EASTERN CARIBBEAN SUPREME COURT
TERRITORY OF THE VIRGIN ISLANDS

IN THE HIGH COURT OF JUSTICE

CLAIM NO. BVI HC (COM) 2012/0130

BETWEEN:

MARUTI HOLDINGS PTE LIMITED

Claimant

-and-

(1) SINCLAIR STRATEGIES LIMITED

(2) MICK CAHILL

(3) PETER MOLTONI

Defendants

Appearances: Mr Simon Browne-Wilkinson QC and Mr Brian Lacy for the Claimant
Mr Christopher Parker QC and Mr Oliver Clifton for the first and third Defendants
Mr Paul McGrath QC and Mr Richard Brown for the second Defendant

JUDGMENT

(Summary judgment application by first Defendant – claim for relief based upon economic torts and unjust enrichment – elements of economic torts considered – requirement for intention to injure claimant considered – whether party paying unwarranted demand made against a third party can have a claim in unjust enrichment against payee)

[1] In this case the Claimant, Maruti Holdings Pte Limited ('Maruti') claims against the Defendants, Sinclair Strategies Limited ('Sinclair'), Mr Mick Cahill ('Mr Cahill') and Mr Peter Moltoni ('Mr Moltoni') (together, 'the Defendants'), the sum of US$21 million, which it is common ground was

paid by Maruti to Sinclair on 22 December 2006. The essence of the claim is that Mr Cahill and Mr Moltoni blackmailed a businessman called Pankaj Oswal ('Mr Oswal') for payment of US$50 million and Mr Oswal procured that Maruti paid Sinclair US$21 million in partial satisfaction of the demand.

[2] Maruti is a Singapore registered company. Filings made with the Singapore Accounting and Corporate Regulatory Authority show that as at 17 January 2013 its directors were Mr Oswal and Mr Shashank Swan. Mr Oswal was the Managing Director. Maruti is owned by a British Virgin Islands registered company called Maruti Investments Limited. In an affidavit sworn in these proceedings on 13 June 2013, Mr Oswal says that Maruti Investments Limited belongs to his wife. Audited financial statements for the year ended 30 June 2011, but signed off by Mr Oswal and Mr Swan on 18 March 2013, contain a statement that none of Maruti's directors in office at 30 June 2011 had any interest in any share capital of Maruti and related corporation [sic]. They also disclose that no director had received or become entitled to receive a benefit by reason of a contract between the director and Maruti or any related company requiring disclosure under the Singaporean Companies Act. As at 30 June 2011 Maruti's financial statements showed that it had an excess of liabilities over assets of over US$82 million. On the face of it, therefore, Mr Oswal has no interest in Maruti.

[3] Mr Cahill identifies himself as the Managing Director of an entity called Intertrust Guernsey, part of the Intertrust Group. He is an Associate of the Institute of Chartered Secretaries and Administrators and is based in Guernsey. Mr Cahill, or rather Intertrust Guernsey, was introduced to Mr Oswal and his then partner, Vikas Rambal ('Mr Rambal') by Mr Moltoni in 2001. The purpose of the introduction was so that Intertrust Guernsey could provide company incorporation and administration services as part of the overall tax planning structure in relation to Mr Oswal's plan (which he subsequently realized) to construct a liquid ammonia plant in Western Australia. Mr Cahill says that the tax planning advice was provided by senior tax Counsel in Wetsern Australia. Intertrust Geuernsey formed companies and provided corporate directors in accordance with that advice. Mr Cahill's involvement was as signatory for certain of the corporate directors. It was Intertrust Guernsey, according to Mr Cahill, which supplied Mr Moltoni with a draft of the consultancy agreement entered into between Sinclair and an Oswal entity called Oswal Projects Limited ('Oswal Projects') and which the Defendants say provided the

true consideration for the payment of the US$21 million to Sinclair. Mr Cahill signed that agreement for one of Sinclair's corporate directors, an entity supplied by Intertrust Guernsey. Mr Cahill says that Intertrust Guernsey continued to act for Mr Oswal until 2011, although he himself had no contact after some point in 2009.

[4] Mr Moltoni is described by Mr Cahill as a 'well respected consultant.' Maruti's statement of claim describes Mr Moltoni as an Australian-tax accountant who, at the material time, was employed by or a partner in a firm called Crowe Horwath in Perth.

[5] Sinclair is a British Virgin Islands registered company. Mr Moltoni and Mr Cahill say in their evidence that it was incorporated in 2006 for what they call, meaninglessly, 'tax structuring purposes.' Mr Cahill says that it was wholly owned and controlled by 'persons from' Intertrust Guernsey. Although Sinclair is said to have been wholly owned by these persons, Mr Cahill claims that 'no person from Intertrust Guernsey' could directly benefit from 'the structure' other than by the receipt of US$100 on its 'formal' winding up. Mr Cahill says that Intertrust Guernsey provided day to day administration and secretarial services to Sinclair, together with corporate directorships through two companies, no doubt captive Intertrust entities[1] until around 2007, when a new corporate services provider appears to have taken over from Intertrust Guernsey. Mr Moltoni, on the other hand, claims to have been appointed a director of Sinclair on 8 March 2013 (while having signed its defence on 12 February 2013, purportedly as its director) and to have been its sole director thereafter. Sinclair, as I have already intimated, claims to have provided Oswal Projects with consultancy services in Western Australia and to have received US$21 million from Maruti, allegedly in consideration of the provision of those services. Apart from what can be gleaned from these opaque references, nothing is known about Sinclair.

The claim in outline

[6] The broad nature of the claim, in ordinary language, is that between about July 2006 and December 2007, but principally in July 2006, Mr Cahill and Mr Moltoni threatened Mr Oswal that if he did not pay them US$50 million, they would tell ANZ Banking Group Limited ('ANZ'), which had provided loan finance for the construction of a fertilizer plant in Western Australia in which companies and trusts connected with Mr

[1] Cosign Services Ltd ('Cosign') and Spread Services Ltd ('Spread')

Oswal had an interest, that cost overruns to the tune of US$491 million, funded by Mr Oswal personally, had occurred in relation to the project. Receipt of that information, so it is said, would have induced ANZ to call an act of default, with the result that Mr Oswal would have lost his investment, the plant and its potential profit stream. In response to this threat, Mr Oswal caused Maruti to pay US$5 million of the US$50 million which had been demanded to a company called Roan Investments Pty Ltd ('Roan') on 18 October 2006. On 22 December 2006 Mr Oswal caused Maruti to pay a further US$21 million to an account of Sinclair's in Luxembourg. No further payments were made, leaving Mr Cahill and Mr Moltoni US$24 million short of the sum demanded. It is not alleged that they pressed for payment of the balance or carried out their threats of disclosure for non-payment of that balance.

[7] These proceedings, for the recovery of the US$21 million were commenced against Sinclair in this jurisdiction as of right on 14 December 2012. There is no claim for recovery of the US$5 million paid to Roan in October 2006, although it appears that proceedings have been commenced by Maruti and Mr Oswal in the Federal Court of Australia and in the Courts of Singapore for recovery of that money.

[8] The causes of action relied upon by Maruti in these proceedings are (1) duress exercised upon Mr Oswal by Mr Cahill, Mr Moltoni and Sinclair; (2) intimidation of Mr Oswal 'and/or Maruti through Mr Oswal' by threatening to commit unlawful interference with Mr Oswal's economic interests; (3) unjust enrichment at Maruti's expense without any legitimate basis and by reason of threats, etc; and (4) conspiracy to injure by unlawful means. Oddly, Mr Oswal's act of surrendering to the demand to make the payments to Roan and Sinclair is defined in the statement of claim as 'the Agreement,' as if it had some sort of binding contractual effect. The relief sought is (a) rescission of the so-called Agreement; (b) a declaration that the Sinclair payment is held by the Defendants (or one or more of them) upon trust for Maruti; (c) an account; (d) restitution of the US$21 million; (e) equitable compensation; or (f) damages in the sum of US$21 million.

[9] On 20 December 2012 Maruti applied for permission to serve the proceedings on Mr Cahill in Guernsey and upon Mr Moltoni in Australia. The ground relied upon was that the proceedings had been served on Sinclair, between whom and Maruti there was a real issue which it was reasonable for the court to try and that Maruti wished to serve upon Mr

Cahill and Mr Moltoni as necessary or proper parties to the claim.[2] The application came on on 23 January 2013, when I adjourned it because I was not satisfied that the pleading disclosed that there was indeed a real issue between Maruti and Sinclair which it was reasonable for the court to try. At the adjourned hearing, for which Maruti put in additional submissions, I allowed myself to be persuaded that there was such an issue and gave leave to serve out accordingly. Mr Cahill and Mr Moltoni acknowledged service on 1 and 21 March 2013 respectively.

[10] On 12 February 2013 Sinclair put in a defence. I think it is fair to say that the only matter of substance which it raises is that the payment by Maruti of the US$21 million was for services supplied by Sinclair to Oswal Projects 'regarding the construction of a fertilizer plant in Papua New Guinea and litigation being pursued in Australia by Mr Rambal.' A copy of the alleged contract (described as a Consultancy Agreement) is annexed to the defence. It is dated 18 September 2006 and stipulates for the provision by Sinclair to Oswal Projects of services 'in respect of various subsidiary and related companies involved in the ownership and proposed construction of a world scale ammonia/urea plants [sic] in various locations.' It refers to Sinclair as agreeing to evaluate 'the policy framework relating to the downstream processing of gas reserves in Papua New Guinea,' but makes no express mention of a fertilizer plant in that state.[3] The minimum fee was to be US$5 million, but that was only payable upon the signing of an MOU with a company referred to as Oil Search Limited. Otherwise, Sinclair was to be paid fees at such a rate and at such times as should be agreed between the parties.

[11] Sinclair's defence does not specifically deny the allegations of blackmail. It confines itself to saying only that the US$21 million was payment for the supply of consultancy services to a third party, Oswal Projects.

[12] Maruti's reply categorises the Consultancy Agreement as a sham designed to provide a false justification for receipt of the total of US$26 million which Roan and Sinclair had received as a result of the alleged threats. It is pleaded that Mr Oswal signed it under duress.

The applications

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[2] CPR 7.3(2)(a)

[3] Mr Oswal explains in his evidence that a supply of gas is the basis for the production of ammoniac fertiliser

[13] On 15 April 2013 Mr Cahill applied for the order granting permission to serve the proceedings upon him in Guernsey to be set aside. The application, which was not settled by Mr Paul McGrath QC, who appeared together with Mr Richard Brown for Mr Cahill on the application, gave as its grounds that Maruti does not have a good cause of action against Mr Cahill; that the case is not a proper one for the Court to exercise its jurisdiction; that the British Virgin Islands are not a convenient forum; and (in short) that there had been material non disclosure of facts and matters which, had they been known to the Court at the time, would have caused it to withhold permission to serve out.

[14] Also on 15 April 2013 Mr Moltoni applied separately for similar relief but asking, additionally, for the claim to be struck out. The grounds given are, first, that this Court is neither the natural nor the appropriate forum for the hearing of the claim; that none of the witnesses of fact is resident in the British Virgin Islands and will almost certainly wish to give evidence in Russia;[4] and that no relevant document is likely to be governed by the laws of the British Virgin Islands; and, secondly, that the Supreme Court of Western Australia is the natural and appropriate forum for the hearing of Maruti's claim.

[15] On 16 April 2013 Sinclair applied for summary judgment, or for the claim to be struck out, on the grounds that Maruti has no real prospects of succeeding; alternatively, that the statement of claim discloses no reasonable grounds for bringing the claim. In the alternative, Sinclair seeks security for costs.

[16] Each of these three applications came on together on 4 July 2013. Sinclair's summary judgment application was heard first. It was common ground that if that application were to succeed, the two set aside applications, which were heard separately, would simply fall away. The summary judgment application was heard first and I shall deal with it first.

Summary judgment/strike out

[17] Mr Christopher Parker QC, who appeared together with Mr Oliver Clifton for Sinclair, submitted not only that the statement of claim disclosed no cause of action but that it was bound to fail on what he submitted were incontrovertible facts.

[4] the reasons for this preference were not addressed during the hearing

[18] I will deal first with the complaint that the statement of claim discloses no cause of action. For that purpose I need to set out the more significant allegations.

[19] The statement of claim alleges that Maruti is one of a number of companies directly or indirectly owned and/or controlled by Mr Oswal. Contrary to what Mr Oswal says in his affidavit, Maruti's holding company, Maruti Investments Ltd, is alleged to be beneficially owned by Mr Oswal and his family.

[20] Maruti pleads that between 2000 and 2006 Mr Oswal was focused upon the construction of a liquid ammonia plane in Western Australia ('the plant'), through a corporate vehicle called Burrup Fertilisers Pty Limited ('Burrup'). Mr Oswal was Burrup's sole shareholder on incorporation. The three directors of Burrup were Mr Oswal, his wife and one Andreas Walewski.

[21] In June or July 2001 and before any contract for the construction of the plant had been entered into, Maruti says that Mr Oswal entered into an oral agreement with Burrup that he would pay any cost overruns arising in connection with the plant. In December 2002 a fixed price contract, at a price of US$320 million, was entered into pursuant to which the contractor engaged sub-contractors, two of which were companies connected to Mr Oswal, whose obligations as sub contractors were guaranteed by Mr Oswal. By so doing, it is pleaded, Mr Oswal effectively guaranteed any cost overruns. Together with financing and other costs the total expected cost of the project was US$385 million.

[22] The statement of claim then alleges that a consortium led by ANZ provided a construction facility of US$270 million, together with a debt service reserve account facility of US$17.5 million. Equity of US$115 million was provided by other types of funding, including US$101 million provided by two Oswal/Rambal companies set up on the advice of Mr Cahill and Mr Moltoni.

[23] Construction of the plant is alleged to have begun in early 2003. Costs proved higher than anticipated and Mr Oswal caused additional payments totaling US$491 million to be paid to the main and sub-contractors by Mr Oswal or by an Oswal family trust of which he was a beneficiary. ANZ was not told about these payments. The reason pleaded is that Mr Oswal believed that if ANZ found out about the cost overruns there would be an event of default under the loan structure that

had been put in place and the entire debt would have been called. Mr Oswal would have been called on his personal guarantees. He would have lost direct investment of US$26 million; 'indirect' investment of US$75 million; the US$491 million of additional funding; profit from the plant; and would have been liable, so it is said, for any shortfall in the security.

[24] Maruti then pleads that in 2006 (when the plant's construction was complete) Mr Cahill and Mr Moltoni knew of the precarious nature of Mr Oswal's business interests; that information about the US$491 million additional funding was sensitive; and that Mr Oswal considered it to be potentially disastrous economically should ANZ learn of the additional funding. This is portentously described as 'the Relevant Knowledge' and is alleged to have been confidential information acquired by Mr Cahill and Mr Moltoni in their role as trusted advisers, giving rise to 'a duty of confidence and fiduciary duties' to Mr Oswal 'and/or the corporate entities connected with Mr Oswal.'

[25] The statement of claim then pleads that in about July 2006 Mr Moltoni visited Mr Oswal in Perth and told him that Mr Rambal (with whom Mr Oswal was then in dispute) had approached him and offered him an unspecified but allegedly significant amount of money to tell ANZ about the additional funding. Mr Moltoni explained for Mr Oswal's benefit that if he did that there would be dire consequences for Mr Oswal, who would lose everything. Mr Moltoni allegedly went on to explain to Mr Oswal that he and Mr Cahill (who is not alleged to have been separately visited by Mr Rambal and who seems to have been generously included by Mr Moltoni as a beneficiary of the money which he was attempting to extract from Mr Oswal) required US$50 million to keep their mouths shut. Mr Moltoni gave Mr Oswal two days to think about it. A little later, Mr Oswal telephoned Mr Cahill (in Guernsey) from Perth. In that call, Mr Cahill is alleged to have said that he would tell ANZ about the overruns unless Mr Oswal paid US$50 million. Mr Cahill, too, is alleged to have given Mr Oswal two days to think about it, although the pleading does not say whether the periods were intended to be concurrent or serial.

[26] Maruti alleges that the threats, if carried out, would have amounted to unlawful interference with Mr Oswal's economic interests, as well as breaches of confidence and fiduciary duty.

[27] Mr Oswal concluded that he had no alternative but to comply. He received, it is pleaded, nearly daily contact from Mr Moltoni demanding

payment and repeating the threat to inform ANZ about the overruns. In September 2006 he told Mr Moltoni that he could not pay US$50 million. In late September or early October 2006 Mr Moltoni visited Mr Oswal. He gave Mr Oswal a piece of paper containing payment details for a bank account in the name of 'Roan Investments Pty Ltd [as] Trustee for the Ord Street Trust.' Mr Moltoni demanded payment of US$5 million into the account as part payment of the US$50 million.

[28] Maruti then pleads that on 17 October 2006 Mr Oswal as Managing Director of Maruti, wrote to Maruti's bank and asked it to make the payment which Mr Moltoni had demanded. That was done on the following day.

[29] Mr Moltoni continued to repeat his threats. In November 2006 Mr Oswal explained to Mr Cahill that he could not pay the balance of US$45 million. Mr Cahill (who appears to have had authority to bind Mr Moltoni) agreed with Mr Oswal that US$21 million would be paid forthwith, the balance of US$24 million to be paid on successful completion of an IPO. In mid December Mr Moltoni brought Mr Oswal another piece of paper, this time bearing payment instructions for an account of Sinclair's in Luxembourg. As a result of the threats to disclose the cost overruns Mr Oswal caused the payment to be made by Maruti on 22 December 2006.

[30] Maruti pleads that the reason why Mr Oswal did not pay the balance of US$24 million was because the IPO did not proceed. In any case, it is alleged, by late 2007 Mr Oswal had bought out Mr Rambal and had the support of ANZ. The plant was operational and the consequences of an event of default were less serious.

[31] Mr Oswal's decision to pay the US$21 million to Sinclair is then defined as 'the Agreement.' The pleading does not identify the parties to the Agreement. It is alleged by Maruti to have been entered into as the result of duress, in the form of unlawful and improper pressure and threats and the only consideration moving from (all three) Defendants was 'purported forbearance' from committing unlawful economic interference, breach of fiduciary duty and breach of confidence. It is pleaded that for these reasons the Agreement should be declared void and set aside.

[32] Maruti then pleads that the same allegations of threats to commit the various torts and breaches of duty which I have already set out support a cause of action in intimidation against Mr Cahill and Mr Moltoni (but not

Sinclair). Particulars of intimidation are set out. For the first and only occasion they describe Maruti as having been 'coerced' - but only 'through Mr Oswal.' The particulars also state that there was no legal right to demand payment of the US$50 million.

[33] Next, Maruti pleads that in receiving the payment Sinclair has been unjustly enriched. This plea is broken down into three elements: first, it is pleaded that Sinclair was enriched by receipt of the payment; secondly, that Sinclair was enriched at Maruti's expense; and thirdly, that the enrichment was unjust because it was (a) without any legitimate basis; and (b) was the result of intimidation and threats to cause economic harm or breaches of duty.

[34] As its final claim, Maruti pleads that each of the Defendants (or any two or more of them) wrongfully conspired and combined together between about mid 2006 and 2007 with the predominant intention of injuring or causing loss to Mr Oswal's economic interests and/or intent to injure Mr Oswal by unlawful means. The overt acts relied upon are those which I have summarized between paragraphs [25] to [30] of this judgment.

[35] Maruti pleads that Sinclair was a mask used by Mr Cahill and Mr Moltoni to conceal their receipt of the US$21 million, or as a vehicle for the commission of unlawful acts. In these premises, it is alleged, the Court should pierce the corporate veil and attribute receipt of the US$21 million to Mr Cahill and Mr Moltoni.

[36] Finally, Maruti pleads that Mr Cahill and/or Mr Moltoni, as well as Sinclair, have been unjustly enriched and claims that as a result they hold the US$21 million as constructive trustees for Maruti.

[37] I have already set out the relief claimed in paragraph [8] above.

Sinclair's summary judgment/strike out application

[37] The allegations relating to the claim in duress appear to be directed at supporting a claim for rescission of the so-called Agreement. Mr Parker did not deal with the question of duress, treating it, I think, as part of the claim in intimidation. Mr Paul McGrath QC, who appeared, together with Mr Richard Brown, for Mr Cahill, however, did make some submissions[5]

[5] Mr Simon Browne-Wilkinson QC, who appeared, together with Mr Brian Lacy, for Maruti, objected to certain of Mr McGrath's submissions on the basis that they were not sufficiently stated in the grounds set out in his application notice. While it is true that the grounds stated in the notice are on the sparse side, I think that they give a sufficient indication of the area and

on the issue, directed at the availability or non-availability to Sinclair of the remedy of rescission of the Agreement. He said that it is now notorious that an agreement procured by duress is voidable, not void, and that it is now far too late for rescission, since Mr Oswal had effectively ratified the Agreement by laches or acquiescence.

[38] I must say that I found these submissions rather bewildering. Granting an alleged submission to yield to demands by blackmailers contractual status at all seems to me decidedly odd. The idea that the resulting 'contract' must be 'rescinded' before the blackmailed party can be released from his obligations thereunder or recover payments made under it seems to me to be even odder. However that may be, a more fundamental problem with the 'rescission' analysis seems to me to be that no-one suggests that Maruti was party to 'the Agreement' or had ever been in any position to rescind it. It is more than likely that I have failed to grasp some link in Mr McGrath's argument, but I have to say that I do not understand it. For the reasons which will follow, that failure on my part is not material to the outcome.

[39] So far as intimidation is concerned, Mr Parker makes the point that there is no explicit allegation of intimidation leveled against Sinclair, but I do not think that that is a significant matter, given that the statement of claim contains allegations that all three Defendants combined to injure Mr Oswal.

[40] Far more significant is the absence from the statement of claim of any allegation that the object of the intimidation was to injure Maruti. As Mr McGrath points out, only the person whom the intimidation was intended to damage has a claim in intimidation – whether he was the recipient of the threats, or whether some other person was threatened with a view of damage occurring in consequence to the claimant.

[41] There is no need for lengthy, or indeed any, citation of authority on these points. They are firmly established. Any reader wishing to reassure him or herself that they are well founded may refer to **Rookes v Barnard**[6] and Clerk & Lindsell on Torts.[7] In my judgment and for these reasons the statement of claim discloses no cause of action in intimidation.

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nature of dispute and the strength of the claim against Sinclair as anchor defendant is inherently bound up with Mr Cahill's objection to joinder

[6] [1961] 3 WLR 438

[7] 20th Ed at 24-057

[42] The difficulty is not cured by the frequent references in the statement of claim to 'the Oswal interests,' or by the allegations of intention to cause harm to or interfere economically with 'the Oswal interests.' It is submitted by Mr Simon Browne-Wilkinson QC, who appeared, together with Mr Brian Lacy, for Maruti, that Maruti falls within the category of 'Oswal interests' (although, as we have seen, Mr Oswal has deposed to the fact that Maruti belongs ultimately to his wife and Maruti's financial statements deny that Mr Oswal has any interest in Maruti at all). Assuming, for the moment, however, that Maruti is properly described as falling within the category of 'Oswal interests,' the intimidation alleged remains intimidation of Mr Oswal. A threat made to me to damage my interests is nothing more than a threat to damage me, whether or not 'my interests' include persons with separate legal personality. Similarly, a description of a person as having the intention to damage 'my interests' is a description of a person having no wider an intention than an intention to damage me. If it is intended to allege that a person intends to damage me together with another person, both I and that other person must be identified. Only a legal person is capable of having a cause of action in intimidation. 'Interests' are not. In my judgment, none of these references is sufficient to complete a cause of action in intimidation in favour of Maruti. The same goes for the other torts mentioned in the statement of claim.

[43] I should, however, deal with the allegation that 'Mr Oswal *and/or Maruti through Mr Oswal* was coerced to pay [the US$21 million to Sinclair],' made in paragraph 40.1 of the statement of claim, setting out the particulars of intimidation. I have added the emphasis. The highlighted words are not capable, in my judgment, of amounting to an allegation that Maruti was coerced by the Defendants or any of them. If a claimant intends to allege that he has been intimidated by the defendant 'through' a third party, he must, in my view, plead that the defendant procured the third party to exert the intimidation – for example, by hiring a hit man with instructions to terrify the claimant. There must, in other words, be pleaded and proved a causal nexus between the intention of the defendant that the claimant should be intimidated and the third party's actual intimidation of the claimant. In the present case, the most that can be got out of the pleading is that Mr Oswal coerced Maruti. For all the pleading shows, none of the defendants intended that Mr Oswal should coerce Maruti into paying Sinclair US$21 million or procured him to do so. The allegation made in paragraph 40.1 of the statement of

claim might provide Maruti with a claim against Mr Oswal but it cannot, without more, provide Maruti with a claim against the Defendants.

[44] Little more needs to be said about the claim in conspiracy. It is not alleged that any of the Defendants had any intention to 'injure' Maruti. Indeed, there is no allegation that any of them knew that either of the two payments would be made by Maruti. The conspiracy claim is hopeless.

[45] Little (if anything) was said about the claim in constructive trust. It, too, is plainly hopeless. The Defendants cannot possibly be said to hold or have held the US$21 million on trust for Maruti. Maruti is to be supposed, on the basis of what is pleaded in the statement of claim, to have intended that the Defendants (or one or more of them) should enjoy the beneficial interest in the money transferred, so that their silence would be ensured. It cannot, on the basis of the allegations set out in the statement of claim, have retained any beneficial interest of its own in the money paid to Sinclair.

[46] That leaves the question of unjust enrichment, pleaded in paragraph 41 of the statement of claim. I should set out the paragraph in full:

> 41 By receiving the Sinclair Payment Sinclair has been unjustly enriched:
>
> PARTICULARS OF UNJUST ENRICHMENT
>
> 41.1 Sinclair was enriched by receiving the Sinclair Payment;
>
> 41.2 Sinclair was enriched at Maruti's expense as it made payment of the Sinclair Payment
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> 41.3 Sinclair's enrichment at Maruti's expense was unjust as it was without any legitimate basis and/or was the result of intimidation and/or threat to commit economic harm and/or breach of fiduciary duties; and/or breach of confidence.

[47] Mr Parker submitted that BVI law does not recognize an obligation to repay uncovenanted benefits, simply because they are uncovenanted. He referred to Goff & Jones Law of Restitution[8] and to the statement of

[8] 8th Ed, paragraphs 1-21, 1-22

Lord Goff in **Woolwich Equitable Building Society v IRC**[9] contrasting that position with that which obtains where money is paid under [illegitimate] compulsion and may be recoverable accordingly. I accept those submissions. It follows that the allegation in paragraph 41.3 that Sinclair's enrichment was unjust as having had no legitimate basis is unsustainable. Mr Parker also pointed out (although in the context of the claim in conspiracy) that it does not follow, because Maruti made the payment, that Sinclair was unjustly enriched at Maruti's expense. As Mr Parker put it, the dealings set out in the statement of claim are that:

> (1) Mr Oswal is blackmailed
> (2) he decides to submit
> (3) he arranges for Maruti partially to satisfy the demand
> (4) Maruti does so.

[48] In other words, Maruti provided Mr Oswal with the funds to satisfy the demand. Whatever financial consequences that may have had as between Maruti and Mr Oswal, and the statement of claim does not say what they were, these allegations do not amount to a case of unjust enrichment of the Defendants at the expense of Maruti. Suppose an eighteenth century man about town is being pursued by low life associates to settle unenforceable gambling debts. Threats against life and limb are made. He throws himself upon the mercies of a rich uncle, who settles the debts. Can the uncle sue the nephew's associates to recover the money? The answer, obviously, is that he cannot, whether he puts the nephew in funds to settle the debts or pays them directly. The reason why he cannot is because what he has done is to make a gift, an advance, or a loan[10] *to the nephew* in order that the nephew may be relieved from the threats which are being made against him. That does not mean that the nephew may not be able to establish a recoverable loss as against his former associates. The uncle, for the reasons which I have given, cannot. The pleading therefore fails to disclose any case that Sinclair has been unjustly enriched at Maruti's expense.

[49] For these reasons, it seems to me that Maruti has no prospect of establishing, on its present pleading, that it has suffered a loss, whether in tort or in restitution, recoverable by it from any of the Defendants.

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[9] [1993] AC 70 at 164 F-H

[10] depending upon the arrangements reached between uncle and nephew

[50] In the course of powerful submissions why I should not accede to Sinclair's application, Mr Browne-Wilkinson submitted that the claim was heavily fact based, turning, as he said, on fundamental questions of intention, and that essentially for that reason it would be unsafe for me to strike it out. It is obvious from what I have already said that I am unable to accept that submission. In my view, it is plain and obvious that Maruti has no case.

[51] Mr Browne-Wilkinson also submitted that I should not strike out the claim, because Sinclair's defence is fatuous.[11] While I respectfully agree with his characterisation, I do not agree that that is any reason why the claim should remain on foot if, on analysis, it is seen to be inherently defective. Mr Browne-Wilkinson points out that there is no denial by Mr Moltoni that he threatened Mr Oswal. Mr Parker said that such a denial was implicit in the assertion that the money was paid for consultancy services. I disagree with Mr Parker on that point. Mr Moltoni nowhere denies threatening Mr Oswal. For the reasons which I have already given, Mr Moltoni's failure to deny threatening Mr Oswal cannot confer a good cause of action on Maruti.

[52] Before leaving this part of the case, however, I should address Sinclair's alternative submissions on summary judgment, which are that facts which have not been and cannot be controverted by Maruti (or by anyone else) show that the claim must fail.

[53] It will be sufficient if I summarise the facts relied upon only briefly. First, it is said that it is incredible, if Maruti truly had a claim for the US$5 million paid to Roan on 18 October 2006, that it would have allowed a claim for its recovery to become statute barred. I am not impressed by this submission. It is not legitimate, in my judgment, to infer from a failure to prosecute one part of a claim that a claimant has no claim at all.

[54] Next, Mr Parker says that it is incredible that a consortium of banks or other financial institutions led by ANZ granting facilities of US$287.5 million (subsequently increased to US$350 million) should not have been fully aware of the costs overruns and of the sources from which they were being met.

[55] Indeed, in a judgment of the Federal Court of Australia given on 19 April 2013 in proceedings between Mr Oswal and receivers appointed over

[11] Mr Browne-Wilkinson used more professional language, but that was the gist of what he said

the plant, Siopsis J found that in addition to the facilities granted to Burrup ANZ had advanced in excess of US$500 million to entities controlled by Mr Oswal. Mr Parker links this to a press statement made by Mr Oswal in May 2011, in which he said that he and entities associated with him had paid approximately US$500 million towards the plant's construction costs. Mr Oswal added that ANZ had been aware of the overruns, although in fairness he did not say for how long ANZ had been aware. Mr Parker said that these facts tend to show that not only did ANZ know about the cost overruns, it was actually funding them.

[56] There is further evidence upon which Mr Parker relied to discredit the claim. For example, Mr Oswal continued to use Mr Moltoni's services until 2011 and even invited him and his wife to a party in 2009. Mr Parker says that it is incredible that Mr Oswal should have paid US$26 million to silence Mr Cahill and Mr Moltoni when Mr Rambal, his commercial opponent, was at large and in a position to divulge the information at any time he chose to do so.

[57] The difficulty which I have about the weight to be attributed to these matters is that, while I can see that they would have been of considerable importance if the claim was being made by Mr Oswal, they seem to me to be irrelevant to the claim actually pleaded by Maruti. They might have been relevant had it been part of Maruti's case that it made the payment because it had its own concerns about the possible disclosure of the allegedly confidential information to ANZ. It does nothing of the sort. Indeed, the fundamental reason why Maruti's claim is hopeless (that it has no explanation why it made the payment) involves the necessary consequence these factual matters are irrelevant to any consideration whether or not the claim should be struck out.

[58] So that while I agree with Mr Parker that summary judgment must be entered in favour of Sinclair against Maruti, alternatively that Maruti's claim must be struck out, I do so on the grounds that it has no prospect of success because (literally) it discloses no cause of action It is therefore unnecessary for me to express any opinions upon the factual issues raised by Mr Parker and in light of the fact that related proceedings are presently on foot in Australia and Singapore, I refrain from doing so.

The set aside applications

[59] Since the grant of permission to serve out was predicated on there being a real issue between Maruti and Sinclair which it would have been reasonable for the Court to try, and since the effect of striking out the claim will be to remove that precondition, it follows that the grant of permission to serve the proceedings on Mr Cahill and Mr Moltoni simply falls away.

[60] That makes it unnecessary to express any opinion upon the matters which I would have had to address had it been necessary to adjudicate upon the set aside applications. In light of the fact that there are related proceedings on foot in Australia and Singapore which touch upon the matters which would have been raised had I not struck out Maruti's claim, it seems to me best that I forbear from expressing any *obiter* opinions on the submissions addressed to me on the *forum* and non-disclosure points.

Conclusion

[61] The proceedings will be struck out. The set aside applications accordingly succeed.

Commercial Court Judge
17 July 2013