Neutral Citation Number: [2023] EWCA Civ 663

Case No: CA-2022-001356

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
His Honour Judge Paul Matthews (sitting as a Judge of the High Court)
[2022] EWHC 1500 (Ch)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 15/06/2023

Before :

LORD JUSTICE MOYLAN
LADY JUSTICE ASPLIN
and
LADY JUSTICE FALK

- -

Between :

BLACKLION LAW LLP	**Claimant/ Respondent**
- and –	
AMIRA NATURE FOODS LTD AND ANOTHER	**Defendants/ Appellants**

- -
- -

John Russell KC (instructed by **Bower Cotton Hamilton LLP**) for the **Appellants**
Sebastian Kokelaar (instructed by **Richard Slade & Co Ltd**) for the **Respondent**

Hearing date: 10 May 2023

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Approved Judgment

This judgment was handed down remotely at 11.30am on 15 June 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Lady Justice Asplin:

1. This appeal is concerned with the proper construction of a solicitors' retainer, various aspects of the conduct of the trial and whether points which were not taken at the trial can be raised for the first time on appeal.

2. The Respondent, Blacklion Law LLP ("Blacklion") is an English law firm which was instructed by the First Appellant, Amira Nature Foods Limited, a company incorporated in the British Virgin Islands ("Amira") under a general retainer and what became known as the "Avatar Retainer". We are concerned only with the Avatar Retainer. The Second Appellant, Mr Karan Chanana, is the chairman of Amira, a director and its majority shareholder. It is accepted that he is Amira's controlling mind.

3. The appeal is against the orders of HHJ Paul Matthews, sitting as a judge in the High Court, dated 24 May 2022 and 21 June 2022. The judge held that Blacklion was entitled to a fixed fee of £300,000 under the Avatar Retainer for work done by 31 May 2017, payable by Amira as a debt, plus contractual interest at the rate of 1.5% per month from 30 days after the date of the invoices rendered in relation to the fixed fee. He also held that Mr Chanana was liable to pay damages in the sum of £300,000 for procuring Amira's breach of the Avatar Retainer, causing Blacklion loss in that sum. He also decided that no credit need be given for certain shares which were in the name of Blacklion's principal, Ms Yasdani, because they could not be sold and the proceeds realised without the authorisation of Amira. The citation for his judgment is [2022] EWHC 1500 (Ch).

Background

4. This is intended as a summary of the relevant background to this appeal. A much fuller account is set out in the judgment to which reference should be made.

5. In January 2017, Mr Chanana proposed that Blacklion should undertake work in relation to the issue of high-yield bonds in Amira in order to raise further capital for the company. This was known as Project Avatar. Ms Yazdani agreed to take on the work and on 22 February 2017, Mr Chanana agreed with Ms Yazdani that shares in Amira would be issued and held on account of Blacklion's fees in relation to the project. On 25 April 2017, Mr Chanana signed a letter on behalf of Amira instructing Continental Stock Transfer and Trust Company (the "Agent") as transfer agent and registrar of Amira's ordinary common shares, to issue 73,391 restricted shares to the value of US $384,570 to be held in the name of Ms Yazdani (the "Shares"). As the judge explained at [44] of his judgment, at that date US$384,570 was the equivalent of £300,000. On the same date Ms Yazdani signed a letter addressed to the Agent, acknowledging (amongst other things) that the Shares were being issued to her pursuant to a written agreement for services and that the proceeds of sale of the Shares were intended "solely as compensation for services rendered". The judge found as a fact that by the end of April 2017, more than 90% of the work which Blacklion would carry out on the transaction had already been done [45].

6. The final form of the retainer agreement which became known as the Avatar Retainer was countersigned by Mr Chanana on 3 May 2017. Its terms, where relevant, are as follows:

> "**Retainer**
>
> We have agreed that the Firm will charge the Company a fixed fee of £300,000 ("Fixed Fee") for the Services plus disbursements ("Disbursements") in connection with this Matter, subject to the completion of the Matter by 31 May 2017. And, it is agreed that the Company shall give irrevocable instructions to its transfer agent to issue an equivalent of its ordinary shares to the Firm and/or its designee to satisfy the Fixed Fee upon execution hereof. If the Fixed Fee is paid in the Company's Ordinary Shares (as set forth below) then such Shares shall be issued by the Transfer Agent as book entry restricted shares on or before May 4, 2017.
>
> **The Fixed Fee**
>
> The Company shall have the option of paying the Fixed Fee in either cash or its ordinary shares. If paid in shares, the Company shall cause its transfer agent to issue £300,000 equivalent of its ordinary shares (the "Shares") to the Firm upon execution hereof. …
>
> The Fixed Fee represents payment for Services previously rendered and the services to be rendered in connection with the Matter. …
>
> The Firm will be able to sell the Shares freely in the open market at any time after six months from the date that services are rendered. Upon the sale of the Shares by the Firm, if the share proceeds ("Proceeds") are less than the Fixed Fee, the Company shall pay to the Firm, the difference between the Fixed Fee and the Share Proceeds, at its option either in cash or additional ordinary shares immediately upon notification of the same. The Firm shall sell only such Shares until the Proceeds equal the amount of the Fixed Fee. Any Shares held by the Firm that remain unsold at the time that the Proceeds equal the Fixed Fee shall immediately be returned to the Company …
>
> The Firm agrees that it shall not sell, on any one day, more than 10% of the average of the Company's daily share volume for the 65-days prior to such sale date."

7. Amira argued that the Avatar Retainer should be construed to mean that payment of the fixed fee of £300,000 was conditional on the completion of Project Avatar by 31 May 2017. Although it appears that a considerable amount of work was undertaken, Project Avatar, in the sense of the bond issue, never took place. Accordingly, it was said that the Fixed Fee was not due. Amira also argued that it had complied with its obligation to pay the Fixed Fee because of the issue of the Shares despite the fact that it had not been possible to sell them because they remained subject to restrictions imposed under the relevant US regulatory regime.

Judgment

8. First, at [5] the judge records that there were two applications before him at the commencement of the trial. The second application is of some relevance to this appeal. It was for permission for Mr Chanana to give his evidence by video link at 3pm on the last afternoon of the trial. The judge refused that application for the reasons he set out in a separate judgment, the citation for which is [2022] EWHC 2370 (Ch) which he summarised at [6] of the judgment. At [13] of that separate judgment he also concluded that it was appropriate to exclude Mr Chanana's evidence (in the form of four witness statements) entirely. In doing so, he noted in the separate judgment as follows:

> "11. I bear in mind, of course, that the evidence of the second defendant is of some importance in considering the questions of whether there was a common mistake and also whether the second defendant procured a breach of contract by the first defendant with the claimant. But I also bear in mind that the primary argument here is one of construction which does not require a great deal of input from the parties; it simply requires the court to construe the particular document in the factual matrix in which it finds itself.
>
> 12. This, being a commercial case, has a whole wealth of documentation within which to find and locate the crucial document. All of the documents in the bundle are, in this case, admissible evidence of their content by virtue of paragraph 27.1 of the Practice Direction to Part 32 of the Civil Procedure Rules. Accordingly, there is a great deal of evidence on which the construction argument can be based and, indeed, which can go some way towards resolving the questions arising out of common mistake and procuring a breach of contract. In addition, of course, there has been the opportunity for the defendants' counsel to cross-examine several witnesses on behalf of the claimant and may make such use of the answers obtained, as may be appropriate. Then, further, there has been the evidence of Ms Nasralla who was, in effect, a kind of assistant to the second defendant in the sense that she dealt with a lot of things on his behalf and on his instructions. Therefore, her evidence is of some value also."

9. Having considered a number of further issues in relation to witness evidence, some of which I shall refer to below, the judge turned to the proper construction of the Avatar Retainer. He held that the language used in the charging section was not clear and unambiguous and looked to see if there was a construction which was consistent with business common sense. He concluded that the construction advocated by Blacklion was consistent with business common sense. That was that the conditional language in the phrase "subject to the completion of the Matter by 31 May 2017" did not render the payment of the Fixed Fee conditional upon the completion of the project by that date. Instead, it related simply to the period of the work covered by the Fixed Fee so that work done after that date would be charged for in addition [54], [55], [57] – [61]. There is no appeal from this decision.

10. The judge went on to consider the question of contractual interest at [62] – [65]. In summary, he held that Blacklion's Terms of Business applied just as much to work done under the Avatar Retainer as the general retainer and, accordingly, clause 35 of the Terms of Business relating to interest applied to the invoices rendered under the Avatar Retainer. As a result, Blacklion was entitled to claim contractual interest under clause 35 on unpaid fees.

11. Having considered the alternative claim for rectification, with which we are not concerned, and on the footing that Blacklion was entitled to the Fixed Fee of £300,000, the judge went on to consider whether Amira had breached the Avatar Retainer. He noted that, although it was pleaded that no fee was due, Amira also argued that it had complied with its obligation to pay the Fixed Fee by the issue of the Shares and commented that Blacklion had received no value because the Shares "remain blocked and unsold, pursuant to the US regulatory regime under which they were issued" [85].

12. He then recorded the parties' opposing positions in relation to the steps necessary to release the Shares for sale. Blacklion's understanding was that the Shares could only be released and sold if Amira's US securities lawyer certified that the requirements of the US regulatory regime had been met but that Ms Hamilton (Amira's securities lawyer) had failed to provide the opinion necessary to lift the restriction on sale. Amira, on the other hand, contended that the necessary opinion could be provided by any US securities lawyer and that Blacklion was the author of its own misfortune because it had not obtained such an opinion [86]. The judge went on at [87], as follows:

> "As I have said, pursuant to the retainer agreement the first defendant had the "option of paying the Fixed Fee in either cash or its ordinary shares". It chose to do the latter, the relevant direction being given on 25 April 2017. The agreement further provided that the claimant "will be able to sell the Shares freely in the open market at any time after six months from the date that services are rendered." In order to give business efficacy to this provision, there must be implied a term that the first defendant will do all such things as are reasonably necessary to enable the sale of the shares in the open market."

13. The judge then noted Amira's pleading in relation to Blacklion's alleged failure to provide the Agent with an opinion from US counsel acting in securities law, stating that the sale of the Shares had been registered with the SEC or that Rule 144 of the Securities Act was available for Ms Yazdani's resale, at [47 6) and 7)] of the Defence and Counterclaim.

14. The judge also noted, however, that there was no pleading of US or other foreign law and that no permission had been given to adduce expert evidence as to foreign law in relation to the lifting of the restriction on the Shares. Ms Hamilton had made a statement, however, which could be interpreted as providing evidence of rules of US law although she did not refer to any particular provisions. The judge concluded that, if it were intended as expert opinion evidence, it would be inadmissible without the permission of the court and no such permission had been given [89].

15. He went on to set out the factual evidence in relation to the release of the Shares at [89] – [92]. In summary, it comprised:

i) an email from Ms Yazdani to the Agent of 14 May 2020 asking about the procedures to be followed for the Shares to be released in which she asked expressly whether it was correct that the only means of release was by way of a legal opinion from Amira itself or its general counsel;

ii) an email in response on the same day from Michele Jones of the Compliance Department at the Agent saying: "yes we would require the opinion from the issuer's counsel, representation letter and letter of instructions" and providing the contact details for Ms Hamilton;

iii) a printout of a page on the US Securities and Exchange Commission website which, amongst other things, provided:

> "Even if you have met the condition of rule 144, you cannot sell your restricted securities to the public until you have gotten the legend removed from the certificate. Only a transfer agent can remove a restricted legend. But the transfer agent will not remove the legend unless you have obtained the consent of the issuer – usually in the form of an opinion letter from the issuer's counsel – that the restricted legend can be removed.";

and

iv) Ms Yazdani's answer in cross-examination that she had enquired of US lawyers, Mayer Brown, with the same result.

16. The judge concluded as follows:

> "93. In my judgment, if in practice the transfer agent refuses to release shares for sale in the market without the issuer's own legal opinion, the reality is that, unless the registered holder (here Ms Yazdani) is prepared to take legal action against that agent, the shares will only be released with the co-operation of the first defendant, which has been refused. This is a breach of the implied term to which I referred above, and leads to the further conclusion that the first defendant is in breach of the retainer agreement, in neither paying the Fixed Fee nor making the issued shares available for sale."

17. The judge then turned to the claim against Mr Chanana that he knowingly induced or procured Amira's breach of contract. Having noted that it was admitted that Mr Chanana had de facto control over Amira, he turned to the law. He set out the elements of the tort in the form of an extract from the speech of Lord Hoffmann in *OBG Ltd v Allan* [2009]1 AC 1 at [39] and [40] and [42] – [44]. In relation to the position of a director of a company, the judge referred to *Clerk & Lindsell on Torts* (23rd edition, 2020) at [23-39] and quoted the following:

> "Moreover, if a director has ordered or procured the breach by the company he may be liable in tort given that he possesses the requisite knowledge and intention."

He went on to note that "[n]one of the three authorities cited for this proposition is a case of a director inducing or procuring a breach of contract. One is about the attribution of knowledge of an officer to the company, and two are cases of a director procuring the company to commit a tort." He concluded that he could see no reason why a director cannot in principle be liable for the tort of inducing or procuring a breach of contract by the company in an appropriate case.

18. It is also important to note that the judge recorded the nature of Mr Chanana's defence at [97]. He stated that Mr Chanana said that there was nothing in the evidence to suggest that he (Mr Chanana) did not hold the belief that the Fixed Fee was contingent upon the bond issue completing by 31 May 2017. Accordingly, it was said that the mental element necessary for liability (actually realising that the act will cause a breach of contract to be committed by the company) could not be satisfied. The judge concluded, therefore, that it was necessary to find the relevant facts.

19. Having reviewed the evidence, the judge concluded as follows:

> "102. On the evidence taken as a whole, I am entirely satisfied that second defendant had no basis to and did not believe in late April 2017 that the claimant's fees were dependent on the issue being completed by 31 May 2017. On the contrary, I am satisfied that the second defendant knew that the claimant's fees were not so dependent. I am further satisfied that he knew that the shares in the name of Ms Yazdani could not be sold without authorisation from the first defendant, and that he knew very well that, by not authorising Ms Hamilton either to write the opinion that would release the shares to the claimant or to pay the invoices in cash, he was causing the company to commit a breach of its contract with the claimant. . . ."

As a result, he held that Mr Chanana was liable to Blacklion in tort for procuring a breach of the Avatar Retainer [104].

Grounds of Appeal

20. When granting permission to appeal Nugee LJ noted that the first ground of appeal in relation to the judge's exclusion from evidence of Mr Chanana's four witness statements on the ground that a hearsay notice had not been served, appeared to be academic. He adjourned the application in relation to that ground to the hearing of the appeal, however.

21. He granted permission to appeal in relation to grounds 2 - 6. They were that: (2) the judge was wrong in law and/or in fact to hold that the fixed fee of £300,000 was due as a debt payable to Blacklion; (3) the judge was wrong in law and/or in fact in holding that there was an implied term of the Avatar Retainer that Amira was obliged to do all such things as were reasonably necessary to enable the sale of the Shares issued to Blacklion on the open market and that Amira was in breach of such an implied term or any term; (4) if Amira was in breach of such an implied term or any term, Blacklion's only remedy was for damages and the judge failed to assess what loss had been proved by Blacklion and should have found that Blacklion had failed to prove that it had suffered loss caused by any breach; (5) the judge was wrong in law and/or fact to award

contractual interest; and (6) that he was wrong in law and/or on the facts to hold that Mr Chanana was liable in tort for procuring a breach of the Avatar Retainer.

The Pleadings and the course of the trial

- *Pleadings*

22. Before turning to the grounds of appeal it is helpful to have both the structure of the pleadings and the course which was taken at trial in mind. The Avatar Retainer is addressed at [20] – [37] of the Amended Particulars of Claim. At [28] it was pleaded that Amira was in breach of the clause of the Avatar Retainer to give irrevocable instructions to its transfer agent (the Agent) to issue an equivalent of its ordinary shares to Blacklion to satisfy the Fixed Fee on execution of the Avatar Retainer because no shares had been issued and at [29] it was averred that the Claimant (sic) (Amira) had failed to pay the Avatar Invoices either in cash or in shares or at all.

23. At [31] Blacklion claimed £418,510.81 from Amira due on invoices rendered and unpaid under the general retainer and the Avatar Retainer. At [32] it was pleaded that further or alternatively, Amira was in breach of contract in failing to issue the Shares and Blacklion claimed specific performance or, in the further alternative, damages in the sum of £300,000. Contractual interest was claimed at [33].

24. The claim that Mr Chanana procured Amira's breach of the Avatar Retainer is at [36]. It is stated that Mr Chanana procured Amira to breach the Avatar Retainer in that he "knowingly and intentionally with the intention to cause loss to Blacklion:

> . . .
>
> 36.2 Instructed the First Defendant [Amira] not to issue shares in the name of the Claimant [Blacklion] in breach of the Avatar Retainer and knowingly made a false statement to Ms Yazdani . . . in respect of the issue of the shares; and
>
> 36.3 Instructed the First Defendant not to make payment of the Avatar Invoices without good cause."

It was pleaded that as a consequence, Blacklion suffered loss and damage in the sum of £418,510.81 plus interest or alternatively such damages as the Court saw fit [37].

25. In the Defence and Counterclaim, amongst other things: the Avatar Retainer was admitted but it was denied that the Terms and Conditions (which included the provision in relation to contractual interest) were incorporated in it [35]; and it was averred that it was an express term of the Avatar Retainer that Blacklion's entitlement to the Fixed Fee was "subject to the completion of the Matter by 31 May 2017" [39] but that the project did not complete by 31 May 2017 and therefore, Blacklion was not entitled to any payment under the Avatar Retainer [44].

26. At [47] it was pleaded that the Shares had been issued and that they were restricted ordinary shares in Amira [47 2)]. As I have already mentioned, at [47 6) – 9)] it was pleaded that in order to claim the Shares an opinion from a US securities counsel should have been provided to the Agent but that Blacklion had not done so. It was also pleaded that, in any event, Blacklion would have been unable to satisfy Rule 144 of the

Securities Act because it requires that consideration be paid at least six months prior to the date of sale, a condition which could not be fulfilled because Project Avatar did not complete before 31 May 2017 (the contingency construction).

27. The claim against Mr Chanana was denied and it was denied that Amira was in breach of the Avatar Retainer and even if it were:

> "55.
>
> . . .
>
> 2) . . . . it is denied that . . . [Mr Chanana] can be liable in the tort of inducing breach of contract where he did not know (and could not know) the allegations of breach being pursued by . . . [Blacklion]."
>
> 3) In any event, . . . [Mr Chanana] did not act intentionally to cause loss to . . . [Blacklion]."

28. In Blacklion's Reply and Defence to Counterclaim, it was pleaded:

    i) That an Engagement Letter dated 2 November 2016 provided that Blacklion's Terms of Business applied to all the services they provided [6];

    ii) The Appellants' construction of the Avatar Retainer was denied and the proper construction was alleged to be that the Fixed Fee was due unless the matter did not complete by 31 May 2017 in which case any additional work after that date would be subject to separate agreement [7]; and

    iii) As to [47] of the Defence, Blacklion's present understanding was that the Shares could be released only when legal opinion from the General Counsel of Amira was supplied [12b].

29. As Mr Russell KC on behalf of the Appellants pointed out, there was nothing in the pleadings about the implication of a term into the Avatar Retainer, nor, in relation to the claim against Mr Chanana, was there any reference to the requirements in *Said v Butt* [1920] 3 KB 497.

- *The trial*

30. At the trial, it seems that much of the time was spent on the argument about the proper construction of the Avatar Retainer and whether payment of the Fixed Fee was conditional upon the completion of the project before the end of May 2017. If the sum was payable, Amira argued that the obligation had been satisfied by the issue of the Shares which could have been released had an opinion from any appropriate counsel been provided. Blacklion was the author of its own misfortune, therefore.

31. Before us, Mr Kokelaar, on behalf of Blacklion, accepted that he had not analysed the Avatar Retainer in terms of an implied term that Amira would do all such things as are reasonably necessary to enable the sale of the Shares in the open market. He took us to the transcript of the hearing and said that he had submitted that: the Fixed Fee had not been paid whether in cash or by way of the Shares because they were not saleable; the

express terms of the Avatar Retainer had stated that Blacklion would be able to sell the Shares on the open market; and if that involved Amira in providing the necessary opinion letter, then it had to do so and having failed to do so it was in breach of its obligations. It seems from the transcript that it was the judge himself who, during closing submissions, suggested the implied term to give business efficacy to the Avatar Retainer.

32. Furthermore, in closing submissions, Mr Jones, who appeared on behalf of Amira below, submitted that if he was wrong and something was due under the Avatar Retainer, there was a dispute about the proper mechanism for lifting the restriction on the Shares. He stated that he agreed with Mr Kokelaar that that was "not really a question of US law". He stated that there was some discussion about whether evidence of US law was necessary at the CMC and it was decided that it was not. The transcript goes on: "I have to say, in fairness, it was decided by the judge that we did not; I thought we did, but I had come around." The transcript records that Mr Jones went on to state that there was "a route through it . . . without US law" which was that as a matter of fact there were things which Ms Yazdani should have done and if she had done so she would have had the Shares or their value. Mr Jones accepted that Ms Hamilton was not going to give the opinion because she supported the contingent construction of the Avatar Retainer. He pointed out, however, that the copy of the US Securities and Exchange Commission webpage stated that the transfer agent would not remove the legend without the consent of the issuer, "usually" in the form of an opinion letter from the issuer's counsel. He submitted that "usually" did not mean always and that the opinion of any US securities counsel would have been sufficient. The transcript also records that Mr Jones explained that, if such an opinion had been provided, Amira would be bound to have approved it and that such an obligation must be implied into the Avatar Retainer.

33. As I have already mentioned, the judge had ruled that Ms Hamilton's evidence about the correct procedure to lift the restriction on the Shares under US securities law, was inadmissible. He decided the matter on the factual evidence before him as Mr Jones had encouraged him to do.

34. Furthermore, the claim against Mr Chanana was approached on the basis that the mental element of the tort could not be made out because Mr Chanana genuinely believed that payment of the Fixed Fee was contingent upon the project being completed before 31 May 2017. It is accepted that there was no express reference whether in the pleadings or at the hearing to *Said v Butt* (supra) and the requirement to plead and prove that a director was not acting bona fide within the ambit of his authority in order to be able to make him liable for inducing a breach of contract by the company.

Grounds (2), (3) and (4) – Fixed Fee due as a debt? – Implied term – Damages?

35. Mr Russell, on behalf of Amira, submits that there are many flaws in the judgment, most of which stem from the failure to amend or re-amend the Amended Particulars of Claim. He says that a case should have been pleaded based upon the fact that the Shares had, in fact, been issued but were allegedly not available for sale on the open market because Amira had failed to provide the requisite legal opinion to its Agent in order to lift the restriction on the Shares. It would have been up to Blacklion to plead and prove the requirements of US law. He says that the judge was also wrong to proceed as if there had been a fully pleaded defence to something which was not pleaded in the first

place. He also says that the alleged implied term in the Avatar Retainer should have been pleaded and complains that the judge proceeded as if the amendments had been made. He says that the position was impossibly vague and Amira was seriously prejudiced.

36. He also says that the judge was wrong to rely upon the email from the Agent's compliance department because it was hearsay and its contents were only the personal understanding and the opinion of the writer and that no weight should have been given to the website printout for the same reason.

37. In any event, he submits that the judgment is legally incoherent because the judge held that there was a breach of an implied term, but nevertheless, concluded that £300,000 was due as a debt. Mr Russell submits that Amira was never obliged to pay Blacklion a sum of money because it always had the option of issuing shares instead and it made that election. Once that election had been made, it was not possible to unwind it in order to claim payment in cash and, therefore, to claim the £300,000 as a debt. It was only possible to claim damages for breach of an implied term (which was not pleaded and, therefore, could not be relied upon) or, possibly, to allege that there was a breach of warranty, if it were pleaded and proved that the Shares were not saleable on the open market. In relation to this latter potential claim, Mr Russell also submits that it was neither pleaded nor proved and that in order to do so, it would have been necessary for Blacklion to adduce expert evidence as to US securities law. He also put it another way, namely, that Amira had paid the Fixed Fee by the issue of the Shares and if they were not saleable that was a breach of contract which sounded in damages. Mr Russell accepted, however, that if there had been no payment at all, it was not possible to argue that there was no debt.

38. Mr Kokelaar, on behalf of Blacklion, submits that no one took the point that the implied term was not pleaded and that it is too late now. Amira's defence and approach at trial had been that the Fixed Fee was contingent and was not due, the contingency not having been fulfilled and, if not, the Shares had been issued and Blacklion itself could have secured their release for sale by the provision of a suitable opinion.

39. Furthermore, Mr Kokelaar says that Amira was not seriously prejudiced. They were not deprived of the opportunity to deal with the case which they ultimately lost. They knew full well the substance of the case they had to meet. Blacklion's case was clear enough on the pleadings. It had not been paid, whether in cash or shares. The fact that Amira raised the point about the way to lift the restriction on the Shares in its Defence and Counterclaim demonstrates that it was not sufficient merely to state that the Shares had been deposited and that it was necessary for them to go further to show that the Fixed Fee had been paid. Mr Kokelaar also submits that it was clear from paragraph 12b of the Reply and Defence to Counterclaim that Blacklion joined issue with Amira on that matter.

Discussion and Conclusions

40. First, it seems to me that there is nothing in Mr Russell's point that Blacklion had not pleaded the failure to provide the requisite legal opinion. Although matters should generally be pleaded (see for example, *Prudential Assurance Co. Ltd v Revenue and Customs Commissioners* [2017] 1 WRL 4031 per Lewison LJ at [12], [14] and [20]) it cannot be said that there was any prejudice here. The pleading point was not raised

either before or at the hearing. As Moore-Bick LJ (with whom Wall and Pill LJJ agreed) stated in *Westbrook Resources Ltd v Globe Metallurgical Inc* [2009] EWCA Civ 310 at [11]:

> "It is always important for Judges to ensure all parties to the proceedings have a fair opportunity to deal with the case against them and in some cases a party's failure to raise a point in its statement of case will lead to its being prevented from arguing it at trial. However, litigation's overriding object is to do justice between parties and it is important that form is not allowed to override substance. In this case, there is nothing to indicate that counsel appearing for Globe objected to the introduction of this issue or sought an adjournment to enable him to take instructions from his client or call further evidence. I do not find that surprising in view of the fact that the Judge had before him detailed evidence of the dealings between the parties, and that if Globe sought to rely on the contractual date for the first shipment, an argument of this kind was bound to be raised. The fact no objection was made reflects what in my view as the inevitable recognition that the Judge had before him all the evidence relevant to the question and that Globe's counsel had sufficient opportunity to address the point."

41. Newey LJ (with whom Simler LJ and the Master of the Rolls agreed) adopted a similar approach (albeit obiter) in *Keane v Sargen* [2023] EWCA Civ 141. Newey LJ addressed what he described as the "pleading issue" at [67] – [72]. That was a case in which the claim had not been framed as a partnership action in the particulars of claim and even the claim form only alleged a partnership from a date in August 2012. Counsel for the claimant had nevertheless opened his skeleton argument for the trial with the sentence "This is a Partnership Action concerning a partnership which Mr Keane claims was formed in 2012 . . ." The judge rejected a submission on behalf of the defendants that the claim as presented fell outside the ambit of the statement of case. Following the handing down of the judgment, the judge gave permission for the claim to be amended to change the date from which it was alleged that the parties were in partnership.

42. Newey LJ stated at [72] that in his view the case presented at trial and, even more so, the case on which the judge ultimately founded his decision were not within the ambit of Mr Keane's existing pleadings. He went on, as follows:

> ". . . On the other hand, (a) the Judge gave permission for the claim form to be amended, (b) the power to permit amendment is discretionary, (c) the Judge was, I think, entitled to take the view that the defendants would not suffer any relevant prejudice if the possibility of a partnership having come into being earlier in 2012 were entertained and (d) Ms Anderson did not insist on the Judge making a formal ruling during the trial. With regard to the last of these points, Mr McDonnell referred us to *Hawksworth v Chief Constable of Staffordshire* [2012] EWCA Civ 293, which the White Book cites at 16.0.1 for this:

> "Complaints that a party was permitted to rely upon an unpleaded point at trial cannot be raised by way of appeal unless, at the trial, the complaining party invited the judge to rule upon the point and insisted upon a ruling. If this is done and a ruling preventing departure from the pleading is made, the other party would then have an opportunity to seek permission to amend his pleading ….""

43. In this case, there was no application to amend. The failure to plead the manner in which the restriction on the Shares could be lifted in the Particulars of Claim was not taken either before or at trial, however. As Mr Kokelaar submitted, the matter proceeded on the basis that the issue had been raised in the Defence at [47] and that issue had been joined at [12b] of the Reply and Defence to Counterclaim. It is clear, for example, from [86] of the judgment that the parties were well aware of the issue in relation to whose obligation it was to provide the relevant opinion in order to lift the restriction on the Shares.

44. Secondly, in my judgment, there is nothing in Mr Russell's point about a failure to adduce expert evidence in relation to the procedure for lifting the restriction on the Shares. As I have already mentioned, the question of whether expert evidence on this point was necessary had been considered and rejected at the CMC and Mr Jones is recorded as having accepted that it was "not really a question of US law" and that there was a "route through" based on the facts. The question of the need for expert evidence had been raised, therefore, and both sides had proceeded without it. In such circumstances, it cannot be open to Mr Russell to raise the lack of expert evidence now.

45. It appears that Amira sought to rely, in part, upon Ms Hamilton's evidence in relation to the form and application of the relevant US securities law and that, in addition, Mr Jones made submissions about the terms of the US Securities and Exchange Commission webpage. The judge decided that, in the absence of permission to call expert evidence as to foreign law, Ms Hamilton's opinion was inadmissible [89]. As Ms Hamilton chose not to attend the hearing to be cross examined, he also decided to give her evidence in general, little weight [6]. There is no direct challenge to these decisions, nor could there be. It seems to me that the judge was fully entitled to come to the conclusions he did.

46. The judge proceeded to deal with the issue as a matter of fact, as counsel had encouraged him to do. I do not accept any of Mr Russell's criticisms of the judge's treatment of the email from Ms Jones in the Agent's compliance department. He was entitled to accept that evidence as the course which the Agent would take. He was also entitled to take the copy of the US Securities and Exchange Commission webpage at face value.

47. There is nothing, therefore, in Mr Russell's points either in relation to the pleading or the need for expert evidence. Further, it cannot be said that Amira and Mr Chanana were prejudiced in any way and it is now too late to raise these points.

48. Thirdly, it follows that in my judgment, the judge was entitled to decide on the factual evidence before him and to conclude that the Fixed Fee had not been paid and remained due as a debt. The Avatar Retainer provided for two alternative means by which the Fixed Fee might be met. Neither means was utilised. The Fixed Fee was neither paid in

cash nor in shares which were saleable freely on the open market. Such a sale was expressly envisaged in the Avatar Retainer and an essential part of the mechanism to pay by way of a share issue. Accordingly, although the reasoning in [93] of the judgment is rather compacted, the conclusion at [105], that the Fixed Fee of £300,000 is due as a debt, is not in error. As I have already mentioned, before us, Mr Russell accepted in argument, that if there had been no payment whether by cash or shares, it was not possible to argue that there was no debt in the form of the Fixed Fee.

49. It follows that I disagree with Mr Russell's submission that Amira's election to pay by issuing shares was irrevocable and therefore, that it was only ever possible for there to be a claim in damages. There is nothing in the Avatar Retainer upon which to base such an argument. It merely provides for alternative means of meeting the Fixed Fee, neither of which were complied with. Although the judge also mentioned the implied term analysis, this, in effect, is what he was saying at [93]. He came to that conclusion on the facts before him and in my judgment he was entitled to do so.

50. Fifthly, it is not necessary, therefore, to consider the implied term analysis in any detail. For the sake of completeness, I will address it in outline. Mr Russell says that the implied term was unpleaded. However, once again, no objection was made either before or at trial and it is difficult to see that any prejudice was suffered. It is not suggested that different evidence would have been called or that the trial would have been conducted in a different way. It was clear that the submission was that the Fixed Fee had not be satisfied whether by cash or by the Shares. Not only was no objection to the implied term analysis raised below, no doubt for good reason, but in circumstances in which there can have been no prejudice, it would be contrary to the overriding objective to conclude that the judge was not entitled to decide that there was a breach of an implied term to do all that was necessary to release the restriction. See Moore-Bick LJ's analysis in the *Westbrook* case above.

51. Sixthly, it follows from what I have already said that the fourth ground of appeal, that any remedy sounded in damages which had not been assessed, falls away. As I have already mentioned, Mr Russell submitted that once Amira had chosen to pay by means of the Shares, its election was irrevocable. As I have already mentioned, it seems to me that there is no basis for that assertion. Blacklion was entitled to the Fixed Fee to be paid either by way of cash or saleable shares. £300,000 remained due as a debt and no question of the assessment of damages arose, therefore.

Ground (5) – Contractual interest

52. It also follows that the fifth ground of appeal falls away. In his written argument, Mr Russell quoted clause 35 of Blacklion's Terms of Business. In summary, it stated that bills were payable on delivery and that interest was payable after thirty days at the rate of 1.5% per month on any amount unpaid. Mr Russell stated that as a matter of construction, the clause was not applicable to an award of damages for breach of contract. As the Fixed Fee remained due as a debt, both the ground of appeal and the submission are irrelevant.

(6) Liability of Mr Chanana

53. This aspect of the appeal is more difficult. Mr Russell submits that this part of the judgment cannot stand because it proceeds on an erroneous basis. He says that the

necessary ingredients of the tort of inducing a breach of contract were not pleaded. No mention was made of *Said v Butt* in the pleadings, the judge made no mention of the requirements set out in that case and he failed to make any findings about them. Mr Russell also says that the judge was hampered by the fact that he had incorrectly ruled that Mr Chanana's witness statements were inadmissible (Ground 1).

54. The first limb of Mr Russell's written argument under this head was that Mr Chanana could only be liable if Amira was also liable for breach of the Avatar Retainer and for the reasons I have already referred to, he submitted that the judgment against Amira in debt ought to be set aside. I have decided that the judge was correct to hold that Amira was, indeed, liable. On that basis, Mr Russell's first limb falls away.

55. His second limb is the one upon which he focussed in oral argument. It is that there was no properly constituted pleading of the cause of action against Mr Chanana. The fact that a director is acting mala fides, outside the scope of his authority, is a necessary component of the cause of action. As a result, the claim was demurrable and should have been struck out. He relied upon *Holding Oil v Marc Rich* (27 February 1996, unreported) per Aldous LJ and *Crystalens Ltd v White* [2006] EWHC 3356 (Comm) per Gloster J. Further, in the recent case of *IBM v LZLABS* [2022] EWHC 884 (TCC) Eyre J held at [29] that the principle in the *Holding Oil* case remained good law and that there was no basis for the suggestion that the decision in *OBG v Allan* had superseded the principles in *Said v Butt* and its consequences for the proper pleading of claims.

56. In *Said v Butt,* McCardie J held at [506] that ". . . if a servant acting bona fide within the scope of his authority procures or causes the breach of a contract between his employer and a third person, he does not thereby become liable to an action of tort at the suit of the person whose contract has thereby been broken. I abstain from expressing any opinion as to the law which may apply if a servant, acting as an entire stranger, or wholly outside the range of his powers, procures his master to wrongfully breach a contract with a third person . . ."

57. That was a case in which by order of the managing director of a theatre, a ticket holder was refused admission to the theatre. He had made unfounded charges against some of the theatre staff and had obtained the ticket through a friend who had bought it for him without reference to his name. He claimed damages from the managing director for maliciously procuring the proprietors of the theatre to breach the contract for admission, allegedly made by the sale of the ticket. It was held that the non-disclosure of the identity of the actual ticket holder prevented the sale of the ticket from amounting to a contract.

58. Mr Russell says, therefore, that Blacklion's pleadings were inadequate and were demurrable, the judge's analysis of the elements of the tort was incomplete and wrong because he was not made aware of the *Said v Butt* requirements and as a result, there are no factual findings about whether Mr Chanana was acting mala fides outside the scope of his authority. Accordingly, the judgment must be set aside.

59. Mr Russell also says that if one considers what would have happened at trial if this point had been raised, any application to amend the pleading to comply with the requirements of *Said v Butt* would have been refused as being too late and having no prospect of success because there was nothing to show mala fides and conduct outside

the scope of Mr Chanana's authority. Mr Russell accepted, however, that we should adopt the approach in relation to a new point on appeal outlined in *Hudson v Hathaway* [2022] EWCA Civ 1648. We must consider the overall balance of justice. He says that when doing so the fact that the judgment as it stands is wrong in law, is a very powerful factor to be taken into consideration.

60. Mr Kokelaar, on behalf of Blacklion, accepts that the *Said v Butt* requirements were not expressly pleaded. He does point out, however, that they were referred to obliquely in his written closing submissions and in his closing oral submissions with which the judge engaged. In his written closing at [24] he had stated that it could not seriously be suggested that Mr Chanana had been acting in the course of his duties as a director of Amira and in its best interests when he caused it to breach its obligations under the Avatar Retainer and he was not acting bona fide within the scope of his authority.

61. Mr Kokelaar also submits that there was no objection made to what is now said to be the inadequacy of Blacklion's pleading in Mr Chanana's pleading, there was no application to strike out Blacklion's pleading as demurrable and the point was not taken at trial. Furthermore, there was nothing from Mr Chanana and Amira to suggest that Mr Chanana was acting bona fide within the scope of his authority and the point was not taken up by Mr Jones in closing.

62. Lastly, in this regard, Mr Kokelaar also took us to *Antuzis v DJ Houghton Catching Services Ltd* [2019] Bus LR 1532, a decision of Lane J. In that case at [113], the judge set out what was described as a useful recent analysis of the so-called rule in *Said v Butt* in the judgment of the Court of Appeal of Singapore in *Arthaputra v St Microelectronics Asia Pacific Pte Ltd* [2018] SGCA 17. In the final paragraph of the quotation the Court of Appeal of Singapore states that the scope of the *Said v Butt* principle should be more clearly demarcated and defined and that in their judgment "it should be interpreted to exempt directors . . . if their acts, in their capacity as directors, are not in themselves in breach of any fiduciary or other person legal duties owed to the company."

63. In summary, Mr Kokelaar submitted that: it is too late to raise this point now and that the trial and the course of the evidence would have been different if it had been raised earlier; if Mr Chanana is permitted to raise the point at this very late stage, we can be satisfied that the judge addressed the issue and that Mr Chanana did not act in the best interests of Amira in plunging it into unnecessary litigation and we should view the judge's conclusions at [102] in this light; but if we are not satisfied that the necessary findings were made, either we should fill in any lacuna ourselves or the matter should be remitted.

Discussion and Conclusions

64. This is an unusual and difficult case. It does not fall neatly into the authorities which have considered the test to be applied where new matters are raised on appeal such as *Singh v Dass* [2019] EWCA Civ 360, *Notting Hill Finance v Sheikh* [2019] EWCA Civ 1337, [2019] 4 WLR 146 and *Hudson v Hathaway* (supra). None of those cases addressed a situation where it was said that a full cause of action had not been pleaded and the judgment was wrong because it did not address a necessary element in relation to a cause of action, to which no objection had been taken.

65. The preceding authorities and the general principles in relation to raising new points on appeal were addressed most recently in *Hudson v Hathaway*. That was a case in which Lewison LJ with whom Andrews and Nugee LJJ agreed, noted at [33] that for reasons which were difficult to understand, whether section 53(1) of the Law of Property Act 1925 was satisfied was not argued at trial or on the first appeal. Lewison LJ went on to consider the authorities including *Singh v Dass,* at [34] – [37] as follows:

> "34. There is no doubt that the court has the power to entertain a new point on appeal. In *Singh v Dass* [2019] EWCA Civ 360 Haddon-Cave LJ set out the principles which this court generally applies in deciding whether a new point may be advanced on appeal:
>
> "[16] First, an appellate court will be cautious about allowing a new point to be raised on appeal that was not raised before the first instance court.
>
> [17] Second, an appellate court will not, generally, permit a new point to be raised on appeal if that point is such that either (a) it would necessitate new evidence or (b), had it been run below, it would have resulted in the trial being conducted differently with regards to the evidence at the trial…
>
> [18] Third, even where the point might be considered a "pure point of law", the appellate court will only allow it to be raised if three criteria are satisfied: (a) the other party has had adequate time to deal with the point; (b) the other party has not acted to his detriment on the faith of the earlier omission to raise it; and (c) the other party can be adequately protected in costs."
>
> 35. In *Notting Hill Finance Ltd v Sheikh* [2019] EWCA Civ 1337, [2019] 4 WLR 146, Snowden LJ (then sitting in this court as Snowden J) amplified these criteria. He first said that there is no general rule that a case needs to be "exceptional" before a new point will be allowed to be taken on appeal. He pointed out that there was a spectrum of cases, at one end of which is a case in which there has been a full trial involving live evidence and cross-examination in the lower court, and there is an attempt to raise a new point on appeal which, had it been taken at the trial, might have changed the course of the evidence given at trial, and/or which would require further factual inquiry. At the other end of the spectrum are cases where the point sought to be taken on appeal is a pure point of law which can be run on the basis of the facts as found by the judge in the lower court. Whilst an appellate court will always be cautious before allowing a new point to be taken, the decision whether it is just to permit the new point will depend upon an analysis of all the relevant factors. These will include, in particular, the nature of the proceedings which have taken place in the lower court, the nature of the new point, and any prejudice that would be caused to the opposing party if the new point is allowed to be taken.

> 36. In these (and all the other cases) that we were shown, it has been the appellant who wished to raise the new point. In other words, it is the party seeking to overturn the judgment who wishes to do so on the basis of a point not argued below. The effect of that would be to deprive the respondent of a judgment in their favour. Here, by contrast, it is the respondent (who already has two judgments in her favour) who wishes to raise the new point. CPR Part 52.13 simply says that a respondent's notice must be filed where a respondent "wishes to ask the appeal court to uphold the decision of the lower court for reasons different from or additional to those given by the lower court." Whether precisely the same principles apply in such a case is not entirely clear. It is, however, fair to say that in an interlocutory appeal in *Riley v Sivier* [2021] EWCA Civ 713, [2021] 4 WLR 84, where the respondent wished to raise a new point, Warby LJ said that this court does not usually allow new points to be taken on appeal although he also rejected the new points on their merits. On the other hand, in *Golding v Martin* [2019] EWCA Civ 446, [2019] Ch 489, this court permitted a respondent to raise a new point which had not been argued below.
>
> 37. . . . The argument now sought to be advanced is a different one. The argument depends on the legal effects of the relevant emails, which is a question of law. In those circumstances the court is not bound by one party's concession (*Bahamas International Property Trust Ltd v Threadgold* [1974] 1 WLR 1514, where a point was raised for the first time in the House of Lords), or the positions taken by the parties on a question of interpretation (*Teesside Gas Transportation Ltd v CATS North Sea Ltd* [2019] EWHC 1220 (Comm) at [119]).
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> 38. Mr Learmonth KC also pointed out, correctly, that this point arose for the first time on a second (rather than a first) appeal. But that, in itself, is not an absolute bar to the raising of a new point: *Bahamas International Property Trust Ltd v Threadgold*; *New Zealand Meat Board v Paramount Export Ltd* [2004] UKPC 45."

66. Although we were not referred to the case of *Golding v Martin* which Lewison LJ mentions, it provides an interesting parallel. In that case, the Respondent wished to take a new point on a second appeal. The point was that the order which had been made was a nullity because it did not comply with the requirements of section 138(3) County Courts Act 1984. It was an order that the court had no power to make. The Court of Appeal in a joint judgment of Sir Terence Etherton MR, Lewison and McCombe LJJ rejected the Appellant's objection to the point being raised for two reasons:

> "18. . . . The first is that the point is a pure point of law. In *Pittalis v Grant* [1989] QB 605 Nourse LJ said:

> "Even if the point is a pure point of law, the appellate court retains a discretion to exclude it. But where we can be confident, first, that the other party has had opportunity enough to meet it, secondly, that he has not acted to his detriment on the faith of the earlier omission to raise it and, thirdly, that he can be adequately protected in costs, our usual practice is to allow a pure point of law not raised below to be taken in this court. Otherwise, in the name of doing justice to the other party, we might, through visiting the sins of the adviser on the client, do an injustice to the party who seeks to raise it."

19. The second, and more important reason, is that if the point is a good one it goes to the jurisdiction of the court. The principle that (subject to the discretion of the court) a new point should not be raised for the first time on appeal has always been subject to limited exceptions. In *Pittalis v Grant* itself Nourse LJ, in discussing the former rule that a point of law could not be taken on appeal from the county court unless it had been taken below, said:

> "…we find it convenient to deal next with the exceptions to the rule which have so far been established and then to consider whether they support a further exception in this case.
>
> The first exception is where the county court has acted without jurisdiction, for example by making an order for possession of premises which are protected by the Rent Acts (see e.g. *Davies v Warwick* [1943] KB 329, 336, per Goddard LJ and *Francis Jackson Developments Ltd v Stemp* [1943] 2 All ER 601, 602-603) or by making an order on a false hypothesis of fact: see *Whall v Bulman* [1953] 2 QB 198, as explained by Diplock LJ in *Oscroft v Benabo* [1967] 1 WLR 1087, 1099F-G. The second is where the county court has enforced an illegal contract: see *Snell v Unity Finance Co Ltd* [1964] 2 QB 203. The third is where the plaintiff's proceedings are liable to be struck out as disclosing no cause of action: see *Jones v Department of Employment* [1989] QB 1."

20. In our judgment, the point that Mr Rainey wishes to take comes within the first of those exceptions. . . ."

67. Although the authorities relating to the exceptions from the general rule are concerned, for the most part, with the way in which appeals from the county court were dealt with and were based, in some part, upon the statutory nature of the county court jurisdiction, they are useful illustrations and of some assistance in this case.

68. The most relevant here are *Whall v Bulman, Oscroft v Benabo* and *Jones v Department of Employment*. As the Court of Appeal explained, in *Whall v Bulman* an order was made on a false hypothesis of fact. It was pleaded that the defendant was in breach of the terms of a tenancy agreement by using the premises for living accommodation rather than as an office. The pleading did not refer to an express covenant in respect of use of the premises nor to any proviso for re-entry in the event of breach of covenant. The judge made an order for possession on the hypothesis that the tenancy had ended and the sole question argued before him was as to the effect of the Rent Acts.

69. Not only was the point about the covenant and proviso for re-entry not taken in the County Court, it did not appear in the notice of appeal. It was raised by the Court of Appeal itself. Evershed MR (with whom Denning and Romer LJJ concurred) held at 200, that the particulars of claim disclosed "no cause of action as alleged, and that the court could not on that pleading make, and should not have made, an order for possession, . . ." Having noted the rule in *Smith Charles Baker & Sons* [1891] AC 325, to the effect that on appeals from the county court the appeal court will not entertain a ground for appeal which had not been taken below, Evershed MR went on at [200] – [201] as follows:

> ". . . The peculiarity of this case is, as I have already indicated, that the real point, which on the face of the claim is fatal to its success, was never apprehended and is not even now raised in the notice of appeal. In such very exceptional circumstances it does not seem to me that this court should allow the matter to stand. It is not a question of taking a new point in support of the appeal. The point is that the order made does not bear any relation to the claim as alleged. Put another way, the claim alleged does not support, on the face of it, the order which was asked for and which was made. This, therefore, seems to me to be a case so exceptional in character that an exceptional remedy is called for. I think in this case that the proper course is that we should set aside the order for possession which the Judge made and refer the matter back for re-hearing to the same judge."

70. *Whall v Bulman* was considered in *Oscroft v Benabo*. In *Oscroft* the county court determined the rent for certain premises, determined that there was a tenancy of a flat which formed part of it and as a result of other findings, that the rent of the flat was a controlled rent. The landlords appealed to the Court of Appeal on the basis that the question of whether the rent was controlled was irrelevant for the purposes of deciding what the rent under the proposed new lease ought to be, and therefore, the case had been decided on the wrong basis. The Court of Appeal held that it would not entertain a point of law which had not been raised below unless it went to the court's jurisdiction or to illegality, except in wholly exceptional circumstances. The point about irrelevance, therefore, was not open on appeal as it had not been raised below.

71. In relation to *Whall v Bulman,* Willmer LJ noted at 1093 B-D as follows:

> "It is said that that is exactly the same as happened in the present case. With all respect, however, I do not think that that is so. It seems to me that *Whall v. Bulman* was a different case from the present one. In that case the court was being invited to deal with

> the matter on a completely hypothetical basis of fact. Here all that can be said is that the argument below proceeded on what is now alleged to be an erroneous view of the law. I do not think that it is a parallel case with *Whall v. Bulman*. In the present case what was tried by the deputy judge was in no sense an unreal case. He applied his mind to the actual facts disclosed in the evidence. If he reached a wrong conclusion in law because his mind was not directed by counsel to what is now said to be the true view, that is not a matter which on principle can be raised for the first time in this court."

72. Lastly, *Jones v Department of Employment* [1989] QB 1, was a case in which the plaintiff's claim for unemployment benefit was disallowed by an adjudication officer but subsequently allowed on appeal. The plaintiff then brought a claim against the Department of Employment as the officer's employee, alleging, amongst other things, that the decision had been taken negligently. The Department applied to have the claim struck out on the basis that the officer's duties attracted immunity from suit under the Crown Proceedings Act 1947. That application failed and the Department appealed on grounds which had not been advanced previously. They were that the officer's duties lay in the field of public law and that he was not subject to a common law duty of care.

73. The Court of Appeal considered whether it was possible to rely upon these new issues. Glidewell LJ with whom Slade LJ and Caulfield J concurred stated at 15A -C as follows:

> "Where what is in issue is whether a pleading discloses a reasonable cause of action, there is no question of evidence or indeed fact. The facts must be assumed to be as set out in the particulars of claim. Accordingly, the main reason for the application of the *Smith v. Baker* principle does not apply in a case such as this. Thus, in my view, there is no reason why an argument not advanced in the county court in support of the application to strike out should not be advanced by either party on an appeal to this court, provided of course that the opposite party has had sufficient time to consider and meet the argument. Mr. Hill-Smith did not suggest that he did not appreciate that the argument was to be advanced or that he has not had time to consider it. Accordingly, in my judgment, Mr. Laws was entitled to raise in this court the first two points contained in his skeleton argument."

74. It is clear from the authorities that the court has a discretion in relation to whether to allow a new point to be taken on appeal which applies even if the point is a pure point of law. It is also clear that the court will allow a new point to be taken where it goes to the jurisdiction of the court. There is no question of a lack of jurisdiction here. Nor is this a case in which the court was asked to deal with the matter on a hypothetical version of the facts as in *Whall* or one in which a non-existent cause of action was relied upon, such as in *Jones v Department of Employment.* One can readily appreciate that those are exceptional circumstances in which the court will be very likely to hear the new point. None of the authorities suggest that it follows inexorably from the failure to plead

an element of a claim and the consequent failure to address that element in the judgment, that the new point must be allowed to be taken and the judgment set aside.

75. As Lewison LJ explained in *Hudson v Hathaway*, it is necessary to apply the principles in *Singh v Dass* as amplified in the *Notting Hill* case. In the end, we must consider the overall balance of justice. The question of whether it is just to admit the new point depends upon the analysis of all the relevant factors.

76. In order to determine the overall balance of justice, it is necessary to take into account: the fact that this is a case in which a cause of action was pleaded, albeit that the *Said v Butt* elements were omitted; the point was not raised on behalf of Mr Chanana at the pleading stage and there was no application to strike out the claim; a full trial went ahead at which witnesses were cross-examined and the *Said v Butt* criteria were not referred to in any real way until written and oral closings when all the evidence had been heard; and it is not suggested that Mr Jones, on behalf of Mr Chanana, asked for a ruling in the way envisaged in *Keane v Sargen*. It is also important to take account of the fact that the new point would have affected the way in which the trial was conducted and the evidence which was before the judge. As Mr Russell pointed out, it is also relevant that the judge's conclusions in relation to the cause of action, are inevitably incomplete. We must also take account of the importance of the finality of litigation.

77. It is also relevant that this is the kind of case in which were we were to allow the new point to be taken, it would be necessary to remit the matter. We are not in a position to fill in the gaps as Mr Kokelaar encouraged us to do and it would be inappropriate to do so.

78. Although it does not affect my conclusion and I consider it unnecessary to address the first ground of appeal directly, I also note that the judge decided that Mr Chanana should not be allowed to give evidence by video link at his convenience, having made that application on the first day of the trial. He also decided to exclude Mr Chanana's four witness statements from the evidence admitted at trial. Without deciding the point, I should say that I consider that the judge was entitled to decide as he did. In any event, if this matter were remitted, Mr Chanana might seek to give evidence and benefit from a further "bite of the cherry".

79. Overall, given the nature of this case and having taken all relevant factors into consideration, it seems to me that it is too late to raise a matter in relation to which no point was taken at any stage and which was aired, albeit obliquely, in closing submissions.

80. Accordingly, in my judgment, the appeal in relation to Mr Chanana fails. This renders Ground 1 academic.

81. For completeness I should also mention Mr Russell's third limb under this head which he set out in his skeleton argument but did not pursue in oral argument. It was that the requirements of *OBG v Allen* were not met either. He sets out in his skeleton, however, that there is no pleaded case that Mr Chanana instructed Amira not to co-operate to enable the sale of the Shares and there was no finding to that effect. Nor was there a finding of the necessary subjective knowledge that the individual is inducing a breach of contract. He also says that there was no basis for the judge's finding at [102] that he was satisfied that Mr Chanana knew that the Shares could not be sold without

authorisation from Amira and that he knew very well that by not authorising Ms Hamilton either to write the opinion or pay the invoices in cash, he was causing Amira to breach the Avatar Retainer.

82. Mr Kokelaar says that each of the points raised amounts to a challenge to the judge's findings of fact. For the most part, I agree. I also consider that in just the same way, it is too late to raise these matters now.

83. For all the reasons set out above, I would dismiss the appeal.

Lady Justice Falk:

84. I agree.

Lord Justice Moylan:

85. I also agree.