

ENGLAND AND WALES / JUDGMENT

Data Direct Technologies Ltd v Marks & Spencer Plc [2009] EWHC 97 (Ch) (26 January 2009)

[2009] EWHC 97 (Ch)

Source: bailii.org · Research copy typeset by Esheria. Not court-issued or certified.

Neutral Citation Number: [2009] EWHC 97 (Ch) Case No: HC08C00973 IN THE HIGH COURT OF JUSTICE CHANCERY DIVISION Royal Courts of Justice Strand, London, WC2A 2LL 26th January 2009 B e f o r e : THE HON MR JUSTICE FLOYD

Between: DATA DIRECT TECHNOLOGIES LIMITED Claimant

- and - MARKS AND SPENCER PLC Defendant

T. E. Bergin (instructed by Blake Laphorn) for the Claimant Steven Walker (instructed by Wragge & Co.) for the Defendant Hearing date: 22nd January 2009

HTML VERSION OF JUDGMENT

Crown Copyright © Mr Justice Floyd : The claimant, DataDirect Technologies Ltd is the successor in business to Neon Systems UK Ltd. When I refer to the claimant I will not distinguish between these two companies. The defendant is the well known retailer, Marks and Spencer. With effect from the 30 th of June 1997 the claimant and the defendant entered into a software license agreement ("the Main Agreement") under which software called Shadow Direct was licensed to the defendant for use in its business. By this action the claimant claims to be entitled to the sum of £135,844 plus VAT for annual maintenance of the software for the period from 26 th October 2007 to 25 th October 2008. For present purposes the sole point in dispute between the parties is a question of construction of the Main Agreement and, more specifically, certain schedules thereto. There was no dispute between the parties as to the correct approach to a question of construction of this kind. As Lord Hoffmann said in Investors Compensation Scheme Ltd v West Bromwich Building Society

- [1998] 1WLR 896 at 912: "Interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract". Both parties have put in witness statements. Very sensibly however, the parties agreed that the trial should be conducted without oral evidence. Apart from the agreed background, to which I will come, there was little if anything in the evidence which was properly admissible on the question of construction. The Main Agreement explains, after the recitals, that certain Schedules are part of the agreement. These include a Product Schedule, said to be a summary of orders for supply of licensed software as listed, and a Maintenance Schedule, concerned with software maintenance. Clause 1 of the Agreement contains certain definitions and concludes with the words "In the event of any conflict between the terms of this Agreement and the Schedules hereto, the terms of this Agreement shall prevail." Clause 3 provides: "The Licensee shall by virtue of execution of the Product Schedule, be liable to pay the Licence Fee set out in the Product Schedule and such licence fee should be a one-time Licence Fee which shall permit the licensee to use the Software throughout the term of this Agreement." Clause 18 provides that the Agreement is to continue until determined by one party in reliance on the other's unremedied breach, or by either party in the event of insolvency of the other. It is clear that the Main Agreement is a perpetual licence of the software, to be terminated only in accordance with clause 18 or consent of the parties. Clause 11, the precise details of which do not matter, deals with what is to happen to the software in the event of termination. The Maintenance Schedule forming part of the Main Agreement provides by clause 1: "(a) The Maintenance fee is payable on an annual basis starting one year after the purchase date of the Licence and is payable within 30 days of the maintenance due date. This fee will be a percentage of the Licence Fee prevailing at the time of order and will be stated in the Product Schedule. The Licence Fee may be subject to an annual review. The Licensor guarantees that the amount charged will not exceed the amount they charge other customers for a similar product running in a similar configuration.
- (b) The Licensee will be given 90 days notice by the licensor of any changes to the Licence Fee and/or the percentage rate used to calculate the maintenance fee for any future purchases.
- (c) the Licensee will give 30 days written notice of any intention to cancel maintenance..." Clause 2 provides for the nature of the support which the claimant is required to provide. Clause 2(a) provides: "As long as the Maintenance fee is paid by the Licensee and the Licensee has not modified the Software without Licensors written approval, the Software will be supported fully by the Licensor." By clause 3, if Maintenance is paid, the Licensee is to receive extensions, enhancements and other changes to the software without additional charge. The Product Schedule for the first year provided for a Licence Fee at a particular rate. It identified the model group or aggregate MIPS rating as 859 MIPS. MIPS is a parameter relating to the number of instructions per second which a computer is capable of executing. No doubt it provides a measure of how much use the defendant is capable of making of the software. The parties have used this parameter as a basis for setting Licence

Fees. The Product Schedule identified the license type as "perpetual". The Product Schedule for the first period also provided: "Maintenance for the first year is included in the above price. For second and subsequent years maintenance will be charged at 17.5% of the prevailing list price of the product." Subsequent Product Schedules were entered into in March 1999, March 2000, March 2001, March 2004, March 2006, October 2006 and October 2007, each time some variation or extension of the Licence was agreed. Product Schedule 8 is the schedule which has given rise to the present dispute. The purpose of that Product Schedule appears to have been to increase the MIPS rating from 3150 at which it had been set in Project Schedule 7 to the figure of 3950 set by Product Schedule 8. The Schedule also extended the scope of the licence, so as to permit use of the software by third parties under certain conditions specified in clause 2 of the Schedule. Clause 7 of Product Schedule 8 provided: "Maintenance shall be provided in accordance with the Agreement and the Maintenance Schedule appended to the Agreement. At the Customer's option , annual maintenance for the licence extension (including upgrade) contained herein for the period 26 th October 2007 to 25 th October 2008 shall be 17.5% of £750,000 i.e. of the licence fee paid and will be subject to an annual RPI increase." (emphasis added) By the second sentence of clause 11 it was provided: "In case of conflict between the term [semble "terms"] of this Product Schedule and the Agreement, this Product Schedule shall prevail provided the authorised representative of both Parties have executed it." The Product Schedule concluded: "This Product Schedule is attached to, hereby incorporates by reference, and is therefore a part of and governed by, all of the terms and conditions of the above referenced SLA and its associated Amendments and Addenda (collectively "the Agreement")." The claim in the action is based on clause 7 of Product Schedule 8. The issue which divides the parties is the effect of the words "at the Customer's option" in Clause 7. Do they mean that the defendant must positively elect whether to have maintenance and pay the charge, and if it does not so elect, no maintenance is payable? The reason for the dispute can be seen from the fact that on 23 rd October 2007 Ms Doyle of the defendant sent an email to Mr Baxter of the claimant saying that the defendant had decided not to renew maintenance for 2007-2008. In fact this was a prelude to the defendant ceasing to use Shadow Direct altogether in 2008. It is common ground that the email of 23 rd October did not constitute a notice in the form required by clause 1(c) of the Maintenance Schedule. The claimant submits that the effect of clause 7 is as follows. Maintenance is payable in accordance with the Maintenance Schedule of the Main Agreement. Under that Schedule the Licensee is obliged to pay for maintenance unless it gives 30 days written notice of its intention to cancel maintenance under clause 1(c) of the Maintenance Schedule. If it fails to give notice of its intention to cancel maintenance in accordance with clause 1(c), then the maintenance fee is payable. Accordingly when Product Schedule 8 refers to "the Customer's option", it is referring to the right to cancel maintenance in accordance with clause 1(c) of the Maintenance Schedule. This construction, says the claimant, avoids any conflict between the Main Agreement and its Maintenance Schedule and Product Schedule 8. As the defendant never served a valid notice in writing terminating maintenance in accordance with the Maintenance Schedule, the maintenance fee is payable. The defendant submits that it is only obliged to pay the claimed

maintenance if it exercises the option granted by clause 7 of Product Schedule 8 to purchase maintenance. That, so argues the defendant, is the natural and ordinary meaning of the expression "at the Customer's option". As the defendant never exercised the option, the maintenance charge is not payable. The defendant further submitted that, on the claimant's construction, the words "at the Customer's option" were unnecessary. If the intention had been to refer to the right to cancel maintenance under clause 1(c), words such as "subject to the right to cancel under clause 1(c)" would have been more apt. Moreover, if the effect of the Maintenance Schedule were as contended for by the Claimant, the Maintenance Schedule and the Product Schedule were in conflict, and the provisions of the Product Schedule should prevail, having regard to clause 11. It seems to me that the first question which I have to address is what the parties intended their respective obligations under the Maintenance Schedule to be. By clause 1(a) of the Maintenance Schedule, the Maintenance Fee becomes payable "starting one year after the date of the Licence". Clause 1(b) ensures that the Licensee has 90 days notice of any changes to the maintenance fee before "future purchases". In the context, I take this to be future purchase of maintenance. In this way, well before the next maintenance fee becomes payable, the Licensee will know what to expect. By clause 1(c) the Licensee is given the right to cancel maintenance by giving 30 days written notice. I think the effect of these clauses is that if the Licensee gives the clause 1(c) notice at least 30 days before the due date, no maintenance fee is payable. If the Licensee fails to give the notice, the maintenance fee must be paid. Thus the payment of the maintenance fee is automatic unless the cancellation notice is given, and given in time. To be effective, the cancellation notice must be served before the fee becomes due. Thus, whilst the Maintenance Schedule leads the reader to expect that the Product Schedules will give information about the maintenance fee, there is nothing in the Maintenance Schedule to lead one to expect that the Product Schedules will have anything to say about the basis on which the maintenance fee will be paid. That is not to say that if there is clear language in a subsequent Product Schedule, or indeed in any subsequent agreement, it would not be possible to effect a change to the way in which the maintenance fee becomes due. When one comes to Product Schedule 8, it is important first of all to note that the Maintenance Fee which it provides for in clause 7 is expressly related only to the licence extension to which the Product Schedule relates. That is because Product Schedule 7 already provided for an advance maintenance payment tied to the previous upgrade. The second thing to note is that, if Product Schedule 8 introduces an option not to take up the maintenance for 2007-2008, it would on its face only relate to maintenance related to the licence extension. I think an important part of the background to this question of interpretation is the fact that, broadly speaking, the software must either be maintained or not maintained. The obligation to maintain must apply to all the licensed software or none of it. The notion of a software licence where maintenance is provided except in relation to an upgrade of the licence from one MIPS rating to another is not, as both parties recognised, a realistic one. If the defendant had an election not to take up that part of the maintenance agreement, how would the claimant know whether to maintain or support the software in the event of a failure? In order to meet this practical difficulty, the defendant submitted that the effect of

clause 7 was that, if the defendant elected not to take up maintenance on the software extension, then it must at the same time be taken as electing not to take maintenance at all, notwithstanding that maintenance under Product Schedule 7 had already been paid for. In my judgment the all or nothing nature of maintenance for the software strongly points in favour of the claimant's construction. The reasonable reader of clause 7 would understand that it could not sensibly be creating a special option to elect for maintenance in respect of the licence extension. That fact, coupled with the reference back in the first sentence of clause 7 to the Maintenance Schedule, combine in my judgment to indicate that the parties intended the provisions of the Maintenance Schedule to continue to apply to all maintenance. The option referred to in clause 7 is merely the option (in the sense of the right to cancel) provided by clause 1(c) of the Maintenance Schedule. It is true that the effect of this construction is that the words in question could have been omitted from clause 7. But this is a relatively weak consideration, and, as it seems to me, not a good reason for rejecting the claimant's construction. Whilst the court will be slow to reach a conclusion that words are empty of any meaning, that is not the case here. The criticism is merely that the words merely draw attention to a right which already exists under the Maintenance Schedule. On the other hand, to give the words the effect contended for by the defendant would be to allow them to create a wholly different regime from that provided generally for maintenance under the Main Agreement. I do not think that this is what the reasonable reader would think the parties had meant by their agreement. The claimant's construction does not, in my judgment, create any conflict between the Maintenance Schedule and Product Schedule 8. In those circumstances it is not necessary to decide whether the defendant can rely on the conflict provision in clause 11, notwithstanding the apparent further conflict between that conflict provision and the conflict provision in clause 1 of the Main Agreement. It follows that I find in favour of the claimant's construction of the clause, and the maintenance under Product Schedule 8 is properly claimed. I will hand down this judgment at 10.30 on Monday 26th January. There is no need for any party to attend. The parties should attempt to agree a minute of order to give effect to my judgment. In the event that there are matters which cannot be resolved by agreement or by submissions in writing for decision on paper, the matter should be restored for further argument. At the time of handing down I will adjourn any application (such as an application for permission to appeal) of which I have been notified by 4.30 pm on 23rd January. BAILII: Copyright Policy | Disclaimers | Privacy Policy | Feedback | Donate to BAILII

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.bailii.org/ew/cases/EWHC/Ch/2009/>

CASE PAGE <https://chat.esheria.ai/case-law/england-and-wales/data-direct-technologies-ltd-v-marks-and-spencer-plc-2009-ewhc-97-ch-26-january-2009>

Prepared on 28 October 2026 · Esheria