Neutral Citation Number: [2021] EWHC 2153 (Comm)

Case No: CL-2020-000270

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 30/07/2021

Before :

CHARLES HOLLANDER QC
SITTING AS A DEPUTY JUDGE OF THE HIGH COURT

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Between :

(1) TIMOTHY JOHN WEBSTER **(2) CHRISTOPHER MARTYN DOBSON** **(3) EMMA LOUISE DAVISON LOISEL** **(4) AITKEN INVESTMENTS LIMITED**	**Claimants**
- and -	
WPP GROUP (UK) LTD	**Defendant**

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Lawrence Akka QC and Mr Sean Snook (instructed by **Proskauer Rose UK LLP**) for the **Claimants**
Yash Kulkarni QC and Ms Emily McKechnie (instructed by **Bristows**) for the **Defendant**

Hearing dates: 20 and 21 July 2021

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Approved Judgment

I direct that no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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CHARLES HOLLANDER QC

"Covid-19 Protocol: This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to Bailii. The date and time for hand-down is deemed to be 30 July 2021 at 10:00 am"

Charles Hollander QC :

1. The Claimants are former executives and shareholders of The Exchange Lab Holdings Ltd. ("TEL"). TEL is a digital media specialist operating in the programmatic advertising industry, essentially the automated buying and selling by software of online advertising.

2. The Claimants developed TEL's proprietary technology platform known as the "Proteus Platform". The Defendant is part of one of the world's biggest advertising agencies.

3. On 17 December 2015, the parties entered into a Share Purchase and Shareholders Agreement (the "SPA") pursuant to which the Defendant acquired 100% of the shares in TEL in return for payment of the Sale Price to be calculated in accordance with Clause 4 of the SPA.

4. The Defendant has paid part of the Sale Price, but the Claimants contend that a substantial Final Payment remains due and payable to them by the Defendant.

5. The dispute now before the Court at this trial concerns the proper construction of certain terms in the SPA, the resolution of which will identify how the Final Payment due (if any) is to be calculated. All questions of quantum are to be determined in a later trial, which has been fixed for 7 February 2022.

6. The Final Payment is to be calculated in accordance with Clause 4.1 (h) of the SPA. The only year I am concerned with is 2018. The relevant part of the clause provides:

> "4 Sale Price
>
> 4.1 The [Defendant] will pay:
>
> …
>
> (h) to each Seller his Relevant Percentage of the Final Payment…calculated as:
>
> (i) 1 x Total Gross Margin in respect of the year 2018,
>
> less,
>
> (ii) the aggregate of the Completion Payment paid…."

7. Total Gross Margin is, in any year, the sum of (i) Proteus Platform Fees; and (ii) Direct Gross Margin (Schedule 5 paragraph 64). No issue arises for present purposes in relation to the two prior years (2016 and 2017) for which Clause 4.1 provided for interim payments.

8. The dispute turns on the correct calculation of Proteus Platform Fees. This is defined in paragraph 45 of Schedule 5 of the SPA as follows:

> "'Proteus Platform Fees' means in any year, a sum equal to 2% x Media Billings, where such Media Billings relate to spend that

> is, i) managed or processed by, through and/or via use of the Proteus Platform in such year and, ii) is actually incurred."

9. Proteus Platform is defined in paragraph 44 of Schedule 5 of the SPA as follows:

> "'Proteus Platform' means the programmatic ad inventory trading platform which enables users to take an aggregated view of, and may direct, media spend towards demand-side platforms to which the trading platform is connected, or into which demand-side date is ingested, as operated by the Group, GroupM Group and/or Connect Group."

10. Media Billings is defined in paragraph 39 of Schedule 5 of the SPA as follows:

> "'Media Billings' means, the gross amount billed to a client in respect of commission-based or fee-based services plus technology fees, comprising the cost of media purchased from media vendors on behalf of a client plus the Revenue generated by the GroupM Group, the Group or the Connect Group (as applicable) on such media purchase."

11. Cost of Media is defined in paragraph 15 of Schedule 5 of the SPA as follows:

> "'Cost of Media' means the cost of media purchased from media vendors on behalf of a client by the GroupM Group, the Group or the Connect Group."

12. Revenue is defined in paragraph 50 of Schedule 5 of the SPA as follows:

> "'Revenue' means in any year, commission, fees and combined Proteus platform/service fees earned in respect of amounts billed, stated exclusive of VAT, sales taxes and trade discounts, calculated in accordance with IFRS."

13. The calculation of Total Gross Margin was in the first instance to be done by the Defendant in accordance with Clause 7 of the SPA. In January 2019, the Claimants, through their then solicitors White & Case (they subsequently transferred to Proskauer Rose UK LLP who now act for them after the partner in question moved firms) sought to engage with the Defendant's solicitors Bristows as to the basis of the 2018 calculation which was shortly to be made by the Defendant. Bristows did not engage with White & Case as to the basis but assured them that the calculation would be done in accordance with the SPA.

14. On 24 September 2019 Deloittes provided the Defendant, who forwarded it to the Claimants, a report stating that the Total Gross Margin, and therefore the Final Payment, for 2018 was nil. This report made clear the basis for their conclusion was a representation to them by S. McCulloch, the Global CFO of GroupM mPlatform, the relevant part of the Defendant group, as follows:

> "We confirm to the best of our knowledge and belief, that there was no media investment in the financial year ended 31

> December 2018 which met the definition of Media Billings (falling within the definition of Proteus Platform Fees) as outlined in Schedule 5 of the Share Purchase Agreement relating to the acquisition of The Exchange Lab Holdings Ltd by WPP Group (UK) Limited dated 17 December 2005. We confirm that, as a consequence of the above, the Proteus Platform Fees for the year ended 31 December 2018 was equal to £nil.
>
> We confirm that the above representations are made on the basis of adequate enquiries of management and staff (and where appropriate, inspection of evidence) sufficient to satisfy ourselves that we can properly make each of the above representations to you."

15. The Claimants now say that the spend managed or processed by, through and/or via the Proteus Platform is in fact likely (on the basis of the 2% payable) to amount to a Final Payment to the Claimants of about £33 million, although these are matters for the quantum hearing.

16. Given the terms of Clause 7 of the SPA, this was an obviously important representation. And particularly given the White & Case correspondence, if a controversial construction of the SPA provision was used for this calculation, it was obviously important for that to be explained. No explanation or correction (or apology) has ever been given for this grossly misleading representation.

17. In Bristows' letter on 7 February 2020 they said:

> "The simple point is that no spend was processed through the Proteus Platform.
>
> Further any suggestion that spend data that had been managed or processed by, through and/or via use of the Proteus Platform falls within the definition of Proteus Platform Fees is plainly wrong."

18. By 3 April 2020 for the first time Bristows set out their client's case, albeit in entirely different terms from that set out in their letter of 7 February 2020.

19. On 1 May 2020 the Claimants commenced Part 8 proceedings for declarations in the light of the dispute that was now apparent. The Defendant submitted that because of all the factual material which would be required to determine the dispute, it should be heard under Part 7. On 3 July Andrew Baker J ruled that the Part 8 procedure was appropriate and gave directions.

20. On 3 August a Defence and Counterclaim was served (26 pages). The Defendant's case was that the SPA should be rectified, alternatively that there was a contractual estoppel which prevented the Claimants from relying on what would otherwise be the natural construction of the provision, and also pleaded a common understanding between the parties which was said to have affected the meaning of the terms. Central to their case was a contention as to "spend allocation functionality" of the product, which the Defendant said was not as they had been led to understand.

21. Pausing there, if that was the basis for the Defendant's Defence and Counterclaim, it is impossible to understand how, consistent with good faith, the Defendant (who, unlike the Claimants, had the relevant information) could have certified that no sums were due for 2018 without explanation other than to state that they were complying with the SPA. Moreover, when the Claimants tried to engage with them as to the basis of their calculation, they received stonewalling responses.

22. A further order of Andrew Baker J on 7 October provided for disclosure by 9 November 2020 and witness statements by 18 December. The trial was fixed for 8 March 2021. Disclosure took place on 16 November with inspection on 24 November. The Defendant sought and obtained extensions for witness evidence. A mediation took place on 13 January 2021. On 19 January the Defendant stated that they did not intend to lead witness evidence (notwithstanding the terms of the Defence and Counterclaim and their previous contentions before Andrew Baker J that the factual dispute made the case unsuitable for a Part 8 claim).

23. On 5 February 2021 Bristows wrote stating that the Defendant no longer intended to pursue their pleaded case at all but instead would rely upon a construction that "Proteus Platform Fees" captured only spend derived from media purchased programmatically via DSPs (in effect the alternative construction now advanced) asserting that such a construction, which had never been raised before, was "an obvious proposition." No witness evidence would be relied upon and the Defendant would "rely solely on the text of the SPA in support of its position" (11 February letter).

24. The matter came before Julia Dias QC on 8 March. The Defendant was permitted to amend on terms that they paid the costs thrown away, with a payment on account of £350,000, and with the determination as to whether the costs should be paid on a standard or indemnity basis left to the trial judge. New directions were given to trial. A declaration was granted in favour of the Claimants which prevented relitigation of the issues originally pleaded in the Defence and Counterclaim but now withdrawn:

> "On the true construction of the Share Purchase and Shareholders Agreement dated 17 December 2015, the Media Billings referred to in paragraph 45 of Schedule are Media Billings which are actually incurred, and relate to spend which is managed or processed by, through and/or via use of the Proteus Platform in any particular year, and not merely those which result directly from the processing or management of spend by, through and/or via the Proteus Platform in the relevant year."

25. The Defendant duly filed an Amended Defence. This asserted two alternative constructions. The alternative case was the DSP case referred to above. The primary case pleaded was now a construction not previously foreshadowed, namely that references to the Proteus Platform in the SPA were to be read as references to the Trading Platform component, thereby limiting or wiping out the sums otherwise payable to the Claimants.

26. According to the witness statement of Victoria Brown, General Counsel, Commercial and Chief Privacy Officer of the Defendant, which was served for the hearing before Julia Dias QC, as a result of interviews in October 2020 with witnesses, it transpired

that certain of the Defendant's witnesses had been mistaken in their understanding as to the detail of the functionality of the Proteus Platform and that the Claimants were correct that the Proteus Platform did not have the "spend allocation functionality" as defined in the Defence, and in consequence it became apparent that the pleaded case could not be sustained.

27. Based on Ms Brown's evidence, therefore, in October 2020 it became apparent to the Defendant that the entire case pleaded was unsustainable and therefore it must follow that the Statement of Truth could no longer be supported. Rather than disclose that to the Claimants, they proceeded with disclosure and let the Claimants prepare witness statements. They then sought extensions of time for their own witness evidence when it must have been apparent to them that they had no intention of leading witness evidence. It can readily be inferred that the purpose of what may be described as a charade was to avoid having to tell the Claimants about the abandonment of the pleaded case prior to the mediation on 13 January.

28. It is not clear how the Defendant or their advisers could properly or consistent with good faith have participated in a mediation in these circumstances.

29. As explained above, by amendment the Defendant pleaded two alternative defences as a matter of construction of the SPA. It is the Defendant's case now that the definition of Proteus Platform Fees is limited by reason of the express incorporation of the term Proteus Platform, which in turn limits the spend relevant to the calculation of Final Payment in either of two alternative ways:

    (a) The Trading Platform construction: Only Media Billings that relate to spend that is managed or processed by, through and/or via use of the Trading Platform component of the Proteus Platform are relevant to the calculation of the Final Payment; alternatively

    (b) The DSP Connection construction: Media Billings are only relevant to the calculation of the Final Payment if they relate to spend on media purchased programmatically via DSPs where (1) that spend is directed towards DSPs to which the Proteus Platform is connected; or (2) DSP data relating to that spend is ingested into the Proteus Platform by reason of its connection to DSPs.

30. The Defendant's complaint is that according to the Claimants the Final Payment should be calculated by reference to any and all spend where data relating to that spend was uploaded into the Proteus Platform by any means. Thus the Claimants include spend even if it related to non-programmatic advertising. It is the Defendant's case that such a proposition is wrong.

31. At the trial before me, there was an agreed Technical Primer, which had previously been ordered by Andrew Baker J, albeit in support of the issues which were between the parties prior to the repleaded case. The Claimants led evidence from Christopher Dobson and Timothy Webster and they were cross-examined by the Defendant. The Defendant led evidence from Sebastian Moesman and Colin Barlow, they were not cross-examined by the Claimants.

32. The role of witness evidence on matters of construction is inevitably limited. Both Mr Dobson and Mr Webster were impressive witnesses who obviously understood the

product well. Much of the cross-examination was concerned with questions relating to ascertaining what the main interest of the Defendant was in the acquisition.

The Proteus Platform

33. An advertiser or advertising agency seeking to buy advertising space on websites and other digital media would typically have to work with a variety of different software (known as demand-side platforms, or DSPs) used by their clients. That software tended to produce data in different (or non-compatible) formats which made it difficult for the advertiser or agency to gain a clear understanding of any particular campaign's performance. The Proteus Platform addressed this problem because it was designed to interface with multiple different software systems. The system would read (or "ingest") the data from these multiple sources and convert it into a uniform (or "normalised") format for the advertiser or agency. It was therefore sometimes described as a "meta-DSP". The Proteus Platform also collated this normalised data with other data (such as Booking Data) and all of this was made available to the user who would typically use it to plan, manage and fine-tune advertising campaigns in real time as well as to obtain performance reports to help plan future campaigns.

34. The Proteus Platform could be used in three key ways, by way of three main tools. The main tools were: (i) Campaign Management and Task Management (ii) The Trading Platform; and (iii) Reporting. As described in Schedule 6 of the SPA, it comprised various components, including Trading Platform, Campaign Management, Datalab, Grablab, and Reporting. The Grablab and Datalab components ensured that the ingested data was normalised and fed to the tools referred to for output to the user. According to Schedule 6:

    (a) Grablab is described as "*a modular system to process daily data (delivery, platform item and log level) supplied by DSPs*"

    (b) Datalab is described as "*the primary data store of all DSP delivery data and all performance related data. It also performs the key service of matching data from the DSPs back to an Exchange Lab Campaign, and allows the Operations team to apply daily margin to their Campaigns. Datalab also supplies performance and delivery data to various systems, including Trading Platform. A 'Third Party Data' upload solution allows users to upload ad serving data into this system and join these metrics back to an Exchange Lab campaign. This enables the system to report on client based conversions as an alternative to the conversions logged by the DSPs. This application supports many third party metrics such as Impressions, Clicks, Costs, Video Completion rates and Viewability.*"

35. None of the output functions could perform their respective tasks unless and until Grablab and then Datalab had done their work. Each of the output functions was therefore entirely dependent on the central processing functions of the Proteus Platform, as explained in paras 15-17 of Mr Webster's second statement, and confirmed by Mr Barlow's statement at paras 17 and 32. Thus, as the Claimants emphasise, none of Proteus Platform's output functions, including whatever use the Defendant wished to make of the Trading Platform, would be available to a user of the system unless Grablab and Datalab had first ingested and normalised the relevant data.

The Trading Platform Construction

36. The Defendant says that The Trading Platform component of Proteus Platform was not used in 2018, whether (a) to enable users to take an aggregated view of media spend towards DSPs (Demand Side Platforms) or to ingest demand-side data (whether this latter term is construed in the way contended for by either party); or (b) to direct media spend towards DSPs. In consequence, if the Defendant's case on the Trading Platform construction is correct, there were no Media Billings relating to spend that was managed or processed by, through or via use of the Trading Platform component of Proteus Platform and the quantum of the Final Payment will be £0. The Defendant submits:

    (a) WPP's rationale for purchasing TEL (and thus Proteus Platform) was that it would confer upon the programmatic arm of WPP's business a competitive advantage by reason of its ability to provide traders with a contemporaneous overview of campaign performance across multiple DSPs and enable them to make changes directly to those DSPs using Proteus Platform as a single user interface. This rationale was well known to the Claimants.

    (b) During the course of negotiations TEL promoted the Trading Platform component of the Proteus Platform. Indeed, the Trading Platform functionality was at the centre of the conversations between the sellers of TEL and WPP.

    (c) Most WPP acquisitions involved businesses which would operate with on-going autonomy, such that earn out provisions could be based upon future profitability. In the case of TEL, however, the company was a loss-making enterprise. In consequence, the earn out provisions were structured by reference to whether Proteus Platform could be put to valuable use within GroupM's business.

    (d) Against this background, it is to be expected that the definition of Proteus Platform Fees should be limited by reference to use of the Trading Platform component of Proteus Platform.

    (e) The Defendant does not dispute that Proteus Platform offered a number of capabilities beyond the Trading Platform component. Nor does it dispute that the usability of the Trading Platform component depended upon support functions offered by the wider components of the Proteus Platform. However, it says the case does not turn upon whether the Trading Platform component could operate independently from other components of the Proteus Platform, or upon the number of functionalities in principle offered by the Proteus Platform. They say the core issue for the court's determination is: what is the functionality offered by the Proteus Platform that, to the knowledge of Claimants, was valued by WPP for use within its business such that the use of the Proteus Platform in that way would trigger the earn out provisions under the SPA? When understood in this way, by reference to the wording of the SPA and the factual context summarised above, it is clear that the earn out provisions were structured by reference to use of the Trading Platform component alone.

    (f) WPP was not interested in purchasing TEL for the reporting capabilities offered by Proteus Platform because it already had its own reporting software, CAPPS. Indeed, CAPPS was considered by WPP to be a better reporting tool than Proteus. In the circumstances, it would make no commercial sense for WPP to

confer upon the Claimants a right to significant additional payments reflecting the use of Proteus Platform as a reporting system alone.

(g) The Claimants suggest that the warranties contained in clauses 15.2(a) and (c) of the SPA would make little sense on the Defendant's construction. In particular, they ask why the SPA would contain a warranty that there would only be an investment in or support of only the trading platform component part of Proteus Platform? The inclusion of warranties limited in this way reflects the fact that it was the Trading Platform component that was of value from WPP's perspective.

37. Perhaps not surprising in the circumstances described above where this argument appeared as a very late afterthought, in my view it is hopeless. It is based on a contentious and partisan interpretation of what the Defendant sought to achieve from the acquisition of TEL. As for the alleged "main interest" of the Defendant in purchasing the product being the Trading Platform, if I agree to buy an orchard and to make payment on the basis of all fruit sold, it does not assist to assert that the main object of my purchase to the knowledge of the vendor was the apples, and I was not really interested in pears. But in any event, and even if the interest of the Defendant (as opposed to the interest of the parties which is not the same thing) is to be taken into account, I do not accept that the Trading Platform was the "main interest" of the Defendant: it sought to buy the product as a whole with its various functionalities and exactly how it used it and integrated it into its own CAPPS system was a matter for the future.

38. There is no support whatsoever for this construction in the language of the SPA; on the contrary, it contradicts the language. The definition of Proteus Platform in the SPA makes clear that it describes the product being sold and referring to it as a trading platform in the definition was not and could not have been intended to indicate that only the Trading Platform part of the product was relevant. The different components which make up the Proteus Platform are described (albeit by way of description not definition) in Schedule 6 for the purpose of identifying intellectual property rights, and make clear that there are many components of the Proteus Platform, something obviously known to the Defendant. Indeed, what "enables users to take an aggregated view of…media spend" was not merely the Trading Platform but the software as whole; the demand-side data was ingested into other components of the Proteus Platform (namely Grablab and Datalab) and not into the trading platform component.

The DSP Construction

39. Alternatively, the Defendant says the incorporation of the term "Proteus Platform" into the definition of "Proteus Platform Fees" has the effect of restricting the qualifying "Media Billings" when construing the term "Proteus Platform Fees". It says the definition of Proteus Platform describes Proteus Platform as the "programmatic" ad inventory trading platform with two constituent parts, both of which depend upon a connection to DSPs, namely:

(a) The pull functionality: Proteus Platform is described as the programmatic ad inventory platform which enables users to take an aggregated view of media spend from DSPs to which the platform is connected or into which demand-side data is ingested; and

(b) The push functionality: Proteus Platform is described as the programmatic ad inventory platform which may direct media spend towards DSPs to which the platform is connected.

40. Thus, the Defendant says, the definition of Proteus Platform focuses on Proteus Platform's connection to the DSPs and (i) the deriving of campaign information from that DSP connection or (ii) the adjustment of parameters in ongoing campaigns through that DSP connection. The definition is, therefore, necessarily concerned with programmatic spend placed with DSPs, not non-programmatic spend. Read in this context, the natural meaning of "*demand-side data*" is data about spend placed with DSPs.

41. The term "Proteus Platform" feeds into the definition of "Proteus Platform Fees". The qualifying "Media Billings" for the purposes of calculating the "Proteus Platform Fees" would, therefore, according to the Defendant's alternative case, be in respect of spend that was managed or processed by, through and/or via use of the Proteus Platform in one of the ways in which the definition of Proteus Platform said it would operate. Both of those ways (whether the push or pull functionality) depend upon a connection between the Proteus Platform and the DSPs. Non-programmatic media spend and/or data in relation to spend uploaded into Proteus other than through its connection to the DSPs would not qualify.

42. In my view this construction is equally hopeless. There is nothing in the language which justifies this restriction on the payments due. Insofar as it matters, it was made clear to the Defendant prior to the acquisition that data ingested into Proteus could include not merely data dependent on a connection to DSPs: see for example the slide "Proteus-Logical Data Flows"[1] which refers to data which could be ingested into Proteus being client data, third party data, DSP data, and live pixel data. Once again, this construction is contrary to the express words of the SPA and finds no support in any provision of the SPA. Although the Proteus Platform could manage programmatic spend via data dependent on a connection to DSPs, that was not all it could do. The fact that the Proteus Platform could perform a particular task is no reason to say that relevant spend must be restricted to spend related to the performance of that one particular task to the exclusion of all others. This construction involves a substantial and unwarranted rewriting of the provisions.

Disposition

43. In these circumstances, and perhaps not as a matter of great surprise given that neither construction appears to have occurred to anyone for over five years after the signing of the SPA, I reject both limbs of the Defendant's case. I will grant declarations in favour of the Claimants and will hear counsel on the precise form of order.

Costs thrown away

44. The other matter which I am required to decide is whether the costs thrown away as a result of the Defendant's change of case should be assessed on a standard or indemnity

[1] C1/300

basis. This arises in accordance with para 2 of the order of Julia Dias QC dated 8 March 2021.

45. The Defendant's strategy in this case has throughout been a shabby attempt to deprive the Claimants of monies due to them by conduct which in turn obfuscated and misled the Claimants as to the monies due to them in circumstances where the relevant knowledge was held by the Defendant and not the Claimants. It involves a course of conduct entirely unworthy of a company of the size and stature of the Defendant.

46. I have already commented on (i) the extraordinary certification on behalf of the Defendant that no monies were due which formed the basis of Deloitte's report and (ii) the decision not to disclose to the Claimants that the entire case pleaded and supported by a Statement of Truth had been discovered to be factually unsupportable and to insist on disclosure, and extensions of time for witness statements that the Defendant must have realised would not be served, presumably for the purpose of avoiding telling the Claimants this until a planned mediation had taken place[2]. It may be said that (i) should not be relevant to the costs order I have to consider but in the light of (ii) there can be no doubt that the Defendant's conduct was "outside the norm" and amply justifies an order for the costs thrown away on an indemnity basis.

[2] I should note that Mr Kulkarni was not instructed until February 2021