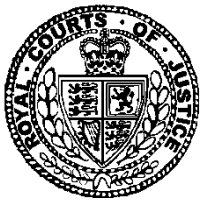

Neutral Citation Number: [2018] EWHC 3524 (Pat)

Claim No: IP-2016-000111

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
INTELLECTUAL PROPERTY LIST (ChD)

Royal Courts of Justice
The Rolls Building
7 Rolls Buildings
Fetter Lane
London, EC4A 1NL

Date: Friday, 14th December 2018

Before:

MR. JUSTICE ARNOLD

- -

Between:

77M LIMITED	**Claimant**
- and -	
ORDNANCE SURVEY LIMITED	**Defendant**
-and-	
(1) ORDNANCE SURVEY LIMITED **(2) GEOPLACE LLP**	**Part 20 Claimants**
-and-	
(1) 77M LIMITED **(2) THE KEEPER OF PUBLIC RECORDS**	**Part 20 Defendants**

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MR. JAANI RIORDAN (instructed by **Gordon Dadds LLP**) for **77M**

MR. JAMES MELLOR Q.C. (instructed by **Fieldfisher LLP**) for **Ordnance Survey**

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Approved Judgment

Transcript of the Stenographic Notes of Marten Walsh Cherer Ltd.,
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MR. JUSTICE ARNOLD:

1. This is an application by Ordnance Survey Ltd ("OS"), the defendant in these proceedings, for partial summary judgment on one of the claims advanced by 77M Ltd, the claimant. The claim in question is a claim for inducing breach of contract. OS is alleged to have induced HM Land Registry ("HMLR") to breach a contract between HMLR and 77M dated 13 February 2014 which is referred to by OS as the A1 Match Licence,. The contractual documents are two-fold: the first is a Contract Schedule, and the second is a set of standard Terms and Conditions.

2. The basis of the present application is that OS contends that it is plain that, on the proper interpretation of the contract, it is a contract for the supply of a one-off service, and not a contract for the provision of an on-going service. Given that the nature of the breach alleged is a refusal by HMLR to continue to provide services under the contract at a later point in time, it is essential for 77M to establish that, on the true construction of the contract, the obligation on HMLR was a continuing one. OS says that it is plain that it was not a continuing one.

3. The starting point in considering that contention, as I see it, is the standard Terms and Conditions which were incorporated into the contract. Clause 1 of the Terms and Conditions contains a series of definitions. The first that is relevant is a definition of Contract Schedule(s), which says:

> "The Contract Schedule[s] for the Service[s] which incorporates these terms and conditions (as may be varied by the Contract Schedule) forms the contract."

It is clear from this it is the Contract Schedule which constitutes the contract, into which the Terms and Conditions are incorporated, rather than vice-versa.

4. The next relevant definition is "Price", which is:

> "The amount payable by you for the provision of the information supplied under the Service[s] set out in the relevant Contract Schedule[s] for the Service[s]."

Next:

> "Service[s]. The service or services we supply to you as set out in the Contract Schedule or Schedules or any additional services required by you from time to time".

Next:

> "Term. The period during which we agree to provide each Service. Unless otherwise specified to the contrary in the Contract Schedule[s] the term of each Service shall be ongoing unless terminated sooner by either party in accordance with these terms and conditions."

5. It is rightly accepted by counsel for OS that, on the face of it, the definition of "Term" in the Terms and Conditions envisages an ongoing provision of the Service.

6. The same message comes from the provisions of clause 9 and clause 10 of the Terms and Conditions. I will not read out those provisions in any detail, but clause 9.4 provides for the Price for the Service to be regularly reviewed each year, and for HMLR to give three months' notice in writing of revisions of prices, and for the customer to have the right to terminate if the revised prices are not acceptable. Clause 10.1 provides for each party to be able to terminate the Contract Schedule by giving three months' notice in writing; and clause 10.2 provides for suspension or termination of the Service in various other circumstances.

7. Accordingly, on the face of the Terms and Conditions, what is envisaged is that Services supplied by HMLR will be, to use the word in the definition of that term, "ongoing".

8. As counsel for OS points out, however, the Terms and Conditions also envisage that the customer may request additional services from time to time. In that event, clause 3 provides that HMLR will use its reasonable endeavours to address the request and to agree supplemental terms for the supply of additional services. Importantly, clause 3.1.2 provides:

> "If agreement is reached, the Parties will enter into a further Contract Schedule for the additional service which shall be signed by both parties."

9. Accordingly, as counsel for OS rightly submits, it is plain that the Terms and Conditions envisage that, in the event that the customer requests the provision of an additional service by HMLR, the parties are to negotiate over terms for the provision of that additional service and a further Contract Schedule is to be entered into. That is to say, having regard to the definition of Contract Schedule, there will be a further contract.

10. Nevertheless, the argument for 77M is that the Service is an ongoing one. I have already quoted the definition of "Term", which includes the words "or otherwise specified to the contrary in the Contract Schedule[s]." Accordingly, one must turn to the Contract Schedule, which contains the specific terms for the A1 Match Licence. It is important to note that, unsurprisingly, clause 3 of the Contract Schedule specifies that, in the event of conflict between the terms set out in the Contract Schedule and the Terms and Conditions, the terms set out in the Contract Schedule prevail.

11. Clause 4 is, which is the key clause for present purposes, is in the following terms:

> "In consideration of You paying to us the Price, we will provide You with the Services on a continuous basis, unless terminated sooner by either party in accordance with the Terms and conditions."

12. Thus far, it can be seen that there is nothing in the Contract Schedule which provides differently to the Terms and Conditions. To the contrary, rather than envisaging a one-off service, clause 4 expressly envisages services being provided on a continuous basis, unless terminated sooner by either party in accordance with the Terms and Conditions.

13. Counsel for OS, however, relies upon certain subsequent provisions of the Contract Schedule as leading to the opposite conclusion. Clause 5 sets out certain specific definitions, which will apply in relation to the service. "Customer File" is defined as "The result of a list of INSPIRE IDs supplied by You", i.e. 77M. "Response File" is defined as "The LR generated response to the Customer File as detailed below." Clause 6 is headed "Service Description", and "Information and Price", and it says:

> "We will return to You a Response File (in Microsoft Excel format), identifying for all the INSPIRE IDs within the Customer File the property descriptions, as extracted from the register."

There is then a clause which is number 6.4:

> "Pricing. The Bespoke price is volume based: £2,500 plus VAT."

14. Counsel for OS submits that it is plain from these provisions that what HMLR is required to do, so far as the Service is concerned, is to provide a single Response File in response to a single Customer File supplied by 77M for a single price of £2,500 plus VAT.

15. Moreover, he points also, in support of that interpretation, to clauses 9 and 13. Clause 9, headed "Permitted use" is in the following terms:

> "You have a business requirement to verify the INSPIRE data held by your internal systems and to confirm whether 910,000 INSPIRE IDs relate to non addressable sites. The information will be limited to this use and you should confirm destruction of the data following completion of your cleansing process."

16. Counsel for OS submits that this, again, is plainly envisaging a one-off supply in which the Customer File will contain 910,000 INSPIRE IDs, and HMLR's obligation is limited to providing a single Response File to that volume of data in the customer file; hence, the pricing being expressed as being "volume-based".

17. Clause 13, which is headed "Payment" provides:

> "The invoice will be raised on signature of this Contract Schedule and no data will be provided until payment for the full Service is received."

18. Again, counsel for OS relies upon that wording as indicating clearly that this is a singular service provided on a one-off basis, for which there is to be a single payment of £2,500 plus VAT. This is not an ongoing service provided on a continuous basis.

19. Moreover, counsel for OS supports these points by asking rhetorically: if that is not the proper interpretation of the Service, what, then, is the limit upon HMLR's obligations, and how is the price for any further supply of information under the contract to be calculated? Does the obligation extend to providing a Response File in respect of a Customer File consisting of as few as 10 INSPIRE IDs? Does it extend to

10 million? Does it extend to 100 million? How much does it cost in these events? He submits that no satisfactory answer is forthcoming if the contract is to be construed as 77M contend. Moreover, he submits that, construed as 77M contend, the contract would be void for uncertainty.

20. However, there are other provisions in the Contract Schedule which point the other way. Thus clause 7, headed "Encryption", is in the following terms:

> "The information and data supplied by us will be encrypted to Land Registry standards. You accept that it may be necessary to vary the form or method of encryption during the Term. We will endeavour to provide reasonable notice on any proposed changes."

21. As counsel for OS largely accepted, that clause is plainly envisaging an ongoing service being provided. On OS's interpretation, it is almost entirely redundant.

22. Moreover, clause 14, headed "Operating hours", commences as follows:

> "Support for the Upfront Analysis and the Full Service will be available on any day Monday to Friday, which is not Christmas day, Good Friday or a day specified or is proclaimed to be a bank holiday in England and Wales..."

Again, this clause is plainly envisaging an ongoing service being provided.

23. I reiterate the point that clauses 7 and 14, as well as clause 4, are contained in the specific provisions in the Contract Schedule, which prevail over the Terms and Conditions in the event of conflict. These are not provisions merely contained in the Terms and Conditions.

24. Pausing there, it seems to me that, simply reading the contractual documents, one finds provisions which support both parties' arguments. One also finds that, on any view, the contractual documentation is lamentably badly drafted. A simple illustration of this is the fact that the numbering of the clauses jumps in both places, thus in the Contract Schedule the numbering jumps from 6 to 6.4; in the Terms and Conditions, it jumps from 9 to 9.4. There are various other infelicities in the drafting, which it is not necessary for me to detail.

25. Thus we have a contract comprising two documents, which are not wholly consistent with each other, which are both badly drafted, and which contain provisions which support both parties' interpretations. That is scarcely a promising starting point for the proposition that the matter is so clear that 77M has no real prospect of success and that summary judgment is appropriate.

26. The matter does not end there, however, because, as is now well established, the contract must be interpreted against the background of the matrix of fact. As to that, the parties are at loggerheads as to the factual background against which the A1 Matrix Licence was entered into.

27. Counsel for OS submits that the factual disputes do not matter, because the matrix of fact cannot be used to re-write the written documentation. That, of course, I accept. I also accept the point which counsel for OS rightly makes, namely that some of the evidence relied upon by 77M is plainly inadmissible, going as it does to the negotiation of the terms of the contract in question. Nevertheless, given the state of the contractual documentation to which I have already referred, it does seem to me that the matrix of fact, once it has been established at trial, is something that may assist the court in reaching its conclusion as to the correct construction of the contractual documentation.

28. For those reasons, it seems to me that it cannot be said that 77M has no real prospect of success in its claim that HMLR has acted in breach of the A1 Match Licence, and accordingly that OS has induced that breach.

29. Furthermore, it seems to me that the application for summary judgment should be refused for an additional reason, namely there is, in any event, a compelling reason for this claim to go to trial. As 77M points out, the A1 Match Licence is going to be in issue at trial in any event, as will be the surrounding matrix of fact.

30. Counsel for OS submitted that that was not a sufficient reason because, as he pointed out, the issues that are going to trial in any event on the A1 Match Licence concern the interpretation and effect of clauses 8 and 9 of the Contract Schedule. He submits that the present issues are completely independent and separate from those issues. Moreover, he submits that there would be benefit to the parties in determining the present issue now, because it would make the other issues between the parties easier to settle.

31. I do not accept those arguments. While it is true to say that the other issues are distinct issues, nevertheless they all form part of the overall inquiry as to the proper interpretation of the A1 Match Licence. Moreover, the suggested short-cut is one that, in my view, is fraught with risk because it leads to a very real prospect that, even if I were persuaded that there was no real prospect of success on the question of contractual interpretation and therefore granted summary judgment, 77M would then appeal to the Court of Appeal; and there is the plain risk that the Court of Appeal would take a different view and send the issue back for trial, with the end result that the parties would simply have incurred further expense and settlement rendered more difficult, rather than easier.

32. For all of those reasons, the application for summary judgment is dismissed.

(After further argument)

33. I have to deal with the costs of the applications that I have been dealing with this morning. So far as OS's application for summary judgment is concerned, that has been unsuccessful. Prima facie, costs should follow the event. However, the parties have agreed that the costs regime in the IPEC should apply.

34. The question I have to ask myself, therefore, is whether the making of that application was unreasonable. In my view, it was unreasonable because it seems to me that it should have been clear to OS that the matter was not suitable for summary determination. I express no view as to who is going to be ultimately successful on the

question of construction of the A1 Matrix Licence agreement. I do so, because I have no view on that question: as I observed in my earlier judgment, that there are arguments both ways and I think the court will be better in a position to decide the matter when it is in possession of the relevant matrix of fact. It seems to me that it should have been clear all along that that was going to be the outcome, and therefore the application was unreasonably made. Accordingly, I think the threshold is crossed for an immediate order in favour of 77M.

35. I have been presented with a schedule of costs on behalf of 77M, which relates to their costs of all the applications before me and totals £29,895. Plainly, I can only make an order in respect of part of that. Moreover, there is this further difficulty. As counsel for OS rightly points out, some of the evidence served on the application can be used at trial, although some of it is inadmissible. I am not in a position at this stage to differentiate between the costs that were incurred which are exclusively referable to the summary judgment application and those which are also referable to evidence that can be used at trial. In those circumstances, I think the appropriate course is for me to make an order for the payment of a reasonable sum on account of 77M's costs of the summary judgment application. Doing the best I can, it seems to me that a reasonable sum on account would be £15,000.

36. I turn next to the costs of OS's application with regard to paragraph 8 of the order of 16 February 2018. As to that, OS is the successful party and prima facie costs should follow the event. Again, I have to ask myself whether there has been unreasonable conduct, this time on the part of 77M. In my judgment, there has. In my view, it should have been perfectly plain to 77M from the order that I made on the last occasion and the reasons that I gave for making the order, briefly expressed though they were, that what I was expecting to be disclosed was the relevant source code. That is the one thing that 77M has wilfully, as it seems to me, refused to disclose up until today. That I consider to be unreasonable. Accordingly, the threshold is passed for the making of an immediate order. In that regard, however, I am not asked by OS either to summarily assess its costs order or to make any direction for an interim payment.

37. As to the other two aspects of OS's applications, that is to say, its application for disclosure of two specific documents and its application for disclosure relating variously to Matrix Diamond and Matrix 2.0, it seems to me that those costs should be costs in the case.

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