Neutral Citation Number: [2020] EWHC 2046 (QB)

Case No: QB 2020 002046

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 28/07/2020

Before :

MR JUSTICE MORRIS

- -

Between :

Create Financial Management LLP	**Claimant**
- and –	
(1) Roger Lee **and** **(2) Karen Scott**	**Defendants**

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John Mehrzad QC (instructed by **Addleshaw Goddard**) for the **Claimant**
Gideon Roseman (instructed by **Flint Bishop**) for the **Defendants**

Hearing date: 24 July 2020

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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 28 July 2020 at 3:00pm

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THE HONOURABLE MR JUSTICE MORRIS

Mr Justice Morris:

Introduction

1. On 17 July 2020 I gave judgment ("the Judgment") granting an interim springboard injunction in favour of Create Financial Management LLP ("the Claimant") prohibiting Roger Lee and Karen Scott ("the Defendants") from soliciting certain former clients of the Claimant. The Judgment is reported at [2020] EWHC 1933 (QB). On Monday 20 July 2020 I made the order for the interim injunction consequential upon the Judgment ("the Order"). The Order identifies in its Schedule a list of 130 clients of the Claimant to whom the prohibition on solicitation applies. After giving Judgment and before the making of the Order, it had become apparent that the Defendants wished to raise a number of further matters arising from the Judgment and that a further hearing would be necessary. That hearing took place on Friday 24 July 2020. In this judgment, I adopt the terminology used in the Judgment. The Consent Order refers to initial "holding" injunction agreed on 18 June 2020.

2. The Defendants raised the following four issues at the further hearing:

   (1) The Defendants' application that a number of clients listed in the Schedule to the Order should be removed from that Schedule.

   (2) The position of third party financial providers in relation to the Order, and whether they will, or are likely to, be in contempt by taking steps to transfer clients from the Claimant's agency to that of the Defendants.

   (3) The Defendants' application for an order that the Claimant sends clarification letters to clients and third party providers in relation to the effect of the Order.

   (4) The Defendants' application for permission to appeal against the Judgment.

   Before turning to these issues in turn, I describe the chronology of events since the Judgment.

3. The written judgment was handed down, subject to editorial corrections, at around 245pm on Friday 17 July. The parties then took about 40 minutes to consider its terms. The hearing then resumed. There was further oral argument, leading to a supplementary ruling on the removal of certain clients from the list to be covered by the injunction (synced contacts: see Judgment paragraph 3). By the time that the hearing concluded at around 415pm, there were a number of outstanding matters; in particular the final form of the order and the Defendants' desire to pursue further argument on what is now Issue (2) above (pursuant to the Judgment paragraph 115). It was clear that there would be a further hearing in the following week ("the further hearing").

4. On the morning of Monday 20 July 2020, counsel emailed competing drafts of the order to be made and their corrections to the written judgment. At 912am Mr Roseman raised, for the first time, Issue (1) above, suggesting that the final Schedule should be resolved at the further hearing. At the same time he indicated to Mr Mehrzad QC that he would be sending over his skeleton setting out the Defendants' position on Issue (1) "and on other outstanding issues". Mr Mehrzad responded, asking the Court to make the order "today", stating that that was practically important so that the expedited trial could be

listed promptly. As regards Issue (1), he stated that the Defendants "should apply to vary [the order as made] – which I understand they intend to do. In the meantime, this order should not be held up whilst [the Defendants] seek to go behind it". At 1017am Mr Roseman wrote to the Court reiterating the Defendants' position on Issue (1) and that the Schedule should not be finalised until the further hearing i.e. the order should not be made until then. At 1210pm I approved the Order in the form in which it was finally made. I indicated that Issue (1) had not been considered at the hearing on 17 July and could be considered at the further hearing, but in the meantime the Schedule should remain in the form discussed on the previous Friday.

5. Then at 1222pm Mr Roseman sent his skeleton argument for the further hearing. This covered Issue (1), including a revised Schedule, and also expressly raised for the first time permission to appeal against the Judgment (Issue (4)), as well as Issue (3). At 145pm I gave directions for the conduct of the further hearing. Mr Mehrzad served his skeleton argument at 11am on Thursday 23 July. The further hearing took place last Friday, 24 July and at the conclusion I reserved judgment.

Issue (1): the Schedule to the Order

6. The clients listed in the Schedule to the Order fall into 3 categories (as pointed out at paragraph 3 of the Judgment): clients whom the Defendants failed to hand over; clients whose contact details remained connected on social media to the Defendants after 30 April; and clients whom the Defendants failed to hand over and who remain connected on social media. The Defendants submit that those clients who are included on the list on the sole ground that they remained connected on social media after 30 April (and thus in respect of whom there is no allegation of failure to hand over) should be deleted from the Schedule in the light of the findings at paragraphs 90 and 98 of the Judgment and in the light of the evidence before the Court at the hearing of the Claimant's application.

7. As appears from the chronology at paragraph 4 above, this issue was first raised at a time when the Order had not been finalised and in the context of finalising it. Mr Roseman had submitted that the Schedule to the Order should not be finalised until the further hearing later in the week.

8. The Defendants submit that in the Judgment I found that the unlawful competitive head start arose from the cumulative effect of the alleged failure to hand over clients and the failure to delete client information. Thus, in respect of those clients in the Schedule where there is no alleged failure to hand over, there is no relevant arguable case that the Defendants have obtained an unlawful competitive head start merely from the failure to delete contact details. In this regard they point to Ms Scott's evidence that the contact detail information is publicly available and easily found and to the fact that the Claimant has not contradicted that evidence. This is referred to at paragraph 98 of the Judgment.

9. The Defendants distinguish between clients whose contact details were acquired before 30 April 2020 and those whose contact details were acquired after 30 April 2020. As regards pre-30 April 2020 contacts, even if there had been a failure to delete in breach of clause 12(b) of the Consultancy Agreements, no sufficient unlawful competitive advantage could arguably have been acquired by reason of that breach and so there should be no prohibition on solicitation of those clients. As regards post-30 April 2020 contacts, these were all contacts first made by Ms Scott on LinkedIn after 30 April 2020

and so cannot have been subject to the obligation in clause 12(b) to delete by 30 April 2020 (nor indeed by definition could qualify as Confidential Information acquired in the course of the consultancy).

10. In response, the Claimant submits as follows:

(1) The Defendants are seeking an impermissible variation of the Order. Applying the principles set out in *Tibbles v SIG Plc* [2012] 1 WLR 2591, they are seeking "a second bite of the cherry".

(2) The Judgment concluded that the Claimant has established a sufficient case for interim relief in respect of this category of clients.

(3) The Defendants are seeking to rely on material which was known at the time of the Order; and in so far as they are relying on new evidence, that evidence is inconclusive. There has been "no material change of circumstances" nor were the facts, on which the Judgment is based, misstated.

11. The relevant principles concerning variation of an interim order, pursuant to CPR 3.1(7) are set out in *Tibbles* supra, per Rix LJ at §§39 to 43. I do not recite them in full, but note the following particular points:

(1) The discretion to allow a variation is curtailed by considerations of finality, of not allowing "two bites" and of undermining the concept of appeal; its successful invocation is rare: §39(i) and (vii).

(2) Misstatement of facts, as a ground to exercise the discretion, may include omissions, both of facts and of argument: §39(ii) and (iv).

(3) Revisiting of orders is commonplace where there is an express "liberty to apply" in the order; in recognition of the possible need to revisit an order "in an ongoing situation": §40.

(4) *Prompt* recourse back to a court may be permissible to deal with something which ought to have been dealt with but which was in genuine error overlooked by the parties and the court and which can be dealt with on the materials already before the court: §§41, 42.

12. Applying these principles to the facts of the present case, - and assuming that the Defendants establish their grounds for the variation - I am satisfied that this is a case where the discretion under CPR 3.1(7) can be properly exercised and that the Defendants are not seeking an impermissible "second bite", for the following reasons.

(1) The Defendants raised Issue (1), and the Claimant was on notice of the Defendants' position, *before* the Order was made. The Defendants asked that the issue be resolved prior to the making of the Order. The making of the Order first was a pragmatic solution, advocated by the Claimant and it would not be fair for the Claimant to take advantage of the solution it had put forward on pragmatic grounds.

(2) The further hearing was always envisaged, was fixed immediately and has taken place promptly.

(3) The Order contains a general liberty to apply to vary at paragraph 13.

(4) Issue (1) was "overlooked" in oral argument after the handing down of the Judgment on Friday 17 July. This was understandable given the short period of time which the parties had had to consider the Judgment. By 912am on the morning of 20 July, the point was no longer "overlooked".

13. As to the substance of Issue (1), the Defendants seek the removal from the Schedule of 35 named clients. Whether these clients had first been connected to one or both of the Defendants before or after 30 April 2020 is not determinative. The essential issue is whether, in respect of each of these clients, there is any real prospect that at trial the Claimant will succeed in obtaining final springboard injunction. In the light of paragraph 98 of the Judgment, and the evidence before the Court, there is no such prospect. Assuming, against the Defendants that, in fact, all the clients were first contacted before 30 April and assuming further that the Defendants were required to delete those contact details by that date, there is no evidence that any competitive advantage from the failure to do so would last more than a few days; and I so found at paragraph 98. Accordingly, unlike the position with clients whom it is alleged were not handed over, there is no serious issue to be tried on the Claimant's claim, in respect of these clients, of a relevant competitive advantage and thus for a final springboard injunction. There is no basis for an interim injunction in respect of this category of clients and the Schedule will be amended to exclude them. Had this argument been canvassed in oral argument on Friday 17 July, I would have reached this conclusion, and there is no reason why the position should be any different now.

Issue (2): third party providers and contempt

14. This issue has two aspects: first whether a third party provider could ever be in contempt by authorising transfer of clients from the Claimant to the Defendants' business (Issue (2)(a)); and secondly, whether if the answer to the first question is yes, some more appropriate wording or mechanism should be put in place to protect the third party provider from being in contempt, whilst allowing the Defendants to carry on their legitimate business (Issue (2)(b)).

15. The background to this issue is set out at paragraphs 43 to 47, 112 and 114 and 115 of the Judgment. In summary the Claimant notified a number of third party providers of the Consent Order; that Order included on its face, and in standard form, notification to third parties that "any other person who knows of this order and does anything which helps or permits the respondents to breach the terms of this order may also be held in contempt of court.".

Issue (2)(a): contempt by third parties

16. When notifying the third parties, including Old Mutual Wealth, the Claimant warned the third party that it must not facilitate a breach of the injunction including by authorising or processing any transfer of assets from Claimant to ScottLee that relate to clients who have been solicited by the Defendants: see Judgment, paragraph 45 . This in turn led Quilter, on behalf of Old Mutual Wealth, to seek clarification as to what it can and cannot do under the terms of the injunction. Depending on the answer to that question, the parties agreed that some additional wording was required in the Order.

Three alternatives were put forward. I heard some, but not full, argument on whether a transfer of assets which took place *after* solicitation prohibited by the injunction could amount to contempt. I reached the conclusion on the basis of that limited argument that it was not clear that such conduct was not capable of constituting a contempt: see Judgment, paragraphs 112 and 115. However I granted liberty to apply to the Defendants and to Quilter to vary the terms of the additional wording on the basis of further argument as a matter of principle.

17. The Defendants submit that it is legally and factually impossible for the authorisation of a transfer request by the financial provider to constitute a contempt of court by "helping" or "permitting" the Defendants to directly or indirectly solicit clients. As a matter of fact, prior to any conceivable involvement of the provider, the client will have decided to move from the Claimant to the ScottLee, and executed a letter of authority confirming that decision and the Defendants will have then uploaded that letter of authority to the provider's platform. It is only after those events have taken place that the provider takes any action to execute the request to transfer. The Defendants submit that in correspondence Addleshaw Goddard have conceded that the transfer takes place necessarily following any prohibited solicitation.

18. As a matter of law, a third party can be in contempt of court in respect of an injunction in two circumstances (see *Gee on Commercial Injunctions* (6th edn) at §19-003):

    (1) where the third party knowingly aids and abets a breach of the injunction; in that situation there has to have been a breach of the injunction by the defendant; or

    (2) where the third party with knowledge of the order does "something which disables the court from conducting the case in the intended manner" and thereby interferes with the due administration of justice. That can arise independently of whether there has been any breach of the injunction. This is the principle set out in *Attorney-General v Punch Ltd* [2003] 1 AC 1046 per Lord Nicholls at §§4, 39-40 and 47.

19. As regards aiding and abetting breach of the injunction, the Defendants submit that the third party can only be liable in contempt if they help or permit the defendants to "solicit" clients. It is impossible for the third party provider to help or permit something that has happened in the past. Authorising transfer after solicitation neither helps the Defendants to breach the order nor encourages or assist them to do so. The transfer follows any act of solicitation, as opposed to being part of the same thing.

20. As regards the second basis of contempt, the Defendants submit that the present case is wholly different from the case of *AG v Punch*. Here the purpose of the injunction was not to prevent the Defendants contacting clients, or dealing with clients or the clients transferring over from the Claimant to the Defendants. Rather the sole purpose of the injunction was expressly limited to preventing the act of direct or indirect solicitation of clients by the Defendants. The only way in which the providers would be liable in contempt would be if the injunction prohibited the Defendants from "dealing" with the clients. But that is not its purpose.

21. The Claimant submits, first, that this application constitutes a further impermissible attempt to vary the Order. The Defendants are seeking to relitigate an issue which was already canvassed in detail at the original application hearing and the Court has already expressed its view on this point at paragraph 112 of the Judgment; if the Defendants

disagree that is a matter for an appeal. Secondly, it is not appropriate for the Court to decide now, and in the abstract, whether any particular transfer would be a contempt of court. Thirdly, the purpose of the injunction is wider than suggested by the Defendants (and includes preventing the taking of the benefit of unlawful solicitation), and on that basis, transfer would, or could, be a contempt on the *AG v Punch* approach.

22. In my judgment, first, the Defendants' submissions here do not amount to an impermissible attempt to vary the Order. I made express provision in paragraph 115 of the Judgment for further argument on this issue. Secondly, however, whilst the Defendants' arguments that, on the facts, transfer by a third party provider after solicitation do not amount to a contempt may have force, I do not consider it appropriate for the Court in these circumstances to make a declaration as to the legality or otherwise of conduct of a number of third parties, (only one of whom is, to any extent, "before the Court"), on a blanket basis and in the absence of the particular facts of any particular transfer of any particular client. There may be arguments about the purpose of the injunction and also arguments that even post-breach conduct might amount to assisting a breach of the injunction. Having considered the arguments in more detail, I remain of the view expressed in paragraph 112 of the Judgment, that, depending on the facts (and absent anything further in the terms of the Order), transfer by a provider might arguably amount to a contempt.

Issue (2)(b): the wording of the Order (paragraph 1.2)

23. On the assumption that transfer by a third party provider could amount to a contempt of court, at paragraph 115 of the Judgment I decided that the Order should contain wording, in the terms advocated by the Claimant, providing that no transfers are to be processed, unless agreed between the parties. This wording was incorporated at paragraph 1.2 of the Order.

24. The Defendants submit that the current wording is unworkable and will necessarily lead to further hearings and a waste of legal fees. The effect is that the provider will not transfer any client unless the Claimant agrees and that effectively gives the Claimant a non-dealing covenant or a resurrection of the Restrictive Covenants. Moreover, clients themselves will be prejudiced as the Claimant would be able to refuse to release them to the Defendants. There is a substantial risk that the Claimant will never be satisfied that there has not been a breach of the injunction and the Defendants will be entirely prevented from dealing with any client, regardless of any solicitation on their part.

25. Accordingly the Defendants put forward modified wording. Paragraph 1.2 of the Order should be modified such that the third party provider should be permitted to transfer any client (a) where the letter of authority from the Client predates 18 June 2020 and (b) in other cases, provided the letter of authority contains a declaration from the client that they have made the decision to transfer from the Claimant based on their own personal choice and/or that this was not the result of any form of solicitation on the part of the Defendants after 18 June 2020.

26. The Claimant opposes the modified wording. First there has been no change of circumstances since the Order. It is too late to put forward a fourth alternative wording. The Defendants are trying to go behind the Order and relitigate an issue. Secondly, there is no basis for saying that the current wording of paragraph 1.2 of the Order is unworkable. The Defendants have not sought to agree the transfer of any clients with

the Claimant. They can produce evidence that any particular transfer request was not the result of solicitation; they have said that they are compiling an audit trail and so it will be easy for them to provide that information to the Claimant "in order to seek to reach agreement". Thirdly, Quilter put forward three alternatives; they did not put forward this fourth alternative. Finally, Quilter and the Defendants are protected by the cross-undertaking in damages.

27. In my judgment, whilst what is now sought is a variation of the terms of paragraph 1.2 of the Order, this is not a case where it is inappropriate for the Court to exercise its discretion. Further argument on the issue was left open in paragraph 115 of the Judgment and in the course of oral argument after hand down on Friday 17 July, there was express reference to the "mechanism" to be applied to transfers. The Order then contained liberty to apply to vary. Issue (2) as a whole was always intended to be addressed at the further hearing.

28. As to the substance, I recognise the Claimant's point that the Defendant is free to demonstrate that a transfer request is not the result of an improper solicitation. However I am concerned that the effect of the present wording is that the Claimant effectively has a veto on any requested transfer, by declining to agree that it is not the result of solicitation. This concern is heightened by the current state of relations between the parties: see Judgment, paragraph 111. Leaving it to the parties to agree may very well only lead to further dispute and court hearings. Secondly, the fact that Quilter has not advocated this fourth approach is not a reason not to adopt it. In their letter of 9 July 2020 (see Judgment, paragraph 47), Womble Bond Dickinson made it clear that they did not support the third alternative (i.e. paragraph 1.2), but rather supported the second alternative (which would have permitted transfers). They have been effectively notified of the Defendants' modified wording; and have raised no objection to it. Thirdly, and significantly, the Claimant has not put forward any substantial objection to the modified wording.

29. In these circumstances, I consider that the mechanism for dealing with transfer requests now put forward by the Defendants (the fourth alternative) is the best way to avoid any potential impasse on the issue of permissible transfers by third party providers. The wording of the Order will be revised. The parties should consider the precise wording and whether it is more appropriately included within the terms of the prohibition in paragraph 1 of the Order or rather elsewhere in the Order. If need be, I will consider further argument on this issue.

Issue (3): corrective letters to clients and third-party providers.

30. At paragraph 113 of the Judgment I found that there was substance to the contention that the terms in which the Claimant had notified the Consent Order to clients was misleading. Most specifically that the words went beyond the prohibition on solicitation and suggested that the injunction covered a communication from client to the Defendants, either absent any solicitation or where solicitation had occurred before 18 June 2020. I added that in the future the Claimant must be very careful to explain the terms of the injunction clearly and precisely.

31. The Defendants submit that the Claimant should be ordered to neutralise any unlawful advantage it had acquired by sending the letter in terms which were too wide. It should do this by sending a further letter to the clients confirming that the Order does not give

the Claimant any right to prevent a transfer of any client; that the client is free to request a transfer of its business and the Claimant must comply with this request; and that the Order does not prevent the client and either of the Defendants from contacting one another. (In the light of my conclusion on Issue (2) above, the Defendants do not seek clarificatory letters to be sent to third party providers.)

32. In Mr Mehrzad's skeleton argument sent on the morning of 23 July, the Claimant opposed the sending of such letters on a number of grounds, including that the Court had already indicated at paragraph 113 what it expects the Claimant to do in the future. The skeleton went on to state: *"*CFM has taken the Judge's comments on board, is exercising extreme care and there is no complaint made by the Ds in relation to communications that CFM has sent to third parties following the judgment and Order".

33. However, despite the terms of this assurance, earlier that very morning, Mr Morton, one of the Claimant's IFAs, had responded by email to a client who had notified him of his decision to transfer to the Defendants. That email repeated, practically verbatim, the wording of previous emails to clients referred to at paragraphs 48 and 49 of the Judgment, and in particular included the wording of which I disapproved at paragraph 113. It later transpired that just before 1pm on that day, Mr Morton had sent an email in similar terms to another client. Just before 5pm, Mr Thomas, the Claimant's managing director, wrote to me personally, offering an explanation of how these emails had come to be written and offering profuse apologies on behalf of the Claimant to the Court and to the Defendants. Mr Mehrzad in oral argument repeated this apology and accepted that the Court was right to be very concerned about this turn of events. Whilst acknowledging this full apology, it was not clear to me from Mr Thomas' letter how Mr Morton had come to send the emails "in error", nor whether other similar emails had been sent. At my prompting, Mr Mehrzad then confirmed his instructions that the Claimant would agree to write corrective emails to all those clients to whom it had previously sent emails in the disapproved terms.

34. The corrective email will confirm that (i) the injunction does not give the Claimant any right to prevent a transfer of any client; (ii) the client is free to request a transfer of its business and the Claimant must comply with this request; and (iii) the injunction does not prevent the client from contacting the Defendants or either of them. The only remaining issue between the parties is whether the Claimant should notify the Defendants of those it has written to in these terms. I consider that it should do so: in view of the Claimant's recent conduct and the uncertain extent to which further emails have been sent; and to give the Defendants comfort that the position has been fully corrected. That notification should be limited to providing the names of the clients to whom emails in the inappropriate wording and correcting emails have been sent.

35. Accordingly the order to be made consequential upon this judgment will contain undertakings to this effect.

Issue (4): permission to appeal

36. The Defendants seek permission to appeal against the Judgment on the sole ground that the Court wrongly interpreted the test for the grant of an interim springboard injunction and thus that an appeal would have a real prospect of success. In essence the Defendants contend, as regards assessment of the "significance" of the gap between breach and

speedy trial, that the approach of Mr Edward Pepperall QC in the case of *MPT v Peel* was the correct approach and the approach I adopted was incorrect.

37. The Claimant however raises the contention that this Court has no jurisdiction to consider this application at all, since it is not made "at the hearing at which the decision to be appealed was made" within CPR 52.3(2))(a). The application was not made on Friday 17 July and there was no adjournment of the hearing to give time for an application for permission to appeal to be made.

38. In response the Defendants accept that they made no application for permission to appeal at the hearing on 17 July nor did they apply then for the hearing to be adjourned for the purpose of allowing such an application to be made subsequently. Nevertheless they submit that the effect of what happened at the close of the hearing on 17 July 2020 - after oral argument following hand down of the written judgment - was that "the hearing" was adjourned until the further hearing the following week. The "hearing" therefore continued over to cover the written exchanges between the parties and the Court on Monday 20 July. Thus, the application for permission, made at 1222pm on Monday 20 July, was made "at the hearing at which the decision … was made".

39. The position is governed by CPR 52.3(2)(a) and Practice Direction 52A para. 4.1(a) as explained in *Lisle-Mainwaring v Associated Newspapers Ltd* [2018] EWCA Civ 1470 [2018] 1 WLR 4766 at §§15-22; see also *The White Book Service 2020* Vol 1 §52.3.7. In short, an application for permission to appeal to the lower court must either be made at the hearing when judgment is given or at some later date to which the hearing is then adjourned *for that purpose*. Absent these circumstances, there is no power to grant a "retrospective adjournment" to allow consideration of a subsequent application for permission.

40. In the present case, the question here is whether the hearing on 17 July was "adjourned". I have not found this an easy question to answer. First, the mischiefs to which the relevant principles are addressed (see *Lisle-Mainwaring,* supra, at §§16, 20) do not arise here: it was clear that this Court's involvement with the case would continue and papers would not be returned; the issues remained fresh in everyone's mind by the time the application for permission was made and came to be considered; and the Claimant, the potential respondent, would clearly have, and has had, the opportunity of making submissions on the application for permission. Secondly, if the Defendants had notified the Court of their application for permission to appeal before the Order was approved at 1210pm on 20 July, then their case that the application had been made in time would have been stronger, on the basis that "the hearing" was continuing, at least pending the making of the order consequent upon the Judgment. Further the Defendants can feasibly argue that, by that time, it was clear that Issue (1) was still a live issue and the content of the Schedule was thus going to be subject to further argument at the further hearing later that week.

41. However, this approach is made difficult by the fact that the Order *was* made and the issue of permission to appeal was not raised until *after* the Order was made. In those circumstances, even if "the hearing" continued over until Monday morning, it is difficult to conclude that it continued after the Order and that the hearing on 24 July was merely a continuation of "the hearing" which had been adjourned on 17 July.

42. On balance, I conclude therefore that the application for permission to appeal was not made "at the hearing at which the decision to be appealed against was made"; and I have no jurisdiction to consider the application.

43. Finally, if, contrary to the foregoing, I had had jurisdiction, I would have refused the Defendant's application. As explained in paragraphs 63, 64, and 65 (first sentence) of the Judgment, the "important point of principle" (as to the correct approach to where or not the "gap" is "significant") identified at paragraph 42 and 41(iv) of the application for permission does not arise for determination on the facts of this present case.

Conclusions

44. For the reasons set out above, my conclusions are as follows:

(1) The Schedule to the Order will be varied by the removal of a number of clients there identified.

(2) I refuse the application to make a declaration in relation to third party conduct. The wording of the Order will be modified, so as to remove the terms of paragraph 1.2, and with the inclusion of alternative wording along the lines set out in paragraph 25 above.

(3) The Claimant will give undertakings to send corrective emails to certain identified clients, providing the names of those clients to the Defendants.

(4) I have no jurisdiction to consider the Defendants' application for permission to appeal against the Judgment.

If not agreed, the form of order consequential upon this judgment and any other consequential matters are to be addressed by the parties, in the first instance, by way of written submission. For the purposes of any application for permission to appeal from this judgment, I formally adjourn the hearing.