Neutral Citation Number: [2021] EWHC 3458 (QB)

Case No: M21Q421

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ON APPEAL FROM MANCHESTER COUNTY COURT
ORDER OF HIS HONOUR JUDGE SEPHTON QC
CLAIM E3QZ88HM

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 20/12/2021

Before :

MR JUSTICE COTTER

- -

Between :

CHARLES RUSSELL SPEECHLYS LLP

Claimant

- and –

BENEFICIAL HOUSE (BIRMINGHAM) REGENERATION LLP

Defendant

- -
- -

Theo Barclay (instructed by Lewis Silkin) for the Appellant/Defendant
Charles Raffin (instructed by Goldsmith Bowers) for the Respondent/Claimant

Hearing dates: 03 December 2021

- -

Approved Judgment

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

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MR JUSTICE COTTER

Mr Justice Cotter:

Introduction

1. This judgment follows the hearing of an application for permission to appeal the order of HHJ Sephton QC dated 10th March 2021 to be followed, if granted, by the substantive appeal, as ordered by Mr Justice Soole on 16th June 2021.

2. The claim before the learned Judge was for fees for legal services provided to the Appellant in this appeal (being the Defendant below) by the Respondent (the Claimant below) between February and the end of November 2016. Following a trial, HHJ Sephton QC found that there was an implied contractual retainer in place between February 2016 and 15 November 2016, when an express agreement was reached, and entered judgment for the Claimant for a sum to be determined at a detailed assessment. The parties had agreed that if the Defendant was liable to pay the Claimant's fees, the bill would be subject to such an assessment.

3. The Appellant argues that the outcome of that trial should have been an order that the Claimant's recovery of fees be restricted to work carried out after 15 November 2016, when there was an express agreement in place. The submissions on appeal centred on whether the existence of an implied retainer had been pleaded by the Respondent at trial, and if not, whether the Judge was entitled to find for the Respondent on the basis of a cause of action which had not been pleaded.

Facts

4. I shall briefly deal with the relevant facts.

5. The Appellant ("the LLP") is a limited liability partnership that acted as a vehicle for members to fund the development of a property in Birmingham whilst benefiting from a tax relief scheme. The LLP consisted of investor members and designated members. The designated members included Mr Colin French and a company called Chancery Nominee Services Ltd ("Chancery"). The LLP agreement provided that the designated members did not have authority on their own to bind the LLP.

6. It is clear that development of the property did not go to plan, as the developer fell into financial difficulties. The role of the developer was key to the success of the project, as it was the pre-payment of funds to the developer that created the tax point upon which the tax relief scheme was based.

7. On 18th February 2016, Mr David Thomson, a consultant with the Respondent, a firm of solicitors, received a call from Mr John Fields, a director of Chancery. Mr Fields, calling on behalf of Chancery in its capacity as one of Beneficial's designated members, sought assistance with the potential removal of the developer to the scheme. Mr Thomson duly filled in a due diligence from and opened a file in the name of the LLP.

8. Initially, not much work was carried out. However, on 28th July 2016 Mr Thompson received instructions from Mr Peter Nichols, another director of Chancery, to prepare a loan agreement in relation to funds that it was intended would be raised from the LLP's members, to enable the completion of the work to the underlying property. It

was the Respondent's case that Mr Thompson and Mr Nichols agreed that Mr Thompson would defer sending a letter of engagement until the scope of the necessary legal works had become clearer. Thereafter, as he set out in his witness statement, Mr Thompson got on with what he has been instructed to do, taking his instructions from the Designated Members. Mr Thompson was also asked to look at the possibility of the LLP acquiring the developer so that it could control the finances and thereby safeguard the scheme.

9. On 11th August 2016, Mr Thomson provided advice during a telephone conference regarding the acquisition of the developer. The conference was attended, amongst other people, by Mr Nichols and also Mr William Stockler, a solicitor and member of the LLP, who was subsequently to represent the LLP at hearing below. Correspondence then followed and Mr Thomson carried out a substantial amount of work.

10. It appears that in late October 2016 or early November 2016, a group of investor members decided that the Designated Members should be replaced. They proposed a resolution to that effect at a meeting of the LLP on 7th November 2016. A discussion of that proposal was then adjourned until the 17th November 2016.

11. When the possibility of this change in Designated Members became apparent, Mr Thomson thought it prudent to have the agreement for the provision of legal services formally recorded, "so that there could be no confusion as to the basis on which he had been instructed to act". Accordingly, on 11th November 2016, the Respondent sent Mr Nichols a letter of engagement ("the Engagement Letter") appending its terms and conditions ("the Standard Terms"). The letter was signed and returned on 15 November 2016.

12. On 17th November 2016, the investor members of the LLP passed the resolution to replace the designated members. On 23 November 2016, Mr Thomson, acting on behalf of the two designated members (Mr French and Chancery), sent a letter to the investor members arguing that this resolution was invalid.

13. On 30th November 2016, the Respondent sent an invoice to the LLP in the sum of £49,179.60. The LLP refused to pay that invoice.

Pleadings

14. A claim form was issued by the Respondent to the LLP on 9th November 2018 seeking payment of that sum of £49,179.60, plus interest at the rate of 8% stipulated in the Standard Terms, in respect of its outstanding invoice.

15. The Defence denied indebtedness and raised a number of issues. The existence of a contract or retainer with the Respondent, as alleged or at all, was denied. It was also averred that Mr Nichols lacked authority to bind the LLP, and that Mr Thomson knew this. It was denied that services were provided to the LLP as opposed to having been provided to individuals. It was also pleaded that the majority of the work allegedly undertaken was carried out before the Engagement Letter was sent on 11 November

2016, and that as this letter only set out the basis for payment for work after it was signed (and that it therefore had no retrospective effect), there was no liability for fees between February 2016 and 15 November 2016.

16. By an amended reply which was not settled by Counsel, the Respondent averred that the retainer and payment obligations under the client care letter extended to work carried out before the 11 November 2016, and that this was clear from the reference to "ongoing advice". Furthermore, the Standard Terms referred to the effective date being the earlier of the letter of engagement or "our beginning to render services". The amended reply set out, at paragraph 2(a), that:

> "It is averred that the Claimant was instructed to act on behalf (sic) the Defendant by the designated members of the LLP; …"

17. There was no express or (to use HHJ Sephton QC's term) 'explicit or specific' reference in the claim form or in the amended reply to an implied contract and /or a quantum meruit claim.

18. Following an unsuccessful summary judgment application, the claim was set down for trial on 3rd and 4th February 2021.

Skeleton arguments at trial

19. In his skeleton argument at trial, counsel for the Respondent, Mr Raffin, submitted somewhat optimistically that this was a very simple case about an unpaid invoice.

20. He addressed the issues of authority of Mr Nichols and Mr Fields to bind the LLP at some length. He then dealt with the scope of the express written retainer set out in the Engagement Letter of 11th November 2016, submitting that:

> *"Once again, this is a matter that is dealt with promptly by reference to the express terms of the retainer. The retainer self-evidently covered both work that had been carried out prior to that date, and work carried out thereafter."* [footnotes omitted].

21. Mr Raffin's footnote to the second sentence in that extracted paragraph referred to an extract from Chitty on Contracts (33rd edn, Sweet & Maxwell), para 4-026 and 4-030. This extract would become relevant at the hearing.

22. It was Mr Raffin's submission that the Engagement Letter incorporated the Standard Terms, which stated that the agreement to provide services was effective from the earlier of the Engagement Letter or the beginning of the rendering of services. He argued that the work between February and November 2016 fell squarely within this term. I pause to observe that the Judge at first instance found that this argument was incorrect.

23. Importantly there was again no express reference in Mr Raffin's skeleton argument to either an implied contract of retainer or a quantum meruit claim.

24. Mr Stockler, who represented the LLP in the trial at first instance, also provided a skeleton argument by way of written opening submissions. He dealt with the authority of Mr Nichols before turning to the meaning of the Engagement Letter. He submitted

that the Engagement Letter was clearly only designed to cover services which were to be provided in the future. Not surprisingly, he did not address the existence of an implied contract and/or quantum meruit as neither had yet been raised.

Evidence

25. The trial bundle contained witness statements from Mr Thomson and Mr Stockler.

26. Mr Thomson set out how his previous firm, McClure Naismith LLP, had been engaged as legal advisors in the key section of the Investment Memorandum. After McClure Naismith went into administration in August 2015 and Mr Thomson moved to the Respondent, the work went with him. Mr Thomson referred to receiving instructions and opening a file in February 2016 and to prepare a loan agreement in July 2016. He stated that Mr Stockler, Andrew Mitchell QC and other members of the LLP were well aware that he had been retained to act on the behalf of the LLP; by way of support, he referred to a telephone conference attended by Mr Stockler and other investor members on 11th August 2016, during which he gave advice and at which it was agreed that he would, inter alia, take steps to liaise with prospective bidders.

27. Mr Thomson's evidence was that, following this call, Mr Stockler sent e-mails to Mr Nichols and others on 14th August 2016 and 22nd August 2016 stating that Mr Thomson should proceed with the takeover of the developer as a matter of urgency. It was also confirmed by an e-mail of 23rd August 2016 sent by Mr Fields that Mr Thomson was handling this work alongside the loan agreement. Mr Thomson stated that whilst undertaking the work he was not concerned about the lack of a formal retainer because of his "longstanding relationship with Mr Fields and Nichols". Given a developing dispute he thought it prudent to have his agreement formally recorded.

The hearing before HHJ Sephton QC

28. The hearing before HHJ Sephton QC on 3rd and 4th February 2021, taking place at a time of significant coronavirus-related restrictions, was conducted by MS Teams.

29. The conduct of the trial and the exchanges between the parties and the learned judge are important given the arguments advanced on appeal. In those circumstances, it is regrettable that a transcript has been obtained for only part of the first day of the hearing, covering the opening submissions, and that there is no transcript for the second day of the hearing.

30. As I have set out above, the Respondent's principal argument at trial was that all of the work which it carried out was covered by the terms of a written retainer as set out in the Engagement Letter dated 11th November 2016.

31. Mr Raffin made the following submissions in response to the written submissions of Mr Stockler, relying on the above-referenced extracts from Chitty on Contracts at paragraphs 4-026 and 4-030:

> "A further point I would just flag and raise is that, as I understand it, Beneficial House appears to assert that, in sum, the contract of retainer executed in November 2016 could not have retrospective effect, as it would be unenforceable for want of

> consideration, to put it — I hope I do not overly summarise that. If that be right, that is incorrect. The reason your Honour will have seen an extract from Chitty on Contracts in the authorities bundle, and in particular paragraphs 4-026 and 4-030, is for this reason. Half way through paragraph 4-026 your Honour will find the proposition that, similarly, "A promise to make a payment in respect of past services is not contractually binding unless the conditions specified in paragraph 4- 030 below are satisfied or some other consideration is provided"
>
> If I may take your Honour, very briefly, just to paragraph 4-030 (which you will find, I hope, three pages later or two pages later) ----
>
> JUDGE SEPHTON: Yes.
>
> MR RAFFIN: Your Honour will just see in there: "An act done before the promise is made can be consideration for the something if three conditions are satisfied. First, the act must have been done at the request of the promisor. Secondly, it must have been understood that payment would be made; and, thirdly, the payment, if it had been promised in advance, must have been legally recoverable. In such a case, the promisee is, quite apart from the subsequent promise, entitled to a *quantum meruit* for his services. A promise can be regarded as either fixing the amount of that *quantum meruit*, or as being given in consideration for the promisee's releasing of his *quantum meruit* claim."
>
> So in those circumstances there is absolutely no - if I can put it that way – legal issue with the retainer having both retrospective and prospective effect. In short, the work that had been carried out by CRS for Beneficial House between February and November, CRS says, was carried out at requests raised on behalf of the defendant. In the premise, it is plain that an implied retainer arose entitling CRS to either payment of a reasonable sum for its work – AKA sometimes phrased *quantum meruit*, or indeed a pure claim of unjust enrichment to any restitutionary award; i.e. otherwise phrased as a *quantum meruit* and in other ways too. And that the retainer executed in November 2016, in so far as it was retrospective, simply fixed the amount of that *quantum meruit* and/or served as consideration for (**inaudible**) of that *quantum meruit* claim. So that is, to put it badly, the bottom of the well on that point."

32. On appeal, Mr Raffin submitted that his submissions clearly included reference to an implied retainer. In my judgment, the submissions covered a number of legal issues; they did not simply argue for an implied contractual retainer up to 11 November 2016 and an express written contractual retainer thereafter. They were far from straightforward submissions to follow without the ability for prior consideration of the issues raised.

33. The Judge raised the possibility of the Respondent running an alternative or secondary case with Mr Stockler. In response Mr Stocker argued that para 2(a) of the reply did not cover a request as para 2(b); indeed, it referred to reliance on the Engagement Letter. He argued that the alternative case was not before the Court. The exchange was as follows:

> "JUDGE SEPHTON: The particulars of claim, Mr Stockler, do not rely on any written agreement, do they?
>
> MR STOCKLER: No, they do not. The particulars of claim themselves simply claim the money.
>
> JUDGE SEPHTON: If Mr Raffin were to base his case in the alternative on the basis that the claimant's services were supplied at the request of the defendant and establishes that the defendant had the right to make that request, that whoever asked on behalf of the defendant had a right to make that request, that gets him home on a claim for *quantum meruit*, does it not? There may then be issues about quantum and whether the various items of work were for the benefit of the LLP or for some other person. That arises in any event, but, if there is a proper request by an authorised member of the LLP and the claimant responded to that request, that is work done at the request of the defendant and therefore, at the very least, the subject of a *quantum meruit*. Or have I got that wrong?
>
> MR STOCKLER: Sir, are you addressing that question to me?
>
> JUDGE SEPHTON: I certainly am, yes.
>
> MR STOCKLER: Oh, I am so sorry. I beg your pardon. I thought you were asking Mr Raffin to comment.
>
> JUDGE SEPHTON: I am sure Mr Raffin would agree. What do you say?
>
> MR STOCKLER: The answer is it is not pleaded, of course, and in fact quite the opposite is pleaded because, if you look at the amended reply to the defence, paragraph 2(b) says the claimant does rely on the client care letter incorporating the claimant's terms of business.
>
> JUDGE SEPHTON: My question was: if Mr Raffin put, as a second plank, reliance upon *quantum meruit*, what can you say about that?
>
> MR STOCKLER: This whole case has not been fought on that basis and I have not taken any steps to assess what work was done, why and at whose request, because that was not the claimant's case. The claimant's case was simply that it was instructed by the engagement letter, and my answer was "You weren't". But, if he is now going to start a completely different case, then that is something which needs to be fought, but, at the moment, that is not part of the documentation in this trial at all."

34. Mr Stockler was making his view clear: that the alternative case, on a *quantum meruit* basis, was not before the Court. The exchange continued as follows:

"MR STOCKLER: Paragraph 2(a) is a reply to 2(a) of the defence, which is "It is denied that the defendant entered into any contract or retainer with the claimant and/or that the claimant provided any services to the defendant", and the answer is not "It did provide services". The answer is that it is averred that it was instructed to act by the designated members.

JUDGE SEPHTON: Well that is a request for services, is it not? Paragraph 2(a) constitutes averment that authorised persons asked the claimant to act, and that, of itself, is sufficient to recover *quantum meruit*, is it not?

MR STOCKLER: No, your Honour, if I may say so. I do not think it is.

JUDGE SEPHTON: Explain to me why not.

MR STOCKLER: Sorry?

JUDGE SEPHTON: Please explain to me why not.

MR STOCKLER: Yes. The first issue on *quantum meruit* is who asked — I mean, this has not been pleaded and therefore I have to reserve my position on it. If you, for example, go back to the section on Chitty which the claimant relies on, the issue is whether the request camefrom the promisor. The promisor in this case is the LLP, and therefore the whole issue of whether the designated members had the authority to issue any request, let alone to sign the engagement letter, is put at issue.

JUDGE SEPHTON: I accept that. I understand that point.

MR STOCKLER: So that is the first point. But the second point is that the answer to paragraph 2(a) of the defence ought to have been, "But yes, we did provide services at your request", but that is not ----

JUDGE SEPHTON: Is that not exactly what paragraph 2(a) of the reply said - exactly that?

MR STOCKLER: With great respect to your Honour, I read that — If you look at paragraph 2(b) where it says that the claimant relies on the client care letter, that says "I am relying on the client care letter" which, by definition, means "I am not relying on any other request". Because if you rely on the client care letter, what is the point of relying on it if in fact you have already got a duty to provide services? It does not make sense. One excludes the other.

JUDGE SEPHTON: Thank you. I have your point on that, thank you. Shall we have some evidence then?

MR STOCKLER: I have no more to say in opening and I would be happy to go straight on to the evidence if your Honour wishes.

JUDGE SEPHTON: Thank you. Let us do that. Mr Raffin, call your evidence."

35. The learned Judge was faced with a Claimant seeking to rely on a claim for an implied retainer and/or quantum meruit as a "secondary plank", as the Judge put it, and the Defendant objecting as the existing pleading did not enable a secondary case to be run and reserving its position as to its arguments (i.e. until Mr Stockler saw the amended case). Notwithstanding the importance of resolving this issue, and determining the limits of the claim, the Judge moved to the evidence without having made any ruling, leaving both sides unsure as to what his view was.

36. As for the Claimant (being the Respondent in this appeal), Mr Raffin submitted on appeal that:

> "Further to the position adopted by the Judge as to the construction of [the Respondent's] pleadings, [the Respondent] did not apply to amend its pleadings to stipulate payment of a reasonable fee under an implied retainer in the period between February and November 2019."

37. The hearing continued with Mr Thomson called and cross-examined. Before the second day, Mr Raffin circulated authorities and two extracts from *Friston on Costs* dealing with claims for quantum meruit in the law of costs, stating that the Claimant would be referring to them in closing.

Closing submissions

38. Mr Stockler made his closing submissions first. Because the Respondent's case was not adequately pleaded in respect of the alternative case on the implied retainer and quantum meruit, he had to anticipate what would be said by Mr Raffin. He said that he understood submissions would be made on quantum meruit and he would like the chance to reply to them.

39. Mr Raffin submitted that the Judge questioned Mr Stockler during his closing submissions about the alternative case, and specifically whether he could identify how the LLP would be prejudiced if the Claimant put its case on an alternative basis. This contention is supported by what is set out at paragraph 50(b) of the judgment, where the learned Judge noted that:

> "Mr Stockler was unable to demonstrate that the Defendant is prejudiced by the alternative way in which the Claimant put its case."

40. Mr Barclay, appearing for the Appellant, submitted that Mr Stockler was understandably confused at this stage as to how the alternative case was put, as proved by the fact that he dealt with unjust enrichment principles as opposed to a straightforward argument as to an implied retainer.

41. In his submissions, Mr Raffin submitted that if it were found that the Engagement Letter did not cover work carried out before the date of the Engagement Letter, then the Claimant had a simple claim for quantum meruit, in circumstances where Mr Thomson's instruction in February and/or July 2016 plainly amounted to an implied retainer under which the Respondent would be entitled to the payment of a reasonable

sum for its services. In support of this position, Mr Raffin took the Judge to the extracts in *Chitty* and *Friston*.

Judgment

42. Judgment was handed down on 5th March 2020. The learned Judge made a number of findings which are not the subject of the appeal. Those findings relevantly include that:

    i) In February 2016, Mr Fields purported to instruct Mr Thomson on behalf of the Defendant; and in July 2016, Mr Nichols purported to instruct Mr Thomson on behalf of the Defendant;

    ii) Although neither Mr Fields nor Mr Nichols had the actual authority of the Defendant to instruct the Claimant, Mr Thomson did not know that they lacked authority. He believed that he was validly instructed on behalf of the Defendant on each occasion. On each occasion, the work which Mr Thomson was purportedly instructed to do was clearly of potential benefit to the Defendant; in the period prior to November 2016, there was nothing to alert Mr Thomson to the possibility that the designated members were attempting to secure some purely personal benefit, and were not acting in accordance with their authority;

    iii) Several investor members were aware that the Claimant, through Mr Thomson, had been instructed to undertake work on behalf of the Defendant, and none had objected;

    iv) The Defendant was bound by the acts of the designated members, in particular in connection with the instruction of Mr Thomson and the Claimant, and in connection with the signing of the Engagement Letter. Accordingly, the Defendant was bound by the terms of the Engagement Letter and the Standard Terms;

    v) On the true construction of the express contract contained in the Engagement Letter and Standard Terms, the Claimant was obliged to pay the Defendant for services rendered after 15 November 2016 but not for the work undertaken before the date of that contract. In reaching that finding, the learned Judge engaged in a textual analysis of the contract and gave careful consideration to contextual factors;

    vi) The Claimant's work in relation to the letter it wrote on 21st November 2016 was not the responsibility of the Defendant, and the Defendant was not obliged to pay for that work.

43. The material part of the judgment for the purpose of the primary issue in this appeal, being the question of whether the Defendant was bound by an implied agreement, was as follows:

    "49. What, then, of the work the claimant undertook before the Letter of Engagement was written? When Mr French and Mr Nichols instructed Mr Thomson, both parties expected that the defendant would pay the claimant for its services. In my opinion,

in circumstances such as these, the law will imply an agreement to pay at a reasonable rate: see *Kellar & Carib West v Williams* [2004] UKPC 30. When assessing what is a reasonable rate, I do not doubt that the court will bear in mind that in the written agreement, the parties agreed on hourly rates in relation to work of a similar nature. Such written agreement on rates may well influence the court's decision about what is to be regarded as a reasonable rate.

50. Mr Stockler objected that the claimant had not pleaded its case on this basis: he submitted that the claimant was committed by paragraph 2(b) of its Reply to rely only upon the Engagement Letter. In my judgment:

(a) The Particulars of Claim simply seek a sum due in respect of professional services. The claim itself is not limited to a claim based on the Engagement Letter.

(b) Mr Stockler was unable to demonstrate that the defendant is prejudiced by the alternative way in which the claimant puts its case. As I stated earlier in this judgment, the issue of how much the claimant should be paid is to be determined at a later date, and the defendant will then have an opportunity to raise any argument it wishes about what work was required and what rate should be applied.

I am not persuaded that the claimant is precluded by its pleading from seeking payment on the basis of an implied agreement to pay at a reasonable rate."

44. Whilst the Judge had rejected the construction of the letter for which the Claimant had contended in its primary case, he allowed the alternative case in respect of the work undertaken prior to 15 November 2016, finding at paragraph 51(d) that:

"The parties expected that the defendant would pay the claimant in respect of the work Mr Thomson and his team were instructed to do. The claimant has a right to be paid a reasonable sum in respect of the work done."

The 'consequentials' hearing

45. At what has been described as the 'consequentials' hearing, the Judge then dealt with interest and costs. The Judge's approach to interest is of relevance insofar as it has been challenged under the second ground of appeal (discussed below).

46. Mr Stockler sought permission to appeal, which was refused. In the Form N460 (the document recording the reasons for refusing permission to appeal) the Judge stated as follows in reference to his "finding that C [i.e. the Claimant, and correspondingly using D for the Defendant] is entitled to succeed on the basis of an implied contract":

"In my judgment C's pleading, though not relying explicitly upon an implied contract, was adequate to raise the issue; in any event, the witness statements amply justified a finding that the defendant's agents had asked C's employee to undertake work on their behalf, for which the parties expected that the D would pay the C."

Grounds of appeal

47. The Appellant advanced three grounds of appeal:

    i) First, that the learned Judge erred in finding that the Defendant was bound by an implied contract to pay the Claimant a reasonable fee for its services, because the existence of an implied contract was not pleaded or canvassed before the court. It fell outside the scope of the pleaded issues, was not explored in evidence and was not addressed in submissions;

    ii) Secondly, if the principal ground of appeal is rejected, that the Judge erred in finding that the Claimant was entitled to contractual interest on the sums owed to it at a rate of 8% on the implied contract; and

    iii) Thirdly, and again if the first ground of appeal is rejected, that the Judge made an unsustainable costs order, and that costs should have been reserved to the costs judge.

Analysis – Ground 1

48. I start with the issue of whether the claim was adequately pleaded so as to enable the Claimant to run a case based on an implied contractual retainer.

49. The learned Judge correctly noted that there was no express or explicit reference to an implied retainer, but appears to have been the view that the claim, being pleaded in very basic terms was not limited in relation to a timeframe and/or it was somehow implied or caught within the very limited averment contained in paragraph 2(a) of the Reply.

50. It has long been a fundamental rule of litigation that a Claimant's statement of case must include all relevant facts. CPR 16.4.1(a) states that particulars of claim should include a concise statement of the facts relied upon. Relied in this context upon must mean relied upon as establishing and supporting a cause of action. CPR 16.4(1)(e) sets out that particulars of claim should also include any matters required by a PD. Relevant to the issue of an implied retainer CPR PD 16 paragraph 7.5:

> **"7.5** Where a claim is based upon an agreement by conduct, the particulars of claim must specify the conduct relied on and state by whom, when and where the acts constituting the conduct were done."

51. Here the pleading not only failed to comply with paragraph 7.5 as regards the material facts, it did not mention an implied retainer at all. Pleadings are meant to set matters out clearly; they should not contain hidden arguments within generalised averments. It is clear, and in my view entirely understandable, that Mr Stockler (although qualified as a solicitor acting as litigant in person) did not arrive at the hearing anticipating that he would face an alternative argument of an implied retainer. That is because the pleading gave him no adequate notice. He was caught by surprise and was unprepared for the alternative case. That simply should not have happened.

52. In my judgment the learned Judge fell into error by proceeding on the basis that the pleading adequately raised the issue of an implied retainer.

53. The next question is, faced with a pleading which did not adequately raise an implied retainer, what options were open to the Judge?

54. In his skeleton argument, Mr Barclay submitted that if a Judge proceeds to decide a case on an un-pleaded issue, that decision will be reversed on appeal. However, he rightly conceded in oral exchanges that such a submission, without more, is far too wide.

55. The overarching principle is that the pleadings frame the limits of the action. They identify the issues and the extent of the dispute between the parties; see **Blay v Pollard** [1930] 1 KB 628 per Scrutton LJ at 624 and **McPhilemy v Times Newspapers Ltd** [1999] 3 All ER 775 per Lord Woolf MR. As Mummery LJ stated in **Boake Allen Ltd & others v HMRC** [2006] EWCA Civ 25 at [131]:

> "While it is good sense not to be pernickety about pleadings, the basic requirement that material facts should be pleaded is there for a good reason - so that the other side can respond to the pleaded case by way of admission or denial of facts, thereby defining the issues for decision for the benefit of the parties and the court. Proper pleading of the material facts is essential for the orderly progress of the case and for its sound determination. The definition of the issues has an impact on such important matters as disclosure of relevant documents and the relevant oral evidence to be adduced at trial."

56. Lord Justice Rimer referred to the role of pleadings in providing advance notice of what a party has to address at trial in **Lombard North Central v Automobile World (UK) Ltd** [2010] EWCA Civ 20:

> "It remains a basic principle of our system of civil procedure that the factual case the parties wish to assert at trial must ordinarily be set out in their statements of case ('pleadings'). That is not a principle based on mere formalism. It is essential to the conduct of a fair trial that each side should know in advance what case the other is making, and thus what case it has to meet and prepare for. It is the function of the pleadings to provide that information."

57. More recently in **UK Learning Academy v Secretary of State for Education** [2020] EWCA Civ 370, Lord Justice Richards sought to dispel any notion that the role of pleadings had diminished (at [47]):

> "I would add here that I endorse the view expressed by the judge to the parties at the trial and repeated in his judgment at [11] that the statements of case ought, at the very least, to identify the issues to be determined. In that way, the parties know the issues to which they should direct their evidence and their challenges to the evidence of the other party or parties and the issues to

> which they should direct their submissions on the law and the evidence. Equally importantly, it enables the judge to keep the trial within manageable bounds, so that public resources as well as the parties' own resources are not wasted, and so that the judge knows the issues on which the proceedings, and the judgment, must concentrate. If, as he said, there was "a prevailing view that parties should not be held to their pleaded cases", it is wrong. That is not to say that technical points may be used to prevent the just disposal of a case or that a trial judge may not permit a departure from a pleaded case where it is just to do so (although in such a case it is good practice to amend the pleading, even at trial), but the statements of case play a critical role in civil litigation which should not be diminished."

58. In **Satyam Enterprises Ltd v Burton** [2021] EWCA Civ 287, Nugee LJ similarly held:

> "35. This is not therefore a case, as sometimes happens, where one or other of the parties seeks to run a different case at trial from that pleaded. That itself is unsatisfactory and can cause difficulties, as has been said recently by this Court more than once: see UK Learning Academy Ltd v Secretary of State for Education [2020] EWCA Civ 370 at [47] per David Richards LJ where he said that statements of case play a critical role in civil litigation which should not be diminished, and Dhillon v Barclays Bank plc [2020] EWCA Civ 619 at [19] per Coulson LJ where he said that it was too often the case that the pleadings become forgotten as time goes on and the trial becomes something of a free-for-all. As both judges say, the reason why it is important for a party who wants to run a particular case to plead it is so that the parties can know the issues which need to be addressed in evidence and submissions, and the Court can know what issues it is being asked to decide. That is not to encourage the taking of purely technical pleading points, and a trial judge can always permit a departure from a pleaded case where it is just to do so (although even in such a case it is good practice for the pleading to be amended); in practice the other party often, sensibly, does not take the point, but in any case where such a departure might cause prejudice he is entitled to insist on a formal application to amend being made: Loveridge v Healey [2004] EWCA Civ 173 at [23] per Lord Phillips MR."

Mr Barclay relied on the final sentence for the proposition that a party need only show that a departure from the pleaded case "might" cause prejudice before an application to amend is required.

59. Mr Barclay also referred to the CA decision in **Al-Medenni v Mars UK Ltd** [2005] EWCA Civ 1041. In that case an employee had been injured when she was struck on the shoulder by a reel of wrapping paper which had fallen from a machine. Her pleaded case was that the reel of wrapping paper had been placed on the machine by an identified fellow employee, B. In the course of her opening, the Claimant's counsel made it clear that her case was that the reel had fallen because it had been wrongly

placed on the machine by B; the defendant's case was that the Claimant herself had placed the reel on the in-feed conveyer to the machine. The Judge then floated the possibility of a third man having placed the reel. Claimant's counsel did not take up the third man theory and apply to amend. In her closing submissions during she sought to advance the third man theory as an alternative to her primary case. She submitted that the particulars of negligence in the particulars of claim were wide enough to encompass the third man theory. In the further alternative she said, without developing the point, that the claimant could rely on *res ipsa loquitur*: the thing speaks for itself. The judge accepted B's denial of responsibility and concluded that another unidentified employee must have placed the reel on the machine. On that basis, he gave judgment in the employee's favour. The appeal was allowed. The Court of Appeal held that the Judge had not been entitled to find for the employee on the basis of the "third man theory". Dyson LJ relevantly stated:

> "21. In my view the judge was not entitled to find for the claimant on the basis of the third man theory. It is fundamental to our adversarial system of justice that the parties should clearly identify the issues that arise in the litigation, so that each has the opportunity of responding to the points made by the other. The function of the judge is to adjudicate on those issues alone. The parties may have their own reasons for limiting the issues or presenting them in a certain way. The judge can invite, and even encourage, the parties to recast or modify the issues. But if they refuse to do so, the judge must respect that decision. One consequence of this may be that the judge is compelled to reject a claim on the basis on which it is advanced, although he or she is of the opinion that it would have succeeded if it had been advanced on a different basis. Such an outcome may be unattractive, but any other approach leads to uncertainty and potentially real unfairness.
>
> 22. The starting point must always be the pleadings."

60. In the present case, the pleadings did not allow the reader to discern an alternative case to what was clearly the primary case: that the retainer letter covered work from February to November 2016. Given the fundamental importance of adequate pleadings, the Judge should have made a ruling on the issue of what case could be advanced and ensured the parties knew where they stood. In my view, he was wrong to proceed with the issue unresolved.

61. When faced with an inadequate pleading, the available options are ordinarily as follows:

i) If the other party takes no point, the court may proceed to consider the case beyond or outside the pleaded case. As Lord Phillips observed in **Loveridge & Loveridge v Healey** [2004] EWCA Civ 173 at [23]:

> "Where one party advances a case that is inconsistent with his pleadings, it often happens that the other party takes no point on this. Where the departure from the pleadings causes no prejudice, or where for some other reason it is obvious that the court, if asked, will give

> permission to amend the pleading, the other party may be sensible to take no pleading point."

ii) If an application to amend is made, it must be determined on its merits;

iii) If a point is taken that the pleading does not cover the case to be advanced, and no application to amend is made, the court should consider what the issues are in the case are and specifically whether the issue said not to be covered is one that falls for determination. This is necessary so that the parties know where they stand. To do so, it is first necessary to determine whether and to what extent the departure may cause prejudice. As Lord Phillips further observed in **Loveridge**:

> "Where, however, departure from a pleading will cause prejudice, it is in the interests of justice that the other party should be entitled to insist that this is not permitted unless the pleading is appropriately amended. That then introduces, in its proper context, the issue of whether or not the party in question should be permitted to advance a case which has not hitherto been pleaded."

62. As Richards LJ observed in **UK Learning Academy Ltd v Secretary of State for Education** [2020] EWCA Civ 370, a Judge may in appropriate circumstances allow a party to depart from its pleaded case where it is just to do so, although it is always good practice to amend pleadings, even at trial. However, I accept Mr Barclay's submission, set out above, that the prejudice threshold is a low one and a party need only show that a departure from the pleaded case "might" cause prejudice before an application to amend is required. If that threshold is met, it would ordinarily not be just to allow a party to depart from the pleaded case advanced up to trial. Context is important. A party who has prepared for trial not anticipating that a particular point will arise may not have the ability at the outset of the trial to fully assess the implications of a point, whether evidential or in terms of applicable law, without time, something that an adequately pleaded case would have afforded him. What Mummery LJ referred to as the orderly progress of the case in **Boake Allen** has been disrupted and too require more than the potential for prejudice would be unfair.

63. The court should also bear in mind that a litigant in person may be at a greater disadvantage than a represented party in this regard. In the present case it is not surprising that Mr Stockler sought to reserve his position until he had chance to assess the factual and legal basis of the new case to be advanced.

64. Mr Raffin submitted that Mr Stockler did not force the issue of an amendment. However, this submission fails to recognise the primary importance of pleadings and the entitlement to have the case adequately set out. In any event he made his view plain; that a secondary argument was not in issue on the basis of the pleadings.

65. It was incumbent on the Judge to address the issue and given that Mr Raffin did not apply to amend he should have considered whether the case could be advanced without an amendment. To do so, he had to address whether there was the risk of prejudice to the Defendant.

66. Mr Raffin submitted that Mr Stockler could not point to anything when the Judge asked what prejudice there could be if the alternative case was run. He argued that Mr Stockler could have requested more time to research the law and then made submissions. He also relied on the fact that Mr Stockler was also unable to identify prejudice when asked by the Judge during his closing submissions. By way of example, Mr Stockler did not say that he would have placed further evidence before the court and/or asked further or different questions of Mr Thomson had he known an implied retainer was being relied upon. However the problem with this submission is that Mr Stockler did not know exactly what alternative case he was facing and had not had the ability, which he should have had, to comprehensively assess the factual and legal basis of the new case before the hearing, so he was at an obvious disadvantage when asked by the Judge during opening to identify what prejudice he faced.

67. As the case was never pleaded, the position was not materially different at the time of closing submissions. I accept that Mr Stockler submitted remained uncertain as to the full extent of the case advanced by the Claimant when he stood up to make his closing submission. Mr Raffin's note of the submission records that Mr Stockler:

    i) Understood that counsel for the Claimant might want to make submissions on 'quantum meruit' and that he was surprised that in a claim where there were pleadings and a summary judgment application, that the first time a 'quantum meruit' claim was heard was about five minutes before the end of closing submissions;

    ii) Was of the view that it was clear that any action for quantum meruit had to be pleaded, and whilst the Judge might think that it was, quantum meruit was not pleaded, and the pleadings did the opposite and it was not pleaded as an alternative. That the trial was not prepared on that basis.

    iii) If a claim was implied into the pleadings then the Claimant would have to prove how Mr Thomson was instructed, what work was done, to what extent the work created unjust enrichment in favour of the person who had instructed a solicitor, and show what the value was to him of the work done. He submitted there was no evidence of this, and that quantum meruit needed the facts on which the claim is based and these were not proved. He referred to the case of **Benedetti v Sawiris** [2014] AC 938 for the proposition that quantum meruit claims were very complex.

68. I accept Mr Barclay's submission that these extracts showed Mr Stockler was confused as to the case that he had to meet and wrongly thought it was based on unjust enrichment.

69. In my view, the unsatisfactory progress of the trial created procedural unfairness and with it the obvious risk that Mr Stockler could not make fully considered submissions and as a result, suffer prejudice, as he did not know the full extent of the case he had to meet. This should have been foreseen at the outset of the hearing, and the Respondent should have been put to an election of either applying to amend or accepting that an alternative case based on an implied retainer was not properly before the court.

70. Notwithstanding this finding of procedural unfairness, it is necessary to consider Mr Raffin's submission, that if Mr Stockler had been fully aware of the Respondent's case

the outcome would inevitably have been the same and as there was no real prejudice the court should not set aside the order made by the Judge.

71. Mr Barclay submitted that the running of an alternative case of an implied contractual retainer at trial, without any advance warning, caused the Appellant clear specific prejudice for the following reasons:

    (a) No disclosure was given by the Respondent of any communications between Mr Thomson and Mr Nichols or Mr Fields (or any internal documents) which might have justified the implication of a contract, evidenced its terms, or which demonstrated that such a contract was performed by the Respondent;

    (b) Mr Stockler did not have the chance to cross-examine Mr Thomson on the circumstances said to justify the implication of the contract in February 2016, its terms, or the extent to which it was performed;

    (c) Given time to assess the legal basis, Mr Stockler would have explored whether the implication of a contract was permissible based on the parties' actual interactions and in particular if the services were to be provided gratuitously until a letter of engagement was provided;

    (d) Neither Mr Nichols nor Mr Fields were called to give evidence. Their evidence would have been critical to the question of the existence of terms of an earlier implied contract, had that been in issue; and

    (e) The Appellant did not have chance to make submissions on whether Mr Fields or Mr Nichols had ostensible authority to enter into a contract before the Engagement Letter of the 11 November 2016.

72. When challenged during submissions, much of this fell away. Mr Raffin was able to confirm that the Respondent had given disclosure of all available documentation. As I pointed out to Mr Barclay, it was a matter for the Respondent who it chose to call as witnesses and it was very highly unlikely that the Appellant would have called either Mr Nichols or Mr Fields, given that it seems clear that their evidence may well have been supportive of the Respondent. Further, it was clear that Mr Stockler had the issue of authority in his mind in relation to the implied contract as he had raised the point with the Judge.

73. Mr Barclay was on firmer ground in relation to the inability to assess the Respondent's case upon an implied retainer and that to consider the necessary requirements for its formation. He submitted that Mr Thomson would have been cross-examined as to whether the provision of legal services was intended, at least at the outset in February, to be gratuitous until a letter of engagement was sent. He relied upon the following:

    (a) The opening of a file by Mr Thomson and the completion of a client due diligence cover sheet dated 24 February 2016 would have been necessary, even if advice were to be provided gratuitously, because of the risk of conflicts;

    (b) In his witness statement of 2 April 2020 Mr Thomson stated as follows:

> "On 18 February 2016 I received a call from JF in his capacity as a director of Chancery, one of the DMs of the Defendant. JF was seeking advice regarding a possible removal of Gethar as a developer on the scheme. I opened a file in the name of the Defendant against which I recorded my time. At that time I had no idea whether I would be providing a small amount of "ad-hoc" advice or something far more substantial. I did not, therefore, send out terms of engagement since if it transpired that I only carried out a small amount of work I would, in all probability, have simply written the time off.";

(c) An email of the 28 July 2016 from Mr Nichols to Mr Thomson referred to the need for a loan agreement and continued;

> "I am sure you have a colleague who can do this. However there are two issues:
>
> 1. Easy first, an engagement letter with the LLP is required.
>
> 2. Not so easy, a client account to hold the funds.
>
> If 2. Is an issue re AML etc let's not waste any time as Osborne Clark will do this for us."

Mr Barclay submitted that this email was inconsistent with the existence of an earlier implied contract for the provision of services at a cost.

74. In response to these submissions Mr Raffin referred to the fact that not only did Mr Thomson open a file, he also recorded time with the Appellant was named as a client under billing details. He submitted that the avenues of cross-examination outlined by Mr Barclay were highly unlikely to have borne any fruit given all the available documentation and the Judge's findings of fact. He also referred to the fact that the Appellant had failed to obtain a transcript of the cross-examination of Mr Thomson which, he submitted, may have covered some of these issues.

75. I recognise that when set out during closing submissions the Respondent's case upon an implied retainer was relatively straightforward. As set out in Friston on Costs (3rd Edition), paragraph 18.92-18.93, the issue of quantum meruit may arise where there is no written retainer and that situation will, in general, present no conceptual difficulties. It would usually be self-evident that the agreement between the legal services provider and the client was not intended to be gratuitous; in those circumstances the law will often imply an agreement that a reasonable fee will be paid. To support this proposition, reference was made to **Kellar v Williams** [2004] UKPC 30, the case quoted by the learned Judge at first instance within his judgment.

76. However, the Appellant was denied an adequate opportunity, before or even at the hearing, to assess at the hearing the factual and legal basis said by the Respondent to support the implication of a retainer and in particular whether it was self-evident, given

the "longstanding relationship with Mr Fields and Nichols", that the agreement between the legal services provider and the client was not intended to be gratuitous. Neither Mr Nicols nor Mr Fields was called to give evidence and this meant that the Respondent was reliant and the evidence of Mr Thomson and documentation to show that *both* parties understood that there was a liability to pay fees incurred before an engagement letter was provided. Whilst there is force in Mr Raffin's submissions, I am satisfied that there was potential prejudice in the inability to properly test and explore this aspect of the case and, again, the risk of it should have been identified at the outset of the case. The threshold to be applied was a low one, whether there was risk of prejudice. In those circumstances, I do not accept Mr Raffin's submission that if Mr Stockler had been fully aware of the Respondent's case the outcome would inevitably have been the same and as such there was no real prejudice.

77. Therefore, for the reasons set out above, I am satisfied that the Judge fell into error in allowing the Respondent to advance, and then making a finding on the basis of, a case outside the scope of the pleadings.

Orders

78. Mr Barclay submitted that as the Judge had not found for the Respondent upon the argument that the letter of engagement had retrospective effect, if the finding in relation to the implied retainer is removed, then the result should be judgment for the Appellant (as the fees incurred after the letter of engagement were de minimis). He argued that it was incumbent on the Respondent to apply to amend and the decision not to do so was its choice, and that it should face the consequences.

79. In my view, in this case (and unlike the position in **Al-Medenni v Mars UK Ltd** [2005] EWCA Civ 1041), the Judge effectively encouraged the Claimant not to apply to amend its pleadings through his comments and subsequent finding that the pleadings were adequate. Although it would nevertheless have been the safer course to have amended notwithstanding the Judge's comments, his approach significantly contributed to the Respondent's decision not to do so as he viewed it as unnecessary. As Mr Raffin set out in his skeleton for the appeal:

> "Further to the position adopted by the Judge as to the construction of the pleading the Claimant did not apply to amend its pleadings to stipulate payment of a reasonable fee under an implied retainer."

80. Given that I accept that the Judge's error in relation to the pleadings did influence the Respondent not to apply to amend, it is my view that it would not be the proper course to enter judgment for the Appellant. Rather, the proper course is to remit this matter for a re-trial before a different Judge. The application to amend can be determined on its merits and, if permitted, the Respondent's case can be fairly challenged.

81. Given that the Appellant has been successful on ground 1, and in light of my decision that the appropriate course is a re-trial, it is unnecessary for me to address ground 2 and 3.

82. I leave it to the parties to seek to agree an appropriate order.