Paul Victor Marshall Doran v Dataquill Ltd

Jurisdiction:	Jersey
Judge:	Matthew John Thompson
Judgment Date:	20 August 2018
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Text

[2018] JRC 148

ROYAL COURT

(Samedi)

Before:

Advocate Matthew John Thompson, **Master of the Royal Court**.

Between
Paul Victor Marshall Doran
Plaintiff
and
Dataquill Limited
Defendant

Advocate S. J. Young **for the Plaintiff**.

Advocate E. L. Jordan **for the Defendant**.

Authorities

Classic Herd Limited v Jersey Milk Marketing Board [2014] (2) JLR Note 4

Classic Herd Limited v Jersey Milk Marketing Board [2014] JRC 217

Minister for Treasury and Resources v Harcourt Developments & Ors [2014] (2) JLR 353.

T.W. Jameson Limited v Cuming-Butler (née Harris) [1981] J.J. 17.

Public Service Committee v Maynard [1996] JLR 343

Boyd v Pickersgill & Le Cornu [1999] JLR 284

Home Farm Developments Limited & Others v Le Sueur [2015] JCA 242

Royal Court Rules 2004, as amended

Cunningham v Cunningham and Others [2009] JLR 227

Minister for Treasury and Resources v Harcourt Developments Limited and Others [2014] (2) JLR 353

Homes v Lingard [2018] JRC 071B

Homes v Lingard [2017] JRC 113

RTS Flexible Systems Ltd v. Molkerei Alois Muller Gmbh [2010] UK SC 14

Benedetti v Sawiris [2013] UKSC 50

Forster v Holt [2018] JRC 076

Calligo Limited v Professional Business Systems CI Limited [2017] JRC 159

Re Esteem Settlement [2002] JLR 053

Flynn v Reid [2012] (1) JLR 370

CMC Holdings Ltd & Anor v Forester & Ors [2018] JRC 081

Striking out — The Master's decision in respect of a strike out application brought by the defendant.

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THE MASTER:

Introduction

1 This judgment represents my decision in respect of a strike out application brought by the defendant. The strike out application sought to strike out paragraphs 4 to 5 and 9 to 11 of the order of justice (set out below) stating that the claims were frivolous or vexatious or otherwise an abuse of process of the Royal Court. The detailed grounds relied upon are set out later in this judgment.

Background

2 There was no real disagreement on the structure of the defendant and the persons involved. In summary the business of the defendant was to exploit the value of certain intellectual property rights that it owns either through licencing agreements or enforcement actions involving litigation. The three shareholders of the defendant are Cloudlane Limited and Boldmine Limited (companies incorporated in the Seychelles) and Lambert Everest Limited (a company incorporated in the British Virgin Islands). These companies each hold 17 shares and are all wholly owned by trustees of three trusts known as the Turtle Trust, the Highland Trust and the Telair Trust. The beneficiaries of the Turtle Trust include the plaintiff and his children; the beneficiaries of the Highland Trust include, or included, a Mr Frank Callaghan and his children and the beneficiaries of the Telair Trust include Mr Garry Robb and his family. The individuals who came together to form Dataquill and the above structure were the plaintiff, Mr Callaghan and Mr Robb. It is these individuals as the inventors of the relevant patents who appear to have taken the lead on behalf of Dataquill in either negotiating licencing agreements or helping conduct enforcement actions.

3 The defendant in relation to its strike out application relied upon an affidavit from a Mr Donnelly a director of the defendant. In his affidavit dated 17 th May, 2018, sworn in support of the application he described the structure which I have summarised above.

4 At paragraph 8 of his affidavit, Mr Donnelly deposed that he was also a director of Clifton S C Limited and Clifton Trust Limited which were both described by him as trust administration companies. The plaintiff in response to this paragraph pointed out that these two companies were part of the Clifton group of companies which provided trustee and corporate administration services to the Turtle Trust and to Mr Callaghan's family trust. This led the plaintiff to suggest that Mr Donnelly faced a conflict of interest. This was disputed.

5 While I set out the above summary by way of background, the above summary is based on the pleadings and the affidavits filed in respect of the present application. It should not be taken as findings of fact but simply sets out the context for the pleadings and the issues I was required to determine as a result of the application.

The pleadings

6 The plaintiff's order of justice is dated 9 th March, 2018. Permission to serve the defendant out the jurisdiction was given by me by an act of court dated 8 th March, 2018. The action was placed on the pending list on Friday, 6 th April, 2018. An answer was filed on 10th May, 2018 and the present summons issued on 24 th May, 2018, to be heard on 25 th June, 2018. A reply was filed on 1st June, 2018.

7 The order of justice claims unpaid fees pursuant to invoices in the sum of £255,000.00 and $3,027,625.00. It is the US dollar applications that are the subject matter of the present application. They are invoice 006 for $500,000.00, invoice 007 for $2,000,000.00 and invoice 012 for $527,625.00.

8 In respect of invoice number 006 paragraph 4 of the order of justice pleads as follows:-

> *“4. The plaintiff was retained by the defendant to assist it in a licensing dispute with Apple Inc. in the USA. It was an express or implied term of the agreement that the defendant should pay a reasonable price for his services. The agreed or reasonable fee for the plaintiff's services is USD500,000. Full particulars are set out in invoice 006 dated 18 January 2018, attached. Wrongfully and in breach of contract the defendant has failed and refused to pay the sum due under invoice 006 to the plaintiff.”*

9 In respect of invoice number 007 paragraph 5 of the order of justice pleads as follows:-

> *“5. The plaintiff was retained by the defendant to assist it in a patent dispute with ZTE USA Inc. in the USA. It was an express or implied term of the agreement that the defendant should pay a reasonable price for his services by reference to the sums paid to its other consultant. The reasonable fee for the for the plaintiff's services is USD2,000,000. Full particulars are set out in the invoice 007 dated*

18 January 2018, attached. Wrongfully and in breach of contract the defendant has failed and refused to pay the sum due under invoice 007, or any sum, to the plaintiff."

10 In respect of invoice number 012 the order of justice pleads as follows:-

"9. The sums which are the subject of invoice 012 represent arrears of consultancy fees with respect to services provided by the plaintiff to the defendant between 1996 and 2007.

10. The defendant acknowledged its indebtedness to the plaintiff and recorded the same in its accounts for the year ended December 2007 which were signed in March 2008.

11. Wrongfully and in breach of contract the defendant has failed and refused to pay the sum due under invoice 012 to the plaintiff."

11 The relevant parts of the answer to these paragraphs are found in paragraphs 6, 7 and 11 to 13 as follows:-

"6. Paragraph 4 is denied. Further the paragraph is inadequately particularised and is embarrassing. Without prejudice to the generality of that denial the following is averred;

(a) Save for the consultancy agreement which is pleaded at paragraph 6 of the Order of Justice, the Defendant did not 'retain' the Plaintiff in any capacity, in particular in relation to a licensing dispute with Apple Inc in the USA;

(b) The Defendant's commercial business is the exploitation and monetarisation of the IP rights that it owns. As such, since approximately 2000 the defendant has commenced the patent monetarisation programme. The patent monetarisation programme involves the Defendant generating revenue by licencing these patents to third parties and/or by enforcing its patent rights against third party infringers and thereby ultimately agreeing damages and/or some form of settlement pay-out in compensation for the relevant infringement;

(c) Over the course of the last 18 years, Dataquill has agreed approximately 15 licence agreements with large technology companies, has obtained one legal award of damages and has settled enforcement actions with others;

(d) The Plaintiff was retained as a consultant to assist Dataquill in this patent monetarisation programme, details of which are pleaded at paragraph 6 of the Order of Justice.

(e) This consultancy agreement came to an end on 2 November 2014 and was not renewed. The only sum owing in relation to that consultancy agreement is a sum of £30,000 for the year ended 2013 and 2014. The payment due under the consultancy agreement increased in 2013 to £45,000 from £30,000 and the

difference for 2013 and 2014 remains unpaid to date;

(f) It is not known what 'services' the Plaintiff provided for the sum of $500,000 because no particulars are given either on invoice 006 or in the Order of Justice but without prejudice to the contention that no such agreement was ever entered into by the parties, it was not agreed by the Defendant that;

(i) a 'reasonable sum' be paid for any such services and/or that any such term is so uncertain as to be unenforceable;

(ii) further or alternatively that the sum of $500,000 is not a reasonable sum for the Defendant to pay to the Plaintiff in relation to any such services involving the licence negotiations.

7. Paragraph 5 is denied. Further the paragraph is inadequately particularised and is embarrassing. Without prejudice to the generality of that denial the following is averred;

(a) Save for the consultancy agreement pleaded at paragraph 6 of the Order of Justice, the Defendant did not 'retain' the Plaintiff to assist it in a patent dispute with ZTE USA Inc in the USA. Paragraph 6 (b) – (e) in this Answer are repeated and relied upon;

(b) Invoice 007 is pleaded as specifying the particulars upon which the claim for $2,000,000 is made. Invoice 007 (the contents of which are denied in its entirety) refers to the Plaintiff's attendance at trial as Dataquill's sole witness "that included vigorous cross examination by the defendant team which examination was directed at causing serious damage to the credibility of Paul Doran as an inventor and the Dataquill Patents". The Defendant did not and could never agree that such a payment be made in relation to the giving of evidence in a US District Court or on oath as such contract would be unlawful and thereby unenforceable in law;

(c) The Plaintiff gained a financial benefit from the patent monetarisation programme, being an ultimate beneficial owner of the Defendant. He was also an inventor of the patents in question in the ZTE US litigation. As such, it was in his interest to assist the Defendant by way of the provision of truthful testimony to a US Court;

(d) Without prejudice to the contention that no such agreement was ever entered into by the parties, it was not agreed by the Defendant that;

(i) a 'reasonable sum' be paid for any such services and/or that any such term is so uncertain as to be unenforceable;

(ii) further or alternatively that the sum of $2,000,000 is not a reasonable sum for the Defendant to pay to the Plaintiff in relation to any such services involving the ZTE US litigation.

11. Paragraph 9 is denied. Without prejudice to the generality of that denial it is averred that all sums due under the consultancy agreement, save for the sum set out at paragraphs 6 (e) and 10 above have been paid by the Defendant. Further, the paragraph is inadequately particularised and is embarrassing. It is further averred that the claims of the Plaintiff in relation to any such consultancy fees for the years 1996 to 2007 are prescribed, being more than 10 years since becoming due and payable and as such, are liable to be struck out.

12. Paragraph 10 is denied. In particular it is not accepted that any accounts for the year dated December 2007 binds the Defendant in relation to the sums claimed by the Plaintiff. The Plaintiff is put to strict proof as to the veracity of the matters contained within those accounts. The Defendant does not admit the truth of that document's contents, nor that the document is evidence of its contents.

13. Paragraph 11 is denied.

12 The relevant part of the plaintiff's reply is at paragraphs 6 to 10 as follows:-

"6. As to:

(1) Paragraph 6(a): The defendant, through its director Mr Donnelly, did ask the plaintiff to assist it in licencing negotiations with Apple Inc. as set out in the body of Invoice 006 attached to the Order of Justice. The defendant had already provided financial benefit to Mr Frank Callaghan (Mr Callaghan) in relation to such negotiations and had paid or procured that he be paid or provided benefit to him or at his direction in the sum of USD500,000 for such services. The plaintiff provided the same or very similar services to Mr Callaghan but has not been paid any monies for the provision of the same. The plaintiff was unaware that any such payment had been made to Mr Callaghan until reviewing a spreadsheet sent to him by Ms Janette Powell dated 8 December 2017. On the basis of the payments made available to Mr Callaghan, which sum the defendant evidently considered reasonable, the plaintiff claims the same sum as being a reasonable fee for the provision of such services as were provided by him.

(2) Paragraph 6(b): This is admitted.

(3) Paragraph 6(c): This is admitted. It is further admitted that the defendant would not have achieved the stated agreements without assistance from the plaintiff and Mr Callaghan.

(4) Paragraph 6(d): This is admitted, save that both Mr Callaghan and the plaintiff were retained as consultants to the defendant and that their remuneration was not limited to the consultancy fee referenced therein. For example:

(i) Mr Callaghan was paid the sum of USD500,000 as pleaded at paragraph

6.(1) above;

(ii) Mr Callaghan was paid the sum of USD1,500,000 in relation to negotiations with HTC Corp. in 2012 it having been agreed that Mr Callaghan would only receive USD1,000,000 and the plaintiff USD500,000;

(iii) Mr Callaghan was paid for services rendered to the defendant between 1996 and 2004 in the sum of approximately USD734,404 for which similar services the defendant, following discussions with Mr Donnelly and Mr Callaghan, also submitted invoices in April 2008, on the basis that his invoices would then be paid, Mr Callaghan having already derived the benefit from his invoiced sums. In fact the sums invoiced were thereafter recorded in the accounts of the defendant as a creditor amount which the plaintiff has always expected would be paid but the defendant has since neglected to pay the sums due. The defendant is thereby estopped from denying that the sums in Invoice 012 are payable.

(5) Paragraph 6(e): This is denied. By unanimous resolution of the defendant dated 30 September 2015 (resolution) that was sent to the plaintiff, the defendant resolved to continue to engage its consultants. The plaintiff will await disclosure of the defendant's bank, payment and other records to evidence retention of the other consultant(s), both of whom were paid to attend meetings in Miami in December 2017 to discuss the defendant's business. Further, Mr Donnelly provided sworn evidence to the Court in Texas in the ZTE litigation that the plaintiff was engaged by the defendant as a consultant.

(6) Paragraph 6(f): The plaintiff repeats paragraph 6(1) above.

7. As to paragraph 7: The defendant retained the plaintiff to assist in a patent dispute with ZTE USA Inc. The defendant paid the plaintiff's living expenses whilst he engaged with the defendant's Counsel and prepared for trial. By reference to the sums paid to Mr Callaghan in relation to the HTC Corp. agreement, the plaintiff is similarly entitled to an equivalent sum for his assistance in relation to the ZTE USA Inc. trial. The interest the defendant pleads is no different to the interest Mr Callaghan or Mr Robb had as co-inventors of the patents or co-owners of the defendant save that the defendant at all times either preferred or acceded to the demands of Mr Callaghan to pay to him the sums pleaded for the reasons pleaded and has unreasonably refused to pay to the plaintiff a reasonable sum for the Services provided either pursuant to contract or on a quantum meruit basis as pleaded at paragraph 3 of the Order of Justice.

8. As to:

(1) Paragraph 9(a): The plaintiff will rely on the resolution for its full meaning and effect.

(2) Paragraph 9(b): The plaintiff avers that Mr Callaghan was paid the sum of £60,000 from 3 November 2014 onwards.

(3) Paragraph 9(c): The plaintiff will rely on the resolution for its full meaning and effect. The resolution was sent to the plaintiff by Mr Donnelly and/or Ms Powell.

9. The defendant is prevented from raising the plea of prescription at paragraph 11 or at all for the following reasons:

(1) Following discussions with Mr Donnelly and/or Ms Powell and/or Mr Callaghan the plaintiff submitted the invoice for the services itemised in Invoice 012 it having clearly been understood by the plaintiff that it would be paid as pleaded at paragraph 6(4)(iii) above and the corresponding creditor amount was included in the accounts of the defendant until removed without any discussion with the plaintiff and unknown to the plaintiff until Ms Powell sent to the plaintiff particulars of payments in December 2017 the accounts were provided to him in 2018 following approximately two years of demands to see financial records.

(2) The defendant concealed from the plaintiff the financial records of the defendant until some records were disclosed in May, November and December 2017 at which time the plaintiff discovered that the creditor position in the accounts in relation to the sums had been reversed without any knowledge of the plaintiff and that Mr Callaghan had been paid the similar sum as invoiced to the defendant.

(3) Further, by reason of the way that the defendant is owned, Mr Donnelly connived with Ms Janette Powell to prevent the plaintiff from being able to discover relevant financial information. Ms Powell is a director and principal of Clifton SC Limited which company provides administration and accounting services to the defendant.

(i) Clifton SC Limited is part of the Clifton Group of companies located in the Seychelles (Clifton) which group provides trustee and company administration services. The defendant is owned by as to one-third each by three companies: Cloudlane Limited (Cloudlane), Boldmine Limited (Boldmine) and Lambert Everest Limited (Lambert). Cloudlane and Boldmine are owned by Clifton as trustees of separate trusts, one of which (that owning Cloudlane) the plaintiff is interested in and one of which (that owning Boldmine) Mr Callaghan is or was interested in. Clifton provide the directors to Cloudlane and Boldmine also and Mr Callaghan is the protector of the Trust pertaining to Cloudlane.

(ii) As a consequence of the above there is a significant conflict of interest in Clifton remaining as trustee of the Trust of which Cloudlane is an asset and providing directors to Cloudlane in circumstances where the plaintiff has been making enquiry of financial information relation to the defendant since February 2015 but the defendant, whether by Ms Powell and/or Mr Donnelly have refused or neglected to provide such information to the plaintiff thereby prejudicing his ability properly to monitor what payments have been made to other consultants for the provision of similar services and when.

(iii) Notwithstanding various and repeated requests Clifton and Mr Callaghan have neglected to resign and/or appoint new trustees in their stead, instead preferring to maintain their appointments in order to protect their own interests.

10. As to paragraph 12. The plaintiff repeats paragraph 9(3) above. The plaintiff is in no position to prove the veracity of the matters contained in the accounts of the defendant without full and uncensored disclosure of the same. The defendant having put the contents of the accounts in issue is now bound to make full disclosure of all financial records of the defendant including all supporting documents, minutes, e-mails and other communication relating to any receipts or payments to or from the defendant."

13 I record for the sake of completeness that in respect of the sterling amount claimed by the plaintiff it was accepted by the defendant that this was an arguable dispute which justified a trial.

14 It is also right to record that during the course of submission Advocate Young for the plaintiff made it clear that his client was suing as a consultant of the defendant. He was not a registered shareholder and was not therefore bringing any form of unfair prejudice claim under BVI company law by virtue of the defendant being a BVI company.

The defendant's submissions

15 Advocate Jordan for the defendant made the following submissions.

16 Firstly, she accepted that to strike out any part of an order of justice was a high hurdle and should only occur in plain and obvious cases.

17 Secondly, the court should strike out a claim where a limitation period had clearly expired (see *Classic Herd Limited v Jersey Milk Marketing Board* [2014] (2) JLR Note 4 striking out part of the plaintiff's claim). I observe for the sake of completeness that the entirety of the plaintiff's claim in *Classic Herd Limited v Jersey Milk Marketing Board* [2014] JRC 217 was struck out on appeal. However there was no dispute in the appeal that any obviously prescribed claims could be struck out.

18 Thirdly, the defendant was critical of paragraphs 4 and 5 as to when the plaintiff was retained. She described the pleading in both paragraphs as inadequate. As it was put in paragraph 11 of her skeleton "there is no reference to when, by whose authority the terms of the services, the extent of the services, what assistance means, when this "retainer" was entered into and what of the agreement was oral or written." This led to the contention that where a pleading was wholly lacking in detail and that detail had not been supplied by the plaintiff's affidavit filed in opposition to the defendant's application, then it was open to the court to strike out the offending paragraphs. The claim for a reasonable sum was also too

vague to give rise to a contract. In addition it was not possible to claim reasonable sum by reference to what another individual had been paid. What someone else had been paid by the defendant was therefore irrelevant.

19 Any potential conflict of interest Mr Donnelly might face was irrelevant to a contractual claim by the plaintiff against the defendant where the plaintiff was not a shareholder.

20 Advocate Jordan also observed that it was strange that there was no written agreement for the amounts claimed in US dollars when there was written documentation in respect of the consultancy fees payable in sterling which were for much lesser figures. Given the written consulting agreements that did exist, you might expect to find written agreements for much larger sums claimed to be payable. Yet none existed.

21 The invoices themselves contained no detail as to when the plaintiff was retained or by whom.

22 Insofar as invoice number 006 referred to Mr Frank Callaghan being paid $500,000.00, Advocate Jordan referred me to paragraph 36 of the affidavit of Mr Donnelly which stated:-

> *"Secondly, the statement that Mr Callaghan received US500,000 for his assistance in relation to this matter is simply wrong.* Mr Callaghan did not receive any such payment. …."

23 It was also not possible to have an implied term to agree a reasonable sum. Such a pleading demonstrates the lack of certainty as to what was agreed. If there was insufficient certainty for there to be a contract, the claim had to be struck out, applying *Minister for Treasury and Resources v Harcourt Developments & Ors* [2014] (2) JLR 353.

24 In addition to the above arguments, in respect of invoice number 007 it was also argued that invoice 007 was a payment for evidence and accordingly it was either illegal or unenforceable as a matter of public policy.

25 A claim could not be brought on the basis of *quantum meruit* for giving evidence as this would amount to a payment for unlawful or illegal work *T.W. Jameson Limited v Cuming-Butler (née Harris)* [1981] J.J. 17.

26 In respect of invoice number 012, this claim was clearly prescribed. While Advocate Jordan conceded it was possible for an estoppel to be pleaded in response to an argument that a claim was clearly otherwise out of time, it was not clear whether estoppel was pleaded. It was also not clear whether the plaintiff was alleging a breach by the defendant by refusing to pay and if so when it is said the defendant refused to pay. It was also not clear whether the plaintiff in the alternative was alleging some form of suspension of prescription by

applying *Public Service Committee v Maynard* [1996] JLR 343 and *Boyd v Pickersgill & Le Cornu* [1999] JLR 284. It was also not clear when the plaintiff saw the 2008 accounts or when the plaintiff became aware that monies said to be due him as a creditor in the 2008 accounts were said to have been written off. In any event he had the knowledge to make a claim as he had provided an invoice in 2008 which had not been paid, and the plaintiff was aware of the non-payment.

The plaintiff's submissions

27 In relation to the plaintiff's claim, this was advanced on the basis that he was a consultant for the defendant. What was claimed was an express agreement to be paid a reasonable sum. It was on this basis that the plaintiff claimed his remuneration by reference to sums paid to Mr Callaghan on a comparative basis to determine what was reasonable.

28 What was needed was the full factual background to determine the contract between the plaintiff and the defendant which required discovery. The plaintiff had clearly pleaded that he had a contract with the defendant.

29 In relation to invoice number 012, this was simply a repetition of an invoice dated 11 th April, 2008 provided to the defendant, exhibited at page 2 of exhibit PVMD1 of the plaintiff's affidavit. I note in respect of this invoice that it has been assigned to Cloudlane and was payable to Cloudlane. If it was assigned, it is not clear why the plaintiff rather than Cloudlane is pursing the claim. It was the amount under this invoice that was recognised in the 2008 accounts. A similar invoice bearing the same date for $734,403.75 was sent by Mr Callaghan and payable to Boldmine Limited. This invoice had been paid. The plaintiff did not know why his invoice had not been paid when an invoice for the same services payable to Mr Callaghan had been paid. The plaintiff also stated he did not know that the invoice had not been paid until he saw the write off in the 2010 accounts of sums due to him recorded in the 2008 accounts. He only saw the 2010 accounts when they were provided to him in 2018.

30 The plaintiff's claim was that there was an understanding between the key individuals involved that the plaintiff would be paid for negotiating agreements or managing proceedings. This was based on a course of dealings giving rise to an expectation as to what would be paid. Alternatively, his claim was put on a *quantum meruit* basis. This was pleaded expressly in paragraph 7 of the reply. I was also referred back to paragraph 3 of the order of justice as also pleading a *quantum meruit* claim because it claimed a reasonable price for the plaintiff's services. Paragraph 3 states:-

> *"3. Alternatively the defendant is liable to the plaintiff for GBP255,000 and USD3,067,625 as damages for breach of contract or as the reasonable price for the plaintiff's services (Services)."*

31 Advocate Young criticised paragraph 36 of Mr Donnelly's affidavit set out above because even if Mr Callaghan had not been paid $500,000 in respect of licence negotiations with Apple, Mr Callaghan had been paid consultancy fees for negotiations with Apple by reference to page 5 of Exhibit PVMD1. This part of the affidavit was therefore misleading.

32 If the defendant wanted better information about the plaintiff's case and why there was a contract a request for information should have been made. No such request was made. If there was insufficient detail in the pleadings, which was not accepted, this did not justify a strike out.

33 An agreement to pay reasonable fees was clearly pleaded.

34 It was not the plaintiff's case that he was paid for evidence but rather the claim was for his services in pursuing the claim for the defendant.

35 The plaintiff did not ask for payment of the invoice submitted in 2008 because he had no need for the funds at that stage. He therefore did not take any action against the defendant because the defendant had accepted it owed monies under the 2008 invoice by recording the same in its 2008 accounts.

36 The matters pleaded at paragraph 9 of the reply prevented any strike out of invoice number 012 on the basis of prescription. This was clear a factual dispute that could only be determined at trial.

37 There was clearly reluctance on the part of the defendant to give information to show how the parties dealt with each other. What the case required therefore was a discovery order. There was no basis to strike out the case at this stage.

Decision

38 In respect of the applicable legal principles on a strike out application, there was no dispute between the parties. Advocate Jordan fairly accepted that there was a high hurdle to overcome and that it was only in plain and obvious cases that a claim should be struck out. Advocate Young emphasised the plain and obvious nature of the jurisdiction. The most recent statement of the jurisdiction is in *Home Farm Developments Limited and Others v Le Sueur* [2015] JCA 242 at paragraphs 23 to 29. This is the test that I have applied.

39 There was also no dispute that obviously prescribed claims should be struck out that apply in *Classic Herd* unless there was an arguable defence of *empechment de fait* or estoppel.

40 In light of these agreed principles, the starting point for my decision is the plaintiff's claim in

the order of justice. The duty on any party filing a pleading is to plead *"all material facts"* (Rule 6/8(1)) of the Royal Court Rules 2004, as amended, ("Rules"). In my judgment the pleading at paragraphs 4 and 5 of the order of justice does not meet this obligation. It simply pleads that the plaintiff was retained by the defendant in respect of both of invoices 006 and 007 without setting out when, how and with whom the plaintiff claimed to be retained. The criticisms of Advocate Jordan set out in her skeleton argument cited at paragraph 18 above are therefore justified.

41 It is also not easy to glean from the affidavits of the plaintiff, what the agreement was or when it was concluded. The implication appears to be that a contract was agreed to pay a reasonable sum by reference to discussions between the plaintiff and Mr Callaghan while they were on good terms. The defendant through Mr Donnelly always acceded to any requests from the plaintiff and Mr Callaghan based on such discussions to make payments (e.g. paragraphs 7, 22 and 23 of Mr Doran's affidavit.

42 This is not however pleaded. It is also not an answer to a strike out application to state that matters should await discovery. A party is required to plead material facts as set out above. Since 2017, Rule 6/15 of the Rules in its current form permits the Court to require a party to clarify any matter in dispute in the proceedings. The overriding objective in Rule 1/6 moreover requires parties to identify the issues at an early date to help parties settle the whole or part of their case.

43 It is also well known that a court will not normally strike out a claim if it can be rescued by an amendment to a pleading (see *Cunningham v Cunningham and Others* [2009] JLR 227). The decision for me in respect of invoices 006 and 007 at paragraphs 4 and 5 of the order of justice is whether I should order the plaintiff to plead all material facts as to when he was retained or whether I should strike the case out now. To reach conclusion on this point requires me to consider Advocate Jordan's submissions which is that, even if details of the contract could be pleaded, there is still insufficient certainty because the pleaded agreement is simply to pay a reasonable sum. If there is no certainty, there can be no concluded agreement (see both *Minister for Treasury and Resources v Harcourt Developments Limited and Others* [2014] (2) JLR 353 and the recent decision of the Deputy Bailiff in *Holmes v Lingard* [2018] JRC 071B upholding the relevant parts of my decision in the same matter reported at [2017] JRC 113.

44 In my judgment in *Holmes v Lingard* [2017] JRC 113 at paragraph 179, I set out paragraphs 45–49 of *RTS Flexible Systems Ltd v. Molkerei Alois Muller Gmbh* [2010] UK SC 14. There are particular extracts in those paragraphs pertinent to the present dispute as follows:-

> ***"45 The general principles are not in doubt.*** Whether there is a binding contract between the parties and, if so, upon what terms depends upon what they have agreed. It depends not upon their subjective state of mind, but upon a consideration of what was communicated between them by words or conduct, and whether that leads objectively to a conclusion that they intended to create

legal relations and had agreed upon all the terms which they regarded or the law requires as essential for the formation of legally binding relations .

46 … Leaving aside the implications of the parties' failure to execute and exchange any agreement in written form, were the parties agreed upon all the terms which they objectively regarded or the law required as essential for the formation of legally binding relations? Here, in particular, this relates to the terms on which the work was being carried out. What, if any, price or remuneration was agreed and what were the rights and obligations of the contractor or supplier?

47 … The court should not impose binding contracts on the parties which they have not reached. All will depend upon the circumstances .

48 These principles apply to all contracts, including both sales contracts and construction contracts, and are clearly stated in *Pagnan SPA v Feed Products Ltd* [1987] 2 Lloyd's Rep 601, ***both by Bingham J at first instance and by the Court of Appeal.*** In Pagnan it was held that, although certain terms of economic significance to the parties were not agreed, neither party intended agreement of those terms to be a precondition to a concluded agreement. The parties regarded them as relatively minor details which could be sorted out without difficulty once a bargain was struck. The parties agreed to bind themselves to agreed terms, leaving certain subsidiary and legally inessential terms to be decided later.

49 ……

It is for the parties to decide whether they wish to be bound and if so, by what terms, whether important or unimportant. It is the parties who are, in the memorable phrase coined by the Judge [at page 611] 'the masters of their contractual fate'….." .

45 In my view, a contract to pay a reasonable sum is arguably capable of providing sufficient certainty for the courts to enforce such a contract having regard to the above principles and the certainty also required by Jersey law. Whether the courts will regard such an agreement as being sufficiently certain or to have a legal effect can only ultimately be determined following a trial, including discovery and evidence from factual witnesses. I am therefore unable to conclude that a case based on an agreement to pay a reasonable sum should be struck out as lacking sufficient certainty. It is only following analysis of the relevant documents and oral evidence that the Royal Court may determine whether there was an agreement to pay the plaintiff a reasonable sum based on how the plaintiff, the defendant and the other individuals involved with the defendant operated before they fell into dispute.

46 My conclusion is reinforced by reference to the case of *Benedetti v Sawiris* [2013] UKSC 50 also referred to in the Lingard judgments. While that was a case on *quantum meruit*, because by the time the matter came before the Supreme Court, it was agreed there was no contract between the plaintiff and the defendant and therefore the

claim was one based on *quantum meruit* only. Lord Neuberger in supporting the decision of the majority at paragraph 177 made the following observation:-

> ***"177 That sum has been described throughout this case as being a quantum meruit.*** It is, I think, arguable that this is a mischaracterisation. It is true that the original contractual arrangement, which identified Mr Benedetti's consideration, fell away. It is also true that the new arrangement which developed did not involve any such identification. However, it seems to me that the new arrangement probably gave rise to a contract, arising from the parties' words and conduct in April and May 2005. That contract did not specify Mr Benedetti's remuneration, but it must be at least arguable that there would be implied into the contract a term that he should be paid a reasonable sum. I say no more about this possible point of distinction, as (i) the point was not argued, (ii) the point may be wrong, (iii) even if it is right, the point may involve an issue of terminology rather than principle, and (iv) even if there is an issue of principle, I am confident it makes no difference to the outcome of this appeal, given the conclusion I have reached."

47 Obviously each case turns on its own facts but it is a matter for the Royal Court to determine what was agreed and whether this gives rise to sufficient certainty to determine the points referred to by Lord Neuberger in paragraph 177 by reference to what occurred in this case.

48 In expressing these views I have not disregarded that the theory of the Jersey law on contract is the subject of some controversy (see *Forster v Holt* [2018] JRC 076 and *Calligo Limited v Professional Business Systems CI Limited* [2017] JRC 159. However, the requirement for certainty is as much part of the Jersey law of contract as the English law of contract despite the above differences.

49 The above conclusions do not mean however that the plaintiff's present pleaded case sets out all the material facts as to why he was retained by the defendant. In my view it does not and Advocate Jordan's criticisms of the lack of detail are justified. While therefore I am not prepared to strike out the plaintiff's claim in respect of paragraphs 4 and 5 of the order of justice relating to invoices 006 and 007, pursuant to the powers vested in me both on strike out applications and by Rule 6/15 of the Rules, the plaintiff must file an amended pleading setting out all material facts upon which the plaintiff relies as to when, how and why he was, says he, retained by the defendant.

50 When this judgment is handed down, absent agreement between the parties, I will hear argument as to how long the plaintiff should have to file such an amendment. The filing of any such amendment to the order of justice will be on the usual terms as to costs.

51 The plaintiff's order of justice should also plead expressly as an alternative that his claim is brought on the basis of *quantum meruit*. However, I do not accept the defendant's

suggestion that the plaintiff cannot bring a claim based on *quantum meruit* as an alternative to a claim in contract. Why such a claim arises is because there is no agreement between the parties. Paragraph 9 of the *Benedetti* judgment in relation to the interrelationship between a claim and contract and a claim in *quantum meruit* states as follows:-

> ***"9 It is common ground that the correct approach to the amount to be paid by way of a quantum meruit where there is no valid and subsisting contract between the parties is to ask whether the defendant has been unjustly enriched and, if so, to what extent.*** The position is different if there is a contract between the parties. Thus, if A consults, say, a private doctor or a lawyer for advice there will ordinarily be a contract between them. Often the amount of his or her remuneration is not spelled out. In those circumstances, assuming there is a contract at all, the law will normally imply a term into the agreement that the remuneration will be reasonable in all the circumstances. A claim for such remuneration has sometimes been referred to as a claim for a quantum meruit. In such a case, while it is no doubt relevant to have regard to the benefit to the defendant, the focus is not on the benefit to the defendant in the way in which it is where there is no such contract. In a contractual claim the focus would in principle be on the intentions of the parties (objectively ascertained). This is not such a case. Mr Benedetti did initially argue that Mr Sawiris, Cylo and the Holding Companies were in breach of the Acquisition Agreement, on the basis, inter alia, that an implied variation had taken place (see para 31A of the amended particulars of claim) or that they were in breach of a collateral contract. Those claims did not, however, rely on an implied term requiring the payment of a reasonable sum. In any event, those arguments ***were rejected by the judge and there has been no appeal against his judgment in that respect.*** Mr Benedetti does not now rely upon a contractual claim, whether on the basis of a request for the services or otherwise. The focus is only on the law of unjust enrichment."

52 The law of unjust enrichment now clearly forms part of the law of Jersey (see *Re Esteem Settlement* [2002] JLR 053, *Flynn v Reid* [2012] (1) JLR 370 and *CMC Holdings Ltd & Anor v Forester & Ors* [2018] JRC 081. Accordingly, the plaintiff has an arguable alternative claim is *quantum meruit*.

53 I accept such an alternative claim is referred to in the reply, but I consider it appropriate for any alternative basis to be set out in the document primarily bringing the claim namely the order of justice. At present it is not clear to me that paragraph 3 of the order of justice contains an alternative claim in *quantum meruit* rather than just a claim in contract for damages based on a failure to pay a reasonable sum.

54 In respect of paragraph 5 of the order of justice and the defendant's argument that the contract was enforceable as being contrary to public policy, my conclusion is that this issue also requires a trial. This is firstly to determine the precise nature of any services being provided by the plaintiff for the benefit of the defendant in relation to the litigation referred to

in invoice number 007. Secondly, I do not consider the authority of *Jameson Limited v Cuming-Butler* assists the defendant at this stage. That decision prevents the plaintiff seeking payment for unlawful or illegal work, i.e. work carried out contrary to a statute. I consider it a matter for trial following determination of the facts as to the limits of any public policy in relation to a payment made after litigation has concluded for a successful outcome to that litigation.

55 In relation to paragraphs 9 to 11 of the order of justice, the conclusion I have reached is also that these paragraphs should not be struck out. While I accept that the claims are out of time, an estoppel is clearly pleaded in paragraphs 9(1) and 6(4)(iii) of the reply.

56 In respect of whether or not the matters pleaded at paragraph 9 of the reply are also relied upon to argue an *empechment de fait*, I consider that the plaintiff should make this clear. When this judgment is handed down I will hear argument to whether this should occur in the order of justice or whether it could be set out in any amended reply consequent upon any amended answer filed in response to the amended order of justice that I require the plaintiff to produce.

Conclusion

57 For the reasons set out in this judgment the defendant's applications are refused but the plaintiff is required to file an amended order of justice addressing the matters set out in this judgment and in particular setting out all material facts relied upon as to when, how and why an agreement was reached with the defendant and pleading any alternative claim in *quantum meruit*.