CAUSE NO: G2023-0098

IN THE GRAND COURT OF THE CAYMAN ISLANDS
CIVIL DIVISION

BETWEEN:

DATALINK, LTD

Plaintiff

-and-

INFINITY BROADBAND, LTD

Defendant

Appearances: **Mr Andrew S Jackson and Mr Ross McLeod of Appleby (Cayman) Ltd for the Plaintiff**

Ms Sally Bowler of McGrath Tonner for the Defendant

Before: **The Honourable Justice Jalil Asif KC**

Heard: **25 March 2024**

Judgment: **2 October 2024**

Summary judgment—whether fair or reasonable probability that defendant has real or bona fide defence—contract alleged to be void for contravening statutory requirements—alleged economic duress—alleged misrepresentations inducing contract—alleged failure to employ contractual dispute resolution mechanism

JUDGMENT

Contents

A. Summary of decision

1. In this action, DataLink Ltd ("DataLink") is suing Infinity Broadband Ltd, which trades as C3 Pure Fibre ("C3"), on invoices rendered to C3 by DataLink over the period from October 2019 to April 2023, contractual interest and pre-issue legal costs incurred. The total sum claimed is just over CI $750,000 after allowing for accrued interest to date. DataLink says that this is a simple debt claim. It seeks summary judgment under GCR O.14 for the majority of the total sum claimed, excluding certain invoices where it accepts that there is a "triable issue", i.e. that there is a fair or reasonable probability that C3 has a real or *bona fide* defence to DataLink's claim.

2. In response, C3 seeks to raise a number of defences to the claim and seeks leave substantially to amend its Defence and also to add counterclaims. It says that its defences and counterclaims raise a triable issue so that I should dismiss DataLink's application for summary judgment. In summary, C3's primary contentions are:

2.1 The terms of the agreements, and in particular the charging provisions in the agreements on which DataLink relies, are contrary to the requirements of applicable legislation in certain respects, with the result that the agreements, or the charging clauses giving rise to the invoices, are void as a matter of law and cannot be relied upon or enforced by DataLink.

2.2 C3 entered into the agreements which DataLink relies on as a result of economic duress, involving the exertion of illegitimate pressure on C3 by DataLink.

2.3 DataLink made various fraudulent or negligent misrepresentations to C3 which C3 relied upon, and which induced C3 to conclude the agreements.

2.4 The agreements which DataLink relies on include dispute resolution provisions requiring DataLink and C3 to go through an ADR process. DataLink has not done so, and therefore the claim is brought prematurely.

3. In answer to these contentions, DataLink says that the dispute resolution provisions in the agreements were not engaged; the charging provisions are not void and, if the regulator were to make a final determination that any provisions in the agreements are unfair, which it has not yet done, that could not have retroactive effect on the validity of the charging provisions up to the date of that determination. Whilst DataLink does not explicitly address in its submissions the second and third points identified above, it is apparent from its position generally that it disputes that either of those matters raises a triable issue.

4. For the reasons set out in this judgment, my decision is that C3 has leave to defend, but such leave is conditional on C3 paying into court the sum of CI $500,000. In summary, this is because, based on the pleadings and evidence filed so far (including C3's proposed Amended Defence and Counterclaim), I am very sceptical that there is any real merit in the first line of defence advanced by C3 and it does not appear to me that there is any real merit in the other three defences that C3 raises. However, whilst my view is that there is little or no substance in C3's defence that the agreements are void, and I am therefore very nearly willing to grant summary judgment in favour of DataLink, I cannot rule out the possibility that C3 might be able to prove its case at trial that the charging provisions in the underlying agreements between the parties may be contrary to the applicable legislation and void as a result. It is therefore appropriate that I make C3's leave to defend conditional on a substantial payment into court reflecting the amount of the principal debt alleged to be owed to DataLink.

5. My preliminary view is that the payment into court should be made within 35 days, but I will hear counsel if C3 wishes to argue that it needs more time to make the payment. In that eventuality, any request for additional time must be supported by affidavit evidence regarding C3's financial position and the reasons why C3 requires further time, particularly given that the debt has accrued over the last five years and C3 should therefore have been making adequate provision for payment over that period. I will also hear counsel on the issue of costs and any appropriate consequential orders.

6. I stress at the outset that in this judgment I am summarising the parties' cases as presented to me in their evidence and submissions. Much of the factual evidence was common ground. In addition, as this is an application for summary judgment, I have not addressed every argument put forwards by the parties, but I have borne them in mind in reaching my decision. Finally, none of what I say in this judgment is intended to represent a concluded finding on the substantive issues between the parties.

7. I am grateful to counsel for their helpful arguments and to the parties for their patience in awaiting this judgment.

B. The proceedings

8. DataLink's claim was commenced by a writ and Statement of Claim both filed on 6 June 2023. C3 filed and served its Defence on 19 July 2023, and DataLink filed and served a Reply on 1 August 2023.

9. There was then a hiatus until 30 November 2023, when DataLink filed and served its summons for summary judgment and the affidavit of Ms Claire Stafford in support. On 12 February 2024, the summons was fixed for hearing on Monday 25 March 2024.

10. C3 filed and served the first affidavit of Mr Randy Merren on 27 February 2024 in opposition to DataLink's application. C3 then filed and served Mr Merren's second affidavit during the evening of Friday 22 March 2024, the last working day before the summons was due to be heard. Mr Merren sought to adduce in evidence an extract from an unidentified report or submission apparently commissioned by C3 relating to ICT provision in the Cayman Islands, and also to exhibit a draft Amended Defence and Counterclaim on which C3 wishes to rely.

11. I heard the application for summary judgment on 25 March 2024. The hearing bundle comprised over 2,000 pages in three files, with a further two full lever-arch files of authorities (with limited

duplication between them) plus the skeleton arguments on each side. The hearing had been estimated by counsel to take half a day, however, it occupied the entire day and required the court to sit late to complete the oral argument.

12. Following the conclusion of the oral argument, there was a flurry of further activity on both sides, adding over 300 pages to the material before the Court:

12.1 On 27 March 2024, C3 prepared a summons for leave to amend its Defence and to make a counterclaim (which appears not to have been filed so far), and on 28 March 2024, C3 served and filed Mr Merren's third affidavit in support exhibiting a further version of C3's proposed Amended Defence and Counterclaim.

12.2 On 5 April 2024, DataLink filed and served an affidavit sworn by Ross McLeod in response to Mr Merren's third affidavit.

12.3 On 11 April 2024, the Court made a consent order for directions concerning filing of further evidence and skeleton arguments in respect of C3's intended summons for leave to amend.

12.4 On 12 April 2024, C3 served a Notice to Produce in respect of certain documents said to have been referenced in Mr McLeod's affidavit.

12.5 Also on 12 April 2024, C3 filed and served Mr Merren's fourth affidavit, seeking to raise a number of new points or to elaborate on points already made in response to DataLink's claim generally and DataLink's application for summary judgment specifically.

12.6 On 18 April 2024, DataLink responded to the Notice to Produce, contending that production of the documents sought is not necessary either for disposing fairly of the cause or for saving costs.

12.7 On 19 April 2024, C3 served its skeleton argument in support of its intended summons for leave to amend.

12.8 On 26 April 2024, C3 served and filed an affidavit sworn by Reece Jones exhibiting further documents on which C3 wishes to rely in support of its defence and intended counterclaim and a summons seeking leave to rely on Mr Jones' affidavit.

13. In parallel with this, on 8 April 2024, DataLink applied for leave to pursue a judicial review claim against the regulator in respect of its draft determinations on certain issues concerning the operation of the market in the Cayman Islands for the provision of ICT infrastructure, and on 11 April 2024, I

gave DataLink leave to do so. This is relevant in that C3 relies in part on the draft determinations in opposition to DataLink's summary judgment application.

C. The relevant law

C.1 The approach to applications for summary judgment

14. The parties agree on the law applicable to DataLink's summons for summary judgment. I can therefore summarise it briefly as follows.

15. The power to grant summary judgment pursuant to GCR O.14, r.1 is engaged where the case is within the scope of GCR O.14, the plaintiff has served a Statement of Claim, the defendant has given notice of intention to defend, and the plaintiff contends, on the basis of affidavit evidence, that the defendant has no defence to the claim or to a particular part of the claim. The affidavit must verify the facts and state the deponent's belief that the defendant has no defence to the claim or to the relevant part of the claim, or has no defence except as to the amount of any damages claimed. The parties agree that DataLink has satisfied these threshold requirements of the Rules.

16. GCR O.14, r.3(1) then comes into operation:

> *"Unless on the hearing of an application under rule 1 either the Court dismisses the application or the defendant satisfies the Court with respect to the claim, or that part of the claim, to which the application relates that there is an issue or question in dispute which ought to be tried, the Court may give such judgment for the plaintiff against that defendant on that claim or part as may be just having regard to the nature of the remedy or relief claimed."*

17. DataLink describes this as giving rise to a presumption in favour of granting summary judgment, with the burden being on C3 to demonstrate why judgment should not be given. DataLink relies on *Lakatamia Shipping Co Ltd v Nobu Su* [2017] 1 CILR 416 at [36]; *McGlynn Enterprises v Embury* (unrep. 22 January 2019, Gunn Ag. J.) at [15] and *Embury v McGlynn Enterprises* (unrep. 20 April 2021, CICA) at [9] to make that proposition good.

18. Where there is conflicting evidence on the hearing of an application for summary judgment, the Court's approach is set out by Vos JA in *Merren v Cayman National Bank* [2008] CILR 428 at [5], [6] and [8] as follows:

> *"5. The proper approach to an O.14 application, where there is conflicting or competing affidavit evidence, was settled in England in* National Westminster Bank plc v Daniel*, in which Glidewell*

> *LJ reviewed the history, and concluded by applying the dictum of Ackner LJ in* Banque de Paris et des Pays-Bas (Suisse) SA v Costa de Naray, *where he said ([1984] 1 Lloyd's Rep at 23):*
>
> > *'It is of course trite law that O.14 proceedings are not decided by weighing the two affidavits. It is also trite that the mere assertion in an affidavit of a given situation which is to be the basis of a defence does not, ipso facto, provide leave to defend; the Court must look at the whole situation and ask itself whether the defendant has satisfied the Court that there is a fair or reasonable probability of the defendants' having a real or bona fide defence.'*
>
> *6. Glidewell LJ himself concluded ([1993] 1 WLR at 1457):*
>
> > *'I think it right to ask, using the words of Ackner LJ in the* Banque de Paris *case, at p.23, 'Is there a fair or reasonable probability of the defendants having a real or bona fide defence?' The test posed by Lloyd LJ in the* Standard Chartered Bank *case, Court of Appeal (Civil Division), Transcript No. 699 of 1990 'Is what the defendant says credible?,' amounts to much the same thing as I see it. If it is not credible, then there is no fair or reasonable probability of the defendant having a defence.' ...*
>
> *8. ... For my part, however, I would prefer to regard the test as simply requiring the Court to ask whether the defendant has shown a fair or reasonable probability that he has a real, or bona fide, defence. ..."*

Accordingly, in this judgment, I use the term "triable issue" to mean a fair or reasonable probability that C3 has a real or *bona fide* defence.

19. Generally, summary judgment applications should be straightforward, should not involve a large volume of paper and should not involve significant court time. Each of these is usually a contraindication against the matter being suitable for summary judgment. However, as noted in the editorial notes to *Supreme Court Practice 1999* at paragraph 14/4/9:

> *"... Summary judgment under this Order should not be granted when any serious conflict as to matter of fact or any real difficulty as to matter of law arises (*Crawford v. Gilmore *30 L.R.Ir. 238;* Electric & General Contract Corporation v. Thomson-Houston, etc., Co. *(1895) 10 T.L.R. 103); but however difficult the point of law is, once it is understood and the Court is satisfied that it is really unarguable, it will give final judgment (see per Lord Greene M.R., in* Cow v. Casey *[1949] 1 K.B. 474 at 481; and see* Verrall v. Great Yarmouth Borough Council *[1981] Q.B. 202; [1980] 1 All E.R. 839, CA). ..."*

C.2 Statutory regulation of the provision of ICT infrastructure within the Cayman Islands

20. The provision of ICT services within the Cayman Islands is regulated by:

20.1 the Information Communication and Technology Act (2019 Revision) ("ICTA");

20.2 the Information Communication and Technology (Interconnection and Infrastructure Sharing) Regulations, 2003 ("the INI Regulations");

20.3 the Information Communication and Technology (Dispute Resolution) Regulations, 2003 ("the Dispute Resolution Regulations"); and

20.4 the Utility Regulation and Competition Act (2024 Revision) ("URCA").

21. Section 2 of ICTA contains definitions and includes:

> *"'**infrastructure sharing'** means the provision to licensees of access to tangibles used in connection with a public ICT network or intangibles facilitating the use of a public ICT network; and, for the purposes of this definition –.*
>
> *(a) '**tangibles**' includes lines, cables or wires (whether fibre optic or other), equipment, apparatus, towers, masts, tunnels, ducts, risers, holes, pits, landing stations, huts, lands, buildings or facilities; and*
>
> *(b) '**intangibles**' include agreements, arrangements, licences, franchises, rights of way, easements and other such interests."*

22. Amongst other provisions, C3 relies upon s.65(5) of ICTA, which provides that:

> *"(5) Any interconnection or infrastructure sharing provided by a licensee under this section shall be provided at reasonable rates, terms and conditions which are not less favourable than those provided to–*
>
> *(a) any non-affiliated supplier;*
>
> *(b) any subsidiary or affiliate of the licensee…."*.

23. Sections 6(2) and 66 of URCA are relevant to C3's case that the charging clauses in the First and Second Contracts are void and unenforceable by DataLink or are liable to be found by the Utility Regulation and Competition Office ("OfReg") to be void. Section 6(2) states:

> *"6. ….*
>
> *(2) In performing its functions and exercising its powers under this or any other Law, the Office may —*
>
> *…*
>
> *(aa) modify or find to be void, agreements involving one or more sectoral providers that unreasonably restrict competition in any relevant market; …"*

So far as relevant, s.66 provides:

> *"66. (1) Agreements by or between sectoral providers or between one or more sectoral providers and any other person, decisions by sectoral providers or concerted practices which —*
>
> *(a) may affect trade in the Islands; and*
>
> *(b) have as their object or effect the prevention, restriction or distortion of competition in the markets and sectors for which the Office has responsibility subject to this Act, are prohibited.*
>
> *(2) Subsection (1) applies, in particular, to agreements, arrangements, decisions or practices which —*
>
> *(a) directly or indirectly fix purchase or selling prices or any other trading conditions;*
>
> *…*
>
> *(d) apply dissimilar conditions to equivalent transactions with other parties, thereby placing them at a competitive disadvantage; …*
>
> *(4) Any agreement, arrangement, or decision which is prohibited by subsection (1) is void."*

24. Separately, s.70 of URCA defines the circumstances in which the conduct of a sectoral provider amounts to abuse of a dominant position, and ss.76 and 77 of URCA give OfReg the power, following an investigation and determination that the prohibition in s.66 or s.70 has been breached, to direct the sectoral provider to bring the infringement to an end, including by modifying the terms of or terminating any infringing agreement.

D. The factual matrix

25. The sole provider of electricity services in Grand Cayman is Caribbean Utilities Company, Ltd. ("CUC"). CUC owns a network of utility poles located throughout the island for this purpose. In recent years, the poles have also been used to carry ICT infrastructure, in particular wire and fibre-optic cables.

26. DataLink is a wholly owned subsidiary of CUC. Since 20 March 2012, it has had a contractual right granted by CUC to attach cables to the section of the utility poles designated by CUC as the "communications space", and to manage and sub-licence the communication space to ICT service providers, including C3. ICT service providers use this space to attach their own cables to CUC's utility poles in order to provide their services to end-users.

27. All of the ICT service providers, including DataLink, are regulated by OfReg, which was established by s.4 of URCA. OfReg took over responsibility for this in 2017 from the Information and Communications Technology Authority.

28. The contractual relationship between DataLink and C3 commenced in May 2012, when a pre-existing contract between CUC and C3 was novated in favour of DataLink and DataLink took over CUC's role in managing and licensing use of the communications space on CUC's utility poles. The original contract with CUC was dated 22 November 2005 ("the First Contract"). Following the expiry or termination of the First Contract, DataLink and C3 concluded a further contract on 13 July 2022 ("the Second Contract"). C3 accepts that the terms of the First and Second Contracts are materially identical. I therefore focus on the Second Contract.

29. The Second Contract includes a governing law clause selecting Cayman Islands law as being applicable (Article XXIX), an entire agreement clause (Article XXVII) and a clause permitting any

invalid provision to be severed from the agreement provided that it does not materially alter the essence of the agreement (Article XXVIII).

30. The Second Contract includes a recital recording that:

> *"D. Both parties acknowledge and agree that this Agreement is subject to the Information and Communications Technology Law, as amended from time to time, and the Information and Communications Technology Law (Interconnection and Infrastructure Sharing) Regulations, 2003 (collectively, the 'Law')."*

31. DataLink has concluded contracts with other ICT service providers from time to time. It is common ground that the terms of DataLink's contracts with the various ICT service providers are similar to each other but are not identical. DataLink and C3 dispute whether the differences between the contracts are material and whether the nature of such differences is such as to fall foul of the applicable legislative scheme, described later in this judgment.

32. DataLink seeks to explain the differences between the terms of its contracts on the basis that OfReg has declined to prescribe a standard form of contract for DataLink to use, and DataLink's contracts with individual ICT service providers have been entered into at different times, so that changes in one form of contract to reflect experience gained and developments in the market cannot immediately be carried over to other contracts. DataLink also points out that OfReg has not exercised its statutory power to reject the terms of DataLink's contract with any ICT service provider, which it says implies that OfReg is content that they are fair.

33. Article III of the Second Contract deals with billing and requires C3 to pay DataLink's fees and charges and to comply with the terms of Article III. These include:

    33.1 DataLink to calculate fees on a quarterly basis, irrespective of when any attachment is made to a utility pole within that quarter;

    33.2 DataLink to bill fees to C3 quarterly in advance and C3 to pay within 30 days;

    33.3 C3 to pay interest on any unpaid debt at 1.5% per month from 45 days after payment is overdue; and

    33.4 any billing disputes to be resolved as described in Article XXIII. In fact, Article XXIII is entitled and addresses "force majeure". The dispute resolution mechanism is set out in Article XXIV, and the reference to Article XXIII is clearly an error.

34. Paragraphs A, B and C within Article XXIV set out an alternative dispute resolution mechanism involving meetings and negotiation with escalation to mediation, but these paragraphs do not apply where there is "gross default". Article I defines "gross default" as being:

> *"... (ii) payments in arrears in an amount greater than US $100,000 for longer than a period of one hundred and twenty (120) calendar days."*

35. C3's outstanding invoices have been listed in Ms Stafford's affidavit and she exhibits copies of them. There are 24 invoices dating from 30 October 2019 to 19 April 2023. None of the invoices individually exceeds CI $45,000 but in total they come to over CI $512,000.

36. In cases where paragraphs A, B and C of Article XXIV do not result in a resolution and in gross default cases, paragraph D provides the parties with the option to agree to arbitrate their dispute. Self-evidently, the parties have not chosen to arbitrate this dispute.

E. OfReg's Consultation on Provision of ICT services

37. In April 2016, OfReg's predecessor initiated a consultation process to consider whether the arrangements for sharing utility pole infrastructure are limiting the promotion of competition in providing ICT services. The consultation was divided into three parts: part A was completed in July 2017 and is not relevant. Parts B and C included consideration of DataLink's contractual arrangements with ICT service providers.

38. OfReg suspended Parts B and C of its consultation in about 2016 or 2017 to allow an industry working group to report, which it did in 2017. OfReg did not re-start Parts B and C of its consultation until 2022. In June 2023, OfReg sought further input from DataLink, C3 and other ICT service providers, which they provided in August and September 2023.

39. On 11 February 2024, OfReg published its draft determination and invited comments. DataLink objected to Part 5 of the draft determination, concerning charging, on the basis that OfReg's draft determination included proposals for amendments to the charging terms on which there had been no consultation and invited OfReg to re-open the public consultation phase to allow DataLink to respond. OfReg did not agree, which led to DataLink's application for judicial review, mentioned earlier. Further progress on finalisation of OfReg's draft determination has been stayed by the Court pending the hearing of DataLink's judicial review application.

40. C3 relies on OfReg's draft determination in support of its argument that there is a triable issue insofar as OfReg's draft determination indicates that OfReg intends to conclude that:

40.1 There are differences between DataLink's agreements with ICT service providers.

40.2 DataLink's charging structure is discriminatory, anti-competitive and does not comply with the relevant legislation.

40.3 DataLink is discriminating against other ICT licensees in certain respects, with the effect of limiting the efficient and harmonized utilisation of infrastructure and/or the promotion of competition.

40.4 DataLink should ensure that its contractual terms with all other ICT service providers are non-discriminatory and no less favourable than the rates, terms and conditions that applies when providing the same services to itself.

40.5 DataLink's charging principles and clauses should be amended in certain respects.

F. Consideration of C3's intended defences to DataLink's claim

41. As indicated, C3 seeks to advance four intended defences, as set out in its draft Amended Defence and Counterclaim:

41.1 The terms of the charging provisions in the First and Second Contracts breach s.66 of URCA, with the result that the agreements, or the charging clauses giving rise to the invoices, are void and cannot be relied upon or enforced by DataLink.

41.2 C3 entered into the Second Contract as a result of economic duress, involving the exertion of illegitimate pressure on C3 by DataLink.

41.3 DataLink made various fraudulent or negligent misrepresentations to C3 which C3 relied upon, and which induced C3 to conclude the Second Contract.

41.4 The First and Second Contracts include dispute resolution provisions requiring DataLink and C3 to go through an ADR process. DataLink has not done so, and therefore the claim is brought prematurely.

42. I have separately considered whether these defences raise a triable issue and set out my views on each in the following paragraphs. I stress that these are not findings or final determinations on those defences, and C3 is not constrained by my ruling on this application for summary judgment from continuing to advance those defences and counterclaims that I have indicated I consider do not have merit, if it wishes to do so.

F.1 Charging provisions are void and unenforceable

43. The first strand of C3's case is that the terms of DataLink's contract with C3 are less favourable than the terms of DataLink's contracts with other ICT service providers, such that DataLink is in breach of s.65(5) of ICTA. However, I do not consider that C3 has shown at this stage that there is any real merit in this line of argument:

    43.1 There is no evidence before me to show that there are differences between the terms of DataLink's contracts with other ICT service providers material to the aims of ICTA. Nor is there evidence to show how such differences as there are, are in conflict with the aims and purposes of ICTA. Non-material variations in DataLink's contractual terms do not give rise to grounds for legitimate complaint.

    43.2 In any event, ICTA does not specify any consequence for breach of s.65(5), and it does not appear to me to be reasonably arguable that s.65 of ICTA creates a right of action enforceable by C3.

44. A more promising line for C3 appears to be an argument that DataLink is in breach of s.66 of URCA, with the result that the First and Second Contracts are void or, that the charging clauses must be severed from them so that DataLink can no longer rely upon them. However, once again, it seems to me that there are significant obstacles in C3's path and notwithstanding the period for which this dispute has been ongoing, C3, which bears the burden in O.14 cases, has not adduced any evidence or analysis that suggests that C3 can overcome them.

    44.1 The first obstacle is that for s.66 to be engaged, C3 needs to show that DataLink's agreements with ICT service providers *"have as their object or effect the prevention, restriction or distortion of competition in the markets and sectors …"*, or that there is a triable issue that they have that effect. C3 has not adduced evidence to demonstrate that there is a reasonable argument to that effect.

44.2 The second obstacle is that the effect of Article XXVIII of the Second Contract is that any invalid provision in the agreement can be severed provided that it does not materially affect the substance of the agreement. Thus, if s.66 of URCA were engaged in relation to the Second Contract, it would be necessary to review the terms carefully to identify which specific provisions offend s.66, whether they can be severed and the effect of their severance on DataLink's ability to charge. C3 has not sought to carry out this exercise and instead appears to contend that the whole of the Second Contract (and by implication, the First Contract) is void. That does not follow.

45. The third strand of C3's argument under this head is that ss.76 and 77 of URCA empowers OfReg to direct an ICT provider to bring an infringement of s.66 (or s.70, abuse of dominant position) to an end, including by a direction to modify the terms of any agreement. However, on this, C3 has not put forward any substantive argument to overcome DataLink's position that OfReg's exercise of this power cannot be retroactive in effect in the absence of a clear legislative intention to the contrary.

46. The one potential area of support for C3's position arises out of OfReg's draft determination, which suggests there may potentially be some mileage in a complaint that some aspects of DataLink's approach to charging is materially different as between different ICT service providers. I am conscious that OfReg's determination is still only in draft and may be significantly revised, for example as a result of DataLink's application for judicial review. However, OfReg's intended comments regarding DataLink's charging raise a question mark in my mind whether there may be a kernel of merit at the heart of C3's case, which would allow C3 to challenge DataLink's basis for charging and thereby undermine the validity of the invoices on which DataLink sues. It is for this reason that I have concluded that I should allow C3 conditional leave to defend.

F.2 Economic duress

47. This is raised by way of a proposed amendment to C3's Defence as served, by introduction as an intended counterclaim rather than a substantive defence. Since it concerns one of the contracts that DataLink is suing on, it could in principle justify giving leave to defend.

48. C3's intended pleaded case is that the alleged economic duress took the form of DataLink threatening in April and June 2022 to pursue a grievance to OfReg under the Dispute Resolution Regulations, and that this threat caused C3 to sign the Second Contract in July 2022. C3 intends to assert that:

> *"60. In the circumstances, C3 did not have any reasonable alternative and Datalink's illegitimate pressure caused C3 to enter into the [Second Contract], which it executed on 13 July 2022."*

49. I consider that C3 is likely to have a number of very significant problems with establishing this asserted counterclaim. First, there was an obviously reasonable alternative to signing the Second Contract, which was for C3 to oppose DataLink's grievance, for DataLink to pursue its complaints before OfReg and for C3 to raise whatever counterarguments it wished to raise with OfReg.

50. Secondly, I struggle to see how DataLink's conduct set out in the draft counterclaim, namely asserting that:

50.1 the First Contract had expired;

50.2 the terms of the Second Contract were the same as those executed by other ICT service providers (which should obviously be construed as meaning materially the same);

50.3 C3 would have to remove its infrastructure from CUC's utility poles unless it signed the Second Contract; and

50.4 DataLink would pursue its grievance with OfReg unless C3 signed the Second Contract

can be said to be "illegitimate". The matters raised by C3 strike me as being perfectly normal positions to take as part of a commercial negotiation. I do not see that this intended counterclaim passes the test of showing a fair or reasonable probability that C3 has a real or *bona fide* defence to DataLink's claim.

F.3 Fraudulent or negligent misrepresentation

51. Similarly to C3's intended economic duress counterclaim, C3 seeks to raise this point as a counterclaim, by way of its intended amendment to its Defence. Also, similarly to C3's intended economic duress counterclaim, this strikes me as having no merit. C3 asserts that DataLink made four representations that it contends were made fraudulently or negligently. The draft counterclaim does not include any particulars of the fraud alleged. I therefore do not allow that particular assertion to be made at this stage. So far as C3 says that DataLink made the alleged representations negligently, three of them were matters of law or were matters of fact which were or should have been known to C3, and so do not take the matter anywhere. DataLink's fourth alleged representation is that the terms of the Second Contract were the same as those in contracts executed by other ICT service providers.

52. As summarily indicated earlier, my view is that this must obviously be construed as meaning materially the same – the contractual terms could not be identical because, at the very least, the parties and dates of execution had to be different. The critical point is that the contract terms should not be materially less favourable than the terms on which DataLink contracted with other ICT service providers. C3 has not sought to particularise how it says its terms with DataLink were materially less favourable than the terms agreed between DataLink and other ICT service providers. It sought to rely on certain assertions made by OfReg in its draft determination issued for consultation in February 2024, but these are not OfReg's concluded views on this point. C3 does not put any evidence before me to show that there are material differences between the contract terms. C3 has not shown me a fair or reasonable probability that it has a real or *bona fide* defence to DataLink's claim on this basis either.

F.4 Failure to employ contractual dispute resolution mechanism

53. DataLink's response is that it was not required to go through the contractual dispute resolution mechanism because C3 was in "gross default" as defined in the First and Second Contracts, i.e. C3's arrears were in an amount greater than US $100,000 for longer than a period of one hundred and twenty days. C3's answer to this is not clear to me. There cannot be any dispute that each of the unpaid invoices is overdue by more than 120 days. I surmise that C3's case is that the individual invoices were less than US $100,000 in amount and that C3 construes the "gross default" exception as only applicable at the individual invoice level rather than applying on a cumulative basis to the total amount owed. If that is C3's intended case, then I do not consider it has any real merit. The definition of "gross default" refers to "payments" not "payment", which indicates that more than one debt can be aggregated together to pass the US $100,000 threshold.

G. Conclusion

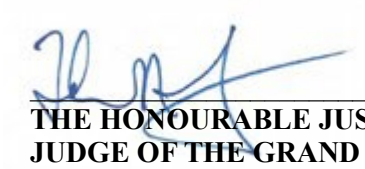
54. I therefore give C3 leave to defend conditional on C3 paying into court the sum of CI $500,000 within a date to be determined, but which I currently intend should be 35 days from the date of this judgment.

55. Within 7 days of handing down of this judgment, counsel should indicate: (a) whether they wish to be heard on costs and any consequential matters, providing their agreed available dates and time estimate for a hearing; or (b) whether they will submit written submissions on those points within 14

days. In either case, counsel should provide a draft order, agreed if possible, in advance of the hearing or with their written submissions.

56. In addition, once C3's summons for leave to amend has been filed, I will deal with it on the papers, unless the parties request a further hearing.

Dated 2 October 2024



THE HONOURABLE JUSTICE JALIL ASIF KC
JUDGE OF THE GRAND COURT