst v Astra* action. It is necessary for the precise order to be worked consequential upon this judgment and to decide what precisely should happen as regards the trial bundles. If it were the case that it was still necessary to have an application for the use of the trial bundles, then it would be necessary for Astra to be made a party and for the matter to be considered further between MRL, Musst and Astra.

120. In the above circumstances, it appears to the Court that it is not necessary for the application for retrospective permission or any permission to be pursued. After sorting out what documents should not be used further, the matter can proceed to

disclosure in the usual way. If third party disclosure is sought from Astra, then that can be processed at a later stage. It occurs to the Court that in this action, the primary documents are external documents from and to the parties as well as internal documents of the parties (but not necessarily of Astra). All of this is for further consideration.

(e) Conclusions

121. In the light of the finding above, I have come to the following conclusions, namely:

(i) a strike out of the second action would be disproportionate, since it would be a sanction out of all proportion for an error rather than deliberate or reckless act of misconduct, and in circumstances where there is no specific or tangible misuse of the documents in the trial bundles which were not read by the Judge or the Court or referred to in evidence in the *Musst v Astra* action[1];

(ii) there is no reason for an invasive order such as requiring Mills & Reeve to come off the record, so long as they cease to make use of the trial bundles to the extent that they were not referred to or were not read in the *Musst v Astra* action;

(iii) although the matter can be considered further on the consequentials, there does not appear to be any need for an order for retrospective permission. The documents which should not have been retained can be returned, or possibly destroyed subject to a copy of the trial bundles being with Musst. The precise order to be made can be considered. This avoids the complications of a retrospective order for permission;

(iv) the costs consequences, if any, of the foregoing are to be considered at a time when orders for costs are made generally as part of the consequentials.

(f) Additional point of MRL

122. A further point was made belatedly by MRL, apparently in response to the application concerning collateral use. It was submitted that Musst had been in breach of the requirement in the embargo on the draft judgment in the *Musst v Astra* action. Within less than 4 hours of the formal hand-down of the judgment on 17 December 2021, there was sent an 8 page letter by Musst's solicitors to MRL's solicitors threatening to strike out MRL's claim and seeking to obtain MRL's consent to the undertaking provided by Musst to Astra not to release any proceeds of the claim in the *Musst v Astra* action. The letter referred in detail to the judgment, and most of the drafting must have taken placed before the embargo was lifted. The argument raised just before the hearing was that there must have been a breach of the embargo in that the letter must have been drafted or drafting must have commenced before the embargo was lifted: see *R (Counsel General for Wales) v Secretary of State for Business,*

[1] The facts are different from a case of the use of evidence obtained by the Financial Conduct Authority pursuant to a request for cooperation pursuant to the Crime (International Co-operation) Act 2003 which documents had been used in a decision to initiate civil proceedings without the prior permission of the Court: see *FCA v Papadimitradopoulos* [2022] EWHC 2792 (Ch). In that case, retrospective permission was nonetheless given: a hearing of an appeal is imminent. Here there is no specific or tangible connection between the decision to bring or to continue the second action and the document in the trial bundle going beyond that which was read in court or mentioned in evidence in the *Musst v Astra* action.

Energy and Industrial Strategy [2022] EWCA Civ 181. MRL submits that Musst is no position to criticise MRL when it has been in breach in this way. This provides a context in which the criticism of MRL should be considered.

123. The response of Musst is that the letter was prepared in connection with the removal of the undertaking given in this action, and was therefore consequential upon the judgment, and not prohibited by the embargo which excepted consequential orders. The fact that it might have been a breach of the embargo if the sole reason was to seek to strike out the instant action, does not affect the fact there was a use to remove the undertaking in the *Musst v Astra* action.

124. I am satisfied that that was a consequential matter in the instant action, and that there was not a breach as a result. This argument of MRL has not therefore served the purpose of exposing one breach for another. However, it has served another purpose. It has exposed the technical nature of the arguments. It is a technical question as to on what side of the line the drafting letter of the letter by Musst came, and it has been resolved in favour of Musst. It does put into context the allegation about collateral use of the bundles in the sense that this is an area in which innocent mistakes do occur, albeit that in the event there was no breach of the embargo and therefore no mistake by Musst.

XI Application to amend to plead concealment

125. The alleged concealment does not require to be adjudicated upon for reverse summary judgment purposes because the application has been rejected irrespective of the plea of concealment. The effect of that plea is that if it turns out that the limitation defences as pleaded would succeed, then there the limitation periods should be extended in respect of the alternative contractual claim and the restitutionary claim so that the claims would be brought in time. The nature of the concealment is in summary that Musst deliberately failed to report to MMM the moneys that they had received, and this was a deliberate breach of duty in circumstances where it was unlikely to be discovered for some time.

126. At this stage, the question is whether there is a real prospect of the concealment case succeeding at trial. In my judgment, there is sufficient material in the plea for it go to trial. Although the proposed amendment comes a long time after the commencement of action (it was not even a part of the Amended Particulars of Claim), it is not to be treated as a late amendment in that it will not affect the progress of this action to trial. The application has been brought before disclosure and witness statements. This is not a case which should not be allowed due to delay. The application for permission to amend is therefore granted.

XII Disposal

127. It therefore follows that:

(i) The applications for reverse summary judgment on the merits of each of the 80/20 contractual claim, the alternative contractual claim and the restitutionary claim is refused;

(ii) The summary application based on abuse of process in the nature of the 80/20 contractual claim being a collateral challenge is dismissed;

(iii) The precise order on the application based on abuse of process for collateral use of documents remains to be worked out as part of the consequentials, but the action will not be struck out as a result and that the application for retrospective permission is unnecessary. This may be refined in the course of the consequentials.

(iv) Other directions for taking this case forward will form a part of the consequential directions.

128. It remains to thank all Counsel and legal advisors for their industry in the preparation of the applications and for the assistance which they have provided to the Court throughout.