

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
BUSINESS LIST (ChD)

7 Rolls Buildings
Fetter Lane
London
EC4A 1NL

Friday, 8 December 2023

BEFORE:

MASTER KAYE

BETWEEN:

TYBURN FILM PRODUCTIONS LIMITED

Claimant

- and -

BROUGHTON & OTHERS

Defendants

MR MOODY-STUART, KC and **MR MARSHALL** (instructed by Mishcon de Reya LLP)
appeared on behalf of the claimant

MR HILL (instructed by Wiggin LLP) appeared on behalf of the Fourth and Fifth
Defendants

JUDGMENT
(Approved)

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1. THE MASTER: This is my determination of the fourth and fifth defendants' application dated 25 May 2022 to strike out or summarily determine the claimant's claim against them ("the application"). I shall refer to the fourth and fifth defendants as "the defendants" (unless context demands otherwise) to the application. The application is supported by the witness statements of Caroline Keane dated 24 May 2022 and 6 February 2023. The evidence in response is provided by Mr Francis and his solicitor, Mr Joshi, both dated 15 December 2022. The delay in listing this application has been caused by various procedural issues, including the need for the claim to be transferred from the Commercial Court to the Chancery Division. Although it is currently sitting in the Business List, it is an intellectual property claim and relates to performers' rights.
2. This claim is about the resurrection of Peter Cushing, a well-known actor who died in 1994. The defendants say that they have the right to resurrect Peter Cushing since 1976 as part of an agreement between Star Wars Productions Ltd and Peter Cushing's production company, Peter Cushing Productions Ltd ("PCPL"), which governed the relationship between those parties prior to the making of and release of what for me will remain the first Star Wars film, now the fourth, in 1977. Peter Cushing appeared in Star Wars 1 as the Grand Moff Tarkin. The defendants alternatively say that they acquired the right to resurrect Peter Cushing from the estate of Peter Cushing by an agreement dated 10 February 2016 between the fourth defendant and the first and second defendants, who were the executors of his estate. Peter Cushing was resurrected as Grand Moff Tarkin and subsequently appeared in Rogue One in 2016, another well-known Star Wars film. The precise way in which that was achieved is not relevant to this determination.
3. Mr Francis of the claimant was a close personal friend of Mr Cushing. The claimant and PCPL made a number of films together involving Peter Cushing. By the early 1990s Peter Cushing was not in good health and by mid-1993 was terminally ill. The claimant and PCPL agreed to work together on a TV movie. This resulted in an agreement in August 1993 between the claimant and PCPL relating to the making of that TV movie and a separate agreement between PCPL, Peter Cushing and the claimant in case he was not to survive until the end of the movie, which the claimant says provides them with the rights in relation to Mr Cushing's resurrection and also

provides in simple terms a blocking or restrictive right as against others. The claimant therefore says that Peter Cushing could not be resurrected by the defendants in Rogue One without their consent. They say that consent from the estate in the form of the first and second defendants was not sufficient because of their rights to block anyone else from resurrecting Peter Cushing without their consent as a result of the 1993 agreement. They claim against the estate for breach of contract. For present purposes that is the claim against the first defendant. They claim against the third defendant, who was Mr Cushing's and subsequently the estate's theatrical agent, for inducement of breach of contract. Those claims are not the subject of this application and will continue whatever the outcome of the application.

4. The claimant claims against the defendants in unjust enrichment in respect of the exploitation of the rights that the claimant says it was in a position to control ("the blocking/restriction rights"). There remains a dispute between the parties about the scope and value of the claim. Although Rogue One was very successful and is said to have made about a billion dollars, the likely value of this claim is more modest. Even the claimant appears to put the value at less than £500,000. Indeed, the defendants appear to have paid the estate something in the region of £28,000 for the 2016 agreement, whilst Mr Francis says some £200,000 were spent on the TV movie, although I was not entirely clear why that might represent the value of the claim now, but it is not necessary to resolve that today.
5. I have listened carefully to the submissions of Mr Hill and Mr Moody-Stuart and reflected on their skeleton arguments and the limited evidence currently available. I have taken into account the totality of their submissions and the evidence, even if I have not set out each and every argument or matter they advanced. However, I intend to give a brief oral judgment today rather than delay matters until after Christmas.
6. I do not discern any particular difference between the parties on the well-known principles applicable to a summary judgment or strikeout applications in circumstances such as this. The court may strike out a statement of case or part of a statement of case pursuant to CPR 3.4(2)(a) on the grounds that it discloses no reasonable grounds for bringing the claim. An application under CPR 3.4(2)(a) calls for an analysis of the

statement of case without reference to the evidence. The primary facts alleged are assumed to be true.

7. Peter Gibson LJ in *Richards (t/a Colin Richards & Co) v Hughes* [2004] EWCA Civ 266 at 22 noted that where statements of case show significant disputes of fact between the parties going to the existence and scope of their duties, the court must be certain that the claim is bound to fail. The principles concerning summary determination under Part 24 were summarised in *Easyair Ltd (t/a Openair) v Opal Telecom Ltd* [2009] EWHC 339 (Ch) at 15. Similar principles can be said to apply equally to strikeout applications, at least where the contention of the applicant for reverse summary judgment is that the case as pleaded discloses no reasonable grounds. The claim must be realistic, not fanciful, and more than merely arguable. There is therefore a bar which the claimant has to overcome, but it is not a high bar.
8. In particular, when considering summary judgment at paragraphs (vi) and (vii), Lewison J said:

"vi) Although a case may turn out at trial not to be really complicated, it does not follow that it should be decided without the fuller investigation into the facts at trial than is possible or permissible on summary judgment. Thus the court should hesitate about making a final decision without a trial, even where there is no obvious conflict of fact at the time of the application, where reasonable grounds exist for believing that a fuller investigation into the facts of the case would add to or alter the evidence available to a trial judge and so affect the outcome of the case: *Doncaster Pharmaceuticals Group Ltd v Bolton Pharmaceutical Co 100 Ltd* [2007] FSR 63;

vii) On the other hand it is not uncommon for an application under Part 24 to give rise to a short point of law or construction and, if the court is satisfied that it has before it all the evidence necessary for the proper determination of the question and that the parties have had an adequate opportunity to address it in argument, it should grasp the nettle and decide it. The reason is quite simple: if the respondent's case is bad in law, he will in truth have no real prospect of succeeding on his claim or successfully defending the claim against him, as the case may be. Similarly, if the applicant's case is bad in law, the sooner that is determined, the better. If it is possible to show by evidence that although material in the form of documents or oral evidence that would put the documents in another light is not currently before the court, such material is likely to exist and can be expected to be available at trial, it would be wrong to give summary judgment because there would be a real, as opposed to a fanciful, prospect of

success. However, it is not enough simply to argue that the case should be allowed to go to trial because something may turn up which would have a bearing on the question of construction: *ICI Chemicals & Polymers Ltd v TTE Training Ltd* [2007] EWCA Civ 725."

9. One of the arguments put forward by the defendants is there is a narrow point of construction which the court should grapple with in relation to the 1976 agreement and/or a short point of legal analysis in relation to Regulation 31 of the Copyright and Related Rights Regulations 1996. However, whilst Lewison J said at (vii) that it may be appropriate for the court to decide a "short" point of law of construction, the court is unlikely to take the view that it is appropriate to decide difficult points of law where the law is uncertain or developing, or where any issue, including issues of construction, would be better decided on actual facts. Here one of the issues that arises is whether there is in fact a narrow point of construction at all, and, if so, it is one in relation to which the encouragement of Lewison J to determine it is the right course.

10. The claimant referred me to Moore-Bick LJ in *ICI Chemicals & Polymers Ltd v TTE Training Ltd* [2007] EWCA Civ 725 at 13 and 14:

"13. In cases where the issue is one of construction the respondent often seeks to persuade the court that the case should go to trial by arguing that in due course evidence may be called that will shed a different light on the document in question. In my view, however, any such submission should be approached with a degree of caution. It is the responsibility of the respondent to an application of this kind to place before the court, in the form of a witness statement, whatever evidence he thinks necessary to support his case. Where it is said that the circumstances in which a document came to be written are relevant to its construction, particularly if they are said to point to a construction which is not that which the document would naturally bear, the respondent must provide sufficient evidence of those circumstances to enable the court to see that if the relevant facts are established at trial they may have a bearing on the outcome.

14. Sometimes it is possible to show by evidence that although material in the form of documents or oral evidence that would put the documents in another light is not currently before the court, such material is likely to exist and can be expected to be available at trial. In such a case it would be wrong to give summary judgment because there would be a real, as opposed to a fanciful, prospect of success. However, it is not enough simply to argue that the case should be allowed to go to trial because something may turn up which would have a bearing on the question of construction."

11. The claimants say that when considering the issues of construction in this case, the circumstances in which the relevant agreements came to be entered into are particularly relevant and that Mr Francis's witness statement provides a sufficient basis for the court to be satisfied that further relevant material is likely to be available in advance of trial if the matter proceeds. This might be seen as at odds with the general approach to construing the terms of a document, but equally, as I note later, some aspects of this claim are particularly fact sensitive.
12. However, importantly for summary judgment, the focus is broader than the focus of strikeout. Rather than simply considering the statements of case, the court has regard to the claim as a whole and has to consider the additional factor of whether there is some compelling reason why the claim should go to trial. Whilst if the court has all the necessary materials to decide a point of law it may grasp the nettle, there is a difference between the parties as to whether this is an appropriate case in which to do so. There are many cases where the court concludes that there are legal issues which are difficult or uncertain or which would be better determined in light of the full context of the found facts rather than on the basis of assumed facts and statements of case. More generally, the court on an interim application does not generally declare the state of the law and then measure the claim as pleaded against it. It determines whether there is a realistically sustainable case which should be allowed to proceed to trial.
13. Ultimately, the decision whether to summarily determine the claim is an exercise of the court's broad discretion consistent with the overriding objective to deal with cases justly, fairly but also efficiently and proportionately. Of course, the court needs to be satisfied that the claim as put forward overcomes the low bar that I have referred to.
14. It is necessary to look at the key elements of the dispute between the parties in relation to this application to understand whether this is a case which the court can determine summarily. The claimant's claim in unjust enrichment against the defendants will only succeed if they can make out the elements of such a claim, and by "the elements" I do not mean a set of principles or a checklist of questions. Each case is different and turns on its own peculiar facts. Unjust enrichment is not itself a cause of action but a term to describe a category of rights. The court has to be satisfied that the defendants have

been enriched at the claimant's expense and that the enrichment was unjust. These broad headings provide a framework for the factual inquiries which the court needs to undertake before it can conclude that the defendants have been enriched at the claimant's expense and that such enrichment was unjust. However, the claimant has to show that the unjust factor they rely on falls within or as close to an established category or factual recovery position in unjust enrichment. Clearly, that very description of what has to be demonstrated explains the fact-sensitive nature of the inquiry. However, as a consequence, unjust enrichment claims are not an exercise of a general discretion. The broad factual inquiry required to establish an unjust enrichment claim does not appear to make them an obvious type of claim for summary determination.

15. Of course, the defendants will not have been unjustly enriched if they already had the rights they assert as a result of the 1976 agreement. In order to determine this part of the claim on a summary basis, the court must grapple with the law in respect of performers' rights and how historic rights are protected through the changes in legislation in 1988 and 1996. As I note later, what happens and the approach to historic rights which arose under the earlier legislation in 1958 and 1972, as they travel across that timeline, does not appear to me to be settled. Indeed, as the defendants' own solicitors commented in June 2023, when trying to persuade the court that this was a hearing that should be before a High Court judge, a year after the application was issued, this claim involves complex legal issues concerning the rights of performers prior to the current explicit protection of performers' rights, on which there are competing authorities. They additionally commented that there were complex issues of construction in various historic actors' agreements, which they accepted would need to be considered against the factual matrix of the then conventional approaches to actors' rights. They specifically identified the 1976 and two 1993 agreements as being agreements with which the court would need to grapple. That seems to me to clearly encapsulate the difficulties and undesirability of seeking to determine this claim on assumed facts on a summary basis.
16. However the difficulties and undesirability of a summary claim are not limited to that issue of historic agreements. This is a claim in which the claims against the estate and the third defendant will continue in any event. The facts will have to be fully explored

by the court in due course and decisions made on the actual facts, not assumed facts. Many of the issues of the rights of the parties in light of the agreements and the approach to performance rights over the years will still have to be explored, analysed and determined by the court. Many of the arguments that were deployed for this application will need to be deployed again based on the actual facts at the trial irrespective of any determination today. This risk of having to revisit much of the same ground but by reference to the actual factual framework does not appear to me to be consistent with either the overriding objective or good case management to manage cases justly efficiently and proportionately. It risks inconsistent outcomes and wastes costs, court resources. This is reinforced by the defendants' own view that the outcome of the summary application will affect or impact the claim against the other defendants.

17. There is a further consideration expressed in the judgment of Mummery LJ in the *Doncaster* case referred to by Lewison J in subparagraphs (vi) and (vii). He said that:

"There can be more difficulties in applying the 'no real prospect of success' test on an application for summary judgment... than in trying the case in its entirety... The decision-maker at trial will usually have a better grasp of the case as a whole because of the added benefits of hearing the evidence tested or receiving more developed submissions and of having more time in which to digest and reflect on the materials."

18. This is wise guidance. In some cases the court is more likely to be able to get to the right answer in light of the facts as found and after prolonged immersion in the case at trial.
19. The issues raised by the application are difficult and involved. Two of them involve consideration of legal issues where the law is not entirely settled. One involves the competing analysis of Regulation 31 of the Copyright and Related Rights Regulations 1996, and one involves arguments at the edges of the scope of unjust enrichment in multi-party or indirect situations, where a multifactorial assessment is necessary before being overlaid with the elements of an unjust enrichment claim. These issues are not, as I say, obvious candidates for summary determination, but when both are in issue at the same time, it points even more firmly against summary determination.

20. It appears to me that this is an archetypal case where the court should exercise restraint before launching into deciding the difficult issues of law and construction. It appears to me that the issues raised are either fact-sensitive, such as the ultimate outcome of any claim for unjust enrichment, or uncertain or in an area of developing or developed law. For example, can the claimant's restrictive block be characterised as a direct benefit for the purposes of a three-party unjust enrichment claim? Does the claimant's claim fall within the scope of an indirect benefit claim? Does Regulation 31 restrict the use that can be made of a pre-commencement authorisation of copying to copies of the pre-commencement copy, or is it broader?
21. A careful reading of the parties' skeleton arguments and consideration of their submissions demonstrates that these are difficult points which are simply unsuitable for summary determination, in relation to which the claimant has satisfied me that they overcome the low bar of being able to say that overall the claim is more than merely arguable and not fanciful. In any event, it seems to me that this claim raises some interesting and potentially novel questions of law in respect to intellectual property rights and performers' rights and unjust enrichment, for which summary determination on assumed facts does not appear to me to be a suitable vehicle. There is therefore a good and compelling reason to allow this claim to proceed to trial in any event.
22. Having concluded it is not appropriate to grant the application, I do not intend to engage in a granular analysis of the parties' arguments. No disrespect is intended by not doing so. Indeed, it is the very detail of that analysis and argument that form a significant part of my reasons for determining that the case is not suitable for summary determination. It is simply that having made that determination, having considered those arguments in detail, it is preferable for the judge to limit the extent of their own analysis at this interim stage when they have concluded they do not have all the relevant information and tools at their disposal. I shall therefore deal with the key points in brief, if nothing else to show I have considered them.
23. It is common ground that although Peter Cushing's performance in the first Star Wars film predates the CDPA, it attracted performers' rights once it came into operation. Performers' rights include rights in relation to making a copy of the whole or substantial part of a qualifying recording such as Star Wars. To do so without Peter Cushing's consent is an infringement of his rights or now those of his estate. Who owned the

relevant rights to resurrect Peter Cushing as Grand Moff Tarkin in Rogue One is not a simple question. The claimants need to be able to demonstrate at least for these purposes sufficient to satisfy me that I cannot summarily determine the claim that the defendants have been enriched and the enrichment has been at the claimant's expense and is unjust, three closely related and fact-sensitive considerations but not, as I have set out, anything more than a framework for the factual inquiries that are necessary to consider the unjust enrichment claim.

24. The claimant says that in fact the rights it acquired from Peter Cushing in 1993 and/or by means of the blocking right or restrictive covenant from the 1993 agreement are expansive enough to enable it to block the estate or anyone else from using those rights without its consent. Consequently they say that the resurrection of Peter Cushing in Rogue One enriched the defendants at the claimant's expense.
25. The rights relied on in the 1993 agreement can be found under a heading, Clause 17(h). The relevant part says that:

"If as a result of illness, Mr Cushing's demise or any other reason, without limitation whatsoever or however, the TVM [the TV Movie] is not produced and/or completed and or/exploited, PCP and Mr Cushing hereby warrant, undertake and agree that neither of them will permit Mr Cushing's participation in any film or programme whereby Mr Cushing appears either in whole or in part other than in person, in or out of any character, by way of Mr Cushing being reproduced by all or any combination of the processes or techniques referred to in subparagraphs (1) through (11) of paragraph (e) without our express prior written consent, which consent we may grant or withhold at our sole and absolute discretion."

26. The relevant parts of subparagraph (e) includes all forms of special effects, computer-generated imagery and all and any successors to or replacements of all and/or any of the above including any processes or techniques which may be hereafter created, discovered or invented.
27. Of course, for the purposes of this application one has to assume that the claimant does have those rights. Indeed, as Mr Moody-Stuart submitted, it is necessary to assume on this application that the claimant's case against the estate and the third defendant is also

correct, and where Mr Hill has not identified any flaws in the claimant's claim, I cannot assume them against the claimant either. This provides a further imbalance and complication to the summary determination application, where one of the issues was the 2016 agreement entered into with the estate.

28. The defendants say that the claimants simply fail at the first hurdle because the defendants have not been unjustly enriched, because either they already had the rights they needed under the 1976 agreement or they owned them under Regulation 31. Further, if that is something that I am not persuaded by, in any event they can fall back on the 2016 agreement with the estate, in respect of which they can rely on the fact that they say they were a bona fide purchaser for value and without notice.

29. The 1976 agreement

The defendant asserts that the rights under the 1976 agreement vest in the fifth defendant. The claimants say that the defendants have not yet proved that. Although it is said to be obvious, the defendants will at some point have to be in a position to prove that the rights they rely on do vest in the current defendants.

30. Mr Hill argues that clauses 11 to 13 of that 1976 agreement relate broadly to the marketing and use of Mr Cushing's rights and performance in Star Wars. He submits the wording of the permission/consent provided is expansive. For example, clause 11 the 1976 agreement provides that all consents required under the Performers' Protection Acts of 1958 to 1972 are given by the lender. Clause 12 says that:

"The lender gives every consent and grants to the company the rights throughout the world (a) to use and authorise others in relation to other reproductions of the artist's physical likeness, recordings taken or made directly or indirectly from the artist's performance, his engagement hereunder."

31. It is a very expansive clause, Mr Hill points to clause 12(b) which says:

"... to make or authorise others to make including any other recordings whatsoever of the artist's performance or any part thereof and to exploit the same, and for the purposes of advertising,

publicising and commercially exploiting the film or otherwise as the company may desire."

32. Mr Hill argues these clauses are expansive enough to transcend any other apparent confines of the 1976 agreement itself and to provide the necessary consent for Peter Cushing's resurrection in Rogue One. Mr Moody-Stuart relies on the totality of the 1976 agreement, referring me to the definitions and the limiting effect of those definitions, arguing that when read as a whole it does not have the expansive meaning the defendants contend for but in fact that the consent or permission is limited to Peter Cushing's appearance or performance in Star Wars 1.
33. It seemed to me that the arguments about what rights actually accrued to Star Wars Productions in 1976 and whether they were sufficient to cover the resurrection of Peter Cushing as Grand Moff Tarkin in Rogue One was not straightforward. Both Mr Hill and Mr Moody-Stuart raised credible arguments as to the meaning and construction of the 1976 agreement. It is simply not possible to say that Mr Moody-Stuart's analysis and construction of the 1976 agreement and scope is unarguable or fanciful. There does not appear to me to be anything inherently fanciful about an argument that seeks to limit the extent of the rights accrued under the 1976 agreement to the four walls of that agreement. Equally, it is unlikely the parties contemplated the significant advances in, for example, CGI, even if Star Wars itself and George Lucas were at the forefront of those developments. This lends some support to the suggestion that a judge may be assisted by understanding the context in which the agreement was made, as suggested by the claimants. This can sometimes be helpful and sometimes can be permissible where the terms may have a particular meaning or understanding in a particular industry or time. However, that is all to be considered at another time, but the court will in due course have to consider whether the rights in the 1976 agreement or indeed the 1993 agreement are the relevant rights for anybody asserting an entitlement to rely on them.
34. Mr Hill further argues that in the alternative, he can rely on Regulation 31 of the Copyright and Related Rights Regulations. It appeared to be common ground that the regulations provide transition provisions between the bundle of different rights that

performers accrued under the earlier legislation and the performance rights created by the CDPA. Again, it appeared to be common ground that for these purposes the relevant rights to resurrect Peter Cushing were new rights as defined by the regulations. Where the performer had died before 1 December 1996, the relevant regulation, Regulation 31, provides:

"New rights: effect of pre-commencement authorisation of copying

31. Where before commencement—

(a) the owner or prospective owner of copyright in a literary, dramatic, musical or artistic work has authorised a person to make a copy of the work, or

(b) the owner or prospective owner of performers' rights in a performance has authorised a person to make a copy of a recording of the performance, any new right in relation to that copy shall vest on commencement in the person so authorised, subject to any agreement to the contrary."

35. Curiously, despite the regulations having come into effect some years ago, neither party was able to point to any authority on the particular issue that arises, which is: what is meant by a copy? Mr Hill argues that under the 1976 agreement Peter Cushing did authorise Star Wars Productions to make copies of the recording of his performance, that the rights in relation to those copies therefore are vested in Star Wars Productions pursuant to the regulations, there being no agreement otherwise. In support of his contention, he referred me to Copinger and Skone-James on Copyright at 12-79, which says:

"the first owner of the performers' rights arising under the 1988 Act is the performer, the individual who gives the performance in question. This applies as regards each performer's property rights, non-property rights, rights of remuneration and moral rights described above. The Copyright and Related Rights Regulations 1996 create a single exception to this rule. This is where before 1st December 1996 the owner or prospective owner of the performer's rights in a performance had authorised a person to make a copy of the recording of the performance. In such a case, the performer's rights in relation to any new right will vest in that person as at that date."

36. Mr Moody-Stuart argues that the right which accrued to Star Wars Productions was much more limited and that Regulation 31 did not extend to vesting the rights that the defendants would have needed to resurrect Peter Cushing in Star Wars Productions. It was at this point that of course the question of the defendant proving that such rights as existed under the 1976 agreement passed to the current defendants arises again. In support of Mr Moody-Stuart's contention that the rights accrued were much narrower than those the defendants needed, he referred me to Arnold LJ's text on performers' rights and in particular 3-03:

"Where the owner or prospective owner of performers' rights in a performance authorised a person to make a copy of the recording of that performance before commencement of the 1996 Regulations, any new right in relation to that copy vests in that person on commencement unless there is an agreement to the contrary ... The words 'in relation to the copy' mean that this exception is very narrow indeed; thus it does not entitle the beneficiary to make or distribute new copies of the recording."

37. Arnold LJ's view received support from Laddie, Prescott & Vitoria: The Modern Law of Copyright at 27-100 and 27-103. In particular, at 27-103 it states that:

"the performer is entitled to the new rights unless he died before 1 December 1996, in which case the person who is entitled to exercise the non-property performers' rights is entitled, but if this is the performer's personal representative, any damages he recovers by virtue of the property rights devolve as part of the performer's estate, notwithstanding the fact that they did not vest in him on the performer's death. However, where the owner or the prospective owner of the performer's right had authorised another to make a copy of a recording of that performance before 1 December 1996, the new rights in relation to that copy only vest in the person authorised. This allows the authorised person to distribute, rent or lend the copy without infringing. It would not allow him to make further copies, because they would be indirect copies of the original recording and therefore an infringement of the new reproduction right in respect of the recording."

38. It seems to me that Regulation 31 includes some very specific wording. For example, the use of definite article "the" coupled with the use of relative pronouns such as "that" for example "that copy" must mean something. Copinger does not unpack this but both Arnold and Laddie on analysis say it creates a very narrow exception in relation to the

performance rights limited to the copy. That would not assist Mr Hill. For Mr Hill, a wider interpretation of Regulation 31 appears to be necessary. Whilst Mr Moody-Stuart accepted that the very narrow approach adopted by Arnold LJ may be too narrow, he did not accept that the decision was binary and that it was either the Copinger approach or the Arnold approach. It seems to me that whatever the ultimate position, the use of the definitive article and the relative pronouns suggests some intended limitation on the scope of the regulation. I am bound to conclude that the precise scope of Regulation 31 is not suitable for summary determination. It is not an appropriate issue on which to grasp the nettle. It seems to me that given the competing texts and my view on the wording of Regulation 31, some limitation is intended, and it is a point that would benefit from proper consideration based on actual facts and considered argument as to its scope and context in that context.

39. If the defendants do not have pre-existing rights under the 1976 agreement, then it is necessary to look at other ways in which the defendants say the unjust enrichment claim does not work. For this Mr Hill would need to navigate a narrow path through the unjust enrichment claim in a way that could have persuaded me that the claimant's claim was so bad that the usual requirement for a full factual inquiry was unnecessary. I am not persuaded he has done so. It appears to me that a fuller analysis of the facts is necessary.
40. The claimants say that they have the right to block the reservation of Peter Cushing and that the defendants were not able to resurrect Peter Cushing in *Rogue One* without their consent. Mr Hill says this is not an appropriate type of right and not the appropriate type of enrichment. He submits that the rights which the claimant has is a right to claim against the estate, as the claimant has done, but not something that engages the defendants at all. It was for the estate to obtain the consent from the claimant to enable them – that is the estate - to enter into the 2016 agreement. The 2016 agreement, I note, included an extensive warranty, including a warranty that the estate did not need the consent of anyone else and that no third-party rights were violated. Of course, the claimant says that not only was their consent needed but their rights have indeed been violated.

41. Mr Hill described the claimant's claim as a two-way chain of causation. Although the breach of contract arose from the same act by which benefit was conferred on the estate, causation points in different directions. The estate causes a contractual loss to the claimant, but the estate also does something which gives benefit to the defendants, the provision of a license to resurrect Peter Cushing as part of a clearing-off exercise. However, the question of whether the defendants' enrichment must have been acquired "at the claimant's expense" is not straightforward where the claim lies against a remote recipient, as it would here. At the claimants expense is not a single set of rules that are applied uniformly on each occasion. It is a series of questions and factual findings that lead to an ultimate conclusion, and there will be different questions each time.
42. Indeed, even if the claimant can eventually prove that the defendant has been unjustly enriched at the expense of the claimant in circumstances that might be deemed unjust, the claimant may still be unable to recover if the defendant is able to establish that they were legally entitled to receive the relevant benefit by, for example, contract. This will bring back into account the question of the 2016 agreement and its acquisition by the defendants as a bona-fide purchaser without notice when considering whether any enrichment was unjust.
43. First, Mr Hills and Mr Moody-Stuart referred to passages in *Investment Trust Companies (in liquidation) v HMRC* [2018] AC 275 and in particular the general discussion which starts at [37]. Importantly at [43] the Supreme Court held:

"The nature of the various legal requirements indicated by the "at the expense of" question follows from that principle of corrective justice. They are designed to ensure that there has been a transfer of value, of a kind which may have been normatively defective: that is to say, defective in a way which is recognised by the law of unjust enrichment (for example, because of a failure of the basis on which the benefit was conferred). The expression "transfer of value" is, however, also too general to serve as a legal test. More precisely, it means in the first place that the defendant has received a benefit from the claimant. But that is not in itself enough. The reversal of unjust enrichment, usually by a restitutionary remedy, is premised on the claimant's also having suffered a loss through his provision of the benefit."

44. It was acknowledged by Mr Hills that this did not provide a single test but that one has to look at the question of whether the claimant has suffered loss through the provision of benefit. He says in this case there is no provision of a benefit by the claimant to the defendants. This then leads on to a discussion by Lord Reed from [46] onwards of the question of direct or indirect benefit. Importantly at [50] Lord Reed recognises that the examples of indirect benefit to which he has referred are treated as the equivalent of direct transfers of benefit on the facts of those cases. However, importantly, at [50] he allows for the possibility of further exceptions or other possible approaches, noting the law is still developing.
45. Lord Reed then considers *Costello & Anor v MacDonald & Ors* [2011] EWCA Civ 930 at [51]. In broad terms, *Costello* is authority for the proposition that as a general rule the court should uphold contractual arrangements even if it is clear that the party against whom the claim was made had received a benefit for which the claimant had not been paid. Mr Hill argues that that is the position here and that the claimant's claim lies against the estate, not the defendants. There is no need for and no space for an unjust enrichment claim against these defendants. There are contractual agreements which set out the rights and obligations between the parties. To allow the claim for unjust enrichment would be contrary to the terms of both the 1993 agreements and the 2016 agreement, under which the defendants had their own contractual arrangements which they obtained without notice of the claimant's restrictive or blocking rights.
46. Mr Moody-Stuart took time to explain the structure of his claim, making it clear that it is not suggested by the claimant that they have acquired any performers' rights in relation to Mr Cushing, only the contractual restrictive/blocking right. He submits that the defendants had to obtain permission from Mr Cushing's estate (the first and second defendants), and the ability of the estate to give that permission was fettered by the restriction or block created by the 1993 agreement. As a consequence the claimant says that unless the 1976 agreement does provide the permissions or rights contended for by the defendants, the 1993 agreement takes effect. Mr Moody-Stuart says the defendants benefit from and are enriched by the rights that were purportedly given by the 2016 agreement and by the exploitation of those rights for commercial purposes without seeking or obtaining permission from the claimant and without paying for permission. He says the estate did not have the authority to grant the permission because of their

contractual obligations to the claimant. What this comes to is a claim by the claimant that there was a direct benefit to the defendants because of the claimant's right to block the defendants from resurrecting Peter Cushing, without paying for that right, the detriment to the claimant is not being paid. Alternatively, the claimant argues, following the reasoning in *Investment Plus*, this is one of the cases that falls within the exceptions where there is an indirect benefit. Mr Moody-Stuart says that there are closely linked series of transactions despite the distance in time between the agreements in 1993 and 2016. This is because the agreements concern the same subject matter, the right to resurrect Peter Cushing.

47. So far as unjustness is concerned, Mr Moody-Stuart points to the fact that the 2016 agreement was entered into without the claimant's consent and that the claimant did not know about it so did not have the opportunity to address/assert their restrictive/blocking rights at the time.

48. It seems to me three-party cases or indirect benefit cases are some of the most difficult and fact-sensitive cases of unjust enrichment. Here the argument is that the defendants were receiving the benefit of the 2016 agreement at the claimant's expense. Mr Moody-Stuart says the claimant has been deprived of any payment for releasing the benefit of its blocking right, and the defendants have obtained the benefit for being able to resurrect Mr Cushing. This has been as a consequence of the activities of the estate, who wrongly did not take into account or seek permission of the claimant before granting the rights. And of course on this application – which again goes to the unsuitability of a summary determination on assumed facts - the court has to assume that the claim against the estate works as set out by the claimant without any further analysis as there is no application before the court in relation to that part of the claim. Mr Moody-Stuart submits that his analysis of how the benefit arises is sufficient for these purposes to arguably amount to a direct enrichment at the expense of the defendants, but otherwise it falls within the exceptions of closely related or third-party transactions.

49. It seems to me that the arguments about direct and indirect benefit fall at the far reaches of the current scope of an unjust enrichment claim. However, given the nature of unjust enrichment, it is not possible to say that the claim as put is unarguable or entirely fanciful, given the need to explore the facts and understand what in fact the parties knew at the relevant time. It is at the edges of the scope of unjust enrichment claims but not one that I can say is certain to fail or is entirely fanciful. My starting point and my end point is therefore that the law on unjust enrichment is not settled in this area and is continuing to develop in a number of respects, particularly in the area of indirect benefit and exceptions. Whilst it may be argued following *Costello* that there where there are contractual rights against the third party as here unjust enrichment is not available, it seems to me, as I say, the law is not settled.
50. It may be that Mr Moody-Stuart's analysis of the direct or indirect benefit on the facts as found more clearly brings it within the scope of an unjust enrichment claim. It may be the court will conclude that on the facts as found that this is not even a three-party or multi-party case because the defendants have no relationship at all with the claimant, did not know the claimant had any rights, but that may not be enough.
51. Equally, I can see in due course when the full facts have been explored, it may be that the court will determine that the relationships in this case are simply too remote and the claim in unjust enrichment against the defendants cannot succeed. Whether that is because there is no space in the contractual arrangements between the claimant and the other defendants to allow for that claim or whether it is because the claim fails as being simply too remote or falling outside the scope of a claim in unjust enrichment will all have to be determined at trial. The authorities on which both the claimant and defendants rely clearly demonstrated that there remains scope for competing legal argument and the need for a factual inquiry where the court is considering the difficult and complex and developing law in relation to the interaction between claims in contracts and unjust enrichment. The determination of whether there remains space for the claim in unjust enrichment between the various contractual rights is fact sensitive. The law in unjust enrichment is said to be complementary to the law of contract, the answer is not necessarily one or the other. One needs to therefore consider the legal

and factual analysis in context to be able to understand whether and how any claim in unjust enrichment can be advanced. Here there is no direct evidence from the defendants or the estate or indeed the third defendant. The only “factual evidence” available on this application is the content of the statements of case and Mr Francis’ statement. The other statements are more technical and procedural, given by the solicitors for the parties, that is not a criticism but highlights the difficulties of determining a fact sensitive issue on a summary basis.

52. The final point I can take briefly. The defendants say that the 2016 agreement is an agreement they entered into bona fide and without notice. I agree with Mr Moody Stuart that this should be treated as part of the defence of the claim. Necessarily it will require a factual investigation. It does not matter at this stage whether it has the narrow analysis which Mr Moody-Stuart says would not provide a defence at all or whether it has the wider analysis which may provide a defence, as I have already alluded to. It may form part of a wider consideration around the unjustness factor. The key point is that it is not a knockout blow at this stage in a claim on a summary determination when one has to ascertain all the facts and must assume the case against the estate as pleaded.
53. At the end of the day, in unjust enrichment the broad factual inquiry and the determination of the rights and obligations between the parties, their intentions, their conduct, which may include a consideration in the round of the 2016 agreement and the circumstances in which it was entered into, will all fall into the same melting pot when it comes to determination of the claim at trial. It is simply not possible to say the unjust enrichment claim will fail on the information available or even attempt to do so. To even attempt to do so would cause me to fall into error in conducting a mini trial. As Wiggin said so presciently in June 2023, this is a complex matter.
54. For those brief reasons and despite Mr Hill's careful analysis, I am not satisfied that I can conclude there is no plausible basis for the unjust enrichment claim nor that it is entirely fanciful. Further, it is clear there are reasonable grounds to conclude that a

fuller investigation of the facts is necessary and may add or alter the evidence as it relates to the unjust enrichment claim.

55. I set out earlier in this judgment my conclusions on why I had determined that this was not a case in which the court should grasp the nettle and make a summary determination of the legal issues on assumed facts in relation to the defendants at this early stage. For the reasons given I am satisfied that the claim should not be summarily determined and should proceed to trial. The application is dismissed and the question of Mr Cushing's resurrection will continue.

Epiq Europe Ltd hereby certify that the above is an accurate and complete record of the proceedings or part thereof.

Unit 1 Blenheim Court, Beaufort Business Park, Bristol BS32 4NE

Email: civil@epiqglobal.co.uk

This transcript has been approved by the Judge