Neutral Citation No: [2024] NIKB 117 *Judgment: approved by the court for handing down (subject to editorial corrections)**	*Ref:* **McB12656** *ICOS No:* **22/37866** *Delivered:* **11/12/2024**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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COMMERCIAL DIVISION

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BETWEEN:

FONE ZONE TELECOMMUNICATIONS LTD

Plaintiff

and

TAILORED FACILITY SOLUTIONS LTD

Defendant

_____

Mr Jordan McClurkin (instructed by Mr Desmond Carr, in house lawyer for Barclay Communications Group) for the Plaintiff
Mr John Coyle (instructed by Brendan Kearney & Co Solicitors) for the Defendant

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McBRIDE J

The claim

[1] This is a debt action arising out of a written agreement entered into between the parties on 6 February 2018 whereby the plaintiff agreed to provide its software product called "Workpal" to the defendant upon agreed terms and conditions. The plaintiff claims €35,100.00 as monies due and owing on foot of the contract or in the alternative damages for breach of contract together with a claim for contractual or statutory interest.

Background

[2] The plaintiff is a private limited company based in Northern Ireland. It is involved in the business of supplying telecommunications and software products and services to businesses in the United Kingdom and Ireland.

[3] The defendant is a private limited company based in the Republic of Ireland. It is a bespoke provider of facility management, recruitment and logistic solutions to clients in North West Ireland and beyond.

[4] The defendant was a customer of the plaintiff.

The contract

[5] On 6 February 2108, the defendant signed a "Workpal order form" which the plaintiff alleges constituted the contract entered into between the parties. Under the terms of the contract, as appears from the order form, the plaintiff alleges the plaintiff agreed to provide Workpal to the defendant for a fixed term of 36 months; one month free; and to provide training and consultancy time. The defendant agreed to pay an initial set up fee and to pay the balance by way of 36 monthly payments. The contract was later amended on 27 March 2018 when the parties agreed the sums due under the contract were to be zero rated, as the contract involved intra EC supply. The plaintiff relies upon the terms and conditions set out in the General and Specific Terms and Conditions which it submits were incorporated into the contract.

[6] The order form, which is entitled "Workpal order form", sets out the name and details of the customer and beside the word "term" it states "36." Under the heading "Monthly recurring costs" it states:

> "1 x desktop (up to 10 users) x unit cost €150: total cost of €150
> 33 x Pro mobile users x unit cost €25: total cost €825.
> Sub Total €975 (excluding VAT)."

Under "Set-up and Customisation Payments (one-off payments)" it provides:-

> "1 x set-up training and implementation": unit cost €500:
> Total cost €500 (excluding VAT)."

Under "Project instructions" it states:

> "1 free month
> three hours software development time
> 10 hours consultancy time."

Before the date and signature boxes the form states:

> "By signing this form you agree to each item on the order and Terms and Conditions, all of which (are) available on our website … /or on request."

The document is dated 6 February 2018 and signed by J Crumlish, an employee of the defendant."

The product – Workpal

[7] Mr Megahey, Development Director of plaintiff played a demonstration video of Workpal to the court and provided some commentary about its capabilities. As appeared from the demonstration the product is cloud-based software and is used for job management. It allows real time data to be uploaded onto the app and this is then transmitted back to the office, where operatives can use the information to perform various tasks, for example creating invoices, quotes, scheduling works, allocation of work to operatives etc. This reduces paperwork and allows for more efficient administration. The product is used mostly in the grounds, heating and property maintenance sector. In addition to providing the software the plaintiff also provided training and aftersales support.

Terms and conditions

[8] The relevant General Terms and Conditions are:

Clause 8.6 which provides as follows:

> "We shall invoice you for the charge as specified in the order confirmation or otherwise provided for under the agreement, in respect of products, on or at any time after completion of delivery, and in respect of services, on a monthly basis…you must pay all undisputed charges set out within each invoice in full and clear funds within 30 calendar days of the date of the invoice."

Clause 8.11 which provides:

> "Interest shall be chargeable on any charges overdue at the rate of 4% above the base rate of HSBC Bank plc as applying from time to time to run from the date due for payment until receipt by us of the full amount due whether or not after judgment…"

Clause 12.4 which deals with termination provides:

> "Unless otherwise set out within the agreement we may terminate the agreement for any reason upon giving three months' prior written notice."

Clause 13 entitled "Effects of termination" provides at Clause 13.1 as follows:

> "Termination of the agreement shall be without prejudice to any rights or liabilities created at the date of termination."

Clause 13.2 provides:

> "Upon termination you shall…pay to us all outstanding charges, including interest due under the terms of the Agreement"

Clause 14.7 is an entire agreement clause.

[9] The relevant specific terms and conditions are as follows:

Clause 15 of Schedule D provides as follows –

> "The agreement between you and us shall come into effect on the date of the order form and, will remain in force (unless terminated earlier in accordance with this agreement) for the initial minimum period and will continue for a further 12 months each term until terminated in accordance with Clause 16 of this agreement."

Clause 16 which deals with the effects of termination states at Clause 16.2:

> "Upon termination of the agreement for any reason, you shall, at our request, promptly return to us or otherwise dispose of the deliverables and any other materials sent to you…and pay to us all outstanding charges and other payments, including interest, due under the terms of the agreement."

Payments made

[10] The defendant paid the set-up fee of €500.00.

[11] In or around 3 April 2018, the defendant in an email to the plaintiff agreed to set up a direct debit to pay the monthly instalments. For various reasons this proved difficult and was never done. After discussions the defendant agreed to arrange a standing order but this was never perfected. The defendant has not made any of the monthly instalments.

[12] On 7 December 2018, the plaintiff's accounts department issued a "termination" fee invoice in the sum of €35,100.00, which represented payment for 36 months' use of Workpal.

[13] The termination fee invoice describes the software products supplied as:

> "1 x desktop licence (up to 10 users) x 36: Net €5,400,
> 33 x pro mobile user x 36: Net €29,700.
> Zero rated intra EC supply
> Total Net - €35,100"

The invoice then provides "(TO) BE COLLECTED VIA STANDING ORDER OVER A PERIOD OF 36 MONTHS." It then details the plaintiff's bank account details.

Notice of disconnection

[14] On 5 August 2019 the plaintiff served a Notice of disconnection. It stated:

> "I am sure you realise that we cannot continue to provide you with a service if you do not pay our invoices.
> If we have not received your full payment within 7 days of the date of this letter I regret that your service will be discontinued….
> In addition your debt will be passed on to our solicitors….
>
> January – August 2019 unpaid
> TOTAL CHEQUE REQUIRED €7800"

[15] Shortly thereafter, due to non-payment, the service was disconnected.

The plaintiff's claim

[16] The plaintiff claims that the defendant is in breach of contract due to its failure to pay the sums due and owing under the contract. The plaintiff claims €35,100.00 as the balance due under the contract or in the alternative the plaintiff claims €35,100.00 damages, by reason of the defendant's breach of contract. In addition, the plaintiff claims contractual interest, from 7 January 2019 to April 2022 (in accordance with Clause 8.11) making a total claim for interest of €4,562.04.00 or alternatively, statutory interest under the Judicature (Northern Ireland) Act 1978.

The defendant's defence and counterclaim

[17] The defendant accepts that it did not make any of the monthly payments but defends the claim on the following grounds:

(i) There was a repudiatory breach of the contract by the plaintiff.

(ii) The plaintiff waived the debt in or around 15 August 2021.

(iii) The plaintiff was in breach of the terms of a binding collateral contract entered into during pre-contract negotiations whereby the plaintiff agreed

that no monies were due from the defendant until the defendant was "100% happy" with the product. As the defendant was never happy with the product it was not liable to pay the monies claimed.

(iv) What sums if any are due and owing upon termination of contract by the plaintiff?

Issues in dispute

[18] As appeared from the pleadings; evidence to the court, and the parties' submissions it was agreed by counsel the following factual and legal issues were in dispute:

(i) was there a binding collateral contract arising out of pre-contract negotiations and if so, was it breached by the plaintiff?

(ii) was there a repudiatory breach of the contract by the plaintiff?

(iii) did the plaintiff waive the debt?

(iv) in the event that the plaintiff terminated the contract, what sums if any were due?

(v) is interest due and if so, is it contractual or statutory interest?

I am grateful to Mr Coyle and Mr McClurkin of counsel for their detailed skeleton arguments and oral submissions.

The evidence

[19] The court heard evidence on behalf of the plaintiff from Mr Ian Megahey, Sales Manager and Business Development Director and Mr Robinson, Senior Technical Manager. The defendant called Mr Ben Magowan, a former employee of the Plaintiff company to give expert evidence.

Mr Megahey's evidence

[20] Mr Megahey stated that he was the Business Development Director and Sales Manager for the plaintiff company and had worked with Workpal for 10 years. He gave a video demonstration of the product with commentary on its capabilities and uses. He described it as an off-the-shelf product and outlined that Workpal had been provided to over 500 companies, mostly in facilities, for example, heating, grounds' maintenance and property maintenance. He stated that the product was developed approximately 10 years ago, and a specialist software team continued to develop it.

[21] In or around January 2018 he recalled attending the defendant's office premises in Letterkenny with the Project Manager, Ben Magowan. Mr Kelly, the defendant's Managing Director, Josephine McCrumlish and another employee were in attendance when the Workpal presentation was made. The presentation lasted approximately one hour and thereafter there was a Q and A session. He recalled that the defendant wanted Workpal to integrate with their SAGE accounting software and he agreed that this could be done. The parties also discussed the number of operatives who would use the product.

[22] The defendant agreed to purchase the software and on 6 February 2018 signed the Workpal order form. The defendant paid the initial set-up fee of €500.00 and Mr Ben Magowan then supplied the necessary equipment and provided in-person training.

[23] Mr Megahey opined that Workpal worked well for the defendant and cited positive testimonials the defendant had given in Business Eye and Specify, a building magazine in or around May/June 2018. In these testimonials Mr Kelly stated: "Workpal software has allowed us to monitor each division of our company, all at the touch of a button. We are able to perform tasks, assign duties and track progress from any country in the world" and "We would have no hesitation in recommending Workpal to anyone as not only is the system extremely efficient and user friendly but the services and support given at the initial set-up stage is excellent."

[24] Mr Megahey stated that there was a very positive relationship between the plaintiff and defendant leading the plaintiff to provide sponsorship to Mr Kelly, a keen rally car driver.

[25] In or around 3 September 2019 Mr Megahey received an email from Brian McElhinney, General Manager of the defendant company which enclosed emails from the previous year. These emails included a number of complaints relating to the functioning of Workpal. Mr Megahey said this the first time he became aware of complaints by the defendant in respect of Workpal. After speaking to Mr McElhinney, Mr Megahey sent the following email to Donna Williamson (service delivery manager) and Britt Megahey:

> "Had a chat with Brian from TFS
> He has claimed the following:
> Workpal never worked for them
> Ben missold it
> Had trouble with Workpal team members not getting back or supporting them"

[26] Mr Megahey carried out an investigation into the complaints and was satisfied the complaints were not made out. Firstly, he was satisfied the product was

not mis-sold as he was present at the initial sales pitch and knew the product's capabilities had been properly demonstrated.

[27] He was also satisfied the product had worked well and had been extensively used by the defendant. Internal emails from Mr Elhinney demonstrated this. For example, email dated 14 May 2018 stated:

> "can you and your team members please start using Workpal immediately";

another email dated 24 July 2018 stated,

> "Following many months of development and fine tuning the system is now fully operational. All staff are required to use Workpal diligently on a daily basis. Use of Workpal is compulsory for your daily work duties."

and on 12 September 2018, stated in an email to staff:

> "As you are aware this system is proving invaluable in our Utilities Division…I now demand full compliance with the roll out of our Workpal system from all divisional managers, administrative staff and employees."

In addition, Excel sheets, prepared by the plaintiff which recorded every job carried out by the defendant company, demonstrated that the defendant had completed almost 1,300 tasks during the period 3 April 2018 to 23 July 2019. The Excel sheets also showed Workpal had been used by desk top operatives and mobile users across all divisions. Further the defendant had given positive testimonials about Workpal to Business Eye and Specify magazines and had recommended the product to third parties.

[28] Mr Megahey was also satisfied the plaintiff had provided necessary support and training to the defendant as was evidenced by the plaintiff's "ticketing system" which recorded training and support provided. It contained records of training and support given to the defendant on several occasions since March 2018. Of particular note was an entry which recorded that on 26 July 2018 Mr Robinson attended on site to train and help with outstanding issues. On 8 August 2018 the ticketing system further recorded "Emailed Conall about outstanding issues which have been resolved."

[29] Mr Megahey stated the defendant paid the set-up fee of €500.00 and agreed to set up a direct debit to pay the balance by monthly instalments. Despite reminders from the plaintiff no direct debit was ever set up. The plaintiff then sent the termination fee invoice dated 7 December 2018 to the defendant. The termination fee invoice set out the total amount remaining due under the contract and stated that

the balance of €35100.00 was to be collected via standing order over a period of 36 months. When the defendant failed to set up a standing order and failed to pay any monthly sums when due the plaintiff served a Notice of Discontinuance on 5 August 2019 stating the service would be disconnected unless payment due was made.

[30] In or around August 2021 a representative of the defendant company reached out to the plaintiff company, not realising the prior history. At that stage Mr Megahey stated the plaintiff was happy to work with the defendant and waive the monies due subject to certain conditions being agreed. No agreement was reached between the parties and proceedings were then commenced to recover the debt.

[31] During cross-examination Mr Coyle showed Mr Megahey an email dated 8 January 2018 from Mr Ben Magowan, an employee of the plaintiff, to the defendant, which stated "we will not begin monthly billing until you are 100% happy with the system. This means we…begin billing when you are all happy" and suggested this was the reason that the defendant entered into the contract and accordingly there was a collateral contract which was breached as the defendant was never 100% happy with Workpal. Mr Megahey replied that billing began when the system was set up and running and asserted the defendant was happy with the system as shown by the positive testimonials, Mr McElhinney's emails, and the extensive use of Workpal by the defendant as shown on the excel sheets.

[32] Mr Coyle also put a number of emails to Mr Megahey dating from May through to July 2018 which detailed problems the defendant had with Workpal including problems interfering with Sage, QR codes not working, Ben Magowan not dealing with the problems, and a lack of training. Mr Megahey described these problems as "glitches" which he said were all ironed out as shown by the ticketing record. In respect of Sage integration however he accepted, that due to the different VAT rates which apply in the Republic of Ireland, this proved to be a more complex problem than he had anticipated and problems remained with invoicing. He also accepted that he had stated at the initial meeting with the defendant that Workpal would fully integrate with Sage. Notwithstanding this failure he opined that the problems with Workpal were not core to its operation and were not of a catastrophic nature especially as the defendant had used Workpal extensively up to 23 July 2019, across all eight divisions of the company and it was used by both desktop and mobile users.

[33] In relation to the issue of waiver he stated that the plaintiff and defendant had talked about waiving fees if a new contract was entered into. No such contract was ever taken up and consequently the plaintiff proceeded to issue proceedings for the monies due and owing.

[34] I found Mr Megahey to be an honest witness doing his best to answer the questions as fully as he could and made concessions when appropriate, for example

accepting Sage did not integrate fully with Workpal. Most of his other evidence was supported by documentation.

Mr Robinson

[35] Mr Robinson, Senior Technical Manager, gave evidence that he provided technical support to the plaintiff's customers. He stated that the problems raised by the defendant were not complex problems and were easily resolved using a mixture of training or changing settings. He recalled when he attended the site in July 2018 that he had resolved all the issues, although he accepted under cross-examination that the VAT issue relating to Workpal and Sage integration had not been raised with him at the training event in July. Otherwise, he confirmed all the outstanding issues, including QR codes had been resolved. He also referred to the Excel sheets which he said demonstrated that the defendant used Workpal to carry out over 1000 jobs across all its divisions.

[36] I found Mr Robinson to be an honest and impressive witness.

Mr Magowan

[37] Mr Magowan, a former employee of the plaintiff gave evidence on behalf of the defendant. He left the plaintiff company in August 2019 on "not the best terms". He stated that he had been part of the plaintiff's sales team which had sold Workpal to the defendant and he had been present at the initial sales meeting. He opined that the product did not work across all the divisions of the defendant company and only really worked for the KN division. Under cross-examination, however, he accepted that the excel sheets proved that the defendant had used the product across all its divisions and not just KN. He further accepted that the testimonials stated that the product had worked across all divisions and he accepted that Mr Kelly had recommended the product to third parties.

[38] In relation to Sage integration he stated that Workpal never fully integrated with Sage. He accepted that it worked to a certain extent but because it did not break down items, it could not be used for invoicing because it failed to reflect the different VAT rates which applied to different items in Republic of Ireland. It worked in the UK because there was a flat rate for VAT. Under cross-examination he accepted that training had been given and that all the outstanding issues had been resolved save the Sage issue. He further accepted that without full integration with Sage, Workpal still had some utility in invoicing as it could be done for some but not all jobs.

[39] Mr Magowan stated that in his view the defendant was never happy with the system as it did not deliver what the defendant needed. Although Mr McElhinney told staff in an email dated 24 July 2018 that the system was fully operational and they were required to use it, Mr Magowan stated that issues continued to be raised after this date.

[40] I do not consider that Mr Magowan is an expert witness as he accepted he had no technical expertise. I further consider that he is a disgruntled former employee of the plaintiff and is not an independent impartial witness of fact.

Determination of the issues

[41] As set out above there are four issues in contention.

Issue one - Was there a collateral contract? Was it breached?

[42] Mr Coyle submitted that Ben Magowan's email dated 18 January 2018, which stated "we will not begin monthly payments until you are 100% happy with the system" was a collateral contract as this representation induced the defendant to enter the contract to purchase Workpal. The plaintiff breached this contract as the defendant was never 100% happy with Workpal as demonstrated by its emails to the plaintiff which detailed various problems with the product. Mr Coyle, therefore, submitted that the contract was discharged through non-performance to the standard guaranteed by Ben Magowan's email and accordingly the defendant was not liable for the debt claimed.

[43] In reply, Mr McClurkin submitted there was no collateral contract as Ben Magowan's email was mere "sales talk." Further he submitted that if it was more than this the defendant had failed to establish by evidence that "but for" this warranty it would not have entered into the contract. In addition, the plaintiff submitted that there was an entire agreement clause within the terms and conditions which excluded prior representations from the contractual terms. Finally, Mr McClurkin submitted that even if there was a collateral contract there was no breach as the evidence demonstrated that the defendant was very happy with the product as evidenced by the positive testimonials, the internal emails from Mr McElhinney, and the excel sheets which evidenced extensive use of the Workpal across all divisions

Consideration

[44] There was no direct evidence before the court which established that "but for" the warranty given by Mr Magowan the defendant would not have entered into the contract. The only witness called on the defendant's behalf was Mr Magowan. No witness was called on behalf of the defendant company to establish that the defendant was induced to enter the contract due to the representations made in Ben Magowan's email. I, therefore, find on this basis alone, that there was no collateral contract.

[45] Secondly, I am satisfied that Clause 14.7 of the terms and conditions, which was easily available for the defendant to read on the website, excluded any prior representations from forming part of the contract, as it provided:

> "The agreement contains all the terms agreed between the parties regarding its subject matter and supersedes any prior agreement notwithstanding our arrangement between them, whether oral or written".

[46] In additional submissions, the defendant argued that Clause 14.7, being an entire agreement clause, did not apply because it was an onerous condition which had not been drawn to the defendant's specific attention. Accordingly, he submitted that it was inoperative, and the collateral contract applied.

[47] I accept Mr McClurkin's submission that the entire agreement clause, is not *per se* unduly onerous as it is a standard term in commercial contracts and the plaintiff and defendant were both business entities. I further find that the defendant had reasonable notice of the clause because the agreement stated, "By signing this form you agree to each item on the order and the terms and conditions, all of which are available on our website." I consider that the wording and prominence of this meant that the defendant was made aware of the terms and conditions and accordingly I find that they were incorporated into the agreement.

[48] In *Rock Advertising Ltd v MWV Business Exchange Centres Ltd* [2018] UKSC 24, Lord Sumption stated at para [14] as follows:

> "The true position is that if the collateral agreement is capable of operating as an independent agreement, and is supported by its own consideration, then most standard forms of entire agreement clause will not prevent its enforcement: see *Business Environment Bow Lane Ltd v Deanwater Estates Ltd* [2007] L & TR 26 (CA), at para 43, and *North Eastern Properties Ltd v Coleman* [2010] 1 WLR 2715 at paras 57 (Briggs J), 82-83 (Longmore LJ). But if the clause is relied upon as modifying what would otherwise be the effect of the agreement which contains it, the courts will apply it according to its terms and decline to give effect to the collateral agreement."

[49] I find that Ben Magowan's statement was not supported by consideration and that same, therefore, falls squarely in the line of seeking to amend and modify the underpinning agreement. In these circumstances, as Lord Sumption stated, the court will apply the entire agreement clause and decline to give effect to the collateral agreement.

[50] For all these reasons, I am satisfied that there was no collateral agreement and therefore it is not necessary to go on to consider the question of breach.

Issue 2 - Was there a fundamental breach of the contract?

[51] Mr Coyle submitted there was a repudiatory breach of the contract due to serious defective performance of Workpal including: QR codes not working properly; failure to fully integrate with Sage, leading to inability to invoice; failure to work across all eight divisions of the defendant company; and a failure to provide adequate training and support. The product therefore failed to meet the defendant's requirements and consequently there was a repudiatory breach.

[52] In reply, Mr McClurkin submitted that the problems identified were "snags" and these teething problems were all resolved in a way which enabled the defendant to use the system which it did extensively. He referred to the positive testimonials, internal emails and excel sheets, all of which he submitted showed the system worked well and demonstrated it was used until July 2019 across divisions, by all staff to carry out over 1000 tasks thereby establishing there was no repudiatory breach.

Relevant legal principles regarding repudiatory breach

[53] The parties agreed that there is a right to terminate an agreement for a repudiatory breach in the following situations:

(a) a substantial or serious failure to perform;

(b) breach of conditions;

(c) repudiation.

[54] Where defective performance is alleged, as it is here, the general requirement to be met before there is a right to terminate is that same amounts to substantial failure to perform - See *Boone v Eyre* [1779] 1 Hy Bl 273N. The breach must, therefore, go to the root of the contract – see *MacAdam v Chappel* [1866] LR 1 CP 643 at 647-648, or frustrate the purpose of the innocent party in making the contract, or deprive the innocent party of substantially the whole benefit of the contract – see *Hong Kong Fir Shipping Co Limited v Kawasaki Kisen Kaisha Ltd* [1962] 2 QB 26 at 66.

[55] *Halsbury's Law of England – Contract* (5th edn, 2019) vol 22 'Discharge of Contractual Promises', at para [346] states:

> "The general requirement to be met before there is a right to terminate for defective performance is that the breach in question amounts to a substantial failure to perform. This may be expressed in a number of ways…such as whether the breach goes to the root of the contract or frustrates the purpose of the innocent party in making the contract or deprives the innocent party of substantially

> the whole benefit of the contract, but such expressions provide no indication of precisely when a breach will be found to have reached the necessary level of seriousness.
>
> Among the factors which the court may take into account are the following:
>
> (1) the extent of the failure to perform when assessed against the performance undertaken;
>
> (2) whether a failure to perform created uncertainty as to future performance;
>
> (3) whether, if the innocent party is confined to damages, that would be an adequate remedy;
>
> (4) the fact that a breach is deliberate is not of itself sufficient…The courts may decline to find that a failure to perform was substantial if the innocent party has an ulterior motive for termination, or termination would result in the unjust enrichment of the innocent party."

[56] Accordingly, it is primarily a matter of evidence whether there has been a repudiatory breach. The burden of proof is on the defendant.

Consideration

[57] I am satisfied that there were initial problems with Workpal as evidenced by the emails sent by the defendant to the plaintiff. These problems, however, were of a teething nature and indeed the defendant referred to them as "snags." I accept the evidence of Mr Robinson that following training and some resetting all of the identified issues were resolved shortly after he attended on site in July 2018. His evidence is corroborated by the "ticketing" documentation which shows that training was provided on site and all issues were resolved by August 2018.

[58] I further find that Workpal worked well and was used extensively by the defendant until July 2019. This is demonstrated by: the positive testimonials given by Mr Kelly; the internal emails of Mr McElhinney; and the excel sheets which prove that Workpal was used by both desktop users and mobile users to carry out over 1000 jobs across all divisions in the defendant company. Mr Magowan accepted under cross-examination that the system worked across all divisions of the defendant company and not the KN division and also accepted that it was used up to July 2019 by employees of the defendant to carry out in excess of 1000 jobs.

[59] I accept, however, that the product did not fully integrate with Sage. Mr Mehagey candidly accepted that although he had promised integration this proved more complex than he had initially thought. This arose due to the different VAT regime in the Republic of Ireland. He accepted that this meant the product did not fully integrate and led to some issues with invoicing.

[60] Despite the problem with Sage integration, I find that the product was capable of carrying out most of the tasks the plaintiff promised it could undertake. The defendant made extensive use of the system and in internal emails and in testimonials was glowing about its usefulness. I, therefore, find that the extent of the failure to perform was minimal when assessed against the performance undertaken and accordingly find that there was no fundamental or repudiatory breach of the contract.

Issue 3 - Was there a waiver of the fees?

[61] Although the defendant originally sought to rely on waiver this argument was not pursued in submissions. I consider that this was a proper course for the defendant to take as there was no evidence of waiver before the court. The plaintiff's evidence was that they had agreed to waive the fees on the basis that the defendant agreed to certain terms and conditions. No new contract was entered into and therefore the proposed waiver never became operative.

Issue 4 - Was the contract terminated unilaterally by the plaintiff?

[62] Mr Coyle submitted that the contract was unilaterally terminated by the plaintiff either on 7 December 2018 when it sent a termination fee invoice or, in the alternative, it was terminated when the plaintiff sent the Notice of Discontinuance dated 5 August 2019.

[63] I am not satisfied that the termination fee invoice dated 7 December 2018 amounted to a termination notice. It is apparent that none of the parties treated it as such as the defendant continued to use Workpal and continued to seek and accept training and support from the plaintiff in respect of Workpal.

[64] I find, however, that the Notice of Discontinuance was a termination notice. The plaintiff did not seek to counter this argument and therefore I find that the contract was unilaterally terminated by the plaintiff in or around 5 August 2019.

Issue 4 (b) What sums are due and owing?

[65] Clause 2.4 of the terms and conditions provides:

> "Unless otherwise set out within the agreement, we may terminate the agreement for any reason upon giving you three months' prior written notice."

Clause 13.1 provides:

> "Termination of the agreement shall be without prejudice to any rights or liabilities accrued at the date of termination."

[66] The defendant argued that upon a true construction of clause 13.1 the plaintiff was only entitled to the amount of money due as of the date of termination ie €7,800.00. He submitted that this interpretation made business sense as otherwise under Clause 12.4 the plaintiff could terminate the agreement after one month and seek to claim for three years' payment. He said that the parties would not have agreed or entered into such an arrangement.

[67] In reply, Mr McClurkin submitted that the parties had entered into an agreement for a fixed terms of 36 months as appeared from the Workpal order form dated 6 February 2018 and the termination fee invoice dated 7 December 2018. The Workpal order form referred to a term of 36 months and the termination fee invoice set out that €35,100.00 was due and owing under the contract payable by 36 monthly instalments.

Consideration

[68] The issue which the court has to determine is what rights or liabilities accrued at the date of termination. The answer to this question depends on what the parties agreed these rights and liabilities would be and therefore it is necessary to construe the terms of their agreement.

[69] As appears from the Workpal order form dated 6 February 2018, the parties agreed a term of 36 months. It refers to set up fee of €500.00 and monthly recurring costs of €1,170.00. This Workpal order form also stated that by signing the form the parties agreed to the company's Terms and Conditions available on its website or on request. The termination fee invoice dated 7 December 2018 set out that the defendant was liable to pay the plaintiff for a period of 36 months on termination which amounted to a total sum of €35,100.00. This was to be collected *via* standing order over a period of 36 months.

[70] Clause 8.2 of the General Terms and Conditions provided that:

> "Where we have been retained on an ad hoc basis to provide deliverables, and no monthly retainer or other fixed fee or retainer arrangement exists…The charges for all services shall be calculated on a time and materials basis…"

[71] Mr Coyle is essentially seeking to argue that *ad hoc* payments applied on termination and, accordingly, the plaintiff is only obliged to pay until date of disconnection being August 2019 and therefore only a sum of €7800.00 is due. I reject this argument because the plaintiff was not retained on *ad hoc* basis. The Workpal order form makes clear that the parties agreed a term of 36 months. Further, the termination fee invoice makes clear that the sum due on termination was €35,100.00, which confirms the fact the parties entered into a fixed term contract for 36 months. The defendant never objected to the termination fee invoice, rather it continued to use Workpal and engage with the plaintiff seeking support and training. Accordingly, I find that the parties agreed a fixed term of 36 months and therefore upon termination I find that the sum due is for the full 36 months and not the amount which would be due if the plaintiff had been engaged on an *ad hoc* basis

What Interest is payable?

[72] The plaintiff claims contractual interest in accordance with Clause 8.11 of the agreement which provides for interest at 4% above the base rate of HSBC Bank plc from the due date for payment until receipt of the full amount whether or not after judgment.

[73] The parties agreed this term and accordingly the court awards interest in accordance with these terms. The figure for interest is €4562.00.

[74] I, therefore, make an order in favour of the plaintiff in the sum of €35,100.00together with €4562.00 for interest.

Costs

[75] The parties to make submissions on costs.