Neutral Citation Number: [2024] EWHC 2312 (Ch)

Case No: CH-2023-000273

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
APPEALS (ChD)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
BUSINESS LIST (ChD) MASTER KAYE

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

Date: 9 September 2024

Before :

TOM MITCHESON KC
(sitting as a Deputy Judge of the High Court)

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Between :

(4) LUNAK HEAVY INDUSTRIES (UK) LTD
(5) LUCASFILM LTD LLC

Appellants

- and –

TYBURN FILM PRODUCTIONS LIMITED

Respondent

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- -

Edmund Cullen KC and Jonathan Hill (instructed by **Wiggin LLP**) for the **Appellants**
Tom Moody-Stuart KC and Joshua Marshall (instructed by **Mishcon de Reya LLP**) for the **Respondent**

Hearing date: 25 July 2024

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APPROVED JUDGMENT

The Deputy Judge:

Introduction

1. This is an appeal against the order of Master Kaye ("the Master") dated 8 December 2023 ("the Order") by which she rejected the Appellants' application for the claim made against them in unjust enrichment to be summarily dismissed or alternatively struck out. The Master gave her reasons for the Order in a judgment ("the Judgment", [2023] EWHC 3247 (Ch)). The Master refused permission to appeal but permission was given by Michael Green J on 13 February 2024.

2. The claim relates to the film *Rogue One: A Star Wars Story* ("Rogue One"). Rogue One was produced by the Fourth Defendant in this action, a special purpose vehicle owned by the Disney group of companies, using intellectual property relating to the Star Wars series of films owned by the Fifth Defendant. The Fourth and Fifth Defendants in this action are the Appellants in this application.

3. Rogue One is set shortly before the events shown in the original Star Wars film (Episode IV) released in 1977. Rogue One itself was released in December 2016 and was a commercial success, grossing more than $1bn at the box office.

4. One of the characters in Rogue One is the admiral of the Empire's space fleet, Grand Moff Tarkin. Grand Moff Tarkin had appeared in the original Star Wars film played by the well-known British actor Peter Cushing. Mr Cushing died of cancer in 1994, at the age of 81.

5. Bernard Broughton (the original First Defendant, now deceased; the current First Defendant is the executor of his estate) and Joyce Broughton (the Second Defendant, also now deceased) were the executors of Mr Cushing's estate ('the Estate'). The Third Defendant, Associated International Management LLP, is the agency that represented Mr Cushing in the period up to his death. The Claimant has since settled with the Second Defendant.

6. The dispute arises as a result of the use of special effects by the Fourth Defendant to recreate Mr Cushing as Grand Moff Tarkin in Rogue One, altering the appearance of an actor, Guy Henry, who played the part. The Appellants' position at the time was that they did not believe any permission was required to recreate Mr Cushing in this

way, given the terms of his contract relating to the original Star Wars film and the nature of the special effects. However, having been contacted by the Third Defendant, on behalf of the Estate, the Fourth and First/Second Defendants entered into an agreement ("the 2016 Agreement") clearing the use of Mr Cushing's appearance in Rogue One in return for a payment to the Estate.

7. The Claimant and Respondent, Tyburn Film Productions Limited, is a film production company whose senior executive, Kevin Francis, had a long-standing personal and professional relationship with Mr Cushing. The Claimant made a number of films in which Mr Cushing appeared. In 1993, in the course of preparing to make a television film "A Heritage of Horror" with Mr Cushing, who was by then very unwell with cancer, the Claimant entered into a collateral letter agreement ("the Letter Agreement") with Mr Cushing by which he covenanted not to grant permission to anyone to reproduce his appearance through special effects without the Claimant's express prior written consent. In the event the film did not proceed and Mr Cushing died shortly thereafter.

8. In 2019 the Claimant, through solicitors, contacted the Appellants, maintaining that Rogue One had been made without the permission of the Claimant and therefore in breach of the Letter Agreement.

9. A pre-action disclosure order was made against the Estate on 2 July 2021 requiring disclosure of its agreement with the Fourth Defendant. On 2 August 2021 the current proceedings were issued, raising a claim for breach of contract against the Estate, a claim for procuring breach of contract against the Third Defendant and a claim against the Appellants for unjust enrichment by receiving the licence to recreate Mr Cushing from the Estate and/or the exploitation of that licence.

10. The claims for unjust enrichment are pleaded in §§38-40 of the Particulars of Claim. The alleged enrichment is set out as follows:

> (a) The Fourth and Fifth Defendants benefitted from and were enriched by:
>
> > (i) The purported right/licence to reproduce the likeness of Mr Cushing in and in connection with the production, exhibition, exploitation, advertising, promotion and merchandising of the Film; and/or

> (ii) The exploitation and/or use of that right/licence for commercial purposes in connection with the Film, without which the Film could not have been made in its present form and/or could not have been (and could not continue to be) exploited to the financial advantage of the Fourth and Fifth Defendants.
>
> (b) Further or alternatively, the Fourth and Fifth Defendants were enriched by the matters pleaded above at sub-paragraphs 39(a)(i) and (ii) without seeking, obtaining and paying for the Claimant's permission (if given) to reproduce the likeness of Mr Cushing."

11. It is then alleged in §39(c) that:

> "The benefits/enrichments pleaded in the preceding sub-paragraphs were at the Claimant's direct expense and/or were obtained as part of coordinated or closely related transactions between the Claimant, the First Defendant and the Second Defendant (as sole executors and the principal beneficiaries of the Estate) and the Fourth and the Fifth Defendants."

12. The Appellants considered that the claim for unjust enrichment was not reasonably arguable and on 25 May 2022 applied for summary judgment or strike out. They contended that there was no arguable case that: (i) there was enrichment, (ii) any such enrichment (if it occurred) was at the expense of the Claimant, (iii) the defence of bona fide purchaser for value without notice should not succeed. This appeal is concerned with (ii) and (iii) above, it being accepted for present purposes that there was enrichment.

13. Pending resolution of this appeal, directions have not yet been set for trial. It is regrettable that the proceedings have taken this long to get this far.

The Judgment Below

14. Following a hearing on 22 November 2023 the Master delivered the Judgment on 8 December 2023, rejecting the present application (amongst others).

15. Her reasoning can be broken down into three sections.

16. In the first the Master referred to the principles governing summary judgment applications. At §7 she referred to the decision of Peter Gibson LJ in *Richards (t/a Colin Richards & Co) v Hughes* [2004] EWCA Civ 266, a case involving an allegation of negligence against an accountant. At §22 he explained (original emphasis):

> I start by considering what is the correct approach on a summary application of the nature of Mr. Richards's application at this early stage in the action when the pleadings show significant disputes of fact between the parties going to the existence and scope of the alleged duty of care. The correct approach is not in doubt: the court must be certain that the claim is bound to fail. Unless it is certain, the case is inappropriate for striking out (see Barrett v Enfield London Borough Council [2001] 2 AC 550 at p. 557 per Lord Browne-Wilkinson). Lord Browne-Wilkinson went on to add:
>
> > "[I]n an area of the law which was uncertain and developing (such as the circumstances in which a person can be held liable in negligence for the exercise of a statutory duty or power) it is not normally appropriate to strike out. In my judgment it is of great importance that such development should be on the basis of actual facts found at trial not on hypothetical facts assumed (possibly wrongly) to be true for the purpose of the strike out."

17. The Master then referred to the well-known decision of Lewison J on summary determination under Part 24 in *Easyair Ltd (t/a Openair) v Opal Telecom Ltd* [2009] EWHC 339 (Ch) at §15. She quoted (vi) and (vii) where Lewison J said:

> "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."

18. In the second section of the Judgment, the Master identified the particular issues which apply to unjust enrichment claims. As she explained at §14:

> …Unjust enrichment is not itself a cause of action but a term to describe a category of rights. The court has to be satisfied that the defendants have been enriched at the claimant's expense and that the enrichment was unjust. These broad headings provide a framework for the factual inquiries which the court needs to undertake before it can conclude that the defendants have been enriched at the claimant's expense and that such enrichment was unjust. However, the claimant has to show that the unjust factor they rely on falls within or as close to an established category or factual recovery position in unjust enrichment. Clearly, that very description of what has to be demonstrated explains the fact-sensitive nature of the inquiry. However, as a consequence, unjust enrichment claims are not an exercise of a general discretion. The broad factual inquiry required to establish an unjust enrichment claim does not appear to make them an obvious type of claim for summary determination.

19. Then at §§17-18 she said:

> There is a further consideration expressed in the judgment of Mummery LJ in the *Doncaster* case referred to by Lewison J in subparagraphs (vi) and (vii). He said that:
>
> > "There can be more difficulties in applying the 'no real prospect of success' test on an application for summary judgment... than in trying the case in its entirety... The decision-maker at trial will usually have a better grasp of the case as a whole because of the added benefits of hearing the evidence tested or receiving more developed submissions and of having more time in which to digest and reflect on the materials."
>
> This is wise guidance. In some cases the court is more likely to be able to get to the right answer in light of the facts as found and after prolonged immersion in the case at trial.

20. In the final section of the Judgment the Master explained her reasoning for refusing to grant summary judgment/strike out. She explained her position in general terms in §21 and then turned to the individual points in more detail (a number of which are no longer live on appeal). It is sufficient at this stage to quote the former:

> A careful reading of the parties' skeleton arguments and consideration of their submissions demonstrates that these are difficult points which

> are simply unsuitable for summary determination, in relation to which the claimant has satisfied me that they overcome the low bar of being able to say that overall the claim is more than merely arguable and not fanciful. In any event, it seems to me that this claim raises some interesting and potentially novel questions of law in respect to intellectual property rights and performers' rights and unjust enrichment, for which summary determination on assumed facts does not appear to me to be a suitable vehicle. There is therefore a good and compelling reason to allow this claim to proceed to trial in any event.

Standard of Appeal

21. The Respondent submitted that I should be reluctant to interfere with the decision of the tribunal below because it involved an evaluative process akin to obviousness in a patent case. It cited the recent decision of the Supreme Court in *Lifestyle Equities CV v Amazon UK Services Ltd* [2024] UKSC 8, where Lords Briggs and Kitchin explained at [49]-[50]:

> "… on a challenge to an evaluative decision of a first instance judge, the appeal court does not carry out the balancing exercise afresh but must ask whether the decision of the judge was wrong by reason of an identifiable flaw in the judge's treatment of the question to be decided, such as a gap in logic, a lack of consistency, or a failure to take into account some material factor, which undermines the cogency of the conclusion.
>
> On the other hand, it is equally clear that, for the decision to be "wrong" under CPR 52.21(3), it is not enough to show, without more, that the appellate court might have arrived at a different evaluation."

22. On the other hand, the Appellants referred me to the observations of Michael Green J. in granting permission to appeal in the present case where he characterised the grounds of appeal as raising questions of law. On this basis, under CPR r.52.21(3) I can interfere if I consider that the Judge below was wrong in law.

23. I think the Appellants were correct to characterise the present appeal and the scope of the doctrine of unjust enrichment as involving points of law. Nevertheless, I am conscious that the tribunal below has considerable experience in determining issues of this nature, and that in addition to the pure points of law it is also necessary under a summary judgment application to consider whether it would be better for the matters to be determined at trial, which involves questions of case management. See the quotes above from the *Richards, Easyair* and *Doncaster* cases cited by the Master. For those reasons I consider that I should show some reluctance to interfere with the

decision, but not the same level of reluctance as may apply to the sort of evaluative decision referred to by the Supreme Court in *Lifestyle Equities.*

24. I should note at this stage that the Appellants did not seek to distinguish between the tests for summary judgment and strike out at the hearing before me. I think they were correct not to do so. For convenience I shall proceed on the basis of Part 24 – namely to consider whether the Claimant/Respondent has no real prospect of succeeding on the claim and there is no other compelling reason why the claim should be disposed of at a trial. As the Master correctly identified, this means that the claim must be realistic, not fanciful, and more than merely arguable.

The Appeal – enrichment at the expense of the claimant

25. The bulk of the hearing before me was taken up with point (ii) in [12] above, and whether as a point of law it was maintainable that any enrichment was at the expense of the Claimant (rather than, for example, at the expense of the Estate). The Appellants' overarching point was that unjust enrichment could never arise in circumstances where B contracts with A not to do something, but B then deals with C in breach of the contract with A. The Appellants submit that, instead, the Estate's activities caused a contractual loss to A, the Claimant here, and conferred a separate benefit, in the form of a licence, upon C, the Fourth Defendant. The remedy of unjust enrichment could not rescue the Claimant in these circumstances. See *OBG v Allen* [2007] UKHL 21, [2008] 1 AC 1 and the orthodox causes of action in such circumstances, namely inducing breach of contract, causing loss by unlawful means or unlawful means conspiracy. See also *One Step v Morris-Garner* [2018] UKSC 20, [2019] AC 649 and the limit to negotiating damages in such circumstances.

26. As for (iii), the defence of *bona fide* purchaser, the Appellants submit that there was simply no plausible material to gainsay it on the only substantial unadmitted issue relevant to it (that of whether the Appellants had notice) and permitting the issue to go to trial would amount to Micawberism ("something might turn up").

27. Further, the Appellants submit that dealing with the Appellants' points now brings significant advantages to the parties and the Court. The case raises a range of other difficult questions, which, to the extent they concern the Appellants, would be

rendered superfluous and, to the extent they concern the other Defendants, raise different facts and issues.

Investment Trust Companies

28. In support of the main submissions on enrichment at the expense of the Claimant, I was taken with some care by Mr Cullen KC on behalf of the Appellants through the decision of the Supreme Court in *Investment Trust Companies v Revenue and Customs Commissioners* [2017] UKSC 29 [2018] AC 275. This is the most recent decision from the senior courts concerning unjust enrichment and specifically the issue of "at the expense of the claimant".

29. In that case the claimants were investment funds who had been charged VAT by their investment managers. A dispute arose as to whether VAT was payable on investment management services. Following a determination by the CJEU that it was not, the claimant companies sought to recover some otherwise irrecoverable sums paid by them on the grounds that the Revenue had been unjustly enriched. The Supreme Court held that they were unable to do so. It reasoned that because the Revenue had only been enriched by VAT which it had received from the managers, and since the claimants had paid the VAT to the managers, not direct to the Revenue, that transaction and the managers' payment to the Revenue could not be collapsed into a single transfer of value from the claimants to the Revenue. Accordingly, the Revenue had not been enriched at the expense of the claimants, although they did have a right to restitution against the managers for the full amount of VAT paid.

30. Mr Cullen emphasised various passages in the judgment of Lord Reed. In particular, he relied on §37, where Lord Reed stated as follows:

> 37. Decisions concerning the question whether an enrichment was "at the expense of" the claimant demonstrate uncertainty as to the approach which should be adopted. Such tests as have been suggested have been too vague to provide clarity. For example, in *Menelaou v Bank of Cyprus plc* [2016] AC 176 , Lord Clarke of Stone-cum-Ebony JSC said, at para 27, with the agreement of Lord Neuberger of Abbotsbury PSC, Lord Kerr of Tonaghmore and Lord Wilson JJSC, that "The question in each case is whether there is a sufficient causal connection, in the sense of a sufficient nexus or link, between the loss to the bank and the benefit received by the defendant". This leaves unanswered the critical question, namely, what connection, nexus or link is sufficient? The same can be said of Arden LJ's statement

> in *Relfo Ltd v Varsani* [2015] 1 BCLC 14 , para 95, that there must be a "sufficient link", Floyd LJ's reference in the same case to "proximity" (para 110), and the Court of Appeal's finding in the present case [2015] STC 1280, para 67 that there was "a sufficient economic connection".

31. The Appellants' position is that there is just insufficient link between the Letter Agreement and the 2016 Agreement for any enrichment ever to be said to have been made "at the expense of the Claimant".

32. However, in the very next paragraph Lord Reed went on to say (emphasis added):

> 38. **It would be unwise to attempt in this appeal to arrive at a definitive statement of the circumstances in which the enrichment of a defendant can be said to be at the expense of the claimant.** Nevertheless, in view of the uncertainty which has resulted from the use of vague and generalised language, this court has a responsibility to establish more precise criteria. Some observations of a general nature should therefore be made, before turning to the specific context in which the issue arises in the present case. It should be said at the outset that these observations are concerned only with personal claims, and not with proprietary claims.

33. It is therefore necessary to go on to study the judgment of Lord Reed in more detail.

34. As to this I was referred to Lord Steyn's remarks in *Banque Financière de la Cité v Parc (Battersea) Ltd* [1999] 1 AC 221 at 227 to the effect that unjust enrichment claims must be examined with rigour, and do not "*create a judicial licence to meet the perceived requirements of fairness on a case-by-case basis*" (§39). In §42 Lord Reed explained by reference to the *Menelaou* case [2016] AC 176 that the remedy of unjust enrichment is designed "*to correct normatively defective transfers of value, usually by restoring the parties to their pre-transfer positions*". The Appellants submit that this could not apply to the present case.

35. In §46 Lord Reed went on to distinguish between direct and indirect provision of a benefit. Whilst unjust enrichment cases usually arise where the parties have dealt directly with each other (or with another's property), in §47 Lord Reed explained that they can also arise where the benefit is indirect. Indeed, this was the focus before me. However he added, as Mr Cullen was keen to emphasise, that *"[t]hese are generally situations in which the difference from the direct provision of a benefit by the claimant to the defendant is more apparent than real.*"

36. The examples which follow in §48 are cases of agency, assignment, sham or proprietary claims, none of which are said to apply here. The final category is where there is a set of co-ordinated transactions which are "*treated as forming a single scheme or transaction for the purpose of the "at the expense of" inquiry, on the basis that to consider each individual transaction separately would be unrealistic*". This is the basis upon which it is said the Claimant puts its case, but Mr Cullen submitted that it could never succeed in demonstrating that the transactions were co-ordinated in this way.

37. §§50 and 51 of Lord Reed's judgment also bear on the issue before me, where he explained (emphasis added):

> 50. It has often been suggested that there is a general rule, possibly subject to exceptions, that the claimant must have directly provided a benefit to the defendant. The situations discussed in the two preceding paragraphs can be reconciled with such a rule, if it is understood as encompassing a number of situations which, for the purposes of the rule, the law treats as equivalent to a direct transfer, in the sense that there is no substantive or real difference. So understood, the suggested rule is helpful. **It may nevertheless require refinement to accommodate other apparent exceptions, and it would be unwise at this stage of the law's development to exclude the possibility of genuine exceptions, or to rule out other possible approaches**.
>
> 51. **Where, on the other hand, the defendant has not received a benefit directly from the claimant, no question of agency arises, and the benefit does not consist of property in which the claimant has or can trace an interest, it is generally difficult to maintain that the defendant has been enriched at the claimant's expense**. …

38. Two further passages were emphasised before me. Mr Cullen relied on §§59-60, where Lord Reed explained that the "at the expense of" requirement is not satisfied by a connection between the parties' respective benefit and loss merely as a matter of economic or commercial reality. Because restitution is about reversing a defective transfer and not merely compensation, looking for the economic loss is not the right test. If a claim such as that advanced by the Claimant could succeed, Mr Cullen submitted, then it would open the floodgates to any innocent third party who benefits from a breach of contract between two other parties to be subject to a claim for unjust enrichment.

39. Finally, at §§61-62 there is a further discussion of "co-ordinated transactions" and the *Banque Financière* case. Mr Moody-Stuart KC for the Claimant relied on this. There, the claimant had contracted to loan money to a manager of a holding company who in turn had lent the money to a subsidiary of the holding company. The claimant paid the money directly to the subsidiary's creditor, discharging the debt, and this enriched the defendant, another subsidiary of the holding company, by promoting the ranking of its own security above that of the claimant. The House of Lords held that this enriched the defendant at the expense of the claimant, either because the claimant had lent to the first subsidiary as a matter of substance not form (Lord Steyn) or through tracing (Lord Hoffmann). This illustrated, said Mr Moody-Stuart, that it was possible for A to claim unjust enrichment from C, even though A had contracted with B and B had contracted with C, analogous to the present case.

40. Further, Mr Moody-Stuart explained that Appellants have been directly enriched through acquiring a valuable commercial right, namely the right to be the first to "resurrect" Mr Cushing through Visual Effects (as defined in the Letter Agreement). That benefit was transferred to the Appellants and its value increased because it took no account of the right held by the Claimant, the value of which was reduced accordingly. Further or alternatively, it was said that there is indirect enrichment as a result of the various contractual agreements entered into by Mr Cushing and the parties which are closely linked transactions in that the subject matter relates to the reproduction of Mr Cushing's likeness and exploitation of Mr Cushing's performer's rights. These dealings in the same subject matter are said to render it irrelevant that the transactions took place many years apart.

41. Mr Cullen countered this by pointing to the facts of *Investment Trust Companies*, analysed more fully by Lord Reed at §§71-72, and submitted that the transactions were much more "coordinated" than the facts of the present case, yet still failed. On this basis, he said, the Claimant could never succeed. Further, it was clear, he submitted, that the *Banque Financière* and *Menelaou* cases were both examples of coordinated transactions planned from the outset where the benefit was intended to be at the expense of the claimant, in contrast to the position in the present case. Here, there was no transfer of value by the Claimant at all.

42. Finally, I was referred by both parties to various passages in the 10th Edition of Goff & Jones. Although this was illuminating, I do not think it advances matters much beyond *Investment Trust Companies* itself. There were various soundbites alluding to the fact that the law of unjust enrichment is not yet settled, and §6-25 of Goff & Jones characterises *Investment Trust Companies* as "*an important step forward, although by its own admission, it does not claim to offer a "definitive statement" and important questions remain*."

43. The authors return to this in §6-46 under the heading (e) Multiple-Party Cases After Investment Trust Companies (i) Preliminary Observations (emphasis added but footnotes omitted):

> First, in *Investment Trust Companies* Lord Reed specifically acknowledged that his account was not a "definitive statement"[110] and more particularly, that the multiple-party situations that he had identified were not necessarily exhaustive: there might be other "apparent" or even "genuine exceptions" to any "general rule" that required the "direct" provision of a benefit between claimant and defendant.[111] No criteria are offered in *Investment Trust Companies* for identifying when such circumstances might exist beyond the proposition that they might be found where there is "no real or substantive difference" from the "direct provision" of a benefit. As noted earlier, this should permit a modest analogical extension which is coherent with the essential concept of "direct provision".[112] However, one problem with this strategy is that the Supreme Court's conception of "direct provision" is very broadly expressed—direct dealings with one another, or with one another's property[113]—and equivocal. **As we explain in Part 2, whilst the Supreme Court's analysis may at times come close to acknowledging, as the core idea, a nexus of intentional or deliberate conferral between claimant and defendant, this is not in fact the case—the Supreme Court's analysis also accommodates, for example, instances of what might be called "non-participatory" enrichments, involving an altogether different species of nexus**. The process of reasoning outwards from any core concept of "direct provision" arguably requires this to be recognised and for the different modes of enrichment concealed within the Supreme Court's broader conception of "direct provision" to be more sharply differentiated.[114]

44. But see also §6-67, under the heading (vii) Exceptions:

> As the authorities currently stand, it is difficult to be confident whether —and in what circumstances—the English courts might ever be persuaded to recognise what Lord Reed described as a "genuine exception" to any general rule requiring a direct enrichment.

45. Mr Moody-Stuart also referred me to Chapter 8 on Lack of Consent and Want of Authority for the more general submission that restitution was available in circumstances such as the present. See e.g. §8-114 and the cases referred to in the following paragraphs:

> There are other cases where D appears to have been more remotely enriched at C's expense, without C's consent, but without receiving any asset which belonged to C or any traceable substitute for C's asset. In these cases, any personal claim that C might have to recover the value of D's benefit obviously cannot be explained as vindicating any title which C might retain or be afforded to any asset which D receives or retains. However, it can be explained as a claim in unjust enrichment, based on either C's lack of consent or X's want of authority.

46. Mr Cullen criticised this section as coming from the wrong section of Goff & Jones to be relevant to the core issue in the application – at the expense of the claimant – but I still think that it has the potential to support the Claimant's more general case.

Analysis

47. I have not found the present appeal easy to determine, particularly in light of the eloquent submissions of Mr Cullen. On the material before me I am far from persuaded that the Claimant will succeed in its claim for unjust enrichment against the Fourth and Fifth Defendants.

48. However, I am also not persuaded that the case is unarguable to the standard required to give summary judgment or to strike it out. This is principally for the reasons given by the Master and reflected in the authorities she cited and which I have quoted above. In the words of Peter Gibson LJ, in a field of law which is not yet settled, I cannot be certain that the claim is bound to fail.

49. This guidance is founded in common sense. In an area of developing law it is very difficult to decide where the boundaries might lie in the absence of a full factual enquiry. In addition, there is a limit to the extent to which one can try to work out the boundaries by comparing facts with decided cases where the facts are so different.

50. I agree that the transactions in *Investment Trust Companies* appear on their face to be (much) more co-ordinated than the transactions in the present case. However, I also note that in *Investment Trust Companies* the claimants were able to recover their

mistaken payments in full without the Supreme Court having to extend the doctrine of unjust enrichment to national tax authorities. In such circumstances one can see why the Supreme Court might have been reluctant to allow the claimant's cross-appeal.

51. In the present case the Claimant is able to articulate a case of unjust enrichment via direct or indirect dealings (although the argument before me focussed on the latter). It is clear that the indirect route is arguable if the transactions are sufficiently co-ordinated. But there is precious little guidance as to where the boundary for "sufficiently co-ordinated" lies. Whilst *Banque Financière* might appear to support the notion that enrichment is possible by C at the expense of A between A-B and B-C contracting parties, again the facts are different and there may be good policy reasons why recovery was permitted in that case but would not be permitted here where the relevant transactions are separated by some 23 years. However, at this stage I am just unable to say that the point is unarguable where it is acknowledged that the law is developing and there is no case sufficiently close on the facts to be able to divine the borderline with any certainty.

52. It is correct that the Claimant has not managed to identify any prior case analogous to its own where a claim for unjust enrichment succeeded. The Appellants emphasise that this is despite the fact that it is common for parties who have entered into restrictive covenants to breach those covenants by doing acts which benefit a third party. But, equally, the Appellants have not identified cases where such relief has been refused. The cases relied on by the Appellants where restitution either was not argued for or was refused on different facts cannot assist a definitive determination of the present case in a field which is still developing. Thus in *Isaac Oren v Red Box Toys* [1999] EWHC 255 (Pat), [1999] FSR 785 an exclusive licensee to a registered design was found to have no remedy against an infringer, but this was in the face of a statutory bar to the same. And in *SmithKline Beecham v Apotex* [2006] EWCA Civ 658, [2007] Ch 71 sister companies of the beneficiary of a cross-undertaking were refused restitution of benefits reaped by the beneficiary of an interim injunction, but the *ratio* at §44 was that there was no possible rational basis for a third party to have a claim in restitution in respect of benefits which accrue to a "wrongful" injunctor – very different facts to the present case.

53. In these circumstances, and given the absence of concrete and definitive guidance from the Supreme Court and the express acknowledgement that the doctrine is not yet settled (and that the principles require further elucidation, per Goff & Jones), I am just not in a position to say that the Claimant's case will unarguably fail at trial.

54. As the Master correctly observed at §48 of the Judgment, "*three-party cases or indirect benefit cases are some of the most difficult and fact-sensitive cases of unjust enrichment*." Further, I cannot fault her analysis at §49:

> It seems to me that the arguments about direct and indirect benefit fall at the far reaches of the current scope of an unjust enrichment claim. However, given the nature of unjust enrichment, it is not possible to say that the claim as put is unarguable or entirely fanciful, given the need to explore the facts and understand what in fact the parties knew at the relevant time. It is at the edges of the scope of unjust enrichment claims but not one that I can say is certain to fail or is entirely fanciful. My starting point and my end point is therefore that the law on unjust enrichment is not settled in this area and is continuing to develop in a number of respects, particularly in the area of indirect benefit and exceptions. Whilst it may be argued following *Costello* that there where there are contractual rights against the third party as here unjust enrichment is not available, it seems to me, as I say, the law is not settled.

55. I am fortified in my conclusion by the Claimant's references to various cases which warn the Court not to attempt to determine summary judgment applications in areas of developing law.

56. Thus in *Begum v Maran (UK) Ltd* [2021] EWCA Civ 326; [2021] 1 CLC 514; at [23] and [24] Coulson LJ explained by reference to the House of Lords in *Barrett v Enfield LBC* and the Supreme Court in *Vedanta Resources v Lungowe*:

> "23. The other principle relevant to the present appeal is that it is not generally appropriate to strike out a claim on assumed facts in an area of developing jurisprudence. Decisions as to novel points of law should be based on actual findings of fact: see *Farah v British Airways* (The Times, 26 January 2000, CA). In that case, the Court of Appeal referred back to the decision of the House of Lords in *Barrett v Enfield LBC* [2001] 2 AC 550 where Lord Browne-Wilkinson said at 557e–g:
>
> > 'In my speech in the *Bedfordshire case* [1995] 2 AC 633, 740–741, with which the other members of House agreed, I pointed out that unless it was possible to give a certain answer to the question whether the plaintiff's claim would succeed, the case was inappropriate for

> striking out. I further said that in an area of the law which was uncertain and developing (such as the circumstances in which a person can be held liable in negligence for the exercise of a statutory duty or power) it is not normally appropriate to strike out. In my judgment it is of great importance that such developments should be on the basis of actual facts found at trial not on hypothetical facts assumed (possibly wrongly) to be true for the purposes of the strike out'.
>
> …
>
> 24. The same point arose more recently in *Vedanta Resources plc v Lungowe* [2019] UKSC 20; [2019] 1 CLC 619. That was a case where the underlying duty of care was alleged against a parent company, rather than the company involved in the day-to-day running of the mine said to have caused the pollution. Lord Briggs said:
>
> > '48. It might be thought that an assertion that the claim against Vedanta raised a novel and controversial issue in the common law of negligence made it inherently unsuitable for summary determination. It is well settled that difficult issues of law of that kind are best resolved once all the facts have been ascertained at a trial, rather than upon the necessarily abbreviated and hypothetical basis of pleadings or assumed facts.'

57. See also two recent judgments dismissing applications for summary judgment and/or strike out of claims for unjust enrichment. In *Terna Energy Trading v Revolut Ltd* [2024] EWHC 1419 (Comm), HHJ Paul Matthews rejected an application for strike out and/or summary judgment where Revolut alleged any enrichment was not at Terna's expense. At [7], he noted that it is not normally appropriate in a summary procedure to decide controversial questions of law in a developing area. Nevertheless, as Mr Cullen pointed out, he did go on to adjudge that there was enrichment at the expense of the claimant on facts much more arguable than the present case ([94]).

58. In *Matrix Receivables Ltd v Musst Holdings Ltd* [2024] EWHC 1495 (Ch), Freedman J rejected an application for strike out and/or summary judgment, citing Potter LJ in *Partco v Wragg* [2002] EWCA Civ 594; [2002] 2 BCLC 323. At [72] the Judge emphasised the point that unjust enrichment is a developing area of law and unsuitable for summary judgment and/or strike out (present emphasis added):

> "…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**."

59. Although Mr Cullen said that this was a specific issue on which the authorities were not clear, I think both these cases lend force to the observations of the Master that it will be easier to decide this issue of law in the light of fully argued facts. This is not a Micawberism, it is just a sensible and practical observation from a very experienced tribunal that cases may look quite different by the time of trial than they do at the pleading stage. As she noted at §53:

> "It is simply not possible to say the unjust enrichment claim will fail on the information available or even attempt to do so. To even attempt to do so would cause me to fall into error in conducting a mini trial."

60. I agree, and accordingly I dismiss the first ground of appeal.

Bona Fide purchaser for value

61. I can deal with the bona fide purchaser point much more briefly.

62. There is no dispute that a defence of bona fide purchase for value is potentially available to the Appellants in the circumstances of the present case. See *Lipkin Gorman v Karpnale Ltd* [1991] 2 AC 548 and *Goff & Jones* at 29-12.

63. The Master held that the defence would "*require a factual investigation*" and could not be a knockout blow at this stage "*when one has to ascertain all the facts and must assume the case against the estate as pleaded*": [52].

64. The Appellants submit that the Master erred in law because no relevant factual inquiry was required. The Court was able to assess the defence on the basis of the pleaded cases as it was not alleged by the Claimant that the Estate (or its agent) told the Appellants anything of the Letter Agreement.

65. But even if that is right, it cannot be the end of the matter. It is well established that notice can be constructive as well as actual. See Goff & Jones at 29-10. So the plea of no actual notice by the Appellants, alternatively the absence of a positive pleading of actual notice by the Claimant, cannot be determinative.

66. In any event I think it is unrealistic to suggest that in a case which stretches back some 8 years to the 2016 Agreement and over 30 years to the Letter Agreement, the exercise of disclosure and/or evidence might not reveal something relevant to this issue. Again, this is not just Micawberism, but realism based on the pleaded relationship between the various parties. The First and Second Defendants had actual or constructive knowledge of the Letter Agreement. It is also possible that the Third Defendant, who was Mr Cushing's agent at the time of the Letter Agreement, had actual or constructive knowledge of it. Either way, the Third Defendant represented the First and Second Defendants in approaching and entering into the 2016 Agreement with the Fourth Defendant. It is not unrealistic to suggest that constructive or actual notice might arise in these circumstances.

67. For these reasons I think the Master was correct to reject the Appellants' attempt to dispose of this aspect of the case also.

No Mini-trial

68. There was a third ground of appeal, namely that there was no need for a mini-trial. At the hearing before me the Appellants accepted that this was not really a standalone ground. I agree, and it follows that as I have rejected the first two grounds the third ground should also be dismissed.

Conclusion

69. For all these reasons I reject the Appellants' appeal. I consider that the matter should return to the Master for directions to be given to trial.

70. I will hear the parties as to costs and any consequential matters, preferably in writing, if they cannot otherwise be agreed.