Neutral Citation Number: [2022] EWHC 144 (TCC)

Case No: HT-2021-000501

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND & WALES
TECHNOLOGY AND CONSTRUCTION COURT (QBD)

Royal Courts of Justice

7 Rolls Buildings, Fetter Lane

London EC4A 1NL

Date: 26/01/2022

Before :

MRS. JUSTICE O'FARRELL DBE

- -

Between:

TRANSPARENTLY LIMITED **App**

- and -

GROWTH CAPITAL VENTURES LIMITED **Respo**

- -

- -

Paul Considine (instructed as Direct Access Counsel) for the **Applicant**

Jamie Morgan (instructed by The Endeavour Partnership LLP) for the **Respondent**

Hearing date: 19 th January 2022

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

Covid-19 Protocol: This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to Bailii. The date and time for hand-down is deemed to be 26 January 2022 at 10.30am.

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MRS JUSTICE O'FARRELL DBE

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MRS. JUSTICE O'FARRELL:

1.

Before the court is an application by Transparently Limited (the applicant) (“TL”) for a mandatory interim injunction requiring Growth Capital Ventures Limited (the respondent) (“GCV”) to deliver up to TL software, source code and other documents required for completion of an IT platform developed by GCV.

2.
The application is supported by the witness statement of Mr Stephen Stewart dated 21 December 2021 and a supplemental statement by Mr Stewart dated 18 January 2022.

3.
The application is opposed by GCV and Mr Craig Peterson of GCV has produced a witness statement dated 13 January 2022.

Background to the dispute

4.
TL is a company incorporated in 2015 which intends to provide technology solutions to the legal sector.

5.
GCV is an FCA authorised business carrying out the development of custom, bespoke software solutions, integrating proprietary, third party, open source and other similar software code as may be required to deliver product solutions for technology-enabled businesses.

6.
In March 2019, following a competitive tender process, GCV was selected to carry out the development of TL’s negotiation management platform, designed to facilitate dispute resolution in the context of separation and divorce proceedings.

7.
On 26 April 2019 GCV provided the Statement of Work (“SOW”), setting out the functional requirements of the software to be delivered in two phases:

i)
an ‘alpha’ or baseline version of the product, comprising a first pass implementation of the functionality described in the SOW, to enable initial review and testing with end users, the resultant feedback to be reported to the developers;

ii)
a ‘beta’ or final version of the product, comprising the fully developed software ready for service, incorporating all functionality described in the SOW and all lessons learned from the alpha version so that it could be operated in an unsupervised manner by customers free from non- trivial defects.

8.
On 14 May 2019 TL (as “the customer”) and GCV (as “the service provider”) entered into a software development agreement (“the SDA”). The SDA included the following provisions.

9.
Clause 2 set out obligations relating to the scope and statement of work, including:

“2.6 … the **service provider** shall, over the term of the **agreement**:

2.6.1 supply to the **customer** the **work** in accordance with this **agreement** and materially as set out in these **statement of work**; specifically, the **bespoke software** and additionally, as may be necessary and agreed to achieve the **specification**, the **service provider** shall supply the **service providers software**, the **third party software** and the **open-source software**

2.6.2 supply to the **customer** all **documentation** appropriate to the **product software** delivered under clause 2.6.1

2.6.3 supply to the **customer** the **work** pursuant to this clause 2.6 at the **price** set out in summary in the **statement of work** and specifically to **schedule 1** and to the terms and conditions of this **agreement**."

10.
"Price" was defined as:

"the aggregate price for the **work** as summarised in the **statement of work** and as calculated and subject to the terms and conditions of **schedule 1 ("the commercial terms")**."

11.
Clause 9 set out the payment provisions, including:

"9.1 the commercial **contract terms** of this **agreement** are as given in **schedule 1** and as in headline form here and in the **statement of work**, as of the date of this **agreement**:

9.1.1 a total, maximum **contract value** due to the **service provider** of £339,600; comprising

9.1.2 a cash sum payable by the **customer** of up to £200,000; and

9.1.3 an equity consideration payable by the **service provider** of up to £139,600, pursuant to clause 29.2 of **schedule 1**, by set off against a **cumulative discount** allowed on all invoices by the **service provider**, where such equity arrangement will be to the terms and conditions of the **conditional equity purchase agreement** referenced in the **recitals** of this **agreement**."

12.
"Contract value" was defined as:

"the agreed total cost of £339,600 as assigned by the **service provider** to the work to be completed to deliver the product to the **customer**, in accordance with the **statement of work** in effect and of same date to this **agreement.**"

13.
"Cumulative discount" was defined as:

"the accrued value of the discounts derived from the application of the **discount percentage** to the total net of taxes, of each commercial invoice submitted by the **service provider** to the **customer** over the term of this **agreement**."

14.
"Discount percentage" was defined as:

"the percentage of approximately forty one percent agreed between the parties that shall be applied in the calculation of the **cumulative discount**; calculated as the maximum **cumulative discount** divided by the **contract value**, as both exist at the date of this **agreement**."

15.
Clause 10 set out provisions for the vesting of intellectual property rights in the software in TL:

“10.1 the **intellectual property rights** in the **bespoke software**, including any derivative component of the **service provider software** integrated by the **service provider** into the **bespoke software** in such a way as to render the **bespoke software** non-functional or unable to meet the **specification** were it to be removed, shall vest in the customer immediately following the later of:

10.1.1 **acceptance** in accordance with clause 8; or

10.1.2 the payment by the **customer** to the **service provider** of:

10.1.2.1 the **price**, in full or as otherwise agreed by the **parties**, or as may result from the termination of this agreement pursuant to clause 18; and

10.1.2.2 of all other sums, including interest, third party costs and fees and expenses that are or would be due and payable under this **agreement** (which shall, for the avoidance of any doubt, include the equity consideration in accordance with paragraph 29.2 of **schedule 1** and the terms and conditions of the **conditional equity purchase agreement** referenced in the recitals of this agreement);

and the **service provider** agrees to assign by way of present and, where appropriate, future assignment all such **intellectual property rights** pursuant to this clause 10.1 to the **customer**

10.2 the **service provider** shall do and execute, or arrange for the doing and executing of, each necessary act, document and/or any request that the **customer** may consider necessary or desirable to perfect the right, title and interest of the **customer** in and to the **intellectual property rights** in the **bespoke software** described in clause 10.1.”

16.
Clause 18 contained provisions for termination, including the following:

“18.1 without prejudice to any rights that have accrued under this **agreement** or any of its rights or remedies, either **party** may at any time terminate this **agreement** with immediate effect by giving written notice to the other **party** if: … the other **party** commits a material breach of any term of this **agreement** … the other **party** repeatedly breaches any of the terms of this **agreement** …

…

18.6 other than as set out in this **agreement**, neither **party** shall have any further obligation to the other under this **agreement** after its termination

18.7 any provision of this **agreement** which expressly or by implication is intended to come into or continue in force on or after termination of this **agreement**, including, without limitation, clause one, clause 10, clause 14 to clause 17, and clause 18 shall remain in full force and effect

…

18.8 termination of this **agreement** shall not affect any rights, remedies, obligations or liabilities of the **parties** that have accrued up to the date of termination, including the right to claim damages in respect of any breach of the **agreement** which existed at or before the date of termination

…

18.11 on termination of this **agreement** for any reason, the **customer** shall immediately pay any outstanding unpaid invoices and interest due to the **service provider** …

18.12 the **parties** understand that termination of this **agreement** will trigger a **completion** pursuant to the terms of the **conditional equity purchase agreement**, referenced in the **recitals** of this **agreement**

18.13 on termination of this **agreement** for any reason, the **service provider** shall, given settlement pursuant to clause 18.11 and **completion** pursuant to clause 18.12

18.13.1 deliver to the **customer** the **product** in full or as may exist in part, including all **software**, source code and any **work** in progress as may exist or as will be created up to and including the date of termination and

18.13.2 assign to the **customer** all **intellectual property rights** and grant all licences to such **work** pursuant to clause 10…"

17.
Schedule 1 set out the commercial terms of the SDA, including, at clause 29.1, the "non-recurring costs" total (the "contract value"), which was stated to be £339,600.

18.
The terms of the services for equity transaction were set out in clause 29.2:

"29.2.1 under the terms of the **conditional equity purchase agreement**, it has been agreed that the **service provider** will offer a **discount** to its **price** to deliver the **product** to **the company** and in return, **the company** has agreed to accept such **discount** in **consideration** of such shares in **the company** as may be calculated equivalent in value

29.2.2 the **"discount percentage"** shall be applied to the **service provider** invoices over the **term** of this **agreement** as given in illustration at full **term**, in the invoice and payment summary in clause 29.3

29.2.2.1 **discount percentage**: 41.1%

29.2.3 the **cumulative discount** shall be calculated over the **term** of this **agreement** as given in illustration at full term, in the invoice and payment summary in clause 29.3

29.2.4 **maximum cumulative discount**: £139,570

…

29.2.10 the **customer** agrees to pay the resulting net total cash value of this **agreement**, equal to (i) the **total non-recurring costs** payable less (ii) the **cumulative discount** accrued, over the **term** of this **agreement** (the **"contract cash value"**), in accordance with the invoice and payment schedule as given in illustration at full term, in clause 29.3

29.2.11 **contract cash value** (maximum): £200,030

29.2.12 for the avoidance of doubt

29.2.12.1 in the event of the cancellation of the **project** and/or the termination of the **software development agreement** pursuant to clause 18 then, without prejudice to the rights of either **party** under this **agreement**, the contract equity **consideration** shall be equal to the **cumulative discount**

accrued against the **project non-recurring costs**, from commencement up to and including the date of cancellation or termination

29.2.12.2 in the event of the cancellation of the **project** or the termination of the **software development agreement** pursuant to clause 18 then, without prejudice to the rights of either **party** under this **agreement**, the **contract cash value** shall be equal to the cumulative cost for the work carried out by the **service provider** from **commencement** up to and including the date of cancellation or termination, reduced by the **cumulative discount** accrued up to and including such date;

29.2.13 the allotment of **shares** in the **company**, pursuant to this clause 29.2, will be strictly in compliance with the terms of the **conditional equity purchase agreement** of same date as this **agreement** and conditional on the execution, by the **service provider** on the date of completion, of a 'deed of adherence' to the **shareholder agreement** of the **company**"

19.
Clause 29.3 contained the invoice and payment summary table, showing the dates and amounts of invoices and payments due throughout the term of the SDA, including the discount amount deducted from each invoice. The table showed a total contract value of £339,600, a cumulative contract cash value of £200,030 and the cumulative discount / equity consideration of £139,570.

20.
On 12 May 2019 TL (as "the company") and GCV (as "the purchaser") entered into the Conditional Equity Purchase Agreement ("the CEPA"), whereby GCV would apply for, and TL would allot and issue shares in TL for consideration of the cumulative discount applied to each commercial invoice submitted by GCV under the SDA.

21.
Clause 2.1 provided that:

"2.1 subject to the **company's** right to **waive** any **condition** in accordance with clause 2.2, **completion** shall be conditional on the following **conditions** and each **condition** to this **agreement**

2.1.1 there being an **acceptance certificate** … or

2.1.2 the **software development agreement** having been terminated under the **terms** of that **agreement** and pursuant to clause 7; and

2.1.3 the **agreed discount** being equal to £139,570 or to a lesser amount only as agreed in and pursuant to clause 3.2."

22.
Clause 3 provided that:

"3.1 it is agreed that the **consideration** payable by the **purchaser** for the **shares** will be paid by way of set off against the accrued value of the **agreed discount** owed to the **purchaser** by the **company** at **completion**

3.2 for the avoidance of doubt, in the event that either the **purchaser** or the **company** terminates the **software development agreement** pursuant to clause 7, then the **consideration** shall be equal in value to the value of the **agreed discount** accrued against all work carried out by the **purchaser** up to the date of termination of such **agreement**."

23.
“Completion” was defined as completion of the performance by the parties of their respective obligations under clause 4, which provided:

“4.2 at completion:

4.2.1 the **purchaser** hereby applies for the allotment and issue of the **shares** to it and the **company** shall accept such application an shall issues such **shares** at the **share price**, on receipt of the **consideration** by way of set off in accordance with clause 3;

4.2.2 the **purchaser** and the **company** shall execute the **deed of adherence** in the form set out in **schedule 1** to confirm the **purchaser’s** willingness to be bound by the **terms** of the **shareholder agreement**.”

24.
Clause 7.1 provided as follows:

“this **agreement** will continue in effect until the date of **completion** or if earlier, until that date that either the **purchaser** or the **company** terminate the **software development agreement** under the terms of that **agreement**, whereupon this **agreement** will terminate automatically, the **consideration** shall be calculated pursuant across 3.2 and **completion** will take place within 10 working days of such date pursuant to clause 4.”

25.
Thus, the material provisions of the SDA and the CEPA operated as follows:

i)
Clause 9 and Schedule 1 of the SDA provided that the contract price was a cash sum of £200,030 together with equity value of £139,570 in TL, calculated as a discount of 41.1% against each invoice submitted during the project, a total contract value of £339,600.

ii)
Clause 10 of the SDA provided that intellectual property rights in the software would vest in TL following the later of (a) acceptance of the product by TL or (b) payment in full of the contract price, including the equity consideration.

iii)
Clause 18 of the SDA provided that termination would trigger a completion under the CEPA.

iv)
Clauses 3, 4 and 7 of the CEPA provided that, on termination of the SDA, the accrued value of the discount would be calculated and TL would issue to GCV shares in the company at the agreed share price in the CEPA up to the value of the discount within ten days of termination.

v)
Clause 18.13 of the SDA provided that following termination for any reason, GCV would deliver to TL all software, source code and any work in progress, assigning all intellectual property rights in the same, subject to (a) payment of any unpaid invoices and (b) completion under the CEPA.

26.
Development of the software commenced in 2019. Invoices were submitted by GCV and paid by TL in accordance with the SDA up to the full cash value of £200,030 by July 2020.

27.
The indicative delivery dates in the SOW included delivery of the alpha baseline release by January 2020 and delivery of the beta final release by April 2020 but delays occurred, and the project is not yet complete.

28.
Disputes have arisen between the parties. TL's position is that the software product delivered by GCV is incomplete, late and defective, as explained by Mr Stewart in his first witness statement and as set out in the functional testing reports exhibited to his statement:

i)
41% of the alpha specified functionality and 10% of the beta specified functionality has been delivered but, this functionality contains a significant number of bugs, other issues and omissions that require further investigation and rectification;

ii)
33% of the alpha specified functionality and 14% of the beta specified functionality has been delivered in part but this functionality contains errors and defects as reported to GCV;

iii)
26% of the alpha specified functionality and 76% of the beta specified functionality has not been delivered; this includes functionality deferred to beta that has not been delivered and those areas of functionality within both alpha and beta listed in the SOW that have not been completed;

iv)
the mobile and desktop native applications of the software have not been produced or delivered as required by Appendix B of the SOW;

v)
GCV has failed to deliver to TL documentation relating to the software as required by the SDA, detailing matters such as final architecture, operating instructions, change control, error reporting, fault diagnosis, security policies and other matters.

29.
GCV disputes the allegations that the software is defective or not in accordance with the SDA. Its case, as explained by Mr Peterson in his witness statement, is that:

i)
during the project, TL required changes to the software and, as a result, the scope of the work significantly increased;

ii)
the majority of the bugs identified by TL are functional changes or additions or changes to the project scope;

iii)
TL was not prepared to make any additional payments in respect of the requirements that GCV considers to be outside the agreed project scope;

iv)
as a result GCV stopped further work on the project from about April/May 2021.

30.
By notice dated 25 October 2021 TL terminated the SDA, alleging material breach of the contract, repeated breaches or repudiation at common law:

"…GCV has not fulfilled its obligations to deliver the completed works by the contracted date or at all.

Such software that has been released or made available [but not delivered since it is not accepted] is incomplete, defective and does not perform materially and substantially in accordance with the requirements of the contract specification or SOW. Software that has been made available is not fit for submission to the integration and interoperability testing by the Customer [part of the acceptance testing following GCV's **alpha testing** and **beta testing** and **Acceptance** certification process] prescribed by SDA clauses 7 and 8 and is not accepted. Such software that has been released or made available to TL on various dates that has been subjected to Functional Testing by TL is not **ready for service** as defined by the contract and clearly must have failed any reasonable **alpha testing** process carried out by GCV if any at all."

31.
Having set out the alleged breaches of the SDA, TL stated:

"GCV is therefore in material breach of contract as regards the Software Development Agreement and has repeatedly failed in the past to remedy breaches identified to it or which were obvious.

By this letter, Transparently is exercising its rights to terminate the Software Development Agreement …

…

TL will also seek damages under SDA clause 18.8 and at common law … and other relief including delivery up of the software and all related documentation for the software [and each version released to TL] as it has been developed to date including all software change and configuration control records and test specifications and test results from tests carried out by GCV to date.

…

GCV is required to and should now comply promptly with its obligations under SDA clause 18.10 and 18.13. This includes all provision of all materials, access codes and any other information to enable TL to secure, control and make use of the software hosting platforms used for this project.

GCV is required to and should now deliver up to TL the source code [all versions developed including any versions not yet released] and any related software development items immediately…"

32.
On 21 December 2021 TL sent a letter before action to GCV, stating its intention to commence proceedings, claiming delivery up of the software and damages for breach of contract. It attached to the letter a deliverables report, setting out the alleged defects in the software, and an estimate of the costs of rectifying and completing the software in the sum of £337,500.

33.
Before it received TL's letter of 21 December 2022, on 22 December 2021 GCV's solicitors sent a letter before action to TL, disputing the allegations of breach made by TL and alleging breach of contract on the part of TL in failing to issue the shares to GCV as required by the terms of the SDA and CEPA, stating:

“By notice dated 25 October 2021 Transparently purported to terminate the SDA under its terms and on the basis of a repudiatory breach claiming that the CEPA was automatically terminated. Our client does not accept that a material breach of the SDA had arisen but waives its right to raise issue with the notice of termination and accepts that the SDA has been terminated. Alternatively, our client treats your notice of termination as itself constituting a breach of the SDA and/or a repudiatory breach, such that the SDA hereby stands terminated.

Under clause 18.12 of the SDA termination of the SDA triggers a completion pursuant to the terms of the CEPA.

…

Clause 4.2 of the CEPA compels Transparently to accept our client’s application for the allotment and issue of shares to it and to provide a deed of adherence for our client to sign, which, for the avoidance of doubt, our client provides an engrossed copy of with this letter.

Our client stands ready to comply with clause 18.13 of the SDA upon completion pursuant to the CEPA and to deliver the product, including all software, source code(s) and work in progress as well as assigning all IP rights to Transparently and granting any necessary licences to the work.”

TL’s application

34.
On 21 December 2021 TL issued this application for a mandatory injunction, requiring GCV to:

i)
deliver up to the applicant all software source code and executable software items including any associated documentation produced by the respondent under the contract for software development made on 16 May 2019 made between the parties for the development of the intended ‘Transparently’ software product along with any design documentation and third party software items integrated with other software to create the version 1.1.20 of the software released in executable form to the Applicant on 18 May 2021 within [7] Days of this Order;

ii)
deliver up to the applicant all software source code and documentation including test records for all versions of the Transparently software released to the applicant between December 2019 and May 2021 together with all project development records including any configuration management records within [14] days of this Order;

iii)
deliver up to the applicant all necessary information and authorisation codes to enable the applicant to take effective control of the account or accounts held with DigitalOcean hosting the Transparently software product [Staging and Production Servers] and the Transparently Website within [3] days of this Order;

iv)
take all necessary and reasonable steps to transfer the current GCV/DigitalOcean account(s) entered into for Transparently software and website hosting services to the applicant [or cause a replacement DigitalOcean account to be set up between Transparently and DigitalOcean] for access to the existing ‘Transparently’ servers within [7] days of this Order.

Applicable test

35.
Under section 37(1) of the Senior Courts Act 1981 the High Court may by order, whether interlocutory or final, grant an injunction in all cases in which it appears to the court to be just and convenient to do so. Section 37(2) provides that any such order may be made either unconditionally or on such terms and conditions as the court thinks just.

36.
The general test that is to be applied in respect of applications for interim injunctions is the well-known test set out in the case of American Cyanamid v Ethicon Limited [1975] AC 396. The test can be summarised as follows:

i)
Is there a serious question to be tried?

ii)
Would damages be an adequate remedy for a party injured by the court's grant of or its failure to grant an injunction?

iii)
If not, where does the balance of convenience lie?

37.
The court bears in mind that this is an application for a mandatory injunction. The relevant test in that regard has now been established as set out in the case of Nottingham Building Society v Eurodynamics Systems [1993] FSR 468 in which Chadwick J set out the following principles at p.474:

i)
The overriding consideration is which course is likely to involve the least risk of injustice if it turns out to be wrong, in the sense of granting an interlocutory injunction to a party who fails to establish their right at trial or would fail if there was a trial, or alternatively in failing to grant an injunction to a party who succeeds or would succeed at trial.

ii)
In considering whether to grant a mandatory injunction the court must keep in mind that an order which requires a party to take some positive step at an interlocutory stage may well carry a greater risk of injustice if it turns out to have been wrongly made, than an order which merely prohibits action, thereby preserving the status quo.

iii)
It is legitimate where a mandatory injunction is sought to consider whether the court does feel a high degree of assurance that the claimant will be able to establish this right at trial. That is because the greater the degree of assurance the claimant will ultimately establish their right, the less will be the risk of injustice if the injunction was granted.

iv)
But even where the court is unable to feel any high degree of assurance that the claimant will establish their right, there may still be circumstances in which it is appropriate to grant a mandatory injunction at an interlocutory stage. Those circumstances will exist where the risk of injustice if this injunction is refused sufficiently outweighed the risk of injustice if it is granted.

38.

Those principles have been approved by the Court of Appeal in Zockoll Group Limited v Mercury Communications Limited [1998] FSR 354 in which Phillips LJ at p.366 indicated that that the concise summary in Nottingham should be considered to be all the citation that should in future be necessary to guide the court on the question of the balance of convenience in cases where an interim mandatory injunction is sought.

Serious issue to be tried

39.
Mr Considine, counsel for TL, submits that TL has a serious claim for damages and delivery up of the software. Whilst the contract provided for assignment of the intellectual property in the code on completion of the project, the circumstances are such that TL has paid in full the contract cash price of £200,030 plus VAT but does not have any software that is commercially usable or access to the source code to make it so. TL has a substantial claim for damages in excess of the contract price and a claim for refund of all or part of the cash payment made. TL's loss of profit caused by GCV's breach is also likely to be very substantial.

40.
Mr Morgan, counsel for GCV, submits that the court cannot be satisfied that there is a serious question to be tried. Firstly, there are no draft particulars of claim or an issued claim form. In those circumstances, TL has failed to particularise its claim sufficiently for the court to be satisfied that the serious issue test has been met. Secondly, the SDA is clear as to the effect of termination and the circumstances in which TL is entitled to receive the source code and software. Clause 18.12 provides that a termination of the SDA triggers a completion pursuant to the terms of the CEPA. Clauses 7 and 4.2 of the CEPA provide that shares with a value of £139,600 must be issued and allotted to GCV with a deed of adherence being provided. Although clause 18.13 of the SDA provides that, on termination of the SDA all software, including source code should be transferred to TL in accordance with clause 10, TL has failed to issue and allocate the shares, such that no obligation to make any transfer under clause 18.13 has yet arisen. As indicated in its letter dated 22 December 2021, GCV remains willing to deliver the product at the necessary time.

41.
In considering this limb of the test, the court must have regard to the fact that the grant of an interim injunction is a remedy that is both temporary and discretionary. The evidence available to the court at the hearing of this application is incomplete and has not been tested by cross-examination or against disclosed documents. It is no part of the court's function at this stage of the dispute to try to resolve conflicts of fact or expert evidence by a mini trial, nor to decide difficult questions of law which call for detailed argument and mature considerations. These are matters to be dealt with at the trial.

42.
It is clear from the evidence before the court that there is a dispute between the parties as to value of the product delivered, responsibility for delays, responsibility for defects in the software and the quantum of each party's claim against the other. The court is not in a position to resolve any aspect of that dispute today.

43.
The claim for interim relief is for delivery up of the software, including the source code and other design documents. Mr Considine submits that there is a serious issue to be tried in respect of the delivery up of the software. However, there is no pleaded case before the court setting out TL's case

that it has a contractual right to the software, prior to allotment and issue of the shares to GCV, and the basis for such submission does not stand up to scrutiny.

44.
Firstly, the terms of the SDA and the CEPA are clear and contain a complete code in the event of termination, including any termination for breach on the part of GCV (clause 18.6 of the SDA). Termination for any reason triggers completion pursuant to the terms of the CEPA (clause 18.1.2 of the SDA). Clauses 7 and 4 of the CEPA require TL to allot and issue the shares, at the agreed share price to the value of the agreed discount accrued against the work carried out by GCV up to the date of completion within ten days of termination. TL's entitlement to delivery up of the software, source code and other documentation is subject to completion under the CEPA (clause 18.13 of the SDA). TL has not satisfied its obligations on completion pursuant to the CEPA and therefore is not entitled to delivery of the software, source code or other documents.

45.
Secondly, TL's case is that the software delivered is not usable but GCV's entitlement to payment, by cash and equity in TL, is not linked to the value of the work done; it is based on the cost of carrying out the work. Clause 9 entitles GCV to the "contract value" of £339,600. "Contract value" is defined in the SDA as "the agreed total cost of £339,600 as assigned by the service provider to the work" . This is clarified in Schedule 1; clause 29.1 states that the "non-recurring costs" total (the "contract value") is £339,600 and clause 29.2.12.2 provides that on termination the "contract cash value shall be equal to the cumulative cost for the work carried out" at termination reduced by the cumulative discount.

46.
Thirdly, TL's case is that clause 2.1 of the CEPA provides that completion is subject to conditions, including clause 2.1.3 which states that: "the agreed discount being equal to £139,570 or to a lesser amount only as agreed in and pursuant to clause 3.2" . Clause 3.2 provides that the consideration for the shares "shall be equal in value to the value of the agreed discount accrued against all work carried out by the purchaser up to the date of termination" . It is said that GCV has not established the value of its services and therefore cannot claim the full equity interest or establish an alternative figure for the same. However, those provisions do not assist TL. There is no "lesser amount only as agreed" in respect of the value of the discount; therefore, the agreed discount for the purpose of condition 2.1.3 of the CEPA is £139,570. Further, the definition of the "cumulative discount" and clauses 9.1.3, 29.2.2 and 29.2.12.2 of the SDA provide that the cumulative discount is calculated as the discount percentage applied to the commercial invoices as shown in the table in Schedule 1; it is not subject to any alternative assessment against valuation of GCV's work. It is common ground that a total of £200,030 has been invoiced and paid in respect of the work done; accordingly, the cumulative discount is £139,570.

47.
Fourthly, TL's case is that it was always contemplated that TL would end up with the intellectual property rights in the software. However, although clause 10 of the SDA makes provision for the intellectual property rights in the software to vest in TL, it also expressly provides that such vesting shall occur "immediately following the later of" acceptance or payment of the price agreed, including the equity consideration. Neither acceptance, nor payment of the equity consideration forming part of the sums due, has occurred; therefore, the obligation on GCV to transfer intellectual property rights has not arisen.

48.

For those reasons, the court is not satisfied that there is a serious issue to be tried on TL's claim that it is entitled to delivery up of the software, source code and other documentation.

49.
Even if it could be said that TL has an arguable case that no further consideration is payable to GCV, by reason of the defective state of the software, its argument that it has a contractual entitlement to the software in those circumstances is weak. However, having regard to that possible argument, the court has considered the other limbs of the test, including the balance of convenience.

Adequacy of damages

50.
Mr Stewart's second witness statement sets out the losses suffered by TL as a result of the incomplete and/or defective software. Works to rectify and complete the system have been estimated at £337,500 plus VAT. TL's internal costs are estimated at £145,500 plus VAT. Lost revenue as a result of delay is estimated at £2.78 million. Future loss of profits is projected to be in excess of £19 million. Although not without difficulty, such losses could be quantified and compensated for by way of an award of damages, if the claim were established at trial.

51.
The IT platform could be replaced but at great cost and delay to the project. Mr Considine submits that TL would not be compensated by damages at a trial which could be some months away given the current threat to its survival by lack of access to the source code developed by GCV. Mr Stewart's evidence is that TL has almost exhausted its cash reserves. It can only secure further funding from existing and potential new investors if it has access to the source code and assignment of the intellectual property rights in the same.

52.
Mr Morgan submits that there is inadequate evidence to support TL's assertion that it will not survive if the software, including source code, is not delivered to it now. There are cash flow forecasts showing limited cash reserves but there are no management accounts or other information showing that TL is insolvent. There are emails from individuals indicating an interest in investing in the project if TL obtains intellectual property rights in the software but there is no evidence that TL would be unable to raise funds or obtain credit from other sources. Mr Stewart has raised a concern that TL might have to repay grants received from Innovate UK but the longstop dates for compliance with the conditions of the grants are five years from the date of award and therefore not imminently due.

53.
Mr Morgan's points are well made. TL has not produced sufficient evidence to demonstrate that it is likely that damages would not be an adequate remedy if the injunction were refused and TL succeeded at trial. Further, if TL's survival as a going concern is at such risk, and the profits of a successful venture would be as projected in Mr Stewart's second witness statement, the obvious solution is for TL to avail itself of GCV's offer to provide the software, source code and documentation, by complying with the CEPA and providing the equity consideration to GCV, reserving its right to challenge the share allotment and issue at a later date.

54.
I turn then to consider whether damages would be an adequate remedy for GCV. GCV would not be adequately compensated by an award of damages if any injunction were to be granted and then shown to be wrong. Although TL has offered the usual undertaking in damages, on its own evidence, it does

not have any funds to satisfy any such award. The suggestion that TL might have sufficient funds when the project is completed is speculative and does not provide sufficient security to support the undertaking.

Balance of convenience

55.
Turning to the balance of convenience, having regard to the principles set out by Chadwick J in the Nottingham case, the court must consider which course is likely to involve the least risk of injustice if it turns out to be wrong.

56.
Mr Considine draws to the court's attention authorities in which the court has granted mandatory injunctions, ordering delivery up of software: Nottingham (above), Saphena v Allied Collection Agencies [1995] FSR 616; Psychometric Services Ltd v Merant International Ltd [2002] FSR 8. However, in Nottingham, the court had a high degree of assurance that the plaintiff would establish at trial an entitlement to delivery up of the software, the termination provision in that case not attaching a condition of payment to such entitlement. Further, the defendant was insolvent so there was no reasonable prospect that it could pay any damages if the plaintiff succeeded at trial. The decision in Saphena concerned the parties' respective contractual obligations following a full trial and did not address interim relief. In Psychometric , the court considered that the contract in question strongly supported the claimant's claim that it was entitled to delivery up of the source code and to proceed with another supplier. These illustrations serve to show that each case turns on its own facts. It is not suggested that the principles to be applied, as set out above, differ in such cases.

57.
Drawing together the above matters, in this case:

i)
TL has not identified an arguable case that it is entitled to delivery up of the software, source code and documents, so as to satisfy the court that there is a serious issue to be tried. On the contrary, the terms of the SDA and CEPA indicate that GCV has much the better argument on this issue. Therefore, the court does not have a high degree of assurance that TL will establish its right at trial.

ii)
TL has produced incomplete and unsatisfactory evidence as to its financial position and its ability to raise funds, so as to demonstrate that it would collapse if the injunction were refused. The estimates provided by TL in its evidence show that it could quantify its loss so as to support a claim for damages by way of compensation. Therefore, damages would be an adequate remedy for TL if the injunction were not granted and it succeeded at trial. However, on its face, the limited financial information produced by TL indicates that it would not have funds to satisfy any award of damages to GCV. Therefore, damages would not be an adequate remedy for GCV if the injunction were granted and it succeeded at trial.

iii)
The balance of convenience lies in maintaining the status quo. TL has a simple solution if the court does not order delivery up as sought; it can comply with its obligations under the SDA and the CEPA. TL can allot and issue the shares to GCV in return for which it will obtain the software, code and documents that will allow it to raise further funds and complete what it anticipates will be a very profitable project.

58.
Taking into account all of those matters, the court considers that the least risk of injustice in this case lies in refusing the interim relief sought.