Neutral Citation Number: [2021] EWHC 2984 (Comm)

Case No: CL-2020-000350

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 09/11/2021

Before :

SIR NIGEL TEARE
Sitting as a Judge of the High Court

- -

Between :

Mayer Cars and Trucks Limited	**Claimant**
- and -	
Jaguar Land Rover Limited	**Defendant**

- -
- -

Tom Wood (instructed by **Mills & Reeve LLP**) for the **Defendant**
Timothy Higginson (instructed by **Direct Access**) for the **Claimant**

Hearing dates: 27 October 2021

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Approved Judgment

I direct that no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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SIR NIGEL TEARE SITTING AS A JUDGE OF THE HIGH COURT

"**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 09 November 2021 at 10:30 AM.**"

Sir Nigel Teare :

1. Until April 2017 Mayer Cars and Trucks Limited (the Claimant) was the approved importer of Jaguar motor cars into Israel pursuant to an Importer Agreement with Jaguar Land Rover Limited (the Defendant). Another company, Eastern Automobiles Marketing Ltd. (EAM), was the approved importer of Land Rover motor cars into Israel. From April 2017 EAM was the approved importer of both Jaguar and Land Rover motor cars pursuant to a tender process which had been completed in September 2016. The Claimant alleges that the Defendant represented to the Claimant that the appointment of the Claimant as the importer of both Jaguar and Land Rover motor cars from April 2017 was "in the bag" to induce the Claimant to maximize its expenditure on promoting the Jaguar brand. The Claimant seeks to recover that expenditure from the Defendant in these proceedings. It initially advanced three causes of action in tort, described as "unlawful means conspiracy/ causing loss by unlawful means/ interference with a trade or business by unlawful means". However, only unlawful means conspiracy is now relied upon. It also advances a case of unjust enrichment. In addition there is a discrete (contractual) claim in relation to the costs incurred in promoting the F-Pace Jaguar motor car.

2. The Defendant seeks to have the claims struck out on the grounds that the Points of Claim disclose "no reasonable grounds for bringing the claims" and/or "are an abuse of the court's process or are otherwise likely to obstruct the just disposal of the proceedings" (CPR 3.4(2)(a) and (b)). Further or alternatively, reverse summary judgment is sought on the claims. In the event that those applications fail, security for the costs of the action is sought together with an order for further and better particulars of the Points of Claim.

The claims in tort

3. The alleged representations are pleaded in this way:

> "12. In the period between January and May 2015, JLR representatives, and in particular SM, made express or implied representations only consistent with the conclusion that MCT would win the Award.
>
> 13. In particular, at a meeting during a visit to Israel by SM In January 2015, the following representations were made:
>
> (a) that JLR should extend indefinitely the temporary lease (then for a period of four months) in relation to its showroom unit at Herzilya, the implication being that it would be winning the Award;
>
> (b) that the Award was "*in the bag*", subject only to his need to "*tie up some administrative loose ends*";
>
> (c) that, regardless of the public position that there were "*other bidders*" in addition to MCT and EAM, the truth was that there were only these two and that the remainder were "*cosmetic*";

(d) that it was necessary for MCT to invest, recruit and develop substantially as if its business would be persisting for the next five to seven years.

14. The above representations were and remained effective, in spite of the terms of various email exchanges and, in particular, an email dated 18 May 2015 from SM to MCT In which it was announced that the decision in relation to the Award would not be made "for the foreseeable future" and would be deferred until a time nearer to the expiry date of the Novation Agreement.

15. In reliance upon such representations, and acting upon the same, MCT began to make and/or continued with the considerable financial investments which were necessary to enhance the Brand, in particular, in the context of the imminent launch of the three new Jaguar models."

4. The causes of action relied upon are particularised in this way:

"27. MCT advances the following claims cumulatively or alternatively:

(i) Unlawful means conspiracy/Causing loss by unlawful means/Interference with a trade or business by unlawful means

28. By reason of the above, JLR has been guilty of the above wrongs.

PARTICULARS

(a) From 2014, JLR consistently induced MCT to further invest and financially commit to both the development and the maintenance of the Brand. These inducements extended to models both to be released in the future and already in the range during the currency of the Novated Agreement.

(b) Such inducements persisted until immediately before the expiry of the Novated Agreement. These inducements were, additionally, accompanied by an insistence on the part of JLR on the investment by MCT of the maximum amount of resources in furtherance of the maintenance and development of the Brand.

(c) MCT says that, either by express reference and/or by inference, the above stances on the part of JLR were taken throughout times when it knew that its intentions were to make the Award to EAM and/or when it was colluding with EAM to prepare it for and to make to it the Award and, for the avoidance of doubt, EAM was, throughout these times, fully aware of all of this.

> (d) Throughout these times, the audit processes being conducted in relation to both MCT and EAM were adjusted and/or altered and/or ignored so that the results of such audits and re-audits led to the false conclusion that the same favoured EAM rather than MCT and/or indicated no substantial difference between those two parties.
>
> (e) In particular, the audit carried out in relation to EAM in April 2016 was not an independent and/or unbiased one.
>
> (f) In every respect in terms of equipment, structure and size, MCT's infrastructure bettered that of EAM."

5. As indicated above only the tort of conspiracy to injure by unlawful means is now alleged. It is common ground that the essential elements of that tort are summarised in *Kuwait Oil Tanker SAK v Al-Bader (No.3)* [2000] 2 All ER (Comm) 271 at paragraph 108 as follows:

> "A conspiracy to injure by unlawful means is actionable where the claimant proves that he has suffered loss or damage as a result of unlawful action taken pursuant to a combination or agreement between the defendant and another person or persons to injure him by unlawful means, whether or not it is the predominant purpose of the defendant to do so."

The strike-out application

6. It is a striking feature of the Points of Claim that one cannot find in them (i) an express allegation of a conspiracy between the Defendant and another, (ii) any allegation that the Defendant and another intended to injure the Claimant, or (iii) any clear allegation of what is alleged to be the unlawful means by which damage was to be caused. The absence of such allegations is the foundation of the submission that the Points of Claim disclose no reasonable grounds for bringing the claims.

7. Counsel for the Claimant explained orally that the Claimant's case was that there was a conspiracy between the Defendant and EAM to injure the Claimant by inducing the Claimant to invest in developing the Jaguar brand by unlawful means, namely, misrepresenting to the Claimant that the contract to import both Jaguar and Land Rover motor cars would be awarded to the Claimant.

8. With regard to that suggested conspiracy, counsel for the Claimant submitted that paragraph 28(c) of the Points of Claim was a sufficient plea of the suggested conspiracy. That provided as follows:

> "[The Claimant] says that, either by express reference and/or by inference, the above stances on the part of JLR [to invest in the development of the Jaguar brand] were taken throughout times when it knew that its intentions were to make the Award to EAM and/or when it was colluding with EAM to prepare it for and to make to it the Award and, for the avoidance of doubt, EAM was, throughout these times, fully aware of all of this."

9. With regard to the necessary intention to injure, counsel for the Claimant explained that loss to the Claimant was an inevitable consequence of inducing the Claimant to invest in the Jaguar brand in circumstances where, to the knowledge of the Defendant and EAM, the Claimant was destined not to be awarded the contract. In this regard, reliance was placed on the judgment of Cockerill J. in *FM Capital Partners Ltd. v Marino* [2018] EWHC (Comm) 1768 at paragraph 94(iii) where the judge said that "*in some cases, there may be no specific intent but intention to injure results from the inevitability of loss*".

10. Whilst the collusion alleged between the Defendant and EAM in paragraph 28(c) of the Points of Claim and EAM's alleged knowledge of "*all of this*" in the same paragraph is consistent with a conspiracy between the Defendant and EAM there is no express plea that the Defendant and EAM agreed to injure the Claimant by causing the Claimant to invest in the Jaguar brand in circumstances where it was not to be awarded the contract. Conciseness in a pleading is a virtue but the case being advanced must also be clear; see *Tower v Wills* [2010] EWHC 1209 (Comm) at paragraph 18 to which counsel for the Claimant referred. An allegation that the Defendant and EAM conspired to injure the Claimant by causing the Claimant to invest in the Jaguar brand in circumstances where it was not to be awarded the contract can perhaps be discerned by a benevolent reading of the Points of Claim but such an important allegation ought to have been made with clarity so that the Defendant was not left guessing as to the case being advanced.

11. Whilst the Points of Claim stated that an unlawful means conspiracy was being alleged the Points of Claim did not expressly identify what the unlawful means were alleged to be. The Points of Claim at paragraph 13 alleged that representations were made by the Defendant in January 2015 that the Claimant would be awarded the contract and paragraph 28(c) alleged that the Defendant knew that it intended to award the contract to EAM. The Defendant might therefore guess that the unlawful means alleged consisted of a misrepresentation, though deceit or fraud was not alleged. But again the Defendant ought not to have to guess what unlawful means are being alleged. They should be clearly stated. Counsel for the Defendant thought that the unlawful means relied upon might also include the alleged manipulation of the audit process (see paragraph 18-21 of the Points of Claim) so as to justify the award of the contract to EAM. When asked about this counsel for the Claimant said that the flawed audit process was "*part of the matrix*" and "*could fit into the unlawful means list*". This perhaps emphasises the importance of a clear pleading of what is alleged to constitute the unlawful means relied upon in support of the cause of action.

12. The question of whether a misrepresentation, not alleged to be deceitful, can amount to unlawful means for the purposes of the tort of unlawful means conspiracy was not mentioned in the skeleton arguments and was no more than touched upon in the hearing before me. This is not the place to debate that issue; it will require examination of the reasoning of the Supreme Court in *JSC BTA Bank v Ablyazov and another (No.14)* [2020] AC 727 at paragraphs 10-16. For present purposes I accept that it is arguable that a misrepresentation can amount to unlawful means.

13. The essential factual elements of the tort of conspiracy to injure by unlawful means must be distinctly pleaded. In circumstances where there is no express allegation of a conspiracy between the Defendant and EAM to injure the Claimant by the use of

identified unlawful means, I do not consider that it can fairly be said the Points of Claim disclose reasonable grounds for alleging an unlawful means conspiracy against the Defendant. If that is wrong and reasonable grounds for such a claim can be detected then I would nevertheless regard the Points of Claim as being "*likely to obstruct the just disposal of the proceedings*" because the lack of a clear statement of the case being advanced is likely to cause unnecessary delay and expense. This has already been evident in the requests which have been made in this action for further information or particulars of the Claimant's case. At the CMC the parties will have to agree the list of issues so that the parties know not only what the issues for disclosure are but also what topics must be covered by the relevant witnesses of fact. The obscurity of the Points of Claim is likely to make that exercise longer and more costly than it ought to be. That does not assist the just disposal of the proceedings.

14. However, striking out a claim is a remedy of last resort. In circumstances where the Claimant's claim can be articulated, as counsel did in his submissions, it seems to me that, notwithstanding that the Claimant has had every opportunity to state its claim clearly, the Claimant should be given a final opportunity to state its claim not only concisely but also clearly. It follows that the claim for unlawful means conspiracy will not be struck out.

The reverse summary judgment application

15. Counsel for the Defendant submitted that the pleaded representation cannot possibly support a case that the Defendant led the Claimant to believe that it was certain to secure the contract. This point is made in paragraphs 50-51 of Counsel's Skeleton Argument and was developed orally when it was submitted that there was "no coherent case" of a misrepresentation. I accept that the allegation in paragraph 13(a) of the Points of Claim may not necessarily imply that the Claimant would be awarded the contract and that the allegation in paragraph 13(c) may even point against the suggested representation. But paragraphs 13(b) and (d) do appear to me to support the suggested representation. In those circumstances I am unable to conclude that the pleaded allegation of a representation cannot possibly succeed. The representation that the contract was "*in the bag*" seems to me particularly clear, notwithstanding the criticism of counsel for the Defendant that it was "*vague and colloquial*".

16. Counsel for the Defendant further submitted that, assuming that the representation alleged was made and that it was initially relied upon, it is clear beyond any doubt from the contemporaneous evidence that from at least 18 May 2015 the Claimant was not proceeding under any assumptions or preconceptions about the destiny of the contract. Counsel took me through the contemporaneous documents. Counsel for the Defendant did not do so but submitted more generally that the court should not conduct a mini-trial and that the court must bear in mind the evidence that may reasonably be expected to be available at trial. This advice was given by Lewison J. in *EasyAir Ltd. v Opal Telecom Ltd.* [2009] EWHC 339 (Ch) at paragraph 15 and endorsed by Floyd LJ. in *TFL Management Services v Lloyds TSB Bank* [2014] 1 WLR 2006 at paragraphs 26-27. Counsel for the Defendant, also relying upon that case, reminded me that a realistic case is one which carries some degree of conviction, that is, more than merely arguable, and that in some cases it may be clear that there is no real substance in the factual assertions made, particularly if contradicted by contemporaneous documents. I was also referred to *King v Stiefel* [2021] EWHC 1045 where Cockerill J. said at paragraph 21

that the court is not barred from evaluating the evidence and concluding that there is no real prospect of success, though the court will be cautious, bearing in mind the potential for further evidence at trial and the need to avoid a mini-trial.

17. On 26 January 2015 there was an email exchange between Mr. Cohen of the Claimant and Mr. Morten of the Defendant. This was shortly after the meeting in Israel on 21 January 2015 when the alleged representation was made by Mr. Morten. The meeting was attended by, amongst others, Mr. Cohen. No mention of the representation is to be found in the exchange though Mr. Cohen thanked Mr. Morten for his "openness".

18. On 1 April 2015 Mr. Cohen referred in an email to the confusing situation in which the Claimant found itself. "*We are told, in simple words, "we may take the business from you soon, but we need you to invest, recruit and develop massively now as if the business is here for the next 5-7 years*." " Mr. Cohen said that was challenging and he sought guidance and suggested a meeting in Frankfurt to discuss the situation. Mr. Cohen's email appears to contradict the suggested representation. Counsel for the Defendant submitted that if at this time the Claimant was relying upon the alleged representation Mr. Cohen would not have sought guidance and a meeting in Frankfurt.

19. On 18 May 2015 Mr. Morten said that a review would not take place until closer to the expiry date of the existing contract. He apologised if "*we have set your expectations for a different result*". On 8 June 2015 Mr. Cohen repeated that the current situation was "*challenging for us*" and "*we seek your guidance*". A meeting in Frankfurt was again suggested. Counsel for the Defendant again submitted that this email was inconsistent with reliance upon the alleged representation.

20. The meeting in Frankfurt took place on 3 September 2015. On 2 November 2015 Mr. Morten said that they had discussed the possibility of discussions being opened between the Claimant and EAM "*on possible changes to J and LR representation in Israel.*" On 3 November 2015 Mr. Cohen replied to the effect that such a meeting will take place. It is the case of the Defendant that such discussions took place but without result. Counsel for the Defendant submitted that Mr. Cohen's willingness to have such discussions was inconsistent with the suggested reliance upon the alleged representation.

21. On 22 June 2016 the Defendant invited the Claimant to participate in the Tender process regarding future JLR representation in Israel. The Claimant had many questions about the process; see the Claimant's email dated 4 July 2016. The presentations were later made in Frankfurt in August 2016.

22. On 23 August 2016 the Claimant, who had been asked about "*training*", said that "*we currently don't know if it's relevant? Should we wait for the announcement?*".

23. It is the case of the Defendant that its decision to award the contract to EAM was announced on 20 September 2016. On 22 September 2016 the Claimant referred to the decision. No complaint was made that the Defendant had not acted in accordance with the alleged representation.

24. I accept that the contemporaneous correspondence raises considerable doubts about whether the alleged representation was made in January 2015. However, it is to be expected that there will be evidence from the Claimant about the January 2015 meeting

at trial. It is not possible to resolve the question of the alleged representation before trial.

25. So far as reliance is concerned the contemporaneous correspondence again raises very considerable doubts as to the suggested reliance. In particular, the emails from Mr. Cohen dated 1 April 2015 and 8 June 2015 appear to be inconsistent with any such reliance. It is striking that, although the Claimant's pleading referred to the terms of various email exchanges (see paragraph 14 of the Points of Claim), no witness statement from Mr. Cohen was provided in response to this application. However, it is reasonable to suppose that there will be evidence from Mr. Cohen at trial dealing with the issue of reliance.

26. The contemporaneous correspondence presents real difficulty for the Claimant's case. So does the time it took the Claimant to articulate the case it now advances; see paragraphs 60-61 of the Defendant's Skeleton Argument. These matters suggest that the Claimant's case is most unlikely to be established. I also accept that it is difficult to say that the case carries some degree of conviction in circumstances where no evidence has been adduced in support of the alleged oral representation and where the documentary evidence provides no support for it. However, Mr. Kass, a co-chairman of the Claimant and who is said to have attended the meeting in January 2015, has said in a signed statement that the Claimant has evidence to support each and every limb of the claim. This cannot be described as cogent in circumstances where no particulars of the evidence have been given but it is, I think, just sufficient to persuade me that the case carries some degree of conviction in that I am told that the case is supported by evidence. The court, as the authorities show, must act cautiously at this stage.

27. For these reasons I have concluded that the court cannot properly grant reverse summary judgment on the claim of unlawful means conspiracy.

<u>The claim in unjust enrichment</u>

28. This claim has been pleaded as follows:

> "Unjust Enrichment
>
> 29. As set out above, JLR, on the basis of the representations aforesaid and the constant inducements in the context of the winning by MCT of the Award, compelled MCT both to maintain to the highest standards and to enhance the value to the maximum of the Brand, such that, whatever was to have been the outcome of the Award, the maximum possible preservation and enhancement of the Brand, at the time of the expiry of the Novated Agreement, would lead to and did lead to the maximum possible benefit to JLR."

29. Further particulars of this allegation were given as follows:

> "The "unjust" factors relied upon hereunder are as follows. They are broadly twofold: first, the extraction from the Claimant, during the currency of the contractual relationship, of work and expenditure in relation to the continued enhancement of the

> Brand, in circumstances where the Defendant, as it transpired, had no or no sufficient intention to continue the contractual relationship beyond expiry; second, the retention and use by the Defendant of the substantial benefits and value derived from such enhancement both during the currency of the contractual relationship and after the time of its expiry, at which point, on any case, it was no longer paying or the same."

Strike-out

30. It was submitted by counsel on behalf of the Defendant that this was an inadequate plea of a claim in unjust enrichment because it failed to identity why the enrichment of the Defendant was unjust. Reliance was placed on the summary of the law in *Goff and Jones The Law of Unjust Enrichment* 9th.ed. at paragraph 1-26.

> "A 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. 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, and the court's jurisdiction to order restitution on the ground of unjust enrichment is subject "to the binding authority or previous decisions"; they do not have "a discretionary power to order repayment whenever it seems …just and equitable to do so. Claims in unjust enrichment must be pleaded by bringing them "within or close to some established category or factual recovery situation". However, "the categories of unjust enrichment are not closed", and the Woolwich case shows that the courts can recognise new grounds of recovery."

31. This principle has been recently described and summarised in *Dargamo Holdings Limited and another v Avonwick Holdings Limited and others* [2021] EWCA Civ 1149 at paragraphs 57-64 by Carr LJ.

32. It is common ground that one of the established categories is where benefits are transferred in anticipation of a contract which does not materialise; see *Goff and Jones* at Chapter 16. Counsel for the Claimant submitted that the circumstances of the Claimant's claim were analogous to such cases. Of course, on the Claimant's case the Defendant was never intending to contract with the Claimant. But the Claimant's case is also that the Defendant represented to the Claimant that it was intending to contract with the Defendant.

33. Although there was very little argument about this issue it seems to me that the Claimant's case is at least arguable; see *AMP Advisory and Management Partners AG v Force India Formula One Team Limited* [2019] EWHC 2426 (Comm) at paragraphs 195-196 per Moulder J. and in particular the quotation from the judgment of Nicholas Strauss QC in *Countrywide Communications Limited v ICL Pathway Ltd.* 1996 C No. 2446, regarded as a helpful analysis by Christopher Clarke J. in *MSM Consulting Ltd. v United Republic of Tanzania* [2009] EWHC 121 (QB) at paragraph 171 – "*What may be important here is whether the parties are simply negotiating expressly or impliedly*

> *"subject to contract" or whether one party has given some kind of assurance or indication that he will not withdraw, or that he will not withdraw except in certain circumstances.*" Although the pleading does not make clear that reliance is placed on this established category of unjust enrichment (cf the particulars quoted in paragraph 29 above) one can foresee an argument based upon it. In any event in this particular area of law (which is always developing) decisions should be reached on the basis of actual facts found at trial rather than on assumed facts; cf the advice of Floyd LJ. with regard to applications for summary judgment in *TFL Management Services* at paragraph 27.

34. I therefore do not consider that the claim in unjust enrichment should be struck out as failing to disclose reasonable grounds for a claim in unjust enrichment.

Reverse summary judgment

35. Counsel for the Defendant next submitted that the enrichment cannot be recovered when to do so would override a valid and subsisting legal obligation of the Claimant to confer the benefit on the Defendant; see *Dargamo Holdings Limited and another v Avonwick Holdings Limited and others* [2021] EWCA Civ 1149 at paragraphs 65-76 per Carr LJ. Counsel submitted that to allow recovery of the enrichment in the present case would override clause 12.1 of the original Importer Agreement dated 29 May 2012 which provided:

> "The Importer shall, at its own cost, and with the assistance of the Dealers advertise and/or promote the Products, and Service facilities in such manner as it set out in the Agreed Business Plan and to secure adequate and effective publicity to the satisfaction of the Company."

36. Counsel for the Claimant submitted that there were two answers to this formidable argument. First, the marketing expenses incurred by the Claimant were above and beyond that which the contract required the Claimant to bear. Although there was no express pleading to this effect (cf paragraph 15 of the Points of Claim), the particulars of damage referred to "*additional marketing costs*" both in 2015 and 2016. Those particulars are perhaps consistent with counsel's suggestion but there is no evidence that the expenditure incurred by the Claimant went beyond that which the contract required. However, there may well be such evidence at trial. Second, it was common ground that there was no Agreed Business Plan and therefore the obligation to advertise and promote "*at its own cost*" had, it was submitted, no content. However, clause 12.1 requires the Importer to advertise and promote the Products not only as set out in the Agreed Business Plan but also to secure adequate and effective publicity to the satisfaction of the Company. In the absence of an Agreed Business Plan it is therefore strongly arguable that the obligation in clause 12.1 continued to have content.

37. The court should hesitate before making a final decision without a trial. Having done so I consider that there are several reasons why it is not appropriate to decide this point on a summary basis. First, the outcome at trial may be affected by the evidence at trial concerning the nature of the additional marketing expenses incurred by the Claimant. Second, there will be a trial in any event of the alleged unlawful means conspiracy at which there will be evidence which will also be relevant to the alleged unjust

enrichment; see the guidance of Lewison J. in *Easy Air* and of Floyd LJ in *TFL Management Services*. Third, unjust enrichment remains an area of law which is developing and claims of that type benefit from being decided upon the basis of actual rather than assumed facts.

The F-Pace Agreement

38. This is a separate claim in contract. Prior to the launch of the Jaguar F-Pace the Claimant was requested by the Defendant to incur the costs of a full launch programme. At a meeting in Frankfurt on 1 June 2016 the Defendant made a verbal offer that all launch costs of the F-Pace would be reimbursed if the Claimant were not awarded the contract to import both Jaguar and Land Rover motor cars. This is admitted by the Defendant save that it alleges that it said that the costs to be reimbursed had to be reasonable and the Claimant was required to provide the Defendant with satisfactory evidence of its costs. The case of the Defendant is that pursuant to clause 30.1 of the Importer Agreement any variation to it (which would include clause 12.1 which required marketing expenses to be at the sole cost of the Claimant) had to be in writing and signed by both parties. The agreement reached on 1 June 2016 was not so evidenced and so is unenforceable.

39. The Defendant sought reverse summary judgment in respect of the F-Pace claim. In *MWB Business Exchange Centres Ltd. v Rock Advertising Ltd.* [2019] AC 119 the Supreme Court upheld the validity of "*no oral variation clauses*", confirming that they served a legitimate business purpose and were intended to achieve contractual certainty. Any unjust reliance on such clauses could be prevented by the doctrine of estoppel. In the present case there is no pleading (by way of Reply) alleging that the doctrine of estoppel applied in this case. In order to do so there would have to some words or conduct unequivocally representing that the variation was valid notwithstanding its informality and something more would be required for this purpose other than the informal promise itself; see the judgment of Lord Sumption at paragraph 16.

40. In the light of that decision of the Supreme Court counsel for the Claimant was only able to suggest that the Claimant might be able to rely upon the doctrine of estoppel to avoid what he suggested was the injustice which would otherwise be caused. However, the Claimant's pleading as to the meeting on 1 June 2016 contains no suggestion that there were any words or conduct of the Defendant representing that the variation would be valid notwithstanding clause 30.1 of the Importer Agreement. All that is pleaded is the oral agreement itself. There is therefore no basis upon which any relevant estoppel might be alleged; and none has been.

41. This therefore appears to be a short point of law to which there is, as a result of the recent decision of the Supreme Court, a clear answer.

42. However, there will be a trial in any event. It can be said that the trial will concern the Claimant's claim in respect of marketing costs other than those incurred as a result of the agreement reached on 1 June 2016 and that that meeting does not feature in the pleaded narrative of events relating to the other claims. Thus it can be said that the F-Pace claim is a discrete or separate claim. Yet there is one connection between the two claims; that is the ambit of clause 12.1 in circumstances where there was no Agreed Business Plan. The ambit of clause 12.1 is relevant to the unjust enrichment claim (see

above; and may also be relevant to the unlawful means conspiracy claim in relation to causation) and is also the foundation of the defence to the F-Pace claim. The unjust enrichment claim and the defence to it based upon clause 12.1 are to be determined at trial. For this reason it would not be sensible to determine the F-Pace claim summarily without a trial. There will also be evidence at trial about the budget and business review meetings which, on the Defendant's case, took the place of the Agreed Business Plan. That evidence may not be relevant to the construction of clause 12.1 (because the budget and review meetings post-dated it) but having regard to the need to be cautious and to consider the matter very carefully before accepting an invitation to deal with a single issue in a case where there will be a trial in any event it is difficult to ignore that further factor.

Security for Costs

43. Orders for security for costs are governed by CPR 25.12 and 13. Such orders can also be made as "conditional orders, pursuant to CPR 24 and as orders for payment in pursuant to CPR 3; see *Allen v Bloomsbury Publishing Ltd*.[2011] EWHC 770 where Kitchin J. (as he was then) reviewed the relevant appellate decisions and summarised the relevant principles; see paragraphs 28-33.

44. The Defendant has sought security for costs under CPR 25 as well as under CPR 24. I shall first consider the claim under CPR 25.

45. If there is reason to believe that the Claimant will be unable to pay the Defendant's costs if ordered to do so then the Court may order security for costs if, having regard to all the circumstances of the case, it is just to do so.

46. The Defendant says that there is reason to believe that the Claimant will be unable to pay the Defendant's costs essentially because the Claimant, though having every opportunity to adduce documentary evidence in the form of management accounts that it will be able to pay, has failed to do so. The Claimant says that "*reason to believe*" cannot be established in that way because to do so reverses the burden of proof which is on the Defendant to establish the required "*reason to believe*". In any event the Claimant says that it has established by witness evidence that it will be able to pay.

47. I was referred to several authorities on this issue; *Aerotel Limited v Wavecrest and others* [2007] EWHC 104 (Pat), *Sarpd Oil International Ltd v Addax Energy SA* [2016] 1 CLC 336 and *Kompaktwerk GMBH v Liveperson Netherland* [2019] EWHC 1763 (Comm). It is sufficient to note the conclusion of David Edwards QC in the last mentioned case at paragraph 31:

> "Secondly, whilst the ultimate legal burden lies upon the applicant for an order for security to establish that the "reason to believe" test is satisfied, where the respondent is given every opportunity to show that it can pay the applicant's costs but deliberately fails to do so, an inference may be drawn that it will be unable to meet the applicant's costs. See in that context the judgment of Sales LJ in *Sarpd Oil International Ltd v Addax Energy SA* [2016} EWCA Civ 120 at [17]."

48. The Claimant and the Defendant had been in business with each other for some years before 2017. There is no evidence that the Defendant had any concern about the Claimant's ability to pay its debts at that time. In June 2020 these proceedings were commenced. On 22 March 2021 the Defendant said that it was considering an application for security for costs and had not been able to obtain any publicly available financial information about the Claimant. The Defendant therefore requested the Claimant to produce evidence that it would be able to comply with a costs order. The Defendant requested the most recent full set of company financial accounts. On 14 April 2021 the Claimant, through its counsel, informed the Defendant that the Claimant is a private company and does not publish financial accounts. Counsel informed the Defendant that "*the combined turnover for the claimant for the years ending 31 December 2019 and 31 December 2020 was 5 billion NIS (1.425 USD) for each year. The profit for each of these years was no less than 20 million USD.*"

49. On 29 April 2021 the Defendant issued its application for security for costs. In the witness statement in support it was pointed out the Claimant must have financial statements for 2019 and 2020 such as management accounts which have not been provided. It was also pointed out that no information had been given for the first quarter of 2021 or as to the Claimant's current asset position. It was said that the Defendant therefore had reason to believe that the Claimant will not be able to pay the Defendant's costs if ordered to do so. The Defendant further said that if satisfactory evidence were now produced the Defendant would withdraw this ground of its application.

50. In response Mr. Kass of the Claimant merely said that "*we produced relevant figures*" and that those figures were "*entirely true and accurate*". He emphasised that the Claimant is a "*company of particular substance and has been for very many years. The assertion ……that it would not have the substance to be able to meet an order for costs ……..is entirely baseless*." He added: "*Were a costs order ever to be made against the Claimant in these proceedings, the Claimant would honour such an order and meet it, provided, of course, it is prosecuted in legitimate, reasonable and proportionate ways.*"

51. Mr. Kass has not explained why management accounts cannot be produced. The figures for turnover and profit must have come from management accounts (in the absence of published audited accounts) and yet they have not been provided. There is no evidence that they could not have been provided. I infer that they could have been provided but that the Claimant prefers not to disclose them in connection with this application for security for costs. Further, Mr. Kass has not provided any information for 2021 or any information as to the Claimant's current asset position. There is also no evidence as to the Claimant's liabilities. It is difficult to rely upon what is said about turnover and profit in the absence of any evidence as to the Claimant's liabilities. Finally, there is no evidence as to how the Claimant distributes its profits.

52. Given that the Claimant was expressly invited both before the application was issued and after it was issued to produce documentary evidence of its ability to pay an order for costs and has chosen not to do so it is open to the court to infer that there is reason to believe that, if ordered to pay costs, it will be unable to pay. I bear in mind that in the years leading up to 2017 the Defendant had no cause to doubt the Claimant's ability to pay its debts when they fell due. But 2017 was over three years ago. I also bear in mind Mr. Kass' evidence that to suggest the Claimant is unable to pay an order for costs

is baseless. However, he could easily have made that point good by the production of up to date management accounts and he has chosen not to do so. In the result I think that the court may properly infer that there is reason to believe that the Claimant will be unable to pay an order for costs. That is not to say that on the balance of probabilities the Claimant will be unable to pay. Rather, there is reason to believe that the Claimant will be unable to pay.

53. The next question is whether it is just to make an order for security for the Defendant's costs of this action.

54. In circumstances where the claim for unlawful means conspiracy has been, at best, unclearly pleaded despite invitations to clarify it, where the factual case for the alleged representation is unsupported by the contemporaneous documents and where the case for alleged reliance on such representation sits unhappily with the contemporaneous documents I have no doubt that it is just to make an order for security for costs. Those evidential difficulties are relevant to both the conspiracy and the unjust enrichment claims. The F-Pace claim also appears weak given (a) the lack of any evidence that the marketing costs incurred were beyond what the contract required and (b) the difficulty in the way of the Claimant's construction of clause 12.1 of the contract. There is no suggestion that an order for security for costs will stifle the Claimant's claim.

55. I therefore consider that it is just and appropriate to order security for costs pursuant to CPR 25.12 and 13. It is therefore unnecessary to consider the alternative claim based upon the additional expense of enforcing a costs order in Israel compared with in England or the claim for a conditional order pursuant to CPR 24.

56. The Defendant has estimated its costs of the trial in the sum of £184,355. The estimate is contained in a 6 page document. It includes incurred costs and estimates future costs up to and including trial. No challenge has been made to this estimate and it does not appear to be excessive.

57. I shall therefore order that security in that sum be provided, either by means of a payment into court or by provision of a first class London bank guarantee.

58. The parties are requested to agree the terms of the order and the date within which it should be provided. If agreement cannot be reached the court can determine those matters at the consequential hearing following the formal handing down of this judgment. The order should also make provision for the Claimant to provide clear particulars of its allegation of an unlawful means conspiracy within, say, 28 days of judgment being handed down. There should be liberty to apply following the provision of those particulars.

Conclusion

59. The claims will not be struck out and reverse summary judgment will not be granted. However, the Claimant must provide (i) clear particulars of its allegation of unlawful means conspiracy and (ii) security for the Defendant's costs of the action. There will be liberty to apply.