Neutral Citation Number: [2019] EWHC 2426 (Comm)

Case No: CL- 2017 -000423

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

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

Date: 18/09/2019

Before :

MRS JUSTICE MOULDER

- -

Between :

AMP ADVISORY & MANAGEMENT PARTNERS A.G.	**Claimant**
- and -	
FORCE INDIA FORMULA ONE TEAM LIMITED (in liquidation)	**Defendant**

- -

WILLIAM MCCORMICK QC and MAX COLE (instructed by **Kingsley Napley LLP**) for **the Claimant**
JAMES SEGAN and GEORGE MOLYNEAUX (instructed by **Solesbury Gay**) for **the Defendant**

Hearing dates: 8-12 ,16 and 22 July 2019

- -

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.

.....

Mrs Justice Moulder :

Introduction

1. By these proceedings AMP Advisory & Management Partners AG ("AMP") claims a percentage of the net receipts under the sponsorship agreement entered into between the defendant, Force India Formula One Team Limited ("Force India") and BWT AG ("the BWT Contract") dated 13 March 2017.

2. Force India went into administration in July 2018. The assets and business were bought and the team continues to race as Racing Point Force India Formula 1 Team ("Racing Point"). A number of the defendant's witnesses are now employed by Racing Point in similar or identical roles to those held in Force India. BWT currently sponsors Racing Point.

Background

3. Mr Emanuel Moser describes himself as the Executive Chairman of AMP. As well as being AMP's sole shareholder he is also its sole employee. He describes the company's focus as being on the "sports marketing industry".

4. Mr Moser's evidence is that AMP has been actively involved in Formula One marketing since 2014 (paragraph 18 of his first witness statement). At that time he states that AMP's objective was to find, interest and convince a high-value principal partner (a potential title sponsor) for the Formula One team Red Bull Sauber Petronas ("Sauber").

5. His evidence is that in around January 2017 he identified BWT, an Austrian company whose business centred on manufacturing water treatment technology as being a suitable potential title sponsor for Sauber (paragraph 26 of his first witness statement).

6. Mr Tara Ramos is the managing director of a marketing, PR and event management company. The focus of the business is on celebrity arrangements and event organisation (paragraph 9 of his first witness statement). His evidence is that he met Mr Moser around 2012, that they would see each other a couple of times a year and they stayed in fairly regular contact and were always looking for opportunities to work together (paragraph 25 of his first witness statement).

7. In February 2017 Mr Ramos was in London for a leisure trip and spoke to Mr Moser who explained that he had a potential sponsorship company. Mr Ramos was told that Mr Moser had introduced the sponsor to Sauber but that deal had broken down, the main problem being that Sauber would not agree to change the base colour of their car to pink. According to Mr Ramos they discussed alternatives to Sauber and identified Force India and the Haas Formula One team. Mr Ramos said that Mr Moser offered him a share of the commission and Mr Ramos said he was happy to work with him. Mr Ramos told Mr Moser that he could approach Force India because he had lunch set up with the Sporting Director of Force India, Mr Stevenson and a lunch with the Team Principal, Dr Mallya.

8. On Sunday, 19 February 2017, Mr Ramos (and one of the Formula One drivers) had lunch with Mr Stevenson. At the lunch Mr Ramos mentioned to Mr Stevenson the

potential sponsor and that the team would have to change the base colour of the car to pink.

9. On Monday, 20 February 2017 Mr Ramos had lunch with Dr Mallya at Dr Mallya's home. Later that night (the early hours of 21 February 2017) Mr Ramos sent Mr Stevenson a copy of the mandate agreement (the "Mandate Agreement") setting out payment terms for the proposed deal but not identifying the sponsor. The Mandate Agreement provided that in the event that Force India concluded a sponsorship agreement for the 2017 Formula One racing season onwards with an (unnamed) sponsor, Force India would pay a commission of 15% of the total net cash sponsorship fees up to €12.5 million and 12% on the sponsorship fees in excess of that amount.

10. On Tuesday, 21 February 2017 Mr Ramos met an old school friend, Ms Levin, for coffee. During the meeting with Ms Levin, Mr Ramos was in communication with Mr Curnow, the Commercial Director of Force India, by WhatsApp and he also spoke to him by phone. In the course of those exchanges, Mr Ramos revealed to Mr Curnow the identity of the potential sponsor. That evening Mr Ramos flew back to Oslo.

11. On Wednesday, 22 February 2017 Mr Ramos had various conversations with Mr Curnow. Mr Moser met Mr Hubner of BWT in the afternoon.

12. Over the next few days the claimant's case is that Mr Moser and Mr Ramos continued to act "as intermediaries" between BWT and Force India (paragraph 95 of Mr Ramos' first witness statement).

13. On 2 March 2018 Mr Curnow sent to Mr Ramos and Mr Moser the Force India draft agency agreement.

14. On 3 March 2017 Mr Moser sent a marked up copy of the Force India draft agency agreement (the "Long Form Agreement") back to Mr Curnow for signature.

15. The sponsorship deal with BWT was announced on 14 March 2017.

Evidence

16. For the claimant the court heard evidence from:

    i) Mr Emanuel Moser; ii) Mr Tara Ramos;

    iii) Mr Toto Wolff, the Chief Executive Officer of Mercedes Benz Grand Prix Limited ("Mercedes") and Team Principal of the Mercedes-AMG Formula One racing team;

    iv) Ms Monisha Kaltenborn, who at the relevant time was team principal of the Sauber Formula One team.

17. For the defendant the court heard evidence from:

    i) Dr Vijay Mallya, a director and the Team Principal of Force India as well as an indirect shareholder (as to approximately 42%);

ii) Mr Otmar Szafnauer, Chief Operating Officer of Force India at the material time; iii) Mr Stephen Curnow, Commercial Director of Force India at the material time; iv) Mr Andrew Stevenson, Sporting Director of Force India at the material time;

v) Ms Leslie Ross, general counsel of Force India at the relevant time;

vi) Mr Andreas Weissenbacher, the Chief Executive Officer and Chairman of the Executive Board of BWT.

18. Mr Haubold, the COO of Weirather Wenzel & Partner, a sports marketing company, and Ms Levin did not give live evidence. The evidence of Ms Levin which related to the events of the morning of 21 February 2017 was agreed.

19. I make the following observations about certain witnesses as it is relevant to the determination of the issues before the court:

i) Mr Wolff was called by the claimant but was an independent witness in the sense that he is the team principal of Mercedes. He accepted that he could not recollect dates but in my view was clear in his recollection that he spoke to Mr Weissenbacher who said he was considering Sauber and Force India and Mr Wolff advised him on balance to go with Force India. He was also clear that he got a call from Mr Szafnauer and provided him with the telephone number of Mr Weissenbacher. Mr Wolff also recalled at least two conversations with Mr Szafnauer and that there was no mention of Mr Ramos in the first call.

ii) Mr Weissenbacher's evidence was of limited assistance to the court. Although he was able to describe in general terms the way in which he operated as chairman of BWT and made it clear that he did not deal personally with emails sent to him, he appeared unable in cross examination to recall any details of exchanges which were relevant to these proceedings, even to the extent that he appeared to have forgotten the meeting with the defendant's solicitors concerning him giving evidence. Whilst his apparent inability to recall any detail may be due to the passage of time, it means that he was able to provide little real assistance on the issues before the court.

iii) Mr Moser was shown by the evidence to have made statements in correspondence which were not accurate: for example he sent an email on 6 February 2017 to Ms Kaltenborn stating that he was "in direct contact" with Andreas Weissenbacher and "recently able to interest Mr Weissenbacher" in Sauber title sponsoring. It is clear from the contemporaneous emails that whilst he was in contact with Mr Hubner he was not in contact with Mr Weissenbacher: the true position was that he had sent an email on 3 February to Mr Weissenbacher's personal assistant, Ms Berger-Sollinger which had been passed to Mr Hubner to respond. The emails also demonstrate that Mr Moser was offering BWT the opportunity to work with Sauber, when no such approach had been mandated by Sauber: Mr Moser sent an email at 9.03 to Mr Hubner on 6 February stating:

> "as already discussed, we, and Sauber respectively, are very interested in a prominent and sustained partnership with BWT…"

His email to Ms Kaltenborn was only sent at 15.05 later that day. Similarly on 20 February 2017 Mr Moser stated in an email that he was "in direct contact with Vijay Mallya" which again on the evidence was incorrect. Whilst in cross examination Mr Moser sought to explain this particular statement on the basis that AMP was in contact with Dr Mallya through Mr Ramos as an agent of AMP, this seemed a somewhat contrived explanation. Of more concern is that in that email of 20 February, Mr Moser made an offer to BWT on behalf of Dr Mallya and Force India to place the BWT logo on the cars, and to change their colour to BWT pink at a cost of between €15 and €20 million for three years. The material part of the email read:

> "…Vijay Mallya and Force India would today offer BWT the opportunity in addition to a prominent BWT logo placement, to present the Formula One vehicles (both vehicles) with their basic colour in BWT pink… The costs, if an agreement is reached shortly, would run to between €15 and €20 million per year (term: three years). The matter has been clarified with Vijay Mallya. For 2017 we could get going directly, or indeed have to do. The next step would be the development of draft designs for examination (Force India)."

When asked about this email in cross examination and it was put to Mr Moser that he had no authority to make such an offer, he failed to give a direct answer, responding:

> "I mean my main thing was after Vijay agreed this, to bring the deal together as soon as possible because we were really in a rush because the season was shortly to start and we had to move things very very quickly to be able that in Australia are these cars with another base colour and with this sponsor. So it was significant and we had just no time and yes. This is why we moved very quickly."

The evidence leads me to infer that Mr Moser's statements in the contemporaneous documents cannot be accepted at face value notwithstanding the fact that they appear in written form.

A further concern with Mr Moser's evidence generally is that in cross examination, on occasions he appeared evasive: for example, as well as failing to answer the question above about authority, when it was put to him that he had asked a friend to produce designs for an F1 car with BWT's logo on his own initiative and not by Sauber, again Mr Moser avoided answering the question directly. The relevant exchange was as follows:

> "Q…you hadn't been asked by any Formula One team to undertake this exercise, had you?"

> "A. I was in regular contact and business relationship with Sauber. I knew that they are really looking for a title sponsor. And yes, I did my own research, I thought this could fit, and I knew this would fit because I knew, for example, the Sauber sponsors and what technology was not a product category there. So yes."
>
> "Q. Sauber had not asked you to have the designs drawn up, had they?"
>
> "A. I mean it was already our understanding that of course I'm on my own risk looking for sponsors and trying to introduce or trying to identify, which is very difficult, and to introduce to Sauber. But in this specific way I did this design and afterwards I get in contact with Monica Kaltenborn and yes, informed her."

To the extent that the claimant seeks to rely on evidence from Mr Moser in support of disputed factual matters, the weight which the court gives to such evidence is reduced in the light of the foregoing observations.

iv) Mr Ramos' evidence in cross examination was unsatisfactory in certain notable respects: Mr Ramos denied that he knew that any agreement would not come into effect unless signed by the CEO and CFO of Force India; however the documentary evidence shows that when pressing for the Mandate Agreement to be signed, Mr Ramos referred in his message of 7 March 2017 to getting it signed by Mr Szafnauer. In relation to the alleged oral agreement with Dr Mallya, he was unable to provide a satisfactory explanation as to why he had not raised with Dr Mallya the alleged oral agreement when subsequently seeking to get paid commission. His evidence in cross examination on the key factual issue of what was said at the lunch with Dr Mallya has therefore to be approached with caution.

v) It was submitted that the court should be cautious in adopting Mr Curnow's account on any contested matter. The claimant submitted that his actions in relation to the claimant indicated that he would mislead if he considered it justified. In my view it does not follow that because Mr Curnow accepted that he misled Mr Ramos concerning the payment of commission in March 2017 that Mr Curnow would mislead the court. There were however certain matters mentioned by Mr Curnow in cross examination which were not in his witness statement or which contradicted that evidence and whilst it is not uncommon for matters to be omitted from witness statements, there were two notable changes for which there was no satisfactory explanation: that he was present at the first telephone call between Mr Szafnauer and Mr Wolff (alleged by the defendant to have taken place at 5pm on Monday 20 February) and that commission was mentioned on that call; and that Mr Stevenson had suggested that the cars should be turned purple rather than pink. The evidence on the latter point was both contrary to his own witness evidence and to the evidence of Mr Stevenson. These were matters which in the circumstances did raise a concern as to his overall credibility and does reduce the weight to be afforded to his evidence to the extent that there is a factual dispute which the court needs to resolve.

vi) It was submitted for the claimant that it was "overwhelmingly likely" that Dr Mallya's account of the conversation with Mr Ramos at his house was inaccurate. In my view there were answers given by Dr Mallya in cross examination which were not entirely satisfactory such as why his mobile phone records had not been made available prior to the trial and whether when he referred to the colour "purple" rather than pink in a Whatsapp message the day after the lunch, this was a "typo" as he suggested. In my view the fact that Dr Mallya wrongly referred to the colour as purple rather than pink rather than leading to an inference (as submitted for the claimant) that he has a poor memory of events, in fact supports his evidence in cross examination that the conversation with Mr Ramos at his house had been a casual conversation about a potential opportunity and when asked if he was "open to the idea" Dr Mallya said yes. Taken in the round, these were not matters which cause me to make any significant reduction in the weight which I afford to his evidence as to the nature and tenor of his conversation with Mr Ramos on 20 February 2017.

Expert evidence

20. The court had before it two expert reports, one from Nick Hayes dated 15 May 2019 instructed by the claimant and the other from Robin Fenwick dated 17 May 2019 instructed by Force India, as well as a joint expert statement signed by the experts on 20 and 21 June 2019, respectively.

21. Mr Hayes is currently employed as Head of Commercial Partnerships at British Cycling. He had previously worked in Formula One notably for Ferrari as Head of Global Partnerships between February 2017 and March 2018 and for Havas between February 2013 and July 2015. He disclosed in his report that he has a personal friendship with Mr Ramos having known him since around the end of 2010.

22. Mr Fenwick is chief executive officer of a company specialising in identifying and realising sports sponsorship opportunities for commercial clients, predominantly in Formula One. Although he did not disclose this in his report, in cross examination he conceded that he knew Mr Curnow of Force India and that he has contact with Mr Curnow in his current role, and seeks to do business with him in the future.

23. The experts addressed three issues in their reports:

i) the basis upon which sponsorship agents are typically engaged in Formula One; ii) the nature of the agency agreements customarily used in Formula One;

iii) whether there is market practice in the Formula One industry for agents to receive a 15% commission up to €12,500,000 and 12% thereafter.

The relevance and significance of the actual and alleged conflicts of interest on the part of the experts are discussed below.

Issues for the court

24. The following issues fall to be determined by the court:

i) Was a binding contract formed orally between the parties on 20 February 2017?

ii) Did the parties enter into a contract on the terms of the Mandate Agreement?

iii) Unjust enrichment.

25. The claimant no longer pursues its case that the parties entered into a contract on the terms of the Long Form Agreement.

Issue 1: Was a binding contract formed orally between the parties on 20 February 2017?

26. It is the claimant's case that the conversation on 20 February 2017 between Dr Mallya and Mr Ramos at Dr Mallya's home constituted a binding oral contract between AMP and Force India under which Force India agreed to pay a reasonable commission to AMP in the event that a sponsorship agreement was concluded with the sponsor to which Mr Ramos was referring. The level of commission was not expressly agreed but it is to be implied (as obvious or necessary) from the commitment to pay a commission.

Relevant legal principles

27. The relevant legal principles were set out in *Blue v Ashley* [2017] EWHC 1928 (Comm) by Leggatt J:

> "[49] Generally speaking, it is possible under English law to make a contract without any formality, simply by word of mouth. Of course, the absence of a written record may make the existence and terms of a contract harder to prove. Furthermore, because the value of a written record is understood by anyone with business experience, its absence may – depending on the circumstances – tend to suggest that no contract was in fact concluded. But those are matters of proof: they are not legal requirements. The basic requirements of a contract are that: (i) the parties have reached an agreement, which (ii) is intended to be legally binding, (iii) is supported by consideration, and (iv) is sufficiently certain and complete to be enforceable:..."
>
> [56] Factors which may tend to show that an agreement was not intended to be legally binding include the fact that it was made in a social context, the fact that it was expressed in vague language and the fact that the promissory statement was made in anger or jest: ...
>
> [63] In determining whether an agreement has been made, what its terms are and whether it is intended to be legally binding, English law applies an objective test. As stated by Lord Clarke in RTS Flexible Systems Ltd v Molkerei Alois Muller GmbH and Co KG [2010] UKSC 14; [2010] 1 WLR 753:
>
> "The general principles are not in doubt. Whether there is a binding contract between the parties and, if so, upon what terms depends upon what they have agreed. It depends not upon their subjective state of mind, but upon a consideration of what was

> communicated between them by words or conduct, and whether that leads objectively to a conclusion that they intended to create legal relations and had agreed upon all the terms which they regarded or the law requires as essential for the formation of legally binding relations."
>
> As with all questions of meaning in the law of contract, the touchstone is how the words used, in their context, would be understood by a reasonable person. For this purpose the context includes all relevant matters of background fact known to both parties.
>
> [64] …where, as here, the court is concerned with an oral agreement, the test remains objective but evidence of the subjective understanding of the parties is admissible in so far as it tends to show whether, objectively, an agreement was reached and, if so, what its terms were and whether it was intended to be legally binding. Evidence of subsequent conduct is admissible on the same basis. In the case of an oral agreement, unless a recording was made, the court cannot know the exact words spoken nor the tone in which they were spoken, nor the facial expressions and body language of those involved. In these circumstances, the parties' subjective understanding may be a good guide to how, in their context, the words used would reasonably have been understood. It is for that reason that the House of Lords in Carmichael v National Power Plc [1999] 1 WLR 2042 held that evidence of the subjective understanding of the parties is admissible in deciding what obligations were established by an oral agreement." [emphasis added]

28. The court was also referred to the judgment of Hamblen LJ in *Global Asset Capital Inc v Aabar Block SARL* [2017] 4 WLR 163 at [28]-[31]:

> "[28] It is well established that when deciding whether a contract has been made during the course of negotiations the court will look at the whole course of those negotiations—see Hussey v Horne-Payne (1879) 4 App Cas 311."
>
> [29] As Earl Cairns LC observed in that case at p 316:
>
> "You must not at one particular time draw a line and say, 'We will look at the letters up to this point and find in them a contract or not, but we will look at nothing beyond'. In order fairly to estimate what was arranged and agreed, if anything was agreed between the parties, you must look at the whole of that which took place and passed between them."
>
> [30] The rationale of this approach is that focusing on one part of the parties' communications in isolation, without regard to the whole course of dealing, can give a misleading impression that the parties had

> reached agreement when in fact they had not— see Lord Selborne in Hussey at p 323."

29. As to the significance of the written mandate agreement and the fact that it was being negotiated at this time, the court was referred to *Rosalina Investments Ltd v New Balance Athletic Shoes (UK) Ltd* [2018] EWHC 1014 (QB) where there was reference to emails passing between the parties as to the need for documents to be signed. The judge in that case referred to Beatson LJ in *Tahar Benourad v Compass Group Plc* [2010] EWHC 1882 (QB), at [106]:

> "Where there is no such stipulation [that the agreement is "subject to contract"], this (see e.g. Winn v Bull (1877—78) LR 7 Ch 29 , 32, per Jessel MR) is a question of construction. The fact that a draft contractual document or a covering letter to it invites a party to initial or sign a copy and return it to the other party, or contemplates that a party would obtain legal advice before signing are telling indications that the parties do not intend to be bound until the document is signed: Investec Bank (UK) Ltd v Zulman [2010] EWCA Civ. 536 at [19—20].".

30. The court therefore has to determine:

    i) the factual dispute as to what was said between Dr Mallya and Mr Ramos on 20 February 2017;

    ii) whether their words and conduct viewed objectively lead to a conclusion that the parties intended to create legal relations and had agreed all the essential terms for the formation of a contract.

Evidence

Sunday, 19 February 2017

31. On 19 February 2017 Mr Ramos met Mr Stevenson and one of the F1 drivers for lunch. The evidence of Mr Stevenson (paragraph 8 of his witness statement) was that in the course of the lunch Mr Ramos:

> "mentioned that there might be someone in the marketplace who might be looking to become a title sponsor in Formula One…He said the only difficulty might be that the car would need to be pink. I said that this was not my area of responsibility but if he wanted to get in touch with me I would put him in touch with the right people at Force India."

Monday, 20 February 2017

32. The evidence of Mr Stevenson (paragraph 10 of his witness statement) is that on the Monday, "as soon as I got to the office" he went to see Mr Curnow to ask him if what Mr Ramos and he had discussed was of interest. He said that Mr Curnow "encouraged [him] to try and learn more from Mr Ramos". Mr Stevenson then sent Mr Ramos an email at 10:09 am:

> "it was good to catch up yesterday, a great way to spend a Sunday afternoon."
>
> "Do you think there may be a chance with the title sponsor you mentioned yesterday? If so I think we should enter into discussions as soon as possible… Therefore if you would like me to arrange anything from this end please give me a shout."

33. Dr Mallya and Mr Ramos met at Dr Mallya's house for lunch on 20 February 2017.

34. The evidence of Mr Ramos (paragraph 51 of his witness statement) is that he:

> "told Mr Mallya that I was working with my business partner from Liechtenstein and that we had this opportunity to bring a significant title sponsorship opportunity to Force India (I said potentially between €15 million and €20 million per year over several years) but that it was conditional upon the car base colour being changed to pink and that this was the basic requirement of the potential sponsor that any deal can be done.… I asked him whether this would interest Force India and whether he would support such a sponsorship introduction.… Mr Mallya confirmed that Force India would be interested and that I should take the matter up with the commercial team and Mr Curnow to agree the terms.…" [emphasis added]

35. Mr Ramos' evidence was that he told Dr Mallya that he would prefer to deal with Dr Mallya but Dr Mallya said that he had to deal with "his people as he did not deal with the detail". Mr Ramos' evidence was (paragraph 53):

> "I said ok but agreed but made clear that we would not be doing this for free and that as I did not work for him or the team any more, myself and my partner would be looking for an introduction fee to be paid based on the overall amount paid by the sponsor if a deal was done… Mr Mallya confirmed that this was "fine" and that "naturally nothing comes for free". He confirmed that we would be remunerated in an appropriate way…" [emphasis added]

36. In cross examination Mr Ramos stated that he was "very sure" that he had reached an agreement with Dr Mallya and that he would give him "an appropriate commission" for bringing him something that had immense value for his operations.

37. Dr Mallya's evidence in cross examination was that he had a clear recollection of that lunch. He said:

> "Mr Ramos casually mentioned to me that there was an unnamed sponsor somewhere lurking around who were in negotiations with Sauber and their condition was that the car they sponsored must be pink. He asked me if I was open to the idea and I said yes."

38. Dr Mallya was asked in cross-examination whether the subject of commission came up in the conversation with Mr Ramos. Dr Mallya replied:

> "no, it did not, because there was no proposal that Mr Ramos brought me. It was a casual conversation where he said that he heard of the company that was prepared to sponsor a Formula One team who was talking to Sauber but their precondition was a pink car."

39. Dr Mallya said that he would:

> "definitely want to know the name of the sponsor to ascertain the credibility of the sponsor to take such a major decision within the team to paint the entire car pink… It would require the approval of our other shareholders, particularly the Sahara Group, who also held a 42.5% interest in the team, because the sidepods were committed to the Sahara Group."

40. Dr Mallya rejected the proposition that he did not need a detailed proposal to agree a commission for an agent bringing BWT to Force India. His evidence was:

> "I would not be sitting there casually in my kitchen with my friend Mr Ramos agreeing commission deals on a purely speculative basis, on a no names basis, without knowing the sponsor, the credibility of the sponsor, and in any event that was a prerequisite because I would have to go to my shareholders and they would necessarily ask me fundamental questions."

41. It was also put to Dr Mallya that the agency agreement would need to be done before the agent would tell Force India who the sponsor was. Dr Mallya rejected this:

> "no, the agent can't keep the identity of a potential sponsor secret because there would have to be some due diligence, particularly in the Formula One context, because there are many people in the Formula One paddock who toss around millions of potential sponsorships which never ever come to fruition."

42. Just after midnight (00.03 on 21 February 2017) Mr Ramos replied to Mr Stevenson by email:

> "… I have also been active in getting more information on the sponsor and have addressed this very topic to [Dr Mallya] as well when visiting him at Ladywalk today and he shares the same view as you.
>
> I have on top of this spoken to my friend and he has gotten in touch with his clients again, which you will see in the next email. In top of this he has sent me over the provision agreement that he would like to have in place if this deal gets

> through, which he had agreed with Sauber before they have turned it down.
>
> Please let me know your thoughts as soon as possible, as you can see they are pushing as well from their side.
>
> Talk very soon, hopefully to set up a first meeting ASAP"

43. Mr Ramos then forwarded to Mr Stevenson a few minutes later the draft Mandate Agreement.

44. Finally Mr Ramos forwarded to Mr Stevenson at 00.09 an email from Mr Moser to Mr Ramos:

> "I just talked to the potential sponsor with regard to the Sahara Force India title partnership. The sponsor explicit told me to sign the partnership agreement immediately (this week) if we can start the collaboration on the following conditions – the basic colour of the race car needs to be their company colour… … I strongly believe there is great potential to grow the partnership financially in the course of time… We just need to get this started today."
>
> The potential sponsor asked me to get feedback until tomorrow. I will see them again on Wednesday.
>
> Please let me know"

45. Mr Stevenson said (paragraphs 13 and 14 of his witness statement) that he passed the draft Mandate Agreement and the email forwarded from Mr Moser to Mr Curnow and Mr Szafnauer.

Tuesday, 21 February 2017

46. On the day after the lunch there was a WhatsApp exchange between Dr Mallya and Mr Curnow. Mr Curnow sent a message to Dr Mallya at 9.54 AM:

> "do u (sic) want me to pick up with Tara on the title opportunity?"

47. Dr Mallya responded:

> "yes"

48. Mr Curnow then emailed Mr Ramos at 10.25:

> "… [Dr Mallya] has asked me to pick this up with you following your meeting yesterday.
>
> Do we yet know the name of the company and the reasons Sauber turned it down?
>
> I'm on WhatsApp if quicker…"

49. Mr Ramos met his friend Ms Levin that morning. At 11.17 Mr Ramos set up a WhatsApp group between himself and Mr Curnow and at 11.26 Mr Ramos sent Mr Curnow a link to the BWT website.

50. At 11.51 Mr Ramos sent an image and Mr Curnow responded by asking for the Pantone reference colour.

51. A little later that day at 12:12 Mr Curnow sent a further message to Dr Mallya:

> "not sure if he mentioned it's a water company called BWT.

Working on it" Dr Mallya responded:

> "no he just said he had a sponsor who could spend $20 million

but that the livery of the car would have to be changed to purple." Mr Curnow replied:

> "its 12.5 million E per year. No title change but want some

magenta colour on car." Dr Mallya said:

> "oh okay I am just repeating what Tara told me."

52. At 13.00 there was a management meeting at Force India attended by amongst others, Dr Mallya, Mr Szafnauer and Mr Curnow. At 13.08 Mr Curnow sent a message to Mr Ramos:

> "Happy to pay 15% if a three-year deal with no breaks."

53. At 16.25 Mr Curnow sent a further message:

> "Vijay has approved everything. Will go with a pink pod and pink lines on a silver car. Uniforms will be pink black and silver."

Submissions

54. It was submitted for the claimant that:

i) there is a significant factual dispute as to what was said at the meeting between Mr Ramos and Dr Mallya;

ii) it is "overwhelmingly likely" that Mr Ramos raised the question of commission with Dr Mallya: he had already agreed with Mr Moser that he would take a cut of any commission and was taking what would be a potentially valuable deal to Dr Mallya;

iii) it is "overwhelmingly likely" that Dr Mallya would have said words to the effect that "nothing comes for nothing" because that is the way in which Formula One operates, namely that if you bring in a deal you would expect to be given a commission. The amount of commission would be open to negotiation but if money is received as a result of the deal then you get a percentage of the sums received;

iv) although Dr Mallya said in cross-examination that his memory of the meeting with Mr Ramos was clear, he was unable to recall even the following day the colour required by the sponsor.

55. For the defendant it was submitted that:

i) the evidence of Dr Mallya was that he did not have any discussion about commission and would not have agreed a commission on the basis of the extremely limited, no names information given to him by Mr Ramos.

ii) it was "fanciful" to say that Dr Mallya would have agreed a commission in excess of €9 million on that basis;

iii) even if Dr Mallya had said that he was fine with the "principle" of paying an introduction fee (as alleged at paragraph 17 of the Amended Particulars of Claim) that is not the same thing as entering into a binding legal agreement.

Discussion

56. Mr Moser said in his witness statement that after his meeting with Dr Mallya, Mr Ramos called him and told him that he had referred to the potential sponsorship being conditional on Force India agreeing to change the colour of the car to pink and had told Dr Mallya that he was working on the deal with his business partner from Liechtenstein and that they were looking for an introduction fee to be paid by Force India. Mr Moser said (paragraph 80 of his first witness statement):

> "Tara said to me that the deal was safe and Mr Mallya had accepted everything including paying the introductory commission to us."

57. Mr Moser clearly has an interest in supporting the claimant's case. He was not present at the meeting. Given this and the observations above about his evidence generally, I accord no weight to his evidence on this issue in his witness statement.

58. It is notable that it was not asserted by Mr Ramos in subsequent correspondence that he had orally agreed a commission with Dr Mallya at the lunch:

i) the evidence of the email sent by Mr Ramos to Mr Stevenson on 21 February 2017 merely refers to having "addressed this very topic" with Dr Mallya. If an agreement had been reached on commission, one might have expected this to have been reflected in that email to Mr Stevenson. Instead Mr Ramos merely sent over the form of Mandate Agreement that he says his friend "would like to have in place if this deal goes through". It also proposed that they should talk "very soon" in order to set up a "first meeting".

ii) when on 14 March 2017 Mr Ramos had a lengthy exchange with Dr Mallya by WhatsApp pressing to have the agency agreement signed, he made no mention of having agreed the commission at their meeting on 20 February 2017. The exchanges included the following:

> "TR: I would be very happy if you could instruct Otmar to sign the mandate for this deal and send back the agreement that we have confirmed with Steve.…"
>
> "VM: I have asked for the details tomorrow as nothing has come for my approval so far.…"
>
> "I do not know anything about this.…"
>
> "TR: This is the quintessence: 15% of the total net cash sponsorship fees in case the said total net fee is up to Euro 20 million…and 12% on such part of the total net cash sponsorship fees that exceeds 20 million…"
>
> "and it was the basic condition for my business partner to make this to happen and as you have seen in the messages from Steve he has agreed to it."
>
> "VM: All about commission… I need to know how this evolved"
>
> "TR: it's the very same commission that Sauber has agreed to reward if the deal would have gone through with them. Since Curnow is the commercial director and the contract came from SFI legal department… there was never any doubt from our side that there might be any issues."

iii) Mr Moser and Mr Ramos met with Mr Szafnauer and Mr Curnow whilst at the Melbourne Grand Prix, on 25 and 26 March 2017, to discuss their entitlement to commission for the sponsorship deal. Mr Ramos asserted that he had it "in writing" from Dr Mallya that he was "OK with paying a commission as we have agreed" and that he was told by Mr Curnow that Dr Mallya "agreed to everything" (a reference I understand to be the Whatsapp message on 21 February).

59. In his evidence Dr Mallya accepted that in the course of the lunch, Mr Ramos asked whether Force India would be interested in a new title sponsor and that he told Mr Ramos that Force India was looking for a new title sponsor. Dr Mallya also accepted that Mr Ramos gave some indication of the amount of the sponsorship and a figure of some €15 million "was floated". Dr Mallya said that their standard process would be to negotiate an agency agreement pursuant to which the agent could receive commission if they were responsible for an introduction that resulted in a sponsorship agreement being successfully negotiated.

60. There is no dispute that at the lunch the potential sponsorship was mentioned but the name of the sponsor was not. The issue is what was said in relation to commission. The evidence supports an inference that Dr Mallya was likely to be very interested in a potential title sponsorship opportunity: (according to Dr Mallya's exchange with Mr Curnow) Dr Mallya had been told the sponsorship was worth €20 million and this was at a time when (according to Mr Szafnauer (paragraph 25 of his witness statement)) it was "well known around the Formula One paddock" that Force India had money difficulties and Force India's position in the sponsorship market was an "extremely difficult one". Mr Szafnauer said (paragraph 26 of his witness statement) that

sponsors were "wary" because of doubts over Force India's solvency and sponsors were "hard to find".

61. However as to whether commission was agreed or even mentioned, I take into account the following:

i) Mr Ramos had no direct experience or track record as a sponsorship agent: Dr Mallya knew Mr Ramos on a social level because Mr Ramos used to host events on behalf of Dr Mallya (until 2016);

ii) Dr Mallya was meeting him in a social context. Whilst this does not preclude an agreement on commission, I note that the tenor of Dr Mallya's exchange with Mr Curnow the following day when he referred in general terms to the discussion: Mr Curnow said

> "not sure if he mentioned it's a water company called BWT.

Working on it" Dr Mallya responded:

> "no he just said he had a sponsor who could spend $20 million but that the livery of the car would have to be changed to purple."

iii) the absence of any reference by Mr Ramos to commission having been agreed orally in the subsequent days and weeks: the explanation offered by Mr Ramos in cross examination that he did not raise it in his subsequent exchanges with Dr
Mallya because "he considered him a friend" and he asked him to deal with Mr Curnow on details, did not in my view provide a satisfactory explanation if in fact commission had been agreed.

62. It was submitted for the claimant that it is "overwhelmingly likely" that Dr Mallya would have said words to the effect that "nothing comes for nothing" because that is the way in which Formula One operates, namely that if you bring in a deal you would expect to be given a commission. However I note the joint statement of the experts (paragraph 7) that:

> "where an agent is to be engaged by the team on a commission basis, the agent will be expected to have influence over a potential sponsor and a developed relationship with that potential sponsor."

Further that the experts stated (paragraph 2 of the joint statement) that they were not aware of any cases in which commissions had been paid in the absence of a signed agency agreement.

63. The evidence of Dr Mallya in cross examination was that the subject of commission did not come up. He said that Mr Ramos did not make a "proposal" to him and would want to know the name of the sponsor to ascertain its credibility and that it would require the approval of the other shareholders particularly the Sahara group who held a 42.5% interest in the team.

64. It seems to me on the evidence that it is unlikely in the circumstances that Dr Mallya would have agreed to pay a commission on the basis of the extremely limited, no

names information given to him by Mr Ramos. Although the evidence of Ms Ross was that agency agreements were sometimes entered into when Force India knew little about the sponsor, it seems to me that this was not just one of the "dozens of approaches" that might be received by Force India over the course of the season (paragraph 5 of the witness statement of Ms Ross) but a title sponsorship deal which was worth potentially as much as €74 million.

65. However given the potential significance of such a title sponsorship opportunity at that time, it seems to me likely that Dr Mallya would not have wanted to exclude the possibility of securing a sponsorship deal, even if it was nothing more than a casual conversation, and whilst therefore I accept his evidence that he did not agree to pay commission in the sense of a specific amount or percentage, he was "open to the idea" and therefore in the circumstances it is likely in my view that he would have wanted to ensure that he did not exclude the possibility of securing the (unidentified) title sponsor at that stage. On balance therefore, for the reasons discussed, I find it is likely that he did say that "nothing comes for free" or similar words to the effect that he was "fine with the principle" of paying an introduction fee.

66. The court therefore has to consider whether such an exchange created a legally binding contract to pay a reasonable commission in the event that a sponsorship agreement was concluded.

Submissions

67. It was submitted for the claimant that:

i) The situation was analogous to *Devani v Wells* [2019] UKSC 4 where a legally binding contract was found to exist: it was submitted that, although that case involved a conversation against the background of an estate agency, and thus it was accepted, this may be an "easier hurdle" for the parties to establish a contract, there is no real distinction because the claimant does not seek a fixed commission but a reasonable commission;

ii) although this was a social context, there is no reason why you cannot have a legally binding agreement made in an informal social setting;

iii) whilst it is better to have a written document, it does not mean that there was no oral contract.

68. It was submitted for the defendant that:

i) it was a social lunch in the kitchen at Dr Mallya's home with Dr Mallya having been given no warning that any business was to be discussed at all; it was a purely social occasion and the topics discussed were almost exclusively social;

ii) such a contract would be too vague: AMP, the alleged counterparty, had not been mentioned, the commission levels had not been discussed, there was no discussion of the duration of the agreement.

iii) the alleged oral contract was not mentioned until the claim in these proceedings was amended in February 2018.

Discussion

69. I accept the submission that there is no reason why you cannot have a legally binding agreement made in an informal social setting. However in my view whilst the social nature of the meeting is a factor to take into account, of more significance in my view is the fact that it was being put forward by Mr Ramos, a person who Dr Mallya had known for a number of years but not as someone who could introduce sponsorship opportunities, let alone a deal of the scale and that was being proposed.

70. As noted above, evidence of the subjective understanding of the parties is admissible in so far as it tends to show whether objectively an agreement was reached and the evidence of the subsequent emails and messages referred to above (including for example the exchange at the meeting in Melbourne) does not support an inference that an oral agreement had been reached to pay a commission.

71. I also have regard to the whole course of the negotiations that took place between the parties. In particular the sending of the draft Mandate Agreement later that same day and the repeated requests for signature support a conclusion that the parties did not intend to be bound until the document was signed:

i) On 24 February 2017 at 10.11 Mr Ramos sent a message to Mr Curnow:

"please would you also be so kind and remember the mandate at your earliest convenience"

ii) On 1 March 2017 at 11.11 Mr Ramos asked Mr Curnow:

"just would like to check with you everything is underway with the mandate and if you could send the signed document promptly"

At 19.28 Mr Ramos wrote:

"Would be great to get an update, especially on the signing of the mandate please" Mr Curnow replied:

"I think mandate has been sent to emmanuel" Mr

Ramos wrote at 19.35:

"He hasn't received anything by email though, so would be great to doublecheck at your earliest convenience." At 21.06 Mr Ramos wrote:

"Really don't want to stress this topic, but please make sure Emanuel gets the mandate signed"

iii) On 7 March 2017 at 19.28 from Mr Ramos to Mr Curnow:

"also Emanuel really would like to get the mandate signed, that would be just right I think"

At 22.09 Mr Ramos to Mr Curnow:

> " I urge you to get the mandate signed tomorrow please! This has been up in the air for way too long already. It really took Sauber only 20 minutes to return this via scan to him. This would just be fair and put Emanuel at ease as well. I've gone through the requested changes and this will take legal max 15 mins and get it signed by Otmar. All of us have been working on this deal to come true very hard, so all involved shall get rewarded as agreed."

iv) On 8 March 2017 at 9.13 Mr Ramos wrote to Mr Curnow:

"would you please kindly take care of the mandate?! Emanuel's asked me again and there hasn't been any response from side since his email reply." Mr Curnow replied:

"I am sorting".

Whilst this insistence on a signed agreement could be said to be merely in order to ensure that the oral agreement was given effect to, there is no reference in the communications to this being to give effect to what had already been agreed orally with Dr Mallya at the meeting on 20 February, and therefore I do not accept this explanation.

Conclusion on Issue 1

72. In my view for the reasons discussed above, viewed objectively the exchange to the effect that in principle Dr Mallya was fine with paying a commission was not intended to be legally binding and I find that no binding contract to pay a commission was formed orally on 20 February 2017.

Issue 2: Did the parties enter into a contract on the terms of the Mandate Agreement?

73. In the alternative to the alleged oral contract the claimant asserts that the parties entered into a contract on the terms of the Mandate Agreement.

74. The claimant's pleaded case (paragraph 28 of the Amended Particulars of Claim) was that Mr Curnow called Mr Ramos on the evening of 21 February 2017 and:

> "in the course of their telephone conversation Mr Curnow told Mr Ramos that the Mandate Agreement was agreed. Force India thereby consented to and entered into the Mandate Agreement with AMP."

The claimant no longer pursues its case in this regard on the basis that a contract was concluded by telephone on the evening of 21 February 2017. (The evidence of Mr Ramos (paragraph 80 of his first witness statement) is that he was on a flight to Oslo that evening missing a call from Mr Curnow and agreeing to speak the next morning instead.)

The claimant also no longer relies on telephone conversations with Mr Ramos on 2, 6 and 7 March 2017 which were after the Long Form Agreement was sent out.

75. The claimant now relies on telephone conversations and certain WhatsApp messages in particular the three WhatsApp messages sent on 21 and 27 February 2017:

i) At 13.08 on 21 February Mr Curnow sent a message to Mr Ramos:

"Happy to pay 15% if a three-year deal with no breaks." ii)

At 16.25 on 21 February Mr Curnow sent a further message:

"Vijay has approved everything. Will go with a pink pod and pink lines on a silver car. Uniforms will be pink black and silver." iii) On 27 February 2017 at 20.30 Mr Curnow sent a message to Mr Ramos:

"All agreed with Andreas. Will sort mandate and other legals in morning."

Submissions

76. Counsel for the claimant submitted that:

i) Mr Curnow was given express and actual authority by Dr Mallya; he sent the message "Happy to pay 15% if a three-year deal with no breaks" in the middle of the management meeting at which Dr Mallya was present;

ii) Mr Curnow had ostensible authority: Force India made a representation that Mr Curnow had authority to conclude an agency agreement by permitting Mr Curnow to conduct negotiations on its behalf;

iii) the reasonable honest businessman looking at the words and conduct of the parties would conclude that given the wholly exceptional need for speed, the parties had decided to press ahead under an agreement on those terms without the need for signatures.

77. Counsel for the defendant submitted that:

i) the draft mandate said that it would "take effect on signature" and was never signed: *Global Asset Capital Inc v Aabar Block SARL* and *Rosalina Investments UK Ltd v New Balance Athletic Shoes (UK) Ltd* referred to above;

ii) the requirement for signature was not waived; there was no "unequivocal agreement to waive" as required: *RTS Flexible Systems Ltd v Molkerei Alois*

Muller GmbH and Co KG [2010] UKSC 14 at [67]. Rather AMP repeatedly requested that the Mandate Agreement be signed; iii) Mr Curnow had neither actual nor apparent authority to bind Force India;

iv) as to the specific messages: the sponsorship was not for a 3 year deal with no breaks; the message "Vijay has approved everything" in context related to the livery; "All agreed with Andreas. Will sort mandate and other legals in morning" showed that the mandate had not been agreed but was still to be sorted.

Relevant law

78. The approach to be adopted in determining whether an oral contract has been made is set out above.

79. As to the position where a written contract is being negotiated and in particular the effect of a clause which provides for such contract to take effect on signature, I was referred to *RTS Flexible Systems Limited* and note in particular the following:

> "[47] We agree with Mr Catchpole's submission that, in a case where a contract is being negotiated subject to contract and work begins before the formal contract is executed, it cannot be said that there will always or even usually be a contract on the terms that were agreed subject to contract. That would be too simplistic and dogmatic an approach. The court should not impose binding contracts on the parties which they have not reached. All will depend upon the circumstances…
>
> 55. We note in passing that the Percy Trentham case was not a 'subject to contract' or 'subject to written contract' type of case. Nor was Pagnan , whereas part of the reasoning in the British Steel case in the passage quoted above was that the negotiations were throughout conducted on the basis that, when reached, the agreement would be incorporated in a formal contract. So too was the reasoning of the Court of Appeal in Galliard Homes Ltd v J Jarvis & Sons Ltd (1999) 71 Con LR 219 . In our judgment, in such a case, the question is whether the parties have nevertheless agreed to enter into contractual relations on particular terms notwithstanding their earlier understanding or agreement. Thus, in the Galliard Homes case Lindsay J, giving the only substantive judgment in the Court of Appeal, which also comprised Evans and Schiemann LJJ, at page 236 quoted with approval the statement in Megarry & Wade , The Law of Real Property , 5th ed (1984) at pages 568-9 that it is possible for an agreement 'subject to contract' or 'subject to written contract' to become legally binding if the parties later agree to waive that condition, for they are in effect making a firm contract by reference to the terms of the earlier agreement. Put another way, they are waiving the 'subject to [written] contract' term or understanding.
>
> 56. Whether in such a case the parties agreed to enter into a binding contract, waiving reliance on the 'subject to [written] contract' term or understanding will again depend upon all the circumstances of the case, although the cases show that the court will not lightly so hold…" [emphasis added] 80. In that case clause 48 of the contract provided that:
>
> "This Contract may be executed in any number of counterparts provided that it shall not become effective until each party has executed a counterpart and exchanged it with the other. "

81. At [67] of the judgment the court stated:

> "67. We agree with the Court of Appeal that, before it could be held that there was a binding contract on the MF/1 terms as amended by agreement, unequivocal agreement that clause 48

> had been waived would be required. We do not however think that it is necessary for that agreement to be express if by that is meant an express statement by the parties to that effect. Such unequivocal agreement can in principle be inferred from communications between the parties and conduct of one party known to the other." [emphasis added]

82. As to ostensible authority, the burden lies on the claimant.

83. It was submitted for Force India that this was a case where, if Mr Curnow was thought to have ostensible authority, the claimant should have made enquiries: *East Asia Company Ltd v PT Satria Tirtatama Energindo (Bermuda)* [2019] UKPC 30 at [92] and [93]:

> "[92]…As Lord Simonds explained in Morris v Kanssen [1946] AC 459 , 475, both the indoor management rule and the doctrine of ostensible authority allow the smooth operation of business by protecting those who are entitled to assume that the person with whom they are dealing has the authority which he claims. But this general principle cannot be invoked if he who would invoke it is put upon inquiry. He cannot presume in his favour that things are rightly done if the inquiry that he ought to make would tell him that they were wrongly done. Similarly, Houghton [1927] 1 KB 246 and Rolled Steel [1986] Ch 246 involved an attempt by a third party to rely on the indoor management rule. The attempt failed in both cases because, among other things, the principle of ostensible authority applied to acts of a director acting as an agent of the company and, if the third party had actual or constructive notice that the steps necessary for the formal validity of the acts of the director had not been taken, the third party could not rely upon the principle"
>
> "[93] The Board therefore concludes that PT Satria could not rely upon the apparent authority of Mr Joenoes to enter into the HOA on behalf of EACL if it failed to make the inquiries that a reasonable person would have made in all the circumstances in order to verify that he had that authority."

Discussion

84. The court applies an objective test to determine whether an agreement has been made. The touchstone is how the words used in their context would be understood by a reasonable person. Evidence of the subjective understanding of the parties is admissible to show whether objectively an agreement was reached (*Blue v Ashley supra*).

85. In determining whether an agreement was made by the response of Force India to the draft Mandate Agreement, "*Happy to pay 15% if a three-year deal with no breaks",* the message has to be considered having regard to the relevant matters of background fact known to both parties:

i) In this case Mr Moser had already provided the draft Mandate Agreement to Force India which provided that the agreement "shall take effect upon signature";

ii) both parties would have been aware of the background context that commission for a sponsorship agreement in Formula One is usually paid only on the basis of a signed agreement. The experts were agreed (paragraph 2 of the joint statement) that:

> "We are not aware of any cases in which commissions have been paid in the absence of a signed agency agreement. We are aware that some agency agreements have been signed after the brand has signed an agreement with the team, but these are exceptions to the rule."

86. Having regard to the evidence of the subjective understanding of the parties as to whether (objectively) an agreement was concluded by this message, the evidence is that the claimant repeatedly pressed for signature of the Mandate Agreement. In particular:

i) on 24 February at 10.11 Mr Ramos sent a message to Mr Curnow:

> "please would you also be so kind and remember the mandate at your earliest convenience."

ii) on the same day Mr Ramos sent an email to Mr Curnow:

> "I would kindly ask you to sign the mandate for the sponsorship deal as soon as possible, so that all of us feel comfortable."

iii) on 27 February at 20.07 Mr Ramos sent a message to Mr Curnow:

> "it would really be great as well, if you could get the mandate signed"

iv) on 1 March at 20.17 Mr Ramos sent a further message on this topic:

> "would be great to get update, especially on the signing of the mandate please."

v) on 7 March at 22.09 Mr Ramos sent a message to Mr Curnow:

> "I urge you to get the mandate signed tomorrow*please*! This has been up in the air for way too long already….."

87. Whilst an unequivocal agreement to waive a requirement for a signed agreement can in principle be inferred from communications between the parties, the evidence here shows that the parties did not agree to such a waiver. When the draft Mandate Agreement was first sent to Mr Stevenson just after midnight (00.03 on 21 February 2017) Mr Ramos told Mr Stevenson by email:

> "… I have on top of this spoken to my friend and he has gotten in touch with his clients again, which you will see in the next email. <u>In top of this he has sent me over the provision</u>

> agreement that he would like to have in place if this deal gets through, which he had agreed with Sauber before they have turned it down." [emphasis added]

88. Whilst the communications between Mr Curnow and Mr Ramos about the terms of the sponsorship deal with BWT continued notwithstanding the absence of the signed Mandate Agreement, there was in my view no unequivocal agreement to waive the requirement for a written contract, which can be inferred from the communications between the parties or the conduct of Force India known to the other. Mr Curnow accepted in cross examination that when asked on phone calls with Mr Ramos about the Mandate Agreement he made "reassuring noises" and gave "the impression that everything was fine". However it is clear from the evidence of the emails and messages referred to above that Mr Ramos was still pressing for a signed agreement. The repeated insistence for the agreement to be signed rather than being consistent with an inference that an agreement had been concluded supports an inference that the agreement was to be signed and neither had intended to waive that requirement.

89. Accordingly on the evidence I reject the submission for the claimant that given the wholly exceptional need for speed, the parties had decided to press ahead under an agreement on the terms of the Mandate Agreement without the need for signatures.

90. The court is not concerned with the meaning of the words viewed in isolation but how the words used in context would be understood. The court has to look at the whole course of the negotiations: as noted in *Global Asset Capital* and cited above, focusing on one part of the parties' communications in isolation, without regard to the whole course of dealing, can give a misleading impression that the parties had reached agreement when in fact they had not.

91. Against the background context referred to above and having regard to the subsequent communications and evidence of the parties' subjective understanding, I find that a contract was not made when the message "*Happy to pay 15%..."* was sent.

92. In relation to the message "*Vijay has approved everything*" the same principles apply. Of particular relevance in relation to this message in determining how the words would

be understood by a reasonable person, is the context of the words relied on in the overall message. The message read:

> "Vijay has approved everything. Will go with a pink pod and pink lines on a silver car. Uniforms will be pink black and silver".

The context therefore of the particular words is the approval of the design and colour of the car and the colour of the uniforms.

93. Having regard to the subjective understanding of the parties, the tenor and nature of the response of Mr Ramos suggests not that the parties have just reached a binding contract but that the matter was progressing: to this message sent at 16.25 by Mr Curnow. Mr Ramos responded at 16.34 with two messages:

> "sounds promising" and

> "as soon as you have a mock up, please send it through. "

To respond with the words "sounds promising" does not suggest that Mr Ramos thought they had just concluded an agreement.

94. Further the background context to this particular message includes that the colour and design of the car were known to the parties to be the key issue which had to be resolved at that point. The importance of the colour and the need for approval of the change to the livery is clear on the evidence: for example, Mr Ramos had forwarded to Mr Stevenson at 00.09 on 21 February an email from Mr Moser to Mr Ramos:

> "I just talked to the potential sponsor with regard to the Sahara Force India title partnership. The sponsor explicit told me to sign the partnership agreement immediately (this week) if we can start the collaboration on the following conditions - the basic colour of the race car needs to be their company colour… " [emphasis added]

The need to agree the colour and livery was an essential element of the title sponsorship but not the only terms which needed to be agreed - the price to be paid by BWT and the duration of the agreement were also key.

95. As in the case of the first message, the subsequent communications between Mr Curnow and Mr Ramos do not lead to an inference that there had been a waiver of the requirement for a signed contract.

96. For all these reasons, I find that no binding contract was made when the message "*Vijay has approved everything*" was sent.

97. As to the third message relied upon by the claimant "*All agreed with Andreas. Will sort mandate and other legals in morning*", in my view the words used would be understood by a reasonable person to indicate, not that the parties intended to create legal relations at that point, but that they intended to enter into a written contract and that they did not

intend to be bound until that document was signed. This is consistent with the background context: in particular the draft Mandate Agreement and the communications passing between the parties.

98. Accordingly I find that no binding contract was entered into by the sending of this message.

99. In the light of my conclusion on the objective meaning of the communications passing between the parties, the issue of actual or ostensible authority on the part of Mr Curnow does not arise for determination. For completeness I will deal with it briefly.

100. It was submitted for the claimant that Mr Curnow had authority to "deal" and that the circumstances were such that Mr Curnow had been given a "platform" to do what he did. In cross examination Mr Ramos said that he was under the impression that as commercial director, Mr Curnow had enough authority to conclude agency agreements, especially as he was instructed by Dr Mallya to deal with the case.

101. As to whether the circumstances were such as to give Mr Curnow a "platform", the expert evidence (paragraph 4 of the joint statement) was that:

> "The decision whether or not a Formula One team will enter into a sponsorship agreement with a sponsor at this level is almost always made by that team's CEO often with the approval of the board. Only they or equivalent such as a COO would have authority to sign agency agreements on behalf of the team."

This evidence is consistent with the email which Mr Ramos sent referring to the agreement being signed by Mr Szafnauer. I do not accept as credible therefore the evidence of Mr Ramos in cross examination that he was unaware of the need for the agreement to be signed by the CEO and CFO.

102. The evidence of Mr Ramos in his witness statement (paragraphs 51 – 53) was that:

> " …I asked [Dr Mallya] whether [the title sponsorship opportunity] would interest Force India and whether he would support such a sponsorship introduction… Mr Mallya confirmed that Force India would be interested and that I should take the matter up with the commercial team and Mr Curnow to agree the terms.…"
>
> I said that I was not happy with this and that I would prefer to deal with Mr Mallya as I did not particularly like Mr Curnow because I had previously had a bad experience with him. Mr Mallya said that I had to deal with his people as he did not deal with the detail.
>
> "I said ok … but made clear that we would not be doing this for free… Mr Mallya confirmed that we would be remunerated in an appropriate way. Mr Mallya confirmed that I would be contacted by "his people" to agree the other terms."

In my view this evidence does not support an inference that Mr Ramos was led to believe that Mr Curnow had actual or ostensible authority to conclude an agreement. His evidence is to the effect that an oral agreement was agreed with Dr Mallya (as discussed above) and that discussions with Mr Curnow/the commercial team were merely to agree the detail and the "other" terms.

103. Against that background context, the fact that Force India permitted Mr Curnow to conduct negotiations does not in my view lead to a conclusion that Force India had made a representation that Mr Curnow had authority to conclude an agency agreement. The claimant was unaware that the message "*Happy to pay 15%..*" was sent during the management meeting at which Dr Mallya was present (the minutes only came to light during the trial) so there can have been no representation by reason of such circumstances and had the claimant thought (contrary to the evidence of Mr Ramos) that Mr Curnow had authority to bind Force India, a reasonable person in the circumstances would have made enquiries to verify that he had authority. For all these reasons had it been necessary to decide the point, I would have concluded that the claimant has not established that Mr Curnow had actual or ostensible authority to bind

Force India in this regard or if he had apparent authority, that it could have relied upon such apparent authority without making enquiry.

Conclusion on Issue 2

104. For the reasons discussed, I find that the parties did not enter into a contract on the terms of the Mandate Agreement.

Issue 3: Unjust enrichment

105. In the alternative to the claim in contract, AMP pleads and claims a quantum meruit in respect of the services that it provided to Force India (paragraph 41 of the Amended Particulars of Claim).

106. The services provided were alleged to be as follows (paragraph 36 of the Amended Particulars of Claim):

i) Mr Moser created the concept for BWT sponsorship of a Formula One team;

ii) AMP created the initial design for BWT's advertising on a Formula One car;

iii) Mr Ramos introduced to Force India the opportunity of sponsorship of the team by BWT; iv) Mr Ramos introduced Mr Hubner to Mr Curnow;

v) Mr Ramos and Mr Moser brokered the deal between Force India and BWT and negotiated some of the terms of that deal in time for the start of the 2017 season.

107. The claimant does not now pursue in this context the services under subparagraph (i) and (ii) as it is accepted that this was preparatory work and not recoverable under the principles identified in *Benourad v Compass Group Plc [2010] EWHC 1882 (QB)* cited below.

Relevant legal principles

108. The legal principles were largely common ground: *Benedetti v Sawiris* [2013] UKSC 50 at [10]:

> "It is now well-established that a court must first ask itself four questions when faced with a claim for unjust enrichment as follows. (1) Has the defendant been enriched? (2) Was the enrichment at the claimant's expense? (3) Was the enrichment unjust? (4) Are there any defences available to the defendant?..."

In *Investment Trust Companies v Revenue and Customs Commissioners* [2017] UKSC 29, [2018] AC 275, Lord Reed said of these 4 questions at [41]:

> "Thirdly, as the judge observed in the present case, in remarks with which Lord Clarke expressed agreement in Menelaou (para 19), Lord Steyn's four questions are no more than broad

> headings for ease of exposition. They are intended to ensure a structured approach to the analysis of unjust enrichment, by identifying the essential elements in broad terms. If they are not separately considered and answered, there is a risk that courts will resort to an unstructured approach driven by perceptions of fairness, with consequent uncertainty and unpredictability. At the same time, the questions are not themselves legal tests, but are signposts towards areas of inquiry involving a number of distinct legal requirements. In particular, the words "at the expense of" do not express a legal test; and a test cannot be derived by exegesis of those words, as if they were the words of a statute."

109. The defendant has not pleaded any defence and therefore the court is not concerned with the fourth question identified in *Benedetti*.

Has the defendant been enriched?

110. Adopting that structured approach, the first question is whether the defendant was enriched. Counsel for the claimant acknowledged in oral closings that the enrichment is said to lie in the services that were provided and not in the provision of the BWT sponsorship contract. These services are now said to be (i) introducing BWT to Force India and (ii) providing whatever further assistance was necessary to try and make the deal.

Mr Ramos introduced to Force India the opportunity of sponsorship of the team by BWT

Evidence of Mr Wolff

111. In his witness statement (paragraph 5) Mr Wolff stated that following the end of the 2016 DTM racing season, Mr Weissenbacher called him to say that he wanted to continue to promote his brand more visibly and wanted to see if he could work together with Mercedes in Formula One. His evidence was:

> "Mr Weissenbacher said that he had a dream, and that dream was that BWT would sponsor two cars in pink in Formula One."

112. Mr Wolff described discussions between Mercedes and BWT. At paragraph 7 of his witness statement Mr Wolff stated:

> "my team came up with some design suggestions which we thought may fit the brief (from recollection pink bubble imagery put on the front wing and elsewhere on the car)."

However BWT rejected this on the basis that it had to be "pink all over".

113. The evidence of Mr Weissenbacher (paragraph 4 of his witness statement) is that he had known Mr Wolff for many years and he asked him if he could work with him on a "crazy idea". He said that his idea was to have two pink Mercedes cars in Formula One in BWT pink livery as in the DTM series. His evidence was that after trying to find a

compromise they had to accept that they could not realise this idea.

114. The evidence of Mr Wolff was that on 9 February 2017 Mercedes sent the final pitch documents to BWT and by 16 February 2017 (although this date was not verified) the negotiations had concluded because Mercedes was not able to incorporate the pink livery required by BWT and Mr Weissenbacher was going to consider other options. His evidence (paragraph 8 of his witness statement) was that Mr Weissenbacher called him to say that he was considering Force India and Sauber and asked for his views on the two teams. (In cross-examination Mr Weissenbacher's evidence was that he did not remember telling Mr Wolff about Sauber. In the light of my observations above regarding his evidence, I prefer the evidence of Mr Wolff in this regard.)

115. Mr Wolff described a telephone call with Ms Kaltenborn advising him of a potential opportunity with BWT and asking for his opinion on certain matters relating to the potential sponsorship opportunity. Mr Wolff could not recall whether this contact came before after he was contacted by Mr Weissenbacher.

116. Mr Wolff also gave evidence of having had (at least) two calls with Mr Szafnauer. Mr Wolff's evidence was that he told Mr Szafnauer about his connection with Mr Weissenbacher, that Mercedes had considered a deal with BWT but it had not worked out. He said that he also told Mr Szafnauer about his call with Mr Weissenbacher and that Mr Wolff had spoken about Force India in positive terms. Mr Wolff said that he told Mr Szafnauer to call Mr Weissenbacher. In cross examination Mr Wolff said that there was no mention of Mr Ramos on the first call but that on the second call Mr Szafnauer had said that Mr Ramos had been in touch with his team about BWT being a potential sponsor of the team and that Mr Ramos wanted a commission.

117. Mr Moser's evidence was that he identified BWT from his own independent research and that it was merely a coincidence that BWT were in discussions with Mercedes about an F1 sponsorship. He acknowledged however that BWT is a major client of WWP and that Mr Moser identified BWT following discussions with WWP (as referred to in an email that he wrote to Ms Kaltenborn on 21 February).

118. The evidence of Ms Kaltenborn was that Mr Moser advised her at the beginning of February 2017 that he had been in touch with BWT AG and that they were interested in a Formula One sponsorship project (paragraph 9 of her witness statement).

Evidence of Mr Curnow

119. In his witness statement Mr Curnow referred to the fact that he asked Dr Mallya if he would like him to follow up on Mr Stevenson's email. His witness statement implies that this was on 20 February but the evidence of the WhatsApp message shows that this was on 21 February. Mr Curnow's evidence was that there were two conversations with Mr Szafnauer that day: in the first Mr Curnow told Mr Szafnauer that there had been an approach from a potential title sponsor and in the second Mr Szafnauer told him that he had been approached by Mr Wolff with a potential sponsor.

120. In cross-examination Mr Curnow said that he was a "silent participant" when Mr Szafnauer spoke to Mr Wolff at 5 o'clock.

121. In relation to his conversation with Mr Ramos on the morning of 21 February, Mr Curnow's evidence was that he gave the impression to Mr Ramos that he did not

know the name of BWT in order to establish the relationship that Mr Ramos had with BWT.

Evidence of Mr Szafnauer

122. Mr Szafnauer stated that he first heard of the fact that BWT might be interested in sponsoring the team on Monday 20 February 2017. He said he was called by Mr Wolff at approximately 11am but was unable to take the call. He called Mr Wolff back and spoke to him at approximately 5pm and Mr Wolff told him that he had recommended a potential title sponsorship partner to the team. His evidence is that Mr Wolff told him that he should call Mr Weissenbacher to discuss the possibility of a commercial partnership (paragraph 27 of his witness statement).

123. Mr Szafnauer said that from 20 to 23 February 2017 he attempted to contact Mr Weissenbacher and (paragraph 35 of his witness statement) finally spoke to him on Friday 24 February 2017. (It appears from the evidence of the WhatsApp messages that this call is likely to have taken place on the following morning). In his witness statement Mr Szafnauer said that in that conversation Mr Weissenbacher said BWT wanted to sponsor the team for the 2017 season and Mr Szafnauer said that they agreed in principle that the cars' livery would change to pink.

124. Mr Szafnauer said that shortly thereafter he called Mr Wolff and told him he had spoken to Mr Weissenbacher.

Mr Weissenbacher

125. The evidence of Mr Weissenbacher was (paragraphs 6 and 9 of his witness statement):

> "Mr Wolff recommended to me the candidate Force India… Mr Wolff connected me with Mr Otmar Szafnauer."
>
> "During all my personal negotiations, neither Mr Tara Ramos, Mr Emanuel Moser nor any other representative of AMP had an involvement whatsoever in my decision to become sponsor of Force India. They did not introduce BWT to Force India; Mr Wolff was solely responsible for that introduction…" [emphasis added]

126. As noted above Mr Weissenbacher was unable to assist the court on matters of detail. However the evidence of Mr Wolff was that he never dealt with Mr Hubner on sponsorship but always with Mr Weissenbacher. In relation to the specific sponsorship proposal to Mercedes to turn the cars pink, Mr Wolff said that it was only Mr Weissenbacher from his recollection and on Mercedes side, it was him interacting with Mr Weissenbacher and his graphic design team.

Minutes of management meeting

127. During the course of the trial, minutes were disclosed of a Force India management meeting on Tuesday, 21 February 2017 between 1 and 2pm. The chair of the meeting was Mr Szafnauer with Dr Mallya, Mr Curnow, Mr Stevenson and Ms Ross amongst others present. Ms Ross said that these minutes had been kept on the laptop of Mr Szafnauer's personal assistant and she had not appreciated that these had not been identified by the disclosure exercise. She said that they were not minutes which were

circulated but minutes which were prepared by Mr Szafnauer's PA in order to enable follow-up to take place.

128. Under the heading "Commercial Update" there was a sentence under the heading "Sponsor – Toto's friend" which read:

> "Toto's friend who currently sponsors DTM is interested in sponsoring the team for a significant amount of money."

Emails and WhatsApp messages

129. The initial contact of Mr Moser with BWT was a telephone conversation, followed by an email to Ms Berger Soellinger, Mr Weissenbacher's PA on 3 February 2017. In that email Mr Moser said that he was working for the Sauber team and informed her that:

> "with regard to Sauber there will shortly be an interesting opportunity arising, as from the 2017 season, for Formula One vehicles to be implemented prominently in BWT design.…"

130. Mr Hubner responded to that email on 5 February 2017 thanking Mr Moser for getting in contact with BWT and asking him to email or call his mobile.

131. On 6 February 2017 Mr Moser sent an email to Ms Kaltenborn stating that he was "in direct contact" with Andreas Weissenbacher and "recently able to interest Mr Weissenbacher" in Sauber title sponsorship.

132. On 20 February 2017 (the day of the lunch between Mr Ramos and Dr Mallya) at 15.48 Mr Moser sent an email to Mr Weissenbacher and Mr Hubner:

> "With regard to a possible BWT Formula One project in 2017 or 2018, following detailed discussions and involvement of my Formula One contacts (naturally without mentioning BWT), I have surprisingly, and contrary to expectations, at short received an excellent opportunity. In this matter I am in direct contact with Vijay Mallya, the owner of the Sahara Force India Formula One team…"
>
> As Mr Hubner wished, Vijay Mallya and Force India would today offer BWT the opportunity, in addition to a prominent BWT logo placement, to present the Formula One vehicles (both vehicles) with their basic colour in BWT pink (analogous to DTM). The costs if an agreement is reached shortly, would run to between EUR15 and EUR20 million per year (term: three years). The matter has been clarified with Vijay Mallya…. The next step would be the development of draft designs for examination (Force India)…
>
> On the basis of this offer, a BWT Formula One project would now have to be examined in detail once again, despite or indeed due to the short notice. Vehicle design must be ready on the Friday before the first Grand Prix (26 March 2017)…

I look forward to a reply shortly." [emphasis added]

133. At 8.38 on 21 February 2017 Mr Stevenson forwarded to Mr Szafnauer and Mr Curnow an email from Mr Moser forwarded by Mr Ramos. The email read:

> "I just talked to the potential Sponsor with regard to the Sahara Force India title partnership. The sponsor explicit told me to sign the partnership agreement immediately (this week) if we can start the collaboration on the following conditions-the basic colour of the Race Car needs to be their company colour (essential requirement)… The potential sponsor asked me to get feedback until tomorrow. I will see them again on Wednesday…"

134. At 10.25 on 21 February 2017 Mr Curnow emailed Mr Ramos:

> "… Vijay has asked me to pick this up with you following your meeting yesterday. Do we yet know the name of the company and the reasons Sauber turned it down? I'm on WhatsApp if quicker…"

135. At 11.03 Mr Ramos emailed Mr Curnow the draft Mandate Agreement and the earlier message from Mr Moser.

136. At 11.26 Mr Ramos sent by WhatsApp message the link to the BWT site.

137. At 11.31 on 21 February 2017 Mr Curnow forwarded to Ms Ross the Mandate Agreement sent by Mr Ramos. Ms Ross responded at 11.34:

> "Who is this and what is it related to? We should use our standard agency agreement."

138. Mr Curnow then responded at 11.37:

> "of course… It's a Tara Ramos deal… Can we put in our speak ASAP?"

139. At 11.49 Mr Curnow sent a further email to Ms Ross:

> "The sponsor is BWT"

140. On Friday 24 February at 18.09 Mr Szafnauer sent to Mr Weissenbacher a WhatsApp message:

> "it looks like our teams are close to a deal. Please call if you would like to discuss or to just meet by phone"

141. The following morning at 9.14 Mr Weissenbacher replied:

> "…very nice to hear from you. As you said I hope we are close to a common successful future. I just pointed out to agree on all topics, like BWT branding of whole team also in the box, helmets, caps etc and therefore I suggested to prepare everything and send it as attachment to you. What I have heard

> up to now it seems a perfect fit, in culture, team spirit, co-op and…"

Submissions

142. It was submitted for the claimant that:

i) the claimant effected the introduction of BWT to the defendant and the only challenge to this is the alternative "introduction" by Mr Wolff; it is more likely that Mr Szafnauer called Mr Wolff to enquire about BWT when Mr Ramos had revealed BWT to Mr Curnow;

ii) what Mr Wolff did on that call did not amount to effecting an introduction because although he named BWT and Mr Weissenbacher he did not put Mr Szafnauer in contact with Mr Weissenbacher. His actions did not produce any contact between the defendant and BWT until late on Friday, 24 February 2017;

iii) the BWT "lead" was extremely important and the minutes of the management meeting do not reflect that importance: if Mr Curnow had known of BWT when he spoke to Mr Ramos this would have been reflected in the messages to Dr Mallya who appears from the WhatsApp messages to be equally unaware of any call with Mr Wolff.

143. It was submitted for the defendant that either there was no enrichment or it was not unjust:

i) Mr Wolff introduced BWT to Mr Szafnauer at 5p.m. on 20 February 2017;

ii) The meeting notes referred to "Toto's friend" (i.e. Mr Wolff) and there is no evidence that the introduction was after the call with Mr Ramos on 21 February;

iii) Mr Wolff called Mr Szafnauer and gave him the phone number of Mr Weissenbacher.

Discussion

144. Mr Curnow's recollection in his witness statement of the date of the exchange with Dr Mallya to "follow up" with Mr Ramos is now shown by the evidence of the WhatsApp messages on Dr Mallya's phone (produced in the course of the trial) to be inaccurate and accordingly it is clear that the exchange did not take place on 20 February but on 21 February. It was submitted for the claimant that the sequence of events as stated by Mr Curnow was likely nevertheless to be correct and that Mr Curnow's evidence in cross examination that he was present at the call between Mr Szafnauer and Mr Wolff was contrary to his witness statement.

145. It was also submitted for the claimant that Mr Szafnauer's memory for dates and sequences was wanting as he referred in his witness statement to being told on 20 February that Mr Curnow had been approached by Mr Ramos when on the evidence of the WhatsApp messages, this only occurred on 21 February.

146. The sequence of events advanced for the claimant is therefore that Mr Curnow told Mr Szafnauer of a potential sponsor and then had a second conversation when Mr Szafnauer told him that he had had a conversation with Mr Wolff.

147. I note the observations of Leggatt J in *Blue v Ashley* at [66]-[69] as to the unreliability of human memory and his opinion originally expressed in *Gestmin SGPS SA v Credit Suisse (UK) Limited* [2013] EWHC 3560 (Comm) (at para 22) that the best approach for a judge to adopt in the trial of a commercial case is to place little if any reliance on witnesses' recollections of what was said in meetings and conversations, and to base factual findings on inferences drawn from the documentary evidence and known or probable facts. I therefore place particular weight on the contemporaneous documentary evidence. In this regard the court has the evidence of the minutes of the management meeting on 21 February. The minutes are a contemporaneous document. There is no reason to doubt that they are genuine: I accept the explanation of Ms Ross as to why they were not disclosed earlier.

148. On the claimant's case, the telephone call between Mr Szafnauer and Mr Wolff would have to have taken place in the small window of time between 11.26 when Mr Ramos sent Mr Curnow a WhatsApp message with a link to the BWT website (thus revealing that the sponsor was BWT) and the management meeting at 1pm. (Given the content of the minute and the reference to Mr Wolff I do not accept the submission that the call would have taken place after the meeting as it would make no sense to refer to Mr Wolff at all in the minutes if the call with Mr Wolff had not yet happened). It was Mr Ramos' evidence in his second witness statement that the call with Mr Curnow took place at about 11.20 and was before he sent the link to the BWT website. Even if that is the case, the window of time is still very narrow being between 11:20am and 1pm.

149. Mr Wolff was not able to remember the timing of his calls but his evidence in cross examination was that there was no mention of Mr Ramos or of "an agent touting a deal" in the first call with Mr Szafnauer. This does not therefore support the claimant's submission that Mr Szafnauer rang Mr Wolff when he heard about BWT from Mr Ramos. As noted above, Mr Wolff is an independent witness and was clear on this point.

150. Further if in fact the initial introduction had come through Mr Ramos rather than Mr Wolff, it does not explain why the contemporaneous minutes referred to "Toto's friend". Counsel for the claimant submitted that the minutes did not reflect the "importance" of the lead but there is no evidence to support this or to suggest that Mr Szafnauer's PA would have done anything other than to reflect what was said at the meeting. This contemporaneous documentary evidence therefore provides strong support for the evidence of Mr Wolff.

151. The evidence of Mr Szafnauer in cross examination was that he believed the call was on the Monday evening (20 February) because the initial call from Mr Wolff was made on the Monday morning and he thought Mr Wolff was chasing payment for engines so he ignored it until the evening. That seemed to me a plausible explanation, given Force India's financial position at the time, of how Mr Szafnauer was able to recollect when the call occurred and accorded with the evidence of Mr Wolff in cross examination that Force India was "constantly in arrears" with Mercedes in relation to sums which were due under the engines' contract and that he spoke to Mr Szafnauer at a minimum once a week. I do not accept the evidence of Mr Curnow that he was a

"silent participant" for that call. His evidence to this effect in cross examination was not a matter which he had referred to in his witness statement and if the reason for returning the call was in fact because Mr Szafnauer thought Mr Wolff was chasing outstanding monies, there was no explanation advanced as to why Mr Curnow would have been present in the room for the call.

152. The claimant places reliance on the management meeting minutes for 15 March where reference is made to the "BWT Agency Mandate" and no reference is made to Mr Wolff having introduced the deal. The minutes read (in material part):

> "…OS said VJM is not happy with 15% as Tara had no influence over BWT and didn't do anything to assist the deal; we will therefore need to negotiate. OS said we need to get Andreas's view first, in case we are dealing with a relative, for example."

In my view, the minutes of 15 March whilst providing some evidence that Force India were prepared to pay some commission to the claimant, provide little or no evidence on the issue of whether it was Mr Wolff or the claimant who made the introduction. (There is some evidence which would suggest that the defendant thought that it might have to pay some commission to the claimant if there was a relationship between the claimant and BWT).

153. The email which Mr Moser sent on 20 February 2017 to Mr Hubner and Mr Weissenbacher about the possibility of BWT sponsoring Force India was sent prior to the call between Mr Wolff and Mr Szafnauer but it was not an introduction of the sponsorship opportunity to Force India and on the evidence, was not sent at Force India's request or with its authority.

154. I accept that Mr Ramos raised the prospect of sponsorship by BWT with Mr Stevenson and Dr Mallya on 19 and 20 February but he did not identify the company until he sent the link to the BWT website to Mr Curnow around 11.30 on the morning of 21 February 2017 and for the reasons discussed above, in my view by this time the call between Mr Wolff and Mr Szafnauer had already occurred.

155. It is suggested for the claimant that Mr Szafnauer took a relaxed approach to contacting Mr Weissenbacher because he knew that matters were being progressed efficiently in any event. (Mr Szafnauer's explanation was that he did not know when he attempted to call him, having been given the number by Mr Wolff, that Mr Weissenbacher would not answer a call from an unknown number). Some support for the claimant's submission can be inferred from the tenor of the message sent by Mr Szafnauer to Mr Weissenbacher: "it looks like our teams are close to a deal". However, even if correct, it does not go to the issue of whether it was Mr Wolff or the claimant which made the initial introduction of the sponsorship opportunity.

156. It is irrelevant in my view to the question of who "introduced" the opportunity to Force India that the opportunity did not result in actual dialogue between Mr Szafnauer and
Mr Weissenbacher until 24 February 2017. It is the action of Mr Wolff in speaking to Mr Weissenbacher (and in effect advising) about Force India as a potential sponsorship target and passing the information about BWT's interest on to Force India, which constitutes the introduction of the sponsorship opportunity not the action

of Force India (namely Mr Szafnauer) speaking to BWT as a result of the introduction.

157. It was also submitted for the claimant that even if the court were to find that the claimant was not the introducer, the claimant would still be entitled to a commission on the basis that the phone call with Mr Wolff was kept secret from the claimant and the defendant had not therefore acted in good faith and in accordance with the expectation within Formula One that a team would reveal an earlier contact that would undermine an agent's claim to commission. I do not accept that submission. The claimant can only be entitled to a quantum meruit if the defendant has been unjustly enriched at the expense of the claimant. The claimant can therefore only claim an entitlement to a quantum meruit if it has performed services. If it did not effect the introduction, then it cannot claim a quantum meruit for introducing the sponsorship opportunity. (It may however be able to claim a quantum meruit for the other services which it asserts it provided in terms of making a substantial contribution to getting the deal done, as discussed below.)

158. It was submitted for the claimant that Mr Curnow asked Mr Ramos to tell him the name of the proposed sponsor in order to move matters along quickly (paragraph 37 of Mr Curnow's witness statement). Whilst the fact that matters needed to move quickly in order for the cars to be ready for the 2017 season is a relevant factor in assessing the value of the services provided if an entitlement to a quantum meruit is established, it is not relevant to the issue of whether it was the claimant which effected the introduction of BWT.

Conclusion on the introduction of the sponsorship opportunity

159. For the reasons discussed and on the evidence, I find that Mr Wolff and not the claimant introduced the sponsorship opportunity to Force India: Mr Wolff was responsible for initiating the sponsorship opportunity and making Force India aware of that opportunity for the first time.

"Brokered the deal" and negotiated some of the terms

160. The alternative basis pursued on which the defendant is said to have been enriched is the claimant "brokered the deal" in the sense that it made a substantial contribution to

the conclusion of the deal which counsel for the claimant submitted meant that the claimant provided whatever assistance was necessary to try and make the deal happen.

Evidence

161. The evidence is that Mr Szafnauer did not make contact with Mr Weissenbacher until he sent a text message on the Friday and then spoke to Mr Weissenbacher on the Saturday morning. As referred to above, it is notable in this context that Mr Szafnauer told Mr Weissenbacher in his message at 18.09 on 24 February:

> "it looks like our teams are close to a deal."

162. The evidence of the work done by Mr Moser and Mr Ramos between Monday 20 February and Friday 24 February can be summarised as follows:

20 February

163. Mr Ramos met with Dr Mallya and just after midnight sent the emails referred to above.

164. After the meeting of Mr Ramos with Dr Mallya, Mr Moser sent the email at 15.48 the same day to Mr Weissenbacher and Mr Hubner offering BWT the opportunity of the title sponsorship (quoted above).

165. That email prompted a phone call in response from Mr Hubner. Mr Moser said (paragraph 90 of his witness statement) that he explained to Mr Hubner "Tara's connection with Mr Mallya" and "confirmed that Force India was prepared and willing to change the car colour into pink and as title sponsor BWT would be the predominant visible brand on the race car."

21 February

166. On 21 February 2017 Mr Moser says (paragraphs 92 and 93 of his first witness statement) that he spoke to Mr Hubner on the telephone a total of nine times and exchanged several emails and messages. Mr Moser says that during the course of his telephone conversations with Mr Hubner they discussed the commercial terms of the deal.

167. It is clear from the contemporaneous evidence of the phone records (including the records of the WhatsApp messages) that conversations did take place and that they were against the background of the discussions which Mr Ramos and Mr Curnow had that morning referred to above, when Mr Ramos sent Mr Curnow the link to the BWT website and Mr Curnow asked Mr Ramos to get the colour code for the cars.

168. Mr Moser sent a message to Mr Hubner at 22.53:

> "dear Lutz the email, including the conditions discussed, has been sent to VJ Mallya and Andy Stevenson, Force India sporting director. I am expecting feedback tomorrow."

22 February

169. On the afternoon of 22 February Mr Moser met Mr Hubner at BWT's office. At the meeting Mr Moser presented the design for the cars' livery prepared by Force India which had been emailed to him prior to the meeting by Mr Ramos (having received them from Mr Curnow). Mr Moser's evidence was that Mr Hubner was:

> "disappointed with the design which he said did not correspond with what I had originally proposed and was for sure not in line with BWT's design for the cars livery that had been sent over by email the previous day."

170. Mr Moser said that during the meeting Mr Hubner dialled Mr Weissenbacher in on his personal mobile. He described Mr Hubner as being "upset" and "unhappy with the designs that are being provided by Force India." He said that he had the feeling that Mr Hubner evaluated Force India's design proposals "as an act of provocation by not providing him 100% what he was expecting." Mr Moser's input was that he said that he "felt that Force India would compromise" and that he would "do everything" that he could to make the Force India deal happen.

171. That same day Mr Ramos passed on by email to Mr Hubner, copied to Mr Moser and Mr Curnow, Force India's "rate card" showing how much the design BWT wanted would cost. Mr Moser's evidence (paragraph 121 of his first witness statement) was:

> "… Rather than call Mr Curnow directly, Mr Hubner called me whilst I was still in my car driving back home from the meeting. He had seen the rate card and completely freaked out about the level of costs. The total cost of the sponsorship deal detailed in the rate card was €25.75 million per annum. Mr Hubner had been working on the basis that BWT would get its proposed design for €12.5 million per year in the first year, rising to €15 million thereafter.… He told me this is crazy and that the deal had fallen through. Mr Hubner was furious. He talked very angry and loudly to me. He said that the figures provided by Force India were an act of madness.…" [emphasis added]

Mr Moser said that (paragraph 122 of his first witness statement) he:

> "thought that it was all over but nonetheless continue to work to repair the damage done by Force India and convince both parties to find a suitable compromise… This was a big challenge with an uncertain outcome at the time but our efforts were successful. I have no doubt that without the work of Tara and me, the deal between BWT and Force India would never have happened, and certainly not in time for the 2017 season." [emphasis added]

23 February

172. On 23 February Mr Moser had various email exchanges with both Force India and BWT. The evidence of the emails show that he passed on car designs from BWT to Mr

Curnow and from Force India. Mr Moser also sent an email to Mr Weissenbacher proposing that they meet in person but Mr Moser notes in his first witness statement that he recalls Mr Hubner telling him that he did not want him to contact Mr Weissenbacher directly but was to go through him. The email read:

> "I very much wanted to ask you whether I could meet you at short notice…
>
> I have also received a final offer from Force India with regard to the costs specified by BWT… This is an absolutely mega offer which is now on the table for BWT. Force India must have a final decision by the beginning of next week.
>
> As you are aware, I had some excellent and intensive discussions with Mr Hubner with regard to BWT in connection with Formula One.… I can assure you that I have personally pushed very hard for the interests of BWT both at Sauber as well as at Force India. I am of the opinion that we have today come a very very long way.…

> The teams have in my view shown very great interest in reaching a compromise in matching the costs indicated by BWT, in the best interests of BWT…
>
> I can assure you 100% that the brand presences… At the prices as indicated by BWT as preconditions are to be assessed at both Sauber as well as at Force India as actually unique, or at least outstandingly high.…" [emphasis added]

173. In an email at 11.02 on 23 February Mr Curnow emailed Mr Ramos and Mr Hubner copying Mr Moser, stating that he wanted to "follow up on a few practical points to ensure all could be ready to launch in Australia on 23rd March". He then referred to the design proposals and stated:

> "subject to you being happy with the car visuals I will instruct our lawyer to start drafting an agreement. Please let me know."

He also referred to a proposed launch event and proposed a meeting the following week. Mr Curnow concluded:

> "let me know your thoughts on the above "

174. Mr Moser's evidence was (paragraph 129 of his first witness statement) that he:

> "reassured him that I knew that Mr Weissenbacher was keen to make the step into Formula One and knew that this was a great opportunity…"

This reassurance took the form of an email at 13.39 to Mr Curnow:

> "… I know Andreas Weissenbacher… is very keen to make the step into Formula One now.…
>
> I strongly believe that Andreas Weissenbacher is fully aware that this is a really great opportunity for BWT to achieve global brand awareness…
>
> Today I also wrote Andreas Weissenbacher to let him know that I would strongly advise him to use this excellent opportunity for BWT based on your last email…" [emphasis added] 175. Mr Curnow responded at 13.55:
>
> "thank you for this, clearly there is hope!"
>
> I will send the visuals through once Rob has finished… I will send the file to you both and Lutz, you can then decide if you want to also send to Andreas to make sure we give the best possible opportunity."

176. At 13.20 on 23 February 2017 Mr Ramos sent an email to Mr Hubner and Mr Curnow copied to Mr Moser and Mr Weissenbacher to re-cap on design changes requested by Mr Hubner. Mr Ramos stated that:

> "as being in Formula One for the past 19 seasons I am very confident that the result of the proposal is the best money for value in the market not only this year! Also I believe that BWT and Force India would be the perfect match, especially on the human side…"

24 February

177. On 24 February Mr Moser was copied to various emails attaching various updated designs and discussions concerning the detail of the contract and an email from Mr Curnow to Mr Hubner attaching what he referred to as "a complete proposal".

178. Mr Moser's evidence (paragraph 132 of his first witness statement) is that this email demonstrates that:

> "at this stage the hard work had all been done, the sponsor had been introduced and now it was just a matter of Force India dealing with the contract.

179. Despite this assertion that the hard work had been done, Mr Moser then states (paragraph 134 of his first witness statement) that he spoke with Mr Hubner on 27 February 2017 to get an update and Mr Hubner said that "everything looked promising but they were not yet over the line." Mr Moser's evidence is that when he spoke to Mr Hubner on 1 March 2017, Mr Hubner told him that the deal would happen and was safe. However this evidence has to be read in the light of the exchange between Mr Ramos and Mr Curnow on 6 March 2017, when in response to a question from Mr Ramos as to how the conference call went with Mr Hubner, Mr Curnow responded:

> "a lot still to agree."

6 March

180. The evidence of Mr Ramos in his witness statement was that on this day an issue arose regarding drivers' helmets and caps. BWT also wanted these to be pink and the deal was in danger of collapsing. His evidence was that he was in contact with both Mr Curnow and BWT throughout the day to try and find a solution to the issue to keep the deal on track.

181. Mr Moser said (paragraph 149 of his witness statement) that on 6 March 2017 he became aware from Mr Ramos that BWT were unhappy because Force India had refused their request that the drivers' baseball caps also go pink. Mr Moser said he spoke with Mr Hubner and "reassured him that the baseball caps were not essential." He said that:

> "Mr Hubner was extremely stressed out about the situation before I spoke with him and I managed to calm him down and get the deal back on track."

182. At 22.24 on 6 March Mr Ramos sent a message to Mr Hubner:

> "I talked to F1 and the situation is like Emanuel has passed on to you. I like to repeat myself: I believe you will do the right

> thing. Basically, the caps are not the most important thing in the world. Please note that Force India is a really human team and really happy to be working with you. In this sense: good night and see you soon."

183. Although the evidence shows that Mr Ramos was not in contact with Mr Curnow throughout the day, the phone records show that on that evening at 20.49 there was an 11 minute 45 second call from Mr Curnow to Mr Ramos and at 22.14 another call of six minutes 50 seconds from Mr Curnow to Mr Ramos. Mr Ramos said in crossexamination that these calls related to the baseball caps.

Discussion

Absence of Mr Hubner

184. The claimant asks the court to draw an adverse inference from the absence of Mr Hubner. The claimant relies on the evidence of a voicemail on 1 March 2017 left by Mr Hubner for Mr Moser which said:

> "hi Emanuel, this is Lutz. That's just typical, you know? You made the deal and pocketed the commission and now you're probably enjoying a champagne breakfast or something and have stopped taking my calls. Well that's just bad. Please call me back as I would like to talk to you about possible cooperation. Okay? Thanks. Bye" [emphasis added]

The claimant submitted that the defendant should be subject to an adverse inference on issues on which the claimant has provided evidence which Mr Hubner could have challenged.

185. In *Wisniewski v Central Manchester Health Authority* [1998] P.I.Q.R. P324 the Court of Appeal stated:

> "(1) In certain circumstances a court may be entitled to draw adverse inferences from the absence or silence of a witness who might be expected to have material evidence to give on an issue in an action.
>
> (2) If a court is willing to draw such inferences, they may go to strengthen the evidence adduced on that issue by the other party or to weaken the evidence, if any, adduced by the party who might reasonably have been expected to call the witness.
>
> (3) There must, however, have been some evidence, however weak, adduced by the former on the matter in question before the court is entitled to draw the desired inference: in other words, there must be a case to answer on that issue.
>
> (4) If the reason for the witness's absence or silence satisfies the court, then no such adverse inference may be drawn. If, on the other hand, there is some credible explanation given, even if it is not wholly satisfactory, the potentially

> detrimental effect of his/her absence or silence may be reduced or nullified."

186. The first question is whether Mr Hubner would have had material evidence to give on an issue in the action. His evidence could not have been relevant to the issues of whether there was an oral contract or an agreement on the terms of the Mandate Agreement. As to unjust enrichment, the factual dispute centres on whether Mr Wolff or the claimant (through Mr Ramos being in contact with Dr Mallya and Mr Curnow) first introduced the sponsorship opportunity. Mr Hubner could not have provided direct evidence on this as it is not alleged that he had the calls with Mr Wolff or was present when Mr Weissenbacher spoke to Mr Wolff. (There is no factual dispute that Force India was not in touch with Mr Hubner until the claimant put it in touch with him.) As to the other services which the claimant asserts it provided and in respect of which the defendant is said to have been unjustly enriched, the issue is not what was said or done between Mr Moser and Mr Hubner of BWT (as to which the court has the evidence of the contemporaneous emails and messages passing between BWT and the claimant). The issue for the court is whether the nature and value of the services rendered to Force India amount to unjust enrichment entitling the claimant to a quantum meruit. As to the value of the services provided, as discussed below, this is an objective question rather than a subjective one. In my view therefore Mr Hubner would not have had material evidence on an issue in the action.

187. However even if I were wrong on that, and Mr Hubner might be expected to have material evidence, the claimant has not shown that it falls within the principles of *Wisniewski* in that the claimant has not shown why, given that Mr Hubner is a third party, it was the defendant who might reasonably have been expected to call Mr Hubner and why the claimant could not have sought to call him, if it believed he could give evidence which would assist its case (as they did in the case of Mr Wolff).

188. Accordingly for these reasons this is not a case where the court should draw an adverse inference from the absence of a witness, namely Mr Hubner.

Services provided

189. In summary, the evidence shows that:

i) the claimant made an initial offer to BWT on behalf of Force India which was not made at the request of Force India or Dr Mallya, notwithstanding the statements in the email from Mr Moser. The statements made by Mr Moser to Mr Hubner that day were at a time when no firm commitment had been made by Force India and in my view Mr Moser was seeking to create a deal;

ii) as to the emails and conversations on 21 February, it is notable that Mr Moser implies that discussions were ongoing with Dr Mallya and Mr Stevenson whereas in fact Mr Curnow was handling the discussions with Mr Ramos. This suggests that either Mr Moser did not know what was going on or he was unconcerned as to whether his email was an accurate reflection of the work. Further in assessing the services provided by the claimant, the court takes into account that a number of the "several emails" relied upon by the claimant were BWT sending Mr Moser its proposed design for the car which Mr Moser then forwarded to Mr Ramos and a further email merely contained the request from

BWT that it wished to have the right to break the agreement after one year and Mr Curnow's response;

iii) the claimant presented Force India's designs to BWT at the meeting between Mr Moser and Mr Hubner on 22 February, designs which the claimant had not prepared and in respect of which not only did it not give advice but which provoked an adverse reaction from BWT. The significance of the different design prepared by Force India and the absence of any advice from the claimant was that, according to Mr Moser, Mr Hubner:

> "made clear that the deal now on the table would not happen. Mr Hubner said that if this was Force India's proposal then BWT needed to quit at this point."

In evaluating the claimant's contribution to the deal, it is notable that Mr Moser chose to present the design prepared by Force India without in any way providing any input to Force India or anticipating any objection from BWT that it did not correspond with what had originally been proposed;

iv) similarly, the same day, Mr Ramos passed on the rate card (copying Mr Moser) and neither Mr Ramos nor Mr Moser anticipated the "furious" reaction of Mr Hubner. Whilst the claimant asserts that it managed to preserve the deal by its intervention on these matters, in fact the claimant failed to provide any advice to prevent these issues arising in the first place and acted (initially on these matters) largely as a postbox;

v) the email sent by Mr Moser to Mr Weissenbacher at 11.14 on 23 February is somewhat difficult to reconcile with services being provided by the claimant to Force India. On the one hand Mr Moser describes the "final offer" from Force

India as an "absolutely mega offer" but at the same time Mr Moser states that he has:

> "personally pushed very hard <u>for the interests of BWT</u> both at Sauber as well as at Force India" [emphasis added];

vi) it is notable that Mr Moser continued to be in contact with Ms Kaltenborn in this period, sending her an email on 22 February 2017. Although Mr Moser states in his witness evidence this was because Ms Kaltenborn was unwilling to give up on the possibility that Sauber might be able to do a deal with BWT, it is unclear why Mr Moser appears still to be advocating Sauber as an alternative to Force India in his email of 23 February in which he stated that the brand presence at the prices indicated by BWT are to be assessed "<u>at both Sauber as well as at Force India</u>" as "unique or at least outstandingly high";

vii) Mr Moser's evidence was that he provided "reassurance" to Mr Curnow as to Mr Weissenbacher's views; on the evidence Mr Moser had had no contact with Mr Weissenbacher which would justify that reassurance; he had sent the email on 23 February but he had received no response from Mr Weissenbacher;

viii) Mr Ramos sent emails and messages recommending the deal to both sides but given that Mr Ramos' previous experience in Formula One was (to the

knowledge of Force India) in organising events and not arranging sponsorship and his absence of any influence with Mr Weissenbacher, his views were of limited value in terms of contributing to the deal being done;

ix) after the initial period to 24 February, Mr Curnow accepted in cross examination that there was little for the claimant to do and he would ask if he needed further help. The main example of this is in relation to the issue of drivers' caps/ helmets where the evidence is of telephone conversations between Mr Ramos and Mr Curnow when this issue was of concern and the evidence of Mr Moser that he reassured Mr Hubner and calmed him down.

190. Whilst Mr Moser asserted in his first witness statement (paragraph 114) that he inferred that Mr Hubner was the decision-maker, it is clear from the evidence that the decision as to sponsorship lay with Mr Weissenbacher. From the evidence of the contemporaneous documents this appears to be the belief of Mr Moser at the time, since he emailed Mr Weissenbacher directly on 23 February 2017 (without copying Mr Hubner). However Mr Moser had no influence with, and no direct contact with Mr Weissenbacher during that initial period which the claimant relies on as the period within which they did the substantial part of their work. (The email of 23 February 2017 appeared to go unanswered by Mr Weissenbacher).

191. It is clear from the contemporaneous emails that Mr Curnow chose to involve Mr Ramos and Mr Moser and routed correspondence through Mr Ramos and Mr Moser on occasions seeking their views. However Mr Curnow was unaware that whilst apparently assisting Force India, Mr Moser told Mr Weissenbacher by email that he was pushing "very hard" in the interests of BWT and that he remained in contact with Sauber. More significantly Mr Curnow was not aware that when Mr Moser "reassured him" that Mr Weissenbacher was "keen to make the step into Formula One", Mr Moser

in fact had had no contact with Mr Weissenbacher and did not have any influence with Mr Weissenbacher.

192. I accept that there were statements in emails and messages from Mr Moser and Mr Ramos advocating to BWT that they should do a deal with Force India. The value of such statements however must be questionable in the light of the evidence that Mr Wolff had recommended the sponsorship by BWT of Force India to Mr Weissenbacher and it is likely, given that the evidence is that they were old friends, that Mr Weissenbacher relied on that recommendation rather than any positive exhortations from the claimant.

Conclusion on services provided

193. It is clear on the evidence that the claimant made a contribution to getting the deal done in terms of acting as an intermediary between BWT and Force India. However, for the reasons discussed, the value of such contribution was limited in nature and I turn then to consider whether these were services for which the law imposes an obligation to pay for the benefit of such services.

Was the enrichment at the expense of the claimant?

194. It appeared to be common ground that, in principle, in a claim for unjust enrichment there need not be a loss in the same sense as in the law of damages and that the loss to the claimant can be incurred through the gratuitous provision of services which could otherwise have been provided for reward where there was no intention of donation: Lord Reed JSC in *Investment Trust Companies v Revenue and Customs Commissioners* at [45]. The issue in this case is whether in the circumstances it would be unconscionable for the claimant not to be recompensed.

Was the enrichment unjust?

195. The relevant principles, where services were provided in anticipation of a contract which did not materialise, were reviewed by Christopher Clarke J in *MSM Consulting Ltd v United Republic of Tanzania* [2009] EWHC 121 (QB) at [170]-[171]:

> "In Countrywide Communications Limited v ICL Pathway Ltd [1996] C No 2446 Mr Nicholas Strauss, Q.C., considered the authorities bearing on the question of whether or not a claim can successfully be made for work done in anticipation of a contract which does not materialise…he concluded:
>
> "I have found it impossible to formulate a clear general principle which satisfactorily governs the different factual situations which have arisen, let alone those which could easily arise in other cases. Perhaps, in the absence of any recognition in English law of a general duty of good faith in contractual negotiations, this is not surprising. Much of the difficulty is caused by attempting to categorise as an unjust enrichment of the defendant, for which an action in restitution is available, what is really a loss unfairly sustained by the plaintiff. There is a lot to be said for a broad principle enabling either to be recompensed, but no such principle is clearly established in English Law.
>
> Undoubtedly the court may impose an obligation to pay for benefits resulting from services performed in the course of a contract which is expected to, but does not, come into existence. This is so, even though, in all cases, the defendant is ex hypothesi free to withdraw from the proposed contract, whether the negotiations were expressly made "subject to contract" or not. Undoubtedly, such an obligation will be imposed only if justice requires it or, which comes to much the same thing, if it would be unconscionable for the plaintiff not to be recompensed.
>
> Beyond that, I do not think that it is possible to go further than to say that, in deciding whether to impose an obligation and if so its extent, the court will take into account and give appropriate weight to a number of considerations which can be identified in the authorities. The first is whether the services were of a kind which would normally be given free of charge. Secondly, the terms in which the request to perform the services was made may be important in establishing the extent

of the risk (if any) which the plaintiffs may fairly be said to have taken that such services would in the end be unrecompensed. 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. Thirdly, the nature of the benefit which has resulted to the defendants is important, and in particular whether such benefit is real (either "realised" or "realisable") or a fiction, in the sense of Traynor CJ's dictum. Plainly, a court will at least be more inclined to impose an obligation to pay for a real benefit, since otherwise the abortive negotiations will leave the defendant with a windfall and the plaintiff out of pocket. However, the judgment of Denning L.J. in the Brewer Street case suggests that the performance of services requested may of itself suffice amount to a benefit or enrichment. Fourthly what may often be decisive are the circumstances in which the anticipated contract does not materialise and in particular whether they can be said to involve "fault" on the part of the defendant, or (perhaps of more relevance) to be outside the scope of the risk undertaken by the plaintiff at the outset. I agree with the view of Rattee J. that the law should be flexible in this area, and the weight to be given to each of the factors may vary from case to case."

[171] I regard this as a helpful analysis of the authorities from which I also derive the following propositions:

(a) Although the older authorities use the language of implied contract the modern approach is to determine whether or not the circumstances are such that the law should, as a matter of justice, impose upon the defendant an obligation to make payment of an amount which he deserved to be paid (quantum meruit):...;

(b) Generally speaking a person who seeks to enter into a contract with another cannot claim to be paid the cost of estimating what it will cost him, or of deciding on a price, or bidding for the contract. Nor can he claim the cost of showing the other party his capability or skills even though, if there was a contract or retainer, he would be paid for them. The solicitor who enters a "beauty contest" in the course of which he expresses some preliminary views about the client's prospects cannot, ordinarily expect to charge for them. If another firm is retained; he runs the risk of being unrewarded if unsuccessful in his pitch.

(c) The court is likely to impose such an obligation where the defendant has received an incontrovertible benefit (e.g. an immediate financial gain or saving of expense) as a result of the claimant's services; or where the defendant has requested the

> claimant to provide services or accepted them (having the ability to refuse them) when offered, in the knowledge that the services were not intended to be given freely;
>
> (d) But the court may not regard it as just to impose an obligation to make payment if the claimant took the risk that he or she would only be reimbursed for his expenditure if there was a concluded contract; or if the court concludes that, in all the circumstances the risk should fall on the claimant: Jennings & Chapman;
>
> (e) The court may well regard it as just to impose such an obligation if the defendant who has received the benefit has behaved unconscionably in declining to pay for it;" [emphasis added]

196. In *Benourad v Compass Group Plc* Beatson J set out the principles at [106]:

> "…Christopher Clark J, in MSM Consulting Ltd v United Republic of Tanzania 2009 EWHC 121 (QB) at [171] … derived a number of propositions from the authorities. Those relevant in the circumstances of the case before me are encapsulated in subparagraphs (i) to (l) below."
>
> (i) "The court is likely to impose [a restitutionary] obligation where the defendant has received an incontrovertible benefit (e.g. an immediate financial gain or saving of expense) as a result of the claimant's services; or where the defendant has requested the claimant to provide services or accepted them (having the ability to refuse them) when offered, in the knowledge that the services were not intended to be given freely": MSM Consulting Ltd v United Republic of Tanzania 2009 at [171(b)]. One example of such a case is where the services constitute accelerated performance of the anticipated contract at the request of the other party, as was the case in British Steel Corp. v Cleveland Bridge and Engineering Co Ltd.
>
> (j) [T]he court may not regard it as just to impose an obligation to make payment if the claimant took the risk that he or she would only be reimbursed for his expenditure if there was a concluded contract; or if the court concludes that, in all the circumstances the risk should fall on the claimant": MSM Consulting Ltd v United Republic of Tanzania 2009 at [171(c)], citing Jennings and Chapman Ltd v Woodman Matthews and Co (1952) 2 TLR 406 .
>
> (k) The court may well regard it as just to impose such an obligation if the defendant who has received the benefit has behaved unconscionably in declining to pay for it": MSM Consulting v United Republic of Tanzania at [171(e)].

> (l) Where costs are incurred or time spent for the purpose of putting a person in a position to obtain and then perform a contract, this is a pointer against the award of restitutionary recompense: see MSM Consulting Ltd v United Republic of Tanzania [2009] EWHC 121 (QB) and Regalian PLC v London Docklands Development Corporation [1995] Ch 212,230. British Steel Corp. v Cleveland Bridge and Engineering Co Ltd. was distinguished by Rattee J as a case of services rendered by way of accelerated performance of the anticipated contract at the other person's express request. In Regalian's case he was concerned with a property developer who unsuccessfully claimed to be entitled to reimbursement by the defendant of almost £3 million which it had paid to professional firms in respect of the proposed development in preparation for the intended contract. In MSM Consulting Christopher Clarke J stated (at [171(b)]) that, "generally speaking a person who seeks to enter into a contract with another cannot claim to be paid the cost of estimating what it will cost him, or of deciding on a price, or bidding for the contract. Nor can he claim the cost of showing the other party his capability or skills even though, if there was a contract or retainer, he would be paid for them. The solicitor who enters a 'beauty contest' in the course of which he expresses some preliminary views about the clients prospects cannot, ordinarily expect to charge for them. If another firm is retained; he runs the risk of being unrewarded if unsuccessful in his pitch."

Submissions

197. It was submitted for the claimant that:

i) the defendant received a benefit in the form of "the ability to set in motion" the work that produced the BWT contract and the need to get the deal moving has echoes of the accelerated performance in *British Steel Corporation v Cleveland* [1984] 1 All ER 504*;*

ii) there was never any intention of offering the claimant any contract and the claimant did not take the risk that the defendant would mislead it into thinking that a contract would be agreed;

iii) the defendant's conduct is unconscionable in that Mr Curnow did not deal with the claimant in good faith but rather had no intention of making any payment but still sought the claimant's assistance.

198. It was submitted for the defendant that:

i) the expert evidence is that it was understood that there would be a written agreement (paragraph 10 of the joint statement);

ii) this therefore falls within the principles identified in *Countrywide, MSM* and *Benourad* that the claimant took the risk in performing services before a

contract had been concluded and there was no assurance given that Force India would not withdraw from the negotiations prior to the contract being signed;

iii) the claimant chose to act knowing that Mr Curnow did not have authority to conclude an agency agreement and it ran the risk that Force India was not prepared to pay commission where the claimant had at best a tangential relationship with BWT;

iv) counsel for the defendant accepted in closing submissions that Mr Curnow made misleading statements to the claimant with regard to the contract being signed but submitted that this cannot transform an untenable claim.

Discussion

199. In my view applying the principles identified in *MSM*:

i) the services which were provided by the claimant were not of a kind which would normally be given free of charge;

ii) the terms in which the request to perform the services was made by Mr Curnow by initially following up the conversations between Mr Ramos and Mr Stevenson and between Mr Ramos and Dr Mallya, the way that Mr Curnow accepted them (having the ability to refuse them) when offered, and then subsequently on occasions sought further assistance such as by his email of 23 February (quoted above) and in relation to the caps, was all in the knowledge that the services were not intended by the claimant to be given freely;

iii) in the circumstances the claimant did not accept the risk that such services would in the end be unrecompensed. Whilst the claimant sought from the outset to have a signed agreement, this was not a case where the claimant took the risk that it would only be reimbursed for his expenditure if there was a concluded contract: it provided the services against the background context that it was led to understand that the mandate was agreed: the messages on 27 February ("All agreed with Andreas. Will sort mandate and other legals in morning.") and 8 March (“Your mandate is safe”), although sent after the initial work, are indicative of what the claimant was led to understand. Mr Curnow in cross examination accepted that he gave the claimant the impression that it would be paid a commission and that he did not tell Mr Ramos that they would not receive a commission agreement as they would probably have tried to take the deal to Sauber.

Conclusion on whether the enrichment was unjust

200. For these reasons in my view the enrichment in the form of the provision of the services by the claimant was unjust and the court should therefore impose an obligation on the defendant to pay for the benefits resulting from the services performed.

Unjust enrichment: Quantum

Relevant legal principles

201. For the purposes of the unjust enrichment claim, the court has to assess the nature of the benefit received by the defendant. The starting point is the objective market price for the services, taking into account the position of the defendant: *Benedetti v Sawiris* [2014] AC 938. Lord Clarke said at [17]:

> "There is a question as to exactly what the objective approach entails. Professor Virgo states the test (at p 98) as the identification of the market value, namely the sum "a willing supplier and buyer would have agreed upon". However, I agree with Etherton LJ (at para 140) that the test is "the price which a reasonable person in the defendant's position would have had to pay for the services". On that approach, although a court must ignore a defendant's "generous or parsimonious personality", it can take into account "conditions increasing or decreasing the objective value of the benefit to any reasonable person in the same (unusual) position" as the defendant (para 145). The editors of Goff and Jones note that such conditions would seem to include the defendant's buying power in a market "so that a defendant who can invariably negotiate a better price for a product than any other buyer will be allowed to say that this price reflects the 'objective' value of the product to him, or in effect that there is one market for him and another for everyone else" (para 4-10)..." [emphasis added]
>
> 100. Prima facie, the monetary value of the services can be fairly ascertained by determining what a reasonable person in the position of the defendant would have agreed to pay for them. That will depend on how much it would have cost a reasonable person in the position of the defendant to acquire the services elsewhere in the market (assuming that a relevant market exists, as will normally be the case)…
>
> 101. A question arises as to what is meant by "the position of the defendant". The answer can be derived from the purpose of the valuation exercise. In order to arrive at an award which is just to both parties, it is necessary to take account of circumstances which would affect the value placed upon the services by a reasonable person receiving them. Those are also circumstances which would affect the cost to a reasonable person in that position of acquiring the same services in the market, and the amount which the claimant could have received if he had sold his services to another recipient in the same position. Such circumstances will include in particular the availability and cost of similar services provided by alternative suppliers…and prevailing rates and practices in the relevant market ..." [emphasis added]

Submissions

202. For the claimant it was submitted that:

i) the claimant made a substantial contribution to the deal and in particular placed reliance on the telephone calls as, for example, in relation to caps;

ii) the contract would not have been put in place in time without the contribution of the claimant; iii) Force India was in difficulty acquiring a sponsor due to financial difficulties;

iv) a "detailed proposal" had been mapped out by 24 February before the telephone call between Mr Szafnauer and Mr Weissenbacher;

v) the type of agency services which the claimant was providing are usually remunerated on a percentage basis and there is no basis proper basis for valuing the services on a time and expense basis as this was not the type of contract that was envisaged and not the sort of arrangement that the claimant was led to believe they were going to have; Mr Fenwick's evidence was that 15% was not "out of line";

vi) even though the value of any quantum meruit is a different exercise of valuing the services which were in fact provided, the quantum meruit figure should be at the level of the contract that was offered because that is what Mr Curnow was representing to the claimant it would be paid and in conjunction with the expert evidence it is good evidence of the market value of their services.

203. For the defendant it was submitted that:

i) The claimant was not performing services that warranted commission: the experts were agreed that you would not pay commission for a mere introduction and in circumstances where there was no influence or relationship;

ii) the contractual claim having failed, the rates in the draft contract are not a guide as to the objective market price; the draft contract required the claimant to demonstrate its relationship with the sponsor;

iii) Mr Weissenbacher was the decision maker and the critical information came from Mr Wolff;

iv) the advice proffered was not based on insight: Mr Moser first met Mr Hubner on 22 February.

Expert evidence

204. Before having regard to the evidence as to the value of the services, it is necessary to consider the actual and alleged conflicts of interest on the part of both experts.

205. Mr Hayes disclosed in his report that he has a personal friendship with Mr Ramos having known him since 2010. Whilst he states in his report that he is "confident" that his relationship with Mr Ramos will not interfere with his responsibilities in compiling the expert report, there must be a concern that his evidence is not truly independent.

206. In relation to Mr Fenwick, he is the chief executive officer of a company specialising in identifying sponsorship opportunities predominantly in Formula One. He acknowledged in cross examination that he knew Mr Curnow on a professional level, had recommended him for marketing and sponsorship on Linkedin and would seek to do business in the future. It was submitted for the claimant that Mr Fenwick had failed to declare his commercial dealings with the defendant, through Mr Curnow, and it was suggested that it was difficult for him therefore to maintain "true independence".

207. It was common ground between the experts (paragraph 4 of the joint expert statement) that the decision whether or not a Formula One team will enter into a sponsorship agreement with a sponsor at this level is almost always made by that team's CEO often with the approval of his board. Mr Fenwick's contact was with Mr Curnow. Therefore whilst Mr Curnow may be a useful contact for Mr Fenwick since Mr Fenwick is operating in Formula One and, as he said, hopes to do business with every team in the Formula One paddock, in my view the nature of his relationship with Mr Curnow had little or no bearing on his ability to provide the court with independent evidence on the relevant issues.

208. In any event the majority of the evidence which is of relevance to the issue of quantum is set out in the joint statement of the experts. In particular the experts are agreed:

> "[7] where an agent is to be engaged by the team on a commission basis, the agent will be expected to have influence over a potential sponsor and a developed relationship with that potential sponsor…"
>
> [12] there is no market practice or industry standard as to the level of commission payable to agents by teams pursuant to an agency agreement. The level of commission payable depends upon what the parties are able to agree bearing in mind a number of factors such as the status of the team, the nature of the sponsorship, and support provided by the agent in introducing the sponsor. In our experience agent's commission within Formula One can therefore range anywhere from 5% to 20% depending on the factors outlined above."
>
> "[14] Neither of us have experience of any industry practice that pays agents a "quantum meruit" or ex gratia payment in relation to any efforts they provided in relation to sponsorship agreement concluded between the rights holder and the brand…"[emphasis added]

209. At paragraph 4.4 of his report Mr Fenwick states:

> "what agents are being paid for is not merely to effect an introduction. They are being paid for the relationship they have with a potential sponsor which gives them sufficient influence to persuade sponsor to enter into an agreement with the team."

210. Mr Fenwick suggested that a reasonable sum by way of an ex gratia payment would be around $20,000 plus expenses.

211. Mr Hayes stated in his report that where a team instructs an agent to represent them on a retained basis, usually where a team with limited in-house resource requests support, services would be paid for normally on a monthly basis with fees sometimes in excess of £15,000 per month. Mr Hayes' evidence on this point was however not from personal experience but from conversations he had with others: his evidence to the court on this point was that it was a "recollection from his time in the industry".

Discussion

212. Given its findings above, the court is not valuing the introduction of the sponsorship opportunity but is valuing the other services provided by the claimant which made a contribution to the deal. The evidence of the services provided is set out above.

213. On the authorities, the court is valuing those services as the amount which a reasonable person in the position of the defendant would have agreed to pay for them. In so doing, the court takes account of circumstances which would affect the value placed upon the services by a reasonable person receiving them. In my view on the evidence the relevant circumstances are as follows:

    i) the need to work quickly in order to get the deal done in time for the 2017 season and in particular the need to get the design finalised so that the paint shop could start work: in cross-examination Mr Curnow accepted that the deadline to get the cars' livery changed was the first few days of March which meant they had about two weeks to get the deal done and that it was going to require "all hands to the pump";

    ii) work still had to be done to agree the deal after 24 February and negotiations took place between the lawyers;

    iii) the lack of input on the part of the claimant- although the claimant sent emails promoting the deal, the claimant acted largely as a conduit forwarding the designs produced by each of BWT and Force India. Mr Moser did intervene over the design, the rate card, and the helmets but as discussed above, in the case of the design and the rate card, only when the dispute had arisen following the claimant passing on the proposals without more.

214. I do not accept the submission that the quantum meruit figure should be at the level of the contract offered because that is what Mr Curnow was representing to the claimant it would be paid. That contract was for an introduction and I have found that the claimant did not introduce the sponsorship opportunity. The commission of 15% for a three year contract without a break (referred to in the Whatsapp message) was not in fact achieved.

215. In arriving at a quantum meruit, the court has regard to the evidence as to the prevailing rates and practices in the relevant market and how much it would have cost to acquire the services elsewhere in the market. The experts agreed that on a commission basis, the agent will be expected to have influence over a potential sponsor and a developed relationship with that potential sponsor.

216. The highest that the claimant can put their case in relation to the influence of Mr Moser and Mr Ramos on BWT is that Mr Weissenbacher did not know or would not say what Mr Hubner was doing to further the deal between BWT and Force India and

that Mr Weissenbacher cannot speak to the claimant's activities and their importance "to bring the deal to the point at which he became directly involved". However the court has the evidence of the emails and messages even if it does not have the content of the telephone calls. On the evidence it is clear that:

i) Mr Moser had not met or spoken to Mr Weissenbacher; ii) Mr Moser had dealt with Mr Hubner in relation to Sauber for a few weeks; iii) Mr Moser did not meet Mr Hubner until Wednesday 22 February;

iv) Mr Ramos had no relationship with BWT.

217. It was submitted for the claimant that Mr Curnow received a commission in respect of this deal notwithstanding that he was not entitled in accordance with the terms of his contract. Under his contract Mr Curnow was entitled to a bonus at a rate of 3% on net income where deals were wholly sourced and secured by him and 1.5% on net income where there was any agency involvement. It seems to me that neither his entitlement in accordance with his contract or the fact that the defendant chose to make a bonus payment to Mr Curnow notwithstanding the strict terms of his contract assist the court: the court is making an objective assessment of the value of the services provided by the claimant and the amount which the defendant was willing to pay its own employees, whether as a matter of contract or otherwise, for their role is in my view irrelevant to the objective value of the services which the claimant provided which, for reasons discussed above, are limited both in nature and duration and different from the role played by Mr Curnow.

218. For all these reasons in my view the answer to the question, how much it would have cost to acquire the services elsewhere in the market, is that it would not have been at the levels of percentage commission payable to an agent with influence over a potential sponsor and who effected an introduction. The only other basis which is advanced is the evidence of the experts as to the fees that would be paid on a retained basis: Mr Hayes suggested services would be paid for normally on a monthly basis with fees sometimes in excess of £15,000 per month. Mr Fenwick suggested an ex gratia payment of $20,000. However the evidence of the experts on this point was unsatisfactory given

that it appeared to lack any real evidential foundation or any details which would enable a meaningful comparison to be made. The court has to take account of the circumstances which would affect the value placed upon the services by a reasonable person receiving them and in my view (accepting the lack of any firm evidence on the circumstances of a retained arrangement) the circumstances of this case would take them outside the circumstances of a retained arrangement where a company merely buys in support. In particular the court has regard to the following circumstances:

i) the significance of the deal for Force India: if the sponsorship deal had gone through to full term, it would have been worth about €74 million and was worth in terms of actual receipts approximately €29 million. The evidence of Mr Hayes to the court orally was that a deal of this size was:

> "a title sponsorship deal that as Robin and I agree are very rare in Formula One, and even more so in this day and age"

ii) not only was this a significant deal for any Formula One team, it was particularly significant for Force India at a time of financial difficulty. Mr Szafnauer's evidence in his witness statement was that:

> "reputationally, sponsors did not want to be associated with the team because of its connections to Dr Mallya. In business terms, sponsors were wary of us because of doubts over solvency. This meant that sponsors were hard to find and could drive a very hard bargain with the team if they were willing to take the risks inherent in sponsoring the team at that time."

iii) The short timescale in which to achieve the deal for the 2017 season. By 2 March even though negotiations were continuing, Force India were going ahead with the change to the livery of the cars: Mr Szafnauer wrote to Mr Weissenbacher:

> "please see the below picture, today we are painting the car pink in anticipation of getting a deal done.
>
> Please make certain to convince your board, otherwise I will be looking for new employment after Melbourne." Mr Weissenbacher responded:
>
> "don't worry – as promised, we will reach some movement in the direction you asked for. Please let's finish the contract now….Full speed ahead"

These are all matters which increase the objective value of the benefit to any reasonable person in the same position as the defendant.

Conclusion

219. For the reasons discussed it seems to me that the market price of the services provided in this case is not a percentage commission of the revenue from the sponsorship at the level which would be payable for an introduction but in the circumstances a reasonable person in the position of the defendant would have placed a value on the services provided to the defendant in an amount which is greater than the amount suggested by the experts as paid for a retainer which still reflects the limited nature of what was done.

220. Doing the best I can, on the limited evidence going to valuation before the court, to arrive at an amount which is just to both parties, I find that the objective value of the benefit of the services which were provided to Force India by the claimant and for which the claimant is entitled to be recompensed by way of a quantum meruit is the sum of £150,000.