Neutral Citation Number: [2023] EWHC 2960 (KB)

APPEAL REF: QA-2022-000120

**IN THE HIGH COURT OF JUSTICE**
**KING'S BENCH DIVISION**
**ROYAL COURTS OF JUSTICE**

Date: 21 November 2023

**Before**:
**MR JUSTICE RITCHIE**

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**BETWEEN**

**DMH ELECTRICAL (UK) LIMITED**

**Respondent/Claimant**

**- and -**

**MK CITY GROUP LIMITED**

**Appellant/Defendant**

**Piers Hill** of counsel (instructed by **Geoffrey Leaver**) for the **Respondent/Claimant**
**Ryan Hocking** of counsel (instructed by **DLS Law**) for the **Appellant/Defendant**

Hearing date: 14th November 2023

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**APPROVED JUDGMENT**

**Mr Justice Ritchie:**

**The appeal**

1. This is an appeal from a decision of Her Honour Judge Bloom (the Judge) made at the County Court at Luton on 12th May 2022 in claim G14YY729 which related to unpaid invoices for electrical work.

2. The Judge entered judgment for the Claimant for £63,185 with interest and costs.

3. By notice of appeal issued on 7th June 2022 the Appellant sought, in three grounds, to overturn the judgment.

4. Permission to appeal was granted on the papers by Lavender J on 8.12.2022 on the substantive grounds (1 and 2) and by Julian Knowles J on 9.6.2023 in relation to the costs order (ground 3).

**Bundles and evidence**

5. The Court was provided with an appeal bundle, an authorities bundle and two skeleton arguments.

**Background facts**

6. This is a tale of two old school friends, one became a plumber and the other an electrician, who worked together in harmony on many building projects including a site at Graven Hill, Bicester (the Site). Whilst they were working together at the Site the main contractor went bust, money was left unpaid for works done and the school friends fell out over where the loss should fall. Unusually for building litigation, in this case:
   (i) both parties agree that the Defendant asked the Claimant to quote for items of electrical installation work within the many properties being built on the Site, the Claimant provided such quotes and these were used to form the bases of a series of contracts made between them; and
   (ii) neither party denies that there were contracts made between them for the Claimant to carry out electrical works at the Site, as the sub-sub-contractor to the Defendant, who was the sub-contractor to the Sylva Group, the main contractor; and
   (iii) the Defendant does not assert poor workmanship, it is agreed that the quality of the Claimant's electrical work was good; and
   (iv) the work was done on time and the parties agree that the Claimant should be entitled to be paid for the work.

7. Some of the Claimant's invoices went unpaid by the Defendant after the main contractor went bust so the Claimant sued the Defendant for the outstanding £157,916. I suspect there was no point in the Defendant suing the Sylva Group. The Claimant's solicitor drafted the particulars of claim (PoC). The defences raised by the Defendant were many and varied. Some were withdrawn when a payment of £85,188 was made by the Defendant to the Claimant around the time when the first trial date was vacated,

due to lack of Court resources. That left £72,728 of the claim remaining. At trial the Judge gave judgment for £63,185, so not all of the items claimed were recovered, so for instance the extras under C1 were not awarded because they were not properly pleaded. No appeal is made from that decision.

8. Two of the contracts are relevant to the appeal. Contract 1 (C1) was made around June 2017 on the basis of the figures provided by the Claimant to the Defendant in a quote dated 21.6.2017. This was for electrical installations at 2/3/4 bedroom houses to be built on plots at Graven Hill Village at the Site based on a set of specifications provided by the Defendant to the Claimant. The Defendant asserted in its defence that the installation of MVHR units was not covered by the pleaded contract so the claim for installation of these was "unpleaded" and could not be awarded. There was no dispute that the parties had agreed to these being supplied and installed by the Claimant or that they were installed and properly. The defence was a pure pleading point.

9. The second contract in dispute (C2) was agreed in around February 2018 and was made in a similar way. The Defendant sent rough specifications for various sizes of houses to be built on plots at Golden Bricks, at the Site, but this time asked for "provisional" costings for: (1) basic electrical installations (lights, plug sockets, etc.), and (2) additional fittings which each house buyer could choose as upgrades. The defence on this contract was not that the work was not contracted to be done, nor that it was not done, nor that the price was wrong, nor that the work was bad, instead the Defendant pleaded that there was no contract arising from acceptance of the pleaded quote because it was expressly stated to include provisional figures to which the Defendant would not hold the Claimant. Alternatively, if that defence failed, then it was pleaded that the contract based on the quote was void for uncertainty.

**The issues – as framed by the Grounds of Appeal**

10. Was the Judge wrong in law and/or fact to find that the claim for invoiced work was actually within the pleaded scope of C1 in relation to the MVHR works?

11. Was the Judge wrong in law and/or fact in relation to C2 in finding that the Claimant's quote was an offer capable of acceptance by the Defendant?

12. If a contract was purportedly made by acceptance of the C2 quote, was the Judge wrong in law and/or fact not to find it void for uncertainty?

13. As I shall explain below, in my judgment the framing of the issues in the Grounds does not address the real issues which I need to determine.

**Appeals - CPR 52**

14. I take into account that under CPR rule 52.21 every appeal is a review of the decision of the lower Court and the appeal Court may allow the appeal if the decision was wrong or unjust due to procedural or other irregularity.

15. Under CPR rule 52.20 this Court has the power to affirm, set aside or vary the order; refer the claim or an issue for determination by the lower Court or order a new trial or hearing.

**Appeals against findings of fact**

16. I take into account the decisions in *Henderson v Foxworth* [2014] UKSC 41, per lord Reed at [67]; *Grizzly Business v Stena Drilling* [2017] EWCA civ 94, per Longmore LJ at [39-40]; Lord Justice Lewison in *Volpi v Volpi* [2022] EWCA Civ. 464, [2022] 4 WLR 48, at paras. 2-4 and 52 and *Deutsche Bank AG v Sebastian Holdings* [2023] EWCA Civ. 191, per Males LJ at [48-55]. In summary, any challenges to findings of fact in the Court below have to pass a high threshold test. The trial Judge has the benefit of hearing and seeing the witnesses which the appellate Court does not. The Appellant needs to show the Judge was plainly wrong in the sense that there was no sufficient evidence upon which the decision could have been reached or that no reasonable Judge could have reached that decision.

**The chronology of the action**

17. The Claimant issued a claim form with particulars of claim (PoC) attached in September 2020. £157, 916 was claimed. In relation to C1 the Claimant pleaded as follows:

> "4. In or about June 2017 the Defendant requested a quotation from the Claimant for electrical works at the development Site. In response to that request, the Claimant provided a quotation by email dated 21 June 2017, a copy is attached marked Cl. The quotation was accepted by the Defendant, although the Claimant cannot recall whether orally or in writing. The acceptance of the quotation constituted a contract between the Claimant and the Defendant for the Claimant to carry out the works set out in the said email for the price therein quoted ("the First Contract")."

18. The PoC were served with and incorporated the quote sent by the Claimant to the Defendant. The quote for C1 was as follows:

> "From: Dean Hanley [mailto:dmhelectricaJ@btinternet.com]
> Sent: 21 June 2017 13:51
> To: 'wes@mkcph.co.uk'
> Subject: Graven hill Village
> Him Wes,
> **I would like to put a cost in as follows for the plots.**
> **I have not allowed for the MVHR Units as I am waiting on the wholesaler to get back to me.**
> I have allowed for all points listed as per the specification you sent as this lists the quantities of lighting and sockets etc. per plot.

This is in section 10,0 -10.7
Property type – 2 bedroom/ 4 person @ £3250.00
Property type – 3 Bedroom/ 6 person @ £3650.00
Property type – 4 Bedroom / 7 person @ £3950.00
Property type – 4 Bedroom/ 7 person 3 STOREY@ £4250.00
I Have allowed for all the TV cables/ Face plates but in the specification 10.6 it says no ariels to be fitted.
Materials:
Sockets and switches – Schneider Ultimate range
Consumer Units – Hagar Dual RCD Split Load boards
Aico mains interlinked smoke alarms and C02 detectors
Kind regards Dean" (My emboldening).

It may help to know that MVHR means: Mechanical Ventilation Heat Recovery.

19. In relation to C2 the Claimant pleaded as follows:

"5. In or about February 2018 the Defendant requested a quotation from the Claimant for electrical works at Golden Bricks at the Development Site. In response to that request, the Claimant provided a quotation by email dated 21 February 2018. A copy is attached marked C2. The quotation was accepted by the Defendant, although the Claimant cannot recall whether orally or in writing. The acceptance of the quotation constituted a contract between the Claimant and the Defendant for the Claimant to carry out the works set out in the said email for the price therein quoted ("the Second Contract")."

20. The quote which was the subject of C2 is set out below. It incorporated the Defendant's email (at the bottom) setting out the items to quote for and is to be read understanding that the figures in the Defendant's email were inserted by the Claimant when it replied with the quotation (at the top).

"Hi mate,
Dean Hanley <dmhelectrical@btinternet.com >
21 February 2018 08:55

RE: Golden Bricks
Please find costings next to your queries.
Give me a bell and can discuss over phone if you need any more info mate.
I have allowed for a basic sort of 1st fit including:
3 x double sockets to bedrooms/ 4 x double sockets to master and lounge

4 X double sockets to kitchen plus cooker circuit and appliance points up to 5 number
Pendants to all rooms
Extractor fans to all bathrooms and W/C's
TV point to lounge and master bedroom
Kind regards Dean

_____

From: Wes Bryan [mailto:wes@mkcph.co.uk]
Sent: 20 February 2018 16:59
To: Dean Hanley;
Subject: Re: Golden Bricks
Hello Deano
Cheers for this fella, con you confirm the following:
As I requested today by telephone- **I need a PV sum against some potential house sizes (just a rough guide you wont be held to it)** Can you price the following types:
First fix (PV sum)
3 Bed house over 2 storeys, 1 bathroom, 1 cloakroom - £2500.00
3 Bed House over 2 floors. 1 bathroom, 1 cloak. 1 ensuite - £3000,00
4 Bed house over 2 storeys, l bathroom, 1 cloak - £3000.00
4 Bed house over 2 storeys, 1 bathroom, 1 cloak, l ensuite - £3500.00
5 Bed house over 2 storeys. L bathroom, l cloak -£3500.00
5 Bed house over 2 storeys, 1 bathroom, l cloak, 1 ensuite - £4000.00
Also where is the consumer unit and breakers? – up lo 10 way Board complete with MCB's and 2 x RCD's @£350.00
Also Spot lights costing?
standard fixed downlighter with LED removable lamp-£35.00 per 1
fully enclosed LED fitting-£40.00 per 1
fully enclosed LED fitting and dimmable - £50.00 per 1
As discussed see attached and odd any items you feel we can up sell, extra shaver sockets, SMART controls, door entry, door bells I dunno anything you can think of it will all be extra £££££££ for us.
Shaver sockets to bathrooms in white - £65.00
Shaver sockets to bathrooms in brushed chrome - £75.00
Shaver sockets to bathrooms in brushed chrome and flat plate - £80.00
Hard wired door bells- £90.00
TV points - £90.00 per point
TV Aerial freeview fitted - £330.00
I will call you in the morning to discuss, as I see I need these put to bed asap.
Thanks mote
Kind Regards

> Wes Bryan
> MK City Plumbing & Heating" (My emboldening)

21. In relation to C1 the Defendant defended as follows:

> "3. Paragraph 4 is admitted, save that the quotation was accepted by the Defendant orally. The email attached to the Particulars of Claim and marked Cl referred to 59 specific plots at the Development Site, the details of which were provided by the Defendant to the Claimant in an email dated 19 June 2017."

Furthermore, at paragraph 9a. the Defendant pleaded:

> "9a. It is admitted that the Claimant carried out all of the works referred to in the email marked C1."

22. I note that no mention is made of the MVHR work in the defence in relation to C1.

23. In the defence in relation to C2, the Defendant pleaded thus:

> "4. Paragraph 5 is denied. The email attached to the Particulars of Claim and marked C2 does not refer to any specific plots at the Development Site, and instead sets out the Claimant's price quotation for categories of houses. The email at C2 does not set out either the total number of houses of each category, nor a total price for the works referred to therein. As such, the email at C2 does not constitute an offer capable of being accepted, or alternatively the Second Contract was void for uncertainty."

24. Furthermore, in paragraph 9 of the defence, the same was repeated in relation to C2.

25. The Claimant sought to understand the Defendant's case and made a part 18 request for further and better particulars. In relation to C1 the Defendant was asked to look through a served, itemised schedule of work items done and indicate what was in dispute. This schedule expressly set out the works done including the installation of multiple MVHR units. This is what was asked:

> "REQUEST
> 1. Please confirm whether it is accepted that the Claimant was instructed to carry out all of the work identified in Schedule 1 pursuant to the First Contract and, insofar as the same is not accepted, please identify each and every item of work contained in Schedule l which the Defendant contends the Claimant was not instructed to carry out pursuant to the First Contract.

> 2. Please state whether it is accepted that the value of the work shown in respect of each item on Schedule 1 accurately reflects the price which the Defendant agreed to pay to the Claimant in respect of the identified item of work pursuant to the First Contract and, insofar as the same is not accepted in respect of any of the items of work, please state what price the Defendant contends it agreed to pay in respect of the said items of work pursuant to the First Contract."

26. Unhelpfully this was refused in the part 18 response. The Defendant responded thus:

> "Response
> 1. The Defendant does not accept that the Claimant is entitled to a response to this request for the following reasons:
>
> a. The Claimant served a Reply on the Defendant under cover of a letter dated 9 August 2021. It is therefore not accepted that the requests made are reasonably necessary to allow the Claimant to prepare its case or to understand the case which it has to meet, in breach of paragraph 1.2 of Practice Direction 18.
> b. The Defendant has already admitted, at paragraph 8a. of the Defence, that the Claimant carried out all of the works which it was obliged to carry out pursuant to the First Contract, as defined at paragraph 4 of the Particulars of Claim:
>
> i. To the extent that the works referred to in Schedule 1 form part of the First Contract, as defined at paragraph 4 of the Particulars of Claim, the fact that the Claimant carried out all of those works is not in dispute in the proceedings.
> ii . To the extent that the works referred to in Schedule 1 do not form part of the First Contract, as defined at paragraph 4 of the Particulars of Claim, those matters do not form part of the Claimant's case and are not relevant in the proceedings. To this extent, the prefatory wording to this request is incorrect in stating that the Claimant has made any relevant allegation.
>
> 2. The Defendant does not accept that the Claimant is entitled to a response to this request for the reasons set out at Response 1 above."

27. Thus, no mention was made of the MVHR work in the response. By this approach the Defendant appears to have been attempting to keep obscure the interpretation point on the scope of C1: namely the assertion that the Claimant's claim, as pleaded, did not cover the installation of the MVHRs. However, this point was taken at trial. I do not consider that this was an appropriate way forward. The pleadings are intended to identify the issues, not obscure them.

## The judgment

28. The Judge gave an extemporary judgment on the remaining issues after a trial lasting 2 days.

29. The Judge noted that the Defendant had abandoned its defence on contract 4 and stated that the remaining issues (which are relevant to this appeal) were: (1) is the Claimant entitled only to work under the original contract (C1) or also to the extra works? (2) Is C2 void? (3) What sum is due, if any? The Judge noted she had heard evidence from the directors of the Claimant and the Defendant and from a Miss Coleman, a bookkeeper. She was impressed by all of the witnesses and found that most of the facts were agreed. She set out that Mr. Hanley (the Claimant's director) and Mr. Bryan (the Defendant's director) were old school friends who worked together a lot. She set out their modus operandi when entering contracts on the Site. The Defendant was the subcontractor and sub-subcontracted work to the Claimant. The Defendant would request a quote from the Claimant. In relation to C1 the request was not in the disclosed documents, despite the Defendant having pleaded it as being dated the 19th of June 2017 in the defence. In response to that request the Claimant had quoted for a cost price per house but had not costed the MVHR installations in each house because the Claimant was awaiting figures from the wholesaler. The Judge noted the Defendant agreed that contract C1 was made by acceptance of the quote but the Defendant asserted that the installation of the MVHR units at the relevant agreed price for the houses and that was not pleaded because it must have been agreed in a later contract. The Judge noted that the Defendant drew up a schedule at the time of the contract with the agreed prices on it. The schedule was at trial bundle page 77 and included electrical items totalling £89,600 and MVHR items totalling £112,000. The Judge noted that the Defendant denied liability for the installed MVHR's due to the Claimant's allegedly defective pleading, not on any other ground.

30. The Judge found, in relation to C2, that installation was to be "Golden Bricks" on the Site and the Defendant had requested the Claimant to provide a provisional valuation, a rough price guide, for the electrical installations for each house size and asked the Claimant for costings of bespoke items as well. The Defendant wrote, when asking for the quote, that he would give the Claimant a call the next morning to put "this to bed". The Judge found that the Defendant wanted a template for pricing to offer prospective buyers or visitors who came to purchase new build houses from the developer. The Defendant's witness explained that the Defendant would pass the Claimant's figures on to the main contractor and would add his margin to them. The Claimant provided the requested figures the same day in the February quote. The Defendant failed to disclose the spreadsheet of figures in relation to C2 which the director said would have been on his computer. The Judge found that later, when they spoke, and the Claimant decided to stick to the prices and the Defendant accepted the Claimant's quoted prices. So, the quoted figures were set out in the Claimant's spreadsheet at trial bundle page 76. The Judge considered both witnesses to be honest professionals. The Judge found that the main contractor had gone bust and the Claimant and Defendant had left the Site out of pocket.

31. In relation to the law, the Judge considered *Prudential v Revenue and Customs* [2016] EWHC Civ. 376, and in particular paragraph 20 of the judgment of Lord Justice

Lewison. The Judge clearly had in mind the Defendant's submissions about the Claimant's pleading being defective. The Defendant submitted that for C1, the "quote" provided by the Claimant was not an offer in relation to installation of the MVHRs because they were expressly excluded from it by the words used. The Judge noted that no quantum meruit had been claimed and understood the Defendant to be saying that the MVHRs were the subject of a second agreement, outside the C1 quote, which must have arisen in the days after the quote was provided. The Judge rejected that analysis, preferring instead the Claimant's analysis. The Judge found that the words of the C1 quote, construed properly, covered MVHR's being supplied and installed by the Claimant but left the precise pricing to a later date once the wholesaler had returned to the Claimant with the prices. The Judge found as a fact that the MVHR prices were provided before the parties spoke (or communicated in writing) to agree the contract and that the agreement was based upon the C1 quotation.

32. The Judge expressly ruled that statements of claim needed to define the claims made and noted that there had been no application to amend the claim in relation to the extra works which were also claimed but were denied in the Defendant's part 18 response. The Judge then rejected the claims for extra works because they had not been pleaded, but found that the MVHR works were part of the C1 quote and were included in the pleaded C1 claim.

33. In relation to C2, the Judge found that it was a valid contract and took into account the guidance given by MacKay J in *Organic Group v Charterhouse* [2007] EWHC Civ. 1275, at paragraph 12, in which the text from Lewison's *Interpretation of Contracts*, 3rd edition, at paragraphs 8.10 - 8.14 was approved. The Judge applied those tenets of contractual interpretation to the facts of the case. She found that contract C2 did not lack certainty. The quote was provided by the Claimant for electrical first fitting per house in various styles. There was a base cost and then there were customer choice upgrade costs. The prices quoted per unit of work were later agreed and the parties were clear as to the terms. As for the request for the quote to be provisional, the Judge found that later the parties had discussed it and agreed that the provisional figures would be the contractual figures. The Judge also noted that the Defendant had not provided disclosure of its schedule of those prices, which she found was less than helpful.

**The Appellant's submissions**

34. Contrary to the way the grounds of appeal were drafted, which included the following words: "*the learned Judge below erred in law and/or fact in finding…"*, in the Appellant's skeleton the Appellant accepted that it did not challenge any of the Judge's findings of fact. Thus, the appeal proceeded on the basis that each of the Grounds was an assertion that the Judge had erred in law.

35. In submissions, in relation to C1, the Appellant relied on paragraph 20 of the judgment of Lewison LJ in *Prudential v Revenue* (cited above) and in addition upon the judgment Longmore LJ in *Scicluna v Zippy Stitch* [2018] EWCA Civ. 1320, at paragraph 15

approving the judgment of Langstaff J in *Land Rover v Short* [2011] UKEAT 0496/10/RN, who stressed the importance of the Court determining the issues arising from the pleaded claim rather than a claim which might have been pleaded but was not. The Appellant submitted that the Claimant was limited to the claims set out in the pleadings. The Appellant also relied on *Chitty on Contracts* 34th edition at paragraphs 4-010 and 4-013. These set out the standard rules separating invitations to treat from offers. The Appellant also relied on *Chitty* paragraphs 4-220 to 4-221 in relation to the assertion that contract C2 was too uncertain to be enforceable. Further, the Appellant relied on the judgment of MacKay J in paragraph 12 of *Organic v Charterhouse* [2007] EWHC 1275, which was to the effect that the Court should construe the contract first and then, when considering whether it was void, the Court should only make a finding of voidness as a last resort. A contract should only be held void if the Court cannot reach a conclusion on what the draughtsman had in mind or if the Court considers it is not safe to prefer one meaning to other equally possible meanings. Also, the guidance to the effect that agreements to agree generally have no legal effect. So, the Appellant submitted in relation to C1 that the offer expressly excluded MVHRs. In addition, the Appellant submitted that the Judge's finding that the Defendant knew the price of the MVHRs before accepting the quotation was irrelevant to the scope of the contract made by acceptance of the quote. In relation to C2, it was submitted that the parties clearly did not intend for the Claimant to be held to the provisional prices quoted, the Defendant used non-committal language in the request for quotation and the Claimant used the same in the quotation. The Appellant submitted it was not an offer capable of acceptance, so the pleaded case was bound to fail. Whilst the Defendant accepted in the skeleton argument that an agreement *may* later have been reached, it was submitted that because the parties anticipated further communications and because no plot numbers were provided and the house sizes were only "potential", it was not possible to ascertain the mutual obligations from the provisional quote because there was insufficient detail. In summary, the Defendant's case was put in the alternative: (1) although an agreement may have been reached between the parties later on, it was not as a result of an acceptance of the C2 quotation and hence because the Claimant had pleaded it was an acceptance of the C2 quotation, the claim under C2 must fail. So, this was again a pleading point. (2) if there was a contract incorporating the quote it was void because it was too uncertain in the terms.

**The Respondent's submissions**

36. The Respondent submitted that the modus operandi of the two company director friends was important. They trusted each other, as the Judge found. The Claimant was the only electrical subcontractor working on Site and he provided sub-contract services to the Defendant. The modus operandi involved the Defendant asking for quotes for various items of electrical fitting work dependent on various house sizes and for additional items of work, for instance in C2, and the Claimant provided such quotes. There was no issue about the fact that the June 2017 quote was accepted and incorporated into C1 and so formed the basis of C1. The request for this quote included a request for the MVHRs to be sourced and installed and the quote clearly evidenced an intention to do

so, subject only to an outstanding query in relation to the prices which the wholesaler would quote. Both witnesses accepted that these prices were provided before the agreement was reached between the parties and after the quote, because accurate figures were set out in the schedule which the parties used for the work which was actually done. The Judge found that when the C1 agreement was made orally or in writing after the quote, the MVHR prices were also agreed between the parties. So, it was submitted that the Judge's finding was correct in relation to the installation of MVHRs being part of C1. They were intended to be included in C1 by both contracting parties, as requested in the invitation to quote and they were intended to be installed by the very wording of the quote. The Judge found that parties' subsequent oral or written communications led to an agreement on the basis of the prices quoted (including the later supplied prices for MVHRs from the wholesaler).

37. In relation to C2, the Respondent's first point was that it was inappropriate for the Defendant to say that the provisional figures provided by the Claimant were too uncertain to form the basis of a contract, when the Defendant itself had expressly asked for provisional figures. It was submitted that the context included the history of the working relationship before being on Site and on Site; the usual modus operandi of the two men and the knowledge which both parties had that the Defendant needed these figures to pass on to the main contractor who would in turn pass them on to the developer, who would provide these options to prospective purchasers. In that context the provisional figures quoted were what the Claimant was asked to produce. Then, in a day or few days after the provisional figures quote, the parties spoke and reached agreement to form C2, based on the February 2018 quote. It was submitted that the Judge was right to find that C2 was made by the Directors and that it was certain enough, so it was not void.

**Analysis of each Ground**

**C1 and the pleading point.**

38. In relation to pleading a claim, Lewison LJ ruled as follows in *Prudential v Revenue* [2016] EWHC Civ 376 at para 20:

> "20 … Our procedural system is and remains an adversarial one. It is for the parties (subject to the control of the court) to define the issues on which the court is invited to adjudicate. This function is the purpose of statements of case. **The setting out of a party's case in a statement of case enables the other party to know what points are in issue, what documents to disclose, what evidence to call and how to prepare for trial.** It is inimical to a fair hearing that a party should be exposed to issues and arguments of which he has had no fair warning. If a party wishes to raise a new point, he should do so by amending a statement of case. We were told that by the time that skeleton arguments for trial were served each party would know what points were in issue. We do not regard that as sufficient. In this case, for example, HMRC's

> skeleton argument was served about ten days before the trial started. If (as in fact happened in this case) HMRC wished to argue that the evidence proposed to be called by Prudential was directed at the wrong issue (being an issue that had not been raised before) ten days' prior notice was manifestly inadequate." (My emboldening).

39. In *Scicluna v Zippy* [2018] EWCA Civ. 1320, Longmore LJ ruled at para. 12 as follows:

> "In paragraphs 32-33 of *Land Rover v Short* (2011) UKEAT/0496/10/RN Langstaff J approved the submission of counsel that:-
>
> > "it was trite law that it was the function of an Employment Tribunal to determine the claims which the Claimant had actually brought, rather than the claims which he might have brought and that accordingly the Claimant was limited to the complaints set out in the agreed list of issues.""

40. The Judge clearly had this guidance well in mind when she made her rulings and findings of fact.

**The scope of the contract**

41. As to the Judge's interpretation of C1, the Defendant sought to persuade the Judge that the words of the quotation specifically excluded the MVHR work from the scope of the works. But in fact the quotation envisaged the subsequent provision of the prices for the MVHRs in the very near future and in evidence the parties both agreed the prices were provided and then the parties contracted on those prices and the quotation prices.

42. This was an agreement made between two commercial tradesmen who knew each other well and who were or were to be working on the Site together. In the event, as Respondent's counsel stated in submissions, the Claimant was to be the only electrical sub-sub-subcontractor on Site doing this work. One tradesman asked for a quote for items A, B and C. The other provided a quote for items A and B but said that the price for C would come soon afterwards. Then they spoke, after the price for C was provided, and reached an agreement on the prices set out in the quotation and the additional information and agreed those would be the prices in the contract. To that extent the quote was "accepted".

43. The Judge ruled that, as a matter interpretation of the words used in the quote, taking into account the circumstances of the contract and from the evidence of the contracting parties, the contract included for the Claimant to install MVHRs, as requested by the Defendant in the undisclosed request to quote, at a price which was known to both parties when the agreement was reached. In my judgment that was an interpretation wholly open to the Judge to make in the circumstances of the case, on the evidence before the Court. It flowed from the behaviour of the parties before the contract and

the words used in the emails and was not undermined by their behaviour straight after the contract was made but instead supported by that. The quote did not say 'we will not install the MVHRs'. It impliedly assumed that they would be installed by the Claimant as requested by the Defendant, subject to finding out the wholesaler's price. It was not conditional upon availability of the units because it did not say so. No one suggested in evidence that MVHRs are like gold dust and difficult to source. The parties then performed contract C1 and that performance included installing MVHRs. Neither director (both of whom gave evidence) thought that there was any second contract for the MVHRs, as was submitted by the Defendant's counsel. The Appellant did not rely upon any witness statement or live evidence from the transcript suggesting that.

**The pleaded case**

44. Having found that the Judge's ruling on the scope of the contact was not wrong and that the contract covered installation of the MVHRs. The next question is whether the Judge's decision that the pleaded case included a claim for MVHRs was wrong in law.

45. At the trial and in the appeal the Defendant attempted to substitute the words used in the PoC so as to swap "offer" for "quotation". The Claimant pleaded the fact of the quotation, and then pleaded that after the quotation was sent the parties reached agreement and that agreement was based upon the quotation, so in that sense it was "accepted".

46. When interpreting the pleaded words and the quote to determine whether the pleading excluded a claim for the MVHRs I take into account the authorities above. I must consider whether: "The setting out of a party's case in a statement of case enabled the other party to know what points are in issue, what documents to disclose, what evidence to call and how to prepare for trial. It is inimical to a fair hearing that a party should be exposed to issues and arguments of which he has had no fair warning." In my judgment, applying a natural and normal interpretation of the words used in the PoC and crucially in the attached quote which was incorporated into the PoC, in the context of the dealings between the parties, and on the evidence of both directors, it was clear to the Defendant that the pleaded claim included all of the items in the quote, including the installation of the MHVR units.

47. All of the Defendant's behaviour after service of the PoC supports the view that it knew the claim which it faced. The Claimant's statement of case enabled the other party (the Defendant) to know what points were in issue, what documents to disclose, what evidence to call and how to prepare for trial. I take into account that the Defendant did not make a part 18 request of the Claimant to clarify the pleading in relation to C1 and MVHR units. The Defendant knew perfectly well what the Claimant was pleading in relation to C1 included the MVHR units. The Defendant has not been taken by surprise by any new case brought forward by the Claimant on this contract at trial. Quite the opposite. As I have mentioned above, the Defendant intentionally avoided expressly pleading a denial in relation to the MVHR installations being part of the scope of C1.

There is no mention of these being excluded from C1 in the defence, and the wording of the Defendant's Part 18 response was intentionally obscure. At trial the Judge allowed the Defendant to take the pleading point despite the obscurity of the Defendant's pleading. But the Judge rejected that defence and found that the pleading claimed for the installation of the MVHRs. In my judgment the Judge's finding in relation to the pleading is unassailable. It was a reasonable, objective interpretation of the words used in the PoC which attached and incorporated the quote. It did not mislead the Defendant.

48. For the reasons set out above I consider that Ground 1 of the appeal is not made out.

**Ground 2: C2 and the offer point**

49. Having referred to the provisional quote in the email and attached the email to the PoC the Claimant pleaded that: "the acceptance of the quotation constituted a contract between the Claimant and the Defendant for the Claimant to carry out the works set out in the said e-mail for the price therein quoted".

50. In relation to the Appellant's submission that the provisional quotation marked C2 could not constitute an offer because it did not contain a clear intention to be bound by any acceptance of it, both before the trial Judge and in the appeal the Appellant submitted that the only proper approach was to consider whether the quote could constitute a contractual offer capable of acceptance. If, on a proper interpretation, it could not be an offer, then no contract was formed. All of this arose from the wording of the pleading which the Defendant asserted, objectively, could only mean that the Claimant was using the word "offer" instead of the word "quotation".

51. The trial Judge carefully considered the factors relied on by the Appellant and made a key ruling, which was that:

> "The quote was given and later accepted by the Defendant in the terms quoted. Both parties were clear as to the terms of the quote and whilst it could have been that the Claimant amended later or sought to withdraw a quote on the basis that it had been given provisionally, it did not do so and the Claimant accepted in evidence that it agreed the figures provided in that quote."

52. These findings of fact are not appealed. They are rather what one would expect, taking into account the modus operandi of these two tradespeople, who trusted each other. The Defendant specified the size of house and the number of rooms in each and asked for a provisional quote for a basic electrical fit for all the rooms. The Defendant also asked for upgrade items and prices on those. The Defendant expressly was not going to hold the Claimant to the provisional prices and the quote was made on that provisional price basis. The Claimant provided the provisional figures. Both envisaged talking the next day or soon after about finalising the contract. The Judge did not expressly find that

the quote was "an offer" in the strict sense and I do not consider on an objective interpretation of the words used in the circumstances of the parties at the time that it was made, that it was intended to be a contractually binding offer either. The key words were from the Defendant's invitation to quote and were at the bottom of it where the Defendant wrote:

> "I will call you in the morning to discuss, as I see I need these put to bed ASAP."

The parties' directors gave evidence and the Judge found that conversations orally (or communications in writing) did take place after the provisional quote and the parties agreed to contract for the Claimant to carry out the items of work set out in the request for a provisional quote at the provisional prices provided. The Judge expressly found in para. 40 of the judgment, set out at para. 51 above, that the Claimant did not wish to revise the provisional figures upwards. She expressly considered the Claimant's right to refuse to be bound by the provisional quote. Thus, the Judge found that the provisional figures became firm figures and in that sense the quote was accepted. But not in the formal sense which the Defendant seeks to impose on the wording of the PoC. The quote was not "the offer". Nor was it pleaded as the offer. In my judgment it is implicit that the Judge found that the subsequent conversations contained the Claimant's offer which was based on the provisional quote. The Defendant seeks to interpret the pleaded words as meaning only that the quotation was an offer capable of acceptance. That is one interpretation which could be placed on the pleaded words. But, in the circumstances of the way in which the parties had interacted in the past and their modus operandi, a more objective interpretation of the pleading, with the quote attached, is that the quote was a provisional figure, as requested, which was not capable of acceptance and a further discussion was needed before the parties could reach an agreement. In the event they did reach agreement to proceed on the basis of the provisional figures which then became the contractual figures. To that extent the quote was "accepted". Thus, I do not think that the Judge's reasoning was in any way faulty or wrong in law when approaching matters in the way that she did or in her finding that C2 was made and properly pleaded.

**Uncertainty – Ground 3**

53. As to whether C2 should have been held void for uncertainty, the Judge found that the directors knew perfectly well what the terms of the C2 work were. Indeed, neither director considered that the contract was too uncertain. On the contrary, they knew that for each size of house the Claimant would install the stated electrical items as a basic fit in each room, at the quoted prices. In addition, if a purchaser wished to buy the additional upgrade items, the price list was also clear. They knew where the houses were to be built. They exchanged "the more the merrier" banter in relation to volume. Remarkably, in submissions, when the Court asked the Defendant to consider an analogy of an Essex motor car main agent offering new Ford motor cars for sale, and doing so on a price list, and to consider whether the contract between the main dealer and the manufacturer was, void for uncertainty because it did not specify how many

cars were to be produced, or of what colour, or to what specifications, the Defendant's submission was that such a contract would be void for uncertainty. I do not accept that submission, not least because it does not make any business sense.

54. As is set out in the authorities providing guidance on contractual uncertainty, it is the function of the Courts in contractual disputes to seek, if possible, to uphold the commercial bargains made between commercial persons and trades persons unless it is not possible to do so. In my judgment this is all the more important when the contract has already been performed in accordance with the terms set out. The Judge found that C2 was certain in relation to the crucial aspects which the two trades persons entering it considered were the important ones. The fact that the contract did not provide specifically for the number of houses to be fitted or provide the precise upgrades to be installed in each house did not undermine the certainty of the contract, as the Judge so found.

55. In *Openwork v Forte* [2018 EWCA Civ. 783, Simon LJ gave this guidance on holding contracts void for uncertainty:

> "25. **The Court should strive to give some meaning to contractual clauses agreed by the parties if it is at all possible to do so**. This point is illustrated by two decisions of the House of Lords, in which different conclusions were reached on the facts. The first case is *Hillas v. Arcos* (above). The dispute in that case concerned a term agreed between the parties in 1930 for the purchase by the plaintiff from the defendant during the 1930 Russian timber season of not less than 10,000 standards of softwood timber on terms. The plaintiffs in fact bought substantially more than that; and the parties then entered into an option for the 1931 season: if the plaintiff bought 22,000 more standards during 1930, they would have an option to buy '100,000 standards for delivery during 1931'. The plaintiff bought the extra 22,000 standards and exercised the option. The defendant argued that the option was too uncertain because no price had been agreed for the 100,000 standards, and there was no specification as to the type or quality of such timber. That argument failed. In a familiar passage in his speech at p.514, Lord Wright described the Court's task:
>
> > But it is clear that the parties both intended to make a contract and thought they had done so. Businessmen often record the most important agreements in crude and summary fashion: modes of expression sufficient and clear to them in the course of their business may appear to those unfamiliar with the business far from complete or precise. **It is accordingly the duty of the Court to construe such documents fairly and broadly, without being too astute or subtle in finding defects,** but, on the contrary, the Court should seek to apply the old maxim of

> English law, 'verba ita sunt intelligenda ut res magis valeat quam pereat.' [**words are to be understood such that the subject matter may be more effective than wasted**]. That maxim, however, does not mean that the Court is to make a contract for the parties, or to go outside the words they have used, except in so far as there are appropriate implications of law, as for instance, the implication of what is just and reasonable to be ascertained by the Court as matter of machinery where the contractual intention is clear but the contract is silent on some detail. Thus, in contracts for future performance over a period, the parties may neither be able nor desire to specify many matters of detail, but leave them to be adjusted in the working out of the contract. Save for the legal implication I have mentioned, such contracts might well be incomplete or uncertain: with that implication in reserve they are neither incomplete nor uncertain. As obvious illustrations I may refer to such matters as prices or times of delivery in contracts for the sale of goods, or times for loading or discharging in a contract of sea carriage. Furthermore, even if the construction of the words used may be difficult, that is not a reason for holding them too ambiguous or uncertain to be enforced, if the fair meaning of the parties can be extracted.

Later, he added this:

> Such matters may require, as the performance of the contract proceeds, some consultation and even concessions between the sellers and the buyers, but there is no uncertainty involved because, if there eventually emerge differences between the parties, the standard of what is reasonable can, in the last resort, be applied by the law, which thus by ascertaining exact dates makes precise what the parties in the contract have deliberately left undefined. Hence in view of this legal machinery id certum est quod certum reddi potest … [that is sufficiently certain which is made certain]" (My emboldening)

56. In the present case there was certainty over the electrical fitting work to be done on each size of house, certainty about the products to be installed, certainty about the price for each piece of work, certainty over the Site and certainty over the process by which the specification would come about – the property buyer's choice. The only uncertainty in the provisional quote (not the contract) was whether the Claimant would need to up its prices when the director had the discussion with the Defendant's director in the next few days to firm matters up. In the event he did not change the prices so the quoted prices became firm and were incorporated into the contract and hence accepted. The parties both accept that they intended to make C2. Performance then followed in line with the terms of C2. Neither party considered the terms too uncertain whilst they performed them. Whilst the Appellant has perhaps been keen to find subtle defects in

C2, it is the duty of the Court to construe such documents fairly and broadly, without being too astute or subtle in finding defects. Thus, I consider that Ground 3 is not made out and the Judge's ruling on uncertainty was not wrong in law.

## Conclusions

57. For the reasons set out above I dismiss the appeal and award the Respondent its costs summarily assessed at £15,554 including VAT. Any stay on enforcement of the Order below shall be lifted.

END