IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
CHANCERY DIVISION

Case No. BL-2023-000313

The Rolls Building
7 Rolls Buildings
Fetter Lane
London
EC4A 1NL

Monday, 27th November 2023

Before:
DEPUTY MASTER GLOVER

B E T W E E N:

MANAGEMENT INFORMATION CENTRE LIMITED

and

ROYAL BERKSHIRE NHS FOUNDATION TRUST

MR S PATEL appeared on behalf of the Claimant
MR S REED appeared on behalf of the Defendant

# JUDGMENT

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DEPUTY MASTER GLOVER:

1. By application notice dated 26 May 2023, the Defendant seeks summary judgment or to strike out parts of the pleaded claim. The application was heard on 18 September 2023. The parties' submissions concluded at 4.45pm on that day, and the application was adjourned for extemporaneous judgment, today.

## Background

2. The Defendant is an NHS Trust. It relies heavily on Information Technology, including in the provision of its healthcare services to members of the public.

3. The Claimant provided IT services to the Trust between 2015 and 2022, described in the Particulars of Claim as "*general day to day IT administration and management services, essentially comprising of an outsourced IT department*". The IT services were provided to the Defendant by the Claimant using a number of independent subcontractors, referred to by the parties as "the Specialists" in this claim.

4. The Claimant was historically managed by its former directors, Mr James Dixon and Mr Bekim Shabani. The Claimant company was acquired by its current owners in or around December 2021. Shortly thereafter, on 17 February 2022, Mr Dixon and Mr Shabani incorporated a new company, Techfull Limited.

5. On 24 June 2022, the Defendant informed the Claimant that its IT services would no longer be required after 30 June 2022. Techfull Limited was to provide IT services to the Defendant from 1 July 2022. The Claimant contends that the same Specialists that it had subcontracted to provide IT services to the Defendant up to 30 June 2022, continued to provide such services to the Defendant on and after 1 July 2022, via Techfull Limited. The Claimant's new owners were no doubt disappointed by these events.

6. By Claim Form dated 2 March 2023 the Claimant claims from the Defendant "*damages in respect of unlawful termination by the Defendant of a contract*". The value of the claim is stated as being "*in excess of £200,000*". The Claim Form does not include a claim against the Claimant's former directors, Mr Dixon and Mr Shabani.

## Witness evidence in the application

7. The application is supported by two witness statements from the Defendant's solicitor, Jane Barker, dated 26 May 2023 and 6 July 2023. The Claimant's evidence in response to the application is given by its solicitor, Mr Andrew Nichol, whose witness statement is dated 23 June 2023. I have read these witness statements in full.

8. The Claimant was represented by Mr Shail Patel of counsel and the Defendant was represented by Mr Steven Reed of counsel. I have read their helpful skeleton arguments. The hearing bundle contained 1,443 pages. I have considered a number of the documents in the hearing bundle, including those documents to which my attention has been directed in the parties' pleadings, the witness statements, the skeleton arguments and oral submissions.

## The pleaded cases

9. The Claimant's primary claim is that the Defendant was in breach of contract for failing to provide the Claimant with nine months' notice of termination. Alternatively, the Claimant claims "*damages for breach of the Defendant's duty of good faith*". The Claimant's case is that because it provided IT services to the Defendant under a contract, that "*resembled a continuous ret*ainer" (see the Claimant's Skeleton Argument, paragraph 48), that contract (i) included a generous notice period for termination, and (ii) contained an obligation of good faith between the parties. The Claimant contends that the obligation of good faith existed because of the critical and sensitive nature of the work being undertaken, which included the need for trust, confidence and close collaboration between the parties. The Claimant's case is that the contract between the parties was "relational".

10. The Defendant's position is that the Claimant's services were provided for "specific IT projects" such that "*the Claimant was engaged on a project by project basis, each project being a separate agreement with an agreed schedule of works for an agreed price*", (see Defendant's Skeleton Argument, paragraph 5). The Defendant pleads that the last such project agreement came to an end on 30 June 2022 through the effluxion of time, and that there is no notice requirement on the Defendant.

**The Basis of Application**

11. The Defence sets out the Defendant's position in relation to how the Claimant provided IT services to the Defendant in the following terms:

    "*9.2.1 James Dixon, for and on behalf of the Claimant and Mike Robinson, for and on behalf of the Defendant, would identify proposed activities, a timeframe and a proposed fee for work to be carried out in relation to various IT projects at the Defendant. The work identified in each project proposal was part of specific IT improvement/update projects being undertaken by the Defendant, such as infrastructure and security improvements or the acceleration of the rollout of Microsoft Windows 10.*

    *9.2.2 Examples of proposed activities, time frames and proposed fees for the proposed work being identified are set out in the Claimant's various "Project Proposals".*

    *9.2.3 If the proposed work, time frame and fee were acceptable, the Defendant would create and send to the Claimant a purchase order or a purchase order number and the Claimant would raise an invoice in relation to the proposed work by reference to the purchase order number*".

12. In this application the Defendant does not rely on witness evidence from Mr Dixon or Mr Robinson.

13. The hearing bundle contains a number of "Project Proposals" and numerous purchase orders and invoices, which the Defendant contends strongly support its case that services were provided by the Claimant under discrete project contracts. The Defendant's position is that, in light of those documents, there is no merit in the Claimant's contention that its IT services were provided under some form of general retainer.

14. The Defendant is particularly critical of the quality of the Claimant's pleaded case and Mr Reed submits that the Particulars of Claim fail to properly address numerous matters, including the particulars going to the formation of the general retainer contract contended for by the Claimant, or the grounds to support a relational contract.

15. Ms Barker notes in her first witness statement in relation to the written or oral contract contended for by the Claimant as follows:

> *"19. Contrary to CPR PD16, paragraphs 7.3 and 7.4, no document containing the alleged agreement is identified or provided, despite the requirements of Initial Disclosure and no words (or even conversation) relating to the formation of the alleged agreement are identified. Instead the Claimant asserts an express written or oral agreement can be inferred whilst also failing to identify the basis for the inference.*
>
> *20. In any event, an express oral or written agreement cannot be inferred. Either the parties agreed in writing or agreed orally or they did not. The mere fact that services were provided does not infer the existence of any offer and/or acceptance of an offer and/or an intention to create legal relations in relation to an overarching agreement. It is telling that the Claimant pleads that the agreement was oral or in writing and may have been made by the individuals identified but may have been made by others; in reality, the Claimant is simply guessing.*
>
> *21. In the circumstances, the Claimant's primary case on the formation of a contract is hopelessly vague and as such, discloses no reasonable ground for making the claim. The fact that the Claimant provided the services to the Defendant does not support an inference that the Claimant and the Defendant "agreed orally or in writing" that the Claimant would provide services pursuant to an overarching agreement of the sort contended by the Claimant".*

16. Ms Barker's first witness statement continues by addressing the Defendant's alternative pleaded claim relating to an implied agreement as follows:-

> *"27. The alternative formulation that an overarching agreement is implied is equally flawed and unsustainable in law.*
>
> *28. The conduct identified is not exclusively indicative of the alleged overarching agreement for the provision of a service "in that nature of a fully outsourced IT solution" or general IT services and is insufficient to infer common intention by the parties to be bound by a contract which has a legal effect. On any view, the parties' conduct is equally consistent with individual agreements for specific work and/or for a specific period.*
>
> *29. Further, the Claimant has failed to identify or plead the alleged terms of the overarching agreement being implied, other than it would provide a service "in the nature of a fully outsourced IT solution" for an unspecified fee and for an unspecified term. The agreement contended for lacks any substantial content and as such, lacks sufficient certainty to evidence the parties' intending them to be enforceable".*

17. Ms Barker's first witness statement is also critical of the pleaded assertion that the claimed retainer contract was a form of relational contract that included a good faith term.

18. The Claimant's position is that it "*has pleaded as well as it is able to in the circumstances which it faces*", (see Claimant's skeleton argument, paragraph 44). The "circumstances" are set out in Mr Little's witness statement and in particular at paragraph 18, which states:

> *"18. I should note, by way of essential context to the reading of these issues, that the Claimant's current directors do not have access to the detail of historic correspondence or documentation regarding the relationship between parties. Following the current owner's acquisition of the business in December 2021, it became clear to the current directors of the Claimant that emails between the Claimant and the Defendant had been manually deleted by the former management of the Claimant (James Dixon and Bekim Shabani). In fact, Mr Dixon's inbox holds no emails sent or received prior to 21 February 2022 and limited emails thereafter and Mr Shabani's inbox holds only 4 emails prior to February 2022".*

19. The Claimant's response to the application tends to focus on a number of emails which Mr Patel says support the Claimant's contention that the true contractual relationship between the parties goes beyond the "*project by project*" case advocated for by the Defendant. Further, the Claimant contends that the evidence of witnesses at trial and a full review of documents following disclosure, will support its case. The Claimant, in Mr Little's witness statement, advances a particular theory to explain why the Defendant wanted the arrangement between it and the Claimant to present as a "project by project" agreement, albeit that was not the true state of affairs:

> "*10. At the Defendant's request, the arrangement for payment of the Services was that the Claimant would raise generic form "Project Proposals", containing a lump sum quotation for work across a period following the proposal. A number of such proposals would be live at any given time. A series of invoices were then raised each month purportedly against those proposals.*
>
> *11. It is the Claimant's case that this payment arrangement was undertaken because this was the only arrangement that enabled the Defendant to meet the Claimants' fees, as there was no budget (or insufficient budget) for general IT services. I set out further below the detailed body of evidence provided by the Claimant in support of this position. For the reasons explained below, this evidence is necessarily limited at this stage, but it is likely that disclosure will add to the evidence available at trial*".

20. This element of the Claimant's case raises a very serious allegation of improper conduct by the parties' directors or employees.

**The Law**

21. The Civil Procedure Rules set out the powers of the Court to strike out a statement of case at Rule 3.4, which reads:

*"(1) In this rule and rule 3.5, reference to a statement of case includes reference to part of a statement of case.*

*(2) The Court may strike out a statement of case if it appears to the court:–*
*(a) that the statement of case discloses no reasonable grounds for bringing or defending the claim,*
*(b) that the statement of case is an abuse of the Court's process or is otherwise likely to obstruct the just disposal of the proceedings, or*
*(c) that there has been a failure to comply with a rule, direction or court order".*

22. The notes in the *White Book* helpfully state as follows at 3.4.1:

*"Grounds (a) and (b) cover statements of case which are unreasonably vague, incoherent, vexatious and scurrilous or obviously ill-founded and other cases which do not amount to a legally recognisable claim or defence…Ground (c) covers cases where the abuse lies not in the statement of case itself, but in the way the claim or defence (as the case may be) has been conducted".*

23. The *White Book* continues at 3.4.2:

*"A statement of case is not suitable for striking out if it raises a serious live issue of fact which can only be properly determined by hearing oral evidence. An application to strike out should not be granted unless the Court is certain that the claim is bound to fail, but where a statement of case is found to be defective, the Court should consider whether the defect might be cured by amendment and if it might be, the Court should refrain from striking it out, without first giving the parties concerned an opportunity to amend".*

24. Mr Reed advances the application under Rule 3.4(2)(a). The Defendant draws attention to Practice Direction 16 and in particular, paragraphs 7.3 and 7.4 which states as follows:

*"7.3 Where the claim is based upon a written agreement:*

*(1) a copy (or copies) of the contract or documents constituting the agreement should be attached to or served with the particulars of claim and the originals should be available at the hearing, and*

*(2) any general conditions of sale incorporated in the contract should also be attached (but where the documents are bulky, it is acceptable to attach or serve only the relevant parts of the contract or documents).*

*7.4 Where a claim is based upon an oral agreement, the particulars of claim should set out the contractual words used and state by whom, to whom, when and where they were spoken*".

25. Part 24 of the Civil Procedure Rules provides the rules concerning summary judgment. CPR 24.2 states as follows:

*"24.2 The court may give summary judgment against a Claimant or Defendant for the whole of the claim on a particular issue if:*

*(a) It considers that the Claimant has no real prospect of succeeding on the claim or issue, or that the Defendant has no real prospect of successfully defending the claim, and*

*(b) There is no compelling reason why the case or issue should be disposed of at trial".*

26. The notes in the *White Book* again provide helpful guidance as to the exercise of this power. In particular, at paragraph 24.2.3:

*"The following principles applicable to application for summary judgment were formulated by Lewison J in Easyair Limited v Opal Telecom Limited [2009] EWHC 339 (Ch) at paragraph 15 and approved by the Court of Appeal in A C Ward & Son Ltd v Catlin (Five) Ltd [2009] EWCA Civ 1098 at 24.*

(1) *The Court must consider whether the Claimant has a realistic as opposed to a fanciful prospect of success. Swain v Hillman [2001] 1 All E.R. 91.*
(2) *A realistic claim is one that carries some degree of conviction. This means a claim can be more than merely arguable. E D & F Man Liquid Products Ltd v Patel and Another [2003] EWCA Civ 472.*
(3) *In reaching its conclusion, the Court must not conduct a mini trial. Swain v Hillman [2001] 1 All E.R. 91.*
(4) *This does not mean that the Court must take at face value without analysis everything that the Claimant says in his statement before the Court. In some cases, it may be clear there is no real substance in factual assertions made, particularly if contradicted by contemporaneous documents. E D & F Man Liquid Products Ltd v Patel and Another [2003] EWCA Civ 472, paragraph 10.*
(5) *However, in reaching its conclusion, the Court must take into account not only the evidence actually placed before it on the application for summary judgment, but also the evidence that can reasonably be expected to be available at trial. Royal Brompton Hospital NHS Trust v Hammond (No.5) [2001] EWCA Civ 550.*
(6) *Although a case may turn out at trial not to be really complicated, it does not follow that it should be decided without the full investigation of the facts at trial than is possible or permissible on summary judgment and the Court should hesitate about making a final decision without a trial, even where there is no obvious contradicting fact at the time of the application or where reasonable grounds exist for believing that following investigation of the facts of the case would add to or alter the evidence available to the trial judge and so affect the outcome of the case. Doncaster Pharmaceuticals Group Limited v the Bolton Pharmaceutical Company 100 Ltd [2007] FSR 3.*
(7) *On the other hand, it is not uncommon for an application under Part 25 to give rise to a short point of law or construction and if the Court is satisfied it has before it all the evidence necessary for the proper determination of the question and the parties to have the knowledge choosing to address it in argument. It should grasp the nettle and decide it. The reason is quite simple. If the respondent's case is bad in law, he will, in truth, have no real prospect of succeeding on his case or successfully defending a claim against him, as the case may be. Similarly, if the applicant's case is bad in law, the sooner that is*

*determined the better. If it is possible to show by evidence that although material in the forms of documents or oral evidence that would put the documents in another light does not come before the Court, such material is likely to be expected to be available at trial, it would be wrong to give summary judgment because there would be a real, as opposed to fanciful, possibility of success. However, it is not enough to simply argue that the case should be allowed to go to trial because something may turn up which would have a bearing on the question of construction. ICI Chemicals & Polymers Ltd v TTE Training Limited [2007] EWCA Civ 725".*

**Submissions and Findings**

27. This is a commercial contractual dispute. The core issue concerns the nature of the contract governing the parties' relationship as at June 2022.

***Particulars of Claim, Paragraph 5***

28. The contract contended for by the Claimant is set out in the Particulars of Claim at paragraph 5:

*"5. Prior to disclosure herein and for the reasons explained below, the Claimant is unable to provide full particulars of the formation of the contract for the provision of the Services. The Claimant reserves the right to plead further in due course. Without prejudice to the foregoing.*

*5.1 It is to be inferred that in or around 2015, Mr Dixon and/or Mr Shabani and/or others on behalf of the Claimant agreed orally or in writing to Mr Robinson and/or others on behalf of the Defendant, that the Claimant would provide the Services in the manner described in paragraph 4 herein for the fees agreed from time to time (alternatively for a reasonable fee) and terminable by either party on reasonable notice.*

*5.2 Alternatively, the provision of Services in the expectation of remuneration in respect thereof, the Defendant's express and/or implied request for the Services and/or payment made by the Defendant for the Services from around 2015 onwards, gave rise to an implied contract for the provision of the Services for the fees agreed from time to time, (alternatively for a reasonable fee), and terminable by either party on reasonable notice*

*(hereinafter "the Contract")".*

29. The first complaint advanced by the Defendant is that the contract is said to have been agreed "orally or in writing". The Claimant's pleading does not contend that the contract was formed, for example, orally but evidenced in writing, or orally *and* in writing.

30. Mr Patel informs the Court that it is the Claimant's case that the contract was formed "*orally and/or in writing*". This assertion is also addressed in Mr Little's witness statement at paragraph 63. The Claimant has indicated that it is willing to amend its pleading to make this element of its claim clear.

31. A pleading plays an important role in assisting a judge to understand the nature of a case. In my judgment, it is appropriate for the Claimant to amend paragraph 5 of the Particulars of Claim to better particularise its position in relation to the contract contend for. This includes its case in relation to the way (oral, in writing, etc.) in which the contract it relies upon was formed, and to capture other matters addressed during the course of the hearing as recorded in this judgment.

***Particulars of Claim, Paragraph 4.3***

32. The Particulars of Claim at paragraph 4.3, states:

    *"The Specialists carried out general day to day IT administration and management services, essentially comprising of outsourced IT department, as well as working on system improvements and updates as requested from the Defendant from time to time. Thus, the service provided by the Claimant was in the nature of a fully outsourced IT solution ("the Services")".*

33. The Defendant's Defence denies the claimed scope of service, noting that a different company called Ultima provided "*general IT services*" to the Defendant at the material time. A copy of Ultima's contract with the Defendant is in the hearing bundle.

34. Mr Patel accepted during the hearing that the reference to an "*IT department*" in paragraph 4.3 of the particulars of claim "*may be misleading*". The Claimant now accepts that other companies, including Ultima, were involved in the provision of IT services to the Defendant. Indeed, Mr Patel relies upon an email dated 3 March 2022 that was copied to the Claimant's former director, Mr Dixon. In the email chain, there are references to a number of IT suppliers to the Defendant, including Ultima, and others such as "Key Stream", "2MG", "DXC" and "Cerner".

35. It is plainly important for a judge, when reading the Particulars of Claim, to understand the contractual role the Claimant claims to have undertaken, not least when the Court is asked to imply terms or to infer contractual arrangements. It was my understanding, when first reading the Particulars of Claim, that the Claimant provided all the Defendant's IT requirements as "an outsourced IT department". The fact that a contracting party occupies an exclusive and vital role might be factors relevant to the determination of (i) whether a retainer and/or relational contract existed, and (ii) the length of any notice period to terminate such a contract. Accordingly, it is important to avoid the risk of "misleading" a reader, and in my judgment, paragraph 4.3 of the Claimant's claim requires amendment so as to properly plead the Claimant's case regarding the scope of its role.

***Good Faith***

36. The Particulars of Claim aver that the contract between the parties was a relational agreement in which the parties owed one another implied duties of good faith. As regards relation contracts, the parties rely on the decision of Fraser J in *Bates v Post Office Ltd* (No.3: Common Issues) [2019] EWHC 606 (QB) where he stated as follows:

> *"711. I therefore consider that in this respect, the learned editors of Chitty do not correctly summarise the jurisprudence in this area of the law. I consider that there is a specie of contracts, which are most usefully termed "relational contracts", in which there is implied an obligation of good faith (which is also termed "fair dealing" in some of the cases). This means that the parties must refrain from conduct which in the relevant context would be regarded as commercially unacceptable by reasonable and honest people. An implied duty of good faith does not mean solely that the parties must be honest.*
>
> And continued:
>
> *721. These cases, both appellate and first instance, all demonstrate in my judgment that there is no general duty of good faith in all commercial contracts, but that such a duty could be implied into some contracts, where it was in accordance with the presumed intention of the parties. Whether any contract is relational is heavily dependent upon context, as well as the terms. The circumstances of the relationship, defined by the terms of the agreement, set in its commercial context, is what decides whether a contract is relational or not.*
>
> And later:
>
> *725. What then, are the specific characteristics that are expected to be present in order to determine whether a contract between commercial parties ought to be considered a relational contract? I consider the following characteristics are relevant as to whether a contract is a relational one or not:*
>
> > *1. There must be no specific express terms in the contract that prevents a duty of good faith being implied into the contract.*
> >
> > *2. The contract will be a long-term one, with the mutual intention of the parties being that there will be a long-term relationship.*
> >
> > *3. The parties must intend that their respective roles be performed with integrity, and with fidelity to their bargain.*
> >
> > *4. The parties will be committed to collaborating with one another in the performance of the contract.*

*5. The spirits and objectives of their venture may not be capable of being expressed exhaustively in a written contract.*

*6. They will each repose trust and confidence in one another, but of a different kind to that involved in fiduciary relationships.*

*7. The contract in question will involve a high degree of communication, co-operation and predictable performance based on mutual trust and confidence, and expectations of loyalty.*

*8. There may be a degree of significant investment by one party (or both) in the venture. This significant investment may be, in some cases, more accurately described as substantial financial commitment.*

*9. Exclusivity of the relationship may also be present.*

*726. I hesitate to describe this as an exhaustive list. No single one of the above list is determinative, with the exception of the first one. This is because if the express terms prevent the implication of a duty of good faith, then that will be the end of the matter. However, many of these characteristics will be found to be present where a contract is a relational one. In other cases on entirely different facts, it may be that there are other features which I have not identified above which are relevant to those cases.*

*727. I consider that all of the above features are all present in this case, between the SPMs and the Post Office, both under the SPMC and the NTC. I would also emphasise that accepting the concept of the existence of relational contracts, and finding that these contracts with the Post Office are relational, does not mean there will be automatic and widespread application of an implied duty of good faith to all commercial relationships. Very specific characteristics are necessary in order that a commercial contract is categorised as a relational one.*

37. Mr Patel submitted that relational contracts are a developing area of contractual law and as such, the Court should be slow to summarily dismiss a claim where such a contract is put forward. The bedfellow of his submissions is that a judge needs to understand precisely how the relational contract case is advanced, which requires a pleading to be drafted with an eye on the "characteristics" detailed in *Bates*. Mr Patel indicated during the course of his submissions that he was "*happy to further particularise how the duty of good faith crystalised*" in this case.

38. In my judgment, Mr Patel was right to make this concession, including within the context of the Claimant's changed position regarding the scope of the services it provided. The Claimant's Particulars of Claim should provide sufficient particulars of the relevant circumstances that gave rise to a relational contract including the commercial context and

instances of good faith which are claimed arise in this case, with clear particulars as to how it is claimed the Defendant was in breach of the same. Better particulars will provide the Court with a map and compass, in what the Claimant says is unchartered legal territory.

***Standard Terms & Conditions***

39. An issue arose during the course of the hearing, when reading documents to which the Court was taken by the parties, that relates to "standard terms and conditions".

40. The Court was shown one of the Defendant's purchase orders dated 28 May 2019, numbered 3470274. The purchase order is addressed to the Claimant. It contains a column titled "Product Description" which contains the text "*MICL clinical applications improvement/CERN*". There is a further column titled "Required Date" which Mr Reed informed the Court was the final date for completion of the project detailed in the "Product Description" column. Mr Reed, on instructions, advised the Court that "CERN" is software concerned with patient records. At the bottom of the purchase order, there is a box with the following text:

"*NHS terms and conditions of contract 2018" can be found on the Trust's procurement page at www.royalberkshire.nhs.*uk".

41. The Court was informed that the "NHS terms and conditions" referred to in this purchase order were not in the hearing bundle. On reviewing the hearing bundle, it is clear that the same wording appears on numerous other purchase orders sent to the Claimant by the Defendant from time to time.

42. Later in date purchase orders address terms and conditions in a slightly different manner. For example, purchase order 3472448 dated 14 June 2019 states:

"*This order is subject to the current NHS standard terms and conditions of contracts 2018*".

43. The "2018" terms and conditions referred to in purchase order 3472448 were not in the hearing bundle. This purchase order also contains additional text:

"*Copies of orders, invoices and remittances can be found on the Supplier Self-Service Portal*".

44. The Court has no submissions and has not been taken to evidence relating to the "Supplier Self-Service Portal" and how, for example, it might refer a supplier using that portal to terms and conditions relating to the supply of services to the Defendant.

45. Another purchase order numbered 3527989 dated 4 March 2021 states:

*"This order is subject to the current NHS standard terms and conditions of contract (copies available on request)".*

46. The terms and conditions referred to in this purchase order number 3527989 are also not in the hearing bundle.

47. The Court was taken to a purchase order number 3371640 dated 3 June 2016. The "Product Description" column contains the text "*MICL/IMB1539/Consultancy fee for IT Cont*". The value of the purchase order is £175,000. This purchase order was relied upon by Mr Patel in support of his contention that the purchase orders were extremely vague. A factor, he submitted, which supported his client's case that there must have been a form of general retainer in place.

48. The Court asked to be taken to invoice 1539, which was said to relate to purchase order 3371640, or any other invoice that related to that purchase order. The Claimant's invoice numbered 1552 dated 30 April 2016 references this purchase order number. That invoice is in the sum of £42,000 including VAT, and contains a column "Description" which states:

    *"April 2016: IT consultancy services. Consultancy fee in support of the IT controls improvement programme, disaster recovery and ongoing IT projects".*

    The Claimant's invoice 1552 also contains the following text:

    "*Our standard terms and conditions apply. A copy is available on request*".

49. The Court was informed that the Claimant's standard terms and conditions referred to in invoice 1552 were not in the hearing bundle. The numerous invoices from the Claimant in the hearing bundle all appear, on a brief review, to contain the same reference to "standard terms and conditions".

50. It is not clear what efforts have been taken to retrieve a copy of the Claimant's standard terms and conditions, including from the Defendant, who may well have been provided with the same at some point in time.

51. In the process of reviewing in more detail the contractual documentation, including purchase order numbered 3371640 and its sister invoice 1552, Mr Patel came to accept that (i) a purchase order could not be taken in isolation, and (ii) a better appreciation of the services to which a purchase ordered related could in fact be ascertained from other contractual documentation. For example, from the Claimant's invoice relating to that purchase order, which might reference in more detail the specific project or programme of services provided. This realistic concession weighs against his original submission that a lack of detail on a purchase order means that the Court can infer that there must have been some other hidden overarching agreement.

***Dates on contractual documentation.***

52. In relation to purchase order 3371640, it would appear that the purchase order (dated 3 June 2016) was raised, *after* the service to which it related had been provided, which

included the services shown on invoice 1552 dated 30 April 2016. Accordingly, it might be assumed that the invoice date was merely an accounting date; as the invoice could not have been created before the purchase order reference number, which it records, was in existence and known to the person who created the invoice. The date on which the invoice was physically stamped as received by the Defendant is 20 June 2016. That tends to suggest that the invoice was raised after the purchase order dated 3 June 2016, and then sent out to the Defendant.

53. The chronology in relation to purchase order 3371640 might also accord with the Defendant's evidence that on occasions, purchase orders would come after work had been commenced or undertaken on specific projects. However, it would therefore follow that even on a project by project basis, services may have been provided on the basis of an oral agreement or understanding, in the first instance.

54. Whatever the parties' accounting practice towards the dating of contractual documentation, or the request for and provision of services before purchase orders were raised, for present purposes, purchase order 3371640 and invoice number 1552 (and other similar documents) give rise to two discrete issues.

55. Firstly, the purchase order and invoice revealed to the Court the existence of at least two sets of standard terms and conditions which are not before the Court or addressed in the written evidence or submissions in this application. The Court is unable to consider how the terms and conditions referred to in these documents may be relevant to either party's position. For example, whether the standard terms and conditions provide for some form of notice period. Alternatively, whether those standard terms and conditions contain an express provision that prevents a duty of good faith being implied into the contract, see *Bates v Post Office Ltd* (No.3: Common Issues) [2019] EWHC 606 (QB), paragraph 725.

56. Secondly, the parties' submissions do not address which of the parties' standard terms and conditions, if any, would have applied to the relationship between them from time to time, whether under some form of general retainer or on a project by project basis. The impression the Court had was that neither party had turned their minds to the relevance of the issue of "standard terms & conditions".

### *Project Proposals*

57. It was also suggested by the Claimant that "Project Proposals" provided by the Claimant to the Defendant from time to time were so vague, that an inference could be drawn that they were merely a thin cover for the provision of what was, in reality, general IT services (for which the Defendant did not have an approved budget).

58. Mr Patel referred me to a Project Proposal prepared by the Claimant which is titled "2021-040 Windows 10 Acceleration Programme Project Proposal". That document, at "Section 2" details the "Proposed Activities" and it states:

> *"Recently, RBFT and IM&T Management have explored options as to how it could accelerate the roll-out of Windows 10 devices across the Trust and have approached*

*MICL to assist with following resources: 2 x resources with in-depth knowledge and experience of the RBFT sites, people and processes. 1 x van used to enable the safe transportation of devices to and from the build locations; to and from all corners of the main hospital site and to the remote satellite sites across Berkshire".*

59. Section 3 of the Project Proposal sets out the programme costs of £63,504 including VAT as follows:

*"2 x resources (including a van) to accelerate the deployment of Windows 10 programme; August to October 2021 (three months)*".

60. The Completion Report for this Project Proposal has a "Sign Off" box which has been completed by the parties on 2 November 2021.

61. I asked to be taken to any invoice or purchase order relating to this project proposal. The hearing bundle contained an invoice number 5656 in the amount of £63,504 from MICL dated 1 September 2021, referring to a purchase order number 3545488. The "description" on the invoice is :

*"Proposal for Windows 10 acceleration programme/2 x resources (including van) to accelerate the deployment of the Windows 10 programme. Period August to October 2021".*

62. I note that the invoice states:

*"Our standard terms and conditions apply. Copy is available on request*".

63. I was not taken to purchase order number 3545488 in the bundle, and I was unable to find that document in the hearing bundle.

64. Having considered this Project Proposal, I do not accept for the purposes of this application, that the Project Proposal was so inadequate such as to support an inference that it was a mere device to conceal a wider overarching agreement. On its face, the Project Proposal sets out with clarity the Claimant's proposal to provide two subcontractors and a van for a period of three months to assist in the roll-out of Windows 10 devices across the Defendant's sites. It is followed by a contemporaneous invoice. There is nothing to suggest that there is anything unusual or untoward in relation to that Project Proposal and the work that followed from it.

65. Mr Patel tended to accept that the contractual documents *prima facie* support the Defendant's position. On the review which the Court has been able to undertake within the confines of this application, the project proposals, leading to a purchase orders, invoices and payments, do appear to weigh heavily in favour of the Defendant's project-by-project case.

**The Claimant's case theory**

66. Mr Patel's suggests in paragraph 30 of his skeleton argument that these "*contractual documents*" were "*nothing of the sort*" and "*rather they were an administrative convenience*". That written submission reflects paragraph 4.5 of the Particulars of Claim. That paragraph avers, in short, that the Project Proposals and subsequent purchase orders and invoices were part of a scheme to obtain funding for "*general IT services or an outsourced IT department*" for which there was no budget. Put simply, the bold assertion being advanced is that the discrete projects were put forward in collusion between the Claimant and the Defendant's managers as cover to obtain public funding for an entirely different form of service; an outsourced IT department.

67. That allegation is a serious one. Further, there is no suggestion in the submissions before me that thought has been given to how such a state of affairs might impact the enforceability of any agreement were the Court to find in favour of the Claimant's position on this point.

68. The basis for the assertion that the extensive contractual documentation before the Court was part of some scheme to hide an overarching agreement, is set out in Mr Patel's skeleton argument and it comprises two emails. The first is an email dated 5 August 2022 from Mr Zac Lloyd (a former Specialist contracted by the Claimant to manage other Specialists provided to the Defendant) to the Claimant's new director, Mr Phil Smith. The email reads as follows:

> *"In terms of forensics, as I explained when we met (and since in conversation), there has been very little direct relationship between individual proposals and the payments for any of the individual contractors over the last five years. It has always been something that I and James juggled to ensure the account flows".*

69. Mr Patel says that the need to "juggle" payment evidences the shadow arrangement contend for in the pleaded case. Mr Reed submits that this passage simply concerns the Claimant's internal accounting in relation to matching its payment out to its subcontractors, to payments received in from the Defendant in the form of fixed fees on individual projects. In my judgment, this passage does not lend evidential weight to the case for which it is advanced. Rather, I prefer Mr Reed's interpretation of this email.

70. The second email is dated 7 February 2022 and is from the Claimant's former director, Mr James Dixon to Mr Phil Smith (the Claimant's new director). The email states:

> *"As discussed with Mark, NHS billing doesn't always align 100% to what is being delivered.*
>
> *This is because the Trust has specific "budget buckets" that they can allocate work against that are preapproved, i.e., a Windows 10 bucket…. So, we supply some resources under Windows 10, that may be doing slightly different work*".

71. Mr Patel submits that this email provides "*prima facie evidence that the project orders do not in fact reflect the work being done under them*". In my judgment, that submission goes too far. The email supports a submission that on occasions work outside the parameters of a project order was undertaken by the Claimant. However, it also makes clear that work done was only "slightly different". The E-mail does not suggest that a wholly different service was being provided, or that a retainer was in place. It is also important to note that

this was an internal Claimant email. In my judgment, this email provides weak evidence in support of the pleaded case and submission that the contractual documentation was "*an administrative convenience*".

***Master spreadsheet re costs***

72. It is of note that the 7 February 2022 email, also states:

"*We provide proposals for the work and have the master contractor spreadsheet with costs*"

73. A "master" document may be relevant to the issue of whether there was a form of overarching agreement, but this reference in the February 2022 email appears to have been overlooked by the parties. A "master" document may also provide insight into amounts that would be due on termination. Moreover, The Particulars of Claim at paragraph 5.1 states: "*The Claimant provided services in the manner described in paragraph four herein for the fees agreed from time to time (alternatively, for a reasonable fee*)". However, the 7 February 2022 email tends to suggest that the Claimant's former director and current director were aware of a document relevant to a contractual fee structure. The Court was told that the "*master contractor spreadsheet re costs*" was not in the bundle. Its relevance to the pleaded case and potential need for that case to be amended, appears to have been overlooked.

74. The Particulars of Claim advance the case that under the guise of discrete projects, the Claimant provided an outsourced IT department, for which the Defendant did not have a budget. The Claimant's primary case is that a Court should ignore the contractual documentation which strongly supports the Defendant's case. The Claimant relies on the two emails set out above to advance that position. The Claimant's primary claim seeks damages for nine months' notice period. It is advanced on the basis that the Court needs to find that the relationship between the parties was, in reality, (i) governed by some form of overarching agreement, which (ii) was contrived to access the public purse. My judgment, for the purposes of this application, is that the Claimant's submission on the first limb of that case theory is weak, and the second limb is not well-founded.

75. However, the Claimant's focus on theories as to *why* there must be an overarching agreement, may obscure the real issue for determination; is there a real prospect of the Claimant successfully arguing that there *was* a notice period in its dealings with the Defendant, whether under: some form of overarching agreement; "standard terms and conditions" applicable to the services provided; or other agreement.

***Call-Off Contract***

76. Counsel for both parties were not familiar with "Call-Off" contracts, which often form an integral part of public procurement agreements with private sector providers of goods and services. Indeed, the parties' approach to the claim, and in particular the commercial context of the relationship, tended to demonstrate a lack of familiarity with this specialist area of contract law.

77. A Call-Off contract, in simple terms, is a form of agreement which enables a buyer to repeatedly "call-off" discrete goods or services from a seller, from time to time, as they are required by the buyer, under the umbrella of the call-off contract. An example would be a construction company calling for goods to be delivered of a shelving rack in a building suppliers warehouse, as and when needed.

78. The parties had historically been negotiating over a draft "Call-Off" contract which was to run for a period of 24 months from 1 April 2020 to 31 March 2022. The services described under the Call-Off contract were "*Cloud software*" and "*Cloud support*", with a list of specific services under those headings including, for example, "*set up and migration*" and "t*raining*". "Schedule 1" of the draft Call-Off contract provides for "*services*" and a number of "*Programmes of work*" including "*End User Experience (Windows 10) Programme*" and "*Telecom Enhancement Programme*". Schedule 2 of the draft Call-Off contract provided details of the "*contract charges*". Clause 18 of the Call-Off contract provided that the "Buyer" would give 90 days' written notice to end the Call-Off contract.

79. The Call-Off contract value was estimated in the contract as being £2 million. The "*charging method*" was provided for in the draft Call-Off contract and is to be by way of "*Call-Off purchase order and invoicing*".

80. The Particulars of Claim deny that the draft Call-Off contract governed the parties' relationship because it was never executed.

81. In anticipation of (i) the Defendant advancing a case that the draft Call-Off contract did in fact govern the parties' relationship, and (ii) the Court finding for that case at trial, the Particulars of Claim pleads a responsive alternative claim. In short, that the Call-Off contract was renewed on 31 March 2022 for another term of two years, and seeking damages for breach of any such renewed contract, including for the Defendant's failure to provide 90 days' notice under any such contract. This form of pleading is an unusual way to advance a claim. It may have been better for the Claimant to have first waited to see how the Defendant pleaded in relation to the draft Call-Off contract.

82. In the event, the Defendant's pleaded Defence does not rely upon the Call-Off contract, and Mr Reed does not assert that the draft Call-Off contract is binding on the parties in any shape or form.

83. As neither party seems to rely on the Call-Off contract as governing the parties' relationship, the document only serves a secondary, forensic, purpose.

84. However, the Court pauses to note that the Claimant's skeleton argument at paragraph 21 briefly states: "*C also relies in the alternative upon the G-Cloud contract which contains a 3 month notice period*". In my judgment, that alternative case is not available to the Claimant on the current state of the pleadings, by which the alternative claim is only triggered if the Defendant relies on the draft Call-Off contract. In that the Claimant wishes to advance an alternative positive case reliant on the draft Call-Off contract, the Particulars of Claim requires minor amendment. If it does not propose to amend its case in that manner, paragraph 14.1 to 14.4 must be struck out.

85. As regards the forensic relevance of the draft Call-Off contract, the Claimant relies upon it to demonstrate that the parties were considering a form of written overarching agreement and/or retainer. Accordingly, the Claimant says that such an arrangement was not anathema to the parties, and that a similar arrangement with a nine months' notice period could have been governing the parties' dealings with one another.

86. The Defendant in turn relies on the draft Call-Off contract to lend weight to its submission that the parties elected not to enter into a formal overarching agreement, and continued to prefer the flexibility of a project by project arrangement. That lends weight, the Defendant says, to its submission that a Court would be extremely slow to impose a similar form of contract on commercial parties by implication.

87. The Defendant also noted that the form of overarching agreement which was being negotiated did not guarantee a fixed amount of call-off of services from the Claimant as a supplier, and the failure to provide notice under the terms of the draft Call-Off contract would not have provided the measure of damages suggested by the Claimant, if any, even had it been entered into by the parties,.

88. The Defendant also rightly notes that a Call-Off contract, whilst a form of overarching agreement, is not an obstacle to services being provided on a project-by-project basis. This draft Call-Off contract specifically requires purchase orders and invoices to be raised as services are called-off from time to time. It also provides that any particular terms or conditions in purchase orders would be incorporated into the terms and conditions of the Call-Off contract.

89. As is clear from the draft Call-Off contract, a call-off contract as a form of overarching agreement, invariably co-exists with contractual documentation such as purchase orders and invoices. Accordingly, the fact that an overarching agreement exists, , does not mean that purchase orders and invoices have to be "*an administrative convenience to conceal an overarching agreement*". Rather, they are normally an administrative necessity as part of an overreaching agreement.

90. The Court is concerned that the Claimant's suggestion that an overarching agreement was in place, but was concealed, fails to have sufficient regard to established business practice in public procurement contractual arrangements. As the draft Call-Off contract demonstrates, it is entirely possible for the supply of services to a public body be governed by an overriding agreement, which may contain notice provision. Indeed, it is a common (if not universal) requirement for a supplier to a public body to enter into a Call-Off contract. Disclosure in this claim may well reveal such a contract having been entered into by the parties, earlier in their relationship.

91. The draft Call-Off contract is a double-edged sword for both parties. It supports the Claimant's fundamental assertion that an overarching agreement may have existed, whilst also lending weight to the Defendant's case that the Claimant still only supplied services for discrete projects. The draft Call-Off contract also illustrates that the two cases advanced do not have to be mutually exclusive of one another. It shows how that an overarching agreement, such as a Call-Off contract, can exist without there being a scandalous hidden agenda.

### *Evidence in Support of an overarching agreement*

92. In addition to the draft Call-Off agreement, the Claimant referred to a number of other documents to support its case that an overarching agreement similar to a retainer was in place between the parties. By email dated 24 June 2022, Mike Robinson, on behalf of the Defendant, had emailed Mr Phil Smith in the following terms:

    "*As you have confirmed, which is also our position, project commitments come to a natural end on 30 June 2022 and therefore require no notice. That said, we do also have the agreement from 2017, that the RBH is able to give 1 weeks' notice to terminate any resources*".

93. There is no witness evidence before the Court addressing the agreement referred to in the above email. Mr Patel notes "the agreement from 2017" has not been disclosed to enable, amongst other matters, the Court to consider any notice period in that agreement.

94. The Claimant also relies on an email dated 28 February 2022 which was internal to the Defendant in which a Heather Allan states:

    "*Of the three suppliers, Key Stream, 2MG and MICL, should be a lot easier and I am really unclear what the problem was [in] using them. Clearly the contracts had expired which was bad. We now have contracts in place with all 3 but we did also take some time in the 2 papers to show we are getting value for money.*

    *I want to really understand any residual concern as we get excellent skills provided by them and can show via framework agreements that we are getting a good deal*".

95. The phrase "framework agreement" is well understood in public procurement, but again appears to have been overlooked in the parties preparation for this hearing. A supplier should enter into a framework agreement as a first stage in offering goods or services to a public body. A number of suppliers may sign up to a framework agreement. That step comes before entering into any individual Call-Off contract with a public body.

96. It is unclear what "contracts" Heather Allan had thought had expired or what new contracts she considered were in place. It is unclear if Heather Allan is simply stating in her email that the three suppliers had signed up to a framework agreement, or whether Heather Allan was asserting that, for example, new call-off contracts had been entered into, that were good value compared to terms of the relevant framework agreement.

97. The Court has before it a dearth of evidence or submissions addressing Heather Allan's email. There is real force in Mr Patel's submission that this email supports the Claimant's case that there was some form of overarching agreement between the parties. That overarching agreement may, of course, have been a form of call-off contract.

## Conclusion

98. I have not set out each issue that has been raised by the parties in their extensive written and oral submissions, but I have considered them all both individually and cumulatively. I have sought to address those core submissions and points which, in my judgment, lead to the correct form of disposal of this application.

99. The Claimant's approach to this claim has been affected by the loss of its documents, which appear to have been taken out of its custody or control by its former directors, who in turn now provide IT services to the Defendant. That is an issue which causes concern to the Court and it has some sympathy for the predicament that the Claimant finds itself in. However, the Court also recognises that there is fault on the Claimant's incoming owners for not securing core documents relevant to what it assumes was a major client of the Claimant company. Moreover, there is no fault alleged as against the Defendant for the predicament the Claimant finds itself in.

100. The Court has regard to the need for pleadings to contain that information called for by the Rules and Practice Directions. However, the Court has to have regard to the particular circumstances prevailing in a case when considering whether a party has done all it can to reasonably plead the best particulars it is able to provide. Save for discrete matters set out in this judgement which require amendments to the Particulars of Claim, I accept the Claimant's submission that it has pleaded its case on the formation of the contract as well as it was able. The case is not so obviously deficient or hopeless that strike out is the right course at this moment, and in my judgment, the Claimant should be given the opportunity to amend its Particulars of Claim.

101. There are realistic grounds for the Claimant's assertion that there was an overarching agreement, similar to a retainer, which may amount to a relational contract. These grounds include undisputed facts including: the length of the relationship between the parties; the nature of the service being provided which invariably required integrity, collaboration and confidence around patient health care; the fact that overarching agreements are common in public procurement relationships (as evidenced by the draft Call-Off contract), and; the express terms of the email from Heather Allan.

102. There is no suggestion that the Defendant has not retained its written communication with the Claimant including as between the principle actors, Mr Dixon and Mr Robinson, or other relevant documents. The prospects of the Claimant obtaining relevant disclosure from the Defendant is not fanciful, see *Gulati v MGN Limited* [2013] EWHC 3392 (Ch).

103. The Defendant has elected to not disclose in this application emails between the principle actors, Mr Dixon and Mr Robinson. Accordingly, the Court, at this juncture, is unable to find that such communications will not support the Claimant's claim, including an entitlement to a notice period. It is very likely that there will be communications between those actors, that will be relevant to the merits of the Claimant's case, including the Court's understanding of the "*circumstances of the relationship*" and its "*commercial context*" (See *Bates*).

104. There are documents before the Court, in particular, in the form of emails set out in this judgment, which suggest that an overarching contract may have been entered into between the parties, which did include a notice period. It would not be unusual for such a contract to exist, as between an NHS trust and a service provider. I have seen no evidence which

enables me to ignore the Claimant's submissions that disclosure may reveal the details of such a contract, which may be relevant to its claim. I have not seen, for example, witness evidence from Heather Allan that removes the significance of her February 2022 email, or from Mr Robinson which explains his reference to "*the agreement in 2017*" in his email dated 24 June 2022. I do not have witness evidence from Mr Dixon or Mr Robinson going to the Claimant's primary claim and indicating, for example, that they would give evidence at trial that would only support the Claimant's case. It is clear that these characters will be called as witnesses at any trial, and their evidence will very likely be central to the Court's determination of this claim.

105. The Court is also faced with numerous items of contractual documentation, including purchase orders and invoices, which refer to standard terms and conditions, that may be relevant to the claim, but which the Court has not seen. The Defendant has elected not to (i) produce these standard terms & conditions, and (ii) show how they are not supportive of the claim, in its application. The Court cannot ignore the potential relevance that those standard terms and conditions, and other factors seemingly overlooked by the parties, may have to the just determination of the claim.

106. In my judgment, it is not appropriate at this juncture for the Court to dispose of the claim summarily under Part 24, or to strike out part or all of the pleaded claim, including by grappling with discrete points of law which will be impacted by the required amendments, and may thereafter be best left to be dealt with at a trial. In my judgment, whilst the Claimant's claim appears to be weak, the claim does have a real prospect of success and I cannot be certain that the claim or part of the claim will fail. Following further input from counsel, I will make an order to reflect the terms of this judgment and disposal of the application.

**End of Judgment.**

Transcript of a recording by Ubiqus (Acolad UK Ltd)
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