Neutral Citation Number: [2025] EWHC 187 (Ch)

Case No: CH-2024-000053

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
CHANCERY APPEALS (ChD)

ON APPEAL FROM THE ORDERS OF DEPUTY MASTER GLOVER DATED 27 NOVEMBER 2023 AND 5 FEBRUARY 2024

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

Date: 31/01/2025

Before :

DEPUTY HIGH COURT JUDGE LANCE ASHWORTH KC

- -

Between :

MANAGEMENT INFORMATION CENTRE LIMITED	**Claimant/ Respondent**
- and -	
ROYAL BERKSHIRE NHS FOUNDATION TRUST	**Defendant/ Appellant**

- -
- -

Shail Patel KC (instructed by **Hill Dickinson LLP**) for the **Claimant/Respondent**
Steven Reed (instructed by **Capsticks Solicitors LLP**) for the **Defendant/Appellant**

Hearing date: 20th December 2024
Judgment: 31st January 2025

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Approved Judgment

This judgment was handed down remotely at 10.30am on Friday 31 January 2025 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Lance Ashworth KC:

1. This is an appeal by the Defendant, Royal Berkshire NHS Foundation Trust, against the orders of Deputy Master Glover:
   (a) dated 27 November 2023, whereby in response to the Defendant's application to strike out the Particulars of Claim and/or to grant summary judgment to the defendant against the Claimant, Management Information Centre Limited, he granted the Claimant permission to amend its Particulars of Claim "*within the terms and scope detailed and recorded in the Court's ex tempore judgment*" and made no order as to costs on the Defendant's application; and
   (b) dated 5 February 2024, in which he dismissed the summary judgment and strike out application and refused permission to appeal.

2. By order dated 16 May 2024, permission to appeal was granted by the Honourable Mr Justice Green on all 5 grounds relied upon by the Defendant.

3. In the appeal the parties have been represented by the same counsel as below, namely Mr Steven Reed for the Defendant and Mr Shail Patel KC for the Claimant. I am grateful to both counsel for their well-focussed arguments both written and oral, which have been of great assistance.

The Background and original Statements of Case

4. The Defendant is an NHS Trust. As part of its operation it requires computer systems and support. It has a supplier, Ultima Business Solutions Limited ("Ultima") which provides general day to day IT administration and management services, including helpdesk support and connectivity and security issues.

5. In addition to having Ultima, the Defendant also contracted with the Claimant. The nature and terms of that contract lie at the heart of this dispute. It is not in dispute that the Claimant provided the Defendant with the services of a number of IT specialists either at the Defendant's sites or working remotely ("the Specialists") over a period from 2015 to June 2022. The number of Specialists working at any particular time is not agreed. The Specialists were not employees of the Claimant, but appear to have been self-employed IT specialists.

6. The Claimant, in the original Particulars of Claim, which were settled before the Claimant was aware of the role of Ultima, asserted (at paragraph 4.3) that the Specialists carried out general, day to day IT administration and management services, essentially comprising an outsourced IT department, which it defined as "the Services". It pleaded that the Claimant raised "Project Proposals" which set out in very high level terms the services being provided in the coming weeks or months and contained a lump sum quotation for that work. The statement of case acknowledged that a number of such Project Proposals would be live at any given time. Payment, it was pleaded, was made against invoices "*which purportedly related to those Project Proposals*". The original Particulars of Claim (at paragraph 4.5) set out the Claimant's understanding that the purpose of the arrangement was that the Defendant was only able to meet the Claimant's fees in respect of "projects" and did not have a sufficient budget for general IT services or an outsourced IT department. The payments were structured this way in order to get round budgetary restrictions. The

Claimant pleaded that the gross fees payable by the Defendant to the Claimant were significant, with revenue for the 12 months to June 2022 being £3,512,837.

7. At paragraphs 5 to 7 of the original Particulars of Claim, it was pleaded:

> "5. *Prior to disclosure herein, and for the reasons explained below, the Claimant is unable to provide full particulars of the formation of the contract for the provision of the Services. The Claimant reserves the right to plead further in due course. Without prejudice to the foregoing:*
>
> > *5.1. It is to be inferred that in or around 2015, Mr Dixon and/or Mr Bekim Shebani and/or others behalf of the Claimant agreed orally or in writing with Mr Robinson and/or others on behalf of the Defendant that the Claimant would provide the Services in the manner described in paragraph 4 herein, for the fees agreed from time to time (alternatively for a reasonable fee), and terminable by either party on reasonable notice.*
> >
> > *5.2. Alternatively the provision of the Services in the expectation of remuneration in respect thereof, the Defendant's express and/or implied requests for the Services, and/or the payment made by the Defendant for the Services from around 2015 onwards, gave rise to an implied contract for the provision of the Services for the fees agreed from time to time (alternatively for a reasonable fee), and terminable by either party on reasonable notice.*
>
> *(hereafter "the Contract")*"
>
> *"6. Further, in light of the scope, duration and fees payable under the Contract and the high level of cooperation required between the Claimant and Defendant for the Services to be provided over time, the Contract was a relational agreement pursuant to which the parties owed one another implied duties of good faith.*
>
> *"7. The Claimant avers that as at June 2022, reasonable notice for termination of the Contract was 9 months, alternatively such period as the Court should determine."*

8. The original Particulars of Claim pleaded that on 24 June 2022 the Defendant "*emailed the Claimant purporting to terminate the Contract, with a purported date for cessation of the services of 30 June 2022*". It is said that the former directors of the Claimant, who left after the Claimant was purchased by its current owners on 1 January 2022, set up a new company and effectively took over the provision of services with effect from 1 July 2022 through the same Specialists. The effect of this was to cut out the Claimant.

9. The Claimant asserts that the actions of the Defendant amounted to a repudiation of the Contract, which repudiation was accepted in July 2022. Damages were sought being the loss of profit which the Claimant says it would have made in the 9-month termination period, estimated at £590,862, alternatively damages in the same sum for breach of an obligation of good faith.

10. By its Defence, the Defendant denied that the Claimant was engaged to provide a service in the nature of a fully outsourced IT solution, saying this was what Ultima provided. Rather it said that the Claimant was engaged to deliver services for specific projects on a

project by project basis. The Defendant says that each project was governed by a separate agreement, with an agreed scope of works for an agreed price. The Defendant engaged the Claimant repeatedly between 2015 and June 2022, but it says that this was on a series of different projects; there was no overarching agreement. The allegations as to the budgetary restrictions were denied. It is admitted that the sums paid were substantial and the Defendant provides a higher figure of £4,174,571.26 for the fees paid in the 12 months to June 2022.

11. As to the Contract pleaded, the Defence averred that the Claimant had failed to identify or plead the existence of an offer and/or acceptance and/or an intention to create legal relations and/or the terms of the purported agreement. It was said that the original Particulars of Claim disclosed no reasonable grounds for bringing the claim.

12. The Defence dealt at paragraph 17 with the matters alleged in paragraph 5.1 of the original Particulars of Claim, asserting that no basis had been identified for the alleged inference that in or around 2015 the Claimant agreed orally or in writing with the Defendant "*that the Claimant would provide unspecified services, for unspecified fees, for an unspecified period of time pursuant to an overarching agreement*". The Defence identified other deficiencies in the original Particulars of Claim, which it effectively suggested were fatal to the claim.

13. At paragraph 18 the implied contract alleged in paragraph 5.2 of the original Particulars of Claim was denied, it being said that the conduct relied on was not sufficient to infer a common intention by the parties to be bound by a legally effective contract. As with the express agreement claim, there was a complaint that no terms had been properly identified or pleaded such that the agreement lacked any substantial content and certainty to be enforceable.

14. The Defence went on to deny any "relational contract" and that even if there was such a contract that it was denied it would include an implied duty of good faith. It also denied that even if there was an overarching agreement, a reasonable notice period would be 9 months.

15. It is admitted that the Defendant engaged a new company (or two new companies) to provide the services which the Claimant had been providing prior to 30 June 2022, that those companies engaged the Specialists and that the former directors of the Claimant were directors of one of those companies.

16. The Defendant served very substantial initial disclosure with its Defence, comprising invoices (cross referenced to purchase orders) from March 2015 to June 2022, purchase orders from June 2018 onwards, "Project Proposals" from August 2021 and Completion Reports covering roughly the same period. Although they were included in the bundle for the appeal, I was not taken through these. I have, however, had a look at some of them.

The Strike Out/Summary Judgment Application

17. On 26 May 2023, the Defendant applied to strike out the Claim Form and Particulars of Claim under CPR rule 3.4(2)(a) and (b) because the statements of case disclosed no

reasonable grounds for bringing the claim and/or were an abuse of process. In the application notice reverse summary judgment was also sought along with costs. The application was supported by the first witness statement of Jane Barker of the same date. She exhibited the "extensive" pre-action correspondence and went on to explain the basis for the application in some detail, which effectively amounted to submissions.

18. This was met by a witness statement of Andrew Little dated 23 June 2023 on behalf of the Claimant, the first part of which to a large part repeated the contents of the original Particulars of Claim. In paragraphs 18 to 21, Mr Little explained that the Claimant's current directors do not have access to the detailed historic correspondence or documentation between the Claimant and the Defendant. This is said to be as a result of the former management of the Claimant having manually deleted the emails between the Claimant and the Defendant, one email inbox having no emails sent or received prior to 21 February 2022 and the other one having only 4 emails prior to that date. Mr Little said that attempts to recover relevant emails were ongoing, but that it appeared that the emails had been deleted by someone with IT experience in order to prevent recovery, the suggestion being that it must have been one of the two who went on to found the company which subsequently took over the provision of services to the Defendant.

19. Mr Little said that they had accordingly asked the Defendant for relevant correspondence and documents, but that the Defendant had not supplied these and had provided no explanation as to why it would not disclose the communications. The inference he was asking the Court to draw was that these would be supportive of the Claimant's case that there was an overarching contract and would be highly damaging to the Defendant's case. His witness statement went on, at paragraph 45 following, to make submissions as to the validity of the strike out/summary judgment application with references to authorities. I do not repeat that here. He addressed the witnesses the Claimant anticipated it might call to provide evidence on the formation of the agreement. They were all employees of the Defendant (although a couple have subsequently left the Defendant), who had been written to in order to make arrangements for them to provide evidence. He did not identify either of the former managers of the Claimant, presumably because he knows that they will be hostile and/or unwilling to assist.

20. Mr Little identified various email correspondence, which he said supports the Claimant's case, including a chain between 28 February and 3 March 2022 referring to the Defendant having "*contracts in place with all 3",* which included the Claimant, and an email of 24 June 2022 in which Mr Robinson on behalf of the Defendant referred, among other things, to there being an "*agreement from 2017, that the [Defendant] is able to give 1 week's notice to terminate any resources*". He relies on these as undermining the Defence that the only contracts in place were the ones under the Project Proposal documents and there was not an overarching contract.

21. Mr Little's witness statement was responded to by a very short second statement of Jane Barker dated 6 July 2023.

The Deputy Master's Judgment

22. The application came before Deputy Master Glover on 18 September 2023. Due to the time at which the hearing concluded, the matter was adjourned for what he described in his

judgment as an "extemporaneous judgment". But given that the judgment was given on 27 November 2023, I assume that this was a typographical error and meant to refer to a reserved judgment, albeit he may have given it orally.

23. In his judgment he set out the background, the witness evidence, the pleaded cases and the basis for the application before turning to the law. He set out the provisions of CPR Part 3.4 and some of the commentary on that from the White Book 2023. He referred to the pleading requirements in the Practice Direction to CPR Part 16 in relation to claims in contract, before setting out CPR Part 24.2 on summary judgment and some of the notes from the White Book, in particular from paragraph 24.2.3, where the well-known and oft-cited decision of Lewison J (as he then was) in *Easyair Ltd v. Opal Telecom Ltd* [2009] EWHC 339 (Ch) was summarised.

24. The Deputy Master then turned to the parties' submissions. One of the matters he recorded was that Mr Patel clarified that the Claimant's case was not that the Contract was agreed orally or in writing, but rather that it was agreed "*orally and/or in writing*" and paragraph 5.1 of the original Particulars of Claim should have said this. At paragraph [30] of his judgment, the Deputy Master said:

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

25. Having noted the pleaded Defence in relation to the role played by Ultima, and that as a result Mr Patel accepted that the reference to an "*IT department*" in paragraph 4.3 of the original Particulars of Claim "*may be misleading*", the Deputy Master said at paragraph [34]:

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

26. The Deputy Master then went on to consider the allegation in the original Particulars of Claim that the contract between the parties was a relational agreement in which the parties owed each other implied duties of good faith. He cited from the judgment of Fraser J (as he then was) in *Bates v. The Post Office Ltd. [No. 3: Common Issues]* [2019] EWHC 606 (QB) before going on at paragraphs [36]-[37] to say:

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

"37. In my judgment, Mr Patel was right to make this concession, including within the context of the Claimant's changed position regarding the scope of the services it provided. The Claimant's Particulars of Claim should provide sufficient particulars of the relevant circumstances that gave rise to a relational contract including the commercial context and instances of good faith which are claimed arise in this case, with clear particulars as to how it is claimed the Defendant was in breach of the same. Better particulars will provide the Court with a map and compass, in what the Claimant says is unchartered legal territory."

27. The Deputy Master next considered some of the evidence which had been put before him addressing these under the headings of "Standard Terms & Conditions", "Dates on contractual documentation", 'Project Proposals", "The Claimant's case theory", "Master spreadsheet re costs" and "Call-Off Contract", before moving to the topic "Evidence in support of an overarching agreement". Without intending any disservice to the Deputy Master, I do not repeat here his analysis, but the following extracts from these sections of his judgment are, in my judgment, the most pertinent for the purposes of this appeal:

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

"63. Having considered this Project Proposal, I do not accept for the purposes of this application, that the Project Proposal was so inadequate such as to support an inference that it was a mere device to conceal a wider overarching agreement."

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

"73. … The Claimant's primary claim seeks damages for nine months' notice period. It is advanced on the basis that the Court needs to find that the relationship between the parties was, in reality, (i) governed by some form of overarching agreement, which (ii) was contrived to access the public purse. My judgment, for

the purposes of this application, is that the Claimant's submission on the first limb of that case theory is weak, and the second limb is not well-founded."

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

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

"89… it is a common (if not universal) requirement for a supplier to a public body to enter into a Call-Off contract. Disclosure in this claim may well reveal such a contract having been entered into by the parties, earlier in their relationship."

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

28. The Deputy Master then set out his conclusions at paragraphs [98] to [105] of his judgment as follows:

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

"99. The Court has regard to the need for pleadings to contain that information called for by the Rules and Practice Directions. However, the Court has to have regard to the particular circumstances prevailing in a case when considering whether a party has done all it can to reasonably plead the best particulars it is able to provide. Save for discrete matters set out in this judgement which require amendments to the Particulars of Claim, I accept the Claimant's submission that it has pleaded its case on the formation of the contract as well as it was able. The

case is not so obviously deficient or hopeless that strike out is the right course at this moment, and in my judgment, the Claimant should be given the opportunity to amend its Particulars of Claim."

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

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

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

"103. There are documents before the Court, in particular, in the form of emails set out in this judgment, which suggest that an overarching contract may have been entered into between the parties, which did include a notice period. It would not be unusual for such a contract to exist, as between an NHS trust and a service provider. I have seen no evidence which enables me to ignore the Claimant's submissions that disclosure may reveal the details of such a contract, which may be relevant to its claim. I have not seen, for example, witness evidence from Heather Allan that removes the significance of her February 2022 email, or from Mr Robinson which explains his reference to "the agreement in 2017" in his email dated 24 June 2022. I do not have witness evidence from Mr Dixon or Mr Robinson going to the Claimant's primary claim and indicating, for example, that they would give evidence at trial that would only support the Claimant's case. It is clear that these characters will be called as witnesses at any trial, and their evidence will very likely be central to the Court's determination of this claim."

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

> *"105. In my judgment, it is not appropriate at this juncture for the Court to dispose of the claim summarily under Part 24, or to strike out part or all of the pleaded claim, including by grappling with discrete points of law which will be impacted by the required amendments, and may thereafter be best left to be dealt with at a trial. In my judgment, whilst the Claimant's claim appears to be weak, the claim does have a real prospect of success and I cannot be certain that the claim or part of the claim will fail. …"*

29. When permission to appeal was sought from the Deputy Master on the same grounds for which permission was ultimately given by Green J, the Deputy Master produced a lengthy form N460 setting out the reasons why permission was being refused. Those included reference back to a number of the documents to which he had referred in his judgment and criticised the Defendant for not producing evidence/witness statements from individuals who were party to those documents.

The Amended Particulars of Claim

30. The Claimant took the opportunity provided to amend its Particulars of Claim, serving these on 12 January 2024. The first key amendment was to paragraph 4.3 to delete the claim that what the Claimant provided was a fully outsourced IT department, alleging that what the Claimant alleged was still an outsourced IT solution, identifying certain areas including systems integration consultancy and digital strategy consultancy. These were defined as "the Services" for the purposes of the Amended Particulars of Claim.

31. Paragraph 5.1 was amended so as to change the date of the inferred agreement from "in or **around** 2015" to "in or **after** 2015" as well as making the change from "orally or in writing" to "orally and/or in writing". Otherwise no changes were made to paragraphs 5.1 or 5.2 of the Particulars of Claim.

32. A wholly new paragraph 5A was introduced which sets out in some detail facts and matters on which the Claimant relies in support of its case that there was a continuing agreement terminable on reasonable notice. These included a number of the matters that were mentioned in the Deputy Master's judgment. One of those was reference to a framework agreement covering the period 1 March 2020 to 31 March 2022 called the "G-Cloud 12 Call-Off Contract" (defined as the "Call-Off Contract"). The Claimant does not allege the Call-Off Contract was entered into, rather it is unable to say if it was, but says that this demonstrates "*that the parties considered that they were already in a continuing relationship requiring a significant notice period for termination*".

33. Additionally, paragraph 6 was substantially amended in support of the case that this was a "relational agreement" which carried with it an implied duty of good faith. At paragraph 6.6, the pleader introduced what appeared to be a new implied term, namely one that the Defendant would not seek to solicit the Specialists or engage them directly or indirectly without the Claimant's consent. In the course of his oral submissions before me, Mr Patel said that despite the way this is pleaded, it was merely a facet of the duty of good faith.

The Grounds of Appeal

34. Permission to appeal was given by Green J on 5 grounds. These are:

> Ground 1:
> The Deputy Master was wrong not to strike out or enter summary judgment in respect of paragraph 5.1 of the Claimant's Particulars of Claim. Paragraph 5.1 did not contain sufficient pleadings as to the formation of the alleged contract such as to demonstrate reasonable grounds for bringing the claim and/or a real prospect of success.
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> Ground 2:
> The Deputy Master was wrong not to strike out or enter summary judgment in respect of the Claimant's claim on the basis that, even if bare contractual formation is established, the agreement pleaded lacks any or any substantial content and, as such, lacks sufficient certainty to evidence the parties' intentions and to be enforceable.
>
> Ground 3:
> The Deputy Master was wrong not to strike out or enter summary judgment in respect of the Claimant's claim that an overarching agreement between the parties could be implied.
>
> Ground 4:
> The Deputy Master was wrong not to strike out or enter summary judgment in respect of the Claimant's claim in relation to the alleged 'relational contract'. The Claimant had failed to plead the basis for the implied term of good faith required to found a relational contract. Alternatively, the Deputy Master erred in law because he failed to recognise that an implied term of good faith is required in order to found a relational contract.
>
> Ground 5:
> The Deputy Master's decision to make no order as to costs was wrong. Although the Appellant's application was dismissed, the Deputy Master's order for the Claimant to amend numerous aspects of its Particulars of Claim demonstrates that the Appellant succeeded in making good the criticisms it had advanced in its application. In the circumstances, the Deputy Master should have made a costs order in the Appellant's favour.

35. I have seen Green J's reasons for granting permission to appeal. He deliberately only provided short reasons as the substantive decision had to be left to the judge hearing the appeal itself. In so far as I do not come to the conclusions that he ruled were arguable, it is because I have had the benefit of much more detailed submissions than he had when considering the application for permission.

Submissions on the Appeal

36. It was common ground between Counsel that this is a "true" appeal, that is to say a review hearing. Accordingly, the Defendant has to establish that the Deputy Master was wrong as a matter of law in coming to the conclusions that he did, or in the case of ground 5 that he exercised his discretion on the question of costs in a manner which no reasonable tribunal could have done. That may well turn on whether any of the other grounds are successful.

37. It was also common ground that given that Amended Particulars of Claim have now been filed, the question of strike out and summary judgment now has to be considered in respect of the amended pleading, even though that was not before the Deputy Master.

38. A point made by Mr Patel on behalf of the Claimant in both his oral and his written submissions was that the Defendant has in places elided the issues of strike out and summary judgment. On the strike out application, he submits, one has simply to look at the Claim Form and Amended Particulars of Claim and ask whether they disclose a reasonable cause of action upon the assumption that the facts pleaded are true. By contrast on the summary judgment application, the Court asks the question whether on all that is known at this stage (including what might come out subsequently in disclosure), but without holding a mini-trial, it can be said that the claim has no real prospects of success, that it is whether it is more than merely fanciful. As to these principles, he says that the Deputy Master correctly stated the principles from the *Easyair* judgment.

39. I accept Mr Patel's submission that the issues of strike out and summary judgment need to be considered separately. I also accept that the Deputy Master correctly set out the principles from the *Easyair* judgment. I do not repeat them again here. The question is whether the Deputy Master correctly applied them.

40. I did not hear submissions on ground 5 as the decision on costs may well be affected by the decisions on grounds 1 to 4. I will therefore receive written submissions on costs, including so far as is necessary the costs order made by the Deputy Master, once this judgment has been handed down.

Ground 1

41. Mr Reed submits on behalf of the Defendant that the pleading of an overarching agreement is no more than an assertion that because services were provided to the Defendant over a period of time, there must be what is now alleged to have been an oral and/or written agreement. There is still no attempt made by the Claimant to identify the written agreement in breach of paragraph 7.3 of PD16. Further, there is no attempt to identify the necessary elements of the oral agreement also in breach of PD16, namely paragraph 7.4. Nor does the pleading identify the individual on behalf of the Claimant and the individual on behalf of the Defendant who made the agreement, rather there are a number of options identified as to who could have been the relevant individual.

42. He submitted that the mistake that the Deputy Master made was to say that there was no dispute as to the existence of a contract and that this was not a case where a party is fishing for a contractual basis to a relationship (see paragraph 6 of the Deputy Master's reasons on the N460 form). He points out that it is illogical to have an overarching agreement in writing simply because services have been provided. And further that in the absence of the Claimant identifying the document in which there is an overarching agreement, it cannot succeed.

43. Mr Reed submitted that the Deputy Master was wrong to take the view that the Claimant had pleaded its case as well as it is able to do so. It had not made any attempt to ask the people it had identified in the original Particulars of Claim (this has not changed in the

Amended Particulars of Claim) what the terms were of the agreement, whether they agreed an overarching contract and if they did so orally. It was therefore wrong of the Deputy Master to have given the Claimant another go at pleading the contract on the basis it could remedy the deficiencies by amendment, as they were never going to be capable of remedy. This, he submitted, is demonstrated by the Amended Particulars of Claim, which far from remedying the deficiencies, if anything makes them worse. He pointed to the 2 amendments to paragraph 5.1 (which I have set out above), submitting that these made the claim even more vague as now the claim is not that the agreement was made "*in or around 2015*", but is now "*in or after 2015*". This makes the alleged agreement even more uncertain than it was before, as the time period now runs for a period of 7 years (the parties having terminated whatever relationship they had in July 2022 at the latest, when the Claimant said it was accepting the Defendant's alleged repudiatory breach of contract). Further rather than it being asserted that the overarching agreement was in writing or oral, it is now alleged it was in writing and/or oral. This makes it more difficult to tie down rather than clearer. None of this is cured, he submitted, by the contents of paragraph 5A of the Amended Particulars of Claim.

44. Mr Reed therefore submitted that the original Particulars of Claim at paragraph 5.1 were strikable and that the Amended Particulars of Claim were equally so.

45. In the alternative, he submitted that even if it was not strikable, there should be summary judgment on paragraph 5.1 as it has no real prospect of success and that the Deputy Master was wrong to conclude that the Claimant was not fishing for an overarching contractual relationship. As to the question of whether further information may become available, I was referred to the judgment of Lord Hamblen JSC in *HRH Emere Gowin Bebe Okpabi v. Royal Dutch Shell plc* [2021] 1 WLR 1294 at paragraphs [127]-[128] that the test is whether there are "*reasonable grounds for believing that disclosure may materially add to or alter the evidence relevant to whether the claim has a real prospect of success*". I was also referred to paragraphs [21]-[22] of the judgment of Cockerill J in *King v. Stiefel* [2021] EWHC 1045 (Comm) concluding that it is not enough to say, with Mr Micawber, that something may turn up.

46. Mr Reed submitted that the Claimant had come nowhere near meeting the burden of proving there was such disclosure. In essence, he complained that what the Claimant has done is produce a place holder of a claim, saying that some documents might exist to support it. The letter before action did not ask with any specificity for documents, rather the request for documentation was very widely drawn, so nothing could be drawn from the failure to respond to that. He made the point that the Claimant had not sought pre-action disclosure. Having not done so, the effect if this matter were to proceed any further would be that the Defendant would be being put to enormous expense to go through a disclosure exercise covering the period 2015 to 2022 inclusive to prove a negative.

47. As to that part of the agreement which was alleged to have been made orally, Mr Reed submitted that the Claimant is not planning on calling as witnesses any of individuals from the Claimant's side who are alleged to have been party to the conversations. And it is not realistic to think that anyone from the Defendant's side would give evidence on behalf of the Claimant, while the one individual from the Defendant's side identified in the pleading is not even one of those people the Claimant has asserted might be called to give evidence.

48. Mr Patel on the other hand pointed out that there was a relationship which lasted from 2015 to 2022 and that there must be documents from the time the relationship began which the Claimant does not have, because the outgoing management appears to have destroyed them all. He submitted that the Claimant did not just walk into the hospital and start working, there must be documents that go to the question of what the parties were agreeing to, be they notes of meetings, emails or WhatsApp messages. No documents have been produced by the Defendant, but the Defendant has not suggested it does not have documents. He complained that the Defendant has been cherry picking documents.

49. He referred me to the decision of Mann J in *Gulati v. MGN Ltd* [2013] EWHC 3392 (Ch), one of the phone hacking cases and in particular to paragraph 7 of the judgment. Mann J was considering the situation where a claimant makes an ostensibly sustainable allegation but acknowledges that the process of disclosure is necessary to make the case stronger or to have it investigated properly. In such a case, a claimant is ultimately reliant on disclosure from the other side to bring his case home. This is particularly so in cases where the nature of the wrong is such that the defendant's activities were covert so that, if the case is good, the defendant is likely to have a substantial amount of material in its hands with no equivalent in the hands of the claimant. In those circumstances Mann J said:

> "*Unless the prospects of getting disclosure are 'fanciful', the claimant is generally entitled to maintain its case in those circumstances. That is not to say that claimants are entitled to embark on speculative cases in the hope that disclosure will throw up something useful. The claimant must have more than that to start with, but the inability to make a full case without disclosure is not, in my view, a bar to starting the litigation in the first place*."

50. While Mr Patel acknowledged that this is particularly pertinent to cases of fraud and akin to fraud, it is not limited to such cases, but applies to cases where there is an information imbalance. In this case, there is an information imbalance because the former management of the Claimant have wiped the information from the Claimant's computers/servers. So while it is not the Defendant's fault that the Claimant does not have the information, the fact is that the Claimant does not have it.

51. Mr Patel said that the Defendant's Counsel has muddled up striking out with summary judgment. As to the application to strike out, if one looks at the pleading in paragraph 5.1 of the Amended Particulars of Claim and asks does it give rise to a claim known to the law, the answer is that it does. The Claimant alleges there was a contract for the Services and that it was subject to termination with a reasonable notice period. What the Defendant is complaining about, Mr Patel submitted, is a lack of particularity. The Claimant's answer to that is that they have done the best they can in the circumstances; they do not know the precise date the contract was entered into, who on behalf of each party entered into it or whether it was in writing or partly in writing and partly oral or completely oral, but that the Defendant knows the basic case it has to meet. He submitted that the Deputy Master was right to say that there was sufficient to survive the application to strike out.

52. As to the application for summary judgment, he said the question was whether there are documents which will bear on this issue, that is to ask what can one conclude as to whether there are documents which support the Claimant's case. He said that the Deputy Master was right to conclude as he did in paragraph [100] that there are realistic grounds for the

Claimant's assertion that there was an overarching agreement similar to a retainer, which may amount to a relational contract. Mr Patel referred to the matters which are now pleaded in paragraph 5A of the Amended Particulars of Claim, which were essentially the matters relied upon by the Deputy Master in his judgment, including the Call-Off Contract, the email of Heather Allan dated 28 February 2022 and an email of Mr Robinson of the Defendant dated 24 June 2022 referring to an agreement from 2017 with a right to terminate on 1 week's notice. He pointed out that there has been no attack in respect of these emails, which form part of the foundation of the Claimant's case.

53. Accordingly, Mr Patel submitted that this is not a case where there is simply a hope that something will turn up. Rather, there is good reason to believe that disclosure may materially add to or alter the evidence relevant to whether the claim has a real prospect of success. It followed that the Deputy Master was correct not to grant summary judgment.

54. In reply, Mr Reed pointed out that there was evidence of what was going on at the beginning of the relationship in 2015 in terms of the invoices and credit notes which had been provided as part of the initial disclosure. Those invoices referenced purchase orders for particular pieces of work. All of this fitted completely with the Defendant's case, whereas by contrast it was difficult to see how it could fit with the Claimant's argument that there was an overarching agreement.

Ground 2

55. Mr Reed submitted that even if paragraph 5.1 disclosed a reasonable cause of action and/or was not amenable to summary judgment on the grounds advanced under ground 1, then the contract pleaded had no substance and could not be enforceable. Effectively, this was an agreement to agree, the Claimant claiming that it would provide the Services for an unspecified fee and for an unspecified term but subject to an implied term as to reasonable notice, good faith and (by the Amended Particulars of Claim) non-solicitation. What the Claimant was trying to do was to use the test of reasonableness to make an agreement for the parties which they have not made for themselves and that was not possible, Mr Reed relying on the judgment of Sir Andrew Morrit VC to this effect in *Baird Textile Holdings Ltd. v. Marks & Spencer plc* [2002] 1 All ER (Comm) 737 at [26].

56. The Court would have to ask a number of questions including: Was the Appellant obliged to provide work to the Respondent? If so, was there a minimum amount of work to be provided? If so, what was the value of the minimum level of work? Could the Appellant engage other providers to provide the "Services"? How many "Specialists" was the Respondent to supply? How was the number to be determined? If the parties did not agree a fee for the "Services", how would a fee be calculated? He also submitted that the Court needs to know what the express terms are in order to be able to know what, if any, implied terms there were.

57. Mr Reed said that the Deputy Master did not consider this in his judgment or in his reasons for refusing permission to appeal, that is to say that there was no analysis in relation to substance certainty. And that was the case in respect of both paragraph 5.1 of the original Particulars of Claim and paragraph 5.2.

58. Mr Patel's response was that if he succeeded on ground 1, there was a properly pleaded contract and they had got over the summary judgment hurdle. He referred to the Services as identified in paragraph 4.3 of the Amended Particulars of Claim and said that the Claimant was required and entitled to provide the Services; the Services included consultancy services as to what steps needed to be taken with respect to the Defendant's IT; the Defendant was required to pay for the Services; and the Claimant could not cease provision of the Services, nor the Defendant end the Claimant's provision of the Services, except on reasonable notice. He submitted that this was amply pleaded in paragraph 5.1 of the Amended Particulars of Claim.

Ground 3

59. This relates to paragraph 5.2 of the Amended Particulars of Claim, which is a plea that if there was no express overarching agreement, there was an implied overarching agreement.

60. Mr Reed again referred to *Baird Textile Holdings Ltd. v. Marks & Spencer plc* (supra) this time to paragraphs [13]-[21] and Sir Andrew Morritt VC's conclusion that the judge at first instance, Morison J, had been right to apply the principle that a court would imply a contract by reason of the conduct of the parties only if it was necessary to do so. That requirement of necessity was not inapplicable to cases in which there had been a long continuing relationship or an intentional inducement. Mr Reed submitted that if the Court found that there was an express agreement, it would not be necessary for there to be an implied agreement. On the other hand, if the Court found that there was no express agreement, which would be on the basis that the relationship was as set out in the series of contracts, this must include that there was no intention to create this overarching legal relationship, and an implied overarching agreement would be inconsistent with such a finding. Further, the evidence of the parties' conduct relied upon by the Claimant would be equally consistent with the individual contracts. Mr Reed submitted that the Deputy Master simply did not engage with this.

61. Mr Patel's response in his Skeleton Argument was that, while he accepted that the Deputy Master did not expressly deal with it in his reasons, it could fairly be assumed that he accepted the Claimant's submissions, namely that the factual foundations from which the Claimant pleaded an express agreement, equally supported in the alternative an implied agreement, seeking to draw reliance on an implied solicitor's retainer. Whether or not an implied agreement exists is uniquely fact sensitive and the Court did not have visibility of all or indeed any of the key circumstances. Orally, he submitted that there might be something short of an express agreement which amounted to an implied agreement and referred to *Heiss v. MF Global UK Services Ltd (in administration)* [2016] EWCA Civ 569 at paragraphs [36]-[39]. The Court could not do the analysis in this case without having all of the evidence. There was good reason to think that there will be helpful documents which will come out on disclosure on this topic.

Ground 4

62. Mr Reed relied on the judgment of Fancourt J in *UTB LLC v. Sheffield Utd Ltd.* [2019] EWHC 2322 (Ch) at paragraphs [201]-[204], in which the judge warned of the danger of using the term "relational contract" when not being clear what exactly is meant by it. It

was self-evidently not all long-term contracts that will involve an enduring but undefined, cooperative relationship between the parties that will, as a matter of law, involve an obligation of good faith. Fancourt J said that the question to be asked was whether a reasonable reader of the contract would consider that an obligation of good faith was obviously meant or whether it was necessary to the proper working of the contract. No term can be implied if it is inconsistent with the express terms.

63. Mr Reed pointed out that paragraph 6 in the original Particulars of Claim made no mention of obviousness, business efficacy or necessity. Paragraph 6.4 in the Amended Particulars of Claim does rely on obviousness and/or necessity. Mr Reed criticises the Deputy Master's judgment at paragraphs [35]-[37] and [100] for starting at the wrong end, that is for saying it was a relational contract therefore there was a duty of good faith, rather than analysing whether there was a basis for implying the term. Further, as no other terms of the contract had been identified, it was not possible to imply a term, because it could not be said if it was necessary or not.

64. Mr Patel submitted that if the original pleading did not put this on the correct basis (which he did not accept), the Deputy Master had given him the opportunity to amend and having done so, the Amended Particulars of Claim cured any defect. In his skeleton argument he said that the Claimant did not need to advance and did not advance some wide ranging good faith obligation; "*It only needs to establish a requirement of good faith or fair dealing to the extent that going behind C's back to solicit its sub-contractors and former management would be a breach of that requirement.*" He clarified that paragraph 6.6 of the Amended Particulars of Claim was not a separate duty alleged, but was part of the duty of good faith generally. If, which he did not accept, there was anything in the complaint by the Defendant that the Amended Particulars of Claim did not specify why the implied term of good faith was obvious or necessary, the Defendant's remedy was to make a Part 18 request.

Discussion

65. In this case the Claimant is hampered by the fact that its former management have deleted all relevant information from the Claimant's computers/servers. I have not been provided with a copy of the sale and purchase agreement by which the new owners of the Claimant acquired it. It seems likely that there was some form of non-compete clause for 6 months because 6 months after the sale, the former management set up their own company/companies and began to provide the identical services, namely the provision of computer and IT support through the same Specialists, to the Defendant as the Claimant had until that time been providing. While it is understandable that as part of the plan to bring this about, they would have wanted to make life as tricky as possible for the Claimant, it also seems inherently unlikely that such deletion of information was not a breach in some way of the sale and purchase agreement. I have not been provided with any information as to what, if any, steps the Claimant has taken against the former management in this regard.

66. Given the absence of information, it is surprising that rather than simply bringing this claim, the Claimant did not seek pre-action disclosure from the Defendant. When asked why it had not, Mr Patel responded that it would not have been practical as it would have been met with complaints that what was being sought was too broad. Given that the scope of what will usually be granted on an application for pre-action disclosure mirrors what would

be disclosed under the disclosure practice direction, this did not strike me as a proper answer.

67. However, I accept (and it has not been disputed) that the Claimant does not have the information as to the contracts between it and the Defendant and that it has been reliant on what the Defendant has thus far provided, including in the initial disclosure. Such documents as have been disclosed do tend to support the Defendant's pleaded case that there was no overarching agreement, but rather a series of contracts, each evidenced by a purchase order and an invoice.

68. It is against this background that I must determine each of the grounds of appeal.

Ground 1

69. There is much force in the analysis by Mr Reed of what the Claimant is seeking to do, which is to set up a case based primarily on the fact of the length of the relationship that there must have been an oral and/or written overarching agreement. He is correct to say that there has been no compliance with PD16, in particular paragraphs 7.3 and 7.4 thereof.

70. In my judgment, the question the Deputy Master had to ask himself on the first basis of the application i.e. was the case strikable, was whether it disclosed reasonable grounds for bringing the claim. That is whether the original Particulars of Claim were unreasonably vague, incoherent, vexatious, scurrilous or obviously ill-founded or did not amount to a legally recognisable claim.

71. While it is very much lacking in detail, the claim as pleaded in the original Particulars of Claim was one which was legally recognisable, namely a claim for breach of contract. The Particulars of Claim allege there was a contract for the Services and that it was subject to termination with a reasonable notice period, that it was terminated without the provision of reasonable notice, and the Claimant has suffered damage as a result of the breach. In my judgment, in the circumstances where it is accepted that the Claimant does not have any documentation and is reliant on what the Defendant has so far supplied, it was open to the Deputy Master to reach the conclusion that he did that the Claimant had done the best it could such that striking the claim out was not appropriate. It cannot be said that he was wrong in law not to have done so. While he seems to have focussed on whether deficiencies in the original Particulars of Claim could be cured by some amendments, rather than considering first whether the claim as pleaded was strikable and then secondly, whether the deficiencies could be made good by amendment, that is not sufficient to come to the conclusion that he was wrong in law.

72. The Amended Particulars of Claim likewise plead a contract and breach of contract, so that there is a claim that is recognisable in law. While it has become even more vague by alleging the contract was in writing and/or oral, the Deputy Master understood that was how the case was intended to be put at all times and decided the application before him on that basis.

73. What I find more troubling is the change from "in or around 2015" to "in or after 2015". That was not an amendment that the Deputy Master understood was being sought or that

he said was necessary. The effect of it is to allege that the overarching agreement was entered into at some time in a period of 7 years, presumably on the basis that if it did not start out as an overarching agreement, it became one at some time in the course of the contractual dealings, but with the Claimant unable at this stage to identify at what particular time it so became. On its case, it does not matter when it became an overarching agreement provided it had become one before the termination in June 2022. This is a much wider case than that being advanced before the Deputy Master. I have considered whether that makes the claim unreasonably vague or incoherent, such that I should strike out or disallow that amendment. In my judgment, it remains a pleading which is recognisable in law and therefore while vague, in the circumstances it is not one which has become unreasonably vague or has become incoherent. I anticipate that, if this case also survives the summary judgment application, that will become a matter in respect of which further information will be sought.

74. As to the summary judgment application, the question for the Deputy Master was whether the claim was one which had a real prospect of success that is to say whether it was more than merely fanciful. It was not open to the Deputy Master to conduct a mini-trial and he did not do so. What he did do, in a number of places, including in paragraphs 54, 89, 100 and 103 was to speculate (partly based on documents which the parties did not seem to rely on i.e. standard terms & conditions and the Call-Off Contract which the parties were agreed had not been entered into, and partly on his experience of public procurement contracts, again something on which the parties did not seem to rely) on why there might be an overarching agreement. He appears to have done this to counter the suggestion from the Defendant that given there were individual purchase orders, there cannot have been in addition an overarching agreement. He also relied on emails which were not necessarily consistent with an overarching agreement in the terms alleged, in particular the email chain of 28 February to 3 March 2022 and the email of 24 June 2022, but which he said were inconsistent with the Defendant's position and pleaded case that the contractual relationship between the parties was only governed by the purchase orders placed in respect of separate Project Proposals.

75. The question for the Deputy Master was on which side of the line identified by Mann J in *Gulati v. MGN Ltd.* (supra) the case falls. Is it one where the Claimant has embarked on a speculative case in the hope that disclosure will throw up something useful? Or does the Claimant have more than that to start with, but the inability to make a full case without disclosure? If the Claimant does have more than that to start with, it is normally entitled to commence the litigation and not be subject to summary judgment. Although *Gulati* was a case where wrongdoing will naturally have been concealed (in that case phone hacking, but equally applicable to fraud cases) and the claimant will necessarily not have access to the documents to make good his case, in my judgment there is no basis to exclude from its ambit cases where the claimant does not have the necessary documents through no fault of its own. That is the case here.

76. The factors identified by the Deputy Master in paragraphs 100 – 103 of his judgment (although I doubt that it would have served much purpose to serve witness evidence from Mr Dixon or Mr Robinson as he suggested in paragraph 103), which I have quoted above were sufficient for him to hold that this case was one where the Claimant does have more to start with than pure speculation. I am doubtful that paragraph 104 supports his conclusion given that neither party was relying on these matters.

77. In my judgment, this is a case where there are "*reasonable grounds for believing that disclosure may materially add to or alter the evidence relevant to whether the claim has a real prospect of success*" (*HRH Emere Godwin Bebe Okpabi v. Royal Dutch Shell plc* [2021] 1 WLR 1294 at paragraphs [127]-[128]) and not one where the Claimant is saying with Mr Micawber, that something may turn up (*King v. Stiefel* [2021] EWHC 1045 (Comm) at paragraphs [21]-[22]). Although the Deputy Master did not refer to either of these authorities, that appears to be because he was not referred to them. It is clear from his judgment that he was firmly of the view that there was further evidence that would be available by way of disclosure, which would be relevant to the prospects of success of the claim. In my judgment for the reasons he gave, he was entitled to come to this conclusion.

78. Accordingly, in my judgment it cannot be said that the Deputy Master was wrong in law to refuse to grant the Defendant summary judgment on this ground. That is not to say that the case is not a weak one. It is rather that it cannot be said to be merely fanciful.

Ground 2

79. It does not appear to me that the Deputy Master considered this as a separate issue. Rather he seems to have formed the view that having concluded that the Claimant had pleaded the claim as well as it could and that he was not going to strike the Particulars of Claim out or grant summary judgment as set out above, paragraph 5.1 was sufficiently pleaded.

80. This may well be because the question of enforceability of the agreement appears only to have been raised in paragraphs 33 and 40 of the Defendant's skeleton argument before the Deputy Master in the context of the alleged express agreement and implied agreement, rather than as a clearly separate and distinct point. It is not clear whether it was the subject of separate argument before the Deputy Master.

81. The Deputy Master must have thought that there was nothing in this point, otherwise he could not have refused the application to strike out and/or to grant summary judgment.

82. In my judgment, had the Deputy Master considered this separately, it would not have assisted the Defendant. While the matter is still not as clearly pleaded as it could be, in particular the steps which Mr Patel set out in his Skeleton Argument are not set out in full even in the Amended Particulars of Claim, I accept that what the pleaded case amounts to is a claim that in respect of the Services identified in paragraph 4.3 of the Amended Particulars of Claim, in so far as the Defendant wanted or needed those services, it was bound to use the Claimant to provide them and the Claimant was bound to provide them. The Defendant was bound to pay for the Services. Neither party could walk away without giving the other reasonable notice. While Mr Patel says that this is amply pleaded in paragraph 5.1 and 5.2, in my judgment the Court would be assisted by this being spelled out further.

83. As understood, the pleading itself is not using the test of reasonableness to make an agreement for the parties which they have not made for themselves. It may well be that at trial, the Court concludes that there was no such agreement between the parties and that it is not open for the Court to find one on the basis of what would have been reasonable, but it cannot in my judgment be said that the Amended Particulars of Claim plead a claim that is unenforceable such that paragraph 5.1 falls to be struck out or to be subject to reverse

summary judgment on this basis. It sets out with just enough detail the necessary terms of the contract, such as to be an enforceable one.

84. Accordingly, if and to the extent that the Deputy Master was wrong not to have considered this separately, had he done so he would not have acceded to the application to strike out or for summary judgment on this basis. Ground 2 therefore fails.

Ground 3

85. It was common ground before me that the Deputy Master did not deal with this argument in his reasons. At paragraph 105, he did say that it was not appropriate to dispose of the claim summarily under Part 24 or to strike out part or all of the pleaded claims "*including by grappling with discrete points of law which will be impacted by the required amendments and may thereafter be best left to be dealt with at a trial*." While I understand why he might have thought this, in my judgment, he was wrong as a matter of law not to grapple with the question of whether there could be an alternative implied agreement if there was not an express one.

86. If the Court found that there was no express agreement, I accept Mr Reed's submissions that this would have to be on the basis that the relationship was as set out in the series of contracts which are in or evidenced by the purchase orders and Project Proposals. Such a finding must necessarily include that there was no intention to create this overarching legal relationship, which is alleged. I also accept Mr Reed's submission that an implied overarching agreement would be inconsistent with such a finding. Further he is correct to say that the evidence of the parties' conduct relied upon by the Claimant would be equally consistent with the individual contracts. Accordingly, it cannot be said that it is or could be necessary to imply a contract (*Baird Textile Holdings Ltd. v. Marks & Spencer plc* (supra)). There are therefore, in my judgment, no circumstances where the Claimant could lose on the express agreement but succeed on the implied agreement as pleaded. Such would be a legally inconsistent finding.

87. Mr Patel did not explain how the implied agreement could work as an alternative to the express agreement. If there was something falling short of an express overarching agreement, it is not possible to see how it could amount (on the grounds of necessity) to an implied agreement given the parties' contractual relationship as governed and/or evidenced by the purchase orders. I reject his analogy with a solicitor's retainer, which might arise as a matter of implication if a solicitor gave advice without issuing a written letter of engagement. That is very different from the situation in this case, where there are undoubtedly a series of contracts.

88. Likewise, I do not accept that there could be relevant documents which might come out in disclosure which would support the alternative implied agreement case, such that it could survive the above analysis. No example of what such a document might be was provided.

89. Accordingly, the Deputy Master should have accepted the Defendant's submissions that paragraph 5.2 of the Particulars of Claim should be struck out, alternatively that the Defendant should have summary judgment on it. He was wrong in law not to have done so. Clause 5.2 is unamended in the Amended Particulars of Claim and it therefore falls to be struck out and/or for summary judgment to be given on it now.

Ground 4

90. In my judgment paragraph 6 of the original Particulars of Claim was an inadequate pleading and one which the Deputy Master was wrong not to strike out. It was a bald assertion that there was a relational contract and therefore there was a duty of good faith. For the reasons set out by Fancourt J in *UTB LLC v. Sheffield Utd Ltd.* that is not the right question to ask. The Deputy Master had to ask the question whether it was necessary to imply such a duty of good faith on the basis of business efficacy or obviousness, neither of which was pleaded. He did not do so.

91. However, the Deputy Master gave the Claimant the opportunity to amend. I accept Mr Patel's submission that paragraph 6, in particular paragraph 6.4 of the Amended Particulars of Claim has cured the defect. The Claimant there pleads the implied term as arising on the basis of obviousness and/or necessity, having pleaded material facts in paragraphs 6.1 to 6.3. If this is said not to provide sufficient particularisation, the Defendant will have to ask for Further Information under CPR Part 18. In light of Mr Patel's clarification that paragraph 6.6 of the Amended Particulars of Claim was not a separate duty alleged, but was part of the duty of good faith generally, the pleading should be amended to make this clear.

92. Mr Reed is right to say that before the Court can make a finding that an implied duty of good faith is necessary, the Court needs to determine what the express terms of the contract were. However, as I have held that these express terms are sufficiently pleaded, it cannot be said at this stage that there is no real prospect of the Court going on to find an implied duty of good faith. That is not to say that the pleaded express terms will be established, merely that it is not merely fanciful to suggest they will be at this stage.

Conclusion

93. The appeal succeeds on ground 3, such that paragraph 5.2 of the Amended Particulars of Claim falls to be struck out and/or the Defendant is entitled to summary judgment on it. Grounds 1, 2 and 4 fail.

94. I stress that this judgment is not a finding that the claim has anything other than more than fanciful prospects of success. Like the Deputy Master I regard the claim as a weak one. I have reached the conclusions I have with some reluctance as this claim is undoubtedly going to divert its limited resources away from other matters the Defendant has to deal with to undertake what may turn out to be a wholly unnecessary disclosure exercise.

95. I invite counsel for the parties to draw up an order reflecting the terms of this judgment. I will deal with questions of costs both of the appeal and in respect of the Defendant's ground 5 if it wishes to pursue it in light of this judgment in writing. The parties are to provide written submissions on costs within 7 days of this judgment being formally handed down.

96. In light of the relatively small amounts at stake in this matter, I am also minded to transfer this matter to Central London County Court or some other regional Business and Property Court, if that is more convenient to the parties. I invite the parties to consider that and any further consequential directions that I might conveniently give.