Neutral Citation Number: [2019] EWHC 442 (TCC)

Claim No D50MA051

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS IN MANCHESTER
TECHNOLOGY AND CONSTRUCTION COURT (QBD)

27th February 2019

Before His Honour Judge Halliwell sitting as a Judge of the High Court

B E T W E E N:

SANDERSON LIMITED

Claimant

AND

SIMTOM FOOD PRODUCTS LIMITED

Defendant

Mr Christopher Cook (instructed by **Aaron & Partners LLP**) for the Claimant.

Mr Jamie Jenkins (instructed by **Direct Access**) for the Defendant.

Hearing dates: 8th, 9th, 12th November and 20th December 2018

APPROVED JUDGMENT

I direct that pursuant to C*PR PD 39A para 6.1* no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

(1) Introduction

1. By these proceedings, the parties seek damages from one another following the termination of a contract dated 10th November 2014 ("the Contract") for the supply of electronic software, equipment and associated services. It is common ground that the Contract has been terminated owing to the acceptance, by one or other of the parties, of repudiatory breaches. However, there are issues as to who committed the material repudiatory breach or breaches so as to furnish the other party with a right of termination and a cause of action in damages. The outcome of the first of these issues dictates when and by whom the Contract was terminated.

2. The Claimant contracted as supplier. It contends that the Defendant repudiated the Contract upwards of two years afterwards when declining to co-operate in arrangements for a meeting to re-start the project following an agreed delay of some 12 months. In

doing so, it is contended that the Defendant renounced the Contract. The Defendant denies that it was in repudiatory breach and maintains that the Claimant itself repudiated the Contract when it purported to accept the Defendant's putative breach or breaches.

3. It is axiomatic that, upon termination, the innocent party is discharged from continuing liability under the Contract but the other party is liable for the losses incurred by the innocent party owing to the repudiatory breach or breaches. Neither party is thereby released from liability for anterior breaches but, in the present proceedings, little turns on this.

4. At the trial before me, both parties were represented by counsel. Mr Christopher Cook appeared on behalf of the Claimant and Mr Jamie Jenkins appeared on behalf of the Defendant. They respectively delivered written closing submissions dated 18th and 11th January 2019.

(2) Factual sequence

5. The Claimant was and is in the business of providing business and related IT services in connection with the production and supply of food and drinks. Its products include the so-called Unity F8 system which enables customers to digitise and automate processes in connection with all aspects of production, finance and logistics.

6. The Defendant is now the chosen vehicle for a family business-first established as long ago as 1977-for the manufacture of cooking sauces, curry pastes, chutneys, pickles and chilli sauces.

7. The parties entered into the Contract following face to face meetings and email communications in which the Claimant sought to elicit the Defendant's business and software requirements and submitted an outline proposal with details of the Claimant's software and implementation methodology. By 25th September 2014, agreement had been reached in principle although it wasn't until 10th November 2014 that the Contract was signed on behalf of the Defendant.

8. The Contract was contained in a two-page document ("the Two Page Document") itemising the goods and services to be supplied under the headings "Software", "Sale of Equipment", "Estimated Professional Services", "Support" and "Equipment Maintenance" together with payment schedules. The parties expressly contracted upon the "Sanderson

Terms and Conditions (December) 2012 & Appendices hereto" ("the Claimant's Standard Terms").

9. Once the Contract had been signed, the Claimant sought to arrange a site visit to review the Defendant's business but, at the Defendant's request, this was postponed to the New Year. On 20th and 21st January 2015, the Claimant conducted a review of the Defendant's business. A draft implementation plan was prepared. Bi-lateral meetings and workshops were then held so as to address and accommodate the Defendant's business requirements and provide training to the Defendant's employees in connection with the use of the Claimant's software. Over time, it was envisaged this would encompass aspects of the Defendant's business ranging from sales and purchase orders, stock control, recipe management and quality control to issues of financial management. Following a meeting on 10th March, there were workshops on 26th March, 30th April, 8th, 18th and 26th June 2015.

10. During this period, the Defendant appointed Mr Andrew Davies as its first finance director. His appointment took effect from 1st June 2015. On that day, Mr Davies joined a project pre-planning meeting between the parties. From the outset, Mr Davies had concerns about the project which he was not slow to raise with the Claimant's employees. At the meeting on 1st June 2015, he asserted that the projected time scale was unrealistic. At a subsequent meeting on 17th June 2015, he raised additional concerns about the training manuals and user documentation. He was also concerned about the quality of the workshops.

11. On 21st July 2015, there was a further meeting between the parties at which they agreed to put back the project until September 2015. For reasons that are in issue, little progress was made until 4th February 2016 when a meeting ("the February 2016 Meeting") was held at the Defendant's business premises to discuss the way forward.

12. By the time of the February 2016 Meeting, the Defendant was in substantial arrears under the contract payment schedules. The parties agreed to re-schedule payment and re-start the contract in 2017. There is a dispute as to whether they agreed, as the Claimant maintains, to re-start the project on 1st February 2017. The Defendant contends that they agreed only that it would re-start "around that time".

13. In January 2017, the Claimant emailed the Defendant to clarify whether it remained the Defendant's intention to restart by the end of the month. Later, it requested the Defendant to provide a date for a "kick-off" meeting. The parties exchanged emails in February and March 2017 but the Defendant declined to provide the Claimant with a date or otherwise provide the commitment that the Claimant required. The Claimant thus engaged Aaron & Partners LLP to act on its behalf and by letter dated 28th April 2017, Aaron & Partners advised the Defendant that they considered the Defendant to be in repudiatory breach and gave notice of acceptance so as to bring the Contract to an end.

(3) Witnesses

14. I heard the oral testimony of nine witnesses.

14.1. On behalf of the Claimant, seven witnesses were called to give evidence, of whom six were directors, employees or former employees of the Claimant and one was a former employee of the Defendant.

14.1.1. The Claimant's witnesses included Mr Nicholas Bird (commercial director), Mr Michael Gallagher (sales director) and Mr Nicholas Slater (former client services manager), all of whom attended the February 2016 Meeting. Mr Slater also attended the meetings on 1st June and 21st July 2015, and Mr Gallagher attended the meeting on 17th June 2015.

14.1.2. Amongst the Claimant's other witnesses, Ms Janet Cartlidge and Mr James Rogers attended the Defendant's business premises for the business review on 20th and 21st January 2015. Ms Cartlidge and Mr Graeme Spencer-also called to give evidence-were involved in the preparation and delivery of the workshops.

14.1.3. In addition, the Claimant called Mr Richard Budd as a witness. Mr Budd was formerly employed by the Defendant as "Supply Chain Coordinator". He was given responsibility for the management of the project until September 2015, when he left the Defendant.

14.2. On behalf of the Defendant, two witnesses were called to give evidence, its director, Mr Bhavin Chandarana and, former finance director, Mr Andrew Davies.

15. In *Gestmin SGPS SA v Credit Suisse (UK) Limited, Credit Suisse Securities (Europe) Limited [2013] EWHC 3560 (Comm),* at *Para 22,* Leggatt J (as he then was) observed that, in the context of commercial cases, the value of "the oral testimony of witnesses "lies largely…in the opportunity which cross examination affords to subject the documentary evidence to critical scrutiny and to gauge the personality, motivations and working practices of a witness rather than…" their recollection of "particular conversations and events". Leggatt J did not state that conducting a more general qualitative assessment of the recollection of witnesses was of no value. In the present case, it has been helpful for me to have the opportunity to evaluate their testimony in this way. However, it is certainly true that, by observing the witnesses in the present case, I was given an important insight into their "personality, motivations and working practices".

16. The Claimant's employees-in particular, Mr Slater and Ms Cartlidge-showed a good understanding of the Claimant's methodology and the project requirements. The same was true of the Claimant's sales director, Mr Gallagher, who conducted the contractual negotiations at the outset. They were all aware of the change of dynamic following the appointment of Mr Davies as the Defendant's financial director and this was brought to the attention of Mr Bird. Mr Bird came across as a measured and determined business man. As commercial director, Mr Bird was prepared to accommodate the Defendant but only within defined limits. He was willing to delay the project and re-schedule payment but only on the basis that the Defendant undertook to pay defined arrears within a realistic time scale. Once he perceived that the Defendant was raising disingenuous queries and objections so as to obstruct further progress, he took steps to terminate the Contract.

17. Mr Slater was a confident witness. He was precise and direct in his answers. His answers were generally consistent with the contemporaneous documentation and he provided me with a reliable account of the progress made during 2015 and the meetings he attended with the Defendant in 2015 and 2016. Where necessary, he was not afraid to make concessions to the Claimant's disadvantage. Ms Cartlidge was less confident than Mr Slater but, again, she was willing to make concessions and I am satisfied she gave me a reliable account of the implementation plan, the workshops and the delays in progress during the period leading up to 1st June 2015. I am satisfied that Mr Bird and Mr Gallagher

were also reliable witnesses. No significant inroads were made, in cross examination, on the grounds for Mr Bird's perception, following the Defendant's 21st February 2017 Email, that the Defendant was seeking to obstruct the project.

18. Mr Budd's evidence was illuminating. Between March and September 2015 when he ceased to work for the Defendant, Mr Budd was effectively responsible for the management of the project. In cross examination, Mr Chandarana sought to criticise Mr Budd's performance as project manager. For his part, Mr Budd was critical of the support he was given; he was plainly unhappy in his role with the Defendant. However, there is nothing to suggest Mr Budd's evidence was somehow coloured by a sense of grievance. In any event, having heard his evidence, I am satisfied Mr Budd's factual account is accurate and his explanation for the delay in the project prior to September 2015-which he put down to failures on the part of the Defendant-is broadly correct.

19. Mr Chandarana was and is positive and optimistic by nature. This was apparent when he gave evidence and it was consistent with the recollection of the other witnesses. These are by no means unattractive qualities. However, in the present case, they shaded into a failure, on the part of Mr Chandarana to address the realities of the situation and engage with the requirements of the project.

20. Mr Chandarana was not a dishonest witness. He did not say anything which he knew to be untruthful. However, at times, his evidence was coloured by his perceptions of the Defendant's interests and the Claimant's shortcomings. For example, when asked whether the Claimant had properly explained to him the measure of resource and commitment required for the successful implementation of the project, he answered that the Claimant had not done so. This was inconsistent with the weight of the contemporaneous documentary evidence and the oral testimony of the Claimant's witnesses and, in my assessment, it was incorrect.

21. Once Mr Davies was appointed as finance director, Mr Davies was allowed to take control of the Defendant's affairs in connection with the Contract. When giving his evidence, Mr Davies was confident and assertive. He gave the impression that he is a man accustomed to getting his own way. By the time of his appointment as the Defendant's finance director, he was approaching retirement. Again, he was not a dishonest witness and, at times, he was willing to make concessions that were to the Company's disadvantage. For

example, in answer to a question from me, he confirmed that, on receipt of the Claimant's 13th February 2017 email (to which I shall refer later), he construed "frustrated" so as to mean "terminated" more widely than the strict contractual sense understood by lawyers. However, he was inflexible in his views and, unlike Mr Chandarana, there is nothing to suggest that he ever had any enthusiasm for the project. When appointed finance director in 2015, it is an inescapable inference that he was immediately unhappy with the contractual commitment owing to the immediate financial implications and his own lack of familiarity with the relevant technology.

(4) The Contract

22. The Two-Page Document was in simple terms. After listing the software, equipment and services to be sold and supplied together with the "Payment Terms", it recorded the Defendant's order-accepted by the Claimant-for the supply of "…the above Software, Equipment, Professional Services, Support and Equipment Maintenance at the price(s) shown and in accordance with Sanderson Terms and Conditions (December 2012) and Appendices hereto".

23. The Payment Terms provided for payments in respect of software of £7,000 on contract signature, to be invoiced in November 2014 and paid within 30 days, two further instalments of £7,000 on 31st December 2014 and 31st March 2015, £6,870 on 30th June 2015 and £3,000 on 30th September 2015. Maintenance and annual licence fees were additionally payable on installation, initially in quarterly instalments of £1,875. The Defendant was to pay for the Claimant's services in the sum of £7,661.11 payable monthly in arrears commencing in December 2014. The sum of £37,995 was payable on delivery of the hardware save that a 30% deposit was payable when the Claimant placed a firm order with any third party supplier.

24. The Claimant's Standard Terms contained conditions governing the software licence, sale of equipment, professional services and equipment maintenance. By Condition H1, the Claimant agreed to provide the Defendant with Support, which was defined so as to mean "the support services supplied by [the Claimant] under the Contract" and, by Condition H6.1.iii "to provide [the Claimant] with information and up-to-date listings and printouts which Sanderson reasonably requires for the purpose of carrying out its obligations under this Contract". Following delivery, the Standard Terms also contained Customer

Covenants (M6) in connection with the maintenance of equipment. There were also express conditions for termination (G11). There was also an "entire agreement" clause (G14.1) and the parties waived their rights to claim damages owing to unincorporated statements in the absence of fraud (G14.2).

25. The Contract required close collaboration between the parties to define the Defendant's business requirements, identify the action necessary to digitise and automate the Defendant's production and accounting processes, implement the Claimant's electronic system and ensure that the Defendant's employees were properly trained in the use of the system. In the absence of specific contractual provision requiring the parties to co-operate with one another in this way, a duty to do so would be implied. In the *Interpretation of Contracts (5th edition) (2011) at Para 6.15*, Sir Kim Lewison enunciates the principle that "where performance of the contract cannot take place without the co-operation of both parties, it is implied that co-operation will be forthcoming". This principle is consistent with the authorities to which he refers, including the observations of Lord Blackburn in *Mackay v Dick (1881) 6 Ap Cas 251 at 263*. It also survives the recent guidance of the Supreme Court in *Marks & Spencer v BNP Paribas [2016] AC 742* in which the tests of necessity and obvious inference have been re-stated. In the absence of express contractual provision to the contrary, I am thus satisfied that a duty of co-operation is to be implied in the present case.

26. Terms were statutorily implied that the Claimant would carry out the services with reasonable skill and care and the service would be carried out within a reasonable time. Since the Contract was made before 1st October 2015, *Sections 13 and 14* of the *Supply of Goods and Services Act 1982 ss13* and *14* applied rather than *Section 100(5)* and *Schedule 1 Para 38(c)* of the *Consumer Rights Act 2015*. Whilst this aspect of the case did not feature in the parties' arguments, the statutory implied terms were not excluded by the Contract.

(5) Who was culpable for the lack of progress during late 2014-2015, what was agreed at the February 2016 Meeting and what happened in the aftermath?

27. Before turning to the critical questions, it is necessary for me to resolve issues between the parties about the reasons for the early delays in the project and the terms of the agreement reached at the February 2016 Meeting.

28. I am satisfied, on the evidence, that the Defendant was itself responsible for almost the entirety of the relevant delay and lack of progress during late 2014 and 2015.

28.1. From the outset, the Defendant was unwilling or unable to commit the resources required for the project owing to the day to day demands on the business. In his written closing submissions, Mr Jenkins submitted that the Defendant was not provided with sufficient information to properly appreciate what was required before the parties entered into the Contract. However, in my judgment, there is little, if any, room for this submission. As an attachment to his email dated 9th June 2014 to Mr Chandarana, Mr Gallagher sent him his Outline Proposal amounting to some 34 pages together with some 9 pages of appendices. This provided extensive details of the intended project with detailed descriptions of the work to be undertaken by the Defendant's Project Manager, process owners and technical representatives. It also included details of the "Sanderson Team" and "Sanderson Resource Estimates" with detailed "Project Assumptions". Mr Gallagher also attended pre-contract meetings with Mr Chandarana in which he explained the requirements of the project and, on 11th July 2014, he delivered an on site software demonstration. In cross examination, Mr Chandarana indicated that he did not read the Outline Proposal before entering into the Contract. I am minded to accept that he didn't read the Outline Proposal in its entirety. However, given his role as the director responsible for the project and the significance of the Outline Proposal, it would be unrealistic to suggest that he was unaware of the document and its essential function at the time. Nor is there anything to suggest that Mr Chanderana did anything, at the time, to indicate to the Claimant he had failed to read the relevant documentation or that he did not understand what the project would require. He certainly didn't seek additional clarification of the requirements.

28.2. On more than one occasion in cross examination, Mr Chandarana accepted that "we could have done better". He agreed that "we didn't commit enough to it" but this was because "if we didn't do our day jobs, we wouldn't have a business". At another point, he said that "we could have been more engaged but I had to protect business, get new business, import more".

28.3. The project was initially postponed until January 2015 at Mr Chandarana's request. The Defendant alleges that, once work commenced on the project, some of the workshops were poorly presented. There is some support for this in the contemporaneous documentation. I am satisfied that, on more than one occasion, Mrs Cartlidge and Mr Spencer were unable to demonstrate the full range of the Claimant's software functions. However, on this issue, Mr Chandarana's allegations were exaggerated. For example, I am not satisfied that Mrs Cartlidge and Mr Spencer "simply could not show what the system would look like" or that they "could not demonstrate the software". No doubt, on at least one occasion, some time was wasted at a workshop. However, no evidence was adduced that this was somehow causative of significant delay in the project as a whole nor does it furnish the Defendant with an evidential basis for the recovery of substantial damages.

28.4. The Defendant's employees did not always attend the workshops as required and, when they did so, they could not be relied upon to attend for the whole session. On at least one occasion, the Defendant cancelled a workshop at short notice. Mr Chandarana was frequently away on business trips abroad. When away, communication with him was not straightforward.

28.5. In March 2015, the Defendant appointed Mr Budd as its supply chain manager. Mr Budd confirmed, in his evidence, that from the time of his appointment, the delays were attributable to internal management issues within the Defendant. He referred to issues arising from the failure of the Defendant to appoint a full-time project manager, inadequate levels of stock, supply issues, the implementation of a decision to move a warehouse and attendant delays in the provision of data information.

28.6. Following his appointment in June 2015, Mr Davies was critical of the project and sought to challenge the Claimant's methodology and training methods rather than engaging positively with the Claimant to make some progress. The meeting on 21st July 2015 was attended by Mr Slater, Mr Chandarana and Mr Davies. I accept Mr Slater's evidence that they agreed to put the project back to September 2015 in order to accommodate the Defendant albeit on the understanding that the Defendant would continue to work on the data set up and the parties would work through a project initiation stage before re-starting implementation. However, in September,

the project was postponed again to give the Defendant time to engage a project manager and the Defendant put the Claimant's invoice or invoices on hold. At that stage, the Claimant envisaged that implementation would be re-started in early October 2015. In October, Mr Slater prepared a project initiation document or PID which Mr Gallagher emailed to Messrs Chandarana and Davies. However, Mr Gallagher did not hear anything further from them until 25th November when by an email that day, Mr Davies sought to remind Mr Gallagher that the Claimant's invoices were "on hold due to the progress of the project". By an email on 1st December 2015, Mr Gallagher sought to arrange a meeting later that month to discuss the issues that had arisen. By an email on 7th December 2015, Mr Davies indicated that Mr Chandarana was away on business and thus proposed that a meeting be arranged in the new year. The first date convenient for the Defendant was 4th February 2016.

29. The February 2016 Meeting was attended by Messrs Bird, Gallagher and Slater on behalf of the Claimant and Messrs Chandarana and Davies on behalf of the Defendant. It took place at the Defendant's businesses. The Claimant was unaware until significantly later that the Defendant took the opportunity to record the discussion. It did so covertly. A transcript of the recording has been obtained and admitted in evidence together with the oral testimony of the participants. Several issues were raised and discussed. A measure of agreement was reached.

    29.1. At the commencement of the meeting, Mr Chandarana acknowledged that the project had been delayed owing to the Defendant's lack of resources and "a few manufacturing issues…which have been taking priority". He gave the Claimant an assurance that "we're still committed to the project" but indicated that "we need another year just to get the right people in the right positions".

    29.2. Mr Bird stated that the Defendant owed the Claimant, in round figures, some £15,000 plus VAT on unpaid invoices together with additional amounts for services not yet invoiced. Mr Chandarana agreed to discharge the invoiced arrears in five equal instalments of £3,000 plus VAT commencing at the end of February 2016 and to make two monthly payments of £2337.50 against invoices to be delivered by the Claimant in respect of the balance.

29.3. The parties agreed to suspend the project with a re-start no later than 1st February 2017. This was first canvassed by Mr Slater and affirmed by Mr Chandarana. Later in the discussion, Mr Gallagher sought confirmation that "the start date of the project would be say February the first or sooner" and Mr Chandarana replied "yes, no…yes". In evidence, Mr Chandarana and Mr Davies both denied that the parties had agreed to re-start the project on or before 1st February 2017. Mr Chandarana stated that 1st February 2017 was merely one of a number of different dates mentioned and Mr Davies stated that the parties merely reached an understanding that the project would re-start around that time. However, their evidence on this was inconsistent with the transcript and in contradiction of the oral testimony of Messrs Gallagher, Slater and Bird whose evidence on the point I prefer.

29.4. At one point in the discussion, Mr Slater said he would provide the Defendant with "a resource profile" described as a "job role type of thing, of across that project timeline what type of resource from you, you need to provide into the project". To do so, however, he indicated that he would need information from the Defendant including "your preference on which modules you want to implement in which order".

29.5. At another point in the discussion, Mr Gallagher said "I'll need to put a piece of paper on_sign that will then be overriding quite a few terms and conditions in our contract". He thus gave the impression that the Claimant would wish their agreement to be embodied in a written agreement signed on behalf of the parties.

30. On balance, I am satisfied that, where the parties did reach agreement, their agreement at the February 2016 Meeting did not amount to a binding contract. Mr Gallagher's comments, recorded in the transcript, about the "the need to put a piece of paper on-sign" were made following a question in which he asked whether the Claimant could be provided with a confirmatory email. It is implicit that he envisaged there would be no binding contract until, at the very least, it had been recorded in a document approved by both parties. The comments were apparently made a significant time before the discussions were brought to an end and, when they were brought to an end, the parties did not allude, at that stage, to the need for a written agreement. However, Mr Gallagher was not challenged when he made his comments. Moreover, when the discussions were

brought to an end, no steps were taken to clarify and spell out the agreed terms in a way that might reasonably have been expected had the parties envisaged that a binding variation of contract would immediately take effect.

31. By an email dated 5th February 2016, Mr Davies asked Mr Bird to send him a copy of the "new contract to incorporate everything discussed yesterday". By email dated 16th February 2016, Mr Bird sent Mr Davies and Mr Chandarana a draft "Contract Variation Agreement" providing for the Defendant to make five payments of £3,064.40+VAT in respect of the outstanding invoices of £15,223.23+VAT and two further payments of £2,125+VAT. The draft agreement also provided that the Defendant "commit[ted] to a formal, resourced and prepared implementation restart by no later than February 1st 2017".

32. By emails dated 18th and 23rd February 2016, Mr Davies stated the draft had omitted to include items which he had expected to be included. By his email of 23rd February 2016, Mr Davies also asserted that the "project restart *specification*" (my italics) had not been raised at the meeting. On this basis, he requested Mr Bird to amend the draft agreement. Mr Bird declined to so. By an email dated 8th April 2016, he sought to remind Mr Davies that the project had been delayed at the Defendant's request owing to its "resourcing issues" and asked him to settle the outstanding invoices of £15,322.23+VAT so that they could re-engage and re-start the project, as agreed in "January/February 2017". In response, by an email dated 21st April 2017, Mr Davies raised a new issue in relation to the quantification of the invoices for £15,322.23, contending that no more than £7,225 was chargeable. In his reply dated 6th May 2016, Mr Bird disputed Mr Davies's calculation and pointed out that it was contrary to the agreement reached at the February 2016 Meeting. However, "in an effort to move this project forward", he agreed to accept £7,225+VAT only by treating it as a payment for 14.5 days under the Contract.

33. The draft agreement was never signed. However, mindful that the parties had reached an understanding that the project would be suspended until 1st February 2017, the Claimant did not take action with a view to the resumption of the project until January 2017.

(6) The correspondence leading up to the termination of the Contract.

34. By emails dated 3rd and 19th January 2017 to Messrs Chandarana and Davies, Mr Bird sought confirmation that the Defendant would be in a position to re-start the project "in February" or, at least that they intended to re-start "on the agreed date by the end of the month".

35. By his email dated 23rd January 2017, Mr Davies referred to "the fallout from Brexit" and stated that "the landscape seems to have changed quite dramatically". He then asked Mr Bird a number of questions, including "what has changed in the original software package:" and "where Sanderson has been implemented in similar sized organisations, how many people were in the implementation team together with the individual roles Simtom has to fill". By email dated 13th February 2017, Mr Bird advised that there had been "no software changes that would impact on the delivery of the contracted solution". However, he also indicated that any questions relevant to the project would be covered at the "project kick-off meeting". He thus requested Mr Chandarana and Mr Davies to provide a date for the project kick off meeting within the next 4 weeks and warned that "failure to restart the project before the end of March 2017 will leave us little choice but to consider the contract to have been frustrated(sic)".

36. Mr Davies responded in a lengthy email dated 21st February 2017 with a mixed series of comments and questions. He maintained that he was "surprised" and "puzzled" by a number of Mr Bird's observations, including the suggestion that the module updates should be discussed at the project kick-off meeting rather than provided to him in writing in advance. He also required the Claimant to specify, in advance of the meeting, the "resource requirement, both numbers and knowledge requirements" and, by implication, the "required ongoing support post implementation as it seems we will have both hardware and software capability requirements" and "information as to how "similar sized organisations manage this requirement(sic)". He asked the Claimant whether the Claimant's "product and hardware solution [was] now an outdated solution".

37. Contrary to Mr Chandarana's acknowledgments at the February 2016 Meeting (to which I have referred in Paragraph 30.1), Mr Davies asserted that "the numerous issues which arose in 2015…was (sic) down to your project manager producing unrealistic plans which had no realistic prospect for success". He also stated that "in this light we would like full

details of your proposed Sanderson appointee as clearly we cannot accept a repetition of what happened in 2015. We need to have our confidence fully in place before we can proceed". Once that stage was reached, the Defendant's own project manager would "devise a workable project plan and Sanderson's role in the project" was to be reduced to the role of "the senior supplier".

38. In the final paragraph of his 21st February 2017 email, Mr Davies contended that, contrary to Mr Bird's comments, "we have never committed to any specific date, as you seem to believe, to start the project".

39. When Mr Bird replied to state that the Claimant was considering its response, Mr Davies again expressed surprise, maintaining that "I am only looking for straightforward replies to straight questions".

40. At this stage, Mr Bird instructed solicitors, Aaron & Partners LLP. By letter dated 28th April 2017, they advised the Defendant that by rejecting the Claimant's position and seeking to impose its own, new and onerous terms on the Contract, it was in repudiatory breach. Notice was then given that the Claimant accepted the Defendant's repudiatory breach so as to bring the Contract to an end.

41. By his un-dated letter in reply-apparently transmitted by fax on 11th May 2017-Mr Chandarana stated that "in February 2016 it was agreed to put a standstill on the original contract. There was no firm agreement by either party to reinstate it…" He also stated that "our recent emails do not resile from any agreement" and that "both parties stepped away from the original agreement and there was no agreement to revive it. Therefore, with no agreement in place there can be no repudiatory breach".

42. Ultimately, on 4th October 2017, the Claimant issued the current proceedings in which it seeks damages for breach of contract. By its Defence and Counterclaim dated 30th October 2017, the Defendant contended that, by attempting to terminate the Contract, the Claimant had itself committed a repudiatory breach. On this basis, the Defendant accepted the Claimant's repudiatory breach and sought to recover damages for breach of contract calculated with reference to the amounts that it had already paid to the Claimant.

(7) How, when and on what basis was the Contract brought to an end?

43. Following the delivery of the parties' written closing submissions dated 11th and 18th January 2019, the essential issues between the parties can be characterised in simple and straightforward terms. Did the Defendant commit a repudiatory breach and renounce the Contract by declining to co-operate with the Claimant in re-starting the project in February or March 2017? How, when and on what basis was the Contract brought to an end?

44. At one point, there was an issue whether the Claimant was entitled to pursue a claim, analogous to an action for the price, in respect of some outstanding arrears of payment prior to termination. By his closing written submissions, Mr Cook abandoned this part of his claim on the basis that the Defendant was furnished with a good defence based on the principle of equitable forbearance. The claim is thus limited to damages for breach of contract.

45. Conversely, the Defence and Counterclaim includes an assertion that the Claimant committed repudiatory breaches of its implied contractual obligations to carry out its services with reasonable skill and care and to do so within a reasonable time in support of the Defendant's own case for rescission. However, Mr Jenkins did not pursue such a case in his closing written submissions. He submits that "the Claimant was…responsible for a number of failings through to mid 2015" but deploys this submission in response to the contention that the Defendant renounced the Contract. He was and is wise to limit his case in this way. In my judgment, there is no room for the proposition that the Claimant committed repudiatory breaches of contract prior to the February 2016 Meeting. However, in the hypothetical event that the Claimant had done so, the Defendant would plainly have affirmed the Contract when it agreed to observe the revised payment schedule and re-start the Contract in 2017.

46. In the event that the Claimant succeeds in its claim for damages, I indicated to counsel, during the opening of the trial, that there was insufficient evidence for me to assess the quantum of its claim for loss of profit and it was agreed that, on this hypothesis, the assessment of damages will be dealt with separately.

47. The critical issue that remains is whether the Defendant committed a repudiatory breach and renounced the Contract when it declined to co-operate with the Claimant in re-starting the project in February or March 2017.

48. The Defendant did not expressly renounce the Contract. The question is thus whether, by words or conduct, it evinced an intention to abandon and refuse to perform its obligations under the Contract. For this purpose, a contracting party is to be treated as having refused to perform its obligations if it evinces an intention to perform but "only in a manner substantially inconsistent with [its] obligations and not in any other way", *Ross T Smyth & Co Ltd v TD Bailey, Son & Co [1940] 3 AER 60,72* per Lord Wright. The same is true if it refuses to perform unless the innocent party complies with conditions not required by the Contract, *BV Oliehandel Jorgkind v Coastal International Ltd [1983] 2 Lloyd's Rep 463.* However, "a party who takes action relying simply on the terms of the contract, and not manifesting by his conduct an ulterior intention to abandon it, is not to be treated as repudiating it…", *Woodar Investment Ltd v Wimpey Construction UK Ltd [1980] 1 WLR 277, 283A per Lord Wilberforce*. The overall question is thus to be addressed by "looking at all the circumstances objectively, that is from the perspective of a reasonable person in the position of the innocent party" and asking whether "the contract-breaker has clearly shown an intention to abandon and altogether refuse to perform the contract", *Eminence Property Developments Ltd v Heaney [2011] 2AER (Comm) 223 at Para 61, Etherton LJ.* I shall address this question with reference to the circumstances on 28th April 2017, which is the date on which the Claimant elected to accept the Defendant's putative breach and thus terminate the Contract.

49. In my judgment, the Defendant renounced the Contract according to these principles.

    49.1. It was an implied term of the Contract that the parties would co-operate closely with one another to give effect to the project (see Paragraph 25 above). Without such co-operation, failure of the project was inevitable.

    49.2. At the February 2016 Meeting, the parties informally agreed to suspend and re-start the project no later than 1st February 2017. From that date, at the latest, they were again under a duty to collaborate with one another in doing so. The Claimant's role was in part advisory and, in that capacity, it was entitled to assume that the Defendant would act on its reasonable advice and guidance. When, by his email dated

13th February 2017 Mr Bird asked the Defendant to provide him with a date for the "project kick-off meeting within the next four weeks", he was reasonably entitled to assume that the Defendant would co-operate with him in doing so.

49.3. By declining to co-operate with the Claimant in providing such a date and making the necessary arrangements for the project kick-off meeting, the Defendant committed a clear breach of its contractual commitments.

49.4. Not only did the Defendant decline to co-operate in making arrangements for the project-kick off meeting. By his email dated 21st February 2017, Mr Davies:

49.4.1. demanded written answers to a series of questions, many of which could more conveniently have been dealt with at the meeting itself;

49.4.2. sought to cast responsibility on the Claimant, rather than the Defendant, for the "numerous issues which arose in 2015";

49.4.3. stated that "we need to have our confidence fully in place before we can proceed"; and

49.4.4. asserted, baldly, that the Defendant had "never committed to any specific date" notwithstanding the discussions at the February 2016 Meeting and Mr Chandarana's confirmation, in answer to a question from Mr Gallagher, that the project would re-start on 1st February or sooner.

49.5. Given the context in which Mr Davies sent the 21st February 2017 Email, any reasonable person in the Claimant's position would have been entitled to infer that the Defendant had no intention of performing in strict compliance with its contractual commitments. In particular, it would have been apparent that the Defendant did not accept that it was under an immediate obligation to proceed with the project at that stage.

49.5.1. Contrary to the impression given by Mr Davies, the parties had agreed to suspend the project at the Defendant's request in order to meet its own lack of resources or, at least to accommodate the Defendant's unwillingness to commit such resources. The reasonable recipient would thus have been minded to look

beyond the 21st February 2017 Email in considering the Defendant's want of co-operation.

49.5.2. The most obvious explanation for the Defendant's want of co-operation is that it was no longer ready, willing or able to proceed with the project, at least in accordance with its contractual commitments. From the time of his appointment, Mr Davies did nothing to conceal his hostility to the project. According to Mr Slater's oral testimony, Mr Davies advised him, as early as 1st June 2015, that he didn't want to see the incorporation of any new systems whilst he was still in work. His account of this was disputed by Mr Davies. However, on this point, I prefer the evidence of Mr Slater. It was based on his own specific recollection of a discussion on the occasion of their very first meeting. It is also consistent with a comment from Mr Slater at the end of the February 2016 Meeting ("I just thought about Andy who said, 'I've only just put one system in and I was hoping to retire before I put the next one in".) Moreover, the Claimant and any reasonable recipient with the same knowledge and information would have been mindful of the failure of the Defendant, from the outset, to accommodate the project properly or commit the resources it required.

49.6. In his written closing submissions, Mr Jenkins pointed out that, contrary to his comment at the February 2016 Meeting, Mr Slater did not provide the Defendant with "a resource profile". In cross examination, Mr Slater accepted that this was the case although he pointed out that he did not receive, from the Defendant, the information he required to prepare it. In reality, both parties overlooked Mr Slater's comment at the February 2016 Meeting and it did not feature in the exchange of emails between the parties prior 28th April 2017.

49.7. The 21st February 2017 Email was written in response to Mr Bird's email dated 13th February 2017 in which the Defendant was warned that "failure to restart the project before the end of March 2017 will leave us little choice but to consider the contract to have been frustrated". In answer to a question from me, Mr Davies indicated that he understood "frustrated" to bear the meaning "terminated" rather than its strict legal meaning and, in my judgment, the 13th February 2017 Email is to

be construed in that way. On that basis, the comments and requisitions in the 21st February 2017 Email could reasonably be viewed as a smokescreen for enabling the Defendant to avoid its contractual commitments.

49.8. In any event, it is striking that the Defendant allowed the March deadline to pass without taking any steps to offer dates for a project kick-of meeting or to do anything to co-operate in the provision of such a meeting. Once this deadline had passed, the Claimant was reasonably entitled to infer that the Defendant had no intention of performing its obligations under the Contract.

50. In my judgment, the Defendant renounced the Contract by declining to co-operate with the Claimant in re-starting the project at any time in February or March 2017. It forms no part of the Defendant's case that the Claimant subsequently elected to affirm the Contract. The Contract was thus brought to an end when, by letter dated 28th April 2017, the Claimant's solicitors, Aaron & Partners LLP, accepted the Defendant's repudiatory breach.

(8) Disposal

51. The Claimant is thus entitled to judgment on liability with damages to be assessed. I shall hear further from counsel in relation to consequential directions and the issue of costs.