Neutral Citation Number: [2024] EWHC 2541 (Comm)

Claim No: CC-2024-MAN-000040

IN THE HIGH COURT OF JUSTICE

BUSINESS AND PROPERTY COURTS IN MANCHESTER

CIRCUIT COMMERCIAL COURT (KBD)

BETWEEN:

Before:

HIS HONOUR JUDGE PEARCE
(Sitting as a Judge of the High Court)

- - - - - - - - - - - - - - - - - - - -

THE REWARD COLLECTION LTD

Claimant/Respondent

-and-

WHALECO TECHNOLOGY LTD

t/a TEMU

Defendant/Applicant

- -

- -

MR HENRY REID instructed by **GUNNERCOOKE LLP** for the **Claimant**

MR ANDREW LOMAS instructed by **ENYO LAW LLP** for the **Defendant**

Hearing date: 19 July 2024

- - - - - - - - - - - - - - - - - - - -

Approved Judgment
This judgment was handed down remotely at 2.00pm on 7 October 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

Note: references to the bundle served for the purpose of this application are in the form "B***" where the asterisks represent the page number.

INTRODUCTION

1. The Claimant company provides marketing services for retailers and e-commerce platforms. The Defendant, an Irish based company, operates a well-known e-commerce platform ("Temu"), by which the products in particular of Chinese vendors are offered for sale at discounted prices. Temu uses software called Impact to manage its relationships with marketing companies.

2. It is the Claimant's case that the parties entered into a contract pursuant to which the Claimant would institute a promotional campaign for Temu. Such a campaign commenced but the Defendant has, the Claimant contends, failed to pay sums due pursuant to the contract. The Claimant sues on that contract, contending that four invoices in the total sum of $4,091,238.709 issued between July and December 2023 are outstanding.

3. The Claimant has served the Defendant with the proceedings out of the jurisdiction, contending that permission is not required because one or more of the provisions of CPR6.33(2B) applies to the proceedings. The Defendant disputes this contention, contending that the English court either has no jurisdiction to hear the claim or should not exercise that jurisdiction and has applied for a declaration to that effect, with a consequent order dismissing the claim. That application was heard before me on 19 July 2024 and this is my judgment on the application.

4. In this judgment, I shall refer to the parties as the Claimant and the Defendant respectively, using the term "Temu" for the platform operated by the Defendant.

THE ISSUE IN BRIEF

5. Fundamental to this issue is whether the parties contracted on the terms alleged by the Claimant, since those terms include the jurisdictional clauses upon which the Claimant relies in support of the argument that CPR6.33(2B) applies. The Claimant's case is that, following communications between Mr James Bannerman, the Claimant's

Head of Global Sales and Ms Mia Zhu, an Affiliate Manager of the Defendant on 17 July 2023, which communications are set out in fuller detail below, Ms Zhu, using a link provided by the Claimant, completed a document using Jotform[1] software which included a contractual template for the Claimant's "National Merchant Contract" and submitted that template to the Claimant. The Claimant contends at paragraph 14 of the Particulars of Claim that it accepted the submission, thereby concluding a contract between the parties on the terms of the National Merchant Contract, including the Claimant's standard terms and conditions. The Claimant contends that the National Merchant Contract at the relevant time of the contract between the parties included a provision at clause 8.12 as to governing law, stating, "This Agreement, and any dispute or claim (including non-contractual disputes or claims) arising out of or in connection with it or its subject matter or formation, shall be governed by, and construed in accordance with, the law of England and Wales." I shall call this version of the contractual terms "the EW JotForm."

6. The Claimant advances an alternative case in quantum meruit. It is not entirely clear from the pleading whether this alternative case supposes that the parties entered into a contract but that it did not contain terms as to payment or rather seeks to obtain relief where the parties did not in fact enter a contract at all, but the Claimant provided services for which it is entitled to remuneration under a doctrine such as that of free acceptance.

7. The Defendant has not as yet filed a Defence. In this application, it contends that, on a true interpretation of the negotiations no concluded contract was entered into on the Claimant's standard terms and conditions, in any event, it contends that the Claimant cannot demonstrate which of the various iterations of the contractual documentation that is has produced are in fact the relevant documents to the alleged contract.

8. The Defendant does not deny that it has received some benefit from the Claimant's marketing of its services. It accepts that it may have some liability to the Claimant in respect thereof. However, it denies that its liability is as claimed by the Claimant in this case and in particular denies any contractual term giving the Claimant the right to serve out of the jurisdiction.

[1] In brief, JotForm software can be used to created bespoke online forms. It is explained further below. In this judgment, I use the word JotForm to mean both the manufacturer of the software and the electronic document created by completing an online form created by the software – the meaning of the word is obvious from the context.

THE EVIDENCE

9. The Defendant relied on witness statements from its solicitor, Mr Andrew McGregor, dated 27 March 2024 and 30 May 2024. The Claimant relied on statements from Mr Thomas Sumner, its Chief Executive Officer, dated 9 May 2024, and Mr Adam | Green, its Chief Operating Officer, also dated 9 May 2024.

10. No witness statement has been produced from Ms Zhu. Whilst the Defendant is of course not under an obligation on an application of this nature to adduce evidence from those who have direct knowledge of matters in issue, the absence of evidence from Ms Zhu creates certain difficulties both in understanding her motives in completing the JotForm document and in understanding how technically the JotForm platform operates, including whether a receipt document is generated in respect of the information that has been inputted.

THE PARTIES' OPERATING PRACTICES

11. The Claimant provides services through so called card-linked offers ("CLOs"). In this case, the customer enrols their credit or debit card with a particular vendor using a bank app or similar. When the customer makes a purchase from a particular vendor using their card, they will receive a cashback reward through the relevant card. It is then possible to track the sale and therefore the commission that is due on it, using the relevant Merchant Identification ("MID").

12. The Defendant normally interacts with marketing companies such as the Claimant to provide Temu through the use of the Impact platform. This system uses so-called Qualifying Links, these being tracking links which the marketing company (known as a "Media Partner") will use in advertisements on websites, emails and newsletters. When a potential customer clicks on the advertisement, they are directed to the Temu shop and the Qualifying Link records that the transaction has been generated by the particular Media Partner, thus allowing Impact to record the sum due to the Media Partner as commission.

13. It is common ground that the Defendant's system is the more traditional approach for such marketing. The Defendant contends that the CLO system operated by the Claimant is fundamentally different to the Qualifying Link system that it operated. My attention is drawn to a blog at B398, which refers to the need to understand "*that CLO partners do not track like traditional affiliates, so things like attribution can be*

challenging." This is said to be an indication of the significant difference between the use of qualifying links and CLOs.

14. As will be seen, the Claimant's position in the negotiations between Mr Bannerman on its behalf and Ms Zhu on behalf of the Defendant was that it always intended the contract to be on its terms that provided for payment through CLOs. On the other hand, the Defendant's case is that it would only ever contract on the basis of payment through Qualifying Links and that this was made clear in the negotiation.

KEY EVENTS LEADING TO THE ALLEGED CONCLUSION OF THE CONTRACT ON 17 JULY 2023

15. The evidence, both in the form of witness statements and in the documents, shows a series of communications between the Claimant and the Defendant starting on 16 July 2023. I set out below the sequence of significant communications, though not all are referred to.

16. On 16 July 2023, Ms Zhu contacted by email over 60 publishers (including the Claimant), inviting them to apply to join the Defendant's affiliate programme on Impact. Ms Zhu's email included a link to apply to the affiliate programme on Impact and made reference to the CPS rate, that is to say the relevant cost per sale or commission.

17. On 17 July 2023:

    a. Mr Bannerman replied to the email. He indicated an interest in the proposal and said that the Claimant could "*bill via Impact no problem and work on a Card linking model and can put Temu in front of over 410 million closed customers groups worldwide. No-cost, just a cashback CPOA for new and returning customers. Deck attached.*" It is common ground that the "deck" was a reference to the Claimant's Global Media Pack, which includes reference in general terms to how card-linking technology works. It also sets out three "*Next Steps*" of which the second is "*JotForm – Sign out JotForm (contract)."*

    b. Ms Zhu replied asking Mr Bannerman to click on the link in the previous email to apply, providing the Impact ID afterwards. She also made reference to the potential CPS rates, indicating that the current policy was a base CPS of 2% with 15%-20% for new customers.

c. Mr Bannerman replied to this email, saying "*We are Card Linking so we track sales via MIDs not links. We can bill and feed the sales data into Impact for ease and streamline of course."* He communicated further about the CPS, suggesting 15% for new customers and 10% for returning work.

d. Ms Zhu responded that they could not offer the CPS rate that the Claimant was seeking but could increase the figure to 10% for new customers only.

e. Mr Bannerman's response was to indicate that they were involved with the world's largest card providers and proposed a commission of 15% for new customers and 8% for ongoing customers.

f. Ms Zhu replied to this staying at her figure of 10% for new customers but offering to review the figure for existing customers if "*your traffic is good.*"

g. Mr Bannerman responded with a further proposal of 15% for new customers.

h. Ms Zhu maintained her figure of 10% in her email of 21.41[2], saying "*If you agree to cooperate, I will send you a separate application link."*

i. Mr Bannerman then emailed to say:

"*We can do that then.*

Can you fill in the jot form then please so we can get boarding on all partners this side then.." He included a JotForm link in the email.

j. It would appear that the JotForm was then completed, presumably by Ms Zhu. There is no formal acceptance of this in the Defendant's witness evidence, though the Claimant's evidence is that the JotForm was completed. Certainly, for the purpose of assessing the issues at this stage, the Claimant shows an arguable case that a representative of the Defendant, probably Ms Zhu, did indeed complete the JotForm.

k. Mr Bannerman emailed at 22:15[3], saying "*I got the Jot form and will bill via the network*" and asking Ms Zhu to agree a 5% commission for returning users. He went on to repeat his request for a payment for sales to returning customers.

[2] This is China Standard Time, i.e. UTC + 8.
[3] Again China Standard Time,

l. Certain of the Claimant's employees received the email at B545 which identified a "New National Merchant Contract" completed by Ms Zhu. The email has the sentence, "*You can edit this submission and view all your submissions easily,"* apparently with hyperlinks to allow these tasks to be completed. It is the Claimant's case that it is probable that Ms Zhu also received a similar email.

KEY EVENTS FOLLOWING THE ALLEGED CONCLUSION OF THE CONTRACT ON 17 JULY 2023

18. On 18 July 2023:

    a. Ms Zhu replied, again declining the proposed commission for returning users. She sent TRC a link to apply for a 10% CPS cooperation via Temu's affiliate program on Impact for new users only.
    b. Mr Bannerman responded saying "*We track sales via MID so don't need the link, the sales will be piped into Impact to view. Lets start at 10% cashback for new then and perhaps get the existing piece moving when we see results then."*

19. Ms Zhu resent that link again on 19 July 2023, stating, "*please click on apply, and then we agree to start cooperation*".

20. Ms Zhu was then put in touch with Ms Tayla Morelis, an Account Manager at the Claimant.

21. On 21 July 2023, after a call between Ms Zhu and Tayla Morelis, Ms Zhu again re-sent the application link for Impact, stating, "…*Let me outline what needs to be done next: 1. You click the link below to apply;* [The link is then included] *And then after we agree, we can start working together…*"

22. The Claimant completed the Impact application form via the link, electronically signing the Impact Agreement. The application was approved and electronically counter-signed by Temu, with effect from midnight on 24 July 2023. The terms of the Impact Agreement included:

    a. At clause 12.6: "*Entire Agreement: This Agreement represents the entire understanding and constitutes the entire agreement in relation to the subject matter herein, it supersedes any previous agreement as to such subject matter*

herein, and may be amended only in writing and executed by both parties. Each party acknowledges and agrees that it has not relied on any representation or warranty other than those expressly set out herein."

b. At clause 13: "*Governing Law. The laws of the State of New York shall govern these Terms. Media Partner hereby expressly consents to exclusive jurisdiction and venue in the courts located in New York for all matters arising in connection with these Terms or Media Partner's participation in the Program*."

23. The Impact Agreement was, on the Defendant's case, later varied to include a governing law clause in favour of the laws of Ireland with exclusive jurisdiction of the Dublin Courts (see paragraph 23 of Mr McGregor's witness statement).

24. Further communications between the parties thereafter show that it quickly became apparent that the parties were at odds on the terms of the agreement, the Claimant insisting that the parties had agreed to use CLOs, but the Defendant insisting that online links be used. A flavour of this can be seen in emails on 3 August 2023 which include the following:

a. Ms Morelis emailed at 18:21 stating "*We don't use Impact to track or verify payments…We use Impact simply for payments*,"

b. Mr Bannerman followed this up by saying. "*…we are Card Linking and track via the Temu MIDs."*

c. Ms Zhu replied stating: "*Sorry, without the tracking link , Temu can't count the revenue, so it can't give you a share of the revenue. The data you send back to Impact, we may not be able to count. Therefore, all promotions must be promoted after obtaining links from the Impact background*."

d. Mr Bannerman replied to this stating that TRC: "*We don't work on online links, we work on closed card link processes as explained 3 or 4 times in previous emails and your call with Tayla who explained all this*."

e. Ms Zhu responded at 20:44 (emphasis added): "*We are sorry that we don't technically support the return of your data at this stage, and we can only track the data through the online link. I'm afraid our cooperation will be suspended. We will start the cooperation when we support card link*."

25. On 7 August 2023, Mr Bannerman responded to the suggestion that the contract be suspended by saying that, "*We already have this moving along and can't simply suspend."* Ms Zhu replied in a later email of the same day that the Defendant "*have to suspend our cooperation*." Again Mr Bannerman said this was not possible.

26. The parties continued to communicate into September 2024, including over the issue of whether the Claimant could operate its marketing through CLOs. Eventually, on 12 September 2023, Mr Green, the Commercial director of the Claimant, emailed Ms Zhu asserting that the parties had a contract in place until 17 January 2024. Ms Zhu replied asserting that the Defendant had not signed an agreement.

27. Mr Green responded to this by sending on 18 September 2023 a copy of the Claimant's standard terms and conditions at the time that the agreement had allegedly been signed using the JotForm procedure. In contrast to the pleaded version of the standard terms and conditions, the version sent in September 2023 stated in respect of the Governing Law at Clause 8.12, "*This Agreement, and any dispute or claim (including non-contractual disputes or claims) arising out of or in connection with it or its subject matter or formation, shall be governed by, and construed in accordance with, the laws applicable to the relevant operating countries."* I shall call this version of the terms and conditions "the ROC JotForm."

28. The ROC JotForm was sent to the Defendant on two further occasions as an example of what was said to be the binding terms and conditions. But Mr Green now says that the ROC JotForm was sent in error. The version that was used at the time of the Defendant using the JotForm process was the Jotform as pleaded, the EW JotForm. But in August 2023, the Claimant was advised to revise its standard terms and conditions, in particular because of its entry in the US market. This led to the creation of the revised ROC JotForm. Mr Green is adamant in his statement at paragraph 10 that there had been no revision to the EW JotForm before 1 August 2023. It follows, he contends that the EW JotForm was the version in force at the time of the parties contracting in July 2023.

29. On 25 October 2023, the Claimant sent a copy of the standard terms that it now pleads and argues to be the correct standard terms at the time that the contract was concluded, the EW JotForm. There are other differences between the EW JotForm and the ROC JotForm but, for the purpose of this application, only the jurisdiction clause

is relevant, other differences merely being relied on to show that there were several versions of the document.

30. By letter dated 21 December 2023, the Claimant's solicitors produced a video clip purporting to show the process of completing the JotForm. That document had differing terms and conditions again (although like the EW Jotform, it included a clause stating that the contract was governed by the laws of England and Wales). The Defendant calls this the December JotForm and I adopt that nomenclature.

THE JOTFORM PROCEDURE

31. Two points of particular importance arise from the evidence in respect of the Defendant's apparent[4] completion of the JotForm:

    a. How does the JotForm procedure work?

    b. What information would the Defendant have received on completing the JotForm?

32. I have noted above the absence of evidence from Ms Zhu. The result is that there is nothing to contradict the Claimant's account as to how the JotForm platform operates, albeit that that evidence is itself seemingly hearsay.

33. The parties have, sensibly, sought to clarify certain aspects of the manner in which the JotForm software works by communicating with them. The parties' first joint letter, dated 24 May 2024, was couched in understandably cautious terms, given that the Claimant continues to operate through JotForm. The reply from JotForm was brief and relatively unhelpful.

34. I note from the extensive correspondence within the hearing bundle that there have been attempts to agree a further letter to JotForm. I do not know whether such letters have been sent. I have not seen any reply to it.

35. As a result of the absence of information on this issue, much of what is said about the JotForm process is essentially supposition, albeit that it appears to be a plausible explanation as to how a platform such as this might work.

[4] I use the word "apparent" here and "seemingly" in sub paragroup (c) below because these matters are not formally admitted. However for the purpose of this application, the Defendant accepts that the Claimant should be taken to be capable of proving them at trial. I agree that this is so and therefore they may be assumed for the purpose of the application.

36. The Claimant's case is that, as of July 2023, it had been using the JotForm software for over two years as the procedure by which it entered into contractual relations with commercial partners (see paragraph 12 of Mr Sumner's witness statement). The prospective contracting party would be asked to complete the relevant fields on the website, then fill in the signature box and submit the JotForm.

37. At paragraphs 26 and 27 of his statement, Mr Sumner states that Ms Zhu was required to and did input a signature into the signature box before submitting the form. He says at paragraph 14 of his witness statement that it was necessary to complete the signature box in order to submit the form. Many people will have had the experience of completing online forms where it is simply not an option to leave blank spaces in certain fields.

38. The Claimant's case as to precisely what was entered into the signature box is put at paragraph 15 of Counsel's skeleton argument as being "*a single click in the signature box."* An inspection of the document itself suggest that this click was by way of insertion of a full stop or a dot.

39. The Defendant responds to this assertion at paragraph 87 of Mr McGregor's statement:

> "*(a) [Ms Zhu] did not realise that the "Merchant Consent Form" appearing at the end of the Jotform was intended to be a legally binding contract. Her understanding, based on the language used by Mr Bannerman in his emails, was that she was required to fill in the details requested in the Jotform as part of TRC's onboarding process, which TRC required in order to participate in Temu's affiliate program on Impact. The majority of the early pages of the Jotform are consistent with this, as they go more to TRC understanding who Temu is / where they are based / etc.*
>
> *(b) She does not recall putting a dot in the blank box appearing at the end of the form as alleged, but in any event, she did not realise that the blank box was intended to be a signature block into which a counterparty is supposed to apply its electronic signature as a mark of its consent to the terms and conditions, even though on TRC's case such an inadvertent dot is supposed to be sufficient to conclude a multi-million dollar agreement. Further, it is unlikely that an objective observer in these circumstances would appreciate*

that the blank space was intended to be a signature block, and the provisions of the Electronic Commerce (EC Directive) Regulations 2002 (S 2002/13) requiring parties to explain the technical steps required to conclude a contract in a "clear, comprehensible and unambiguous manner" may be relevant in this context.

(c) She did not intend to enter into a legally binding contract, nor did she realise that by submitting the Jotform, it would be alleged that she had done so.

(d) Ms Zhu is a junior BD employee, and does not have authority to enter into contracts on behalf of Temu directly."

40. At paragraph 28 of his statement, Mr Sumner states that the Claimant received an automated email confirmation on 17 July 2023. At B544, one can see the confirmation that was sent to several members of the Claimant's staff. The Claimant contends that a copy of this email will have been sent to the Defendant as well. Although that would seem sensible, there is no clear evidence to show that this happened.

41. The Claimant's case is that it then reviewed the JotForm submissions and acknowledged the JotForm submission. At paragraph 30 of his statement, Mr Sumner interprets this as an acceptance of an offer that was made by the Defendant submitting the JotForm document. Somewhat puzzlingly he contradicts this at paragraph 44, where he says that the Defendant's submission on the JotForm platform amounted to an acceptance of the terms offered by the Claimant.

42. In his skeleton argument for the Defendant, Mr Lomas notes this inconsistency. He points out that neither of these cases are pleaded. That is technically correct, though the pleading is not inconsistent with either version and is probably sufficiently broad to bear either interpretation of the offer and acceptance alleged by Mr Sumner. For the purpose of this application, the Claimant has a plausible case on either basis albeit that they are mutually inconsistent.

SERVICE OUT OF THE JURISDICTION

43. The claim was issued by the Claimant on 26 January 2024. The claim form was served in Dublin on 7 February 2024, the Claimant having filed form N510 (entitled "Notice for Service out of the jurisdiction where permission of the court is not required") asserting that CPR 33(2B)(a) and CPR 6.33(2B)(b) or (c) applies.

THE LAW – CPR 6.33

44. CPR 6.33 deals with service of the claim form out of the United Kingdom where, the Court's permission for service is not required. CPR6.33(2B) provides:

"*The claimant may serve the claim form on the defendant outside of the United Kingdom where, for each claim made against the defendant to be served and included in the claim form –*

(a) the court has power to determine that claim under the 2005 Hague Convention and the defendant is a party to an exclusive choice of court agreement conferring jurisdiction on that court within the meaning of Article 3 of the 2005 Hague Convention;

(b) a contract contains a term to the effect that the court shall have jurisdiction to determine that claim; or

(c) the claim is in respect of a contract falling within sub-paragraph (b)."

45. The Claimant contends that each of these three provisions is capable of being applied here and hence service for permission out is not required. The Defendant denies this to be so.

46. It is common ground that, in determining whether any of these gateways apply, the court should apply the "good arguable test," as stated in *Brownlie v Four Seasons Hildings Inc* [2017] UKSC 80 and *Goldman Sachs International v Novo Banco SA* [2018] UKSC 34. The test was considered by the Court of Appeal in *Kaefer Aislamientos v AMS Drilling Mexico* [2019] EWCA Civ 10. This test was helpfully summarised by Master Stevens in *Pantheon International Advisors v Co-Diagnostics* [2023] EWHC 1984 (KB) as follows:

> "18. Lord Sumption at paragraph 9 in the *Brownlie* case, identified the limbs as follows in bold type, and Green LJ's further guidance from paragraphs 73-80 of the *Kaefer* case is shown in italics alongside.
>
> a) **the claimant must supply a plausible evidential basis for the application of a relevant jurisdictional gateway**. This is '*a reference to an evidential basis showing that the claimant has the better argument … For the avoidance of doubt the test under limb (i) is not balance of probabilities …the test is context -specific and flexible…)'*

b) **if there is an issue of fact about it, or some other reason for doubting whether it applies, the court must take a view on the material available if it can reliably do so.** '*Limb (ii) is an instruction to the court to seek to overcome evidential difficulties and arrive at a conclusion if it "reliably" can. It recognises that jurisdiction challenges are invariably interim and will be characterised by gaps in the evidence. The Court is not compelled to perform the impossible but, as any Judge will know, not every evidential lacuna or dispute is material or cannot be overcome. Limb (ii) is an instruction to use judicial common sense and pragmatism, not least because the exercise is intended to be one conducted with "due despatch and without hearing oral evidence"…Where there is a genuine dispute judges are well versed in working around the problem… where there is a dispute between witnesses it might be possible to focus upon the documentary evidence alone and see if that provides a sufficient answer which then obviates the need to grapple with what might otherwise be intractable disputes between witnesses'.*

c) **the nature of the issue and the limitations of the material available at the interlocutory stage may be such that no reliable assessment can be made, in which case there is a good arguable case for the application of the gateway if there is a plausible (albeit contested) evidential basis for it.** *'Limb (iii) is intended to address an issue which… arises where the Court finds itself simply unable to form a decided conclusion on the evidence before it and is therefore unable to say who has the better argument. What does the judge then do?.... the solution encapsulated in limb (iii) addresses this situation. To an extent it moves away from a relative test and, in its place, introduces a test combining good arguable case and plausibility of evidence. Whilst no doubt there is room for debate as to what this implies for the standard of proof it can be stated that this is a more flexible test which is not necessarily conditional upon relative merits'."*

47. The authorities emphasise that the exercise of determining jurisdiction for the relevant gateway does not involve coming to concluded views on disputed matters, nor conducting some kind of mini-trial. Rather the court must take a pragmatic view on the material before it as to whether the Claimant makes out any of the limbs of the test in *Brownlie.*

THE LAW – CONTRACTUAL FORMATION

48. As indicated above, the central challenge to service out in this case is whether the parties contracted on the terms contended for by the Claimant. This in turn raises the questions as to whether there is sufficient certainty to demonstrate that the parties contracted at all and, if so, whether it was on the JotForm terms upon which the Claimant relies.

49. The Claimant draws my attention to the helpful judgment of Leggatt J as he then was in *Blue v Ashley* [2017] EWHC 1928 (Comm) summarising the ingredients of contract formation at [49] as requiring it to be shown:

    a. that the parties have reached an agreement;
    b. that the agreement is intended to be legally binding;
    c. that the agreement is supported by consideration; and
    d. that the agreement is sufficiently certain and complete to be enforceable.

50. The Defendant draws attention to the need for there to be correspondence between the offer and acceptance to show that the parties have reached an agreement. It cites paragraphs 5-014 and 5-019 of Chitty on Contracts in support of the propositions that:

    a. The intention of the parties in making and accepting offers is to be judged objectively;
    b. There may be cases where there is such latent ambiguity in the terms of the offer and acceptance that no agreement can be imputed;
    c. If the parties are genuinely at cross purposes it may be that there is no objective offer and acceptance because neither party can show that, judged objectively, its interpretation of the agreement is more reasonable than the other's.

51. In ordinary commercial transactions, where the parties have come to an express agreement, the onus of proving a lack of intent to create legal relations lies on the person asserting that lack of intent and is a heavy burden (see Chitty on Contracts at 4-208). If the court finds that there was an intention to create legal relations, the court will strive to find the contract to be sufficiently certain and complete as to be enforceable (see the judgment of Coulson LJ in *Durham Tees Valley Airport v BMIBaby* [2010] EWCA Civ 483).

52. The parties agree that there is no specific formality required to render this contract binding. The Defendant cites Longmore LJ in *Investec Bank (UK) Ltd v Zulman* [2010] EWCA Civ 536 at [16]: "*It is a question, in every case where a written agreement is contemplated, whether the parties intend not to be bound until the relevant document is actually signed or merely intend that the relevant document is to be the record of an agreement made orally and intending to be binding when made*."

THE CASE FOR THE DEFENDANT/APPLICANT

53. The Defendant contends that the evidence on the issue of contractual formation is not going to get better than it is now. The contemporaneous correspondence shows the details of the alleged contractual terms and the provision of witness statements and disclosure is unlikely to add to the picture. Thus the court is in territory of the first limb of *Brownlie* where it need not speculate on what further material may become available. It can judge the issue of the contractual formation on the current material and determine who has the better argument.

54. The Defendant contends that, on any realistic reading of the correspondence leading up to the alleged contract, the parties were not in agreement since the Claimant was insistent upon using CLOs as the means of linking the Defendant to purchasers, whereas the Defendant was clear that it would only operate through Qualifying Links. As noted above, these are two substantially different systems. The parties may have had good reason for favouring one over the other, but at no point did either agree that the other's method was to be preferred. Since the determination of what purchases fall within the terms of the agreement between the parties is fundamental to the parties' dealings, without there being clear objective evidence that the Defendant was, through the JotForm submission, agreeing to the Claimant's proposed terms, the Claimant cannot show that the jurisdiction term relied on was in fact a binding term between the parties.

55. In support of this argument, the Defendant refers to the Electronic Commerce (EC Directive) Regulations 2002. In particular, reliance is placed on Regulation 9:

> "*9.—(1) Unless parties who are not consumers have agreed otherwise, where a contract is to be concluded by electronic means a service provider shall, prior to an order being placed by the recipient of a service, provide to that*

recipient in a clear, comprehensible and unambiguous manner the information set out in (a) to (d) below—

(a) the different technical steps to follow to conclude the contract;

(b) whether or not the concluded contract will be filed by the service provider and whether it will be accessible;

(c) the technical means for identifying and correcting input errors prior to the placing of the order; and

(d) the languages offered for the conclusion of the contract.

(2) Unless parties who are not consumers have agreed otherwise, a service provider shall indicate which relevant codes of conduct he subscribes to and give information on how those codes can be consulted electronically.

(3) Where the service provider provides terms and conditions applicable to the contract to the recipient, the service provider shall make them available to him in a way that allows him to store and reproduce them.

(4) The requirements of paragraphs (1) and (2) above shall not apply to contracts concluded exclusively by exchange of electronic mail or by equivalent individual communications."

56. The Defendant contends in particular that the Claimant's argument that the mere introduction of a dot in the signature box is inconsistent with the requirement for clear, comprehensive and unambiguous information as to the effect of introducing the dot. The Defendant did not make this a major part of its submissions, perhaps because, although the regulations are clearly designed in general terms to encourage the provision of clear information, it is not clear that the Claimant can in fact be said to have breached them, still less that such a breach would have any relevant consequence for the claim. But the Defendant does contend that the Regulations assist in judging the objective effect of the parties' actions, including the alleged consent to the contract. Quite simply, no reasonable person would consider that simply entering a dot into a box on a screen amounted to an indication of acceptance of an offer to contract (or alternatively the making of an offer to contract that was capable of acceptance, if that version of the Claimant's case is preferred).

57. During oral submissions, the Defendant considered the argument that the acts alleged by the Claimant to be the Defendant's offer or (more likely) acceptance was not simply the inclusion in the box of a dot but also the act of pressing "submit" in respect

of the JotForm process. Mr Lomas contended that there was a spectrum of conduct by the party completing the JotForm. To have completed the signature box with initials or an expression of agreement, followed by the submission of the form would readily be taken as objective evidence of consent. At the other end of the spectrum, to insert "not agreed" and to submit the form would be taken as a lack of consent. A mark such as a dot (which might have been inadvertently introduced, rather than being an expression of consent) lies closer to the latter than the former.

58. When the material before the court is analysed more generally, the Defendant contends that the Claimant's conduct and approach to the evidence has been, as it is put in the Defendant's skeleton argument, "*evasive, contradictory and misleading."* The essence of the Defendant's argument is that the Claimant has produced various versions of the JotForm agreement and simply cannot show which is the version that would have formed part of the JotForm process that Ms Zhu followed. In particular, the Defendant draws attention to the following:

    a. Whilst the Claimant now contends that the contract was on the terms of the EW JotForm, it had previously sent the ROC JotForm to the Claimant on three occasions.

    b. Subsequently the Claimant produced a yet further version of the terms and conditions in the December JotForm.

    c. The witness statements of Mr Green and Mr Sumner in response to the Defendant's application exhibit different versions of the contract. The two differences are identified by Mr Sumner at paragraph 19 of his second statement. One of the differences relates to a section of the General services Agreement headed "consent" that appears in the video referred to in paragraph 19 of Mr Green's statement but does not appear in the screen print of the JotForm process annexed to Mr Sumner's statement at B549. The second is that the jurisdiction clauses differ between those two documents in that:

        i. the version in Mr Sumner's statement reads, "Each party irrevocably agreed that the courts of England and Wales shall have exclusive jurisdiction to settle any dispute or claim (including non-contractual disputes or claims) arising out of or in connection with this Agreement or its subject matter or formation **provided that either party may**

enforce any judgement of the courts of England and Wales in the courts of any jurisdiction" (words in bold emphasised by me)

ii. The version in the video annexed to Mr Green's statement reads "Each party irrevocably agreed that the courts of England and Wales shall have exclusive jurisdiction to settle any dispute or claim (including non-contractual disputes or claims) arising out of or in connection with this Agreement or its subject matter or formation." In other words, this version does not include the words in bold, in the previous sub-sub-paragraph. By way of comparison, both the EW JotForm and the ROC JotForm contain the same language as the version in the video annexed to Mr Green's statement rather than the version annexed as a screenshot to Mr Sumner's statement.

d. As the Defendant notes, both versions of the JotForm produced by Mr Green and Mr Sumner include a dot in the signature box. Taking this evidence together would appear to indicate that the boxes completed by Ms Zhu are capable of being produced with differing standard terms. The difference in these documents is said by the Claimant to have been an administrative error in collating the exhibits, but the fact that two differing versions of the document produced from the single process of completion of the JotForm procedure by Ms Zhu inevitably raises a doubt as to the ability of the Claimant to show which of those standard terms were visible when Ms Zhu completed the form.

e. Mr Green explains how the Claimant changed from using JotForm to using DocuSign at paragraph 11 of his statement. This change is suggestive of a lack of confidence in the JotForm process which is borne out by events in this case.

f. In pre-action correspondence, solicitors for the Claimant by letter dated 2 November 2023 invited the Defendant to agree "*that the law of England and Wales applies and that the courts of England & Wales have jurisdiction to hear this dispute."* This invitation to agree the jurisdiction issue implies a lack of confidence on the Claimant's part as to whether in fact the England and Wales courts have jurisdiction. Unsurprisingly perhaps the Defendant did not take up the offer to agree the jurisdiction of the England and Wales courts.

59. The Defendant further contends that the Impact Agreement superseded any agreement on JotForm terms since it is a later agreement of the parties relating to the same dealings as the alleged earlier agreement, with an "entire agreement" clause as identified above. Hence, it is said, the Impact Agreement is only consistent with the parties having varied their contractual relations so as to deal on those terms rather than any earlier terms.

60. A number of the points made by the Defendant involve criticisms of the manner in which the Claimant has approached this dispute:

    a. Whilst the standard terms of the contract relied on by the Claimant define the commencement date of the contract as being the date on which it is signed by both parties, in fact the contract has not on any version been signed by both parties. Thus the Claimant's contention that this contract is enforceable is inconsistent with the terms of the contract on which it relies.

    b. Although the Claimant said that it was not possible to suspend the contract, this is inconsistent with material which indicated that the campaign could be suspended before it went live, so long as it had not been started with the relevant banks. This is confirmed in an email from Cardlytics to the Claimant, dated 17 November 2023, which states, *"... Once a campaign is live, we have no ability to pause it - after it's been set live with the banks, it has to run its course and cannot be pulled back from customers' accounts. This is due to contractual obligations with our FIs, as it's a poor user experience especially when engaged users are activating the offer and starting to convert. In this case, by 10/30, the second flight was already live, which meant it would need to run until its intended 11/24 end date. We were however able to pull the 11/25 - 12/31 campaign, since there was ample notice here."* The Defendant contends that this email was only disclosed in error but that it demonstrates the Claimant's bad faith.

    c. On 16 October 2023, a number of the Defendant's employees received emails, purporting to come from DocuSign which in fact came from the email address of Mr Green. The email invited the recipient to view what was said to be *"the completed documents for your DocuSign signature*." The Claimant contends that this was a form of phishing (see email from Mr Green dated 18 October

2023), they were sent at a time when the parties were in dispute about whether contractually binding terms had been agreed (and if so what those terms were). The Defendant says that it is more likely that the sending of these emails was the Claimant's deliberate act in order to induce an employee of the Defendant into acknowledging the terms of the document that had been sent.

d. Whilst the Claimant asserts that Ms Zhu received an automated email upon completion of the JotForm, there is in fact no evidence to support this conclusion.

e. Although the Defendant denies any contractual liability to the Claimant it has sought to engage with the Claimant as to whether it can prove that any transactions which were genuinely purchased by new users took place in consequence of the Claimant's campaign. The Defendant has indicated in general terms a willingness to pay the appropriate commission for such transactions but complains that the Claimant simply has not engaged in identifying such transactions.

61. Drawing on these submissions, the Defendant in summary asserts:

a. The contract relied on is not binding in its own terms because a version signed by both parties was not produced;

b. Judged objectively, the parties were not in agreement on the terms of the alleged contract;

c. Even if there was objective agreement to some contractual terms, the Claimant cannot show which terms those were.

d. Specifically, the Claimant cannot show that the terms agreed included clauses sufficient to meet one or more of the gateways in CPR 6.33.

e. The Claimant's alternative case in quantum meruit is not caught by any of the gateways relied on.

f. If the parties entered into an agreement on the terms alleged by the Claimant, that agreement was subsequently superseded by the parties entering into the Impact Agreement.

62. In so far as the claim is brought on a quantum meruit, the Defendant contends that this is not a contractual claim capable for falling within CPR6.33(2B). The quantum

meruit here is a backstop position based on there being no contractual entitlement to recover the sums claimed. But if one supposes there is no contract, then it would not be possible for the claim to fall within CPR6.33(2B).

63. As the Defendant accepted in oral submission, it would be possible to grant retrospective permission for service out, if this case falls within one of the grounds set out in PD6B where service out of the jurisdiction may be permitted.

THE CASE FOR THE CLAIMANT/RESPONDENT

64. The Claimant contends that it is well able to meet the relevant test that for arguability on its case that the parties contracted on the EW JotForm. It is critical of the lack of material adduced on behalf of the Defendant by those with knowledge of the parties' dealings, especially Ms Zhu, and points to the fact that, since disclosure has not yet taken place, the court cannot know what further relevant material may come to light.

65. On the material before the court, the Claimant draws attention to the video annexed to the statement of Mr Green. This shows how the person in the position of Ms Zhu would need to go through the various pages of the JotForm, populating each field, then scroll through standard terms and conditions before entering some keystroke in the box intended for a signature and pressing "Submit." The document is headed "New National Merchant Contract" (emphasis added) and the standard terms refer to a "General Services Agreement" (again emphasis added).

66. The Claimant says that the act of completing this form is patently contractual in nature and, judged objectively, the Claimant clearly has the better of the argument as to whether the submission of this document was intended to have contractual effect.

67. The Claimant also seeks to rely on the argument that Ms Zhu, like its employees, received an email as at B545. Whilst Mr McGregor says that Ms Zhu denies receiving any such email, there is there is no evidence from Ms Zhu herself that she did not do so. This is an evidential gap on an important matter in the proceedings, on which disclosure is likely to be significant.

68. As to the Impact Agreement, the Claimant contends that the terms of that agreement, certainly in the context of the parties having entered into a JotForm agreement, are consistent with it relating only to how billings were to be recorded between the parties, not as to whether Qualifying Links rather than CLOs were to be used by third party customers. As Mr Sumner addresses in his witness statement, the Impact

Agreement was not capable of governing all aspects of the parties' dealings and it is more properly seen as relating to the parties' rights and obligations relating to invoicing and the use of the Impact Platform.

69. In terms of the version of the JotForm that formed part of the process completed by Ms Zhu, the Claimant accepts that there were changes in the standard terms and conditions as noted above, but argues that the evidence of Mr Sumner and Mr Green is clear that the version of the terms and conditions in the form that Ms Zhu submitted was the EW JotForm (see in particular paragraph 12 of Mr Green's statement and paragraph 40 of Mr Sumner's statement). The subsequent changes in particular to the Governing Law and Jurisdiction clauses are explained within those statements.

70. The Claimant notes that the Defendant has not submitted evidence to say that the Jurisdiction Clause in the form of the EW JotForm was not present in the document that would have been visible to Ms Zhu.

71. If the court is persuaded that there is plausible evidence that the parties contracted on the terms of the EW JotForm, the result is that this is a written contract with a choice of court clause, bringing the claim within that class of cases dealt with in CPR6.33(2B)(a).

72. Taking these matters together, the Court can be satisfied that the Claimant has provided a plausible evidential basis for the relevant jurisdictional gateway; that in so far as there are factual issues (and it is not entirely clear how far there are factual disputes, given the lack of a statement from Ms Zhu), the court can take the view that the material favours the Claimant's case; but that if it is not so persuaded, there is a plausible evidential basis for the Claimant's case on jurisdiction, even if that case is contested.

73. On the issue of the quantum meruit, the Claimant contends that this claim is "in respect of a contract falling within" CPR6.33 (2B)(b) and therefore meets the test for service out under CPR6.33(2B)(c). The Claimant notes that, in *Pantheon,* Master Stevens considered at paragraph 65 that the new version of CPR6.33(2B)(c) might bring a quantum meruit claim within the range of cases where permission was not required for service out of the jurisdiction. I was referred to the text of the White Book at 6.33.4.1 which appears to give some force to the argument that a claim on a quantum meruit might fall within this new rule.

DISCUSSION

74. This application turns on whether the Claimant shows a sufficiently arguable case that its relations with the Defendant were governed by a contract to which one or more of the gateways under CPR6.33 applies. This requires consideration of whether the submission of the JotForm is properly capable of amounting to the making of an offer or the acceptance of an offer; and whether the Claimant has sufficient prospect of showing that the terms on which any contract consequential upon the submission of the JotForm pass one of the thresholds in CPR 6.33.

75. The starting position in dealing with this is to recognise the nature of the jurisdiction that is engaged and the proper approach to the issues. Whilst the court is clearly required to look at the strength of the evidence, and mere plausibility of the Claimant's case will not suffice to meet the test in *Brownlie* referred to above, this application is not to be a mini-trial. Several of the points raised by the Defendant, particularly as to the Claimant's dealings generally go to issues of good faith and possibly credibility but do not in fact inform the issue of the contractual terms agreed by the parties.

76. That said, I agree with the Defendant's argument that it is not sufficient for the Claimant to show a sufficiently arguable case that there is a contract on terms that may include a jurisdiction clause sufficient to meet one of the gateways under CPR 6.33. Rather, the Claimant needs to show a sufficiently strong case of the parties being bound by a contract that does meet one of the limbs. That is an important distinction in a case where the Defendant says that there is such ambiguity in the contractual terms as to jurisdiction even on the Claimant's case that, even if the court were persuaded that one of the versions of the JotForm contract contained the relevant contractual terms, the court will never be able to determine which version of the terms was adopted by the parties.

77. In my judgment, the determination of the jurisdiction question here requires the court to grapple with five issues:

    a. Does the Claimant show a sufficiently plausible case that the submission of the JotForm amounted to contractual binding conduct?

    b. If so, was any such contract varied as a result of the Impact Agreement such as to prevent the Claimant relying on its jurisdiction clause?

c. If not, does the Claimant show a sufficiently plausible case that the jurisdictional terms of the contract permit the claim form to be served without permission?

d. If the Claimant shows a sufficient jurisdictional gateway for service out without permission in respect of a contractual claim, is permission required for service out of the claim for a quantum meruit?

e. If the Claimant does not show a sufficient jurisdictional gateway for service out without permission in respect of a contractual claim, is permission required for service out of the claim for a quantum meruit?

78. On the first issue, the failure of the Defendant to produce a witness statement from Ms Zhu is potentially problematic. Of course, the Claimant's argument that the submission by her of the JotForm amounts to contractual conduct is to be judged objectively. But it is also to be judged in its factual matrix. Ms Zhu's understanding of what she was doing when she submitted the document is at least capable of being relevant to that factual matrix. To that extent at least I do not accept the Defendant's argument that the court already has all of the material necessary to judge this issue.

79. I accept that the evidence before the court in the communication between the parties shows that Ms Zhu was throughout maintaining that the Defendant would work using Qualifying Links. This might lead to the conclusion that there never was sufficient consensus between the parties as to allow the inference of agreement on the terms advanced by the Claimant. But the video attached to Mr Green's statement allows the reader to contemplate being in the position of Ms Zhu in completing the form. The latter parts of the video show clear evidence that the person completing the form is not simply providing information that might be of some use to further negotiations between the parties or might be preliminary information necessary for a contract to be agreed later. Rather it shows that the person in Ms Zhu's position not only had to complete information but had to scroll through the terms and conditions before inserting some mark in a box and pressing submit.

80. I further accept that when matters are fully reviewed, the Defendant may be able to persuade the court that on a true interpretation this does not amount to the objective expression of an intention to contract on the terms through which the reader needs to scroll before pressing submit. But, applying the relevant *Brownlie* test, I agree with

the Claimant's contention that it has, at least on the current evidence before the court (and in the absence of a statement from Ms Zhu), the better of the argument as to whether this is the proper way to judge the actions of Ms Zhu. Quite simply, the completion of the relevant boxes scrolling through what are quite obviously on an objective reading intended to be contractual terms, followed by inserting some mark in a box and clicking "submit" is at least as plausibly the act of someone intending to be contractually bound by their actions as it is for example the act of someone who believes that they are simply submitting necessary information for billing purposes in due course.

81. I am not dissuaded from this conclusion by the clear evidence that Ms Zhu did not wish to contract on terms that provided for payments using CLOs. Whilst I accept that this would point against her having the intention to contract when she submitted the JotForm, her acts are at least as consistent with her intending to contract but having failed to read the terms on which she was contracting.

82. Turning to the second issue, the Defendant's argument that the subsequent signature to the Impact Agreement has the effects of superseding the parties' agreement, presumably by the substitution for the terms of the Impact Agreement for those of the JotForm agreement, suffers from the same problem as the Defendant identified in respect of Ms Zhu having submitted the JotForm agreement. The terms of the Impact Agreement are inconsistent with the terms for payment that the Claimant was very clearly stating it wished to adopt. Thus it might be argued that, on the Defendant's own analysis of the lack of consensus between the parties, it is arguable that the alleged variation was not in fact something on which the parties reached consensus.

83. But further, there is force in the Claimant's argument that, even on its express terms, the Impact Agreement does not have the effect of varying by discharge any agreement on the terms of the JotForm. The terms of the Impact Agreement do not appear to me to cover all of the anticipated dealings between the parties. In those circumstances, it is arguable that even if the agreement has contractual effect, it does not discharge the earlier agreement on JotForm terms but merely varies it where there is any inconsistency. The effect of that interpretation would need to be explored in pleadings and if necessary at trial.

84. On the limited material available, the Claimant has the better of the argument as to whether the effect of the Impact Agreement was to vary a pre-existing agreement between the parties so as to discharge that agreement.

85. The aspect of the Claimant's case which raises the most difficulty is the ability of the Claimant to show which version of the JotForm terms were said to have been visible to Ms Zhu and therefore to have been incorporated into the alleged contract between the parties, the third point referred to above. The Defendant argues that the Claimant has not been able to show a plausible basis for showing that it was the EW JotForm rather than one of the other versions that would have been visible to her. If it cannot do so now, it is unlikely ever to be able to do so, but in any event cannot pass even the third limb of the *Brownlie* test.

86. In looking at this issue, it is important to examine the material that the Claimant relies on in support of the argument that the visible terms would have at this time been the EW JotForm.

    a. Mr Sumner's statement asserts this to be so but gives no basis for this assertion beyond referring to Mr Green's statement.

    b. But on close examination, Mr Green's statement is also lacking detailed material that supports the argument that the change to the Jurisdiction clause did not happen until after the submission of the JotForm by Ms Zhu. In particular he does not refer in his statement to material that verifies when the change was made. The best that can be said is that he produces a JotForm submission from another client dated 18 July 2023 at B580 to 581 which appears to contain the England and Wales jurisdiction clause.

87. I would have expected to see material from JotForm itself dealing with this issue. As I have noted, the parties have attempted to engage with JotForm and I accept that the initial response was less full than it might have been. This has led to a further discussion between the parties about engaging with JotForm and the draft letter at B1189 is an attempt to gain further important information on this issue. However I am not told that a letter has been sent to JotForm, still less have I been sent any response.

88. Whilst of course this is only an interlocutory application, the need for plausible evidence to pass the jurisdiction test means that a party must ensure that it looks with care at the material that it might obtain in support of the jurisdiction argument. It is a

matter of some concern that there has not in advance of this application been further enquiry of JotForm and the court has therefore been left with an incomplete picture on a jurisdiction issue when in fact the parties (specifically the Claimant who ultimately has to show the plausibility of its case on jurisdiction) could have addressed the issue earlier.

89. This is of particular significance where the Claimant itself has been inconsistent as to which version of the JotForm terms were agreed to by Ms Zhu. The provision of different versions of the standard terms and conditions at different times undoubtedly raises the suspicion that the Claimant cannot in fact mount a convincing case as to which terms applied.

90. Nevertheless, the court must do what it can on the available material and I am conscious of the need to avoid some kind of mini trial that might deprive the Claimant of the opportunity to advance a case, where disclosure and the provision of witness statements might permit the Claimant to prove the case it now advances. Ultimately, whatever inconsistences there are in the Claimant's case, it does advance a positive case as to the terms that were being used at the relevant time.

91. On balance, I accept that the witness statement of Mr Green shows, through the reference to a JotForm submission apparently made on 18 July 2023, a plausible case that the Claimant was at that time using the EW JotForm. If, as Mr Green asserts, the change to the ROC JotForm came later, it follows that the Claimant's case that the version of the JotForm seen by Ms Zhu was the EW JotForm is sufficiently plausible to meet at least the third of the limbs of *Brownlie*.

92. Indeed, given that there is not technically a factual dispute on this issue, since the Defendant has not advanced an alternative factual scenario, but rather simply contend that the Claimant cannot prove the case it advances as to the operative terms of the contract, it might be argued to meet the first limb. This is a somewhat academic argument – the simple fact is that on balance the Claimant is able to pass one of the *Brownlie* limbs, even if one might debate precisely which is the most apt.

93. If the Claimant is in due course able to show that parties contracted on the terms of the EW JotForm, it has not been argued that the Claimant cannot show one of the jurisdictional gateways of CPR6.33(2B). Indeed, I agree with the Claimant that it could probably show that it met all three.

94. Finally, I deal with the claim in quantum meruit. Given my finding on the third point, it is only necessary for me to consider the fourth issue. I accept that the new version of CPR6.33(2B)(c) is capable of applying to at least some quantum meruit cases. The potential difficulty, identified by the Defendant, is the basis on which the quantum meruit arises here. If it is said that the Claimant is entitled to payment even though there is no contract between the parties, I consider it arguable that the absence of any contractual relationship between the parties may prevent the case falling within CPR6.33(2B)(c). Thus, as the Defendant says, it may matter to know precisely how the claim on the quantum meruit is put.

95. But the reality is that the quantum meruit claim is very much secondary to the contractual claim and it is undoubtedly based on closely connected facts to those which form the basis for the court having jurisdiction. In those circumstances, there would be a strong ground for the grant of permission for service out under CPR 6.36. Admittedly, if permission is required, it should have been sought before service, but I accept the Defendant's sensible and pragmatic point that the court could consider granting retrospective permission. The alternative of allowing only the contractual claims to proceed would be a poor use of the parties' and the court's resources.

96. For the sake of completeness, if the claim were arguable only on the quantum meruit claim, I would have had considerably greater difficulty in concluding that one of the jurisdictional gateways was met. This was not fully argued out in submissions and I decline to give what would only be an obiter decision on the issue.

CONCLUSION

97. For these reasons I am satisfied that:

    a. In so far as the Claimant brings contractual claims, it was entitled to serve out of the jurisdiction under CPR6.33(2B).

    b. In so far as the Claimant brings a claim on a quantum meruit, it ought for the avoidance of doubt be granted permission retrospectively to serve out.