Neutral Citation Number: [2021] EWHC 583 (QB)

Appeal No. M20Q270
Claim No. B20YJ161

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
MANCHESTER DISTRICT REGISTRY

Date: 11th March 2021

Before :

MR JUSTICE FORDHAM

- -

Between :

RIAZ AHMAD	**Applicant**
- and -	
LATIMER LEE LLP	**Respondent**

- -
- -

Daniel Metcalfe (instructed by Schofield Sweeney LLP) for the **Applicant**
The **Respondent** did not appear and was not represented

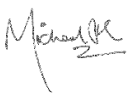
Hearing date: 11.3.21

Judgment as delivered in open court at the hearing

- -

Approved Judgment

I direct that 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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THE HON. MR JUSTICE FORDHAM

Note: This judgment was produced for the parties, approved by the Judge, after using voice-recognition software during an ex tempore judgment in a Coronavirus remote hearing.

MR JUSTICE FORDHAM :

Introduction

1. This is a renewed application (CPR PD52B paragraph 7.2) for permission to appeal against an order of Mr Recorder Wells ("the Judge") in Manchester County Court on 4 May 2020, arising out of judgments given by the Judge on 24 April 2020 and 1 May 2020, following a trial heard over five days during 2019 (27 and 28 June 2019, 24 and 25 September 2019 and 15 November 2019). By that order: the Judge gave judgment for the Respondent on the Respondent's claim in the sum of £25,763.60 together with interest and uplifts arising from the judgment being more favourable than a Part 36 offer; and the Judge dismissed the Applicant's counterclaim. Permission to appeal to this Court was refused by Johnson J on 2 December 2020 (an order drawn up and sealed on 18 December 2020).

Mode of Hearing

2. The mode of hearing was by BT Conference Call. Mr Metcalfe confirmed that he was satisfied, as am I, that this mode of hearing involved no prejudice to the interests of his client. A remote hearing eliminated any risk to any person from having to travel to, or be present in, a court room during the pandemic. The open justice principle was secured. The case and its start time, together with an email address usable by any member of the press or public wishing to observe the hearing, were published in the cause list. This was a public hearing. It was recorded and this ruling will be available in the public domain.

The Shape of the Case

3. The Respondent is a firm of solicitors whose claim against the Applicant was for £42,222.86 relating to unpaid invoices for work done on the instructions of the Applicant and in accordance with certain Terms and Conditions. The solicitor-client relationship had preceded, and some of the invoices related to work done by the partnership Latimer Lee ("the Partnership") preceding, what was said to have been an assignment of assets to the Respondent from the Partnership in October 2007. Some invoices related to work done for companies of which the Applicant was a director. The Applicant's defence to the claim included these contentions: (1) that he was not liable to the Respondent, there having been (a) no assignment or (b) no notification to him of an assignment ("Liability to the LLP"); and (2) that he was not liable for work done for any of the companies, and he had not signed Terms and Conditions documents containing a claimed 'guarantee' making a director liable to pay the company's fees ("Liability for the Companies"); and (3) that the charges claimed needed to be reduced for sums paid, and because they were not reasonable charges for work done ("Scaling Down"). By a counterclaim, the Applicant sought to recover from the Respondent redress constituting £102,948 (plus interest) retained by the Respondent in February 2009 – which it had held as the proceeds of certain property transactions – inter alia on the ground that the permanent retention of those sums was a breach of trust ("Breach of Trust"). The Respondent's defence to the counterclaim was that an entitlement to retain the £102,948 had arisen under an agreement by way of "settlement of outstanding liabilities on the part of the [Applicant]", a letter dated 6 February 2009 having served "expressly [to] record [the] agreement" between the Respondent and the Applicant ("the Settlement Agreement").

The Judge's Analysis

4. The main judgment (24 April 2020) is a 35-page, 119-paragraph judgment. Having analysed the pleadings (§§3-7) and identified the issues (§8), the Judge began with the counterclaim (§9) – setting out the evidence in detail (§§10-60) and then setting out his analysis and findings (§§61-89). The Judge then turned to the claim (§90), identifying three issues (§90a-c), which he then addressed: terms and conditions (§§93-104); assignment of the assets of the firm to the LLP (§§105-111); and the individual invoices (§§112-116). He ended with his final conclusions (§117-119).

5. In relation to the counterclaim, the Judge held that there had been no Breach of Trust (§74), because the retention was in accordance with the Settlement Agreement, the Judge finding that the letter of 6 February 2009 was "a written record of a concluded and binding agreement whereby a final arrangement was reached between the [Applicant] and the [Respondent]", based on an "annexed schedule" of invoices, it being agreed that the Applicant "would settle his debts to the [Respondent]", "in part" by the retention (§73), after a "joint settlement meeting" (§70), as a "final settlement" (§71). The Judge rejected the Applicant's case that this had been an "interim settlement", "pending" resolution of a dispute about the fees. He found that "agreement as to the monies due and owing from the [Applicant] to the [Respondent] had been crystallised in so far as they related to the invoices listed in the schedule" and "there was agreement as to the invoices and their quantum" (§76). The Judge also found that it was appropriate to treat the "contractual agreement [as] conclusive" so far as the quantum of fees was concerned, in the context of the counterclaim, absent what he described as any "very strong challenge" (§88). The Judge dismissed the counterclaim.

6. The Judge recorded that his findings about the Settlement Agreement means "this case turns, for the most part, not on terms and conditions of business between the parties or whether the [Applicant] was aware that the assets of Latimer Lee, a firm, had been transferred to Latimer Lee LLP by an assignment, but on the fact that in January/February 2009 the parties reached a binding agreement about monies due and owing to that date and how the matter was to be compromised" (§76). In other words, the Settlement Agreement would, logically, be a basis for the claim succeeding: in particular, without needing to analyse the issues about signing terms and conditions or about an assignment and notice of it. However, as the Judge then said: that was "not at all how the case was pleaded" and had only "obliquely" been the subject of "Counsel's submissions" in "closing" (§77). So, the Settlement Agreement was not the basis of the claim, including in the pleading. The Judge returned to this theme when introducing the issues under the claim. There, he said that issues about Liability for the Companies (§90a) and Liability to the LLP (§90b), being the "first two issues" (the third being Scaling Down), which two issues "do not arise if the agreement of January/February 200[9] had the effect that I have found it had, namely to crystallise the amount owed and who owed it" (§91). Having made those observations, the Judge then turned to analyse the issues arising under the claim.

7. In relation to Liability for the Companies (§§90a, 93-104), the Judge discussed the evidence, including the oral evidence of the relevant witnesses. He made this finding: "I find that terms and conditions were sent to the [Applicant] who signed them in a capacity as a director, the director, of the companies" (§103e). The Judge thus clearly "found that the Applicant had signed the Standard Terms in relation to each

instruction" (I have taken those words directly from the Applicant's skeleton argument before this Court). This was a finding of fact. In relation to it, the Judge said this: "I find that the oral evidence of Mr Latimer to that effect is more credible than the evidence of the [Applicant] to the contrary". Having made the finding of fact, the Judge turned to make observations: about the Applicant's description "that he was effectively the companies" (§103f); and about how, "in any event", the logic of the finding on the Settlement Agreement would provide an answer to the issue concerning Liability for the Companies (§104).

8. In relation to Liability to the LLP (§§90b, 105-111), the Judge discussed the evidence, including the oral evidence of the relevant witnesses. That included the oral evidence of Mr Latimer of the Respondent, regarding the Deed of Assignment, quoted by the Judge as follows (in terms which reflect, albeit not verbatim, the transcript which Mr Metcalfe at my request showed me at the hearing today): "I signed it and it was witnessed by a receptionist" (§107). The Judge also discussed the fact that no "copy of any letter sent to clients was disclosed", accepting "that it should have been disclosed on the Disclosure List", and recording Mr Metcalfe's invitation to draw "an adverse inference" about the existence or contents of such letters. The Judge did not record a related submission relied on by Mr Metcalfe on this appeal as to what he says is the preclusionary effect of CPR 31.21. Mr Metcalfe tells me today that he did make the submission to the Judge that, absent inclusion in a disclosure list or permission of the court, a party is not entitled to contend that a document has existed. I accept that from Mr Metcalfe: firstly, given his ethical responsibilities on which I know I can rely; but secondly, because – by reason of one of the advantages of a remote hearing – Mr Metcalfe was able to access what no doubt is a large volume of trial hearing materials, from which he read me a note of written submission at the trial. In determining the issue of Liability to the LLP, the Judge made this finding: "I … find that the [Applicant] was aware that the assignment had taken place" (§111). That was a finding of fact. In my judgment, beyond argument, it reflected the Judge finding both that "the assignment had taken place" and that the Applicant was "aware" of that fact.

9. In relation to Scaling Down (§§90c, 112-116), the Judge considered certain invoices in detail (§§113-116), making some findings and recording some concessions leading to some downward adjustments in sums recoverable by the Respondent. He made clear that he had decided not individually to consider, for the purposes of determining the claim, individual invoices which had also been part of the schedule used in the Settlement Agreement. The Judge gave this reason (§112): "I find that the agreement reached in respect of that Schedule crystallised what was due and owing at that time and is powerful and compelling evidence of the reasonableness of the charges and work done". He concluded that – but for the downward adjustments – all invoices relied on in the claim were due and owing and reasonable "whether under the agreement of January/February 2009 or under the original agreements" (§116).

10. In his subsequent judgment on consequential matters (1 May 2020) – the Judge said (§5) that, whereas the claim did not succeed "on a compromise agreement", it did succeed "because it had been agreed that the invoices were due and owing both as to number of invoices and as to quantum within them"; "as I held, [the Applicant] was bound by those invoices in the light of the fact of that agreement".

This Appeal

11. Mr Metcalfe advances, as he did on the papers before Johnson J, 9 grounds of appeal. I will seek to encapsulate, throughout what follows, the essence of the grounds of appeal as I see them, but without setting out or seeking to paraphrase everything that has been said about them.

The Settlement Agreement

12. Grounds 1 and 2 relate to the Settlement Agreement. Ground 1 is this. The judgment was 'prejudicially infused', as to the determination of the claim, with a Settlement Agreement analysis which: as the Judge acknowledged, was unpleaded; which unfairly curtailed the Judge's analysis of the claim; as well as denying the Applicant a fair opportunity to deal with the issues. Ground 2 is this. The logic of the Settlement Agreement analysis – if it were being adopted by the Judge – required the dismissal of the claim. That is for this reason. If the Settlement Agreement analysis (including its wider implications: as recognised by the Judge) were correct, there would have been a settlement agreement 'occupying the field' in relation to all work covered by all invoices which featured in the Settlement Agreement schedule. That would have constituted a new cause of action which would have extinguished any other pre-existing debt or cause of action. Being thus extinguished, all other claims would fail.

13. In my judgment, the clear answer to ground 1 is as follows. The Judge was addressing the Settlement Agreement in the context of the counterclaim, where it had been pleaded as a defence to the counterclaim. As Johnson J put it in his reasons: "In doing so he was resolving the matters that were in issue between the parties on their pleaded cases". The evidence at the trial – as Mr Metcalfe today accepted – related to the nature of the (alleged) Settlement Agreement, including as to the schedule, that work, and the invoices relating to that work. As the Judge recorded, the Applicant's own witness statement evidence had described the letter of 6 February 2009 as "a pivotal letter in these proceedings". The parties had a full and fair opportunity to address the agreement and its nature. The point was not the pleaded basis of the claim, but that was the point which the Judge expressly recorded in the judgment. Importantly, the Judge did not proceed from his conclusions on the counterclaim and the Settlement Agreement – including his observations as to the logic of that analysis – to allow the claim on that basis. As Johnson J pointed out in his reasons, had the Judge done so, the judgment would have been much shorter. Mr Metcalfe has accepted today – in my judgment, rightly – that, when the Judge came to deal with the claim, he did so for "freestanding" reasons which involved putting the logic of the Settlement Agreement analysis to one side, in circumstances where it was not the pleaded basis of the claim. Mr Metcalfe has explained that he accepts that he needs to impugn that freestanding analysis. He submits that grounds 1 and 2 really operate as a 'shield', in case the Respondent, on any substantive appeal, contends as follows: that other (successful) grounds of appeal, in relation to aspects of the Judge's determination of the claim, are 'no basis for the appeal succeeding', given that the Judge's Settlement Agreement analysis 'answers everything'. I will turn to focus on the other grounds in relation to the way in which the claim was determined by the Judge, to see whether there is any arguable basis of appeal. However, given the clearly freestanding basis on which the Judge dealt with the claim, it is, in my judgment, impossible for the Applicant to succeed on the appeal, based on any contention that the analysis of the claim was prejudicially infused with an unpleaded point, or that the Judge unfairly curtailed his analysis of the claim, or that the Applicant was denied the opportunity to deal with the

relevant issues. I will need to address distinctly below the ground 9 'first limb' criticism made of paragraph 112 of the judgment on the issue of Scaling Down.

14. In relation to ground 2, I cannot see – even arguably – how the point relating to the claim being 'extinguished' in consequence of the Judge's Settlement Agreement analysis can assist the Applicant. The Applicant's position is that the Respondent was not entitled to base the claim on the Settlement Agreement, because that point was not pleaded in the claim. The logic of that is that the Settlement Agreement could not drive the determination of the claim, no pleading having been put forward to that effect. Because of the Judge's freestanding reasoning, the Settlement Agreement did not drive the determination of the claim. It is, in my judgment, not only unattractive but somewhat bizarre for the Applicant then to submit as follows: that what the Judge should have done, having considered the evidence in relation to the Settlement Agreement, in circumstances where it was not the basis of the pleaded claim that could drive the determination of the claim in the Respondent's favour, was to identify it as a basis which 'extinguished' all other claims so as to drive the determination of the claim in the Applicant's favour. That is to 'have it both ways': to insist that the analysis on the issue both (i) does not drive and (ii) does drive the determination of the claim. There is, moreover, more than an irony in this fact: in circumstances where the Settlement Agreement had become in issue through defence to the counterclaim, had the Applicant wished to contend that the implications of the Settlement Agreement – if the Applicant's primary case on the evidence was rejected – was that all other claims were 'extinguished' because of a binding Settlement Agreement, the Applicant could and should have been including that contention within its own pleaded case. In my judgment, there is nothing in grounds 1 and 2.

Liability to the LLP

15. I deal next with ground 8 which relates to liability to the LLP. The essence of ground 8 is that the Judge made no finding, or no sustainable or reasonable finding, in relation to the assignment from the partnership to the LLP. This is one of two points at which Mr Metcalfe includes within his submissions reliance on what he contends is the preclusionary consequence of CPR 31.21, where a document has not been listed in a disclosure list. CPR 31.21 provides: "A party may not rely on any document which he failed to disclose or in respect of which he found to permit inspection unless the court gives permission". Mr Metcalfe says that a party is precluded from contending that a document existed, or exists, if it has failed to list that document in the disclosure list. I tested the logic with him, during his oral submissions, by reference to this example: a document is said previously to have existed, is believed to have been destroyed, but witnesses give direct evidence describing the document. Mr Metcalfe says, rightly, that a document previously held by a party needs to be listed in a disclosure list. The Judge, rightly, agreed with him on that point. Mr Metcalfe then submits that, where it has not been so listed, the effect of CPR 31.21 precludes a party, absent the court's permission, from contending that a document exists or existed. In the alternative to that argument, Mr Metcalfe says that the failure to list should have led the Judge acting reasonably to adopt an adverse inference as to there having been any assignment or notification of it to the Applicant. Mr Metcalfe painted a vivid picture of his client going to trial on the basis that, by reference to the CPR, the Respondent would not be able to adduce any evidence referable to the assignment, including in circumstances where the Applicant's witness statement evidence had not

expressly dealt with it, a position which he says "changed at the last minute" at the trial under cross-examination when Mr Latimer described the signing of the assignment. Finally, Mr Metcalfe submits that the Judge could not arrive at a sustainable adverse finding in relation to Liability to the LLP absent detailed evidence of the terms of the assignment, to be able to make an explicit finding as to which specific assets were transferred from partnership to LLP.

16. In my judgment, there is no realistic prospect of this Court overturning the Judge's findings in relation to assignment, and knowledge of the assignment, in the relevant section of the judgment. The Judge made a finding of fact on the key points which were in dispute: as to whether there had been assignment; and as to whether it had been notified to the Applicant. The Judge had heard oral evidence at trial, with cross-examination: from Mr Latimer (27 June 2019) dealing with the assignment; and then from the Applicant himself (24-25 September 2019) denying any notice of it. There was, in my judgment, a full and fair opportunity and the evidence was properly adduced in what was, beyond argument, a fair hearing. The Judge did not need, and was entitled to conclude that he did not need, to go further and make specific findings about specific details, in all the circumstances and given the contested issues. The Judge was plainly satisfied, and was entitled to be satisfied, that a relevant assignment had taken place transferring the relevant assets. He dealt expressly with the point about unlisted documents in a disclosure list and addressed the arguments about whether adverse inferences were appropriate. He was entitled to conclude that no adverse inference was appropriate. I agree with Johnson J that Mr Metcalfe is wrong, beyond argument, in seeking to give his preclusionary consequence to CPR 31.21. As Johnson J pointed out in his reasons: "CPR 31.21 does not apply. The Respondent was not seeking to rely on a document: it did not have a copy of the operative assignment… [I]t was exposed to an argument that the document never existed. However, I do not think that the failure to record a document on the list obliged the [Judge] to find that it had never existed. There was oral evidence that it had existed. The [Judge] made factual findings, on the basis of the oral evidence, that an assignment had taken place and that the [Applicant] had been given adequate notice of it. These were findings that he was entitled to make". I agree.

Liability for the Companies

17. Grounds 3 to 7 relate to the issue of Liability for the Companies. Grounds 3, 4 and 5 are put forward to deal with what is said by Mr Metcalfe to be, or it is said by him to be feared that the Respondent may say on appeal to be, a 'three-pronged' basis on which the Judge decided this issue. Ground 4 relates to the second of those 'three prongs' and is this. The Judge was not entitled to treat, as a basis for a finding on Liability for the Companies, that the Applicant "was effectively the companies and… knew precisely what the situation was". I agree with Johnson J: if that had been what the Judge had decided this would not only be an arguable point but would be clearly correct. However, in my judgment, in no way was the Judge relying on this as a freestanding basis for determining the Liability for the Companies issue. What the Judge was saying was that the finding of fact that he had already recorded fitted alongside the Applicant's own evidence that "he was effectively the companies …" That is all that the Judge was saying. Ground 5 relates to the third of the 'prongs': paragraph 104 of the judgment, in which the Judge said "in any event" the Settlement Agreement analysis would be an answer to Liability for the Companies. That was the

point he had made at paragraph 91, referable to the issue described at paragraph 90a. If that had been the basis of the finding in relation to the claim then ground 1 (which I discussed earlier) would be directly engaged. What matters most, in my judgment, is what Mr Metcalfe is characterised as the first of the three 'prongs'. In my judgment, that so-called 'first prong' is the clear basis on which the Judge decided this aspect of the claim, before then making his observations including his "in any event" observation. Ground 3 attacks this, the key part of the Judge's analysis on the issue. I will return to grounds 6 and 7 later.

18. Ground 3 is this. It is true that the Judge made a finding of fact that the terms and conditions were sent to the Applicant who signed them. It is also true that that finding, properly understood, was a finding relating to 19 sets of signed terms and conditions relevant to the 19 instances involving work by the solicitors for companies. However, that finding of fact by the Judge was unsustainable or otherwise erroneous. The Judge could not reasonably base this finding on preferring oral evidence from Mr Latimer, in circumstances where Mr Latimer had not stated unequivocally that there had been 19 sets of signed terms and conditions, still less that he had personal knowledge of that. Mr Latimer's evidence was that is that he, "certainly", "would have thought" that there were "other terms and conditions signed", but that "the accounts department" dealt with sending them out. He said: "[w]hether they were signed as returned, I would not know, but they would have been set out in the opening of new matters". That evidence, says Mr Metcalfe, cannot be a proper and sustainable basis for the Judge's finding of fact. In addition, at this stage Mr Metcalfe repeats the submissions about unlisted documents in a disclosure list, with his dual contentions: first, that CPR 31.21 precluded any contention that terms and conditions had existed, been sent, been signed and returned; and secondly, that the Judge could not reasonably do other than reach an adverse inference.

19. In my judgment, there is no realistic prospect of this court overturning the judge's finding of fact regarding the terms and conditions being sent and signed, in relation to the relevant 19 cases involving companies. This is a clear finding of fact. It was, in my judgment, beyond argument a finding properly made and open to the Judge. The Judge had the evidence of Mr Latimer about the procedure at the time and what he said "would" have happened and, to use Mr Latimer's word, "certainly" would have happened. The Judge also had the oral evidence of the Applicant with cross examination. As the Judge recorded, the Applicant addressed in cross-examination the question of whether he had "received terms and conditions". His evidence was that "the majority of the time" he had "never received terms and conditions". He also gave evidence in which he said he "did not recall", and "had never seen", terms and conditions that were put to him from the trial bundle. The Judge plainly evaluated all the evidence, including Mr Latimer's evidence, but also the evidence from the Applicant which he clearly did not regard as "credible" on this point. There is no basis, in my judgment, on which an appeal court – in the circumstances of the evidence in this case – would overturn the finding of fact made by the Judge. The CPR 31.21 point fails for the same reason I gave earlier, beyond argument. Nor was the Judge, even arguably, obliged to arrive at an adverse inference based on non-inclusion in the disclosure list.

20. Grounds 6 and 7 go together. Ground 6 is that no guarantee was pleaded in the claim and that the Judge, in allowing the Respondent to rely on the terms and conditions

including the term making a director liable – which the Judge correctly analysed as a guarantee – was allowing a departure from the Respondent's pleaded claim. Ground 7 is that the guarantee was not properly pleaded and that it was not sufficient that it was addressed in the Respondent's reply pleading. Mr Metcalfe submits that these pleading points were prejudicial to the Applicant at the trial and that the Judge should have dismissed this part of the claim, given the way in which the case had been pleaded. In my judgment, again, there is no realistic prospect that this Court would overturn the Judge's finding based on these pleading points. In the first place the pleaded claim itself specifically invoked the terms and conditions and relied on them. As Johnson J explained in his reasons: "it was the [Applicant] that had raised the issue of guarantees, it being part of the [Applicant's] defence that the terms and conditions were properly construed as amounting to a guarantee rather than an indemnity, and it being his case that the guarantee was unenforceable for non-compliance with the Statute of Frauds. The [Judge] agreed with the [Applicant] in relation to the construction of the terms and conditions, but he found that they had been signed. These were findings that he was entitled to make". That, in my judgment, is an accurate encapsulation of the way in which the arguments arose. Everybody knew that squarely in issue at the trial was whether or not the Applicant could rely on the terms and conditions, including the term which expressly dealt with liability as a director. The Applicant could be in no doubt at all that that was the case against him. It was an answer to a point of defence that he had raised about Liability for the Companies, but it was an answer arising from the very terms and conditions invoked in the claim itself. I can see no substance, still less any prejudice, in the pleading points that have been advanced.

Scaling Down

21. Ground 9 relates to Scaling Down. As it was explained to me by Mr Metcalfe at today's hearing, there are in fact two distinct limbs to what is said by the Applicant. The first limb relates to the Judge's assessment of the claim on the third (§90c) of the three issues in determining the claim. As to that, what is said is that the Judge did not assess individually those invoices which had featured in the Settlement Agreement schedule. That failure to assess properly the reasonableness of the fees featuring in the claim was in error or unreasonable. Alternatively, this first limb is a manifestation of ground 1, because the Applicant says it involves the claim being determined by the Judge by reference to the Compromise Agreement, which was not the pleaded basis of the claim. That is the first distinct limb of ground 9. The answer to it, in my judgment, beyond argument, is that what the Judge did was to find that the Compromise Agreement was "powerful and compelling evidence of the reasonableness of the charges and work done". That evidential approach to the assessment task was one, in my judgment, beyond argument, that the Judge was entitled to take. I agree with Johnson J when he said: "[the Judge] was entitled to rely on the [Applicant's] agreement as powerful evidence of the reasonableness of the invoices".

22. The second distinct limb of ground 9 which, I confess, did not emerge as being clear to me until Mr Metcalfe helpfully explained it at today's hearing is this. He submits that even if the Judge was entitled to rely on the Compromise Agreement in relation to the counterclaim and Breach of Trust – in circumstances where the Compromise Agreement was pleaded in the defence to the counterclaim – the Judge should nevertheless have assessed the reasonableness of the charges to which the scheduled

invoices related. Even in the case of a settlement agreement, submits Mr Metcalfe, an issue of unjust enrichment can be raised – as it was in the present case – and the Court "can" (as Mr Metcalfe put it) assess reasonableness. The answer to that point, in my judgment, beyond argument, lies in the Judge's analysis of the relevant case law and the conclusion which he expressed at paragraph 88 of the judgment to which I have already referred: "It seems to me that, unless there is a very strong challenge from the Defendant, in carrying out the assessment exercise I should find the contractual agreement conclusive". In my judgment, there is no realistic prospect that this Court on a substantive appeal would conclude that the Judge was not entitled to adopt that approach in the circumstances of the present case.

Conclusion

23. For all those reasons, and in agreement with Johnson J in his determination on the papers, this appeal in my judgment has no realistic prospect of success; nor in my judgment is there any compelling reason why permission should be granted in those circumstances. I therefore refuse the application for permission to appeal.

Discharging the stay

24. My attention has been drawn by the Respondent in an email to the fact that Turner J on 9 June 2020 had ordered a stay in the present case pending further order of the Court. As Mr Metcalfe realistically and sensibly accepts, it must now follow from the refusal of permission to appeal at this oral renewal hearing that it is appropriate that I formally discharge that stay, as I do.

11.3.21