

JUDGMENT : David Donaldson Q.C.(sitting as a Deputy High Court Judge). Chancery. 19th June 2008

1. This action arises out of a Project Agreement dated 18 February 2004 ("*the Agreement*") between the Claimant ("*Ardentia*") and the Defendant ("*BT*"). BT had been appointed the main contractor by the Department of Health for the provision of the so-called Data Spine in the NHS national programme for information technology. BT sub-contracted to Ardentia the provision of certain Secondary Usage Services ("*SUS*") involving the development of programmes making secondary use of anonymised data taken from patient records and the licensing of those programmes to BT.
2. The action, commenced on 18 April 2008, covers essentially two matters:
 - a. In late 2007 a dispute arose as to the payment of licence fees by BT. In brief, Ardentia alleges that BT is using more licences than it has been paying for. While not disputing that it is using more than the basic contractual allocation of 2,000 licences, BT contends that the excess licences are used for testing purposes and are therefore not chargeable. Ardentia estimates the claim at around £18.5 million as at December 2007 increasing by about £285,000 per months thereafter. On this basis it makes a claim for payment and/or specific performance and declaratory and ancillary relief.
 - b. In early 2008 Ardentia learned that BT was intending to engage a third party to develop and supply new software superseding Ardentia's programmes. Ardentia takes the view that this will infringe Clause 5.5 of the Agreement under which BT agreed that Ardentia would be BT's exclusive supplier of certain services, defined as "*Core Services*" in the Agreement, for the purposes of onward transmission to the NHS. On this basis, it claims an injunction restraining breach of Clause 5.5 and/or damages for its breach.
3. At same time as issuing the proceedings Ardentia applied for an interim injunction to prohibit BT from engaging a third party to provide services covered by Clause 5.5. BT riposted on 22 April 2008 with an application to stay the action under section 9 of the Arbitration Act 1996. Both applications came before me on 20 May 2008.
4. Since the court's jurisdiction to grant an interim injunction did not depend on the outcome of the application for a stay of proceedings under the Arbitration Act, I was able to deal with the former while reserving judgment on the latter. I made a limited order restraining BT from procuring the services from a third party conditional upon Ardentia undertaking, as it was willing to do, to co-operate fully in the appointment of an arbitrator to hear the claim for a permanent injunction and in obtaining a hearing and award as soon as possible, with liberty to BT to apply for reconsideration of the order if it appeared that an award could not be obtained within three months. I have recently been informed that Mr David Blunt Q.C. has been appointed as sole arbitrator in respect of the exclusivity dispute
5. The contractual basis for the stay application is Clause 66.1 of the Agreement, which provides that any dispute arising out of or in connection with the Agreement is to be resolved in accordance with the Dispute Resolution Procedure ("*the DPR*"), which is set out at length in Schedule 7.1. The DPR is initiated by notice in writing followed shortly thereafter by a meeting between two nominated representatives (paragraph 2). In the event of disagreement at that level the dispute moves upward to management level, and if that fails to CEO level (paragraph 3). Should that in turn fail, the DPR provides in paragraph 4 that "*the parties shall consider mediation unless either (a) BT considers that the Dispute is not suitable for mediation or (b) the Contractor does not agree to mediation*".
6. Paragraph 7 of the DPR, headed "Arbitration" provides that "*... the parties shall not institute court proceedings until the applicable procedures ... under paragraph 2,3 to 4 (inclusive) ... have been exhausted, save that:*
 - 7.1.1 *BT may at any time before court proceedings are commenced serve a notice on the Contractor requiring that the Dispute be referred to arbitration ...*
 - 7.1.3 *if the Contractor intends to commence court proceedings it shall serve written notice on BT of its intention and BT shall have 15 (fifteen) business days following receipt of such notice to serve a notice in reply on the Contractor requiring that the dispute should be referred to arbitration ...*"
7. I interpret this as imposing three restrictions on the institution of court proceedings by Ardentia:
 - a. The procedures up to and including consideration of mediation, and where applicable, the conclusion of the mediation process, must first have been exhausted.
 - b. Ardentia must have given 15 days notice of its intention to commence court proceedings.
 - c. The matter is to be referred to arbitration if BT serves an appropriate notice within the 15 days period.
8. An exception to these restrictions in the case of an application for an interim injunction is provided for by Paragraph 2.2 of the Schedule:

"Nothing in this Dispute Resolution Procedure shall prevent the parties from seeking from any court of competent jurisdiction an interim order restraining the other party from doing any act or compelling the other party to do any act. To avoid doubt, in relation to:

 - (b) *any ... dispute in which either party's rights are reasonably likely to suffer significant prejudice in the event that it is not able to apply quickly to the court for non-monetary relief (including without limitation an injunction or specific performance)*

then in any such case either party may apply to the court without having to go through any of the other procedures provided for by this Schedule or otherwise by this Agreement. In that event, all issues in the dispute concerned (including those in relation to which monetary relief is sought) may be dealt with by the court."

9. The dispute on the licensing charges was discussed but not resolved at managerial level on 1 November 2007. Under the DPR it was then to be referred to the CEOs. For this purpose Ardentia's solicitors wrote to the BT CEO, Mr Verwaayen on 14 December 2007 (accepted as the correct date by Ardentia) with full details of the licensing claim. The final paragraph of that letter read:
"Please respond in 28 days, failing which our client will have little alternative but to commence proceedings in order to protect its position and recover the sums owed to it."
10. BT's solicitors responded on its behalf by letter dated 11 January 2008, setting out BT's position on the points made in the letter under reply. The final two paragraphs read:
"The Dispute Resolution Process ("DRP")"
We note that you appear to threaten legal proceedings in the event that BT does not respond within the allotted 28 day period. We would remind you that at present, pending completion of the contractual DRP, neither party is entitled to commence court proceedings.
The escalation process provided for in the DRP has not achieved a resolution to this dispute, despite the meetings of 19 July and 29 August 2007. We also know that, given Mr Luke's central role in the matter, it has not been possible for Ardentia to escalate the dispute within its organisation as is contemplated by the process. In these circumstances, BT believes that the most appropriate next step is for the dispute to be referred to mediation."
I understand the reference to Mr Luke to be accepting that the managerial and CEO levels were in the case of Ardentia effectively compressed into one, making it appropriate to proceed immediately to the mediation stage.
11. In their reply dated 28 January 2008, Ardentia's solicitors stated that their clients were prepared to engage in a mediation, and followed this up suggestions as to a mediator on 21 February 2008.
12. BT's solicitors in reply pointed out that the basis issue underlying the dispute concerned the proper construction of the Agreement and that such issues did not easily lend itself to resolution through mediation. They expressed the view that the parties would benefit from an early neutral evaluation on the question of construction and that such an approach would be *"likely to be more helpful in effecting a resolution to the dispute, at least in the short term"*.
13. In the event, the parties never engaged in either mediation or ENE. Ardentia explained that this was due to the advent of the exclusivity question and the need to apply for immediate injunctive relief.
14. Ardentia's primary case seeks to found on Paragraph 2.2 of the Schedule, and in particular the last sentence which provides that where an application is made for an interim injunction the court may deal with all issues in the dispute concerned, including those in relation to which monetary relief is sought. It is, as I understand it, suggested that the making of an application for an interim injunction restraining breach of Clause 5.5 frees the way to asking the court to give judgment on all the claims, including that for a permanent injunction and those based on the dispute as to the licensing charges.
15. This interpretation cannot in my judgment be reconciled with the structure, function and content of Paragraph 2.2. A exception is carved out of the DRP permitting only an application for a interim injunction, and the final sentence has to be read in that very limited context. So understood, its function is to make clear that the court in deciding whether to make an interim order can determine all issues necessary for that purpose, notwithstanding that they may also be relevant to another matter such as a claim for monetary relief of which the court is(*ex hypothesi*) not seised.
16. Ardentia's alternative case is that the letter of 14 December 2007 gave written notice of its intention to commence court proceedings and BT failed to give a counter-notice as required by Paragraph 7.1.3 within 15 days requiring the dispute to be referred to arbitration.
17. This argument fails in my view at the outset. The letter was written as part of the DRP. Until such time as the DRP had been exhausted, it was not in my view open to Ardentia to serve a notice of intention to commence proceedings under Paragraph 7.1.3, since the existence of such an intention would have at that point have been inconsistent with its continuing obligation to seek a consensual solution by bona fide negotiation. Quite rightly, therefore, the letter did not purport to give such a notice. It did not even intimate that absent a response *"within 28 days"* it would definitely commence proceedings, referring only to having *"little alternative"*. Moreover, as matters developed, a response was received within that time. It is finally to be noted that the parties proceeded to the next stage of the DRP by considering mediation as envisaged by Paragraph 4 of the Schedule, with Ardentia itself proposing the names of three possible mediators, a position inconsistent with any present intention to commence court proceedings.
18. It is true that BT did not serve a notice requiring reference of the disputes to arbitration before the commencement of the proceedings. This was however because Ardentia, in breach of Paragraph 7.1.3, did not give any notice of intention (let alone the required 15 days notice) to commence the proceedings prior to the service of the claim form. In these circumstances, it was sufficient that BT should -as it did by its application for a stay communicate its requirement for arbitration within 15 days of the service of the claim form. Indeed, Ardentia did not advance any argument to the contrary.
19. I therefore consider that all the matters in the present action are covered by an agreement to refer them to arbitration, and I shall make an order accordingly for stay of the proceedings.