OUTER HOUSE, COURT OF SESSION

[2022] CSOH 60

CA84/21

OPINION OF LORD BRAID

In the cause

CSG COMMERCIAL LIMITED

Pursuer

against

AJ CAPITAL PARTNERS LLC

Defender

Pursuer: Lord Davidson of Glen Clova QC; DAC Beachcroft Scotland LLP
Defender: Barne QC; Brodies LLP

30 August 2022

Introduction

[1] In, or at least by, January 2021 the defender (or companies affiliated to it) purchased three hotels from Macdonald Hotels Ltd (MH): Rusacks Hotel, St Andrews; the Randolph Hotel, Oxford; and the Marine Hotel, North Berwick. The total acquisition price was £91.2m. The pursuer avers that it introduced the defender (an American company) to MH, and that it did much of the ground work for the acquisition, from which the defender benefitted. In this action it sues for recovery of two sums from the defender, £912,000 and £169,923.

[2] As will be seen, the pleaded legal basis for the action is unclear. However, distilled to its essentials, the pursuer's case for payment of the sum first concluded for of £912,000 is based on an alleged agreement that the defender would pay it an introduction fee of 1% of the purchase price of the hotels in question. If there was no agreement to pay an introduction fee, the pursuer contends that it is in any event entitled to payment of that same sum on principles of delictual liability or recompense. The sum second sued for, £169,923, is said to be the value of the time and resources the pursuer expended in advancing the acquisition, and its recovery is sought on somewhat nebulous contractual/delictual/unjustified enrichment grounds.

[3] The defender does not dispute that this court has jurisdiction to hear the action insofar as it is founded on a contract between the parties, or delict, but it does argue that there is no jurisdiction insofar as the action is founded on recompense. It also argues that the pursuer's pleadings are so confused as to be irrelevant and lacking in specification such that the action should be dismissed. The case called before me for debate on these issues.

Prior procedure

[4] Before the debate, the case had called before me on two occasions, the first a preliminary hearing, the second a procedural hearing. One purpose of the preliminary hearing was to agree the issues which the court would be called upon to resolve. In its original incarnation, the pursuer's case was for damages of £4.8m said to have been caused by its exclusion from an agreed joint venture between the parties, together with a conclusion founded on recompense. One of the issues which parties agreed had to be determined was:

> "whether or not the parties entered into a verbal contract in the form of a joint venture agreement and, if so, the nature and terms (including implied terms) of that agreement."

A further issue was whether the pursuer was entitled to damages for breach of any such agreement. No mention was made at that time of any agreement to pay an introduction fee (although reference was made to an industry standard of 1%). Subsequently the pursuer introduced, by adjustment, averments about an agreement to pay an introduction fee of 1%, averring (although it did not formally amend the sum sued for at that stage) that it was entitled to be paid £1,365,000, which was at that time thought to be 1% of the transactions entered into by the defender. Thus, not only was the sum first concluded for to be reduced from £4.8m to £1.365m, the nature of the claim appeared to have changed from one for damages for breach of a joint venture agreement, to one for payment of a sum contractually due under an entirely different (and earlier) introduction agreement.

[5] The procedural hearing took place on 9 June 2022 in advance of which the defender lodged a note of proposals seeking a debate and observing that the pursuer's case had undergone a radical shift, as mentioned in the preceding paragraph. At the hearing, senior counsel for the pursuer did not demur from that proposition, observing only that he recognised that there was a dissonance between the averments and the sum sued for. The defender also lodged a note of arguments in support of its motion for a debate, in which it attacked the relevancy and specification of the pursuer's pleadings. Although the note argued that there was a lack of clarity as to what the pursuer's case was, it observed that it now appeared to be based exclusively on an introduction agreement rather than on a joint venture agreement. Following the procedural hearing, the pursuer lodged its own note of argument, in which it stated among other things that its averments were not yet finalised but that the parties had agreed on remuneration by means of an introduction fee, which the defender now refused to pay. Thus, although still not entirely clear, the pursuer appeared to

confirm that its claim was one for payment due under an introduction agreement and not for damages for breach of a joint venture agreement.

[6] On the morning of the debate, senior counsel for the pursuer tendered a minute of amendment and moved that the summons be amended in terms of it. Senior counsel for the defender intimated that he did not oppose that motion, but maintained that the pleadings as amended continued to be irrelevant and lacking in specification. I granted the pursuer's motion and the debate duly proceeded on the basis of the proceedings as amended.

The pursuer's pleadings

[7] Since the debate largely centred on the defender's criticisms of the pursuer's pleadings, it is appropriate to begin with a consideration of those pleadings, not least as it is necessary to understand what the pursuer's case is before considering the plea of no jurisdiction.

[8] It is convenient to take the pleadings slightly out of order and first to examine the averments about the introduction agreement. In article 2(i) of condescendence the pursuer avers that in about January 2019 the defender invited it to provide the defender with market intelligence about competition in the UK with the defender's Graduate Hotel brand. The pursuer's Mr Stewart provided such intelligence and identified MH as a competitor and as offering potential acquisitions for the defender. The averments go on:

> "By email of 19 February 2019 Mr Stewart requested a discussion with Mr Allen concerning the remuneration for work done by the pursuer for the defender. Mr Allen agreed to the discussion which took place on 21 February 2019. In said discussion it was accepted by Mr Allen on behalf of the defender that the pursuer would receive remuneration for its work."

In article 2(ii) further averments are made about that agreement:

> "The parties' agreement of 21 February 2019 was for the pursuer to be remunerated on a commercial basis. Both the pursuer and the defender understood introduction fees in said circumstances were normal commercial practice."

In article 3 of condescendence, the pursuer avers:

> "The parties having agreed that the pursuer would be entitled to an introduction fee in respect of work done outside of a joint venture, the defender is bound to pay such a fee to the pursuer".

Finally, and for completeness, these averments are in condescendence 2(vi):

> "In prior discussions concerning prospective transaction (*sic*) the pursuer introduced to the defender, Mr Stewart and Mr Allen agreed that the pursuer was to be remunerated by means of an introduction fee. Such an approach is normal custom in the industry. Awareness of an intention to sell assets by a party is not the same as an introduction that produces the provision of financial information from the prospective seller."

Senior counsel for the pursuer explained that the reference to "prior discussions" in this passage was to discussions which took place before even the discussion in February 2019, in relation to the Temple Bar Inn Hotel, Dublin. If so, it is not entirely clear what relevance that discussion has to the subsequent agreement. Nonetheless, the pursuer has colourable averments that in February 2019 the parties reached an agreement that the pursuer would be paid an introduction fee in respect of hotels introduced by the pursuer which the defender subsequently purchased. (That said, it is unclear how the parties could agree in February 2019 that the introduction fee would be in respect of work done outside of a joint venture which was not discussed, let alone agreed, until April 2019 but that is perhaps a question for another day, should the action survive).

[9] The pursuer then goes on to make averments about the joint venture which it avers the parties entered into on 26 April 2019. These averments appear in article 2(i):

> "On about 19 April 2019 after further researching MH, Mr Stewart was made aware independently, MH might be available for acquisition. The availability of MH for

acquisition was not known to the marketplace. Any acquisition was a closed transaction and not an open market transaction. He instructed Mr Scott of EY Edinburgh to contact MH's corporate advisors, Deloitte, thereafter. The contact resulted on 26 April 2019 in the pursuer being enabled to carry out due diligence, to obtain access to the MH data room and an invitation to make an offer for MH. Information was provided to the pursuer on behalf of MH prior to any NDA being signed and at a point when MH was unaware of the defender's potential involvement. EY at that point did not have direct contact with the defender. EY's involvement was only as a result of being brought in to the possibility of a transaction by the pursuer. Mr Stewart immediately contacted Phillip Allen of the defender proposing a joint venture between the parties, directed to an acquisition of MH. Mr Allen agreed to the proposal. Mr Stewart in consequence introduced the defender to MH. Prior to the pursuer's said introduction the defender had no knowledge of or contact with MH. But for the pursuer's efforts and informing the defender thereof, the defender would have been unaware of MH's availability for acquisition. The sole conduit between MH and the parties prior to the pursuer's introduction of the defender was Mr Stewart. The defender's Mr Allen thereafter on 26 April 2019 wrote to MH recording the defender's interest in acquiring MH in conjunction with the pursuer. On 26 April 2019 EY wrote to Deloitte stating the pursuer and defender 'in partnership' wished to make a bid under the codename Project Unicorn for MH."

[10] In article 2(ii) the pursuer avers that parties' agreement was that the defender would acquire six of the MH hotels, and the joint venture would acquire the balance of 27 MH hotels with 50/50 funding and 50/50 profit sharing. The averments continue:

> "The 50/50 profit sharing was in respect of the balance of the hotels that would be for the joint venture being the hotels that the defender would not purchase directly for its sole ownership. The 50/50 profit share was not intended to remunerate the pursuer in respect of the hotels acquired by the defender for its sole ownership. Accordingly it having been agreed on 21 February 2019 that the pursuer would be remunerated in respect of its work, the pursuer would be remunerated in respect of the joint venture hotels by the profit share. The separate direct acquisition of hotels by the defender was not remunerated by the profit share as those hotels were not part of the joint venture. Said acquisition of non joint venture hotels by the defender pursuant to the pursuer's introduction was not intended nor agreed to be unremunerated."

[11] Pausing there, and drawing the foregoing together, the pursuer therefore founds upon two separate agreements. The first, reached in February 2019, was that it would be remunerated on a commercial basis ("understood" to be an introduction fee) for six hotels to be purchased solely by the defender. The second agreement was that the parties would

enter into a 50/50 joint venture to purchase the remaining 27 of MH's portfolio of 33 hotels. The pursuer's remuneration for work done in relation to that purchase was to comprise its 50% share of the profit. Standing the indication given previously by senior counsel for the pursuer that the breach of joint venture case was being departed from, the relevance of the foregoing averments about the joint venture is not immediately obvious, although it might be said that they are relevant by way of background.

[12] However, the pursuer then goes on to make averments of breach of the joint venture agreement by the defender. In article 2(iv) it avers that MH chose not to proceed to conclude a transaction in May 2019 due to the emergence of a competitive bid from a third party but, that bid having failed, that the defender reopened negotiation with MH on its own account. In 2(v) the pursuer avers that in August 2019 it was told by the defender that Mr Macdonald of JH had indicated he did not wish Mr Stewart of the pursuer to be involved in the negotiation of price. The pursuer then avers:

> "The defender … subsequently used this indication as a pretext to exclude the pursuer from the transaction. The pursuer did not agree to said exclusion. Thereafter it sought payment from the defender to be made in light of the parties' agreement, the introduction of the defender to MH and the amount of work done by the pursuer to bring about the transaction. The defender made no payment asserting it had changed its view as to the structure of the transaction. The defender made various proposals about the pursuer's potential involvement and investment in Project Unicorn. Said proposals were not accepted by the pursuer as they did not reflect the work done by the pursuer from which the defender benefitted… On 23 August 2019 Mr Allen told Mr Stewart that it was now the defender's 'deal'. Mr Stewart protested. Thereafter [a] proposal of 26 August 2019 was sent by the defender to the pursuer. As the proposal was not acceptable Mr Stewart told Mr Allen parties should revert to the pursuer being paid an introduction fee. Mr Allen did not agree."

In that passage, the pursuer appears to aver that the defender was in breach of the joint venture agreement by excluding the pursuer from any involvement in the transaction. The reference to a statement that the parties should *revert* to the pursuer being paid an

introduction fee is interesting, since that would suggest that, in light of the joint venture, *no* such fee was to be paid. Again, however, that may be an issue for another day.

[13] In article 2(vi) the pursuer repeats its assertion that its work was not to be done gratuitously, along with a further averment of what the defender "understood":

> "The pursuer at no point offered or agreed that work done by it in respect of the transaction was provided gratuitously to the defender. The defender at all times understood such work was not undertaken gratuitously. Without the work done by the pursuer the defender would not have been aware of any possible transactions with MH. …"

[14] In article 2(vii) the pursuer avers that by January 2021 the defender had completed acquisitions of the Marine Hotel, and Rusacks for £72m, and the Randolph Hotel for £19.2m. The latter two were always part of the six hotels to be purchased by the defender alone, whereas the Marine was to have been part of the joint venture portfolio. It is admitted that otherwise the purchase of the 33 hotels did not conclude. In article 2(viii) the pursuer avers that the defender benefitted from the pursuer's work, through obtaining access to MH, and by obtaining an assessment of, and subsequently acquiring, MH's assets.

[15] Following the foregoing factual averments, the pursuer's contract case is set out in article 3 of condescendence, as follows:

> "The defender is in breach of contract. It agreed the MH acquisition would proceed as a joint venture. The joint venture as agreed on 26 April 2019 gave the pursuer a reasonable return on its contributions to the joint venture being a 50% profit share. The pursuer made such contributions as condescended on. The pursuer accordingly was entitled to be remunerated for its contributions when the joint venture did not proceed. The exclusion of the pursuer from the MH acquisition was effected by the defender without cause and for its own interest. Said exclusion enabled the defender to proceed to select only those MH assets that suited its own interests, without regard to those of the pursuer."

These averments suggest that the pursuer's claim is one for breach of the joint venture agreement. However, the averments continue:

> "The parties having agreed that the pursuer would be entitled to an introduction fee in respect of work done outside of a joint venture, the defender is bound to pay such a fee to the pursuer. The defender did not pay such a fee to the pursuer."

These two sentences suggest that the pursuer's claim is either for payment of the sum said to be due under the introduction agreement, or (perhaps) for breach of that agreement. When the passages quoted in this paragraph are read together, it is entirely unclear whether it is the joint venture agreement or the introduction agreement which the pursuer avers has been breached, entitling it to damages.

[16] The pursuer's case based on negligence (which, having regard to the pleas in law, is pled as a concurrent rather than alternative ground of action) is set out in article 4:

> "In any event the defender represented to the pursuer that the pursuer would be remunerated for its work in introducing the defender to MH, carrying out the work of due diligence and developing the parties' assessment of MH's assets. The defender at no point indicated to the pursuer that its work in respect of introducing the defender to MH, due diligence and developing the parties' assessment of MH's assets would be either gratuitous or speculative. The defender encouraged the pursuer to carry out said work in the belief the pursuer would be remunerated for its work. The pursuer relied on the defender's representations as the defender well knew. The defender was accordingly under a duty to exercise reasonable care in respect of the pursuer's interests. The defender knew the pursuer was incurring expenditure and using its resources and staff with a view to being remunerated by the defender. The defender's negligent misrepresentations induced the pursuer to introduce MH to the defender and carry out the aforementioned work. The pursuer suffered loss and damage as a result of either the defender's said careless statements or said careless actings or both."

[17] The unjust enrichment case is in article 5:

> "Further and separately, the pursuer carried out said work and expended resources with the defender's knowledge, consent and encouragement. The parties' contractual relationship in the event it did not amount to an agreement for an introduction fee (which is denied) nonetheless gave benefit to the defender who did not require to pay any introduction fee to any third party. The defender knew the pursuer did not carry out said work and expend resources gratuitously. The defender benefitted from the pursuer's said work and expenditure of resources by enabling the defender's acquisition of the above named hotels. But for the pursuer's said work and expenditure the defender would not have made the MH acquisitions. Accordingly the pursuer is entitled to recompense."

[18] In article 6(i) the pursuer avers that the defender's breach of contract, and separately its negligent actings, caused it loss:

> "The pursuer was not paid the introduction fee to which it was entitled. An introduction fee at a level of 1% of transactions entered into by the defender with MH was agreed and in any event is the industry standard rate. Accordingly the pursuer is entitled to be paid £912,000 which is the sum first concluded for."

Here, the pursuer appears to be averring that it is contractually entitled to payment of the sum first concluded for, as distinct from damages of that amount.

[19] The pursuer then goes on to aver, in article 6(ii):

> "Alternatively the defender's breach of contract negligent actings (*sic*) caused loss and damage to the pursuer. The pursuer's exclusion from the MH acquisitions by the defender's actings caused the pursuer to receive no remuneration for its expended time and resources. Further the pursuer expended time and resources to a value of £169,923 in advancing the acquisitions from which the defender benefitted. The pursuer's loss and damage is reasonably estimated at the sum first[1] concluded for."

No specification is given anywhere in the summons of how the figure of £169,923 has been arrived at; nor, perhaps more fundamentally, of how it is broken down as between work which was done in relation to the three hotels purchased by the defender, and work which was done pursuing the abortive joint venture. (By way of example, it is common ground that in early May 2019, Mr Stewart and Mr Allen visited some 22 hotels in four days: given that the defender is said ultimately to have purchased only three hotels, in respect of which the pursuer is seeking payment/damages, it is unclear on what basis the expenditure incurred in relation to the other 19 hotels (assuming that the hotels purchased were included in the 22) would be recoverable by the pursuer. On the pleadings, there is no way of telling whether that expenditure is in fact included in the sum of £169,923 and, if so, what the basis of the pursuer's claim is; in particular, since it is presumably expenditure which would have

[1] Counsel for the defender conceded that this should be a reference to the sum second concluded for.

been incurred in any event absent any breach of the joint venture agreement, it is unclear on what basis that sum is recoverable by way of damages.)

[20] The quantification of the recompense claim is set out in article 6(iii):

> Separately the pursuer is entitled to recompense in respect of work done and resources expended. But for the pursuer's said work and resources the defender would not have been able to have its affiliates acquire the Rusacks and Randolph hotels. The pursuer would normally be entitled to an introduction fee in respect of said acquisitions. The pursuer is entitled to an acquisition fee in respect of said acquisitions The defender had it not received the benefit of the pursuer's efforts it (*sic*) would have required to employ another third party to obtain introductions to the Scottish market and in particular MH. It would have required to pay introduction fees. The industry standard is for introduction fees to be paid at 1% of the acquisition price. The acquisition prices for the Marine, Rusacks and Randolph hotels are stated by the defender to be a total of £91.2m. Accordingly the pursuer is entitled to payment of £912,000 by the defender which is the sum first concluded for."

In these averments, the pursuer clearly asserts that (if there was no contract) it is entitled nonetheless to recover what would have been the introduction fee on the basis of recompense (although the reference to work and resources, in the second sentence, which are the words used in 6(ii), might otherwise have suggested that if there was a claim in recompense at all, it was in relation to the sum second concluded for of £169,923).

[21] Finally, it is necessary to look at the pursuer's pleas-in-law since these ought to set out the propositions in law on which the action is founded and to clarify whether the pursuer's action is truly one of payment, or damages. Insofar as material, they are in the following terms:

> "2. The defender having acted in breach of contract et separatim delictually as condescended on to the pursuer's loss and damage decree should be pronounced as first concluded for.
>
> 3. Alternatively the defender having acted in breach of contract et separatim having negligently made representations et separatim acted as condescended on decree should be pronounced as first concluded for.

> 4. The sum first concluded for, alternatively the sum second concluded for, being a reasonable estimate of the pursuer's loss occasioned by the defender's breach of contract et separatim delict decree should be pronounced as concluded for.
>
> 5. The pursuer being entitled to recompense as condescended on decree should be pronounced as first concluded for."

[22] Pleas 2, 3 and 4 all suggest that the sum first concluded for – £912,000 – represents damages arising out of both a breach of contract and a delictual wrong. As already noted, counsel for the pursuer acknowledged that any sum due in delict would require to be quantified on a different basis. Plea in law 4 suggests that the sum second concluded for - £169,923 – is sought as damages in the alternative. The conclusions and averments are to the opposite effect. Plea in law 5 states that the foundation for the sum first concluded for is recompense. The pleas tend to obfuscate, rather than clarify, the legal basis of the action. One further small point is that the reference in plea in law to the defender having "acted as condescended upon" is so vague as to be meaningless.

Jurisdiction

[23] Having set out the pleadings at some length, including the averments about recompense, I now turn to consider the plea of no jurisdiction in relation to that claim.

[24] Section 20 of the Civil Jurisdiction and Judgments (Scotland) Act 1982 provides, insofar as material:

> "**20 Rules as to jurisdiction in Scotland.**
> (1) Subject to Parts I and II and to the following provisions of this Part, Schedule 8 has effect to determine in what circumstances a person may be sued in civil proceedings in the Court of Session…
> …
> (5) In determining any question as to the meaning or effect of any provision contained in Schedule 8 —
>
> (a) regard shall be had to any relevant principles laid down by the European Court in connection with Title II of the 1968 Convention or Chapter

II of the Regulation and to any relevant decision of that court as to the meaning or effect of any provision of that Title or that Chapter; and

(b) without prejudice to the generality of paragraph (a), the expert reports relating to the 1968 Convention may be considered and shall, so far as relevant, be given such weight as is appropriate in the circumstances.

(6) The requirement in subsection (5)(a) applies only in relation to principles laid down, or decisions made, by the European Court before IP completion day."

[25] In accordance with section 20(1), schedule 8 of the Act sets out the rules as to jurisdiction in Scotland. Rule 1, the general rule, is that persons shall be sued in the courts for the place where they are domiciled. There follow various special rules, including rule 2(b), upon which the pursuer founds. It provides that persons may also be sued, in matters relating to a contract, in the courts for the place of performance of the obligation in question.

[26] The issue in this case is whether the pursuer's claim for recompense upon the basis of unjustified enrichment can be said to be in a matter relating to a contract.

[27] Before considering that issue, two preliminary observations fall to be made. First, senior counsel for the pursuer confirmed more than once that the pursuer's unjustified enrichment case is founded on the premise that it is ultimately established that there was no contract between the parties for the payment of an introduction fee. Second, subsections (5) and (6) of section 20, read together, require this court, in considering whether the claim for recompense falls within rule 2(b) properly construed, to have regard to any relevant principles laid down by the European Court before IP completion day (which by virtue of section 39(1) of the European Union (Withdrawal Agreement) Act 2020, read with section 5 and schedule 1 of the Interpretation Act 1978 means 31 December 2020 at 11pm).

[28] Returning to the issue at hand, the parties agree that recompense is a remedy available to a pursuer under the law of unjust enrichment (*Shilliday* v *Smith* 1998 SC 725),

and that ordinarily an action based on unjustified enrichment does not fall within the scope of "matters relating to a contract". In *Kleinwort Benson Ltd* v *Glasgow City Council (No 2)* [1999] 1 AC 153 the House of Lords held by a majority that a claim for restitution of moneys paid under a purported contract subsequently accepted by both parties as being void *ab initio* did not fall within article 5(1) of schedule 4 to the 1982 Act as being in "matters relating to a contract". While that was an English case concerning the interpretation of schedule 4 (which deals with intra-UK jurisdiction, article 5(1) of that schedule corresponding to rule 2(b) of schedule 8) counsel accepted that it was highly persuasive in a Scottish context. It was followed by Lord Eassie in *Eddie* v *Alpa Srl* 2000 SLT 1062.

[29] Where the parties differ is how, if at all, *Kleinwort Benson* falls to be applied to the present case. Counsel for the defender submitted that there was no real difference between a situation where a purported contract had been entered into which was subsequently agreed (or held) to be void *ab initio*, and one where there simply never was any contract in the first place, as was the case here (since the recompense claim would only arise if the court had first held that there was no contract). That being so, the recompense claim was not in a matter relating to a contract and so the court did not have jurisdiction under rule 2(b).

[30] In response, counsel for the pursuer submitted that *Kleinwort Benson* was distinguishable since there, unlike here, it had been agreed that the contract was void; and, under reference to European authority, that a broader approach should be taken. The essence of that approach was that where there was a close link to a contractual relationship but no concluded contract, a claim for recompense or restitution was a claim in a matter relating to a contract. The first case founded upon in support of this submission was *Profit Investment Sim SpA* v *Stefano Ossi* (2016) case C-366/13, [2016] 1 WLR 3832, an action concerning annulment of a contract and return of moneys paid under it. The court held,

first, that under the rule in question, the court had jurisdiction to consider whether or not a contract existed (paragraph 54) and, second, at paragraph 55, that:

> "if there had not been a contractual relationship freely assumed between the parties, the obligation would not have been performed and there would be no right to restitution. That causal link between the right to restitution and the contractual relationship is sufficient to bring the action for restitution within the scope of matters relating to a contract."

Counsel also referred to *Hrvatske Sume* v *BP* (2021) C-242/20, [2022] I.L.Pr 9 (which unlike *Profit Investment*, post-dates the IP completion day). In that case the court reaffirmed the general principle that a claim for restitution did not fall within "matters relating to a contract" (paragraphs 45, 51) but also held (following *Profit Investment*) that a claim for restitution may be so closely linked to a pre-existing contractual relationship as to be regarded as coming within matters relating to a contract (paragraph 51).

[31] In relation to *Hrvatske Sume* the first question for me is whether I should have regard to it at all, since it was decided after the IP completion day. However given that it refers to, and follows, a case to which I do have to have regard it would be artificial to ignore it. Both cases are therefore useful in construing schedule 8, but need not be applied with their full rigour: *cf Kleinwort Benson*, per Lord Clyde at page 178G.

[32] Since Lord Goff, for one, in *Kleinwort Benson* expressed the view, at page 167E to F, that there may be exceptional cases where a claim in restitution is nevertheless based on a contractual obligation, there is not necessarily any tension between that case, and the European cases. Both lines of authority are to the effect that the general principle is that a restitutionary obligation is not a contractual one, although the European cases would perhaps entertain more by way of exception to that general principle. However, where the argument for the pursuer founders is on its reliance merely on some sort of amorphous contractual relationship between the parties, short of an actual contract, such as to create a

link between that relationship and the claim for recompense. Rule 2(b) refers to matters relating to "a" contract – that is, a particular contract – and it is insufficient simply to aver that the parties' dealings were contractual in nature without specifying what the contract between them was. In *Profit Investment* and *Hrvatske Sume* it was possible for the court to specify what the particular pre-existing contractual relationship was.

[33] The question of whether or not a contract exists is essentially a binary one. As Lord Clyde said in *Kleinwort Benson:*

> "Where one party is claiming that there is a contract and is seeking some remedy in respect of the performance or the non-performance of its obligations and the other party is resisting the claim on the ground that there has never been a contractual relationship between them article 5(1) should be available. In such a case if the court holds that there never has been a contract its jurisdiction will not extend beyond the decision on that point. If on the other hand it holds that a valid contract has been constituted its jurisdiction to entertain the dispute will be affirmed."

[34] So it is here. The pursuer contends that the parties entered into a contract for the payment of an introduction fee, which the defender disputes. If the pursuer succeeds, the court will have jurisdiction under rule 2(b). If it does not succeed, then there will never have been a contract between the parties, and that factual scenario is indistinguishable in any meaningful sense from the situation in *Kleinwort Benson* where there was a purported contract which turned out to have been void all along. If anything, the facts in this case (should the court find there never was a contract) are *a fortiori* of those in *Kleinwort Benson.* Both scenarios are readily distinguishable from the case where there is an identifiable pre-existing relationship between the parties, or where questions of annulment (or perhaps reduction of a voidable contract) are involved.

[35] A further reason for holding that the present case is *a fortiori* of *Kleinwort Benson* is that in that case there was at least a purported contract to which regard could be had in deciding what the place of performance of the supposed obligation was to be (see the

reference to the judgment of Millett LJ at page 168 of the report). Where there has never been a contract, that exercise is not possible: how is the court in those circumstances to determine what the place of performance of the obligation in question was?

[36] Ultimately the pursuer's argument rests on there being some form of nebulous hinterland between the realms of contract and no contract such that there can be said to be a contractual relationship between them even though there is no contract. I do not consider that such a hinterland could, or does, exist. To have a contractual relationship with someone necessarily entails that there is a contract. If parties enter discussions with a view perhaps to entering into a contract, but do not in fact do so, then there is no contractual relationship. If two persons have dealings but do not enter into a contract, there is no contractual relationship. On the hypothesis that there was never a contract concluded between the parties here, where no pre-existing contractual relationship is founded upon, the authorities, domestic and European, are all to the effect that rule 2(b) does not apply.

[37] I therefore find that this court has no jurisdiction to entertain the pursuer's case insofar as it is founded on recompense. Consequently the defender's first plea in law will, to that extent, fall to be sustained.

Relevancy and specification

Overview

[38] I have already identified many of the criticisms which counsel for the defender had of the pursuer's pleadings, which he described, somewhat colloquially, as a guddle. The response of counsel for the pursuer was that it was not the pleadings which were a guddle but the underlying factual matrix which was confused, and that the appropriate course was

to allow a proof before answer, particularly in the context of a commercial action, in which abbreviated pleading was encouraged.

[39] While I would express it differently, counsel for the defender has a valid point. The fundamental problem with the pursuer's case is not that its pleadings are brief but that it invokes a number of different, and in some respects contradictory, legal principles without nailing its colours to any particular mast. As it is, one is left floundering in vain when attempting to answer the following questions (there may be others). Is the case based on an agreement to pay an introduction fee, a joint venture, or both? Is the sum first concluded for a payment which the defender is contractually obliged to pay or damages? (It cannot be both, even if the amount arrived at by different routes is the same.) If the pursuer is successful in recovering the sum first concluded for, on what basis is it entitled also to recover the sum second concluded for (since it would then have been fully remunerated, by damages or otherwise, for the work which it did)? Further, insofar as the case is based on breach of an alleged joint venture agreement, it would appear that the pursuer has failed properly to recognise (or at least, to take into account in its quantification of damages) that the joint venture, had it proceeded, could only ever have done so in relation to the Marine Hotel. That is because the pursuer accepts that Rusacks and the Randolph were never to be part of the joint venture, and because the acquisition of the other hotels did not proceed at all, which cannot be laid at the defender's door. So, if there was a wrongful exclusion of the pursuer from the joint venture in breach of contract, that can only have been in relation to the Marine. And yet, the sum first concluded for includes 1% of the purchase price of the Marine. That may or may not be something to which the pursuer is entitled, depending on the precise terms of the agreement to pay an introduction fee, but if it is so entitled, why should it then receive anything further by way of damages? And if it is not so entitled what

loss was caused to the pursuer by its exclusion from the Marine purchase? It cannot be the sum second concluded for, since on any reading of the pleadings that is intended to compensate the pursuer for all of the work it did (which will therefore include not only work in relation to Rusacks and the Randolph, but also work in relation to the abortive joint venture).

[40] These criticisms are not tempered by the fact that the action is a commercial action. If anything they are exacerbated, in that by the time a commercial action reaches debate, the court is entitled to expect that the issues will have been properly focussed and analysed, and can be readily understood, or at least gleaned, from the pleadings. Accordingly, the action cannot be allowed to continue in its present form. Before reaching a decision as to whether parts of the case might be excised from the pleadings, leaving the remaining parts to go to proof before answer, the individual branches of the case require to be examined.

The contract case

[41] In fairness, the pleaded contract case starts reasonably well. To the extent that it founds upon an agreement to pay a 1% introduction fee on hotels to be purchased outwith the joint venture, said to have been entered into between two named individuals in February 2019, it is relevant and provides sufficient specification as to give fair notice of what the pursuer alleges was agreed and when. That said, as further pleadings about that agreement are introduced it becomes unclear what the precise express terms of the agreement are said to have been, which terms (if any) are sought to be implied, and how, if at all, the initial agreement was subsequently modified by the joint venture agreement. Nonetheless, the reader can follow a link between the pursuer's averments and the first conclusion, and if the averments ended there, a proof before answer might well have been allowed from the

outset, possibly coupled with an order for further specification of the claim (and some tidying up of the pleas in law, which on any view remain difficult to reconcile with the factual averments).

[42] However, the pursuer's averments do not end there and as I have already observed, the contract case then becomes muddled by the introduction of averments about the joint venture agreement. There is a complete disconnect between the averments about breach of that agreement (if that is what the averments are) and the sum sued for. While there was at least a logic to the pursuer's original position – that it had lost the profit it would have made from the joint venture – there is no logic (nor does it appear to be correct in law) that the pursuer should be entitled to recover the sum which would have been the introduction fee, by reason of the joint venture not having proceeded.

[43] I therefore find that to the extent that it contains averments about both the joint venture agreement, and its breach, the pursuer's contract case is irrelevant and lacking in specification.

The delict case

[44] The delict case is founded on the premise that the defender's statement that the pursuer would be remunerated was made negligently causing the pursuer to do work which it would otherwise not have done. On one view I need say no more than that senior counsel conceded there was a "lacuna" in this branch of the case, in that he accepted that the proper approach to quantification of damages would be to ascertain (and plead) what the pursuer would have done had no such statement been made (presumably, as counsel for the defender submitted, it would have done no work in which event, its loss would be quantified by valuing the work done, at least in relation to those hotels which were

ultimately purchased, whether on a time and line basis, or otherwise). It would not have been entitled to an introduction fee, yet that is the sum currently sued for.

[45] More fundamentally, I accept the defender's submission that there is no relevant averment of any misrepresentation. A misrepresentation must be an inaccurate statement of fact, not simply an expression of future intent. A future intention to pay remuneration is not a relevant misrepresentation. As *Gloag on Contract* (2nd edition) puts it at 464:

> "…in no event is an expression of actual intention a misrepresentation; it is either a contractual obligation, or it has no legal effect."

[46] Of course, as Gloag also makes clear, if someone misrepresents their intentions, that is actionable, but despite senior counsel for the pursuer making several colloquial references at the debate to the pursuer "having been led up the garden path", there are no averments that the defender fraudulently misrepresented its intentions to the pursuer, nor has there been any suggestion of dishonesty. Indeed, the pleadings are to the contrary effect, namely, that the defender did change its mind with regard to the pursuer's involvement in the joint venture because of the intervention of Mr Macdonald of MH. A change of mind is not redolent of a representation which was false from the outset.

[47] For these reasons, the pursuer's case insofar as founded upon delict/fraudulent misrepresentation is also irrelevant and lacking in specification.

The recompense case

[48] Aside from the jurisdictional issue, the pursuer's recompense case is in any event pled in such vague and unspecific terms as to be irrelevant. As Lord Rodger put it in *Shilliday* v *Smith*, above, if a person spends money or otherwise acts in his own interest, but his expenditure or actings incidentally benefit someone else, the first person cannot seek any

payment from the other on the basis that his expenditure or actings have resulted in a benefit to that other person. The point made by senior counsel for the pursuer as I understood it was that the defender had not received an incidental benefit since the work was done for its benefit and was never meant to be gratuitous, but that does not satisfactorily answer the defender's point that at least some of the work undertaken by the pursuer must have been for its own benefit in relation to the joint venture, and as I have already pointed out, no specification is given of the breakdown of the pursuer's work; how much relates to work it had to do for the proposed joint venture; and (which may be the same thing) how much of it relates to work for the acquisition of the hotels which never proceeded.

[49] Additionally, while one can at least follow the logic of a recompense claim for the sum second concluded for of £169,923 it is entirely unclear on the pleadings how a claim in recompense would justify payment of an amount equivalent to an introduction fee which (on this hypothesis) was never agreed.

[50] Accordingly, I also hold that the recompense case is irrelevant and lacking in specification.

Disposal

[51] Tempted as I am to dismiss the entire action as irrelevant and lacking in specification, I return to the comment I made above, that had the pursuer's contract case ended with the averments about the introduction agreement, it might have been suitable for proof before answer in respect of the sum first concluded for (subject to some tidying up of the pleas in law, and perhaps greater specification of which terms are said to be express, and which are said to be implied). I also acknowledge (as in fairness did the defender) that if

there was an agreement that the pursuer would be remunerated, but no agreement as to price, the pursuer would have a contractual *quantum meruit* claim, and that beneath the muddy waters of its present pleadings there may be lurking the basis of a legally sound case based upon contract.

[52] Accordingly, while I do propose to exclude from probation the averments relating to breach of the joint venture, the delict case and the recompense case, and in due course to sustain the defender's second plea in law to that extent, I will not dismiss the action at this stage. Instead I will put it out by order to discuss with parties the precise terms of the order to be made, and thereafter, having ascertained the pursuer's intentions in light of this opinion, to regulate further procedure.