



Neutral Citation Number: [2021] EWHC 1226 (Ch)

Case No: IL-2020-000059

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
OF ENGLAND AND WALES
INTELLECTUAL PROPERTY LIST

Rolls Building, Fetter Lane,
London EC4A 1NL

Date: 24/05/2021

Before:

DEPUTY MASTER MARSH

Between:

JOHN LOBB LIMITED
- and -
JOHN LOBB SAS

Claimant

Defendant

Ian Mill QC and Tom Cleaver (instructed by **Clintons Solicitors**) for the **Claimant**
Huw Davies QC and Jaani Riordan (instructed by **DLA Piper UK LLP**) for the **Defendant**

Hearing date: 24 March 2021

Approved Judgment

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

.....
DEPUTY MASTER MARSH

Deputy Master Marsh:

1. This judgment concerns an agreement made between the claimant and the defendant dated 6 March 2008 (“the 2008 Agreement”) relating to the use and ownership of trade marks relating to the John Lobb brand which have been registered by the defendant in various countries around the world. I will refer to the trade marks and their related logos as “the Mark”.
2. The claimant seeks a declaration that it is not bound by the 2008 Agreement on the basis that the agreement is void ab initio for common mistake and a declaration that it is beneficially entitled to the Mark, and the related registered protections, other than in the territory of France. This is my judgment on an application made by the defendant seeking either an order striking out the claim in its entirety or an order granting the defendant judgment on the claim under CPR rule 24.2.
3. Ian Mill QC and Tom Cleaver appeared for the claimant and Huw Davies QC and Jaani Riordan appeared for the defendant. I am grateful to counsel for their succinct and clear submissions.

The Parties

4. The claimant (also referred to as “JLL”) is a company owned by the Lobb family which operates a made-to-measure footwear business in London. The claimant was incorporated as a company by Eric Lobb in 1972 to carry on that business.
5. The defendant (also referred to as “JLSA”) which was incorporated by Eric Lobb for the purpose of operating a parallel business in Paris.
6. In 1976 the defendant was purchased by Hermès. Steps were then taken by Hermès’ to protect the goodwill and reputation attaching to the John Lobb name using its infrastructure and experience of brand protection by obtaining and maintaining trade mark registrations in respect of the Mark in territories outside France.
7. On 9th March 1992 the claimant and the defendant, together with Eric Lobb, entered into an agreement (“the Radlett Agreement”) which was expressed to run for a term of 15 years. It stated the parties’ intention to review its operation at the end of that period. It suffices to record the summary of the effect of the Radlett Agreement that is set out in recital D to the 2008 Agreement:

“(i) it was agreed, inter alia, that JLSA would manufacture, promote and sell ready to wear footwear and other classes and categories of products described in the registered designations of the Mark throughout the world;

(ii) JLSA agreed not to manufacture made to measure footwear in the UK and assigned to JLL any right that may have accrued to JLSA in the made to measure hand made footwear by its acquisition of the Mark in the UK;

(iii) JLL was given the right to continue to use the Mark in the UK in accoutrements such as belts, cases, shoe cloths, polish and other accessories connected with their business;

(iv) JLSA agree pursuant to its ownership of the Mark to continue protection of the Mark where necessary.”

8. The 2008 Agreement superseded the Radlett Agreement. Discussions about renewing the Radlett Agreement started in 2006 well before its 15 year term had expired. The claimant relies upon a letter sent by the defendant’s lawyers DLA Piper Rudnick Gray Cary UK LLP (“DLA”) on 3 March 2006 following a meeting in the previous month. In paragraph 20 of the particulars of claim the claimant refers to what it describes as material statements of fact made in that letter about rights in the Mark and at paragraph 21 asserts that the letter contained fundamental errors of fact. Discussions continued between the parties from 2006 up to the date the 2008 Agreement was entered into.
9. The essence of the claimant’s case is that it only entered into the 2008 Agreement because it believed the statements of fact made by DLA on behalf of the defendant, and subsequent similar statements, were true. The claimant says that the belief held by both parties about the ownership of rights in the Mark was mistaken and that the claimant is entitled to beneficial ownership of all the registered marks other than those that are registered in France.
10. In the particulars of claim the claimant seeks the following relief:
 - a. A declaration that it is not bound by the terms of the 2008 Agreement, on the basis: (i) that it is void ab initio for common mistake; alternatively, (ii) that it has been terminated in accordance with its terms;
 - b. A declaration that the Claimant is beneficially entitled to the ownership of the John Lobb Marks, including to the registered protections in respect thereof, save in the territory of France.”
11. The claimant no longer maintains that the 2008 Agreement has been terminated (relying upon an implied term) and paragraph 31 of the particulars of claim will be struck out together with the reference to termination of the 2008 Agreement in the claim form.
12. Both parties rely upon the negotiations leading up to the 2008 Agreement being concluded in March 2008 as context that is relevant to the issue of common mistake. At the hearing, Mr Davies took me through the highlights and in answering his submissions Mr Mill referred me to the witness statements provided on behalf of the claimant by members of the Lobb family. I do not consider it is necessary to go through the chronology of events for the purposes of this judgment because I have come to the view that the defendant’s application should be dismissed and, as a consequence, it is appropriate for this judgment to be rather briefer than might otherwise be the case. It is right, however, to note two points:
 - (1) The claimant’s evidence provides support for its contention that by the date the 2008 Agreement was entered, there was no dispute between the parties about ownership, legal and beneficial, of the Marks. This is despite the notable absence of any evidence from the solicitor acting for the claimant at the time. It would not be right for the court to reach a concluded view on the hearing of this application that the 2008 Agreement recorded the compromise

of a dispute. If anything, it appears more likely, without making a finding one way or the other, that the Lobb family had by March 2008 accepted the position put forward by the defendant.

- (2) The question of whether there was a common assumption about the legal and beneficial ownership of the Marks is fact sensitive. For the purposes of the application, I assume that the claimant's case is right on this point.

The 2008 Agreement

13. The 2008 Agreement was made between the claimant and the defendant. The claimant's shareholders are also parties but nothing turns upon them having signed the agreement. The recitals (including those relating to the Radlett Agreement set out earlier), and in particular recital G, contain provisions that are relevant:

“BACKGROUND

- A. [The first recital refers to two agreements that pre-date the Radlett Agreement]
 - B. In accordance with further agreements the John Lobb/Lobb (word mark and/or with device) trade mark was registered for its protection in various countries around the world by JLSA (“the Mark”)
 - C. JLL and JLSA have fully cooperated to maintain and develop a mutual business built on the Trade Mark and trade name Lobb with a view to ensuring that standards continue into the future.
 - D.
 - E.
 - F. ...
 - G. JLSA is the legal and beneficial owner and registered proprietor of the Mark throughout the world and has all the rights in the Mark save in respect of the rights enjoyed by JLL as set out in clause 1 below. A schedule of the Mark currently owned by JLSA is attached as Appendix B.”
14. Appendix B sets out what is described as the “John Lobb SA Trademark Portfolio” and lists the applications for and registrations of the Mark in a wide range of countries throughout the world. Clause 3 of the Agreement provides that the defendant “as owner of the Mark set out hereto in Appendix A¹” shall carry out at its absolute discretion the registration and renewal of the existing and future trade marks.
 15. The remaining provisions can be summarised in the following way:
 - (1) Clause 1.1 acknowledges that the defendant's previous agreement “... to permit JLL's exclusive right to use the mark in relation to its UK business in made to measure hand made products (“JLL Products”) continues ...” and

¹ It is clear the intended reference was to Appendix B.

- clause 1.2 permits JLL to continue to use the Mark in the UK on ancillary products.
- (2) Under clause 1.3 “JLL acknowledges JLSA’s ownership rights in the Mark” and continues by limiting JLL’s use of the Mark to its place of business in London and only in relation to JLL Products and Ancillary Products.
 - (3) Clause 1.9 provides JLSA’s consent to JLL marketing and promoting the JLL Products and the Ancillary Products to its UK customers.
 - (4) Under clause 2.2 the parties agree to promote the Mark. It is expressly agreed under clause 2.3 that JLSA’s obligation in that connection is at its discretion.
 - (5) Under clause 2.3 JLSA agreed to make annual payments to JLL of £65,000 for 5 years and thereafter £35,000 per annum for a further 5 years.
 - (6) Under clause 2.4 JLSA agreed to pay to JLL the balance due under the Radlett Agreement.
 - (7) Clause 5 provided that the agreement is to continue “without limit of time”.
16. The parties operated under the terms of the 2008 Agreement without there being any issue between them about its effect or validity for 9 years until Clintons, acting on behalf of the claimant, wrote to DLA on 19 April 2017. The defendant has made all the payments due to the claimant under clause 2.3 of the 2008 Agreement totalling £465,000. The final payment of £35,000 was made in March 2017. However, the payment was returned by the claimant and is held by the defendant in escrow. There is no dispute that the 2008 Agreement was capable of being performed and was performed by the parties. As the claimant’s case has developed in relation to the doctrine of common mistake, it is now said that impossibility of performance is merely an element that was considered in many of the cases on common mistake, but it is not an essential component of the doctrine.
17. The claim was issued on 22 May 2020 some 12 years after the 2008 Agreement was signed.
18. The defendant seeks an order striking out the claim or in the alternative seeking judgment in its favour pursuant to CPR rule 24.2. Under CPR rule 24.2 the court may enter judgment for the defendant if it is satisfied that the claimant’s case has no real prospect of success and there is no other compelling reason why the case should be disposed of at a trial. The submissions made in the skeleton arguments were put forward on the primary basis that the application was made under CPR rule 24.2 and referred to the well-known summary of the applicable principles in *Easyair Ltd v Opal Telecom Ltd* [2009] EWHC 339 (Ch) [15] per Lewison J (as he then was). However, during the hearing Mr Davies said his primary case was based upon CPR 3.4(2)(a), namely there are no reasonable grounds for bringing the claim. It is well established that in order to succeed in striking out the claim the defendant must show that it is bound to fail.² Even then, it is open to the court to determine that the claim should be tried if it considers the relevant area of law is subject to some uncertainty

² *Hughes v Colin Richards & Co* [2004] EWCA Civ 266

and is developing. The court may then consider it is desirable for findings of fact to be made at a trial so that any further development of the law should be on the basis of actual rather than hypothetical facts.

19. The distinction between the two rules is not an empty one. In the case of CPR rule 3.4(2)(a) the focus is on the statement of case whereas under CPR rule 24.2 the court has regard to the claimant's case as a whole including the evidence that is relied upon. Furthermore, the second limb of CPR rule 24.2 is potentially wider than the exception to the 'bound to fail' test, namely that there is uncertainty about the law in an area that is developing.
20. The defendant originally relied upon three grounds:
 - (1) The doctrine of common mistake cannot apply where either the claimant has agreed or warranted the matters about which it claims the parties were mistaken or it cannot be said that the contract was impossible to perform. It is said that either of these states of affairs is fatal to the claim.
 - (2) The claim is precluded by the doctrine of contractual estoppel.
 - (3) The claim is subject to a limitation defence by the operation of section 5 of the Limitation Act 1980 and section 32(1)(c) does not assist the claimant.
21. At the hearing the defendant did not rely upon contractual estoppel. The defendant accepted, at least in relation to its application, that since a contractual estoppel takes effect as a matter of contract, there is a real prospect of establishing that there can be no contractual estoppel arising out of the 2008 Agreement which would have the effect of precluding an argument that the agreement is void for mistake.

Common mistake

22. The defendant principally relies upon the analysis of the law of common mistake provided in the judgment of Lord Phillips MR in *The Great Peace*³ and the five elements he summarises in paragraph [76]:

“(i) there must be a common assumption as to the existence of a state of affairs; (ii) there must be no warranty by either party that that state of affairs exists; (iii) the non-existence of the state of affairs must not be attributable to the fault of either party; (iv) the non-existence of the state of affairs must render performance of the contract impossible; (v) the state of affairs may be the existence, or a vital attribute, of the consideration to be provided or circumstances which must subsist if performance of the contractual adventure is to be possible.”
23. Mr Davies submits that the claim is bound to fail because the claimant cannot establish the second and fourth elements in this formulation of the necessary elements of the doctrine. If he is right, the second limb of relief sought by the claimant, which is consequential upon the 2008 Agreement being void, falls away.

³ *Great Peace Shipping Ltd v Tsavliris Salvage (International) Ltd* [2002] EWCA Civ 1407.

24. It is interesting to contrast the summary provided by Lord Phillips MR in *The Great Peace* with the summary of the law provided by the editors of Chitty on Contracts at 6-15:

“Where the mistake is common, that is shared by both parties, there is consensus ad idem, but the law may nullify this consent if the parties are mistaken as to some fact or point of law which lies at the basis of the contract. In summary, if: (i) the parties have entered a contract under a shared and self-induced mistake as to the facts or law affecting the contract; (ii) under the express or implied terms of the contract neither party is treated as taking the risk of the situation being as it really is; (iii) neither party was responsible for or should have known of the true state of affairs; and (iv) the mistake is so fundamental that it makes the “contractual adventure” impossible, or makes performance essentially different to what the parties anticipated, the contract will be void.”

25. There are marked differences between the two formulations and particularly the way in which the second and fourth elements are described.⁴ The second element is described in relation to the allocation of risk, rather than there being no warranty, and the fourth element is described, in the alternative to impossibility of performance, by reference to the contractual adventure being essentially different to that which was anticipated.
26. Chitty goes on to set out paragraph [76] in the judgment of Lord Phillips in *The Great Peace* at 6-35 and this is followed in 6-36 to 6-51 with a detailed analysis of each of the elements. It is clear from the analysis that the editors of Chitty do not accept the formulation by Lord Phillips as being a complete summary of the doctrine of common mistake.
27. Mr Mill relies upon the judgment of Mr McDonald Eggers QC, sitting as a Deputy High Court judge, in *Triple Seven MSN 27251 Ltd v Azman Air Services Ltd* [2018] 4 WLR 97 and his analysis of the law at [60]-[76]. In considering what is said to be the second element of the doctrine of mistake (its non-application where the contract makes provision for the unexpected state of affairs) he refers to the judgment of Leggatt J in *Dana Gas PJSC v Dana Gas Sukuk Ltd* [2017] EWHC 2928 Comm at [61]-[65]. Importantly for present purposes, the Deputy Judge at [76] provides an analysis of the law that is different in its emphasis to that of Lord Phillips MR in *The Great Peace*:

“76 Drawing these considerations together, the elements of a common mistake which has the effect of rendering the contract based on that common mistake void are as follows:

- (1) There must have been, at the time of the conclusion of the contract, an assumption as to the existence of a state of affairs substantially shared between the parties.
- (2) The assumption itself must have been fundamental to the contract.

⁴ Nothing turns on the absence of a fifth element in the formulation in Chitty.

- (3) That assumption must have been wrong at the time of the conclusion of the contract.
- (4) By reason of the assumption being wrong, the contract or its performance would be essentially and radically different from what the parties believed to be the case at the time of the conclusion of the contract; alternatively, the contract must be impossible to perform having regard to or in accordance with the common assumption. In other words, there must be a fundamental difference between the assumed and actual states of affairs.
- (5) The parties, or at least the party relying on the common mistake, would not have entered into the contract had the parties been aware that the common assumption was wrong.
- (6) The contract must not have made provision in the event that the common assumption was mistaken.
28. The first three elements can be assumed to be present for the purposes of the defendant's application. The fourth element provides for two alternative elements the first being performance of the contract being radically different from that which the parties believed to be the case and the second being impossibility of performance. The essential point the Deputy Judge is making here is that there must be a fundamental difference between the assumed and actual states of affairs. If that test is right, then the claimant has no difficulty meeting it. The difference between the defendant having the entire legal and beneficial ownership of the Marks and the claimant having beneficial ownership of all the Marks other than those registered in France is stark.
29. It is helpful to refer briefly to the discussion in *Chitty* at paragraph 6-51. Reference is made to the analysis of Mr McDonald Eggers QC in *Triple Seven MSN*:
- “In *Triple Seven MSN 27251 Ltd v Azman Air Services Ltd*, Peter MacDonald Eggers Q.C., sitting as a deputy High Court judge, suggested that:
- “... the test determining the application of the doctrine of common mistake is best applied by (a) assessing the fundamental nature of the shared assumption to the contract, and (b) comparing the disparity between the assumed state of affairs and the actual state of affairs and analysing whether that disparity is sufficiently fundamental or essential or radical.””
30. I turn briefly to deal with the two elements that are relied upon by the defendant.
31. The first element relates to whether there is a ‘warranty’ that the state of affairs, which is said to have been the common understanding of the parties, exists. The starting point is the contract itself. The court must be in a position to construe the terms of the contract and to determine whether it deals with who bears the risk of the relevant mistake.⁵ As the element is described in *Chitty*, it is that neither party bears the risk of the situation being as it really proves to be.

⁵ See Steyn J in *Associated Japanese Bank (International) Ltd v Crédit du Nord SA* [1989] 1 WLR 255 at page 268B-C.

32. The common understanding relied upon by the claimant is that the defendant held the legal and beneficial ownership of the Mark. The defendant says that there is no gap in the contract and the 2008 Agreement contains a ‘warranty’ about the legal and beneficial ownership of the Mark being vested in the defendant. Recital G of the agreement states in terms that this is so and the terms of the contract are clearly based upon this premise. In clause 1.3 the claimant acknowledges the defendant’s “ownership rights in the Mark”.
33. In the passage in *Associated Japanese Bank (International) Ltd v Crédit du Nord SA* I have referred to, Steyn J says it is only if the contract is silent about who bears the risk, there is scope for invoking mistake. The point is put differently, but to the same effect, in the judgment of Lord Phillips in *The Great Peace* at [80] where he says:
- “... the English doctrine of mistake ... fills a gap in the contract where it transpires that it is impossible of performance without the fault of either party, and the parties have not, expressly or by implication, dealt with their rights and obligations in that eventuality.”
34. Later on at [84] Lord Phillips says:
- “Once the court determines that unforeseen circumstances have, indeed, resulted in the contract being impossible of performance, it is next necessary to determine whether, on a true construction of the contract one or other party has undertaken responsibility for the subsistence of the assumed state of affairs. This is another way of asking whether one or other party has undertaken the risk that it may not prove possible to perform the contract, and the answer to this question may well be the same as the answer to the question of whether impossibility of performance is attributable to the fault of one or other of the parties.”
35. As it seems to me, it is not possible to construe the 2008 Agreement as containing a warranty by the claimant that the defendant is the legal and beneficial owner of the Mark, or for the contract be taken to allocate the risk in the event that the assumption is wrong. The common understanding is clear from Recital G and clause 1.3. The contract does not go on to specify what is to happen if that understanding proves to be wrong.
36. It is impossible to conclude that the claimant’s case on this point is bound to fail and the claimant has a real prospect of showing that there is no allocation of risk between the parties about how the 2008 Agreement is to operate if the common understanding proves to be wrong.
37. I turn to the second element that Mr Davies says is absent. Mr Mill accepts that the contract was not impossible to perform. The defendant has made substantial payments to the claimant which it has accepted, the defendant has continued to take steps to protect the Marks and the parties together have respected the operation of the agreement that leaves the UK market to the claimant. If it is the case that impossibility of performance is a sine qua non, then it must follow that the claim is bound to fail.
38. It is clear, however, that impossibility of performance may need to be measured against the common assumption; the test may also be that performance is essentially different to that common assumption. If that is the test, the defendant is unable to

show that the claimant's case with regard to the second element that is relied upon is bound to fail. The defendant is also unable to establish, were it to be necessary to do so, that the claimant's case in this regard has no real prospect of success.

39. I do not accept that the essential elements of the doctrine of common mistake can be reduced to the formulation provided by Lord Phillips. It is clear there is disagreement about the way in which the constituent elements of the doctrine should be formulated and disagreement about its doctrinal basis. The elements of the doctrine cannot be taken to have been entirely settled by the Court of Appeal in *The Great Peace*.
40. I would also observe that although the court may resolve a point of law on the hearing of an application of this type, there are limits to when it is appropriate to do so. It has been said that the point must be a short one, although as I have observed elsewhere the line between short and not being short is difficult to see. I consider that the points of law that arise here, concerning the application of elements of the doctrine of mistake, are unsuited to summary disposal. In addition to the reasons I have already given I would observe that:
- (1) It is necessary for the 2008 Agreement to be construed in its admissible context. Although part of the story has been provided, and the court has been taken to communications between the parties, there are many unresolved issues that cannot be dealt with by making assumptions in favour of the applicant. The doctrine of mistake, as it seems to me, needs to be applied in this case against findings of fact at a trial.
 - (2) The doctrine of mistake, even if it is properly seen as a settled doctrine, is likely to apply in different ways depending upon the precise assumption that is relied upon.
 - (3) I do not consider the doctrine is sufficiently settled to enable the court to take two of the elements that are described in the judgment of Lord Phillips MR at paragraph [76] in *The Great Peace* and simply apply them as if they were part of a statute. The approach adopted to the doctrine in *Chitty* and the judgment of Mr McDonald Eggers in *Triple Seven v Azman Air* suggest that the law is continuing to refine and develop.
41. Finally, even if the defendant were to be right in its submissions based upon the analysis set out in the judgment of Lord Phillips MR in *The Great Peace* this is a case that warrants a trial. It matters not whether this is seen as an application of the principle derived from *Hughes* or the second limb of CPR rule 24.2. The claimant's case may not be a strong one (I express no view about this one way or the other) and it may fail at a trial. It is, however, a case that is unsuitable for summary disposal on the defendant's first ground.

Limitation

42. Section 5 of the Limitation Act 1980 provides:

“5. Time limit for actions founded on simple contract.

An action founded on simple contract shall not be brought after the expiration of six years from the date on which the cause of action accrued.”

43. It seems to me that whether or not this section applies to this claim gives rise to two questions. First, is the claim “founded” on the 2008 Agreement? Secondly, is it right to analyse a claim for a declaration that the 2008 Agreement is void for common mistake as being based upon a cause of action that has accrued?
44. At a superficial level it can be said that the claim is closely related to the 2008 Agreement and, unsurprisingly, it is much referred to in the particulars of claim. In that sense the claim can be said to be founded in the 2008 Agreement. Mr Davies submitted that until declaratory relief is granted that the contract is void, the contract exists and that the claimant’s case is founded on the fact that there is a contract. I do not consider that either proposition is correct. The answer depends upon the right starting premise.
45. In *Aspect Contracts (Asbestos) Ltd v Higgins Construction plc* [2015] 1 WLR 2961 the court was concerned with the effect of an adjudication made under the Housing Grants, Construction and Regeneration Act 1996 where the award is implemented and not challenged by either party. Higgins claimed £822,482 arising out of breaches of duty in 2004. In 2009 an adjudicator awarded Higgins a total of £658,017 which was paid by Aspect. Higgins did not pursue the balance of its claim and Aspect did not challenge the adjudicator’s award until it issued a claim in February 2012. The principal issue in the claim was whether Aspect was entitled to disturb the adjudicator’s award by seeking a declaration that it was not liable to Higgins long after Higgins’ time for bringing a claim had expired.
46. The claim reached the Supreme Court and in the course of his judgment Lord Mance considered whether the declaratory relief sought in that case, a declaration that Aspect was not liable to Higgins for breach of contract, fell within section 5 of the Limitation Act 1980. He first considered at [20] whether a declaration could be granted where there is no cause of action and concluded, relying upon the majority judgments in *Guaranty Trust Company of New York v Hannay* [1915] 2 KB 536, that such claims are permissible. He instanced as a common example a claim made by an insured against liability insurers seeking a declaration that he will be liable to indemnify him in respect of any third party liability which it may be found to have.
47. In the following paragraph he went on to observe:

“21. I am furthermore unable to accept that a claim for a declaration that a person has not committed a tort or breach of contract is a claim falling within, respectively, section 2 or 5 of the Limitation Act 1980, or that either section could be applied by analogy as Higgins also submitted. A claim for a declaration that a contractual right has accrued has been held at first instance to be a claim involving a cause of action founded on simple contract: *P&O Nedlloyd BV v Arab Metals Co (The “UB Tiger”)* [2005] EWHC 1276 (Comm), [2005] 1 WLR 3733, para 20. Accepting without considering that analysis, a claim for a declaration that a person has not broken a contract might also be regarded as a claim “founded on simple contract” (though a claim that a person was not party to any contract certainly could not be); however a claim that a person has not broken a contract could not be a claim in respect of which it could sensibly be said that

any “cause of action” had accrued, still less accrued on any particular date. On that basis section 5 could not apply, directly or by analogy.

48. Lord Mance therefore considers both questions posed at paragraph 42 of this judgment. He refers to the decision in *P&O Nedlloyd BV v Arab Metals Co*⁶ and accepts the possibility that a claim for a declaration that a person has not broken a contract could be regarded as a claim “founded on a simple contract”. However, he distinguishes a claim for a declaration that a person was not a party to a contract as not being one so founded. Furthermore, he observes that a claim for a declaration of non-breach of a contract could not be a claim in respect of which a cause of action had accrued.
49. Mr Mill relied upon *Fisher v Brooker* [2008] EWCA Civ 287 as an example of a case in which despite the lengthy passage of time between the events giving rise to the claim, the Limitation Act 1980 was not engaged. In that case the claimant sought a declaration as to his rights in relation to the ownership of a copyright. The Court of Appeal confirmed that the Limitation Act 1980 had no bearing on the claim although equitable defences such as laches and acquiescence could be relied upon.
50. It seems to me there are at least three different circumstances that can usefully be distinguished:
 - (1) Where the claimant has an underlying cause of action in contract and the claim for declaratory relief may be seen as an attempt to sidestep the effect of the Limitation Act 1980. *Woodeson v Credit Suisse* is an example of such a case. Such a claim is both founded in the contract and there is a cause of action under the contract which has accrued.
 - (2) Where the claimant brings a claim to establish there is no cause of action, such as a claim to establish there was no breach of contract, or indeed no contract at all.
 - (3) Where the claimant relies upon a cause of action concerning legal status, such as a claim to be the owner of copyright.
51. I consider that the defendant is unable to show that the claimant’s case is bound to fail because of the effect of section 5 of the Limitation Act 1980. If it were necessary to do so I would also hold that the defendant has not established that the claimant has no real prospect of showing that section 5 has no application to the claim.
52. The claimant has a real prospect of showing that the claim for a declaration is neither founded on the 2008 Agreement nor based upon a cause of action in the sense in which that expression is used in section 5 of the Limitation Act 1980. My reasons for reaching those conclusions, stated briefly, are:
 - (1) There is real doubt about whether a claim seeking a declaration that a contract is void ab initio for common mistake can be said to be founded on that

⁶ The first instance decision in *P&O Nedlloyd BV v Arab Metals* has more recently been considered and approved in *Woodeson v Credit Suisse (UK) Ltd* [2018] EWCA Civ 1103.

contract. The claimant is not bringing the claim pursuant to the contract or seeking relief under it. The claimant says there was never a contract at all. It does not matter for these purposes, as it seems to me, that the parties have acted upon the basis there was a contract. The purpose of the claim is to consider whether the premise upon which they have been operating is correct. The defendant is not relying upon an estoppel for the purposes of its application.

- (2) This conclusion is not affected by what the defendant's position may be if the claim succeeds. The defendant prima facie has a claim in restitution which is likely to be treated as falling within section 5 of the Limitation Act 1980.⁷ Equally, section 32(1)(c) is likely to be of aid to the defendant since the defendant could not have had knowledge, actual or constructive, before the letter of claim sent on behalf of the claimant. Regardless of whether that is right, at least at this stage of the claim on hearing an application for reverse summary judgment, the defendant's ultimate position is not determinative.
- (3) The claim is not based upon there being a cause of action. The doctrine of mistake is a rule of law. Its applicability needs to be proved by the party relying upon it but that is quite different to the elements that need to be proved forming a cause of action such as a claim in contract. This claim is analogous to a claim in which a party seeks a declaration to the effect that there is no breach of contract or that a contract was not concluded, because one of the elements that is required to form a contract is absent.

Conclusion

53. The defendant's application will be dismissed.

⁷ *Kleinwort Benson Ltd v Sandwell Borough Council* [1994] 4 All ER 890 per Hobhouse J [942]-[943]