Neutral Citation Number: [2012] EWHC 67 (QB)

Case No: HQ11X00256

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 06/02/2012

Before :

THE HONOURABLE MRS JUSTICE LANG DBE

Between :

Fladgate LLP	**Claimant**
- and -	
Lee Harrison	**Defendant**

E. Hitchens (instructed by **Fladgate LLP**) for the **Claimant**
D. Burkitt (instructed by **Mishcon de Reya**) for the **Defendant**

Hearing dates: 14, 15 December 2011

Judgment
As Approved by the Court

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The Honourable Mrs. Justice Lang DBE:

1. The Claimant, a firm of solicitors, claims the sum of £63,332.06 in respect of unpaid fees for legal work carried out on behalf of the Defendant. In summary, the Defendant disputes liability on the grounds that:

    i) the parties agreed that invoices addressed to the Defendant personally would be re-addressed to Ypres Rose Developments Limited ('YRD');

    ii) alternatively to i), the Claimant is estopped from claiming payment because it acquiesced in the Defendant's understanding that the invoices would be re-addressed to YRD;

    iii) the Claimant cannot rely on a written or oral retainer;

    iv) alternatively to iii), the work allegedly performed by the Claimant did not fall within the scope of the alleged retainer and/or was not done on behalf of the Defendant;

    v) the Claimant's invoices are invalid

Findings of fact

2. I heard evidence from Mr Andrew Bessemer Clark and Mr Mark Saunders, on behalf of the Claimant, and from the Defendant, Mr Lee Harrison, and Mr Philip Desmond, on behalf of the Defendant. I also considered documentary evidence. I found Mr Bessemer Clark to be a truthful witness, whose evidence was supported, at least in part, by the contemporaneous documentary evidence. In contrast, I found Mr Harrison to be an evasive and at times untruthful witness, whose evidence was not supported by the contemporaneous documentary evidence.

3. Based upon my consideration of all the evidence, I make the following findings of fact.

4. The Defendant was Managing Director of YRD, a private property development company which went into liquidation on 30 September 2010. The Defendant was also a major shareholder in YRD.

5. The Defendant, in his capacity as Managing Director of YRD, had instructed Mr Saunders, partner in the Claimant firm, on a number of occasions, from 2006 onwards, to act for YRD in connection with the sale and acquisition of property.

6. In early 2008, the Defendant asked Mr Saunders for legal advice in connection with the restructuring of YRD. Mr Saunders referred the Defendant to another partner in the Claimant firm, Mr Bessemer Clark, who had experience in company re-structuring. However, Mr Saunders continued to deal with the property aspects of the transaction and was kept informed of the progress of the re-structuring project.

7. Mr Bessemer Clark met the Defendant on or about 16 January 2008. The Defendant explained to him that the main objective was to enable another shareholder, Mr Jeffers, to sell his shares in YRD, and to recover substantial amounts loaned to YRD by his firm, CLP. It was intended that this would be achieved by a new investor, Mr

Thayne Weston, purchasing shares and making loans, through his company Hopetown.

8. The Defendant emailed Mr Bessemer Clark on 17 January, informing him of the outcome of his meeting with Mr Weston, and he asked him to prepare draft heads of terms for the re-structure.

9. On 18 January 2008, Mr Bessemer Clark emailed the Defendant, thanking him for his email and informing him that he was currently drafting some heads of terms. He attached a draft engagement letter, together with the Claimant's standard terms of business. He said:

> "I also attach a draft engagement letter together with our standard terms of business which we will need you personally to sign up to. If you are happy with the provisions of the letter then we will send you an execution copy for you to sign and send back to us – otherwise, if you have any comments on the letter please let us know."

10. The draft engagement letter, dated 18 January 2008, was addressed to the Defendant at his home address, not to YRD. It stated:

> "You have instructed us to act for you in respect of the following:
>
> 1. the advance to you by Thayne Weston of funds to acquire CLP's shares and debt in YRD;
>
> 2. the acquisition by you of CLP's shares and debt in YRD and the subsequent sale of certain of those shares to Thayne Weston and the cancellation of the debt;
>
> 3. an internal re-organisation of YRD, including the adoption of new articles and a new shareholder's agreement.
>
> The work described above is referred to in this letter as the Transaction.
>
> If this is incorrect in any way, please inform me as soon as possible."

11. In his oral evidence, the Defendant denied that, as at 18 January 2008, the proposed re-structuring was as described in the engagement letter. I did not accept Mr Harrison's evidence on this point, finding it more believable that Mr Bessemer Clark was recording the proposals discussed with the Defendant, and which the Defendant confirmed following his meeting with Mr Weston. Mr Bessemer Clark explained that, as Mr Weston did not wish to negotiate directly with the exiting shareholder, Mr Jeffers, it was agreed that Hopetown would lend money to the Defendant to enable him to purchase Mr Jeffers' shares. The Defendant would then sell the shares on to Hopetown, in return for the cancellation of the obligation to repay the loan.

12. Although he now disputes the details of the transaction, at the time, the Defendant did not reply to Mr Bessemer Clark's invitation to inform him if the letter was incorrect in any way. Indeed, he did not respond to the letter at all.

13. It is apparent from emails and subsequent billing that both the Defendant and Mr Bessemer Clark treated the solicitor/client relationship as ongoing from January 18 2008. They communicated regularly during February and March 2008.

14. A final version of the engagement letter in almost identical terms was sent by Mr Bessemer Clark to the Defendant personally at his home address on 14 April 2008, together with a copy of the Claimant's terms of business. On this occasion, the letter was signed by Mr Bessemer Clark. At the end of the letter, there was a section for the Defendant to complete which stated:

> "I confirm my understanding and accept the terms of your engagement as set out in this letter and the attached terms of business.
>
> Signed:
>
> Dated:"

15. The Defendant did not at any stage complete this section of the letter; nor did he respond to the letter in any other fashion. Despite the Defendant's failure to respond to the engagement letter, Mr Bessemer Clark, on behalf of the Claimant, continued to act for him until the completion of the transaction on 10 July 2008.

16. At a date in May/June 2008, the proposed nature of the transaction changed. It was an essential element of the original transaction that Mr Jeffers would give certain warranties regarding the company to the Defendant upon the purchase by the Defendant of his shares in YRD. The Defendant would then assign the benefit of those to Hopetown. During the course of the transaction Mr Jeffers indicated that he would only give very limited warranty protection.

17. As a result, Mr Weston and his lawyers decided to re-structure the transaction so that Mr Weston would purchase the shares directly from Mr Jeffers. Therefore the Defendant was no longer directly involved in the purchase and sale of shares. Items 1 and 2 of the transaction, as set out in the engagement letter, never took place. However, the Claimant did carry out item 3 – the internal re-organisation, including new articles and a shareholders' agreement.

18. Mr Bessemer Clark advised the Defendant orally, on more than one occasion, that section 151 of the Companies Act 1985 made it unlawful for a company to give financial assistance, directly or indirectly, and at any time, for the purpose of acquiring shares. He explained to the Defendant that s.151 was very broad in scope. Thus, the payment of legal fees incurred in the course of a transaction to acquire shares would constitute unlawful financial assistance, even if the payment was made to someone other than the purchaser of the shares.

19. Mr Bessemer Clark expressly advised the Defendant that it would be unlawful under section 151 for YRD to pay legal fees incurred by Fladgates in connection with the acquisition of shares by the Defendant and Hopetown, Mr Weston's company.

20. Mr Bessemer Clark also advised the Defendant that the re-negotiation and drafting of the warranty deed, shareholders' agreement, new articles of association and disclosure letter were integral elements of the acquisition of shares by Hopetown. Therefore it

would be unlawful under section 151 for YRD to pay legal fees incurred in respect of this work too.

21. The warranty deed was to include extensive warranties from the existing shareholders, including the Defendant, relating to YRD. The shareholders' agreement and articles were amended to provide restrictions on the shareholders. The disclosure letter was a letter from existing shareholders, including the Defendant, to Hopetown disclosing any matters in respect of which the warranties were not true. Hopetown was not willing to proceed with the transaction without such safeguards.

22. In the light of the prohibition imposed by s.151, Mr Bessemer Clark advised the Defendant that he would have to be solely liable, in a personal capacity, for payment of the Claimant's legal fees for work carried out which was connected with the acquisition of shares. YRD could, however, take responsibility for the Claimant's legal fees in connection with the debt element of the re-structuring, which was unconnected with the acquisition of shares.

23. I accepted Mr Bessemer Clark's evidence that he informed the Defendant that, because of a forthcoming change in the law, due to take effect on 1 October 2008, section 151 would no longer prohibit private companies from providing financial assistance in connection with the acquisition of shares after that date. Private companies would be able to provide such assistance, even retrospectively in respect of transactions concluded prior to 1 October 2008, but only if such assistance was for the corporate benefit of the company at the time it was provided.

24. In the light of this forthcoming change to the law, Mr Bessemer Clark advised the Defendant that, in certain circumstances, after 1 October 2008, it would be lawful for YRD to provide financial assistance in respect of the legal fees which had been incurred by the Defendant in a personal capacity, prior to 1 October 2008, in connection with the acquisition of shares in YRD. Mr Bessemer Clark explained that whether or not it would be lawful to do so would depend on whether there was a corporate benefit to YRD at that time (i.e. after 1 October 2008) in providing such assistance. If it was lawful for YRD to meet the Defendant's invoices, the Claimant could re-address the invoices to YRD.

25. Although Mr Burkitt referred to authorities, textbooks and other solicitors' advice notes on the scope of s.151, to suggest that Mr Bessemer Clark's advice could or should have been different, I was satisfied that this was the view which Mr Bessemer Clark genuinely held, and that he advised the Defendant accordingly.

26. The Defendant's account of Mr Bessemer Clark's advice was significantly different. He said in his witness statement:

> "During February 2008 I had a meeting with Andrew Bessemer Clark of FS. In this meeting I was told verbally that in order for a company to buy its own shares it couldn't do this as the company. I would therefore need to 'be seen' to be instructing FS separately. I was also told at the same time that this legislation was going to change on the 1st October 2008 and at that stage any bills that were addressed to me personally would be reallocated to YRD's account. ABC made comment that it was all a bit of an admin nightmare but they had to be seen to do things correctly."

He later said:

> "From the very outset it was made clear to me that the function of getting round the financial assistance rules was a temporary measure until October 1st 2008 when the legislation would change and these invoices received by me would be re-addressed to the company. During the months leading up to that point verbal comfort and references that this would happen were given to me directly and through comments made on invoices.
>
> My PG position at the time amounted to circa £5m+, which supported the companies borrowing from banks and its equity providers. Given this level of support I was giving the company already I would never have agreed to assume any personal liability for legal fees.
>
> Being this how I felt plus the verbal assurances from Fladgates I never bothered signing an instruction sent to me by Fladgates and they, knowing what would happen at the beginning of October, never chased me for it. This was further comfort in my own mind that I wasn't indebting myself personally to Fladgates."

27. I did not find the Defendant's account plausible, for the reasons set out below.

28. First, he seemed to have ignored the obvious point that, even after the change in the law on 1 October 2008, the company, YRD, could only legitimately make payments in respect of invoices addressed to him if it was for the benefit of the company. That could only be assessed at the time the decision was made. Mr Bessemer Clark was not in a position to guarantee in advance that YRD could lawfully make such payments.

29. Secondly, in his oral evidence, the Defendant candidly conceded that the arrangement he allegedly made with Mr Bessemer Clark could not be put in writing because it was illegal and "would have made a mockery of the legislation". Section 151(3) made it a criminal offence to act in contravention of the prohibition. Having heard Mr Bessemer Clark give evidence, I was satisfied that he was a responsible and professional solicitor, experienced in corporate law, who would not have advised the Defendant or YRD to act unlawfully.

30. Third, in July 2008, the Defendant was a party and signatory to the Agreement relating to the acquisition of equity holdings and investment, which stated:

    i) each party would be responsible for his own legal costs (clause 16.1); and

    ii) the 'continuing shareholders' (which included the Defendant) warranted to the investors that YRD had not paid any legal charges in connection with the sale and purchase of shares or the preparation of the Agreement (clause 16.2).

    These provisions directly contradicted the Defendant's account of the agreement he had with the Claimant.

31. Fourth, contrary to the Defendant's evidence, the dealings between the parties did not support the Defendant's account that the Claimant agreed that he would not be

required to pay the legal fees personally because they would be re-invoiced to YRD after 1 October 2008:

i) The Claimant sent engagement letters to the Defendant personally, at his home address, and set up separate matter numbers and billing guides for the Defendant personally, in addition to those for YRD.

ii) The Claimant sent separate interim invoices to the Defendant personally, and initially expected immediate payment, before 1 October 2008. The Defendant only subsequently negotiated deferral of payment with the Claimant.

iii) On 28 March 2008, the Claimant sent an invoice to the Defendant personally, in respect of work done up to 29 February 2008, requesting immediate payment. The invoice was paid on 25 April 2008. Although the Defendant said at trial that he had arranged for payment to be made by the company. Mr Bessemer Clark was not informed of this unlawful payment, and assumed that payment had been made by the Defendant. Significantly, in his email dated 20 May 2008, the Defendant said that he had paid the bill, and made no reference to the bill having been paid by the company.

iv) In his email of 20 May 2008, the Defendant said to Mr Saunders; "[m]y understanding was that we would sit down post restructure and sort out all outstanding fees". Mr Saunders agreed to this. The re-structure was completed on 10 July 2008, long before 1 October 2008.

v) The Claimant sent two further invoices to the Defendant personally, dated 30 June 2008 and 16 July 2008. By then the Defendant had arranged to meet Mr Saunders and Mr Bessemer Clark to discuss payment in September.

vi) Thereafter there was a series of communications between Mr Saunders and the Defendant, in which Mr Saunders was pressing for payment of the invoices addressed to the Defendant personally, as well as those addressed to YRD, and the Defendant was offering to make payment as soon as he was in a position to do so, upon the sale of properties (Westbourn and Hollow Lane) and obtaining loans. Nothing in these emails referred to an agreement that the Defendant's personal invoices would be re-addressed to YRD.

vii) On 5 December 2008 the Defendant emailed Mr Bessemer Clark saying:

> "Essentially I cannot agree to release circa £63K from the sale of Hollow Lane to Fladgates as these invoices are mine, not the companies….Therefore can you get your accounts department to send out the invoices addressed to me (circa 63K) and address them to YRD. We will then have it all tidy and I will then authorise clearance on completion of Hollow Lane."

viii) Mr Bessemer Clark replied saying:

> "we have several invoices outstanding with you at the moment, some of which are addressed to YRD and some of which are addressed to you personally. The £63K that you refer to relates to the invoices we

issued to you on the restructuring transaction in respect of the work that we undertook for you (and the other shareholders) in agreeing the terms of that restructuring. All of the work that was undertaken by us on the transaction that did not relate to the restructuring of the company's debts (i.e. agreeing the warranty deed, the terms of the transfer of the shares to Thayne, the shareholders' agreement, disclosure letter etc.) was carried out on your behalf and not that of the company's – hence the need to issue you with personal invoices. At that time (as I think you are aware) the financial assistance regulations prevented YRD from picking up the tab for this work because the assumption of the debt by YRD would have been in connection with the transfer of its own shares and therefore illegal. As of 1st October this year, these regulations changed to allow a privately owned company to provide precisely this kind of financial assistance. However, for a company to do this its directors still have to show that they have sufficient assets to pay the debt and that it would be in the best interests of its shareholders to do so. They also need to hold a board meeting to record their deliberations to that effect.

As you know we had discussed the fact that after 1st October, once the purchase of Westbourn had been completed, and the associated banking finance drawn down, YRD would most probably be in sufficient funds to pay off your invoice (as well as its own) and we could look then at taking advantage of the relaxation in the financial assistance rules. Unfortunately though given the collapse of the Westbourn acquisition and YRD's consequent financial difficulties at present (i.e. it is currently not able to pay the invoice for the work Fladgate undertook on its own behalf in respect of the restructuring of its loans) the directors of YRD would not be exercising their fiduciary duties correctly or acting in the best interests of the company if they agreed for YRD to assume the liability to pay the invoice addressed to yourself when they knew the company had no funds with which to pay it. Once YRD has the money to satisfy both invoices then the directors would be perfectly at liberty to resolve that YRD assumes your share of the debt but until that time it would be incorrect (and risky) for them to go ahead with it."

ix) This response was consistent with Mr Bessemer Clark's account of the advice previously given to the Defendant, and inconsistent with the Defendant's belief that there was an agreement that invoices addressed to him personally would be re-addressed to YRD after 1 October 2008. (I accept the Claimant's submission that Mr Burkitt erred in his closing submissions in submitting that Mr Bessemer Clark was here referring to the 'whitewash' provisions in sections 155 – 158 Companies Act 1985, as these provisions no longer applied after 1 October 2008. Mr Burkitt failed to put this point to Mr Bessemer Clark in cross examination).

x) The Defendant responded on 5 December 2008 saying:

"Cheers Andrew. Understand the problem and legal's involved."

In my judgment, this was a clear indication that the Defendant was aware of, and understood, the position as set out in Mr Bessemer Clark's email. He did not contend, in response to Mr Bessemer Clark, that there was an agreement with the Claimant that his personal invoices could and would be paid by YRD, regardless of establishing corporate benefit.

xi) On 7 May 2009, in response to a request from Mr Saunders, the directors of YRD signed a written confirmation that:

a) the Claimant would be instructed to act in connection with the sale of Hollow Lane;

b) The Claimant would receive the proceeds of sale into its client account and would be authorised to deduct from the proceeds the full amount outstanding in respect of work undertaken from YRD and the Defendant;

c) Subject to the above, upon completion of the sale of Hollow Lane and upon receipt of funds sufficient to settle the bills in full, the Claimant would then re-address bills currently addressed to the Defendant personally to YRD.

xii) In my judgment, it is unlikely that the Defendant would have entered into this agreement if he genuinely believed that he was already entitled to have the personal invoices re-addressed to YRD.

32. In the event, the conditions in the letter of 7 May 2009 were never met as YRD's bank demanded re-payment of its loans and took possession of the Hollow Lane property, selling it at a reduced price to pay off its debt. There were no surplus funds left to meet the Claimant's invoices to YRD or the Defendant.

33. The Claimant's invoices to YRD were included in the liquidation, but not the invoices rendered to the Defendant, in the sum of £63,332.06.

34. Since the Defendant now disputes that relevant work was done by the Claimant, I record as a finding of fact that Mr Bessemer Clark and his assistants carried out a substantial amount of work on behalf of the Defendant, advising, negotiating, and drafting the amended articles and shareholders' agreement, the disclosure letter and the warranty deed.

35. I have not been asked by the Claimant or the Defendant to conduct a detailed assessment of the fees incurred, and I do not have the information to enable me to do so. I can say that, on the basis of the evidence before me, both documentary and oral, I am satisfied in broad terms that the fees in dispute were properly and reasonably incurred.

36. Whilst other shareholders also benefited from this work, the agreement that the Defendant had entered into with the Claimant was that he would be solely responsible for its legal fees in matters relating to the acquisition of shares, to comply with the prohibition under s.151. In my judgment, he agreed to do so because, as an experienced businessman, he considered the re-organisation was in his interests, in

order to secure new investment into YRD. His personal financial position was directly affected by the success or failure of YRD, as Managing Director, shareholder and because of the personal guarantees he had given on behalf of YRD.

37. The Defendant also needed the Claimant's legal advice in his personal capacity as a shareholder. As an existing shareholder, he was required to enter into the shareholders' agreement, to give warranties and to sign the disclosure letter. Some of the restrictions on shareholders which Mr Weston insisted upon were directly aimed at the Defendant, for example, the restriction upon involvement in other business. The Defendant also secured a benefit from the amended shareholders' agreement as he was given a right of pre-emption over 5% of the shares in YRD upon a future sale by one of the existing shareholders. Since Mr Weston acquired a 40% shareholding, this right was essential to ensure that the Defendant did not lose control of YRD at a later date.

The contract of retainer

38. The Defendant submitted that the letter of 14 April 2008 was not a written contract of retainer, as pleaded by the Claimant in the claim form, because the Defendant never signed it or agreed its contents. There was no evidence to support the finding that a contract of retainer had come into existence orally, nor that it could be implied by conduct, and the Claimant had not pleaded its case on that basis. The Defendant had never intended to incur personal liabilities with the Claimant.

39. In my judgment, the giving of instructions by a client to a solicitor constitutes the solicitor's retainer by that client. It is not essential that the retainer is in writing. It may be oral. It may be implied by the conduct of the parties in the particular case. Under the Solicitors Code of Conduct 2007, certain matters must be provided in writing:

    i) The name and status of the person dealing with the matter, and the person responsible for overall supervision (rule 2.02(2)(d));

    ii) Any information about the cost (rule 2.03(5));

    iii) Details of the applicable complaints procedure (rule 2.05(1)(b)).

    But the Code Guidance explains that "it is not envisaged or intended that a breach … should invariably render a retainer unenforceable".

40. It is possible for parties to opt to enter into a 'Non-Contentious Business Agreement' pursuant to s.57, Solicitors Act 1974, which does have to be in writing and signed. The advantage of such an Agreement to the solicitor is that it deprives the client of the opportunity to apply for a remuneration certificate under the Solicitors (Non-Contentious Business) Remuneration Order 1994. However, such Agreements are not mandatory, and there is no evidence that a Non-Contentious Business Agreement was ever contemplated in this case.

41. The giving of a retainer is equivalent to the making of a contract for the solicitor's employment, and creates the solicitor's right to be paid. In determining whether or not a retainer has come into existence, the general principles of contract law apply.

42. In *RTS Flexible Systems Ltd v Molkerei Alois Muller GmbH & Co KG (UK Production)* [2010] 1 WLR 753, at [45], the Supreme Court held that "whether there is a binding contract between the parties, and if so on what terms, depends upon what they have agreed. It depends not upon their subjective state of mind but upon a consideration of what was communicated between them by words or conduct and whether that leads objectively to a conclusion that they intended to create legal relations and had agreed upon all the terms which they regarded or the law requires as essential for the formation of legally binding relations."

43. The Supreme Court approved the approach of Steyn LJ in *G. Percy Trentham Limited v Archital Luxfer Limited & Ors* [1993] 1 Lloyd's Rep 25, CA. Steyn LJ said:

> "In a case where the transaction was fully performed the argument that there was no evidence upon which the judge could find that a contract was proved is implausible. A contract can be concluded by conduct. Thus in *Brogden v Metropolitan Railway* (1877) 2 AC 666 … the House of Lords concluded in a case where the parties had acted in accordance with an unsigned draft agreement for the delivery of consignments of coal that there was a contract on the basis of the draft. That inference was drawn from the performance in accordance with the terms of the draft agreement….
>
> One must not lose sight of the commercial character of the transaction. It involved the carrying out of work on one side in return for payment by the other side, the performance by both sides being subject to agreed qualifying stipulations. In the negotiations and during the performance of phase 1 of the work all obstacles to the formation of a contract were removed. It is not a case where there was a continuing stipulation that a contract would only come into existence if a written agreement was concluded. Plainly the parties intended to enter into binding contractual relations. The only question is whether they succeeded in doing so. The contemporary exchanges, and the carrying out of what was agreed in those exchanges, support the view that there was a course of dealing which on Trenthan's side created a right to performance of the work by Archital, and on Archital's side it created a right to be paid on an agreed basis. What the parties did in respect of phase 1 is only explicable on the basis of what they had agreed in respect of phase 1. The judge analysed the matter in terms of offer and acceptance. I agree with his conclusion. But I am, in any event, satisfied that in this fully executed transaction a contract came into existence during performance even if it cannot be precisely analysed in terms of offer and acceptance."

44. These passages are, in my view, applicable to the circumstances of this case. I have found, on the evidence, that the Defendant instructed the Claimant to act in connection with the restructuring of YRD between January and July 2008, and that the Claimant carried out the work as requested. The Claimant was therefore entitled to be paid for its services.

45. It is not disputed that the Defendant, in his capacity as managing director of YRD, retained the Claimant to act for YRD, the company. I have found, as a fact, that following advice from Mr Bessemer Clark to the Defendant that s.151 Companies Act 1985 rendered it unlawful for YRD to pay the Claimant's legal fees in so far as they were incurred for the purpose of the acquisition of shares in YRD, the Defendant also

retained the Claimant to act for him, in his personal capacity, in respect of the acquisition of shares, so as to avoid breaching s.151. There were, therefore, two separate retainers: the company retainer by YRD and the personal retainer by the Defendant. The Claimant sent separate invoices to each client.

46. Judged objectively, the words and conduct of the parties lead to the conclusion that they intended to, and did, enter into a contract. As I have described in my findings of fact, the Defendant judged that it was in his interests to agree to take sole personal responsibility for the legal fees which were potentially caught by the prohibition in s.151, despite the fact that the other shareholders also benefited from the work undertaken by the Claimant.

47. Although it was the Claimant's intention that there should be a written retainer contract, to be executed by both parties signing the letter of 14 April 2008, in my judgment, a written retainer never came into existence, as the Defendant never signed and returned the acceptance slip.

48. However, it was not a pre-requisite to the formation of the Defendant's personal retainer that he should sign and return either of the retainer letters, dated 18 January 2008 and 14 April 2008. I conclude, on the evidence, that a personal retainer was agreed orally, and implied by the conduct of the Defendant in employing the Claimant to carry out the work requested by him.

49. In my judgment, the letters of 18 January and 14 April 2008, and the Claimant's 'Terms of Business' annexed to each letter, are evidence of the terms of the personal retainer.

50. In these circumstances, I consider it would be unfair to reject the Claimant's case on the basis that it initially pleaded its case as a written retainer, when the essence of its claim was set out in the claim form, namely, that there was a contract for services, which had been provided to the Defendant, but not paid for. Furthermore, in its Reply, the Claimant pleaded its case more fully, and in paragraphs 5(f) and (h) said that the agreement between the Claimant and the Defendant was "contained in <u>and/or evidenced by</u> the Retainer Letter and the Terms and Conditions". The phrase "evidenced by" correctly summarises the position.

51. The Defendant submitted that, even if there had been a retainer in the terms set out in the letter of 14 April 2008 (which he denied), it did not extend to the quite different transaction which actually took place. The letter of 14 April 2008 envisaged that Mr Weston would advance funds to the Defendant to enable him to acquire Mr Jeffers' shares and debt in YRD. In the event, Mr Weston's company, Hopetown, purchased the shares directly from Mr Jeffers.

52. Mr Bessemer Clark explained that Mr Weston and his lawyers wished to alter the way in which the transaction was structured because they were not satisfied with the limited warranties which Mr Jeffers was willing to give. I accepted Mr Bessemer Clark's evidence that this is what occurred, as evidenced by the documentation drawn up by the Claimant.

53. In my judgment, the correct analysis is that the terms of the retainer were varied by oral agreement between the parties, evidenced by the conduct of the parties. The

retainer did not have to be varied in writing. The Defendant changed his instructions and the Claimant carried out his revised instructions. The overall objective – to buy out Mr Jeffers and enable Mr Weston to invest in YRD – remained the same. Even after the variation, item 3 in the engagement letter of 14 April 2008 – the internal reorganisation - still had to be carried out. Mr Bessemer Clark described the very substantial amount of documentation which had to be drafted and agreed, some of which was contained in the evidence before me.

54. I accept the Claimant's submission that this work was properly included in the invoices to the Defendant personally, and not to YRD, because it was still caught by the prohibition in section 151. It was connected to the acquisition of shares by Hopetown.

55. The Defendant submitted that, where a dispute arises between a solicitor and a client over the nature of an oral retainer, the client's version of the retainer should prevail, citing *Cook on Costs* at 1.2; *Crossley v Crowther* (1851) 9 Hare 384; *Re Paine* [1912] 28 TLR 201; *Griffiths v Evans* [1953] 1 WLR 1428; *Gray & Anor v Buss Murton (a firm)* [1999] PNLR 882; *Sibley & Co. v Teachbyte Ltd and Kris Motor Spares* [2008] EWHC 2665 (Ch). However, that principle does not preclude me from finding against the client, where his case is clearly contradicted by other documentary and witness evidence.

Estoppel

56. The Defendant submitted that the Claimant acquiesced in the Defendant's understanding or assumption that the Claimant would re-address the invoices to YRD and was therefore estopped from suing on them.

57. In his first set of written closing submissions Mr Burkitt relied on estoppel by representation but he abandoned that submission, accepting Ms Hitchens' point that a statement concerning future intention i.e. to re-address invoices at a future date falls outside the doctrine.

58. Mr Burkitt did pursue his defence under estoppel by convention, which he submitted arises "Where two parties act ... or operate a contract, each to the knowledge of the other on the basis of a particular belief, assumption or agreement between the parties (for example about a state of fact or of law, or about the interpretation of a contract), they are bound by that belief, assumption or agreement." (*Amalgamated Investment & Property Co Ltd (in liq) v Texas Commerce International Bank Ltd* [1982] QB 84 at 121, [1981] 3 All ER 577 at 584 (CA) (Lord Denning MR).)

59. On the findings of fact which I have made, the defence of estoppel cannot succeed. Mr Bessemer Clark did not carry out his work in the belief, or on the assumption or agreement that the invoices addressed to the Defendant personally would be re-addressed to YRD, regardless of the circumstances arising after 1 October 2008. I have found that the Defendant's evidence that this was his understanding of the agreement was not plausible.

Invoices

60. Mr Burkitt raised for the first time, in his written closing submissions, a point which was never pleaded, namely, that the Claimant's bills were invalid because they were insufficiently particularised He referred to *Re a Solicitor* [1955] 2 QB 252 (CA); *Cook on Costs* 2011 [3.4]; *Re a Solicitor* (10 May 1994 (unreported) QBD); *Ralph Hume Gary (a firm) v Gwillim* [2002] EWCA Civ 1500.

61. In my judgment, if the Defendant wished to rely on this argument, it should have been raised earlier in the proceedings, to enable the Claimant to prepare its response, and for the relevant evidence to be adduced. The court would have had to consider all evidence relating to the drawing up of the bills; all communication of information about the bills to the Defendant; the state of knowledge of the Defendant both as to the work proposed and actually done. Mr Bessemer Clark, Mr Saunders and the Defendant would all have had to be given the opportunity to give oral evidence on this issue, and to be tendered for cross examination. Therefore I do not allow the Defendant to pursue this point at this late stage.

62. The Defendant has made generalised complaints about the invoices and whether they represented a proper and reasonable fee for the work done. I note that the Defendant did not apply for assessment of the bills under the Solicitors Act 1974, s.70 and the Solicitors (Non-Contentious Business) Remuneration Order 1994, which it was open to him to do.

63. I have not been asked by the Claimant or the Defendant to order a detailed assessment of the costs incurred, and I am not in a position to conduct such an assessment on the evidence before me. Some invoices, narratives and billing guides were in evidence, but the Claimant has not disclosed all its billing records and the Defendant has not applied for an order for disclosure of the same.

64. The issue raised by the Defendant during the trial was whether Mr Bessemer Clark had fairly apportioned the work done on behalf of the company and the work done on behalf of the Defendant personally. The two invoices to which the claim relates were sent to the Defendant under cover of letters dated 3 and 16 July 2008. Each letter enclosed two invoices: one addressed to the Defendant and one addressed to YRD. In the first letter, Mr Bessemer Clark said he had "split the fees equally between yourself and the Company as I think this is a fair reflection of the apportionment of the work we have carried out".

65. In evidence, Mr Bessemer Clark described the extensive work done; the fact that it had included individuals from the firm's corporate, employment and property departments and involved fee earners at different levels - partners, assistants and trainees. Some work done (e.g. meetings, telephone calls) related to the transaction as a whole, including both the debt element (for which YRD was paying), and the shares element (for which the Defendant was paying). He said he would have looked at the billing guides for each file, and had concluded that an equal split was a fair division. He considered that, given the substantial amount of work on the warranty deed, shareholders agreement and other documentation, the equal split may have favoured the Defendant i.e. his liability may have been higher than 50%.

66. On hearing Mr Bessemer Clark's evidence, I was satisfied that his approach was legitimate and reasonable.

67. On the basis of the evidence before me, both documentary and oral, and without carrying out a detailed assessment, I am satisfied that the fees which are the subject of this claim were properly and reasonably incurred by the Claimant in carrying out the work which it was instructed by the Defendant to do.

68. The Defendant has failed, without good cause, to pay the invoices rendered to him in respect of the services provided by the Claimant.

69. Therefore I enter judgment for the Claimant in the sum of £63,332.06 plus interest to be calculated.