



Neutral Citation Number: [2020] EWHC 3268 (Ch)

Case No: HC-2017-001606

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
PROPERTY TRUSTS AND PROBATE (ChD)

7 Rolls Building
Fetter Lane
London, EC4A 1NL

7th December 2020

Before:

JUDGE JONATHAN RICHARDS
(Sitting as a Deputy Judge of the High Court)

Between:

SPI NORTH LIMITED
- and -
(1) SWISS POST INTERNATIONAL (UK)
LIMITED
(2) ASENDIA UK LIMITED

Claimant

Defendants

Vikram Sachdeva QC (instructed by **Milners Solicitors**) for the **claimant**
David Drake (instructed by **Peters & Peters LLP**) for the **defendants**

Hearing dates: 24 and 25 November 2020

APPROVED JUDGMENT

Covid-19 Protocol: This judgment is handed down remotely by circulation to the parties' representatives by email, release to BAILII and publication on the Courts and Tribunals Judiciary website. The date and time for hand-down is deemed to be 10:30 AM on 7th December 2020.

.....
JUDGE JONATHAN RICHARDS

Judge Jonathan Richards:

INTRODUCTION

Overview of the applications to be considered

1. These are applications by the Claimant (“SPIN”) and the two Defendants (“SPUK” and “Asendia UK” respectively) relating to the pleadings in this case. In very broad summary, on 29 July 2019, Mr Andrew Hochhauser QC, sitting as a Deputy Judge of the High Court, gave SPIN permission to amend its Particulars of Claim and also gave the Defendants a corresponding permission to make amendments to their Defence that were “consequential” on SPIN’s amendments to its Particulars of Claim (the “2019 Order”).
2. The Defendants have now filed and served a Re-amended Defence. The pleadings in this case have been amended so many times that it is difficult to find a concise way of describing their various iterations. For the purposes of this judgment, I will use the parties’ definitions and refer to SPIN’s amended particulars of claim as they stood prior to the 2019 Order as the “APC” and the re-amended particulars of claim, as amended pursuant to the 2019 Order as the “RAPC”. I will adopt a similar convention with the Defence: the (amended) defence as it stood prior to service of the RAPC is the “AD” and the re-amended document incorporating the contentious amendments is the “RAD”. Thus, the Defendants’ position is that the changes set out in the RAD are consequential on the amendments to the RAPC.
3. SPIN objects to the RAD, arguing that certain of the amendments made were not “consequential” on the amendments to the APC and so fall outside the terms of the permission granted by the 2019 Order and/or disclose no reasonable grounds for defending the claim. They also argue that a specific aspect of the AD which was left largely unamended in the RAD is legally embarrassing.
4. Accordingly, SPIN applies for aspects of the RAD to be struck out (and the provisions of earlier versions of that pleading reinstated) and for summary judgment to be granted in respect of aspects of its RAPC.
5. The Defendants argue that their amendments fall within the permission granted by the 2019 Order¹, however, in case they are wrong on that, they seek permission to amend the AD. They resist SPIN’s application for strike-out on the basis that all aspects of their RAD disclose reasonable grounds for resisting SPIN’s claims and no aspects are legally embarrassing.

¹ The Defendants acknowledge that a specific change, to paragraph 44 of the RAD, contains text omitted through oversight from the RAD and they have therefore requested the court’s permission to make that amendment. At the hearing, SPIN confirmed through counsel that it had no objection to that amendment and I will accordingly allow it.

The dispute between the parties

6. As well as the decision that led to the 2019 Order which is reported as *SPI North Limited v Swiss Post International (UK) Limited and Asendia UK Limited* [2019] EWHC 2004 (Ch) (the “2019 HC Judgment”), there has also been a judgment of the Court of Appeal relating to an interlocutory matter reported as *SPI North Ltd v Swiss Post International (UK) Limited and another* [2019] EWCA Civ 7 (the “2019 CA Judgment”). I will not, therefore, set out a full summary of the dispute between the parties as I gratefully adopt the description of the background set out in the two judgments to which I have referred. Rather I will set out an overview of the dispute which, when read together with the above judgments is sufficient to put in context the issues that I am now deciding. I note that Mr Sachdeva QC’s written skeleton argument submitted on behalf of SPIN sought to argue that the High Court and the Court of Appeal have already provided some indications in their own summaries of the background as to how contractual provisions relevant to this dispute might be construed. I will address those submissions later. For the time being I will simply say that my summary of relevant background set out below is not intended to make any determination of contentious issues.
7. The dispute arises out of the terms of a “Premium Partner Agreement” (the “PPA”) between SPIN and the Defendants dated 1 September 2010. By Article 4.1 of that agreement, SPIN was granted the exclusive right to market Swiss Post postal services in the North of England, Wales and Scotland (the “Territory”). The PPA was expressed to endure for an indefinite period of time, although by its express terms permitted either party to terminate it early for just cause or, after 31 July 2015, by giving six months’ notice in writing.
8. Under Article 2.1 of the PPA, SPIN undertook to offer specified “PRODUCTS²” to all potential clients in the Territory with the exception of certain “Excepted Clients”.
9. Article 10 of the PPA provided that SPIN was to deal as principal with its customers under contracts concerning the PRODUCTS. To enable it to do so, SPIN would purchase delivery services from SPUK.
10. SPIN was, by Article 13 of the PPA, granted the right to use Swiss Post trademarks and branding.
11. Under the PPA, SPIN was obliged to pay SPUK a one-off licence fee in return for the exclusive right to sell PRODUCTS in the defined territory (Article 8) and periodic royalties (Article 7) in return for, among others, the grant of intellectual property rights and SPUK’s provision of marketing. SPUK paid SPIN a contribution to the cost of SPIN’s own marketing activities by Article 9 of the PPA. In addition, SPIN was to receive a Target Bonus to the extent that it

² Definitions appeared in the PPA in block capitals. I will not generally adopt this convention in this judgment. However, part of the argument in this case centres on the precise sense in which the defined term “PRODUCTS” was used and the extent to which it might have a different meaning from the term “products” (in lower case) which also appears in the PPA.

met or exceeded quantitative and qualitative targets to be agreed between SPIN and SPUK.

12. In or around September 2011, about one year after the PPA took effect, the Swiss Post group entered into discussions with La Poste, the French national postal service, with a view to merging their global cross-border operations (except within France and Switzerland). Those discussions were successful and were approved by the European Commission from a competition perspective. As a result, a new joint venture company was formed, called Asendia Holding AG which was owned as to 50% by the Swiss Post group and as to 50% by La Poste. The joint venture was to sell the combined cross-border services of La Poste and Swiss Post under the brand name “Asendia”.
13. As part of the joint venture, on or around 6 July 2012, SPUK became a subsidiary of Asendia Holding AG meaning that it was only controlled (indirectly) as to 50% by the Swiss Post group whereas it had previously been a wholly-owned subsidiary of that group. In addition, La Poste transferred Asendia UK (which had previously carried on La Poste’s UK operations as a wholly owned subsidiary) into the joint venture.
14. Following implementation of the joint venture there were some attempts to agree either (i) amendments to the PPA to take into account the joint venture and the Asendia brand and/or (ii) a novation of all of SPUK’s rights and liabilities under the PPA to Asendia UK. No agreement was reached. On 1 January 2014, SPUK transferred all its assets to Asendia UK. However, since SPIN was not prepared to agree to a novation, liabilities arising out of the PPA remained in SPUK. The Defendants’ position is that, from 1 January 2014, Asendia UK performed obligations under the PPA on SPUK’s behalf.
15. SPIN brought legal proceedings against the Defendants. At the heart of SPIN’s claim is the proposition that the Asendia joint venture entailed breaches by SPUK of the PPA, and that Asendia UK induced SPUK to commit those breaches. In particular, SPIN asserts that, under the PPA, SPUK was obliged to provide it with products that were branded specifically as “SWISS POST” and it breached that contract by providing products bearing “Asendia” branding. More specifically, SPIN argues that it was a breach of contract for SPUK to cease, on becoming part of the joint venture, to be a subsidiary of the Swiss Post Group.

PRINCIPLES RELATING TO THESE APPLICATIONS

16. I understand the parties to be agreed on the following principles:
 - i) To the extent that the changes set out in the RAD were “consequential” on amendments in SPIN’s RAPC, the Court has already given permission in the 2019 Order to make those amendments so that there is no need for the Defendants to apply afresh for permission. Conversely, to the extent that the amendments are not “consequential”, the Court has not to date given any permission for them to be made and accordingly, absent consent from all parties, the Defendants can only make those amendments with the permission of the court (CPR 17.2).

- ii) Amendments in the RAD may be “consequential” on the amendments in the RAPC and so be permitted under the terms of the 2019 Order but may still not set out any reasonable grounds for defending the claim. In such a case, this court has the power to strike out the relevant part of the RAD (CPR 3.4(1) and 3.4(2)).
- iii) To the extent that the Defendants need permission to make the amendments in their RAD, the court will refuse permission if the proposed amendments have no real prospect of success. The test to be applied in such a case is that same as that for summary judgment under CPR Part 24 and the same as that for deciding whether there are “reasonable grounds” for defending the claim.
- iv) To the extent that the RAD contains pleadings that are legally embarrassing in the sense of being so vague, uncertain or confused as to prejudice SPIN’s ability to respond to them, they should be struck out.
- v) The RAD as whole, including both the amended and unamended parts of that pleading, may demonstrate that the Defendant(s) have no real prospect of successfully defending a “claim or issue” set out in the RAPC. In such a case, if the court considers that there is no other compelling reason why the claim or issue should be disposed of at a trial, the court has power to give summary judgment on that claim or issue in favour of SPIN (CPR 24.2). That involves the application of a test similar to that set out at (ii) and (iii) above. The parties both accept that in applying that test, I should follow the approach set out at [5] to [9] of the 2019 HC Judgment and I will do so.

“REASONABLE GROUNDS FOR DEFENDING”

17. The parties are agreed that, whether the matter is approached by considering an application to strike out aspects of the RAD, to grant permission to make amendments in the RAD, or to grant summary judgment, the Defendants need to show reasonable grounds for defending the claim or, which they agree amounts to the same thing, their defence to the claims in which summary judgment is sought must have a “realistic prospect of success”. In this section I will consider these issues under the portmanteau heading of whether the relevant aspects of the RAD disclose reasonable grounds for defending the claims.

Relevant aspects of SPIN’s case

18. Any analysis of the reasonableness or otherwise of the Defendants’ grounds for defending has to start by considering the case that they are seeking to meet.
19. Paragraph 8 of the RAPC states:

“The purpose of the PPA was the increase of the presence and market share of the brand “Swiss Post” registered trademark and logo in the field of national and international consignments via the

UK subsidiary of the Swiss Post Group; PPA Recital paragraphs (a), (b) and (d). The Purpose of the PPA was expressed at paragraph 2.1 as the sale of SWISS POST's products (the "PRODUCTS") commercialised in the UK by the First Defendant as subsidiary of the SWISS POST group. There were, therefore, three, essential core elements to the services contract (1) the provision of SWISS POST branded products in the context of supplying national and international postal consignments (2) commercialized by the First Defendant and (3) the First Defendant would remain at all times a subsidiary of the Swiss Post Group."

20. Paragraph 13 of the RAPC makes the specific point that "PRODUCTS" could, by definition:

"...only include products branded solely as Swiss Post, and could not [extend] to products created in collaboration with any other postal provider."

21. Paragraph 10a of the RAPC pleads that there was an express term of the PPA, applicable throughout its term that:

"The First Defendant would supply solely Swiss Post branded (using the registered trademark and logo within the meaning of the BRAND in recital (a) to the PPA) postal services to the Claimant's customers within the Territory, which had to be commercialised by the First Defendant, as a subsidiary of the Swiss Post Group."

22. Those pleadings underpin the allegations of breach set out paragraphs 46(a), (c) and (g) of the RAPC in respect of which summary judgment is sought:

"a. Failing to supply the contracted for services under the PPA from 6 July 2012 [i.e. the date the joint venture took effect] and subsequently, further or alternatively including from 1 January 2014 [the date on which SPUK transferred its assets to Asendia UK], by failing to provide (1) SWISS POST branded products; (2) commercialised by the First Defendant, with (3) the First Defendant remaining at all times a subsidiary of the Swiss Post Group.

... c. Failing to allow performance of the PPA by withdrawing the First Defendant's ability to commercialise the SWISS POST PRODUCTS on or around 1 January 2014;

...g. Breaching the indefinite term alternatively initial period term of the PPA set out in clause 23 and/or rendering it nugatory by removing the ability of the Claimant to carry out work pursuant to the PPA and/or by removing the Swiss Post brand."

23. Also relevant to these applications are two other groups of pleadings in the RAPC:

- i) That as a result of conversations between SPIN employees and Wendy Holt and Nick Frazer of SPUK, SPUK was precluded, notwithstanding

Article 6.3 of the PPA, from charging SPIN more than cost prices for goods and services provided (paragraphs 26 to 32 of the RAPC). That result is argued to arise either as a result of a variation of the PPA, a collateral contract, an estoppel or the failure of the PPA to reflect the terms agreed by the parties (so that it should be rectified).

- ii) That although the Article 23 of the PPA permitted either party to terminate without cause after five years on giving six months' notice, there was a "Second Collateral Contract" to the effect that SPUK could only terminate, even after five years, if SPIN failed to meet turnover or quality management targets (paragraph 34 of the RAPC).

The relevant aspects of the RAD

24. Thus, in the RAPC, SPIN advances the following propositions, so far as relevant for present purposes:

- i) SPUK was obliged to provide PRODUCTS either to SPIN, or to SPIN's customers.
- ii) Those PRODUCTS could only be "Swiss Post branded".
- iii) SPUK had a contractual obligation to "commercialise" those PRODUCTS.
- iv) SPUK was under a contractual obligation to remain a subsidiary of Swiss Post when providing the PRODUCTS and commercialising them; it was not enough that its shares be owned only as to 50% by the Swiss Post group through the joint venture arrangements.
- v) SPUK's transfer of its assets to Asendia UK on 1 January 2014 necessarily meant that it could not honour its obligations under the PPA. In particular, SPUK could not delegate performance of its obligations to Asendia UK.

25. In the RAD, SPUK challenges all of these propositions:

- i) In paragraphs 13A.9, 13A.10, and 13A.11, 17A.2, 18.2(b) and 40A.5 (in particular), SPUK asserts that the PPA should not be read as if it were a contract for the sale of goods that could bear a physical brand. The PPA was more complicated than that. The PPA did not require SPUK to provide PRODUCTS to SPIN, still less to provide those PRODUCTS to SPIN's customers. Rather, the PPA envisaged that SPIN would, as principal, sell PRODUCTS to SPIN's own customers. Therefore, the subject matter of the PPA is not tangible objects but rather two sets of delivery services that dovetail together. The first leg of delivery, for which SPIN was solely responsible, involved SPIN collecting consignments from its own customers and delivering to SPUK's UK consignment centre. The second leg of delivery involved SPUK making use of the wider Swiss Post consignment network to ensure that the item arrived at its ultimate destination. It was not meaningful to talk about any

- “branding” being applied to the second leg of the delivery service and indeed, the term “PRODUCTS” in the PPA is not defined by reference to any particular branding.
- ii) In paragraphs 13B.4 and 17A.3 of the RAD, the Defendants deny the existence of any separate or free-standing obligation to “commercialise” the PRODUCTS.
 - iii) In paragraphs 13A.15, 13B.3 and 17A.4 the Defendants deny that there was any provision of the PPA that required SPUK to discharge its obligations while remaining a subsidiary of the Swiss Post group.
 - iv) In paragraph 41.2, SPUK asserts that, from 1 January 2014, Asendia UK performed its obligations under the PPA as SPUK’s sub-contractor or agent.

The Defendants’ arguments set out at [25.i]

26. For the reasons that follow, I consider that, having regard to the express terms of the PPA, the Defendants’ arguments summarised at [25.i)] above set out reasonable grounds for resisting the claim.
27. First, the Defendants’ analysis at [25.i)] is consistent with express terms of the PPA. The PPA as a whole embodied an arrangement under which SPIN (acting as principal) would market and sell to third party customers certain national and international mail delivery services (see Articles 2, 3, 6, 10, 12 and Annexes A, B and F of the PPA). Moreover, the PPA envisaged that SPIN would obtain services from SPUK to enable it to meet the duties which it owed as principal to its own customers. Specifically, pursuant to Article 10.2 of the PPA, SPIN was to collect consignments and deliver them to SPUK. Under Article 6 of the PPA, SPIN paid SPUK a fee expressed to be paid as remuneration for the use of SPUK’s consignment network. Annex B of the PPA set out procedures that SPIN was to follow to deliver mail to SPUK’s UK processing centre. Therefore, the PPA envisaged that SPIN would itself collect mail from its customers, deliver that mail to SPUK’s UK processing centre whereupon SPUK would, using its “consignment network” deliver the mail to the ultimate destination so that SPIN’s obligation, owed as principal, to deliver the mail was met.
28. Therefore, as the Defendants say, SPUK’s obligations to SPIN under the PPA consisted, to a significant extent, of the provision to SPIN of delivery services rather than goods that could have a particular branding that would affect their physical appearance. Moreover, paragraph 6(i) of Annex I to the PPA made it clear that SPUK was entitled to subcontract the “second leg” of the delivery service with the result that it is certainly arguable that the PPA did not envisage that any particular “branding” should be provided in relation to that service.
29. SPIN counters that SPUK’s analysis contradicts other aspects of the PPA. For example, by Article 11.1 of the PPA, SPIN was obliged to maintain Swiss Post branding at its business premises and to use Swiss Post branding in its commercial documentation. Annex A of the PPA set out minutiae of how Swiss Post branding should appear on staff uniforms, premises and vehicles. It also

emphasises the steps that the Swiss Post group takes in order to promote that brand. Therefore, argues SPIN, the Defendants' analysis seeks to deny the essential role that the Swiss Post brand played in shaping the rights and obligations of the parties to the PPA. I do not, however, accept that there is any contradiction, and certainly not a contradiction that prevents SPUK's analysis at [25.i)] from constituting a reasonable basis for defending the claim. I consider it perfectly arguable that the focus of the positive obligations on SPIN to use the Swiss Post brand, was on "getting customers through the door" by inducing them to place business with SPIN by making it clear that SPIN had an association with Swiss Post. SPUK in turn would benefit from this because every time a customer asked SPIN to deliver post, SPIN would necessarily have to engage, and pay, SPUK to take that post from SPUK's UK consignment centre to its ultimate destination. I regard it as quite clearly arguable that it does not follow from the fact that SPIN was required to use Swiss Post branding to attract customers that SPUK had to apply any particular "branding" to services that it provided to SPIN when performing the second leg of delivery.

30. Nor do I consider that the Defendants' analysis goes against the grain of the PPA by denying the significance of the brand more generally. SPUK's analysis recognises that the specific Swiss Post brand occupies a central place in the PPA. For example, SPIN was obliged to use the Swiss Post brand at its premises and on its vehicles. It could not have complied with this obligation by displaying Asendia branding at those premises. Indeed, the PPA granted it no intellectual property rights in respect of the Asendia brand. However, these provisions deal with the way that SPIN was obliged to market itself to its own customers. I do not consider that they prevent SPUK's arguments (which focus on its analysis of the way that SPUK was obliged to deal with SPIN) from constituting reasonable grounds for defending the claim.
31. SPIN also argues that the analysis at [25.i)] above is at odds with the plain terms of the PPA. SPIN refers to Recital (d) of the PPI which recited that:

"[SPUK] intends to increase its BRAND presence and its market shares in the northern part of the UK by assigning the sale of its products to a party with a sufficient organization to offer a high-quality service and with thorough sales expertise".

It also referred to Article 2.1 which provides, so far as material, as follows:

"The purpose of the present Contract is the sale of SWISS POST's products (hereinafter the "PRODUCTS") commercialised in the UK by SPI UK as a subsidiary of the SWISS POST Group. The Premium Partner undertakes to offer the PRODUCTS to all potential clients ("CLIENTS") present in the area defined in Article 5 (hereinafter the "TERRITORY") [with exceptions for certain "excepted clients"]."

32. Both parties were agreed that the fact that Recital (d) is framed as a recital does not prevent it from having contractual effect. Nevertheless, I do not consider that these provisions prevent SPUK's analysis set out at [25.i)] from setting out reasonable grounds for defending the Claim. First, I do not consider those provisions to be necessarily inconsistent with the Defendants' argument that

increasing “BRAND presence” was achieved by SPIN’s use of that brand in its dealings with its own customers without necessarily imposing any obligation as to the way that SPUK performed the second leg of the delivery service. In any event even if, at a high level, it can be said that the overall purpose of the PPA was to increase the “BRAND presence”, the PPA remained a complex commercial agreement that contained provisions of some detail. Accordingly, I do not consider that the broad articulation of purpose deprives the Defendants’ alternative argument, which was based on the way particular terms of the PPA should be construed, of reasonable prospects of success. In oral submissions in support of this aspect of his arguments, Mr Sachdeva referred me to statements as to the purpose of PPA in both the 2019 HC Judgment and the 2019 CA Judgment. I read the relevant passages of both judgments as setting out quotes from the PPA, and summaries of the PPA’s effect, as part of the process of setting the scene for the judgments that follow rather than setting out any conclusions as to how the PPA should be interpreted. I do not, therefore, consider that my conclusion in this regard is inconsistent with anything said in the 2019 HC Judgment or the 2019 CA Judgment.

33. In a similar vein, I do not consider that Article 2.1 makes it so abundantly clear that SPUK was to provide SPIN with only Swiss Post branded products as to prevent the Defendants’ arguments to the contrary from constituting “reasonable grounds” for resisting the claim. Article 2.1 does not expressly refer to any branding. Moreover, throughout the PPA, the defined term “PRODUCTS” is used in a number of different senses. In the first sentence of Article 2.1, they are defined as “SWISS POST’s products”. In the second sentence the term is used in connection with services that SPIN is to offer to its own clients (noting that SPIN is to transact as principal with those clients). In Article 10.2 the term “PRODUCTS” is used to describe physical items of mail that SPIN is to collect and deliver to SPUK’s UK distribution hub. Given the variety of senses in which the term “PRODUCTS” is used, I consider it reasonable for SPUK to argue that Article 2.1 does not impose an obligation on SPUK to provide SPIN (or its customers) with only “Swiss Post” branded products and that, instead, the “PRODUCTS” were to be provided by SPUK to its customers.
34. SPIN’s next objection is that the Defendants’ interpretation “flouts business common sense”. It argues that the individuals behind SPIN had previously carried on business as a consolidator through a company called Arctic Media Systems Ltd but that the consolidator business of Arctic Media Systems was replaced with an exclusive relationship with SPUK which, moreover, in Article 15 of the PPA included an onerous “non-compete” provision which applied even after the PPA was terminated. In SPIN’s submission, it simply would not make sense, against the background of the successful business of Arctic Media Systems, for SPIN to engage in an exclusive relationship with SPUK, including the non-compete obligation, unless it had a high degree of certainty that SPUK would indeed supply it with exclusively Swiss Post branded products.
35. As a technical matter, SPIN’s assertions about the nature of Arctic Media Systems Ltd were not admitted. I agree with Mr Drake that while, for the purposes of testing whether SPUK’s RAD shows reasonable grounds for contesting the claim, I should assume that facts asserted in the RAD are true, it

would be quite wrong to assume the accuracy of facts in SPIN's RAPC which are not admitted for the purposes of what is in effect SPIN's own strike-out application. However, even putting that point to one side, the Defendants' arguments set out at [25.i)] above remain consistent with the apparent express terms of the PPA. Assertions that they flout business common sense do not deprive those arguments of a reasonable prospect of success.

36. Finally under this heading, I deal with SPIN's argument to the effect that, if the PPA truly did permit SPUK to "deliver Asendia products", there would have been no need for SPUK to seek SPIN's agreement to a renegotiation of the PPA, or even its novation. Moreover, the Defendants would have been wrong when writing, in a letter of 10 December 2013 to SPIN, that following the Asendia joint venture "the Agreement is not really pertinent". Those arguments involve reliance being placed on the parties' conduct, after the PPA was entered into, based on their subjective beliefs as to what the contract said. They are of little, if any, significance in determining the true interpretation of the PPA and certainly not of enough force to prevent the Defendants' analysis from constituting reasonable grounds for defending the claim.

The Defendants' arguments set out [25.ii)]

37. For the reasons set out below, I consider the Defendants' arguments set out at [25.ii)] also to set out reasonable grounds for defending the claim.
38. SPIN's argument that the PPA set out an overarching obligation to "commercialise" the PRODUCTS rests primarily on the following wording of Article 2.1 of the PPA:

The purpose of the present Contract is the sale of SWISS POST's products (hereinafter the "PRODUCTS") commercialised in the UK by SPI UK as a subsidiary of the SWISS POST Group.

39. In his oral submissions, Mr Sachdeva expressed incredulity that the Defendants should seek to deny that the PPA imposed obligations to "commercialise" the PRODUCTS. But that is to misunderstand the Defendants' argument. The Defendants accept that there were provisions of the PPA that refer, to what might be described in general terms as "commercialisation" of the PRODUCTS. For example, SPUK granted SPIN intellectual property rights so that SPIN would be in a position to make increased sales of PRODUCTS to its own customers. Annex A of the PPA explains steps that the Swiss Post group takes to market its brands. More generally, the Defendants argue that the PPA as a whole "commercialised" the PRODUCTS in that they put SPIN in a position to sell them to its customers. The Defendants' point therefore, is that Article 2.1 sets out no free-standing separate obligation to "commercialise" the PRODUCTS in a way that was contrary to its commercial interests, or which would necessarily be breached by the act of establishing the Asendia joint venture.

40. I consider the Defendants' arguments set out above to have a realistic prospect of success. The quoted extract from Article 2.1 can quite reasonably be read, as Mr Drake argued, as nothing more than a general articulation of purpose that imposes no specific contractual obligations. Even if Article 2.1 does impose specific obligations, the word "commercialised" can be read as descriptive of the "PRODUCTS" being referred to rather than as imposing a positive specific obligation to "commercialise". Both approaches are consistent with the fact that the provisions of the PPA that follow set out detailed terms as to how the parties will deal with each other. Neither approach is obviously wrong.

The Defendants' arguments summarised at 25.iii)

41. SPIN's argument is that since Article 2.1 of the PPA refers to PRODUCTS being "commercialised by SPI UK as a subsidiary of the SWISS POST Group", SPUK could not validly perform its obligations under the PPA, or at least its obligations relating to "commercialisation", at a time when it was not such a member. It was common ground that SPUK ceased to be a member of that group on or around 6 July 2012.
42. The Defendants deny the existence of any obligation on SPUK to remain a subsidiary of Swiss Post and for the following reasons, I consider that their arguments in this respect have a realistic prospect of success.
43. First, the PPA imposes no express obligation on SPUK to remain a member of the Swiss Post Group. Therefore, SPIN's case that there nevertheless was such an obligation has to be based on the wording of Article 2.1 as interpreted in the light of the relevant factual matrix including the provisions of the PPA as a whole. I agree with the Defendants that the words "as a subsidiary of the SWISS POST Group" can sensibly be read as describing SPUK's status as the time the PPA was entered into rather than as imposing any positive obligation to remain such a member.
44. SPIN argues that this interpretation of Article 2.1 is unduly restrictive since the PPA as a whole would not be workable if SPUK ceased to be a member of the group. I will not set out every aspect of the PPA that SPIN says would be unworkable since I can deal with the arguments by giving a flavour of them:
- i) SPIN points out that many provisions of Annex A to the PPA refer to input being provided by the wider Swiss Post group. For example, Annex A refers to the steps that will be taken to promote the "Swiss Post brand". Those steps could only sensibly be taken if SPUK was a member of the Swiss Post group as, if it were a member of a different group, by definition that other group would be selling products that compete with Swiss Post products and so could not be expected to promote the Swiss Post brand.
 - ii) More specifically, Annex A informs SPIN that final approval of any communications or activities relating to the Swiss Post brand will need to come from Swiss Post's headquarters.

- iii) Article 4 of the PPA defines “excepted clients” (from whom SPIN was not allowed to solicit business) as including clients of the “Corporate Sales Obligation of the SWISS POST Group”. It would not be possible to ascertain the identity of these clients if SPUK was not a member of that group.
45. I agree with SPIN that Annex A certainly reflects, in a number of places, an assumption that SPUK was a member of the Swiss Post group. Annex A consists of “Partner Guidelines” issued to Preferred and Premium Partners by regional subsidiaries throughout the world. SPUK was, at the time of the PPA, one of those regional subsidiaries. However, I do not accept that it is so clear that the PPA would become “unworkable” if SPUK ceased to be a subsidiary as to deprive the Defendants’ contrary arguments of a realistic prospect of success. If, as SPIN argues, Annex A imposed positive obligations on SPUK to engage in brand promotion then, were SPUK to cease to be a member of the Swiss Post group, it might well need to put in place arrangements with the Swiss Post group to enable it to honour its obligations. However, that does not make the contract “unworkable”. That conclusion is only reinforced by the fact that, although SPUK ceased to be a member of the Swiss Post group, Swiss Post retained a significant economic interest in it, through the Asendia joint venture. Similarly, SPUK and SPIN could still ask Swiss Post for approval of brand initiatives even if SPUK was not a subsidiary of the Swiss Post group. By way of analogy, holders of franchises will often not be subsidiaries of the owner of the related brand, but will be accustomed to asking the brand owner for approval of ways in which that brand is to be exploited.
46. A similar analysis applies to SPIN’s point on “excepted clients”. If SPIN wanted clarification on whether it could approach a particular client, it could always ask SPUK, or Swiss Post, whether that client was considered “off limits”. In any event, as I read Article 4 of the PPA, the “excepted clients” were a set list of clients that could be added to from time to time. Therefore, if Swiss Post wanted to restrict SPIN from approaching a particular client after the point at which SPUK ceased to be a member of the group, it would be quite workable for it to put in place an arrangement with SPUK under which SPUK could be required to add new names to the list.
47. Finally, I agree with Mr Drake that there is some link between this issue and SPIN’s assertion of the existence of the “Second Collateral Contract”. It would be appropriate to test SPIN’s assertion that the PPA imposed significant restrictions on SPUK’s wider commercial interests in the light of SPIN’s argument that there was only a limited right for SPUK to terminate the PPA. That could only take place at trial when the facts relevant to the existence or otherwise of the Second Collateral Contract have been established: a further reason why this aspect of the Defendants’ case should not be struck out at this stage.

The Defendants’ arguments set out at paragraph 25.iv)

48. This issue can be dealt with briefly. The points I have made above explain why the Defendants have reasonable grounds for contesting the claim that there was

necessarily a breach of the PPA from July 2012 when the Asendia joint venture took effect and SPUK ceased to be a member of the Swiss Post Group.

49. The Claimants have also pleaded that there was necessarily a breach of the PPA from 1 January 2014 when SPUK's assets were transferred to Asendia UK. The Defendants assert that even though SPUK ceased to own any assets, it procured Asendia UK to perform the PPA as its agent or subcontractor. Two issues are raised by that defence:
- i) Whether SPUK was entitled to delegate performance of its obligations; and
 - ii) If it was, whether Asendia UK actually properly performed on its behalf.
50. As regards [49.i)], SPIN has not pointed to any express prohibition on delegation. The Defendants point to Articles 13.1, page 10 of Annex A and Clause 6(i) of Annex I of the PPA as envisaging that SPUK could subcontract certain activities and make good the performance of its obligations by procuring the co-operation of others. In those circumstances, I consider that the Defendants have reasonable grounds for arguing that delegation was, in principle, permitted.
51. As regards [49.ii)], I have already explained why the Defendants have reasonable grounds for defending the claim that SPUK's obligations under the PPA could only validly be performed while it was a member of the Swiss Post group. It follows that the Defendants have reasonable grounds for resisting any claim that performance by Asendia UK (which was not a Swiss Post subsidiary) was insufficient. The question whether Asendia UK actually performed SPUK's obligations on its behalf can only be determined on the basis of the evidence as to what it actually did.
52. It follows that the Defendants' arguments at 25.iv) constitute reasonable grounds for defending the corresponding aspects of SPIN's claim.

DETERMINATION OF THE VARIOUS APPLICATIONS

53. I have concluded that the relevant parts of the RAD set out reasonable grounds for defending the corresponding claims set out in the RAPC. It follows that SPIN's application for summary judgment fails.
54. It also follows that, except to the extent that the amendments set out in the RAD are not "consequential" on the corresponding amendments in the RAPC, or are embarrassing, the RAD should be allowed to stand. I will therefore turn to those issues.

"Consequential" amendments

55. Neither party was able to point to any authority on what the term "consequential" meant for the purposes of the 2019 Order. I consider that the word should be given its ordinary meaning and applied consistently with the overriding objective.

56. Applying that approach, I agree with Mr Drake that, in the circumstances of these applications at least, it would be inappropriate to parse, line by line, every change made in the RAD and ask whether each amendment was “necessary” in the light of corresponding changes made in the RAPC. The RAPC represented a significant change in the way SPIN chose to put its case. Faced with such a significant change, the Defendants should be permitted to make correspondingly significant changes to the way they choose to defend the claims. Applying that approach, I am satisfied that all of the changes set out in the RAD were “consequential” on the amendment to the RAPC.
57. Given the attention that Mr Sachdeva gave to paragraph 18.2(b) of the RAD, I will make some specific points on that amendment. Previously, in the AD, the Defendants had admitted SPIN’s assertion set out in the APC that “PRODUCTS” could by definition:

“...only include products branded solely as Swiss Post and could not extend to products created in collaboration with any other postal provider”

In the RAD, that admission was replaced with a denial.

58. SPIN does not argue that this change of tack has caused it any prejudice. No trial date has yet been fixed and disclosure has not yet taken place. Therefore, SPIN does not argue that the amendment should be refused simply on the basis that the Defendants are resiling from an admission. Rather, it argues that this amendment is not “consequential” as it amounted to, as Mr Sachdeva put it, an opportunistic attempt to replead their case rather than a change prompted by the RAPC.
59. I reject SPIN’s submission and have concluded that the amendment in paragraph 18.2(b) was “consequential”. In the APC, SPIN was advancing a case based on the proposition that SPUK had failed to honour its promise to grant SPIN exclusive sales rights in respect of the “PRODUCTS”. Faced with that case, the Defendants chose not to contest SPIN’s analysis of the meaning of the term “PRODUCTS”. However, when, in the RAPC, SPIN’s case changed so as to involve the assertion that SPUK was breaching an obligation to provide “PRODUCTS” at all, the meaning of that term became much more contentious. SPUK’s withdrawal of its previous admission was, viewed in that light, consequential on SPIN’s newly pleaded case.

The “embarrassing” paragraphs

60. SPIN argues that paragraphs 22.1 and 23.5 of the RAD are embarrassing. In those paragraphs, the Defendants deal with SPIN’s assertion, in paragraph 26 of the RAPC, that Wendy Holt and/or Nick Frazer, employees of SPUK, made representations, undertakings or promises to SPIN as to the prices that SPIN would be charged. Paragraph 22.1 of the RAD states:

“It is denied that Wendy Holt and Nick Frazer or either of them would have made any representation, undertaking or promise... It would have been wholly inappropriate for either of them to do so.”

61. In responses to Part 18 questions, the Defendants provided further information on this pleading. They stated that SPIN's pleading was denied because it was "inherently unlikely" that Ms Holt and/or Mr Frazer would have made any such representation without the benefit of formality and contrary to the very terms of the PPA.
62. SPIN argued that the pleading was embarrassing for two reasons. First, it was said that it was not clear whether the Defendants were denying or not admitting the allegation, the distinction being important to the question whether the Defendants could call evidence on the point. I do not accept that argument. It is clear from paragraph 22.1 of the RAD that the allegation is denied. Moreover, in the 2019 CA Decision, the Court of Appeal confirmed that it was legitimate for the Defendants to deny the allegation without having any duty to contact Ms Holt or Mr Frazer.
63. Next it was said that the pleading was embarrassing because it was not appropriate to deny the allegation simply on the basis of "inherent implausibility". I reject that submission as well. The Defendants have not tested the allegation with Ms Holt or Mr Frazer. The Court of Appeal has confirmed that it is nevertheless still appropriate for the Defendants to deny that allegation. Since they have not spoken to Ms Holt or Mr Frazer, I can understand why the Defendants might be reluctant to say unequivocally, in a defence that it is supported by a statement of truth, that Ms Holt or Mr Frazer definitely did not give the undertakings or representations alleged. In those circumstances, I regard the pleading as appropriate. SPIN knows that the allegation is denied. It also knows that the allegation is denied without any enquiries having been made, but on the basis that it is inherently implausible. SPIN knows the case it has to meet on this point and the pleading is not embarrassing.

Conclusion

64. The RAD as served is permitted to stand. The application for summary judgment is refused. Please could the parties seek to agree the terms of an order and submit it for approval by 5pm on 9 December 2020. If they cannot agree the terms of the order, please can they submit their competing versions by the same deadline.
65. Please could the draft order(s) deal with costs. My view at this stage is that the costs of these applications should be the Defendants' in any event, but I will consider any submissions to the contrary that the parties wish to make.