



Neutral Citation Number: [2015] EWHC 312 (Ch)

Case No: HC11C04032

IN THE HIGH COURT OF JUSTICE  
CHANCERY DIVISION

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 13 February 2015

Before:

MR STEPHEN MORRIS QC (Sitting  
as a Deputy High Court Judge)

Between:

**MICHAEL AGAPIOS DIAMANDIS** **Claimant**

-and-

**(1) SIR DAVID SETON WILLS**  
**(2) JAMES SETON WILLS** **Defendants**

**Lawrence Power** (instructed by **JH Law, Solicitors**) for the **Claimant**  
**Richard Samuel** (instructed by **Howard Kennedy FSI LLP, Solicitors**) for the **Defendants**

Hearing dates: 17, 18 and 25 July 2014 and 12 November 2014

### **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.

MR STEPHEN MORRIS QC

## **Introduction**

1. In this action, Michael Diamandis ("the Claimant") seeks payment of remuneration for consultancy services he provided to Sir Seton Wills and his son David Wills ("the Defendants") in the period between January 2002 and October 2008.
2. There are two matters before me. First an appeal from two orders of Master Teverson made, respectively, on 6 December 2012 and 25 January 2013, and on 26 June 2013 ("the First Order" and "the Second Order") in so far as, by those orders, he dismissed applications by the Defendants for summary judgment and/or to strike out the Amended Particulars of Claim in this action. I refer to those Amended Particulars of Claim as "POC 1". Permission to bring this appeal was granted by Arnold J at an oral hearing on 14 February 2014.
3. Secondly there is an application by the Claimant to re-amend the Amended Particulars of Claim. This application was first made on 4 March 2013. The application initially was placed before Master Teverson. However when granting permission for the appeal, Arnold J directed it be heard at the same time as the present appeal. [The Claimant now seeks permission to amend the Particulars of Claim in the form of the Draft Re-Amended Particulars of Claim provided on 23 July 2014. This is the fifth version of *amended* Particulars of Claim (and the sixth version overall) advanced by the Claimant and is referred to herein at "POC 5".
4. As explained below, I will address first the application to re-amend. If and to the extent that this application succeeds, it is accepted that the appeal will fail, save on issues of costs. If and to the extent that the application to re-amend fails, then there is an issue as to whether and to what extent the existing POC 1 can stand.

## **The Factual Background**

5. The claim form was issued on 15 November 2011 and Amended Particulars of Claim, POC 1, served on 24 January 2012. The Claimant claims remuneration for consultancy services he provided to the Defendants in relation to the latter's business and property interests, including, but not limited to, their shareholding interest in Swindon Town Football Company Limited ("the Club"). Those services were provided in the period from 2002 to 3 October 2008 and included financial and business advice, negotiation of transactions and raising of finance. The Defendants accept, broadly, that the Claimant did provide those services (see second witness statement of Mr Bignell 23 April 2012, §§4 and 5). However they deny liability on the basis that they never agreed to remunerate the Claimant by way of fees, but rather by way of giving him shares in the Club and in the Club's parent company, Swindon Town FC Ltd ("STFC"); that since the Claimant was at the material times subject to a director's disqualification order, but nevertheless acted as a de facto director of the trading company of the Club, the agreement for services was a sham to cover up those activities and further that the agreement was, for this reason, illegal. At the relevant times, the Claimant had an office at The Litten, Newbury, Berkshire; the First Defendant owned the Eastridge Estate in Berkshire, and it appears that he had an office at Eastridge Farm.

## **The Agreement**

6. As matters currently stand, the claim is based upon the terms of a written consultancy agreement ("the Agreement") said by the Claimant to have been executed by himself and the Defendants (defined together as "the Wills Family") on 8 October 2003 to cover the provision of his services from 3 January 2002 until 1 December 2004. The Agreement as signed was subject to manuscript amendments and additions to its original typed draft. After recitals setting out its purpose, the Agreement in its signed form provided, inter alia, as follows (manuscript amendments are indicated in bold):

*"Definitions and Interpretation*

*1.1....*

*"Fee" means the consultancy fee at the rate of £80,000K per annum exclusive of VAT (if applicable)*

*"Services" means the provision of advice and assistance in relation to the management and marketing activities of Swindon Town Football Company Limited and Swindon Town FC Limited or such other advice and assistance as may be requested by the Wills family from time to time.*

*2 Commencement*

*2.1 This agreement shall [be deemed to have commenced/commence] on [3rd Jan 2002] ("the Commencement Date")."*

The original draft agreement had provided that rather than an annual amount, the fee would be calculated by reference to a "per Man Day" rate. The Defendants dispute that they agreed to the insertion of the £80,000 per annum figure.

7. Then, importantly, Clause 4 provided as follows:

*"4 Fees*

*4.1 In consideration of the Services provided by the Consultant, the Wills Family will pay the Consultant the Fee.*

*4.2 The Fee shall be paid by the Wills Family on a monthly basis. Payment of the Fee for any Month will be made by the Wills Family within [fourteen days] of receipt of an invoice submitted by the Consultant no earlier than the last working day of that Month PROVIDED THAT, where requested by the Wills Family, the Consultant shall state on the invoice the number of hours worked and brief details of the Services provided during that Month.*

*"*

Whilst on its face Clause 4.2 does not impose any requirement upon the Claimant as to the last date upon which an invoice for a month's work is to be submitted, two things are clear. First, under the terms of the Agreement the submission of an invoice at some time at least is a condition of payment of the Fee and the Fee does not become due until such invoice has been submitted. Secondly, as a matter of fact, it is common ground that the Claimant has never to date submitted any such invoices.

8. Clause 5 of the Agreement then provided for the "Period of services" as follows:

*"5.1 The Consultant will provide Services to the Wills Family from the Commencement Date until 1 December 2004 or until this Agreement is terminated in accordance with clause 15 below.*

*5.2 The agreement may only be extended or renewed by mutual agreement of the parties in writing".*

Clause 15 gave the Wills Family the right to terminate in the event of certain specified events. No one alleges that the Agreement was terminated prior to 1 December 2004.

9. As matters currently stand, at §§8 and 10 of POC 1, the Claimant alleges that the Agreement was in fact extended so as to continue beyond 1 December 2004 by an oral agreement made in November 2001 or by the parties' conduct. The Claimant further alleges, or has alleged at different times, that various demands for payment of the fees under the Agreement were made to the Defendants: orally on 29 August 2007, on 22 August 2008 and again in July 2010.

**The Claimant's petition to wind up the Club: April 2010 to January 2011**

10. In 2010, the Claimant sought payment of management fees from the Club, and in April 2010 presented a petition for the winding up of the Club based on a debt, which included a substantial sum for management fees, alleging that he had been employed as manager of the Club. The Club's application to restrain the Claimant from proceeding with petition was dismissed by Peter Smith J on 19 July 2010. On 17 January 2011 the Court of Appeal allowed the Club's appeal and the Claimant was restrained from carrying on with the petition. In the course of that appeal, the Club submitted new evidence in the form of witness statements from each of the Defendants, dated November and December 2010 respectively, which included a copy of the Agreement. Those witness statements stated that the Claimant's services were provided under the Agreement, that that was an agreement between the Claimant and the Wills Family (and not the Club) and that he had been paid "management fees due to [the Claimant] pursuant to the Agreement". This was to demonstrate that it was the Defendants and not the Club who were liable to pay for the Claimant's services under Agreement. The Court of Appeal held, relying in part on this evidence, that the Club had grounds for disputing that the fees were its liability, rather than that of either Wills Family or STFC.

**The claim as originally pleaded on 24 January 2012**

11. The Claimant's claim in POC 1 (as elaborated in a response, dated 20 January 2012, to a Part 18 request ("RFI")) was as follows.
12. The Claimant provided his services under the Agreement: §7. The term of the Agreement was extended beyond December 2004 either by an oral agreement made at meetings between the Claimant and the First Defendant at "The Litten" in Newbury in November 2001 (§8 and RFI §§9-10) alternatively by conduct after 1 December 2004 (§10). By oral request on 29 August 2007 the Claimant asked the Defendants for payment under the terms of the Agreement. The Defendants agreed to pay a sum and on 30 August 2007 the First Defendant paid to the Claimant the sum of £50,000 as a part payment towards the sums due under the Agreement. That payment was said to affirm the ongoing Agreement: §9. §11 set out, in 24 numbered sub-paragraphs, details of the variety of services provided by the Claimant under the Agreement.
13. Then, importantly, §§12 to 14 of POC 1 alleged that *"the Defendants have failed to comply with the terms of the Agreement by failing to pay the Claimant for the performance of the Services as agreed"*, going on to allege that the failure to pay the fees due and owing under the Agreement as extended constituted a breach of the Agreement; and that that breach caused loss and damage to the Claimant. The claim in POC 1 was thus for damages for breach of contract, the breach consisting of the failure to pay the fees due under the Agreement, as extended *in time*.
14. At §§15 to 20, the Claimant pleaded that the Defendants had confirmed the validity of the Agreement and that it was the Defendants in their personal capacity who were liable to pay the Claimant under the Agreement, by virtue of their admissions made in their witness statements in the winding up proceedings referred to in paragraph 10 above.

**The Defendants' defence**

15. By their Defence and Counterclaim served on 14 February 2012, the Defendants denied liability.

The Claimant had been subject to a director's disqualification order from December 1997 to December 2004. The Defendants engaged the Claimant to assist the Club and agreed to remunerate him by way of the transfer of a substantial shareholding in the Club, and not at all by way of wage, salary or other remuneration. The Claimant acted as de facto director of the Club's trading company. Concerned about working for the Club whilst disqualified, the Claimant proposed the terms of the Agreement which would protect the Claimant legally and satisfy potential investors who might otherwise express concerns. However the Claimant represented that the Agreement was merely a cover device and that he would not seek payment under it. Against this background, the Defendants raise the following defences to liability:

- (1) the Agreement was incomplete as not providing for remuneration or a commencement date alternatively it was a sham; and for those reasons was void ab initio and unenforceable; (§§ 26 to 29);
- (2) it was subject to a representation that it would not be enforced (§§30 to 35);
- (3) it was void because its terms were altered without the Defendants' consent (§§36 to 38);
- (4) it was entered into for an illegal purpose, namely to facilitate the Claimant's management of the Club in breach of his disqualification order and was thus unenforceable (§§39 to 45);
- (5) there is no right to payment under the Agreement because the condition of submission of an invoice in Clause 4.2 has not been met (§§56 to 58);
- (6) any claim under the Agreement is statute barred (§59);
- (7) the Agreement was not extended beyond 1 December 2004 (§§60 to 65).

Finally, the Defendants allege that in 2006 and 2007 they loaned substantial sums to the Claimant (including the £50,000 paid in August 2007). They counterclaim for repayment of outstanding sums due under those loans, in excess of £500,000 (§§79 to 83 and 87, 88). At §55, the Defence refers expressly to financial problems with the Wills family farming business in 2004.

**The Defendants' application to strike out/for summary judgment: April 2012 to July 2013**

16. On 23 April 2012, the Defendants applied to strike out all or part of POC 1 alternatively for "reverse" summary judgment on all or part of the Claimant's claim, on three grounds: first, that the claim was based on an illegal contract; secondly, that no right to payment under the Agreement had arisen since no invoices had been submitted (Clause 4.2) and thirdly, that the claims were statute-barred. Substantial witness evidence was filed by both parties between May and July 2012. In a further witness statement dated 2 July 2012, the Claimant stated that at the time of the Agreement the Wills family had a very substantial overdraft with the bank and that the Agreement was never enforced as the Defendants did not have the money. At the time of the Agreement the Wills did not have the income to pay for his services and as such the terms of his work were orally varied in that he would get paid not in line with the terms of the consultancy agreement, but sometime in the future. He referred to evidence dated 24 November 2004 showing that both the Wills farm businesses were "flat broke". Thus the case that the payment terms were varied due to the Defendants' financial situation was made in this witness statement in July 2012, and there was reference to events on or around 24 November 2004, although it was not alleged that this variation was made at a meeting on that date.

*6 December 2012: the first hearing before Master Teverson*

17. The application was heard by Master Teverson on 6 December 2012. He decided to dismiss the

application in relation to the first two grounds (illegality and no right to payment). As to the third ground, limitation, Master Teverson adjourned the application and gave more time for the Claimant to plead more clearly the cause of action so that limitation could be determined at the resumed hearing. The formal order ("the First Order") reflecting this decision was made later, on 26 January 2013 (as set out in paragraph 21 below).

18. In his ex tempore judgment, Master Teverson dismissed the application based on grounds of illegality as it was not suitable for summary determination. He then addressed the second and third grounds (no right to payment and limitation) together. As to Clause 4.2 he recorded that the Claimant's response was to allege that the Agreement had been varied by subsequent agreement between the parties (transcript §8). After pointing to the difficulties in the Claimant's pleading of breach of contract and entitlement to payment, he concluded (§13) that he did not think that it was right to strike out the whole of the claim on this application as matters stood on the basis of Clause 4.2. He commented at the same time that POC 1 might be said to obstruct the just disposal of the proceedings, because they did not clarify when the Claimant claims that his cause of action accrued. The right course was to order the claimant to amend the POC1. POC 1 were inadequate and "*must be amended if the claim is allowed to proceed*" (§14). When counsel for the Defendants sought to clarify the basis for refusing the application, Master Teverson said "*In relation to 4.2 I take the view that the claimant has a real prospect of success of being able to circumvent that point by being able to rely upon the way in which the matter has operated*". He added that "*I have made requiring the particulars of claim to be amended, because it may be in the light of what is pleaded there is still some ground for the court considering the limitation issues*". In refusing permission to appeal, Master Teverson added "*in relation to the issue concerning clause 4.2 I have indicated that the matter involves ... factual investigation as to how the parties conducted themselves in relation to the agreement*". In this way, the Claimant was put firmly on notice of the inadequacy of his pleading. Those facts as to how the parties conducted themselves are now sought to be set out in POC 5, particularly at paragraphs 8, 9, 12A and 13A set out in paragraphs 33 to 35 below.

*Events following the first hearing: December 2012 to March 2013*

19. On 20 December 2012, the Claimant served a further amended pleading: the first draft Re-Amended Particulars of Claim ("POC 2"). POC 2 is the version which was before Master Teverson on 11 April 2013 and made the subject of the Second Order. POC 2 sought to introduce new versions of paragraphs 12 to 14, referring to two distinct demands for payment said to have been made by the Claimant on 22 August 2008 and in July 2010. The Claimant alleged that the claim under the Agreement did not fall due at all until the Claimant made a demand by letter dated 22 August 2008. It also added in an additional paragraph in the prayer for relief to claim "repayment of the debt", in addition to damages.
20. In his witness statement in support of POC 2 dated 4 January 2013, the Claimant explained the agreement that the Defendants would pay for his work when they had money themselves, saying that by 24 November 200, the Defendants were flat broke. They could not afford to pay him under the terms of the Agreement. "*We agreed I would be paid when they had the money to do so and I would continue to help the Wills family*". The Claimant expressly stated that he made a demand in August 2008. The Defendant responded by requiring the Claimant to seek permission to amend in this form at the same time at the resumed hearing of the strike out application; that resumed hearing in fact took place on 11 April 2003.

*The First Order*

21. On 26 January 2013, the formal order following the judgment of 6 December and a further ruling on 25 January 2013 (the First Order) was made. It provided that:
  - (1) the application to strike out, or for summary judgment, on grounds of illegality is refused;

- (2) the application to strike out, or for summary judgment, on grounds that no right to payment had arisen is refused;
  - (3) the Claimants shall apply to re-amend the Amended Particulars of Claim by 20 December 2012 to clarify when it was alleged that breach occurred;
  - (4) the application to re-amend and the balance of the Defendant's application to strike out on limitation grounds be re-listed before the Master;
  - (5) the time for appealing was extended until 21 days after the balance has been determined.
22. On 28 January 2013 the Defendant made a further application seeking an order that the claim form and POC 1 be struck out on wider grounds, including that they were an abuse and embarrassing, that the claim was inherently implausible and that the changes in the various witness statements to the essential elements of claim were such as to render the claim incapable of belief. On 4 March 2013, the Claimant applied to re-amend the particulars of claim in the form of POC2.

*The second hearing before Master Teverson: 11 April 2013*

23. On 11 April 2013 Master Teverson heard the balance of the Defendants' original application, its further application of 28 January 2013 and the Claimant's application to re-amend the particulars of claim in the form of POC 2. He reserved judgment.

*Master Teverson's second judgment and the Second Order: 26 June 2013*

24. On 26 June 2013 Master Teverson handed down judgment. After reciting the history, he referred to his first judgment, explaining why he had dismissed the application to strike out in relation to illegality and in relation to failure to invoice. In relation to the latter ground, he said that he had decided then that this was too narrow a ground on which to dismiss the whole claim summarily: §17. As to limitation, he explained that he had required the Claimant to plead more clearly when the cause of action accrued, and referred to the fact that now POC 2 identified a demand in August 2008: §19. He then held that he could not strike out on grounds of limitation alone, as the limitation issue was too closely bound up with factual issues and would have to be determined at trial: §20. In relation to the Defendants' further application to strike out on broader grounds of incoherence of the contract claim, he found it credible that the Claimant expected to be paid at a future date, but he agreed that claim for amounts going back to the date of the Agreement was less credible. He added that he did not think the claim for payment arose from the Agreement, but rather it was based on an expectation that the Claimant would be paid reasonable remuneration: §34. However he thought it not appropriate to grant reverse summary judgment and that the case should go to trial. He concluded by identifying two unsatisfactory features in the pleading in POC 2. First the claim was unquantified. Secondly, he considered that the claim could not properly be formulated as a claim for damages for breach of contract. The only possible claims could be for debt for an agreed sum or a claim in quasi-contract or restitution for reasonable remuneration: §§37 to 40. He made the following order (the Second Order):

- (1) Paragraphs 12 to 14 of POC 1 (the damages claim) be struck out;
- (2) the Claimant's application to re-amend in the form of POC 2 be dismissed, save for the inclusion of the "debt" claim in the prayer for relief;
- (3) there be no order as to the balance of Defendants' applications to strike out/summary judgment relating to limitation and broader grounds;
- (4) the Claimant to provide particulars of the value of the claim by 5 July 2013;
- (5) the Claimant shall, if so advised, serve any further draft Re-Amended Particulars of Claim by 5 July 2013 (paragraph 6).

*Events following the Second Order: July 2013 to February 2014*

25. In line with paragraph 6 of the Second Order, on 5 July 2013 Claimant served a second version of

draft Re-Amended Particulars of Claim (POC 3). This draft omitted the original paragraphs 12 to 14 and relied only upon the alleged oral demand for payment made at the meeting in July 2010, and omitted any reference to a demand in August 2008; it also included for the first time claims for quantum meruit and for restitution, presumably in response to Master Teverson's observations at §40 of his second judgment.

### *The Appeal*

26. On 22 July 2013, the Defendants issued notice of appeal against Master Teverson's two orders. On 6 November 2013, Norris J refused permission to appeal on paper. On 11 February 2014, Defendants renewed their application for permission to appeal orally, contending that Master Teverson should have adjourned the application to strike out, pending an application to amend remedying the defects and not dismissed the strike out application in the absence of a viable amendment. On 14 February 2014 Mr Justice Arnold granted permission to appeal and he directed that the application to re-amend should be heard at the same time as the Defendants' appeal.

### **The Appeal and the Application to Re-amend**

27. The appeal and the application to re-amend were heard initially on 17 and 18 July 2014. As a result of argument on the first day, and at my prompting, on 18 July 2014, the Claimant produced a further version of the draft Re-Amended Particulars of Claim (POC 4), which sought to set out in the particulars of claim how the Claimant said that Clause 4.2 of the Agreement did not apply. As a result of the changes introduced in POC 4 and the substantial volume of new case authority then produced by the parties, the hearing was adjourned, and subsequently re-fixed in the first place for 23 September 2014. On 23 July 2014, after the hearing, the Claimant produced a yet further version of the draft Re-Amended Particulars of Claim (POC 5).
28. By this time, the Defendants had raised the limitation objection to the re-amendments sought. The Claimant was concerned that his application to re-amend should not be prejudiced by the adjournment, and following application, at a further hearing on 25 July 2014, the Defendants gave undertakings not to rely upon a limitation defence in respect of the restitution claims in so far as causes of action accrued between 25 July 2008 and 23 September 2008 (i.e. six years before the date of the undertaking and the then next hearing).
29. Although extensive written argument on POC 5 was duly served in September, in fact the hearing on 23 September 2014 did not go ahead and was re-fixed for November 2014. At the outset of that hearing, counsel for the Defendants accepted that, since he was raising limitation as a ground to refuse amendment in respect of the contract claims too, no limitation objection to amendment would be taken in respect of causes of action in contract accruing on or after 25 July 2008.

### *The Parties' overall cases*

30. *The Defendants* contend that Master Teverson's approach was wrong. Having concluded that the pleading before him was unsatisfactory, he was wrong to *dismiss* the Defendants' strike out applications, whilst allowing the Claimant a further opportunity to amend his statement of case. The Master ought either to have granted the Defendants' application to strike out or *adjourned* that application to see if the Claimant could remedy the defects in the then current particulars of claim, by way of re-amendment, and thereafter, upon considering that re-amendment, he would have refused it and struck out the existing Particulars of Claim. They submit that the application now to re-amend in the form of POC 5 should be refused, thereby leaving only the existing POC 1 (without original paragraphs 12 to 14). POC 1 does not plead a viable claim, and should be struck out. It follows that their appeal against the Orders should succeed. If, on the other hand, the Claimant's application to re-amend is successful, the Defendants accept that their appeal cannot succeed, save in relation to the costs, since in any event the Master should not have



dismissed their applications to strike out.

31. *The Claimant* contends that permission should be granted to re-amend in the terms of POC 5, and in that event the Defendants' appeal should be dismissed. If permission to re-amend is not granted nevertheless POC 1 (without paragraphs 12 to 14) still stands and discloses a viable claim in debt, based on admissions and the fact that Master Teverson was not prepared to strike out on the basis of clause 4.2.
32. I thus approach the issues as follows. First, should the Claimant be granted permission to re-amend in the form of POC 5? Secondly, and depending on my decision on the first issue, what are the consequences for the Defendants' appeal addressing the applications to strike out and/or summary judgment?

### **The Application to Re-Amend**

(1) POC 5: The current Draft Re-Amended Particulars of Claim served on 23 July 2014

33. The application to re-amend is now made in respect of POC 5. Paragraphs 1 to 7 remain as in POC 1, save for the inclusion of an express reference to Clause 4.2 of the Agreement. Paragraph 8 is amended by giving more detail of the further agreement made in November (the agreement is now said to have been made in November 2001), and by introducing, crucially, the variation of the Agreement as to the terms of payment and the facts relating to why Clause 4.2 did not operate. Paragraph 8 provides, so far as material (with amendments to POC 1 shown in underlining):

"On or around 24 November 2004 it is averred that Littlecote Farm Partners and Highclose Farm Enterprises & Co Limited the key family businesses were broke. The claimant was asked by the defendants at the first defendants' private office at Eastridge Farm to save them from bankruptcy but had no funds to pay the claimant under the Agreement. ...[the witness statement of 2 July 2012 referred to in paragraph 16 above is referred to and appended]. The parties agreed that the claimant would continue to provide the Services to the Wills family. Furthermore the parties agreed that the claimant would wait for payment and the debt would fall due when the Wills family received suitable funds from their businesses. Furthermore by this subsequent November agreement between the claimant and the first and second defendant the claimant was asked to continue to provide the Services after 1 December 2004 and pursuant to that further agreement continued to do so. It is averred that this varied clause 5.1 and 5.2 of the Agreement thereby extending the duration of the Agreement. Furthermore by the November variation the parties agreed that there was no need to issue invoices pursuant to clause 4.2 of the Agreement but that the payment mechanism would be that the defendants would pay the claimant when they were able to afford it or that the claimant would contact either defendant and ask for payment of his Fees when the defendants' were financially stable and able to afford to make payment under the Agreement ..."

Paragraph 9 provides:

"In the summer of 2007 the first defendant received a large sum of money from the sale of his Eastbourne properties. In the circumstances he made a payment of £50,000 to his farming manager Robert Loxton which the claimant became aware of from Mr Loxton and on or around the 27 August 2007. By oral request made by telephone on 29 August 2007, and pursuant to the 24 November 2004 agreement, the claimant asked the first defendant for payment under the terms of the Agreement. For the avoidance of doubt it is averred that the payment asked for was the same sum that was paid to Robert Loxton and the balance of the debt would continue to be deferred until demanded. In the circumstances the balance of the debt included the ongoing Services supplied to the Wills Family. The first defendant agreed to pay the sum and on 30 August 2007 the first

defendant paid to the claimant the sum of £50,000 as a part payment towards the sum due under the Agreement. Further or alternatively, the first defendants' performance in paying to the claimant the £50,000 due under the Agreement for the performance of the Services in the absence of obliging the claimant to comply with clause 4.2 of the Agreement to supply an invoice by such action the first defendant waived off the contractual obligation upon the claimant to produce any invoices. Furthermore the first defendant's conduct in not requiring an invoice confirms the 24 November agreement. It is averred that this payment recognises and affirms the ongoing Agreement between the parties which had been extended beyond the terms originally drafted in the Agreement and affirms the debt owed by the defendants to the claimant arising out of performance of the Services. It is further averred that this payment was made into the account of Dunwoody Marketing Communications by the first defendant at the request of the claimant."

34. Paragraph 10 is amended slightly to allege that the continuation of the Agreement had arisen as set out in paragraph 8 - thereby changing this plea from amendment by conduct to amendment by the agreement on 24 November 2004 and to that extent is inconsistent with the earlier particularisation of paragraph 8.
35. Paragraph 11 remains essentially unaltered, although a new paragraph 12 is included to refer to an Appendix where it is said that a particularised list of the services provided by the Claimant and the relevant period is set out. Old paragraphs 12 to 14 of POC 1 are deleted, as required by the Second Order. Then new paragraphs 12A and 13A plead the obligation to pay arising, as follows:

"12A Upon performance of the Services the defendants were required to provide the claimant remuneration for the work done either when he requested payment from them at a time when they had come into money pursuant to the November agreement or when the Wills family received suitable funds from their businesses and had money to pay. In breach of the Agreement the defendants failed to pay the claimant any of the sums due other than the payment of £50,000.

#### PARTICULARS OF BREACH

13A The defendants have failed to pay the debt owed by them to the claimant arising out of the Agreement and the Services that had been provided to them by the claimant. Following a meeting between the claimant and the second defendant in July 2010 at the offices of Hacker Young UHY and arranged by Andrew Andronicus at the time when the holding company was put into administration, the claimant made a further demand to the second defendant to be remunerated for the Services. In breach of the request the defendants failed to pay the sums requested. For the avoidance of doubt this demand was for all the debt that was due to the claimant for the Services he provided under the Agreement."

New paragraph 14A then pleads the quantum of the sums due as follows:

"Further it is averred that the total duration that the claimant performed services for the defendants was from 3 January 2002 to 3 October 2008, being a period of 6 years and 9 months, at a pro-rata rate of £6,666.67 per month, making a total of £540,000.27 less the £50,000 paid as set out in paragraph (9) above, making a total due of £490,000.27. For the avoidance of doubt the claimant avers that at all times this was how he was to be paid and not on a case by case or piecemeal basis."

36. Mr Power asserts, and I accept, that this new paragraph 14A quantifies the claim in contract,

pleaded in paragraphs 8, 9, 12A and 13A. He further asserts, and I accept, that the next following paragraphs, 14B to 14D, assert alternative claims in restitution. They provide:

"14B Alternatively the claimant is entitled to £490,000.27 as a reasonable fee which the claimant is entitled to recover by way of quantum meruit. A particularised list of the different Services provided and the relevant period are set out in Appendix 5 attached to this claim.

14C Further and alternatively if the Agreement is void or otherwise unenforceable than [sic] the claimant is entitled to recover £490,000.27 or a reasonable sum as remuneration for the work undertaken on behalf to the defendants as set out in paragraph 11 herein for which they were obliged to pay the claimant.

14D Accordingly the claimant is entitled to recover and the defendants are required to pay him the sum of £490,000.27 or such other sum as the court consider to be a reasonable fee in the circumstances of the case"

37. Paragraphs 15 to 20 remain largely unaltered, referring to the admissions made in the course of the winding up proceedings. Paragraph 20 is amended to read as follows:

"By way of these admissions the defendants have affirmed the Agreement as lawfully binding upon them and allege all Fees have been satisfied by them, the latter assertion being disputed by the claimant. In the circumstances that it is admitted and common ground between all parties that the claimant never rendered any invoices as required by Clause 4.2 of the Agreement, by the defendants' performance in paying the claimant the Fees due under the Agreement in the absence of obliging the claimant to comply with clause 4.2 of the Agreement the defendants waived off the contractual obligation upon the claimant to produce any invoices. It is further averred that in making these payments the performance confirmed that the Fees were the £80,000 sum per annum as per the manuscript entry made at page 4 of the Agreement".

*Summary of the Claimant's case now*

38. The claim as now put forward in POC 5 advances three bases of claim:
- (1) Contract: a claim based on the Agreement as varied in or around November 2004: POC 5 paragraphs 8, 9, 12A and 13A;
  - (2) Restitutionary quantum meruit claim, on the basis that the Agreement was valid and subsisting: POC 5 paragraph 14B and 14D;
  - (3) Restitutionary quantum meruit claim, on the basis that the Agreement was illegal and/or void and unenforceable: POC 5 paragraph 14C and 14D.
39. In relation to the contract claim in particular, two points emerge. First, the variation is alleged to have been made at a meeting held at the First Defendant's offices on 24 November 2004; previously it was alleged to have been made at a meeting at the Claimant's premises in November 2003. The agreed variation is alleged to have been as to the terms of payment; previously it was alleged to have concerned the duration of the Agreement only. Secondly, there appears to be two, alternative, bases upon which payment was to become due: first, when the Defendants could afford to pay ("afford only"); and secondly, when the Claimant made a demand for payment at a time when the Defendants were able to pay ("demand/afford"). Moreover, the Defendants have pointed to three particular difficulties in the contract pleading.

- (1) At two points in paragraph 9, the Claimant refers to "sums due" and "the debt owed" as at August 2007; this is strictly inconsistent with the pleaded "demand/afford" basis for liability.
- (2) On the other hand, the plea in the fourth sentence of paragraph 9 saying that the balance of the debt would be deferred until demanded is inconsistent with the "afford only" basis.
- (3) On the "afford only" basis, the Claimant's case as to when that condition was satisfied is far from clear. Either the sale of the Eastbourne properties referred to in paragraph 9 is to be taken as the date that the condition was satisfied once and for all, in which case the date when payment for services provided *after* August 2007 fell due is not clearly pleaded or is possibly monthly thereafter; or, as the Claimant's counsel asserted in oral argument, the Claimant does not know when the "afford" condition was satisfied.

**(2) Legal principles relating to amendment of statements of case**

*(a) Amendment in general*

40. As regards amendment of a statement of case in general, CPR 17.1(2)(b) provides that, once served, a party may amend its statement of case with the permission of the court. Principles governing the exercise by the Court of its discretion under CPR 17.1(2)(b) are set out in *The White Book Service 2014* §§17.3.5 to 17.3.7.
41. First, amendments ought in general to be allowed so that the real dispute between the parties can be adjudicated upon, subject to any prejudice being compensated for in costs and subject to the public interest in the administration of justice.
42. Secondly, an application to amend will be refused if it is clear that the proposed amendment has no real prospect of success; in this regard the test to be applied is the same as that for summary judgment under CPR 24. Thus, the court may reject an amendment seeking to raise a version of the facts which is inherently implausible, self-contradictory or is not supported by contemporaneous documentation. Equally, an amendment seeking to raise a claim which is unsustainable in law will not be allowed.
43. Thirdly, late amendments, close to the date of trial, will require particular scrutiny. In *Brown v Innovatorone Plc* [2011] EWHC 3221 (Comm) Hamblen J (at §14) considered relevant factors in deciding whether to allow a late amendment; these included the history as regards the amendment and the explanation as to why it was being made late; prejudice to either party if the amendment was or was not allowed; and whether the text of the amendment was satisfactory in terms of clarity and particularity. The Defendants submit that this last factor also applies in the present case.

*(b) Amendment after the end of a relevant limitation period*

44. Special provision is made for amendment of a statement of case which raises a limitation issue. This is to be found in the combined effect of s.35 Limitation Act 1980 ("the 1980 Act") and CPR 17.4, and, in the particular case of an amendment adding or substituting a new cause of action, in s.35 (2)(a) and (5)(a) of the 1980 Act and CPR 17.4(2). In this regard, I have considered a number of authorities on the operation of these provisions and in particular *Welsh Development Agency v Redpath Dorman Long* [1994] 1 WLR 1409; *Darlington Building Society v O'Rourke* [1999] PNLR 365; *Paragon Finance v D & B Thakerer & Co* [1999] 1 All ER 400; *Lloyds Bank v Rogers* [1999] 3 EGLR 83; *Hoechst UK v IRC* [2003] EWHC 1002 (Ch); *Furina v Bajwa* [2004] 1 WLR 1971; *Aldi Stores Ltd v Home Buildings Plc* [2005] PNLR 136; *Finlan v Eyton Morris* [2007] EWHC 914 (Ch) (citing *Smith v Henniker-Major & Co* [2003] Ch 182t ; *Berezovsky v Abramovich* [2011] 1 WLR 2290; *Chandra v Brooke North* [2013] EWCA 1559

and most recently, *Ballinger v Mercer Ltd* [2014] 1 WLR 3597 (CA).

45. I do not set out in full the provisions of s.35 of the 1980 Act and CPR 17.4(2). Their effect can be summarised as follows. For the purposes of the 1980 Act any new claim made in the course of existing proceedings which involves the addition or substitution of a *new cause of action* is treated as a separate action commenced on the same date as the original proceedings: s.35(1) and (2)(a) of the 1980 Act. Where a statement of case is amended to add such a claim (i.e. involving a new cause of action) after an applicable limitation period has expired, the effect is to deprive the defendant of an accrued limitation defence. By the combined effect of s.35(3) to (5)(a) of the 1980 Act and CPR 17.4(1) and (2), the court may not allow such an amendment after the expiration of any relevant limitation period unless the new cause of action arises out of the same facts or substantially the same facts as are already in issue on any claim previously made in the original action. (As pointed out in *Ballinger* at §33, CPR 17.4 does not accurately or faithfully reproduce the wording of s.35(5)(a)).
46. In *Ballinger*, Tomlinson LJ recently reviewed the authorities and, at §15 summarised what he described as "the three-stage test that the claimants need to satisfy before being granted permission to raise a new claim in an existing action". The three stages there identified (together with my additional explanation) are as follows:
  - (1) Is it reasonably arguable that the opposed amendments are outside the applicable limitation period ("arguable limitation defence")? If not, then the amendment falls to be considered under CPR 17.1(2)(b).
  - (2) If the answer to (1) is yes, do the proposed amendments seek to add or substitute a *new cause of action*? If they do not, then again the amendment falls to be considered under CPR 17.1(2)(b).
  - (3) If the answer to (2) is yes, does the new cause of action arise out of *the same or substantially the same facts* as are already in issue in the existing claim? If not, the amendment cannot be allowed. If so, then the Court has a discretion under CPR 17.4(2) to allow the amendment.
47. A number of further principles emerge from the authorities. First, as regards Stage 1 (*arguable limitation defence*):
  - (1) The issue upon an application to amend is whether the defendant has an *arguable* limitation defence to the new claim; if he does, then the amendment cannot be allowed unless the two further stages are surmounted. The Court may well not be able to decide, upon such an application, whether that limitation defence is or is not made out. In this way, the defendant is not deprived of an arguable limitation defence, as a result of the "relation back" effect of an amendment under s.35(1), whilst at the same time the claimant is able to bring a fresh action, to which he is free to demonstrate that in fact there is no limitation defence. The claimant remains free to bring a separate action, and it may be advisable to do so.
  - (2) The burden of persuasion on this issue lies upon the claimant i.e. to show that the defendant does *not* have a reasonably arguable limitation defence: see *Ballinger*, supra at §§24 to 29 citing also *Welsh Development Agency* at 1425H and *Paragon Finance* at 404.
  - (3) A new claim is not made by amendment until the pleading is amended. It follows that the relevant date for the purpose of calculating the limitation period is the date at which the amendment is actually made, which by definition must be no earlier than the date at

which leave to make the amendment is granted: *Welsh Development Agency* at 1421B-D and *Furina v Bajwa*, at 1977G.

48. As regards Stage 2 (*new cause of action*) from the recent analysis of the authorities by Longmore LJ in *Berezovsky v Abramovich* §§59 to 69, the following principles arise:
- (1) The "cause of action" is that combination of facts which gives rise to a legal right; (it is the "factual situation" rather than a form of action used as a convenient description of a particular category of factual situation: *Lloyds Bank v Rogers* at 85F and *Aldi Stores* at §21).
  - (2) Where a claim is based on a breach of duty, whether arising in contract or tort, the question whether an amendment pleads a new *cause of action* requires comparison of the unamended and amended pleading to determine (a) whether a different duty is pleaded (b) whether the breaches pleaded differ substantially and (c) where appropriate the nature and extent of the damage of which complaint is made: *Darlington* at 370C-D and see also *Berezovsky* §59. (Where it is the same duty and same breach, new or different loss will not be new cause of action. But where it is a different duty or a different breach, then it is likely to be a new cause of action).
  - (3) The cause of action is every fact which is material to be proved to entitle the claimant to succeed. Only those facts which are material to be proved are to be taken into account; the pleading of unnecessary allegations or the addition of further instances does not amount to a distinct cause of action. At this stage, the selection of the material facts to define the cause of action must be made at the highest level of abstraction. *Berezovsky* §60 citing *Cooke v Gill* (1873) LR 8 CP 107 and *Paragon Finance*, *supra*.
  - (4) In identifying a new cause of action the bare minimum of essential facts abstracted from the original pleading is to be compared with the minimum as it would be constituted under the amended pleading: *Berezovsky* §§61 and 62.
  - (5) The addition or substitution of a new loss is by no means necessarily the addition of a new cause of action: *Berezovsky* §64 and *Aldi* §26. Nor is the addition of a new remedy, particularly where the amendment does not add to the "factual situation" already pleaded: *Lloyds Bank v Rogers* per Auld LJ at 85K.
49. As regards Stage 3, ("*arising out of the same or substantially the same facts*") a number of points emerge, particularly from *Ballinger* at §§34 to 38:
- (1) "Same or substantially the same" is not synonymous with "similar".
  - (2) Whilst in borderline cases, the answer to this question is or may be substantially a "matter of impression", in others, it must be a question of analysis: *Ballinger* §§35 and 36.
  - (3) The purpose of the requirement at Stage 3 is to avoid placing the defendant in a position where he will be obliged, after the expiration of the limitation period, to investigate facts and obtain evidence of matters *completely outside the ambit of and unrelated to* the facts which he could reasonably be assumed to have investigated for the purpose of defending the unamended claim.
  - (4) It is thus necessary to consider *the extent to which* the defendants would be required to embark upon an investigation of facts which they would not previously have been concerned to investigate: *Ballinger* §38. At Stage 3 the court is concerned at a much less abstract level than at Stage 2; it is a matter of considering the whole range of facts which

are likely to be adduced at trial: *Finlan* at §§56 and 57 citing *Smith v Henniker-Major* at §96.

- (5) Finally, in considering what the relevant facts are in the original pleading a material consideration are the factual matters raised in the defence: see *Berezovsky* §73 and *Goode v Martin* [2002] 1 WLR 1828 where the Court of Appeal interpreted CPR 17.4(2) so as to produce a just result where an amendment involved the introduction of no new facts. There the facts in question had been raised in the defence, though not in the original statement of claim.

- (3) The Parties' contentions and the Issues on re-amendment

*The Defendants' case*

50. In relation to the re-amended claim in contract, the Defendant submits:

- (1) regardless of limitation considerations, permission to amend, pursuant to CPR 17.1(2)(b), should be refused, because the proposed re-amendments are inadequately pleaded, conflicting and incoherent;
- (2) with the exception of claims accruing on or after 25 July 2008, the claim or claims are arguably time barred, raise a new cause of action and, because they do not arise out of the same or substantially the same facts, cannot be allowed under CPR 17.4(2); such claims must be pursued, if at all, by the Claimant commencing a fresh action.

In relation to the re-amended claims in restitution, the Defendant submits:

- (3) regardless of limitation considerations, permission to amend, pursuant to CPR 17.1(2)(b), should be refused, because (a) they are not sustainable as a matter of law and/or (b) they are inadequately or improperly pleaded;
- (4) with the exception of claims accruing on or after 25 July 2008, the claim or claims are arguably time barred, raise a new cause of action and, because they do not arise out of the same or substantially the same facts, cannot be allowed under CPR 17.4(2); such claims must be pursued, if at all, by the Claimant commencing a fresh action.

*The Claimant's case*

51. In relation to there-amended claim in contract, the Claimant submits:

- (1) regardless of limitation considerations, permission to amend, pursuant to CPR 17.1(2)(b), should be granted, because the Claimant's case is pleaded with sufficient clarity;
- (2) as regards limitation, the claims in contract are not arguably statute barred; even if they are, they do no raise a new cause of action, and in any event, they arise out of the same or substantially the same facts as those in POC 1 and the Court should exercise its discretion under CPR 17.4(2) to allow the re-amended claims.

In relation to the re-amended claims in restitution, the Claimant submits:

- (3) regardless of limitation considerations, permission to amend, pursuant to CPR 17.1(2)(b), should be granted, because they raise arguable claims in law and are sufficiently pleaded;
- (4) as regards limitation, the claims in restitution are not arguably statute barred; even if they are, they do no raise a new cause of action, and in any event, they arise out of the same or

substantially the same facts as those in POC 1 and the Court should exercise its discretion under CPR 17.4(2) to allow the re-amended claims.

*The Issues*

52. Thus, the issues on the application to re-amend are, in respect of each of the contract claims and the restitution claims, first, whether in each case, permission to re-amend should be refused under the general discretion under CPR 17.1(2)(b) on the basis that the case pleaded has no real prospect of success, and secondly, if and to the extent not, whether the re-amended claims raise limitation issues and thus whether the provisions of CPR 17.4(2) apply and whether permission must or should be refused under those provisions. In the following paragraphs I address each of these issues, in respect of the contract claim, the paragraph 14B restitution claim and the paragraph 14C restitution claim in turn.

**(4) Analysis**

53. At the outset I note that the Claimant has had ample time to plead his case clearly. As the Defendants have pointed out with considerable justification, the Claimant has made numerous attempts to clarify his case, there have been significant changes as between the different drafts put forward and inconsistencies with witness statements. Further Master Teverson put the Claimant on notice that his pleading was not sufficiently clear. So, subject to making some allowances for the imperfections of drafting and taking care not to seek to construe the pleading as if it were a statute, I assess the application to re-amend on the basis of what is now in POC 5. It is this case, and no other.

**(A) Contract Claims**

54. Master Teverson said on 6 December 2012 that at that point he considered that there was a real prospect of the Claimant being able to circumvent the Clause 4.2 defence by being able to rely upon the way in which the matter in fact operated. In my judgment, this has been the purpose of the amendments now pleaded in paragraphs 8 and 9 of POC 5. The Claimant has purported to plead precisely how it in fact operated and how he can circumvent Clause 4.2.
55. On their face, and as contended by the Defendants, paragraphs 8 and 9 put forward two bases of claim in contract: first the debt fell due when the Defendants can afford to pay ("the afford only" basis"); secondly and alternatively the debt fell due upon demand by the Claimant at a time when the Defendants could afford to pay ("demand/afford" basis). I consider each of these bases in turn

*(i) CPR 17.1(2)(b): real prospect of success*

56. The Claimant submits that the amendments do no more than clarify the facts already advanced. New paragraph 9 merely clarifies what is already pleaded.
57. The Defendants' overall submission is that, as regards the "afford only" basis, there is no clear pleading as to when in fact the Defendants could afford to pay; that it is plainly inconsistent with other parts of pleading saying that payment was duly only after a demand and inconsistent with what the Claimant said both in written and oral argument. As regards the "demand/afford" basis, it is inconsistent with the pleaded case in paragraph 9 and inconsistent with the Claimant's written argument which refers only to the need for a demand. The pleading is thus not satisfactorily clear: see *Innovatorone* at §14.
58. *First*, as regards the "afford only" basis of claim, in my judgment the Claimant's pleaded case is not sufficiently clear, particularly bearing in mind the time and number of opportunities which the



Claimant has had in which to state his case clearly. The claim is inconsistent with the "demand/afford" claim made. Furthermore, there is no sufficiently clear pleading as to when it was that the Defendants could afford to pay the Claimant either in whole or as regards amounts from time to time; and thus when the debt fell due. The Claimant accepted in oral argument that he has not pleaded whether or when the Defendant could afford to pay, saying that this is not possible as it not within the Claimant's knowledge. Be that as it may, if and in so far as the Claimant's claim is that the sums only fell due when the Defendants could afford to pay, the failure to plead the relevant date, means that, on this basis, it is impossible to see whether the debt or debts fell due at all (and if so, when) and there is and can be no complete cause of action.

59. Further, even if contrary to what was said in oral argument, the "afford" condition was met once and for all by the events in August 2007 pleaded at paragraph 9, there is no sufficiently clearly pleaded case as to when the debt or debts in respect of the work carried out *after* that date fell due - for example, as and when each particular piece of work was done, or on a monthly basis or on a yearly basis. The Defendants themselves suggest that one option is that the sums fell due on a monthly basis; however paragraph 14A of the Claimant's own pleading is not clear as to the date or dates when the sums claimed fell due.
60. For these reasons, and after all this time, the contract claim based on "ability to afford" is inconsistent, incoherent and inadequately pleaded. It has no real prospect of success and accordingly I refuse permission to re-amend to introduce such a case.
61. *Secondly*, as regards the "demand/afford" basis of claim in contract, I accept that the references in paragraph 9 to payment in August 2007 being payment towards "the sum due under the Agreement" and to the payment affirming "the debt owed" seem to suggest that by that time all other sums were due, and thus is inconsistent with the "demand" condition. However, as regards the first of these references, the relevant sentence has been carried over from POC 1 and has not been adjusted to take account of the proposed re-amendment. I am prepared to accept that this is no more than a drafting oversight. The second reference to "debt owed" is new and difficult to understand; it is due perhaps to a lack of precision in drafting.
62. However in my judgment, the claim based on demand is sufficiently pleaded, most specifically because a specific demand is pleaded and thus the Claimant's case as when the obligation to pay arose is made clear. The claim based on "demand/afford" is really a claim based on a demand and, whilst there are some inconsistencies, overall I think it is arguable and raises some real prospect of success. Thus, subject to CPR 17.4(2), I am prepared to grant permission to re-amend for this basis of contract claim to be pursued. In light of the matters referred to in paragraph 29 above, no limitation issue arises in relation to claims in contract for payment for services carried out on or after 25 July 2008 and so I will grant permission to amend in respect of *those* claims under CPR 17.1(2)(b).

(ii) *CPR 17.4 and limitation*

63. I turn to consider CPR 17.4(2) in relation to "demand/afford" basis claims in respect of services rendered before 25 July 2008. In the light of my conclusion in paragraph 60 above, I do not consider this issue in relation to the "afford only" basis. (I note that, on that basis, it is likely that there would have been an arguable limitation defence in respect of sums claimed for services provided before 25 July 2008).

*Stage 1: Has the Claimant shown that the Defendant does not have an arguable limitation defence?*

64. The Defendants submit that they can raise a limitation defence in respect of contract causes of action accruing before 25 July 2008. The Claimant submits that the obligation to pay under the Agreement as varied did not arise until a demand was made in July 2010 and the cause of action

did thus not accrue until that date. The demand is a pre-condition to liability; in particular paragraph 12A makes it clear that the Defendant is only *required* to pay the Claimant on demand.

65. The Defendants accept that they have no arguable limitation defence, *if the* pleading is to be interpreted such that the July 2010 demand gives rise to the cause of action. However, the Defendants submit, it is far from clear that this is the legal consequence of the pleaded variation. It is at least arguable that the Claimant's pleaded contractual condition of a demand does not mean that time did not begin to run until the making of that demand in July 2010; rather the cause or causes of action accrued as and when the services were supplied. The requirement of a demand is a condition to enforcement, and not a condition to liability: *Legal Services Commission v Henthorn* [2012] 1 WLR 1173 (CA) at §§30-31, 45-46.
66. In the *Henthorn* case, the Legal Services Commission made payments on account for work done under civil legal aid certificates between 1992 and 1998. After assessment of those costs, the Commission sought repayment of the amount by which the payment on account exceeded the final costs as assessed. The Commission claim was made under Regulation 100(8) of the Civil Legal Aid (General) Regulations 1989, which provided:

*"Where after taxation or assessment, payments made under this regulation are found to exceed the final costs of the case, the solicitor or counsel (if any) shall, on demand, repay the balance due to the fund, {and where the total costs exceed any payments made under this regulation, the balance shall be paid from the fund}" (emphasis added)*

67. Proceedings to recover the overpayment were commenced in 2006 and it was argued by the defendant barrister that the claims were statute barred (under s.9 of the 1980 Act). The defendant contended that time began to run from the date that she had completed the work covered by the legal aid certificate. The Commission contended that time began to run not until the date of the "demand" made under Regulation 100(8) alternatively from the date of "assessment" of the costs.
68. The Court of Appeal held (§33) that time began to run from the date of "assessment" and not from the earlier date of work done, nor from the later date of the Commission's demand. The words "on demand" in the regulation and statutory context were a condition to "enforcement" and not a condition to "liability" (such that time only ran from the date of the demand). Lord Neuberger stated at §30 that the words "on demand" carry with them an obligation on the Commission to make a demand before taking any steps to *enforce* its right to recover the balance. At §31 he said:

*"Save where it is the essence of the arrangement between the parties that a sum is not payable until demanded (e.g. a loan expressly or impliedly repayable on demand), it appears to me that clear words would normally be required before a contract should be held to give a potential or actual creditor complete control over the time when time starts running against him, as it such an unlikely arrangement for an actual or potential debtor to. have agreed" (emphasis added)*

He continued, at §32, that once the assessment was complete, the Commission had a claim, but in order to be entitled to recover there had to be a demand. This result was *"consistent with commercial common sense and with the natural implication that the expression "on demand" imposes an extra duty, not an extra benefit, on the Commission when the balance is in its favour, as opposed to when the balance is against it"*

69. At §§45-56 Lord Neuberger considered a number of authorities not concerned with the Regulations (in addressing in particular the question whether the cause of action accrues on date of relevant work rather than assessment). Whether there is a difference between the date the claim arose and the date from which it is actionable *"is a question of construction of the relevant instrument, whether statute, regulations, rules or contract in each case"*: §45. Further in decided cases where only one party could be the creditor, an important factor supporting the construction

of a statute or contract that the need for a demand was not a condition as to liability, rather than enforcement, is that the creditor should not be able to control the date from which time ran: see §§47 and 49-50 citing *Swansea City Council v Glass* [1992] QB 844 and *Coburn v Colledge* [1897] 1 QB 702.

70. The Claimant submitted in argument that the analysis in *Henthorn* does not apply to a contractual claim. The claim there was to enforce a *statutory* obligation, which was more akin, if anything, to a restitutionary claim. However, as appears from the foregoing, Lord Neuberger went out of his way to indicate that his analysis would apply equally to the case of a contractual obligation.
71. It may well be that at a trial, the terms, construction and context of the agreement are such that it is clear that the parties intended the demand condition to be a condition to liability and not just a condition to enforcement. However that is not something that I can decide on this application to amend.
72. I conclude that, at this stage, the Claimant cannot demonstrate, on the basis of the pleaded material, that it is not at least arguable on the Defendants' part that, the requirement for a demand was only a condition to enforcement and that the cause of action accrued earlier, at the date when the relevant services were provided. Thus, the Defendants have an arguable limitation defence in respect of the contract claim.

*Stage 2: Does the claim raise a new cause of action?*

73. Applying *Darlington*, the Claimant submits that in both POC 1 and in POC 5, the relevant duty was a contractual duty to pay and the breach was the failure to pay. Paragraph 13A introducing the demand for payment in July 2010 does not introduce a new cause of action; it merely clarifies when time began to run.
74. Applying the approach summarised in *Berezovsky*, I consider this issue at the "highest level of abstraction" and regardless of the detail of the factual investigation that may arise. In my judgment, on this basis, the "demand/afford" basis of claim does raise a new cause of action. A comparison of POC 1 with POC 5 shows that POC 5 pleads a new duty in respect of payment and a new and different failure to pay. This new cause of action arises out of the oral agreement made in November 2004; the old duty to pay arose under Clause 4 of the Agreement and was a duty to pay on submission of an invoice; the duty to pay now arises from the agreement made in November 2004; and it is a duty to pay upon demand; most importantly the breach of duty is different and took place at a different time- in July 2010 on the Claimant's case. Because of these changes in the facts, there is clearly a change as to when the obligation to pay fell due: in some cases, as much as seven years later.

*Stage 3: Does the claim arise out of the same or substantially the same facts?*

75. The Defendants submit that the contract claim does not arise out of the same or substantially the same facts as those in issue in POC 1. The facts now pleaded require quite different evidence to succeed: evidence relating to a meeting on 24 November 2004 and as to the making of an oral demand in July 2010, and evidence relating to the impecuniosity and wealth of the Defendants from time to time. This will require witness evidence as to who said what and potentially the tracking down of different witnesses.
76. The Claimant submits that the amendments do no more than clarify that the demand for payment was made in 2010 and the circumstances in which the parties made the November variation agreement. The facts are substantially the same. Clause 4.2 was never relied upon and the November agreement has always been pleaded at paragraph 8 and 10. The factual differences in *Paragon Finance* and in *Ballinger* were of a different order.

77. It is the case that, on the basis of POC 5, evidence as to certain different and new events is likely to be needed: the meeting on 24 November 2001: attended by the Claimant and the First Defendant; the making of a demand by the Claimant to the Second Defendant following a meeting between the two men in July 2010 at the offices of Hacker Young and arranged by Andrew Andronikou.
78. It is equally the case that as matters stand in POC 1 and the Defence, there is already in issue in these proceedings a very extensive range of matters concerning the relationship between the Claimant and the Defendants and over a very extensive period of time, running from 2001 to 2009. The claim in POC 5 covers essentially the same matter as those covered in POC 1; the services provided by the Claimant to the Defendants over time. In particular the alleged difficulties encountered by the farming business carried on at the Defendants' farm and the Claimant's involvement with the Defendants in connection with those difficulties are already referred to in the pleadings.
79. Set against this context, and applying the purposive approach to s.35(5)(a) and CPR 17.4(2) summarised in *Ballinger* at §§34 to 38, in my judgment evidence relating to these specific additional matters raised in POC 5 are not "completely outside the ambit of and unrelated to" the facts which the Defendants could reasonably be assumed to have investigated for the purpose of defending the claim as it currently exists. They are within the ambit of and related to the facts already in issue. Furthermore, even if it can be said that those matters are outside or unrelated to existing matters, I have to consider *the extent* to which the Defendants would be required to embark upon an extra investigation of new facts. This is a matter of degree; and when set against the scope of the matters which are already in issue in the proceedings, in my judgment the extent of this further inquiry is relatively limited.
80. Finally, there is a further consideration here. The Defendants accept that they have no limitation defence to the contract claim, in so far as it relates to services supplied after 25 July 2008, and in the light of my conclusion in paragraph 62 above, permission to re-amend, under CPR 17.1(2)(b) to introduce that claim is to be granted and that claim will continue in any event. In relation to claims for those services, the very same matters of the November 2004 agreement and the demand in July 2010 will therefore have to be investigated by the Defendants. In this way, allowing the amendment in relation to services provided before 25 July 2008 will not require the Defendants to conduct any investigation of facts which they would not otherwise be required to make. I accept that, as matters currently stand formally, those issues do not yet have to be investigated. However if I were to refuse now permission in respect of pre-25 July 2008 services, but allow it in respect of post-25 July 2008 services, the Claimant could make a fresh application to re-amend in respect of the former services, and by that time the then "existing claim" would cover the facts relating to the November 2004 meeting and the July 2010 demand. The purpose of 17.4 is to protect from having to investigate matters which would otherwise not have to be investigated. In my judgment, that purpose would not be achieved by disallowing the amendment pursuant to CPR 17.4(2).
81. For these reasons I conclude that the factual matters raised by the contract claim in paragraph of POC 5 arise out of the same or substantially the same facts as those already in issue in the proceedings, and I have power to grant permission to re-amend POC 5 in those respects. In my judgment, it is appropriate to exercise my discretion to allow those amendments to be made, so as to allow all matters in issue to be adjudicated upon.

**(B) Restitution Claim: paragraph 14B**

82. The claim in restitution in paragraph 14B is advanced on the basis that at the time that the services were supplied there was in place a valid, binding and subsisting contract between the parties, whether in the form of the Agreement or as varied. The Defendants submit, and I accept, that the legal basis for the claim for unjust enrichment in the present case is free acceptance of services

supplied: see, for example, *Goff and Jones: The Law of Unjust Enrichment* (8th edn) §4-27 et seq, and §17-03 et seq.

*CPR 17.1(2)(b): real prospect of success*

83. The Defendants submit that this claim has no real prospect of success. First they submit it is bound to fail in law. There can be no claim for restitution where a subsisting contract between the parties allocates the risk between them, relying in particular upon the case of *Re Richmond Gate Property Co Ltd* [1965] 1 WLR 335. Secondly, they submit that there is no properly pleaded claim in restitution. In particular the Claimant has failed to plead either a statement of the objective market value of the enrichment or the relevant "unjust" element. This second point is made also in respect of the claim in paragraph 14C and I address it in that context, at paragraphs 91 to 95 below.
84. As regards the first submission, the relevant principle is that where there is a contract between the parties relating to the benefit transferred, no claim in unjust enrichment will generally lie whilst the contract is subsisting: *Goff and Jones*, supra, §3-13. This general principle is justified on the basis that the law should give effect to the parties' own allocation of risk and valuations, as expressed in the contract and should not permit the law of unjust enrichment to be used to overturn those allocations or valuation: *Goff and Jones*, §3-16 citing *Re Richmond Gate*, where Plowman J stated: "*since there was an express contract with the company in regard to the payment of remuneration it seems to me that any question of quantum meruit is automatically excluded*". *Goff and Jones* accepts that the same principle applies today. *Goff and Jones* continues (at §3-29):

*"The terms of the contract between the parties will frequently provide for payment to be due only once specified conditions are satisfied. Where the conditions for payment are not satisfied, a party who has done work or incurred expense in some other way in a failed attempt to complete the contractual performance is not permitted to have recourse to a claim in unjust enrichment for the value of that work or expense"*

*Goff and Jones* cites the well-established authorities of *Cutter v Powell* (1795) 6 TR 320 and *Sumpter v Hedges* [1898] 1 QB 673 and the more recent decision in *Cleveland Bridge UK Ltd v Multiplex Construction (UK) Ltd* [2010] EWCA Civ 139 at §§135-138. The principle was recently restated by Lord Reed in *Benedetti v Sawiris* [2014] AC 938 at 980F-G at §91. There are two principal exceptions to this principle: the provision of services (a) over and above those contracted for and (b) in anticipation of a contract which does not result: *Chitty on Contracts* (8th edn) §§29-075, 29-076.

85. In my judgment, this principle applies to the claim made in paragraph 14B. First, neither of the two principal exceptions applies to the present case. Secondly, I do not accept the Claimant's argument that *Re Richmond Gate* can be distinguished, because in the present case the requirement to invoice in Clause 4.2 was not an allocation of risk. The express terms of the Agreement (assuming it was not varied as now alleged) provided that unless the Claimant invoiced, he would not be paid. The Claimant ran the risk of not complying with the agreed terms of the contract; in this case the risk of not invoicing.
86. For these reasons, I consider that the claim in paragraph 14B is unsustainable in law, and has no real prospect of success and accordingly I refuse to grant permission to re-amend in this respect under CPR 17.1(2)(b). In the light of this conclusion, I do not go on to consider either the issues of the adequacy of pleading or the issue of limitation and CPR 17.4(2) in relation to paragraph 14B, although similar considerations as identified below in relation to the paragraph 14C claim would be likely to apply.

**(C) Restitution Claim: paragraph 14C**

87. The claim in restitution in paragraph 14C is advanced on the alternative basis that the Defendants establish, as pleaded in the defence, that the Agreement between the parties was illegal or void, for one of the reasons pleaded in the defence (set out in paragraph 15 above) and is thus unenforceable.
- (i) *CPR 17.1(2)(b): real prospect of success*
88. The Defendants submit that this claim has no real prospect of success. First they submit it is bound to fail in law. They submit that there can be no claim in restitution when it is premised on the Claimant's own unlawful behaviour. It cannot be unjust that in the circumstances outlined in the defence for the Claimant to go unrewarded for his services. Secondly, they submit that there is no properly pleaded claim in restitution. In particular the Claimant has failed to plead either a statement of the objective market value of the enrichment or the unjust element.
89. As regards the first submission, the relevant legal principles can be summarised as follows. First, if the contract is *illegal*, a defendant who receives benefits under an illegal contract can rely on the illegality of the contract a defence to a claim in unjust enrichment, provided that the parties were *in pari delicto* - equally to blame for engaging in the transaction. There are certain exceptions to the principle: *Goff and Jones*, supra §§35-01 to 35-08 and *Chitty*, supra §§29-082 and 29-083. Secondly, if the contract is merely void or unenforceable, there is a restitution claim unless the claim would undermine the policy of the statute or rule rendering the contract unenforceable. A person who renders services under a contract which is unenforceable will be entitled to a quantum meruit if the other party has failed to carry out his part, provided that the restitutionary claim does not undermine the policy of the statute (or common law rule) rendering the contract unenforceable: *Chitty*, supra, §§29-081 and 29-085.
90. In the present case, the application of these principles and their exceptions will depend upon the precise factual and legal basis upon which the Agreement is found to be either illegal or void and/or unenforceable. For example, in relation to illegality, the relative blame of the parties will fall for consideration. In relation to the various grounds of invalidity, the Defendants may seek to advance arguments as to why the policy of the rule should exclude a restitutionary claim. It may be that the Claimant's claim here will ultimately encounter substantial difficulties, particularly in the event that the Defendants' case on illegality (pleaded at §§39 to 45) is established. However, at this stage, it is not possible to say that which of these defences will succeed, and on what basis, and thus that the Claimant has no real prospect of success in relation to the claim in paragraph 14C.
91. As regards the Defendants' contention that this restitutionary claim is not adequately pleaded, they submit that the Claimant has failed to plead two of the key ingredients for a restitutionary claim, namely a statement of the objective market value of the enrichment or benefit and the facts to establish that the enrichment was unjust, relying inter alia on *Benedetti v Sawiris* per Lord Clarke at §34 and *Cobbe v Yeoman's Row Management* [2008] UKHL 55 per Lord Scott at §§40-44.
92. The Claimant, in response, contends that what is required to be pleaded are the facts, which if established, constitute a recognised claim in law in restitution. It is not necessary to refer to the particular legal category of restitution that it falls under. In my judgment, this is correct: *Uren v First National* [2005] EWHC 2529 (Ch) at §18. As regards the "unjust" factor, what has to be pleaded is the *fact* which makes the enrichment unjust. Here that fact is that the Claimant has done the work and conferred the benefit upon the Defendants but has not been paid. The Claimant further submits that, whilst the value of the enrichment is to be measured by reference to its objective market value, there is no authority requiring the objective market value to be pleaded expressly as such. The value of the enrichment is pleaded in any event by the figures given in paragraphs 14B and 14C, being a figure for the value of the services based on the £80,000 per

annum rate specified in the Agreement. Here the Agreement establishes the value of the benefit.

93. In *Benedetti v Sawiris*, supra Lord Clarke (at§10) stated that in a restitutionary claim for quantum meruit for services where there no contract, four questions arise: Has the Defendant been enriched? Was the enrichment at the claimant's expense? Was the enrichment unjust? Are there any defences available to the defendant? As regards the third factor, he indicated (§11) that, in that case failure to pay for the claimant's services was sufficient to render the enrichment unjust. He then went on (§§12-34) to consider the further question of what is the value of the unjust enrichment. On this issue, the starting point for identifying whether a benefit has been conferred on a defendant and for valuing that benefit is the *market* price for the services. That is the *objective* market value, or market prices, of the services performed by the claimant. An objective test is applied to the issue of market value. The test is "*the price which a reasonable person in the defendant's position would have had to pay for the services*" albeit taking account of the defendant's own particular situation (§17).
94. Lord Clarke then went on to consider the points there in issue, referred to as "subjective devaluation" and "subjective revaluation". He held that the defendant is entitled to adduce evidence in order subjectively to devalue the benefit, thereby proving either that he in fact received no benefit at all or that he valued the benefit at less than the market price; however, save in exceptional circumstances, the principle of subjective revaluation (where the defendant has valued the services at higher than market price) should not be recognised either for the purpose of identifying a benefit, or for valuing a benefit received.
95. As regards *evidence* relevant to ascertaining market value, Lord Reed (at §139), citing *Cobbe* at §44, suggested that an amount in fact offered by the defendant may be *evidence* of objective market value of the particular services at the time they were provided. I do not however accept the Claimant's further submission that objective market value does not apply at all where there is a meeting of minds as to how the parties value the benefit. Such a proposition is contrary to the general approach set out in *Benedetti* and, particularly, to the rejection of the subjective revaluation approach.
96. I conclude as follows. First, the Claimant has sufficiently pleaded the relevant "unjust" factor; the Claimant has pleaded that the Defendants have not paid for the services rendered. Secondly, I accept that, in order to succeed the Claimant's restitutionary claim in paragraph 14C has to be a claim for the objective market value of the services he provided to the Defendants. There is no express reference in the pleading to this term, nor are any facts pleaded referring to market value. All that is pleaded is the rate of reward provided for in the Agreement, and a claim for restitution calculated on the basis of that rate. The pleading as to value of enrichment is certainly not detailed. However in my judgment it is sufficient to raise a claim with a real prospect of success. I accept that there is no need to refer, in terms, to "objective market value". Moreover, it is at least arguable that what the parties agreed or what the defendant offered may be relied upon as *evidence* of the objective market value of the services.
97. Thus, subject to CPR 17.4(2), I am prepared to grant permission to re-amend for the claim in paragraph 14C to be pursued. In light of the undertaking referred to in paragraph 28 above, no limitation issue arises in relation to claims in restitution in respect of services carried out on or after 25 July 2008 and so I will grant permission to amend in respect of those claims under CPR 17.1(2)(b).  
  
(ii) *CPR 17.4 and limitation*
98. I turn to consider CPR 17.4(2) in relation to the restitution claim in paragraph 14C in respect of services rendered before 25 July 2008.

*Stage 1: Has the Claimant shown that the Defendant does not have an arguable limitation defence?*

99. The Defendants submit that there is a limitation period applicable to the claim in restitution and that the cause of action in restitution is statute barred under s.5 of the 1980 Act; the cause of action accrues either when the benefit is conferred or, if later, when the unjust element occurs. In the present case, it accrued as and when the services were supplied. A cause of action in restitution does not depend on demand. The claim is a claim in debt and is subject to s.5 of the 1980 Act. All claims for unjust enrichment are subject to s.5. Thus in the present case, the claim in restitution in respect of services supplied before 25 July 2008 is statute-barred, or at the very least arguably so.
100. The Claimant contends that the claim in restitution in respect of those services is not even arguably statute barred. First, there is, in law, no statutory limitation period for a common law restitutionary quantum meruit claim, because such a claim is founded neither on contract nor on tort: *McGee: Limitation Periods* (7th edn) §4.008. This is not a claim in debt and *Phillips v Bath Housing Co-operative Ltd* [2013] 1 WLR 1478 at §§17, 47-48 was a *contractual* quantum meruit case. Secondly, the cause of action in restitution arises only when demand for restitution is made by the claimant of the defendant. There is no clear authority on this issue; the cause of action crystallised at the time that the Defendants refused to pay the Claimant the money they owed him -here the enrichment became unjust only when the Defendants retained the benefit of the services whilst refusing to pay for it and that was when they refused to pay in response to the demand in July 2010. In this connection he relies on the decision of the Supreme Court of Canada in *Deglman v Guaranty Trust Company of Canada* [1954] SCR 725 at 736.
101. In my judgment, on this issue, the Claimant has not discharged its burden of persuasion. First, whilst the point is not entirely free from doubt and whilst I accept that the case of *Phillips v Bath Housing* may be distinguishable as suggested by the Claimant, the balance of authority (both judicial and academic) is that common law claims in unjust enrichment (including the present claim for restitutionary quantum meruit/free acceptance) are generally statute barred after six years under s.5 of the 1980 Act: *Goff and Jones*, supra, §§33-06 to 33-08; *Burrows: Restatement of the English Law of Unjust Enrichment* §30(2) and *Metcalf v Dennison* TCC HH Judge Raynor QC 6 December 2013 at §§28-30. As to the date of accrual of the cause of action in restitution, this is normally the date when the defendant receives the benefit. That is the date at which it is possible to ascertain objectively the reasonable value of the services or goods. As to whether it is necessary for the claimant in restitution to demand repayment, although some cases suggest that this may be the case, in principle claims in unjust enrichment should not depend upon the making of a demand: see *Goff and Jones*, supra at §§33-11 and 33-12, *Burrows*, supra and *Birks: Unjust Enrichment* (2nd edn) at p239 and *Fuller v Happy Shopper Markets Ltd* [2001] 1 WLR 1681 at 1689, §18. In any event, it is certainly at least arguable that time starts to run earlier than the date of any demand. The *Deglman* case is authority only for the proposition that time starts to run only once the enrichment becomes unjust, and does not support the proposition that time does not run until the date of a demand. For these reasons, the Defendants have an arguable limitation defence to the pre-25 July 2008 restitution claims in paragraph 14C.

*Stage 2: Does the claim raise a new cause of action?*

102. The Defendants submit that the restitution claim in paragraph 14C is a new cause of action. The Claimant submits that he is not relying on any new facts here but merely responding, if the Defendants manage to establish facts already pleaded in their defence which result in the Agreement being found to be illegal or void and unenforceable.
103. In *Berezovsky*, the claimant claimed the value of his beneficial or contractual interest in Sibneft, an oil and gas company. He sought to amend to add two claims in restitution. The first claim was for restitution of the value of his interest in Sibneft. The second alternative restitution claim was



put forward on the assumption that the claimant had no interest of any kind in Sibneft, but instead sought a quantum meruit in respect of the work which he had done to the benefit of the defendant. As regards the first claim, Longmore LJ (at §73) expressed no concluded view as to whether this gave rise to a new cause of action, but held that "in any event", the claim arose out of the same or substantially the same facts and allowed the amendment. However, in relation to the second restitution claim, Longmore LJ held (at §74) that "as framed" it was a new claim (i.e. cause of action) and could not be said to arise from the same or substantially the same facts. He reached this conclusion because this quantum meruit claim raised "questions of fact (such as the work actually done [and] the value of the benefit in fact accruing to [the defendant])" which "went well beyond the ambit of the old particulars of claim".

104. The Defendants submit that the present situation is analogous to that relating to the second restitution claim in *Berezovsky*, saying, similarly, that here facts relating to the value of the benefit are equally outside the ambit of the current claim. In my judgment, the second restitution claim there is not analogous to the present case, since here the *existing* claim is already equally concerned with "the work actually done" by the Claimant. The Claimant submits that the present situation is analogous to the first restitution claim in *Berezovsky*, but in my judgment that does not assist the Claimant on this Stage 2 issue, since Longmore LJ did not rule out the possibility that the first restitution claim was to be regarded as a new cause of action.
105. Considering the bare minimum of essential facts needed to establish the cause of action, in my judgment the claim in restitution does give rise to a new cause of action distinct from the existing contractual claim. First, applying the approach in *Darlington*, the claim is founded upon a different duty from that pleaded in POC 1. In POC 1 the claim was based on a duty arising from a contract, and a duty to pay a contractually agreed sum. The duty upon which claim in paragraph 14C is based does not arise out of contract at all; it is a duty to pay for the value of the benefit conferred and freely accepted. I do not consider that the facts relating to the unjust factor give rise to a new cause of action. However, for the reasons explained in *Benedetti*, the facts relating to the "objective market value" are, at a high level of abstraction, conceptually different from the facts relating to a contractually agreed price. Whilst the evidence relevant to the fact of objective market value (or some of it) may turn out be similar to that relating to the contractually agreed price, that is an issue for Stage 3 and not Stage 2. I conclude that the restitution claim in paragraph 14C does raise a new cause of action.

*Stage 3: Does the claim arise out of the same or substantially the same facts*

106. The Defendant submits that this claim arises out of new and different facts; in particular the facts relating to objective market value and the unjust element, neither of which have been raised in the pleadings to date. In particular, objective market value is a new fact upon which new evidence including expert evidence will be required. The Claimant responds, by saying that the claims in restitution are made out on the same facts as are already pleaded; it is wholly parasitic on facts already pleaded.
107. First, as regards the unjust factor the Claimant relies upon the fact of non-payment. I do not consider that evidence relating to the "unjust factor" will be significantly different from evidence already in issue in the case.
108. Secondly, as regards "objective market value", I accept that in so far as *the Claimant* seeks to rely on, and only on, the value ascribed to his services under the terms of the Agreement as his *evidence* to establish the objective market value (as explained in paragraph 95 above), then the Claimant's evidence is not "completely outside the ambit of and unrelated to" the facts which the Defendants could reasonably be assumed to have investigated for the purpose of defending the claim as it currently exists. To this extent, I accept the Claimant's contentions.
109. However, this is not the end of the story as far as likely investigations by the Defendants are

concerned. Objective market value is not the same as the contractually agreed price. The Defendants have indicated that expert evidence is likely to be relevant to this issue, and if, as seems likely, the Defendant will wish to contend that the objective market value of the Claimant's services was other (and less) than the sum provided for in the Agreement, it will have to adduce its own evidence of the value, in the market, of services of the kind supplied by the Claimant to the Defendant over the period of time from 2002 to July 2008, taking account both of the varying nature of the different services provided by the Claimant and perhaps too changes in market price over that period. On the existing pleadings, the scope for detailed investigation of the work carried out by the Claimant is limited, in view of the Defendants' admissions (see paragraph 5 above). That would change, if the market value of those services required investigation. In my judgment, evidence relating to the objective market value of such services over such an extensive period of time is completely outside the ambit of and unrelated to the facts which they could reasonably be assumed to have investigated for the purpose of defending the unamended claim. §74 in *Berezovsky* in relation to value of the benefit supports this conclusion. The effect of allowing this amendment will be to place the Defendants in a position where they would be obliged to investigate and obtain such evidence, after the expiry of the limitation period.

110. I note further that, whilst the Claimant currently has no intention of adducing its own distinct evidence of objective market value, were I to allow the amendment, the introduction of such an alternative case would not be barred by the provisions of s.35(5) and CPR 17.4(2), because by that time it might very well not involve the introduction of a new cause of action. Further, in this instance, I do not consider that the fact that I am granting permission for the post-25 July 2008 claims affects my conclusion in relation to the pre-25 July 2008 claims. Whilst I accept that the Defendants may now be required to investigate the market value of the services provided in the short period of just over two months up to 2 October 2008, the investigation of that issue for a period covering all the various services provided over the previous 6½ years would be a different and far more extensive exercise. This is to be contrasted with the position in relation to the contract claim (identified in paragraph 80 above), where the relevant evidence (relating to the November 2004 and July 2010) will be the same for both the pre-25 July 2008 and post-July 2008 periods.
111. For these reasons, I conclude that the claim in restitution in paragraph 14C does not arise out of the same or substantially the facts as those already in issue, and so there is no power to allow the amendment in this respect. The Claimant remains free to bring this claim by way of separate action, where, if so advised, he can advance his case, referred to in paragraph 100 above, that the claim is not statute barred.

### **Conclusion on amendment**

112. In summary, I conclude as follows:

Permission to re-amend to introduce the contract claim based on "demand/afford", contained within paragraphs 8, 9, 12A and 13A of POC 5, in respect of all services supplied by the Claimant to the Defendants is granted, under CPR 17.4(2) in respect of services supplied before 25 July 2008 and under CPR 17.1(2)(b) in respect of services supplied on or after 25 July 2008.

Permission to re-amend to introduce the contract claim based on "afford only", contained within paragraphs 8, 9, 12A and 13A of POC 5, is refused under CPR 17.1(2)(b) on the grounds that it is insufficiently clearly pleaded and has no real prospect of success.

Permission to re-amend to introduce the claim in restitution in paragraph 14B of POC 5 is refused under CPR 17.1(2)(b) on the ground that it is unsustainable in law and thus has no real prospect of success.

Permission to re-amend to introduce the claim in restitution in paragraph 14C of POC 5 is

- (a) is granted under CPR 17.1(2)(b) in respect of the value of services supplied on or after 25 July 2008;
- (b) is refused under CPR 17.4(2) in respect of the value of service supplied before 25 July 2008 on the grounds that the claim is arguably subject to a limitation defence and raises a new cause of action which arises out of facts which are not the same or substantially the same as facts already in issue in the proceedings.

### **Consequential matters, including the Appeal**

- 113. It follows that permission will be granted to re-amend the Particulars of Claim in respect of some, but not all of there-amendments in POC 5. To that end, the Claimant will be required to submit a revised version of POC 5 to reflect this judgment, for approval by the Court.
- 114. The parties' submissions in relation to the Defendants' appeal were largely predicated on the assumption that permission to re-amend would be granted or refused for POC 5 in its entirety. That is not the position now however and accordingly, if necessary, I will hear short further argument as to the appropriate disposal to be made in respect of the appeal, as well as argument in relation to the costs of the application to amend.
- 115. In any event, however, I do not accept the Claimant's argument that absent the amendments introduced by POC 5, there exists a viable claim on the basis of POC 1 (with old paragraphs 12 to 14 deleted). Shorn of those paragraphs, POC 1 does not allege when the duty to pay remuneration fell due and when it was breached and there is no cause of action based simply on the admissions alleged in paragraphs 15 to 20. Further Master Teverson did not conclude that the Claimant's claim could overcome Clause 4.2 in any event; rather he indicated that it might be able to do so because of the way the Agreement was operated, and the whole purpose of the re-amendments now put forward has been to seek to plead how it operated. The Claimant's case now can only be the case set out in POC 5, as now to be modified in the light of this judgment.
- 116. Unless these matters can be agreed, I propose dealing with these and other consequential matters, including the making of further case management directions following the amendment to the particulars of claim, either by way of further written submission alone or, if necessary, at a further hearing to be fixed as soon as convenient.

