Neutral Citation Number: [2023] EWHC 1984 (KB)

Case No: QB-2021-002245

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 28/07/2023

Before:

MASTER STEVENS

- -

Between:

Pantheon International Advisors Limited	**Claimant**
- and -	
Co-Diagnostics, Inc	**Defendant**

- -
- -

Wendy Parker (instructed by Ronald Fletcher Baker LLP) for the **Claimant**
Sophie Weber (instructed by Freshfields Bruckhaus Deringer LLP) for the **Defendant**

Hearing dates: 9th November 2022 & 28th July 2023

- -

Approved Judgment

This judgment was handed down remotely at 10.30am on 28th July 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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MASTER STEVENS

Master Stevens:

Introduction

1. This judgment relates to the defendant's application seeking a declaration that the English court has no jurisdiction to try the claims in this action and to set aside the Claim Form and Amended Particulars of Claim, ("the APOC"), in addition to setting aside service of the same.

2. After the defendant's application was issued, the claimant issued a cross- application to re-amend its Amended Particulars of Claim (the "RAPOC") to plead reliance upon a contract dated 3rd February 2016 in the alternative to the main claim in respect of an alleged contract dated 18th October 2018, but the hearing of that application has been deferred. However, I previously ruled that as the defendant had relied on the draft RAPOC when filing evidence in support of their jurisdictional challenge, I too would require sight of all relevant material pertaining to the existence and status of the prior agreements between the parties dated 2016 and 2018, although I am aware that the status of those agreements is disputed.

3. The matter was listed for a full day's hearing, and the hearing bundles ran to 502 pages with the claimant requesting that I consider further material which their witness had not formally put into evidence. The subject of disclosure had occupied the parties in the weeks leading up to the hearing with some last-minute redactions and both parties counsel submitted they had not had a proper opportunity to review every document the parties had put together for the hearing bundle (apparently there were over 1000 pages of new material from the claimant and 5 documents from the defendant), but neither requested an adjournment. An additional 2 lever arch files of authorities were supplied by the defendant and a separate 401-page bundle was produced for the claimant along with a supplemental skeleton argument at the hearing. Accordingly, judgment was reserved.

4. As there were multiple points of law and procedure to consider and a wholly disputed factual matrix to apply the legal principles to, I am providing an overall index to my judgment for ease of navigation.

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Factual background

6. The claimant is a company registered in England which offers business and networking services to companies interested in growing internationally. Mr Andrew Greystoke is the sole director of that company which I will refer to as "Pantheon". In about mid-2015, Mr Greystoke was introduced to the defendant corporation, Co-Diagnostics, Inc ("CDX") based in Utah, USA, which specialises in supplying a range of products and services to diagnostic laboratories and others relying on a particular form of technology, polymerase chain reaction technology, (commonly known as "PCR"). Whilst the difficult financial cashflow situation of the company prior to receipt of substantial funding in around 2017 appears to be acknowledged by the claimant there is no dispute that there have been significant financial boosts since then and that demand for the company's products has been significantly elevated during/since the Covid-pandemic.

7. On 3rd February 2016 the parties entered into a written agreement ("the 2016 contract") whereby Pantheon would assist CDX in raising capital in the UK markets through pursuing a listing on the London Stock Exchange or the AIM. CDX asserts that no substantive services were provided by Pantheon under the 2016 contract and that it has lapsed. Pantheon says, on the contrary, that services were provided but not paid for and the 2016 contract has been superseded by a new agreement in 2018. The 2016 contract contained an exclusive jurisdiction clause in favour of the English court, as does the alleged 2018 contract and both contain clauses that the governing law of the contract shall be that of England and Wales.

8. The initial Claim Form in this action, as opposed to the APOC accompanying it, did not reference the 2016 contract but relied solely upon breaches of the subsequent alleged agreement produced in 2018 but which only Pantheon signed, ("the alleged 2018 contract"). That agreement contains a multi-tiered dispute resolution procedure at

clause 23 and at clause 25 an exclusive English jurisdiction agreement. As indicated above it is the claimant's case that the purpose of the alleged 2018 contract was to replace the 2016 contract and that upon execution it would not seek any outstanding payments under the 2016 contract. This, it averred, was due to regulatory issues for the defendant that would be caused by relying upon the 2016 contract which had not been disclosed to their shareholders and others in breach of US security laws. The defendant however is quite clear that there has been no such breach as any such disclosure was only necessary for new contracts entered after they became listed as a public company in summer 2017, and that following listing there is no requirement to disclose historic contracts. As mentioned at paragraph 2 above, shortly after the issue of proceedings, and prior to service of the claim, the claimant felt it was necessary to add further particularisation into the factual matrix of its Particulars of Claim at paragraphs 6-12 of the APOC by specifically referencing the 2016 contract, its terms, various events that the claimant stated resulted in breach after the 2016 contract had been executed and, by averring that "the Defendant sought retroactively to remedy the breach by replacing the 2016 Agreement with the present Contract". The claimant asserted that the defendant was estopped from denying the validity of the alleged 2018 contract by its conduct and representations after the defendant's amendments had been incorporated into a final agreement that was executed by the claimant and which the claimant therefore believed was a valid and binding contract.

9. While the defendant accepts that there were discussions between the parties in 2018 and early 2019 around entering into a potential consultancy agreement concerning business development and transactional advisory services, they maintain that the alleged 2018 contract was never finalised and no services were provided under it.

10. The defendant submits that in spring 2019 its CEO, Mr Egan, stopped negotiations between the parties after becoming aware of Mr Greystoke's "*torrid past*". The behaviours complained of concern what counsel for the defendant characterised as "clear and serious breaches of the FSA's Conduct of Business Rules", together with providing "unreliable evidence to the Financial Services and Markets Tribunal" resulting in a personal fine of £200,000 and prohibition under section 56 of the Financial Services and Markets Act 2000 from performing any function in relation to any regulated activity. Mr Egan maintained that CDX had concluded it could not enter any agreement with Pantheon for reputational reasons after discovering these facts and that CDX was unclear whether the FSA ban precluded Pantheon from performing the services contemplated by the 2018 contract in any event. These assertions are denied although a copy of the Tribunal decision itself was placed in the hearing bundle.

11. There is a factual dispute about what payments may be due to the claimant, if any, which are the subject of the proceedings. The claimant believes the defendant has failed to make any payments due under the alleged 2018 contract. There is a curious reference in a witness statement filed in support of the defendant's application from the defendant's CEO, dated 4th March 2022, to settlement negotiations which purported to resolve all potential claims between the parties in around June 2019. The claimant denies knowledge of these discussions. Although referenced in their skeleton argument, in oral submissions the defendant accepted they would place no reliance upon that aspect of their evidence in support of this application so I will make no more than a passing reference to it now although it had detained me in pre-reading. At the hearing

neither party submitted that any payments had been made to the claimant since the commencement of their business relationship in 2016.

12. Much of the claimant's skeleton argument referenced proceedings commenced in Utah by the defendant in November 2021 whereby they obtained a declaration that there are no ongoing contractual or business relationships between the parties and no monies are owing. The claimant was understandably concerned about the issue of concurrent proceedings and whether the correct US court had been chosen for such proceedings in any event, as well as whether the declaration was forward or backward looking. On the day before this hearing the claimant issued an application for permission to rely upon written expert evidence about whether the District Court of Utah had jurisdiction to grant the declaration that has been issued from that court. The defendant however made it plain in oral submissions that they were not seeking to enforce the declaration, nor was it relied upon in their application. They also submitted that there could be no issue about concurrent proceedings as those in Utah have now concluded. In view of the defendant's submissions, and the fact that the claimant's application was issued very late and had not been listed, I will say no more about it.

13. One further issue which had occupied the claimant greatly in their preparation for the hearing was whether there had been good service of this claim upon the defendant in the US, but again the defendant made it clear in oral submissions that there was no live issue over the fact of service, so again I will disregard that part of the claimant's skeleton argument.

Procedural chronology

14. The table below sets out key events and dates. It will be plain from this that the applicable CPR at the time of issue of the claim and service are those contained in the White Book for 2021 which is where **subsequent CPR quotes** are taken from.

DATE	EVENT
3.2.2016	The 2016 contract is signed
18.10.2018	The date of the new alleged contract between the parties as signed by the claimant
15.11.2020	Letter before action seeking $2,629,673 under the alleged 2018 contract
16.11.2020	Letter before action retracted
7.5.2021	2nd Letter before action sent seeking sums calculated by reference to Annexes 1 and 2 of the alleged 2018 contract

14.5.2021	Defendant files a complaint in the State Court of Utah for a declaration that there was no ongoing contractual or business relationship between the parties and that no monies were owing for any reason whatsoever. *(NB: The claimant says they did not engage with the proceedings as that court has no jurisdiction-they assert the 2016 and alleged 2018 contracts mandate reference of disputes to the English courts and in any event the Federal Court not the State Court would be the appropriate place to issue if there was jurisdiction in the US)*
2.6.2021	Claim Form issued for these proceedings pursuant to the alleged 2018 contract and totalling £2,024,180.27 including interest
13.8.21	Notice for service out of jurisdiction where permission is not required filed at court by the claimant
9.9.2021	Claimant asserts they were ineffectively served with a 30-day summons and Complaint in respect of the State Court of Utah
10.9.2021	Claim Form and APOC served on defendant out of the jurisdiction
1.10.2021	Acknowledgment of service filed contesting jurisdiction
8.10.2021	Defendant asks the claimant to clarify the nature of its case
25.10.2021	Claimant advises defendant that they intend to claim in the alternative that even if the alleged 2018 contract is not binding and the 2016 contract has therefore not been superseded, there has been a breach of the 2016 contract and requesting consent to the amendment
1.11.2021	Defendant files motion for entry of default judgment in State Court of Utah
28.11.2021	Default judgment entered in Utah

10.2.2022	Claimant sends draft RAPOC to the defendant which includes the claim in the alternative that was indicated on 25.10.2021
4.3.2022	Defendant issues this application to challenge jurisdiction
7.6.2022	Claimant issues an application for permission to re-amend Particulars of Claim

The issues surrounding the jurisdictional gateway tests

15. The parties adopted different structuring to their arguments and identified differing issues for the determination of this application. I propose to deal with matters in the following order:

    i) Whether the test applicable to determining whether CPR 6.33, service of the claim form out of the jurisdiction **where permission is not required** (the good arguable case test) is satisfied. The relevant question is whether there is a good arguable case that there is a contract containing a term that the English court has jurisdiction to determine the claim and that the dispute falls within the scope of the jurisdiction agreement. The defendant has also suggested that case law is unclear as to whether even if the first test is satisfied, I still need to consider a separate merits threshold as well as per Julia Dyas KC sitting as a High Court Judge in *Naftiran Intertrade Company (Nico) Ltd v GL Greenland Ltd* [2022] EWHC 896 (Comm) at [54] (for the test see further below at paragraph 80). When considering the test, the defendant also submitted in their skeleton argument and in initial oral submissions that I should consider the status of the claimant's unjust enrichment claim pleaded alongside the contractual claims, such claim the defendant asserting (i) has not been fully pleaded and (ii) not being one permitted to be served without permission of the court as it does not fall within the definition of CPR 6.33 (2B) (b). The unjust enrichment claim was subsequently conceded by the claimant orally at the hearing so I will limit what further I say about that.

    ii) If I decide that the good arguable case test is not satisfied for CPR 6.33, I will then turn to consider the tests applicable **where permission of the court is needed** under CPR 6.36 and CPR6.37. Whilst the defendant made much of the fact there was no formal application before me to seek permission retrospectively, nonetheless they dealt with the permission tests in their skeleton argument and in submissions. The tests where the court's permission is required are summarised in *Altimo Holdings and Investment Ltd v Kyrgyz Mobile Tel Ltd* [2011] UKPC 7 as set out in the notes in the White Book at paragraph 6.37.13 and following which includes:

(a) whether there is a good arguable case under PD 6B 3.1 that the claim falls within a specified ground of jurisdiction or gateway (the claimant did not reference any particular gateway in submissions, but the defendant submitted the only possible relevant one for contractual claims is a *claim in relation to contracts* as set out in PD 6B 3.1(6)

(b) there is a serious issue to be tried on the merits of the claim and

(c) whether England is the appropriate forum under the doctrine of forum non conveniens and

(d) the court should exercise its discretion

iii) If I decide permission should have been sought, the claimant has also asked me to consider whether I should permit service out of the jurisdiction retrospectively using CPR 3.10 or should dispense with service retrospectively. Similarly, they asked me to consider permission for alternative service pursuant to CPR 6.15.

iv) If I am persuaded that this court has jurisdiction to hear the claim, whether I should stay it in any event to allow ADR to proceed first in accordance with clause 23 of the alleged 2018 contract.

CPR 6.33 (2B) (b) SERVICE OUT OF JURISDICTION WITHOUT COURT PERMISSION

(i) the legal principles and burden of proof where permission is not required prior to service

16. The general rule is that a claim form can be served on a defendant present within the territorial jurisdiction of England and Wales, but not outside that territory (CPR rule 2.3(1)). It is the act of uncontested service which establishes jurisdiction. When preparing to serve the proceedings the claimant had relied upon CPR 6.33(2B) (b) namely that "*The claimant may serve the claim form on the defendant outside of the United Kingdom where, for each claim made against the defendant to be served and included in the claim form a contract contains a term to the effect that the court shall have jurisdiction to determine that claim*".

17. The defendant, whose application it is, summarised the historical background to this rule, which was only introduced in April 2021, as part of the EU exit arrangements consequent upon Brexit, and noted that there is relatively little case law therefore on its application. However, both parties accepted that cases decided in respect of the now obsolete former Practice Direction 6B (at paragraph 3.1(6) (d)) remain relevant. Both parties also accepted that to succeed on jurisdiction the claimant needed to satisfy the court that it has a **good arguable case,** the test for which has evolved over time but happily both agreed that two recent Supreme Court decisions have authoritatively restated it (*Brownlie v Four Seasons Holdings Inc* [2017] UKSC 80 and *Goldman Sachs International v Novo Banco SA* [2018] UKSC 34), and subsequent to that the Court of Appeal has provided yet more guidance in *Kaefer Aislamientos v AMS Drilling Mexico* [2019] EWCA Civ 10. I turn now to examine the principles of the 3 limbs of the good arguable case test.

(ii) A good arguable case? The three limbs to the test.

18. Lord Sumption at paragraph 9 in the *Brownlie* case, identified the limbs as follows in bold type, and Green LJ's further guidance from paragraphs 73-80 of the *Kaefer* case is shown in italics alongside.

a) **the claimant must supply a plausible evidential basis for the application of a relevant jurisdictional gateway.** This is *"a reference to an evidential basis showing that the claimant has the better argument … For the avoidance of doubt the test under limb (i) is not balance of probabilities ...the test is context -specific and flexible…")*

b) **if there is an issue of fact about it, or some other reason for doubting whether it applies, the court must take a view on the material available if it can reliably do so.** *"Limb (ii) is an instruction to the court to seek to overcome evidential difficulties and arrive at a conclusion if it "reliably" can. It recognises that jurisdiction challenges are invariably interim and will be characterised by gaps in the evidence. The Court is not compelled to perform the impossible but, as any Judge will know, not every evidential lacuna or dispute is material or cannot be overcome. Limb (ii) is an instruction to use judicial common sense and pragmatism, not least because the exercise is intended to be one conducted with "due despatch and without hearing oral evidence"…Where there is a genuine dispute judges are well versed in working around the problem… where there is a dispute between witnesses it might be possible to focus upon the documentary evidence alone and see if that provides a sufficient answer which then obviates the need to grapple with what might otherwise be intractable disputes between witnesses".*

c) **the nature of the issue and the limitations of the material available at the interlocutory stage may be such that no reliable assessment can be made, in which case there is a good arguable case for the application of the gateway if there is a plausible (albeit contested) evidential basis for it.** *"limb (iii) is intended to address an issue which… arises where the Court finds itself simply unable to form a decided conclusion on the evidence before it and is therefore unable to say who has the better argument. What does the judge then do?.... the solution encapsulated in limb (iii) addresses this situation. To an extent it moves away from a relative test and, in its place, introduces a test combining good arguable case and plausibility of evidence. Whilst no doubt there is room for debate as to what this implies for the standard of proof it can be stated that this is a more flexible test which is not necessarily conditional upon relative merits."*

(iii) Not a mini trial

19. As the factual matrix in this case is fiercely contested it is important that I remember it is not my function to conduct a mini trial at this interim stage. Again, at paragraph 76 of *Kaefer* it was held, "*the Court must be astute not to express any view on the ultimate merits of the case, even if there is a close overlap between the issues going to jurisdiction and the ultimate substantive merits*".

(iv) Burden of proof

20. The defendant asserted that it is well-established from the *Kaefer* case at paragraph 75 that the burden of proof falls upon the claimant to establish the English court's jurisdiction and the claimant did not seek to dissuade me of this. However, it is not a burden on the balance of probabilities as I cannot weigh the evidence in its totality as at trial. At paragraph 80 of *Kaefer* Green LJ referred to "*the burden of persuasion*" resting with the claimant which I find a helpful indicator. The mere raising of an issue is not enough however (as per Davis LJ at paragraph 119 of *Kaefer*).

Matters to be determined under the good arguable case test

21. In order to determine the gateway issue, the defendant reminded me that I need to have in mind:

    i) whether the contract in respect of which the claim is made existed and was legally binding -there is a dispute about the relevance of the 2016 contract

    ii) whether such contract contained a valid and effective jurisdiction agreement in favour of the English Courts binding on the defendant

    iii) the dispute falls within the scope of that jurisdiction agreement.

Is there a good arguable case that the claim falls within the gateway relied upon?

(i) Defendant's submissions

a) Is there is a relevant and binding legal contract?

22. The defendant's submissions were detailed and extensive and as the burden of proof is on the claimant to establish that they have the better argument, or at least a good arguable case based on plausible evidence, I will attempt to provide a high-level summary only. They submitted that the claimant has never explained how or when CDX entered the alleged 2018 contract despite many prompts and opportunities to do so, such as in pleadings or witness evidence, since the letter before action and they deny a contract was ever entered whether in writing or otherwise.

23. Submissions also concerned the lack of any particulars of alleged performance under the contract or any documentary evidence despite my order of 13th October 2022 permitting disclosure for the preparation of the jurisdiction application to cover "documents relevant (i) to the existence and status of the 2016 contract; (ii) the existence and status of the 2018 contract; (iii) any services provided under the 2018 unsigned contract; (iv) the reasons why the 2018 contract was not signed and why that contract might nevertheless be operative and binding as alleged by the claimant; (v) any continuing course of dealing after the parties agreed the terms of the 2018 contract; and (vi) any prior settlement reached by the parties". Also, the lack of evidence of conduct of the parties to suggest that a contract had been agreed was referenced, and the unilateral and uninvited nature of communications received from the claimant.

24. It was submitted that the lack of a signed counterpart agreement raises an obvious inference that CDX never arrived at the point where it agreed to, and wished to be bound by, the terms of the alleged contract. Inaction and silence do not amount to acceptance

it was submitted. Furthermore, it was submitted, the defendant has raised a plausible explanation in their witness evidence as to why they never signed a contract, namely that in spring 2019 their CEO became aware of prior regulatory breaches by Mr Greystoke such that it did not wish to proceed with a business relationship for reputational and other reasons.

25. The defendant also highlighted that the claimant's initial demand for payment sent 21st December 2018 referred to fees overdue "for months"/ "for years" is inconsistent with a contract being entered in October 2018 and that the sums do not readily reflect the payment instalments set out in that alleged contract at Schedule 2.

26. The defendant asserted that allegations, that they had made representations which create an estoppel from them denying they are bound by the alleged 2018 contract, are too vague and unparticularised to assist the court or the claimant and, in any event estoppel by representation does not create new rights but simply acts as a shield not a sword.

(b) Principles of contract formation

27. Regarding the principles of basic contract formation, the defendant reminded me of the basic rules as conveniently set out by Leggatt J in *Blue v Ashley* [2017] EWHC 1928 (Comm) at [49] namely evidence that:

i) the parties have reached an agreement;

ii) it is intended to be legally binding;

iii) it is supported by consideration;

iv) it is sufficiently certain and complete to be enforceable.

28. The defendant then cited various chapters in Chitty on Contracts (34th edition, 2021) to the effect that acceptance of a contract requires a final and unqualified expression of consent whether by words or conduct. There can be no acceptance by silence and conduct will only amount to acceptance if it is clear objectively that a party did an act with the intention of accepting the offer. It was acknowledged that the lack of a signature on the agreement is not necessarily fatal as it is just one factor, and as Longmore LJ set out in *Investec Bank (UK) Ltd v Zulamn* [2010] EWCA Civ 536 at [16], "*It is a question, in every case where a written agreement is contemplated, whether the parties intend not to be bound until the relevant document is actually signed or merely intend that the relevant document is to be the record of an agreement made orally and intending to be binding when made*".

(c) Did the contract contain a valid and effective jurisdiction agreement in favour of the English Courts binding on the defendant

29. The defendant submitted on this point that the law governing a jurisdiction agreement, as a matter of common law, is the law applicable to the contract of which it forms a part, which is often the law expressly chosen by the parties. It was accepted that jurisdiction agreements are usually given a broad and purposive construction. The defendant stated there must be a good arguable case that the agreed terms in any contract included the wording of clause 25 (the jurisdiction clause) in the alleged 2018

contract and pointed to a complete lack of evidence that this was discussed or ever communicated save in the 23rd October 2018 version of the contract sent to the defendant.

30. The defendant further submitted that the relevance of the 2016 contract, as asserted by the claimant, has never been explained save that it contained an exclusive jurisdiction clause, but the defendant reminded the court that even Mr Greystoke seems to accept that there is no legal relationship between the two contracts in his first statement at paragraph 45. The defendant also submitted that the claim under the alleged 2018 contract does not fall within the terms of the jurisdiction clause in the 2016 contract.

(d) The quantum meruit claim under CPR 6.33(2B) (b)

31. If I decide that there is a valid binding contract, containing an appropriate jurisdiction clause that encompasses the dispute, the main thrust of written and preliminary oral submissions was then focussed on whether it is correct to interpret CPR 6.33 (2B) (b) as allowing a mixed claim to be served without permission where not all claims on the claim form fall within the underlying contract, and therefore within the scope of the jurisdiction clause. It was submitted by the defendant that a claim for quantum meruit is not covered by a contractual term on a proper construction of the new rule. The implications for me to consider, it was submitted, are whether in such circumstances CPR 6.33 (2B) (b) should not be relied upon at all, or whether it should be relied upon just for the claims falling within contractual terms and permission should be sought to serve out of jurisdiction for the balance of claims falling outside that. I have already indicated at paragraph 15(i) above that the quantum meruit claim was conceded in oral submissions by the claimant so I will limit what further I say on the point as it is now strictly obiter.

Is there a good arguable case that the claim falls within the gateway relied upon?

(ii) Claimant's submissions.

32. The claimant's skeleton argument concentrated on the correct legal tests for the court to apply which in fact were agreed during the hearing but did not apply the relevant tests to the material in front of me. The skeleton argument was also more focussed on the tests where permission of the court is sought rather than where it is not required (as set out in their N510 on commencement). However, in oral submissions it was said that there were no documents denying the existence of a contract between the parties nor that invoices should be rendered, and payments made. It was also forcibly submitted that there had been no rebuttals of numerous requests for payment on the basis that there was no legal basis for payment to be made. I was taken to many documents in the hearing bundle which I have included in a table which I have compiled and reproduced at paragraph 43 below, evidencing such demands and the replies which indicated payment would be on the way. Whilst it was acknowledged that no invoices have been produced for the hearing bundle on behalf of the claimant it was said that there is "*a plethora*" of documents demonstrating that a lot of work had been undertaken by the claimant under the 2016 contract and that the 2016 contract was subsumed within the

alleged 2018 contract due to the SEC requirements. The claimant also took me to documents evidencing activities by the claimant on the defendant's behalf after the parties had purportedly agreed new terms and the claimant had signed the alleged 2018 contract. It was further submitted that if the claimant was wrong to believe the alleged 2018 contract superseded the 2016 contract, then that former contract, which is signed, forms a standalone claim for work done pursuant to that contract.

33. The claimant, in reliance upon both the 2016 and 2018 contracts maintained that there was nothing inadequate about the jurisdiction clauses drafted, and which they said had been agreed, which stated that the governing law was that of England and Wales with jurisdiction clauses in favour of the English court. They went further to cite reliance upon *JJH Enterprises Ltd (Trading As Value Licensing) v Microsoft Corporation* (2022) EWHC 929 (Comm), where it was held that the fact of English law being applicable to a large part of the claims was one of several reasons why the court concluded that England and Wales was the appropriate forum. This would have been plainly relevant to the quantum meruit claim.

34. The quantum meruit claim was only very briefly particularised by the claimant in the APOC which simply states, "*The Defendant has therefore acknowledged that the amounts are outstanding pursuant to Contract. In any event, the Defendant has been unjustly enriched by the provision of the Claimant's services as acknowledged in further emails from the Defendant*". The claim was conceded during oral submissions after the defendant had challenged in their initial oral submissions whether it was indeed a claim that would be relied upon at all, as restitution is not included in the prayer for relief.

Documents review

(i) The alleged 2018 contract

35. This is the only contract referenced on the Claim Form and under which payments were said to be due of £2,024,180.27 including interest. The schedule to the APOC shows 3 fees as due ($10,000 on 18th October 2018, and similar amounts on 18th January 2019 and 18th April 2019) plus monthly fees due from October 2018 through to April 2021 at a rate of $6000 cash and $6000 per month in shares. This accords with the payment structure set out in Schedule 2 of the alleged 2018 contract.

36. The contract itself:

i) is only signed by the claimant.

ii) does not reference any prior agreement (and clause 17 contains an entire agreement clause which extinguishes all previous agreements).

iii) has a commencement date of 18th October 2018.

iv) Under clause 2.1 notice to terminate must be given in writing and not before the first anniversary of the agreement.

v) At clause 6.1 there is reference to charges due in accordance with Schedule 2 which specifies that they are due in arrears following submission of an invoice.

vi) At clause 6.3 (b) Pantheon could suspend services until payment had been received in full under invoices submitted.

vii) At clause 23 there is a multi-tiered dispute resolution procedure requiring service of an ADR notice prior to commencement of court proceedings.

viii) The governing law in clause 24 is England and Wales and at clause 25 the exclusive court jurisdiction is clearly set out as that of England and Wales also, which extends to include "*non-contractual disputes or claims arising out of or in connection with this agreement or its subject matter or formation*".

ix) The services to be provided and contained in Schedule 1 include access to a relationship network, use of Pantheon's offices, advice on commercial transactions in Europe, USA and Latin America, strategic advice for general business development, introduction to potential non-executive directors and senior executives and general assistance with operations in Brazil.

Documents review

(ii) How the alleged 2018 contract is pleaded

37. The APOC as served with the Claim Form, sets out more of the history concerning execution of the contract. It states at paragraph 13, "*The Defendant and Claimant agreed to amend their previous contractual relationship by way of a written agreement*" and recites that there was an email exchange between the defendant's CEO and the claimant's sole director tidying up draft contract terms on 17th October 2018, with the defendant's CEO committing to execute the contract once the agreed changes had been inserted. The APOC goes on to recite that the changes were incorporated, and that the claimant executed his counterpart agreement on 23rd October 2018, and thereafter the defendant's CEO expressed a hope to return their executed copy of the contract (on 28th October 2018) and pay the first instalment in the next few days. There is no further communication referenced until 2 January 2019, responding to the 28th October 2018 email but simply mentioning that "*the compensation for which you are waiting*" will be sorted out when the company is in funds. That email does not reference the unsigned counterpart to the contract. The term "compensation" is not explained. There is reference in the APOC to Pantheon performing some limited tasks under the contract, and it is averred at paragraph 20 "*the Claimant expressed on numerous occasions its willingness to proceed actively to carry out its contemplated role under the Contract*". The first payment is noted at paragraph 14a) of the alleged contract to be due and payable on signature in any event before any further performance by the claimant.

38. The only other interactions between the parties referenced in the APOC were: (i) an exploratory email from the Defendant's Head of Business Development, Joseph Featherstone, dated 18th February 2019 resulting in a conference call the following day at which it is claimed Mr Featherstone committed to ensure implementation of the contract and to set the payments up.

(ii) An email dated 21st February 2019 from Mr Featherstone purporting to check if any payments had been made to date and a follow up message sent on 26th February indicated that payment details had been "*provided for payment*".

(iii) On 4th March 2019 the claimant was said to have chased up payment as nothing had been received. That is the last communication between the parties referenced in the APOC.

Documents review

(iii) The 2016 contract, including references to how it is pleaded in the APOC.

39. The agreement refers to provision of "*introductory services, with a view to a Funding*" at clause 1. At clause 2.1.1-3 types of work to be included under contract are listed as "*introduction to corporate adviser(s) and investor(s), commercial review of the company and production of required documentation acceptable to investor(s) to support the introductions".*

40. The contract provides for staged payments as the funding process progressed with the first one payable upon CDX deciding to proceed with admission of company shares to trading on the London Stock Exchange but with an abort fee of $50,000 if CDX did not proceed or if the admission did not proceed or CDX terminated the contract for any reason on or before 30 days (clause 3.3). No other fees were payable unless contained in a separate agreement (clause 3.4.) Pantheon's standard terms and conditions attached to the agreement provided at clause 4.4 that if the admission application did not proceed for any reason the abort fee would become payable forthwith. At clause 10 of the standard terms and conditions it was recited that "*the Agreement shall be governed by the laws of England and Wales and the parties submit to the exclusive jurisdiction of the English Courts*."

41. The amendments introduced by the APOC refer to a prior agreement executed between the parties dated 3 February 2016 which had a completely different fee structure to the alleged 2018 contract (at clause 7). At paragraph 10 it is averred that "*At no stage did the Claimant ever release its claims under the 2016 Agreement or compromise them in any way*". At paragraph 11 it is maintained that "*the 2016 Agreement was ignored by the Defendant*" and there is an assertion that the defendant ignored US securities law for a public company by failing to notify its shareholders of the 2016 agreement. And at paragraph 12 "*it was in that context that the Defendant sought retroactively to remedy the breach by replacing the 2016 Agreement with the present Contract. It was a particular issue during the course of those negotiations that the Claimant would not seek any remedies or payments under the 2016 Agreement and would rely (for the reasons stated above) exclusively on the new agreement*".

Documents review

(iv) Tabulated summary of disclosure items.

42. A large number of documents has been produced and I have studied and tabulated them carefully to get a better sense of the overall flow of communications between the parties than was possible from the defendant's skeleton argument which analysed them by topic. Demands for payment, references to the agreements and replies are shown in bold and work allegedly performed is shown in italics.

43. In the following table abbreviations have been adopted as follows:

AG – Andrew Greystoke, Director of Pantheon

CDX- used for any employee of CDX except DE or SE

DE -Dwight (Ike) Egan, CEO of CDX

JF-Joseph Featherstone, CDX Head of Business Development

Pantheon – used for any employee of the company other than AG

RS-Richard Serbin-Director of CDX since 2017 and previously a long-standing business associate of AG

SE -Seth Egan, Director of CDX

Date	Item	Content	Notes
25.8.2015	Letter AG to DE	Richard Serbin and AG expressing desire to work with CDX and setting out preliminary information	
13.01.2016	Letter AG to DE, SE	Introductory advice and proposition from Pantheon to CDX	
14.01.2016	Pantheon email to SE, DE	Due diligence questionnaire	
03.02.2016	Cover email for **fully executed 2016 contract** – called an engagement letter	Also supplies due diligence documents from CDX for Pantheon to review.	D says this is irrelevant material and that C has not explained why it is relevant to jurisdiction under the Claim Form and APOC

18.02.2016	Letter Pantheon to Reed Benson	*Due diligence report on "voluminous "information supplied re CDX.*	D says that there is no evidence of consistent performance under the contract
21.04.2016	Conference call CDX and Finncap	*Call set up by Pantheon to secure funding*	
25.04.2016	SE email to Pantheon	Enquiring whether CDX can do any follow up work following the conference call.	
03.04.2017 Response later that day	Letter AG to SE Email DE to Pantheon	"We were anticipating a response to our proposal and would be grateful to receive one" … "Richard and I both truly want to be part of the Co-diagnostics story". "Hopefully I'll have a proposal to you by the end of the week"	
11.04.2017	Letter Pantheon (AG) to SE	**"Look forward to your proposal for finally sorting out the current position" …** Look forward to making serious progress with the company and working seriously with you"	

04.01.2018	Email sent on behalf AG to DE	**"I have been concerned for many months at the non payment** [sic] of the monies due to us …I understand ... that you would like the final agreement to be reached in terms of consultancy services to be provided by Pantheon."	
23.01.2018	Email AG to SE, DE, RS	**We are owed money for nearly 2 years now** and Richard played a major role in getting the company to SALS... we can work together for the future...but the prior **debt must be cleared** first	C comments that this relates to the 2016 contract No specific comment from D
28.02.2018	Letter AG to DE, SE	"I understood that **you promised Richard to call me to resolve the outstanding issue.** I am sure that once we can speak properly we will **come to a sensible commercial transaction**… I truly do look forward to the restoration of our relationship, to the **resolution of this problem** and to working forward with Co-Diagnostics"	
09.03.2018	Email AG to DE	**"You have agreed to provide a proposal to deal with the past and much more importantly the future"**	

27.03.2018	Email AG to DE, SE	"We had hoped to get your proposal before Easter"	
03.04.2018	Email AG to SE, DE, RS	"Politeness and courtesy **require that you at least fulfil your promise** and make a proposal". NB previous documents in the bundle refer to a social evening March 5th in Utah AG/DE	No specific comment by D
04.04.2018	Email AG to DE, SE RS	**Need to resolve past invoices** $90,000, **a new** monthly **fee** of $10000 **to compensate for delay and to recognise services will be provided - consultancy agreement to be drafted**	D says this must relate to 2016 contract and the alleged 2018 contract cannot have replaced it else those old fees would be wrapped into the new agreement C says there is no indication at all that the payments are not agreed nor that the new agreement would compensate for past services going forwards
05.04.2018	Email exchange SE and AG	**"Ike is working on a response** and will get it out to you ASAP "AG replies "I do not understand why **in spite of many promises this remains unresolved.** We really want to work with the Company…"	
21.05.2018	Email DE to AG in response to a letter not in the bundle	**"You are not being ignored...We simply have limited bandwidth to get everything done that needs to be done in terms of document preparation** etc You	

		need to **relax in the comfort that you and I have come to terms with respect to our relationship and its terms. We will get it papered as soon as we can."**	
01.06.2018	Email AG to DE, SE	"*We have identified 2 companies…which we think could be appropriate for the company...*" "So **let's get our agreement signed** and get on with it!"	
19.06.2018	Email chaser AG to DE, SE	No sign of progress- *we have a potential acquisition for you* – can you move it up the list?	
17.10.2018	Email DE to AG headed changes to contract	Specific changes requested to the schedule of charges ... "**after these changes are made ... we will execute the contract** and send it to you. You can sign it and return to us". NB it includes **$10,000 on signature** and next instalments after 3 months	D says will only be bound when signed and prior course of dealing irrelevant NB all suggestions are incorporated into the later draft
22.10.2108	Email SE to AG	**chasing contract**	
23.10.2018	AG reply to SE email –	**contract sent last week** – will resend. "Can we have a call to start giving you value for money".	D says the offer of a call is not performance of the contract

27.10.2018	Email AG to DE, SE	**Surprised not to have received payment**	C says not rebutted that a payment is due D says that a lot of demands do not relate to the alleged 2018 contract and there is no need to reply every time
31.10.2018	Email AG to SE, DE, RS	**Requesting signed contract and cheque** and stating available to work	
08.11.2018	Email exchange Pantheon and SE etc	**Pantheon chasing contract and cheque apology given by CDX for delay -**they have been away on a trip	D says objectively C cannot believe there is a contract if still chasing for it C says evidence they believe there is a contract and monies are due
11.11.2018	Email SE to AG	**I will try and get some progress** on the document	D says shows terms are still being considered
12.11.2018	Email AG to SE, RS	Delighted to see you for dinner- **bring the cheque**	
19.11.2018	Email AG to SE, DE, RS	More or less **repeats email above** of 12.11.18	
23.11.2018	Email DE to AG	**"We're waiting for a schedule from our banker" and arranging meeting in NY**	
26.11.2018	Email AG to DE, SE, RS	**"Please confirm that the initial payment has been sent** so that we can have a meaningful conversation of moving forward"	

28.11.2018	Email AG to SE, DE	Headed "disappointed" ...now that **we have an agreement…** I want to assist ...as set out in our agreement	C says there is no rebuttal of the agreement, and the email indicates that Pantheon has started work
29.11.2018	Email DE to AG	**Explains expecting to complete company financing w/c 10th "I'm enthused about getting together with you to talk about a plan going forward." "Thank you for getting the amended contract to me. I hope to have that all wrapped up in the next few days, at which time I'll send you the executed contract along with a check [sic] for the first instalment"**	C emphasises that this indicates the contract would be signed and money paid
12.12.2018	Email AG to DE	"Richard Krotz of Peak Ridge Capital was formally[sic] a part of Nestle and has *offered to arrange an introduction. We have a number of targets for potential acquisition from our relationships in the United Kingdom which we will now progress with you….* **we fully agree on the contract.** you will be letting me know over the next few days as to **when the initial payment will be made**."	
21.12.2018	Email AG to DE, SE, RS	**Payment is months if not years out of date**	C says not rebutted that monies are due D says inconsistent with the alleged 2018 contract

			being in existence or the 2016 contract being superceded
31.12.2018	Email AG to DE, SE	**Headed "the end of the road" Pantheon has always been willing and able to perform its obligations…there has been a total failure of consideration of the contract and we may cancel it …Claims $90,000 for agreed consultancy services provided and duly invoiced**	D says this appears to relate to the 2016 contract and fees sought do not match the draft 2018 contract -no invoices disclosed, and the burden is on C.
02.01.2019	Continuing Email chain DE to AG	**I am writing "regarding the compensation for which you are waiting" ...awaiting funds … we'll get you taken care of… we need to arrange a time to go over future plans**	C says does not say monies are not due – just a cashflow issue D says was written in response to threat of legal action and does not say they have a contract
06.01.2019	Email AG to RS and Pantheon	He has ignored us for years…I propose saying to CDX the money is due…the company could have been dramatically advanced with our assistance	D says this email reflects that there is no agreement/work done under the alleged 2018 contract C says not rebutted money due NB this is an internal communication at Pantheon
08.01.2019	Letter AG to DE	We have always been willing to assist your company-*we have taken a number of steps to discuss the company with*	D says this is inconsistent with what went before (AG witness statement at paragraph 34) and they do not believe it demonstrates

		our relationships…references CDX total lack of communication-**willing to extend time for payment** and happy to assist until end of February." States "**you have committed to the new contract, and we have agreed.** You may as well take advantage of our services which are going to be paid for anyway."	performance under the alleged 2018 contract D says some letters may not have been replied to as a low priority (DE 2nd witness statement at paragraph 9a), although does refer to an earlier timeframe)
05.02.2019	Email DE to AG, RS	**"At long last we have just closed ...the critical financing ... without such ... there would ultimately not be anything to talk about. I would like to have a conference with the two of you on Monday 11th ... to galvanise our forward going plans "**	
11.02.2019	Email AG to DE, RS,	Headed "Thank you and congratulations" ... "Please assume that *you have an office in London* and a talented team willing to help in any way possible … *Richard will follow up with* … Delighted about Joseph Featherstone."	C says this demonstrates work undertaken by Pantheon for CDX D says a cautious approach is needed regarding JF who was not senior in CDX and it is questionable how much detail he knows about Pantheon
18.02.2019	Email JF to AG, RS	"Ike and I visited this morning and we discussed *three projects* that he has *asked me to work on together with you both. He is anxious*	C says there is no indication that the parties believed there was no contract-there is engagement

		for us to continue the work you are doing."	D says it shows negotiations are ongoing- there is no agreement
21.02.2019	Email JF to AG, RS	"I have a strong feeling that *we are going to do great things together*" ... "I did *check after the meeting with Ike to assure that the funds had been sent and he will check with Reed in the morning"*	C says that demonstrates CDX expected monies to be sent
22.02.2019	Email AG to JF	"Thank you for chasing the money- not your role"	
26.02.2019	Email JF to Pantheon, AG	**Bank information forwarded to Reed and Ike and discussed with them so it does not delay process**	C says there is no rebuttal that money is due
27.02.2019	Email AG to JF, DE, SE, RS	**In last call with Ike he apologised for delay in payment -now months overdue if not years**	C says this confirms ongoing calls between CDX and Pantheon re advice, and an acknowledgement by CDX of the debt which was not rebutted D says at best this recognises past fees have been demanded but they do not accept anything is due under the 2016 contract and there is no reference to new terms being agreed
04.03.2019	Email AG to JF	"**Until the company honours its …obligations we can go no further**"	

04.03.2019	Email JF to AG	JF says "I realise that the **past obligations need to be resolved so that we can start fresh**". "I will be ready when things are made right financially"	
05.03.2019	Email AG to JF cc RS, DE	**"We have a number of months ago agreed and accepted a revised agreement** negotiated in detail with a modest retainer which **Ike said would be now paid immediately -3 weeks ago".** *Pantheon has identified a potential acquisition for CDX*	C says this indicates work done by Pantheon on CDX behalf
15.05.2019	Email RS to AG	Headed "Confidential-Co-Diagnostics" **"Ike will come to NY** either June 4 or June 5 **to finalize a settlement with the outstanding bill.** I believe he needs to get this resolved-he is under Board pressure"	
26.05.2019	Email RS to DE, AG	"As discussed and agreed, **a meeting will be held in NYC on June 4th to resolve the outstanding issue relating to consulting"**	
07.04.2020	Email AG to DE, SE	Headed "well done my friends" ... happy to help with anything in Europe/UK	D says this shows no ongoing alleged 2018 contract

			C says it shows no animosity between the parties

Witness evidence

44. I have not found the four witness statements filed in respect of this application to be particularly helpful as there is a conflict of testimony. Mr Dwight Egan has filed 2 statements in support of the defendant's application. In the first he denied that a contract existed between the parties (paragraph 12) although he accepted that a contract was signed in 2016 but stated "*it swiftly became clear ...that Mr Greystoke was unable to provide the services envisaged under the 2016 contract*" and that it therefore lapsed but was not terminated. He also said Pantheon never sought payment under that contract (at paragraph 24). I have already noted on review of contemporaneous documents that a letter dated 31.12.18 states that CDX has been invoiced. He also said there were no communications between the parties from early 2016 until February 2018 when Mr Greystoke "*out of the blue*" made contact expressing a desire to provide consultancy services (at paragraph 26). My review of the contemporaneous documents also shows that there were some communications in this time period as tabulated earlier. Mr Egan accepts there were discussions around a new contract in autumn 2018/early 2019 but states that he terminated them in spring 2019 because he became aware of regulatory breach issues in Mr Greystoke's past for the first time (paragraphs 32/33). He exhibited a copy of the judgment of the Financial Services and Markets Tribunal dated March 2010. He then said, *" in order to avoid any negative public perception resulting from any association with Mr Greystoke, and to get Mr Greystoke to leave CDX alone once and for all, rather than because there was any contract in place, in around June 2019 Mr McCluskey and Mr Lynn Briggs… together representing CDX, met with Mr Serbin (who at that time CDX understood to be negotiating on behalf of Mr Greystoke). Following negotiations, it was agreed that CDX would pay $ 30,000 …. to completely resolve and settle any claims…*" (paragraph 34). The statement does not inform what happened next nor indeed reference actual payment being made but simply states at paragraph 37 that the fact of settlement was the reason Pantheon's first letter before action was retracted.

45. In his second witness statement Mr Egan seeks to correct misunderstandings about the disclosure requirements of CDX following listing, maintaining that there is no issue regarding disclosure of the 2016 contract in that regard. At paragraph 9(b) he seeks to explain what he and his son meant when referring to "*terms*" and "*progress on the document*" in May and November 2018 and says this relates to future services under a new 2018 agreement which was never executed and maintains at paragraph 9(d) that no "*no substantive services*" were provided under the 2016 contract and no fees were due -the contract has lapsed. Finally at paragraph 11 he confirms there never has been a formal written settlement agreement with Pantheon/Mr Greystoke (as contrasted with the position outlined above in his first statement).

46. Mr Greystoke's first statement dated 7th June 2022 confirms his belief that the 2018 contract was intended to supersede and replace the 2016 contract (at paragraph 16.) He says that the purpose of the new contract was to remedy the position of non-payment

under the 2016 contract and to remedy a regulatory breach by CDX in not disclosing the 2016 contract to the Security and Exchange Commission in breach of regulations for listed companies (paragraphs 44/45).

47. Mr Greystoke explained at paragraph 50 that "*Mr Egan did not dispute the validity of the 2018 Contract nor suggest that the parties had not entered the 2018 Contract. I understood from this that the 2018 Contract had taken binding effect and that there was no need for an executed signed page to be returned as this would be merely for our records in due course. The Claimant relied on the Defendant's representations and conduct to its detriment as it resulted in the Claimant not enforcing the payment obligations it was owed pursuant to the 2016 Contract*." In the preceding paragraphs Mr Greystoke directly referred to his e-mail of 28th November 2018 specifying that now the parties had an agreement they would like to meet and discuss the way forward and the following day by return an e-mail from Mr Egan thanking him for the amended contract in which he said he hoped to have it "*all wrapped up in the next few days at which time I'll send you the executed contract along with a check [sic] for the first instalment*". This was followed by a further e-mail from Mr Egan on 2nd January 2019 specifying that as soon as funding was available, he would get Mr Greystoke "taken care of" regarding compensation for which he had been waiting.

48. At paragraph 59 Mr Greystoke says that Mr Egan always knew about his regulatory ban as he had explained it at their first meeting. At paragraph 60 Mr Greystoke says Mr Serbin was never instructed on behalf of the claimant in respect of any settlement negotiations in June 2019 and he believes Mr Serbin was acting on his own behalf.

49. At paragraph 61 Mr Greystoke states that there has been no suggestion prior to the commencement of proceedings that the 2018 contract was not in effect nor that it replaced the 2016 contract and it had always been the case in correspondence that the defendant would say they would arrange payments.

50. In his second witness statement dated 28th October 2022 Mr Greystoke recounts work undertaken pursuant to the 2016 contract and at paragraph 22 he states, "*Due to the fact that the Defendant was not paying the sums due under the 2016 Contract, I was chasing the Defendant for payment. I was also asking for a reasonable proposal to settle the outstanding amounts*." He continues at paragraph 27 to state that after the 2018 contract had been signed "*the claimant then continued the works that it had been performing prior to the 2018 contract and the defendant at no time gave any indication that it did not wish for the claimant to continue its works and indeed continue receiving the benefits of the introductions that were being made/offered to the defendant*."

51. Importantly at paragraph 28 Mr Greystoke states, "*In respect of both the 2016 and 2018 Agreement it was always accepted by the Defendant that they would be subject to English law and to the exclusive jurisdiction of the English courts since the works[sic] was to be undertaken by the Claimant which is based in London*". Mr Greystoke concludes the statement at paragraph 37 with the words, "*it is the Claimant's position that the 2018 Contract is binding and without prejudice to this, if it is not, then the 2016 Contract remains*."

52. Whilst each party may say a few documents cast doubt on the credibility of the recollections of the opposing witnesses, this cuts both ways. I have no means of determining the conflicts within the witness evidence and nor am I required, or indeed

encouraged to do so, in fact quite the reverse, at this early interim stage. It seems however uncontested between the parties that there has never been any payment of monies to Pantheon, but the differences are (i) what the purpose of contemplated payments was and (ii)whether such monies only relate to the 2016 contract. Similarly, neither party asserts in witness evidence or pleadings that the 2016 contract was ever terminated, the term "lapsed" being non-specific and not in accordance with the agreement itself. There is also no indication how Mr Egan believes he "*terminated negotiations*" in spring 2019 or what negotiations he thought were continuing on the contract terms after October 2018. There is no witness evidence that either party ever believed that the jurisdiction of the English courts was contentious, nor that the governing law for contractual arrangements should not be that of England and Wales.

Analysis and conclusions on the good arguable case test

(i) for each claim made is there an enforceable contract.

53. First, I remind myself that under limb (i) of the "good arguable case" test I need to establish that the claimant has the better argument that there is a "plausible evidential basis" for finding that the alleged 2018 contract is legally binding such that it satisfies the contractual gateway requirement of CPR 6.33(2B) (b). I do not need to do so to the standard of the balance of probabilities. Where there is an issue of fact about it, then under the second limb I need to use common sense and if there is a dispute between witnesses to ascertain if the matter can be decided using the documents alone. Finally, if I am unable to form a decided conclusion on the evidence, the ultimate limb (iii) test is one combining a good arguable case with plausible evidence which is not necessarily conditional upon relative merits, but merely raising the issue is not enough to get the claimant home on the point.

54. Although I have carefully set out the 3 limb approach under the "good arguable case" test I note that Green LJ in *Kaefer* at paragraph 74 stated that " *provided it is acknowledged that labels do not matter, and form is not allowed to prevail over substance, it is not significant whether one wraps up the three-limbed test under the heading "good arguable case""* when referring to the test and I prefer that approach in this instance.

(a) The alleged 2018 contract

55. On the basis of the documents before me I conclude that the claimant does have a good arguable case supported by plausible evidence regarding the existence of a binding 2018 contract, without trying the ultimate issue, but such that it can open the gateway to service out without permission. Under limb (iii) it is not necessary to make a relative finding as to which party has the better argument. My reasons for concluding that there is a good arguable case that there is an enforceable contract between the parties are:

    i) There are clear expressions in all the disclosed documents that terms were negotiated and agreed starting from the email set out in the Table at paragraph 43 above, ("the Table"), dated 21st May 2018, the only alteration being the pricing structure introduced by the defendant on 17th October 2018 which was fully incorporated into the document signed by Pantheon. The entries thereafter,

none of which refer to outstanding terms for discussion, are simply too numerous for me to objectively conclude that the claimant does not have a good arguable case (backed by plausible evidence) that there were no outstanding areas of disagreement on contractual terms. Furthermore, the nature of the communications displays a good arguable case that there was no real lack of intention to be bound by either party after the final draft contract had been drawn up and signed by Pantheon. I marked the most pertinent entries in bold type in the Table. I remind myself of the correct test as set out in *Blue v Ashley,* as referred to above at paragraph 27, as to whether a contract was concluded, namely, *"how the words used, in their context, would be understood by a reasonable person*". Without repeating every entry in the Table I will select a few in the paragraph that follows to illustrate the point. Furthermore, the defendant supplies intelligible reasons as to why payment has not been made (as was required by the contract) on several occasions after the claimant had signed their counterpart, which tends to undermine the suggestion that terms were unresolved or non-binding. I will return to the defendant's submission that these payments did not relate to the alleged 2018 agreement at (v) below, but first I will set out some of the key entries below.

ii) Key communications start with the defendant's email dated 21st May 2018 "*we have come to terms with respect to our relationship and its terms*", continuing through their email of 17th October 2018 "*after these changes are made… we will execute the contract*", the changes being made the following day and chased for by the defendant on 22nd October. There was then an apology for delay in return of the signed counterpart with the reason given that the directors had been away from the office on 8th November 2018, an email on 23rd November from the defendant stating they are just "*waiting for a schedule from our banker*", then an explanation on 29th November from the defendant saying the necessary company funding transaction has just been completed and thanking the claimant for the amended contract and expressing a desire to set up a meeting through to the email of 2nd January acknowledging that monies are due to the claimant and saying "*we'll get you taken care of* " and " *we need to arrange a time to go over future plans*". Then on 5th February the defendant wrote "*at long last we have just closed….the critical financing...without such there would ultimately be nothing to talk about and setting up a meeting for "forward going plans*", with confirmation by the defendant of the bank details for Pantheon's payment being with Mr Egan on 26th February to avoid further delays, then reference to an apology for the delay by Mr Egan in an email of 27th February 2019 which was not rebutted and a chaser in March 2019 was also not rebutted. On the plain face of the words used these examples illustrate to me a good arguable case that there was no controversy over terms after 17th October 2018 and there was an intention to be bound by the defendant. There is not a deafening silence when the claimant sends chasers which have been characterised before me as him "*resurfacing opportunistically*". There is absolutely no documentary evidence that negotiations continued into spring 2019, nor is there any document setting out that negotiations or a commercial relationship have terminated. Indeed, the reference to a settlement in May 2019 relates only to "the outstanding bill", not to the contract overall.

iii) As for the claimant, there are a number of documents showing some performance of tasks (consideration) as contemplated by the alleged 2018 contract which I marked in italics in the Table at paragraph 43. I will not repeat them here, but the types of activity do conform with the Services described in Schedule 1 to the alleged 2018 contract.

iv) The defendant's skeleton argument correctly acknowledged established law that the lack of execution of the counterpart contract by the defendant is not fatal. It seems to me from the history above that there is, at the very least a good arguable case that from the end of November neither party was concerned about the missing signature and all thoughts were focussed on getting the initial payment made under the 2018 agreement-the return of the counterpart was simply not referenced after that time, within the material made available to me, as something outstanding and the claimant asserted to the defendant that the agreement existed several times without rebuttal. Whilst the defendant has said it was a low priority to respond to every communication from Pantheon, it seems to me that the claimant has a good arguable case, where the assertion of an existing contract is combined with chasers for payment between experienced businessmen, that the reason there was no rebuttal was because the contract did in fact exist. Additionally, it is not the defendant's case that the 2016 contract was still "alive" so the natural interpretation is that it is the 2018 agreement being referred to by them.

v) I have turned my attention to whether references were about monies due under the 2016 contract, rather than the alleged 2018 contract cited on the Claim Form, especially as the defendant pointed out that the amount demanded by the claimant in both December 2018 and January 2019 does not match the payment structure under the alleged 2018 contract. Mr Egan himself accepts at paragraph 24 of his first statement that Mr Greystoke never made any demand for payment under that first contract. Mr Greystoke's email of 26th November 2018 (i.e., shortly after the alleged 2018 contract was signed by him) refers to "*the initial payment*" being due and on 31st December he says in view of the lack of consideration from the defendant he can cancel the contract. Both witnesses state that the 2016 contract was never cancelled (Mr Egan's first statement at paragraph 24 references it lapsing only and Mr Greystoke's first witness statement at paragraph 42 references it never being terminated) so it appears to me that the claimant has the better argument, or at least a good arguable case, that the parties were communicating about the 18th October alleged 2018 contract after the alleged October execution date as though the contract was in force. I do not consider given the amount of to and fro between them, and the tenor of correspondence was such that Mr Greystoke was making "*uninvited*" requests or approaches for payment under that contract. This is of course not a finding of fact but simply expressing what I consider to be a good arguable case combined with plausible evidence. Also, on the face of it, and without being able to try the issue, I do not consider Mr Greystoke's comment in December 2018 that payment has been overdue for months/for years makes it implausible that a contract was entered in October 2018. It seems to me that Mr Greystoke's position is (i) that he had done some work under the 2016 contract which the documents marked in the Table at paragraph 43 tends to support, (indeed Mr Egan says there was no "*sustained performance*" rather than no performance at

all in his witness statement), (ii) the 2018 contract payment schedule which the defendant had asked him to incorporate provided for a fee due on execution (i.e. prior to performance). Therefore, I do not conclude that the rather loose language adopted about what precisely is overdue nullifies a good arguable case that the 2018 contract was binding.

vi) The defendant points to a lack of performance by the claimant under the alleged 2018 contract to undermine its existence, but I do not think this assertion is sufficiently evidenced to assist them under the good arguable case test. The Table at paragraph 43 highlights entries in italics where the documents supply evidence after October 18th 2018 of the claimant performing services under Schedule 1 of the contract such as "*access to Pantheon's worldwide relationship network*" and introducing the company to executives who could "*assist in the development of the company*". In any event, as referred to in the preceding sub-paragraph, it was the defendant who was to pay $10,000 immediately upon signing the contract and there is clear evidence that did not happen. The claimant says they have invoiced for services (their email of 31st December 2018) so it is understandable that the claimant did not undertake copious amounts of work when they had not yet received the payment due, against a history of no services being paid for from the inception of the 2016 contract, although the Table does highlight some illustrations of work being done.

vii) The correct tests require me to ignore any subjective state of mind of the parties and in any event Mr Egan's assertion that from spring 2019 he decided to terminate negotiations is something for which I currently have no documentary support and I cannot, indeed must not, form a view on that testimony when there is no opportunity to test it at this interim stage.

viii) In view of my conclusions that the claimant has a good arguable case in respect of the defendant having accepted agreed terms to be bound by contract through their words and conduct I do not need to consider issues raised of estoppel by representation which the defendant had argued with some force would only create a shield not a sword, such that new rights would not come into being as a result.

(b) the 2016 contract, and its relevance

56. Whilst the defendant attacked the relevance of the 2016 contract (see paragraph 30), there was no attempt to undermine the fact that the contract had been entered and that it contained a jurisdiction clause in favour of the English court. In the defendant's first witness statement it was simply set out that the contract had "*lapsed*" and in their second statement that no "*substantive services*" had been performed which is rather different to saying nothing at all had been done or that the contract had terminated. The defendant focussed in their skeleton argument on the distinctive and separate nature of the 2016 contract such that it was said that it provided "*no basis to found the jurisdiction of the English courts to try Pantheon's pleaded claims under the Alleged 2018 Contract*".

57. The APOC averred that the claims under the contract had never been released (see paragraph 41 above) and in submissions the claimant maintained that it forms a standalone contract with persisting rights under it (at paragraph 31 above). My Table at paragraph 43 references documents evidencing a small amount of work done allegedly

pursuant to the contract and there is no evidence of payment for this. In the claimant's first statement he references an intention for the 2018 contract to remedy non-payment under the 2016 contract and in the second statement at paragraph 37 he confirms that the contract remains in force and can be relied upon if the alleged 2018 contract is found not to be binding. He states that it was always accepted by the defendant that the 2016 contract was subject to English law and that the exclusive jurisdiction of the English courts was also recognised.

58. As I mentioned at paragraph 2 above the claimant has issued an application to amend the APOC further to specifically plead reliance upon the 2016 contract in the alternative to the claim for damages for breach of the alleged 2018 contract. That application has not yet been listed and is not consented to. In view of the outstanding amendment application, I will say nothing further about the 2016 contract. The amendment application may, or may not, succeed and no doubt when it is heard consequential arguments will be heard about any further service requirements that may or may not arise. As matters currently stand it will be for the trial judge to determine the relevance of the 2016 contract to the current dispute and to make the final determination as to the existence and terms of that contract, if relevant, after reviewing all the evidence.

(c) Overall Conclusions

59. I therefore conclude that CPR 6.33 (2B) (b) was not an incorrect choice of procedure for the claims relating to the alleged 2018 contract, subject to my determination about the inclusion of a suitable jurisdiction clause in the alleged 2018 contract which I will address further below. However, I will reflect a little further on the quantum meruit claim indicated in the pleading (even though it has now been conceded) which the defendant submitted is inconsistent with a claim under contract such that the gateway under CPR 6.33(2B) (b) could be inappropriate anyway either for some or all of the claims alleged.

(ii) The quantum meruit claim

(a) Defendant's submissions

60. As set out in paragraphs 15(i) and 31 the defendant was keen to press a submission that, as a quantum meruit claim is not one concerning a dispute over defined relevant contract terms, and the wording of the CPR 6.33 (2B) (b) gateway is clearly restricted to claims arising in contract, that part of the claim did not meet the requirements to serve overseas without the court's permission. They further submitted that such a claim may fall within PD6B paragraph 3.1 (6) (claims where the court's permission should be sought) if made "*in respect of a contract*" and signposted me to PD6B paragraph 3.16 where claims for restitution may be considered permissible for service out of jurisdiction if the court considers that "(a*) the defendant's alleged liability arises out of acts committed within the jurisdiction: or (b) the enrichment is obtained within the jurisdiction; or (c) the claim is governed by the law of England and Wales*". They further submitted that the law governing unjust enrichment claims is determined pursuant to Article 10 of the Rome II Regulation i.e., it shall be governed by the law governing the relationship between the parties where such relationship exists which is closely connected to the unjust enrichment. The defendant made no further submissions after their opening oral

ones elicited a concession from the claimant that this aspect of the claim was not being pursued.

(b) Claimant's submissions

61. The claimant did not address this submission head on in their skeleton argument, and the claim was clearly only pleaded in the sketchiest outline in what appears to be a "catch-all" allegation, should reliance upon the claim in contract be impeded in some way. The claim appears at paragraph 34 of the APOC, this paragraph being under an overall heading for paragraphs 29 to 34 entitled "*Breach of the Contract*" (where "the contract" is a defined term pursuant to paragraph 1 of the APOC referencing the alleged 2018 contract) and commencing with the words in paragraph 29, "*In breach of the Contract, the Defendant has failed to make any payments or transfer of shares whatsoever for the Claimant's services in accordance with the terms of the Contract*". Paragraph 34 then reads, "*The Defendant has therefore acknowledged that the amounts are outstanding pursuant to Contract. In any event, the Defendant has been unjustly enriched by the provisions of the Claimant's services as acknowledged in further emails from the Defendant*". Those emails are not set out. The claim was not maintained by the claimant when its brevity and imprecision was alluded to by the defendant.

62. Due to the concession, I received no submissions as to how the quantum meruit claim would have been dealt with alongside a contractual one, under convention and regulations before the recent CPR changes to rule 6.33. There were no CPRC minutes within the large hearing bundle which could have shed light on the background to the final words chosen for the new rule change. Furthermore, it was acknowledged by both parties that there is no case law directly on the applicability of the new CPR 6.33(2B)(b) to this situation.

(c) Obiter remarks on the quantum meruit claim

63. My analysis which follows is strictly obiter, following the concession made by the claimant during the course of the hearing. However, as I had given the point some thought, and there appeared to be no case law upon it, I will still set out a shortened form of my conclusions, should that issue have remained in issue in this claim. I am aware from the notes to the White Book, and my own research of past CPRC minutes, especially those for October 2020 at agenda item 7, that the background to the rule changes was to ensure permission was not required "where the Hague Convention does not apply" (at paragraph 44), in a post-Brexit world, and a contract contained a suitable jurisdictional clause. The purpose being to "instil confidence in businesses to continue to choose COCAs in favour of the courts of E&W, by eliminating a preliminary step which adds costs and delay" (at paragraph 45 of the minutes). The oddity in this case is that the defendant is not based in a Member State of the EU, but one covered by the Hague Convention in any event. The defendant had submitted that the claimant could have completed Form N510 to elect to rely upon the Hague Convention exception to requiring permission for service out but had not chosen to do so. Whether that would have assisted with the quantum meruit claim was not explored by either party in submissions, but I was informed that it made no difference regarding the other aspects of this application.

64. I have taken the opportunity to review the legal status of claims in quantum meruit as set out in chapter 4, section 12 of Chitty on Contracts (34th edition, 2021), although it

was not one of the sections of the text reproduced for the hearing bundle. That section is headed "*Liability when Negotiations do not Produce a Contract*". At 4-275 it states, "*Where work has been done in anticipation of a contract that does not eventuate, the remedy of quantum meruit (the reasonable value of the services provided) may be awarded, as a form of restitution for unjust enrichment, provided the services were requested or acquiesced in by the recipient and provided the claimant did not take the risk of being reimbursed only if a contract was concluded*". Quite clearly, despite the quantum meruit claim being pleaded in this action under the heading, "*Breach of the Contract*", such a remedy is directed to claims brought outside of the contract.

65. On the basis of the APOC itself, and a proper understanding of claims in quantum meruit as referenced in *Chitty* where a contract does not provide for the remedy, and in the absence of any authority to extend the scope of the clearly drafted rule beyond its plain and natural meaning, I find this part of the claim to have been outside of the scope of Rule 6.33 (2B) (b), such that the claimant should not have served it without seeking the court's permission. As the claim is directed to redress where a breach of contract claim fails, there cannot be a good arguable case that there was a contract giving rise to the remedy sought. Furthermore, given that (i) the rule was relatively new at the time of service, (ii) it is extremely brief, and (iii) that the wording explicitly differs from that in PD6B paragraph 3.1(6) by referring to "*a contract claim*" rather than one "*in respect of a contract*" which has been interpreted to include quantum meruit ones, it does appear to me that the claimant was overly optimistic in assuming that permission was not required. I am aware that the Civil Procedure Rules Committee has, after service of this claim (with effect from 1st October 2022), introduced a new rule 6.33 (2B) (c) which seeks to deal with the perceived lacuna created by the earlier rule change such that claims made "in respect of a contract" can now be served out of jurisdiction without court permission but this, to my mind, only reinforces my view that such claims were not/are not covered by rule 6.33 (2B) (b), as was relied upon by the claimant, until the claim was conceded.

66. As to whether the presence of one claim requiring permission impacts on the need for permission for the other for service out (such other having satisfied the Rule 6.33(2B) (b) gateway), I am of the view that there is absolutely nothing in the rules to mandate such a course and therefore nor should I make such a finding. In those circumstances, the only way in which the quantum meruit claim could have avoided being struck out, if not conceded, is if I considered it was appropriate to grant permission for service out retrospectively or to make an order dispensing with service. Those considerations are now obviated by the concession.

(iii) Is there a valid and effective jurisdiction agreement in favour of the English courts within the alleged 2018 contract (non-quantum meruit claim)

67. I set out the parties' submissions at paragraphs 29 and 33. There is no apparent reason to suppose from the material before me currently that the parties were not of one mind as to their choice of jurisdiction and governing law, contrary to submissions by the defendant. As referenced above, I made a disclosure order on 27th September 2022 to assist with determination of this jurisdiction application. Nothing was produced following that order to suggest there was a dispute over the correct forum for dispute resolution and the witness statements do not suggest any controversy over jurisdiction

either; they focus more on whether the alleged 2018 agreement was executed, although the claimant goes further in his second statement to positively state that the defendant had always accepted *"that they would be subject to English law and to the exclusive jurisdiction of the English courts*" at paragraph 28 of that statement. In Pantheon's email dated 31st December 2018, High Court proceedings in England were intimated and none of the correspondence produced following that date from the defendant makes any comment about jurisdiction. Similarly, the letters before action sent by the claimant's solicitors on 15th November 2020 and 7th May 2021 also reference proceedings being commenced in England without any rebuttal thereafter in the material placed before me. As I have already concluded that the claimant has a good arguable case, backed by plausible evidence, as to the binding nature of the alleged 2018 contract, given the further evidence reviewed concerning the jurisdiction clause contained within that agreement I am also able to conclude the claimant has a good arguable case, backed by plausible evidence that the contract has an appropriate jurisdiction clause and that this dispute seeking damages for losses said to be caused by breaches of the terms of contract (excluding the quantum meruit one) fall within the scope of that clause.

iv) is the jurisdiction agreement in favour of the English courts within the 2016 contract relevant?

68. For completeness I refer back to the points considered at paragraph 40 where I set out the wording of the jurisdiction clause 10 in the 2016 contract which specified that agreement was governed by the laws of England and Wales and that there was submission to the exclusive jurisdiction of the English courts. The claimant has averred at paragraph 12 of the APOC that "*It was a particular issue during the course of those negotiations that the Claimant would not seek any remedies or payments under the 2016 Agreement and would rely (for the reasons stated above) exclusively on the new agreement*". Therefore, pending any successful amendment application to plead causes of action relating to the 2016 contract, the fact that the English court was also chosen to have jurisdiction for that contract is not determinative of any issue in the application before me.

(v) The relevance, if any, of the merits threshold

69. I have already set out at paragraph 15(i) that there is currently a judicial question mark over whether under CPR 6.33 (2B) (b) I need to conduct a merits threshold test, as would be the case where court permission was being sought. As the position is uncertain, I am content to examine this threshold in addition to the gateway test which I have already concluded. However, I consider it is more conveniently reviewed in the sections which follow where I will address the requirements under CPR 6.36, being the alternative route for establishing good service out of jurisdiction, which the claimant asked me (somewhat belatedly) to consider notwithstanding their primary position that permission had not been necessary. I will embark on that examination, not because I have any doubt about my findings pursuant to CPR 6.33(2B) (b), but simply because the rule change is still relatively new and untested so if I am wrong about it, it makes sense to examine and apply the principles of the more traditional route to securing good service out of jurisdiction and whether that is a possible or suitable alternative at this late juncture.

CPR 6.36/PD6B para 3.1 SERVICE OUT OF JURISDICTION WITH COURT PERMISSION

(i) The additional legal principles and burden of proof where permission is required prior to service

70. As I have previously referenced CPR6.37 requires a claimant seeking permission to serve out of the jurisdiction, (i) to identify the relevant ground pursuant to PD6B paragraph 3.1 and (ii) their belief that the claim has a reasonable prospect of success as well as (iii) evidence that England and Wales is "*the proper place in which to bring the claim*". According to the notes in the White Book to CPR 6.37.5 the latter issue not only gives the court a discretion but "*In effect it flags up sophisticated conflict of law rules, particularly as regards the doctrine of forum non conveniens*". The burden of proof is on the claimant. It is immediately plain that the test is that for reverse summary judgment, relying as it does on a reasonable prospect of success i.e. non-fanciful. It is generally unnecessary to go too deeply into merits.

71. I set out brief details of the leading case of *Altimo Holdings and Investment Ltd v Kyrgyz Mobile Tel Ltd* [2011] UKPC,7 at paragraph 15(i) but I now need to review the principles in greater depth. First, a reminder of the main principles of the test which is:

(i) that there is a good arguable case that the claim against the foreign defendant falls within one or more of the heads of jurisdiction …as set out in paragraph 3.1 of PD6B

(ii) that there is a serious issue to be tried on the merits of the claim

(iii) that in all the circumstances (a) England is clearly or distinctly the appropriate forum for the trial of the dispute and (b) the court ought to exercise its discretion to permit service of the proceedings out of the jurisdiction.

The first test of a good arguable case "*connotes more than a serious issue to be tried or a real prospect of success, but not as much as the balance of probabilities and is the same as where permission to serve is not sought"*. The notes to CPR 6.37.15 in the White Book make it clear as to how to deal with the different standards of proof between the test for a good arguable case and whether there is a serious issue to be tried, namely that where there is an ingredient to the cause of action relevant for both tests, the "*lower standard of proof for (1) is subsumed into the higher (for 2) and becomes irrelevant*".

72. As to the heads of jurisdiction in paragraph 3.1 of PD6B, subsections (6) to (8) deal with disputes about contracts. I no longer need to deal with relevant gateways where there is also a claim for restitution.

(ii) Defendant's submissions on a good arguable case that the claim for breach of the alleged 2018 contract falls within a permitted head of jurisdiction

73. The defendant held fast to the view that as there was no formal written application before me for retrospective permission to serve out, the claimant had lost their opportunity to make such an application now.

74. In any event, they had argued forcibly in submissions in respect of rule 6.33(2B) (b) both that there was no good arguable case that there was a binding 2018 contract, and secondly that the 2016 contract was separate and distinct and did not aid the claimant to recover losses incurred under the alleged 2018 contract in any event.

75. It was only the defendant who had given consideration to the relevant gateway being potentially viable if permission had been sought, stating that the claim "may fall within PD6B para 3.1(6)".

(iii) Claimant's submissions on a good arguable case that the claim for breach of the alleged 2018 contract falls within a permitted head of jurisdiction

76. Whilst never waiving the position that an appropriate route to service out had been adopted by the claimant, their skeleton argument was structured around the tests to be applied where permission of the court is required prior to service. Their submissions on the correct legal test as to what amounts to "*a good arguable case*" I have already recorded in preceding paragraph 17 as somewhat happily being in accord with those of the defendant.

Analysis and conclusions on the good arguable case test

77. There is no doubt that it is within the overall discretion of the court to consider oral applications where a formal written one has not been filed prior to the hearing. This accords with the overriding objective in terms of saving expense, appropriate use of court resources and managing the issue expeditiously. It is of course important that the parties are on an equal footing and the case is managed justly under the overriding objective too. In this case, there is a huge overlap between the facts and law pertaining to the defendant's written and listed application and the claimant's oral one. In any event, I have already found that the claimant has a good arguable case that the alleged 2018 contract is valid and binding on the parties.I stated at paragraph 69 that if it was considered I had erred in my conclusions on the test under rule 6.33 (2B) (b) I would examine the matter under rule 6.36. but the first "good arguable case" aspect of the test regarding the existence of a binding contract does not need me to rehearse those findings all over again; all that is required is that I consider if there is a good arguable case that a relevant gateway is available which I do find in respect of PD6B paragraph 3.1(6).

Is there a serious issue to be tried on the merits of the claim?

(i) Defendant's submissions

78. Although the defendant had acknowledged that even under the relatively new CPR 6.33 test there may be a need to consider merits, there were no submissions that there is not a serious issue to be tried; their main focus was on the absence of a formal permission application. They did submit that if merits more generally were being reviewed it was open to a defendant to challenge the court's jurisdiction on grounds of *forum non conveniens* (2022 White Book notes at 6.37.21) which I will consider shortly.

Is there a serious issue to be tried on the merits of the claim?

(ii) Claimant's submissions

79. The claimant's skeleton argument was directed towards me finding that there is a substantial question of law and/or fact which needs to be determined and that there is a real prospect of success. As the test is seen as less stringent than that for "a good arguable case" which they had already made numerous submissions about there were no additional points made beyond those.

Analysis and conclusions on the merits threshold

80. The notes to the White Book at 6.37.15 make it plain that the rationale for this test is that the court should not subject a foreign litigant to proceedings which the defendant would be entitled to have summarily dismissed. As I have set out above the same notes make it clear that where the claimant has a good arguable case on the facts and /or law, which in this case relate to a contractual claim, there is no need to re-examine matters for the lower threshold of a real (as opposed to fanciful) prospect of success. I have already concluded that the claimant has a good arguable case in respect of the alleged 2018 contract, so I conclude that the merits threshold is satisfied for ~~all~~ the claims brought.

Is the English court the appropriate forum?

(i) Defendant's submissions

81. Once again, due to the lack of a formal application by the claimant prior to the hearing the defendant did not frame submissions specifically to address the many factors which a court may take into account as to whether England is the appropriate forum where permission is sought. However, as set out at paragraph 29 they had acknowledged that parties can choose the law governing their contract and that in practice that provision will govern the validity and proper construction of a jurisdiction clause which is usually given a broad and purposive construction, as in *Deutsche Bank AG v Sebastian Holdings Inc* [2010] EWCA Civ 998). The headnote to that case at (2) stated "*Parties would be held to their contractual choice of English jurisdiction, unless there were overwhelming, or at least very strong, reasons for departing from the rule*."

82. I mentioned previously (under "merits") that the defendant had submitted it was open to them to rely upon the doctrine of forum non conveniens, in accordance with the notes at 6.37.21 of the White Book (such notes continuing through to 6.37.24), where they have entered a contract containing a choice of court jurisdiction clause but wish to depart from that. This point was not developed further during the hearing.

Is the English court the appropriate forum?

(ii) Claimant's submissions

83. The claimant set out their arguments at some length on this topic, drawing my attention to the principal test as to whether England was a suitable forum for the "*interests of all the parties and for the ends of justice*" as per Lord Goff in *Spiliada Maritime v*

Cansulex [1986] 3 All ER 843 and they also referenced the "*connecting factors*", i.e. which forum the action has the "*most real and substantial connection"* to as required by the application of the *Spiliada* principles. In that judgment Lord Goff made it plain that the exercise of selecting jurisdiction is not a mere matter of the court's discretion but an evaluative judgment of all the relevant considerations which will vary from case to case. The claimant submitted that two of the most relevant factors in this case are (i) the existence of jurisdiction clauses in both agreements which demonstrate a choice of the English court and (ii) the "concurrent proceedings" in the US; the latter factor occupied a good deal of the claimant's skeleton argument, but the defendant made it clear there are no concurrent proceedings, the US litigation having been concluded.

84. As to the relevant clauses in the contracts, the claimant accepted that the *applicable law* governing the contract was *not* generally seen as a significant connecting factor as English courts routinely apply foreign law when dealing with disputes. However, it was submitted that as both contracts contained clauses providing for English law to govern the contracts, England was the appropriate forum for jurisdiction.

85. Regarding the connecting factor of *choice of jurisdiction* clause by the parties in their contracts they referred to the leading case of *Donohue v Armco Inc* [2001] UKHL 64 where it was held that the court will be reluctant to depart from such a chosen jurisdiction clause unless there are very strong reasons for doing so. They also relied upon the more recent Court of Appeal decision in *UBS AG v HSH Nordbank AG* [2009] EWCA Civ 585 where it was held that where English proceedings have been brought in compliance with an English jurisdiction clause, it would be very unusual for an English court to stay proceedings. Further, they relied upon Dicey, Morris & Collins "The Conflict of Laws" (16th ed, 2022) at 12-004 which states "*the fundamental presumption is that an English court will uphold the agreement of the parties*". Similarly, they drew my attention to the same text at 12-111 which states, "*In practice, the two factors which have proved the most significant in not giving effect to exclusive jurisdiction clauses have been the existence of a time bar in the chosen forum, and the risk of inconsistent judgments involving not only the parties to the jurisdiction agreement but third parties also*"; they submitted neither of these factors is relevant to this claim.

Analysis and conclusions on forum

86. The notes in the White Book at 6.37.16 make it plain that "*the burden is on the claimant, not merely to persuade the court that England is the appropriate forum, but "to show that it is clearly so*". The notes go on to emphasise the important parts of Lord Goff's speech in *Spiliada,* referenced above, and that an evaluative judgment is required, not simply an exercise of discretion; the court must look at the natural or appropriate forum for the dispute to be resolved.

I have already considered aspects of jurisdiction at paragraphs 67-68 above, noting that nothing was produced within pre-hearing disclosure to suggest the parties were not of one mind as to the jurisdiction clauses contained within the alleged 2018 contract which the defendant maintains was not executed. Similarly, there was nothing in the witness statements to suggest controversy over the jurisdictional issue and pre-action correspondence highlighting the fact that the claimant intended to issue proceedings in the High Court in England met no resistance on the jurisdictional point. Against that backdrop, and the cases relied upon by both parties that there needs to be a very strong

reason for finding that the appropriate forum is not the one chosen by the parties in their contract, I see no good reason to find that the English courts should not have jurisdiction over this dispute.

The court's discretion

87. Although the defendant's skeleton argument mentioned that the claimant has to persuade the court to exercise its discretion to permit service of the proceedings out of the jurisdiction in all the circumstances, the notes in the White Book at 6.37.25 make it plain that whilst the court's residual general discretion is not entirely exhausted within the forum conveniens principle or rule 6.37(3) it would nonetheless be a rare case where an order was made based on the exercise of the general discretion alone. In the absence of any more specific submissions, and given the detailed analysis and evaluation already undertaken, I do not think further consideration of my general discretionary powers takes matters any further forward.

Is retrospective permission of the court necessary or appropriate and is there a need to dispense with service?

88. As I have explained earlier there was no formal application before me from the claimant to order retrospective permission to serve out of the jurisdiction, it was very much a plea in the alternative and made in the claimant's supplemental skeleton argument produced at the hearing. A separate bundle of authorities to deal with the point was also produced at the hearing. The defendant considered that both the lack of a formal application, and the lack of identification as to which gateway would apply in this scenario, was conclusive on the point. However, I consider that the material placed before me does enable me to form substantive and reasoned conclusions, which I will set out below.

89. The claimant relied upon CPR 3.10 which states:

"Where there has been an error of procedure such as a failure to comply with a rule or practice direction-

a) the error does not invalidate any step taken in the proceedings unless the court orders otherwise; and

b) the court may make an order to remedy the error.

90. Thus, the CPR does not attempt a definition of the types of errors where this power may be applied. The main authority relied upon was *Nesheim v Kosa* [2006] WL 2794124 in which Briggs J, as he then was, held that the court did have the power to grant retrospective permission to order service out of the jurisdiction. At [21] he found that "*in terms of the express provisions of the rules, the grant of retrospective permission is neither expressly permitted nor expressly prohibited*. "At [22] he referenced the Court of Appeal decision in the case best known by its more colloquial name, The Ikarian Reefer, (*National Justice Compania Naviera v Prudential Assurance Company Limited No.2* [2000] 1WLR 603) where the court's retrospective power to grant permission was confirmed. He took the view that such a remedy is in furtherance of the overriding objective, provided it is not exercised to circumvent CPR 7.6(3), but is appropriate in a

case where there has been in time "de facto service", that is service which achieved the intended effect of bringing the claim to the attention of the defendant", (at [47]).

91. Having considered the authorities in some depth after the hearing, I have reached the conclusion that this case is indeed one where the interests of justice demand that I do grant retrospective permission to serve out of jurisdiction, if indeed the relevant requirements of CPR 6.33(2B) (b) are not made out in respect of the main claim in respect of the alleged 2018 contract, as per my findings at paragraph 59 above. As Brooke LJ pointed out at [38] of *Hannigan v Hannigan* [2002] 2 FCR 650, if I did not make such an order it would be "*the antithesis of justice… the claim would be struck out in its infancy without any investigation into its merits and the defendants would receive a completely unjustified windfall simply because of a number of technical mistakes made by a solicitor in the very early days of a new procedural regime*".

92. Briggs J set out at [14] of *Kosa*, that it is important to consider the tensions under the overriding objective between doing justice and avoiding "*as far as possible the parties becoming embroiled in long, costly but arid procedural warfare and to focus them and their resources upon the litigation (or resolution by some other means) of the underlying issues in dispute between them*" and the need to ensure compliance with rules. I have focussed on that exercise and summarise it below.

93. The matters which I consider tip the balance in favour of me exercising discretion (and adopting the test pursuant to CPR 3.9 as did Briggs J [at 41] in *Kosa*) are that despite the potential serious breach of CPR there is a good explanation for any error. I should re-iterate that I do not consider there has been such a breach, save for the rather poorly worded quantum meruit claim (which has now been conceded in any event and therefore no longer forms part of my consideration concerning retrospective permission) but there is no prior judicial interpretation of the relatively new rule 6.33(2B) (b) provision to aid my judgment. Furthermore, in all the circumstances (i) the defendant has suffered no real prejudice apart from delay and (ii) there is no complaint of failed service within the prescribed time limits, it is just the fact that permission was not sought first from the court in a situation where the rule relied upon is new and untested in the courts so there was a range of opinion as to the correct course, (iii) the claimant has pointed out that if the claim is struck out there will now be limitation issues in recommencing a new action (iv) I have considered the merits of the claim and there are compelling reasons to consider that there is a real, rather than fanciful, prospect of success and (v) it would be wholly disproportionate and unjust in the circumstances to deprive the claimant of further investigation into this sizeable claim.

94. Within the claimant's bundle and supplemental skeleton argument there were also various authorities containing references to CPR 6.15 which permits a court to authorise service of a claim form by an alternative method, and to order that steps already taken to bring the claim form to the attention of the defendant are valid. There was no argument before me as to the appropriateness of making an order via the CPR 6.15 route rather than CPR 3.10 but the notes in the White Book at 3.10.5 make it plain that CPR 3.10 should not readily be relied upon where CPR 6.15 (or indeed CPR 6.16 which I will consider in the following paragraph) is appropriate; at the very least CPR 3.10 (which is of general application) should not be used to validate service of a claim form

where under CPR 6.15 (which specifically deals with service of originating process) it would not be permitted. My reading of the relevant rules and authorities is that CPR 6.15 relates to service *methods* under CPR 6.3 which is all about choice of communication, e.g., post or fax, rather than whether service out of jurisdiction without the permission of the court in circumstances where this was needed, could be validated. In any event in the leading case on the rule, *Abela v Baadarani* [2013] UKSC 44 (which concerned use of a wrong address for service), the Supreme Court held that whether there is good reason to treat a method of service not permitted by CPR rule 6.3, as good service under CPR 6.15, is a question of fact but that the essential point is whether the contents of the claim form came to the attention of the defendant. I particularly note in a concluding paragraph at [53] that Lord Clarke who gave the lead judgment commented unfavourably on a previous judgment where it had been remarked that "*service of the English Court's process out of the jurisdiction as an "exorbitant" jurisdiction, which would be made even more exorbitant by retrospectively authorising the mode of service* ". Lord Clarke held on the contrary that "*The characterisation of the service of process abroad as an assertion of sovereignty may have been superficially plausible under the old form of writ …But it is, and probably always was, in reality no more than notice of the commencement of proceedings which was necessary to enable the Defendant to decide whether and if so how to respond in his own interest. It should no longer be necessary to resort to the kind of muscular presumptions against service out which are implicit in adjectives like "exorbitant". The decision is generally a pragmatic one in the interests of the efficient conduct of litigation in an appropriate forum*". Accordingly, I decline to make any order under CPR 6.15.

95. The claimant also drew my attention to various authorities whereby the court dispensed with the need for service of the Claim Form under CPR 6.16 in exceptional circumstances but as the defendant is not denying the fact of service in time, I do not consider it necessary to examine those authorities or that procedure further. Once again both the rule and the case law relate to inappropriate methods of service under CPR 6.3, or to correct use of such methods but insufficient attention to the various deemed dates of service under rules for each particular method. None of that is relevant in the current instance to my mind, especially when the defendant's closing submissions, in briefly addressing the point, reflected the fact that the real issue in their application is one of jurisdiction not actual service.

The defendant's alternative position regarding a stay of proceedings to enable an ADR process to be pursued.

96. Finally, the defendant submitted that even if I was persuaded that the court had jurisdiction in this action, I should not exercise it at the present time, but instead order a stay until 14 days after service by Pantheon of an ADR notice in accordance with clause 23.2 of the alleged 2018 contract (as referenced at paragraph 35(vii) above). They submitted that this was a mandatory condition precedent under the contract before commencing proceedings and that it was common ground no such notice had yet been served. As such, the defendant submitted the claimant was in breach of contract and that they cannot unilaterally decide not to follow the correct ADR process, nor can they say it has been waived (for example by entering unsuccessful correspondence to try and resolve matters), unless that has been agreed in writing pursuant to clause 14.1 of the alleged contract, which most certainly has not occurred.

97. The defendant also referenced the overriding objective in support of the court's duty to promote ADR wherever possible and strong policy reasons as set out by O'Farrell J in *Ohpen Operations UK Ltd v Invesco Fund Managers Ltd* [2019] EWHC 2246 (TCC) at [58]. Furthermore, they relied upon the findings of Joanna Smith J in *Children's ARK Partnership Ltd v Kajima Construction Europe (UK) Ltd* [2022] EWHC 1595(TCC) at [48], that the courts usually give effect to ADR obligations provided that the contract makes it a mandatory process and the process itself is sufficiently clear and certain. The power to stay is contained within CPR 11(1) (b) or section 49(3) of the Senior Courts Act 1981 and /or pursuant to the court's inherent jurisdiction.

98. The claimant made initial oral submissions that they did not follow the ADR route strictly according to the terms of the alleged 2018 contract because efforts between the parties leading to the setting up of a meeting to resolve issues in June 2019 had come to nought so there would have been no benefit in applying for a stay. Subsequently they submitted that they would welcome a stay to enable the ADR process to get underway.

99. Whilst the defendant replied to the claimant's submissions to say they disagreed that there were any negotiations in 2019, they remained of the view that the ADR process should now be followed, if I accepted that the court had jurisdiction. They explained their lack of institution of the ADR process before commencing the Utah proceedings on the basis that they did not accept the alleged 2018 contract had been executed and that it was therefore not binding upon them.

100. Given the apparent agreement between the parties, I do not need to set out my reasoning laboriously on this point. I have already concluded that the court has jurisdiction, and the alleged 2018 contract clearly contains a process which there is good authority to say should be followed, and such a decision is well within my powers as carefully set out by the defendant. Accordingly, I will order a stay.

Concluding remarks

101. Due to the extremely detailed nature of wide-ranging submissions made by each party, each requiring consideration of multiple issues, I will set out a brief summary of my findings below. There are however two outstanding short points which I have mentioned along the way and need to cover in my final summing up.

102. First, the defendant placed great emphasis at the hearing on the fact that there was no formal application for permission to serve out of the jurisdiction before me, so I could not consider the claimant's submissions in that regard. However, I decided when writing this judgment that pursuant to my inherent discretion that I could, and should, deal with the application made orally by the claimant and implicitly in their skeleton argument. Whilst the defendant had made many submissions which overlapped with those that could have been made if there had been a written application on file, on the topic of forum non conveniens that was not the position. I did not feel impeded in any way from making a decision based on the material placed before me, but for procedural fairness I offered the defendant the opportunity to provide further short written submissions on that particular point prior to handing down, should they consider they need to do so, but with the benefit of my current views on the topic (at paragraph 87). They decided they did not wish to do so.

103. Similarly, as the claimant's supplemental skeleton argument addressing the salient points about retrospective permission was only filed at the hearing with a supplemental authorities bundle, fairness dictated that I permit the defendant an opportunity to file further brief submissions prior to handing down, if they considered it absolutely necessary on that particular aspect. I wish to emphasise that this permission was not given because of any difficulty in reaching conclusions (at paragraph 90 and subsequently) based on the current material before me. Once again, they decided they did not wish to do so.

104. My findings are:

i) It was appropriate to serve the claim for damages for breach of contract without seeking permission of the court, pursuant to CPR 6.33(2B) (b), as there is a good arguable case that there was a relevant and binding legal contract entered into in 2018, containing a valid and effective jurisdiction agreement covering the subject matter of the dispute.

ii) It will be for the trial judge to determine the relevance of the 2016 contract to the current dispute after reviewing all the evidence, and any permitted amendments that may arise following the determination of the claimant's outstanding application in that regard.

iii) The claim for restitution in respect of quantum meruit claims should not have been served without the court's permission, as the civil procedure rules were drafted at the material time, but it was conceded in any event during the course of the hearing.

iv) The fact that one claim in contract was validly served out of jurisdiction without the court's permission, but the claim in quantum meruit required permission that was not obtained, did not invalidate service of the accompanying contractual claim, although this ceased to be a material point following the claimant's concession.

v) That, in any event, (i) the good arguable case test that the gateway in PD 6B paragraph 3.1(6) applies and that test, (ii) the merits threshold and (iii) appropriate forum tests would all have been satisfied for the claim in contract if permission of the court had been sought.

vi) That it is appropriate pursuant to my inherent discretion and CPR 3.10 to permit retrospective service out of jurisdiction of the claims made.

vii) That there is no need to revisit methods of service under CPR 6.15 or to dispense with service under CPR 6.16 as the claim was brought to the defendant's attention in good time.

viii) That there should be a stay of proceedings to enable the ADR process set out in clause 23 of the alleged 2018 contract to be followed.

105. In view of the parties' agreement that if I did not set aside the claim and service of it, a stay would be appreciated to enable ADR to proceed, I do not propose to list the claimant's outstanding application for permission to re-amend the Particulars of Claim at the present time but will await a draft order dealing with that and other consequential matters in the normal way.

106. I would like to take this opportunity to thank counsel for their considerable assistance in dealing with the application of the relatively new changes to CPR 6.33 (2B) (b), which to both their knowledge and mine remained largely untested by the courts prior to this application.