[2025] EWHC 1098 (Comm)

Claim No: LM-2023-000318

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
LONDON CIRCUIT COMMERCIAL COURT (KBD)

Royal Courts of Justice
Rolls Building, London, EC4A 1NL
Date Friday 9 May 2025

Before

Philip Marshall KC (sitting as a Deputy Judge of the High Court)

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Between:

(1) CLIFFORD STEWART LAY

(2) JACQUELINE SUZANNE LAY

Claimants

-and-

INDEPENDENT VETCARE LIMITED

Defendant

- -

JUDGMENT

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Richard Hanke (instructed by DLA Piper UK LLP) for the Defendant
Paul Strelitz and Charlotte Eborall (instructed by Broadfield Law UK LLP) for the Claimant
Hearing dates: 31 March and 1 April 2025

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I direct that no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

This judgment has been handed down by the judge remotely by circulation to the parties' representatives by email and release to Bailii. The date for hand-down is deemed to be 9 May 2025.

PHILIP MARSHALL KC:

Introduction

1. This is an application by the Defendant, Independent Vetcare Limited **("IVL")**, for an order that particular parts of the Reply and Defence to Counterclaim and some passages of a response to a Request for Further Information be struck out. This application to strike out is based on CPR rule 3.4(2)(a), it being contended that the relevant passages disclose no reasonable grounds for defending the counterclaim.

2. There is also a claim for summary judgment in respect of certain issues and that the Defence to Counterclaim be dismissed.

3. The proceedings arise out of the acquisition by IVL of the issued share capital of Easy Direct Debits Limited **("EDD")**, a company that assisted veterinary practices to receive direct debit payments from pet owners who were their clients. The acquisition was carried out pursuant to a share purchase agreement dated 28 October 2020 **("SPA")**. The vendors of the majority of the shares were the Claimants, who were to be paid part of the consideration based on the performance of the business of EDD after acquisition (so called "earn out" payments). The Claimants seek to recover just over £1.5 million in respect of this consideration which they contend is due and payable. In response IVL contends that no sums are due and has counterclaimed for what it contends is a breach of warranty in respect of the business of EDD. The counterclaim focuses in particular on an alleged failure of EDD to comply with the requirements of the Payment Services Regulations 2017 **("the Regulations")** by obtaining appropriate authorisations to conduct its business.

4. Both the application to strike out and that for summary judgment focus on one aspect of the counterclaim, namely whether EDD was engaged in the form of regulated activity termed "acquiring payment transactions". Whereas the strike out application must proceed on the footing that the facts pleaded in the Claimants' statement of case are true, the summary judgment application addresses the issue of whether there is evidence giving rise to a real prospect of the Defence to Counterclaim succeeding (see, for example, Three Rivers B.C v Bank of England (No.3) [2003] 2 AC 1, at [91] and [121]). However, the approach taken to the summary judgment application in this case is unusual. The focus of

IVL is on certain specific issues which are set out at length in paragraph 3 of the draft minute of order that accompanies its application notice.

5. The question of whether an application for summary judgment can address particular points in this manner has been the subject of two recent first instance decisions. The first is that of Anan Kasei Co. Ltd. v Neo Chemicals [2021] EWHC 1035 (Ch) in which Fancourt J. stated, at [79] to [83]:

> *"…Mr Cuddigan implied that the difference between preliminary issues and summary judgment was of no consequence because, since Order 14A of the Rules of the Supreme Court 1965 was introduced, it has been possible to seek summary judgment on a question of law and the court will make a final determination of the question raised in an appropriate case.*
> *80. The difference is not however a matter of semantics, nor has the difference been erased by the development of a broader summary judgment jurisdiction. A party is free to issue a summary judgment application, subject to compliance with the rules, and the court will determine it, whether it depends on an issue of law, fact or mixed fact and law. Whether a preliminary issue should be determined is a matter for the court to decide, and any party may apply for a direction in that regard. The court has various case management considerations and guidance from appellate courts to weigh when deciding whether the overriding objective is best served by directing the trial of a preliminary issue at that stage. The likelihood that resolution of such an issue may assist the parties to settle the claim or part of the claim is one of the relevant considerations, in modern case management.*
> *81. The justification for allowing the parties to bring forward a summary judgment application is the asserted strength of the case against the respondent and the fact that a final trial of at least part of the claim will be disposed of (CPR 24PD , para 2(3) : " The application notice or the evidence … must – …(b) state that it is made because the applicant believes that on the evidence the respondent has no real prospect of succeeding on the claim or issue or (as the case may be) of successfully defending the claim or issue to which the application relates, and … states that the applicant knows of no other reason why the disposal of the claim or issue should await trial ").*
> *82. The "issue" to which rule 24.2 (" the claimant has no real prospect of defending the claim or issue ") and PD24 refers is a part of the claim, whether a severable part of the proceedings (e.g. a claim for damages caused by particular acts of infringement or non-payment of several debts) or a component of a single claim (e.g. the question of infringement, or the existence of a duty, breach of a duty, causation or loss). It is not any factual or legal issue that is one among many that would need to be decided at trial to resolve such a claim or part of a claim. If the determination of an issue before trial has no consequences except that there is one fewer issue for trial then the court has not given summary judgment and the application was not for summary judgment. If it were otherwise, parties would be able to pick and choose the issues on which they thought their cases were strong and seek to have them determined in isolation, in an attempt to achieve a tactical victory and cause the respondent to incur heavy costs liability at an early stage.*
> *83. The fact that the summary judgment application raises for determination issues of law does not make a relevant difference. Legal issues are often the only relevantly*

disputed question in a claim or part of a claim. Where the issue of law is relatively straightforward and the court is satisfied that it has before it all relevant material and that a trial judge would be in no better position to decide it, the court generally decides the issue of law finally, on a balance of probabilities, and not merely on the basis of whether the respondent has a realistically arguable case: see per Lewison J in Easyair v Opal Telecom [2009] EWHC 339 (Ch) at [15] . That does not mean that any issue of law can properly be the subject of a summary judgment application".

This approach was endorsed and applied in the second decision, that of Steyn J in Vardy v Rooney [2021] EWHC 1888 (QB), at [75].

6. In cases in which an application is made to strike out part of statement of case (as is permissible having regard to CPR rule 3.4(1)) on the grounds that it clearly cannot be maintained as a matter of law, there may be little in substance to distinguish it from an application for summary judgment on a particular point on the grounds that there is no real prospect of the respondent succeeding on that question. Nevertheless the wording of the relevant provisions for strike out and summary judgment is different as is the possibility of having regard to evidence and I note that in the Vardy case Steyn J did address a strike out application despite rejecting the application for summary judgment having regard to the approach taken by Fancourt J in Anan Kasei.

7. In my judgment the approach adopted in these two cases is one that I should follow. Looking at the list of particular points on which IVL seeks summary judgment in paragraph 3 of its draft order, each is simply a factual or legal issue that constitutes one among many that would need to be determined at trial for the counterclaim to be resolved. This does seem to me to be an instance of a party seeking to pick and choose the issues on which it thinks its case to be strong and to have these determined in isolation and is not properly a summary judgment application. If such specific points were to be addressed on evidence in advance of trial it would need to be by way of an application for the trial of preliminary issues. But no such application has been made in this case.

8. For these reasons I do not regard the application for summary judgment, as reflected in paragraph 3 of the draft minute accompanying the application notice, to be a viable one. The only application for summary judgment that can properly be advanced is that set out in paragraph 4 of the draft minute, which seeks summary judgment and dismissal of the entire counterclaim and this is the part of that application that I address below. This does

not affect consideration of the strike out application, which, as already mentioned, is to be considered without reference to the evidence and involves a different approach.

Relevant Background

(1) The Parties and EDD

9. In 2015 the Claimants incorporated EDD to assist veterinary practice customers in relation to direct debits for pet healthcare subscriptions. The business involved maintaining a payment services website or "dashboard", with at least two other companies, regulated by the Financial Conduct Authority **("FCA")**, being contracted to provide services in respect of the processing of transactions, namely GoCardless Limited and Bottomline Technologies Limited. Such third party contractors were referred to as "payment service providers" or "PSPs".

10. IVL is a large veterinary care provider and either itself or through its subsidiaries was a user of the services of EDD prior to the SPA.

11. For the purposes of the application, IVL did not challenge the following, more detailed, description of the business model of EDD at the time of the SPA, derived from the witness statement of the First Claimant, Mr Lay:

    11.1 EDD engaged a contractor to develop a user-friendly online "dashboard" which EDD's vet practice customers could use to manage pet healthcare subscriptions purchased by their customers.

    11.2 Upon a vet practice customer confirming its intention to use EDD's services, it would be sent a contract to execute with EDD. It would also be sent a bulk change deed to switch from the customer's previous direct debit facilities manager to one of the PSPs contracted to EDD.

    11.3 EDD would then provide vet practice customers with access to the online "dashboard". The vet practice customer would then input the relevant information for pet owners purchasing pet healthcare subscriptions into the online 'dashboard'.

11.4 Once a vet practice customer had inputted the information into, and given EDD instructions via, the online "dashboard", EDD would communicate the information to its third-party PSPs through an Application Programming Interface or "API". The third-party PSPs would then collect payment from the pet-owner customers. The funds would be held by the third-party PSPs in ring-fenced client accounts. Finally, the third-party PSPs would execute the transfers of funds to EDD's vet practice customers' bank accounts.

11.5 If EDD received a notification from one of the third-party PSPs that a payment had failed, EDD would ask the PSP to attempt to collect the payment two more times.

(2) The SPA

12 In the course of 2019, IVL began exploratory discussions with the Claimants to purchase EDD. Following negotiations and a process of due diligence and disclosure, the SPA was signed and completed on 28 October 2020.

13 The SPA provided for IVL to purchase the entire issued share capital of EDD, the majority of which was owned by Mr Lay and his wife, the Second Claimant. In terms of consideration, after certain adjustments, £2,714,446.21 was to be paid immediately on completion and the balance was to be deferred and either paid on certain conditions or based on performance calculated by reference to "EBITDA" (earnings before interest, tax, depreciation and amortisation but excluding certain direct costs).

14 The SPA contained detailed provisions as to how "EBITDA" was to be calculated and determined for the purposes of performance related payments. This included the delivery of a specific form of management accounts within a set time period, the raising of any objection by the Claimants to the amount of "EBITDA" shown by such accounts within 10 business days, then a further period of 10 business days for resolution of the dispute, failing which, any matter related to the preparation of the management accounts identified in the notice of objection was to be referred to an independent expert chartered accountant for determination.

15 The cash consideration was duly paid on completion and the first instalment of deferred consideration based on financial performance, amounting to £1,535,666.98, was paid to the Claimants in January 2022. However, a dispute arose in relation to the next instalment. When relevant management accounts were delivered on 6 December 2022, the Claimants at first raised a dispute on 16 December 2022, which was not then resolved by agreement, but then seem to have withdrawn the notice of objection on 7 September 2023. The Claimants thereafter claimed the sum due based on the management accounts of £1,534,047.15. When this was not paid it led to the commencement of these proceedings on 14 December 2023.

16 A number of alleged breaches of the SPA have been raised by IVL by way of defence to the claim but the principal focus for this application has been upon an alleged breach of warranty which forms part of the counterclaim and which is relied upon by way of set-off.

17 The SPA included a number of provisions regarding warranties and indemnities that are relevant as follows:

"[clause 14.2] The [Claimants] jointly and severally warrant that the Warranties are true and accurate as at Completion, save as Disclosed or save for those matters in respect of which Keith Chandler, Sophie Taylor, Ben Hanning or James Brown have actual knowledge in accordance with clause 14.4.

[clause 14.4] Except for the matters Disclosed and save for those matters in the actual knowledge of Keith Chandler, Sophie Taylor, Ben Hanning or James Brown:

(a) no information of which the Buyer, its agents or its advisers has knowledge (in each case actual, constructive or imputed) or which could have been discovered (whether by investigation made by the Buyer or on its behalf), shall prejudice or prevent any Warranty Claim or reduce the amount recoverable under the Warranty Claim; and
(b) the Sellers may not invoke the Buyer's knowledge [actual, constructive or imputed] of a fact or circumstances as a defence to a claim for breach of clause [14.2]"[1]

[1] The document refers to clause 16.1 but this appears to be an error and should be a reference to clause 14.2.

The term *"Disclosed"* as used in these provisions was itself defined in clause 1.1 as meaning *"fairly disclosed to the Buyer expressly for the purposes of this Agreement in the Disclosure Letter and "fairly" means disclosed with sufficient particularity to enable a reasonable buyer to assess the impact on the Company of the matter disclosed and to enable a reasonable buyer to properly identify the nature and scope of the matter disclosed and "Disclose" shall be construed accordingly".*

[18.1] [The Claimants]…irrevocably undertake to indemnify and keep indemnified the Buyer…following completion against any Losses arising from…(c) any breach, prior to Completion, of FSMA or any rules or regulations made under FSMA including (but not limited to) the conduct of any unauthorised regulated activity in contravention of section 19 of FSMA".

18. The particular warranties relied on by IVL are set out in Schedule 4 to the SPA. These include a warranty that certain financial statements for EDD gave a true and fair view of its state of affairs (paragraph 11.2); accurate details of all licences, consents and permissions required by EDD to carry on its business had been Disclosed (paragraph 22.1); and *"the business of [EDD] has at all material times been conducted in accordance with all applicable laws, regulations, orders and by-laws"* (paragraph 23.1).

19. The above provisions are then qualified by limitations on liability provided for in clause 17.1 and Schedule 5. Relevantly this schedule provides in paragraph 3 that: *"The Warrantors shall not be liable for any Warranty Claim if, and to the extent that, the fact, matter, circumstance or event giving rise to such Warranty:*

(a)relates to a matter, specifically and fully provided for in the Accounts, or is within the actual knowledge of Keith Chandler, Sophie Taylor, Ben Hanning or James Brown pursuant to clause 14.4; or

(b)has been Disclosed in the Disclosure Letter in respect of the Warranties given at the date of this Agreement…."

20. The four individuals identified in clause 14.4 and Schedule 5, paragraph 3 appear to have been members of IVL's mergers and acquisitions department.

21. For the purposes of the application the focus has been upon a claim of breach of warranty arising from the alleged failure of EDD to conduct its business lawfully in that it failed to obtain the requisite authorisation for "acquiring of payment transactions". As a consequence it is said that the relevant accounts failed to provide a true and fair view (contrary to the warranty in Schedule 4, paragraph 11.2) and to have resulted in a breach of the warranties concerning the conduct of business lawfully with all requisite permissions (in Schedule 4, paragraphs 22.1 and 23.1).

The Regulatory Context

22. The Regulations were enacted in 2017 to implement the EU's Second Payment Services Directive 2015/2366 EU **("the Directive")**. It is common ground that the Regulations are to be interpreted to give effect to the Directive.

23. Both parties have also drawn attention to and relied on published guidance of the FCA in relation to certain aspects of the Regulations in the form of the "Perimeter Guidance Manual" **("PERG")**. There is also non-legislative guidance from EU institutions (in particular, the European Banking Authority).

24. Counsel for IVL drew attention to the following aspects of the regulatory framework and put its case in the following way:

    24.1 Under reg.138 of the Regulations, it is a criminal offence to provide a payment service in the UK unless authorised to do so or falling within certain exempt classifications.

    24.2 By reg.144 when an offence is committed by a body corporate, its officers can also be liable if the offence was committed with their consent or connivance or if it can be attributed to their neglect.

    24.3 It is common ground that, if it was carrying on a regulated payment service, EDD was not authorised under the Regulations and did not fall within an exempt category.

    24.4 The Claimants' case is that EDD did not need to be authorised because it was not providing payment services. A central issue is therefore whether EDD

was carrying on one or more "payment services" within the meaning and scope of the Regulations.

24.5 "Payment service" in the Regulation means *"any of the activities specified in Part 1 of Schedule 1…when carried out as a regular occupation or business activity…".*

24.6 Although it is also IVL's case that EDD was conducting 'payment initiation services' under paragraph 1(g) of Part 1 of Schedule 1 of the Regulations, it has chosen to focus its application only on the activity of 'acquiring payment transactions' under paragraph 1(e) of Part 1 of Schedule 1 of the Regulations.

24.7 IVL contends that there is no real prospect of the Court concluding at trial that EDD was not carrying out this activity.

25. The focus in submissions was therefore upon what "acquiring of payment transactions" involves. As to this paragraph 2 of the Regulations provides that:

25.1 *""acquiring of payment transactions" means a payment service provided by a payment service provider contracting with a payee to accept and process payment transactions which result in a transfer of funds to the payee*"; and

25.2 "*payment transaction" means an act initiated by the payer or payee, or on behalf of the payer, of placing, transferring or withdrawing funds, irrespective of any underlying obligations between the payer and payee*".

26. The combined effect of the above provisions is therefore that the "acquiring of payment transactions" covers the "business activity" of *"contracting with a payee to accept and process payment transactions [i.e. acts initiated by the payer or payee … of placing, transferring or withdrawing funds] which result in a transfer of funds to the payee*".

27. This payment service is to be contrasted with "execution of payment transactions" which is covered separately in Schedule 1, paragraph 1(c) of the Regulations and which includes "*execution of direct debits".*

28. In the tenth recital to the Directive the following description is provided:

"*This Directive introduces a neutral definition of acquiring of payment transactions in order to capture not only the traditional acquiring models structured around the use of payment cards, but also different business models, including those where more than one acquirer is involved. This should ensure that merchants receive the same protection, regardless of the payment instrument used, where the activity is the same as the acquiring of card transactions. … Moreover, some acquiring models do not provide for an actual transfer of funds by the acquirer to the payee because the parties may agree upon other forms of settlement.*"

29. In terms of FCA guidance PERG 15.3, Q21, states the following in answer to the question "When might we be acquiring payment transactions…?":

"Acquiring of payment transactions… includes traditional 'merchant acquiring' services enabling suppliers of goods, services, accommodation or facilities to be paid for purchases arising from card scheme transactions. However, as set out in Recital 10 of [the Directive] it is designed to be technology neutral and capture different business models, in particular:
-those where more than one acquirer is involved (and so you may be acquiring payment transactions even if you are not the 'acquirer of record' from the point of view of the card scheme);
-regardless of the payment instrument used to initiate the transaction (for example where the instrument is a mobile telephone application); and
-those where there is no actual transfer of funds from acquirer to payee, because another form of settlement is agreed.
In our view, this definition is likely to capture 'master merchants' or 'payment facilitators' that contract with payees for the provision of acquiring services and activities carried out by businesses that aggregate carrier billing transactions. However, provision of merely technical services to merchants such as processing or storage of data and provision of terminals or online gateways, will not itself constitute acquiring".

30. The final comments in this section of PERG appear to be based on the exclusion of the activities of technical service providers from the ambit of the Regulation: *"services provided by technical service providers, which support the provision of payment services, without the provider entering at any time into possession of the funds to be transferred"* do not constitute payment services according to Schedule 2, paragraph 2(j). Illustrations of this type of activity include "processing and storage of data", "information technology" and "provision and maintenance of terminals and devices used for payment services".

31. PERG 15.3 provides further commentary on this exclusion as follows:

"*[Q25A]:…A business that obtains and processes payment account information in support*

of an authorised or registered account information service provider, but does not itself provide the information to the user, is a technical service provider. It does not require authorisation or registration as an account information service provider. The authorised or registered account information service provider is responsible for compliance with the PSRs 2017 where account access is outsourced to a technical service provider."

"*Q39. We are a firm simply providing IT support in connection with payment system infrastructures- are these services subject to the regulations?*
No. There is an exclusion for technical service providers which simply provide IT support for the provision of payment services (see PERG15Annex3, paragraph (j)). Other support services that may be provided by technical service providers include data processing, storage and authentication. This does not mean that where these services form part of a payment service they are not regulated, but in that case it is the payment service provider that is responsible under the PSRs 2017 for the provision of these services, not the person they have outsourced these technical services to. Providers of payment initiation services or account information services are not technical service providers."

The application to strike out

32. I turn first to the application to strike out.

33. An application can be made to strike out all or part of a statement of case on the grounds that it discloses no reasonable grounds for bringing or defending the claim (applying CPR rule 3.4(1) and (2)(a)). The correct approach to an application to strike out, based on this aspect of the CPR, was considered by Warby J in HRH The Duchess of Sussex v Associated Newspapers [2020] EWHC 1058 (Ch) where he stated at [33(2)]:

"*An application under CPR 3.4(2)(a) calls for analysis of the statement of case, without reference to evidence. The primary facts alleged are assumed to be true. The Court should not be deterred from deciding a point of law; if it has all the necessary materials it should "grasp the nettle": ICI Chemicals & Polymers Ltd v TTE Training Ltd [2007] EWCA Civ 725 , But it should not strike out under this sub-rule unless it is "certain" that the statement*

of case, or the part under attack discloses no reasonable grounds of claim: Richards (t/a Colin Richards & Co) v Hughes [2004] EWCA Civ 266 [2004] PNLR 35 [22]. Even then, the Court has a discretion; it should consider whether the defect might be cured by amendment; if so, it may refrain from striking out and give an opportunity to make such an amendment".

34. The passage referred to by Warby J in the Court of Appeal's judgment in Richards v Hughes is worth setting out in full in the context of the present case. There Peter Gibson LJ (with whom all other members of the court agreed) explained:

> *"22.. I start by considering what is the correct approach on a summary application of the nature of Mr. Richards's application at this early stage in the action when the pleadings show significant disputes of fact between the parties going to the existence and scope of the alleged duty of care. The correct approach is not in doubt: the court must be certain that the claim is bound to fail. Unless it is certain, the case is inappropriate for striking out (see Barrett v Enfield London Borough Council [2001] 2 AC 550 at p. 557 per Lord Browne-Wilkinson). Lord Browne-Wilkinson went on to add:*
> *"[I]n an area of the law which was uncertain and developing (such as the circumstances in which a person can be held liable in negligence for the exercise of a statutory duty or power) it is not normally appropriate to strike out. In my judgment it is of great importance that such development should be on the basis of actual facts found at trial not on hypothetical facts assumed (possibly wrongly) to be true for the purpose of the strike out."*

35. The application in the present case is to strike out paragraphs 16, 21.2, 26.1, 28.1, 29.4, 30.4, 30.6, 45.1.2.2, 45.1.2.3, 45.3, 46, 48.2 and 48.5.3.2 of the Reply and Defence to Counterclaim and answers 1 to 3 to a Request for Further Information that were provided on 9 October 2024. References hereafter are to paragraphs of the Reply and Defence to Counterclaim unless otherwise indicated.

36. Shorn of unnecessary assertions regarding the clarity of the Defence, paragraphs 16 and 21.2 contend in essence that there was no entitlement on the part of IVL to withhold payment of the sums claimed in Particulars of Claim. In my judgment it would not be appropriate to strike out these passages. They add nothing of substance to what is stated in the Particulars of Claim and no attempt is being made to strike out that statement of case.

37. Paragraph 26.1 essentially admits that EDD had no authorisation from the FCA. There is simply in addition a reference to this having been disclosed under the SPA. I can see no

proper basis on which it would be appropriate to strike out what is in substance an admission.

38. Paragraph 28.1 is also in substance an admission of the description applied by IVL to how vet practices outside of its group were serviced after completion under the SPA. Again I do not consider there to be any proper basis to strike out what is in substance an admission.

39. Paragraphs 29.4, 30.4 and 48.2, along with answers 1 to 2 of the Claimants' response to the Request for Further Information, appear to be linked and address the issue of whether EDD was engaged in the "acquiring of payment transactions". Specifically, paragraph 30.4 contains a denial that EDD carried on such activity within the meaning of the relevant provisions of the Regulations. This is expanded on in paragraph 30.7 and in the answers to the Request for Further Information by not only denying such activity but by also saying in the alternative, that if, prima facie, there was any such activity EDD was nevertheless exempt from the requirement to obtain authorisation on the basis that its services were limited to those of a technical service provider within the meaning of paragraph 2(j) of Schedule 1, Part 2 of the Regulations.

40. The denial that EDD has been engaged in "acquiring of payment transactions" and the reliance on the exclusion of services provided by a technical service provider must be considered in light of the Claimants' pleaded case regarding what EDD actually did. This is expressed in very general terms in the Particulars of Claim, paragraph 3(b) as *"the business of helping veterinary practices receive direct debit payments from their pet owners"* and is not greatly clarified in the Reply and Defence to Counterclaim, which at paragraph 27, denies that EDD handled any money or had any other involvement in relevant processes other than *"passing pet owner's information over to a payment service provider…which payment service providers would then submit payment requests to BACS…"*.

41. Given the generality of these statements of case, in my judgment it is not possible to conclude that the defence advanced must fail as a matter of law. Even assuming that all of IVL's submissions were correct as to how the Regulations are to be interpreted, I could not conclude that EDD was engaging in the "acquiring of payment transactions" or any other regulated form of business merely on the basis of what the Claimants have pleaded. The

assertions of the Claimants (which I must assume to be true for present purposes) are simply too general to arrive at a firm conclusion on that matter and, as I have already set out above, on a strike out application of this type I am confined to a review of the statements of case.

42. IVL has submitted, principally through the witness statement of Mr Murdoch, its solicitor, that the above aspects of the Claimants' statement of case amount to no more than a bare denial of IVL's contention that there has been a breach of the Regulations, and, in reliance on paragraph 4 of CPR Practice Direction 3A, this is said to warrant striking out. On analysis, however, I do not accept that the Claimants have only pleaded a bare denial, although I accept that what they have said is rather general. If IVL found this unacceptable then the correct course was to make an application to require a fuller or more detailed answer to its Requests for Information or even to seek a peremptory order to ensure compliance. But no such application has been made.

43. Paragraphs 45.1.2.2 and 45.1.2.3 and response 3 to IVL's Request for Further Information that was supplied on 9 October 2024 are the next targets for the strike out application. They all concern the actual knowledge of Mr Keith Chandler, which is said to have encompassed the matters about which IVL currently complains (so falling under the provisions of clause 17.1 and Schedule 5, paragraph 3 of the SPA which prevent any warranty claim being made).

44. IVL contended in correspondence and in the witness statement of Mr Murdoch that this pleading was impermissible as being contradictory of the Claimants' principal case that the business of EDD involved no breach of the Regulations. There is nothing in this complaint. As the opening words of paragraph 45 make clear, the Claimants' reliance on the knowledge of Mr Chandler is pleaded as an alternative case. There is nothing to prevent that under the CPR.

45. Mr Hanke, counsel for IVL, then submitted that, on the true construction of the SPA, it would have to be shown that Mr Chandler and his colleagues actually knew that EDD was carrying on business in breach of the Regulations before it could be concluded that a warranty claim was excluded on the above basis. However, I am not convinced that such a conclusion on the true interpretation of the SPA can be reached on the materials presently available. At present I have no witness statement from any of the four individuals whose

actual knowledge is relevant and have little in the way of context to explain how their knowledge was picked out as being of key importance. Without such materials I do not regard this as a case in which I have all the necessary contextual items to reach a safe conclusion on the true interpretation of clause 17.1 and Schedule 5, paragraph 3 of the SPA. It would not therefore be appropriate to "grasp the nettle" to adopt the language of ICI Chemicals & Polymers (quoted by Warby J in his decision in HRH The Duchess of Sussex). Further I bear in mind the contents of answer 12(b)(xvii) and (xviii) to IVL's second Request for Further Information that was provided on 23 August 2024, which appear to envisage Mr Chandler appreciating the facts and obtaining expert legal advice on the matters alleged to give rise to the breach of the Regulations on which IVL now relies. Since I have to assume that the Claimants' pleading is correct, these passages also make it inappropriate for these parts of the Claimants' statement of case to be struck out.

46. The next aspect of the strike out application relates to paragraph 46 in which the Claimants plead, in support of their alternative case, that various events or actions post-completion of the SPA are supportive of their case that the matters of which complaint is now made by IVL were already sufficiently known pre-completion to prevent a warranty claim by virtue of Schedule 5, paragraph 3. IVL contends that logically events post-completion cannot support a case of knowledge pre-completion. I do not agree. It seems to me well arguable that conduct post-completion could be consistent with and support an inference of knowledge pre-completion. These matters would have to be explored at trial to reach any firm conclusion. They cannot be resolved by reference only to the statements of case.

47. This leaves paragraph 48.5.3.2 as the final target of the strike out application. This concerns a non-admission of a contractual right to withhold transfer of the second payment of consideration under the SPA based on performance (or "the second earn out payment" as it was referred to in submissions). I do not regard this passage as being one that should be struck out either. It responds to paragraph 39(e) of the Defence and Counterclaim which contends that management accounts were artificially inflated due to a wrongful transition by EDD to a hybrid business model post-completion. It will properly be a matter for trial as to whether there has been any artificial inflation and as to how each party's case is to be reconciled with the procedure in the SPA for determination of the amount properly payable in respect of this element of the consideration.

The application for summary judgment

48. I now turn to the application for summary judgment, which can be addressed more briefly.

49. The relevant principles to be applied were largely a matter of common ground between the parties. They both referred to the well-known guidance derived from Easyair Ltd v Opal Telecom Ltd [2009] EWHC 339 (Ch) at [15] (approved by the Court of Appeal in AC Ward & Sons Ltd v Catlin (Five) Ltd [2009] EWCA Civ 1098). Omitting internal citations, the seven key principles are these:

> "*i) The court must consider whether the claimant has a "realistic" as opposed to a "fanciful" prospect of success;*
>
> *ii) A "realistic" claim is one that carries some degree of conviction. This means a claim that is more than merely arguable*
>
> *...*
>
> *iii) In reaching its conclusion the court must not conduct a "mini- trial" ...*
>
> *iv) This does not mean that the court must take at face value and without analysis everything that a claimant says in his statements before the court. In some cases it may be clear that there is no real substance in factual assertions made, particularly if contradicted by contemporaneous documents ...*
>
> *v) However, in reaching its conclusion the court must take into account not only the evidence actually placed before it on the application for summary judgment, but also the evidence that can reasonably be expected to be available at trial ...;*
>
> *vi) Although a case may turn out at trial not to be really complicated, it does not follow that it should be decided without the fuller investigation into the facts at trial than is possible or permissible on summary judgment. Thus the court should hesitate about making a final decision without a trial, even where there is no obvious conflict of fact at the time of the application, where reasonable grounds exist for believing that a fuller investigation into the facts of the case would add to or alter the evidence available to a trial judge and so affect the outcome of the case ...;*
>
> *vii) On the other hand, it is not uncommon for an application under Part 24 to give rise to a short point of law or construction and, if the court is satisfied that it has before it all the evidence necessary for the proper determination of the question and that the parties have had an adequate opportunity to address it in argument, it should grasp the nettle and*

decide it. The reason is quite simple: if the respondent's case is bad in law, he will in truth have no real prospect of … successfully defending the claim against him …. Similarly, if the applicant's case is bad in law, the sooner that is determined, the better. If it is possible to show by evidence that although material in the form of documents or oral evidence that would put the documents in another light is not currently before the court, such material is likely to exist and can be expected to be available at trial, it would be wrong to give summary judgment because there would be a real, as opposed to a fanciful, prospect of success. However, it is not enough simply to argue that the case should be allowed to go to trial because something may turn up which would have a bearing on the question of construction…"

50. I also bear in mind Mummery LJ's warning in Doncaster Pharmaceuticals Group Ltd v. Bolton Pharmaceutical Co 100 Ltd [2006] EWCA Civ 661 that the court should be alert to "the defendant, who seeks to avoid summary judgment by making a case look more complicated and difficult than it really is", and "the cocky claimant who … confidently presents the factual and legal issues as simpler and easier than they really are and urges the court to be 'efficient' …". Further neither CPR Part 24, nor the overriding objective, permits the court to enter judgment on the basis that a party has a strong case, the defence is not likely to succeed, or that the time and costs involved in a trial are disproportionate to the potential gains (see HRH The Duchess of Sussex v Associated Newspapers Ltd. [2021] EWCA Civ 1810, at [32]).

51. In my judgment, whilst I accept that IVL has many powerful points to make in relation to EDD having been engaged in activity that required authorisation under the Regulations, it remains the case that the Claimants have a defence to the counterclaim that has a reasonable prospect of success.

52. It would be inappropriate at this stage to go into detail on the merits of each point relevant to the above conclusion. By way illustration only, however, I have concluded that there is a realistic prospect of the Claimants establishing at trial, after disclosure and cross-examination, that Mr Chandler or one of more of his three colleagues named in paragraph 3 of Schedule 5 to the SPA had "actual knowledge" of the matters which now feature in the breach of warranty claim advanced in the Counterclaim:

52.1 The true construction of the term "actual knowledge" as used in these provisions of the SPA is one that needs to be considered in context. At present I do not have sufficient evidence as to that context. For example, there is nothing to explain why Mr Chandler and his colleagues were specifically picked out by the parties and as to the detail of the role that they were to perform in the transaction. At this stage there is no evidence from Mr Chandler himself or any of his colleagues. IVL's evidence is limited to that of Mr Murdoch and a limited selection of documents.

52.2 In light of the above there is a real prospect of the Claimants establishing that the true construction of "actual knowledge" only requiring that the relevant individual was aware of all of the relevant *facts* that are said to give rise to a warranty claim, as opposed to the correct *legal analysis* to be applied to those facts. Further, in my judgment, on the evidence provided by the Claimants, specifically the witness statement of Mr Lay, there is at the very least a reasonable prospect of establishing that Mr Chandler and others within the relevant group of individuals were fully aware of all of the relevant facts as to how EDD conducted business which are now said to have required authorisation under the Regulations.

52.3 Further, even if the term "actual knowledge" did require some appreciation of the legal consequence of the relevant facts, I am not convinced that it is fanciful to conclude that material supporting that conclusion may not arise from disclosure of documents in these proceedings and witness evidence in due course. It is the Claimant's evidence that IVL did have legal advice on regulatory issues arising from disclosure given by prior to the SPA being executed. It seems to me to be reasonably arguable that, if all of the relevant facts as to how EDD conducted business were known, such advice could be expected to have included a review of the requirements of the Regulations.

53. To these matters can be added further questions such as whether the Counterclaim has any real substance in circumstances in which, since its acquisition by IVL, EDD has continued to conduct business without the need for any authorisation under the Regulations and

without interruption. This raises the real and substantial question of whether the counterclaim is one that could be for anything more than nominal damages. The Defence to the Counterclaim seems to me to have reasonable prospects of success in establishing this contention as well.

Conclusion

54. For the reasons set out above the application of IVL to strike out and for summary judgment is dismissed.

55. I shall hear submissions on costs and consequential matters and what directions should follow for the continued progress of the proceedings, if these cannot be agreed.