Neutral Citation Number: [2023] EWHC 840 (CH)

Case No: CH-2022-BRS-000010

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS IN BRISTOL
CHANCERY APPEALS (ChD)

Bristol Civil Justice Centre
2 Redcliffe Street
Redcliffe
Bristol BS1 6GR

Date: 18 April 2023

Before:

MR JUSTICE ZACAROLI

- -

Between:

MICHAEL JORDAN	**Claimant/ Appellant**
- and –	
DAVID THORNER	**Defendant/ Respondent**

- -
- -

James Pearce-Smith (instructed on a direct access basis by) the **Appellant**
Charles Auld (instructed by **Michelmores LLP**) for the **Respondent**

Hearing date: 28 February 2023

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JUDGMENT

Mr Justice Zacaroli:

Introduction

1. This is an appeal against an order of Recorder McGrane dated 9 August 2022 following the trial of a claim by the claimant ("Mr Jordan") against the defendant ("Mr Thorner") for sums alleged to be due under a contract to provide farm services at Langaford Farm (the "Farm").

2. Mr Thorner purchased the Farm, a dairy farm of approximately 450 acres in North Devon in January 2016. At Mr Thorner's request, Mr Jordan stayed on as farm manager, pursuant to a written, but unsigned, contract which took effect from 22 January 2016 (the "Contract").

3. By clause 2.1 of the Contract, Mr Jordan agreed to make himself available during the term of the contract to provide the "Services", defined as being to:

> "2.1.1 oversee all farm staff and supervise them in respect of the milk production business at Langaford Farm Dairy;
>
> 2.1.2 be responsible for maintaining the Farm Assurance of the Langaford Farm Dairy;
>
> 2.1.3 be responsible for the forage production for the dairy unit which will include being responsible for all cultivations, ordering seeds and fertilizers and sprays, crop husbandry and organising the harvesting of forage;
>
> together with providing any other services normally associated with the field of Farm Management which the Client may require from time to time."

4. By clause 3.1, Mr Jordan was entitled to render an invoice to Mr Thorner in respect of the Services provided by Mr Jordan during the previous calendar month.

5. By clause 3.2, Mr Jordan was entitled to a fee of £12.50 per hour during which the Services were provided.

6. By clause 4.1, Mr Thorner was obliged, "on the presentation of suitable evidence of payment", to reimburse Mr Jordan for "all his reasonable expenses incurred in connection with the provision of the Services."

7. Under the Contract, therefore, Mr Jordan had the right to be paid for such hours as he worked on the farm and to be reimbursed (on presentation of proof of payment) for amounts he paid to other labourers or for supplies.

8. In addition, however, Mr Jordan provided what have been called "contracting services". These consisted, in essence, of the supply by Mr Jordan of a machine (e.g. a tractor) and a person to operate it, to carry out specific tasks, such as dung spreading, slurry tanking or mowing. For

these, Mr Jordan charged Mr Thorner a rate which varied depending on the type of work. For example, in July 2016 he charged £5 per acre for raking, £10 per acre for cutting grass, £50 per hour for "Umbilicle setting up" and £70 per hour for "Umbilicle spreading". The machinery in question belonged to Mr Jordan, so that these rates included something by way of notional hire of the machinery (i.e. the machinery being applied for use to the benefit of Mr Thorner) and something by way of labour charge.

9. The precise contractual basis for Mr Jordan's entitlement to charge for these contracting services is not clear. They do not fit within the Contract (because they are neither labour charges nor reimbursement for payment made to third parties). It is common ground, however, that Mr Thorner agreed with Mr Jordan that he would provide, and could charge a reasonable rate for, these services. Moreover, Mr Auld (who appeared for Mr Thorner) accepted that the rates charged were in all cases reasonable rates.

10. On 31 August 2016, Mr Thorner gave Mr Jordan three months notice of termination of the Contract. The Contract therefore terminated on 30 November 2016.

11. In order to seek repayment, Mr Jordan prepared a series of sheets purporting to record, for each month, the hours worked by him and others, supplies received and paid for, and contracting services carried out (the "Sheets").

12. The judge found (and there is no appeal against this) that Mr Jordan provided the Sheets for January and February 2016 to Mr Thorner's brother, Alan, who produced typed invoices based on these Sheets which he provided to Mr Jordan. Mr Thorner paid the amount set out in these invoices in full, albeit late (the last payment being made in September 2016).

13. From March to November 2016 Mr Jordan continued to prepare Sheets in the same way. The judge found (and again there is no appeal against this) that for each of March, April and May 2016, Mr Jordan provided the Sheets to Mr Thorner towards the end of the following month but that he provided Sheets for June onwards in October 2016, along with invoices which he prepared for each of the months March to October 2016. Mr Jordan also prepared and supplied Sheets and an invoice for November 2016.

14. The amounts claimed in the invoices break down into three categories, so far as relevant for this appeal: (1) charges for labour supplied to the Farm (including Mr Jordan's own time and other labourers); (2) contracting services; and (3) supplies and various sundry items.

15. In total, the amount invoiced by Mr Jordan to Mr Thorner for March to November 2016 was £327,395.80 inclusive of VAT. On 29 November 2016, Mr Thorner paid Mr Jordan £59,575.15 on an interim basis, for a

small part of the invoiced amounts, relating to machine hire, diesel, grass keep, hay purchased, mileage, mobile phone and electricity charges, and purchases of supplies which were supported by receipts. Otherwise, Mr Thorner paid nothing against the invoices, claiming that none of the amounts claimed were properly verified by any supporting evidence.

16. Accordingly, Mr Jordan issued this claim, seeking payments totalling approximately £258,000 plus VAT, principally comprising the amounts claimed in the invoices from March to November 2016, but giving credit for the sum already paid and certain other items.

17. Mr Thorner counterclaimed for damages for various matters, in the sum of £137,000.

The Judgment

18. The judge awarded Mr Jordan:

(1) £4,600 plus VAT for his own labour, against a total amount claimed of £16,525 plus VAT;

(2) £5,134.25 plus VAT for the labour of some only of the other farmworkers who Mr Jordan claimed to have worked on the Farm, against a total amount claimed of approximately £21,000;

(3) £48,335.69 plus VAT for the reimbursement of third party purchases (there is no appeal against this aspect).

19. In respect of contracting services (against a total sum claimed of approximately £140,000), however, the judge awarded Mr Jordan nothing.

20. The judge also gave judgment for Mr Thorner on certain aspects of his counterclaim. Of these, the only one relevant to the appeal is a counterclaim for damages for Mr Jordan's breach of contract in failing to keep adequate paperwork in place when he left the farm so as to satisfy inspectors when they visited (for the purposes of continuing farm assurance for the Farm). The judge awarded Mr Thorner damages in the sum of £2,500.

21. The judge's reasons are set out in a lengthy judgment of nearly 600 paragraphs. The following is a condensed summary of his findings and conclusions.

22. Sections A to E deal with the background, and the provision of Sheets and invoices for January and February 2016.

23. Section F deals in outline with the charges from March 2016 onwards. At §71 the judge noted that the amount claimed in the invoices coincided largely with the monthly total in the corresponding Sheet, and said:

> "It follows that the accuracy and reliability of the amounts recorded by [Mr Jordan] in this sheets is fundamental to his prospects of succeeding with his unpaid invoices claim in these proceedings, as [Mr Jordan] acknowledged in evidence."

24. He expanded on this point in §71:

> "[Mr Jordan] stated unequivocally in his first witness statement that his 'handwritten notes' [i.e. the Sheets] were "accurate". He agreed with [Mr Thorner's] Counsel in cross-examination that they must be "reliable" for him to get paid as a result of these proceedings. As [Mr Thorner's] Counsel put to him: "Your total claim relies upon your handwritten documents being correct?" Answer: "Yes"."

25. Section G deals with the report of a joint expert accountant. Without questioning the expertise of the joint expert as an accountant experienced in the business affairs of the agricultural sector, I consider that there is very little, if anything, in the way of true expert evidence in her report. She was essentially asked to try to reconcile the matters invoiced by Mr Jordan to underlying documents. Her overall conclusion was that she was unable to do so. That was, however, a question of fact for the Court and not something that called for any expert evidence.

26. In Section I (§100 to §229) the judge considered the accuracy and reliability of the Sheets. As he noted, at §100, he had to undertake "what has proved to be an extremely time-consuming review of the evidence." He reiterated the point that Mr Jordan had:

> "…acknowledged unequivocally in his oral evidence that the correctness of the information in [the Sheets] is fundamental to the success of his unpaid invoices claim."

27. At §110 the judge identified as a matter of considerable importance the question of precisely *when* Mr Jordan wrote up the Sheets. He noted Mr Jordan's evidence – corroborated by his wife – that he wrote up the Sheets "religiously every night".

28. At §117 he referred to evidence relating to one particular person identified in the sheets under charges for labour, a Mr Wootten. He said that this had been of "considerable value" to his assessment of the accuracy and reliability of the Sheets, including as to the question of when they were written up. He then devoted 49 paragraphs to considering the evidence relating to Mr Wootten, of which the following is a summary:

(1) Mr Wootten's witness statement exhibited a series of numbered invoices, extracts from his pocket diary, and redacted copies of his bank statements.

(2) These demonstrated that he had worked 87 hours for Mr Jordan during March 2016, at rates of £10 or £30 per hour, and had been paid the sum of £1,290.

(3) In the Sheets, however, Mr Jordan had recorded Mr Wootten working 108 hours in March 2016, which he had valued at £12 per hour, resulting in a sum which almost exactly matched the amount which he had in fact paid to Mr Wootten. The discrepancies included that Mr Jordan had recorded Mr Wootten working 8 hours on 8 March, whereas Mr Wootten did not work that day, and that Mr Jordan recorded Mr Wootten working a total of 31 days over 4, 10, 13, 15 and 17 March) which Mr Wootten had not claimed for.

(4) A further invoice, numbered 100 ("Invoice 100") had been disclosed by Mr Jordan (over a year after the service of his first list of documents). The judge found that there were a number of 'troubling features' about Invoice 100. It had not been referred to in Mr Wootten's statement. It claimed £390 for work done on 8 March, and the five March dates which had been included in the Sheet, but not in Mr Wootten's earlier disclosed invoices. Mr Wootten had already billed Mr Jordan for eight hours on 8 March, in one of the invoices appended to his witness statement. The numbering of Invoice 100 was also out of sequence with other invoices presented by Mr Wootten in March 2016.

(5) In light of these points, the judge concluded that Invoice 100 was not a genuine invoice, but had the hallmarks of being created after the event. He concluded that Mr Wootten did not, therefore, work on the additional five days identified in Mr Jordan's Sheet for March 2016.

(6) A further invoice, numbered 99, also disclosed only just before the trial, was also out of sequence, but the judge concluded that this reflected an adjustment to correct an apparent lacuna in earlier invoices, so as genuinely to reflect work done on the Farm by Mr Wootten.

(7) The judge then speculated as to why Mr Jordan had recorded in the Sheets Mr Wootten working 31 hours on the additional five days in March. He noted that for all but one of the five days, Mr Wootten was recorded as doing "concrete work". He then noted that three of these dates coincided with days on which Mr Jordan received supplies of concrete. One of the suppliers of concrete was Edworthys. The judge found (and there is no appeal against this finding) that Mr Jordan had falsely claimed reimbursement in respect of concrete supplied by Edworthys which had in fact been used for building work at his father's house. In light of this he said, at §175:

> "…it seems to me that [Mr Jordan] recorded [Mr Wootten] as working for 31 hours on the alleged additional five days to give the impression, if the point was ever scrutinised, that, together with [another labourer] sufficient manpower had been deployed at the Farm to handle the numerous supplies of concrete [on the relevant dates in March]."

29. Following his review of the evidence relating to Mr Wootten, he stated his conclusion on the timing of the writing up of the Sheets at §179:

> "The inescapable conclusion from my consideration of the evidence is that [Mr Jordan] did not 'religiously' record details of each day's work on the Farm in March 2016 in his continuation handwritten labour charges sheets every night on returning from work, as both he and his estranged wife insisted in oral evidence."

30. In the subsequent paragraphs, the judge identified two of the reasons for that conclusion as:

(1) It was not credible that, had Mr Jordan written up his Sheets on the evening of 7 March, he would have omitted reference to the 8 hours that Mr Wootten had, according to his own diary, worked that day; and

(2) The additional 31 hours recorded in Mr Jordan's sheets for Mr Wootten during March 2016 were added as "camouflage", along with the later created invoice 100, to deflect attention from the unauthorised delivery of Edworthys contract.

31. The judge then identified the following, as further support for the unreliability of the handwritten labour charges in the Sheets, and the untruth of the claim that they were written up every night:

(1) Mr Jordan's Sheets recorded Mr Ryan Buse (or Bewes) as working on the Farm on various dates which were not corroborated by Mr Buse's own diary (reducing the amount he allowed for reimbursement of Mr Jordan's claim in this regard from £2,940 to £2,396.50).

(2) In October 2016, the Sheets record work done by Mr Buse on 26, 27 and 28 October *after* an entry recording Mr Jordan and his father working on 29 October. That demonstrates that he did not write up the entries for Mr Buse until at least 3 to 4 days later.

(3) Five other occasions when Mr Wootten's diary did not include hours which Mr Jordan included in his Sheets: on 1, 3, and 23 March 2016, 7 April 2016 and 31 May 2016 (the last four occasions being when the Sheets record Mr Wootten as having dehorned calves). The judge rejected Mr Jordan's evidence that Mr Wootten had been dehorning calves, relying instead on Mr Wootten's diary records.

(3) As to the contracting services elements of the Sheets, by way of example, the judge referred (at §218-224), to the fact that Mr Jordan could not realistically have known what hours a Mr Robert Heard was working on 12 October 2016, when he himself had only claimed for working for two hours on that date, and when he would only receive an invoice from Mr Heard three weeks later. He concluded, at §224, that he was not satisfied that Mr Jordan was making entries in the Sheets on or after 10:30pm on 12 October 2016.

(4) The judge, having heard evidence from Mr Thorner and his two brothers, each of whom said they had not been to the "Devon show" on 19 May 2016,

rejected Mr Jordan's evidence that he had met Mr Thorner or one of his brothers on that day. This was – said the judge – a further illustration of the unreliability of Mr Jordan's evidence.

32. At §230 the judge concluded that these matters infected and undermined the credibility of the Sheets as a whole, "the accuracy and reliability of which is essential to the success of his unpaid invoices claim". He concluded that the fact that Mr Jordan did not write up the Sheets each night of itself compromises their accuracy and reliability, particularly given his acknowledgment in cross-examination that he could not remember the correct times even a day later.

33. Accordingly, at §231, the judge concluded that the information in the Sheets could not safely be relied on in support of his unpaid invoices claim unless it was verified by credible supporting evidence. He rejected (at §232 to §236) Mr Thorner's contention that Mr Jordan's claim was an "amalgam of truth and falsehood" and since the Court could not readily separate the truth from the lies the whole case must fail (based on a decision of the Court of Appeal in *Ul-Haq v Shah* [2010] 1 All ER 73). He did not, therefore, accede to the suggestion that the Sheets must be ignored altogether, so that Mr Jordan could only succeed if he could establish a claim to the amounts invoiced by other evidence. In fact, I can see little daylight between this approach (which the judge rejected) and the approach he adopted (certainly as regards contracting services) in refusing to award anything unless it was verified by evidence *other than* the Sheets.

34. At §237 to §244, the judge addressed the question of the extent of supporting evidence required for the Sheets, in particular the effect of clause 4.1 of the Contract (which required "presentation of suitable evidence of payment" in order to be reimbursed for expenses incurred by Mr Jordan) and Mr Jordan's argument that a course of dealing had been established that the provision of the Sheets was sufficient to justify payment or that Mr Thorner was estopped from disputing the Sheets. The judge said by way of initial observation at §244 that this could only apply to the nature of the information required in relation to Mr Jordan's own labour charges, because in relation to expenses, Mr Thorner was obliged to reimburse Mr Jordan on presentation of "suitable evidence of payment".

35. As I have already noted, however, payment in respect of the contracting services element of the claim falls outside clause 4.1 of the Contract, it being common ground that contracting services were neither expenses incurred nor labour charges, but a combination of the two, in respect of which it had been agreed that Mr Jordan was entitled to charge at the rates in fact claimed.

36. The judge also concluded that, while Mr Thorner had taken rather too long to check the Sheets provided for March to June 2016, he had never agreed that it would be his responsibility to produce an invoice, following checking the Sheets. He found, instead, that Mr Jordan had *mistakenly*

assumed that Mr Thorner's brother had taken on responsibility to check the Sheets and to prepare invoices (in the same way that Mr Thorner had done in relation to the January and February invoices).

37. The judge rejected the contention, largely in light of this evidence, that there was any course of dealing leading to an agreement as to the nature of supporting information Mr Jordan was required to provide, or to support a claim that Mr Thorner had waived his right to require payment, by having failed to comply with the terms of the Contract, or was otherwise estopped from relying on the breach of Mr Jordan's payment notification obligations under the Contract to avoid liability.

38. At §278, the judge concluded that, irrespective of the above arguments, it was for Mr Jordan to establish to the satisfaction of the Court that the information set out in the Sheets was reliable and accurate. He rejected Mr Jordan's Counsel's contentions that (1) the Court should allow Mr Jordan's claim for his own labour charges on the basis of the hours set out in the Sheets alone; and (2) the Court was bound on the balance of probabilities to award Mr Jordan the amounts claimed in the Sheets in respect of contracting services because he had stated in evidence that the amounts were due and that had not effectively been challenged. The judge said this, at §279:

> "Those submissions are completely unsustainable in the light of my findings and conclusions regarding C's credibility, and the integrity of the information contained in the continuation handwritten labour charges and contracting services sheets. The Court is manifestly not obliged to take their contents as read on C's word alone."

39. He then reiterated the conclusion he reached at §231 (see above), that the Sheets could not be relied on unless the amounts claimed were verified by credible supporting evidence.

40. In section K, the judge considered the extent to which there was such credible supporting evidence for: Mr Jordan's own labour charges; the labour charges of others; the contracting services; and the payments for supplies.

41. In relation to Mr Jordan's own labour charges, the judge essentially preferred the evidence of a Mr Mark Sutton, an employee of Mr Thorner, to that of Mr Jordan and the time recorded in the Sheets. Mr Sutton had been asked (secretly) to keep an eye on Mr Jordan in April 2016, because Mr Thorner was concerned that Mr Jordan could not be trusted. Mr Sutton's evidence was that Mr Jordan had not been working more than 2 hours a day on Farm business. From June 2016, Mr Jordan had been told by Mr Thorner that the maximum time he should spend on the Farm was 10 hours a week. Accordingly, the judge allowed only such amount as equated to 2 hours per day until June, and then 10 hours a week.

42. In relation to others' labour charges, the judge went through the records relating to each labourer, allowing a certain amount to be charged in respect of Mr Wootten and Mr Buse (where, as I have already noted, there was corroborating evidence of them having worked, and having been paid) but otherwise disallowed all claims, essentially on the basis that there was no evidence of payment having been made.

43. The judge dealt with contracting services at §370 to §393.

44. First, he noted that it was not disputed that Mr Jordan had provided contracting services to Mr Thorner.

45. The judge noted that he had already rejected Mr Jordan's claim to award him the full sum claimed on the strength only of the evidence in the Sheets, on the basis that they were not to be trusted. He referred to the fact that the joint expert had been unable to verify any of the contracting services charges by reference to underlying records. In response to a question as to what she would expect to have been provided with, she had said that she would have expected to see details such as the number of labourers supplied and the machinery and implements used, as well as the number of acres for items such as dung spreading, fertiliser and rolling, and miles covered for fetching silage and straw.

46. The judge noted that, despite the expert having communicated her reasons for being unable to verify the charges, no attempt was made by Mr Jordan or his advisers to provide any of the supporting evidence the expert referred to.

47. He pointed to one instance, in particular, where supporting evidence might have been produced. This related to intensive activity of dung spreading over four days in November 2016, for which an amount of £11,463.95 had been charged by Mr Jordan according to his Sheets. He noted that the expert had been unable to agree any of this work to underlying records, and that Mr Jordan had relied solely on the Sheets. The Sheets contain no details such as the names of drivers, although the judge concluded that the names of at least some of them could be deduced from other evidence, for example an invoice from two of the drivers (one who invoiced for 41 hours over the first four days of November and the other – Mr Wootten – who invoiced for 37 hours over the same period). As to this, the judge said that it provided "snippets of support" for some of the contracting services work recorded by Mr Jordan in the Sheets, but said:

> "It is, however, fragmented, incomplete, and dispersed within the record, and not drawn together and presented in a clear and coherent manner. It therefore has no, or no sufficient, evidentiary value in terms of verifying the full extent of work on the four days recorded by [Mr Jordan] in his discredited [Sheets] and charged to [Mr Thorner]."

48. He went on to note that there were concerns expressed at the time that this work had been done carelessly, resulting in Mr Thorner being over-charged for the number of hours it *should* have taken.

49. At §391 to §393 the judge expressed his conclusions on this aspect of the case. Given their importance, I set them out in full:

> "391. C's claim against D is for the totality of (i) the labour charges and (ii) the contracting services charges for the nine-month period, which C invoiced to D, all of which remain unpaid. C has not brought a claim against D for payment of amounts that C paid, either to named individuals in the continuation handwritten labour charges sheets or to others (like RH), for "non labour charges work", such as driving tractors as an integral part of the contracting services work being provided by C to D. As C said in evidence, those separate labour costs have been allowed for in the contracting services charges invoiced to D. C does not contend that they can somehow be filleted out of his contracting services charges and recovered from D if his contracting services claim against D was to be unsuccessful.
>
> 392. In these circumstances, it seems to me there is no basis on which the Court could award to C amounts paid by him to individual workers (such as the £1,092.25 to RH for his tractor work) which did not constitute labour charges (as recorded by C in his continuation handwritten labour charges sheets and invoiced as such to D).
>
> 393. As with his case on his own labour charges, C has taken his chances of establishing his contracting services charges to the satisfaction of the Court by relying exclusively on the accuracy and reliability of the information recorded by him in his continuation handwritten contracting services sheets. His Counsel has repeatedly stressed in these proceedings that C's invoice to D for his contracting services charges is the only invoice, and that it should be accepted by the Court. I disagree. For the reasons explained, I cannot trust C's figures, and in the absence of credible supporting evidence against which to verify the contracting services charges recorded in those sheets, and invoiced to D, I am unwilling to make any award in respect of them."

50. The remainder of the judgment addressed the claim in respect of supplies, residual items and the counterclaim. The only other issue relevant to this appeal is one aspect of the counterclaim, relating to "farm assurance", a quality assurance process. The judge found that Mr Jordan was in breach of his obligation under clause 2.1.2 of the Contract to "be responsible for maintaining the Farm Assurance of the Langaford Farm dairy", by not leaving relevant paperwork at the Farm at the end of the Contract. As a consequence, Mr Thorner's brother and his wife had spent many hours

putting together the paperwork. They estimated that this took 50 hours. Mr Thorner claimed damages on the basis that he had to incur the cost of doing this, which he estimated at £50 per hour. The judge accordingly awarded £2,500 damages for this breach.

The Grounds of Appeal

51. Mr Jordan appeals, with permission granted by me on 4 November 2022. There are ten grounds of appeal, which fall into four categories: (1) Charges for Mr Jordan's own labour; (2) charges for other labourers; (3) contracting services; and (4) the counterclaim. By far the most significant of these (in terms of value) is contracting services, and I will therefore deal with that first.

Contracting services

52. Mr Pearce-Smith, who appeared for Mr Jordan, submitted that the judge was wrong to conclude that the Sheets were wholly unreliable, first because of procedural irregularities in connection with his findings based on Mr Wootten's invoices from March 2016 and, second, because he was wrong to base his conclusion as to the unreliability of all of the Sheets on certain isolated incidents of inaccuracies.

53. As to the first point, Mr Pearce-Smith submitted that there was a serious irregularity because the judge had concluded, in effect, that Mr Wootten had fabricated two invoices, without this allegation being put either to Mr Wootten or Mr Jordan.

54. I do not accept that there was an irregularity in Invoice 100 not having been put to Mr Wootten. That is because the judge did not make any finding of wrongdoing on the part of Mr Wootten. Invoice 100 had not been referred to at all in Mr Wootten's evidence, having been produced by Mr Jordan (not Mr Wootten) shortly before the trial.

55. Nor was there any error in relation to the other invoice in respect of which complaint is made (that numbered 99) because the judge did not find that it was a fabrication.

56. I nevertheless think that the judge was wrong to make findings to the effect that Invoice 100 had been fabricated by Mr Jordan, without Mr Jordan having been given the opportunity to address the allegation. This was, however, only one of a number of matters relied on in deciding to reject Mr Jordan's evidence as to the reliability and accuracy of the Sheets overall. Importantly, the judge's finding that Mr Jordan had deliberately included in the Sheets a claim for concrete used in connection with his father's house is not challenged on appeal. There was already, therefore, evidence of dishonest fabrication in relation to the Sheets without relying on his findings in relation to Invoice 100. Accordingly, I do not think that the error infected the judge's conclusion as to the unreliability of the Sheets.

57. As to the second point, although the judge focused in his judgment on a few specific instances where the Sheets were clearly inaccurate, his finding as to the overall unreliability of the Sheets was based largely on his rejection of Mr Jordan's evidence that they had been written up contemporaneously, itself based on his assessment of Mr Jordan's lack of credibility as a witness. Having concluded that this was demonstrably so in certain respects, I do not think that the judge can be faulted for having concluded that he could not rely on Mr Jordan's evidence that the Sheets, or any of them, had been written up contemporaneously. In circumstances where it was Mr Jordan's own evidence that if he had not written up the Sheets within a day or so then he would not have retained enough of the detail to write them up accurately, I consider that the judge's conclusion that the Sheets as a whole did not provide a completely accurate or reliable record of work done is not one with which I can interfere.

58. Mr Pearce-Smith also submitted that the judge was wrong to reject Mr Jordan's case that Mr Thorner was estopped from refusing to pay for the charges on the grounds of lack of documentary evidence, or had waived his right to do so. As I have noted above, the judge dismissed this claim largely in the light of his factual finding that there was no agreement reached that Mr Thorner or his brother would check the Sheets and prepare invoices, and the most that could be said is that Mr Jordan was under a misapprehension in this respect. The short answer to the arguments advanced in relation to this ground of appeal is that they do not identify any error of law in the judge's conclusions of fact which underpinned his rejection of the estoppel or waiver case.

59. The more substantial objection taken by Mr Pearce-Smith, however, is that the judge was nevertheless wrong to dismiss the whole of the claim for contracting services in circumstances in which:

(1) The contracting services were not included within the Contract, and therefore were not caught by the strict evidential terms of the Contract (if there were any such terms);

(2) There is no dispute that Mr Jordan provided the contracting services;

(3) Mr Thorner expressly encouraged Mr Jordan to continue to supply the contracting services, having received his manuscript notes of the services provided;

(4) The rates payable for the various services were established by a course of dealing;

(5) There was no evidence that the rates payable for the contracting services were unreasonable (and, on the contrary, the evidence from the expert showed they were reasonable);

(6) There was no evidence that the quantum charged for the contracting services was unreasonable. Mr Thorner had not adduced any evidence to challenge Mr Jordan's evidence and refused to provide disclosure of documents

showing the amounts which he had paid for equivalent services in the following year;

(7) The decision was wholly unjust in that it gave Mr Thorner a huge windfall at the expense of Mr Jordan. Essentially Mr Jordan supplied all of the forage for the dairy herd for March to November 2016 (including the grass cut for silage) at no cost to Mr Thorner.

60. For the reasons which follow, I agree that the judge was wrong to conclude that nothing at all was owing in respect of contracting services.

61. The judge placed considerable reliance on Mr Jordan's comment in the course of cross-examination that he "acknowledged unequivocally" that the correctness of the information in the Sheets was "fundamental to the success of his unpaid invoices claim". On the back of that acknowledgment, the judge himself concluded that the accuracy and reliability of the Sheets was "essential" to the success of the claim.

62. To the extent that the judge relied on what Mr Jordan said in cross-examination in reaching this conclusion, he was wrong to do so. Whether it was essential or fundamental to Mr Jordan's claim that the Sheets were correct is a point of law, and not something which turned on Mr Jordan's evidence. What Mr Jordan said in the course of cross-examination cannot be taken as an acknowledgment of that point of law.

63. In any event, I consider that the judge was wrong to conclude that the accuracy of the Sheets was fundamental to the success of Mr Jordan's claim. It is not entirely clear why the judge thought this was so. It does not appear to be because he accepted the defendant's argument that entitlement to payment under the Contract was dependent on Mr Jordan having provided "suitable evidence" (per clause 4.1), so that if the Sheets were found to be unreliable, the precondition for payment was not met.

64. Had he accepted it, then I consider he would have been wrong to do so. As I have noted, payment for contracting services was not provided for in the Contract, yet it was common ground that: Mr Jordan was asked to provide them; Mr Thorner agreed to pay for them at a reasonable rate; and the rates set out in the Sheets were reasonable rates. There is accordingly no basis on which it can be said that the provision of accurate Sheets was a precondition to the entitlement to be paid for contracting services. Mr Jordan was entitled to be paid at the rates set out in the Sheets to the extent that he in fact provided those services.

65. Nevertheless, while the judge does not appear to have accepted the defendant's argument, his conclusion that nothing is due to Mr Jordan in respect of contracting services comes close to it. In light of his acknowledgment that it was not disputed that contracting services had indeed been provided by Mr Jordan to Mr Thorner, it is difficult to see on what other basis the judge could have awarded nothing under this head. If any work at all was done, then it follows that Mr Jordan was entitled to

at least some payment, so that the one conclusion which was *not* justified is that he is entitled to no payment at all.

66. I agree with the judge that, having concluded that the Sheets as a whole were an unreliable record of the work done, he was entitled to require the claim for contracting services to be corroborated by some other evidence. I consider, however, that in adopting that approach the judge then failed to recognise that there was indeed evidence sufficient to justify the conclusion that Mr Jordan was entitled to at least some – indeed a substantial – payment for contracting services.

67. First, the acceptance by Mr Thorner that contracting services had in fact been provided itself justified the conclusion that some payment was due. The judge referred to Mr Sutton's acceptance that Mr Jordan had carried out each type of service listed in a request for further information made by Mr Jordan. It is worth setting these out in full, together with the rates charged:

"a) umbilical - setting up: £50/hr
b) umbilical - pumping: £70/hr
c) fertiliser spreading: £32/hr
d) dung spreading: £38/hr
e) tractor and stirrer: £20/hr
f) fetching straw/silage: £34/hr
g) dehorning calves: £4.50/calf
h) tractor, roller & driver: £27/hr
i) spraying: £5/acre
j) ploughing: £32/acre
k) other umbilical: £30/hr
I) power harrowing: £18/hr
m) sowing grass seed: £32/hr
n) mowing: £10/acre
o) tedding: £5/acre
P) raking/buckraking: £5/acre
q) aerator: £7/acre / £6/acre
r) tractor & dung trailer: £30/hr
s) slurry tanking: £38/hr
t) spraying docks: £4.50/acre
u) rolling seed field: £30/hr
v) tractor, trailer & driver: £34/hr
w) pumping out dirty water pit: £30/hr
x) tractor & driver for rolling silage pit: £30/hr
y) bale wrapping: £6.50/bale
z) handler, attachment & driver for straw-unloading: £35/hr
aa) rolling grass seeds: £27/hr
bb) hedge-trimming: £30/hr
cc) buck-raking maize: £40/hr
dd) tractor & driver for rolling maize pit: £38/hr
ee) handler hire: £15/hr"

68. Second, when concerns arose about the amount of time that Mr Jordan was claiming for his own labour, Paul Thorner emailed him on 25 June 2016. He expressed concern that costs were outstripping income and that all expenditure must come under scrutiny, with the natural starting point being the biggest cost area – labour and staff costs. As to contracting services, he said the following:

> "We emphasized this did not have any implications for your role as a supplier of contract services, for which you charge us separately. Clearly this also needs to be controlled, but that process seems to be working well at the moment where we consider each supply e.g. silaging and agree the appropriate cost for the job. As is the current practice, you will mainly liaise with Alan on this as he is far easier to make contact with than either Dave or I."

69. Third, Paul Thorner's knowledge and encouragement of the ongoing provision of contracting services is demonstrated by an email from him to Mr Jordan of 18 July 2016, asking; "Silage – how's it going? Is it as we anticipated, and what's the impact on feed requirement for the rest of the year." It is further demonstrated by the fact that when three months' notice of termination of the contract was given on 31 August 2016, Mr Jordan was told in the covering email that there may still be the possibility of contract work "in the shape of 4th cut silage, hedge trimming etc", although Mr Jordan should not assume that would be a source of long-term income as Mr Thorner may choose to bring all that work back in house in due course. As to outstanding payments, Mr Jordan was assured that he would be paid for all charges that were agreed to be owing to him at the end of the contract. The notice of termination itself said that Mr Jordan was expected, while the contract continued, to do everything he could to act in the best interests of the Farm.

70. Fourth, while I consider that the judge was entitled to reject the waiver and estoppel arguments advanced by Mr Jordan, corroborating evidence that substantial contracting services were provided is found in the fact that Mr Thorner was provided with Sheets for March, April and May 2016 containing claims for contracting services totalling more than £35,000, yet not only did Mr Thorner not object that those services had not been provided, but commented in the email referred to above that these services seemed to be going well. It is also noteworthy that even when the dispute arose, Mr Thorner's objection was not that no contracting services had been provided, or that the amount charged was wholly out of proportion to the work required for forage production across the year, but that without verification of the precise amounts claimed in the Sheets no payment would be made.

71. Fifth, as a result of the presence of TB in the herd of cattle on the Farm, the herd was kept in sheds and the land was used primarily for forage – producing food for the cattle. This was undoubtedly done, and done to the extent that the cattle were in fact fed throughout the year (albeit this was supplemented by feed purchased from elsewhere). Mr Thorner did

not provide any disclosure as to the amounts paid in subsequent years for the work required to be done in place of the contracting services provided by Mr Jordan. In cross-examination, however, Mr Sutton said that the charges in 2021 were £250,000. Without knowing the precise nature of the work done during that year, it is not possible to draw an exact comparison, but this at least demonstrates that the work carried out during 2016 would have entitled Mr Jordan, at the rates for contracting services approved by Mr Thorner, to payment of a substantial sum.

72. Sixth, the judge referred to certain instances in his judgment where there was specific corroborating evidence of contracting services being carried out, but nevertheless allowed no payment in respect of that work. For example, the judge referred to Mr Buse having been paid £4,500 for work he recorded in his diary, which had not been recorded in the Sheets, because this "almost certainly" reflected payment for work done by Mr Buse in driving machinery charged by Mr Jordan to Mr Thorner as contracting services. Another example is four days of slurry pit work carried out in November 2016, which had been caught on CCTV.

73. In these circumstances, I consider that it was not open to the judge to conclude that nothing at all was due to Mr Jordan in respect of contracting services. The judge did so because (see §393 of the judgment) Mr Jordan had "taken his chances of establishing his contracting services to the satisfaction of the Court by relying exclusively on the accuracy and reliability of the information recorded by him in his [Sheets]". To the extent that this conclusion rested on what Mr Jordan said in cross-examination, then I consider it was wrong for the reasons set out above. To the extent that it was based on the judge's own conclusion that, because the Sheets were unreliable, no amount was due unless corroborated by other evidence, then it was wrong because it ignored the evidence and other matters I have referred to above that corroborated the fact that contracting services had been performed which justified not only some but a substantial amount being paid to Mr Jordan.

74. I sympathise with the judge in that (as I go on to explain below), no real assistance was provided to him by the claimant as to the quantification of the amount due in respect of contracting services once it was concluded that the Sheets were unreliable. The claimant appears to have contended only that the Sheets were – even if unreliable in parts – the best evidence of the amount of contracting services that had been provided. While the judge was entitled to reject that argument, that did not in my view justify the conclusion that nothing at all was due.

75. The question then arises as to what follows from that conclusion. Neither party wished for the case to be remitted to the judge. That leaves, however, the same problem that faced the judge. Mr Jordan did not help by providing any alternative method for assessing what work was done or what a reasonable sum to pay for that work would have been. He could, for example, have led expert evidence as to the nature of the tasks that would have been required to carry out foraging services for the year so as to arrive at a reasonable amount, taking into account the charges for the

various services which it was agreed were reasonable. Alternatively, he could have pieced together such evidence as there was (including the hours claimed by others such as Mr Buse who had operated machinery as part of contracting services, or the CCTV evidence of work actually done) to build up a picture of the work that was done over the course of the year. As Mr Pearce-Smith acknowledged, however, that was not done at trial, and no attempt was made on the appeal to build such a case.

76. Mr Auld submitted that it is for the claimant to prove his case and that even on this appeal no attempt had been made to identify what amount was payable other than the amount set out in the invoices based on the Sheets. In the absence of that being done, he submitted that, I – like the judge – could only conclude that the claimant had not made out his case, so that nothing at all should be awarded for contracting services.

77. For the reasons I have already given, however, I do not accept this argument. If, as I have found, provision of an accurate invoice, or an invoice based on accurate time records, is not a precondition to the entitlement to be paid, then on the basis of the six matters I have identified above at paras 67-72, something must be due.

78. The question, therefore, is what that amount should be, having regard to the judge's primary findings of fact and the other undisputed evidence. In the absence of any real assistance in this regard provided on Mr Jordan's behalf (as I have already indicated, no alternative amount was suggested – Mr Pearce-Smith merely said in reply submissions that I would have to "pick a number") I consider that this question should be answered by reference to the highest amount I can safely conclude must have been owing in respect of contracting services, giving Mr Thorner the benefit of any doubt that may exist.

79. The six factors I have identified above point to that amount being in the high tens of thousands of pounds. In particular: (1) faced with a total claim of £140,000 plus VAT, the Thorners' response was not that this was wholly at odds with the value of the work which had in fact been carried out; (2) with the benefit of Sheets identifying over £35,000 of work having already been done, Mr Thorner told Mr Jordan in June 2016 that contracting services were going well and, on that and a subsequent occasion, encouraged him to continue with that work; (3) the Thorners were not blind to the work that was in fact being carried out, because they had Mr Sutton surreptitiously observing Mr Jordan since April 2016; (4) although the comparison is not necessarily on a like-for-like basis, the cost to the Thorners of providing services of a similar nature in 2021 was in the region of £250,000.

80. In addition, on 23 December 2016, having analysed all the invoices, the defendant himself made an open offer to pay £71,000 plus VAT (on top of the £59,579.15 paid earlier that month). This is far from conclusive, given that there may be any number of reasons why the defendant was prepared to pay this sum to avoid a dispute. Nevertheless, it provides a measure of comfort – coupled with the above points – that something in

the region of this sum was reasonably due for the contracting services carried out.

81. Based on these factors, I consider that an amount I can safely conclude represents a reasonable sum for the work done by Mr Jordan in providing contracting services is one-half of the total amount claimed in the Sheets, namely £70,000 plus VAT. The right figure may be greater, even much greater, but in the absence of any help from Mr Jordan other than to pick a number, and giving the benefit of the resulting doubt to Mr Thorner, that is the most I consider can safely be awarded.

Charges for Mr Jordan's own labour

82. Ground 3 of the grounds of appeal contains a number of objections to the judge's decision to limit Mr Jordan's claim for his own labour charges to £4,600: (1) the procedural irregularities relating to Mr Wootten's evidence; (2) the Judge was wrong to extrapolate from a few incidents of errors in the Sheets to the conclusion that they were wholly unreliable; (3) the judge was wrong to base his conclusion on Mr Sutton's estimate of the hours worked, because Mr Sutton had kept, but not disclosed, his own record; (4) the Thorners had produced an estimate of the hours worked by Mr Jordan that exceeded Mr Sutton's estimate; (5) the judge had wrongly placed weight on Mr Sutton's evidence without considering the type of work Mr Jordan was doing (and hence whether it would have been visible to Mr Sutton) and despite Mr Sutton's evidence that he was busy carrying out tasks or resting so that he was not in a position to see what Mr Jordan was doing; (6) the judge was wrong to disregard Mr Jordan's Sheets on the basis of his finding that he did not compile the Sheets every night; (7) the judge was wrong to reject the case that Mr Thorner was estopped from refusing to pay labour charges on the grounds of lack of documentary evidence.

83. The short answer to these points is that the judge's conclusion was based on his acceptance of the evidence of Mr Sutton – who had been secretly deputed by the Thorners to keep an eye on Mr Jordan – over the evidence of Mr Jordan. That is a conclusion of fact with which an appeal court will not interfere unless there was some identifiable error of law or it was plainly wrong, in the sense that it was one which no reasonable judge could have reached.

84. As to the first, second, sixth and seventh points, I have addressed and rejected these in dealing with contracting services, and the same conclusions apply to labour charges.

85. As to the third and fifth points, these do not amount in my judgment to an error of law in the approach taken by the judge in preferring Mr Sutton's evidence to that of Mr Jordan. They are matters which go to weight, and might have persuaded a different judge to reach a different conclusion. That is not, however, sufficient to justify interfering with this finding of fact.

86. As to the fourth point, the Thorners' estimate of the hours worked (by Mr Jordan and others) was expressly based on "assumptions rather than hard facts". In any event, the complaint as developed at the hearing was as to the weight the judge placed on this point. Even if I considered that more weight should have been placed on the Thorners' own estimates, that would not be enough to interfere with the judge's finding.

Charges for others' labour

87. I can similarly deal with this aspect very shortly. The judge allowed reasonable charges for the labour of others where there was evidence both that they had carried out work and had been paid by Mr Jordan for it.

88. In respect of those labourers where no payment was allowed, I consider that the judge was justified in reaching that conclusion on the basis that without proof that Mr Jordan had paid them, then he is not entitled to reimbursement. The contract entitles him to be reimbursed for expenses paid by him, upon presentation of suitable evidence of payment. Mr Jordan did not present evidence even at trial that he had paid the relevant labourers for the work done by them.

Counterclaim

89. I have set out the nature of the one aspect of the counterclaim which is relevant to this appeal at para 50 above. Mr Thorner's claim was for damages for Mr Jordan's breach of his contractual obligation to be responsible for maintaining the Farm Assurance of the Langaford Farm dairy, by failing to leave the relevant paperwork at the Farm when he left.

90. Mr Pearce-Smith submitted that the judge's conclusion was wrong because, on Mr Thorner's own evidence, he had suffered no loss. That was because it was his brother, and his brother's wife, who spent the time necessary to put the records in order, and there is no evidence that Mr Thorner paid them anything for that work.

91. Mr Auld pointed to the further reasoning given by the judge in his judgment refusing permission to appeal on this point. At §88 of that further judgment, the judge said that he was prepared to accept Mr Thorner's evidence that he had incurred the cost of extra work. This was a reference to Mr Jordan's witness statement (referred to at §86 of the further judgment) that he "had to incur the cost of extra work".

92. In my judgment, however, the evidence in Mr Thorner's witness statement about "incurring" the cost can only be read as referring to what follows: namely that "I claim that this amounts to about 50 hours at £50 per hour together making £2,500", i.e. that the cost was incurred in the sense that hours were spent on the task, not that he had made any payment to anyone for carrying out the work. Given his acknowledgment in cross examination that he had not done the work, but the work had been done by his brother and his brother's wife, I accept Mr Pearce-Smith's

submission that this did not evidence any loss recoverable for breach of contract being suffered by Mr Thorner.

Conclusion

93. For the above reasons, I allow this appeal in two respects: (1) in relation to the claim for payment for contracting services, where I substitute the judge's conclusion that no amount is due with judgment for Mr Jordan in the sum of £70,000 plus VAT; and (2) in respect of the counterclaim, where I set aside the judge's decision that Mr Jordan pay Mr Thorner £2,500 for breach of contract in relation to the obligation to be responsible for maintaining the Farm Assurance of the Langaford Farm dairy. In other respects, the appeal is dismissed.