Neutral Citation Number: [2021] EWHC 1887 (QB)

Case No: QB-2020-004498

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 06/07/21

Before :

MR JUSTICE CAVANAGH

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Between :

(1) CREDICO MARKETING LIMITED **(2) PERDM TRADING LIMITED**	**Claimant**
- and -	
(1) BENJAMIN GREGORY LAMBERT **(2) S5 MARKETING LIMITED** **(3) GILLES JEAN BAUDET** **(4) POWER 21 LIMITED** **(5) INTERACTIVE LIMITED**	**Defendant**

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John Mehrzad QC and **Matthew Sheridan** (instructed by **Addleshaw Goddard**) for the **Claimants**
Paul Casey (instructed by **Brandsmiths**) for the **First and Second Defendants**

Hearing date: 18 June 2021

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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.

Mr Justice Cavanagh:

1. On 4 June 2021, I handed down judgment after a speedy trial in this matter ([2020] EWHC 1504 (QB)). The speedy trial dealt with liability and with injunctive and declaratory relief. At the end of the judgment, I said that I would hear from counsel in due course about the terms of the order that I should make (in so far as the terms were in dispute), and about consequential matters. A hearing took place on 18 June 2021, at which the parties filed detailed skeleton arguments and made oral submissions on these matters.

2. So far as the outstanding issues relating to the terms of the injunctive and declaratory relief are concerned, these have now been resolved by agreement between the parties. The Claimants accept that the order in relation to their claims for relief for misuse of confidential information obligations should be made in the following terms:

> "The claims for an injunction and/or for damages and/or for an account of profits in connection with the alleged misuse of the Claimants' allegedly confidential information pleaded in paragraphs 58, 62, 65, 70(b), 71(b) and 75 to 80 of the Particulars of Claim are dismissed."

3. The Claimants also sought a declaration that they were entitled to interim injunctive relief in the terms that were granted by Jacobs J, by consent, on 22 December 2020. During oral argument on 18 June 2021, it became clear that the reason why the Claimants sought a declaration in these unusual terms was so as to close off any possibility that the First and Second Defendants might seek to enforce the cross-undertaking as to damages that was offered on 22 December 2020. In the event, Mr Casey, counsel for the First and Second

Defendants, made clear in open court that the First and Second Defendants had no intention of applying to enforce the cross-undertaking as to damages and, in those circumstances, the Claimants did not persist with their application for a declaration that they had been entitled to the interim injunctive relief that was granted by consent on 22 December 2020. In any event, I would have been reluctant to grant such relief. In my judgment, it would not ordinarily be appropriate for a judge to grant a declaration which, in effect, expressed a view about the relief that another judge would have granted some six months previously, if an interim hearing that was disposed of by consent had been effective.

4. The issues that remained for the consequentials hearing on 18 June 2021 were as follows:

(1) What order should be made for the costs of the speedy trial (and of the costs that had been incurred in relation to hearings at earlier stages in these proceedings, in respect of which the order had been "costs reserved" or "costs in the case")?;

(2) If an award of costs is being made at this stage, should the Claimants be awarded a sum by way of interim payment in respect of costs, and, if so, what should that sum be?;

(3) Should the Claimants be granted permission to re-amend the Claim Form and amend the Particulars of Claim so as to add claims for the torts of: (a) unlawful means conspiracy; and (b) unlawful interference?; and

(4) Should the First and Second Defendants be granted permission to appeal against my judgment of 4 June 2021?

5. I will deal with these issues in turn. I will not repeat the findings of fact or summarise the rulings that I made in the judgment dated 4 June 2021, to which reference can be made. I will use the same definitions and abbreviations as I used in that judgment.

(1) and (2) Costs

The Claimants' argument

6. The Claimants seek the costs of speedy trial, and of the earlier hearings at which costs were reserved or were ordered to be costs in the case.

7. On behalf of the Claimants, Mr Mehrzad submitted that the general rule is that the successful party should be awarded its costs. The impecuniosity, or potential impecuniosity, of the unsuccessful party is not a reason for the court to decline to award costs.

8. Mr Mehrzad submitted that the Claimants were successful in these proceedings. The central issue in this case was the enforceability of the pre- and post-termination restrictions in paragraphs 21.1 and 21.2 of the Trading Agreement respectively. He said that the Claimants were successful on this issue. They were also successful with their argument that the Trading Agreement and Guarantee had been novated in 2017. Still further, they established that Mr Lambert and S5 had breached the pre-termination restriction. They were successful in establishing that the restrictions that Mr Lambert and S5 had

agreed to in the Undertakings were legally binding upon them. He accepted that the Claimants had not been successful on every issue at the speedy trial, but he submitted that this was not an appropriate case for an issue-based or claim-based costs award. The Claimants were the overall winners. Moreover, he submitted that it would not be appropriate to postpone a decision on costs until the determination of the quantum stage of the proceedings, because the key issue at the speedy trial was the enforceability of the covenants, and that had been determined. A quantum hearing may well be more than a year away and it would be wrong to deprive the Claimants of their costs for this length of time. He submitted that this case is not primarily about damages, but is about a point of principle concerning the enforceability of the two restrictive covenants.

9. In addition, Mr Mehrzad submitted that the court should take account of the unreasonable conduct of Mr Lambert and S5 when deciding whether to award costs at this stage. He said that the Defendants had relied on some points that were hopeless, for example the novation and Statute of Frauds points. They had made factual assertions in the defence about the extent of Mr Lambert and S5's dealings with ESM and the 60 Second Challenge which the court had rejected. Mr Mehrzad said that Mr Lambert had behaved unreasonably in deleting the WhatsApp group for ISAs who were involved in the 60 Second Challenge and in wiping his home computer. He had refused to pay the outstanding charges for the Jump-Manchester email account which meant that he was not in a position to disclose the emails from that account until mid-April 2021. This meant that the Claimants were, at that stage, provided with a "data dump" consisting of 8,000 emails and some 20,000 documents which needed to be reviewed or checked. Still further, he submitted that the parts of the claim

which were unsuccessful, specifically the claims for misuse of confidential information and for delivery-up, were not brought unreasonably. Although there had been no offers to settle, the Defendants had been invited to concede liability in open correspondence.

10. Mr Merhzad submitted that the Claimants are also entitled to the costs of the interim application which resulted in the consent order of 22 December 2020 because they were successful in obtaining a declaration that the pre-termination restrictive covenant in clause 21.1 of the Trading Agreement was binding and they were successful in obtaining a final injunction to enforce the post-termination restriction in clause 21.2.

11. As for an interim payment in respect of costs, the Claimants seek an interim payment on account, pursuant to CPR 44.2(8), in the sum of £567,449, being 60 per cent of the Claimants' total costs claimed, which are £945,748.54 (not including the costs of the amendment application).

The Defendants' arguments

12. On behalf of Mr Lambert and S5, Mr Casey's first submission was that the court should postpone consideration of costs as they relate to the issues concerning the pre-termination restriction in clause 21.1 of the Trading Agreement (and the equivalent restrictions in the Guarantee and the Undertakings) until after the quantum hearing. Mr Casey submitted that the authorities show that the decision on costs should be deferred if there is a real possibility that the outcome of a later stage in the proceedings may make a difference to the decision on costs. He submitted that, in light of the evidence before the court at the summary

trial, and in light of my findings as regards the extent of the breaches by Mr Lambert and S5, there was a real possibility that the damages flowing from the breaches of clause 21.1 were minimal. They may be no more than a few hundred pounds. He said that the schedule of loss filed by the Claimants, which claimed losses of about £1.9 million, was inflated, and did not take account of the impact that the Pandemic would have had on Credico's business in any event. This was a relevant consideration when deciding whether the Claimants should be awarded the costs of the speedy trial and the hearings that took place prior to the summary trial, as these would represent the bulk of the costs of the litigation overall. He submitted that a decision on costs on this issue should be postponed until after the quantum hearing, so as to enable the Defendants to submit that the court should take account of the level of damages when deciding who was the real winner or loser of the proceedings.

13. Mr Casey accepted that he could not make a similar submission in relation to the parts of the proceedings that were concerned with the enforceability of the post-termination restriction, in clause 21.2 (and the equivalent restrictions in the Guarantee and the Undertakings). This was because the only relief sought by the Claimants in the Claim Form in relation to the restriction in clause 21.2 was injunctive and declaratory. There was never any possibility that the claim in relation to clause 21.2 would proceed to a quantum hearing, since the interim injunction was obtained before the Trading Agreement had terminated. Mr Casey accepted that the post-termination restrictions had been litigated to finality. The same applies to the claims for misuse of confidential information and delivery up, in which the Claimants were unsuccessful.

14. So far as the issues which have been litigated to finality are concerned, Mr Casey submitted that the Claimants were only partially successful. They were successful in obtaining findings to the effect that the post-termination restrictions in Clause 21.2, and in the Guarantee and Undertakings, were enforceable. But the Court also found that the Defendants had not breached the post-termination restrictions, and found that the Defendants were not entitled to injunctive relief in relation to confidential information and/or know-how, or in relation to the delivery up of documents. Mr Casey submitted that this means that the Claimants were granted only one of the four orders for injunctive or final relief sought in the Particulars of Claim.

15. Moreover, Mr Casey submitted that the main thrust of the Claimants' arguments in favour of the enforceability of the covenants was that they were justified by the Claimants' legitimate business interests in the protection of the know-how and confidential information which they had passed on to Mr Lambert and S5. He submitted that this was presented by the Claimants as the central issue in the case. The court had not been persuaded by the Claimants' submissions and evidence about the central importance of know-how and confidential information.

Discussion

General principles relating to costs

16. It is common ground between the parties that, since the speedy trial was a multi-day hearing, it would not be appropriate for the court to make a summary assessment of costs. Whatever the nature of the court's order on costs, it must

involve a detailed assessment of costs under CPR 44.6(1)(b). There was no suggestion that costs should be awarded on an indemnity basis.

17. The general rule about costs is that costs follow the event, but this is not the inevitable outcome: the court must take account of all of the circumstances of the case. This is set out in CPR 44.2, which states, in relevant part, that:

> "44.2
>
> (1) The court has discretion as to –
>
> (a) whether costs are payable by one party to another;
>
> (b) the amount of those costs; and
>
> (c) when they are to be paid.
>
> (2) If the court decides to make an order about costs –
>
> (a) the general rule is that the unsuccessful party will be ordered to pay the costs of the successful party; but
>
> (b) the court may make a different order.
>
> ….
>
> (4) In deciding what order (if any) to make about costs, the court will have regard to all the circumstances, including –
>
> (a) the conduct of all the parties;
>
> (b) whether a party has succeeded on part of its case, even if that party has not been wholly successful; and
>
> (c) any admissible offer to settle made by a party which is drawn to the court's attention, and which is not an offer to which costs consequences under Part 36 apply.
>
> (5) The conduct of the parties includes –
>
> (a) conduct before, as well as during, the proceedings and in particular the extent to which the parties followed the Practice Direction – Pre-Action Conduct or any relevant pre-action protocol;
>
> (b) whether it was reasonable for a party to raise, pursue or contest a particular allegation or issue;

> (c) the manner in which a party has pursued or defended its case or a particular allegation or issue; and
>
> (d) whether a claimant who has succeeded in the claim, in whole or in part, exaggerated its claim.
>
> (6) The orders which the court may make under this rule include an order that a party must pay –
>
> (a) a proportion of another party's costs;
>
> (b) a stated amount in respect of another party's costs;
>
> (c) costs from or until a certain date only;
>
> (d) costs incurred before proceedings have begun;
>
> (e) costs relating to particular steps taken in the proceedings;
>
> (f) costs relating only to a distinct part of the proceedings; and
>
> (g) interest on costs from or until a certain date, including a date before judgment.
>
> (7) Before the court considers making an order under paragraph (6)(f), it will consider whether it is practicable to make an order under paragraph (6)(a) or (c) instead.
>
> (8) Where the court orders a party to pay costs subject to detailed assessment, it will order that party to pay a reasonable sum on account of costs, unless there is good reason not to do so."

18. It is clear, therefore, that the Court may (i) take account of the conduct of the parties in the litigation, including whether it was reasonable to take a particular point; (ii) make an issues-based costs award (CPR 44.2(6)(f)), having taken into account whether it is practicable to do so; and (iii) must order a payment on account of costs unless there is a good reason not to do so (CPR 44.2(8)). It is also clear, as will be seen, that the court has a discretion to postpone a decision on costs at the liability stage until quantum has been decided.

Should a decision on the costs incurred so far, in relation to the enforceability of clause 21.1, be postponed until after quantum has been decided?

The guidance in the authorities

19. In **Weil v. Mean Fiddler Holdings Limited** [2003] EWCA Civ. 1058, the claimant appealed against the decision of the trial judge to postpone the issue of costs after the liability hearing until after the quantum hearing, on the basis that there was a possibility that the claimant might recover nil or nominal damages at the quantum stage. The Court of Appeal held that the trial judge had been entitled to take this course. At paragraph 31, Lightman J, giving the judgment of the court, said that in any ordinary case in the absence of special circumstances, the general principles relating to costs would be likely to lead the court to make an order for costs in favour of the claimant who succeeded on liability. At paragraph 32, Lightman J said that, not without hesitation, he had reached the conclusion that it was not possible to say that the judge's decision to postpone consideration of costs in the **Mean Fiddler** case was clearly one that he was not entitled to reach.

20. At paragraph 33, Lightman J said:

> "33. The fact that only nominal damages are awarded after a single trial of the issues of liability and damages in the circumstances of a particular case may constitute grounds for refusing the claimant his costs or his full costs of the issue of liability. There is much to be said for the view that the incidence of costs should be the same whether or not for case management reasons there has been an order for a split trial and whether or not the order for a split trial was made on the initiative of the claimant or the defendant. If this is so, in the case where there is a split trial and it is left uncertain until conclusion of the trial on

> quantum whether the claimant will recover more than nominal damages, it may be proper for the trial judge to defer making any order for the costs of the trial of the issue of liability until the final outcome of the action is known. This may be the case whenever the judge considers that there is a real possibility that the outcome of the assessment of damages may affect the merits of the parties' entitlement to the costs of the issue of liability. If the Judge forms the view that it does, he must consider carefully whether justice to the defendant requires him to postpone any decision on costs until the final outcome of the action is known. I do not think that the Judge's decision in the exercise of his discretion to follow this course in this case and postpone the decision on costs can or should be disturbed."

21. I agree with Mr Casey that the principle to be derived from this passage is that which was identified by Birss J in **Unwired Planet International Limited v. Huawei Technologies Co & Ors.** [2015] EWHC 3837 (Ch), at paragraph 24, namely that:

> "… if the court considers there is a real possibility that the outcome of the hearing which is to take place at the overall conclusion, may affect the merits of the parties' entitlement to costs of the issue which is before the court right now, then it would be appropriate to consider carefully whether to postpone the decision on costs."

The application of the relevant principle to the present case

22. Applying that principle to the present case, I have come to the conclusion that it is not appropriate to postpone the decision on costs relating to the enforceability of clause 21.1 until the issue of quantum has been decided.

23. This is for a number of cumulative reasons. The primary one is that, unlike the **Mean Fiddler** case, this is not a case in which the only relief that was sought by the Claimants in relation to clause 21.1 was damages. They also sought, and obtained, interim injunctive and final declaratory relief. It was of real significance to Credico, and to its business model, to obtain a ruling on the enforceability of clause 21.1, irrespective of whether Credico is successful in

obtaining significant damages from Mr Lambert and S5. Put bluntly, this is not a case that is all about damages. The Defendants could have conceded on liability and defended the claims for damages on the basis that Credico's actual losses were minimal, but they chose to deny that clause 21.1 and 21.2 were enforceable and this meant that these issued had to be litigated.

24. Second, whilst it is true that, on the basis of my findings at the speedy trial on liability, the profit made by Mr Lambert and S5 from their breaches of clause 21.1 in late November and early December 2020 were very small, probably less than £1,000, this does not mean, inevitably, that Credico's claim for damages will result in an award of minimal damages. Credico is not seeking an account of profits. The provisional schedule of loss that has been filed by Credico states that the company has lost some £1.9 million as a result of the Defendants' breaches of clause 21.1. This is on the basis that the Defendants' breaches led to the loss of 17 MCs from Credico's network, and this resulted or will result in a loss of profit of an estimated £1.9 million. Mr Casey submitted that, on the face of it, this figure appeared to be inflated and, in any event, it is improbable that a judge at the quantum stage would conclude that these breaches caused – either factually or legally – the loss of 17 Marketing Companies from Credico's Network.

25. I can see that there may be grounds for a submission on the Defendants' part that the figure claimed by Credico may be ambitious. As Mr Casey submitted, Credico will have to demonstrate that there was a causal link between the Defendants' breaches of clause 21.1 in November and December 2020 and the loss of 17 Marketing Companies from the Credico Network. However, I stress

that I have not heard any evidence or submissions on the quantum issues. The fundamental point, however, is that this is a matter that will need to be determined at the quantum hearing. If it turns out at the end of the quantum hearing that the actual damage suffered by Credico from the Defendants' breaches of clause 21.1 were minimal, this may affect the costs order that will be made in relation to the quantum stage of these proceedings, but, in my judgment, there is no real possibility that it will affect the apportionment of costs arising from the speedy trial and the interim injunction proceedings.

26. Third, in my view the distinction that Mr Casey's submission seeks to draw between the claim relating to the pre-termination and post-termination restrictions is an artificial one. The reasons why clause 21.1 was enforceable are also the reasons why clause 21.2 were enforceable. The "legitimate interest" arguments were the same. The arguments based on novation and the Statute of Frauds applied to both clauses. Similarly, the arguments about the enforceability of the Undertakings were the same for the undertaking about pre-termination restrictions and the undertaking about the post-termination restrictions. The costs of the claim relating to clause 21.1 and the pre-termination restrictions cannot realistically be separated from the costs relating to clause 21.2 and the post-termination restrictions. This serves to reinforce the conclusion that the outcome of the assessment of damages for breach of the pre-termination restrictions should not affect the award of costs for the liability stage. The claim in relation to post-termination restrictions was never about damages.

Should there be an issues-based costs award?

The guidance in the authorities

27. The starting point, as CPR 44.2(2) makes clear, is that the successful party should be awarded its costs. However, CPR 44(6) makes clear that a partial or issues-based costs award may be made.

28. The relevant principles were helpfully submitted by Mann J in **Sycamore Bidco v Breslin** [2013] EWHC 583 (Ch), at paragraphs 11 and 12:

> "11. The principles on which I should determine this dispute were not themselves disputed. Many are set out in the judgment of Jackson J in **Multiplex v Cleveland Bridge** [2009] Costs LR 55:
>
> "(i) In commercial litigation where each party has claims and asserts that a balance is owing in its own favour, the party which ends up receiving payment should generally be characterised as the overall winner of the entire action.
>
> (ii) In considering how to exercise its discretion the court should take as its starting point the general rule that the successful party is entitled to an order for costs. (iii) The judge must then consider what departures are required from that starting point, having regard to all the circumstances of the case.
>
> Where the circumstances of the case require an issue-based costs order, that is what the judge should make. However, the judge should hesitate before doing so, because of the practical difficulties which this causes and because of the steer given by Rule 44.3(7) [now 44.2(7)].
>
> In many cases the judge can and should reflect the relative success of the parties on different issues by making a proportionate costs order.
>
> In considering the circumstances of the case the judge will have regard not only to any Part 36 offers made but also to each party's approach to negotiations (insofar as admissible) and general conduct of the litigation.
>
> …

(viii) In assessing a proportionate costs order the judge should consider what costs are referable to each issue and what costs are common to several issues. It will often be reasonable for the overall winner to recover not only the costs specific to the issues which he has won but also the common costs.

12. In addition:

The fact that a party has not won on every issue is not, of itself, a reason for depriving that party of part of its costs.

'There is no automatic rule requiring reduction of a successful party's costs if he loses on one or more issues. In any litigation, especially complex litigation such as the present case, any winning party is likely to fail on one or more issues in the case. As Simon Brown LJ said in **Budgen v Andrew Gardner Partnership** [2002] EWCA Civ 1125 at paragraph 35: "the court can properly have regard to the fact that in almost every case even the winner is likely to fail on some issues" … (Gloster J in **Kidsons v Lloyds Underwriters** [2007] EWHC 2699 (Comm))."

The reasonableness of taking a failed point can be taken into account (**Antonelli v Allen** The Times 8th December 2000 per Neuberger J).

The extra costs associated with the failed points should be considered (**Antonelli**). (iv) One still has to stand back and look at the matter globally, and consider the extent, if any, to which it is just to deprive the successful party of costs (**Antonelli**).

(v) The conduct of the parties, both before and during the proceedings, is capable of being relevant (CPR 44.3(5))."

8. In **J Murphy & Sons Ltd v Johnson Precast Ltd (No.2)** [2008] EWHC 3104 (TCC); [2009] 5 Costs LR 745, Coulson J said, at paragraph 10:

"In civil litigation it is almost inevitable that there will have been some point or argument, raised by the otherwise successful party but rejected by the judge, which will have added to the length of the trial. In my view, the mere fact that the successful party was not successful on every last issue cannot, of itself, justify an issue-based costs order."

Applying these principles to the present case

29. In my judgment, it is not appropriate to make an issue-based costs order in the present case. The Claimants are entitled to the full costs of the speedy trial and of the earlier stages of these proceedings (for which costs were reserved or were stated to be costs in the case).

30. There is no doubt, in my view, that Credico was the overall winner of the speedy trial on the liability issues. I rejected the Defendants' arguments on novation and on the Statute of Frauds. I found that Credico could rely upon the Guarantee as against Mr Lambert. I found that the restrictions in clause 21.1 and 21.2 of the Trading Agreement and the equivalent restrictions in the Guarantee went no further than reasonably necessary to protect Credico's legitimate business interests, and so were enforceable. I found in Credico's favour in relation to the arguments on the meaning and scope of the restrictions. I found that the Undertakings that Mr Lambert had provided on his own and S5's behalf in December 2020 were plainly enforceable. Even if the restrictions in the Trading Agreement and the Guarantee had not been enforceable, the ruling on the enforceability of the Undertakings freely offered by Mr Lambert in December 2020 in return for an agreement not to take proceedings against him would have been sufficient to mean that Credico was successful in obtaining the declaratory and injunctive relief sought at the speedy trial.

31. There were three respects, however, in which the Claimants were unsuccessful, or at least were not substantially successful.

32. Mr Casey was right, in my view, to submit that a major plank of Credico's argument in relation to the strength of its legitimate business interests and the enforceability of the restrictions was the importance of the know-how and

confidential information which Credico had imparted to MCs and their owners, including S5 and Mr Lambert. I was not persuaded by this part of Credico's argument. I took the view that the importance of the know-how in documents that were passed on to MCs was somewhat exaggerated by Credico's witnesses. As I said at paragraph 140 of my judgment, the know-how was certainly of some assistance, but it was not of great value, and it was not as valuable as the Claimants' witnesses claimed that it was. I did not accept that the material that was relied upon by Credico as being confidential information had the necessary quality of confidentiality at all. The much more important and valuable assistance that was provided by Credico to MCs consisted of the ready-made clients, the processing of sales and commission, and the back-office support, and these were the foundations for the legitimate business interests that justified the restrictions.

33. However, I do not think that this provides a good reason for an issue-based costs award. The fact that I, as the judge, took a different view from that put forward by Credico as regards the relative significance of the factors that made up the legitimate business interests is not a reason to reduce the costs award to Credico. The fact remains that Credico succeeded in establishing that it had legitimate business interests and the restrictions went no further than was required to protect those interests. In my judgment, Credico was fully justified in leading evidence in relation to the know-how and confidential information issues, as this evidence played its part in building up a full picture of the nature of the relationship between Credico and Mr Lambert/S5. Also, I found that the provision of know-how was of some assistance to the MCs.

34. A further relevant consideration is that the Claimants were also successful in relation to the enforceability of the Undertakings. So far as the Undertakings were concerned, the extent of the know-how and confidential information was irrelevant. In other words, there was a simple and straightforward reason why Credico was entitled to the main relief sought, for which the Defendants' arguments on know-how and confidential information were of no relevance.

35. The second respect in which the Claimants' claim was unsuccessful was in respect of the claims for misuse of confidential information and for delivery-up of documents. So far as the claims for misuse of confidential information was concerned, I decided that the material did not have the necessary quality of confidentiality. So far as the claim for delivery-up was concerned, I took the view that there was insufficient evidence that Mr Lambert was withholding documents.

36. In my judgment, the Claimants' failure on these parts of their claims do not provide a good reason for an issue-based costs award. It was not unreasonable for the Claimants' to advance these arguments. The argument that the material had the necessary quality of confidentiality was not self-evidently hopeless. There were proper grounds for suspicion that Mr Lambert had paid insufficient attention to any obligations of confidentiality that he might be under, and/or had not delivered up all relevant documents. These suspicions were engendered by Mr Lambert's deletion of his WhatsApp group, the wiping of his home computer, and the late delivery of emails from the Jump-Manchester account. Furthermore, the evidence relating to misuse of confidential information and delivery-up entirely overlapped with the evidence that would have been led in

any event on the issues relating to legitimate interests and breach. In particular, the allegations relating suspicious activity relating to the WhatsApp group etc were directly relevant to the allegations of breach. Moreover, the time spent in submissions on these issues was very limited. It follows that the Claimants' unsuccessful arguments on these issues did not materially increase the costs of the speedy trial and so there is no valid basis for a reduction in the costs award to the Claimants.

37. The third respect in which the Claimants' claim was unsuccessful was that the scale of the breaches of the pre-termination restrictions that I found to have taken place in late November and early December 2020 was somewhat less than the Claimants were alleging. However, once again this is not a good reason to adjust the costs award. The fact remains that I found that Mr Lambert and S5 had acted in breach of the pre-termination restrictions. The extent of the losses suffered by Credico as a result of those breaches is a matter for the quantum hearing, not the speedy trial. Also, it was inevitable that, in bringing these proceedings, Credico would not have had a full picture of the scale of the breaches, because this was in the knowledge of Mr Lambert but was not known to Credico, as the competitive activity had been concealed from Credico. It was reasonable for Credico to explore this issue in evidence.

38. For the above reasons, I do not consider there to be any basis for departing from the normal principle that the unsuccessful party should pay the successful party's costs of the speedy trial and of the earlier stages in this litigation. In addition, the Claimants are entitled to the costs of interim injunction application because they were successful at trial in obtaining declaratory and injunctive

relief on the basis that the restrictions that they sought to enforce through the interim injunction application were enforceable.

39. Finally, I do not think that it is right to characterise the Defendants' conduct in these proceedings as unreasonable, for the purposes of the decision on costs. Mr Lambert and S5 were entitled to defend the proceedings and to take such points as they thought appropriate. The reason why I am awarding the costs of the speedy trial and the earlier parts of these proceedings to the Claimants is because they were the winners, not because the Defendants' behaviour was unreasonable.

Interim payment on account of costs

40. It is nowadays standard practice for a court to order an interim payment on account of costs, if the court is also making an order for a detailed assessment. The amount that should be ordered is a "reasonable amount" (CPR 44.2(8)). Often, the amount awarded by the court is 70% or 80% of the amount claimed in the schedule of costs.

41. The Claimants have filed a detailed schedule of costs. They say that their total costs are £945,748.54, and they seek an order for interim payment in the amount of £567,449, being 60 per cent of the total costs claimed.

42. On behalf of the Defendants, Mr Casey submitted that the Court should award 40% of the sum claimed. He relied on the following submissions (which I have taken from Mr Casey's skeleton argument):

i) This is ultimately a low value claim in every sense. The Claimants have obtained an injunction to prevent activities that the Defendant never engaged in or threatened to engage in, and the findings on breach of the pre-termination restrictions are unlikely to lead to substantial damages at the quantum phase.

ii) In relation to the claim for breach of the pre-termination restrictions, the Defendants admitted their involvement with ESM in their Defence, an account which the court accepted as largely accurate. This part of the case did not require enormous investigations, as opposed to whether the extent of the Defendants' involvement constituted a breach within the meaning of the restrictions.

iii) A large amount of costs were incurred by the mammoth and obviously disproportionate disclosure exercise described by Mr Ashcroft [the Claimants' solicitor], in which 17,000 documents were reviewed and initially marked as disclosable. The Claimants then had to conduct a re-think of their disclosure when the judge (Mr Justice Griffiths) who heard the Claimants' application for the confidentiality ring order required the Claimants to produce a witness statement from their solicitors – in the event Mr Ashcroft's – stating that proportionality had been taken into account when giving disclosure. The court is also invited to note the obvious heavy legal involvement in the Claimants' witness statements

for trial, such that the statements did not really reflect the witnesses' evidence.

iv) The Defendants intend to appeal.

v) The Defence of the claims is being funded by Mr Lambert, an individual who is not a wealthy man. He is not only facing a quantum phase of proceedings but also, potentially, new and substantial claims in conspiracy and unlawful interference. His means are far from limitless and will be stretched enormously by a payment on account.

43. The determination of the relevant amount of the interim payment is necessarily somewhat rough-and-ready. The sum claimed by the Claimants by way of costs is very substantial, but this is heavy litigation and speedy trials always involve heavy expenditure on legal costs, especially by claimants. I do not accept that it is a low value claim in every sense. I accept Mr Mehrzad's submission that it would not be fair to make the Claimants wait until after the conclusion of the quantum hearing before receiving any costs (and the Defendants do not contend that there should be no payment on account.) Impecuniosity or inability to pay is not of itself a good reason for the court to decline to order an interim payment on account.

44. On the other hand, there may be scope for argument about the quantum of costs at the detailed assessment. The Defendants say that a great detail of unnecessary costs were incurred in the disclosure exercise. I express no view about that, but,

doing the best I can, I have decided that the appropriate interim payment figure should be 50% of the total costs claimed. This is £472,874. This sum must be paid within 14 days of the order herein (subject to any application that the Defendants may make for a stay pending any application to the Court of Appeal for leave to appeal, in light of my decision, set out below, to refuse permission to appeal).

Conclusion on costs

45. Accordingly, I order that:

(1) The First and Second Defendants pay the Claimants' costs of and incidental to the proceedings so far (save insofar as a costs order other than costs reserved or costs in the case has already been made, and save for the costs of the Claimants' application to join the Third to Fifth Defendants);

(2) These costs are subject to a detailed assessment pursuant to CPR 44.6(1)(b); and

(3) The First and Second Defendants must make an interim payment on account pursuant to CPR 44.2(8) in the sum of £472,874, such sum (subject to further order) to be paid within 14 days of the date of this order.

(3) The amendment application

46. The Claimants filed an Application Notice on 23 April 2021 to re-amend the Claim Form and amend the Particulars of Claim so as to add claims against the Mr Lambert and S5 for unlawful means conspiracy and unlawful interference. The application to amend was supported by the Fourth Witness Statement of

Jenny Linney. In an order made by consent and dated 28 April 2021, Mr Justice Hilliard ordered that the amendment application would be heard as a consequential matter upon the handing down of judgment at the speedy trial (and that the trial of those issues would be without prejudice to any further subsequent trial on liability in respect of the amended claims). A revised version of the draft Amended Particulars was served on 9 June 2001. This deleted passages which relied upon misuses of confidential information and breaches of the injunction or order, which are not proceeded with in light of the findings that I made in my judgment dated 4 June 2021.

47. The nature of the unlawful means conspiracy which Credico wishes to amend to rely upon, in essence, is a conspiracy by Mr Lambert and S5, along with the Third to Fifth Defendants, to take over part of Credico's network of MCs. The unlawful means that are alleged are, in particular, the inducement by the Third to Fifth Defendants of Mr Lambert's and S5's breaches of contract and the inducement of breaches by other MCs of their Trading Agreements. The central purpose of this conspiracy, it is alleged, was to circumvent the contractual restrictions which applied to Mr Lambert and S5 and to the other MCs and their owners as a result of the Trading Agreements.

48. The allegation of unlawful interference is an allegation that Mr Lambert and S5 unlawfully interfered with the actions of third parties in which Credico has economic interests, i.e. other MCs in Credico's network, with the intention of causing loss to Credico. The alleged interference was the making by Mr Lambert and S5 of fraudulent representations to the other MCs and their owners to the effect that they could avoid breaching the restrictions in their Trading

Agreements with Credico by operating through newly incorporated companies. This led to the MCs terminating their Trading Agreements with Credico and so to interfere with Credico's economic interests.

49. Credico relies on a number of strands of evidence in support of the proposed amended claims. The company points out that a number of MC owners incorporated new MCs in late November or December 2020 and then gave notice of termination of their Trading Agreements with Credico in January 2021. Credico says that this is no coincidence and supports the contention that, during this period, Mr Lambert and Mr Baudet (for the Third to Fifth Defendants) were engaged in the unlawful means conspiracy and unlawful interference. Credico also relies upon WhatsApp messages between Mr Baudet and Mr Lambert in November and December 2020, which they say show that Mr Baudet were planning to entice MCs in Mr Lambert's network to move to work with the Third to Fifth Defendants. Credico further says that there is evidence that Mr Lambert was in contact with and advising the other MC owners during this period.

50. The Defendants' solicitor, Mr Hall, filed a witness statement in opposition to the application dated 16 June 2021. He made clear that the Defendants oppose the application to amend because it was made too late, and all of the facts and inferences on which the additional claims are based were known to the Claimants by early January 2021. Also, they say that they will be prejudiced by having to face a trial on the additional claims. They say that such a trial will go much further than the quantum hearing on the claims that have already been

dealt with at the summary trial. This will lead to duplication of costs, and will use up court time to the detriment of other court users.

The relevant legal principles

51. CPR 17.1(2)(b) permits a party to amend a statement of case that has already been served on another party with the permission of the court. CPR 17 does not set out the principles which the court should apply when exercising its discretion whether to do so.

52. In **Cobbold v Greenwich LBC**, 9 August 1999 (Unreported) (CA), Peter Gibson LJ said:

> "The overriding objective is that the court should deal with cases justly. That includes, so far as practicable, ensuring that each case is dealt with not only expeditiously but also fairly. Amendments in general ought to be allowed so that the real dispute between the parties can be adjudicated upon provided that any prejudice to the other party or parties caused by the amendment can be compensated for in costs, and the public interest in the efficient administration of justice is not significantly harmed."

53. In **Pearce v East and North Hertfordshire NHS Trust** [2020] EWHC 1504 (QB), Lambert J helpfully summarised the relevant principles as follows, at paragraph 10 of her judgment:

> "The legal framework is not in dispute and can be stated succinctly here. The starting point is CPR 17.3 which confers on the Court a broad discretionary power to grant permission to amend. The case-law is replete with guidance as to how that discretionary power should be exercised in different contexts. I need cite only two cases which taken together provide a helpful list of factors to be borne in mind when considering an application such as this: **CIP Properties (AIPT) Ltd v Galliford Try Infrastructure Ltd** [2015] EWHC 1345 (TCC)and **Quah Su-Ling v Goldman Sachs International**

[2015] EWHC 759 (Comm). From those cases, I draw together the following points.

(a) In exercising the discretion under CPR 17.3, the overriding objective is of central importance. Applications always involve the court striking a balance between injustice to the applicant if the amendment is refused, and injustice to the opposing party and other litigants in general, if the amendment is permitted.

(b) A strict view must be taken to non-compliance with the CPR and directions of the Court. The Court must take into account the fair and efficient distribution of resources, not just between the parties but amongst litigants as a group. It follows that parties can no longer expect indulgence if they fail to comply with their procedural obligations: those obligations serve the purpose of ensuring that litigation is conducted proportionately as between the parties and that the wider public interest of ensuring that other litigants can obtain justice efficiently and proportionately is satisfied.

(c) The timing of the application should be considered and weighed in the balance. An amendment can be regarded as 'very late' if permission to amend threatens the trial date, even if the application is made some months before the trial is due to start. Parties have a legitimate expectation that trial dates will be met and not adjourned without good reason. Where a very late application to amend is made the correct approach is not that the amendments ought, in general, to be allowed so that the real dispute between the parties can be adjudicated upon. A heavy burden lies on a party seeking a very late amendment to show the strength of the new case and why justice to him, his opponent and other court users requires him to be able to pursue it. The timing of the amendment, its history and an explanation for its lateness, is a matter for the amending party and is an important factor in the necessary balancing exercise: there must be a good reason for the delay.

(d) The prejudice to the resisting parties if the amendments are allowed will incorporate, at one end of the spectrum, the simple fact of being 'mucked around' to the disruption of and additional pressure on their lawyers in the run- up to trial and the duplication of cost and effort at the other. The risk to a trial date may mean that the lateness of the application to amend will of itself cause the balance to be loaded heavily against the grant of permission. If allowing the amendments would necessitate the adjournment of the trial, this may be an overwhelming reason to refuse the amendments.

(e) Prejudice to the amending party if the amendments are not allowed will, obviously, include its inability to advance its

> amended case, but that is just one factor to be considered. Moreover, if that prejudice has come about by the amending party's own conduct, then it is a much less important element of the balancing exercise."

Applying the relevant principles to the present case

54. Applying the principles summarised by Lambert J to the present case, I have to strike a balance between the interests of Credico, on one hand, and Mr Lambert and S5 on the other, and I must take account of the interests of other court users. It is necessary to consider whether the new claims have a real prospect of success and also whether there was a good reason for the application not being made until 21 April 2021, only about three weeks before the start of the speedy trial.

55. As for the prospects of success, I do not think that it would be right at this stage to reject the proposed amendments because they have insufficiently strong prospects of success. It is difficult to form any clear view of the prospects of success because the Defendants have not yet pleaded in response to the allegations and because it is not yet clear what evidence the Defendants may be able to rely upon in defence of the claims. The Claimants' further allegations of wrongdoing against Mr Lambert and S5 are currently based in large part upon inference and circumstantial evidence. However, I think that, on the basis of the material currently before me, the new claims are at least arguable. As Mr Mehrzad pointed out, Mr Lambert did not provide a witness statement in opposition to the amendment application. I do not think that the findings that I have made in the judgment of 4 June 2021 have made it impossible for Credico to succeed in these claims, or give rise to any estoppel in relation to the new claims and, indeed, I made clear that I was being careful not to make findings

on the central issues that arise in these new claims (see the main judgment at paragraph 167). Mr Casey made clear in his oral submissions that he did not assert that any issue estoppel arose.

56. Perhaps the most important issue is whether Credico can satisfy the heavy burden that lies on a claimant when it seeks to make a late amendment to its claim. Such a burden is particularly heavy where, as here, the amendment application widens the scope of the litigation to a considerable extent.

57. In my judgment, Credico have satisfied this burden. The key point is that the delay in making this application is justified on the basis that Credico's solicitors did not receive disclosure of the WhatsApp messages between Mr Lambert and Mr Baudet until 8 April 2021. These messages provide the main foundation for the proposed amended claims. In particular, Mr Lambert sent to Mr Baudet a photograph of a handwritten organisational chart, showing all of the MCs in his network. Other messages referred to "Get all managers & top leaders fully bought in", "The Plan – step by step", "Operational set up (P&Ls, buildings, territories, overrides, clients". Another WhatsApp message said, "Everyone needs the game plan when Credico start calling". It is true that there was some information already in Credico's possession by early January 2021 which had alerted Credico to the departure of a large number of MCs, and which gave rise to suspicion about some sort of conspiracy between Mr Lambert and Mr Baudet. Also, on 28 December 2020, Credico's CEO, Mr Attwood received an anonymous email alleging that Mr Lambert had approached MCs in his network, encouraging them to incorporate new companies to trade in competition with Credico without breaching the strict terms of the Trading

Agreements, but in my judgment Credico and its legal advisers were justified in taking the view that it was only when they saw the WhatsApp messages that they were able to take a decision about whether to apply to amend. In particular, an anonymous message of this type is not sufficient on its own to form the basis for an amendment application.

58. Credico was not at fault for the late receipt of the WhatsApp messages in April 2021. They were only made aware of their existence upon receipt of the Defence on 9 March 2021 and they then acted reasonably promptly in seeking disclosure of them (in the face of the assertion of privilege by the Defendants' solicitors). Credico and its legal advisers cannot be criticised for the delay between receipt of the WhatsApp messages on 8 April 2021 and the application to amend on 21 April.

59. It is also relevant that the late application to amend did not result in the adjournment of any hearing. The speedy trial went ahead. It would not have been realistic or desirable to deal with the new claims at the same time as the issues that were dealt with in the speedy trial. The nature of these new claims is such that the appropriate time to deal with them would be at the stage of the quantum hearing. There is a degree of overlap between the new claims and the central issue for the quantum hearing on the existing claims, as the key issue in both is likely to be the nature and extent of the connection between Mr Lambert's activities in November and December 2020 and the decision of 17 MCs in his network to stop working for the Credico network. By the same token, I do not think that the fact that the new claims will be dealt with at a later stage than the speedy trial will give rise to a duplication of issues or evidence.

60. I do not accept Mr Casey's submission that to allow this amendment would run counter to the rule in **Henderson v Henderson**, to the effect that a party should bring all of its claims at once, and that it may be an abuse of process if it fails to do so. The point in the present case is that the Claimants were not in a position to plead these additional claims when they drafted the Particulars of Claim that were filed on 3 February 2020. As I have said, they have a good reason for the delay in pleading these additional claims.

61. In these circumstances the balance of prejudice comes down in Credico's favour. On one level, the grant of permission to amend will prejudice Mr Lambert and S5, because it will open up a fresh front in the battle between the parties, but the same would have applied if the new claims had been pleaded from the outset, and, as I have said, I accept that Credico had a good reason for its failure to apply to amend until April 2021.

Conclusion

62. I grant leave to amend. Subject to any submissions (in writing) by the parties upon receipt of the draft judgment, the following consequential directions will be made:

(1) The Claimants shall file and re-serve the Amended Claim Form and Re-Amended Particulars of Claim within 7 day of the date of hand-down of this Consequentials Judgment;

(2) The First and Second Defendants shall serve their Amended Defence within 21 days thereafter;

(3) The Claimants shall file and serve any Reply within 21 days thereafter;

(4) There shall be listed a CCMC to take place on the first available date convenient to the parties after 20 September 2021 (the parties to be responsible for liaising with Queen's Bench Listing to fix the date); and

(5) The First and Second Defendants shall pay the Claimants' costs of and incidental to the application to re-amend the Claim Form and to amend the Particulars of Claim, such costs to be the subject of detailed assessment.

(4) The application for permission to appeal

63. On behalf of Mr Lambert and S5, Mr Casey sought permission to appeal. I have not been provided with draft grounds of appeal, but Mr Casey said that his clients would rely upon four grounds.

64. The issue when deciding whether to grant permission to appeal, of course, is whether the appeal would have a real prospect of success or there is some other compelling reason for the appeal to be heard (CPR 52.6(1)).

65. The first potential ground is the contention that the types of legitimate interests which I found to exist, namely (a) the provision of back-office services, assistance, and advice and (b) a steady stream of work, were not proper "legitimate interests" for the purposes of the law relating to restrictive covenants.

66. I do not think that this ground has a real prospect of success. This was not an employment case, but a case concerned with the enforcement of restrictive covenants in a contract for exclusive agency between two businesses. For the

reasons I gave at paragraphs 262-273 of the main judgment, it is clear that Credico had legitimate business interests which were capable of protection. This is supported by two Court of Appeal judgments, **Dawnay, Day & Co Ltd v de Braconier d'Alphen** [1997] IRLR 442, which made clear, at paragraph 30, that the categories of legitimate interests (at least in business rather than employment cases) are not closed, and **One Money Mail Limited v RIA Financial Services** [2015] EWCA Civ 1084**,** paragraph 18, which shows that broadly similar interests to those that existed in the present case can amount to legitimate business interests in exclusive agency cases. It is also significant that the present case was close to the borderline beyond which there is no need to justify a restriction at all: **Quantum Advisory Ltd v Quantum Actuarial LLP** [2021] EWCA Civ 227.

67. The second potential ground is that the court was wrong to find that the post-termination restriction in clause 21.2 went no further than reasonably necessary to protect the Claimants' legitimate interests. This ground does not have a real prospect of success, for the reasons given at paragraphs 278-289 of the main judgment.

68. In any event, the question of the enforceability of clauses 21.1 and 21.2 of the Trading Agreement was essentially beside the point, as Mr Lambert and S5 had given similar undertakings voluntarily in early December 2020, in return for the Claimants' agreement not to commence proceedings. The general principles which apply to restrictive covenants do not apply in the same way to restrictions voluntarily assumed in order to settle proposed litigation. There is a presumption, in these circumstances, that the restraint is enforceable: see

Thurstan Hoskin & Partners v Jewill Hill & Bennett [2002] EWCA Civ 249 (see main judgment, at paragraphs 295-296). This means that success on the first two proposed grounds of appeal would be of no practical benefit to Mr Lambert or S5.

69. The third potential ground is that the court was wrong to exercise its discretion to grant a final injunction. This is parasitic on the first two grounds and, therefore, has no real prospects of success.

70. The final potential ground of appeal is that the court was wrong in its interpretation of the words "any similar business" in paragraph 238-243 of the main judgment, and should have found that the 60 Second Challenge for ESM did not fall within this definition (and so that there had been no breach of the restrictions in this regard). For the reasons given in those paragraphs, this has no real prospect of success. In practical terms, there was no difference between the roles performed by ISAs when conducting business for Credico and when conducting the 60Second Challenge for ESM.

71. There is no other compelling reason for the appeal to be heard. Accordingly, I refuse permission to appeal.