

Case No: HQ16X01511

Neutral Citation Number: [2017] EWHC 2320 (QB)
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 13 September 2017

Before :

HIS HONOUR JUDGE SIMPKISS
(Sitting as a Deputy Judge of the High Court)

Between :

ANTHONY D. MARTIN
- and -
(1) MICHAEL POSENER
(2) NICHOLAS POSENER

Claimant

Defendants

Peter Oliver for the **Claimant**
Clifford Darton and George Woodhead for the **Defendant**

Hearing dates: 3, 4 and 5 July 2017

Judgment

His Honour Judge Simpkins :

Introduction

1. The Claimant and the Defendants are distant second cousins, the Defendants are brothers. The Claimant and the Defendants did not know each other before the events leading up to the contract, although they were vaguely aware of each other's existence as family members. The Claimant brings this claim to recover sums of money that he says are due to him under a written contract entered into between them on 22nd November 2014 ("the contract"). Under the contract the Claimant agreed to provide finance for Lee Chudson ("Mr. Chudson") to carry out research for the purpose of supporting claims for compensation in Germany in relation to assets seized by the Nazi regime. In consideration for this finance, the Defendants agreed that they would reimburse the Claimant for the expenses and fees paid to Mr. Chudson and also to 30% of the net sums awarded in compensation after deducting certain expenses. It is common ground that the Defendants are refusing to permit any sums to be paid out to the Claimant, either in respect of expenses and fees that he says that he paid or incurred to Mr. Chudson or any share in the award that was ultimately obtained. The contract is governed by the Law of the Commonwealth of Massachusetts and the court directed that a report should be obtained from a jointly instructed expert, a retired judge Hon Allan van Gestel ("Judge van Gestel"), whose last public position was to preside over the Superior Court's Business Litigation Session.
2. The Claimant is a senior partner in the firm of Duane Morris LLP in Boston Massachusetts. He has acted in person throughout, instructing his counsel, Mr. Oliver, under the direct access scheme. The Defendants were represented by Humphries Kerstetter LLP until 24 May 2017, then by Mayo Wynne Baxter LLP until they came off the record on 13th June 2017 and in person since then and at the trial. They instructed Mr. Darton and Mr. Woodhead under the direct access scheme for the trial. The Defence was drafted by different counsel at the time that Humphries Kerstetter were on the record.
3. It is easier to understand the issues in the case with knowledge of the background facts which I will now turn to. Although the amount at stake in this case is relatively low for a High Court trial, a voluminous amount of documentation has been produced, much of it not relevant and not referred to. The witness statements are also very long and contain matters which are either not relevant or are in fact inadmissible as evidence in relation to the issues that arise, for example, subjective views about what the parties intended the contract to mean. This case therefore appears to be much more complex than it is or ought to be.
4. In relation to the instructions of Judge van Gestel, there was a dispute between Mr. Darton and Mr. Oliver. Mr. Darton submitted that the only instructions came from the Claimant and that the questions posed were not the Defendants'. I was informed by Mr. Oliver that the reason for this was that the Claimant produced draft instructions and submitted them to the Defendants for their agreement or for them to suggest amendments. They did not respond and at a hearing before Mr. Justice Ouseley in the applications court in June 2017 there was some discussion and Mr. Darton argued, rightly and successfully, that the instructions should not contain references to authorities. These were removed. Mr. Oliver expected that there would then be some discussion outside the court to agree instructions, but Mr. Darton insisted that they go

to the expert in the form drafted without the references to authorities. The Defendants therefore had every opportunity to argue for their own instructions. If the questions are not ones that they wanted to then, that is a matter which they could have rectified and chose not to. Any deficiencies in the instructions cannot therefore be blamed on the Claimant.

The background facts

5. The parties are descended from German-Jewish business owners whose properties, or the proceeds of those properties and businesses, were confiscated by the Nazi regime during the 1930's. In the 1950's schemes were set up to enable those whose property had been confiscated, or their living heirs, to make claims for compensation. At this time, the compensation schemes were operated in West Germany. After unification in 1989, similar schemes were set up for those claiming in East Germany.
6. In 2014 these compensation claims were administered by a federal German agency known as the Bundesamt für zentrale Dienste und offene Vermögensfragen ("BADV"). Because so many records of ownership of properties and assets were destroyed in or following the Second World War applicants were required to prove that they were heirs by circumstantial evidence. The BADV scheme was closed to new applicants on 31st December 1992.
7. Claims filed at the BADV are private and confidential and third parties can only obtain access to them by means of a "Vollmacht" or power of attorney granted by the claimant or his heirs.
8. The BADV pays compensation for 3 types of claim: loss of real estate, loss of business assets and confiscation of bank accounts into which proceeds from forced sale of these assets had been deposited.
9. Because so many potential claimants died during the Holocaust, Germany transferred ownership of all unclaimed heirless property to the Conference on Material Claims against Germany, also known as the Jewish Claims Conference ("The JCC"). The JCC listed unclaimed properties and names of original owners. If a claimant proved to be an heir, the JCC would obtain compensation from the BADV for the property. JCC operated 3 separate funds:
 - i) the Good Will Fund, which was expected to pay out some 80% on any admitted claim. Time for making applications under this fund had expired by November 2014;
 - ii) the Late Applicant's Fund for which final claims had to be made by 31st December 2014. This would pay out 50% of the claim;
 - iii) the Third Claim Programme which gave no guarantee of the percentage payment to be made.
10. It is common ground that in order to make a claim it was necessary retain a German lawyer.
11. Heinrich Posener was the Defendants' grandfather, and Siegbert Posener was their father. Heinrich was in partnership with his brother-in-law Moritz Falk ("the

Partnership”) and the Partnership owned and operated a number of department stores. Some of the real estate on which the stores were run was in separate ownership from the partners. Heinrich owned one of these properties in particular was a department store in Kesseldorfstrasse Dresden-Lobtau, Germany (“the Lobtau Store”).

12. The Partnership formed a purchasing consortium with stores owned by other members of the extended family. This was known as Wollwarenhaus Saxonia Falk & Posener (“WSF&P”) with headquarters in Dresden and servicing 18 stores. In 1936 Heinrich died, leading to the liquidation of the stores. The proceeds of the liquidation were deposited at East German banks and were subsequently confiscated by the Nazis.
13. In 1957 Moritz Falk’s 2 daughters, Edith Ostreicher and Margot Weiss (the Falk daughters), who lived in Rio de Janeiro, made claims for both the Falk and Posener heirs in the West German compensation scheme. It was said that this claim was erroneous, because it was based on an assertion that Moritz owned all the business assets of the Partnership, which is said to be untrue. The effect of this claim was to create a “cloud” (The Falk cloud”) on the title of Heinrich’s heirs to claim compensation.
14. In 1990 Siegbert Posener made claims in the East German compensation scheme and after his death his sons, the Defendants, made claims for the real estate owned by Heinrich, using a German lawyer called Dirk Plagemann. Mr. Plagemann obtained compensation for the real estate of the Dresden Store but not for the business assets.
15. The Claimant is the grandson of Josef Lenczynski and his wife Margarethe. Margarethe was Heinrich’s sister. Unsurprisingly, he took a great interest in his family’s experience in Germany before the war, but equally unsurprisingly, his parents would not talk about it.
16. The Claimant became aware of the JCC in about 2004 and the list on its website of properties which had been owned by his grandfather, Joseph. He engaged Mr. Chudson to assist him in making a claim. Mr. Chudson is also distantly related to the parties. He has been involved in researching Holocaust archives since the 1950’s and as carried out research in several countries, including Germany. From 2002 he started to work closely with Dr. Arndt Sumner, a German lawyer in the firm of Hirsch Thiem & Collegen, dealing with claims to the BADV, the JCC and appeals from their decisions to the German courts.
17. Mr. Chudson became aware that claims had been filed by Siegbert Posener in relation to Heinrich’s assets. He says he found this out in 1998. These were under the West German programme and later under the East German programme.
18. Mr. Chudson and Dr. Sumner were able to recover compensation for the Claimant in respect of an East Berlin property, and another department store owned by his paternal grandfather, Joseph Lenczynski. Mr. Chudson says that Joseph Lenczynski was Heinrich’s executor and also one of the liquidator of the department stores.
19. In 2014, in the course of his investigations on behalf of the Claimant, Mr. Chudson became aware that Siegbert Posener had 2 sons by his second marriage, namely the Defendants. He wrote to the Claimant on 28th September 2014 telling him that he had made contact with the First Defendant, but that the latter was not responding to recent

emails. On 6th October 2014 Mr. Chudson emailed the Defendants informing them that no-one appeared to have made a claim for the Wollwarenhaus Saxonia or the assets of Moritz Falk and Heinrich, save for the real estate of the department store.

20. On 20th October 2014, the Claimant emailed the Defendants asking for their help in pursuing a compensation claim. The Claimant emphasised that the key was to use Mr. Chudson and Dr. Surner's expertise in making claims to the JCC. Mr. Chudson, who had already been in touch with the Defendants, also sent an email to the Defendants on that date. He informed them that he had found a reference to claims for Heinrich and for Edith Falk on the JCC web site and several claims that could be "WFS & P" claims which would go 50% to the heirs of Heinrich and 50% to the heirs of Moritz Falk. The email ended as follows:

"It is necessary, whether claims are with the Bundesamt or with the JCC that you, Michael and Nicholas, contact cousin Tony (the Claimant) to both protect your highest compensation payment rights with the JCC (if the Siegbert Posener family have never filed before) as well as with the Bundesamt without extended delays because of the JCC time limit in December 2014".

21. There followed a number of emails between the parties and with Mr. Chudson and Dr. Surner about the claims and the steps that were going to be taken to take them forward. One of the steps required was for each of the potential claimants or heirs to provide a Vollmacht to Mr. Chudson and Dr. Surner. This is usually what happens and enables them to inspect files that would otherwise be restricted as confidential.
22. On 11th November 2014, the Claimant emailed a draft contract to the Defendants inviting them either to approve it or to suggest amendments. No amendments were suggested. The intention, which had been discussed in earlier correspondence, was that the Claimant would provide the funds to pay Mr. Chudson and that, if the claims were successful, these would be repaid out of the compensation moneys, together with Dr. Surner's fees, and the balance then distributed with the Claimant receiving 30% of that balance.
23. The operative clause in this draft, clause 8, set out the event that would trigger the obligation to repay Mr. Chudson's expense and entitle the Claimant to his 30% share. This was expressed to be in the event that *"the JCC makes any Awards for the Claims to the Posener Property"*. I will set out the relevant terms in more detail when I come to deal with the contract that was actually signed. Shortly after this, the negotiations fell through, apparently because Mr. Chudson was refusing to undertake the research. It is an understatement to say that Mr. Chudson's emails to the Defendants were *"colourful"*. They were emotional and offensive and at that stage the deal seemed to be off.
24. On 20th November 2014, all this changed when Mr. Chudson sent the parties an email. It said that he was standing next to Dr. Surner with letters from the JCC and Bundesamt showing that there was an open claim for Palaisstrasse 15, Dresden showing Heinrich as the owner. There was also an open claim for Edith Falk, which her living heir could collect and a series of unresolved claims for Gebr. Posener which

“appear to be for WSF&P” in the JCC records. Whether there were other claims would require further research, but

“it appears if they are open Claims, they would be for Heinrich Posener’s portion of the business as Mortiz Falk’s portion of the business was paid out in the 1990’s to the Falk sisters in the opinion of the JCC. The Bundesamt however thinks maybe real estate claims in the old 1991-1992 programme, which is also included in the JCC website as these open claims under the name “gebr. Posener Dresden in error”.

25. The email then informed the Defendants and the Claimant that Dr. Surner had filed “a second written application with the Bundesamt to get clarification of what, if any, WSF&P real estate claims are open or can be re-opened”. He concluded by saying that an agreement was now urgent so that a JCC claim could be filed.
26. The Claimant sent an email to the Defendants very shortly after the above, stating that the facts had been cleared up enough to enable them to enter into an agreement “that will assist you obtaining compensation from the JCC or any other German agency/court as a result of Lee’s production of documents and Dr Surner’s services, all financed by me”.
27. The Claimant therefore made some amendments to the previous draft contract and attached it to this email requesting the Defendants to send him their comments on it. The agreement was signed on 22nd November 2014 with no amendments. The Claimant had requested the Defendants to get their signatures notarised, but this didn’t happen. He explained in a subsequent email that if either side later challenged their signatures on the agreement there might be difficulties unless it was witnessed by a notary. The Claimant had been warned by Dr. Surner that Dr. Plagermann had warned him that the First Defendant had given problems in relation to his bill and also that 2 other lawyers had been accused of cheating him by the First Defendant. The First Defendant denied that he had had any dispute with Dr. Plagermann, and there was no direct evidence that he had. This issue must therefore be ignored, but he accepted that he had felt that he had been cheated by the other lawyers, who had been acting for opposing parties and done too good a job.
28. Mr. Chudson claims that he carried out research and obtained documents that supported claims which eventually led to compensation by the BADV.
29. On 23rd December 2014 Dr. Surner filed a claim at the JCC’s Late Application Fund. It is common ground that no compensation was successfully obtained through the JCC.
30. On 23rd March 2015, the BADV declared that it had opened the file for claims in respect of the Dresden store. It was essential to this happening that the Falk cloud was lifted. This was done by the obtaining of a Vollmacht from a Falk heir living in Rio Janeiro, namely Margot Lessor (formerly Falk). This paved the way for obtaining a declaration from the BADV that it had re-opened the file for claims in respect of the Dresden store. The claim was successful and on 23rd December 2015 the BADV made an award of 420,475 euros.

31. Following the signing of the contract, it is common ground that there was no claim that could be made by the JCC route.
32. Subsequently, the Defendants refused to honour the contract and the Claimant has received nothing for Mr. Chudson's expenses and the 30% of the net award which he says he is entitled to.
33. In July 2015, it is alleged by the Defendants that the Claimant repudiated the contract. The relevant communications are all contained in emails and I will examine these, and the alleged acceptance of the breach when I come to deal with this issue.
34. In July 2015, it became necessary for someone to go to the BADV office in Berlin to inspect some documents, namely claim forms. Dr. Surner had requested some documents which Mr. Chudson had advised he needed to obtain. The BADV refused to send them to Dr. Surner but said that someone could come to Berlin and look at them. On 10th July 2015 Dr. Surner informed Mr. Chudson of this and asked when he could go. Mr. Chudson did not react well to this, stating that he had agreed a schedule with everybody 3 months earlier and would be on vacation in Rome during the week when he was required in Berlin. He asked about payment for the trip. The emails suggest that everyone was annoyed that a trip to Berlin was required, since Dr. Surner had been given a Vollmacht to see documents. As before, Mr. Chudson reacted "*colourfully*". At one point the Defendants suggested that they might go, but Mr. Chudson pointed out that this would achieve nothing because they did not have the relevant authority to inspect the documents. Mr. Chudson's email of 17th July 2015 says: "*I think we are at the end of our rope so far as the Posener claims are concerned. If the Bundesamt doesn't release the 1990 form to Surner or me, there is nothing to talk about. No 1990 form, no open claim documentation. PERIOD FULL STOP*".
35. In the end Mr. Chudson did go to Berlin, on 22nd July 2015, and inspected various documents at the Bundesamt. The Defendant's case is that the Claimant refused to fund this trip and flatly refused to pay \$500 dollars towards Mr. Chudson's expenses. He threatened to cancel the meeting at the Bundesamt and in the end the Defendants sent the money to Mr. Chudson.

The issues

36. The Defendants resist the claim on the following grounds:
 - i) The construction of the contract. It had been argued that the contract did not cover compensation paid under claims to the BADV, but in his final submissions Mr. Darton, rightly in my judgment, conceded that he could not argue this point.
 - ii) The contract was "barred under the doctrine of clean hands. The Agreement the Claimant seeks to enforce is contrary to Rule 1.8 of the RPC [Massachusetts Code of Professional Conduct] and unenforceable" (paragraph 37 of the Defence) ("the Code 1.18 issue").

- iii) The Claimant was in repudiatory breach of contract by refusing to fund Mr. Chudson's trip to Berlin in July 2015 and this breach was accepted, relieving the Defendants from performance of the contract.
- iv) The award was not made as a result of any research carried out by Mr. Chudson and therefore no sums are due to the Claimant.
- v) The amount claimed has not been proved or adequately accounted for.

The witnesses

- 37. I heard oral evidence from the Claimant and the First Defendant. Rather surprisingly, the Second Defendant, who attended the trial, did not give evidence, but I cannot draw any conclusions from this, nor do I. The First Defendant said that he knew more than anyone else in court about claims to the BADV and he also took the lead role as between him and his brother in the negotiations. The other live witness was the Claimant. Mr. Chudson did not attend to be cross examined by the Defendants' counsel. It was said that he had asked for a fee of £10,000 in order to attend. Mr. Darton could not oppose my reading of his evidence, but said that I should place little weight on it. Where there are legitimate issues about his evidence, then I must treat it with great care. His emails show clearly that he is someONE who reacts very quickly to incidents and situations that don't fit in with his ideas and plans and expresses himself in colourful language – jumping to conclusions which are not always justified. In the event, it is his evidence of the work that he carried out on the Claimant's instructions and his computation of expenses and fees which is the most relevant evidence and I will treat this with care, when I come to that issue.
- 38. The Claimant was cross-examined for nearly 2 days. He is a Massachusetts attorney who specialises in inheritance matters. I took from this that in England he would be described as a "*private client*" lawyer. He gave his evidence very carefully and was quick to correct minor errors by counsel, for example use of pounds sterling or euros instead of dollars and other matters. He was very precise in his evidence. He was challenged in a number of areas with a view to suggesting that he had acted in conflict of interest with the Defendants, withheld from them that he was in discussion with Margot's lawyers in Rio de Janeiro, knew full well about the potential for a claim to the BADV and somehow deliberately withheld that information from the Defendants at the time he presented the contract to them. Much of this was very unfair, and not open to the Defendants on the pleadings. There is no claim to rectification on either side, the Defendants are not claiming to set aside the contract for fraud, misrepresentation or mistake and the Code 1.18 claim that they now seek to put does not in my judgment run.
- 39. It was also put to the Claimant that he deliberately made claims, subsequently withdrawn, to sums which he wasn't entitled to. I found the Claimant's evidence straightforward and honest and found it much more reliable than the First Defendant. The Claimant can be criticised on 2 counts: firstly, as he accepts, he has made a mistake in drafting the contract in not amending the recitals; secondly, he failed to enter a clear agreement with Mr. Chudson about his charges, (for example hourly rate) before work started and did not make arrangements for proper accounting by Mr. Chudson. If anything, this points towards his not acting as a lawyer in this matter, but in his personal capacity with the common objective with the Defendants of obtaining

compensation for their ancestors' wrongly confiscated assets. It was also put to him that he was not telling the truth when he said that he did not appreciate the significance of the BADV until just before the Contract was signed, the inference (unpleaded) being that he deliberately omitted the reference as he didn't want any point to be taken before the contract was signed and was somehow tricking the Defendants. I reject this suggestion. The Claimant said that he had had experience with the JCC but, unlike the First Defendant, not the BADV whom he hadn't appreciated handled claims. It was only late in the day, when Mr. Chudson explained in his email of 12th November 2014, that the penny dropped. If he had understood the BADV before, then there is no reason why he would have drafted the first version of the contract as he did. It was also suggested that he was not acting in a straightforward manner in referring to the Bundesamt, and not the BADV when he amended to draft, a suggestion which I reject. In any case, the First Defendant well understood the distinction.

40. I did not find the First Defendant a reliable and straightforward witness. He was plainly evasive when asked straightforward questions and went into long answers, which avoided the question. He jumps to conclusions about the motives of others, such as Mr. Chudson and the Claimant, and when faced with emails – written to or by him – which appeared in the context to make it clear that Mr. Chudson and Mr. Surner were exploring a potential claim to the Bundesamt in November 2014, he said that he did not know that this was a reference to the BADV. This suggestion was completely untenable on the documents and against the background that the First Defendant says that he is very experienced at dealing with the BADV. It is also contrary to paragraph 12 of his first witness statement. He doggedly stuck to his answer that Bundesamt simple meant a government office. The numerous references to Bundesamt in emails from Mr. Chudson, the Claimant and from Dr. Surner cannot be read as references simply to an office or archive or to claims only through the JCC. For example, the email from Mr. Chudson dated 20th November 2014 at 7.57 shortly before the contract was signed. In the end Mr. Darton did not argue that the reference to Bundesamt in the contract was not a reference to BADV, but I find that the First Defendant's refusal to accept that he had not understood it to mean that, was designed to improve his case in these proceedings and not because it was true. Furthermore, it is not credible for him to have allowed Mr. Chudson and Dr. Surner to pursue researches and claims at the BADV (once he accepts that by that time he appreciated the meaning) without sending them an email asking them why they were doing this, since it was not part of the contract and telling them to stop.

The construction of the contract

41. The starting point is the contract, the relevant terms of which I now set out. The following recitals are relevant. Words in square brackets are my explanations and not part of the contract:

WHEREAS, Tony [Claimant] has engaged "Lee" [Chudson] of, to research German and US archives for documentation ("Claim Documents") needed to support claims ("Claims") to be made to the Conference on Jewish Material Claims Against Germany ("JCC") and/or the German courts for award of compensation ("Awards") for German property

that was confiscated directly or by forced sale by the Nazi regime (“German Property”); and

WHEREAS, Tony has also engaged Attorney ARNDT SUMNER (“Surner”) of the Dresden office of Hirsch, Thiem & Kollegen to prosecute Claims at the JCC and in the German courts, for which purpose Tony has delivered to Surner a German power of attorney known as a “Vollmacht”;

WHEREAS, Lee has reported to the parties that the JCC may hold property of Heinrich (“Posener Property”) including without limitation Palaistrasse 15 Dresden and Hienrich’s interest in the Falk and Posener partnership;

WHEREAS, the JCC has declared that Claims for German Property held by the JCC must be submitted to their Late Application/Second Heirs Fund prior to 12/31/14; and

WHEREAS, Mike [First Defendant] and Nicky [Second Defendant] have not yet registered with the JCC, nor made Claims for the Posener Property, nor have they obtained the necessary Claim Documents to support any such Claims; and

WHEREAS, Mike and Nicky wish to obtain Tony’s assistance in making Claims in the Late Application Fund at the JCC for the Posener Property and for any other German property for which Lee may be able to produce Claim Documents; and

WHEREAS, Tony is willing to assist Mike and Nick in making Claims for the Posener Property on the terms and conditions hereof;

42. The following is a summary, or in some cases a quote, of the provisions in the body of the contract:

Clause 1 provides for the Defendants to deliver a Vollmacht to Dr. Surner authorising him to represent them at the JCC for the prosecution of the Claims for the Posener Property.

By clause 2 the Claimant agrees to obtain Claim Documents by paying Mr. Chudson’s charges and out of pocket expenses for obtaining the Claim Documents and Surner’s charges and disbursements for prosecuting Claims for the Posener Property.

By clause 4 the Defendants acknowledged that there were “no guarantees that sufficient Claim Documents may be found as may be required by the JCC in order to obtain Awards to them for the Posener Property”. In those circumstances the Defendants would be under no liability for the costs and expenses incurred by the Claimant.

By clause 6 the Claimant will account for the payment of Expenses (defined in Clause 5) including by the delivery of receipts and other evidence of payment of Expenses as the Claimant receives from Mr. Chudson and Dr. Surner.

By clause 7 the Claimant agreed to allocate the Expenses between researches and prosecution of Claims for Posener Property and any Claims that did not involve the Defendants.

8. *“The parties agree that in the event that the JCC, any German court or any German agency (including without limitation the Bundesamt) makes any award for Claims for Posener Property supported by Claim Documents and/or prosecuted by Dr. Surner, the parties shall not direct the JCC or any German court or German agency to pay the Awards directly and that all Awards shall be paid to Surner out of which he shall pay his fees and shall then allocate the balance of the Awards (if any) as follows:*

(a) Surner shall first remit to Tony out of the Awards sufficient funds to reimburse him for the Expenses he has incurred with respect to such Claims;

(b) Surner shall pay the remainder of the Awards with respect to such Claims, if any (the Net Awards), in the following percentages: 30% to Tony (“Tony’s Percentage”); and 70% to Nicky and Mike to be apportioned among all heirs of Siegbert.”

9. *“In the event that Mike and/or Nicky breach their obligations under this Agreement, including without limitation, their obligation not to seek direct payment of any Awards for Claims for Posener Property and fail to reimburse Tony in full for his Expenses and/or for Tony’s percentage, Mike and Nicky, jointly and severally, hereby agree to indemnify and hold Tony harmless from and against all losses, liabilities, costs and expenses, including without limitation legal fees and disbursements, that relate to or arise out of such breach.”*

Clause 10 provides that the contract is governed by the laws of the Commonwealth of Massachusetts and that may not be waived, amended or the obligations in the contract terminated in whole or in part except by a writing executed by all parties.

Clause 11 provides that the contract is an entire agreement and supersedes any prior understanding or agreements of the parties.

43. The expert, Judge van Gestel, was instructed on 9th June 2017 (3 working weeks before trial) and produced his report by 20th June 2017. He was asked part 35 questions by both sides and produced his replies by Thursday 29th June 2017, with the trial starting the following Monday.

44. The following points in his report relate to the construction issue:
- i) Where the words of the contract are clear, they alone determine the meaning of the contract and the court should only consider extrinsic evidence when a term in a contract is ambiguous.
 - ii) Contract language must generally be construed in its usual and ordinary sense.
 - iii) Contract language is ambiguous only if it is susceptible of more than one meaning and reasonably intelligent persons would differ as to which meaning is the proper one.
 - iv) It is not the role of the court to alter the parties “agreement”.
 - v) If the court determines that there is an ambiguity, there are a number of factors to consider:
 - a) whether the ambiguous language is material to the intent of the parties;
 - b) who drafted the ambiguous language;
 - c) whether the contract has an integration clause, and if so its effect on the ambiguous language;
 - d) whether the language used has a special meaning in the industry, circumstances or situation in which it is used;
 - e) to the extent that there is an ambiguity, the court should construe it against the drafter (the contra preferentem rule);
 - f) the language of Clause 11 of the contract (the entire agreement clause) would generally be considered to prevent the admission of any evidence of the parties’ negotiation of the agreement prior to its execution.
45. Part 35 questions were put to Judge van Gestel by the Claimants in relation to his opinion and the following are the relevant responses:
- i) a court would not favour a reading of one clause that undermines explicit provisions elsewhere in the contract and will look at the fair construction of the contract as a whole.
 - ii) Although as a general principle a court considers extrinsic evidence to discern intent only where there is an ambiguity, there is an exception to that general rule and a court may consider parol and extrinsic evidence “*for the very purpose of deciding whether the documentary expression of that contract is ambiguous*”.
 - iii) If there is an ambiguity, then the circumstances surrounding the making of the agreement must be examined to determine the objective intent of the parties “*the practice is to impute to the parties a solution that best carries out the logic and purpose of their agreement*”. The search is for “*manifest meaning*”

and not “*privately held belief*”, therefore subjective evidence of intent is not admissible.

46. The most contentious part of Judge van Gestel’s report and his responses to Part 35 questions related to the *contra preferentem* rule. Mr. Darton submitted that in Massachusetts law, it was a much stronger rule than it is in English law. Mr. Darton submitted that if the words were clear, then there was no difficulty, the court should give the words their natural and ordinary meaning. Where there was an ambiguity, then the *contra preferentem* rule should apply and the clause (in this case clause 8) should be construed against the Claimant who drafted the contract without the court looking at extrinsic evidence at all. This was partly an application of the *contra preferentem* rule and partly an application of the integration clause (clause 11).
47. Mr. Oliver submitted that this misrepresented Judge van Gestel’s opinion. The Claimant’s part 35 question on these points asked whether his views on clause 11 should be refined as clause 11 only barred prior understandings and agreements and not reference to negotiations. In particular, he was asked to comment on the case of ***Amicas Inc v GMG Health Systems***, 676 F. 3d 277. He was also asked to consider whether there were any limits to the principle of construing ambiguity against the drafter and how his view fitted in with his earlier opinion about the use of extrinsic evidence to resolve issues of ambiguity.
48. Judge van Gestel responded, in answer to both questions, that not all cases of ambiguity led to a construction against the drafter. “*Once the contract is determined to be ambiguous, the court is free to look at extrinsic evidence In order to give a reasonable construction in the light of the intention of the parties at the time of formation of the contract ...*” Construction of an ambiguity against the drafter is only a last resort and where justice and equity demand it.
49. I do not agree with Mr. Darton’s submission that, even if there is an ambiguity, extrinsic evidence is not admissible because the *contra preferentem* rule operates and the contract is immediately construed against the drafter. Judge van Gestel has modified his view, and this is perhaps not surprising given the very short period of time that was available to deal with this expert evidence and the subsequent part 35 questions. It is a last resort but doesn’t prevent the court looking at extrinsic evidence if there is an ambiguity, at least in the first place.
50. Judge van Gestel did not expressly answer the question about Clause 11 of the agreement (the integration clause). The ***Amacas*** case touches on the point. There it was argued on appeal that evidence from the negotiations would be admissible to resolve an ambiguity in the contract. The court decided that there was no ambiguity, and therefore the point did not arise for decision. In my judgment, it is important to read Judge van Gestel’s original opinion on this point carefully. He has not said that Clause 11 prevents the use of extrinsic evidence to resolve an ambiguity in the meaning of a word in the contract. His opinion was asked in answer to the question whether subjective evidence of intention was admissible, as appeared from the negotiations or subsequent conduct. It was in this context that he was referring to Clause 11, which of course precludes recourse to any earlier agreements or understandings. I do not read his evidence as saying that Clause 11 does other than provide that evidence of the negotiations is not admissible to give evidence of an understanding or prior agreement. It is also for this court to construe Clause 11, with

the benefit of the evidence of Massachusetts law as to how that should be done, and the plain meaning of Clause 11 does not, in my judgment, prevent reliance on extrinsic evidence of the matrix of facts against which the agreement was drafted. For example, if the subject matter of the contract is defined as “*property*” but there is nothing in the contract to identify the property, the court would have to hold that the contract was void for uncertainty unless extrinsic evidence was admitted to identify the property. I cannot believe that Massachusetts law would hold a contract to be void for uncertainty because of an integration clause drafted in the terms of Clause 11 if there was evidence that all the negotiations were about the sale of a property identified in all the correspondence. Evidence might well not be admissible of an agreement (say subject to contract) but if the matrix of facts is that a property sale of a particular property is being discussed and negotiated, then that ought to be sufficient to resolve the ambiguity created by the failure to specify the property in the contract.

51. In his final submissions, Mr. Darton submitted that the award by the BADV did not trigger the consequences set out in Clause 8 because the award was not “*for Claims for Posener Property*”. He also argued that the consequences did not apply because the Award “*was not supported by Claim Documents*”.
52. I can deal with the second point very quickly. The trigger clause is not dependent on the Award being supported by Claim Documents as it is sufficient if the Award is for a Claim prosecuted by Dr. Sumner. It was common ground that the BADV claim which led to the award was prosecuted by Dr. Sumner and therefore irrelevant whether it was supported by documents obtained by Mr. Chudson. It was submitted that Mr. Chudson had not provided any documents leading to the successful BADV claim. There was no detailed analysis by either side of what documentation led to the award. Although Mr. Chudson’s evidence does not carry as much weight as it would if he had attended to be cross-examined, it is improbable that he is lying about providing some documentation to the BADV and his attendance in Berlin was regarded as crucial by the Defendants. There were several emails from the First Defendant which suggest that Mr. Chudson’s involvement was important and supportive. On 29th January 2015, the First Defendant sent an email saying that Dr. Plagemann “*went after what we can call the low hanging fruit in the way of claims, the claims that were for his time investment the easiest to resolve. Where more in-depth research was much needed he stopped trying to hard*”.
53. The First Defendant was cross-examined about his contention that Mr. Chudson had not discovered any relevant documents. He said that the documents which led to the successful claim had been obtained “*partly from Dr. Plagemann’s file, partly from the BADV and partly from Dr. Sumner*”. He would provide no detail and it is not inconsistent with the Claimant’s case that Mr. Chudson sent documents to Dr. Sumner. He was asked about his email dated 2nd February 2015, where he said that they were at the point where Dr. Plagemann stopped, and whether he accepted that any documents found after this date would be new. His reply was very evasive, but he eventually agreed. He tried to suggest that he had meant newly created documents. This was disingenuous (to put it kindly) in the context.
54. On 9th February 2015, the First Defendant emailed Mr. Chudson to say that he was treading new ground and joining the dots, “*you are getting there piece by piece*”. In the light of these documents and Mr. Chudson’s evidence, I am satisfied that he did provide supportive documents. It is not necessary for the Claimant to establish that

they were decisive. In any event, this is not relevant to the decision that the trigger has been operated. This leaves the main issue of whether the Award qualifies.

55. Mr. Darton's argument is as follows: Clause 8 provides the trigger as being the making of any Award for Claims for Posener Property. The recitals define Posener Property as property of Heinrich held by the JCC. Since the successful award was by the BADV as a result of a claim to the BADV, then it was not property held by the JCC and therefore does not trigger Clause 8. He says that the wording of the contract is clear and unambiguous and therefore extrinsic evidence is not admissible.
56. If he is right, and the contract does not contain an ambiguity, then extrinsic evidence is not admissible according to Massachusetts law. Evidence might however be admissible to determine whether there is an ambiguity. In this case, the background facts explaining the various bodies to whom claims might be made and the claims that were actually being made or were or might be on foot. In other words, the surrounding circumstances.
57. If it hadn't been for the additional words in Clause 8 added to the earlier draft, then there would be little doubt that Mr. Darton's construction would be correct. Posener Property is defined by reference to the JCC and Clause 8 would apply to awards by the JCC or the German courts (covering any appeal from a JCC decision). If the JCC rejected a claim but were overruled on appeal then the trigger would operate without argument.
58. The problem in this case is that Clause 8 is an operative clause of the contract. It explicitly provides that the trigger will operate if an award is made by entities other than the JCC – specifically the BADV (it having been conceded that Bundesamt means BADV for this purpose). If Mr. Darton's construction is right, then the additional words in Clause 8 cannot have been intended ever to have any effect.
59. The definition of Posener Property in the recitals to the first draft contract differs significantly from the definition in the contract. In the former, there was explicit reference to property which might form the subject matter of claims to the Late Applications Fund. The definition in the contract excluded this part and added (including without limitation) Palaistrasse 15, Dresden and Heinrich's interests in the Falk and Posener Partnership. The actual BADV award was to compensate for the business assets of Kesseldorfstrasse 9, Dreson-Lobtau (the Lobtau Store), the real estate compensation having previously been obtained with the services of Dr. Plagemann. While the business assets of the Lobtau Store were not in fact part of the Falk Posener partnership, but vested in Heinrich alone, the expanded definition (with the background factual knowledge that the freehold had been compensated already) shows that the definition was to include business assets as well as real estate.
60. In my judgment, there is a clear conflict between the definition in the recital and the wording of Clause 8. The JCC does not hold property, it is a restitutionary fund as explained earlier. Nor can claims be made to both the JCC and the BADV. If effect is to be given to Clause 8, then the Posener Property definition in the recital does not work because it limits awards to claims before the JCC. That cannot have been the intention of the parties when they signed a contract containing the additional words in Clause 8 and if effect is to be given to Clause 8, there is an ambiguity or doubt as to the definition of Posener Property. In order to resolve that ambiguity, Massachusetts

law permits the court to look at extrinsic evidence to establish what property the parties intended.

61. Bearing in mind that the court cannot take into account subjective intention, I now turn to see if there is any extrinsic evidence that can assist in interpreting Clause 8. In the first place, if the letter JCC were removed from the definition of Posener Property in the recital then the difficulty would disappear and there would be no tension between the recital and Clause 8. One way of dealing with the problem might be to ignore the reference to JCC on the basis that it is inconsistent with Clause 8 and undermines it.
62. The other way is to look at the factual matrix at the time the contract was executed. This means examination of the emails immediately before the new wording was inserted. I explained earlier how the negotiations had broken down following the drafting of the first version of the contract. What got the negotiations going again was Mr. Chudson's email of 20th November 2014, which referred to open claims shown in letters from the JCC and the Bundesamt and that the Bundesamt thought that there may be other open claims. There is an express reference to Dr. Surner filing an application with the Bundesamt in respect of WSF&P real estate claims. Later that morning the Claimant emails the Defendants informing them that Mr. Chudson's latest information is enough to enable the parties to go forward with "*an agreement that will assist you in obtaining compensation from the JCC or any other agency/court as a result of Lee's production of documents and Dr. Surner's services*". The contract is attached to the email and contains Clause 8 with the added reference to Bundesamt awards.
63. In my judgment, there can be no doubt that by the time that the Defendants signed the contract, they intended that Posener Property would include all property in respect of which claims would be made (whether to the JCC, BADV or any other agency of German court) and that Clause 8 includes the Award which was made by the BADV which is the subject of these proceedings. The Defendants' argument against this is an opportunistic attempt to avoid the obligations which they agreed with the Claimant, having taken advantage of Mr. Chudson and Dr. Surner's services.
64. Subject to the remaining issues raised in the Defence and to the quantum issue, I hold that Clause 8 has been triggered and that the consequences set out in Clause 8 follow.

The Code 1.18 issue

65. This issue can be dealt with relatively shortly. It is pleaded in the Defence that the Claimant is in breach of the Code with the result that the contract is unenforceable. The Defendants contend that the Claimant was acting for them in an attorney/client relationship and that the Code therefore applies. The breaches of the Code are then pleaded as follows:
 - i) the terms of the contract giving rise to liability on the part of the Defendants to pay him a percentage of any award were not disclosed to them in a manner that could reasonably be understood by them;
 - ii) the Claimant failed to advise them in writing or orally, that they should seek independent advice before entering into the contract;

- iii) as a result, the Claimant's claims are barred under the doctrine of unclean hands and the agreement is contrary to Rule 1.8(a) of the Code and unenforceable;
66. Judge van Gestel's report dealt with 2 points arising out of this. He said that "*clean hands*" is an equitable doctrine that usually comes into play when equitable relief is sought. That is not the situation which arises on the pleadings in this case. He then turns to the Rule 1.8 claim – in fact Rule 1.18 since the former is a pleading error. The court firstly determines whether there is a client/attorney relationship which: "*may be shown by an express contract, ... or implied when (1) a person seeks advice or assistance from an attorney, (2) the advice or assistance sought pertains to matters within the attorney's professional competence, and (3) the attorney expressly or impliedly agrees to give or actually gives advice or assistance.*"
67. He was then asked whether a violation of Code 1.18 would render the contract void or unenforceable. His categorical answer was "*No*", on the basis that this would be decided by the Board of Bar Overseers and is not determined or enforceable by the court. He said that it may be evidence of negligence. He was then asked by the Defendants if, "*Absent the Code*" if the contract would be rendered void or unenforceable under the Law of Massachusetts if the terms were unfair or unreasonable, were not fully disclosed to the client in a manner that could be understood by the client or a failure to advise the client to seek independent advice. Judge van Gestel's answer was based on the premise that an attorney/client relationship was found. His response was that an attorney's contract with his client may be rendered void or unenforceable if the terms were found to be unreasonable or the terms were not fully disclosed to the client in a manner that could be fully understood or the client not advised to obtain independent advice. No particulars were given of the circumstances in which Massachusetts law would render an agreement void or unenforceable.
68. The problem for the Defendants is they do not plead that the contract is void or unenforceable on general legal grounds, but rely either on the doctrine of unclean hands (which does not apply in this case for reasons given by Judge van Gestel and set out above) or on the alleged breach of the Code. There is no other case pleaded. It is not therefore open to the Defendants to run this point. In any event, it would have been extremely unfair on the Claimant to allow an amendment to plead the new case. Judge van Gestel's response can be compared to a response by an English lawyer to the question: "*Can a party to a contract set aside a contract on the grounds of undue influence where the other party is his solicitor?*". The answer "*maybe*" (which is in effect what Judge van Gestel is saying) goes nowhere near providing evidence of the circumstances in which such a claim might be made. The Claimant has had no notice of the claim and, in the light of Judge van Gestel's previous categorical response, would not have expected to meet such a claim at trial. Therefore, the Code 1.18 (in whatever form) does not arise in this case.
69. In any event, the evidence is overwhelming that there was no client/attorney relationship because the 3-stage test set out by Judge van Gestel is not satisfied:
- i) In evidence the First Defendant, who played the lead role on the Defendants' side in the negotiations, accepted that he had not sought any legal advice from the Claimant;

- ii) He accepted that advice given in relation to the subject matter of this case was not within the competence of the Claimant, as it involved German law and a claim in Germany;
 - iii) He accepted that no legal advice was in fact given by the Claimant.
70. This was a case where the Claimant and Defendants were related and all had a potential interest in making claims in Germany to compensation for assets seized by the Nazis from their common forebears. The Claimant happened to be a lawyer but both fully appreciated that there was a common benefit in co-operating in relation to the claims. The First Defendant is a competent businessman whose own evidence was that he knew more about the BADV than anyone else in the case. He well knew what the contract meant and what the parties were negotiating about.
71. Therefore, the Code 1.18 defence fails.

Repudiatory Breach

72. The Defendant's case is that the Claimant was in repudiatory breach of contract in refusing to fund Mr. Chudson's attendance on the BADV in Berlin by providing \$500 in mid-July 2015. The Claimant says that this was not a repudiatory breach, but if anything, a variation of the contract whereby the Defendants paid \$500 to Mr. Chudson in return for the Claimant agreeing to reimburse that sum (plus a further \$1,000 out of any award moneys).
73. Judge van Gestel's opinion was sought on a number of points in relation to this issue. His views were as follows:
- i) How does the court determine what is a repudiatory breach?
 - ii) He quoted an extract from *Burlington Landmark Associates v RHI Holdings Inc* 27F. Supp. 2d 95,99, which shows that mere expression of doubt by the obligor as to his willingness or ability to perform is not enough to constitute repudiation. There must be language that is sufficiently positive to be reasonably interpreted to mean that the party will not or cannot perform the contract. He explained that the court must determine, from the evidence, whether some statement made by a party that the party will commit a breach is required. That statement or act must be either with respect to the entire performance that was promised or with respect to so material a part as to go to the essence of the contract.
 - iii) The court may determine that a breach is not material if the other party suffers no loss or damage as a result of the breach.
 - iv) Where there is a repudiatory breach, and it is accepted by the other party, then unless the parties agree in writing otherwise, their rights and obligations accumulated up to the breach remain extant.
 - v) If there is a repudiatory breach, the contract is not automatically determined. It may be affirmed by acts of the party claiming repudiation, although he doubted whether it could be implied by conduct because of Clauses 10 and 11 of the contract. In his response to the Claimant's part 35 request, Judge van

Gestel said that there may be circumstances - acts or failures to act – that have the effect of affirming the existence of a contract despite there having been one or more repudiations.

74. The expert's answers in relation to issues 7 and 8 and the subsequent part 35 questions appear to be somewhat confusing and require careful analysis. Issue 7 asked him to give his opinion whether the party not in repudiatory breach could treat the contract as automatically terminated and whether he could elect to treat the contract as continuing by affirmation. Automatic termination does not occur, the injured party must do something before the contract terminates. It is in this context that Judge van Gestel referred to Clauses 10 and 11.
75. Clause 11 provides that the contract may not be waived, amended, or the obligations thereunder terminated in whole or in part except by writing executed by all the parties. It is difficult to follow how, as a matter of any common law system, it would be necessary for a party wishing to treat a contract as at an end for repudiatory breach, to be required to obtain the agreement of the repudiating party that this was the case. If, as appears to be the case, there is a concept of repudiatory breach in Massachusetts law, which enables the other party to take steps to treat further performance at an end by some act or notice – or application to the court – then Clause 11 would prevent this is Judge van Gestel's opinion is taken literally. He does not explain how Clauses 10 and 11 would operate in these circumstances.
76. The Claimant asked a part 35 question about this, pointing out that there might have been a misunderstanding about what was meant by affirmation in the context of this case. He was also referred to a decision of his own (*Tomer v Hollister Associates Inc*, 20 Mass. L. Rptr. 487). In his response, he says that there can be acts or failures to act that can amount to affirmation of the contract, but does not develop or explain his point on Clauses 10 and 11. If the contract continues following a repudiatory breach until the injured party takes some step treating it at an end, then there doesn't appear to be much difference between English and Massachusetts law. A repudiatory breach does not relieve the other party of further performance unless and until there is an acceptance of the breach and he can't do this if he has affirmed the contract in the knowledge of the breach in the meantime.
77. In *Tomer*, there was also an integration clause in similar terms to the contract in this case. The case wasn't directly about affirmation of an agreement after a repudiatory breach, but the decision by Judge van Gestel to order summary judgment for the defendant was made on the basis that an integration clause did not always require a written document signed by both parties. In that case, the parties' emails affirming that the parties were continuing to perform the contract notwithstanding that the defendant had unilaterally reduced the defendant's wages, at least amounted to a variation of the original agreement by email exchange notwithstanding the integration clause.
78. I therefore conclude that the integration clause does not prevent a party who has not accepted a repudiatory breach as freeing him from further performance, from continuing to be bound by the contract if he acts on the footing that the contract is continuing or gives the other party notice that he considers it to be continuing. Alternatively, an agreement to treat the contract as continuing does not fall foul of the integration clause if it is in emails between the parties following the breach.

79. The relevant communications between the parties are all contained in emails. In mid-July 2015 Mr. Chudson had been expecting that the Bundesamt in Berlin would be sending all relevant documents to Dr. Sumner in Dresden. At the last minute the Bundesamt said that someone with authority would have to come to Berlin to inspect the documents. Mr. Chudson had arranged to have a vacation in Rome and was unenthusiastic at the prospect of cancelling. There was some email communication between Dr. Sumner, Mr. Chudson and the parties about who could go, but it became apparent that it had to be Mr. Chudson.
80. On 12th July 2015 Mr. Chudson emailed the Claimant saying that there was no money in the budget for a trip to Berlin. On 17th July 2017 the First Defendant emailed Mr. Chudson in order to establish whether it was really necessary for someone to go to Berlin saying “*before we invest, I want to know what is in that file, plain and simple. ... As you would (sic) us to pay for your time, travel and expenses to retrieve this document, we want Sumner to contact the Bundsamt ...*”.
81. Later that morning Mr. Chudson sent an email to the First Defendant which contained the following: “Either 500 dollars to cover the expenses of this trip to Berlin is advanced now or I must cancel the appointment at the Bundesamt ... I am sorry, but Tony and I have invested all we are willing to do without something from you and Nicky”.
82. The First Defendant replied: “*Not the arrangement we agreed to but I will contact Tony now*”. The Claimant then sent an email to the First Defendant containing these words:
- “Mike and Nicky, I have advanced over \$40,000 for Lee’s research efforts, by far most of them have been for your benefit. I understand his trip to the Bundesamt is the last step in determining if there are any recoveries for you. If you are not willing to risk 1.25% of my advance by advancing the last \$500, I have advised that I will not advance another dollar and he should cancel his trip*
- If you do advance the \$500 ASAP, I will reduce the amount I collect post expenses from your recoveries dollar for dollar against my advances for your benefit – after repayment of course of your advance. I suggest you make a decision on this immediately”.*
83. The First Defendant replied that as the next step (the meeting in Berlin) was directly linked to the Posener claim “*I am willing to forward the requested \$500.00 USD If the \$500.00 USD is needed today, then get busy*”.
84. Following this email exchange, the First Defendant transferred \$500 to Mr. Chudson, who went to Berlin and met the Bundesamt. There is also an email from Mr. Chudson to the First Defendant on 20th July 2015 stating that the Claimant was also transferring \$300 to him to help with his travel expenses. This followed another email of that date from the First Defendant to Mr. Chudson (who had requested further funds) “*can cousin Tony assist*”. The First Defendant’s only answer when questioned about his email was “*It was probably a flippan remark*”. In fact the Claimant forwarded

another \$500 on 20th July 2015 and it is quite clear that the First Defendant considered that the Claimant was still obliged to make payments, which he did.

85. The Defendant's pleaded case is the Claimant was in repudiatory breach of contract by refusing to pay Mr. Chudson's fees and expenses of the Berlin trip. It is also alleged that he is in breach by failing to pay the remaining sums which Mr. Chudson says are due to him in the overall account. No particulars were pleaded and it has never been suggested or explained, either in submissions or in evidence, how the Claimant was in breach prior to 1st December 2015. This aspect of the pleading simply doesn't get off the ground. In any case, the final account due to Mr. Chudson was not resolved, on the Claimant's case which I accept and is borne out by the documents, until long after the award by the BADV (23rd December 2015). No case about this was advanced by the Defendants. The Claimant cannot be in breach for failing to make a payment before Mr. Chudson had worked out what was due and presented an invoice.
86. In paragraph 47 in the Defence, it is pleaded that "*as set out above*" the Defendants accepted the repudiatory breach, but no particulars were given either there or anywhere else in the pleadings of anything that could be regarded as an acceptance. It was only in the course of final submissions that Mr. Darton submitted that the only acceptance relied on was an email dated 1st December 2015 from the First Defendant to the Claimant. This was not the case on acceptance put forward in Mr. Darton's opening skeleton. In this email he states that he will now instruct Dr. Surner "*to discount any involvement with you for breach of contract on 3 counts*". He does not state the 3 grounds, but describes the Claimant as a scammer who has deceived, falsified and colluded with other to give false statements, been unacceptably bullish and that the agreement does not include any and all claims for Posener inheritance for all time. The context of this was the First Defendant's contention that he was not under any liability to pay for anything in respect of a BADV claim.
87. The Claimant pleaded in his reply that there was no repudiatory breach and, even if there was, the Defendants did not accept that the contract was repudiated, but affirmed the agreement by continuing to act in conformity with it. A further alternative case put forward in Mr. Oliver's skeleton was that the events of July 2015 amounted to a variation of the Contract by email.
88. Apart from the payments by the Claimant after the alleged repudiatory breach, and referred to above – which the First Defendant disingenuously denied knowledge of despite requesting Mr. Chudson to ask the Claimant if he needed more money – the First Defendant was copied into emails between the Claimant and Mr. Chudson, including one dated 7th September 2015 asking the latter calculate his expenses to date. The First Defendant's response made it quite clear that he was expecting the expenses to be dealt with as provided by the Contract. This email is a clear indication that he considered that the contract remained in place.
89. After his visit to Berlin, Mr. Chudson continued his involvement in the claim for compensation and copied his emails to the First Defendant. His emails also show that he was continuing to carry out his researches, visiting Wroclaw for instance on 12th October 2015. By mid-November 2015 the First Defendant was asserting that the Contract did not cover the BADV claim, but was still emailing Mr. Chudson on 18th November 2015 stating that his researches had "*clearly had real effect on the Posener*

claims” and stating that they needed to analyse his costs attributable to the Posener claims. Mr. Chudson then sent the First Defendant a list of invoices “to be billed by me to cousin Tony and which are to be reimbursed (which is in accordance with the agreement between you and him)”.

90. On 22nd November 2015, the First Defendant made it quite clear to Mr. Chudson, that he did not consider that he was under any liability to pay him direct, and that his retainer was solely with the Claimant. It is quite clear that the First Defendant continued to regard the Claimant as being solely responsible for Mr. Chudson’s remuneration and expenses.
91. I therefore turn to the issues. It is difficult to categorise the Claimant’s email of 17th July 2015 as anything other than a repudiatory breach of contract. While Mr. Oliver argued that it was an offer to vary the contract, my judgment is that it is a flat refusal by the Claimant to provide any more funds to Mr. Chudson, in the knowledge that the visit to Berlin was probably the last step required in the claim. The provision of funds was the main obligation on the part of the Claimant.
92. As regards the Defendants’ claim that in refusing to settle Mr. Chudson’s general bill there was a further breach of contract, I disagree. There was no refusal by the Claimant to payment of Mr. Chudson’s fees and expenses. How the Claimant dealt with resolving these with Mr. Chudson was a matter for them. The issue was as to the amount and how they should be apportioned between work done for the Claimant and under the contract and any delay in paying Mr. Chudson had no impact on the Defendants and was as a result of discussions between Mr. Chudson and the Claimant about the amount and Mr. Chudson’s delays in producing his final bill. The Defendants have not put forward any particulars of this alleged breach and there is no evidence advanced that there was any breach prior to 1st December 2015 or indeed the 23rd December 2015 – the date of the BADV award.
93. If there is a repudiatory breach then I am satisfied that it has been affirmed prior to any attempt by the Defendants to give notice accepting the breach as putting an end to their obligations under the contract. Although in breach in his email of 17th July 2015, the Claimant made an offer to the Defendants that if they paid Mr. Chudson \$500 then, if the Clause 8 trigger operates, then he would reimburse them the \$500 and another \$500 on top. Following that email, as set out above, the First Defendant responded by saying that he would make the payment and “*let’s get busy*”. He then asked the Claimant to provide further funds to Mr. Chudson, which was done, and until the email on 1st December 2017 not only took no steps to inform the Claimant that he considered that he was no longer obliged under the contract, he behaved to all intents as if the contract was still on foot and that he fully expected the reimbursement of the expenses to go ahead out of the proceeds of the compensation moneys in due course.
94. In my judgment, it is quite clear that the Defendants have, by the First Defendant’s emails and significant delay in accepting the breach, affirmed the contract and that for reasons given earlier, as a matter of Massachusetts law, the provisions of Clauses 10 and 11 do not prevent this consequence. I am also satisfied that there was also a new agreement, to treat the original contract on foot, when the First Defendant responded to the Claimant’s offer and that if he hadn’t taken the line that BADV claims were not

covered by the contract, he would have been arguing that he should be reimbursed the \$500 and another \$500 in accordance with the offer.

95. I therefore conclude that the Defendants cannot resist the claim on the grounds of repudiatory breach of contract.

Conclusion on liability

96. For the reasons set out above, I conclude that the Defendants are in breach of the contract by directing Dr. Surner to pay them the proceeds of the BADV compensation claim, subject only to deducting his fees and expenses. The Defendants are liable, jointly and severally, to account to the Claimant for the expenses and fees he has paid, or is liable to pay, to Mr. Chudson relating to the latter's researches in connection with the BADV and JCC claims and any other similar claims for compensation as a result of the seizure by the Nazis of Posener property. They are also liable to account for 30% of the net compensation moneys after deducting these fees and expenses and Dr. Surner's fees.
97. There was also an issue about whether the Claimant could recover for his work and expenses. By Clause 9 of the Contract, in the event that the Defendants are in breach of their obligations, including their obligation not to seek direct payment of any Awards for claims to the Posener Property and fail to reimburse the Claimant in full for his expenses and percentage, they agree to indemnify him for all losses, costs and expenses, including legal fees relating to or arising out of the breach.
98. Judge van Gestel's opinion was that it is standard in Massachusetts that costs of litigation are borne by each party and attorney fees are not usually included in damages awards. Clause 9 of the Contract applies but does not entitle the Claimant to recover the reasonable value of his legal services, only the costs and expenses that he actually incurs. The Claimant asked a part 35 question about this, and his response was that where there is a contractual provision allowing the recovery of attorney's legal services a court may examine the amount of those services to determine whether they are reasonable. This would include the nature and extent of the services and the hourly rate, if that is the basis of the charges. There can also be a contingency arrangement.
99. In the light of this opinion, the Claimant is entitled to an indemnity for the costs and disbursements that he had actually incurred as a result of having to take steps to enforce the agreement against the Defendants, but may not recover under Clause 9 for the time that he has personally spent. This would have to be recovered by an assessment of the costs of the actual proceedings (on the usual basis for assessing costs of a litigant in person).
100. Therefore, the Claimant is entitled to recover the following damages:
- i) a sum to represent the expenses that he has paid to Mr. Chudson or is liable to pay him;
 - ii) 30% of the net compensation received from the BADV, after discounting Dr. Surner's fees and the sum under (a);

- iii) His own expenses and costs incurred as a result of the Defendants' breach of contract.
101. Clauses 5 and 8 of the Contract provide for the payment of Expenses out of the Award. Apart from Dr. Sumner's fees, which were deducted from the Award before Dr. Sumner paid the balance to the Defendants, these include Mr. Chudson's travel expenses and charges for researching archives as well as any other expenses incurred by the Claimant in performance of the services under the Contract.
102. In the Amended Particulars of Claim, the Claimant pleads that he has made the following payments, for which he is entitled to reimbursement:
- i) \$71,377 between 30th October 2014 and 11th August 2016 to or for the benefit of Mr. Chudson in researching the archives or prosecuting the claims;
 - ii) \$1,962 to Brazilian counsel and Dr. Plagemann to obtain a relevant Vollmacht and for information;
103. He also pleads that pursuant to Clause 9, he is entitled to recover expenditure for his own time as an attorney seeking to enforce the contract, including consulting counsel in Germany, Ireland and the UK and communicating with Mr. Chudson and Dr. Sumner. Under this head he claims the following:
- i) counsel's fees in Germany, Ireland and the UK totalling \$9,400;
 - ii) \$2,600 payments from Mr. Chudson to obtain documents to support his claim against the Defendants;
104. Rather curiously, the Amended Particulars of Claim leave it open as to the amount that the court should award for the Claimant's own time spent on this case. Originally, he had pleaded that he had spent 18 hours recoverable time but on 14th June 2017 this was deleted. There are therefore no pleadings of the time he spent. His witness statement was similarly unspecific. At the start of the Claimant's oral evidence, he handed up a schedule and an email which, he said, set out the sums he had paid towards the enforcement of the contract (in other words covered by Clause 9). The email, dated 2nd July 2017 contained his claim for personal time spent as an attorney. There was insufficient detail and it was all provided very late in the day. It would have been impossible for the Defendant to cross-examine him about any of these matters and a waste of the court's time, during a 3 day trial, to deal with these issues. I therefore suggested that this aspect of the matter should be dealt with either by an inquiry before the Master or by a costs judge on assessment of costs.
105. In the light of the expert evidence of Massachusetts law my decision in relation to the section 9 claims is as follows:
- i) The Claimant is entitled to be indemnified for any expenses he has incurred with lawyers and others in order to recover the moneys due to him under the Contract, including the prosecution of this claim. He must establish that the various sums claimed were incurred to that end. This should be dealt with by an inquiry as he is entitled to damages equivalent to those sums;

- ii) He is not entitled to be indemnified in respect of his own time under Clauses 9 (as set out in Judge van Gestel's opinion);
 - iii) If an order for costs is made in favour of the Claimant at the conclusion of the trial (and I cannot make such an order at this stage as there may be relevant matters of which I am presently unaware) then he may be able to recover sums to reflect his own time spent on the case in the usual way. This will be a matter for the costs judge on the assessment.
106. Finally, I turn to the sums paid under the Contract which the Claimant says that he is entitled to recover under Clauses 5 and 8. Mr. Darton submits that the court should conclude that the Claimant's evidence is wholly unreliable on this issue and that he should not therefore recover anything.
107. Mr. Darton's submissions were that the way that the quantum of the claim was presented was inconsistent, Mr. Chudson had not produced any documentation from which his expenses and fees could be assessed as being reasonable and the Claimant's original pleading, and Mr. Chudson's final fee, suggested that the Claimant had abandoned part of the claim (his own time) but then added it to Mr. Chudson's charges. This latter point would require Mr. Chudson to have colluded with the Claimant.
108. On 11th August 2016 Mr. Chudson sent a letter to the Claimant which purports to set out what he has been paid. It states that he has been paid in full for all expenses he has incurred and all his time expended on research and prosecution of the holocaust claims. He sets out all payments, whether in respect of work for the Claimant alone or for work covered by the Contract. He apportions 90% of the work to the Contract and this leads to a total sum of \$71,366.45. Mr. Oliver submitted that each payment is vouched by wire transfer instructions and receipt for payments or by credit card statements where card payments were made. These documents are in the bundle. I have not checked them, but this has not been challenged by the Defendants during this trial and I therefore find that these sums were paid to Mr. Chudson and that the figure above is 90% of the total amount paid.
109. As Mr. Darton submits, these sums were paid after proceedings had been issued (29th April 2016). He referred to the following discrepancies from the final figure:
- i) In the letter before action dated 1st March 2016 the sum claimed was 50,000 euros already paid and a further estimated 26,000 euros. A further sum of 20,000 euros for the Claimant's services and expenses. It is to be noted that all that the Claimant is saying at that stage is that a sum has been paid and that further sums are due which is, at that time, only an estimate. It is not therefore reasonable to criticise the Claimant for misstating the sum due.
 - ii) In the original Particulars of Claim it is pleaded that the Claimant has made payments of \$38,338.31 between 30th October 2014 and 24th November 2015. Mr. Darton submitted that this was "*a lot less than 50,000 euros*" and that the Claimant and Mr. Chudson had not settled the sum due. That is correct, but the pleading says no more than that the Claimant has paid this sum. It is however clear from the documents that significant payments were made by the Claimant to Mr. Chudson in January and February 2015 (I have identified at

least \$5,000, and other direct expenses were incurred). The pleading and the letter before action are dealing with different periods. If this allegation was to be made good as an indication that the Claimant's case is not credible or honest, then it is not enough to make the assertion without doing the sums and the currency computation. In any case I find that it is improbable that there is any significant discrepancy and therefore that this allegation is not proved.

- iii) Mr. Darton said that the statement of \$50,000 in the letter before action was a deliberate untruth by the Claimant. He relied on an email from Mr. Chudson dated 16th February 2015 in which he said that he had never been paid a penny for his work. The documents produced by the Claimant clearly show that this is not correct and I think it is another example of Mr. Chudson's emotional and colourful way of dealing with matters which he is not happy with. The documents show that he had been paid, but the final bill had not been agreed with the Claimant.
- 110. The Claimant was cross-examined at length about his integrity. For example, in relation to his communications with the Falk heirs it was suggested that there was a conflict of interest. This might have been the case if he had been acting as attorney for either but I have already found that this was not the case and wasn't pleaded. He was also asked about his original pleading, in which he had claimed for sums incurred as attorney. This was a misconceived case in law which he subsequently abandoned when the pleadings were amended, but does not, in my judgment, show that he is lying or that he is presenting a false case.
 - 111. The Defendants, through their counsel, alleged in cross-examination and in final submissions that the Claimant had colluded with Mr. Chudson in putting forward an inflated bill for Mr. Chudson's work. It was put to the Claimant that it was more than a coincidence that, having deleted his claim to his fees as attorney, he simply agreed with Mr. Chudson to add them onto the latter's bill. This wasn't pleaded, but in any case there is no basis for the allegation. The final account was not arrived at until after the commencement of these proceedings, and the Claimant did not contend that it had. The Defendants' case falls a long way short of establishing the serious allegation of collusion and has no evidential basis, nor was it pleaded.
 - 112. The Claimant's evidence was that he had always agreed with Mr. Chudson that he would not pay him in full until the end of his work under the Contract. There is nothing to contradict this. He said that he paid him quarterly, and was asked about an email from Mr. Chudson dated 1st January 2016 in which he said that he had not sent invoices for October, November and December 2015. The Claimant agreed that he hadn't but said that this was because Mr. Chudson had stopped doing any work when the Defendants emailed him on 17th November 2015 refusing to pay. The Claimant's explanation that Mr. Chudson wanted his view whether to charge up to the point in November 2015, is borne out by the email and makes sense.
 - 113. The Claimant was also challenged about item 11 in Mr. Chudson's email of 11th August 2016, but Mr. Chudson goes on to say that this sum (relating to work done to enforce the agreement and therefore recoverable under Clause 9) has been excluded in computing the sum due under the Contract for work done on the Posener claims. The other items challenged were item 2, which was for research carried out between 30th April and 8th October 2014 and item 9 for the period 4th January 2016 and 7th April

2016. Item 2 (\$9,700) relates to work done before the Contract was signed, but on a true construction of the Contract does not fall within the definition of Expenses in Clause 5, which looks to the future and not the past. This item must therefore be deducted from the overall figure for expenses. Item 9 relates to payment, not to work done, and this is not therefore a good point.

114. The Claimant was reliant upon Mr. Chudson to provide his bill of expenditure and fees. Although no hourly rate was agreed, it is not pleaded that the fees and expenses were unreasonable. The Defence is that the fees are not genuine. The defence puts the Claimant to proof that the sums were expended or incurred, and also that the efforts of Mr. Chudson were of benefit to the Defendants. For reasons explained earlier, it was not necessary for the work to be proved to be of benefit. Inevitably, where research is carried out, some may be of direct benefit and some not. Under the Contract that was not the determining factor.
115. My decision is that the Claimant has satisfied me that he has now paid the sums claimed to Mr. Chudson, that these sums were paid by the Claimant in respect of research carried out by Mr. Chudson under the agreement and that the Claimant was entitled to rely on Mr. Chudson to apportion the bill to remove expenses and fees relating to work done for the Claimant and not covered by the Contract. I completely reject the case that there was collusion between Mr. Chudson and the Claimant and that the fees and expenses are therefore a fiction. As with the suggestion that the Defendants were tricked into signing the Contract and cheated, this was, at best, a completely unsubstantiated supposition with no evidential basis.

Conclusion

116. In summary, my conclusions are as follows:

- i) The Contract is to be construed as covering the BADV claim and Clause 8 is triggered;
- ii) The contract is not void or unenforceable by reason of the alleged breach of Code 1.18;
- iii) The contract is not repudiated and remains on foot;
- iv) The Claimant is therefore entitled to the following:
 - a) Reimbursement of the sum of \$61,666.45 which I find he has paid to Mr. Chudson for his researches under the Contract;
 - b) Payment of the 30% of the net sum to be computed on the sum received by the Defendants from Dr. Surner whose fees had already been deducted, (385,175 euros) less the amount to be reimbursed under (i). The precise amount is to be fixed at a further disposal hearing.
- v) An indemnity for sums actually paid or incurred by the Claimant to third parties (including legal fees paid or incurred to third parties) following the refusal of the Defendants to honour the Contract and in order to enforce the

Contract and recover the moneys due. This sum is to be ascertained by an order for an inquiry.

- vi) The Claimant is not entitled to compensation for his own time under the indemnity provision in the Contract, but may be entitled to some compensation on an assessment of the costs of these proceedings in the usual way (having regard to his being a litigant in person). Such matters are to be dealt with by the costs judge but will be subject to an order for costs being made which I cannot do until I have heard further argument as there may be matters of which I am presently unaware that are relevant.
117. Under Massachusetts law interest will run on the sums due under the Contract at the rate of 12% per annum and I will hear further argument on the amount of such interest and the date from which it should run.