Neutral Citation Number: [2023] EWCA Civ 12

Case No: CA-2022-001291

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS IN WALES
BUSINESS LIST (ChD)
HHJ Jarman QC
[2022] EWHC 1423 (Ch)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 19/01/2023

Before:

LORD JUSTICE SNOWDEN
LADY JUSTICE WHIPPLE
and
LADY JUSTICE FALK

- -

Between:

QUANTUM ADVISORY LIMITED	**Claimant/ Appellant**
- and –	
QUANTUM ACTUARIAL LLP	**Defendant/ Respondent**

- -
- -

Guy Adams (instructed by **Harrison Clark Rickerbys**) for the **Appellant**
Andrew Butler KC (instructed by **Acuity Law**) for the **Respondent**

Hearing date: 13 December 2022

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Approved Judgment

This judgment was handed down remotely at 11.00am on 19 January 2023 by circulation to the parties or their representatives by email and by release to the National Archives.

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Lady Justice Falk

Introduction

1. This is an appeal from a decision of His Honour Judge Jarman QC (sitting as a Deputy High Court judge) on a Part 8 claim. The decision, and single ground of appeal, relate to a short point of contractual construction.

2. The dispute relates to an agreement, titled "Services Agreement", entered into on 1 November 2007 between the then recently formed defendant, Quantum Actuarial LLP ("the LLP"), and a predecessor to the claimant, Quantum Advisory Ltd ("Quad"). That predecessor is referred to in the judge's decision as "old Quad". The Services Agreement was novated from old Quad to Quad shortly after it was entered into. It has a 99 year term.

3. This is the second time that the Services Agreement has been considered by this court. The previous dispute related to a number of aspects including the novation, whether certain services to clients were covered by the Services Agreement and whether provisions that prevented the LLP from soliciting or enticing away Quad's clients or doing work directly for them amounted to an unreasonable restraint of trade. His Honour Judge Keyser QC (sitting as a Deputy High Court judge) determined that dispute largely in favour of Quad ([2020] EWHC 1072 (Comm)), and the LLP's appeal on the restraint of trade issue was dismissed by this court ([2021] EWCA Civ 227).

4. The factual background is set out in more detail in the earlier decisions. For present purposes it can be summarised briefly. Prior to 2007 old Quad carried on business as a provider of administrative, actuarial and related services primarily for defined benefit pension schemes. The motivation for establishing the LLP was that those involved in old Quad and two other related companies had different ideas about the future of the business. The single largest shareholder and managing director of old Quad wanted to diversify, but his colleagues did not and they could not afford to buy him out. This led to the formation of the LLP and a reorganisation of the business.

5. The basic idea was that the existing business of old Quad would be ring fenced, with its existing clients and certain prospective clients remaining with it but being serviced by the LLP. The LLP would also be free to develop and expand its own business.

6. The remuneration provided for under the Services Agreement is that the 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. HHJ Jarman found at [4] that this represented the cost to the LLP of providing the services, with no profit element. However, as part of the overall transaction the LLP took over all of Quad's staff and also gained full use of its premises, equipment and brand.

7. The issue between the parties is whether the Services Agreement requires the LLP to do what is necessary to enable tenders or re-tenders to be submitted on behalf of Quad for work from Quad's clients. Quad says that the judge was wrong to construe the Services Agreement as not extending to tendering work, and rather that he should have found that tendering to provide the "Services" required to be provided by the LLP under the Services Agreement is an activity for which the LLP is responsible.

HHJ Jarman's decision

8. The judge noted at [9] that Mr Adams, for Quad, relied neither on any implication of terms nor on any "infelicities of language or oddities" in the Services Agreement. Rather, he relied on a construction of the agreement as a whole and the fact that it was known to both parties at the time it was entered into that tendering had been and could in future be required. As the judge noted at [12], the LLP had worked on a tender to Swansea University between the arrangements being put into practical effect in April 2007 and the formalisation of the Services Agreement in November of that year. The LLP's position before the judge was that this work, and further tenders during the first year of operation, were performed to assist the LLP's cash flow but on the basis that the cost would need to be addressed in future, and that work on tenders thereafter was subject to individual negotiation and agreement.

9. There was no dispute before the judge as to the general principles to apply to the construction of contracts. The judge set out at [14] the recent helpful summary by Carr LJ in *Network Rail Infrastructure Ltd v ABC Electrification Ltd* [2020] EWCA Civ 1645 ("*Network Rail*") at [18].

10. The judge went on at [15] to comment that the Services Agreement "is a professionally drafted bespoke long-term and relational contract", and that as such the court could expect the parties to adopt a reasonable approach in accordance with its long-term purpose. He set out the following extract from the judgment of Jackson LJ in *Amey Birmingham Highways v Birmingham City Council* [2018] EWCA Civ 264 ("*Amey Birmingham*") at [93]:

> "I do, however, make this comment. Any relational contract of this character is likely to be of massive length, containing many infelicities and oddities. Both parties should adopt a reasonable approach in accordance with what is obviously the long-term purpose of the contract. They should not be latching onto the infelicities and oddities, in order to disrupt the project and maximise their own gain."

11. The judge then considered the Services Agreement in some detail, and the parties' submissions, before reaching his conclusions at [37]-[38] in the light of the principles set out in *Network Rail*. In the course of his discussion, he noted at [27] that it was not disputed that Quad's business included obtaining and performing engagements to provide the relevant services, and that to obtain them it was necessary to participate in tendering from time to time. He referred to a tender to Cardiff Bus in 2004, and the tender to Swansea University just before the Services Agreement was finalised.

12. At [28]-[30] the judge also took into account submissions made by Mr Adams that the relevant background included the fact that Quad retained no staff, premises or equipment, but pointed out that it did not follow that the parties must be taken to have intended that Quad would be unable to get the work done by some means. He noted that the agreement envisaged that Quad would or could continue to be involved in some level of activity.

13. At [35] the judge referred to certain subsequent emails relied on by Mr Butler, for the LLP, on the topic of tenders. He correctly noted that they were inadmissible insofar as

they conveyed the subjective understanding of the parties as to the meaning of the Services Agreement, but that some of them were relied on as demonstrating that the cost of tendering was not included in the calculation of the 57% fee split. The judge commented that the fact that the cost of tendering may not have been included did not assist, because tendering was for the benefit of both parties, the cost was likely to be factored into the calculation of the fees, and the process of tendering was an occasional rather than ongoing one.

The Services Agreement

14. The single recital to the Services Agreement, which clause 1.8 provides should be treated as part of the operative provisions, provides:

> "Quad has resolved to appoint the LLP to carry out certain responsibilities for and on behalf of Quad in relation to its business, and the LLP agrees to carry out such responsibilities (the Services, as defined below) in consideration for the payment by Quad of the Administration Fees and any other payments due to Quad pursuant to this Agreement."

15. Clause 2.1 provides for the appointment of the LLP in the following terms:

> "With effect from the Effective Date, Quad confirms the appointment of the LLP to be (subject to the provisions of clause 2.8 below) solely responsible for the provision to Quad of the services set out in Schedule 7 to this Agreement to the extent that they:- (a) relate to any engagements of Quad by the Clients, or (b) are referred to Quad or the LLP by any of the Introducers during the Extended Period (save where any Introducer receives a bone fide substantive financial reward from the LLP), or (c) relate to the Pipeline Business, together with such other services as the parties may agree from time to time in writing that the LLP is to perform for Quad (the "Services"). Quad confers upon and grants to the LLP such power and authority as is necessary or desirable for providing the Services. The LLP hereby accepts the appointment to provide the Services to Quad, subject to the terms and conditions set out in this Agreement."

16. The Effective Date was 6 April 2007, and the Extended Period was the period from 6 April 2007 to 31 March 2008. The definitions of Clients, Introducers and Pipeline Business are a little complex and appear (at least when read with clause 2.1) to include an element of circularity and duplication, but for present purposes the broad effect can be summarised as follows. The LLP was required to provide the services set out in Schedule 7 in respect of:

    i) existing clients, being clients and schemes to which Quad had provided services prior to 1 April 2007;

    ii) clients attributable to "Pipeline Business" comprising:

a) "Prospects", being entities targeted as potential new clients during the 12 months leading up to the date of the Services Agreement; and

b) entities introduced to Quad or the LLP by Introducers during the Extended Period.

The concept of Introducers covers, broadly, a) clients and b) other persons to whom Quad had pitched for business at a face-to-face meeting during the 12 month period prior to 31 March 2007. Non-exhaustive lists of existing clients and Prospects are set out in Schedule 2 to the agreement.

17. Schedule 7 describes the services to be provided as follows:

"**The Services**

Provision of pensions consulting, actuarial, administrative and investment services including, by way of example:

Actuarial

Compliance per Institute of Actuaries Guidance notes

Consulting Actuary work for Company

Investment & Life assurance

For trusts

For individuals

Risk benefits for companies

Pensions Consultants

Compliance for trustees

Pensions administration

Record keeping

Benefit calculations

Routine member communications

Litigation support

Other

Benefit design consultancy and advice to company and trustees (that is not necessarily compliance).

Accounting and payroll

> Other member communications — other than routine
>
> Liaison with investment managers, legal advisers
>
> For the avoidance of doubt the above does not include taxation related advisory work.
>
> **Quad Administration**
>
> Preparation of (a) monthly and annual accounts for Quad in such format as Quad may reasonably request from time to time and (b) VAT/Corporation Tax/ statutory returns for Quad and provision of such other administrative support as Quad may reasonably require from time to time.
>
> **Handling of any claims against Quad**
>
> Preparing professional indemnity insurance proposal form and dealing with any actions against Quad (whether by any Client or otherwise) including notification of any actual or potential claim to professional indemnity insurers."

18. Most of the remainder of clause 2 contains the anti-solicitation provisions which were the subject of the previous dispute.

19. Clause 2.8, to which clause 2.1 cross refers, contains a carve-out. It provides that to the extent the Services comprise "Sub-Contracted Activities", the LLP would instruct a named entity, Innovation, or such other entity as Quad might designate, to perform those functions on terms to be approved by Quad in advance. Clause 2.8 expressly recognised that Quad could nominate itself in place of Innovation. The definition of Sub-Contracted Activities in Schedule 6 includes among other things:

> "• Lecture tours, meeting with senior level Client contacts…
>
> • Instigation of strategic project work for Clients…
>
> • Soliciting Prospects for Quad (until the expiration of the Extended Period)…".

20. Clause 7 contains more detail on the supply of the Services. In particular, clause 7.2 requires Quad to provide the LLP with "all necessary information, data, documentation and other records and materials relating to the Services", and, for so long as the Services Agreement continues, to make all the assets owned or leased by Quad available to the LLP to the extent that they had previously been used in Quad's business.

21. Clause 7.3 was relied on heavily by Mr Adams. It provides:

> "The LLP shall provide the Services in a professional, competent, diligent and efficient fashion in accordance with Best Industry Practice and shall devote such time and efforts as it deems reasonably necessary for the efficient operation of Quad's business."

22. Clause 7.4 obliges the LLP to comply with statutory, regulatory and professional requirements "as well as any other reasonable requirements made known to it from time to time by Quad", and to consider in good faith any recommendations made by Quad. Clause 7.5 requires the LLP to perform the Services to a standard "no less favourable than that provided by the LLP from time to time for other clients" in respect of the same or similar services.

23. Clause 8 deals with the powers and duties of the LLP under the agreement, including requiring it not to do anything which might prejudice Quad's business or reputation (clause 8.4), and obliging it to provide immediate access to any information requested by a Quad director in respect of Clients or Services (clause 8.5).

24. Clause 9.1 provided for the fee split already referred to. It is also worth noting the "entire agreement" provision in clause 17.1, which provides:

> "This Agreement and the documents referred to in it constitute the entire agreement between the parties and supersedes all prior arrangements, written or oral with respect thereto. All other terms and conditions, expressed or implied by statute or otherwise, are excluded to the fullest extent permitted by law."

The applicable legal principles

25. Both parties were content to rely, as they did below, on Carr LJ's summary in *Network Rail* as their starting point. Carr LJ drew the points together at [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."

The parties' submissions

Quad's submissions

26. Mr Adams' submissions for Quad can be outlined as follows. He relied principally on the express terms of the Services Agreement but also maintained that, given the contract was a "relational" one, the court should adopt a purposive approach which paid less attention to the "black letter" and focussed more on ensuring that the arrangement between the parties was workable. Although reference was made to the implication of

terms in oral argument, Mr Adams did not ultimately seek to rest his case either on that or on any infelicity of language.

27. In more detail, Mr Adams' principal argument was that the concept of "Services" was defined in the first few words of Schedule 7, namely the "provision of pensions consulting, actuarial, administrative and investment services". What followed were, he submitted, mere examples. The exception to this was the last two sub-headings, Quad Administration and Handling of any claims against Quad. These exceptions were activities undertaken directly for Quad which were necessary to provide the Services (or, in terms of clause 7.3, reasonably necessary for the efficient operation of Quad's business), rather than being Services themselves. That definition was restricted to services provided to Clients for and on behalf of Quad.

28. Mr Adams submitted that this was supported by other provisions of the Services Agreement including clause 7.3, which he said only made sense if the concept of Services was so confined. Tendering was a part of Quad's existing business which was necessary to enable Services to be provided and, bearing in mind that Quad had outsourced its entire operation, was an activity which the LLP was required to carry out. The judge was wrong to conclude that it would be in both parties' wider interests to tender for new business throughout the 99-year term, or to take that into account. The effect of the decision was to leave the continuation of Quad's business at the will of the LLP, which made no commercial sense.

29. Mr Adams further submitted that the judge had accepted that the contract was a relational one. That required the court to respect the parties' intention to establish a long-term workable relationship and reject technical arguments at odds with its long-term purpose. Mr Adams suggested that this was related to the recognition of implied obligations of good faith under relational contracts, and that to latch on to an aspect of the agreement to disrupt the arrangement was tantamount to sharp practice.

The LLP's submissions

30. Mr Butler submitted that, insofar as Mr Adams was now advancing a case based on implied obligations of good faith, that was contrary to the way in which the case was put below, and he should not be permitted to do so. Among other things, the LLP would have relied on the fact that the Services Agreement makes express references to good faith where such an obligation was intended. The judge did not intend to refer to relational contracts in a technical sense, and Mr Adams had in any event misinterpreted *Amey Birmingham*.

31. Mr Butler submitted that the Services Agreement did not require the LLP to do whatever was required to operate Quad's business. It simply required it to provide the Services as defined. It was not the complete outsourcing suggested by Mr Adams. The contract was relatively short and was professionally drafted; its language was a reliable guide to the parties' intentions. The only references to activities in the nature of business retention or development were in the definition of the carved out Sub-Contracted Activities. Further, the definition of Clients was a limited one.

32. Mr Butler also relied on three points raised in a Respondent's Notice. First, the judge was wrong to conclude that the fact that a tender had been performed in the months leading up to the conclusion of the Services Agreement did not assist in its

interpretation. Secondly, the fact that tendering was not in the same category as other administrative services referred to in Schedule 7 was not only because it was occasional rather than ongoing (as the judge had said) but because it was not administrative in character. Thirdly, in referring to the fact that the cost of tendering was likely to be factored into the fees, the judge overlooked that, on Quad's case, the LLP would bear 100% of the cost of tendering but would only recover 57% of the corresponding fees.

Discussion

33. The judge was clearly correct to conclude that the Services Agreement does not oblige the LLP to undertake tenders or re-tenders.

34. The Services Agreement is a relatively short, professionally drafted, document. As Carr LJ said in Network Rail at [18(ii)]:

> "(ii) The reliance placed in some cases on commercial common sense and surrounding circumstances should not be invoked to undervalue the importance of the language of the provision which is to be construed. The exercise of interpreting a provision involves identifying what the parties meant through the eyes of a reasonable reader, and, save perhaps in a very unusual case, that meaning is most obviously to be gleaned from the language of the provision. Unlike commercial common sense and the surrounding circumstances, the parties have control over the language they use in a contract…"

35. It is also worth repeating the proposition set out at [18(v)]:

> "(v) While commercial common sense is a very important factor to take into account when interpreting a contract, a court should be very slow to reject the natural meaning of a provision as correct simply because it appears to be a very imprudent term for one of the parties to have agreed, even ignoring the benefit of wisdom of hindsight. The purpose of interpretation is to identify what the parties have agreed, not what the court thinks that they should have agreed. Accordingly, when interpreting a contract a judge should avoid re-writing it in an attempt to assist an unwise party or to penalise an astute party;"

36. If the parties had intended a full outsourcing, as Mr Adams submitted, they could easily have said so. Instead, they agreed that the LLP would provide the "Services". The recital, on which Mr Adams relied, is consistent with this in its reference to "certain" responsibilities, which it goes on to refer to as being the Services.

37. I do not agree with Mr Adams that the defined term "Services" is limited to the provision of services to Clients, excluding the last two sub-headings in Schedule 7. Whilst it is right that certain provisions of the agreement, including sub-paragraphs (a) to (c) in clause 2.1 itself, indicate that the draftsman had primarily in mind services provided externally to Clients rather than matters internal to Quad, it is sufficiently clear that the functions covered by those final two sub-headings are included in the "Services" set out in Schedule 7 that the LLP is appointed to provide under clause 2.1,

and for which it is remunerated under clause 9. I note that, were it otherwise, then none of the conferral of authority in the penultimate sentence of clause 2.1, the obligation on Quad to provide necessary information and assets in clause 7.2, nor the service standards in the first part of clauses 7.3 and in clause 7.4, would apply to those "internal" functions. That cannot have been intended.

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.

39. It is worth noting here that neither party is prevented by the terms of the Services Agreement from seeking business from a person not caught by the limited definition of Client. However, if Quad wished to do so and succeeded in obtaining business then the Services Agreement would not require the LLP to service that client. Further, even if Quad was correct in its submissions, it was not saying that tendering to persons who are not Clients (as defined) would be required. It follows that to the extent that Quad lost Clients, or pipeline business did not materialise, then even on its own interpretation it could not require the LLP to assist it in replacing that business with different clients.

40. In contrast to the first part of Schedule 7, the "internal" functions referred to in the last two sub-headings are not, and cannot sensibly be, limited to activities undertaken for Clients. The commitment to prepare accounts and tax returns can only sensibly relate to the entirety of Quad's business, and claims handling expressly extends beyond claims against Quad by Clients. This no doubt reflects the fact that, when the Services Agreement was entered into, Quad in fact retained no clients that were not serviced by the LLP. However, any oddity in the contrast between the scope of the client-facing and internal functions is not material to the decision that this court needs to make.

41. Clause 7.3 does not assist Quad. That clause contains obligations relating to the standard at which the Services must be performed. The closing words, which require the LLP to devote "such time and efforts as it deems reasonably necessary for the efficient operation of Quad's business", do not amount to an obligation to do whatever is required to operate Quad's business, however Quad might wish to carry it on or develop it. The obligation is also limited to what *the LLP* deems necessary.

42. Mr Adams submitted that, if he needed to rely on any specific wording in Schedule 7, he would rely on the words "…such other administrative support as Quad may reasonably require from time to time" at the end of the paragraph headed "Quad Administration". I agree with the judge that these words do not cover tendering. 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 closing words of the paragraph need to be construed in the context of the earlier words.

43. It is not necessary to have regard to the email correspondence referred to by the judge at [35], on which Mr Butler sought to rely and to which Mr Adams objected. Suffice to say that it is not clear that what the correspondence evidences is background facts known to both parties at the date of the agreement (which would be admissible), as opposed to individuals' subjective views as to what the 57% was intended to cover.

44. However, I do respectfully disagree with the judge's observation at [13] that the fact there had been a recent tender was of no assistance, because the benefit accrued to both parties. Quite apart from Mr Butler's comment that reflecting tender costs in the fees would not fully reimburse the LLP, the more substantive point is that the tender to Swansea University between April and November 2007 was clearly a substantial piece of work, and that must have been known to both parties. Swansea University was one of the entities listed as a "prospect" in the Services Agreement. Even if existing clients did not require any re-tendering to maintain business, at least some other prospective clients would surely require a formal tender. It would have been straightforward to include tendering in the list in Schedule 7 or elsewhere in the agreement. The fact that it is not there, in circumstances where both parties must have had that activity in mind, supports the conclusion that it was not intended to be included.

45. Instead, clause 2.1 includes a perfectly sensible provision for the addition of "such other services as the parties may agree from time to time in writing that the LLP is to perform for Quad". This explicitly contemplates that the LLP may perform further functions, such as the tenders that the judge found at [12] that the LLP did perform during the first year of operation, but also allows scope for a different agreement to be reached as to remuneration, reflecting the substantial and occasional nature of the work. Alternatively, if agreement could not be reached, then there was nothing to prevent Quad's directors from either doing the work themselves, or entering into an arrangement with another person to do so. To the extent that Quad required information for that purpose it would have a right to obtain it under clause 8.5.

46. Mr Adams' submission that Quad's position was assisted by the contract being relational in nature can be answered shortly. Even if it was the case that the judge was using the term "relational contract" in the sense described by Leggatt LJ in *Sheikh Tahnoon Bin Saeed Bin Shakhboot Al Nehayan v Kent* [2018] EWHC 333 (Comm) at [167], such that a duty of good faith might be implied, there is no special rule that allows a different approach to interpretation to be applied to relational contracts: see *Chitty on Contracts*, 34th ed. at 15-084, referring to the judgment of Beatson LJ in *Globe Motors v TRW Lucas Varity Electric Steering* [2016] EWCA Civ 396; [2017] 1 All ER (Comm) 601 at [64]-[68]. As Beatson LJ said at [68]:

> "… an implication of a duty of good faith will only be possible where the language of the contract, viewed against its context, permits it. It is thus not a reflection of a special rule of interpretation for this category of contract."

47. This passage was cited by Coulson LJ in *Candey v Bosheh* [2022] EWCA Civ 1103; [2022] 4 WLR 84 at [32], where he added:

> "Putting that another way, it might be said that the elusive concept of good faith should not be used to avoid orthodox and clear principles of English contract law."

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.

49. The passage in *Amey Birmingham* relied on by Mr Adams does not assist Quad. That case dealt with a contract of enormous length, in which there were bound to be infelicities and oddities. Jackson LJ's point that those should not be latched upon to disrupt the project has no application here, where the confines of the Services to be provided are clear.

Conclusion

50. In conclusion, I would dismiss the appeal.

Lady Justice Whipple

51. I agree.

Lord Justice Snowden

52. I also agree.