

SHERIFFDOM OF TAYSIDE, CENTRAL AND FIFE AT DUNDEE

[2024] SC DUN 39

PER-CA13-23

JUDGMENT OF SHERIFF JILLIAN MARTIN-BROWN

in the cause

STAFFSCANNER LIMITED, a company incorporated under the Companies Acts (registered number SC566169) and having its registered office at 125 West Regent Street, Glasgow, G2 2SD

Pursuer

against

HUDSON HEALTHCARE LIMITED, a company incorporated under the Companies Acts (registered number SC08376121) and having its registered office at 1st Floor, Sutherland House, 70-78 West Hendon Broadway, London, NW9 7BT

Defender

**Pursuer: Ms Niven; Morton Fraser MacRoberts LLP
Defender: Mr Casiday; Mitchells Robertson**

Dundee, 4 April 2024

Introduction

[1] In this case the pursuer sought payment of invoices rendered to the defender for the supply of temporary workers in its care homes. Parties were in dispute as to whose terms and conditions governed the contract between them.

Findings in Fact

[2] The pursuer is Staffscanner Limited, a company incorporated under the Companies Acts (registered number SC566169) and having its registered office at 125 West Regent

Street, Glasgow, G2 2SD (“Staffscanner”). Staffscanner supplies temporary workers to care homes.

[3] The defender is Hudson Healthcare Limited, a company incorporated under the Companies Acts (registered number SC08376121) and having its registered office at 1st Floor, Sutherland House, 70-78 West Hendon Broadway, London, NW9 7BT (“Hudson”). Hudson operates care homes across the United Kingdom, including care homes at 146 Pitkerro Road, Dundee, DD4 8ER and Lornebank Care Centre, 3 Lorne Street, Hamilton, ML3 9AB.

[4] In January 2021 Staffscanner approached Hudson to offer their services. Staffscanner explained that they had a booking app that Hudson would have access to for placing all booking requests and provided a demonstration. Hudson asked Staffscanner to agree to their terms and conditions (“the care home terms and conditions”). On 12 January 2021, Staffscanner’s employee, Amir Najafian, signed the care home terms and conditions on behalf of Staffscanner and returned it to Hudson via email.

[5] Paragraph 2 of the section on Bookings and Signing In / Out provided:

“2. Agency staff must sign in and out of their shift using the touch screen Careblox Time and Attendance Terminal as an ‘Agency Worker’. **Only shifts signed in and out of Careblox will be invoiced.**”

[6] Paragraphs 1, 2 and 3 of the section on Timesheets provided:

“1. Agency staff should submit their manual timesheet to the Home Manager, Administrator or Receptionist.

2. The Home Manager, Administrator or Receptionist will send manual timesheets away in accordance with the electronic information recorded on Careblox time and attendance and scan these back to the agency provider on a Monday of each week for the previous week’s shifts.

3. Only the Home Manager, Administrator or Receptionist are authorised to sign timesheets. **Timesheets signed by an unauthorised person will not be invoiced.**”

[7] Paragraph 1 of the section on Invoicing provided:

“1. Invoices must be sent directly to Head Office within 14 days of their issuance and the shift dates worked.”

[8] Following the demonstration, Hudson was sent a secure link by email to enable it to setup its profile on the Staffscanner app. Hudson followed the link to create an account, using a password of its choice. Hudson set up profiles for use at its homes. Once the account and profiles were set up, Hudson’s managers were able to log in using its password to start posting shifts and booking staff. Hudson’s managers began booking staff through Staffscanner’s app in January 2021 for the care home in Dundee and in July 2021 for the care home in Hamilton.

[9] All persons using Staffscanner’s app to book temporary workers were required to accept Staffscanner’s terms and conditions (“the agency terms and conditions”) every time they logged in by ticking the box accepting Staffscanner’s “licence terms and conditions” before proceeding to the next page. The agency terms and conditions were updated regularly and could be accessed at any time via the client dashboard or via Staffscanner’s website.

[10] Hudson’s managers posted the details of the shifts they were looking to book workers for, including the duration and rate of pay. Workers were shown details of Hudson’s available shifts when they logged into the app. The workers could then click “apply” to notify Hudson’s managers that they wanted to cover the shift. Hudson’s managers were notified of all applicants, which allowed them to choose which applicant they wanted to fill the shift. The successful applicant was notified through the app that they had been allocated the shift.

[11] When workers arrived for their shifts, they had to use the app to electronically start their shift. Workers could only clock in or out when they were within a certain radius of the

centre of the care home in which they were working. If they clocked in late or clocked out early then a deduction would be applied to the amount charged to Hudson, based on 15-minute blocks of time.

[12] Hudson's managers were notified through the app that workers had completed their shifts. Hudson's managers were prompted at that stage to give the workers a rating and were given the option to leave a comment about the workers' performance.

[13] Hudson's managers booked 304 temporary workers for their site at Pitkerro, Dundee and 512 workers for their workers at Lornebank, Hamilton during the period from June 2021 until August 2022. Staffscanner issued invoices to clients on a weekly basis every Wednesday. The sum of £30,567.45 remained outstanding and represented the sum sued for.

[14] Hudson ceased using Staffscanner's app in respect of both care homes in August 2022.

[15] Contrary to the care home terms and conditions, some agency workers did not sign in and out of Careblox. Hudson made payment of most invoices issued by Staffscanner, which were compliant with the care home terms and conditions. Hudson made payment of non-compliant invoices where it was Hudson's Careblox system that was non-functioning. In such circumstances, Hudson informed Staffscanner timeously and contemporaneous alternative evidence was obtained.

[16] On 19 August 2021 Hudson's executive assistant Aviva Kushner emailed Amir Najafian stating that Hudson would only honour and pay invoices that complied with the care home terms and conditions and re-stating the steps necessary to comply with those requirements.

[17] On 30 September 2021 Aviva Kushner emailed Amir Najafian that a specific shift would not be processed because the agency worker had not complied with the care home terms and conditions.

[18] Clause 6 of the agency terms and conditions deals with the payment of fees and VAT by clients. It provides:

“6.1 The client will pay Staffscanner Temporary Worker Fees in respect of Temporary Workers in accordance with the scale of charges advised to the client via the Staffscanner platform. The Temporary Workers Fees comprise of the Temporary Worker’s pay and holiday pay and include Staffscanner Limited’s commission and employer national insurance contributions. The following conditions apply to the Temporary Worker fees:

- (a) Fees are calculated according to the number of hours worked by the Temporary Worker (to the nearest quarter hour).
- (b) The client shall during the Assignment verify the number of hours worked by the Temporary Worker. If a client is unable to verify hours worked due to the client disputing the hours claimed, the client shall inform Staffscanner immediately and shall cooperate fully and in a timely fashion with Staffscanner to enable Staffscanner to establish what hours, if any, were worked by the Temporary Worker.
- (c) Failure to verify hours does not absolve the client of its obligation to pay the Temporary Worker fees in respect of the hours actually worked.
- (d) The client acknowledges that it shall not decline to verify hours worked on the basis that it is dissatisfied with the work performed by the Temporary Worker. In cases of unsuitable or unsatisfactory work the provision of clause 5.2 shall apply.
- (e) Staffscanner shall submit all invoices verifying the number of hours worked by the Temporary Worker.
- (f) Staffscanner shall invoice the client in arrears and invoices are payable within 14 days of receipt. No fee is incurred by the client until the Temporary Worker has commenced the assignment unless the client cancels the assignment within 24 hours of the commencement time.
- (g) The client may terminate an assignment only upon giving 24 hours’ notice via the Staffscanner app failing which it shall be entitled to terminate

an assignment, but it may do so only upon payment of a sum equal to 50% of the assignment.

(h) The client shall not be required to pay Temporary Worker fees for any absences (for whatever reason) of a Temporary Worker.

6.2 Staffscanner sub-charge VAT to the client, at the prevailing rate.

6.3 If the client fails to make a payment due to Staffscanner Limited under this agreement by the due date then Staffscanner may, without prejudice to its other rights, suspend the services of Temporary Workers to the client, and a client shall pay interest on the overdue sum from the due date until payment of the overdue sum, whether before or after judgment. Interest under this clause shall be accrued at 8% plus the Bank of Scotland base rate accrued on a daily basis.”

[19] Clause 16 of the agency terms and conditions is an entire agreement clause which provides:

“16.1 This agreement constitutes the entire agreement between the parties and supersedes and extinguishes all previous agreements, promises, assurances, warranties, representations, and understandings between them, whether written or oral, relating to its subject matter.

16.2 The client acknowledges that in entering into this agreement it does not rely on, and shall have no remedies in respect of, any statement, representation, assurance or warranty (whether made innocently or negligently) that is not set out in this agreement.”

Findings in Fact and Law

[20] Hudson made an offer for the supply of temporary workers on 12 January 2021, subject to the care home terms and conditions.

[21] That offer was met by counter offers from Staffscanner in January 2021 onwards for the care home in Dundee and from July 2021 onwards for the care home in Hamilton. Those counter offers were subject to the agency’s terms and conditions.

[22] Hudson accepted the counter offers as a result of creating an account on receipt of a secure link from Staffscanner using a password of its choice; setting up profiles for use at the homes; permitting their managers to book staff via the app by virtue of supplying them with

the log in details, including the password; and their managers ticking a box confirming agreement to the agency's terms and conditions before being able to book staff via the app.

[23] The agency terms and conditions were readily available via a hyperlink. They were updated regularly and could be accessed at any time via the client dashboard or via Staffscanner's website. The agency terms and conditions were sufficiently drawn to the attention of Hudson and its managers. The agency terms and conditions were incorporated into the contract between the parties.

[24] The invoices issued by Staffscanner are overdue for payment. Interest accrues at 8% plus the Bank of Scotland base rate on a daily basis.

Procedural History

[25] Evidence was led from the following witnesses by WebEx on 27 February 2024:

1. Amir Najafian;
2. Reza Najafian;
3. Gary Anderson;
4. Aviva Kushner;
5. Rita Ribeiro; and
6. Samuel Maierovits.

[26] Oral submissions followed the conclusion of the evidence on 27 February 2024 and I made avizandum.

Pursuer's Evidence

Amir Najafian

[27] Amir Najafian was previously employed by Staffscanner Limited as a pharmacist. He left the company at the end of 2021. He supported business development activities. He was introduced to Hudson by one of the managers in or around January 2021 and set up a

meeting with Aviva Kushner. At the meeting he provided a demonstration of the app and its capabilities. He agreed to provide Hudson with a one week trial period, during which Hudson would arrange agency workers for Staffscanner conventionally.

[28] Amir Najafian conceded that Aviva Kushner asked him to sign the care home terms and conditions, which he did. He conceded that unless the policy was signed then Staffscanner would not have been able to provide staff to Hudson. However, he maintained that he told Aviva Kushner that if the trial period was a success Hudson would be required to sign up to the agency terms and conditions, which would take precedence over the care home terms and conditions. When pressed, he was unable to explain why he would enter into a contract which he anticipated would be overridden in the space of a week.

[29] The trial period went well and Aviva Kushner wanted to proceed with setting up an account on the platform. He arranged for the business development team to send her a link so that Hudson could sign up to the app and create their own account.

[30] I found Amir Najafian to be a credible and reliable witness overall. However, I did not accept his position that he told Aviva Kushner that if the trial period was a success Hudson would be required to sign up to the agency terms and conditions, which would take precedence over the care home terms and conditions.

Reza Najafian

[31] Mr Reza Najafian was the Chief Executive Officer of Staffscanner Limited and was responsible for the overall strategic operation of the company. He also ran his own care home, which had led to him setting up Staffscanner.

[32] In the version of the app that Staffscanner was operating in January 2021, new clients were sent a link to sign up to the app and create their own account. They followed the link

to create an account, using a password of their choice. Once their account was set up they were able to log in to start posting shifts and booking staff. When logging in, clients had to agree to Staffscanner's terms of business by ticking a box confirming agreement to the agency terms and conditions. They were not able to proceed with logging in if they had not ticked the box.

[33] The terms of business were updated regularly and could be accessed at any time via the client dashboard or via Staffscanner's website. Updates were usually to the provisions relating to the app.

[34] Conventional staffing agencies relied on paper timesheets which were not always accurate, vulnerable to being misused and could often go missing. In the app, workers could only start their shift when they were within a certain radius of the care home location. If a worker was late in clocking in for their shift, 15 minutes would be deducted from the length of time worked. Once a worker ended their shift in the app, the client received notification saying that the worker had finished their shift and they were prompted to provide a rating for the worker. The client did not have to rate the worker, that was optional.

[35] Staffscanner calculated fees based on the information recorded in the app. The wage payment for the worker and invoice for the client was automatically generated at the same time through their accounting software, Xero. All workers were paid within 48 hours of completing their shift. Invoices were collated and sent out to clients once a week. The process was automated. On the rare occasions that invoices were challenged, it tended to be because a worker had fallen asleep during their shift. In those circumstances, the client would not be charged and the worker would be put on disciplinary measures.

[36] Reza Najafian first became aware of Hudson's unpaid invoices at one of their monthly finance meetings. Staffscanner did not have any credit controllers. Their payment terms were 14 days but in reality they allowed clients 30 days as most providers completed a monthly payment. He believed that Hudson was paying the minimum number of invoices that they could in order for them to be able to keep their service going. As time went on, the debt began to mount up.

[37] Reza Najafian did not know whether Careblox was a tool that was unique to Hudson or something used more widely across the sector. It was not something any other client had referred to before. He maintained that Staffscanner did not expressly agree to only issue invoices for shifts recorded in Careblox, nor did they undertake to ensure that their workers would use Careblox.

[38] Reza Najafian had two meetings with Samuel Maierovits and Aviva Kushner. The first meeting took place on 8 February 2022 and was amicable. Samuel Maierovits told him that Hudson used Careblox to budget and their policy was not to pay agency staff if they had not recorded their shift on Careblox. Reza Najafian was surprised to hear this as he did not think it was legal nor moral not to pay staff that had worked. He indicated Staffscanner could not issue fees in accordance with what was recorded on Careblox because Staffscanner had no access to it. He took the opportunity to demonstrate the reporting facilities in the app which clients could download, in which all shifts recorded on the app were time and date stamped. Samuel Maierovits and Aviva Kushner wanted to continue using the app so they committed to going away and looking at each invoice.

[39] Several months passed and the same pattern of partial payment behaviour continued. Hudson would pay some invoices but not all. Staffscanner continued to raise

this with Aviva Kushner, who would respond by raising questions about the invoices and referring to Careblox. This was all just a way of avoiding paying the invoices.

[40] The second meeting took place via Microsoft Teams on 22 September 2022 between Reza Najafian, Rita Ribeiro, Samuel Maierovits and Aviva Kushner. Samuel Maierovits and Aviva Kushner talked about Careblox again. Reza Najafian reiterated that Careblox was Hudson's internal system, had no bearing on Staffscanner's system, and that the agency terms and conditions took precedence.

[41] In an attempt to move forward, Samuel Maierovits proposed that Staffscanner discount 15% from the outstanding invoices and applied the same discount to any future invoices for shifts not recorded on Careblox, conditional on Staffscanner reaffirming a commitment to their agency policy. Reza Najafian rejected that proposal and made a counter offer of a discount of 5% on the historic invoices and 5% on any future invoices where the worker had not recorded their shift on Careblox, conditional on a process being established whereby compliance with Careblox was checked and reported to them on a weekly basis. Staffscanner did not receive any response to that offer and suspended Hudson's account on 7 October 2022.

[42] I found Reza Najafian to be a credible and reliable witness. In light of the difficulties conventional staffing agencies experienced through reliance on paper timesheets, he had devised a system for recording shifts, paying workers and issuing invoices which avoided such difficulties, from which care homes could not opt out if they wished to use his agency.

Rita Ribeiro

[43] Rita Ribeiro was Staffscanner's finance manager and had worked there for over four years. Her responsibilities included sending out invoices to clients.

[44] Hudson's payment of invoices was sporadic from the beginning. When asked why they were not paying they said it was because the relevant worker had not clocked in or out using Careblox. She responded to this by saying that Staffscanner could confirm that the shift had been completed through the information recorded in the app. She had never heard of Careblox before. It was not something any of their other clients used.

[45] Careblox was something Hudson brought up regularly. It was the excuse used for withholding payment numerous times. Workers told her that they were told not to bother with Careblox because the system was down and were told not to worry. That was fed back to Aviva Kushner, who reassured her that when the system was down the workers would still get paid.

[46] Things were made more difficult because Hudson challenged invoices months after they had been issued. Under the agency terms and conditions, a failure by clients to verify hours worked did not release them from their obligation to pay the fee for the hours worked. In addition, the agency terms and conditions provided that if the client was disputing the hours, then the client should inform Staffscanner immediately and raise any issues timeously. She informed Hudson on numerous occasions that even if the worker did not record their time on Careblox, Staffscanner would calculate the wage payments and issue invoices on the basis of the shift recorded by the worker in the app, in line with the agency terms and conditions.

[47] Issues continued and Staffscanner was left with no choice but to threaten to suspend Hudson's account on 18 October 2021. Aviva Kushner called her and said Hudson would sort out the unpaid invoices and asked them not to suspend their account. Staffscanner agreed to this. However the same thing started happening again, at which point Reza Najafian got involved and had a meeting with Samuel Maierovits and Aviva Kushner.

It was not the case that Hudson was not paying any of the invoices between June 2021 and August 2022. They paid the majority.

[48] Rita Ribeiro did not attend the first meeting. She attended the second meeting on 22 September 2022 via Microsoft Teams. Prior to the meeting Staffscanner had sent Samuel Maierovits and Aviva Kushner a breakdown of the outstanding invoices, which included the amount paid to the worker and their margin on each invoice. The only reason given for non-payment was that the workers had not clocked in or out of the Careblox terminal. Samuel Maierovits tried to reassure them at the meeting that Careblox was not a system for avoiding payment. At the meeting Reza Najafian said that the agency terms and conditions governed the agreement between both parties and were deemed accepted by virtue of the fact that Hudson was continuing to book workers through the app. Samuel Maierovits was not happy. At the end of the meeting he said he would be seeking legal advice. As a gesture of goodwill, Reza Najafian offered a nominal discount on the outstanding sum to draw a line under matters. That was rejected and Staffscanner suspended Hudson's account permanently.

[49] Some payments were received after the meeting on 22 September 2022. The last payment was received from Hudson on 4 November 2022.

[50] I found Rita Ribeiro to be a credible and reliable witness. She conceded that from the beginning, the reason given by Hudson for not paying invoices was because the relevant worker had not clocked in or out using Careblox and that Careblox was brought up regularly.

Gary Anderson

[51] Gary Anderson was head of technology at Argo Digital. Staffscanner was their biggest client. He was responsible for the entire technology side of Staffscanner and was supported by a team of five people.

[52] The current version of the software was launched on 6 April 2021. Hudson signed up to a previous version of the software. In that version, a client was able to register themselves on the platform by completing a form. Once registered, they would then have to log in to the platform. The log in process would not allow them to proceed unless the user checked a box labelled "I agree to the licence terms and conditions." The terms and conditions text was a hyperlink that brought up the agency terms and conditions.

[53] Gary Anderson was not involved in drafting the agency terms and conditions. He was given the agency terms and conditions from the operations team and asked to mirror them on the platform. The agency terms and conditions were available on demand via the web dashboard which the clients saw when they logged into the platform.

[54] Gary Anderson suspended Hudson's account on the platform on 7 October 2022 by disabling certain items in Hudson's settings on the platform. On 8 October 2022, Hudson accessed those settings and re-enabled these items before posting a new shift. That was noticed and the shift removed. Gary Anderson terminated the account following this incident to prevent Hudson being able to use Staffscanner's services by revoking access rights from all of Hudson's user accounts.

[55] I found Gary Anderson to be a credible and reliable witness. He was candid that he was not involved in drafting the agency terms and conditions.

Defender's Evidence

Aviva Kushner

[56] Aviva Kushner was known as Aviva Ryan prior to 9 December 2021. She had worked at Hudson Healthcare since March 2020, when she joined as an Executive Assistant. She was the primary contact for service contracts at head office. That included agency work, food contracts, mechanical engineers, goods and services. Hudson operated one system for service providers and another for goods providers. By way of example, service providers were required to sign in when they arrived at the care homes. There was no such requirement for delivery of goods.

[57] Aviva Kushner took initial consultation with agencies to determine whether Hudson would enter into a contract with them. At any given time Hudson might work with up to eight agencies across all four homes. All the agencies required to agree to observe the terms of the care home terms and conditions and if they did not agree to do so, she would end the discussion.

[58] Once an agency had been approved by head office, day to day operations were overseen by the managers at the home. The managers did not have authority to agree contracts. Invoices were sent to the head office for reconciliation and payment. Any problems in respect of terms of service were referred to the head office.

[59] When carers and nurses arrived at one of their homes, they tapped in using the Careblox system. That applied to direct employees as well as agency workers. Agency workers were required to identify the approved agency that sent them and sign their names before beginning work. Carers and nurses tapped out using Careblox when they finished their work.

[60] Careblox generated data that was used by the head office *inter alia* to pay staff. In the case of agency workers, Careblox generated the data that she used to reconcile invoices sent to Hudson by agencies. She authorised payment of invoices to the extent that she could reconcile their content with Careblox data. If she could not reconcile the data she notified the agency that there was a problem. If the problem could be overcome, she authorised the payment. Otherwise, she contacted the agency and explained that the invoice would not be paid in full under reference to the care home terms and conditions.

[61] Aviva Kushner thought a third party recommended Staffscanner. Her initial dealings were with Amir Najafian. She had a preliminary discussion with him using Teams and explained to him the care home terms and conditions. He did not raise any problems. At no point did Amir Najafian indicate that Staffscanner would seek to incorporate their terms of business into the contractual relationship, nor that their terms of business existed. If he had done so, she would have brought the discussion to an end.

[62] Aviva Kushner thought that Amir Najafian offered a demonstration of the Staffscanner app but that had little relevance for her since the use of the app would be a matter for the managers at the homes. Profiles were set up for use at the homes. The app was not used in the head office. From her perspective, there was no difference between the managers requesting agency staff using the Staffscanner app and the managers requesting agency staff by phoning other agencies.

[63] She was able in most instances to reconcile the contents of Staffscanner's invoices with Careblox data and authorise payment. If she declined payment for specific items in Staffscanner's invoices, she notified them that she had done so. On 19 August 2021 she wrote to Amir Najafian reminding him that under the policy Hudson honoured only those invoices supported by Careblox data. On 30 September 2021 she wrote to Amir Najafian

again and informed him that she was declining payment for a specific item. Her practice was to encourage compliance so that Hudson and its agencies worked well together.

Mistakes happened and sometimes adjustments were needed in developing the commercial relationship with agencies.

[64] Staffscanner disputed Hudson's decision to withhold payment and insisted that payment should be made according to the agency terms and conditions. That was how she came to be aware that Staffscanner considered that the agency terms and conditions had been incorporated into the contract between the parties. That came as a surprise. So far as Amir Najafian had made her aware, the app was simply what the managers in the homes would use to book workers.

[65] On 14 February 2022 Reza Najafian emailed Aviva Kushner with a spreadsheet for Lornebank showing a breakdown of the invoicing which was under dispute and those where he understood people did not sign into Careblox. He also indicated that the templates for Hudson had now been changed to state clearly all applicants must sign into Careblox at the care home on arrival as this would affect payment. She took this as acknowledgment that he understood and accepted the importance for Hudson of signing in using Careblox and accepted the consequences of failing to use Careblox. As discussions continued, it became clear that her optimism was premature. Reza Najafian insisted that the agency terms and conditions were incorporated into the contract between the parties.

[66] After a second meeting between Reza Najafian and Samuel Maierovits, Mr Maierovits told her to stop using Staffscanner. She had no recollection of Staffscanner threatening to suspend their account and was certain that no such threat made its way to head office.

[67] I found Aviva Kushner to be a credible and reliable witness. She was conceded that mistakes happened and that if problems could be overcome, she authorised payments.

Samuel Maierovits

[68] Mr Maierovits was the Managing Director of Hudson since November 2012. He was supported by his Executive Assistant Aviva Kushner.

[69] Mr Maierovits developed the care home terms and conditions. He aimed for them to be clear and concise so that contractors could understand how agency workers fitted within their business model. It was only two pages long because he wanted to ensure it was easily understood by agencies. He wanted it to be clear that Hudson was not sneaking anything into the contract. There was a counterpart document for goods suppliers. That was the framework within which their homes operated.

[70] Careblox was the system that Hudson used at the homes for all staff clocking in and out of shifts. Careblox generated data that Hudson used to confirm and process payroll of their own staff as well as to authorise and pay agency staff invoices. They used this data to analyse staffing levels against staffing requirements of the home to help ensure appropriate and sustainable levels of staffing. Careblox data was used to respond to any periodic requests from the Care Inspectorate for Hudson's rotas and records. In the event of an emergency, they knew who was there.

[71] He knew that occasionally it took time for the relationship with agencies to settle. Hudson took a sensible and pragmatic approach to any difficulties in the early stages of those commercial relationships. However, given the importance of Careblox to its business model, Hudson did insist on compliance with its care home terms and conditions. Hudson

did not enter into bespoke contracts with any agency who refused to accept the care home terms and conditions.

[72] He entered into discussions with Reza Najafian when Aviva Kushner told him there were disputes about invoices. She was declining to pay items in invoices where she could not reconcile them with Careblox data as per the care home terms and conditions. He told Reza Najafian that as long as Staffscanner's agency workers were also following and using Careblox, it did not matter to him whether they were booked on the app. Booking was handled by the homes. The app was simply a way for managers to book agency workers. Reza Najafian's position was that the agency terms and conditions had displaced the care home terms and conditions and Staffscanner had no obligation to use Careblox.

Samuel Maierovits was surprised by this.

[73] There was never an agreement between the parties to incorporate the agency terms and conditions into the contract between them. Allowing a service provider to vary the contractual terms would undermine the entire purpose of the care home terms and conditions. Managers could not enter into contracts for Hudson in their role as end users of the app. As discussions progressed he had a frustrating sense that Staffscanner was trying to sneak in its own contract as a consequence of terms and conditions embedded in an app. In hindsight it seemed to him they only pretended to agree to the care home terms and conditions, without any intention of ever abiding by them. He felt Staffscanner had acted in bad faith and tried to trick Hudson.

[74] Reza Najafian and Samuel Maierovits informally discussed settlement as a pragmatic way to bring the relationship to a close but made little progress. Thereafter, Samuel Maierovits determined that Hudson would no longer use Staffscanner. He rejected the assertion that Hudson was paying the minimum number of invoices they could in order

to be able to keep their service going and fly under the radar. He accepted payments had been made to Staffscanner in late November 2022, because the corresponding invoice was compliant with the care home terms and conditions. Several years ago another agency tried to unilaterally change the terms of their service contract with Hudson and seemed to think if they threatened to withhold agency staff, then he would agree to the changes. In response, he withdrew their status as an approved service provider. He mentioned that incident to Reza Najafian to illustrate the point that he would not be bullied into agreeing the changes to the care home terms and conditions.

[75] I found Samuel Maierovits to be a credible and reliable witness. He conceded that occasionally it took time for the relationship with agencies to settle and tried to take a sensible and pragmatic approach to any difficulties in the early stages of commercial relationships. The importance of Careblox to his business model was such that he developed clear and concise care home terms and conditions.

Legislation

[76] Section 1 of the Contract (Scotland) Act 1997 provides as follows:

- “1. Extrinsic evidence of additional contract term etc.
 - (1) Where a document appears (or two or more documents appear) to comprise all the express terms of a contract or unilateral voluntary obligation, it shall be presumed, unless the contrary is proved, that the document does (or the documents do) comprise all the express terms of the contract or unilateral voluntary obligation.
 - (2) Extrinsic oral or documentary evidence shall be admissible to prove, for the purposes of subsection (1) above, that the contract or unilateral voluntary obligation includes additional express terms (whether or not written terms).

(3) Notwithstanding the foregoing provisions of this section, where one of the terms in the document (or in the documents) is to the effect that the document does (or the documents do) comprise all the express terms of the contract or unilateral voluntary obligation, that term shall be conclusive in the matter.

(4) This section is without prejudice to any enactment which makes provision as respects the constitution, or formalities of execution, of a contract or unilateral voluntary obligation.”

Authorities

[77] Parties referred me to the following authorities:

- *Butler Machine Tool Company Limited v Ex-Cell-O Corporation* [1979] 1 WLR 401;
- *Difference Corporation Limited v Unitel Direct Limited* [2019] EDIN SC 56;
- *Grafton Merchanting GB Ltd t/a Buildbase v Sundial Properties (Gilmerton) Limited* [2013] 1 WLUK 643;
- *Robert Allan and Partners v McKinstry* [1975] S.L.T. (Sh Ct) 63;
- *Robert Barry and Company v Doyle* [1998] S.L.T 1238; and
- *TRW Limited v Panasonic Industry Europe GMBH* [2021] EWCA Civ 1558.

Pursuer’s Submissions

[78] Ms Niven submitted that the facts of this case were straightforward. It was not disputed that the parties contracted with each other. The only dispute was whether Hudson was entitled to withhold payment for services because the care home terms and conditions excluded any right to be paid when certain administrative requirements were not complied with. The situation did not arise because Staffscanner’s own agency terms and conditions took precedence. In any event it was entitled to be paid for work done. On any view this was a technicality.

[79] It was an express term that Staffscanner was entitled to be paid. If not there should be an implied term that they were entitled to payment for services.

[80] Staffscanner's business was entirely online. Amir Najafian made it clear that the agency terms and conditions would take precedence when he signed the care home terms and conditions at Aviva Kushner's request. Once Hudson logged in to post shifts and assign workers it had to agree to the licence terms and conditions and an agreement was formed between the parties.

[81] *Difference v Unitel* was an example of a contract formed by a purchase order. It was held the process was electronic and there was no need to deliver an electronic copy of standard terms and conditions. *Grafton v Sundial* was an example of the battle of forms, which held that the party that got terms in last won. A party can circumvent the last shot rule by saying that their conditions will prevail over other party's terms and an example could be seen in the *Butler Machine Tool* case. However, in this case the agency terms and conditions contained an entire agreement clause, whereas the care home terms and conditions did not. Under the Contract (Scotland) Act 1997, that was conclusive.

[82] Hudson relied on the *Panasonic* case which was an exception to the last shot rule. In that case Panasonic's terms were deliberately and carefully drafted to protect against the last shot doctrine and should be distinguished.

[83] If there was no express term then there was an implied term of *quantum meruit* to be paid for a service provided. An example was in *Robert Allan*. People were presumed not to do professional work gratuitously. Careblox was not material to performance and there was no basis for withholding payment. The information in the terminal was the same information available to Hudson from the Staffscanner app, namely the date, name of the worker and duration. It was not in a format that could be easily plugged into other internal processes therefore it appeared that it was primarily a matter of convenience rather than

material to the performance of the contract. In reality, using Careblox was never an issue until payment was required and it was far too late to be raising that issue at that stage.

Defender's Submissions

[84] Mr Casiday submitted that the relevance of the *Panasonic* case was not the emphasis on a tightly worded contract overriding another contract but about the parallel features to this case, which were striking. In *Panasonic* the customer file was analogous to the care home terms and conditions.

[85] The purpose of approved status was to allow services to be provided with no further difficulties at places of business like Pitkerro and Lornebank. There was no guarantee services would be provided and instead there was an umbrella agreement.

[86] Amir Najafian signed the care home terms and conditions. No one else had been shown to have accepted terms and conditions who clearly had authority to enter into a contract. He conceded that he signed it as per Aviva Kushner's request because she stated unless the policy was signed they could not provide staff. When pressed he was unable to explain why he would enter into a contract which he anticipated would be overridden in the space of a week. That aligned with the status of the *Panasonic* customer file in that it was a framework agreement.

[87] Reza Najafian indicated that accounts were connected to care homes. He was not able to confirm accounts were ever associated with head office. The evidence was very clear that contract formation rested with head office and delegated responsibilities to care homes did not include entering into contracts. No evidence had shown that anyone with authority to enter into a contract ever created such an account, much less used the app.

[88] The function of a master contract or framework was to provide access to services. That was so whether the breach of terms of the contract was significant or trivial. It was not impossible to modify the terms of the contract. What kind of notice was required could be seen from the authorities. In *Butler Machine Tool* it was held that a buyer ought not to take advantage unless a term is drawn to their attention. Failure by the *proferens* to draw attention to an unusual provision disabled the party from relying on it. The degree of notice required varied according to the onerousness of the relevant provision. In this case, the agency terms and conditions were described as “licence terms and conditions”. Neither Amir Najafian nor Reza Najafian were able to provide assistance as to why that phrase was used. Samuel Maierovits repeatedly said he felt tricked. There was no suggestion of Hudson acquiescing by abandoning their rights under the care home terms and conditions. For the reasons outlined, the invoices that did not conform to the care home terms and conditions did not fall due to be paid.

[89] As regards *quantum meruit*, that operated when there was a lack of specification and no contractual relationship. Here, both parties agreed there was a contract but disagreed as to which contract it was. If the contractual terms were as per the care home terms and conditions, there was no unjust enrichment. There was enrichment but it was not unjustified because of the terms of the care home terms and conditions.

Decision

[90] Although I was not specifically referred to *McBryde's* The Law of Contract in Scotland (3rd edn.), paragraphs 6-97 – 6-109 were discussed within *Grafton v Sundial*. I agree with Sheriff NMP Morrison, KC that the traditional approach set out in *McBryde* represents the current law.

[91] *McBryde* at para 6-97 explains the “battle of forms” succinctly as follows:

“The requirement that offer meet acceptance has given rise to problems with the use of standard forms. The supplier A offers to supply goods to B. The offer is on a form with printed conditions. B accepts the offer by sending an order on the back of which are B’s standard conditions. B’s conditions, if different from A’s, are a “counter offer” to A which A may accept by conduct, i.e. by supplying the goods. That A has not intended this result is irrelevant if A’s conduct, viewed objectively, is acceptance.”

[92] At para. 6-102, *McBryde* makes reference to the *Butler Machine Tool* case and summarises the current law as follows:

“Despite judicial attempts by Lord Denning to suggest that the problem should be solved by looking at what was agreed in the whole correspondence, the traditional approach has been followed in England and Scotland. A qualified acceptance is a counter offer which amounts to rejection of the original offer. The counter offer may be accepted expressly or by conduct. The result is often referred to as a battle of forms in which the “last shot” wins. If both parties have careful drafting neither will win. The result is no contract which is commercially inconvenient and the reason other systems consider alternative solutions.”

[93] An example of careful drafting on the part of one of the parties can be seen in *Panasonic*, in which the English Court of Appeal held that, in signing the supplier's customer file which contained general conditions subject to German law, the English purchaser had acknowledged that those conditions would be incorporated into any subsequent supply contract between them. Accordingly, the supplier’s first shot prevailed.

[94] More commonly, in the battle of forms, the last shot wins. A recent example can be seen in *Grafton v Sundial*, in which a buyer completed and returned an application for a trade account, which contained the seller’s terms and conditions. Subsequently, the buyer submitted a purchase order, which referred to its own terms and conditions. With reference to *McBryde*, Sheriff NMP Morrison, KC held that looking objectively at what the parties had to be taken to have intended, the seller’s offer to contract on its conditions had been met by the buyer’s counter offer to contract on its own conditions. The seller then proceeded to process the order and would have to be regarded as having accepted the buyer’s conditions.

A proof before answer was allowed on whether the buyer's conditions had been brought to the attention of the seller.

[95] What is sufficient to provide adequate notice of standard terms and conditions can vary in each case and has evolved over time as business transactions have moved online. A modern example can be seen in *Difference v Unitel*, in which there was a dispute whether a call centre's standard terms and conditions had been incorporated into a contract with a software supplier. The contract was formed by the software supplier's purchase order form, which had been sent to the call centre electronically and electronically signed by the call centre's director. The purchase order form contained a live link via the internet to the software supplier's standard terms, which excluded liability on the part of the software supplier in contract, tort or for consequential or indirect loss. Sheriff N A Ross held that the software supplier's terms had been sufficiently brought to the call centre's attention and had been accepted without having been read. The contracting process was entirely electronic and the terms and conditions were readily available on a hyperlink.

[96] Applying those general principles to the circumstances of this particular case, following the demonstration of the app by Amir Najafian to Aviva Kushner, Hudson made an offer to Staffscanner to supply them with temporary workers on 12 January 2021, subject to the care home terms and conditions.

[97] That offer was met by counter offers from Staffscanner in January 2021 onwards for the care home in Dundee and from July 2021 onwards for the care home in Hamilton. Those counter offers were subject to the agency's terms and conditions.

[98] Hudson clearly did not intend for the agency's terms and conditions to govern the contract between them. However, viewed objectively, Hudson accepted the counter offers as a result of its conduct in creating an account on receipt of a secure link from Staffscanner

using a password of its choice; setting up profiles for use at the homes; permitting their managers to book staff via the app by virtue of supplying them with the log in details, including the password; and their managers ticking a box confirming agreement to the agency's terms and conditions before being able to book staff via the app.

[99] When logging in, the managers had to agree to Staffscanner's terms of business by ticking a box. They were not able to proceed with logging in if they had not ticked the box. The agency terms and conditions were readily available via a hyperlink. They were updated regularly and could be accessed at any time via the client dashboard or via Staffscanner's website. The agency terms and conditions were therefore sufficiently drawn to the attention of Hudson and its managers. The agency terms and conditions were incorporated into the contract between the parties.

[100] It is clear from the evidence that both parties assumed that their own terms and conditions would prevail. However, by virtue of the requirement to tick the box confirming agreement to the agency's terms and conditions, Staffscanner ensured that it fired the last shot in the battle of forms. Hudson did not avail itself of the careful drafting seen in *Panasonic*, providing that the care home terms and conditions would be incorporated into any subsequent contract between the parties for the provision of agency workers. Had it done so, it is possible that its first shot would have prevailed. By contrast, Staffscanner included an entire agreement clause in the agency terms and conditions. In light of the provisions of section 1(3) of the Contract (Scotland) Act 1997, that is conclusive on the matter.

[101] Accordingly, the agency terms and conditions govern the contract between the parties. That contract provides that fees are calculated according to the number of hours worked by the temporary worker to the nearest quarter hour. Failure to verify hours does

not absolve Hudson of its obligation to pay the temporary worker fees in respect of the hours actually worked. Invoices are payable within 14 days of receipt. Interest accrues at 8% plus the Bank of Scotland base rate on a daily basis.

[102] I therefore granted decree in favour of the pursuer as craved, together with interest thereon.

Expenses

[103] I was not addressed on expenses so I assigned a case management conference on this point.