COMMONWEALTH OF THE BAHAMAS
IN THE SUPREME COURT

COMMON LAW AND EQUITY DIVISION
2009/CLE/gen/00176

BETWEEN

BALMORAL DEVELOPMENT LIMITED

BALMORAL ESTATES LIMITED

UNITED BAHAMAS DEELOPMENT LIMITED

ARISTO INVESTIMENTS LIMITED

Plaintiffs

AND

COTTISLAW (a firm)

GREGOR I.H. COTTIS

Defendants

AND BETWEEN

GREGORY I.H. COTTIS

COTTISLAW (a firm)

Plaintiffs

AND

JASON KINSALE

ALMORAL DEVELOPMENT LIMITED

Defendants

Before: The Hon. Senior Justice Stephen G. Isaacs

Appearances: Wayne Munroe, Q.C. and Clinton Clarke and Jade Fowler with him for the Plaintiffs
Brian Moree, Q.C. and Sean Moree with him for the Defendants

Hearing Date: 19 June 2014

JUDGMENT

1. This action is brought by the Plaintiffs against the Defendants for breach of contract for legal services negotiated and agreed between the parties. I have produced the following key in order to distinguish the Plaintiff companies and one subsidiary company that are affected by this action by their initials

AIL	-	Aristo Investments Limited
UBDL	-	United Bahamas Development Limited
BDL	-	Balmoral Development Limited
BEL	-	Balmoral Estates Limited
BCL	-	Balmoral Club Limited (a subsidiary of BDL)

2. The dispute arose from an unwritten contractual relationship struck in 2007 whereby the Plaintiffs retained the Second Defendant to act as legal representative on their behalf, with regard to the purchase and development of property valued just under $10m.

3. The Plaintiffs filed a Statement of Claim on 13 November 2009. The First to Third Plaintiffs are Bahamian companies duly incorporated under the statute laws of The Bahamas. The Fourth Plaintiff is an International Business Company (IBC) also incorporated under the statute laws of The Bahamas. The Defendants are a law firm and the firm's sole practitioner respectively. Jason Kinsale, a Defendant by counterclaim, holds shares in (BDL) that are claimed by the Second Defendant as payment for work done.

4. Collectively, the Plaintiffs brought this action as "the Balmoral Group" of companies. Due to the nature of the pleadings I shall reproduce portions thereof so as not to distort the competing claims, or the opposing reliefs sought.

5. In the Statement of Claim, the Plaintiffs plead the following:

PARTICULARS OF BREACH OF CONTRACT/NEGLIGENCE

In breach of their retainer and further, or in the alternative as a result of their neglect or negligence, the Defendants failed to carry out those items as listed below in respect of each of the four Plaintiffs:

31.1 AIL

a) **Failed to produce Minutes resolving to the transfer of the Registered Office and Agent from the Bank of Nova Scotia to Cottislaw;**

b) **Failed to produce a Register of Officers and Directors;**
c) **Failed to produce a Register of Shareholding;**
d) **Failed to cancel Share Certificate No. 1;**
e) **Failed to cancel Share Certificate No. 2;**
f) **Failed to order a Corporate Seal**
g) **Failed to carry out Mr. Zeilstra's instruction on the 27th March 2008 to remove his wife as a shareholder and director.**

31.2 UBDL

a) **Failed to witness the signature of Nicole Gardiner on Transfer at the back of Share Certificate No. 2;**
b) **Failed to cancel Share Certificate No. 1;**
c) **Failed to produce an Annual Statement for the year 2005;**
d) **Failed to produce an Annual Statement for the year 2007;**
e) **Failed to produce an Annual Statement for the year 2008;**
f) **Failed to produce an Annual Return (Section 59 Form) for the year 2005;**
g) **Failed to produce an Annual Return (Section 59 Form) for the year 2006;**
h) **Failed to produce an Annual Return (Section 59 Form) for the year 2007;**
i) **Failed to produce an Annual Return (Section 59 Form) for the year 2008;**
j) **Failed to produce Minutes of Annual General Meeting for the year 2006;**
k) **Failed to produce Minutes of Annual General Meeting for the year 2007;**
l) **Failed to produce Minutes of Annual General Meeting for the year 2008;**
m) **Failed to produce Minutes of Directors to transfer Registered Office from Kendal Wright & Co. to Cottislaw;**
n) **Failed to produce Letters listing the Directors and Officers which should have been filed upon incorporation of the Company with the Office of the Registrar General;**
o) **Failed to produce a transfer of nominee shares to new Shareholder (Nicole Gardiner);**
p) **Failed to produce Central Bank notification as to Mr. Zeilstra's shareholding;**
q) **Failed to produce an Investment Board Certificate of Registration naming Mr. Zeilstra as a new Shareholder of UBDL;**
r) **Failed to produce a receipt evidencing the payment of a Stamp duty pursuant to the above.**

31.3 BDL

a) **Failed to produce a filed, Director-signed Annual Declaration for the year 2007;**
b) **Failed to produce a filed, Director-signed Annual Declaration for the year 2008;**

c) **Failed to produce a filed, Director-signed Annual Declaration for the year 2009;**
d) **Failed to produce Minutes of the First Meeting of the Members appointing the first Directors and Officers of the Company and adopting the common seal;**
e) **Failed to produce Minutes of the First Meeting of the Board of Directors listing the address of the Registered Office and issuing the Shares;**
f) **Failed to produce a Letter with the Official Stamp of the Registrar General listing the Directors and Officers of the Company upon incorporation;**
g) **Failed to produce an Annual General Meeting of the Members for 2008;**
h) **Failed to produce an Annual General Meeting of the Members for 2009;**
i) **Failed to produce a Share Transfer Form for the transfer of the shares held in Share Certificate No. 1 to Aristo;**
j) **Failed to produce a Share Transfer form for the transfer of the shares held in Share Certificate No. 2 to Aristo.**

31.4 **BEL**

a) **Failed to produce a filed Annual Declaration for the year 2008 signed by 2 Directors or otherwise;**
b) **Failed to produce a filed Annual Declaration for the year 2009 signed by 2 Directors or otherwise;**
c) **Failed to produce Minutes of the First Meeting of the Board of Directors listing the address of the Registered Office and issuing the shares;**
d) **Failed to produce a Letter with Official Stamp of the Registrar General which lists the Directors and Officers of the Company upon incorporation;**
e) **Failed to produce a Share Transfer Form for the transfer of the shares held in Share Certificate No. 1 to Mr. Kinsale;**
f) **Failed to produce a Share Transfer Form for the transfer of the shares held in Share Certificate No. 2 to Mr. Zeilstra.**

31.5 **The Balmoral Club Limited ("BCL") (a subsidiary of BDL and also forming part of the Balmoral Group)**

a) **Failed to produce a filed Annual Declaration for the year 2008 signed by 2 Directors or otherwise;**
b) **Failed to produce a filed Annual Declaration for the year 2009 signed by 2 Directors or otherwise;**
c) **Failed to produce Minutes of the First Meeting of the Board of Directors listing the address of the Registered Office and issuing the shares;**

d) **Failed to produce a Letter with Official Stamp of the Registrar General which lists the Directors and Officers of the Company upon incorporation;**
e) **Failed to transfer the shares held by Share Certificate Nos. 1 and 2 to Mr. Kinsale and Mr. Zelistra (despite instructions to do so dating back to 17th August 2008).**
f) **Failed to produce Share Transfer Forms in relation to the item immediately above;**
g) **Failed to produce evidence of Central Bank Approval.**

31.6 <u>The Balmoral Group</u>

1. **Failed to produce a single original share certificate that had been signed (save and except for BDL);**
2. **Failed to produce Name Strips to accompany the Company Seals;**
3. **Failed to deal with reasonable requests in a timely manner;**
4. **Failed to respond to numerous requests for an accounting on the interest accruing on the Balmoral Group US$ Client Account;**
5. **Failed to within a reasonable time respect the clients' instructions to have the RBC mortgage dealt with by Lennox Paton;**
6. **Failed to obtain the mortgage from RBC on behalf of their clients;**
7. **Failed to confirm the proper Site Plans for the conveyance so as to enable proper Central Bank Approval and Investment Board Permits;**
8. **Failed to ensure the safety of the Balmoral Group's respective investments by ensuring that share certificates were properly issues and signed, effectively;**
9. **Failed to regularise UBDL properly;**
10. **Failed to fully update AIL, specifically given the exposure in reference to Mr. Zeilstra and his wife and her control as a shareholder and director of AIL which was to be The Balmoral purchasing entity;**
11. **Failed to issue the shares of BEL and BDL to the names of Mr. Zeilstra and Mr. Kinsale;**
12. **Failed to remove Olivia Knowles, an employee of Cottislaw from playing a part in any of the companies forming part of Balmoral Group;**
13. **Wrongfully and unreasonably withheld papers and property belonging to the Balmoral Group when requested by the clients;**
14. **Failed to maintain the corporate requirements for the new entities;**
15. **Failed, even to date, to produce invoices for work performed on behalf of the Balmoral Group in accordance with normal best practice standards of the Bahamian legal profession.**

31. By reason of all those matters as set out above the Balmoral Group has suffered loss and damage:

AND THE PLAINTIFFS CLAIM:-

a. A declaration that:

(1) There exists a valid contract, whether express or implied between the Balmoral Group and the Defendants for remuneration in cash not in kind, for legal services rendered;

(2) The Share sale and Trust Agreement and the Operating Agreement mentioned herein are null and void as between the Balmoral Group and the Defendants, due to the revocation of the same by the Plaintiffs;

(3) The Defendant is neither a shareholder in any of the Plaintiff companies nor in any project owned and/or operated by or on behalf of the Plaintiffs.

b. An enquiry as to any and all sums due and owing to the Plaintiffs from the Defendants, if any, and to the Defendants from the Plaintiffs, if any, inclusive of earned fees, expenditures, disbursements, deposited sums and/or interest thereon pursuant to the retainer between the parties.

c. An Order that such sums as are found by this Honourable Court to be due and owing to the parties or any of them pursuant the enquiry in paragraph 2 hereof be paid by the party or parties liable to do so.

d. Damages (special and general) for loss and damage occasioned to the Plaintiffs by the Defendants as a result of the Defendants' breach of contract, or alternatively, as a result of the Defendants' breach of duty.

e. Interest pursuant to Section 3 of the Civil Procedure (Award of Interest) Act, 1992.

f. Such further or other relief as to the Court may seem just.

g. Costs.

6. On 11 April, 2011 the Defendants filed its Defence and Counterclaim. Insofar as is needed to dispose of the issues the Defendants plead as follows:

COUNTERCLAIM

1. ...

2. **The date of the Engagement was 1st July, 1997 or thereabouts and the Terms of Engagement included the following legal services in connection with the purchase of the Balmoral Property.**

   (i) The settling of Option Agreements and Agreements for Sale;
   (ii) Title investigations;
   (iii) Applications to the BIA and the Exchange Control Department of the Central Bank of The Bahamas;

(iv) **Corresponding with the Vendor's attorney;**
(v) **Raising requisitions on Title as necessary;**
(vi) **Conducting site inspections;**
(vii) **Settling Shareholders Agreement for purchasing entities and**
(viii) **Settling forms of Conveyances.**

AND THE DEFENDANTS COUNTERCLAIM:-

1. **A Declaration that Jason Kinsale is holding the BDL Shares on trust for the Second Defendant;**
2. **An Order that Jason Kinsale forthwith transfer the BDL Shares to the Second Defendant or his nominee;**
3. **Damages for failing to act in accordance with the trust in favour of the Second Defendant;**
4. **Alternatively, in the event the SSTA was effectively withdrawn prior to its acceptance, an Order that the Plaintiffs pay the Defendants $200,000.00 pursuant to the fixed fee agreement;**
5. **Such further or other relief as the Court may seem just; and**
6. **Costs.**

The Evidence

7. The genesis of the dispute are cross allegations of breach relative to agreements for the purchase and development of land situated in the western district of New Providence. Mr. Raimon Zeilstra as principal of the UBDL, then subsequently through BDL, and later through BEL, purchased property in the Prospect Ridge area to develop a gated residential community with amenities.

8. On 1 June 2007 the Plaintiffs retained the Second Defendant as legal representative on their behalf in relation to the aforementioned development. What is in dispute between the parties is the scope of work for which the Second Defendant was retained to do, as well as the form of remuneration to which he is entitled. The Defendants argue that there are in existence two separate agreements with respect to the retainer. The remuneration for the first being legal fees, and for the second a share equity transfer.

9. The Plaintiffs allege that the Defendants employ was terminated on the 15th January 2009; conversely the Second Defendant avers that the oral retainer was terminated by him after Mr. Kinsale failed to acknowledge the Share Sale and Trust Agreement (SSTA).

10. Further, the Plaintiffs assert that there was only one agreement, whereunder the Defendants could decide between option one, an "all-in-one" fee valued at $150,000.00 for

services rendered, or an equity share option valued at $200,000.00 which was to include disbursements by the Defendants on behalf of the Plaintiffs.

11. With regard to the issue of the retainer, a retainer is **"a fee that a client pays to a lawyer simply to be available when the client needs legal help during a specified period or on a specified matter"** See Black's Law Dictionary Eighth Ed. In other words, a retainer is a contract between the Attorney and client in which the Attorney provides services for payment.

12. The uncontroverted evidence is that there was in place an oral retainer. By his vive voce evidence, Mr. Zeilstra, on behalf of the Plaintiffs, indicated that sometime in 2007 he engaged the services of Cottis Law to represent the Balmoral group in its project development.

13. The law has been settled that if an Attorney acts on an oral retainer, the burden of proof is on the Attorney to establish the scope of the retainer. See **Griffiths v Evans** [1953] 2 All ER 1364.

14. I accept that there exists a legal relationship between the parties to engage the Defendants for legal services for pay. The scope of the agreement stands to be determined.

15. The Defendants by their counterclaim, laid out the scope of work for which the Second Defendant was retained as it was understood by him (see paragraph 6 *supra).* That list is strikingly shorter than the list pleaded by the Plaintiffs as being the scope of work covered by the oral retainer (see para 5 *supra*).

16. The scope of work identified by the Defendants was not disputed by the Plaintiffs' witness, but Mr. Zeilstra indicated that the list proffered by Counsel for the Defendants is only a partial list.

17. On 27 June, 2007 UBDL signed a letter of Intent ("LOI") to purchase the Balmoral Property from Mr. Donald Tomlinson for the purpose of the Balmoral project. By email dated 13th August, 2007 between Zeilstra and Cottis, Zielstra on behalf of the Plaintiffs outlined to Mr. Cottis the need to incorporate three (3) new companies including one that will be named as buyer of the subject parcel of land as outlined in the LOI.

18. The date of engagement of the Defendants was 1st June, 2007 as confirmed by email on that date. Bearing in mind that the scope of work as orally agreed, the Defendants assert that by August 2007 they were retained to carry out additional work outside the scope of the first engagement, thereby entering into a second engagement. As a matter of law the terms of a retainer can be implied by the conduct of the parties.

19. I accept that an Attorney's retainer and/or scope of work can be so altered that it, in essence, creates a new contract. However, whenever this occurs, the scope of work is noticeably different from what was originally retained. In the instant case, email communications and the LOI indicate that at all material times the agreed retainer covered certain legal work for the Balmoral group, as those documents constitute parole evidence of the scope of that work.

20. Under cross examination, Mr. Cottis stated that he understood his work in the Balmoral project to include the acquisition of High Tor property, together with getting the necessary approvals and to close on the property.

21. It is not in dispute that the purchase of the High Tor property was processed by the second Defendant. Indeed the Defendants asserted that after securing the permission to purchase the subject property, Mr. Zeilstra approached the Second Defendant to incorporate BDL, BEL and BCL, and to make fresh applications to vest title to different parts of the property in the newly formed companies, and to provide a registered office for those companies, as well as regulating Mr. Zeilstra's shareholding in UBDL. According to the Defendants, this in essence formed the second engagement.

22. There is no documentary evidence to define the scope of this second engagement as described by the Defendants. The Second Defendant admitted that no invoices for services were produced to Balmoral during the engagement that can clearly separate the scope of work for the first and second agreements. The only financial invoice directed to the Plaintiffs from the Defendants was a Statement of Accounting dated 9th March, 2009. The Second Defendant alleges that at the time he withdrew his services from the Plaintiffs, no bill of cost was directed to the Plaintiffs itemizing services rendered.

23. In determining whether or not the scope of work was amended to include incorporation of BDL, BEL and BCL, I take judicial notice of the public record that they were incorporated by the Defendants. Obviously instructions were given and carried out, but not yet paid for.

The Law

24. The Defendants assert that the main issues involved in this matter centres around the concepts of trust and contract, the trust having arisen from an oral contract.

25. It is trite law that a retainer need not be in writing to be enforceable as stated by Lang DBE J in the case of **Fladgate v Harrison [2012] 3 EWHC 67** where he stated:

> **"In my judgment, the giving of instructions by a client to a solicitor constitutes the solicitor's retainer by that client. It is not essential that the retainer is in writing. It may be oral. It may be implied by conduct of the parties in the particular case."**

26. A review of the viva voce evidence adduced during the trial by both sides makes it pellucidly clear that there was an oral and enforceable retainer agreement between the parties. In this regard words of Bingham LJ. in the case of **Blackpool Aero Club v Blackpool BC [1990] 3 All ER 25**:

> **"I readily accept that contracts are not to be lightly implied. Having examined what the parties said and did, the court must be able to conclude with confidence both that the parties intended to create contractual relations and that the agreement was to the effect contended for."**

27. Judging from the oral contract of retainer agreement between the parties, which is supported by parole evidence, and the conduct of the Defendants, a fee of $150,000.00 plus disbursements was to be paid to the Defendants for legal work. The scope of the work involved under the said retainer included at the very least those items described in paragraph 6 above. There is no evidence that the list of tasks chronicled by the Plaintiffs under "particulars of breach of contract/negligent" was agreed upon for a flat fee of $150,000.00.

28. In my judgment, the documentary evidence, as well as the viva voce evidence adduced during the course of the trial, clearly show an intent by both parties to establish legal relations based on the said oral agreement. Further, the actions of the defendants in performing work

under the said agreement, without remuneration and at some personal cost to the Defendants, illustrates reliance on the terms of the said contract and the intention to be bound thereby.

29. Of course, the Defendants herein assert that the initial oral retainer was later replaced by a series of documents (the Investment Documents) in which the parties agreed that the Defendants would be paid in shares instead of cash.

30. The Defendants say that in or around October 2008, they were approached by the Plaintiffs with the Share Sale and Trust Agreement (SSTA) which incorporated the terms of an Amended Investment Agreement concluded between Mr. Zeilstra and Mr. Kinsale for the Plaintiffs, and Mr. Cottis for the Defendants.

31. Under the Amended Investment Agreement Mr. Cottis was not to be paid for services rendered under the oral contract, but rather the sum of $150,000.00 plus disbursements, which were incurred by Cottislaw in connection thereto, was to be credited as part of Mr. Cottis investment in the development.

32. The Investment Documents which include the Investment Agreement, Amended Investment Agreement, and SSTA all illustrate the terms of the original retainer in so far that the works already performed by Cottislaw would be viewed as part of an overall investment in the project by Mr.Cottis, and instead of being paid in cash he would be given a percentage of shares of BDL valued at $200,000.00. These shares were to be held by Mr. Jason Kinsale in trust for Mr. Cottis. Essentially, the terms of the SSTA and all of its supporting documents were an attempt by the Plaintiffs to pay Mr. Cottis' legal fees by contingency. This fact was readily admitted by Mr. Zeilstra during the course of the trial.

33. Counsel for the Defendants has urged that the original retainer agreement between the parties was replaced by the SSTA, and as such the Defendants should receive their remuneration in accordance with the terms of the same, namely 126 shares in BDL.

34. It is well established that an oral contract can later be reduced to writing, without affecting the enforceability of the said oral contract. The principles which govern reducing an oral contract to writing were outlined by Lloyd LJ. In the case of **Pagnan SpA v Feed Products ltd [1987] 2 Lloyd's Rep 615** where he stated the following:

> **"(1) In order to determine whether a contract has been concluded in the course of correspondence, one must first look to the correspondence as a whole.**
>
> **(2) Even if the parties have reached agreement on all the terms of the proposed contract, nevertheless they may intend that the contract shall not become binding until some further condition has been fulfilled. This is the ordinary 'subject to contract' case.**
>
> **(3) Alternatively, they may intend that the contract shall not become binding until some further term or terms have been agreed;**
>
> **(4) Conversely, the parties may intend to be bound forthwith even though there are further terms still to be agreed or some further formality to be fulfilled.**
>
> **(5) If the parties fail to reach agreement on such further terms, the existing contract is not invalidated unless the failure to reach agreement on such further terms renders the contract as a whole unworkable or void for uncertainty.**
>
> **(6) It is sometimes said that the parties must agree on the essential terms and that it is only matters of detail that can be left over. This may be misleading, since the word 'essential' in that a context is ambiguous. If by 'essential' one means a term without which the contract cannot be enforced then the statement is true; the law cannot enforce an incomplete contract. If by 'essential' one means a term which the parties have agreed to be essential for the formation of a binding contract, then the statement is tautologous. If by 'essential' one means only a term which the Court regards as important as opposed to a term which the Court regards as less important or a matter of detail, the statement is untrue. It is for the parties to decide whether they wish to be bond and, if so, by what terms, whether important or unimportant.**

35. Upon reviewing the correspondence between the parties that make up the investment documents, and hearing Mr. Zeilstra's oral testimony, the legal relations between the parties is defined by the SSTA, and that the SSTA was an attempt to replace the oral agreement. The terms of the SSTA were sufficiently certain so that the parties could be bound thereby, and those terms were not unworkable so as to make SSTA unenforceable.

36. In the case of **Bear Stearns Bank plc v Form Global Equity Ltd [2007] EWHC 157,** the facts of which are nearly indistinguishable from the present matter, Andrew Smith J. stated:

> **"The proper approach is, I think, to ask how a reasonable man, versed in the business, would have understood the exchanges between the parties. Nor is there any legal reason that the parties should not conclude a contract while intending later to reduce their contract to writing and expecting that the written document should contain more detailed definition of the parties' commitment than had previously been agreed."**

37. The Plaintiffs herein were in the business of real estate development and the Defendants were legal experts skilled in the process of obtaining the necessary governmental approvals, company formations, and conveyancing. It seems reasonable that getting a large project off the ground can be cash intensive during the initial phases, which ensures that the development proceeds steadily from inception to completion. Agreements such as the SSTA serve to avoid excessive upfront costs.

38. Given the evidence led, I find that the SSTA was frustrated by the conduct of Mr. Kinsale. The reward for legal services rendered was not only reduced to writing, but the reward and the scope of work was expanded by the SSTA. The Defendants having acted to their detriment, Mr. Kinsale refused to honor the SSTA on the premise that the expanded scope of work was not completed. The Defendants cannot be faulted for refusing to continue to render legal services to the Plaintiffs in circumstances where they had not been paid, and had absorbed disbursements on the Plaintiffs' behalf. Not having any evidence as to the market value of the shares in BDL offered to the Defendants in lieu of cash, and bearing in mind the fractured relationship between the parties, it seems the only reasonable outcome to this dispute is to award the rounded figure of $200,000.00 to the Defendants for work done as prayed in the alternative in the counterclaim Otherwise, a forensic examination and costing of all the work done by the Second Defendant would have to be undertaken at further expense and time to both parties, which is impracticable in the circumstances.

39. In the result I order that the Defendant be paid the sum of $200,000.00 for services rendered. None of the other reliefs sought by either side are granted. Interest is to accrue on this award at 6% per annum pursuant to the Civil Procedure (Award of Interest) Act from the date of this judgment until payment.

40. Costs are awarded to the Defendants to be taxed if not agreed.

Dated the 22nd day of March, A.D. 2016.

Stephen G. Isaacs
Senior Justice