Neutral Citation Number:[2025] EWCC 3

Claim Nos: L5QZ85E2
L1QZ706Q
L4QZ7F61

IN THE COUNTY COURT AT MIDDLESBROUGH

Teesside Combined Court Centre
Centre Square
Middlesbrough
TS1 2AE

Date: 16 January 2025

Before :

HIS HONOUR JUDGE ROBINSON BEM

- -

Between :

UNITEL DIRECT LIMITED

Claimant

- and -

RACING EDGE AUTO REPAIRS LIMITED

1st Defendant

BULL UTENSILS LIMITED

2nd Defendant

INNOVATION PEST CONTROL LIMITED

3rd Defendant

- -

Mr. Eastman, Chartered Legal Executive, instructed directly on behalf of the Claimant
No attendance of or on behalf of the 1st Defendant
No attendance of or on behalf of the 2nd Defendant
Mr. Rennie, Director of the 3rd Defendant

Hearing date: 15 January 2025

- -

JUDGMENT

This judgment was handed down at a remote hearing on 16 January 2025.

A. INTRODUCTION

1. The proceedings before me concern an alleged contractual relationship between the claimant and a number of defendants. The County Court at Middlesbrough has, at the last count, 28 claims which have been brought by the claimant against different defendants, and such claims all have the same or similar basis namely that it is alleged the claimant and each defendant "*entered into a verbal business to business 12 month contract with the Claimant for Internet advertising ... There was an offer, acceptance and consideration, a valid contract*" (as per the particulars of claim of each of the 3 claims before the court (such particulars of claim included within the body of each claim form)).

2. For ease of reading this judgment, as can be seen from the above I have referred to Racing Edge Auto Repairs Limited as the first defendant, Bull Utensils Limited as the second defendant and Innovative Pest Control Limited as the third defendant. I do note from some of the documentation before me that the claimant has at times referenced trading as "The Trade Finder", but it is the name of Unitel Direct Limited in which the claims are brought.

3. The third defendant pursues a counterclaim against the claimant for sums already paid to the claimant.

4. For completeness to this introduction, 12 such claims (falling into what has previously been named "cohort 1 claims") have been struck out on 13 May 2024 at commencement of what was listed as a 3-day trial when I was then sitting as a District Judge. Such a 'strike out Order' was made for the failure of compliance by the claimant with an earlier directions Order. Permission to appeal that Order has since been refused by His Honour Judge Gargan.

5. The claims that remain to be determined are therefore "cohort 2 claims", for which an initial Order for collective case management was made but then an application to vary that Order was made on behalf of the claimant and such cohort 2 claims were therefore stayed pending determination of the above referred to appeal.

6. Further claims were issued and formed "cohort 3 claims", and to avoid delay, and recognising that the then application for permission to appeal did not impact on the substance of the cohort 3 claims as the application for permission related to matters of procedure (namely the 'strike out Order'), I exercising my discretion pursuant to Civil Procedure Rule 3.1(2) to stay all but 3 claims within the cohort 3 claims, and to try those 3 claims as specimens of the overall cohort of claims before the court. The 3 specimen claims involve the 3 defendants named in these proceedings. My Order dated 11 November 2024 set out directions for the specimen claims leading to this trial.

7. I did review the court file last week and noticed that rather than a single composite bundle prepared as per my directions, I had 3 separate bundles and within each bundle there was only information in respect of the claimant's cases. For example, there were no defences of the defendants. I accordingly made an Unless Order to ensure compliance with my earlier directions.

8. At the outset of the hearing yesterday there was a question mark over compliance with those directions, in that the third defendant and the court have not received such a consolidated bundle. The sanction of the striking out of the claims would therefore take effect without further Order. However, Ms Adwedaa, a paralegal who works in-house with the claimant, confirmed that in respect of the first defendant and second defendant there were no witness statements or documents, and as such it was only the defences to be included which she said has been done. In relation to the third defendant, Ms Adwedaa said that an updated bundle had been provided. I took a pragmatic view and enquired with Mr. Eastman whether he had the said missing information which could be provided to me, and he confirmed that he did. I therefore adjourned to be able to read the missing documentation before returning to the hearing. I am not satisfied that there had been compliance with the Unless Order, and I took the submissions of Mr. Eastman to amount to an application for relief from sanction. In this regard, I do find it to be a serious and significant breach in failing to comply with the Unless Order, and there is no good reason for such a breach. However, when considering all the circumstances of the case, noting Ms Adwedaa comments about the response to the recent orders, noting the history of the litigation, noting that the documents have been readily provided to me now and noting the short time for which the Unless Order applied (although recognising that the earlier Order had been made), and considering the overriding objective of dealing with case justly and at proportionate cost, I granted relief.

9. I do add that whilst small claims are ordinarily dealt with by the District Bench, given my consent (as per Practice Direction 2B to the Civil Procedure Rules, at paragraph 11.2(1)) there is nothing which prevents me hearing such claims. Due to the volume of claims before the court which are proceeding on the same or similar basis as set out above, it is of benefit for me to hear the specimen claims and provide a determination upon the issues. I do issue a caveat that each claim will ultimately turn upon its own individual facts.

10. As a final matter, I have provided this judgment in written form. I have done so for the assistance of the parties and noting that there are a number of claims stayed pending the outcome, and a written judgment will therefore assist in the consideration of such claims. However, this judgment is very much extempore, in that it is delivered the day immediately following hearing evidence and submissions.

B. EVIDENCE ON BEHALF OF THE CLAIMANT

11. In respect of a claim against the third defendant, the claimant relies upon evidence of Ms Abii Adwedaa, who is a paralegal working in-house for the claimant. Her witness statement is dated 16 December 2024. Such a statement sets out a number of exhibits, including what is said to be transcript of a telephone call between the claimant and the third defendant on 24 January 2024. Such a statement stood as Ms Adwedaa's evidence-in-chief, that is to say her evidence without her needing to repeat it verbatim to the Court.

12. An issue arose at the outset of Ms Adwedaa's evidence in that it became apparent that there were 2 statements of Ms Adwedaa, both dated 16 December 2024. When seeking to clarify what her evidence was, Ms Adwedaa said "we can go with any of them". She

explained that one statement was updated to include some additional information regarding artificial intelligence in respect of the services it provides.

13. In her oral evidence, Ms Adwedaa said that she was not involved in any contractual discussions between the claimant and the third defendant, and that she became involved when the claimant's debt department passed over the file and she then reviewed matters progressed to the issue of court proceedings. It is Ms Adwedaa who has signed the claim form on behalf of the claimant.

14. Ms Adwedaa was asked about an additional document which has no providence but which appeared on the last page of the court digital bundle. Ms Adwedaa said that it was an attachment from a previous email and showed how the third defendant's website was appearing on Google.

15. As to the transcript of a telephone call on 24 January 2024, Ms Adwedaa said that that the call recording was given to a third-party software company which uses artificial intelligence to transcribe it. She said that the audio recording has been provided but it is not included in the court bundle. As to the headings inserted in the transcript, Ms Adwedaa said that the third-party software added the headings into the transcript.

16. When considering the said transcript, Ms Adwedaa said that the consideration for the verbal contract was when it shows that the line was secured for payment.

17. When assessing the terms of the contract, Ms Adwedaa said that the terms included the purchase of a generic domain and internet advertising. As to the duration of the contract, when being shown reference within the transcript to the sales executive saying "*three, six, 12, nine, whatever it is*", and by the fact that Mr. Rennie had earlier asked "*Can I have this for a month and see how it goes?*", Ms Adwedaa said "I can definitively understand why there could be confusion".

18. Ms Adwedaa said that the third defendant provided written notice to cancel the contract on 26 January 2024, 2 days following the call on 24 January 2024. In terms of the work which the claimant had undertaken by this point, she set out the following: (a) the purchase of 2 generic domains, but she did not know where they had been purchased from or the cost of the purchase, (b) listing the third defendant's website across multiple directories, some of which needed to be inputted manually, but that Ms Adwedaa did not know how long it would have taken for such inputting tasks, (c) adding the third defendant's website to registers, but Ms Adwedaa did not know how long this would have taken, (d) completing the third defendant's website, which was built on a generic domain and has the pages which appears in exhibit to her statement (UD6) and (e) making submissions to Bing Maps and Google Maps, but Ms Adwedaa concerned that is "not a rigorous process". Ms Adwedaa could not assist me with details of any costs incurred, or any time incurred, in undertaken any such work, and said the timeframe was for it to be undertaken in 72 hours.

19. When being asked about the purchase of the generic domain names, Ms Adwedaa said she did not know who owned them. When being taken to the claimant's written terms and conditions, and reference to the claimant owning the said domains and renting them from the claimant, Ms Adwedaa said these are matters of technicalities and the claimant's technical department use different terms.

20. In considering the written terms which had been sent, Ms Adwedaa accepted that there was no mention in the verbal contract pertaining to "bronze", "silver" or "gold" packages. She said that an e-contract was sent and signed by Mr. Rennie on 25 January 2024 (although Mr. Eastman on behalf of the claimant subsequently referred to this as 'a clarification document'). Ms Adwedaa said that such a document was sent because it was considered that "more credibility" would be given to the contract and provide customers a written version as to what had been agreed. She said that sometimes "names are mispronounced or things are not clear".

21. The claimant also relied upon evidence of Ms Teale, who has provided witness statements dated 13 December 2024 and 16 December 2024 in respect of the first defendant and second defendant respectively. Attached to her statements are purported transcripts of telephone calls with the first defendant and second defendant. Ms Teale did not attend to provide oral evidence, and no application was made for her attendance remotely. I was invited to accept the statements as hearsay, and that given the matter proceeded on the small claims track of the county court (Part 27 of the Civil Procedure Rules applying) that the strict rules of evidence did not apply.

22. In relation to the first defendant, Ms Teale's evidence is that the first defendant "*agreed to a 12 month business to business contract for advertising and purchased the Generic Domain name of* www.mobilemechanicderbyshire.co.uk". Ms Teale further says: "*When we sign new customers we pay for them to be submitted to the search engines for the twelve months. This is because this is the shortest time we can submit them for and we cannot remove them before this period has elapsed. We then allow the customers to pay us back monthly thus assisting them further*". The statement sets out further interactions between the first defendant and the claimant, referencing the transcript of a telephone call between the claimant and the first defendant on 31 October 2023. The transcript itself is labelled as being "*Second call to customer"*.

23. In relation to the first defendant, there is telephone call transcript attached to Ms Teale's witness statement. The date of the call is recorded as 31 October 2023. In that conversation Mr. Pett is recording as discussing with a sales agent for the claimant and references other financial commitments he has for advertising costs alongside the claimant's proposals, and says "*I can't afford that amount of advertising*".

24. A further exchange takes place, and an account manager joins the call, and an offer of £89 plus VAT is made, plus a set-up fee of £5.00 plus VAT. When Mr. Pett asks about the duration, the account manager says: "*It has to be for 12 months, mate, but the beauty of what we do compared to Yell is we give you legal guarantees. The guarantees we read out over the phone, you get a hard copy in the post as well, that covers absolutely everything. The reason it's for 12 months is because your web space is reserved for a full 12 month period. Once you're on that first page with that generic term and domain name, you can't come down. But for the 12-months commitment we're asking off of you, you are backed by guarantees*".

25. The account manager goes on to say: "*we give you a guarantee to be there. You know, 93% of people are looking at search engines. The other 7% on directories, national, local, newspapers, online, certain registers. We cover that 7% as well. So, as sales is,*

this is going to sound, Andy. It really is a one-stop shop for your marketing, mate, and we cover everything for you".

26. The account manager then places Mr. Pett on a secure line to take payment, and thereafter proceeds to read out what are purported to guarantees and subsequent terms and conditions.

27. There is a further telephone call with the Mr. Pett on 6 November 2023 the claimant's account manager says: "*I'm still the cheapest. I will get you ranking*". Mr. Pett is recorded as saying "*I don't have two grand to give you*". The account manager says further "*You're going to get up to 200 Google backlinking campaigns, a brand new website that's actually going to work, that ranks and optimised on the search engines … You give me one go to work with you for a year, no more than that. Forget a year. A couple of months down the line, you'll come back to me and say, do you know what Salvir, I should have done this years ago*". Mr. Pett immediately responds: "*My only concern is the cash I've got to pay out*". The account manager proceeds to say "*It's not monthly direct debit*". Mr. Pett says "*I can't afford it. That's the problem*".

28. The call then proceeds with Mr. Pett agreeing to pay a £50.00 deposit. The account manager sets out what the claimant says its contract is: "*So as this is a business to business contract you do not need to sign anything for the contract to upgrade, no cooling off period with this product you contract is now live. Terms and conditions can be viewed at uniteldirect.co.uk. You can end your agreement with us by giving a 30-day notice in writing prior to your contract end date. Our intended services will be taken down such as directory listings and any websites created on your behalf. You should get in touch with our customer services team to discuss the contract ending. If we do not receive written notice from you, 30 days before the contract end date the contract between us will further renew for twelve months. Any previous conversations do not form a contract on this current conversation*".

29. The account manager says further "*the amount to be taken from your card today will be £50 plus the VAT. There is £1,225 plus the VAT will be taken on the 17th of December 2023 and then £1,025 plus the VAT will be taken on the 22nd of January 2024*". There is repetition of its 'consolidation', according to the transcript, to cover 2 different elements of the service.

30. Ms Teale's evidence in relation to the second defendant is that the second defendant "*agreed to a 12 month business to business contract for advertising and purchased the Generic Domain names of: www.smartwhipeastlondon.com Domain unavailable, replaced with www.creamcanisterseastlondon.co.uk".*

31. Ms Teale says further: "*In his defence the Defendant is trying to say that no agreement was in place because the original domain name was not available. We dispute this because and [sic] agreement was still in place and the domain name did not impact on the service we provided or the results we obtained on his behalf. The conversation that took place during the sales call was based around his cream chargers and how this was his main product. Therefore by being able to obtain www.creamcanisterseastlondon.co.uk as his domain did not warrant default of the contract. His Smart Whip product was then placed as a key word so that when potential*

customers searched this word his business would still come up for that search. We had therefore not breached the contract".

32. Exhibited to her statement is also a transcript of a call which is said to have taken place between the claimant and the second defendant on 6 November 2023.

C. EVIDENCE ON BEHALF OF THE DEFENDANTS

33. The only evidence before the court from the defendants is that from the third defendant. Mr. Rennie is the sole director of the third defendant and he relies upon 2 witness statements dated 23 December 2024 and 14 January 2025. The latter statement principally deals with matters of procedure and compliance with court orders. Such statements stood as Mr. Rennie's evidence-in-chief.

34. In his oral evidence Mr. Rennie said that he was cold called by the claimant on 24 January 2024. He described that the sales executive spoke "very fast" and had a "thick accent". He said he accepts that the claimant has done some work, but that he had cancelled the contract the very next day on 25 January 2024. He said he did not accept that there was a 12-month contract and that when he answered "business card" when being asked about payment type, that did not signal his acceptance of a 12-month contract.

35. As to the work undertaken by the claimant, the defendant said his view is that it has to be satisfactory, and that on the website created there are spelling errors and his business name is not even mentioned. He said he did not receive an account manager. He said he said his business has only been placed on free directories and not on the ones to which there is a cost, for example he said his business is not on the Pest Control Register. He accepted he had received 2 domains from the claimant. He said the website created (which is within the trial bundle as exhibit UD6) was "not intended to be free".

36. Mr. Rennie agrees that he accepted matters in what is being referred to as a clarification document which was signed on 24 January 2024. He said, however, that his understanding of the verbal agreement was that he was paying £119.00 plus VAT for a 1-month trial. He said the subsequent terms which the claimant is seeking to rely upon are unfair. He also doubted the accuracy of the transcript of the telephone call before the court.

37. Mr. Rennie accepted that following making payment in discussing matters that follows that he had said "*Yes, I do, yes*", in answer to a question, but that he had not appreciate change in the language being used from what had been said earlier in the call.

38. He confirmed that he sought to cancel the agreement within 24 hours, as evidenced from the claimant's own records.

D. CLOSING SUBMISSIONS

39. On behalf of the third defendant, Mr. Rennie submitted that Ms Adwedaa's evidence is not supported by documentary evidence, for example that a cold-call was not made. It

was submitted that the claimant does not explain the work that it says it submitted. It was further submitted that he has not been sent the complete audio recording of the telephone call.

40. On behalf of the claimant, it was submitted that the Trader Finder was completed online by the third defendant, and the third defendant would have then been contacted. It was submitted that the contracts involved are not consumer contracts, and there is no cooling-off period. It was submitted that work has been undertaken by the claimant on the basis of what the defendants have said. I was taken through the claims in respect of the first defendant and the second defendant, and the terms were submitted based on the telephone conversations. In relation to the third defendant, the claimant maintains the 12-month contract applies, but if the court is not with the claimant on that point a sum of £119.00 plus VAT was exchanged for initial work and more work has been done than the cost of that £119.00 plus VAT. It was submitted that the court is in a difficult position to assess what the value of the work undertaken by the claimant and to apply quantum meruit, assessing what was fair and reasonable. Interest on late payment was sought from the issue date of the proceedings.

E. THE BURDEN OF PROOF

41. It is the claimant who brings its claim who must prove it on both the facts and the application of the law. The burden which applies is the balance of probabilities; there is no burden on the defendants to disprove the claim.

42. In respect of the third defendant's counterclaim, it is the third defendant who must prove this, again on the facts and the application of the law. The same burden of the balance of probabilities applies, and there is no burden on the claimant to disprove the counterclaim.

F. IMPRESSION OF THE WITNESSES

43. In respect of Ms Adwedaa, I found she was a witness who sought her best to assist the court, answering questions as fully as she could. She readily conceded when she did not know matters, for example the cost of services provided. She made further concessions in her evidence, such as appreciating a level of confusion concerning the duration of any agreement between the claimant and the third defendant. I found her to be honest. However, I remain concerned as to the absence of any real explanation as to why there were 2 witness statements, both signed by a statement of truth and dated the same date, and with different versions being disclosed. This latter matter does not undermine the entirety of Ms Adwedaa's evidence, but it is a factor I weigh in the balance when assessing the whole evidential landscape.

44. When assessing Mr. Rennie, I found that he was a straightforward witness. He too made candid concessions, such as signing the clarification document on 24 January 2024. I found he sought to answer questions fully. He was honest and credible.

45. It was disappointing that Ms Teale did not attend. There was no opportunity to ask her questions or test her evidence. Ms Adwedaa confirmed that Ms Teale is the Legal

Manager for the claimant, which assisted me in understanding her position. Whilst I weigh Ms Teale's evidence in the balance, there being no strict rules of evidence applying pursuant to Civil Procedure Rule 27.8(1), I do place more limited weight on Ms Teale's evidence as from reading her statements she was not present during any discussions with the first defendant or second defendant and there has been the absence of hearing orally from her. For the avoidance of any doubt, I have not discounted Ms Teale's evidence.

G. FINDINGS OF FACT

46. I will deal with the claim against the third defendant first, and I find as follows:

    a. The transcript of the telephone call between the claimant and Mr. Rennie dated 24 January 2024 is incomplete, noting that the third entry by the sales agent references an earlier discussion between Mr. Rennie and a colleague, but such a transcript is not before the court. Furthermore, I find it is incomplete by accepting the evidence of Mr. Rennie in this regard, being the only evidence provided of any other person who was party to the telephone conversation and finding him to be honest and credible.

    b. On 24 January 2024 the claimant telephoned Mr. Rennie, the sole director of the third defendant. I make this finding accepting Mr. Rennie's evidence that he did not contact the claimant directly, which is further corroborated by the transcript the claimant relies upon which commences by the sales executive of the claimant speaking. Furthermore, the statement of Ms Adwedaa accepts the process of the claimant is to call out to customers, stating: "*We do not cold-call potential customers; we have several free online business directories. The defendant would have completed our Trade Finder business listing request, as this is where we obtained their details. We then call the customer to ensure all details are correct and to determine if a premium listing is required. During this call, we advise the individuals of other services we can offer*".

    c. During the telephone conversation on 24 January 2024 the claimant offered to build a website for free for the third defendant, as evidenced in the words upon which the claimant relies from the transcript. Furthermore, that a second website would be build "*completely free*" for the third defendant, again accepting the words used within the transcript.

    d. Mr. Rennie asked the sales executive during the telephone call on 24 January 2024: "*Can I have this for a month and see how it goes*?", but the sales executive does not directly answer this question and instead answers only a secondary question asked by Mr. Rennie relating to what is allegedly being promised, a finding made having read the transcript. The reference to "*no, no, no, no. I'm not. I'm not. I'm not. I'm not promising anything*" cannot meaningfully be read in response to that first question asked by Mr. Rennie.

    e. There was ambiguity as to the duration of the agreement. As noted above, Mr. Rennie had asked for a 1-month period. The sales executive on behalf of the defendant says, accepting what is contained within the said transcript, that "*once*

you go forward, three, six, 12, nine months, whatever it is …", and then later references "*once you come to the end of the 12 month contract*". Ms Adwedaa accepted in her oral evidence that she could "definitively understand why there could be confusion".

f. The duration of the agreement was a critical part of the purported contract, noting that when Mr. Rennie sought to cancel the following day, the claimant emphasises the duration as being a bar to this, the following being recorded in the claimant's notes: "*I then explained to him that He is in a contract with us for the next 12 months and that this is a business-to-business contract therefore there are no cooling of period and if customer wants to cancel he will have to pay a termination fee which would be the amount he will be paying months added for 12 months*".

g. Prior to consideration being given by Mr. Rennie on behalf of the third defendant, the only term of the agreement was that the claimant would build 2 websites for free (see (c) above) and engage in internet marketing and advertising on behalf of the third defendant, and in return the third defendant would pay a sum of £119.00 plus VAT for a 1-month trial. I make this finding on accepting the evidence of Mr. Rennie noting the consistency of his evidence and noting he is the only individual involved in the conversation to provide evidence, and also having examined the purported transcript and noting the discussion that is recorded to have taken place (albeit with the caveat set out at (a) above that I have found the transcript to be incomplete).

h. I find that the general tenor of the conversation from the claimant to Mr. Rennie was confusing. I say this not only by Ms Adwedaa's concession of the same in relation to the duration of the contract, but also by the language and amount of words spoken by the representatives on behalf of the claimant. For example, the account manager says: "*I'm not promising anything. I'm giving you a written guarantee*". When one looks at the definition of "guarantee", it is as follows: "a promise that something will be done or will happen" [Cambridge Dictionary online]. Therefore in one sentence the account manager says it is not a promise, but in the next sentence the account manager uses a word which is synonymous with the word promise. Furthermore, Ms Adwedaa confirmed that the claimant has since sought to send out written terms after the purported contract has come into existence to provide "more credibility", and recognising that sometimes "things are not clear".

47. In respect of the claim against the second defendant, I find as follows:

a. On 13 November 2023 the claimant telephoned the second defendant and introduced itself as calling from "*One One Eight Online*", as evidenced by the transcript of the telephone call.

b. The first reference in the said telephone conversation to the claimant is when the account manager enters what it refers to as "consolidation", stating: "*Can you confirm you've agreed to proceed with the contract with Unitel Direct Limited, trading as the Trade Finder for the supply of internet advertising?*". As Ms Adwedaa explained in her evidence, the purpose of "consolidation" is to recap the previous discussions. However, as evidenced from the transcript and (a) above, the second defendant was introduced to *"One One Eight Online"*, not the claimant.

c. When discussing the domains sought, the discussion was as follows, accepting this evidence within the transcript:

Sales Manager:	*In regards to the domain names, you said you want to go for Cream Chargers East London and then Smart Whip Canisters East London?*
Mr. Oduntan:	*The domain name?*
Sales Manager:	*Well, I think, yeah, so the Cream Chargers is definitely the better one. From what I can see, people are looking for Smart Whip Canisters. Those would be the best two.*
Mr. Oduntan:	*OK, cool. But I don't know why it's called Smart Whip Canisters, because Smart Whip and Canisters are two different things.*
Sales Manager:	*Smart Whip. Oh, OK. No, to be fair, that's why I was making a point. So Smart Whip, that'd be better as that one.*
Mr. Oduntan:	*Yeah, they call it Smart Whip. They call it Fast Gas.*
Sales Manager:	*OK. Yeah, yeah, yeah, yeah. Oh, no, that's me, that. Ignore me, mate. Yeah, so we've got Smart Whip East London and then Cream Chargers East London, yeah?*
Mr. Oduntan:	*Yeah, and they call it Cream Chargers. There's Cream Chargers Canisters. I don't know if all of those abbreviations help.*

d. As per the consolidation of the contract within the transcript, a term was "*We will now secure you a guaranteed first page listing for your generic domain name of Smart Whip East London and Cream Chargers East London*", accepting the transcript in this regard.

e. The domain www.smartwhipeastlondon.com was unavailable and the claimant replaced it by purchasing www.creamcanisterseastlondon.co.uk, accepting the evidence of Ms Teale in this regard. As noted from the transcript above, www.creamcanistereastlondon.co.uk was not the domain which the second defendant agreed as part of the agreement.

f. On 26 January 2024 the claimant wrote to the second defendant, stating: "*Due to non-payment we find you in breach of contract, you can remedy your breach by bringing your account up to date, the outstanding balance is currently £285.60 inclusive of VAT, failing which I will cancel your contract, making the full contractual sum due*", noting this letter which is before the court.

g. Within the verbal discussions which took place on 13 November 2023, there was no term provided which address the circumstances in which the claimant was able to cancel any contract.

h. The discussion between the claimant and the second defendant included confusion in respect of the purported terms, notably that the account manager reference "*if we don't follow through with what we say, we're in breach of that agreement anyway, and obviously you have a right to request a cancel*", but then seeks to set out an alternative clause regarding cancellation.

48. Finally, I turn to findings which I make in respect of the claim against the first defendant:

a. The transcript of the relevant discussions between the claimant and the first defendant are incomplete, noting that the transcript on which the claimant relies refers to it being a "second call to customer" on 31 October 2023 and the first call having not been provided as evidence. Furthermore, the sales agent goes on to say "*we offered you that £5 set-up fee*". Given that offer is not detailed prior to this being said on the call, and given that this is referred to as a second telephone call, it follows that the offer must have been made in the preceding call.

b. In addition to the transcript being incomplete as per (a) above, it is inconsistent. It is dated as 31 October 2023 but when the sales manager reads out the date it records: "*I'd like to state today's date as the 1st of November, 2020*".

c. The conversation between the claimant's sales manager and Mr. Pett was confusing. The sales manager recognises this, by stating: "*It probably sounds more complicated than what it is*". The words that are used by the sales manager include the following: "*as long as you believe people are looking for the services that you provide, not just who you are. As long as you believe that, we give you a guarantee to be there. You know, 93% of people are looking at search engines. The other 7% on directories, national, local, newspapers, online, certain registers. We cover that 7% as well. So, as sales is, this is going to sound, Andy. It really is a one-stop shop for your marketing, mate, and we cover everything for you*". In this last exchange the sales manager is offering a guarantee predicated on a belief held by Mr. Pett.

d. There is no discussion about any terms regarding cancellation prior to consideration being taken on a secure payment line, as evidenced by the transcript upon which the claimant relies.

e. A further telephone call takes place between the claimant and Mr. Pett on 6 November 2023, as evidenced by a transcript on which the claimant relies. During this telephone conversation Mr. Pett sets out his financial difficulties. The account manager proceeds to say: "*You're going to get up to 200 Google backlinking campaigns, a brand new website that's actually going to work, that ranks and optimised on the search engines and all your keywords and a bigger geographical area. Derby, Nottingham, Leicester, Loughborough, you're not ranking for mobile mechanic Andrew, if you let me do everything for you, I'll go away and do it. You give me one go to work with you for a year, no more than that. Forget a year. A couple of months down the line, you'll come back to me and say, do you know what*

Satvir, I should have done this years ago". I find that is wholly vague. It does not set out the terms it relates to and it does not set out the specifics of the work to be undertaken, save for *"everything"*.

49. In having made the above findings of fact, I will proceed to apply the law, but I will address one preliminary matter relating to the transcripts of the telephone calls which are before the Court.

H. TRANSCRIPTS

50. As a general approach, I find that the court must apply caution when considering purported transcripts of conversations when the original recording is not disclosed in full to other parties in the proceedings and to the court and when another party (a) disputes the existence of such a conversation, (b) disputes the content of such a telephone conversation, (c) where another party has limited or impaired recollection of the conversation or (d) where it appears on the face of the transcript that there are material errors.

51. Caution in such circumstances is because the other parties and the court have been denied the opportunity in which to check the transcripts for accuracy and to verify whether in fact the conversation occurred at all. There are more nuanced matters which may also arise, such as the speed at which an individual may be speaking and tone used (including suggestion, sarcasm and such like), which may be matters of relevance to the substance of a claim.

52. When applying such caution the court should consider a number of factors to assess the weight, if any, to be placed on such transcripts. Whilst not intended to be an exclusive or exhaustive list, such factors which I consider in these proceedings are as follows:

    a. Whether there has been an Order made for disclosure in the proceedings, the nature of that disclosure order and whether the party seeking to relying on the transcript has complied with that Order.

    b. The reason why the audio recording has not been provided to any other party and to the court.

    c. Whether the reason for not providing the audio recording to any other party and to the court is a good reason.

    d. The stage of the proceedings at which the transcript was provided to any other party.

    e. Details pertaining to the transcription, notably whether it has been undertaken by a professional transcriber and certified accordingly, or whether it has been transcribed through another means (and details of that other means, for example through the use of computer software).

    f. Where the audio recording has been transcribed by an individual who is not a professional transcriber such that it has not been certified accordingly, whether there is any evidence from the individual, verified by a statement of truth pursuant to Part

22 of the Civil Procedure Rules, confirming that the transcription is true and confirming that such an individual is aware that proceedings for contempt of court can be brought by anyone who falsely verifies a statement of truth.

g. Any other provenance which can be attributed to the transcript (whilst this may be less than a verified statement of truth, there might be, for example, an email from the individual transcribing it in which he or she has confirmed the fact and method of transcription).

h. Whether the transcript has, on the face of it, been edited in any way, for example by headings or summaries being inserted, redactions, excerpts seemingly missing and such like. In other words, the presentation of the transcript.

53. Once those factors have been considered the court must consider them together holistically to determine the weight, if any, to be attributed. This is the exercise which I will now undertake.

54. Whilst Part 31 of the Civil Procedure Rules does not apply to claims proceedings on the small claims track, CPR 27.4(3)(a)(i) sets out a standard directions include

> "that each party shall, at least 14 days before the date fixed for the final hearing, file and serve on every other party copies of all documents (including any expert's report) on which he intends to rely at the hearing".

55. In reliance upon the transcript of telephone calls there is therefore explicit reliance upon the source of that transcript, being the audio recordings. I find the absence of disclosing the full audio recordings, and by not placing them before the court with the bundle for trial, does not fully comply with the disclosure obligations I have set out for the reasons stated immediately above. There has been no reason provided to the court as to why that has not occurred. Ms Adwedaa said the recording had been sent in relation to the claim against the third defendant but accepted it was not included with the trial bundle, but in relation to the third defendant Mr. Rennie says he has never received the full audio recordings. Mr. Rennie has been consistent in this regard and I accept his evidence. I do not know the exact date the transcripts have been provided to the parties, but I do note and accept that Mr. Rennie has been seeking the full audio recordings. I note a third-party software company has been used in relation to the production of the transcript, but I have limited information about that process or how any checks are undertaken to ensure accuracy. Whilst there is a statement of truth attached to the transcripts from Ms Adwedaa (pertaining to the transcript for the claim against the third defendant) and Ms Teale (pertaining to the transcripts for the claims against the first and second defendant), there is nothing before me as to how Ms Adwedaa and Ms Teale have been able to verify the truth and accuracy of the transcripts, yet they have signed a statement of truth confirming the same. There is no other meaningful documentation which gives providence to the transcripts. Finally, headings have been inserted into the transcripts which reflect a degree of editing.

56. When stepping back and looking holistically at the transcripts before me, and I do so looking separately at each case, I find that they are not completely accurate and they are not completely reliable for the reasons I have set out in the preceding paragraph.

I. DISCUSSION AND ANALYSIS

57. The very essence of the claimant's pleaded case is in respect of each of the 3 defendants is set out within its claim forms and which I have outlined above and which I will repeat:

> *"The Defendant company entered into a verbal business to business 12 month contract with the Claimant for Internet advertising … There was an offer, acceptance and consideration, a valid contract …".*

58. It is useful to go back to very basic matters of law, and to ask the first question as to what amounts to a contract. As per Cartwright (at 1-03) in *"*Formation and Variation of Contracts*"* (4th edition, Sweet and Maxwell):

> "the model of contract adopted in English law is not simply an agreement which contains a promise, but an agreement in which the promise by one party has been given in return for – in exchange for – some other promise or performance by the other party".

59. Cartwright goes on to set out (at 1-04) that:

> "The first question is whether the parties have formed their agreement in the way, and with the content and characteristics, that the law requires in order to find a valid contract".

60. It is this first question which must be assessed first as it is central to the parties' respective positions.

61. In all 3 of the cases before me there was a degree of pre-contractual negotiations which took place by telephone between the parties. At the point of those pre-contractual negotiations a contract is not yet formed, and indeed may never be formed. Cartwright (see above, at 2-03) discusses the relationship between the parties at this point ebbing and flowing.

62. Cartwright sets out further (at 2-05):

> "Where the parties have agreed to enter into a contract, but have not yet agreed (expressly or impliedly) on all the terms necessary to form the contract, the agreement is not enforceable because the courts have no mechanism to determine the missing terms if the parties have not provided an objectively certain mechanism for the gap to be filled".

63. Lord Buckmaster addressed this very matter in *May and Butcher Ltd v The King* [1934] 2 KB 17 HL [at 20]:

> "It has long been a well recognized principle of contract law that an agreement between two parties to enter into an agreement in which some critical part of the contract matter is left undetermined is no contract at all. It is of course perfectly possible for two people to contract that they will sign a document which contains all the relevant terms, but it is not open to them to agree that

> they will in the future agree upon a matter which is vital to the arrangement between them and has not yet been determined".

64. Blackburn J helpfully examines matters further in *Smith v Hughes* (1871) LR 6 QB 597 at 607:

> "if one of the parties intends to make a contract on one set of terms, and the other intends to make a contract on another set of terms, or, as it is sometimes expressed, if the parties are not ad idem, there is no contract, unless the circumstances are such as to preclude one of the parties from denying that he has agreed to the terms of the other".

65. It does not seem to be in dispute that the claimant and each individual defendant had an intention to create legal relations with one another. I will therefore not explore that issue any further within this judgment. What does, however, need further exploration is just what was being agreed. This is because in order to form a contract the parties "must have agreed on a sufficient body of terms that the law can recognise as a contract" (Cartwright, at 3-14). It is not necessary for every term to be outlined to create a contract, and implied terms can effectively 'fill the gaps'. However, what is created between the parties must be sufficient – in colloquial terms, there must be sufficient 'meat on the bone'. In *Devani v Wells* [2019] UKSC 4, Lord Kitching held:

> "where, as here, the parties intended to create legal relations and have acted on that basis, I believe that it may be permissible to imply a term into the agreement between them where it is necessary to do so to give the agreement business efficacy or the term would be so obvious that 'it goes without saying', and where, without that term, the agreement would be regarded as incomplete or too uncertain to be enforceable. Each case must be considered in light of its own particular circumstances".

66. I must therefore ask whether the agreement between the claimant and each defendant is sufficiently certain. I find in the present 3 cases before me that there is an absence of certainty as to key terms. In addition to the findings of fact which I have made above, I will explain my reasons further.

67. In relation to the third defendant, there is confusion as to terms of the duration of the contract as I have made as a finding of fact above, and that this was a critical term. Each party believed it was something else as to what was being agreed. This also bleeds into uncertainty in relation to terms pertaining to cancellation. These matters were utterly fundamental and were not capable of being agreed without further negotiation, which did not take place as the third defendant sought to cancel the contract within 24 hours and the claimant refused to accept the third defendant was entitled to, and it set the matter on course for these proceedings. I have considered whether it is open for me to imply terms into the agreement to provide business efficacy, but the parties are not at ad idem and are at almost polar opposites. It is not for the court to then pick what it considers is the better or a hybrid approach. The terms are so uncertain as to render there being no valid contract.

68. Turning next to the second defendant, the name of the contracting party was uncertain from the outset, with the claimant introducing itself as "*One One Eight Online*" but then

referencing "*Unitel Direct Limited*" later. This is a level of uncertainty right at the outset of purported contractual negotiations. The name, whilst fundamental, can perhaps be addressed by the subsequent clarification of the name. But when examining further, as set out in the findings of fact above, there was uncertainty as to cancellation terms to the contract. It was the claimant who cancelled the contract but then sought full payment despite having cancelled it. Such a cancellation right to the claimant was not included in the purported verbal contract, let alone a term that if the claimant cancels the second defendant would be liable for the full sums. The absence of clarity around these terms, terms which I find are fundamental to understanding the agreement, leads to a finding that there is no valid contract. I have once again considered whether I could imply terms to provide business efficacy, but I must ask 'what would I be implying?' It is not appropriate for the court to simply accept the claimant's term giving it cancellation rights when no such cancellation rights have been discussed. It is not for the court to write the terms of the contract, and this is a prime example as to the importance of clarity around terms before agreements are entered into, and businesses should consider very carefully whether contracts should be entered without the clearest of written terms.

69. I do also add in respect of the second defendant that I find what the second defendant thought I was obtaining by way of one of the generic domains was changed because it was not available, and the claimant substituted it for something else. Ms Teale's analysis that this was capable of being done under the contract is flawed. If I pay for 'click and collect' at a supermarket and they substitute one item for something else, I have the option to reject that substitution because it is not what I had agreed to when I made my payment online. That is reflective of the situation in respect of the second defendant, who thought he was paying for one particular domain, as shown in his thought process by the discussion with the claimant, and he was given something different. That, along with Ms Teale's interpretation, shows the parties were at odds even as to the services of the contract, and has led to uncertainty.

70. Finally, I turn to the claim against the first defendant in which I have found uncertainty around the cancellation terms. I have found there is confusion as to the terms as to what was being offered. When viewing these matters as a whole, I simply find that the uncertainty renders there being no contract. In any event, even if was wrong in this regard, I find the claimant has failed to prove its case as there is an absence of the entirety of the telephone conversation noting the findings I have made in respect of the transcript (including contradictions), and therefore I have no confidence as to what the agreement was.

71. As a result of the above I find that given the absence of certainty set out, there was no valid contract between the claimant and each defendant at the point at which the claimant alleges the contracts were entered into.

72. In view of there being no valid contracts existing, it follows that the claimants' claims must be dismissed. I have considered whether the claimant should be provided with any further sums for services it has provided to the defendants, often referred to by the principle of "quantum meruit" ("the amount one deserves"). However, the claimant has provided no evidence as to the costs of domains purchased, and its subsequent purported written terms set out the claimant owns these domains in any event and are rented. There has been no evidence as to the amount of work which the claimant has undertaken, but I find that it is unlikely to be any high level of work noting that websites

with limited pages have been created and there has been some limited data input. I find the fees which have been paid is sufficient for such services. There has been no unjust enrichment to the defendants, and the claimant has failed to prove this on the evidence before the court.

73. Turning to the third defendant's counterclaim, in which he seeks payment for the sum he had paid to the claimant, the third defendant accepted that the claimant had undertaken some work. The burden is upon the third defendant to prove its claim, as I have set out above. In having undertaken some work which the third defendant accepts, including provision of data input for some online directories. The logs recorded by the claimant demonstrate such data input, as well as links to amend a website. In view of this, I find that the claimant likely undertook work which would have been equivalent to the sum paid by the third defendant, such that I dismiss the third defendant's counterclaim.

J. ORDER AND FURTHER MATTERS

74. In view of the above, the Order which I make is as follows:

    a. The claim against the first defendant is dismissed.
    b. The claim against the second defendant is dismissed.
    c. The claim against the third defendant is dismissed.
    d. The third defendant's counter claim is dismissed.

75. The claims proceed in the small claims track of the county court such that Civil Procedure Rule 27.14 applies in respect of costs, and given that the claimant has been unsuccessful in its claims, the third defendant has been unsuccessful in its counterclaim and the first and second defendants have not attended, it would appear the appropriate order would be one of no costs. However, I will invite submissions on the point of costs when handing this judgment down.

76. I was invited by Mr. Eastman to provide thought to the further case management of the remaining claims. In the first instance, I will ask the court to provide a copy of this judgment to all parties. It is a judgment given in public proceedings and there is nothing which prevents its onward transmission.

77. Thereafter, it occurs to me that directions can be provided for the progression of those claims. Given that the claims will undoubtedly turn upon their own facts, there is no reason why the claims cannot now proceed individually, and separate Orders can be made in respect of them. However, this judgment may assist the parties in those cases, particularly where there are matters of similarity or distinguishment.

HHJ Robinson BEM
16.01.2025