



Neutral Citation Number: [2020] EWHC 291 (Comm)

Case No: CC-2017-BRS-000001

**IN THE HIGH COURT OF JUSTICE**  
**BUSINESS AND PROPERTY COURTS IN BRISTOL**  
**CIRCUIT COMMERCIAL COURT (QBD)**

Bristol Civil & Family Justice Centre  
2 Redcliff Street  
Bristol BS1 6GR

Date: 28/02/2020

**Before :**

**HH JUDGE RUSSEN QC**

**(sitting as a Judge of the High Court)**

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**Between :**

**DOWMAN IMPORTS LIMITED**

**Claimant**

**- and -**

**2 TOOBZ LIMITED**

**Defendant**

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**Simon Goldberg** (instructed by **McDaniel & Co**) for the **Claimant**  
**James Wibberley** (instructed by **Ashfords LLP**) for the **Defendant**

Hearing dates: 12<sup>th</sup>, 13<sup>th</sup>, 14<sup>th</sup> and 15<sup>th</sup> November 2019

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**Approved Judgment**

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

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HH JUDGE RUSSEN QC

## HH Judge Russen QC:

### Introduction

1. This is my judgment following a trial between the parties on the Claim and Counterclaim outlined in paragraphs 7 to 12 below.
2. The Claimant (“**Dowman**”) is a company which carries on the business of supplying high quality soft toys. That business extends to procuring the manufacture of such toys by a small factory in Shanghai (“**the Chinese Factory**”) run by Shanghai Jin Wei Gifts Co. Ltd (“**SJWG**”).
3. Dowman owns a 30 per cent stake in the Chinese Factory and Dowman’s sole director, Mr Dominic Whittle (“**Mr Whittle**”), is also a director of SJWG. The manager of SJWG is Mr Li Jian Guo (“**Mr Li**”) who Mr Whittle describes as his best friend. Dowman and SJWG have been in business together in producing toys to their own design and order since around 1991. The Chinese Factory was established at that time for the purpose of meeting Dowman’s production needs and, although it now has other customers, its primary function is to service Dowman’s business. It has an in-house design department, though Mr Whittle told me that two designers had to be laid off because the Defendant had not paid Dowman the monies now claimed from it.
4. The Defendant (“**Toobz**”) carries on business as a designer of soft toys, trading under the name ‘Little Handfuls’ and does so under the direction of Mr Andrew Coates (“**Mr Coates**”). Mr Coates is a painter and artist by occupation. From the 1990s he was working on a toy design based on the insertion of one tube into another (whence Toobz derives its name) which would enable the eyes of the toy character to be moved by a finger inserted in the back of the toy. Moving ears and fur came later. Toobz was incorporated in 2008, after Mr Coates’ concept had been patented in the UK and US, and it was around that time that Mr Coates hit upon the idea of a range of toy characters known as ‘Bush Babies’ (alongside another related concept for toys known as ‘Wee Boos’).
5. Toobz has now been successful in exploiting the Bush Babies with another UK company called Golden Bear Products Ltd (“**Golden Bear**”) which, also with the assistance of a factory in the Far East, carries on the business of manufacturing and distributing toys (including so-called ‘plush’ toys of which the Bush Baby is a type).
6. It is the entry by Toobz into merchandising deals with Golden Bear (the first one in September 2016) for the exploitation of the Bush Babies that has prompted Dowman to bring proceedings against Toobz in relation to what Dowman says was its part in the development of the toys during the period between October 2014 and June 2016 and under what it had alleged, prior to trial, to have been an oral agreement with Toobz that they would instead be manufactured by Dowman through the Chinese Factory.

### The Claim and Counterclaim

7. When the Claim was issued in August 2017 in the London Circuit Commercial Court the primary claim advanced by Dowman was that the entry by Toobz into a Licence Agreement with Golden Bear was a breach of an oral agreement that Mr Whittle and Mr Coates had reached on behalf of their respective companies in November 2014. Dowman alleged that it had agreed to assist with the development of Bush Babies (including the provision of design and manufacturing resources at the Chinese Factory) in return for being appointed as the manufacturer of them. Dowman alleged that, through Mr Coates, Toobz had initially agreed to a 2 year appointment but one year later, in November 2015, they had reached further agreement upon a period of 5 years.
8. Dowman's primary claim was therefore one for the loss of profit that would have been earned on the manufacture and supply of Bush Babies over a 5 year period. Based upon certain assumptions formed by reference to the number of unit sales subsequently achieved by Golden Bear and a predicted sale price per unit, Mr Whittle's third witness statement put that loss as being in excess of \$4 million (alternatively, \$1.656m under the notional 2 year term previously agreed).
9. However, following the transfer of the proceedings to the Bristol Business and Property Courts and before the claim and counterclaim came on for trial, Dowman indicated that it was not pursuing its claim in contract but instead its alternative pleaded claim for what the prayer to the Particulars of Claim summarised as being "*restitution of the value of the development services provided to [Toobz] between July 2014 and May 2016.*" In fact, Dowman has since confirmed by a CPR Part 18 response that the initial Bush Baby samples produced by it in October 2014 were the result of gratuitous work and so the claim in restitution is advanced in respect of the 20 month period down to June 2016 mentioned above.
10. Since the indication by Dowman, in mid-June 2019, that it was not pursuing its allegations of loss arising through a breach of contract, the claim against Toobz has been for the considerably more modest sum of £144,450. That VAT inclusive sum was identified in an invoice dated 1 December 2016 which Dowman delivered to Toobz after being told about the deal with Golden Bear ("**the 2016 Invoice**"). The 2016 Invoice lists a number of costed items but begins with the words "*For works undertaken to take your design for 'Bush Babies' from handmade samples to market ready products*". Although the nature and form of it assumes some established indebtedness, the 2016 Invoice really represents the quantification of the suggested claim in restitution. As I explain below, in a case of the present type such a claim is best expressed in terms of quantum meruit.
11. Paragraph 13 of the Particulars of Claim provides a fuller narrative for the work summarised in the 2016 Invoice and (with a correction made by the Reply to what had been an erroneous reference to "September 2015") introduces it as the product of the parties having, even in the absence of any binding agreement, "*nonetheless dealt with each other between September 2014 and June 2016 upon the common understanding, encouraged by Mr Coates on behalf of [Toobz] that, in return for the provision of its development services, [Dowman] would be appointed as the manufacturer of Bush Babies.*"
12. Toobz has not only denied both the primary claim in contract and the alternative claim for restitution but advanced its own counterclaim. That counterclaim arises out of

what Toobz alleges to have been the supply by Dowman in December 2015 of approximately 2000 defective Bush Babies. Dowman had invoiced Toobz £7,244 for the supply of the 2,016 toys under what the parties had come to describe as the “initial order” (which had been quantified by reference to the Chinese Factory’s minimum production run of 56 dozen for each of the three Bush Baby styles – Kojo, Kewku and Yaimba – covered by it). That sum formed part of Toobz’s counterclaim. In addition, Toobz claimed the sum of £10,800 in respect of the anticipated profit that could have been realised on a sale of those toys had they not been defective, together with a further unliquidated amount of lost profit arising from the company’s inability to fully market the product at the February 2016 Toy Fair (Mr Coates confirming that the reference in the Part 20 Claim to the 2014 fair was a mistake).

13. At the case management conference which took place in August 2018, before the proceedings were transferred to Bristol, the deputy High Court judge, Mr Christopher Hancock QC, had directed that there would be evidence from a single joint expert in toy manufacturing quality control, in the form of a written report, to address Toobz’s allegation of defective manufacture in the initial order. As must be obvious, and was confirmed to me at the telephone hearing mentioned in paragraph 16 below, the court was therefore persuaded of the parties’ view that such expert evidence was reasonably required to resolve the counterclaim.
14. However, by a letter dated 11 December 2018 Toobz’s solicitors wrote to Dowman’s solicitors stating that an inspection of some of the toys supplied under the initial order had clearly revealed them not to be of satisfactory quality. Their letter said:

*“Therefore we write to confirm that our client no longer intends to rely on expert evidence in this matter, not least because the parties can save the costs of instructing an expert. We invite you to confirm your client’s position on this.”*
15. In fact, no agreement upon the way forward (in lieu of any expert evidence upon the alleged defects in manufacture) was reached between the parties and the consequence was that 6 months later Toobz made an application to the court which was aimed at ensuring that the Bush Babies supplied under the initial order (and other samples produced by Dowman and others including Golden Bear) were before the Court at trial. By an Application Notice dated 20 June 2019, Toobz sought an order (or perhaps clarification of its primary position) that it did not require permission to rely upon those physical items or alternatively that it should have permission.
16. That application came before me on a telephone hearing on 2 October 2019. For reasons which I expressed more fully at that hearing I rejected Toobz’s primary contention that it did not require any permission to produce at trial numerous items of real evidence when no notice of its intention to do so had been given in accordance with CPR 33.6 (initial witness statements were to be served by 2 November 2018 and supplemental ones by 14 December 2018) and the 4 day trial had been directed at the CMC on the basis that the counterclaim would be tried by reference to the anticipated expert evidence rather than the court taking time to physically inspect some or all of the initial order with a view to reaching a conclusion unguided by such evidence. As to Toobz’s fallback position, I rejected the application for permission to produce the toys covered by the initial order, not only by reference to the obvious jeopardy posed to a 4 day trial by the idea of me inspecting even a modest portion of them at trial (when the proposed expert would have done that in his or her own time) but also

because of the obvious doubt over me presuming to take on the task of an expert in forming a view as to whether or not any of them should be considered to be defective when the parties and the court had previously decided that the test in CPR 35.1 had been met.

17. However, I did not reject all of Toobz's application but instead made it clear that, subject to the need for them be proved at trial when only photographs of some Bush Babies had been exhibited to witness statements, certain samples could be produced at trial. The upshot of the hearing on 2 October 2019 was that I made an Order granting Toobz permission to adduce in evidence at trial 9 Bush Babies which were described by Toobz as follows: a pre-October 2014 version produced by Brazier & Co (the company which had produced samples of toys before Dowman and SJWG were asked to do so and which thereafter continued to supply their plastic elements); 3 produced by Dowman/the Chinese Factory in October 2014 (and therefore at a time when Dowman accepts it was acting for Toobz gratuitously); 4 produced by them in May 2015; and one Golden Bear Bush Baby produced in 2017. In the event, Mr Whittle did not accept at trial that some of those relied upon at trial by Mr Coates had been produced by SJWG, or were part of the batch to which they were suggested to belong.

### **The Legal Principles**

18. I have already outlined above the nature of Dowman's claim in restitution.
19. Mr Wibberley for Toobz submitted that Dowman had failed to identify which of the established categories of unjust enrichment it relied upon in pursuing that claim and that this was fatal to Dowman's case. I cannot accept that submission. The particulars within paragraph 13 of the Particulars of Claim are introduced (on the footing that the parties may not have reached a binding agreement) by the language quoted in paragraph 11 above. That clearly describes the situation of work being done in anticipation of a contract which is one of the established categories of such a claim. I also note that, in responding to paragraph 13, the Amended Defence referred to the deliberately positive tone of the emails sent by Mr Coates who "*appreciated that [Toobz] relied upon [Dowman's] goodwill as contractual terms had not been agreed.*" The Defence earlier referred to Mr Coates having engaged Dowman "*in the hope and expectation that that it would be willing to enter into a joint venture to produce and exploit the toys*". As Mr Wibberley pointed out, Mr Coates' witness statement made a number of references to the risk that the parties would not conclude firm arrangements for "*production or joint venture*" which he had mentioned to Mr Whittle in an early email of June 2014.
20. The parties therefore dealt with each other in anticipation of entering into a contract that would provide for the manufacture of the Bush Babies (if not more).
21. Despite its introductory language, the 2016 Invoice did not seek to recover an asserted value of the suggested enhancement of the Bush Baby's readiness for market which was said to be attributable to Dowman's efforts. Instead, the invoice claimed for the time of Mr Whittle, Mr Li and three designers at the Chinese Factory (at their respective hourly rates), for the cost of preparing for an EN71 safety test, a portion of the trade show stand at the 2016 Toy Fair, and for assorted incidental costs such as the

cost of materials and courier costs beyond those recovered under the invoice for the 2000 or so Bush Babies delivered in December 2016.

22. The claim based upon Dowman's efforts in working with Bush Baby samples to the point of the toy becoming a marketable product (per the language of the 2016 Invoice and paragraph 14 of the Particulars of Claim) is therefore one premised upon the unjust enrichment of Toobz. That enrichment is said to have been through the provision of services (rather than the transfer of money or an asset for which the defendant is said to be accountable) and the 2016 Invoice makes clear that Dowman values its restitution claim not by reference to the suggested enhancement in the value of the product on a "before" and "after" (or end-product) basis but instead on the basis on the suggested market price, and in some cases the disbursement costs, of those services. The suggested price of the services is therefore relevant both to the question of whether or not Toobz has been enriched and to the quantum of Dowman's claim (in the event of it being established, by reference to the circumstances of the case, that any such enrichment of Toobz was unjust and that Toobz has no defence to being held accountable in respect of it).
23. The parties were largely agreed upon the basic principles governing the claim in restitution though they differed upon their suggested application to the facts.
24. In *Benedetti v Sawiris* [2014] AC 938, at [10] – and again in *Menelaou v Bank of Cyprus Plc* [2016] AC 176, at [18] – Lord Clarke observed that:

“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? See *Banque Financière de la Cité v Parc (Battersea)* [1999] 1 AC 221, 227, per Lord Steyn; *Investment Trust Companies v Revenue and Customs Comrs* [2012] STC 1150, para. 38, per Henderson J.”
25. I return to these questions below in my analysis of Dowman's claim (in particular the second question in the light of Toobz's challenge to Dowman's standing to recover in respect of SJWG's efforts). For the moment, I confine myself to some observations which are material to the first question and Toobz's rejection of the suggestion that it was enriched by the work of Dowman and SJWG.
26. Unlike the other three cases identified in the paragraph 24 above, *Benedetti* involved a claim in restitution based upon the provisions of services rather than the payment of money. However, the claim in that case arose in circumstances where the parties had reached what can be described as a 'pre-service agreement' but one which the trial judge found had been abandoned and was therefore neither enforceable nor, for the purposes of the alternative claim in restitution, to be taken as a guide to the value of the services subsequently provided. The earlier decisions in *Countryside Communications Ltd v ICL Pathway Ltd* [2000] C.L.C. 324 and *MSM Consulting Ltd v United Republic of Tanzania* [2009] EWHC 121 (QB), also cited to me by the parties and referred to further below, each involved a basic sequence of events closer to the present case. They concerned claims of alleged enrichment through the

claimant's provision of services *in anticipation of concluding a contract* with the defendant under the terms of which those services would come to be rewarded.

27. In such a 'services' case, and assuming the four questions posed in *Benedetti* have been answered in favour of the claimant, the court must then proceed to value the defendant's unjust enrichment. *Benedetti* shows that this involves the court applying an objective test to the issue of the market value or price of the services. The focus is upon the defendant's gain rather than the claimant's loss. At this stage of evaluation of the claim the court may talk in terms of it being *a quantum meruit claim* so long as the need first to establish an element of unjust enrichment is not overlooked. In *Benedetti*, the only head of claim upon which the claimant succeeded at trial was the one for a 'quantum meruit': see the decision of Patten J at [2009] EWHC 1330 (Ch), [573]-[575]. That claim was based upon the defendants' enrichment through the transaction that they knew the claimant to be working on and in respect of which he expected to be paid for his services.
28. In both *Countryside Communications* and *MSM Consulting*, the court also used the language of 'quantum meruit' in addressing the claim in restitution advanced by the claimant as an alternative to that brought under an alleged contract. That said, in *Countryside Communications*, Mr Nicholas Strauss QC, sitting as a deputy High Court judge, referred to the decision of the Court of Appeal in *Brewer Street Investments Ltd v Barclays Woollen Co Ltd* [1954] 1 QB 428 (also cited to me) and the observation of Denning LJ, at 435, about such a claim not being one being one for recovery "*on a quantum meruit as ordinarily understood*". However, it should be noted that, although Denning LJ preferred to analyse his finding of liability as being based on "a claim in restitution", he also used language - "*a request implied in law*"; "*by means of implying terms*"; and "*they in the first place agreed to take responsibility for [the work]*") - which seems to come very close to the traditional implied contract analysis of the claim, based upon the imputation of a promise to pay, as favoured by Somervell LJ in that case.
29. Where a quantum meruit award is pursued on a claim in restitution the basis for it is therefore not an implied term of an established contract to pay reasonable remuneration for requested services (in the absence of any express agreement upon the amount or rate) or the terms of a contract which for some reason has become unenforceable but which remains relevant to valuing such services. Those contractual or quasi-contractual situations are what, so I would have thought, a common lawyer would ordinarily have understood to be the circumstances for a quantum meruit claim, at least until the more recent decisions considered in this judgment. Instead, the basis for the claim in restitution is *the enrichment of the defendant* through the provision of those services. However, and as Mr Strauss QC observed in *Countryside Communications*, at 345-6, the facts in *Brewer Street* indicate that the plaintiff's works of alteration had been intended to benefit the defendant but did not actually come to do so. The defendant in that case never took the lease of the premises which had been altered, at its request, in anticipation of it doing so.
30. On the *ex post facto* assessment of the value of the services at the time they were provided the decision in *Benedetti* confirms that the defendant may (under the principle of 'subjective devaluation') seek to prove that he genuinely valued the services at less than market value so as to reduce the court's assessment of their value to him. Mr Wibberley for Toobz also cited the speech of Lord Nicholls in *Sempra*

*Metals Ltd v IRC* [2008] 1 AC 561 (which did not concern a quantum meruit claim for services rendered but instead a claim in restitution for interest on money had and received) where, at [119], his lordship recognised the scope for subjective devaluation. The principle of subjective devaluation was expressly invoked by paragraph 17D of Toobz's Amended Defence.

31. However, any attempt by the defendant to reduce the value of the services to less than what the market would pay, possibly even to nil, can itself be defeated by the claimant establishing either that the benefit was incontrovertible (such as saving the defendant a necessary expense) or that the defendant requested or freely accepted the benefit: see *Benedetti* at [25] (per Lord Clarke), [112]-[113] and [119] (per Lord Reed) and [189]-[190] (where Lord Neuberger said it would be a “*very unusual case*” where such a request, with no indication from the defendant that he intended to pay less than market value, would not provide an answer to such an attempt).
32. The third question posed in *Benedetti* highlights the need for the claimant to establish that the circumstances in which the services were provided to the defendant fall within one of the categories which the law recognises as giving rise, in principle, to a claim in restitution. On that point, and as I have noted, Dowman relies upon its services having been provided in anticipation of a contractual agreement which did not materialise: see generally Chapter 16 of *Goff & Jones on Unjust Enrichment* (9<sup>th</sup> ed) on this established category of unjust enrichment claim.
33. In *MSM Consulting*, at [171], Christopher Clarke J referred to the helpful analysis of this type of restitutionary claim by the deputy judge in *Countryside Communications*, at 349, from which he derived 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*): *Lacey*<sup>1</sup>; for that reason it does not seem to me that section 18 of the Estate Agents Act 1989 has any application to this claim;
  - (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;

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<sup>1</sup> *William Lacey (Hounslow) Ltd v Davis* [1957] 1 WLR 932



(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*<sup>2</sup>;

(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.”

34. It will be noted that the third point, relating to the trigger of the restitutionary obligation, is expressed by the judge using the kind of language that later came to be used in *Benedetti* when addressing issues over the *extent* of the enrichment for which the defendant should be answerable and what I might describe as the fetter upon the principle of subjective devaluation: see paragraph 31 above. Although it is clear that the imposition of an obligation to make restitution and any decision to award the claimant so much as he deserves for his services both depend upon the court’s objective assessment of the circumstances in which they came to be provided, and *not* upon any attempt to analyse the parties’ intentions in that regard, the fact that the defendant requested them in the knowledge that they were not being provided gratuitously is clearly relevant to that assessment.
35. The Amended Defence says that “*the development work undertaken by the Claimant, as well as other items invoiced by the Claimant, had no intrinsic financial value and did not benefit the Defendant.*” However, in my judgment, the authorities show that that a claim in restitution for services provided in anticipation of a contract (otherwise than gratuitously or where their preparatory nature indicates they were provided speculatively and at the claimant’s risk) may still succeed even if the idea of an enduring benefit to the defendant is essentially a fictional one, as it was in the *Brewer Street* case. It is important to note that, when addressing such a claim in *MSM Consulting*, Clarke J formulated his third proposition having quoted and endorsed the observation of Mr Strauss QC in *Countryside Communications*, at 349, that, even where the benefit is less than real, “*the judgment of Denning LJ in the Brewer Street case suggests that the performance of services requested may of itself suffice amount to a benefit or enrichment.*” Although not also quoted in *MSM Consulting*, the deputy judge had earlier (at 345, and with his emphasis) observed that “*Denning LJ’s judgment supports the view that a claim in restitution can be brought, where the ‘benefit’ or ‘enrichment’ consists of the performance of work at the defendant’s request which, as it turns out, has not provided any actual benefit to the defendant at all.*”
36. In my judgment it is therefore clear that a defendant will normally be precluded from denying the necessary element of enrichment not only where the resulting benefit is incontrovertible but also where he requested the services (or at least acquiesced in the claimant providing them, having had a reasonable opportunity to reject them, so to have freely accepted them either expressly or implicitly) in the knowledge that they were to be paid for. The language of the judgment of Denning LJ in *Brewer Street* reveals just how close that last situation is to a quantum meruit claim based upon an

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<sup>2</sup> *Jenning and Chapman Ltd v Woodman Matthews & Co.* [1952] 2 TLR 406.

implied contract but, nevertheless and as a matter of strict analysis, the claim to recover their value remains one in restitution. I note that, in addition to the decision in *Brewer Street*, the deputy judge in *Countryside Communications* considered a number of other authorities (including the decision of Robert Goff J in *British Steel Corp v Cleveland Bridge & Engineering Co. Ltd* [1984] 1 ALL ER 504) which lend further support to his above quotes and to this particular piece of legal taxonomy.

37. The parties also cited to me the well-known decision of the House of Lords in *Cobbe v Yeoman's Row Management Ltd* [2008] UKHL 55; [2008] 1 W.L.R. 1752. Certainly by the start of the trial in that case the claimant's claim was first and foremost one founded upon a proprietary estoppel. However, as Lord Scott noted, at [9], a further amendment to add a claim for "*such restitution as the court considers just*" left it open to the court to award alternative relief, in respect of his time and expenditure incurred in obtaining planning permission for the defendant's property, "*on the basis of unjust enrichment, or a quantum meruit or a consideration that had wholly failed.*" The House decided that proprietary estoppel claim failed but that there should be an assessment of the claimant's 'quantum meruit' entitlement. On the basis of Lord Scott's analysis of the three common law remedies, at [40]-[44], each of which was noted to produce much the same result, it can be said that he favoured 'quantum meruit' over 'unjust enrichment'. However, in addressing quantum meruit under a separate heading from unjust enrichment, I note that he used language (including as to "*the extent of the unjust enrichment*") which is entirely apposite to the category of claim with which I am concerned. Lord Walker, at [85], referred to the claimant being entitled to "*restitutionary relief*".
38. The resulting financial benefit to the defendant in that case was very real, and well in excess of the generous assessment of the value of the claimant's services directed by the court, but (even though it appears that *Cobbe* was not cited to him) the reasoning and outcome in *Cobbe* provides further support for what Clarke J came to say soon after in *MSM Consulting* in his analysis of the claim in restitution.
39. Establishing that services have been provided at the defendant's request is not only material in deciding whether or not a claim lies in restitution but, as I have already noted, is also important in quantifying the claimant's likely recovery. Where the services have been requested or freely accepted by the defendant - with no strings attached of the kind that might alert the provider of them to the precariousness of a claim in restitution, or at least one for their full market value, should they not later agree upon a contract - that fact is likely to place a fetter upon the principle of subjective devaluation when it comes to putting a market value of the services by which the defendant is taken to have been enriched.
40. It therefore follows that I do not accept without qualification the submissions made by Mr Wibberley in his skeleton argument that "*the service needs to be an end in itself, not merely a means to an end*" and that the development services which Dowman claims to have provided "*are only of value if something was being done to develop [Toobz's] concept, leaving [Toobz] with something of (increased) value in the end*". In his closing submissions, Mr Wibberley re-emphasised "*the point that the foundation of the cause of action is enrichment not the time spent, so although it is easy - and this is the quantum meruit point that we touched on at the outset - to say that this is an implied contract, that is not the right way of looking at it. The first stage of the assessment has to be the benefit in your hands.*"

41. Those submissions may be well aimed when considering the question of whether the defendant has received an incontrovertible benefit but, in my judgment, neither on the issue of liability or quantum do they conclusively address the enrichment of a defendant who has requested the services knowing that they were not being provided gratuitously. As Mr Wibberley recognised by reference to a passage in *Goff & Jones*, op. cit., at para. 5-36, a claim of unjust enrichment may lie in respect of the provision of ‘pure’ services, which leave no marketable residue in the defendant’s hands. For the reasons given in paragraphs 33 to 38 above, it is not just the provision of a service which can be shown to have produced an indisputable financial benefit but also one provided at the request of the defendant which *may* (in and of itself) be treated as constituting a real enough benefit to support a claim for unjust enrichment. Such deemed enrichment, by reference to the circumstances surrounding the request when made, may support a claimant who is unable to later demonstrate at trial that the defendant derived an incontrovertible benefit from his efforts.
42. However, it is also clear from the fourth proposition in *MSM Consulting* that simply establishing that the defendant had requested the services, in the manner contemplated by the third, will not be conclusive of the claimant’s suggested entitlement. As can be the case even where the defendant has incontrovertibly benefited from his *involuntary* receipt of the claimant’s services, the court may nevertheless refuse to order payment for what they would otherwise have been worth if the circumstances show that the claimant knowingly took the risk that he would only ever be paid for them under the express or implied terms of the hoped-for contract with the defendant. Even if the relevant work went beyond the kind of preparatory work contemplated by the second proposition, the court may conclude from its objective assessment of the circumstances that the claimant continued to provide his services on the same speculative basis, with knowledge of the risk that it would otherwise go unpaid. If it does, then the circumstances will show that the defendant’s enrichment was not “unjust”.
43. In addition to denying any enrichment at all by the matters covered by the 2016 Invoice, or that it had been at the expense of Dowman as opposed to the Chinese Factory, paragraph 17 of the Amended Defence denied that any such enrichment was unjust. Paragraph 17C said that the invoiced matters were undertaken or incurred on a gratuitous basis, in the hope of securing a contract with Toobz, and was preparatory work in respect of which Dowman had knowingly and freely undertaken the risk of it going unremunerated. Building on that line of defence, Mr Wibberley submitted that the work was undertaken by Dowman and the Chinese Factory in an attempt to show that they could mass produce the Bush Babies. He said that it was therefore akin to the preparatory work in a “beauty contest” of the kind mentioned in *MSM Consulting* and that, in circumstances where Dowman could have sought Toobz’s agreement that it should be paid separately for such development work when that was *not* work that was to be the subject of any later production contract, Dowman had consciously and deliberately undertaken the risk of not being paid for it.
44. Whether or not some or all of the items on the 2016 Invoice are to be treated as caught by the second proposition in *MSM Consulting* is an issue of fact. Obviously, it need not necessarily be decided in favour of Dowman simply because Dowman is prepared to recognise that the early work it and the Chinese Factory undertook down to October 2014 was done gratuitously. Similarly, the potential implications of the

fourth proposition must turn on an analysis of the facts of the present case and they include the point, by which Toobz puts much store, that Dowman invoiced and was paid for the Bush Babies supplied under the initial order in December 2015.

45. Nevertheless, the Amended Defence and Mr Coates' witness statement referred to the work which Dowman undertook as having been provided on a "speculative" basis and, although that is fundamentally a question of fact, it masks a point of principle. I think it is important to recognise that this type of restitutionary claim necessarily involves an acceptance that the parties were proceeding in a position of uncertainty and a situation where a contract was anticipated but not yet concluded. If the claimant's involvement in what between the parties must therefore have been the inevitable uncertainty (or degree of speculation) over the conclusion of a contract was enough to defeat a claim in restitution, without further consideration of the extent of his appetite in that context for a gamble that may not pay off (at all), then this category of unjust enrichment claim would probably not even exist.
46. As I observed to counsel during their closing submissions, most speculators have their eye on the main prize and in the present context the court must decide whether or not all of Dowman's efforts should be treated as only being part of a complete gamble that the prize of a production contract might not be won. The authorities are clear in showing that decision must be based upon careful consideration of the circumstances in which the claimant came to provide his services in anticipation of a contract which, in the event, was never concluded.
47. In *Countryside Communications* the court reviewed earlier authority which variously had considered the concepts of "fault", unilateral abandonment or a change of mind on the part of the defendant in relation to the proposed contract, in contrast to the situation where there had simply been a bona fide failure to reach agreement upon the contractual terms. The judge then included, within the four factors operating upon any decision to impose an obligation to make restitution, the second one of considering "*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.*"
48. I have already mentioned the decision of the House of Lords in *Cobbe*. In that case the claimant provided his services in anticipation of a contract which (given its subject matter) they knew would not be enforceable in the absence of it being reduced to writing. However, the defendant's unilateral decision to withdraw from the proposed transaction was no bar to the claimant recovering the value of those services. The reference in *Countryside Communications* to the parties expressly or impliedly negotiating on a subject to contract basis must now be read in the light of *Cobbe* as the later decision indicates that the point cannot be regarded as decisive on the question of whether the claimant has taken the risk of remaining entirely unrewarded for his efforts while a contract was in prospect.
49. I have also already referred to the fourth proposition in *MSM Consulting* which requires the court to consider whether "*all the circumstances*" support the conclusion that claimant should be treated as having shouldered all of the risk that the value of his commitment to the proposed contract should go unrewarded. It is the fifth proposition in *MSM Consulting* which encapsulates the notion that, in circumstances

where no contract resulted and otherwise the claimant's services will go unrewarded, the defendant may instead be held responsible by "*behaving unconscionably*" in not making any recompense for them. *Goff & Jones*, op. cit. at para. 16-10, under the heading "Risk", state that it cannot be assumed that the claimant has taken the risk of receiving no reward for his services if the anticipated contract does not materialise for any reason; and it may be necessary to investigate whether the defendant simply changed his mind about proceeding to a contract.

50. The court must therefore consider the reasons why no contract between the parties resulted and any part the defendant might have played in increasing the level of risk of one not being concluded beyond that which the claimant can be taken to have assumed when he began to provide the relevant services.
51. That point might be expressed colloquially in terms of asking whether the defendant at some stage changed 'the rules of the game', most obviously by moving the goalposts at which the claimant thought he had been aiming. Again, this is an issue of fact, though the second proposition in *MSM Consulting* provides a pretty firm steer against recovery for work which is properly to be regarded as preparatory or undertaken before 'the game' can be said to have commenced. In his witness statement Mr Coates said that Dowman knew that Toobz was seeking something more than a manufacturing contract and that its preference was to agree a deal with a company that would also distribute the product. He said in his evidence that he had never been looking for a stand-alone manufacturing contract. That observation was made in hindsight, after he had decided to proceed with Golden Bear.

### Golden Bear

52. Since the expiry of the 20 month period on which Dowman bases its claim, Toobz has entered into two agreements with Golden Bear, albeit that the second superseded the first in the sense that took effect from the same date as the first one: 1 September 2016.
53. The first agreement was dated 16 September 2016 (for a term of 3 years and 4 months from the effective date) and the second was dated 21 December 2017 (for a term of 15 years from that same date). The first ("**the 2016 Licence**") was described as a "License Agreement in respect of Bush Babies" and the second as a "Master Toy License Agreement in respect of Bush Baby World".
54. The 2016 Licence granted to Golden Bear the right to use "the Brand" to manufacture a category of "plush toys" based on that brand. This reflected the terms of an earlier "Merchandising Deal Memo", dated 10 June 2016, which identified the product as "Collectible Plush range of toys based on the Bush Babies Brand with patented internal mechanic for moving eyes and ears." That memorandum referred to Toobz providing ongoing creative advice and support. Clause 3.1 of the 2016 Licence expressly recognised that, before Golden Bear went into production with the Bush Babies it would seek Toobz's at the pre-production stages of creating the first concept and sample, rough design and artwork, pre-production sample and initial design and artwork. It was obvious, therefore, that Golden Bear were going to work further with

the Bush Baby, as the concept of the toy existed by mid-2016, and work further with it before going into mass production.

55. As indicated by the description given to it, the later licence of 2017 had a different focus. It covered all toys (not just plush toys) under the Brand and, in addition to the existing patent in respect of the moving eye mechanism and other intellectual property rights belonging to Toobz, also provided for the parties to share their jointly owned intellectual property rights acquired since their entry into the 2016 Licence. Golden Bear was granted a licence to use all such rights in connection with the Brand and any plush toys incorporating the Toobz's rights whether or not in connection with the Brand.
56. For the purposes of assessing the merits of Dowman's claim in restitution it is obviously the 2016 Licence, rather than the later one, which provides the appropriate reference point for considering whether or not Dowman provided Toobz with services to support its claim in restitution. That is because it was closer in time to the cessation of Dowman's involvement with the Bush Babies before Golden Bear set to further work upon their design.
57. With that observation in mind, I should note that there was one particular limitation upon the evidential value of the copy of the 2016 Licence in the trial bundle. That is because a copy of Schedule 4 to the Agreement (which served to define the names, logos, IP rights and designs making up the Brand) was missing from the bundle.

### Witnesses

58. The evidence at trial was given by Mr Whittle, Mr Coates and Mr Martin Lowde.
59. Mr Lowde is the Managing Director of a company called Brands with Influence. Brands with Influence represent clients in licensing the intellectual property rights in their products to third party manufacturers and distributors. Toobz entered into Heads of Agreement with Brands with Influence in early February 2016 for that company to act as agent in promoting Bush Babies through licensing the brand to manufacturers and securing retailers and distributors. By an email of 28 January 2016 to Mr Coates, Mr Lowde recognised the tension between his own company's interests and those of Dowman. In circumstances where he respected "*their distance travelled with you*", he anticipated that Dowman "*will come back to you and try to cut us out.*" It was Brands with Influence who secured for Toobz the deal with Golden Bear.
60. I found Mr Whittle to be a generally reliable witness who was prepared to concede that his recollection of events may have suffered with the passage of time. The most significant illustration of this was in connection with his acceptance that he may have been wrong to pin the date of the previously alleged initial agreement between Dowman and Toobz, for the manufacture of Bush Babies, to the date of 3 November 2014. He accepted in cross-examination that it was probably later, around 11 November 2014, that the alleged agreement was reached. Mr Coates denies there was one. I do not now have to reach a decision on that issue, for the purpose of determining the claim, though Toobz's challenge to the reliability of Mr Whittle's

account of events in support of the former contract claim is obviously of potential relevance to my assessment of his evidence in support of the claim for restitution.

61. In relation to that claim, Mr Wibberley was also able to establish in his cross-examination of Mr Whittle that there had been shortcomings in Dowman's disclosure, in that it was clear that Mr Whittle had not thought to disclose the regular email communications that he said he had with Mr Li. Those communications would have related to the Bush Babies (as well as other business matters between Dowman and SJWG) and would clearly have been relevant to the claim to restitution for the services provided by both.
62. Nevertheless, whilst the correspondence between Dowman and SJWG would also have potentially been of real significance in relation to any understanding on the part of Dowman that an oral agreement for manufacture had been reached in November 2014 and then re-visited a year later, there was no shortage of documentation before the court which evidenced the efforts that SJWG and Dowman made in responding to the requests of Mr Coates over the relevant 20 month period for the restitution claim. The production by the Chinese factory of numerous samples of Bush Babies is evident from the documentation that was disclosed and within the trial bundle.
63. In my judgment, such failings as there were in the evidence of Mr Whittle were not such as to have a detrimental impact upon Dowman's remaining claim in restitution. That claim is made *because* it is now recognised that no binding agreement was reached between the parties. As I remarked to Mr Wibberley during his closing submissions, Dowman may have given up its contract claim for reasons that a lawyer would grasp more readily than a non-lawyer like Mr Whittle might. For example, it seems clear from the correspondence surrounding the initial order that the parties had yet to fix upon a production price per unit (when Mr Coates was talking in June 2015 in terms of a retail price of under £10).
64. I regret to say that I found the evidence of Mr Coates to be much less reliable. I do not go so far as to accept Mr Goldberg's submission that he was a dishonest witness who was willing to say anything to assist his company's defence. However, by the end of Mr Coates' evidence it was clear to me that, in hindsight, he had convinced himself that the efforts of Dowman and SJWG were not as valuable as he had previously considered and openly recognised them to have been.
65. This exercise in denigrating the value of Dowman's efforts involved Mr Coates producing some samples of the toys at trial (some with tails in the wrong place, so that they would not sit, and at least one other with loose fur around the head) with a view to establishing poor workmanship at the Chinese factory. Mr Whittle disputed the origin and date of production of those samples, and it may well be the case that Mr Coates had since done some further experimental work on some of them in advance of the trial. In these circumstances, I have felt unable to reach any firm conclusions about what those samples reveal when there is no evidence of Mr Coates having made corresponding complaints at the time he was seeking the development support of Dowman and the factory. For example, he made no complaint at the time that some of the samples would not sit up because the tails were incorrectly fitted.
66. For reasons explained above in the context of the legal principles, I think Mr Coates' attempt to establish that no end product of any real value came of Dowman's efforts is

one that perhaps does not engage with the true thrust of Dowman's claim in restitution. I also consider his exercise in subjective devaluation of Dowman's services to be at odds with his position at the time, as he expressed it in correspondence, and some of which I quote below. On that basis, and as urged by Mr Goldberg, I have therefore proceeded on the basis that I should be sceptical about the reliability of Mr Coates' evidence and treat it with caution where it was not corroborated by contemporaneous documentation.

67. There was an issue between Mr Whittle and Mr Lowde as to whether they had spoken in early February 2016 (as suggested in the exchange of emails between Mr Lowde and Mr Coates on 3 February 2016 mentioned below) with the result that Dowman would have learned that Brands of Influence had been engaged to find a licensee of the product. Mr Lowde reported to Mr Coates on 3 February 2016 that Mr Whittle did not want to make a proposal in relation to manufacturing until a distributor had been found. Mr Lowde's evidence was to the effect that Mr Whittle had also made it clear that it was not interested in distributing the toys. Toobz relied upon these matters to argue that it was therefore clear that Dowman did not consider itself to have already reached a firm agreement with Toobz for the manufacture of the toy.
68. Mr Whittle had no recollection of a telephone conversation with Mr Lowde in early February, nor of being told by anyone in his office that Mr Lowde had tried to make contact. Mr Whittle said that he was introduced to Mr Lowde by Mr Coates at the Toy Fair which took place later that month, after he (Mr Whittle) had seen them having a conversation together. Neither did Mr Whittle have any record of an email or letter from Mr Lowde in circumstances where he (Mr Lowde) had told Mr Whittle that he would "*drop him a line*" explaining their plans.
69. I prefer the evidence of Mr Whittle on this evidential conflict. I am satisfied that Mr Lowde spoke to a Mr Peter Bourne (who was not employed by Dowman but instead a separate company interested in providing packaging for the toys) but not Mr Whittle. As for the suggestion that Mr Lowde wrote to Mr Whittle, it seems to me unlikely that Mr Lowde would have written to Mr Whittle explaining the plans of Toobz and Brands with Influence and (as he also indicated to Mr Coates he would) saying "*we won't do anything without discussing with him first*". The quick response from Mr Coates to Mr Lowde's email containing that suggestion – which anticipated "*awkward moments*" with Dowman – would probably have discouraged him from saying that. And, of course, later events show that Brands with Influence and Toobz did proceed with Golden Bear without first telling Dowman.
70. In any event, I do not regard this point of disagreement between the witnesses as being of any great significance to Dowman's claim in restitution. Whether or not an oral agreement for Dowman to manufacture the Bush Babies had already been reached is not a matter I now have to decide. So far as Dowman's alternative claim is concerned, it is clear from the contemporaneous documentary evidence that Toobz continued to hold out the prospect of Dowman being contracted to make them well after the Toy Fair in February. I refer below to an email that Mr Coates sent to Mr Whittle on 4 May 2016 (at a time when Toobz was clearly hopeful that Brands with Influence might produce the rival "*larger than life offer*" mentioned in the exchanges on 3 February) in which he asked him to "*please stick with me*" on a proposal where "*I want to start selling toys directly to the public from mid October.*" Even as late as May 2016 Mr Coates was therefore holding out the prospect of a manufacturing role



for Dowman. This is despite the fact that Toobz's prior engagement of Brands with Influence in the February had significantly increased the risk of the goalposts being moved without Dowman knowing.

### Analysis

71. It is probably because paragraph 14 of the Particulars of Claim referred to Dowman having (through the provision of advice upon design and materials and the production of several samples over almost 2 years) developed the Bush Babies product into one which "*as at June 2016, was ready to be put into mass production*" that, in my view, the parties have perhaps focussed too much upon the question of whether or not they had, by that date, collaborated to produce something that Golden Bear was more or less able to adopt for the purpose of commencing mass production of Bush Babies. I agree with the general thrust of the argument by Toobz that the evidence does not support that conclusion. Mr Whittle recognised that the initial order, fulfilled in December 2015, was anything but the finished product. I have already observed that the 2016 Licence expressly contemplated further work with the concept.
72. That said, the value to Toobz of being able to show Brands with Influence and Golden Bear actual samples of the toys which had been developed with Dowman and SJWG over the previous 2 years should not be overlooked. It is a point that emerges from Mr Coates' email to Martin Lowde on 27 May 2016:
- "As Golden Bear are so committed to this project we should have a meeting with them to discuss manufacturing and securing property rights as soon as possible. The new drawings for registering the designs will be ready today and we can then decide which other territories to register in. Although details have been passed in drawings and text to Golden Bear there is nothing like being shown how the toy is assembled in sequence."*
73. However, paragraphs 13 to 15 of the Particulars of Claim clearly support a claim based upon the second limb of the third proposition in *MSM Consulting*: the encouragement and acceptance by Toobz of Dowman's development services which advanced the concept of the toy. It follows from my analysis of the authorities that, in relation to the allegedly non-gratuitous services provided by Dowman after October 2014 at Toobz's repeated requests, the fetter upon the principle of subjective devaluation also serves to limit the significance of any point sought to be made by reference to the further design work required of Golden Bear.
74. On my assessment of the evidence, it is clear that Dowman has made out its claim in restitution based upon the matters particularised in paragraph 13 of the Particulars of Claim. Indeed, the only point in what I consider to be an otherwise unmeritorious line of defence by Toobz, which has caused to me to hesitate over Dowman's ability to recover in respect of all the items in the 2016 Invoice, is the point taken by reference to the separate legal personality of SJWG (and the absence of any claim from the Chinese factory). I return to this below.

75. One of the pieces of correspondence pleaded in paragraph 13 is the email written by Mr Coates on 4 April 2016 Mr Coates had written an email to Mr Whittle to bring him “*up to date with BB news*”. This was towards the end of the period in respect of which Dowman now claims.
76. Mr Coates told Mr Whittle that he was:
- “waiting on the final plastic tube designs to come through so I can then get production costs and time of delivery. The last two toys from the factory work really well and resolved the last few problems. I am confident this will be the blueprint we move forward with. ....”*
77. Mr Goldberg contrasted the terms of that message with an email he wrote to Mr Whittle on 30 June 2014 (responding to Mr Whittle saying that the presence of plastics in the toy meant that “*I don’t think it something we could do for you now*” but indicated he would be happy to make an introduction to another factory in Southern China for which the product would be ideal). In that message of June 2014, Mr Coates had said of his experience with the production of samples by others:
- “At the moment all the plastics are made and the factory is applying the fabric to the plastics as I want, the problem is more about future design work, communication and consistency. One of my problems is the supply of fabrics and I need to be closely involved in the selection. I am finding hard to relay what is required and how important some issues are with assembly. Any assistance will be most appreciated.”*
78. In the event, Dowman and SJWG did provide the requested assistance. When he was cross-examined about the contrasting terms of these two emails, 21 months apart, Mr Coates accepted that “*we had travelled a long way, yes.*” However, he then immediately said: “*When I say “we”, I mean I am the one – as far as I’m concerned – doing, having the aggravation and doing all the development work. I know I put it in terms of “we”; it’s just to keep them included. It’s me who is actually doing the development work.*”
79. As far as I am concerned, however, Mr Coates has through that caveat chosen unrealistically and unfairly to overlook the very significant input made by Dowman and SJWG during that period. Their input cannot be ignored when it is safe to infer that Toobz would not have been content to see Brands with Influence providing Golden Bear with the toy’s design as it stood in 2014.
80. A trawl through the contemporaneous documents in the trial bundle (in particular pages 61 to 253 of Mr Coates’ exhibit “ASC1”) clearly shows how much Mr Coates’ caveat departed from reality. The reality included the pleaded trip by him and Mr Whittle to the SJWG’s factory in March 2015 by which time, Mr Whittle explained, SJWG’s designers had identified two design problems relating to gluing (of fabric around the face – which led to the use of a drawstring instead – and of fabric to the inner tubes). Mr Coates wrote a list of 8 points to be addressed during that visit – the

purpose of which was, he said, to “*work with key production persons in the research of fabrics and toy development following the factories first samples*” – and Mr Whittle followed it up with his email of 28 March 2015 in which he said “*we can continue to make other samples*” and “*move forward to a sample order and a test production order.*”

81. By way of a few examples, the following communications from Mr Coates illustrate what he clearly regarded at the time as being the value of the input provided by Dowman and SJWG:

- i) “*I’m ready to work with the factory to develop samples anytime. Let me know how you think we can move things forward and factory approach to development costs and invoicing for future work. Is there a project manager I could work with at the factory who could oversee everything that is Little Handfuls?*” (email 11 November 2014);
- ii) “*Thanks for the meeting yesterday, and for overseeing the BB/WB project. Good luck with the factory – I honestly think we are not far away from what needs to be achieved.*” (email 26 November 2014);
- iii) “*Now that they can work with new pattern we just need to get the fabrics right. I need to see the fabrics used on their patters used with my pattern. .... Can you get Li Jian Guo to include some of the same fabrics and any other suitable fabrics so I can help make samples. Sorry to add to your work load – I know how busy you are at the moment.*” (email 27 May 2015);
- iv) “*Many thanks for all your work developing this product. I know together we will make this a very successful selling toy.*” (email 1 July 2015);
- v) “*I am doing an autopsy on the toys this morning and will send the details to you later. If we can preserver (sic) a little longer I know things will come right. I have to say though the problem in the movement is an error that should have been avoided given the attention I paid to this in the original drawings and instructions. As the company have put so much time into this I will meet full production costs but the next consignment will have to see everything put right.*” (email 14 December 2015);
- vi) “*I am writing as a personal thank you for all the work and valuable help everyone has put in so far. It is a great achievement to have got where we are and I know how much work you have personally put in to make things happen. Although we are not quite there with the finished product you have shown from the first delivery that the toys look very good, are sewn and put together very well and most importantly the construction/assembly can work well in production. Following this first consignment I hope everyone feels the same way as I do that we can all work together on some small modifications to turn this into an exemplary (brilliant) all round soft toy. As outlined to Dominic yesterday there are still some very important changes to be made but although I was very disappointed with the ear movement of many of the toys I found in my determination to stretch and pull the fabric to free them they are incredibly strong and well put together. Dominic has very kindly allowed me to use a small section of Dowman’s stand at the Spring Fair in February and I hope*

*you will be able to produce a small quantify of toys that introduce the new details. There are no dramatic changes required, but with a few pattern changes at the top of the head we should achieve a lot more upward movement.”* (email 15 December 2015 to Mr Li);

vii) “.... *I have made some significant changes to ears. By using a much thinner fabric for the back and front of the ears the whole ear construction is lighter and easier to use. I have made samples and the sewing is more accurate and will help quality and consistency in production. Can you source an ear fabric which is thin and is the same or similar to the hands and feet? You and your factory have been a great help but we are not quite there at the moment. We are so close to making a truly original toy it would be a shame not to finish this last piece of development work. Could you pass on your comments to the new designs attached.”* (email 31 December 2015 to Mr Li); and

viii) “*My apologies for the delay – plastic are in a final stage of design. We are looking at mid June for new plastic components to be supplied. I want to start selling toys directly to the public from mid October. .... This is turning into a long protracted development process which does not make for an easy life – please stick with me.”* (email 4 May 2016)

82. In his testimony, Mr Whittle gave an answer which showed how demanding of his and the factory’s time and resources Mr Coates had been during 2015. He said that Mr Coates was making too many revisions (on something like a weekly basis) and making them even before he had seen the factory’s latest sample: “*I was having to pile up his revisions because it just didn’t make any sense. His revisions were like three stages ahead of actually where we were with the samples, so we were actually getting to the point of saying “Yeah, we need to bring this to an end now”. I wasn’t convinced the product was ready but we had to bring that sort of process to an end.”*
83. Mr Whittle said that, by June 2015, “*we were on about variation 11 or 12”*. He said that when, in that month, Mr Coates talked about submitting an order for 12,000 toys (4000 of sample J1120 in each of ginger, black and grey) it “*came as a bolt out of the blue”* as “*we weren’t really finished. We were making all kinds of revisions.”*
84. Mr Whittle also said, and I accept, that until Brands with Influence set Toobz on a different path, that Mr Coates had been “*desperate for us to become the manufacturers, I never imagined for one minute that he would do this to us. The situation wasn’t where I was selling to him, he was trying to sell to me.”* A strong flavour of this emerges from the contemporaneous correspondence, including some of it quoted above. It is also reflected in the Amended Defence which I have quoted in paragraph 19 above.
85. It is therefore abundantly clear from the evidence at trial that Dowman comes within the third proposition in *MSM Consulting*.
86. In my judgment, it is equally clear that Dowman should not be treated as having taken the risk of going largely unrewarded for its efforts simply because (as it now recognises) no production contract was agreed with Toobz.

87. So far as the fourth and fifth propositions in MSM Consulting are concerned, I conclude that Toobz has behaved unconscionably in seeking to deny Dowman's alternative claim because no contract was concluded between them.
88. So much is obvious from an exchange of emails between Mr Coates and Mr Lowde on 3 February 2016. Mr Coates had by then obviously told Mr Lowde about Dowman's involvement to date.
89. By an email on the morning of 3 February, Mr Coates reported to Mr Lowde that Mr Whittle had phoned with an update about the stand at the Spring Fair and had mentioned that he was awaiting a letter of intent from Brands with Influence in relation to manufacturing. Mr Lowde responded by saying that Mr Whittle was interested in manufacturing ("*This makes sense as he has done a lot of the dev. But leaves us with the situation of needing to get orders, or a distributor, or take the risk of stock*") and suggested that, having garnered interest at the Spring Fair, his company would then have ammunition to help "*pitch to big players*" and "*in two to three weeks we can then take some decisions on people like Dominic*". Mr Coates replied by saying: "*I'll leave it with you as regards Dominic – I really want to accommodate but if some larger than life offer comes our way it can't become a deal breaker. This is where I dip out over negotiations. At the moment I want to fend off any awkward moments at the fair.*"
90. Within a fortnight or so of Mr Coates' email of 4 May 2016 (partially quoted above and envisaging that Toobz would act as distributor) Brands with Influence were reporting to Mr Coates upon Golden Bear's strong interest in the Bush Babies product and that they were negotiating upon a "*Worldwide deal with them acquiring rights for global production and distribution of the plush toys.*"
91. Only once arrangements with Golden Bear appeared to be quite firm did Mr Coates write to Mr Whittle in terms indicating Dowman and SJWG would no longer be involved. He did so in terms that were self-serving and, in my view, disingenuous. His email of 13 June 2016 said that recent developments with a rival producer had happened very quickly (only in the preceding 3 weeks) and was written as if he had never been interested himself in marketing the toys. His later email to Mr Whittle of 19 October 2016 stated that it had very nearly worked out with Dowman but went on to assert "*you know I was always looking for a bigger player to step in and take over the operations if and when it got going.*"
92. Mr Coates had therefore done to Dowman and SJWG what Mr Whittle had said in testimony he never imagined would be done. That last email contained Mr Coates' recognition (albeit expressed in a light-hearted way) that, if he attended Dowman's stand at the next toy fair, he might be "*frog marched off the premises*". Despite his attempts in these proceedings to denigrate the input of Dowman in the development of the toy, Mr Coates knew full well that this was the awkward moment that he had seen coming (when acting upon Mr Lowde's advice to promote it using Dowman's stand) before the earlier fair in February.
93. Although Toobz is now recognised to have been contractually free to walk away from Dowman, its conduct was plainly unconscionable when viewed in the context of the claim in restitution.

94. As a matter of principle, Dowman has therefore made out its case that Toobz is under an obligation to make restitution for the services provided from October 2014 to June 2016.
95. Mr Wibberley argued that the invoice under which Dowman was paid for the 2,016 toys supplied under the initial order (and for which Dowman was paid £7,722.24) covered the matters in respect of which it now seeks restitution. However, although it is clear that Dowman did add an element of profit to “*the landed cost*” (as Mr Whittle put it in his email of 3 November 2015 in which he said he would keep the profit to a minimum) the toys supplied were a test run.
96. I have already touched upon Mr Whittle’s surprise that Mr Coates wanted to order a full 12,000, when the development of the toys was still not complete. When he placed the order for 2,106 units rather than the full 12,000, Mr Coates told Mr Li that he had been advised to do so by Mr Whittle (as “*this will make sure we are all happy with the production and final product*”). It cannot be said that, by being paid for a test run of toys produced in the interests of working towards a contract for their mass production, that there has been full compensation of all preparatory work intended to be recouped under the hoped-for contract. It is the anticipated contract for mass production, not the supply of a couple of thousand test toys, which supports the claim in restitution in respect of the efforts to achieve a design suitable for such production. In my judgment, it would be absurd for Toobz to think that the payment of £7,722 covered the value of the input it had requested and continued to request of Dowman.
97. There remains the point taken by Toobz that Dowman cannot claim for items in the 2016 Invoice which were truly for the account of SJWG. The point really amounts to saying that SJWG should have been a co-claimant with Dowman.
98. Again, the contemporaneous correspondence indicates this is a completely unattractive point when viewed in isolation from any relevant legal principle.
99. It is clear from the correspondence that Mr Coates treated Dowman and “its” Chinese factory as one and the same. Even after Mr Whittle had put Mr Coates directly in touch with Mr Li, he was told that “*Dominic will discuss with you for prices, packages (if you want special packages), sewing label and paper tag.*” That was said in anticipation of the contemplated order of 12,000 toys. Mr Coates replied saying he would speak to Mr Whittle about the order. Before that point, in June 2015, when opened up a direct point of communication Mr Whittle had been (as he put it in testimony) “*an intermediary between the factory and Mr Coates.*” Even after that point, it was expanded into “*a three-way conversation. So he wasn’t contacting the factory exclusively and leaving me out, we were all copied in on each other’s emails. Obviously, we weren’t party to the phone calls three way but essentially it became a three-way conversation.*”
100. Throughout his witness statement and testimony, in describing those services, Mr Whittle referred to Dowman and SJWG without distinction by talking in terms of “*we*”, “*us*”, “*our designers*” and “*our factory*”. He referred to the daily discussions and regular emails between himself and Mr Li and his own visits to China of up to five times a year. At an early point in his cross-examination, he said in relation to Dowman’s usual business: “*The manufacturing work is done in China, yes, but the design work is actually done – whilst I am not a designer, we instigate designs that*

*the Chinese factory work on and then I tend to spend quite a lot of time in China actually going through the designs with regards to approval or amendments that need to be made.”*

101. It is obvious from the evidence that, when Mr Coates visited the Chinese factory in March 2015, he treated Dowman and SJWG as part of the same team. That was the position throughout the relevant period, beginning with what Mr Whittle accepted in cross-examination was his initial agreement (or offer) to have the Chinese factory look at Mr Coates’ samples to see where he is going wrong. When Mr Whittle was asked about the primary claim in contract, and whether it would have been between Toobz and Dowman or between Toobz and SJWG, he said: *“To be honest, it’s an agreement with both of us. We act as a single entity”*. He accepted that Dowman would not have done the actual manufacturing.
102. That is obviously the position as Toobz also saw it. In advancing its counterclaim for the allegedly defective 2000 toys supplied in December 2015, Toobz did not think to sue SJWG. Instead, it alleged that they were supplied by Dowman as the invoice dated 10 December 2015 indicated. Yet, on the logic of its argument against recovery by Dowman in respect of SJWG’s efforts, Toobz might well have sued the wrong party in respect of the initial order. Of course, the fact that Toobz has, predictably, sued the party it paid under the initial order is clear indication that Toobz’s own understanding of the three-way conversation was that it would be Dowman presenting the bills.
103. However, one of the four questions identified in *Benedetti* (see paragraph 24 above) – and this is before one gets to any measurement of relief in quantum meruit terms – is *“was the enrichment was at the claimant’s expense?”*.
104. By reference to that question, Mr Wibberley challenged Dowman’s ability to recover some costs identified in the 2016 Invoice which were properly for the account of SJWG.
105. This argument about Dowman’s inability to recover in respect of the services provided by SJWG was given some prominence at trial. The Amended Defence had raised the point that Dowman’s own case involved the notion of enrichment at the expense of that separate legal entity and that *“in so far as it is alleged”* Dowman was put to proof that it had any liability to SJWG: paragraph 17B of the Amended Defence. In the alternative (at least to Toobz invoking the principle of subjective devaluation) Toobz said that the most Dowman could recover is *“the reasonable cost of the work undertaken by a Chinese Factory at the rates it would normally charge a third party”*: paragraph 17D.
106. Mr Wibberley submitted that the court could not simply ignore the separate identity of SJWG and said that the point was really an elementary one based upon the indemnity principle. He said that there was no satisfactory evidence to support the conclusion that SJWG would pursue Dowman, on heads of claim which properly belonged to SJWG, if Dowman did not first recover from Toobz. That was not sufficient, he submitted, to support the elements of the claim which reflected effort or cost on the part of SJWG.

107. In my judgment, this argument based on legal principle overlooks the true nature of Dowman's claim in restitution, even though Dowman did engage with the Defence by asserting that (in respect of the development work it had not undertaken itself) it did have a present liability to SJWG: see paragraph 26A of the Amended Reply.
108. In my view, it is important to note that the four questions highlighted in *Benedetti* (for the purpose of framing a viable claim based on unjust enrichment) were identified by the Supreme Court's citation of two cases which were not 'services' cases. Like that in *Menelaou v Bank of Cyprus*, the decision in *Banque Financière v Parc* concerned the remedy of subrogation (through restitution, based upon unjust enrichment, rather than by contract or the application of conventional principles of property law) so the significance of the second question – paragraph 103 above – was obvious. The case of the *Investment Trust Companies v Revenue & Customs Comrs* concerned the claimant companies' overpayment of tax. The decision in *Benedetti* itself did, of course, involve a claim based upon the provision of services but there was no issue over the identity of the person providing all the relevant ones (the parties had in fact contracted for Mr Benedetti to be remunerated in working up a different scheme than the one later pursued, which was a contract found by the judge to have been abandoned). At the trial and on the appeals in that case all the focus on the claim in restitution was upon what, if anything, further he should recover (for services assessed, in the light of the evidence, as being worth €36m for quantum meruit purposes) in circumstances where he had already received €67m.
109. Although I recognise that the Supreme Court in *Benedetti* expressly recognised the significance of the second question to a claim for quantum meruit based on the provision of services, it is clear from authorities that any inquiry into the claimant's 'expenditure' should not be allowed to detract from the focus upon the claimant's enrichment which forms the basis of the restitutionary obligation.
110. The reality of the present case, and the true basis of Dowman's claim in restitution, is *not* that Dowman is seeking to recover *losses* suffered directly by itself or through exposure to claims by SJWG but, instead, is claiming reasonable remuneration for the services that it, Dowman, agreed to provide at the request of Toobz. Otherwise, the concept of subjective devaluation by the recipient of the services (as opposed to any suggested mitigation of loss by the provider of them) would have no theoretical place in these proceedings. Nor, for that matter, would any concept of 'subjective revaluation' (by which the claimant might recover more than the objectively valued market value of his services by reference to the particular needs of the defendant) even though *Benedetti* has confirmed that, if it has any place at all, it will only be in an exceptional case. Indeed, the very nature of the *ex post facto* assessment of what the services were worth at the time – a fundamentally objective exercise subject to any subjectively-driven devaluation/revaluation – illustrates that the court is not, by that second question, necessarily concerned with "expense" to the claimant in the strict sense.
111. Instead, in my judgment, the essence of the second question in *Benedetti* is whether or not the claimant can establish that he was responsible for the enrichment identified by the first question. Has there been a transfer of value from himself to the defendant which gives him standing to pursue the restitutionary obligation triggered by the resulting benefit? In a case falling within the second limb of the third proposition in *MSM Consulting* (i.e. where the defendant has *asked* the claimant to provide the



services) one would not ordinarily expect there to be much of an issue on the point. For example, a house owner who finds that, for some reason, he is under no clear contractual liability to pay the builder he has requested to carry out works of improvement to his house ought not to be able to resist the builder's claim to their value simply because sub-contractors (as they had been assumed to be) were brought in to carry out part of them.

112. In the present case, the services requested of Dowman by Toobz included what Toobz (through Mr Coates) understood to be the services of "its" Chinese factory, without drawing any distinction between them, even if a company lawyer might have quibbled with the terminology. Mr Coates' communications at the time (including those quoted at paragraph 81 above) also make it abundantly clear that Toobz was proceeding on the basis that the contract for the production of Bush Babies – the anticipation of which serves to categorise the claim in restitution – would be entered into *with Dowman*. This being the reality of the situation, paragraph 26B of the Amended Reply was justified in expressly including with "*the works carried out by [Dowman]*" those undertaken by the Chinese factory.
113. The claim therefore being one for recovery in respect of Toobz's enrichment in the form of the non-gratuitous services requested by it, rather than compensation for loss suffered through the diversion of business resources that each of Dowman and SJWG might otherwise have respectively directed elsewhere, I am entirely satisfied that the recovery should be in favour of Dowman. Dowman was the intended contracting party, Toobz's initial request for assistance was made to Dowman (as indeed were later ones also involving SJWG) and Dowman, through Mr Whittle, procured the requested services. I certainly cannot see any proper basis for concluding that Toobz should not have to pay for the benefit derived from some of the services simply because no direct claim has been made in respect of them by the factory as "sub-requestee". The payment of Dowman's invoice in respect of the initial order (in circumstances where Mr Coates had acted upon Mr Li's request to place the order with Dowman and to discuss payment with Mr Whittle would formulate) is the clearest illustration of Toobz's own recognition of the reality of the situation.
114. Nevertheless, to the extent that Dowman recovers under the 2016 Invoice in respect of sums "due" (or, perhaps more accurately, conditionally payable) to SJWG, I am also satisfied that Mr Whittle's position on the board of the Chinese company and the relationship between the two entities are such that Dowman will account, as appropriate, to SJWG.
115. In my judgment, having considered the evidence, Dowman has established that the costed items in the 2016 Invoice represent a justified claim in respect of the benefit derived by Toobz from the non-gratuitous element of the services requested of Dowman. Dowman's recovery under that invoice is fully justified by the application of the third and fifth principles in *MSM Consulting*. Although it is sufficient for Dowman to come within the second limb of the third principle, and the costing of items in the 2016 Invoice is better suited to it than the first limb, I am also satisfied that Toobz also derived an incontrovertible benefit from those services. So much is obvious from the fact that (as Mr Coates and Mr Lowde contemplated in their email exchanges on 3 February 2016) Toobz was able to use Dowman's trade stand and some samples from the initial order to very profitable use.

116. Having regard to the fact that it is in addition to the value of the initial order which Toobz was content to pay in satisfaction of the efforts of SJWG and Dowman in relation to that order, I am also satisfied that the total sum claimed by Dowman under the 2016 Invoice also reflects a realistic global assessment of the services provided over the 20 month period. Having heard and read the evidence about those services in some detail, I certainly have no grounds for concern that the amount of the invoice falls foul of Toobz's fall-back position, set out in the Amended Defence, that it should not have to pay more than what the court would consider to be the reasonable cost of such work at notional market rates. I had no evidence to guide me upon what they might be if Dowman was to be confined to a lower level of recovery but the evidence of Mr Whittle has persuaded me that the overall sum sought by Dowman is a reasonable one.
117. Finally, there remains the counterclaim advanced by Toobz in relation to the allegedly defective toys supplied in December 2015. I have already noted that this is not supported by any expert evidence of the kind that the parties had recognised would be required for proper consideration of the allegation of defects.
118. It is also unclear (for reasons which begin to emerge from the way Toobz's solicitors expressed themselves in the letter dated 11 December 2018) how many of the 168 dozen toys supplied under the initial order have actually been inspected for defects. Mr Whittle was sceptical as to whether all of them had been inspected for defects and said that Mr Coates never answered his question (in an email of 14 December 2015) as to what percentage of the run was good.
119. Be that as it may, the reason why Toobz's counterclaim is not, in my judgment, a sustainable one is because it was clearly understood that Dowman's fulfilment of the initial order was part of the ongoing process of design with a view to creating a toy suitable for mass production. Mr Whittle explained how he had told Mr Coates that he had refused to take an order for 12,000 toys as he (Mr Coates) had not finished making alterations: "*[B]ut he was so insistent that what I said we would do was across the three characters we would make the absolute minimum quantity possible to test the production at that point.*" They were not toys for resale, as the counterclaim assumes, though Mr Coates said that he did use some of the better ones to put on the stand at the Spring Fair (and they were clearly of some value in generating the kind of interest Brands with Influence soon came to seek).
120. It is also clear that Mr Coates recognised the initial order was for a test run. He accepted in cross-examination that when he placed the initial order there was not yet a sample of a Bush Baby with which he was entirely happy. Although the initial order only came to be placed several months later, in an email to Mr Whittle of 28 March 2015 Mr Coates had referred to moving to a position for placing a "*test production order*". When he placed that order on 1 July 2015, Mr Coates referred to Mr Whittle's advice that they should start with an order of 2,016 rather than 12,000 as "*[T]his will make sure we are all happy with the production and final product.*" In a later email to Mr Li dated 8 September 2015 (and copied to Mr Whittle), when the Chinese factory had received the initial order, Mr Coates stated "*I'm treating this order as a trial run.*" In late November 2015, Mr Coates told Brazier & Co (who were supplying the plastic parts) that all plans for Christmas sales had been shelved and that the design of the plastic tubes might be re-visited the following year. And it was because Mr Coates was continuing to make adjustments to the design in the light of

his inspection of part of the initial order that, despite his disappointment over problems in movement, that he agreed to meet the full production costs of the initial order: see his emails of 9 December and 14 December 2015.

121. In my judgment, Toobz's counterclaim therefore represents an attempt to go back on the parties' clear understanding at the time. That shared understanding was reflected in Mr Whittle's insistence that the numbers under the initial order should be kept low specifically to avoid unnecessary wasted costs of the kind which the counterclaim now seeks to recover.
122. The counterclaim therefore falls to be dismissed.

### **Disposal**

123. I therefore award Dowman the VAT inclusive sum of £144,450 on its claim in restitution and dismiss Toobz's counterclaim. I will hear the parties further on the questions of interest, costs and any other consequential matters.