Neutral Citation Number: [2022] EWHC 3098 (Ch)

CR 2018 010778

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
INSOLVENCY AND COMPANIES LIST

IN THE MATTER OF ETHOS SOLUTIONS LIMITED
AND IN THE MATTER OF THE INSOLVENCY ACT 1986

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

Date: 08/12/2022

Before :

ICC JUDGE BARBER

- -

Between :

CHRISTOPHER PURKISS
(as Liquidator of Ethos Solutions Limited)

Applicant

- and –

TIM KENNEDY & 34 OTHERS

Respondents

- -

Hugh Sims KC and Simon Passfield (instructed by **Clarke Willmott LLP)** for the Applicant
Setu Kamal for the Ethos Respondents

Hearing dates: 16 June 2022, 2 September 2022, 18 and 21 October 2022

- -

Approved Judgment

This judgment was handed down remotely by email. It will also be sent to The National Archives for publication. The date and time for hand-down is 9.30a.m. on 8 December 2022

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ICC Judge Barber

1. On 13 December 2018, Ms Michaela Hall, as liquidator of Ethos Solutions Limited ('the Company') issued an application ('the Main Application') pursuant to s.423 of the Insolvency Act 1986 seeking to challenge payments in the total sum of approximately £9 million alleged to have been made by the Company to sixty-two respondents ('R1-R62') via a business benefit trust ('the Trust') of which the sixty-third respondent was the trustee company.

2. By application dated 8 June 2022, Mr Purkiss, who has since replaced Ms Hall as liquidator, now seeks permission to re-amend the Main Application (i) to add the Company as the second applicant and (ii) to plead additional, alternative claims in unjust enrichment ('the Re-Amendment Application'). The Re-Amendment Application is opposed by a number of remaining respondents collectively referred to as 'the Ethos Respondents'.

Background

3. The background to this matter is set out in my earlier judgment dated 4 February 2021, reported at [2021] EWHC 142 (Ch) and [2021] BPIR 550.

4. In brief summary, the Company was an 'umbrella' company which ran a business benefit trust scheme from 2008 to 2012. Under the terms of the scheme, the respondents received a modest 'PAYE' salary from the Company and the balance (net of various commissions and expenses) by way of discretionary loans made from an offshore trust.

5. At the time that the Company was incorporated, the courts did not accept HMRC's views on the tax consequences of loan schemes. In Sempra Metals Ltd v Revenue and Customs Commissioners [2008] STC (SCD) 1062, the court had rejected the argument that loans made by an employer's EBT were subject to income tax.

6. HMRC made some progress in 2010. On 29 October 2010, judgment was handed down in the case of Aberdeen Asset Management Plc [2010] UKFTT 524 (TC). This case was slightly different on the facts, (involving monies paid by the employer which ultimately, via a series of steps, found their way to a 'cash-box' company in which the relevant employee was sole shareholder), but the rhetoric was Ramsay; see, by way of example, the Aberdeen Asset judgment at [48]:

> "Gone are the days, and rightly so, when a taxpayer could elide the literal interpretation of a taxing statute by a complex series of prearranged transactions, involving an almost impenetrable jungle of companies, trusts and shareholdings with each participant following a well scripted plan … designed to defeat the Revenue's fiscal claims. The law is no longer impressed, if it ever was, by superficial facts and apparent discretions … The law looks through these arrangements, identifies the substance of the transaction (by viewing the facts realistically), and considers whether they fall within the taxing provision in issue, construed purposefully …"

7. At [54] of the judgment in Aberdeen Asset, the tribunal further concluded that it did not matter if the payment to the cash-box company was made by the employer or by the EBT. Subsequent appeals to the Upper Tribunal and to the Court of Session were later dismissed.

8. On 9 December 2010, the government published draft legislation designed to tackle loan schemes, alongside a written ministerial statement, warning that anti-forestalling provisions would apply between 9 December 2010 and 5 April 2011 to any payments which would be caught by the legislation if paid after 6 April 2011.

9. In January 2011, the Company modified the Scheme. The modifications included the introduction to the Scheme of a business registered in Jersey known as Scope Self Employment Jersey ('Scope'). The Ethos Respondents contend (inter alia) that following the introduction of Scope, the Company ceased to be 'employer'. The Liquidator disputes this.

10. On 10 June 2011, HMRC wrote three letters to the Company and its accountants, Magee Gammon Partnership LLP. These letters confirmed (1) that HMRC would be checking the Company's CTSA (corporation) tax returns for the period 20/12/08 – 19/12/09 and 20/12/09-31/12/09; (2) that such checks would include 'all arrangements involving the Employee Benefit Trust (EBT)'; (3) that the enquiry into the EBT would be carried out by Special Investigations Liverpool under Code of Practice 8; and (4) that a VAT visit would take place in July 2011.

11. HMRC's letter of 10 June 2011 to Magee Gammon also enclosed a detailed list of questions. One question related to the deduction of £2,110,911 from the profit and loss account as an expense in respect of the contribution made to the Trust in the year ending 31 December 2009, asking how the directors considered the presumptions imposed by UITF 32 to be rebutted.

12. UITF 32 was a financial reporting standard covering EBTs which provided that when an entity transferred funds to an intermediary, there should be a rebuttable presumption that the sponsoring entity has exchanged one asset for another and that the payment itself did not represent an immediate expense. This was a potential line of attack on the deductions which the Company had made for corporation tax purposes in respect of sums contributed to the Trust.

13. Shortly thereafter, by letter dated 27 June 2011, HMRC's Specialist Investigations team wrote to the Company, stating that it was opening an enquiry into the EBT scheme operated by the Company in respect of 2008/9. The letter referred to recent developments in the case law (Aberdeen Asset Management Plc [2010] UKFTT 524 (TC)) and the potential impact of the new disguised remuneration legislation, by then published in revised form as part of the Finance (No. 3) Bill on 31 March 2011. The letter stated that HMRC would be treating the sums paid to each employee by the Trust or sub-trust as the payment of earnings on which charges to PAYE and NIC would arise, stating that in HMRC's view, the Company had accrued approximately £1,135,670.12 in outstanding liabilities. There is no evidence that HMRC opened an enquiry in respect of the years 2009/10 or 2010/11.

14. In July 2011, the Finance Act 2011 (inserting Part 7A into ITEPA 2003) received Royal Assent. Part 7A, which had been heralded by the government announcement on

9 December 2010, had retrospective effect; it covered 'relevant steps' (as defined) on or after 9 December 2010. In broad terms these included loans made by a relevant trust/sub-trust to an employee on or after 9 December 2010 from ear-marked funds which had been paid to the trust by the employer on or before 9 December 2010.

15. In November 2012, Mr Clark, the sole de jure director of the Company, instructed a firm of insolvency practitioners, CCW Recovery Solutions LLP ('CCW') to take the necessary steps to place the Company into creditors voluntary liquidation. By letter dated 29 November 2012, CCW sent to HMRC notice of a meeting of creditors due to be held on 18 December 2012.

16. On 4 December 2012, HMRC's Specialist Investigations team wrote to the Company, enclosing regulation 80 determinations (PAYE) and a notice of decision (NIC) in respect of the accounting years 2008/9 and 2009/10 ('the determinations'). HMRC did not issue a Regulation 80 determination for the tax year 2010/11 or for the year ending 31 December 2011.

17. On 18 December 2012, the Company entered creditors voluntary liquidation. The Company's creditors comprised (1) trade creditors of approximately £4,500 and (2) HMRC claiming approximately £2.4m. Mr Ian Defty of Kingston Smith & Partners LLP was appointed as liquidator on the vote of HMRC. Mr Defty was appointed within the 30 day period for appealing the determinations, but did not appeal them. Mr Defty was later replaced by Ms Hall as liquidator.

18. In the 2016 budget, the government announced plans to introduce legislation to tackle both historic and ongoing use of loan schemes: Budget 2016, paragraph 1.217 ('the loan charge'). Affected taxpayers could settle, repay any outstanding loans, or pay the loan charge.

19. The loan charge was introduced by the Finance Act (No 2) 2017. When first introduced it could 'look back' 20 years; that is to say, it applied to loans made between 1999 and 2019 which were not paid back by 5 April 2019. It also stacked the loans made into a single tax year, imposing a tax charge in a single year on all outstanding loans, regardless of the number of years over which those loans were entered.

20. In 2017, the Supreme Court in RFC 2012 plc (in liquidation) (formerly The Rangers Football Club plc) v Advocate General for Scotland [2017] UKSC 45 ('the Rangers case') overruled Sempra Metals Ltd v Revenue and Customs Comrs [2008] STC (SCD) 1062. As summarised by Lord Hodge JSC (giving the judgment of the court) at [58]:

(1) income tax on emoluments or earnings is due on money paid as a reward or remuneration for the exertions of the employee;

(2) the governing primary legislation does not require the employee himself or herself to have received the remuneration for income tax to be chargeable;

(3) references in the PAYE Regulations to making a relevant payment to an employee or other payee fall to be construed as payment either to the employee or to the person

to whom the payment is made with the agreement or acquiescence of the employee or as arranged by the employee.

21. By s.15(1) of the Finance Act 2020, paragraph 1 of Schedule 11 to the Finance (No.2) Act 2017 was amended to reduce the 'look back' period for loan charges to 9 December 2010. This followed the Morse Report. It will be noted that notwithstanding these changes, the legislation introduced in 2017 remained of significant retrospective effect.

The Main Application

22. The Main Application was issued on 13 December 2018. It was based solely on s.423 of the Insolvency Act 1986.

23. As originally formulated, the liquidator's claim was set out in her Points of Claim dated 13 December 2018, settled by Mr Sims KC and Mr Passfield ('the POC'). In broad terms, the POC alleged that (i) between 4 March 2009 and 26 March 2012, the Company made payments to a trust ('the Trust') or latterly to an offshore entity known as Scope, in the total sum of £9,032,925.77; (ii) that the payments were for no consideration or at an undervalue (iii) that the monies were subsequently transferred to sub-trusts for the benefit of R1-R62 and were made available to them by way of loans never intended to be repaid; (iv) that the Company's payments to the Trust/Scope were made for the statutory purpose under s.423, the relevant 'victim' being HMRC.

24. The POC covered 3 distinct periods:

(1) Phase 1: 2 February 2009 (the date of the creation of the Trust) to 31 December 2010: POC, para 10. At this stage the Company made payments to the Trust in its own right.

(2) Phase 2: January 2011 to 31 May 2011: POC para 19f. In this phase, it is alleged that the Company made payments to the Trust marked 'Nautilus re Scope'.

(3) Phase 3: 3 June 2011 onwards: POC para 19f. During this phase, it is alleged that the Company made payments to Scope, which then made payments to the Trust.

25. The POC alleged

(a) at para 23(a), that the Company did not receive any consideration for the payments which it made to the Trust, whether directly or via Scope (the 'no consideration' allegation'); and in the alternative,

(b) at para 23(b), that if it did receive any consideration for such payments, the value of the service provided to the Company by the employees was worth significantly less than the payments which the Company made to the Trust (whether directly or via Scope), because the Company was required to deduct PAYE and NIC for such payments but instead paid gross (the 'undervalue allegation').

26. The POC sought either

(a) repayment of all the payments made to the Trust (directly or via Scope) for any given respondent on the basis of the 'no consideration' case, or alternatively

(b) a sum said to be the equivalent of the PAYE/NIC element of such payments, on the basis of the 'undervalue' case.

27. Forty-one of the respondents ('the Ethos Respondents') filed and served Points of Defence in materially identical terms ('the Ethos Defences'), settled with the assistance of Mr Setu Kamal, a specialist tax barrister.

The First Strike-Out Application

28. By Application Notice dated 27 November 2019 (amended on 4 March 2020), the Ethos Respondents applied under CPR 3.4(2)(a) and CPR 3.4(2)(b) to strike out the Main Application ('the First Strike out Application').

29. The First Strike out Application was in very large part successful. In my judgment on that application ([2021] EWHC 142 (Ch); [2021] BPIR 550), I concluded inter alia as follows:

(1) The POC disclosed no reasonable grounds for bringing a claim based on the 'no consideration' allegation pleaded at para 23(a) POC. This allegation (i) was inconsistent with the POC read as a whole and (ii) was ultimately self-defeating, for if the payments to the Trust were not payments 'for services', no PAYE/NIC would arise in any event. The claim, insofar as based on the 'no consideration' allegation, was struck out under CPR 3.4(2)(a).

(2) The POC disclosed no reasonable grounds for including a claim in respect of unpaid PAYE and NIC for the tax year 2020/11 or the year ended 31 December 2011. It was also an abuse of process for the liquidator to have issued a claim in respect of unpaid PAYE and NIC for the year ended 31 December 2011, because no return or assessment in respect of the year ended 31 December 2011 existed and there had been no intimation by HMRC, whether by proof or otherwise, whether before or after the Company's entry into CVL, of a claim in respect of that year. The claim insofar as based on the year ending 31 December 2011 was struck out under both CPR 3.4(2)(a) and CPR 3.4(2)(b).

(3) Whilst I had reservations about the viability of the remainder of the claim covered by the 'undervalue allegation' (ie PAYE and NIC referable to the years 2008/9 and 2009/10), I declined to strike out the undervalue allegation (insofar as it related to tax years 2008/9 and 2009/10, those years being the years covered by the Regulation 80 determinations) and gave the liquidator the opportunity to seek permission to amend.

The Amendment Application

30. On 17 March 2021, the liquidator applied for permission to amend the POC. The hearing of that application took place in June 2021. The Ethos Respondents opposed the amendment application, but permission was granted.

31. The liquidator filed and served her amended points of claim ('APOC') on 29 June 2021. The APOC remained confined to s.423.

32. As a result of the Ethos Respondents' successes in the First Strike out application, (1) the claim against any respondents (including a number of the Ethos Respondents) in respect of any payments made by the Company to the Trust/Scope from 2011 onwards was struck out completely and (2) the total sum claimed by the Main Application shrank from a high point of £9.032m (no consideration) or £4.004m (undervalue) (Schedule 5 to the POC) to £1.1m (undervalue) at most. The bulk of this reduction is a direct result of the First Strike Out Application; whilst a handful of other respondents to the Main Application have settled with the liquidator, the settlement sums received have been fairly modest. As at the date of the last progress report, they totalled £158,932.58.

33. On 6 October 2021, the remaining Ethos Respondents (who now number approximately 27) filed and served their Amended Points of Defence ('the APOD'). At paragraph 29(h) of the APOD, one of the points raised, in answer to the undervalue allegation, was that

> 'Even had the Company operated PAYE, it ought to have had the right to be paid back by the employees under the common law rule whereby anybody who has been forced to meet the liability of another is entitled to seek it back'

34. On 4 November 2021, the liquidator filed and served Points of Reply to the APOD. At paragraph 14 of the Points of Reply, the restitution point raised by the Ethos Respondents at paragraph 29(h) of their APOD is acknowledged but rejected as 'disingenuous', on the basis that the Ethos Respondents hadn't offered to pay the liquidator.

CMC: December 2021

35. A CMC was listed for hearing on 3 December 2021. In the run-up to that hearing, the Ethos Respondents made clear that they intended to issue a second strike out application. At the CMC on 3 December 2021, Deputy ICC Judge Agnello ordered (inter alia) that

(1) the second strike out application should be listed before me if possible on the first available date after 3 January 2022;

(2) the parties were to file and serve witness evidence of all persons on whose evidence they intended to rely at trial by 4pm on 31 May 2022; and

(3) that the Main Application would be listed for a further CMC on 16 June 2022.

The Second Strike-Out Application

36. The second strike out application of the Ethos Respondents was dismissed on 1 March 2022.

Subsequent Developments

37. On 6 April 2022, ICC Judge Prentis handed down judgment following a trial in a case called Re Marylebone Warwick Balfour Management Limited [2022] EWHC 784 (Ch). This was an application brought by Mr Hunt as liquidator against several respondents said to have received remuneration via a tax avoidance scheme which had resulted in approximately £27m of PAYE and NICs going unpaid. The application, which was in part based on s.423, was dismissed on the ground, inter alia (at [293]), that the liquidator had not made out his case on statutory purpose, there being a difference between purpose and consequence.

38. On 19 April 2022, Mr Purkiss replaced Ms Hall as liquidator.

39. On 26 May 2022, Mr Purkiss filed his witness statement for trial, in accordance with the directions given on 3 December 2021. The witness statement had a single exhibit of over 2600 pages, although the bulk of the correspondence passing between the Company/its accountants and HMRC over the period 2011 to 2012 was not included in it (and I am told is missing from the Company's books and records).

40. By the concluding paragraph of his statement of 26 May 2022, Mr Purkiss stated:

> 'In the circumstances, and as set out in the APOC, I invite the court to declare that the transactions which formed part of the Scheme, and to which the Company and the Respondents were party to [sic], were transactions defrauding creditors under section 423 of the Insolvency Act 1986 and to make the payment orders sought against the Respondents as set out in the APOC.'

41. At this stage (26 May 2022) no mention was made of any intention to seek permission to pursue an alternative claim in restitution.

42. Less than two weeks later, on or around 6 June 2022, Mr Purkiss decided to apply for permission to add the Company as a second Applicant and to re-amend to include an alternative claim in restitution.

The Re-Amendment Application

43. The Re-Amendment Application is supported by the third witness statement of Sonal Crocker of the Applicant's solicitors. At paragraph 13, Ms Crocker stated that:

> 'Having considered the APOD, and also the arguments raised by counsel for the Ethos Respondents, Setu Kamal ('Mr Kamal'), during the hearing of the Second Strike Out, the liquidator (with the assistance of legal advisers), has identified additional or alternative new claims against the remaining Respondents. Those additional or alternative claims are claims in unjust enrichment. As such, the liquidator has caused to be prepared a draft re-amended point of claim ('RAPOC')… The main proposed amendments to introduce these new claims, without prejudice to the primary section 423 claim, are set out

> in paragraph 26A to 26C inclusive. Two unjust enrichment claims are identified: the first is based on mistake of law; the second is based on payment under compulsion of law. The amount sought is the same as is currently claimed and against the same Respondents.'

44. Mr Kamal maintains that the real reason for the change of tack is the realisation by the Applicant's legal team of the 'futility' in pursuing the s.423 claim (R's skeleton argument, paragraph 15). Mr Sims KC refutes this, insisting in submissions that the s.423 claim remains the Applicant's 'primary case'.

45. The first that the Ethos Respondents heard of the Applicant's intention to apply for permission to re-amend was on 6 June 2022, when the Applicant's solicitors wrote to Mr Kamal, inviting him to consent to the proposed amendments. Mr Kamal emailed back the same day, refusing consent and raising, among other things, limitation.

46. Ms Crocker commented on this email at paragraph 18 of her statement, where she states:

> 'As to the alleged limitation defence, again Mr Kamal does not elaborate on this in his email and so it is difficult for me to respond to this point in any detail here. Even if it may be said a primary limitation period has expired the Applicant is likely to be entitled to rely on the benefit of section 32(1)(c) of the Limitation Act 1980, which provides that where the action is for relief from the consequences of a mistake, the period of limitation shall not run until the plaintiff has discovered the mistake or could with reasonable diligence have discovered it. Further, to the extent necessary the liquidator will also rely on CPR 17.4(2) which provides that the court may allow an amendment, even if a limitation period has expired, if the new claim or claims arise out of the same facts or substantially the same facts as the existing claim. The proposed new claim or claims as set out in the draft RAPOC clearly do so.'

47. As the Re-Amendment Application was issued on 8 June 2022, very shortly before the CMC already listed for 16 June 2022, it was listed to come on at the same time as the CMC for initial consideration. On 16 June 2022 I dealt with one minor, uncontroversial aspect of the Re-Amendment Application (the joinder of Mr Purkiss as applicant in place of his predecessor Ms Hall). The balance of the Re-Amendment Application was then adjourned with further directions to come on for final hearing.

The proposed amendments

48. The draft RAPOC provide for the addition of the Company as second applicant. The proposed amendments in the body of the pleading are set out in the draft RAPOC at paragraphs 26A, 26B, 26C and 26D. These read as follows:

> "Unjust Enrichment

26A Further, or in the alternative, and without prejudice to the matters pleaded above, or matters pleaded in reply to any defences or amended defences, the Respondents are liable to the Company by reason of unjust enrichment, for the reasons set out in paragraphs 26B to 26D below.

26B By reason of the Company making the payments particularised in amended schedule 2 hereto, the Employee Respondents, Mr Webster and M Merifield were enriched at the Company's expense in the sum identified against their name in amended schedule 1. Paragraphs 3 to 16, 21 and 22A above are repeated.

26C It would be unjust for the Employee Respondents, Mr Webster and Mr Merifield to retain the benefit of the said enrichment, as set out in the sum stated in amended schedule 1, because

a. the payments were made under a mistake of law. In particular:

(i) at the time when it made the said payments, the Company believed, on the basis of the decisions in Dextra Accessories Ltd v Macdonald [2002] STC (SCD) 413 and Sempra Metals Ltd v Revenue and Customs Commissioners [2008] STC (SCD) 1062, that it would not be liable to deduct and pay income tax and NIC on the monies which it paid to the Trust under the Scheme;

(ii) as particularised in paragraph 12 above, the Supreme Court in RFC 2012 Plc (in liquidation) (formerly The Rangers Football Club plc) v Advocate General for Scotland [2017] UKSC 45 subsequently confirmed that such belief was incorrect;

(iii) had the Company known that this was the case at the time when it made the said payments, it would either not have operated the Scheme (and thus not made the payments as set out in amended schedule 2), or would have deducted the income tax and NIC which it was liable to pay to HMRC on the Employee Respondents', Mr Webster's and Mr Merifield's behalf from the monies which it paid to the Trust for their benefit, as set out in amended schedule 1;

(iv) accordingly, the said payments under amended schedule 2 or such part of them as is equivalent to the liabilities under amended schedule 1, were made by the Company under a causative mistake of law; and/or

b. the Company became compelled by law to pay HMRC as a result of the payments. In particular:

> (i) by making the said payments, the Company became compelled by law to pay to HMRC the sum set out in amended schedule 1 which the Employee Respondents, Mr Webster and Mr Merifield were ultimately liable to pay, by reason of the benefit derived by those Respondents in the sum of the payments set out in amended schedule 2;
>
> (ii) this payment liability resulted in the Company entering into liquidation as pleaded more generally above;
>
> (iii) in consequence, the Employee Respondents, Mr Webster and Mr Merifield are liable to indemnify the Company in respect thereof either (a) due to the Company being wound up in the circumstances above or (b) on payment of such liability by the Company.
>
> 26D In the premises, the Company seeks declarations as to unjust enrichment and/or the obligation to indemnify, and the personal restitutionary remedy of an order requiring each of the Employee Respondents, Mr Webster and Mr Merifield to repay to the Company the sum identified against their name in amended schedule 1 hereto."

49. Consequential amendments are proposed to the Prayer for Relief, the draft RAPOC proposing a new paragraph 4 and 5 to the Prayer, as follows:

> '(4) Further or alternatively, a declaration that the Respondents have been unjustly enriched at the Company's expense by reason of the payments to the Trust particularised in amended schedule 2 hereto to the extent of the sums set out in amended schedule 1 hereto, and/or are currently liable or will become liable, in the event of payment by the Company, of the said sums.
>
> (5) In consequence, an order requiring that each Respondent do pay to the Company the sum identified in amended schedule 1 hereto (or such lesser sum as stated on schedule 6 hereto in the event that the basic rate is found to apply to any of them) by way of personal restitutionary remedy'

Joinder: CPR 19

50. CPR 19 addresses the circumstances in which parties may be added to proceedings.

51. CPR 19.2 provides:

> '(1) This rule applies where a party is to be added or substituted except where the case falls within rule 19.5 (special provisions about changing parties after the end of a relevant limitation period) (GL).

> (2) The court may order a person to be added as a new party if
>
> (a) it is desirable to add the new party so that the court can resolve all the matters in dispute in the proceedings; or
>
> (b) there is an issue involving the new party and an existing party which is connected to the matters in dispute in the proceedings, and it is desirable to add to the new party so that the court can resolve that issue'.

52. CPR 19.5 sets out special provisions about adding or substituting parties after the end of a relevant limitation period. It provides as follows:

> '(1) This rule applies to a change of parties after the end of a period of limitation under –
>
> (a) the Limitation Act 1980; ….
>
> (2) The court may add or substitute a party only if –
>
> (a) the relevant limitation period (GL) was current when the proceedings were started; and
>
> (b) the addition or substitution is necessary.
>
> (3) The addition or substitution of a party is necessary only if the court is satisfied that –
>
> (a) the new party is to be substituted for a party who was named in the claim form in mistake for the new party;
>
> (b) the claim cannot properly be carried on by or against the original party unless the new party is added or substituted as claimant or defendant; or
>
> (c) the original party has died or had a bankruptcy order made against him and his interest or liability has passed to the new party…'

53. I pause here to note the conjunctive employed in CPR 19.5(2). The opening words of CPR 19.2(2) and 19.5(2) ('the court may…') also confirm that the court has a discretion to refuse an application for addition or substitution even if the threshold requirements are met. That discretion should be exercised in accordance with the overriding objective, including the cost and delay elements contained therein, and should take into account all relevant circumstances, including prejudice to the parties and to other court users.

Amendment: CPR 17

54. CPR 17 sets out the circumstances in which a party may amend his statement of case.

55. Under CPR 17.1(2), if his statement of case has been served, a party may amend it only with the written consent of all the other parties or with the permission of the court.

56. CPR 17.4 addresses amendments to statements of case after the end of a relevant limitation period. It provides as follows:

> '(1) This rule applies where –
>
> (a) a party applies to amend his statement of case in one of the ways mentioned in this rule; and
>
> (b) a period of limitation has expired under –
>
> (i) the Limitation Act 1980; …
>
> (2) The court may allow an amendment whose effect will be to add or substitute a new claim, but only if the new claim arises out of the same facts or substantially the same facts as a claim in respect of which the party applying for permission has already claimed a remedy in the proceedings. …'

57. Again, it will be noted that, even where the new claim does fall within the limits imposed by CPR 17.4(2), the court has a discretion to refuse the amendment.

Section 35 Limitation Act 1980

58. Section 35 of the Limitation Act 1980 provides as follows:

> '(1) For the purposes of this Act, any new claim made in the course of any action shall be deemed to be a separate action and to have commenced–
>
> in the case of a new claim made in or by way of third party proceedings, on the date on which those proceedings were commenced; and
>
> in the case of any other new claim, on the same date as the original action.
>
> (2) In this section a new claim means any claim by way of set-off or counterclaim, and any claim involving either-
>
> (a) the addition or substitution of a new cause of action; or
>
> (b) the addition or substitution of a new party; …
>
> (3) Except as provided by section 33 of this Act or by rules of court, neither the High Court nor the county court shall allow a new claim within subsection (1)(b) above, other than an original set-off or counterclaim, to be made in the course of any

> action after the expiry of any time limit under this Act which would affect a new action to enforce that claim….
>
> (4) Rules of court may provide for allowing a new claim to which subsection (3) above applies to be made as there mentioned, but only if the conditions specified in subsection (5) below are satisfied, and subject to any further restrictions the rules may impose.
>
> (5) The conditions referred to in subsection (4) above are the following –
>
> (a) in the case of a claim involving a new cause of action, if the new cause of action arises out of the same facts or substantially the same facts as are already in issue on any claim previously made in the original action; and
>
> (b) in the case of a claim involving a new party, if the addition or substitution of the new party is necessary for the determination of the original action.
>
> (6) The addition or substitution of a new party shall not be regarded for the purposes of subsection (5)(b) above as necessary for the determination of the original action unless either
>
> (a) the new party is substituted for a party whose name was given in any claim made in the original action in mistake for the new party's name; or
>
> (b) any claim already made in the original action cannot be maintained by or against an existing party unless the new party is joined or substituted as plaintiff or defendant in that action.
>
> (7) Subject to subsection (4) above, rules of court may provide for allowing a party to any action to claim relief in a new capacity in respect of a new cause of action notwithstanding that he had no title to make that claim at the date of the commencement of the action.
>
> This subsection shall not be taken as prejudicing the power of rules of court to provide for allowing a party to claim relief in a new capacity without adding or substituting a new cause of action….'

Caselaw on Joinder/Amendment

59. On the issue of joinder, Mr Kamal referred me to Hassan Khan and Co (A Firm) v Al Rawas [2017] EWCA Civ 42, a case in which Sharp LJ at para [24], cited with approval (and only modest additions at [36] not material here) the following guidance composed by Lord Collins in Roberts v Gill:

> '24. At para 38 of Roberts v Gill Lord Collins summarised so far as relevant to that appeal, the effect of the provisions of section 35, and the Civil Procedure Rules with which section 35 must be read:
>
> (1) A new claim means a claim involving either (a) the addition or substitution of a new cause of action; or (b) the addition or substitution of a new party: section 35(1).
>
> (2) Any new claim made in the course of an action is deemed to have been commenced on the same date as the original action: section 35(1).
>
> (3) No such new claim may be made after the expiry of any applicable limitation period, except as provided by rules of court: section 35(3).
>
> (4) Rules of court may provide for allowing a new claim, but only (a) in the case of a claim involving a new cause of action, if the new cause of action arises out of the same facts or substantially the same facts as are already in issue on any claim previously made in the original action; and (b) in the case of a claim involving a new party, if the addition or substitution of the new party is necessary for the determination of the original action (i.e. any claim made in the original action cannot be maintained by an existing party unless the new party is joined as claimant or defendant): section 35(4), (5), (6). The relevant rules of court are in CPR 17.4 and 19.5.
>
> (5) CPR 17.4(2) has the effect that a new claim may be added by amendment but only if the new claim arises out of the same facts or substantially the same facts as the original claim.
>
> (6) CPR 19.5(2),(3) have the effect (among others) that a new party may be added only if the limitation period was current when the proceedings were started, and the addition of that party is necessary in the sense that the claim cannot properly be carried on by the original party unless the new party is added.
>
> (7) Rules of court may allow a party to claim relief in a new capacity: section 35(7). The relevant rule is CPR 17.4(4), by which the court may allow an amendment to alter the capacity in which a party claims if the new capacity is one which that party had when the proceedings started, or has since acquired'

60. On permission to amend, Mr Sims referred me to Seele Austria GmbH Co v Tokio Marine Europe [2009] EWHC 255 per Coulson J at paragraphs 13 and 14:

> '[13] Generally, a party wishing to amend pursuant to CPR 17.3 will be permitted to do so if:

> a) The amendments have a real prospect of success such that they are properly arguable: see Flexitallic Group Inc v T & N Ltd, 19 December 2001 (QB), unreported;
>
> b) Any prejudice caused by the amendments can be compensated for in costs and the public interest in the administration in justice is not significantly harmed: see Cobbold v Greenwich LBC, 9 August 1999, CA, unreported.
>
> [14] However, a party will not generally be permitted to amend:
>
> a) To add a new claim outside the limitation period, unless it arises out of the same or substantially the same facts as a claim already pleaded (CPR 17.4);
>
> b) To raise a claim which is an abuse of the process of the court, because such a claim would be liable for immediate striking out … ;
>
> c) To raise a claim which is not maintainable in established law (Mandrake Holdings Ltd v Countrywide Assured Group plc [2005] EWCA Civ 638.'

61. Mr Kamal referred me to the more recent case of SPI North Ltd v Swiss Post International (UK) Ltd [2019] EWHC 2004 (Ch) per Mr Andrew Hochhauser QC sitting as a Deputy High Court Judge, at paragraph [5]:

> '[5] The test to be applied in an opposed application to amend a statement of case is the same as the test applied to an application for summary judgement. The question is whether the proposed new claim has a real prospect of success. A real prospect of success is to be contrasted with a "fanciful" prospect of success: see Swain v Hillman [2001] 1 All ER 91. A "realistic" claim is one that carries some degree of conviction. This means a claim that is more than merely arguable see: ED & F Man Liquid Products v Patel [2003] EWCA Civ 472 at [8], applied and approved in Easyair Ltd v Opal Telecom Ltd [2009] EWHC 339 (Ch) at [15].'

62. To the extent that the case of Seele might be taken to suggest a lower threshold for permission to amend ('properly arguable') than that outlined in SPI North Ltd ('more than merely arguable') in the case of a proposed amendment introducing a new cause of action, I shall respectfully follow the approach adopted in SPI North. I am fortified in that decision by the approach adopted by Popplewell LJ (Henderson and David Richards LJJ concurring) in the later case of Kawasaki Kisen Kaisha Ltd v James Kemball Ltd [2021] EWCA Civ 33. This confirms that a proposed amendment must be arguable, carry a degree of conviction, be coherent, properly particularised and supported by evidence that establishes a factual basis for the allegation. As put by Popplewell LJ (Henderson and David Richards LJJ concurring) at [16]-[18]:

> '[16] It was common ground that on an application to serve a claim on a defendant out of the jurisdiction, a claimant needs to establish a serious issue to be tried, which means a case which has a real as opposed to fanciful prospects of success, the same test as applies to applications for summary judgement: Atimo Holdings and Investment Ltd v Kyrgyz Mobil Tel Ltd [2012] 1 WLR 1804 per Lord Collins JSC.
>
> [17] The Court will apply the same test when considering an application to amend a statement of case, and will also refuse permission to amend to raise a case which does not have a real prospect of success.
>
> [18] In both these contexts:
>
> (1) It is not enough that the claim is merely arguable; it must carry some degree of conviction: ED & F Man Liquid Products Ltd v Patel [2003] EWCA Civ 472 at paragraph 8; Global Asset Capital Inc v Aabar Block SARL [2017] 4 WLR 164 at paragraph 27(1).
>
> (2) The pleading must be coherent and properly particularised: Elite Property Holdings Ltd v Barclays Bank Plc [2019] EWCA Civ 204 at paragraph 42.
>
> (3) The pleading must be supported by evidence which establishes a factual basis which meets the merits test; it is not sufficient simply to plead allegations which if true would establish a claim; there must be evidential material which establishes a sufficiently arguable case that the allegations are correct: Elite Property at paragraph 41.'

63. A party will not be permitted to raise by amendment an allegation which is pure speculation or invention.

64. As noted in Seele, a claimant should not be granted permission to amend their claim in order to raise a claim which is not maintainable in established law. The possibility that the Supreme Court may develop or change the law is not sufficient to afford a claimant a real prospect of success at trial and the duty of the court is to apply the law as it stands: Mandrake Holdings Ltd v Countrywide Assured Group Plc [2005] EWHC 311 (Ch).

65. Where there is a dispute as to whether or not a new claim sought to be raised by amendment is statute barred, the claimant must prove (i) that the defendant's limitation defence is not reasonably arguable, or (ii) that, in any case, the amendment falls within the provisions of CPR 17.4 or CPR 19.5. If they cannot establish either (i) or (ii), permission to amend should be refused, leaving the claimant to bring fresh proceedings on the new claim: Chandra v Brooke North [2013] EWCA Civ 1559; Ballinger v Mercer Ltd [2014] EWCA Civ 996.

Grounds of objection

66. Mr Kamal objects to the proposed amendments on four grounds, which may be summarised as (1) Henderson v Henderson (2) no real prospect of success (3) limitation and (4) discretion.

Henderson v Henderson

67. Mr Kamal submitted that the Re-Amendment Application was a violation of the rule in Henderson v Henderson (1843) 3 Hare 100.

68. In Henderson v Henderson (1843) 3 Hare 100 at 114-116, Wigram V-C formulated the following principle which has become known as 'the rule in Henderson v Henderson' or 'the Henderson principle':

> 'where a given matter becomes the subject of litigation in, and of adjudication by, a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permits the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of the case. The plea of res judicata applies, except in special cases, not only two points on which the court was actually required by the parties to form an opinion and pronounce a judgement, but to every point which properly belong to the subject of litigation, in which the parties, exercising reasonable diligence, might have brought forward at the time …'

69. Mr Kamal contends that the rule in Henderson v Henderson requires parties to raise an issue at the 'earliest opportunity', citing Barrow v Bankside Members Agency Ltd [1996] 1 All ER 981 at 983 per Sir Thomas Bingham MR:

> 'The rule in Henderson v Henderson (1843) 3 Hare 100.. is very well known. It requires the parties, when a matter becomes the subject of litigation between them in a court of competent jurisdiction, to bring the whole case before the court so that all aspects of it may be finally decided (subject, of course, to any appeal) once and for all. In the absence of special circumstances, the parties cannot return to the court to advance arguments, claims or defences which they could have put forward for decision on the first occasion, but failed to raise. The rule is not based on the doctrine of res judicata in a narrow sense, not even on any strict doctrine of issue or cause of action estoppel. It is a rule of public policy based on the desirability, in the general interest as well as that of the parties themselves, that litigation should not drag on for ever and that a defendant should not be oppressed by successive suits when one would do. That is the abuse at which the rule is directed.'

70. Mr Kamal submits that if the Applicant wished to raise an alternative claim in restitution, it should have been pleaded from the outset, or at the very least at the time of responding to the first strikeout application. He points out that it was not raised even when the applicant was given an opportunity to review the points of claim following judgment in the first strikeout application. He submits that no good reason has been put forward for the delay, pointing out that it cannot be said that the restitutionary claim is founded on any new facts that have arisen from the pleadings. He reminds me that the events in question took place 12 years ago and that it has now been over three years since the litigation commenced. He also reminds me that the Henderson rule was applied against the Ethos Respondents in the context of their second strike out application. Just as it was applied against the Ethos Respondents, he argues, so should it be applied against the Applicant in the context of the re-amendment application.

71. The Applicant submits that the underlying policy is to achieve finality in litigation and to ensure a party should not be vexed twice. As emphasised in the Virgin Atlantic case [2013] UKSC 46 at [24] and also in Johnson v Gore Wood & Co [2002] 2 AC 1 at 31, the circumstances in which an application to amend to introduce a new claim into existing proceedings will constitute an abuse of process are likely to be very rare.

72. I accept that submission, although as confirmed in Kensell v Khoury [2020] EWHC 567 (Ch), it is theoretically possible for it to apply in the same set of proceedings.

73. The facts of Kensell bear some parallels with those of the present case. In Kensell, after the defendant obtained summary judgment on the claimant's claim for breach of covenant based on a building scheme, the claimant applied for permission to amend to assert a different basis for enforcing the covenants (s.56 of the Law of Property Act 1925). The defendant submitted that it ought to have been obvious to the claimant that the defendant's objective in bringing the application for summary judgment was to achieve finality in respect of the claims for breach of covenant and that there were good reasons why the claimant ought to have relied on their alternative legal basis for their breach of covenant claim, at the latest, in answer to the application for summary judgement.

74. Whilst accepting (at [47]) that the Henderson principle can be invoked even at a later stage in the same proceedings and whilst recognising the force of these submissions, Zacaroli J concluded that the Henderson principle was not engaged, noting at [69]:

> 'The burden of establishing abuse of process lies on the Defendant. While the Claimants clearly could have brought the s.56 claim earlier, I am not satisfied that the failure to do so was caused by anything other than the failure of their former legal advisers to appreciate the merits of the argument. The action is continuing in any event (albeit only in respect of the common law claim in nuisance). The application to amend was at least raised prior to the hearing of the first appeal. It is true that it was made too late for it to be dealt with (as a matter of discretion) at the hearing of the first appeal. Had it been raised in sufficient time before the appeal hearing to give the Defendant the opportunity to deal with it, then I do not think

> that the Claimants would have been shut out from relying on it by reason of the Henderson principle. The fact that I exercised my discretion to preclude it being taken at the first appeal, thus requiring the Claimants to make a separate application to amend, does not in my view tipped the balance sufficiently to merit characterising the conduct as unjust harassment or otherwise abusive.'

75. In the present case, the Applicant has not given any good reasons for the delay in raising the alternative claim in restitution. Mr Sims suggested that the Applicant was simply seeking to 'reflect back' a case first raised by the APOD, but that is to glamourise an afterthought. All the APOD did in context was to flag a very well-known restitutionary principle when addressing the issue of alleged undervalue (the point being that when valuing the consideration received by the Company, one should take into account its right to recoup any PAYE/NIC which it paid to HMRC in respect of a given employee from the employee him or herself); it did not aver an alternative factual case. As noted by Mr Kamal, an experienced legal team such as Mr Sims KC and Mr Passfield must be taken to have known such a basic restitutionary principle all along. A short reference to that basic principle in the APOD does not justify the delay in raising an alternative case.

76. Mere delay, however, does not render the Re-Amendment Application an abuse in my judgment. In this regard I remind myself that the burden of establishing abuse is on the Ethos Respondents. In my judgment they have failed to discharge that burden.

77. Mr Kamal maintains that the Re-Amendment Application is no different from a Henderson perspective than the second strike out application. I disagree. The Ethos Respondents had opposed the liquidator's application for permission to amend the original points of claim on the ground that the proposed amendments had no real prospect of success and then a few months later, having failed in their opposition, applied to strike out the APOC (for which permission had been given) on the ground that the APOC had no real prospect of success. It was in that context that I concluded that the second strike out application was abusive; the grounds raised by the Ethos Respondents in the second strike out application should have been raised during the contested application for permission to amend. Moreover, it is important to note that the second strike out application was not dismissed solely on Henderson grounds. It was also dismissed on the ground that, whilst the new arguments raised undoubtedly included some good points for trial, none of the points raised were 'strike-out' points. The second strike out application was dismissed for both reasons, not on Henderson alone. It would have been dismissed even if Henderson had been left out of account altogether.

No real prospects of success

78. English law once gave claimants different types of action to recover the value of different types of benefit received by the defendant. Money paid to the defendant fell into the category of action of money had and received. Actions for quantum meruit and quantum valebant awards dealt with services and goods. Actions for money paid to the defendant's use lay where the defendant was benefited through the claimant's payment to a third party, for example to discharge the defendant's liability to a creditor: Goff & Jones, The Law of Unjust Enrichment (9th ed) at 1-13.

79. More than 150 years have elapsed since the abolition of these forms of action, and the law of unjust enrichment now rests on a single set of common principles.

80. Now, a claimant must show three things to make out a claim in unjust enrichment: that the defendant was enriched, that his enrichment was gained at the claimant's expense, and that his enrichment at the claimant's expense was unjust: Banque Financiere de la Cite v Parc (Battersea) Ltd [1999] 1 AC 221 per Lord Steyn at p227; Goff & Jones at 1-09. If these requirements are satisfied, the further question arises, whether there are any defences to the claim.

81. The claimant must be able to point to a ground of recovery that is established by past authority, or at least is justifiable by a process of principled analogical reasoning from past authority: Goff & Jones para 1-26. There is in English law 'no general rule giving the plaintiff a right of recovery from a defendant who has been unjustly enriched at the plaintiff's expense': Woolwich Equitable Building Society v IRC [1993] AC 70 at 196-197 per Lord Browne-Wilkinson. The court's jurisdiction to order restitution on the ground of unjust enrichment is subject 'to the binding authority of previous decisions'; the courts do not have 'a discretionary power to order repayment whenever it seems … just and equitable to do so': Kleinwort Benson Ltd v Birmingham CC [1997] QB 380 at 386 per Evans LJ. Claims in unjust enrichment must be pleaded by bringing them 'within or close to some established category or factual recovery situation': Uren v First National Home Finance Ltd [2005] EWHC 2529 at [16] – [18] per Mann J. Whilst 'the categories of unjust enrichment are not closed' (CTN Cash & Carry Ltd v Gallaher Ltd [1994] 4 All ER 714 at 720 per Nicholls VC), 'clear reasoning' that provides 'clear analogues with other cases' is 'required for the elaboration of any extension of unjust enrichment': Gibb v Maidstone and Tunbridge Wells NHS Trust [2010] EWCA Civ 678 per Laws LJ.

82. In Investment Trust Companies v Revenue & Customs Comr [2018] AC 275, Lord Reed JSC (Lords Neuberger, Mance, Carnwath and Hodge JJSC concurring) again emphasised the importance of adopting a principled approach to claims in unjust enrichment and paying due regard to precedent. At paragraphs [39] to [42], his Lordship reasoned as follows:

> '[39] First, it is important, when dealing with personal claims based on unjust enrichment, to bear in mind what was said by Lord Goff of Chieveley in Lipkin Gorman v Karpnale Ltd [1991] 2 AC 548, 578, when rejecting a submission that, when dealing with a claim to restitution based on unjust enrichment, it was for the court to consider the question of injustice or unfairness on broad grounds, and that it should deny recovery if it thought that it would be unjust or unfair to hold the defendant liable :
>
> "The recovery of money in restitution is not, as a general rule, a matter of discretion for the court. A claim to recover money at common law is made as a matter of right; and even though the underlying principle of recovery is the principle of unjust enrichment, nevertheless, where recovery is denied, it is denied on the basis of legal principle"

> As Lord Steyn remarked in Banque Financiere de la Cite v Parc (Battersea) Ltd 1999 1 AC 221, 227, unjust enrichment ranks next to contract and tort as part of the law of obligations. A claim based on unjust enrichment does not create a judicial licence to meet the perceived requirements of fairness on a case-by-case basis: legal rights arising from unjust enrichment should be determined by rules of law which are ascertainable and consistently applied. …
>
> [40] Secondly, the adoption of the concept of unjust enrichment in the modern law, as a unifying principle underlying a number of different types of claim, does not provide the courts with a tabula rasa, entitling them to disregard or distinguish all authorities predating the Lipkin Gorman case [1991] 2 AC 548. The point is illustrated by the judgement of Floyd LJ in the TFL case [2014] 1 WLR 2006, para 39, where the decision in Rubon Steamship Co Ltd v London Assurance [1900] AC 6 was put to one side on the basis that "the House of Lords … was not looking at the case through the eyes of the modern law of unjust enrichment". Although judicial reasoning based on modern theories of unjust enrichment is in some respects relatively novel, there are centuries worth of relevant authorities, whose value should not be underestimated. The courts should not be reinventing the wheel.
>
> [41] Thirdly, as the judge observed in the present case, in remarks with which Lord Clarke JSC expressed agreement in the Menelaou case [2016] AC 176, para 19, Lord Steyn's four questions are no more than broad headings for ease of exposition. They are intended to ensure a structured approach to the analysis of unjust enrichment, by identifying the essential elements in broad terms. If they are not separately considered and answered, there is a risk that courts will resort to an unstructured approach driven by perceptions of fairness, with consequent uncertainty and unpredictability…
>
> [42] The structured approach provided by the four questions does not …. dispense with the necessity for a careful legal analysis of individual cases. In carrying out that analysis, it is important to have at the forefront of one's mind the purpose of the law of unjust enrichment. As was recognised in the Menelaou case, at para 23, it is designed to correct normatively defective transfers of value, usually by restoring the parties to the pre-transfer positions. It reflects an Aristotelian conception of justice as the restoration of a balance or equilibria which has been disrupted. That is why restitution is usually the appropriate remedy.'

83. At [45], Lord Reed in the ITC case went on to confirm that restitution 'is not a compensatory remedy'. This long-standing principle is also reflected in Goff & Jones at 1-17: 'the law of unjust enrichment is not concerned with… compensation for

losses sustained by claimants'. Similarly, in Chitty vol 1 at 32-017, 'a claim in unjust enrichment is a claim in debt and not for damages': Foskett v McKeown [2001] 1 AC 102, 109 per Lord Browne-Wilkinson.

84. The cause of action in unjust enrichment accrues only when all the elements of the claim can be established, which will usually be when the defendant is enriched, although where the ground is failure of basis, the cause of action may be established after the defendant has received the enrichment, when the basis has failed: Chitty Vol 1 at 32-017.

No real prospect: Submissions

85. Mr Kamal submits that the restitutionary claims sought to be introduced by the proposed amendments have no real prospect of success. He contends that:

(1) the draft RAPOC do not particularise how the Ethos Respondents were enriched;

(2) the draft RAPOC do not particularise how the purported enrichment was at the expense of the Company;

(3) the draft RAPOC do not particularise how the enrichment was unjust, especially given the contractual nature of the transactions. The argument that the risk was not in the contemplation of the parties runs counter to the Liquidator's own pleadings at paragraph 11 of the draft RAPOC, which asserts that the Company intended for any tax liabilities to fall upon it.

86. In relation to (1) and (2), the Applicant maintains that the draft RAPOC is adequately pleaded. Mr Sims KC argued: Paragraph 26B of the draft RAPOC (i) pleads that by reason of the Company making the payments particularised in amended Schedule 2 (which sets out the payments made by the Company to the Trust on behalf of each Respondent), the Respondents were enriched at the Company's expense in the sum identified against their name in amended schedule 1 (which identifies the income tax and NIC which it is said the Company should have deducted and paid to HMRC on behalf of each Respondent) and (ii) repeat paragraphs 3 to 16 (which set out the relevant background), 21 (which pleads the payments made by the Company to the Trust were on the Respondents' behalf), 22 (which sets out the steps which are alleged to have formed one composite transaction between the Company and the relevant Respondents) and 22A (which pleads the tax liability arising to the Company thereon).

87. Considered against that backdrop, the Applicant submits that the Respondents:

> 'can have no genuine doubts as to the case which they have to meet in this respect. Quite simply, the Respondents were enriched at the Company's expense because the Company paid them (via the Trust) the monies which it should have deducted and paid to HMRC on their behalf in circumstances where the Company (and not the Respondents) remains liable to account to HMRC for those monies'.

(Applicant's skeleton argument at paragraph 37).

88. The Applicant further contends that 'it is clear from the decision of the Supreme Court in Investment Trust Companies v Revenue & Customs Comrs [2017] UKSC 275; [2018] AC 275 at [46]-[50] and [61]-[66] that there is, at the very minimum, a realistic prospect of success in the argument that the court will find this was a coordinated set of transactions forming a single scheme or transaction for the purposes of the 'at the expense of' enquiry …'

Discussion and Conclusions on (1) and (2)

(1) Enrichment

89. In my judgment the draft RAPOC fail to articulate a properly particularised, 'more than merely arguable' case on enrichment, or enrichment 'at the expense of' the Company, with any real prospect of success. The Applicant has also failed to evidence a sufficiently arguable case on enrichment, or enrichment at the expense of the Company, with any real prospect of success.

90. Whilst I accept that the fact that the payments were made to the respondents indirectly, via a trust, is not of itself fatal to the Applicant's proposed claim (Investment Trust Companies v Revenue & Customs Comrs at [48] per Lord Reed JSC), in my judgment, merely pleading the payment by the Company of gross sums (rather than sums net of PAYE/NIC) to the employee respondents is not, of itself, sufficient to make out a 'more than merely arguable' case on enrichment.

91. In this regard I remind myself of the guidance given in FII Group Litigation v Revenue & Customs Commissioners [2021] UKSC 31 per Lord Reed and Lord Hodge (Lords Briggs, Sales and Hamblen concurring) at [170], with emphasis added:

> '170. There is no dispute but that the claimant suffered loss in this sense in paying the sums that have been held to be unlawfully levied ACT. The question on this appeal is the measure of restitution: *what was the Revenue's enrichment*? Where the transfer involves the provision of services, difficult questions can arise as to the valuation of those services in order to correct the injustice which has arisen by the defendant's receipt of the claimant services on a basis which was not fulfilled. This court considered such a case in Benedetti v Sawiris [2014] AC 938. *Where, as here, the transfer of value is the payment of money, such complex questions do not arise. But the court in ascertaining the defendant's enrichment cannot always conclude its enquiry by saying that because the claimant transferred £X to the defendant, the defendant's enrichment is £X. The court may, as the Revenue argues, have to have regard to liabilities which the defendant incurs as a consequence of the receipt of the money*'.

92. In my judgment, in the context of this case, when the payments relied upon give rise to parallel liabilities on the recipient, such liabilities, be they actual or continent, must be taken into account when considering the question of enrichment. (I pause here to note that on existing authority, the position is different in determining an undervalue for the purposes of s.423; the latter requiring a comparison between the value

obtained by the company and the value provided by it: Re MC Bacon [1990] BCLC 324).

93. To adapt with gratitude the words of Lords Reed and Hodge, in ascertaining the respondents' enrichment, the court cannot simply proceed on the basis that because the Company transferred £X (the PAYE/NIC element) to the respondents, the respondents' enrichment was £X (the PAYE/NIC element). As a matter of law, the respondents were under parallel liabilities. None of these are adequately addressed or properly particularised in the draft RAPOC or evidence before me. Save for the odd bare assertion, (to the effect of 'the Company is liable and the Respondents are not'), the parallel liabilities are for the most part ignored or dismissed as irrelevant in the Applicant's pleadings.

94. As noted in the Rangers case, the tax laws in this country are 'not a seamless garment'. In broad summary however, the parallel liabilities relevant to these proceedings include the following:

(1) from the point of payment by the Company to the Trust, the employee respondents bore parallel contingent liability for PAYE and NIC. Where an employer does not account for PAYE and NIC, it is open to HMRC to look to the employee for payment under Regulations 72 or 81 of the Income Tax (PAYE) Regulations 2003 SI 2003/2682 and Regulation 86(1)(a)(ii) of the Social Security (Contributions) Regulations 2001. The threshold set for recovery under these regulations is low: see by way of example Stephen West [2018] UKUT 0100 (TCC). If PAYE is due and the employer does not pay it, the employee may also be liable to an additional punitive charge under s.222 ITEPA. Whilst, ordinarily, the time-lines for recovery are 4 or 6 years, in certain circumstances a 20 year time limit may apply: see for example s.29 and 36 of the Taxes Management Act 1970, CH53600 and CH53900. 'Discovery Assessments' may be made many years after the event: see by way of example HMRC v Jafari [2022] UKUT 119 (TCC), a recent case concerning inter alia a discovery assessment made in respect of the tax year 2009-10. Under s.29(5) TMA 1970, one of the triggers for a discovery assessment, where a taxpayer has delivered a return for a given year, is that 'the officer could not have been reasonably expected, on the basis of the information made available to him before that time, to be aware' of income which ought to have been assessed to income tax but had not been so assessed: ss29(5), 29(1) TMA 1970;

(2) any loans made by the Trust or a sub-trust to the employee respondents on or after 9 December 2010 (even from ear-marked sums advanced by the Company to the Trust *prior to* 9 December 2010) are taxable under Part 7A. Such loans are a 'chargeable step' under s554C;

(3) over the period 16 November 2017 (the date upon which the Finance (No 2) Act 2017 received Royal Assent) to 22 July 2020 (the date upon which the Finance Act 2020 received Royal Assent), any outstanding loans made by the Trust or a sub-trust to the employee respondents *from 1999* which were not paid back by 5 April 2019 were subject to the loan charge, payable by the employee respondents: Finance Act (No 2) 2017; and

(4) with effect from 22 July 2020, any outstanding loans made by the Trust or a sub-trust to the employee respondents from 9 December 2010 (including loans made from

that date from sums paid by the Company to the Trust *prior to* 9 December 2010) were subject to the loan charge, payable by the employee respondents.

95. Against that backdrop, the question arises: at what stage, on the Applicant's case, were the employee respondents 'enriched' by the payments representing PAYE/NIC paid by the Company to the Trust over the period 4 March 2009 to 5 April 2010? In my judgment, the Applicant has not presented, pleaded, or particularised a coherent, 'more than merely arguable' case on this issue with a real prospect of success. At times the Applicant pointed to the moment of payment by the Company to the Trust, yet at that stage the employee respondents were plainly liable to account to HMRC in their own tax returns for any PAYE/NIC not paid by the Company.

96. At other times the Applicant appeared to rely on HMRC's issue of regulation 80 determinations against the Company in December 2012, yet the issue of such determinations does not, as a matter of law, count as an 'election' on the part of HMRC, and HMRC remained free to pursue the employees for unpaid tax. (Indeed, it is clear from defences and correspondence filed by various of the original respondents to the Main Application that a number have liaised direct with HMRC over many years in relation to sums paid to them via the Trust/Scope and have settled up directly with HMRC).

97. At yet other times the Applicant by Counsel asserted that HMRC is now time-barred from pursuing the employee respondents, but the Applicant has not pleaded or particularised a 'more than merely arguable' case on this, setting out when, or how, such time-barring is said to have occurred in the case of each respondent; and has not adduced any evidence in support of such an assertion. In this regard it should be noted that the Company ran a PAYE payroll system (which would include details of all employees and their respective National Insurance Numbers) and HMRC is effectively the only creditor in this liquidation. Such information should therefore be readily available to the Applicant.

98. In submissions, Mr Sims submitted that it was for the employee respondents to demonstrate what potential liabilities they remain subject to. I reject that submission. This is the Applicant's application for permission to amend. As a first step, the Applicant must by his proposed pleading demonstrate a 'more than merely arguable' case on 'enrichment' with a real prospect of success. It is for the Applicant to particularise in his draft RAPOC and evidence in support how - and when - the employee respondents were allegedly enriched by the PAYE/NIC element of each payment made by the Company to the Trust.

99. Had the Company actually paid HMRC the PAYE/NIC due in respect of the employee respondents, the task of establishing that the employee respondents had been enriched at the Company's expense would be simple; they would be enriched at the point of payment by the Company to HMRC, as that payment would *extinguish* the employees' parallel liabilities.

100. As the Company has not paid HMRC the PAYE/NIC due in respect of the employee respondents, the Applicant can only clear the 'enrichment' threshold for present purposes by way of a 'more than merely arguable' case that (i) on the Company incurring liability to pay PAYE/NIC on the payments in question and/or (ii) in the events which have since occurred, any parallel liabilities of the employee respondents

in respect of the same payments *have been extinguished*. The Applicant cannot clear that hurdle, on the draft pleaded case and evidence before me. The Applicant's pleaded case goes little further than mere assertion that the Company is saddled with a liability to pay tax on the payments and the employee respondents are not. Paragraph 33 of the Reply, for example, proceeds on a bare assumption that all payments made by the Company *to* the Trust on or by 5 April 2010 would have been exhausted by way of loans *paid out* of the Trust or the relevant sub-trust by 9 December 2010; yet it is clear from some of the defences filed, such as that of Mr Wynter, that (i) not all sub-trusts granted loans immediately upon receipt of funds from the Company and that (ii) some sub-trusts had balances remaining in them long after 9 December 2010 from funds advanced by the Company prior to that date.

101. As confirmed by Popplewell LJ (Henderson and David Richards LJJ concurring) in Kawasaki Kisen Kaisha Ltd v James Kemball Ltd [2021] EWCA Civ 33, the proposed pleaded case must be properly particularised and at [18(3)] (with emphasis added):

> '(3) The pleading must be supported by evidence which establishes a factual basis which meets the merits test; it is not sufficient simply to plead allegations which *if true* would establish a claim; there must be evidential material which establishes a sufficiently arguable case that the allegations are correct: Elite Property at paragraph 41'

102. For all these reasons, I conclude that the Applicant (i) has failed to plead a properly particularised, 'more than merely arguable' case on enrichment with any real prospect of success and (ii) has failed to evidence a sufficiently arguable case on enrichment with any real prospect of success.

103. In my judgment the Applicant has also failed to plead or evidence a case on enrichment 'at the Company's expense' with any real prospects of success.

104. On the Applicant's pleaded case, the payments were remuneration *for services*. The Scheme pleaded is premised on *gross* payments being made for the services provided, rather than *net*. This was fundamental to the Company's business model and an essential part of the Scheme. This is acknowledged in the RAPOC and APOC (see by way of example paragraph 24(iii)).

105. Viewed in this context (ie paragraph 104 above), as the Company has not actually paid HMRC the sums said to be due for PAYE/NIC, the reference to payments of the PAYE/NIC element to the employee respondents having been made 'at the expense' of the Company in the proposed RAPOC can only be a reference to the Company having been left with a *liability* to pay HMRC such sums. Paragraph 37 of the Applicant's skeleton argument effectively confirms this, asserting that the monies should have been deducted as the Company is 'liable to account' to HMRC for the same. But here, in my judgment, the Applicant's proposed case on unjust enrichment again falls short of the threshold required for permission to amend, for this reason: the payment of the PAYE/NIC element of each remuneration payment to employee respondents did not, of itself, trigger a liability on the part of the Company to pay the PAYE/NIC element to HMRC; on the Applicant's case, *it was under that liability anyway*. That is to say: even if the Company had simply made payments to the

employee respondents (via the Trust/Scope) *net* of PAYE/NIC, it would have been under the *same liability* to account to HMRC for PAYE/NIC on the *net* payments made. Payment by the Company of the gross sum rather than the net sum did not trigger the liability.

106. As the Supreme Court made clear in the case of Test Claimants in the FII Group Litigation v Revenue & Customs Commissioners [2021] UKSC 31 at [169] (with emphasis added):

> '169. Dealing first with the position under domestic law, it is not in dispute that unjust enrichment is designed to correct normatively defective transfers of value and that it usually does so by restoring the parties to the pre-transfer positions. The recipient of the value transferred must have benefited, or in other words have been enriched, by the transfer of value. The transfer value must have been at the expense of the claimant. In other words, *the claimant must have suffered a loss,* in the sense that he or she has given up something of value *by providing the benefit to the claimant* in the normatively defective transfer.'

107. This in my judgment is a fundamental and insuperable weakness in the Applicant's proposed case on enrichment 'at the expense of' the Company. To adopt the language of FII, the claimant's 'loss' (liability to pay the PAYE/NIC) did not arise 'by providing the benefit' (on the Applicant's case, payment of the PAYE/NIC element to the employee respondents).

108. For similar reasons, even if the Applicant had pleaded a properly particularised, 'more than merely arguable', case that all parallel liabilities borne by the employee respondents were now time-barred, he would still fail to clear the 'at the expense of' threshold. In that case the 'enrichment' (arising on the extinguishment of parallel liabilities by passage of time) would not be 'at the expense of' the Company. It would arise simply as a result of the passage of time.

109. Again, the position would be different if the Company had paid HMRC the PAYE/NIC due. Had the Company paid HMRC, the employee respondents could readily be said to have been 'enriched' at the 'expense of' the Company, because the Company's payment to HMRC would extinguish the tax liability of the employee respondents for PAYE/NIC for the Payments (and on the rule against double taxation would free the employee respondents from other potential liabilities under Part 7A and/or the 2017/2020 legislation) and the Company would be the poorer *for having paid HMRC.*

110. Taking all such matters into account, I conclude that the Applicant's proposed case on payments of the PAYE/NIC elements having 'enriched' the employee respondents 'at the expense of the Company' has no real prospects of success.

111. Moreover, even if I am wrong in that conclusion, and the employee respondents should be treated as having been 'enriched' by the PAYE/NIC element at the 'expense' of the Company, that is not the end of the enquiry; the proposed RAPOC

must also demonstrate a 'more than merely arguable' case, supported by evidence, that the enrichment is 'unjust'.

The unjust factor

112. The burden is on the claimant to establish the factor which renders it unjust for the defendant to retain an enrichment, rather than the burden being placed on the defendant to establish that it was unjust for a liability to be imposed on him: Kleinwort Benson Ltd v Lincoln CC [1999] 2 AC 349 per Lord Hope at 408.

113. Mr Kamal maintains that the DRAPOC do not particularise how the enrichment was unjust, especially given (i) the contractual nature of the transactions and (ii) the Applicant's pleaded case at paragraph 11 of DRAPOC that the Company accepted that if any tax liabilities did arise, they would fall on the Company.

114. Counsel for the Applicant maintains that the unjust factors relied upon are set out with full particularity at paragraph 26C of the DRAPOC, 'namely (i) mistake and (ii) compulsion of law': Applicant skeleton argument at paragraph 37b.

115. The Applicant argues that:

(1) so far as mistake is concerned, it is the Ethos Respondents' own pleaded case that the Scheme was set up on the basis of what they say the law was understood to be at the time based on the decisions in Dextra Accessories Ltd v Macdonald [2002] STC (SCD) 413 and Sempra Metals Ltd v Revenue and Customs Commissioners [2008] STC (SCD) 1062. In the circumstances, it is the Applicant's case that making gross payments to the Trust in the belief that no tax liability arose was a causative mistake of law (see Kleinwort Benson Ltd v Lincoln CC [1999] 2 AC 349 and Goff & Jones: The Law of Unjust Enrichment (9th ed) at 9-105 to 9-109), which is a 'justifying ground' for the court to grant the Company a personal restitutionary remedy; and

(2) so far as compulsion of law is concerned, given paragraph 29h of the APOD, the Ethos Respondents would have no rational defence to a claim for a declaration that the remaining respondents would be liable to indemnify the Company if it paid their tax liabilities. The liquidator argues that the principle should apply equally where the Company has entered liquidation as a result of its inability to pay the liability. Whilst the latter point is said to be 'novel', the Applicant argues that this is a 'developing area of jurisprudence' and that 'the reasons justifying the existence of an unjust factor are not fixed', relying on Dargamo Holdings Ltd v Avonwick Holdings Ltd [2022] 1 ALll ER (Comm) 1244 at [55]-[63]. Reliance was also placed on Farah v British Airways.

(Applicant's skeleton argument at paragraph 37)

116. It will be seen that the 'unjust' factors relied upon by the Applicant are (i) mistake and (ii) compulsion of law: Applicant's skeleton argument at paragraph 37b.

117. I shall deal with each in turn.

Mistake of Law

118. The advantage of founding a claim on mistake is that in certain circumstances, it enables the claimant to gain the benefit of an extended limitation period under s.32(1)c) of the Limitation Act 1980.

119. In Test Claimants of the FII Group litigation v Revenue and Customs Commissioners [2020] UKSC 47, a majority of the Supreme Court held that time begins to run from the point in time when the claimant discovered or could with reasonable diligence have discovered the real possibility of a mistake, in the sense of recognising that a worthwhile claim had arisen.

120. Following the decision in Kleinwort Benson Ltd v Lincoln City Council [1999] 2 AC 349, it is now settled law that a mistake of law may ground a claim in restitution, as well as a mistake of fact.

121. Where the law is changed by a judicial decision, the common law proceeds on a working assumption that judges declare law but do not make it. So when the common law changes, a legal fiction (known as the declaratory theory) means that the law is regarded as having always been what the judicial decision has stated it to be. By a bare majority, the House of Lords held in Kleinwort Benson Ltd v Lincoln City Council that the logical consequence of the declaratory theory is that a pre-decision payment may be regarded as mistaken. This is so both where the law is established by a judicial decision which is subsequently overruled and where, as in Kleinwort Benson Ltd itself, the law was arguably settled as a matter of practice but without a decision in point: Chitty Vol 1 para 32-054.

122. In Kleinwort, it was held that the questions raised in a claim for restitution of money paid under a mistake of law are the same as those raised in a claim for restitution of money paid under a mistake of fact, namely:

(1) was there a mistake;

(2) did the mistake cause the payment;

(3) did the payee have a right to receive the sum which was paid to him?

123. As put by Lord Hope in Kleinwort (at p407-8):

> ‘The first question arises because the mistake provides the cause of action for recovery of the money had and received by the payee. Unless the payer can prove that he acted under a mistake, he cannot maintain an action for money had and received on this ground. The second question arises because it will not be enough for the payer to prove that he made a mistake. He must prove that he would not have made the payment had he known of his mistake at the time when it was made. If the payer would have made the payment even if he had known of his mistake, the sum paid is not recoverable even on the ground of that mistake. The third question arises because the payee cannot be said to have been unjustly enriched if he

> was entitled to receive the sum paid to him. The payer may have been mistaken as to the grounds on which the sum was due to the payee, but his mistake will not provide a ground for its recovery if the payee can show that he was entitled to it on some other ground.'

124. In the present case, the Applicant contends that he clears the first hurdle by relying on the declaratory theory and reflecting back the APOD. At paragraph 37bi of his skeleton argument, he states:

> 'so far as mistake is concerned, it is the Ethos Respondents' own pleaded case that the Scheme was set up on the basis of what they say the law was understood to be at the time based on the decisions in Dextra Accessories Ltd v Macdonald [2002] STC (SCD) 413 and Sempra Metals Ltd v Revenue and Customs Commissioners [2008] STC (SCD) 1062 (i.e. that payments to an employee via an EBT would not attract any liability to pay PAYE and NIC) (see amongst others paras 8, 12, 16 and 33-37 of the APOD). Those decisions were subsequently overturned by the Supreme Court in [the Rangers case] [2017] UKSC 45. In these circumstances, it is the Company's case that in making gross payments to the Trust in the belief that no tax liability arose thereon, it was operating under a causative mistake of law (see Kleinwort Benson …), which is a "justifying ground" for the court to grant the Company a personal restitutionary remedy…'

125. Working through Lord Hope's three factors, in my judgment, the Applicant does clear the 'more than merely arguable' threshold on factor (1) (i.e. *was there a mistake?*).

126. The Applicant is however on much weaker ground on factor (2) (*did the mistake cause the payment?*). For this purpose, the Applicant must raise a 'more than merely arguable' case that the Company would not have made the payment had it known of its mistake. In the words of Lord Hope:

> 'He must prove that he would not have made the payment had he known of his mistake at the time when it was made. If the payer would have made the payment even if he had known of his mistake, the sum paid is not recoverable even on the ground of that mistake'

127. Mr Sims KC suggested that this was a 'no-brainer'. In my judgment the matter is not nearly as clear-cut as the Applicant would like it to be. The Applicant does not have evidence from those managing the Company over the material period. He does not know what their thinking would have been had the Rangers decision been handed down on 3 March 2009 rather than in 2017. It is pure speculation to suggest that the Company would not have made any of the payments, or that it would have made such payments net of PAYE/NIC. In this regard I remind myself of the guidance given in Kawasaki (loc cit) at [18(3)], as set out at paragraph 101 of this judgment.

128. Moreover, on the Applicant's own pleaded case, when the introduction of Part 7A was announced by the government in December 2010, the Company did not simply cease trading or stop making gross payments. On the Applicant's pleaded case (and evidence; see Purkiss (1) at [32]), the Company *responded* to the government announcement *by varying its scheme; it carried on making gross payments* (albeit via a more elaborate route), having introduced Scope into the equation in January 2011. The general nature of Scope's business was described in its registration application as the 'supply of services contracted out to Ethos Solutions Limited (UK)'. Scope then invoiced the Company for services provided by the employee respondents. The accounting treatment of the Company's contributions to the EBT changed after the introduction of Scope; payments to the Trust or Scope thereafter being termed 'purchases' in the Company's accounts, rather than 'staff costs'. It is in my judgment legitimate to conclude that in putting in place such revised arrangements, the Company was seeking to move away from the role of 'employer', in order to stay clear of the reach of Part 7A. Had it succeeded in putting in place a scheme which rid it of the status of employer, that may well have been an answer to Rangers as well. At the hearing of the First Strike-Out Application, Mr Sims KC accepted that there was 'more of an argument to be had' on whether Rangers applied to the scheme following the introduction of Scope. I also note that HMRC did not issue a Regulation 80 determination in respect of 2011 (the year that Scope was introduced) and has at no time indicated a claim for unpaid PAYE in respect of that year.

129. Against that backdrop, in my judgment the Applicant has not pleaded a 'more than merely arguable' case, supported by evidence, on factor (2). For these purposes, it is not sufficient for the Applicant to plead a 'more than merely arguable' case that the Company *would not have operated 'the Scheme' in its original form*; he must plead a 'more than merely arguable' case, supported by evidence, that the Company *would not have made the gross payments*.

130. This weakness in the Applicant's proposed case on mistake must also be considered in the context of the third of Lord Hope's factors: *did the payee have a right to receive the sum which was paid to him?*

131. As put by Carr J in Co-operative Bank plc v Hayes Freehold Ltd 2017 EWHC 1820 at [149], the doctrine of unjust enrichment cannot be used to relieve a party of a bargain which he has made.

132. On the Applicant's pleaded description of the Scheme, the employee respondents clearly had a contractual right to the gross sums paid to the Trust.

133. In Fairfield Sentry Limited v Migani and Ors [2014] UKPC 9 at [18], Lord Sumption spoke of the 'basic principle' that 'The payee of money "cannot be said to have been unjustly enriched if he was entitled to receive the sum paid to him"', quoting from Lord Hope's judgment in Kleinwort Benson Ltd v Lincoln City Council [1999] 2 AC 249 at 408B.

134. The interplay between contract and unjust enrichment was recently considered by the Court of Appeal in Dargamo Holdings Ltd and another v Avonwick Holdings Ltd [2022] 1 All ER (Comm) 1244. At [67], Carr LJ referred to Professor Burrows in The Restatement (at 3(6)), where he states that an 'often overlooked but crucial' element of the unjust factors scheme is:

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

135. At paragraphs [68] to [75], Carr LJ continues:

> '[68] This orthodox position in England was articulated in Kleinwort Benson ([1998] 4 All ER 513 at 560… Lord Hope identified that a third question for consideration was 'did the payee have a right to receive the sum which was paid to him ?' That question was relevant as follows:
>
> 'The third question arises because the payee cannot be said to have been unjustly enriched if he was entitled to receive the sum paid to him. The payer may have been mistaken as to the grounds on which the sum was due to the payee, but his mistake will not provide a ground for its recovery if the payee can show that he was entitled to it on some other ground'.
>
> [69] The principle is not confined to contractual obligations …
>
> [70] I describe this principle, namely that an unjust factor will not override a valid and subsisting legal obligation of the claimant to confer the benefits on the defendant, as the 'Obligation Rule'. It has been reaffirmed recently at the highest level by the Privy Council in Fairfield Sentry Ltd (in liq) v Migani [2014] UKPC 9… at [18] and DD Growth Premium 2X Fund (in official liq) v RMF Market Neutral Strategies (Master) Ltd [2017] UKPC 36… As stated in DD Growth Premium by Lord Sumption and Lord Briggs (at [62]):
>
> "[62] … It is fundamental that a payment cannot amount to an enrichment if it was made for full consideration; and that it cannot be unjust to receive or retain it if it was made in satisfaction of a legal right … The proposition is supported by more than a century and a half of authority …"
>
> [71] For the Taruta Parties it was suggested that these statements should in some way be read as limited to their specific factual context … However, Mr Crow was unable to identify any principled reason why this should be so, and I can see no good basis for not treating them as being of more general application.
>
> [72] The Obligation Rule is not absolute (as evidenced by Professor Burrows' use of the word 'normally' at the passage in 3(6) of The Restatement quoted above). There will be exceptions, albeit limited. Thus, as explored further below, in Roxborough a claim in unjust enrichment succeeded despite the

> existence of a valid contract. The rationale behind these exceptions is difficult to pinpoint. In The Restatement it is suggested (again at 3(6)) that:
>
> "one might say that they are situations where there is no underlying conflict between the reason for allowing restitution and the defendant's legal entitlement (for example, because allowing restitution does not conflict with the allocation of risk in the contract or does not conflict with the contract as there is a good reason for the contract not to be enforced because it is unenforceable or has been validly terminated)…"
>
> [73] …
>
> [74] In 'Failure of Consideration and its Place on the Map (2002) 2 Oxford University Commonwealth LJ 1, in the immediate aftermath of Roxborough, Professor Birks emphasised (at p4) that it would be 'a very rare' case in which failure of consideration could be made out despite the existence and performance of a valid contract.
>
> [75] The Gaiduk Parties submitted that a claim in unjust enrichment functions as a 'gap-filling' device which is in some way subsidiary to the law of contract… Provided that what is meant by this is properly understood, it can be seen to make sense: the claim in unjust enrichment is not allowed to contradict the terms in the contract….'

136. In my judgment, the third of Lord Hope's factors, (namely, did the payee have a right to receive the sum which was paid to him?) poses an insuperable difficulty for the Applicant in relation to his proposed claim based on mistake. Whether the Scheme is viewed as one over-arching contract or a series of inter-connected contracts, it was plainly contractual. Indeed, the Applicant's pleadings make this clear; see by way of example DRAPOC paras 3, 9, 10, 22 and Reply para 20f. I pause here to note that the DRAPOC do not seek rescission of the contractual arrangement or a declaration that it is void for mistake.

137. Whilst the Australian case of Roxborough and the English case of Barnes provide two examples of instances where restitutionary relief was granted notwithstanding the subsistence of a contract, they are very much the exception rather than the rule. At [128] of Dargamo, Carr LJ described such exceptions as 'rare'.

138. Roxborough is a decision of the High Court of Australia and does not bind this court. As noted by Carr LJ at [121] in Dargamo: 'Roxborough has proved to be a controversial decision'. He continues:

> 'There are those who consider it to have been wrongly decided … What matters for present purposes, however, is that, as Goff & Jones identifies, those who consider it rightly decided do so on the basis that it did not upset the party's contractual allocation of risk. On this basis, it is not to be seen as authority

> for the proposition that an unjust enrichment claim can succeed in circumstances where it contradicts that allocation. As was stated in Mann at [23], it was essential to the reasoning in Roxborough that the restitutionary claim did not 'cut across the contractual charter of the party's rights and obligations'.

139. Similarly, the facts of Barnes were 'highly unusual'. As put by Carr LJ in Dargamo at [124]:

> 'in granting the unjust enrichment claim the Supreme Court in Barnes was not interfering with the party's contractual allocation of risk. The risk that was allocated contractually was the risk of the corporate assets being insufficient to meet the receiver's costs and expenses under the receiver's lien, not the risk of the lien not existing at all in the first place'.

140. At [125], Carr LJ continues:

> '[125] It is in this context, namely the contractual allocation of risk, that it is relevant that a failure of basis was externally imposed or not negotiated,… That is not to play an inappropriate 'blame game' in the sense of looking to see who, if anyone, is at fault for the failure of basis. That is irrelevant: a claimant can pursue a claim in unjust enrichment even where he himself is responsible for the failure of basis … rather it is to examine whether or not the basis of failure was something that was within the party's contemplation (for example by way of negotiation or as a matter under their control) at the time of the relevant contract. In Roxborough, the lawfulness of the tobacco tax the subject of the licence fee was something that was not in the parties' gift or purview, any more than was the lawfulness of the receivership order in Barnes at the time of the receiver's retainer by the CPS'.

141. In contrast, on the facts of Dargamo, the further assets not mentioned in the description of consideration in the relevant share purchase agreement (SPA) were 'very much within the party's understanding and discussions at the time' of entering into the SPA and the price for the shares in the SPA was 'freely negotiated between the parties': Dargamo at [126]. Carr LJ concludes: 'In this way, the unjust enrichment claim can be seen to interfere impermissibly with the parties' contractual allocation of risk. It seeks not to compliment but rather to override the … SPA'.

142. Whilst the proposed unjust enrichment claim in the present case is not based on failure of basis, the parallels are obvious. Tax planning was at the heart of the Scheme. It was the very reason for the Company's existence. As Mr Kamal put it, it was the 'DNA' of the Scheme. The documentation sent out by the Company to the employees expressly acknowledged that tax laws could change (Exhibit 'CP1' page 120). The risk of a change in tax treatment was plainly in the contemplation of the parties at the time of entering the contract.

143. The Applicant's APOC (and DRAPOC) *allege and rely upon* a contractual allocation of risk agreed by the Company. By paragraph 26B of the DRAPOC, 'Paragraphs 3 to 16, 21, 22 and 22A are repeated'. Paragraph 10 describes the Scheme. Paragraph 11 provides (with emphasis added):

> "11. The Scheme was designed to prevent the Employee Respondents from becoming liable to pay income tax and national insurance contributions ('NIC') on the monies which the end users paid for their services. *The Scheme was also designed and operated on the assumptions that* the Company would not be required to deduct income tax and NIC from the monies paid to the Trust and pay them to HM Revenue and Customs ('HMRC') under the 'pay as you earn' ('PAYE') regime, or to pay corporation tax in respect of the monies paid to the Trust, *but if this assumption was incorrect, that the Company would be liable to account to HMRC for any unpaid tax (and not the Employee Respondents*, save in the event of a direction being made by HMRC, which was not made, as referred to in paragraph 23b below)"

144. It will be seen from the quoted passage above that the Applicant's positive case, as pleaded at paragraph 11 of the APOC in the context of the s.423 claim and expressly adopted at paragraph 26B of the DRAPOC for the purposes of the alternative unjust enrichment claim, is that the Scheme was '*designed and operated on the assumptions that*':

(a) the Company would not be required to deduct income tax and NIC from the monies paid to the Trust and pay them to HMRC under the PAYE regime, or to pay corporation tax in respect of the monies paid to the Trust; *but that*

(b) "*if this assumption was incorrect, that the Company would be liable* to account to HMRC for any unpaid tax (and not the Employee Respondents, save in the event of a direction being made by HMRC, which was not made…"

145. It follows that, on the Applicant's proposed pleaded case, the unjust enrichment claim, in the words of Carr LJ, 'can be seen to interfere impermissibly with the parties' contractual allocation of risk'.

146. During the course of submissions, Mr Sims argued that the Company could simply drop reliance on paragraph 11 of the proposed RAPOC for the purposes of its unjust enrichment claim. The Company's undertaking of the risk, however, is at the very heart of the Applicant's s.423 claim. It is reflected not only in paragraph 11 of the DRAPOC, but also in paragraph 24, which pleads the Applicant's case on statutory purpose and specifically alleges '*knowledge*' on the part of the Company '*that if such liability did arise, it would fall on the Company* (which would not retain and did not retain sufficient monies to discharge the said liability)'. Paragraph 19 of the Reply again alleges such knowledge.

147. Paragraph 23c of the RAPOC (and APOC) confirms that the Applicant 'does not contend that the Trust is liable for any tax liabilities arising from the Scheme'. Paragraph 4 of the Reply goes further, and expressly denies that either the employee

respondents or the Trust agreed to discharge any tax liability falling on the Company as a result of the Scheme. This denial is repeated at paragraph 13 and (in relation to the Trust) again at paragraph 18(b) of the Reply.

148. Lest it be said that paragraphs 11, 23c, and 24 of the RAPOC could simply be airbrushed out, and paragraphs 4, 13, 18(b) and 19 of the Reply could also be ignored, for the purposes of the Applicant's alternative claim, there is also the question of *evidence* already filed by the Applicant to contend with.

149. In this regard I remind myself that, in considering an application for permission to amend to add a new cause of action, the Court must have regard not simply to the pleaded case but also to the evidence. In accordance with Deputy ICC Judge Agnello's directions by order dated 3 December 2021, Mr Purkiss has already filed his evidence for trial. By his witness statement dated 26 May 2022, Mr Purkiss (at paragraph 48) states:

> 'In the circumstances, and as set out in the APOC, I invite the court to declare that the transactions which formed part of the Scheme, and to which the Company and the Respondents were party to [sic], were transactions defrauding creditors under section 423 of the Insolvency Act 1986…'

150. The APOC plainly include paragraphs 11, 23c, and 24. By paragraph 48 of his statement, Mr Purkiss expressly adopts the facts and matters set out in the APOC (including paragraphs 11, 23c and 24). As previously noted, there is no mention of the alternative unjust enrichment claim.

151. I accept that it is possible for an applicant to pursue alternative claims by the same pleading, notwithstanding the uneasy tension that this can give rise to in relation to the statement of truth. In the present case however, the APOC (and the proposed RAPOC) *positively aver* that the Company *knowingly undertook the risk* that it would incur a tax liability, *and that this formed part of the Scheme.* The Applicant's pleadings also *expressly deny* that the Ethos Respondents and/or the Trust agreed to discharge any tax liability falling on the Company as a result of the Scheme. Ms Crocker's witness statement dated 8 June 2022, filed in support of the amendment application, does not in any way seek to 'correct' or qualify the facts and matters alleged in the paragraphs of the Applicant's pleadings listed at paragraph 148 above. It does not address this aspect at all, or put forward any evidence to support an alternative case on this issue.

152. Moreover, the underlying documents already adduced in evidence by Mr Purkiss, which are exhibited to his statement, also fall to be considered. In this regard I remind myself that when considering an application for permission to amend, the court is entitled to reject a version of the facts which is implausible, self-contradictory or not supported by contemporaneous documents: Elite Property Holdings (loc cit) at [42]. In this case, the underlying documents include the Trust Deed entered into by the Company and Nautilus Trustees Limited ('the Trustees'). This is expressly referred to at para 24(i) of the DRAPOC (and APOC) and again at para 18d of the Reply. By clause 14 of the Trust Deed, the Company undertakes to indemnify the Trustees 'against any actions claims and demands arising … out of anything done (or caused to be done) by them in the exercise or purported exercise of the powers and

discretions vested in them by this Plan' (as defined) or 'otherwise in connection with the preparation administration operation or determination of this Plan', save for any actions claims and demands due to fraud on the part of the Trustees. This indemnity clause is plainly wide enough to include any claims against the Trustees in respect of the tax liabilities of others, such as the Company. The Trustees (originally the 63rd Respondent) pointed out this 'circularity' in their defence, settled by leading counsel. The Main Application has since been discontinued against the Trustees. The Trust is an essential link in the chain between the Company and the employee respondents. The Applicant invites the Court to treat the payments to the Trust as payments to the employee respondents, on the footing that the payments to the Trust and onwards payments to sub-trusts and thereafter the employee respondents all form part of one transaction or scheme. Paragraph 20f of the Reply states in terms that the payments made by the Company to the Trust were made 'on the Ethos Respondents' behalf'. The express indemnity clause in the Trust Deed therefore cannot be ignored when considering allocation of risk. In my judgment, the contractual allocation of risk on the Company is positively evidenced by the indemnity provisions contained in the Trust Deed.

153. Conversely, it forms no part of the Applicant's pleaded case (and I was taken to no evidence to suggest) that the Company sought express indemnities in its own favour from the employee respondents in respect of any liabilities (tax or otherwise) arising on payments made to the Trust for their ultimate benefit.

154. In addition, it is clear from the correspondence before me that HMRC had by letter dated 27 June 2011 made clear that it considered the Company to have incurred PAYE and NIC tax liabilities of £1.1m in respect of the year 2008/9. This was 18 months before the Company ultimately entered CVL. There was no evidence before me to suggest (and it forms no part of the Applicant's pleaded case that) the Company at any stage prior to entering CVL sought to recoup from the employee respondents any sums representing the PAYE/NIC element of the sums paid to the Trust. I also note that the sworn statement of affairs prepared for the Company's entry into CVL makes no reference to the employee respondents as debtors, or even potential debtors, in respect of the PAYE/NIC element of payments made to them via the Trust or Scope.

155. All such matters are consistent with the contractual allocation of risk being on the Company.

156. Taking all such matters into consideration, in my judgment the Applicant has no real prospect of succeeding in its unjust enrichment claim based on mistake. On the Applicant's own pleaded case and evidence, (i) the payees had the right to receive the gross sums paid to them via the Trust and (ii) the proposed claim contradicts the allocation of risk agreed between the parties.

Compulsion of law

157. The 'compulsion of law' principle is helpfully summarised by the Chancellor in McCarthy v McCarthy & Stone Plc [2007] EWCA Civ 664 at [34]:

> '34. The principle on which the Company relies is not in dispute. It is set out in Goff & Jones "The Law of Restitution" (6th Ed.) paragraph 15-01 in the following terms:
>
> "In general anybody who has under compulsion of law made a payment whereby he has discharged the primary liability of another is entitled to be reimbursed by that other..
>
> The classic statement of the common law principle is to be found in a passage from the first edition of Leake on Contracts, which was quoted by Cockburn CJ in Moule v Garrett in 1872
>
> "Where the plaintiff has been compelled by law to pay, or being compellable by law, has paid money which the defendant was ultimately liable to pay, so that the latter obtains the benefit of the payment by the discharge of his liability; under such circumstances the defendant is held indebted to the plaintiff in the amount"
>
> ….
>
> "To succeed in his claim for recruitment the plaintiff must satisfy certain conditions. He must show;
>
> (1) that he was compelled, or was compellable, by law to make the payment;
>
> (2) that he did not officiously expose himself to the liability to make the payment; and
>
> (3) that his payment discharged a liability of the defendant"

158. In this case the Applicant accepts that the Company has not paid the tax. Paragraph 26C b of the DRAPOC pleads that the Company came under a liability to pay the tax (26Cb(i)) and in consequence went into liquidation (26C b (ii) and (iii)(a)). Mr Sims submits that there is 'no case on point' but that the proposed claim is 'an extension of McCarthy v Stone principles'. I reject these submissions.

159. In this regard I turn to consider the case of Bernard & Shaw Ltd v Shaw [1951] 2 All ER 267. The facts of the Bernard Shaw case are similar to those of the present case, although set in an earlier jurisprudential context, when a mistake of law was not recognised. Mr Sims seeks to distinguish the Bernard Shaw case on the basis that it did not involve a company in liquidation. In my judgment, this is not a valid distinguishing factor. The proposed claim is a claim of the Company in unjust enrichment. It is not a liquidator claim and does not rest on insolvency legislation. The same principles apply to an insolvent claimant as to a solvent claimant.

160. In the Bernard Shaw case, a company paid to one of its directors certain sums as remuneration for his services without deducting income tax as required by the Income Tax (Employments) Act 1943 s.1 and the Income Tax (Employments) Regulations 1950. On receipt of a claim by the revenue authorities against the company for the

payment of income tax on the sum so paid (but not having paid the tax due itself), the company sought to recover from the director the amount of tax which should have been deducted, alleging that the amount in issue was either recoverable as a loan or on restitutionary principles.

161. Having found that the payments had not been made by way of loan, Lynskey J went on to consider the company's alternative case in restitution, reasoning (at p.268) as follows:

> 'I now come to the alternative claim, which is framed in the statement of claim as follows:
>
> "Alternatively, if the said sum represented salary, it includes the sum of £709 10s being income tax (P.A.Y.E.) for which tax the Inland Revenue now makes claim against the plaintiffs. The plaintiffs are entitled to recover such tax against the defendant, but the defendant has failed, neglected and refused to pay the same ."

162. Reflecting on the pleaded quote set out above, Lynskey J continued in the Bernard Shaw case (with emphasis added):

> 'I have first to find *whether the facts alleged give any cause of action to the plaintiffs* … The plaintiffs say that this sum was due to them as money had and received by the defendant to the use of the plaintiffs. They say that the defendant was under liability to pay tax to the Inland Revenue in respect of the remuneration which he received, that they (the plaintiffs) did not deduct the tax from his remuneration as they were entitled to do and ought to have done, and, therefore, that the defendant has been overpaid his remuneration by the amount which represents the tax which was not deducted. It is said that in those circumstances the plaintiffs are entitled to recover from the defendant that sum as money had and received at the time of receipt to the use of the plaintiffs.'

163. Having considered the underlying tax regulations requiring the employer to deduct PAYE and imposing liability on the employer to pay the tax to the revenue authorities whether he has deducted it or not, Lynskey J continues at p268h:

> 'In the present case the plaintiffs did not carry out their statutory obligations by deducting tax. They paid all the remuneration without any deduction. It is said on their behalf that in any event the effect is that the defendant would escape liability for that tax as they have not deducted it, and, therefore, he has received money to their use. I am not satisfied that the defendant would escape liability for the tax due from him in respect of his remuneration….'.

164. Lynskey J then makes reference to regulation 52(2) of the 1950 regulations. Then as now, it would seem, the legislation enabled the tax authorities to look directly to the

employee to recoup unpaid PAYE which should have been deducted from the employee's salary by the employer and paid by the employer to the tax authorities but was not.

165. Lynskey J continued at p269:

> '… it seems to me that this money was paid to and received by the defendant as remuneration. It was remuneration to which he was entitled, and the plaintiff knew that they were paying it in full. In no circumstances could it be said that in the making of that payment there was any mistake of fact. What happened was that, instead of exercising their right, and, indeed, carrying out their statutory obligation, to make deductions, the plaintiffs failed to do so.
>
> That being so, I should have thought without any authority that it could not be said that the defendant received this money to the use of the plaintiffs …'

166. At p 270 Lynskey J went on:

> 'I am satisfied that the basis on which the present case was put forward primarily was as for money had and received by the defendant to the use of the plaintiffs, and that is a form of action which must fail'

167. Lynskey J continued (with emphasis added):

> 'It is *next* suggested that, because there is a *legal liability* to pay the tax to the Inland Revenue authorities, the plaintiffs are entitled to recover it from the defendant. *I know of no such form of action.* If the money had in fact been paid by the plaintiffs in discharge of the tax liability, it might well be that there would be a cause of action for money paid by the plaintiffs to the use of the defendant, on the basis that they were compelled by process of law to pay money which was due in respect of his remuneration as to which he would ultimately be responsible for taxation. In those circumstances, the money might be recovered, but in the present case the money has not been paid, and, until the money is paid, it seems to me that there can be no action for money paid to the use of the defendant.'

168. Whilst Lynskey J's approach in the Bernard Shaw case pre-dates the recognition of a mistake of law as a potential ground of restitution, his conclusions on (a) the relevance of the monies having been paid and received *as remuneration* and (b) on the recovery of monies on the 'compulsion of law' ground requiring payment of the monies by the claimant first, in my judgment remain valid to this day. In this regard I note that the case was referred to with approval in the later case of McCarthy v McCarthy & Stone Plc [2007] EWCA Civ 664, a decision of Smith J upheld by the Court of Appeal.

169. At this stage I remind myself that a claimant should not be granted permission to amend in order to raise a claim which is not maintainable in established law. The possibility that the Supreme Court may develop or change the law is not sufficient to afford a claimant a real prospect of success at trial and the duty of the court is to apply the law as it stands: Mandrake Holdings Ltd v Countrywide Assured Group Plc [2005] EWHC 311 (Ch).

170. I also remind myself of the guidance of Lord Reed in the ITC case at [40]:

> '[40] … the adoption of the concept of unjust enrichment in the modern law, as a unifying principle underlying a number of different types of claim, does not provide the courts with a tabula rasa, entitling them to disregard or distinguish all authorities predating the Lipkin Gorman case [1991] 2 AC 548….'

171. The Applicant stressed that this is a 'developing area of jurisprudence' and that 'the reasons justifying the existence of an unjust factor are not fixed', relying on Dargamo Holdings Ltd v Avonwick Holdings Ltd [2022] 1 All ER (Comm) 1244 at [55]-[63]. But this is an application for permission to amend: see Mandrake and paragraph 169 above. In the context of an application for permission to amend, it is the duty of the court to apply the law as it stands. Moreover, whilst 'the categories of unjust enrichment are not closed' (CTN Cash & Carry Ltd v Gallaher Ltd [1994] 4 All ER 714 at 720 per Nicholls VC), 'clear reasoning' that provides 'clear analogues with other cases' is 'required for the elaboration of any extension of unjust enrichment': Gibb v Maidstone and Tunbridge Wells NHS Trust [2010] EWCA Civ 678 per Laws LJ. The law in this area is clear and well-established: see paragraph 157 above.

172. In my judgment the Applicant has no real prospects of success in establishing that the matters set out in paragraph 26Cb (i)(ii) and (iii)(a) qualify as an 'unjust' factor for the purposes of an unjust enrichment claim. These matters do not have 'clear analogues' with established caselaw. They are at odds with established caselaw. Moreover, as pleaded, paragraph 26Cb(iii)(a) of the DRAPOC is tantamount to a claim *for compensation*. In essence it alleges that the Company suffered loss as it went into liquidation as a result of the tax liabilities imposed and seeks compensation calculated by reference to such tax liabilities. Restitution is not, however, a 'compensatory remedy': ITC case per Lord Reed at [45] and paragraph 83 above.

173. For all these reasons, in my judgment the Applicant has no real prospect of establishing a claim based on paragraph 26Cb (i)(ii) and (iii)(a).

174. The Applicant contends that the 'compulsion of law' limb of his proposed unjust enrichment claim does not stop there; he also seeks to amend to claim a declaration that the Company *will* be entitled to a claim in unjust enrichment *if* it pays HMRC: para 26Cb(iii)(b) and (4) of the Prayer for Relief to the DRAPOC.

175. I turn, then, to look at the circumstances in which the court will grant declaratory relief.

176. As helpfully explained by David Richards J (as he then was) in Pavledes v Hadjisavva [2013] EWHC 124 (Ch) at [22]:

> '[22] …. The present jurisdiction [to grant declarations] is statutory. The power conferred by statute on the Court of Chancery in the mid-nineteenth century was subsequently applied to the High Court by the Judicature Acts and now by section 19 of the Senior Courts Act 1981. The court may make a binding declaration whether or not any other remedy is claimed: CPR 40.20. It is a matter for the court's discretion whether to grant a declaration in the circumstances of any particular case, although it is of course a judicial discretion to be exercised in accordance with general principles'

177. As between the parties to a claim, the court can grant a declaration as to their rights, or as to the existence of facts, or as to a principle of law: Financial Services Authority v Rourke [2002] C.P.Rep 14. When considering whether to grant a declaration or not, the court should take into account justice to the claimant, justice to the defendant, whether the declaration would serve a useful purpose, and whether there are any other special reasons why or why not the court should grant the declaration (ibid).

178. Mr Kamal submits that the courts do not generally make hypothetical declarations, referring me to Argosam Finance Co Limited v Oxby (Inspector of Taxes) and another [1963] AC 2852. This was an application for a declaration in a case involving a hypothetical tax issue. Lord Denning rejected the application, stating

> 'The court turns its face against answering hypothetical questions unless it will be of real practical use. In this case it would be an abuse for it to entertain this summons'

179. Whilst, in modern times, the appellate courts have indicated a greater willingness to entertain proceedings which raise points of law which, although "academic" or "hypothetical", involve areas of law which require clarification or a point of general public interest, (see by way of example Rolls Royce plc v Unite the Union [2009] EWCA Civ 387 at [118] to [120]), the court may still refuse a declaration on grounds of prematurity, or because it would serve no useful purpose or practical utility: Pavledes v Hadjisavva [2013] EWHC 124 (Ch) per David Richards J at [39], [48].

180. At first instance, parties are discouraged from advancing arguments of academic interest only. As put by Vos J in Lehman Commercial Mortgage Conduit Ltd v Gatedale Ltd [2012] EWHC 3083 (Ch) at [30]:

> 'The parties, including liquidators, must be careful not to advance arguments just for the sake of academic interest or arguments that have the effect of needlessly lengthening court hearings when there is nothing substantive in issue. Such conduct is neither proportionate nor in accordance with the overriding objective'

181. In the present case, the entitlement of anyone who, under compulsion of law makes a payment discharging the liability of another, to be reimbursed by that other (subject to the usual restitutionary defences) is not in issue between the parties and in any event is the subject of settled law: see para 157 above. The case of McCarthy v McCarthy & Stone [2007] EWCA Civ 664 makes clear that an employer who provides money or

other benefits to an employee without deducting PAYE and NIC and *later pays* sums representing that PAYE and NIC to HMRC itself when required by HMRC to do so may seek reimbursement from the employee on conventional restitutionary 'compulsion of law' grounds.

182. Against that jurisprudential backdrop, in my judgment, the Applicant's proposed claim for a hypothetical declaration serves no useful purpose or practical utility.

183. On behalf of the Applicant Mr Sims urged that it would, arguing that the liquidator *might pay* the PAYE and NIC due in respect of the remaining employee respondents – suggesting variously that he might pay the PAYE and NIC due to HMRC from sums received from respondents who had settled (a total of £158,932 as at date of the latest progress report), or might borrow the sums required to do so - and then seek recovery on a conventional 'compulsion of law' basis. Such matters were entirely unsupported by the evidence, however, and, after I had explored this with him in submissions, ultimately, Mr Sims confirmed that the liquidator had formed no settled intentions to take any such steps.

184. In the context of this insolvency, such steps seem extremely unlikely. There is a substantial shortfall in the estate. According to the latest Annual Progress Report dated 28 April 2022, there are minimal assets in the estate, save for recoveries of £158,932 odd from respondents who have settled the s.423 claim. Cumulative time costs exceed £400,257.06. There is a conditional fee agreement in place in relation to legal costs.

185. Mr Sims also argued that the proposed 'compulsion of law' declaration would assist with the s.423 claim, as it would 'test out' the real position of the Ethos Respondents on undervalue. I do not accept that argument. All that paragraph 29h of the APOD did in context was to flag a very well-known restitutionary principle when addressing the issue of alleged undervalue (the argument being that when valuing the consideration received by the Company, one should take into account its right to recoup any PAYE/NIC which it paid to HMRC in respect of a given employee from the employee him or herself). It did not aver an alternative factual case and certainly does not require the joinder of another party and the insertion of a new claim to meet it: that would be a sledgehammer to crack a nut. The point raised by paragraph 29h of the APOD can readily be dealt with in submissions within the s.423 claim itself.

186. In reality, the main function of the hypothetical declaration sought appears to be to side-step any limitation issues and problems posed by s.35(5) LA 1980 and CPR 17.4 and 19.5, by inviting the court to adopt the approach employed in Diamandis v Willis [2015] EWHC 312 at [80]. I decline that invitation.

187. Ultimately, I come back to the starting point: there is no need for a declaration as to the basic principle, as the basic principle is a matter of settled law. And to allow amendment to seek a more targeted declaration, to the effect (as pleaded in para 4 of the proposed prayer for relief) that the respondents '*will*' become liable to pay the various specific sums set out in the amended schedule 1 *if* the Company pays HMRC those sums, would be premature.

188. It would also be utterly wasteful of court time and costs. Whilst it is in theory possible to raise the defence of change of position in a s.423 context, the Ethos Respondents

have focused their defence to the s.423 claim largely upon the issues of undervalue and statutory purpose. As put in the APOD at para 51, the Ethos Respondent points of defence 'have been … limited to points of principle for the most part'. They have made clear in evidence filed in answer to the amendment application, however, that if permission to amend to include claims in unjust enrichment is granted, a number of the remaining 27 Ethos Respondents will wish to raise *individual* restitutionary defences, including change of position. Mr Sims sought to play down the potential impact of this, submitting that as on the Ethos Respondents' case, the monies advanced by the Trust were loans, they could not run change of position. I do not accept that submission. The loans in question were on very generous terms; one respondent, Mr Wynter, for example, annexed to his points of defence dated 30 April 2019 a loan agreement confirming an interest-free loan for a 5 year term which was extendable on a rolling basis for additional 5 year terms on payment of a one-off fee of £250. Moreover, it is the Applicant's case that these advances were not really loans. Either way, in my judgment it must be open to the Ethos Respondents, as a matter of principle, to run change of position (and other restitutionary) defences should they wish; and it is clear from the evidence filed in answer to the Re-Amendment Application that a number of such respondents intend to do so in the event that permission to re-amend is granted. Ultimately, when the matter was explored during submissions, Mr Sims accepted that this may result in two trials rather than one – on liability and quantum. It would be utterly wasteful, in my judgment, to allow this for the purpose of exploring a hypothetical.

189. In summary:

(1) In my judgment, the unjust enrichment claims based on mistake and compulsion of law pleaded at paras 26Ca and 26Cb(i)(ii) and (iii)(a) of the DRAPOC have no real prospect of success;

(2) For the reasons given at paragraphs 174-188 above and 212 to 224 below,

(a) I conclude that it would not be desirable to add the Company as a new party for the purposes of allowing the Company to pursue a hypothetical declaration based on paragraph 26Cb (iii)(b) of the DRAPOC, whether pursuant to CPR 19.2(a) or (b); and

(b) in the exercise of my discretion, I decline to grant permission to amend to include a claim for hypothetical declaratory relief based on paragraph 26Cb (iii)(b) of the DRAPOC.

In my judgment, following the guidance given by Vos J in Lehman Commercial Mortgage Conduit Ltd v Gatedale Ltd [2012] EWHC 3083 (Ch) at [30], it would be neither proportionate nor in accordance with the overriding objective to allow joinder or amendment for such a purpose.

190. These conclusions, of themselves, are sufficient to dispose of this application. For the sake of completeness however I shall also deal with limitation. My ultimate decision to dismiss this application is based on my conclusions on all issues addressed in this judgment.

Limitation

191. No limitation issue arises in respect of the claim under paragraph 26Cb(iii)(b) and paragraph (4) of the prayer for relief of the DRAPOC for a declaration that the respondents *would be* liable to indemnify the Company *if* it paid HMRC.

192. In relation to the remainder of the proposed amendments, my conclusions on limitation are as follows.

193. With regard to paragraph 26Ca DRAPOC (mistake of law), even if the proposed claim did have real prospects of success, I would refuse joinder and permission to amend to pursue such a claim as (a) it is (at the very least) reasonably arguable that the opposed amendments are outside the applicable limitation period (b) the proposed amendments seek to add a new cause of action (c) the new cause of action does not arise out of the same or substantially the same facts as are already in issue in the existing claim (even allowing for the matters pleaded not only in the APOC but in the APOD) and (d) the Applicant has failed to establish that the requirements of s.35(5) and CPR 19.5(2),(3) are satisfied.

194. In relation to (a), in a claim in unjust enrichment based on payment of a sum of money, the limitation period would ordinarily run for a period of 6 years from the date of each payment. The payments relied upon in these proceedings span 2009-10. The Applicant relies on s.32 of the Limitation Act 1980 and maintains that the limitation period should run from the date that the Supreme Court handed down judgment in the Rangers case in 2017. As made clear in Test Claimants of the FII Group litigation v Revenue and Customs Commissioners [2020] UKSC 47, however, time begins to run from the point in time when the claimant discovered or *could with reasonable diligence* have discovered the real possibility of a mistake, in the sense of recognising that a worthwhile claim had arisen. It does not run from the point at which the Supreme Court hands down judgment. HMRC alerted the Company to the real possibility of a mistake in June 2011, relying not only on Part 7A but also on Aberdeen Asset Management Plc [2010] UKFTT 524 (TC). The Rangers case was also underway by 2011; clearly by 2011 some specialist tax lawyers took the view that PAYE/NIC was payable in contexts similar to that of the Scheme. HMRC then issued regulation 80 determinations seeking payment of PAYE/NIC for the tax years 2008/9 and 2009/10 in December 2012. It is notable that the Company did not appeal them, yet did appeal a VAT assessment. The first liquidator of the Company was in office comfortably within the 30-day period for appealing the regulation 80 determinations, and the initial process for triggering an appeal is very simple (a letter), yet the liquidator did not appeal the determinations. In my judgment it is reasonably arguable that time began to run from the Regulation 80 determinations (or expiry of the 30 days for appealing the same) at the latest.

195. Moreover, the Supreme Court decision in 2017 in the Rangers case was not HMRC's first success in that case. It had won in the court below; the Inner House of the Court of Session (equivalent to the English Court of Appeal) had decided in HMRC's favour in 2015. On any footing therefore, it cannot sensibly be said that the first point at which the claimant could with reasonable diligence have discovered the real possibility of a mistake, in the sense of recognising that a worthwhile claim had arisen, was in 2017. Even if time ran only from 2015, the claim would be statute-barred by the time of the application for permission to re-amend in 2022.

196. Against that backdrop, it is clearly 'reasonably arguable' that the opposed amendments regarding mistake of law are outside the applicable limitation period.

197. In relation to (b), it was common ground that the proposed amendments sought to introduce a new cause of action.

198. In relation to (c), Mr Sims rightly reminded me that when considering the 'same or substantially the same facts' test, issues raised in the defence as well as those raised in the particulars of claim must be taken into account: Mullaley & Co Ltd v Martlet Homes Ltd [2022] EWCA Civ 32 at [78]; Ballinger v Mercer Ltd [2014] EWCA Civ 996 at [15] and Diamandis v Wills [2015] EWHC 312 (Ch) at [44] – [49] and [79]-[80]. He further relied upon the guidance given in Mullaley at [88], that there must be 'sufficient overlap in order to meet the test of "the same or substantially the same facts"' but 'such overlap does not have to be total'. Naturally I take all such matters into account.

199. I also remind myself that a key function of the 'same or substantially the same facts' test is to avoid placing the defendant in a position where he will be obliged, after the expiration of the limitation period, to investigate facts and obtain evidence of matters completely outside the ambit of and unrelated to the facts which he could reasonably be assumed to have investigated for the purpose of defending the unamended claim: Diamandis v Wills at [49(3)]. This requires consideration of (i) the extent to which the defendants would be required to embark upon an investigation of facts which they would not previously have been concerned to investigate (Ballinger at [38]) and (ii) the whole range of facts which are likely to be adduced at trial: Finlan at [56] citing Smith v Henniker-Major at [96].

200. Taking all such guidance into account, in my judgment the claim in mistake is not based on the same or substantially the same facts as those already in issue in the existing claim (even allowing for the matters pleaded not only in the APOC but in the APOD).

201. A key issue arising on (c) in my judgment is the counterfactual posed by paragraph 26Ca(iii) DRAPOC. In this regard Mr Kamal referred me to the case of Re One Blackfriars Ltd [2019] EWHC 1516 (Ch) at [67]. Mr Sims sought to play down the impact of the proposed introduction of a counterfactual, claiming that what the Company would have done was a 'no brainer'. For reasons already explored at paragraphs 126 to 129 of this judgment, however, the position is not as clear-cut as the Applicant would wish it to be. Exploring this issue would require witness evidence and documentary evidence on matters entirely distinct from those required for the s.423 claim.

202. With regard to (d), the Applicant has failed to satisfy me that the Company meets the requirements of s.35(5) LA 1980 and CPR 19.5(2) and (3) on the issue of joinder in relation to its proposed unjust enrichment claim based on mistake. Even if the Company could clear the s.35(5)(a) threshold, on any footing it cannot clear the s.35(5)(b) threshold, as in light of my conclusions at paragraphs 174 to 188 above, it does not satisfy s.35(6).

203. I turn next to the proposed claim based on paragraph 26Cb(iii)(a) (compulsion of law). Again, even if this claim did have real prospects of success, I would refuse

joinder and permission to amend to pursue such a claim as (a) it is reasonably arguable that the opposed amendments are outside the applicable limitation period (b) the proposed amendments seek to add a new cause of action (c) the new cause of action does not arise out of the same or substantially the same facts as are already in issue in the existing claim (even allowing for the matters pleaded not only in the APOC but in the APOD) and (d) the Applicant has failed to establish that the requirements of s.35(5) and CPR 19.5(2) and (3) are satisfied.

204. With regard to (a), the alleged cause of action arose at the latest on the Company's entry into CVL, more than 6 years prior to the application for permission to amend. Accordingly it is (at the very least) reasonably arguable that the proposed amendments are now outside the applicable limitation period.

205. With regard to (b), again it is common ground that the proposed claim is a new cause of action.

206. In relation to (c), in my judgment the proposed claim under paragraph 26Cb(iii)(a) (compulsion of law) would necessitate detailed investigations into precisely what (as a matter of *fact*, rather than by application of the 'declaratory theory' fiction) caused the Company's entry into CVL in December 2012. In this regard it will be recalled that HMRC first wrote to the Company stating that it was liable for unpaid PAYE/NIC in June 2011, yet the Company continued to trade and did not enter into CVL until 18 months later. It will also be recalled that the Company's decision to enter CVL was taken in November 2012, *ahead of* the Regulation 80 determinations issued by HMRC on 4 December 2012 and at a time when Sempra had yet to be overruled. Against that backdrop, the question whether '*the payment liability* resulted in the Company entering into liquidation' (as pleaded at 26Cb(ii)) is far from clear cut. The court would need to consider, for example, whether the Company concluded that in light of the introduction of *Part 7A*, it had no viable service to provide (as suggested, for example, by Mr Webster in a s.235 interview on 4 June 2013), or whether it considered itself (or the evolved scheme) crushed by HMRC's claims in correspondence (which included attacks on deductions made for *corporation tax* purposes, quite separately from the PAYE issues raised – see paras 10 to 12 above) in the period leading up to entry into CVL. This area of enquiry is entirely irrelevant to the s.423 claim as pleaded and defended. Indeed, the fact that the Company is in liquidation at all is largely irrelevant in the context of a s.423 claim.

207. Mr Sims submitted that the cause of the Company going into liquidation was simply 'a matter of documentary record and enquiry'. He argued that it would be a matter of inference from the documents. I do not accept that it would simply be a matter of documentary record. Defending the claim would involve new witnesses, including those at Magee Gammon who advised the Company in November 2012 shortly before its entry into CVL. It would also almost certainly involve third party disclosure as well, as already it is clear that a considerable number of documents relevant to the events which led to the Company entering CVL, including the bulk of correspondence passing between the Company/its accountants and HMRC over the period 2011-12, are missing from the Company books and records.

208. Stepping back, in my judgment the new cause of action proposed by Paragraph 26Cb(i)(ii) and (iii)(a) DRAPOC cannot on any footing be described as arising out of the same or substantially the same facts as are already in issue.

209. In addition, with regard to (d), the Applicant has failed to satisfy me that the Company meets the requirements of s.35(5) and CPR 19.5(2) and (3) on the issue of joinder in relation to its proposed unjust enrichment claim based on Paragraph 26Cb(i)(ii) and (iii)(a) DRAPOC. Even if the Company could clear the s.35(5)(a) threshold, on any footing it cannot clear the s.35(5)(b) threshold, as in light of my conclusions at paragraphs 174 to 188 above, it does not satisfy s.35(6).

Discretion

210. I have already addressed the proposed claim under paragraph 26Cb(iii)(b) and paragraph (4) of the prayer for relief of the DRAPOC (the hypothetical declaration).

211. In relation to the remainder of the proposed amendments, in the light of my earlier conclusions it is strictly unnecessary for me to address the issue of discretion. For the sake of completeness, however, I confirm that, even absent my earlier conclusions, in the exercise of my discretion I would have declined to grant permission to amend.

212. This is an extremely stale claim. It relates to payments made in the period 2009-10, over 12 years ago. Already almost four years have passed since proceedings were issued.

213. At the time of issue, the s.423 claim was grossly exaggerated. In pre-action protocol correspondence, Mr Kamal warned the Applicant that the 'no consideration' claim was untenable, but the Applicant pressed ahead with that claim regardless. The Applicant also included a claim in respect of the year 2010/11, when HMRC had made no claim, formal or informal, in respect of that year, whether before or at any time since the Company went into liquidation. Both claims were struck out, the latter as an abuse of process as well as on the ground that it had no prospects of success: see paragraph 29 above and my earlier judgment at ([2021] EWHC 142 (Ch); [2021] BPIR 550.

214. Whilst the First Strike-Out Application was entirely justified, inevitably it delayed progress to trial. The Applicant was then afforded a generous amount of time in which to review what was left of the Main Application and to seek permission to amend. This resulted in the APOC, which made no mention of an alternative claim in unjust enrichment. It was not until June 2022, a year after the APOC were settled by Counsel and after the deadline for exchange of witness statements for trial had passed, that the Applicant gave any indication of his plan to seek permission to rely on the alternative ground of unjust enrichment. No adequate reasons have been put forward for the delay.

215. Mr Sims KC points out that no date has yet been fixed for trial. This is however a direct result of the current Re Amendment Application; but for that application, a direction that the matter be listed for trial would have been given at the CMC listed in June 2022.

216. For reasons already explored, the claim raised under paragraph 26Cb(iii)(b) of the DRAPOC (the hypothetical declaration) is entirely unnecessary and is contrary to the overriding objective. It is also cynically designed to deny the Ethos Respondents the protections which the legislature intended them to be afforded under s.35(5) LA 1980.

217. The remainder of the new claims proposed are extremely weak and are almost certainly statute-barred. Whilst Mr Sims sought to rely on the Aldi principle and maintained that it would be open to the Company to issue separate proceedings, the current re-amendment application is clearly intended to secure the Company the benefit of s35(1) LA 1980. In my judgment it would be wrong to deny the Ethos Respondents a limitation defence in this case, when the Company's position on limitation is so weak.

218. Moreover, allowing the new claims to be added, at the behest of an insolvent company, would cause unnecessary and disproportionate complication and expense in what is otherwise relatively straightforward litigation brought by an office-holder.

219. The Ethos Respondents would face two Applicants, represented by the same legal team, running diametrically opposing cases, one case casting the Company as the knowing participant in a s.423 transaction and the other case casting the Company as an innocent in an unjust enrichment claim based on mistake.

220. To date, the Ethos Respondents have focused their defence to the s.423 claim primarily on challenging undervalue and statutory purpose. Having regard to existing caselaw, defending the s423 claim along such broad lines, as a group, is plainly a proportionate approach to adopt. The burden of proof is on the Applicant to establish both undervalue and statutory purpose. A successful attack on either limb would dispose of the s.423 claim in its entirety, at relatively modest cost.

221. The proposed unjust enrichment claim, however, would give rise to many more granular issues (a number of which have been touched on in this judgment), against a backdrop of fading memories and missing documentation.

222. The Company's books and records are incomplete. The agent used for some time by the Company for book-keeping (Fuller Accounts) confirmed a number of years ago, following cessation of its retainer, that it had undertaken block deletions of relevant emails. The Trustees (Nautilus) resigned from office in 2015 and have assigned any outstanding loans to a trustee based in Mauritius. There is no guarantee that Magee Gammon, the Company's accountants, will have retained all their records some 10 years after the Company entered CVL, or that such records would include the full run of relevant documents which had been held by the Trust.

223. The timing, length - *and number* - of trials required would be significantly affected. The Ethos Respondents have made clear in evidence filed in answer to the re-amendment application that if permission to amend to include a claim in unjust enrichment was granted, a number of the 27 individuals comprised in the Ethos Respondent group would wish to raise individual restitutionary defences, including change of position: see paragraph 188 above. Collating such information would be an arduous, time-consuming and expensive task, pushing back the ultimate trial date; and would be likely to involve applications for third party disclosure, (some cross-border), at extra expense. Mr Sims sought to play down the potential impact of the new claims, but ultimately accepted that they would probably result in *two* trials rather than one – on liability and quantum.

224. In short, the task faced by the Ethos Respondents in defending the claim would change out of all recognition. In my judgment it would be oppressive, wasteful and

contrary to the overriding objective to permit the Applicant to introduce the Company and the new claims to the proceedings at this late stage.

Conclusion

225. I have already ordered the joinder of Mr Purkiss in place of his predecessor Ms Hall: see generally paragraph 47 above.

226. For the reasons set out in this judgment, I shall dismiss the remainder of the Re-Amendment Application.

227. I shall hear submissions on costs on the handing down of judgment.

ICC Judge Barber