CL-2018-000732

Neutral Citation Number: **[2020] EWHC 1477 (Comm)**

Case No: CL-2018-000732

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
OF ENGLAND AND WALES
COMMERCIAL COURT (QB)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 10 June 2020

Before :

MR JUSTICE FOXTON

- -

Between :

(1) SCHOOL FACILITY MANAGEMENT LIMITED
(2) BOSHIRE LIMITED
(3) GCP ASSET 1 FINANCE LIMITED

Claimants

- and –

(1) GOVERNING BODY OF CHRIST THE KING COLLEGE
(2) ISLE OF WIGHT COUNCIL

Defendants

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- -

Timothy Straker QC and **Pia Dutton** (instructed by **Stephenson Harwood LLP**) for the **Claimants**
Peter Oldham QC and **Christopher Knight** (instructed by **Stone King LLP**) for the **First Defendant**
Daniel Stilitz QC and **Rupert Paines** (instructed by **DAC Beachcroft LLP**) for the **Second Defendant**

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APPROVED JUDGMENT

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

Covid-19 Protocol: This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to Bailii. The date and time for hand-down is deemed to be 10:30am on Wednesday 10 June 2020.

Mr Justice Foxton:

1. This judgment ("the Consequentials Judgment") addresses the various issues which have arisen following my judgment reported at [2020] EWHC 1118 (Comm) ("the Judgment").

2. The issues for determination are as follows:

    i) Issues as to the final relief which should be ordered:

        a) In what amount is SFM is entitled to judgment against the College?

        b) Is the College entitled to a declaration that the Contract is *ultra vires* and void?

        c) Are the Claimants entitled to any relief now in respect of the use of the Building in the period after Judgment?

        d) What orders should be made on the Part 20 Claims between the College and the Council?

    ii) Issues of costs:

        a) What costs orders should be made?

        b) Should any orders be made for payment on account of any costs ordered?

        c) Should the court make any orders for the payment of interest on any costs ordered?

    iii) Issues relating to permission to appeal:

        a) The Claimants' application for permission to appeal.

        b) The College's application for permission to appeal.

        c) The College's application for a stay of execution.

        d) The College's application to retain the benefit of the security for costs provided by the Claimants pending any appeal.

3. While the resolution of the majority of these issues is likely to be only of interest to the parties, the College's application for permission to appeal raises an issue of law which received very limited attention at the trial, and which is of potentially wider interest, as is one aspect of the College's application for a stay of execution pending any appeal and the issue relating to security for costs. For that reason, I have decided to deal with the requests for

permission to appeal first, and with the College's application for permission to appeal before the Claimants' application.

4. The parties made their submissions on these issues in writing. I am very grateful to the legal teams for the considerable work which went into those documents.

ISSUES RELATING TO PERMISSION TO APPEAL

5. The test for granting permission to appeal is whether:

   i) the Court considers that the appeal would have a real prospect of success; or

   ii) there is some other compelling reason for the appeal to be heard.

   (CPR 52.6(1)).

The College's application for permission to appeal

The issue raised

6. The College's application for permission to appeal arises out of the last three substantive paragraphs of the Judgment: [502] to [504]. These provide:

   "[502] In relation to the period from September 2013 to September 2017, SFM can make no further recovery beyond the amounts which the College has already paid and which I have held it cannot recover. This result can be rationalised in a number of ways. It might be said that SFM has received the anticipated counter-performance in circumstances in which the College cannot recover it (because of SFM's change of position defence), and so there has been no failure of condition. Alternatively, it might be said that any enrichment has not come at SFM's expense because SFM had been paid for it. In the further alternative, it might be said that in circumstances in which the College cannot recover back the amounts paid by way of rent for this period because of SFM's change of position, the College has its own change of position defence to any claim in unjust enrichment by SFM for that period.

   [503] In respect of the period from September 2017 to trial, I have concluded that SFM can recover in unjust enrichment at the market rate I have set out above. It is no answer to such a claim that, in respect of the preceding three years, the College will have paid in excess of the market rate. In circumstances in which the College cannot recover the rent paid during the preceding period because SFM has changed its position, it

would not be appropriate to allow the College nonetheless to rely upon those payments as, in effect, creating a credit which can be used to answer SFM's claim in unjust enrichment in respect of later years for which no payment has been made.

[504] It will be apparent that my analysis treats the unjust enrichment claim for each year's hire as, in effect, severable for the purposes of analysing the claims and defences to claims in unjust enrichment. In my view, this analysis best represents the nature of the benefit transferred – the possession or use of property over a period of time – and the market valuation of that benefit (which involved a period-dependent payment). It is for this reason that the amounts paid by the College for the period from September 2013 to September 2017, and which I have found to be irrecoverable, do not provide a complete answer to SFM's claim in unjust enrichment for the entire period of use of the Building (cf. the rule that a failure of basis must be total unless the benefit conferred is severable analysed in *Goff and Jones* paras. 12-26 to 12-28)."

7. The College fairly acknowledges that the submissions developed in support of the application for permission to appeal "were not directly advanced before the Court" at the trial. The entirety of the College's submissions on its proposed ground of appeal was set out at paragraph 228 of its closing submissions:

> "Accordingly, the total market rental value of the benefit received by the College from 5 September 2013 to the date of trial (six and a half years) is £1,625,000. The College has paid £3,205,636.80. Just as in Benedetti, the Claimants have received substantially more than is owed to them applying the principles of unjust enrichment; nothing further is owed".

It will be apparent that this submission does not address the effect of the Claimants succeeding on their change of position defence, and at what point that defence is to be brought into consideration in a case in which both parties raise claims in unjust enrichment arising from an ongoing course of dealings. Nor was the issue raised in the College's post-trial response to the further submission I allowed from the Claimants on the change of position defence.

8. However, in fairness to the College, the Claimants' case on unjust enrichment and change of position was largely under-developed at trial. The Claimants have not raised any objection to this issue being raised by the College now. In any event, it would ill-behove the Claimants to complain about the late development of this point, when their own case on unjust enrichment was largely developed only after trial and in response to requests by the Court. In a case with so many issues and inter-connected parts, the issue is likely to

have been one which was only brought into focus for the parties by the Judgment (just as it has been brought into sharper focus for the Court by the post-Judgment submissions). In these circumstances, I am satisfied that the issue is one which it is open to the College to raise.

Counter-restitution in exchange transaction cases

9. There are a number of cases which have considered the position where payments have been made back and forth between two parties on the basis of a void contract, raising the issue of whether the Court should proceed on the basis that each individual payment gives rise to a claim in unjust enrichment, or only consider the net position and, if the latter, what the justification for adopting this approach is. In Kleinwort Benson Ltd v Sandwell BC [1994] 4 All ER 890, Hobhouse J considered restitutionary claims in respect of payments made under a void swap transaction, some of which had been made more than 6 years before proceedings were commenced (and which might, therefore, be subject to a defence under the Limitation Act 1980 if considered in their own right). At p.929, Hobhouse J observed:

> "In my judgment, the correct analysis is that any payments made under a contract which is void ab initio, in the way that an ultra vires contract is void, are not contractual payments at all. They are payments in which the legal property in the money passes to the recipient, but in equity the property in the money remains with the payer. The recipient holds the money as a fiduciary for the payer and is bound to recognise his equity and repay the money to him. This relationship and the consequent obligation have been recognised both by courts applying the common law and by Chancery courts. The principle is the same in both cases: it is unconscionable that the recipient should retain the money. Neither mistake nor the contractual principle of total failure of consideration are the basis for the right of recovery.
>
> Where payments both ways have been made the correct view is to treat the later payment as, pro tanto, a repayment of the earlier sum paid by the other party. The character of the remedy, both in law and equity, is restitution, that is to say putting the parties back into the position in which they were before. Accordingly, the remedy is only available to a party on the basis that he gives credit for any benefit which he has received. He must give credit for any payments which have been made by the opposite party to him and, where the court thinks appropriate, pay a quantum meruit or quantum valebat. The same conclusion follows from the application of the principle of unjust enrichment: in so far as the recipient

> has made cross-payments to the payer, the recipient has ceased to be enriched".

10. At p.940 he continued:

> "The argument under the Limitation Acts depends upon the premise that each cause of action in money had and received, or analogous equitable claim, must be treated as having accrued at the date when the relevant sum was paid. For the reasons that I have given earlier in this judgment I consider that the claim of Kleinwort Benson, whether put in money had and received or in equity, is in truth only for the net sum of £196,322·4372. Its claim has to give credit for the payments that it has received. As is implicit in the action for money had and received on the ground of unjust enrichment and as was expressly held in Hicks v Hicks (1802) 3 East 16, 102 ER 502, the claim cannot be asserted without at the same time giving credit for any payments received. As a matter of the principle of unjust enrichment, the defendant has only been enriched in the net sum and the enrichment has only been at the expense of the plaintiff in the net sum.
>
> Accordingly, the position was analogous to that of a running account between the two parties. Only one underlying transaction was involved—the first Sandwell swap contract. The successive payments merely altered the location and extent of the enrichment which existed from time to time. The earlier payments had long since ceased to give any cause of action to either party. They were merely part of the previous dealings between the parties which were relevant to ascertaining what, if any, cause of action either party had at a later date".

11. In summary, Hobhouse J held that the party seeking to recover in unjust enrichment could only recover the net amount paid under the void swap transaction, and then only if it had made payments within the limitation period in an amount equal to the net payment it sought to recover. Hobhouse J followed the same approach in Kleinwort Benson Ltd v South Tyneside Metropolitan BC [1994] 4 All ER 972, 979. In that case, the payments made within the limitation period were less than the net balance in the claimant's favour, and the claim was limited to the lower amount.

12. *Goff and Jones: The Law of Unjust Enrichment* (9th) at paras. 4.67 and 31.05 note that where two parties have made payments to each other under an exchange transaction, it is possible to rationalise the rule that there should only be judgment in favour of the net payer for the net amount paid on two bases:

> "It might be a rule that claim and counter-claim must be netted off, imposed with the pragmatic purpose of reducing multiplicity of suits. Or it might be a rule that enrichments transferred and received in a process of exchange must be netted off, imposed to ensure that the mutual reciprocity of the parties' performances is duly reflected in the unwinding process that must follow failure of the basis for the parties' exchange. English authority on this point is sparse, but in Kleinwort Benson Ltd v Sandwell BC, Hobhouse J took the latter view. This suggests that there are special rules to govern the identification and quantification of enrichment in situations where the defendant's enrichment has been gained in exchange for an enrichment conferred on the claimant".

13. There are indications in *Goff and Jones* that the editors favour the procedural analysis, in which the net payment rule provides a pragmatic response to the fact that a claim by one party to an exchange transaction to recover the enrichment it has conferred removes the legal basis for the enrichment it has received from the other party in the exchange, setting up a cross-claim. For example at paragraph 31-16, the editors state:

> "It follows that the best explanation of the counter-restitution requirement does not turn on the defendant's disenrichment in the same way as the change of position defence. Instead the rule rests on the fact that, where there has been an exchange between the parties, and the claimant recovers the benefit that he has conferred on the defendant, the basis on which he received the benefit from the defendant must fail. Were he to recover without making counter-restitution, the defendant would therefore have a claim against him on the ground of failure of basis."

14. Professor Burrows QC also appears to favour the cross-claim analysis. In *The Law of Restitution* (3rd) p.570 he suggests that:

> "The requirement of counter-restitution appears to be an unjust-related defence which rests on recognising that the defendant has a counterclaim for the *claimant's* unjust enrichment at the defendant's expense, grounded most obviously on total failure of consideration …. To treat counter-restitution as a defence may therefore be doing nothing more than applying the general law that a counterclaim may operate as a set-off defence ….
>
> It seems clear, therefore, that counter-restitution is not an enrichment-related defence concerned with the defendant's overall enrichment".

Professor Burrows QC expresses the view that Hobhouse J's judgment in Sandwell may have caused "some obfuscation of the true nature of counter-restitution". He seeks to analyse Sandwell as a cross-claim case (suggesting that Hobhouse J was "pointing out that one should 'net off' the claimant's entitlement to restitution against the defendant's counter-entitlement to restitution"). In what appears to be a challenging interpretation of Sandwell, he concludes that:

> "On the best interpretation, therefore, Hobhouse J was not contradicting the correct analysis that counter-restitution is an unjust-related defence (recognising a counterclaim/set-off) based on the claimant's unjust enrichment rather than being an enrichment-related defence".

15. The College suggests that the approach adopted by Hobhouse J in Sandwell was approved by Lord Goff in the Privy Council in Goss v Chilcott [1996] AC 788, 798. While the outcome in Sandwell (a single order for payment of the net amount) was approved, the terms in which Lord Goff summarised the decision in Sandwell are more consistent with the cross-claims analysis than the view that the only enrichment is the net balance, giving a cause of action for that amount to the net payer. In addressing a scenario in which a lender had advanced capital and a borrower paid interest under a loan which had been discharged for alteration of the security, Lord Goff stated:

> "In such a case, therefore, the capital sum would be recoverable by the lender, and the interest payment would be recoverable by the borrower; and doubtless judgment would, in the event, be given for the balance with interest at the appropriate rate: see Westdeutsche Landesbank Girozentrale v Islington Borough Council [1994] 1 WLR 938".

16. These cases do not, however, consider the stage at which any defence of change of position should be brought into the analysis.

At what stage in an exchange transaction should the defence of change of position be considered?

17. Treating counter-restitution under exchange transactions as akin to a set-off would support the approach I adopted, which was to consider the change of position defence when determining whether the College could recover the amounts it had paid, rather than first ascertaining the net balance between SFM and the College, and only considering the change of position defence to the extent relevant to a claim to recover that net balance. This approach involves considering whether there is a defence to the Claimant's putative cross-claim, on the basis that if there was such a defence, the College would have no "cross-claim" to set-off in the final balance.

18. By contrast, treating the issue of counter-restitution as part of the process of identifying the enrichment would support the position for which the College contends (because netting-off would be part of the anterior stage of determining whether there was any enrichment, and therefore any *prima facie* claim in unjust enrichment, before considering whether there was any defence to such a claim). However, matters may not be as straightforward as that. While, as I have noted above, Professor Burrows QC appears to be a supporter of the "cross-claims" analysis, he nonetheless suggests at p.571 that:

> "To avoid unnecessary confusion between the two and to enhance clarity, counter-restitution is best applied before going on to the change of position defence".

19. The Singapore Court of Appeal in Skandinaviska Enskilda Banken AB v Asia Pacific Breweries Singapore Pte Ltd [2011] SGCA 22 considered claims in unjust enrichment brought between two innocent victims of the same fraud, and held that it was appropriate to adopt a "net payment" or running account approach precisely because of the risk that, considered as independent claims, one innocent party might be able to recover its payments when the other could not because of a defence specific to one party, such as change of position. However, no defence of change of position was established on the facts, and the Court's analysis appears to have been influenced by the fact that both parties were innocent victims of the same fraud and should, so far as possible, be treated in the same way. The Court observed at [129]:

> "It is precisely where the victims of the same fraudster are suing each other in restitution (as in the present case) that the victims' claims should be tied together, which is the effect that applying the running account method would have".

As a case in which the two claims arose because the fraudster recycled the same money between the bank accounts of the innocent parties in what the Court described at [27] as "round-tripping", Skandinaviska presents a particularly strong case for establishing enrichment on a net basis rather than considering each party's claim independently.

20. These references apart, I have found no discussion in the commentary or case law of the order in which the issues of counter-restitution and change of position should be addressed in exchange transaction cases. The difficulty to which this issue gives rise, and the debate as to whether it concerns the unjust factor, the question of enrichment or a defence, reflects the tendency of the conceptual compartments of the law of unjust enrichment to fold in on themselves in particularly challenging cases. I have concluded that there is no single, immutable, sequence in which the issues of the

unjust factor, enrichment, counter-restitution and change of position must be considered. There will be cases in which the issues of counter-restitution and net benefit should be determined before any consideration is given to a change of position defence. These might include the example much-discussed by German lawyers of two Old Masters paintings exchanged by collectors under a void transaction, one of which is destroyed before the true status of the transaction is revealed. In analysing this scenario, German scholars have generally favoured the difference theory (*Saldotheorie*) of unjust enrichment, in which there is a claim for the difference in value unaffected by the accidental destruction of one painting, over the "two-claims" theory (*Zweikondiktionentheorie*), under which each party has its own claim which is susceptible to defences such as a change of position by the other party (see the discussion in *Goff and Jones* at paras. 31-18 to 31-21). Another example may be the decision of the Singapore Court of Appeal in Skandinaviska Enskilda Banken AB v Asia Pacific Breweries Singapore Pte Ltd where the court had to consider the impact of a fraud on two innocent parties.

Analysis and conclusion

21. On the particular facts of this case, I remain satisfied that the approach I adopted in the Judgment at [502]-[504] is the correct one, for the following reasons.

22. First, even if the approach of Hobhouse J is adopted, and the relevant question is to identify the net benefit received in a particular context, there are limits to the netting-off process. In South Tyneside at p.579, Hobhouse J rejected the plaintiffs' argument "that in evaluating what their net claim in the present action is, one should have regard to the payments made in connection with all five of the interest rate swaps concerned in this action so as to arrive at some overall aggregated position" because:

> "Each interest rate swap contract was an independent transaction and no right of set-off or aggregation exists or existed as between one contract and another. Each contract, both in law and in equity, must be looked at separately".

23. Similarly in Goss v Chilcott, Lord Goff at pp.797-8 appears to envisage that payments of capital and interest under a discharged loan should be considered separately, rather than aggregated to arrive at a net balance. Lord Goff stated:

> "The function of the interest payments was to pay for the use of the capital sum over the period for which the loan was outstanding, which was separate and distinct from the obligation to repay the capital sum itself. In these circumstances it is, in their Lordships' opinion, both legitimate and appropriate for present purposes to consider the two

> separately. In the present case, since it is unknown when the mortgage instrument was altered, it cannot be known whether, in particular, the second interest instalment was due before the defendants were discharged from their obligations under the instrument. Let it be supposed however that both interest payments had fallen due before that event occurred. In such circumstances, there would have been no failure of consideration in respect of the interest payments rendering them recoverable by the defendants; but that would not affect the conclusion that there had been a total failure of consideration in respect of the capital sum, so that the latter would be recoverable by the company in full on that ground. Then let it be supposed instead that the second interest payment did not fall due until after the avoidance of the instrument. In such circumstances the consideration for that interest payment would have failed (at least if it was payable in advance), and it would prima facie be recoverable by the defendants on the ground of failure of consideration; but that would not affect the conclusion that the capital sum would be recoverable by the company also on that ground".

24. In this case, I found that the unjust enrichment rendered by the Claimants was the provision of a benefit over time, the market value of which is to be determined by reference to the particular period of enjoyment (Judgment, [437] and [504]). The rent instalments paid by the College were referable to, and conditional on, the enjoyment of the use of the Building during the Contract years for which those payments were made. While in respect of those periods, I have concluded that there should be a netting-off ([502]), the College seeks to go further and argues that payments made in respect of the benefit provided in one period should be netted off for the purpose of determining whether the College was unjustly enriched by its use of the Building during another period. In my view, these aspects of the exchange transaction are sufficiently distinct that it is "both legitimate and appropriate to consider the two separately".

25. Second, this is a case of anticipatory change of position. On the basis of the conclusions I have reached, there was never a point in time at which the College was entitled to recover the payments it had made, because SFM had incurred expenditure significantly in excess of those amounts in anticipation of receiving them. In those circumstances, the suggestion that the Claimants' change of position should be considered entirely separately from, and only subsequent to, the identification of the net benefit conferred at the College's expense is particularly unattractive. If the College had realised its mistake the day after payment, and sought to recover the amounts paid, it would have failed. On that basis, it is difficult to see why the College should nonetheless be entitled to use those payments thereafter as some form of "restitution voucher" to net-off against any subsequent enrichments it received at the

Claimants' expense. If the payments were not repayable when made, then the College should not be permitted to treat the use of the Building thereafter "as, pro tanto, a repayment of the earlier sum paid by the other party" (cf Sandwell at p.929).

26. Finally, this is not a case (unlike the German pictures example) in which the change of position relied upon arises from matters which are wholly extraneous to the party seeking restitution. The change of position consisted of purchasing the Building, as the College anticipated and intended would be done, in order to provide the use of the Building to the College (the event which gives rise to the Claimants' unjust enrichment claim). There are passages in Hobhouse J's decision in Sandwell which suggest that the "net benefit" approach rests in part on the perceived unfairness of allowing a claimant to bring an unjust enrichment claim without giving credit for the benefits it has itself received. For example at p.929 he suggested that credit had to be given because "it is unconscionable that the recipient should retain the money". While it would clearly be unconscionable for the Claimants to assert a claim in unjust enrichment in respect of the use of the Building for a period for which the College had already made an irrecoverable payment, there seems nothing unconscionable in the Claimants refusing to give further credit to the extent that it had changed its position in anticipation of receipt of the payment, when it had done so for the purpose of providing a benefit to the College.

27. For these reasons, I remain of the view set out in the Judgment. However, I accept that the issue of law raised by the College is one which has both a real prospect of success, and raises an issue of law of general importance. Accordingly I grant the College permission to appeal on this point.

The College's application for a stay of execution

28. The granting of permission to appeal is not of itself a sufficient reason to grant a stay of execution. A successful litigant should not generally be deprived of the fruits of litigation pending appeal: Leicester Circuits Ltd v Coates Brothers plc [2002] EWCA Civ 474. The approach to be adopted in deciding whether to grant a stay was set out by Clarke LJ in Hammond Suddards Solicitors v Agrichem International Holdings Ltd [2001] EWCA Civ 2065, [22]:

> "Whether the court should exercise its discretion to grant a stay will depend upon all the circumstances of the case, but the essential question is whether there is a risk of injustice to one or both parties if it grants or refuses a stay. In particular, if a stay is refused what are the risks of an appeal being stifled? If a stay is granted, and the appeal fails, what are the risks that the respondent will be unable to enforce the judgment? On the other hand, if a stay is refused and the

> appeal succeeds, and the judgment is enforced in the meantime, what are the risks of the appellant being able to recover any monies paid from the respondent?"

29. An applicant for a stay must generally put forward solid grounds, namely some form of irremediable harm if a stay is not granted: Mahtani v Sippy [2013] EWCA Civ 1820, [13]-[17].

30. If the College succeeds in its appeal, it will have been under no liability to the Claimants at the date of the Judgment. The appeal is clearly arguable. It is clear on the evidence before the Court, including the third witness statement of Ms Williams, that the College would be placed in severe difficulty if required to make the payment now. The College's most recent deficit is just under £2 million. As a public body, operating in a time of crisis, such funds as it has are required for education purposes, and its ability to raise funds from other means (for example borrowing) is heavily circumscribed. I am satisfied, therefore, that the College is likely to be severely and irreversibly prejudiced if exposed to process of execution, only for it to succeed in its appeal at a later stage.

31. Further, there is no evidence before the Court that the Claimants are companies of financial substance. SFM, the judgment creditor, is a special purpose vehicle. I note that the Claimants provided security for the Defendants' costs in the sum of £400,000, which involved a tacit recognition that the Defendants' concerns that the Claimants would be unable to meet any costs order had some substance. This provides a second source of potential prejudice to the College if no stay is granted, namely that any amounts it now pays might prove irrecoverable if the appeal succeeds. However, this is a subsidiary factor in my decision.

32. By contrast, I am not persuaded that SFM's prospects of recovering the amount of the Judgment will be prejudiced if a stay is imposed. The College is a public body, not a trading entity, and the reality is that SFM will ultimately be relying on the College obtaining financial assistance from the Council for the Judgment to be satisfied. That prospect will not be significantly impacted by a stay pending appeal.

33. In these circumstances, I am satisfied that it would be appropriate to stay execution of the amount awarded in SFM's favour pending the determination of the College's appeal.

34. The College also seeks an order that interest under the Judgments Act 1838 should not run on the amount ordered during the period of the stay. This raises a difficult, and interesting, question.

35. S.17 of the Judgments Act 1838 provides:

> "(1) Every judgment shall carry interest at the rate of 8 per centum per annum from such time as shall be prescribed by rules of

court until the same shall be satisfied, and such interest may be levied under a writ of execution on such judgment.

(2) Rules of court may provide for the court to disallow all or part of any interest otherwise payable under subsection (1)".

36. Case law supports the view that the court does not have power to vary the rate payable under the 1838 Act, save in exercise of the express statutory power to do so for non-sterling judgments under s.44 of the Administration of Justice Act 1970: Rocco Giuseppe & Figli v Tradax Export SA [1984] 1 WLR 742, 747 and Chubb v Dean [2013] EWHC 128 (Ch), [11]. This is also the view expressed in *Civil Procedure* (2020) para. 16AI.17. That conclusion is consistent with the terms of s.17, which provide for Rules of Court to determine the time from which interest will run under s.17, or to disallow some such interest, but not to vary the rate (still less for a judge to do so absent a Rule of Court).

37. CPR Order 40 Rule 8 is the relevant rule of court. It is headed "time from which interest begins to run" and provides:

"(1) Where interest is payable on a judgment pursuant to section 17 of the Judgments Act 1838 or section 74 of the County Courts Act 1984, the interest shall begin to run from the date that judgment is given unless—

(a) a rule in another Part or a practice direction makes different provision; or

(b) the court orders otherwise.

(2) The court may order that interest shall begin to run from a date before the date that judgment is given".

38. The provision does not expressly empower the court to disallow a period of interest, save in so far as this might be said to be implicit in providing that interest will start at a later date. Nor does it provide for the court to vary the rate at which interest is payable on a judgment debt.

39. Does the granting of a stay of execution change the position? In Axel Johnson Petroleum AB v MG Mineral Group AG [1992] 1 WLR 270, 275, Staughton LJ noted that "whether a stay of execution operates to prevent interest accruing under the Act is a question to which I have not been able to find the answer, but I would assume that it does not".

40. This also appears to have been the view of Underhill LJ (with whom Patten LJ agreed) in Yapp v Foreign and Commonwealth Office [2014] EWCA Civ 1512. Underhill LJ observed at [146]:

> "If the Claimant had been intransigent and the FCO had had to seek, and had obtained, a stay from the Court he would have been entitled to interest at the judgment rate if the appeal failed and the payment fell to be made at that point".

41. However, the judgment of Davis LJ can be read as supporting the view that the Judgments Act rate applied in that case as a result of the exercise of a judicial discretion, rather than on its own terms and as of right: [157].

42. So far as the pre-CPR position is concerned, Order 59 rule 13 of the Rules of the Supreme Court provided:

> "(1) Except so far as the court below or the Court of Appeal or a single judge may otherwise direct –
>
> (a) an appeal shall not operate as a stay of execution or of proceeding under the decision of the court below; ….
>
> (2) On an appeal from the High Court, interest for such time as execution has been delayed by the appeal shall be allowed unless the Court otherwise orders".

43. This Rule clearly envisaged that a stay of execution stopped interest running. There appears to have been a practice whereby judges who granted stays of execution ordered as a term of the stay that some alternative rate of interest should run during the period of the stay. In G K Serigraphics v Dispro Limited Court of Appeal Transcript 15 December 1980, there was the following post-judgment exchange between Cumming Bruce LJ and counsel for the respondent:

> "Miss Owen … There is a question also of interest. There was a stay of execution, which I understand has been since the date of judgment, and I would ask for interest on that ….
>
> I would refer to Order 59, rule 13 . Certainly I would not want to argue myself out of a better rate of interest. There has been a stay of execution. It is rule 13(2) at page 909 of the Annual Practice: 'On an appeal from the High Court, interest for such time as execution has been delayed by the appeal shall be allowed unless the Court otherwise orders' . There is a note about interest: 'In the absence of an express order to the contrary, a judgment of the Court of Appeal, reversing a judgment of the Court below, does not date back to it for the purpose of calculating interest and such an order will only be

made in exceptional circumstances' . That has not happened here.

Cumming Bruce LJ … I would have thought that if there has been a stay then interest on the judgment does not automatically run but that, from the date of the stay, the interest under the Judgments Act will be the interest that the court will order when it orders interest, because but for the stay there would have been interest running at the rate under the Judgments Act and that is the interest which should have been running, and as a result of the order of this court it is the interest that should have been running all the time since the date of judgment. So logically I think Mr. Englehart must be right, that the order will be interest since the date of judgment at the rate prescribed under the Judgments Act".

44. The origins, and eventual fate, of RSC Order 59 Rule 13 are not entirely clear. A rule of court to that effect appears to have been adopted in 1867 (Lancashire and Yorkshire Railway Company v Gidlow (1873-74) LR 9 Ex 35), which applied to appeals generally a provision which already applied when the execution of a judgment had been stayed pending the determination of a writ of error. There had been a similar provision in s.30 of the Civil Procedure Act 1833 which provided:

> "And be it further enacted, That if any Person shall sue out any Writ of Error upon any Judgment whatsoever given in any Court in any Action personal, and the Court of Error shall give Judgment for the Defendant thereon, then Interest shall be allowed by the Court of Error for such Time as Execution has been delayed by such Writ of Error, for the delaying thereof."

45. That provision was enacted before the Judgments Act 1838, and the relationship between the 1838 Act and the rule of court does not, at least to the extent of my researches, appear to have been considered anywhere. A provision in equivalent terms to RSC Order 59 Rule 13(2) found its way briefly into the Civil Procedure Rules 1998, in Schedule 1 which preserved the existing RSC Order 59. It remained there until 1 May 2000 but was not re-produced in CPR 52 Rule 16 (which did re-produce Order 59 Rule 13(1)).

46. Given the clear terms of s.17 and CPR 40.8(1), I have concluded that the mere fact that a stay of execution is ordered does not of itself prevent interest starting to run under the Judgments Act 1838, but that it is open to the Court expressly to order that interest will not run under CPR 40.8. On that basis, it would be open to the Court to grant a stay of execution on the basis that interest would not begin

to run under the Judgments Act 1838 for so long as the stay remained in place, but make it a condition of the stay that interest was payable at some other rate during that period (cf. the suggestion advanced without success in Assetco plc v Grant Thornton UK LLP [2019] EWHC 592 (Comm) at [69]-[70]). However, it could not be a sufficient reason to make such an order that the court thought the Judgments Act rate was too high. As Leggatt J observed in Involnert Management Inc v Aprilgrange Ltd [2015] EWHC 2834 (Comm), [21]:

> "I do however agree with Andrew Smith J and with Mann J in the Schlumberger case that the date from which Judgments Act interest runs should not be deferred simply because it is at a considerably higher rate than commercial rates. The rate at which interest should be payable under the Judgments Act is a matter for the Secretary of State to decide. The court's concern is to identify the date from which it is appropriate that interest should run on the judgment debt at whatever rate is fixed by statutory instrument as the appropriate rate of interest for judgment debts to carry. Whether that statutory rate is (at the moment) higher or lower than commercial rates of interest cannot be a relevant consideration".

47. I can see that it might be appropriate to make such an order in a case in which the stay was granted solely because of the risk that the judgment creditor would be unable to effect repayment if the appeal succeeded, and the amount of the judgment was paid into court or escrow in the meantime. In such a case, it might be said that the judgment debtor had done all it could to discharge the debt, and should not suffer from any mismatch between the interest payable under the Act and that earned in court or escrow simply because of issues arising from the judgment creditor's financial condition. However, in this case, the College is unable to pay the Judgment, and my principal reason for granting a stay is the prejudice which the College would suffer if enforcement proceedings began now and then the College succeeded on its appeal. If the appeal succeeds, no interest will be payable. However, if the appeal fails, the fact of an unsuccessful appeal is not a sufficient reason to make an order which would leave the Claimants in a worse position than if no appeal had been brought at all.

48. Accordingly I make no order delaying the point at which interest under the Judgments Act 1838 will begin to run.

Security for costs

49. In this case, the Claimants provided security for the Defendants' costs by letters of undertaking from their solicitors, Stephenson Harwood LLP:

i) a letter dated 15 August 2019; and

ii) a letter of 21 February 2020;

(the Letters of Undertaking).

50. The Letters of Undertaking were in the same terms. They provided that:

i) Stephenson Harwood LLP held sums in their client account "for the purpose of paying any costs order that is made against our clients at the trial of the Proceedings".

ii) If agreement was reached "or an order made for [their] clients to pay the College's costs of the proceedings", the sum would be released from the client account to the College's solicitors.

iii) The undertakings "will expire in the event that no costs order is made against our clients in favour of the College at the trial of the Proceedings".

51. Where security for costs has been provided by way of the payment of money to a defendant who loses at trial, the court can make an order staying the return of the security pending an appeal. In Slocom Trading Limited v Tatik Inc [2013] EWHC 1201 (Ch), [81], Roth J noted:

> "Finally, the Claimants had provided over £400,000 as security for the Defendants' costs and they sought the return of this money. However, justification for that security continues to apply if there should be an appeal, as covering the Defendants' potential costs in the event of the appeal being successful. Accordingly, release of the security will be stayed on the same terms as the stay on execution of the Judgment".

52. However, what is to happen when security takes the form of a written undertaking or instrument? In Dar International FEF Co v Aon Ltd [2003] EWCA Civ 1833, Mance LJ considered an application by an unsuccessful defendant for an order requiring the claimant to reinstate security for the costs of the trial, in circumstances in which the existing security had been time-limited, and had lapsed at the end of the trial. He held that the first instance judge, and the Court of Appeal, had jurisdiction to make a further order for security ([11]-[12]). However, he declined to make an order for security on the facts of the case because the defendant had accepted time-limited security; it had allowed that security to lapse; and the Court had no effective sanction to impose if the claimant/respondent failed to put up further security when ordered ([16]).

53. The first issue which arises here is whether the undertakings provided by Stephenson Harwood LLP are time-limited in this sense. I have concluded that the better view is that the Letters of

Undertaking are time-limited, and only apply in relation to costs orders at the trial, and not following an appeal, given the words:

> "For the avoidance of doubt these undertakings will expire in the event that no costs order is made against our clients in favour of the College at the trial of the Proceedings".

That is exactly what has happened.

54. I would note that if I am wrong in that conclusion, and the issue was taken to the Court of Appeal who reached a different conclusion on the meaning of the Letters of Undertaking, then Stephenson Harwood LLP would presumably find themselves facing a demand under the Letters of Undertaking whether or not they still had the money in their client account. No doubt that is a matter which they may wish to consider if they have yet to pay the money out of their client account. However, there can be no question (as the Claimants and the College have respectively suggested) of the Court making an order releasing Stephenson Harwood LLP from the Letters of Undertaking or ordering them to maintain them. The Letters of Undertaking take effect in accordance with their terms.

55. That leaves open the possibility of the College making a further application for security for costs now. Such an application would have to be made on notice to the Claimants, supported by evidence. It would inevitably raise the issue which troubled Mance LJ as to whether there is any effective sanction if the court makes such an order and it is not complied with. Whether or not there is such a sanction might depend on whether the Claimants seek and/or obtain permission to appeal from the Court of Appeal, because it would be open to the Court of Appeal to make a reinstatement of the Letters of Undertaking a condition of seeking and/or granting permission under CPR 52.6 (see Republic of Djibouti v Boreh [2016] EWHC 1035 (Comm), [20]).

56. I would further note that if the Claimants sought to bring a fresh set of proceedings against the College seeking a remedy in unjust enrichment for use of the Building in the period after Judgment, it would be open to the College to ask the court to stay those proceedings under, for example, CPR 3.1(f) until any outstanding costs order arising from this action had been paid, or to bring a counterclaim by way of an action on any unpaid costs judgment, although any such applications or arguments would fall to be resolved on their merits.

The Claimants' application for permission to appeal

57. The Claimants advance seven grounds of appeal.

Ground 1: my finding that the Contract was ultra vires

58. Ground 1(a) raises the "such sum" argument with which I dealt in the Judgment at [171]-[183]. This raises an issue of law, namely one of statutory construction. However it is not one which has a real prospect of success for the reasons given in those paragraphs.

59. Ground 1(b) argues that I erred by "retrospectively and incorrectly applying accountancy standards and classification" and contends that "the accounting standards IAS 17 was misconstrued". Ground 1(c) argues that I should not have found that the Contract was a finance lease. These grounds are, in effect, an attempt to challenge my conclusions on the factual and accounting evidence. The grounds do not have a real prospect of success and the arguments advanced in support of them do not fairly reflect the Judgment or the course of the trial.

60. As to the arguments advanced in support of Grounds 1(b) and (c):

    i) I did consider the issue of whether the College had contractual capacity by reference to the time the Contract was entered into, and I did not decide that it was enough that at some stage in its life the Contract might be classified as a finance lease: Judgment, [190],[192]. The expert evidence and inputs into the calculation were all concerned with the position *in April 2013* when the Contract was concluded (subject to the issue considered at Judgment, [192]-[197], when the Claimants sought to suggest at a late stage that the expert evidence which they themselves had served, and to which the Defendants' experts had responded, had all been prepared by reference to the wrong date in 2013, which argument I held could not fairly be advanced by the Claimants at the late stage it was raised and which I was not persuaded made any difference in any event).

    ii) The Claimants' complaint that a retrospective exercise was done is, in effect, an argument that because the parties themselves called the Contract an operating lease, and may have believed it to be such, it was not open to the Court to reach its own determination on that issue by reference to the position when the Contract was entered into. However, the parties' own descriptions or understandings cannot be conclusive, for the reasons given in the Judgment, [251]-[254].

    iii) The suggestion that a retrospective construction of the Contract was undertaken is inaccurate for the same reason, and because I concluded that the question of whether the Contract involved "borrowing" for the purposes of the relevant statute was not to be answered merely by considering the terms of the Contract, but by reference to the economic substance of the transaction: Judgment, [176]-[181]. I did not arrive at the conclusion that the Contract involved borrowing

by a process of contractual construction. Nor did I find that it was enough that one of the parties could classify the Contract as a finance lease (indeed I expressly rejected one of the Defendants' arguments because it would give rise to the issue of what was to happen if the Contract had a different status for the Claimants and the College: Judgment, [205]-[209]). On my findings, the effect of the accountancy evidence here was not that one party could legitimately classify the Contract as a finance lease and one as an operating lease, but that making almost every possible assumption in the Claimants' favour, the Contract was a finance lease. This was not a case in which the classification of the Contract hung in the balance (something repeatedly asserted in the Claimants' submissions in support of permission to appeal), but one in which the Claimants' own accounting expert was only able to arrive at a PVMLP in excess of what he described as the appropriate standard of 90% using two wholly unreasonable assumptions which he was unable to support in cross-examination, and where adjusting any one of the Claimants' expert's assumptions led the PVMLP to exceed that 90% threshold: Judgment, [223], [233]-[234].

iv) To the extent that this ground of appeal argues that borrowing for the purposes of the statute depends solely on the form and terms of the Contract (and not its economic substance ascertained with the assistance of accounting standards), then that is an argument of law, namely one of statutory construction. However it is one which in my view does not have a real prospect of success for the reasons I have given in the Judgment.

v) The allegation that IAS 17 was misconstrued is wholly without merit. The proper application of IAS 17 was largely common ground between the experts, subject to minor nuances which did not affect the classification: Judgment, [186]-[189]. The case which the Claimants now seek to advance on appeal is not consistent with the evidence of their own expert.

vi) The Cozens v Brutus argument has no realistic prospect of success for the reasons given at Judgment, [176]-[181]. Further, if the Contract was, as a matter of accounting substance, a finance lease then the evidence before the Court was that those involved in the asset leasing industry (including the Claimants themselves and Mr Spring) regarded this as borrowing for the purposes of the statute.

61. I should also deal with the suggestion that Judgment, [191] is wrong. This provides:

> "Nor did the Claimants seek to adduce evidence of *expert consideration* which was given to the issue before the Contract was signed, *nor to establish and verify the inputs to whatever contemporaneous calculations they may have performed*. Rather than putting forward and seeking to defend a contemporaneous assessment, the Claimants have relied upon a retrospective calculation performed by their experts for the purposes of the trial".

(emphasis added).

62. The Claimants contend that this is wrong, referring to paragraph 32 of Mr Spring's witness statement. They made no comment on this paragraph when the draft judgment was circulated. The evidence now referred to did not reveal the contents of any expert (valuation or accountancy) input obtained by the Claimants. Nor did the Claimants ask their own experts at trial to verify any calculation or the inputs into any calculation done contemporaneously. The Claimants' accounting expert did not refer to any such calculations, nor were they referred to by the Claimants in opening, in the course of their cross-examination of the Defendants' accounting expert or in their closing. At no stage was the Court taken by the Claimants through any calculations to explain what they were and why it was said the inputs and approach used were reasonable on the basis of the evidence before the Court.

Ground 2: the Hire Contract

63. This ground proceeds on the misapprehension that I arrived at the conclusion that the Contract was *ultra vires* as a matter of construction, which I did not (as I have explained). I do not believe that there was any dispute as to the meaning and effect of the terms of the Contract as a matter of contractual interpretation, and I did not resolve any such disputes, nor impermissibly use expert evidence to do so. The expert evidence – which the Claimants never suggested was inadmissible, and which they served first to support their own case – was used to assist the Court in ascertaining the economic substance of the Contract, and in providing the inputs and quantitative assessments necessary when ascertaining the economic substance.

Ground 3: Negligent Misstatement

64. The negligent misstatement claim failed at the following four stages.

65. First, the claim against the College, but not the Council, failed because the *ultra vires* finding precluded such a claim: Judgment, [355]-[366]. Had this issue been the only element of the claim on which the Claimants lost, I would have given permission to appeal

on this point on the basis that this is an arguable point of law of some importance.

66. Second, the claim against the College and the Council failed because I found that they did not owe the Claimants a duty of care: Judgment, [389]-[394]. This involved the application of settled and undisputed principles of law to the particular facts of this case, and any appeal against this finding has no real prospect of success. Those facts are not accurately summarised in paragraph 34 of the Claimants' skeleton argument in support of the application for permission to appeal.

67. Third, the claim against the College and the Council failed because I found that the Claimants had not relied upon their respective letters in the relevant sense (i.e. as statements on the basis of which the Claimants accepted the truth of a particular fact or state of affairs): Judgment [374]-[383]. That is a conclusion of fact reached on the evidence and any appeal against that finding has no real prospect of success. While I found that the Claimants would not have entered into the Contracts if the Letters had not been provided, I found that this was not sufficient to constitute reliance in a statement-based tort claim as a matter of law: [399]-[401]. The Claimants had not in fact sought to argue that this would be sufficient. If they had done so, and there were no other findings which they needed to overturn for which permission to appeal had not been granted, then I would have granted permission to appeal on this issue, which is a point of law of some interest, albeit I think the right answer is clear.

68. Fourth, against both the College and the Council, because the Claimants had adduced no evidence to support what eventually became their case on loss: Judgment, [350]-[354] and [370-[373]. The truth of the matter is that the Claimants committed themselves to a challenging and inherently improbable case on loss which they then made no serious attempt to support by evidence, and in support of which they adduced no witness or documentary evidence. The assertion now made that "no one suggested there was anything other than a growing market for such or similar units, which the Appellants were precluded from selling or renting" is not supported by the evidence adduced before the Court.

69. For all these reasons, I am satisfied that Ground 3 has no realistic prospect of success.

Ground 4

70. Ground 4 would appear to raise an argument of statutory interpretation, but the issue of statutory interpretation which is the subject of the ground is not set out. To the extent that it repeats matters already advanced under grounds 1 to 3, it does not have a real prospect of success for the reasons set out above. It has long

been recognised, not least by the Claimants' themselves, that maintained schools cannot borrow without the permission of the Secretary of State, that contracts which involve borrowing entered into without such permission are *ultra vires* and that a contract which is, as a matter of economic substance, a finance lease and not an operating lease is one which involves borrowing.

71. My conclusion that the Contract was a finance lease reflects the expert evidence in this case, the nature of the transaction, the size of the rent payments and the fact that the College was the only user for whom the Building had any significant value once installed (cf Judgment, [14], [206] and [233]-[234]). The status of other leases entered into by schools or other public bodies will reflect the particular circumstances and terms of those contracts.

Ground 5

72. This ground of appeal involves generalised assertions as to the consequences of the Judgment. Those assertions are unfounded. The correctness of the accounting treatment of other transactions will be determined by the features and circumstances of those transactions, and the issue of whether a duty of care is owed or breached is inevitably context-specific.

73. To the extent that the Claimants are arguing that the College's and Council's Letters had contractual effect as warranties, this is not a contention the Claimants advanced at trial, and any appeal on this basis has no real prospect of success.

Ground 6

74. The difficulty for the Claimants on this ground of appeal is that they neither adduced any evidence of the market value of the benefit themselves, nor cross-examined the Defendants' expert as to his evidence of market value. The result was to leave the Court in a position in which there was evidence of only one value, which evidence was unchallenged.

75. The Claimants' reliance on Benedetti v Sawiris [2014] AC 983 proceeds under a number of misapprehensions:

    i) It is clear from the decision that when the court has expert evidence of value before it, it is not obliged to use the price agreed under a void contract or which featured in negotiations as the best evidence of market value: Judgment, [427].

    ii) I did not apply any subjective devaluation to the only evidence I had of market value, but in any event it is clear that it is legitimate to apply subjective devaluation: Benedetti, [18]. What is not legitimate is to apply a subjective revaluation on the basis that the services have a higher value to the recipient

than their market value, which is what the Claimants' ground of appeal effectively asserts: Benedetti, [29].

76. It follows, therefore, that this ground of appeal has no real prospect of success. There is no foundation for it as a matter of fact, and it is misconceived as a matter of law.

Conclusions

77. For these reasons, I refuse the Claimants' permission to appeal in respect of all proposed grounds of appeal.

ISSUES AS TO THE FINAL RELIEF WHICH SHOULD BE ORDERED

78. It is agreed on the basis of my findings that:

    i) The Claimants' claims against the Defendants for breach of contract, under s.2(1) of the Misrepresentation Act 1967 and in negligent misstatement are to be dismissed.

    ii) SFM's claim in unjust enrichment succeeds in the amount of £711,323.88, but the claims of the other Claimants in unjust enrichment are to be dismissed.

    iii) The College's counterclaim in unjust enrichment is to be dismissed.

79. However, four issues remain for decision.

What interest rate is SFM entitled to?

80. The first is the rate at which SFM is entitled to interest. The Claimants have identified three possible rates:

    i) 8% as the amount payable under the RSA;

    ii) 5% as a reasonably commercial rate; or

    iii) 2% above Bank of England base rate.

81. The rate at which interest is to be awarded under s.35A of the Senior Courts Act 1981 is the rate at which a claimant with the same general characteristics as the claimant could in general borrow money (Jaura v Ahmed [2002] EWCA Civ 210; Tate & Lyle Food and Distribution v GLC [1982] 1 WLR 149). In this case, the Claimants have adduced no evidence as to the rate at which they borrow, but point to the 8% payable under the RSA. However, I have heard no evidence to explain how the 8% rate under the RSA was arrived at, nor how far it may have reflected particular features of that transaction. I certainly do not feel able to conclude that that is the rate at which a company with the same broad characteristics as SFM could generally borrow.

82. I accept, however, that as a special purpose vehicle with limited assets, a borrower with SFM's attributes is likely to have had to pay a significant premium to borrow money. In the absence of any evidence on this issue, I have concluded that an interest rate of 3% over Bank of England base rate is a realistic rate at which a company with SFM's general characteristics could have borrowed money, and the parties should perform an interest calculation on this basis.

Is the College entitled to a declaration that the Contract was *ultra vires* and void?

83. The central issue in this case, and the issue which consumed the clear majority of time in submission and evidence, was whether the Contract was *ultra vires* and void. That issue is important not only for the purposes of the parties' monetary claims against each other in these proceedings, but potentially also in relation to any claims which arise from the future use of the Building, and for the purposes of the parties' accounting.

84. The court has a broad discretion as to whether to grant declaratory relief: Feetum v Levy [2005] EWCA Civ 1601, [55]. Here, the nature of the issue (the status of a 15-year Contract), its importance, and the potential relevance of that issue beyond the immediate resolution of the monetary claims in the action all make this an appropriate case in which to exercise my discretion to make a declaration that the Contract was *ultra vires* the College and void. The Claimants' objection that the application for a declaration involves a belated attempt to amend the College's statement of case is without merit (not least because the College has from the outset claimed such declaratory relief).

Are the Claimants entitled to any relief now in respect of the use of the Building in the period after Judgment?

85. In their reply consequential submissions, the Claimants refer to the fact that they wrote to the College after Judgment asking for an undertaking that no use would be made of the Building without the Claimants' written permission, and asking the Court to record such an undertaking in the order.

86. No such undertaking has been offered. However, the legal consequences of any use by the College of the Building after the Judgment are not matters which formed part of the trial, which has now finished, and accordingly the order should not address those issues.

What orders should be made on the Part 20 Claims between the College and the Council?

87. The College's and the Council's Part 20 Claims against each other were contingent on the Claimants succeeding in their claims against one or other defendant in contract or tort. As those claims failed, I did not find it necessary to consider the Part 20 Claims. In these circumstances, I am satisfied that no order should be made on either Part 20 Claim.

88. I reject the College's suggestion that the Council's claim should be dismissed as a matter of logic. The principal basis of the Council's Part 20 claim was the College's claim (which I rejected) that the Council was liable under the Contract because the College was acting as its agent. Nor do I accept that the Council failed sufficiently to put its factual case. In circumstances in which the College was itself advancing the contention (successfully, as I held), that its own personnel had acted in breach of their Roberts v Hopwood and Wednesbury duties, it was not necessary for the Council to do any more than adopt this case against the College. The Council are certainly not to be criticised for focussing their submissions on the issues which they thought really mattered (their forensic evaluation having been vindicated by the Judgment).

COSTS

Costs as between the Claimants and the College

89. Under CPR 44.2, the Court has a discretion whether to make a costs order in favour of one party at the expense of another, but that discretion must, of course, be exercised judicially. CPR 44.2(2(a) provides that the general rule is that the unsuccessful party will be ordered to pay the costs of the successful party, but that the court may make a different order. Matters to which the court may have regard include the conduct of all the parties (CPR 44.2(4)(a)), whether a party has succeeded on a part of its case, even if that party has not been wholly successful (CPR 44.2(4)(b)), whether it was reasonable for a party to raise, pursue or contest a particular allegation or issue (CPR Part 44.2(5)(b)) and "the manner in which a party has pursued or defended its claim or a particular allegation or issue" (CPR Part 44.2(5)(c)).

90. The starting point when determining what costs order to make is to ask who the successful party is (Fox v Foundation Piling Ltd [2011] CP Rep 41). In this context, significance is attached to which party has obtained a monetary recovery in the case (AL Barnes v Time Talk (UK) Ltd [2003] EWCA Civ 402, [28]; Widlake v BAA Ltd [2009] EWCA Civ 1256, [36]; Day v Day [2006] EWCA Civ 415, [17]).) In this case, the Claimants are able to point to the fact that they have obtained a judgment in their favour substantially in excess of £700,000 plus interest, and have successfully resisted the College's counterclaim to recover back amounts paid exceeding £3.29m. The

College has resisted the Claimants' claim under the Contract and in tort, but obtained no monetary relief in its own favour.

91. There was a "without prejudice save as to costs" offer ("the Offer"), made jointly by the College and the Council on 21 February 2020. The Offer involved the College and the Council making a payment of £1,000,000 in settlement of all of the Claimants' claims, conditional on title to the Building and its fixtures and fittings being transferred to the Council. The transfer of title is not relief sought in the proceedings, which makes it difficult to compare the Offer with the recovery the Claimants have in fact made. In my view, however, on any commercial analysis the Claimants have "beaten" the Offer. They have recovered in excess of £750,000 including interest in the period up the Judgment, and retained their title to the Building, with the possibility of further claims if the College continue to use the Building in the period after Judgment. At the market rate which I have found should apply to the period up to Judgment, the value of one year's further use would take the Claimants over the £1,000,000 mark, with the prospect of a further claim after that. Accordingly, the Claimants have obtained more by coming to court than if they had accepted the Defendants' offer.

92. Having identified the starting point, I then turn to consider whether there is any adjustment which should be made to reflect issues on which the successful party has lost or other circumstances which make a costs order in the Claimants' favour inappropriate (Fox, [47]).

93. Here, there is no doubt that the Claimants' success has come at a considerable cost. It is no coincidence that the Claimants seek permission to appeal on a much wider front than the College. Not only is the amount of SFM's recovery very much less than that claimed, but the Claimants lost on the central issue of whether the Contract was *ultra vires* and void. The Claimants also failed in their alternative tort claims. The Claimants' successful defence of the College's counterclaim was achieved in circumstances in which they made little effort to develop a change of position defence at the hearing, necessitating post-hearing submissions and evidence on this issue without which the defence would not have succeeded. Finally, the Claimants' unjust enrichment claim succeeded in a significantly lower amount than the sums claimed, by reference to the amounts put forward by the Defendants' expert.

94. One option open to me in respect of the costs of the *ultra vires* and misrepresentation/misstatement issues is to make an issue-based costs order for those claims. The authors of the *Civil Procedure Rules* (2020) in the commentary on CPR 44.2 note that:

> "Routinely, judges approach the matter by asking themselves three questions: first, who has won?; secondly, has the

winning party lost on an issue which is suitably circumscribed so as to deprive that party of the costs of that issue?; and thirdly, is it appropriate in all the circumstances of the individual case not merely to deprive the winning party of its costs of an issue in relation to which it has lost, but also to require it to pay the other side's costs?"

95. In this case, the *ultra vires* and misrepresentation/misstatement issues are both sufficiently circumscribed, in terms of the legal and evidential issues they raised, and of sufficient importance when considered in their own right, to justify making an issue-based costs order, and to do so on terms which would require the Claimants to pay the College's costs of those issues. The Claimants' judgment on the unjust enrichment claim was very much their third-choice outcome. While, the College advanced its *ultra vires* argument across a wide range of fronts, most of which I have found to have failed as a matter of law, I have concluded that this merits only a small debit entry on what Ward LJ described in Widlake v BAA Ltd at [39] as the costs' "balance sheet". These arguments took up limited time at the hearing, the Claimants had little to say about them in submissions and they involved exploring statutory materials which were relevant context to the *ultra vires* argument which did succeed in any event.

96. However, there are practical disadvantages to issue-based costs orders (namely the difficulty in determining which costs are referable to the relevant issues and which are not), which has led to encouragement to first instance judges to consider alternative approaches, in particular whether it is possible to reflect the costs relating to the issues within the overall order (see for example Burchell v Bullard [2005] EWCA Civ 358, [30] and Multiplex Constructions (UK) Ltd v Cleveland Bridge UK Ltd and another (No 7) [2008] EWHC 2280 (TCC), [72(iv)]).

97. It is clear that a "successful" claimant's failure on an important issue which takes up considerable time at trial can justify a costs order which make it the net payer (Summit Property Ltd v Pitmans [2011] EWCA Civ 2020), or making no costs order on the basis that both parties can be regarded as successful (The Square Mile Partnership Limited v Fitzmaurice McCall Limited [2006] EWHC 236 (Ch)), or a heavily diminished recovery (e.g. AL Barnes Ltd v Time Talk (UK) Ltd [2003] EWCA Civ 402 where the "successful" claimant made a 25% recovery).

98. In reaching my conclusion as to the appropriate order in this case I have had regard, in particular, to the following matters:

    i) The Claimants have made a substantial financial recovery. However, there were only two live issues on the claim on which they succeeded: (a) whether the Claimants took the risk

that the Contract was beyond the College's capacity such that no remedy in unjust enrichment was available and (b) whether the Claimants had a change of position defence to the College's counterclaim.

ii) Those issues took relatively limited time at the trial, and, as I have indicated, in the case of the latter, were largely developed in post-trial additional submissions at the Court's request.

iii) Had the Claimants' claim been limited from the outset to one in unjust enrichment in the amount recovered, the entire shape and scale of the action would have been very different, with a real prospect of out-of-court resolution. In particular, had the claim been so confined, the Claimants are likely to have engaged constructively with the Offer (as they should have) instead of failing to respond to it (a matter on which I place some, albeit limited, weight under CPR 44.2(4)(c)).

iv) Even if the unjust enrichment claim is viewed in isolation, the amount recovered by the Claimants is very substantially less than the amounts claimed.

v) The *ultra vires* and related issues were the most substantial and significant issues in the action. While page-counts can be a crude guide, they are of some assistance in determining how much time was spent on particular issues at trial. I have ignored for this purpose those parts of the submissions which were introductory in nature. In opening, 34 of the Claimants' 54 pages; 32 of the College's 48 pages and 32 of the Council's 48 pages were devoted to the *ultra vires* and misrepresentation/misstatement issues. In closing, 36 of the Claimants' 48 pages; 40 of the College's 54 pages and 34 of the Council's 43 pages addressed these issues (the figures for the College and the Council do not include introductory material, albeit the greater part of that material was also concerned with the *ultra vires* and misrepresentation/misstatement issues). About half of the time spent on factual witnesses and all the time spent with experts was concerned with these issues, and (by my calculations) substantially in excess of 200 pages of the 320 pages of oral closing submissions.

vi) Further, the Part 20 costs incurred by the College arose from the contractual and tortious claims advanced by the Claimants, which have failed. No similar issues arose in relation to SFM's claim in unjust enrichment. If the contract and tort claims had not been pursued, there would have been no Part 20 Claims.

vii) A small allowance must be made for the number of *ultra vires* or authority arguments which the College ran, but which did not succeed (although these took relatively little time at trial).

viii) Finally, some small proportion of the Claimants' costs will concern the agency issue, which was advanced by the Claimants against the Council but was not in issue as between the Claimants and the College.

99. Taking all of these factors into account, I have decided that this is a case in which both the Claimants and the College can be said to be successful, and perhaps more relevantly, both can be said to be unsuccessful parties, and that I should make no order for costs between them.

Costs as between the Council and the Claimants and the College

100. The Council has succeeded in defending the entirety of the Claimants' claim and is entitled to recover the costs of doing so from the Claimants. Four arguments are raised by the Claimants as to the amount of any costs order.

101. First, it is said that the Council should not recover costs incurred on issues on which its position was allied to that of the College. As to this:

i) The fact that the Council and the College were making common cause on certain issues is a factor which can be considered on assessment when considering whether the costs incurred on particular aspects of the case were reasonable. I have in mind, in particular, the time spent on expert evidence. The Council and the College shared experts, and the costs judge will need to consider whether steps were taken to avoid unnecessary duplication of effort in the costs related to that evidence. So far as the trial is concerned, I sought to allocate time evenly between the Claimants and both Defendants, and the Defendants divided up the cross-examination of the Claimants' experts between them in a sensible way.

ii) In addition, the Council will not be able to recover amounts spent funding the College's defence of the action, but only those amounts spent on its own legal team, factual evidence and its share of the common expert costs. The amounts which the Council advanced to the College so that the College could meet its legal expenses do not constitute costs recoverable by the Council.

iii) These points aside, however, there is no reason why the Council cannot recover costs on issues on which it and the College shared a common position. The Council is very far

from a "volunteer in litigation" (as the Claimants contended) or someone who interfered for its own reasons in litigation primarily concerning others. On the contrary, it was sued by the Claimants from the outset for substantial amounts, was no doubt seen by the Claimants as a significantly deeper pocket than the College, and was entitled to defend those claims.

iv) In particular, there was a clear conflict of interest between the College and the Council on the issue of whether the College had acted as the agent of the Council, how far it had obtained the Council's approval for the Contract, and in respect of the Part 20 Claims the two Defendants brought against each other. The claim in respect of the Council's Letter only concerned the Council. Separate legal representation was inevitable.

102. Second, it is said that the amount recoverable by the Council should be reduced to reflect the variants of the *ultra vires* argument which did not succeed. I have addressed this issue already when considering costs between the Claimants and the College. I have concluded that some reduction in the Council's costs award is appropriate to reflect the Council's failure on these points, but only a limited amount as these issues consumed relatively little time at trial. I have concluded that a 5% reduction is appropriate.

103. Third, the Claimants say that they should not have to make any payment in respect of the costs incurred by the Council in the Part 20 Claims. However those claims only arose because the Claimants advanced contract and tort claims, and did so on the basis that the College was the Council's agent. It was an entirely foreseeable consequence of the Claimants' decision to advance those claims against both Defendants that there would be claims as between those Defendants addressing the contingency that the Claimants' claims succeeded. In any event, the Part 20 Claims did not give rise to any separate factual or expert enquiry beyond those raised by the Claimants' failed claims in contract and tort, and only limited additional legal arguments which were dealt with relatively briefly at the trial.

104. Fourth, it is said that the Council's costs of the agency claim should be divided between the Claimants and the College. The Claimants pleaded the agency claim against the Council first, and the Council are clearly entitled to recover the costs of that issue (which was essentially an issue of statutory construction) from the Claimants. As the agency argument was only advanced by the College in response to the Claimants' contract and tort claims, which themselves relied upon the agency issue, and was a foreseeable and reasonable response to the manner in which the Claimants had formulated their own claim, I do not accept that the Claimants are

entitled to reduce their costs liability to the Council on the basis that the College also advanced this argument against the Council.

105. Accordingly, the Council is entitled to recover 95% of its costs against the Claimants, to be assessed on the standard basis.

106. As between the College and the Council, I made no order on the claims, which did not arise for decision given that the Claimants' claims failed, and the appropriate order is no order for costs as between the College and the Council.

The Council's application for an interim payment on account of costs and interest on costs

107. The Council is entitled to a reasonable payment on account of costs under CPR 44.2(8). The appropriate amount to order is an amount which represents a likely level of recovery with a margin for error: Excalibur Ventures LLC v Texas Keystone Inc and others [2015] EWHC 566 (Comm), [22]-23].

108. In this case, the College filed a costs budget which was approved in the amount of £447,843.26, comprising £42,780.56 of incurred costs and £405,062.50 of estimated costs. Where there is an approved costs budget, CPR 3.18 makes it plain that the approved figure should not be departed from on assessment unless there is good reason to do so. The decision in MacInnes v Gross [2017] EWHC 127 (QB) suggests that the reduction for interim payment purposes from the estimated and approved costs should not normally exceed 10%. However, costs already incurred at the date the costs budgets were approved are to be dealt with on the ordinary basis when determining the amount of any interim payment (Cleveland Bridge UK Ltd v Sarens (UK) Ltd [2018] 2 Costs LR 333).

109. In this case, I have not made an order for indemnity costs, and there may be issues (which could not have been reviewed at the costs budgeting hearing) as to whether reasonable steps were taken to divide work between the College and the Council on common matters (in particular in the retention and instruction of experts and in the preparation of expert reports). I have decided that the appropriate amount of the interim payment is 60% of 95% of the Council's incurred costs and 80% of 95% of the Council's estimated and approved costs as at the date the costs budgets were approved. The Claimants must therefore make a payment to the Council on account of costs of £332,000, to be paid within 14 days.

110. So far as interest is concerned:

    i) Pursuant to CPR 44.2(6)(g), I will award interest on costs incurred by the Council from the date of payment by the Council at the rate of 2% over Bank of England base rate until

payment, or three months from the date of the order giving effect to the Consequentials Judgment, whichever comes first.

ii) Under CPR 40.8(1), I have power to direct the date from which interest under s.17 of the Judgments Act 1838 will run on costs payable to the Council pursuant to this order. In relation to the costs which are the subject of the interim payment order, I direct interest should run under s.17 from the date when payment is due (i.e. 14 days from the date of the order giving effect to this judgment). In relation to any further costs, interest under s.17 should run from 3 months from the date of the order, for the reasons given by Leggatt J in Involnert Management Inc v Aprilgrange Ltd [2015] EWHC 2834 (Comm), [23]-[24]. That will allow time for a meaningful engagement on the amount of any outstanding costs balance. The Council is sufficiently protected until then by the substantial interim payment I have ordered, and by my order under CPR 44.2(6)(g).

Conclusion

111. The parties are asked to draw up a final order reflecting this judgment.