Neutral Citation Number: [2023] EWHC 2916 (Ch)

Case No: BL-2022-001485

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
BUSINESS LIST (Ch)

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 17 November 2023

Before :

MASTER TEVERSON

- -

Between :

SIMON BAIN BUILDING SERVICES LIMITED	**Claimant**
- and -	
(1) MS JENNA CARDONE **(2) MR KEVIN O'KEEFE**	**Defendants**

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- -

Stephen Bishop (instructed by **New Media Law LLP**) for the **Claimant**
Brenna Conroy (instructed by **Charles Russell Speechlys LLP**) for the **Defendants**

Hearing date: 5 October 2023

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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.

This Judgment was handed down remotely at 10.30am on 17 November 2023. It has been sent by email to the parties' legal representatives and to National Archives.

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MASTER TEVERSON (sitting in retirement)

MASTER TEVERSON :

1. This is my reserved judgment following the hearing before me on 5 October 2023 of three applications by the Defendants. In the order in which they were issued, the applications are;-

   (1)An application dated 21 March 2023 pursuant to CPR 13 to set aside the default judgments entered on 16 March 2023 against the Defendants ("the Default Judgment Application");

   (2)An application dated 28 June 2023 asking the court (i) to treat the application of 21 March 2023 as an application under CPR Part 11 by rectifying an error of procedure said to be capable of rectification under CPR r. 3.10; (ii) to extend time and/or grant relief from the sanctions in CPR r.11(4) and 11(5) in respect of making an application to challenge jurisdiction; and (iii) an order declaring that the court has no jurisdiction to try the claim or should not exercise any jurisdiction which it may have ("the Jurisdiction Application"); and

   (3)An application dated 2 October 2023 for an extension of time for filing the Acknowledgement of Service and/or for relief from sanctions pursuant to CPR r.11(2) ("the Acknowledgement of Service extension of time application").
2. The dispute between the parties arises out of a construction contract for works at 24 Northumberland Place, London W2 5BS ("the Property"). The Claimant, Simon Bain Building Services Limited, was the contractor. The Defendants, Ms Jenna Cardone and Mr Kevin O'Keefe, a married couple, were the employers.

The claim

3. The Claimant's claim is for the balance of monies said to be owed under the construction contract. The Claimant claims that the amount owing to it is £250,112.78 together with interest and costs. The sum is claimed under what is alleged to have been a cost-plus agreement under which the Claimant would charge cost plus 20% in respect of labour and cost plus 15% in respect of materials. The Claimant claims this agreement was reached at meetings held on 27 May 2016 and on 3 June 2016 at the Property. This is referred to in the Particulars of Claim as the "Costs Plus Variation".
4. The Defendants deny that any cost-plus arrangement was ever entered into between the parties. The Defendants aver that the contract was a lump sum contract which was originally contained in or evidenced by a quotation sent by email by the Claimant to the First Defendant on 8 October 2014 ("the Quotation"). The Defendants say that thereafter the parties agreed a revised lump sum of £496,000 plus VAT ("the Revised

Quotation") to include a Mansard Roof Extension for which planning consent had been obtained after the Quotation.

5. The Defendants say they moved back into the Property on 31 August 2016 and that after they had taken back possession of the Property, no further substantive works were carried out.
6. The Defendants say they have paid the Claimant the sum of £465,008.88 to date. They say they have also made payments to external contractors and that the sums paid exceed the value of the works carried out by the Claimant.
7. The Claimant in reliance on an expert's report prepared by Mr Ryan Greening dated 13 December 2022 says that the amount reasonably payable on a cost-plus basis is £715,071.66. The Claimant gives credit for the sum of £464,958.88 which is the amount it says has been paid by the Defendant leaving, the Claimant claims, an amount owing of £250,112.78.
8. Alternatively, the Claimant claims the sum of £250,112.78 as a quantum meruit. In the further alternative, the Claimant claims that it is entitled to restitution in the sum of £63,175.83 being the difference between its actual incurred costs and the sum paid by the Defendants.

The procedural history

9. The Claimant began pre-action correspondence on 26 January 2017. The Claimant initially instructed Russell-Cooke LLP. The Defendants originally instructed Child & Child to represent them. In the course of pre-action correspondence the Defendants changed solicitors and instructed Charles Russell Speechlys ("CRS") on or around 8 November 2019.
10. Pre-action correspondence then continued between Russell-Cooke and CRS. The last letter to CRS from Russell-Cooke was dated 8 January 2020. This was replied to in a letter from CRS to Russell-Cooke dated 27 January 2020. In that letter CRS stated that the Defendants would not engage in further correspondence with the Claimant until further explanation and relevant supporting documentation was provided. CRS stated that it would be entirely disproportionate for the Claimant to issue proceedings at that time. CRS did however confirm that it was instructed to accept service of proceedings on behalf of the Defendants as follows:-
"Nonetheless, we confirm that we are instructed to accept service of proceedings on behalf of our clients".
11. In or around August 2020, the Claimant changed solicitors from Russell-Cooke to its current solicitors, New Media Law LLP ("NML"). NML wrote to CRS on 26 February 2021. That letter made reference to CRS's letter dated 27 January 2020.

12. CMS replied to NML's letter dated 26 February 2021 by a letter dated 22 March 2021. NML did not reply until a letter dated 1 September 2021. CRS responded on 4 October 2021. CMS did not receive any response to that letter or any further correspondence from NML until after issue of the claim form.
13. The claim form was issued some 11 months later on 15 September 2022. It was not served at that time. Instead the Claimant instructed Mr Ryan Greening of Bennington Green Limited to provide a quantum report to assess the value of the Claimant's works to the Property upon the basis of a cost-plus agreement.
14. On 15 February 2023 a certificate of service was filed recording that the Claim Form, Particulars of Claim and Expert Report of Ryan Greening was served on 10 January 2023 on the Defendants at the Property referred to as being the Defendants' usual residence.
15. On 20 February 2023 CRS acknowledged service on behalf of the Defendants. They ticked the box stating that the Defendants intended to contest jurisdiction.
16. The 14 day period for making an application under CPR Part 11 expired on 6 March 2023.
17. On 16 March 2023 judgments in default of defence were entered against the Defendants for an amount (in respect of damages and interest and costs) to be decided by the Court.
18. By application notice dated 21 March 2023 the Defendants applied pursuant to CPR Part 13 to set aside the default judgments entered on 16 March 2023 against them.
19. The application notice in box 3 in answer to the question "What order are you asking the court to make and why?" stated:-
    "1. The Defendants seek an order (a draft of which is attached) pursuant to CPR 13 to set aside the Default Judgments entered on 16 March 2023 in respect of these proceedings.
    2. The Defendants have a real prospect of successfully defending the claim, as set out in the witness statement and exhibit of Andrew Keeley dated 21 March 2023 in support of this application.
    3. There are good reasons why the Default Judgments should be set aside or varied or why the Defendants should be permitted to defend the claim, as set out in the witness statement and exhibit of Andrew Keeley dated 21 March 2023 in support of this application."
20. The draft order attached to the application sought orders that:-
    "1 The default judgments entered on 16 March 2023 be set aside on the grounds that the Defendants have a real prospect of defending the claim [and/or] there are good reasons why the judgments should be set aside or varied, or why the Defendants should be permitted to defend the claim.

2. The Defendants have 14 days from the date of this Order to file their Defence to the Claimant's claim.
3. The Claimant has 14 days from the service of the Defence to file a Reply to the Defence.
4. Costs in the case."

21. The application was supported by the first witness statement of Andrew Keeley, a partner of CRS, dated 21 March 2023. In paragraph 2 Mr Keeley set out the background to the application. In paragraph 2.3 he said he was instructed that the Defendants (who are American) no longer reside at the Property, having returned to the United States of America on 15 August 2022. In paragraph 2.5 Mr Keeley said that for the reasons explained below the claim form should have been served on CRS instead of at the Property. In paragraph 2.6 Mr Keeley said he was instructed that the Defendants no longer own or reside at the Property and consequently the Defendants did not receive the claim form until Tuesday 14 February 2023, when the letter was forwarded from their old address. In paragraph 2.7 Mr Keely said CRS were instructed promptly by the Defendants to respond. He said that CRS filed an acknowledgement of service on behalf of the Defendants on Monday 20 February 2023, indicating the Defendants' intention to contest jurisdiction.

22. In paragraph 2.8 Mr Keeley gave the following explanation why no further procedural steps had been taken by the Defendants:-
"Given the lapse of time between the claim form being filed in September 2022 and receipt of the claim form by the Defendants in February 2023, CRS expected that the acknowledgement of serviced [sic] had itself been served out of time and awaited directions from the Court <u>in relation to filing a defence.</u>" (emphasis added).

23. It is unclear why Mr Keeley expected that the Court would give directions in a Part 7 claim prior to either an application being made under CPR Part 11 or a defence being filed and served. In the former case, CPR r. 11(7) provides that:-
" If on an application under this rule the court does not make a declaration:-
..
(c) *the court shall give directions as to the filing and service of the defence in a claim under Part 7 or the filing of evidence in a claim under Part 8 in the event that a further acknowledgement of service is filed."*
The statement by Mr Keeley that CRS awaited directions from the court in relation to the filing of a defence is not consistent with an intention to apply under Part 11 to contest jurisdiction.

24. In paragraph 2.9, Mr Keeley said that no such directions were received, and no further correspondence was received from the Claimant, New

Media, or the Court until CRS received the Default Judgments by e-mail on 16 March 2023.

25. In paragraph 3.1 Mr Keeley states that [the Default Judgment Application] is made pursuant to CPR r.13.3. In paragraph 3.2 Mr Keeley set out the tests that the Court has to apply under CPR 13.3. In paragraph 3.3 Mr Keeley stated that the court was further required to have regard to whether the party seeking to set aside the judgment made an application to do so promptly.
26. In paragraph 3.4 Mr Keeley stated his belief that there were good reasons why the Default Judgments should be set aside or varied, or why the Defendants should be permitted to defend the claim. In paragraph 3.4.1 Mr Keeley said:-

"There is a real prospect of successfully defending the claim on the basis of :-

(a) Invalid service of the claim form in circumstances where the limitation period has expired and/or
(b) Expiry of the limitation period; and/or
(c) The substantive defence to the claim."

27. In paragraph 4 of his witness statement Mr Keeley dealt with the issue of service. In paragraph 4.1 he quoted the part of CRS letter dated 27 January 2020 to the Claimant's legal representatives confirming they were instructed to accept service of proceedings on behalf of the Defendants.
28. In paragraph 4.2 Mr Keeley said:-

"Pursuant to CPR 6.7(1)(b):-

"where-(b) a solicitor acting for the defendant has notified the claimant in writing that the solicitor is instructed to accept service of the claim form on behalf of the defendant at a business address within the jurisdiction, the claim form <u>must</u> be served at the business address of that solicitor."(emphasis added)"

29. In paragraph 4.3 Mr Keeley said that the claim form was not served on CRS by the Claimant and accordingly the claim was not validly served.
30. In paragraph 5 Mr Keeley dealt with limitation; in paragraph 6 he dealt with the merits of the claim. In paragraph 7 he said there was some other good reason why the Default Judgments should be set aside namely that the Claimant did not warn the Defendants that a claim had been issued. In paragraph 8 Mr Keely said that the Defendants had met the requirement to act promptly in making the application.
31. A draft Defence was exhibited to the witness statement. The draft Defence is a fully pleaded defence dealing with every allegation in the Particulars of Claim. In paragraph 49 it is denied that the Claimant served the claim form validly in accordance with CPR Part 6. In

paragraph 50 it is pleaded that *"Accordingly, the Defendants reserve the right to strike out the claim on this basis"*.

32. On 27 March 2023 the court listed the Default Judgment Application for hearing on 5 July 2023.

33. On 28 June 2023 CRS issued the Jurisdiction Application inviting the Court:

(1)to order that the Default Judgment Application be treated as an application under CPR Part 11 challenging the Court's jurisdiction in these proceedings by rectifying an error of procedure said to be capable of being rectified under CPR 3.10;

(2)to extend time and/or grant relief from the sanctions in CPR r. 11(4) and 11(5) in respect of making an application to challenge jurisdiction pursuant to CPR Part 11; and

(3)pursuant to CPR r. 11.1 to grant an order declaring that the court has no jurisdiction to try the claim or should not exercise any jurisdiction which it may have.

34. The Jurisdiction Application was supported by the second witness statement of Andrew Keeley dated 28 June 2023. In paragraph 2.1 Mr Keeley said under the heading "Challenging Jurisdiction" that CRS expected that the acknowledgement of service had itself been served out of time. In paragraph 2.5 Mr Keeley said that CPR Part 11 appears to apply only to an acknowledgement of service filed in accordance with CPR Part 10.

35. The Jurisdiction Application was listed to be heard alongside the Default Judgment Application. On 5 July 2023 the hearing of the two applications was adjourned to a hearing to be fixed with a time estimate of 1 day. In addition to the listing of the Jurisdiction Application alongside the Default Judgment Application, three witness statements had been filed on 30 June 2023 on behalf of the Claimant to which the Defendants had not had the opportunity to reply.

36. The Applications were re-listed before me on 5 October 2023. On 2 October 2023 the Acknowledgement of Service extension of time application was issued. I directed it be listed alongside the two adjourned applications.

37. At the hearing on 5 October, I was invited by Ms Conroy, counsel for the Defendants, to deal first with the Jurisdiction Application. It was submitted that if the Jurisdiction Application were to succeed, the Court would not need to deal with the Default Judgment Application.

The Jurisdiction Application

38. Ms Conroy took as her starting point that the claim form had not been validly served. She submitted that compliance with CPR r.6.7(1)(b) was mandatory. She submitted that there was no obligation on a defendant solicitor to re-notify a claimant that they are instructed to accept service

where a claimant decides to change its solicitor. She submitted that in any event NML had notice that CRS was instructed to accept service as it expressly stated in its letter of 26 February 2021 that it had a copy of and was responding to CRS's letter of the 27 January 2020.

39. In his oral submissions, Mr Bishop, counsel for the Claimant, accepted that, as he put it, the service point was a good one. He accepted that CRS had notified the Claimant's former legal representatives that CRS was willing to accept service of the claim form on behalf of the Defendant and that for this purpose no distinction could be made between the Claimant and its legal representatives. He also accepted that the position was not changed by the Claimant instructing new legal representatives. I note that CPR r. 6.7 (1) is expressed in mandatory terms. I observe that it was open to NML to have checked with CRS that they were still instructed to accept service on behalf of the Defendants.
40. The issue which then arises is whether the Defendants have the right to challenge the court's jurisdiction as a matter of procedure. It is accepted by the Defendants that the correct procedure for such a challenge to be raised is to notify that jurisdiction is being challenged in an acknowledgement of service filed in accordance with CPR Part 10 and to make an application within 14 days of the date of the acknowledgement of service. It is further accepted that whilst the jurisdictional issue was raised in the Defendants' acknowledgement of service, no such application was made.
41. The explanation given for no Part 11 application having been made is that CRS was aware or suspected that the acknowledgement of service had been filed out of time. In circumstances where the timing of the filing of the acknowledgement of service was on the Defendants' evidence the result of the method of service of the claim form, it was open to them to apply for an extension of time for filing an acknowledgement of service and for an order relieving the defendant from sanctions in accordance with CPR 3.9: see *AELF MSN 242 LLC v Surinam Airways* [2021] EWHC 3482 (Comm); [2022] 1 WLR 2181 at [45]-[46]. If the application is successful, the right to challenge jurisdiction is retrieved provided that there has not been a submission to the jurisdiction.
42. A defendant who files an acknowledgement of service stating an intention to contest jurisdiction, but does not apply under CPR r. 11.1 for an order declaring that the court has no jurisdiction or that the court should not exercise any jurisdiction it may have, is to be treated as accepting that the court has jurisdiction to try the claim: CPR r. 11(5).
43. The Defendants accept that the Default Judgment application did not refer to CPR Part 11. They submit however that in substance it was a challenge to the court's jurisdiction which they say the Claimant was put on notice of in the acknowledgement of service.

44. The Defendants submit that it is open to the court to treat the matters set out in the Default Judgment Application as an application under CPR Part 11. In support of that submission they rely on the decision of Dingemans J. (as he then was) in *Caine v Advertiser and Times Ltd* [2019] EWHC 39 (QB).
45. The facts in *Caine* were that the claim form had been served out of time. On 19 October 2017, an acknowledgement of service was filed by the defendants then acting in person stating an intention to defend. A covering email and letter were sent stating that the Defendants were seeking legal advice and stating that it was not clear the claim form had been correctly served. On 7 November 2017, four days after the expiry of the 14 day period for making an application under CPR Part 11, the defendants made an application to strike out the claim and/or for summary judgment. The application was made under CPR r.3.4(2)(a), CPR r.24.2 and/or that the Claimant had failed to comply with various rules within CPR r.3.4(2)(c). One of the failures to comply with the rules identified by the defendants was the failure to serve the claim form within time.
46. In written submissions directed by the Master following a part heard hearing on 11 May 2018, the Claimant took the point that even if the claim form had not been served in time, the Defendants had submitted to the jurisdiction because they had not disputed jurisdiction pursuant to CPR Part 11 within 14 days and because they had waived their right to challenge the jurisdiction of the court. On 18 May 2016 in response, the defendants made an application for a 4 day retrospective extension of time from 3 November to 7 November 2017 and/or relief from sanctions in CPR r.11(4) and 11(5).
47. In *Caine*, Dingemans J. treated the applications made by the defendants on 7 November 2017 and 11 May 2018 as applications under CPR Part 11. In paragraph 33 he stated:-

> *"I have set out above relevant parts of the wording of the applications made on 7 November 2017 and on 18 May 2018. The application made on 7 November 2017 raised the points about late service but was not an application made under CPR Part 11(1). However by 18 May 2018, in the light of Mr Caine taking the CPR Part 11 point in his submissions filed after the first hearing before Master Yoxall on 11 May 2018, the point about CPR Part 11 was expressly addressed, together with an application for an extension of time. In the application dated 18 May 2018 there was express reference to an application under CPR Part 11 and for an extension of time. Further, in the supporting witness statement reasons were set out for relief from sanction implicit in CPR Part 11(4) and 11(5). In these circumstances I am satisfied that the joint effect of the applications of 7 November 2017 and 18 May 2018 is that an application was made pursuant to CPR Part 11 to challenge the*

exercise of jurisdiction by the Court, and to extend time for making the application, and that Master Yoxall was entitled to consider that the application had been made, and was right to do so."

48. The Defendants submit that in the same way it is open to the court to treat the Default Judgment Application and the Jurisdiction Application as together being made under CPR Part 11.
49. The Defendants further rely on *Pitalia v NHS Commissioning Board* [2022] EWHC 1636 (QB) a decision of His Honour Judge Pearce sitting in the County Court at Manchester. *Pitalia* was also a case of late service of a claim form. The facts in *Pitalia* were that on 21 January 2020 the defendant filed an acknowledgement of service stating an intention to defend together with a covering letter making clear that it intended to apply to strike out the claim. Three days later, on 24 January 2020 the defendant applied to strike out the claim form due to non-compliance with CPR r.7.5. The Judge concluded that the failure of the application to refer to CPR Part 11 was an error of procedure which should be rectified under CPR r.3.10. In paragraph 71 the judge set out the matters supporting the argument that the error of procedure should be rectified under CPR r.3.10 as follows:-

    "a.The Respondent in all documents other than the Acknowledgement of Service itself, always made clear that it disputed the court's jurisdiction on the ground the Claim Form was served out of time;
    b.The letter under cover of which the Acknowledgement of Service was served itself raised the issue of the late service of the Claim Form and stated an intention to apply to strike out;
    c.The application to strike out was made within the 14 days prescribed for application under CPR 11(1)
    Had the application notice bore additional words to the effect that an application was being made for an order declaring that the court had not jurisdiction because of the late service of the claim form, it would have been in compliance with CPR 11(1); yet it is clear from the witness statement of Mr Parker in support of the application that this was the very argument being advanced."
50. In paragraph 74, the judge concluded that on those grounds the court should exercise its power to rectify the procedural failing so as to render this an application under CPR r.11(1). He said that any other result would be a triumph of form over substance.
51. An appeal by the Claimant from the decision of His Honour Judge Pearce was dismissed by the Court of Appeal in *Pitalia v NHS England (formerly known as The National Health Service Commissioning Board)* [2023] EWCA Civ 657 on 9 June 2023. Lord Justice Bean, with whose judgment Lady Justice Nicola Davies and Lord Justice Underhill agreed, said at

paragraph 35 that the critical question was whether the Defendant's application of 24 January 2020 could, by the use of CPR r.3.10, be treated as having been made under CPR r.11(1). At paragraph [36] Lord Justice Bean stated:-

> *"The failure to make express reference to CPR 11(1) in the letter of 21 January 2020 or the application of 24 January 2020 was in my view an error capable of rectification under CPR 3.10. The three documents – the acknowledgement of service, the covering letter and the application to strike out supported by witness statements – together made the Defendant's intentions clear. This was in substance an application to stop the case on the grounds that the Claimants had failed to serve the claim form in time."*

52. In my view, the critical question is whether the Defendants' conduct looked at objectively involved a submission to the jurisdiction. There are two forms of submission to the jurisdiction: a statutory form of submission pursuant to CPR r.11.5 and CPR r.11.8 and a common law submission to the jurisdiction or a common law waiver. For there to have been a common law submission to the jurisdiction, the defendant's conduct must be unequivocal in submitting to the jurisdiction. There will be a submission to the jurisdiction where the defendant's conduct cannot be explained, except on the basis that the defendant accepts that the court has jurisdiction.
53. The Defendants in the present case indicated an intention to contest jurisdiction in their acknowledgement of service but did not apply to contest jurisdiction within 14 days of filing their acknowledgement of service. In my view, the Defendants must be treated as having submitted to the jurisdiction pursuant to CPR r.11 (5). As the decision in *Caine* demonstrates however, the position might still be capable of retrieval provided that there has been no common law waiver of the right to dispute jurisdiction.
54. In *Caine*, the court rejected Mr Caine's argument that the Defendants had submitted to the jurisdiction of the court. The judge held on the evidence as a whole that there had been no waiver of the right to dispute jurisdiction on the basis that the claim form and particulars of claim were not served in time.
55. In the present case, I am of the view that the Default Judgment Application was in substance an application inviting the court to permit the Defendants to defend the claim on its merits. The application was framed by reference to CPR r. 13.3. The draft order sought an order that the Defendants have 14 days from the date of the order to file their Defence to the Claimant's claim. The witness statement in support of the

application exhibited a draft defence in order to demonstrate that the Defendants had a real prospect of successfully defending the claim. The issue of service was relied upon in the witness statement but not as a ground for contesting jurisdiction but as one of the grounds for asserting that there was a real prospect of successfully defending the claim.

56. In my view there was a fundamental inconsistency between the Default Judgment Application on the one hand and any intention to contest jurisdiction on the other. Applying to set aside the default judgments under CPR r.13.3 required the Defendants to show they had a real prospect of defending the claim. It involved taking a step in relation to the merits. The authorities indicate that there may be circumstances where steps taken to prevent a default judgment being entered are consistent with an intention to contest jurisdiction: see *Winkler v Shamoon* [2016] EWHC 217 (Ch) at [48] but in my view, in the present case, the substance of the Default Judgment Application was inconsistent with an intention to contest jurisdiction. This conclusion is consistent with the approach of Ms Sara Cockerill QC, as she then was, in *Newland Shipping & Forwarding Ltd v Toba Trading FZC* [2017] EWHC 1416 (Comm) when rejecting an argument that a defendant seeking to challenge jurisdiction should first have applied to set aside a default judgment entered against it.
57. In my view, the Defendants are to be treated as having submitted to the jurisdiction both under CPR r.11(5) and at common law. Having issued the Default Judgment Application, it was no longer possible in my view for the Defendants to seek to retrieve the position by issuing a fresh application relying on CPR Part 11 and inviting the court to treat the applications together as being made under CPR Part 11, as in *Caine*, or by relying on CPR r.3.10 to rectify an error of procedure.
58. In my view the facts in the present case are distinct from those in *Caine* and those in *Pitalia*. In neither of those cases did the Defendants allow a default judgment to be entered against them and then apply to have it set aside relying on the merits of their defence. In neither of those cases was there a common law waiver of the right to challenge the validity of service of the claim form. In *Pitalia*, the strike out application was made within the 14 days period from the filing of the acknowledgement of service. In *Caine*, the first application was made four days after the 14 day period had expired
59. In my view on the facts in the present case it is not open to the court to treat the Default Judgment Application as an application under CPR Part 11 by treating it together with the Jurisdiction Application. The making of the Default Judgment Application amounted to a once and for all submission to the jurisdiction in these proceedings.

60. No attempt was made by the Defendants to contest jurisdiction again until the issuing of the Jurisdiction Application on 28 June 2023 some 16 weeks after 6 March 2023 and some 14 weeks after the Default Judgment Application. I regard that delay as being serious and significant. It is not explained. In all the circumstances it was by 28 June 2023 far too late to allow the Defendants to revert to seeking to contest jurisdiction. For those reasons, I dismiss the Jurisdiction Application.

The Default Judgment Application

61. I turn to the Default Judgment Application.
62. It was submitted on behalf of the Defendants that the default judgments should be set aside irrespective of the merits on the ground that the Claim Form was not validly served. I was invited by counsel for the Defendants in her oral submissions if necessary to treat the Default Judgment Application as also being made under CPR r.13.2 as well as under CPR r.13.3.
63. I have concluded for the reasons set out above that the Defendants by making the Default Judgment Application lost the right to challenge the validity of the claim form. No detailed argument was addressed to me as to whether the Defendants had also lost the right to contend that the default judgments should be set aside under CPR r. 13.2.
64. In view of the fact that the Default Judgment Application is in substance an application under CPR r. 13.3 and that it is expressly stated by Mr Keeley in his first witness statement to be made pursuant to CPR r. 13.3, I propose to proceed on the basis that the default judgments were regular judgments.
65. CPR r.13.3 provides for the case where the Court has a discretion whether to set aside a default judgment. It provides:-

"(1)In any other case, the Court may set aside or vary a judgment entered under Part 12 if –
(a)the defendant has a real prospect of successfully defending the claim; or
(b) it appears to the court that there is some other good reason why-
(i)the judgment should be set aside or varied; or
(ii) the defendant should be allowed to defend the claim.
(2)In considering whether to set aside or vary a judgment entered under Part 12, the matters to which the Court must have regard include whether the person seeking to set aside the judgment made an application to do so promptly."

66. It has recently been made clear by the Court of Appeal that an application to set aside a default judgment under CPR r. 13.3 is an application for relief from sanction to which CPR r. 3.9 also applies:

FXF v English Karate Federation Limited [2023] EWCA Civ 891: see the judgment of Sir Geoffrey Vos, Master of the Rolls, at [63] and Lord Justice Birss at [76]. Once the two specific matters mentioned in CPR 13.3 have been considered (merits and any delay in making the application to set aside), the Court must apply the tests set out in *Denton v TH White Ltd* [2014] 1 WLR 3926 ("the *Denton* tests").

67. On behalf of the Defendants it was submitted by Ms Conroy that the Defendants have a real prospect of successfully defending the claim both on the basis of the expiry of the limitation period and on the substantive merits of the defence to the claim.

68. In relation to limitation, section 5 of the Limitation Act 1980 provides that:-

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

69. On behalf of the Defendants it was submitted that the accrual of a cause of action for sums due under a contract for work carried out occurs when that work was provided: see *Coburn v Colledge* [1897] 1 Q.B. 702 and *Birse Construction Limited v McCormick (UK) Limited* [2004] EWHC 3053. at [7]. HHJ Peter Coulson QC (as he then was) stated:-

"The date of the accrual of a cause of action for sums due under a contract for work or services will usually depend on the terms of the contract itself. However, it is important to note that the starting point for any consideration of this question is the established principle that, in the absence of any contractual provision to the contrary, a cause of action for payment of work performed or services provided will accrue when that work or those services have been performed or provided. In such circumstances, the right to payment does not depend on the making of a claim for payment by the party who has provided the work or services."

70. The claim form was issued on 15 September 2022. On that analysis, the Claimant cannot recover for works completed before 15 September 2016. In the Particulars of Claim it is pleaded that the Claimant incurred external costs in performing the works between March 2015 and September 2016. The claim is framed as a claim for breach of contract causing the Claimant to have suffered loss and damage in the sum of £250,112.78.

71. It was submitted on behalf of the Claimant that for the Defendants to have a real prospect that the claim is statute barred they must show there was a fixed price lump sum contract and that the work under the contract

had been substantially performed. In my view the limitation issue should be considered at this stage on the basis of the facts alleged in the particulars of claim and not the draft defence.

72. In my view, the Defendants do have a real prospect of succeeding on their argument that the claim is in whole or in part statute-barred. There may well be further arguments that can be advanced on behalf of the Claimant in response to a limitation defence. For the purposes of the Default Judgment Application I proceed on the basis that there are serious issues raised by the Defendant on limitation.
73. A further argument advanced on behalf of the Claimant is that an email dated 7 January 2017 from the Second Defendant to Mr Simon Bain offering as a proposal for final settlement payment of £32,000 is an acknowledgement of the claim with the effect that the right of action is to be treated as having accrued on and not before the date of the acknowledgement: see section 29(5) of the Limitation Act 1980. The Claimant relies on that letter as an admission by the Defendants that they owe the Claimant something. The Claimant says it is akin to the letter in *Philips & Co v Bath Housing Co-op Ltd* [2013] 1 WLR 1479 set out at para [7] and treated as an acknowledgment at para [73]. In response, the Defendants say it is clear from the language of section 29(5) that what is required is an acknowledgement of "the claim": see *LJR Interiors v Cooper Construction Limited* [2023] EWHC 3339 (TCC). The Defendants submit the email contains no such acknowledgement. I do not consider it is possible to determine this issue simply by looking at the email of 7 January 2017 in isolation. I am not prepared to say on the basis of that email read in isolation that the Defendants' reliance on limitation does not have a real prospect of success.
74. On behalf of the Defendant, Ms Conroy submitted that even if the Defendants do not have a complete limitation defence, they still have a real prospect of defending the claim. She submitted that by the time of the alleged cost-plus agreement in May or June 2016, the bulk of the work had been done. The Claimant had submitted invoices for staged payments and been paid by the Defendants under those invoices. She submitted that it flew in the face of common sense for the Defendants to have agreed to pay an extra £250,000 or thereabouts for work carried out and paid for. Ms Conroy submitted that no documentary evidence had been provided in support of the alleged cost-plus agreement. She further pointed out that on this issue the Claimant's evidence was given by its solicitor Mr Ring and not by its director Mr Bain in his witness statement.
75. Mr Bishop on behalf of the Claimant submitted that the Court should focus its attention on the draft Defence. He submitted that the Defendants have no real prospect of establishing that the contract

between the parties was a lump sum contract as pleaded in paragraph 19 of the draft defence.

76. In reply, Ms Conroy submitted that the defence that the contract was a lump sum contract did not preclude more (or less) being payable if variations to the work quoted for were agreed. It meant only that if the works were carried out without any further changes after the parties had agreed a revised lump sum of £496,000 plus VAT in respect of the Rear Extension and Mansard Roof Extension ("the Revised Quotation"), the Claimant would not be entitled to be paid any more.
77. The Defendants' case is that there is no evidence that a cost-plus arrangement was ever agreed. They say that it is inherently unlikely they would have agreed to such an arrangement retrospectively .It is accepted by the Claimant that there is a dispute of fact as to what was agreed at the meetings relied on by the Claimant. The Defendants accept the issue was raised but deny they agreed to a cost-plus arrangement. It is not in dispute that initially the contract was based on the Quotation sent on 8 October 2014. Project invoices were issued by the Claimant with the description *"staged payments for works being carried out as per specifications and quote"*. The Defendants dispute that the basis of the contract was varied to a cost-plus arrangement. Such an arrangement is not referred to by Mr Bain in his witness statement. In the absence of documentary evidence recording the alleged cost-plus agreement, the Defendants in my view have a real prospect of defending the claim for £250,112.78 based on such an arrangement or a quantum meruit for the same amount based on such an arrangement.
78. On the substantive merits of the defence, there remains the point that there is a difference of £130,191.12 between the amount of £496,000 plus VAT, namely £595,200 which the Defendants say was the revised lump sum agreed in the Revised Quotation and the sum of £465,008.88 which the Defendants say is the amount they have paid. The First Defendant says in paragraph 6.2 of her witness statement that due to the Claimant stopping their work, the Defendants had to engage other contractors to complete the works. She says they spent £32,335.80. The Claimant says that is an insufficient set off to extinguish the amount owed.
79. On behalf of the Defendants it is submitted that the Claimant did not complete the works and is not therefore entitled to be paid the full contract sum. It is further submitted, as pleaded in paragraph 38.2 of the draft defence, that the Defendants also made numerous payments to external contractors such as Martin Moore for kitchen design and installation.
80. I have considered whether I should regard the Defendants as not having a real prospect of defending at least part of the claim. I have concluded

however that taking into account the limitation issues and the factual disputes, it is right to treat the Defendants as having a real prospect of defending the whole claim.

81. In my view, the application to set aside the default judgments was made promptly. The default judgments were entered on Thursday 16 March 2023. The Default Judgment Application was made on the following Tuesday 21 March 2023 supported by the first witness statement of Mr Keeley and a full draft defence settled by counsel.

82. Applying the three-stage test laid down in *Denton v TH White Ltd* [2014] 1 WLR 3926, I consider that the failure to file a Defence prior to 16 March 2023 was serious and significant in that it enabled judgments in default of defence to be entered. The reasons given by Mr Keeley for the default are not in my view procedurally good reasons. It was open to the Defendants to have protected their positions. Looking at all the circumstances, and taking into account the need (a) for litigation to be conducted efficiently and at proportionate cost and (b) to enforce compliance with rules, practice directions and orders, I am however of the clear view that it would be right to grant relief against sanctions. This is a claim brought by the Claimant many years after the dispute arose. The Claimant issued the claim form on 15 September 2022. It then waited until 10 January 2023 to serve the claim form and particulars of claim by what is now accepted to have been an invalid method. It is right that having acknowledged service stating an intention to contest jurisdiction that the Defendants failed to take any steps to protect their procedural position. Against that, the Defendants have in my view a real prospect of successfully defending the claim or at least a substantial part of it. They applied promptly to set aside the default judgments. In my view the Defendants' breach must be seen in the context of the delays on the side of the Claimant in formulating its claim and in the context of the effect of the Claimant having used an invalid method of service. It would in my view in all the circumstances and in the context of the dispute as a whole be disproportionate to refuse to grant relief against sanctions.

83. For those reasons I shall order that the default judgments entered on 16 March 2023 be set aside.

The Acknowledgement of Service extension of time application and directions

84. On the Acknowledgement of Service extension of time application, I do not consider in view of my conclusion on common law waiver that it would be right to extend time for the filing of the acknowledgement of service filed by the Defendants stating an intention to contest jurisdiction. In my view, that ship has sailed. I shall instead direct the Defendants to file a further acknowledgement of service within 7 days, if so advised, stating an intention to defend and, if that is done, to direct

that the Defendants have a further 7 days in which to file and serve their defence substantially in the form of the draft defence dated 23 August 2023. I will give the Claimant 21 days from the service of the defence to file and serve a reply to the defence.

85. At the conclusion of the hearing I raised with counsel the possibility of this claim being transferred to the Technology and Construction List at Central London County Court. If the parties agree, I will make that direction.

86. This judgment is to be handed down remotely without attendances required at 10,30am on Friday 17 November 2023. If consequential matters are not agreed, the claim is to be listed for a 45 minute hearing before the end of term. The parties are to provide in a single letter to the court dates convenient to all parties.