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BL-2021-CDF-000013

IN THE HIGH COURT OF JUSTICE

BUSINESS AND PROPERTY COURTS IN WALES

BUSINESS LIST (ChD)

Cardiff Civil and Family Justice Centre
2 Park Street, Cardiff, CF10 1ET

Date: 05/06/2023

Before :

HIS HONOUR JUDGE JARMAN KC

Sitting as a judge of the High Court

Between :

QUANTUM ADVISORY LIMITED

- and -

QUANTUM ACTUARIAL LLP

Claimant

Defendant

Mr Jeffery Onions KC and Mr Guy Adams (instructed by **Harrison Clark Rickerbys**) for
the **claimant**

Mr Andrew Butler KC (instructed by **Acuity Law**) for the **defendant**

Hearing dates: 22 May 2023

Approved Judgment

This judgment was handed down remotely at 10.30am on 5 June 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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HIS HONOUR JUDGE JARMAN KC

HHJ JARMAN KC:

Introduction

1. This is the latest round of litigation between the parties (Quad and LLP respectively) as to the meaning and effect of a services agreement (the agreement) entered into on 1 November 2007 by LLP and Quad’s predecessor, which agreement was then novated to Quad. The first claim concerned whether the agreement prevented LLP from soliciting Quad’s clients. His Honour Judge Keyser QC, sitting as a judge of the High Court, found largely in favour of Quad ([2020] EWHC 1072 (Comm)). LLP’s appeal was dismissed by the Court of Appeal ([2021] EWCA Civ 227). Quad then brought a claim for declarations that LLP was obliged to carry out tendering, and to render various other services, on behalf of Quad under the agreement. The issue as to whether LLP was obliged to carry out tendering came before me, and I found that it was not ([2022] EWHC 1423 (Ch)). Quad appealed and the Court of Appeal dismissed that appeal too ([2023] EWCA Civ 12). The parties were then in dispute about the mark “Quantum Advisory,” which dispute came before Judge Keyser. He found that under the agreement LLP is a fiduciary to Quad in respect of the conduct of the Quad’s business and is entitled by licence to the use of the mark during the subsistence of the agreement ([2023] EWHC 47 Ch), but refused other relief. That decision too is headed for the Court of Appeal. Quad also applied for two other orders, which applications were dismissed by Judge Keyser and there is no appeal from those decisions.
2. The dispute which I must now resolve has a rather convoluted procedural history, which I will need to summarise, albeit briefly. Before I do so, I will set out what Mr Onions KC with Mr Adams for Quad, in oral submissions, indicated was at the centre of the current dispute, namely what LLP must do to comply with its obligations under clause 8.5 of the agreement. Quad seeks declarations, and no other relief, as to what those obligations are. The clause provides:

“8.5 The LLP shall allow Quad, upon demand from any director of Quad, immediate access to any Information requested.”
3. “Information” is defined to mean “such data, records, files or information in the possession of the LLP in relation to the Clients and the Services.” Schedule 7 defines the Services as “Provision of pensions consulting, actuarial, administrative and investment services” and sets out a list of examples of what falls within the definition. Clause 1 defines “Clients” to mean:

“the clients and schemes to which Quad has provided any Services prior to 1st April 2007 together with such clients as are attributable to the Pipeline Business and any parties introduced either to Quad or the LLP by any of the Introducers during the Extended Period including (without limitation) those clients and schemes as are set out in Part 1 of Schedule 2 to this

Agreement which expression shall include (where appropriate) any companies within the same group of companies as the relevant Client from time to time and any pension schemes sponsored by any Clients and any new entrants into such schemes”.

4. The Pipeline Business is defined to mean “any engagements by Quad entered into with any of the Clients or Prospects or which are referred to Quad by any of the Introducers in connection with the provision of Services during the Extended Period”. The definition of Introducers includes all Clients, all those identified in Schedule 4 to the agreement, and everyone else with whom Quad’s predecessor had had face to face contact for the purposes of engendering a commercial relationship in the twelve months immediately prior to 1 April 2007.
5. Little more need to be said about the factual background than set out in the earlier decisions set out above. In brief summary, before 2007 the business of Quad’s predecessor was as a provider of administrative, actuarial and related services primarily for defined benefit pension schemes. The largest shareholder and managing director wanted to diversify the business, but his colleagues did not, so they agreed to form LLP and reorganise that business. This was done by ring fencing existing clients and certain prospective clients, which would remain with Quad and be serviced by LLP, but allowing LLP to develop and expand its own business. The agreement was to put this all into effect, and provides that LLP is paid a monthly amount equal to 57% of the aggregate of Quad’s receipts of fee income from the Clients serviced by the LLP and any commissions. This represents the cost to LLP of providing the Services, with no profit element. LLP took over all of Quad’s staff and also has full use of its premises, equipment and brand.
6. In the second Court of Appeal decision cited above ([2023] EWCA Civ 12), Falk LJ, giving the lead judgment, referred to the Services to be provided under the agreement in these terms at paragraph 38.:

“The contractually agreed Services are a hybrid of client-facing and internal functions. The former, of which examples are set out in all but the final two sub-headings in Schedule 7, are restricted to “Clients”, a concept which is limited to existing clients of Quad and certain business that was in the “pipeline” in 2007. Further, the client-related activities referred to all relate to services supplied to Clients on behalf of Quad, rather than work done to obtain or retain Clients so that services can be provided, which is of course what tendering involves.”

7. In paragraph 42 Falk LJ referred to particular parts of schedule 7 which Quad relied on in saying that it included tendering, namely “...such other administrative support as Quad may reasonably require from time to time” at the end of the paragraph headed “Quad Administration”. Falk LJ continued:

“Tendering is a form of business development and is not aptly covered by the descriptor “administrative support”. It is also very different from the accounting and tax functions that are specifically referred to in the first part of the paragraph. Both of

those are routine, continuing and necessary internal functions. They are neither client-facing nor sporadic in the way that tendering is.”

The current dispute

8. The claim form which included the current part of the dispute states as follows:

“The Claimant seeks the court's decision on the following question, namely whether, upon the true construction of the Services Agreement, LLP is or is not obliged (as part of the provision to Quad of the Services which LLP was appointed to provide by clause 2.1 of the Services Agreement and which it is obliged to provide by clause 7.1 of the Services Agreement in accordance with clauses 7.3 to 7.5 of the Agreement):

(a) to prepare tender/retender documentation and/or do such other things as are necessary for the participation by Quad in any procurement procedure undertaken by Clients in relation to the provision of pensions consulting, administrative and investment services during the Initial Period; and/or

(b) to prepare tender/retender documentation and/or do such other things as are necessary for the participation by Quad in the tender on consulting, actuarial, administration and investment services planned to take place in the second and third quarters of 2022 by the trustees of the Cardiff City Transport Services Limited Pension Scheme.”

9. As indicated above, the issue in relation to tendering has already been dealt with. Judge Keyser gave directions seeking to clarify what remained to be determined under this claim, and directed that the hearing to determine the question as to the extent to which LLP is obliged to do such other things as are necessary for the participation by the Quad in any tendering procedure be restored and re-listed. It is that hearing which has now taken place before me. Judge Keyser also directed that the parties should file statements setting out their respective cases as what remains to be decided under this claim.

10. That of Quad provides as follows:

“1. The Defendant (“LLP”), being under an implicit and/or implied obligation of good faith and fair dealing, is obliged to co-operate in good faith with any tendering procedure for the provision of pensions consulting, actuarial, administrative and investment services (and any other agreed services) to the Claimant’s (“Quad’s”) Clients (“the prospective engagement”).

2. LLP is obliged under clause 8.5 of the Services Agreement and/or as a fiduciary to Quad in respect of the conduct of Quad’s business and/or pursuant to its obligation of transparency within its implicit or implied obligation of good

faith and fair dealing, to allow Quad, upon demand from any director of Quad and/or in any event, immediate access to any information whatsoever available to LLP in relation to Quad's Clients and in relation to the provision of pensions consulting, actuarial, administrative and investment services (and any other agreed services) to Clients ("the client services"), including, by way of example only and without prejudice to the generality of such obligation:

2.1. information: 2.1.1. about the provision of such services both in the past and prospectively by LLP whether on behalf of Quad or otherwise;

2.1.2. about the appropriate pricing of such services both in the past and prospectively;

2.2. information within the knowledge and expertise of the members of LLP, its employees, servants and agents or otherwise within its control or to which it has access;

2.3. information necessary for the preparation of any document in the course of any tendering procedure;

2.4. information in response to any questions raised by or on behalf of any director of Quad in the course of any tendering procedure;

2.5. information necessary to prepare any response to any requests raised by the tenderer in the course of any tendering procedure.

3. LLP is under an implicit and/or implied obligation of co-operation to positively and fully cooperate at all stages of any tendering procedure and within any timescale required by the tendering procedure in order to seek to win the prospective engagement, including, by way of example only and without prejudice to the generality of such obligation:

3.1. co-operate with Quad in identifying any ambiguity, discrepancy, error or omission in or between the information presented by the tenderer with a view to seeking further information or clarification from the tenderer;

3.2. co-operate in the production and presentation to best effect of any information requested by the tenderer or necessary for the purposes of the tendering procedure in any document prepared in the course of any tendering procedure, including;

3.2.1. information about LLP;

3.2.2. information about LLP's provision of client services;

- 3.2.3. information necessary to prepare any case studies;
- 3.2.4. information necessary to prepare any description of client services under the prospective engagement;
- 3.2.5. information necessary to prepare any pricing under the prospective engagement;
- 3.2.6. information necessary to prepare proposed terms of engagement and/or new or replacement terms of engagement;
- 3.2.7. information necessary to identify and nominate any suitable referees.
- 3.3. co-operate in making arrangements for any meeting or call with any persons involved in the provision of client services in the past or prospectively as requested by the tenderer;
- 3.4. co-operate in making arrangements for any visit to or inspection of LLP's premises or systems as requested by the tenderer;
- 3.5. co-operate in the production and presentation to best effect of any information requested by the tenderer or necessary for the purposes of the tendering procedure at any meeting or call with or at any visit or inspection by the tenderer in the course of any tendering procedure;
- 3.6. co-operate in making any appropriate approaches to any referees and making any requests for suitable references;
- 3.7. co-operate in the negotiation of any new or replacement terms of engagement."

Principles relating to construction and declarations

11. The principles of contractual construction have been set out in the previous decisions cited above and are not in dispute. It suffices for present purposes for me to remind myself of the recent helpful summary by Carr LJ in *Network Rail Infrastructure Ltd v ABC Electrification Ltd* [2020] EWCA Civ 1645 ("Network Rail") at paragraph 18 and the conclusion at paragraph 19 as follows:

"19. Thus the court is concerned to identify the intention of the parties by reference to what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean. The court's task is to ascertain the objective meaning of the language which the parties have chosen to express their agreement. This is not a literalist exercise; the court must consider the contract as a whole and, depending on the nature, formality, and quality of drafting of the contract, give more or less weight to elements of the wider

context in reaching its view as to that objective meaning. The interpretative exercise is a unitary one involving an iterative process by which each suggested interpretation is checked against the provisions of the contract and its commercial consequences investigated."

12. In my judgment, it is immediately obvious that what Quad's statement quoted in paragraph 10 above seeks to do is to rewrite clause 8.5 of the agreement. LLP's overarching point is that it is not appropriate to grant declaration of the type sought, where there is no real and present dispute between the parties, merely concern at what disputes might arise in the future. Section 19 of the Senior Courts Act 1981 gives the court power to grant such relief, and by CPR 40.20 the court may do so whether or not any other remedy is claimed.
13. In *Well Barn Shoot Ltd v Shackleton* [2003] EWCA Civ 02, the Court of Appeal dealt with this discretionary power, and amongst other matters, the appropriateness of using it where issues are hypothetical. Carnwath LJ, as he then was, said this at paragraph 57:

"In *Zamir and Woolf*, "the Declaratory Judgment" (3rd Ed.), the reluctance of the court to adjudicate on "hypothetical issues" is noted, with the following comment:

"... It should be observed that the fact that the claimant has an immediate practical interest in the declaration is not sufficient to render real an issue otherwise hypothetical. Nor is it sufficient that, additionally, the defendant has a real interest in opposing it. A substantial interest of both parties in disputing the issue is, indeed, important; but this is not in itself sufficient. If the issue in dispute is not based on concrete facts the issue can still be treated as hypothetical. *The absence of a dispute based on concrete facts is critical*. This is the missing element which makes the case hypothetical." (para 4.055, emphasis added)

In this case, as the pre-trial correspondence recognised, both parties had a substantial practical interest in resolving a genuine dispute, and there was no suggestion at that time that the facts were not sufficiently "concrete". In my view, this was correct."

14. Sedley LJ, agreeing, put it this way at paragraph 67:

"To make declarations predicated upon undertakings which are proleptic in form and proactive in effect, but are made in necessary ignorance of the situations in which they will be invoked, is more often than not to court trouble. Such cases stand in contrast to those where some identifiable step can be forbidden because it either has violated or inevitably will violate one party's rights, or can be declared lawful because it can have no such effect."

15. The most recent edition of the textbook cited by Carnwath LJ (2011) has a similar reference to the need for concrete facts.
16. A useful summary of the principles to be observed in determining whether it is appropriate to exercise the discretionary power has been given more recently In *Bank of New York Mellon, London Branch -v- Essar Steel India Ltd* [2018] EWHC 3177 (Ch) Marcus Smith J, after reviewing the authorities on the grant of declarations, at paragraph 21 set out the principles, the most relevant of which for present purposes are as follows:

“The power to grant declaratory relief is discretionary. When considering the exercise of the discretion, in broad terms, the court should take into account justice to the claimant, justice to the defendant, whether the declaration would serve a useful purpose and whether there are other special reasons why or why not the court should grant the declaration. More specifically:

(1) There must, in general, be a real and present dispute between the parties before the court as to the existence or extent of a legal right between them. However, the claimant does not need to have a present cause of action against the defendant. A present dispute over a right or obligation that may only arise if a future contingency occurs may well be suitable for declaratory relief and amount to a real and present dispute.

(2) Each party must, in general, be affected by the court's determination of the issues concerning the legal right in question.

...

(6) In all cases, assuming that the other tests are satisfied, the court must ask: is this the most effective way of resolving the issues raised? In answering that question, the court must consider the other options of resolving the issue.”

The key issues and how to resolve them

17. The key practical issues between the parties, as focussed upon in oral submissions and as I understand them, are whether LLP is obliged to;
 - i) Give access to information which is available to it rather than in its possession, or to formulate answers to questions;
 - ii) Co-operate in tendering by Quad;
 - iii) Provide premises and/or personnel for meetings or presentations;
 - iv) Give access to information only in tangible form;
 - v) Give remote access to information;

- vi) Give access to information as to the philosophy of LLP.
18. It is clear in my judgment from the history of the disputes between the parties concerning the agreement, and the polarised position they have taken in the present proceedings, that they have a real difficulty about agreeing what the agreement says and does. In terms of clause 8.5, in my judgment there is a real and present dispute about the extent of LLP's obligations thereunder. However, I am doubtful that declarations are the most effective way of resolving the issues. I accept Mr Butler KC's submissions that the level of detail sought in Quad's statement and the various circumstances set out, some of which may be more hypothetical than others, are such that the granting of declarations may cause more problems than they resolve.
19. Mr Onions KC adopted a somewhat more general approach in his oral submissions than shown in Quad's statement. He realistically recognised that not every situation which might arise under clause 8.5 could be dealt with by declarations. As an alternative he invited the court to give what he termed narrative guidance on the key practical issues between the parties. In my judgment that is likely to be the most effective way of resolving these issues.
20. In the course of their respective submissions, both counsel referred to the possibility of coming back to court if further disagreement arose between the parties. In my judgment, given the unfortunate history of litigation between the parties over the agreement, this is to be strongly discouraged. Most agreements need some compromise to work effectively, and however strained relationships may be at present, both parties are strongly encouraged to take a more positive approach to making the agreement work, rather than undertaking the further time, stress and expense that even more litigation is likely to involve.
21. Clause 8.5, in my judgment, is a fairly straightforward provision. It allows Quad to access information in the possession of LLP which relates to the Clients and Services as defined. It is not subject to an express duty of good faith, although some six other clauses in the agreement are expressly subject to such a duty. Mr Onions KC submits that this shows there is an implied term of good faith underpinning the whole of the agreement, which needs to be implied into clause 8.5 to make it work. Mr Butler KC, for LLP, submits that it shows that the parties have chosen which obligations under the agreement are subject to such a duty and clause 8.5 is clearly not.
22. A term will be only be implied if it is necessary to make the agreement work and/or is so obvious as to go without saying. In *Marks & Spencer Plc v BNP Paribas Securities Services Trust Co (Jersey) Ltd* [2015] UKSC 72, Lord Neuberger, giving the lead judgment of the Supreme Court, said at paragraph 21, that the implication of a term will satisfy the test of business efficacy "if, without the term, the contract would lack commercial or practical coherence".
23. I am inclined to the view that an implied term of good faith in respect of clause 8.5 fulfils neither of those tests. However, on the assumption for present purposes that it does, in my judgment that does not assist in resolving the key issues between the parties, because such an implication cannot serve to widen the scope of the obligations under clause 8.5. Falk LJ, in the second Court of Appeal decision referred to above ([2023] EWCA Civ 12), said this at paragraph 48:

“What Quad seeks to do is to expand the range of Services actually covered by the Services Agreement. Resort to the concept of good faith, even if it could be implied into the Services Agreement beyond the express references to good faith in it (none of which are relevant), would not assist in achieving that. At the most, an obligation of good faith would apply to the way in which the parties acted within the confines of what the Services Agreement provided for. As Snowden LJ said in *Faulkner v Vollin Holdings (Re Compound Photonics)* [2022] EWCA Civ 1371 at [205] in the context of an express obligation of good faith, any invocation of a concept of the "spirit of the contract" which such an obligation might be said to encompass does not amount to an open invitation to read in additional substantive obligations, particularly in a professionally drafted contract with an entire agreement clause.”

24. The agreement contains an entire agreement clause. Five points are immediately obvious from clause 8.5. The first is that what LLP must give is not the information itself, but access to it. The second is that the obligation refers to *any* information, providing that it comes within the definition. Third, the definition of information is wide, and refers to “data, records, files or information” relating to the Clients and Services as defined. Fourth, it is information “in the possession” of LLP. Fifth, the definitions of Clients and Services are narrow, the former relating only to existing clients of Quad and certain clients in the pipeline as at 2007.
25. Clause 8.5 should be read in the context of the agreement as a whole, which includes the preceding sub-paragraphs of the clause. These provide as follows:

“8.1 With effect from the Effective Date, but subject to the proviso to this clause and to clause 8.3 below, the LLP is authorised to and agrees to exercise the powers and authorities conferred upon Quad to the extent that such powers and authorities relate or are ancillary to, arise from or are requisite for the provision of the Services PROVIDED THAT, in performing the duties and exercising the powers and authorities referred to in this clause the LLP shall:

8.1.1 have no power or authority whatsoever to bind or commit Quad, other than pursuant to a power of attorney or other written authority granted by Quad; and

8.1.2 be subject to the restrictions set out or referred to in this Agreement.

8.2 The LLP reserves the right to request specific approval by Quad before taking any action whether or not such action constitutes part of the Services and shall not be in breach of this Agreement if it requests such approval but such approval is not or has not been granted and it does not therefore take the action for which approval was requested.

8.3 Quad shall have the right at any time while this Agreement subsists to serve notice on the LLP prescribing limitations on the duties, powers, authorities and discretions exercisable by the LLP hereunder and the time at which such limitations shall take effect.

8.4 The LLP shall use all reasonable endeavours to avoid doing anything which might prejudice or bring into disrepute in any manner the business or reputation of Quad or any of its directors.”

Guidance on the issues:

Issue i)

26. In my judgment there is no room for the type of gloss which Quad seeks to put on the information to which access must be given. For example, its request for any information “whatsoever available” to LLP, as set out in paragraph 2 of its statement, goes beyond the scope of the obligation in clause 8.5, which is expressly limited to information in the possession of LLP. Information may be available to LLP but not in its possession, and in my judgment the obligation under clause 8.5 is limited as stipulated. The formulation of answers to questions also goes beyond giving access to information. There is no obligation to create new documents or to process information in a particular format.

Issue ii)

27. Some of the references in Quad’s statement to tendering, for example paragraph 2.3-5 and 3.1-2, also go beyond the scope of clause 8.5, given the fact that information is limited to Clients and pipeline business as at 2007 and to the Services as defined. As Falk LJ observed and as cited above, the client-related activities referred to in schedule 7 of the agreement relate to Services supplied to Clients on behalf of Quad, rather than work done to obtain or retain Clients so that Services can be provided. I accept LLP’s submissions that a demand for access to information which in truth effectively amounts to a request that the LLP prepares a tender, does not amount to a demand under clause 8.5.
28. Having said that, as Mr Onions KC submits, if Quad is already providing the Services to Clients then it is entitled to access information that preserves that competitive edge. I accept that submission as far as it goes. The mere fact that information is required as part of a tendering process does not mean that it necessarily falls outside the scope of clause 8.5. The particular information in question must be looked at to see if it does relate to the Clients and Services as defined, and if it does, access to it must be given.

Issue iii)

29. When Quad was shortlisted by Cardiff City Transport Services Limited in a tender exercise, that company expressed a wish to meet the key team members and to visit the location from which all or most of the services will be provided. Accordingly Quad requested LLP for the next stage of the process to make its premises available for a site visit requested by that potential client and to make its personnel available to

prepare and deliver a presentation. In my judgment both of those requests are outside the scope of clause 8.5.

Issue iv)

30. In some respects LLP seeks to put too restrictive an interpretation on its obligations. Mr Butler KC submits that the information to be provided must be “tangible” and does so by saying that “information” in the definition must be read in the context of the words which precede it namely “data, records, files.” He submits that it does not extend, for example, to information which is stored personally by employees in their own memories. I accept that the words data, records and files, suggest tangible information and that the phrases “access to” and “in the possession of” may suggest the same. In my judgment however, a reasonable reader would conclude that by adding the word “information,” the parties intended to add something more than already provided for. That word is capable of ordinary meaning and includes information held by employees in their memories, as long as it complies with the definitions.

Issue v)

31. LLP also submits that clause 8.5 is complied with by allowing Quad’s directors to inspect documents such as the Client file at LLP’s premises, and Quad’s request for remote access goes beyond the scope of LLP’s obligations under clause 8.5. That clause does not stipulate how access is to be given, and in my judgement, as long as LLP gives access which is effective for Quad to obtain the information, then its obligation is complied with. Again, the narrow ambit of the definitions of Clients and Services in the agreement militate against Quad’s suggestion that it is entitled to any wider access.

Issue vi)

32. This is whether access to information which may be demanded under clause 8.5 includes information as to LLP’s philosophy, which is something that some Clients demand. As long as this relates to Clients and Services as defined in the agreement, and not otherwise, then LLP must give access to this information if demanded. It may well be that such a proviso means that in practice this issue is unlikely to arise very often, but as a matter of principle it may do.

Conclusions

33. In my judgment it is not appropriate or desirable to go beyond the key issues set out above which have arisen as a matter of practice. The parties have chosen the words set out in the agreement including clause 8.5, which as I have indicated is fairly straightforward, and should strive to ensure that their agreement is put into effect. I have worded the guidance set out above in a way which I hope will assist the parties to do just that, rather than to give them something more to disagree about.
34. Counsel helpfully indicated that any consequential matters which cannot be agreed should, as far as possible, be dealt with on the basis of written submissions. Any such submissions, together with a draft order agreed as far as possible, should be filed within 14 days after handing down of this judgment.