Neutral Citation Number: [2024] EWHC 3106 (Comm)

Claim Nos: CL-2021-000065
CL-2024-000493

IN THE HIGH COURT OF JUSTICE
BUSINESS & PROPERTY COURTS OF ENGLAND AND WALES
COMMERCIAL COURT (KBD)

The Rolls Building
7 Rolls Buildings
Fetter Lane
London
EC4A 1NL

Friday, 15th November 2024

Before:

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

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Between:

TP GLOBAL OPERATIONS LIMITED (trading as 1GLOBAL)	**Claimant/ Applicant**
- and –	
INSIGHTFUL TECHNOLOGY LIMITED	**Defendant/ Respondent**

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MS. LISA LACOB (instructed by **Allen Overy Shearman Sterling LLP**) appeared for the **Claimant/Applicant.**

MS. LAURA NEWTON (instructed by **Reynolds Porter Chamberlain LLP**) appeared for the **Defendant/Respondent.**

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Approved Judgment

Transcript of the Stenograph Notes of Marten Walsh Cherer Ltd.,
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HIS HONOUR JUDGE PELLING KC:

1. This is an application made on notice by the claimant, TP Global Operations Limited (trading as 1Global), for an order against Insightful Technology Limited, which I refer to hereafter as either Insightful or the defendant, for an order that the defendant must comply with what is contended by the claimant to be its obligations under clause 25.3 and Schedule 6 of a services agreement, entered into between Truphone Limited, to whom the claimant is the successor, and the defendant, dated 30th May 2018, which was novated in favour of the claimant from 24th January 2023.

2. The application is advanced by reference to a claim form which has been issued but so far not served, and is acknowledged to be, in effect, an order for specific performance of one particular post termination, or termination obligation, that arises under the contract. The defendant opposes the making of the order on various grounds, including but not limited to the following; that is to say, first, that the obligation upon a true construction of the contract to return the relevant data has not yet arisen, will not arise until the end of February next year at the earliest and therefore any order is premature and unnecessary, because in any event the defendant is taking the steps necessary to return the data; secondly, the data cannot be returned lawfully unless and until various assurances have been received from the end users for whom the data is stored by defendant on behalf of the claimant, who has the contractual relationship with the end users, to the effect that the end users consent to the transfer of the data stored by the defendant to the claimant; and, thirdly, on the basis that, in any event, a licence is required, for which the claimant must pay in order to regularise the retention of the data by the defendant until after these various steps have been taken. In the result, Ms. Newton, who appears on behalf of the defendant, submits that no order ought to be made.

3. Ms. Lacob, on behalf of the claimant, submits that this is a straightforward application for an interlocutory injunction. She accepts, I think at least implicitly, that given the mandatory nature of the orders being sought, there is an enhanced need on the part of the court to look at the underlying merits before considering granting an injunction, but none the less maintains that even if that is correct, on an analysis of the merits there should be no difficulty whatsoever in the court acceding to the order made. She answers the point made concerning prematurity by saying that the defendant has, in the past, and upon proper analysis of the submissions made in the course of this afternoon, continues to insist upon payments to which it is not entitled as a condition of handing over the data which, as a matter of contract, the claimant maintains it is entitled to on an unconditional basis. Therefore, unless the court intervenes at this stage, having regard to the lead times that are necessary in order to deal with this issue, no sensible forward progress will be made.

4. The principles which apply to an application like this are those that I have perhaps already alluded to. The first question is whether or not there was a serious issue to be tried. As I have already indicated, I am prepared to work on the basis that there is an enhanced obligation for a court to look at the merits when considering the grant of an injunction in the terms sought in this case. The second question that arises is whether damages would be an adequate remedy. As to that, the point which is made by Ms. Newton on behalf of the defendant is that no serious attempt has been made by the claimant to identify what losses it is likely to suffer as a result of not retrieving its data, with no evidence of claims being made by end users in

relation to that data. Therefore, no damage is likely to be suffered, and therefore damages would plainly be an adequate remedy. There is apparently no dispute that the claimant is good both on the usual cross undertaking as to damages and on a further undertaking that was offered by Ms. Lacob in the course of her submissions, to pay £150,000 to the defendant upon receipt of, or within a short time after the receipt of, the data being the highest sum her client concedes would be payable to the defendant.

5. With those introductory remarks, it is convenient to start by reference to the services agreement between the parties. As might be expected, given the nature of the data that is in dispute in this case, the contract is a complex one, with a number of different schedules each containing a series of detailed obligations. The claimant has fairly acknowledged that some of these provisions might, upon one construction of them, appear to be in conflict, and therefore has adopted what it maintains is the fairest construction in favour of the defendant for the purposes of developing its case that it is entitled to recover the data by a court order.

6. Before turning to the terms of the contract, it is convenient to explain in a few words what the contract and the data is concerned with. Financial institutions in the United Kingdom are required to maintain transactional records, including audio recordings of staff undertaking trades or otherwise entering into contractual relations on behalf of those institutions. The data is collected on behalf of those institutions by contract between the claimant and the end user institution concerned. The claimant became a party by substitution to the services agreement, which is an agreement under which, very broadly, the defendant provides data storage facilities for data collected by the claimant on behalf of its institutional clients in return for various fees, which storage is undertaken on behalf of the claimant as the defendants sole relevant counter party. The management of data in the United Kingdom is the subject of specialist statutory regulation. For these purposes, it is relevant to start with the General Data Protection Regulations, because they provide the statutory background which is relevant for the purposes of this agreement. Under Article 28(3) within section 1 and Chapter IV of the regulations

> "Processing by a processor shall be governed by a contract or other legal act under [F1domestic law], that is binding on the processor with regard to the controller and that sets out the subject-matter and duration of the processing, the nature and purpose of the processing, the type of personal data and categories of data subjects and the obligations and rights of the controller…"

Including specifically a stipulation that the processor:

> " g at the choice of the controller, deletes or returns all the personal data to the controller after the end of the provision of services relating to processing, and deletes existing copies unless [F3domestic law] requires storage of the personal data;
>
> h makes available to the controller all information necessary to demonstrate compliance with the obligations laid down in this Article and allow for and contribute to

> audits, including inspections, conducted by the controller or another auditor mandated by the controller.

7. Under Article 29 within section 1 and Chapter IV of the regulations, it is provided as follows:

> "The processor and any person acting under the authority of the controller or of the processor, who has access to personal data, shall not process those data except on instructions from the controller, unless required to by domestic law."

However under the agreement between the parties, as between the claimant and defendant, the controller is the claimant and the processor is the defendant. That is so as a matter of contract because under the terms of the contract it is provided that that is so. There is equally provision within the contract which makes it clear that as between the claimant and defendant the property interest in the data belongs exclusively to the claimant. Thus, it is submitted on behalf of the claimant, and I accept, that as between the claimant and the defendant, the claimant is the controller, the defendant the processor, with the consequence that the duties which are owed are owed by the defendant to the claimant with any duties concerning the end user owed by the claimant to the end user. Thus, I accept the submission made by Ms. Lacob on behalf of the claimant that in those circumstances the demands which are made by the defendant for confirmation by the end users to be provided by the claimant as to the transfer of data is a mistaken submission. That issue does not arise as between the claimant and the defendant.

8. As might be expected, the contract contains complex termination provisions. The relevant part, for present purposes, starts with clause 25 of the agreement, which appears under the subheading "EXIT AND SERVICE TRANSFER". Clause 25.1 of the contract provides:

> "Following the termination or expiry of this agreement for any reason, if Truphone", [for which throughout should be read the claimant] "so requires, the Supplier shall continue to provide the Services for so long as Truphone requires (subject to such period of time being no more than 6 months from the date of termination or expiry)."

By clause 25.2, the supplier, that is the defendant, was required to cooperate with Truphone or, by substitution, the claimant, to the extent reasonably required to assist the migration of the services from the defendant to the claimant, or as the claimant may direct. By clause 25.3, it was agreed:

> "With respect to the return of Client Data", as defined, "both parties shall comply with their respective obligations set out in Schedule 6."

9. Schedule 6 is entitled "*Exit Plan and Service Transfer Arrangements*". That schedule contains a number of provisions which are designed to take effect and manage the data transfer process. The opening part of Schedule 6 is in these terms:

> "In the event of termination or expiry of this agreement, all Client Data relating to Truphone Customers must be extracted from the Supplier's platform and transferred to Truphone in a controlled manner. The extraction and transfer of all such data must be completed within a period of six months from notice of termination being issued or the expiry date (as applicable), subject to Truphone making sufficient data storage space available."

There is a point to be made in relation to that wording, because Ms. Newton submits that one of the difficulties which has arisen between the parties is that the claimant failed to make sufficient data storage space available at the time when transfer of data was meant to take place. The language used in this part of Schedule 6, and in particular the words "*subject to",* suggests to a level of at least reasonable arguability that the obligation to provide sufficient storage space was a condition precedent to the obligation of the defendant to transfer data. There is no particular surprise about this being the appropriate construction, since unless sufficient data space is made available for the transfer of the data, it is pretty obvious that transfer of the data cannot take place. As I will explain in a moment, whilst there is an issue about this between the parties, it is or is likely to be of no practical significance because of the period of time the claimant concedes should be made available to the defendant for the data transfer..

10. Schedule 6 then continues by setting out a process for the extraction of data in four steps, including (1) the cessation of processing, (2) export of data, (3) validation and (4), at the end, a data purge, which requires that the defendant take the following steps, namely:

> "Once all Client Data has been exported from the Insightful Platform and Truphone has successfully validated the exported data, the storage drives that Insightful uses to store the customer data will be systematically purged by Truphone. At this stage Insightful will confirm in writing that neither it nor any member of the Supplier's Group, retains any Truphone Client Data in any format at any location."

Although this is said to be a reason why third party consents are required, I do not see it in those terms. These requirements are all in conformity with Article 28 of the regulations quoted earlier and constitute a contractual obligation as between the claimant and defendant. In any event, the requirement to purge only arises once all data has been exported, and, more particularly, the claimant has successfully validated the exported data. Therefore, the question of purging is really not an issue which should expose anyone to any risks, since it is not something that can or should be undertaken until after the export of the data has been successfully validated.

11. There is then a provision which is one of the central provisions relevant to this application. Under the heading "*Data Return Fees*", it is provided:

> "Other than where Truphone has terminated the agreement further to Clause 23, a Supplier may charge Truphone a

> reasonable fee for the Data Return as outlined [in] this schedule, subject to a cap of £150,000."

12. The points made on behalf of the claimant in relation to this obligation are that the £150,000 is a cap, not a fixed sum or floor. However, what it does do is to identify the maximum sum that can be required to be paid by the claimant, other than where the claimant has terminated the agreement f pursuant to clause 23, and that is not alleged to be relevant for present purposes. The key point, for present purposes, is that the claimant is offering an undertaking to pay £150,000 to the defendant, within working day of the export of the data to the claimant. That will require a little refinement in order to make sure that it fully satisfies all legitimate requirements. However, the point which is made by Ms. Lacob on behalf of the claimant is that is a relatively generous concession to make, since there are other provisions within the agreement which support the proposition that this sum is not payable at all. However, for present purposes, that is not a point which is being taken, and the undertaking that I have identified has been offered.

13. I return, then, to the essential facts of the agreement. Notice of termination was given by the claimant to the defendant on 24th August 2023. The notice expired in accordance with its terms on 24th February 2024. Therefore, on the claimant's case, the time for completing the export of data in accordance with the provisions to which I have referred was 24th February 2024. Ms. Newton disputes that as being a correct analysis, not least because she maintains there was a delay in making the data collection facilities available. That is not an issue that is relevant to the issue I have to determine, because it has been agreed between the parties that the data should be capable of being provided by no later than 23rd February 2025. Thus it is that whatever happened in the period after the expiry of the notice to terminate and the termination in February 2024, and the concern there was about data facilities to receive data, that has been corrected now, and therefore at a level of practicality data can be exported by the date identified.

14. In those circumstances, the submission which is made on behalf of the claimant is the first issue which has to be determined on an application of this sort, namely whether or not a serious issue to be tried has been demonstrated, or whether, on a consideration of the merits, it has demonstrated that it has the better of the claim, I should be satisfied that that requirement has been made out. I agree. The contractual provisions concerning the return of the data are clear. The timing by which the data has to be returned is clear. There is no sensible regulatory or contractual basis upon which it can be said that the defendant is entitled to retain the data until it has received confirmation from all the end users that they are content for the data to be transferred to the claimant by the defendant. That is not a relevant consideration once it is understood that, as between the claimant and the defendant, the claimant is the controller and the defendant the processor, with the claimant being the processor as between it and the various end users and the end users being the controllers. The contractual obligations are those I have identified and there is no reason why effect cannot or should not be given to them.

15. The second problem that potentially arises, which Ms. Newton relies upon, is that on a proper construction, or what she contends to be the proper construction of the agreement, additional fees above and beyond the £150,000 are recoverable. The basis on which she advances this argument starts with the definition of "*Transitional assistance services*" in the services agreement, which refers to

services to be provided by the supplier to the claimant pursuant to clause 25 and Schedule 5, including those required to facilitate the transfer of the services to Truphone or a replacement supplier. This is used as the springboard for a suggestion that there are numerous additional services which will have to be provided in order to comply with the obligation to transfer the data. The point which is made by Ms. Lacob on behalf of the claimant is that there is a dispute about that by reference to the language that has been used, but it does not really arise for present purposes, since there is no wording which suggests that the payment is a condition precedent to the transfer of data, and there is no reason why, with the data transferred and the claimant then able to satisfy the requirements of the end users, the disputes between the parties concerning what the defendant is entitled to from the claimant financially cannot then be dealt with by way of litigation in the ordinary way. I agree with that submission. The issues I am concerned with now is the transfer of the data pursuant to mandatory contractual obligations that arise following termination and which are not expressed to be subject to any condition precedent entitling the defendant to payment of the sums to which Ms Newton refers before transfer can be required to take place. .

16. The second point which arises, therefore, is whether Ms. Newton is entitled to rely upon the fact that, on the defendant's analysis of the events that have happened, the obligation to transfer the data has or may not have currently arisen, and will not arise until sometime in February of next year. Ms. Lacob's answer to that is to point to the fact that, despite numerous requests from the claimant to agree to the transfer of data in accordance with the terms to which I have referred, the position of the defendant has been to indicate only that it is willing to make transfers on terms which are conditional, and which are disputed. In my judgment, Ms. Lacob is entitled to submit, as she does, that unless the court puts an order in place for the transfer of the data, there is an obvious real prospect that the data will not be transferred by the date that has been identified, and that unless the order is put in place now, the relevant steps necessary to ensure a transfer by the date, which both parties agree in principle ought to be capable of being delivered, will not be complied with. I accept that submission in the light of the material that I have been taken to, and in particular the correspondence I have been taken to. The short point is that the defendant has made it clear that unless and until the various demands it has made are addressed it will not volunteer the transfer of the data. The defendant could have but has not offered an undertaking to make the necessary transfer.

17. The next point which arises is a point made by Ms. Newton concerning the need for a licence. Her submission, advanced by reference, I think, to what she says in footnote 20 within her skeleton argument, is that it is necessary for a licence to be entered into by the claimant with the defendant, which authorises the defendant to hold the data until it is transferred by the defendant to the claimant in accordance with the order that is proposed. The difficulty about that is that the contract between the parties sets out what is contemplated between the parties for the holding of data, following termination, and then its transfer by the defendant to the claimant. Ms. Lacob indicated, in the course of her reply submissions, that she was content, on behalf of her client, for the order to record expressly an acknowledgment by her client that the defendant is entitled to hold the data, the subject of these proceedings, as the claimant's data processor, but strictly subject to the terms of the order to be made on this application, for the purposes of complying with it. In those circumstances, the ostensible concern expressed by Ms. Newton on behalf of the defendant, namely that it would be alleged that the defendant was

acting unlawfully, or perhaps illegally, and contrary to relevant criminal law by holding the data, simply disappears.

18. That being the position in relation to the serious issue to be tried point, the point which then has to be considered is damages. Ms. Newton's submission on behalf of the defendant is that damages will be an adequate remedy, because the claimant has failed to demonstrate any claims being made against it which would sound in damages by any end user. In those circumstances, it is submitted that the damages would be an adequate remedy because no claims are being made or have been made, therefore there is no need for an injunction applying conventional reasoning, and therefore the application should fail and be dismissed.

19. The submission which is made on behalf of the claimant is that this is entirely unreal, and it is unreal for a number of different reasons. Firstly, it is worth acknowledging that clause 26 of the agreement, under the heading "*INADEQUACY OF DAMAGES*" provides:

> "Without prejudice to any other rights or remedies that a party may have, the parties acknowledge and agree that damages alone may not be an adequate remedy for any breach of the terms of this agreement by the other party. Accordingly, each party shall be entitled to the remedies of injunction, specific performance or other equitable relief for any threatened or actual breach of the terms of this agreement."

20. This gives rise to a contractual estoppel and is in my view is fatal to the defendant's case on this point. In any event, the key point about damages being an adequate remedy is the difficulty of proving damages, in circumstances where the claims that will be made might be difficult to quantify. Where multiple end users have contractual relationships with the claimant, which require the claimant to act as the processor of its data, the real problem that arises is not so much the risk that the claimant will be sued in damages and therefore have to sue the defendant in turn if the data is not returned, but that, for various regulatory purposes, the end users will or may require access to the data concerned. In those circumstances, I am certainly satisfied that, as between the claimant and defendant, damages would not be an adequate remedy, and that what is required is the transfer of the data in accordance with the agreement between the parties so that that data can be dealt with by the claimant to the orders and instructions of the end users.

21. The next question which arises, therefore, is whether damages will be an adequate remedy so far as the defendant is concerned. So far as that is concerned, I am satisfied of that for essentially two reasons. First of all, an unqualified cross undertaking in damages is offered in the usual way, and no one has suggested that the claimant is not good on that cross undertaking. Secondly, there has been the unqualified undertaking to pay £150,000 that I alluded to earlier in this judgment and likewise it has not been suggested that the claimant is unable to pay that sum when it becomes due under the terms of the undertaking. .

22. In those circumstances, Ms. Lacob submits that it is not necessary to consider the balance of convenience. I agree. If and to the extent that is wrong, I should make it clear that on the balance of convenience I am satisfied that it is appropriate to grant the injunction sought, essentially for the reasons I have already identified when

indicating why at a factual level I am satisfied damages would be an inadequate remedy; that is to say, this is material which the claimant is entitled to recover from the defendant; the data is required by end users in order to enable them to comply with their regulatory obligations and delaying further the return of that data is an unwarranted interference which is not justified either by the terms of the applicable regulations or the terms of the contract between the parties. The balance of convenience, therefore, lies in ensuring that all parties to this agreement comply with their contractual obligations in relation to the data, which means, as I have said, that the defendant must transfer the data to the claimant against the claimant undertaking to pay the apparently maximum sum due to the defendant following transfer of $150,000. If the defendant considers that they have additional financial claims, there is no reason why they should not launch such claims by way of defence and counterclaim.

23. The final point which I should deal with concerns the service of the claim form. Ms. Lacob submitted on behalf of the claimant that it may be appropriate to order that the date for service of the claim form should be delayed until one month after the date by which data is to be delivered in accordance with the order that was proposed by the claimant. Ms. Newton indicated that that was a source of suspicion so far as the defendant is concerned, not least because of her point that defendant's belief is that there would be no loss actually suffered by the claimant, and therefore the remedy that they really seek is the interlocutory injunction which I have indicated is to be granted.

24. The short point which arises in relation to this is the party who issues proceedings in the High Court is generally required to serve the proceedings in accordance with the rules that apply, and indeed a defendant, knowing of the existence of proceedings issued against it, is entitled to call for service in any event. Generally, a court will not granny an interlocutory injunction unless proceedings are not only issued but served. In those circumstances, I do not propose to accede to the submission that there should be an order which permits the claimant to delay service. They have sought an injunction, the originating process is the claim form, and that claim form must be served with the particulars of claim to follow so as to facilitate a defence and counterclaim, if so advised by the defendant. Subject to that point and to the provision of a satisfactory formulation of the additional undertaking to be provided by the claimant I will grant the interlocutory mandatory order sought.

(**Proceedings continued, please see separate transcript**)

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(This Judgment has been approved by HHJ Pelling KC.)

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