Neutral Citation Number: [2022] EWHC 2114 (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: 8th August 2022

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**
Rory Brown (instructed by **Brandsmiths**) for the **First and Second Defendants**

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FURTHER RULING ON COSTS

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.

2. The First Claimant provides direct or face-to-face marketing services for clients by contracting with Marketing Companies ("MC") which contract in turn with Independent Sales Advisors to do the actual selling, under the guidance and support of the MC which has recruited them. The First Claimant enters into a contract known as a Trading Agreement with the MC and with the individual who runs the MC. The Second Defendant was an MC and the First Defendant was the person who owned and operated the Second Defendant. A dispute arose between the First Claimant and the First and Second Defendants (by the time of the trial, the proceedings had been discontinued against the Third to Fifth Defendants, and so I will refer to the First and Second Defendants, collectively, as the Defendants). In broad summary, the Claimants sought the following principal relief:

   (1) A ruling that a pre-termination restrictive covenant in Clause 21.1 of the Trading Agreement was enforceable and had been breached by the Defendants. The Claimants sought declaratory relief to the effect that Clause 21.1 was enforceable, plus damages for breach (which were to be determined at a later hearing);

   (2) A ruling that a post-termination restrictive covenant in Clause 21.2 of the Trading Agreement was enforceable. The Claimants sought declaratory and injunctive relief only, as it was not alleged that the Defendants had

breached 21.2 (as they had given the contractual undertakings between the dated 7 December 2020, "the Undertakings", in which they undertook to comply with Clause 21.2);

(3) A declaration that the Undertakings were binding upon the Defendants, and injunctive relief (again the Claimants did not seek damages for breach of the Undertakings, as it was not alleged that they had been breached by the Defendants); and

(4) A ruling that the Defendants had misused confidential information belonging to the Claimants, and damages and injunctive relief.

3. The issues for the Speedy Trial are summarised in more detail at paragraph 20 of my judgment after the Speedy Trial ("the Main Judgment"). In the Main Judgment, I made the following rulings:

(1) The pre-termination restrictions in Clause 21.1 were binding on the Defendants, and had been breached. The quantification of damages was a matter for a further hearing;

(2) The post-termination restrictions in Clause 21.2 were also binding on the Defendants and I granted declaratory and injunctive relief accordingly (though by the time of the Speedy Trial and the Main Judgment, the six-month period of restriction had almost expired);

(3) The Undertakings were also binding on the Defendants and so I granted declaratory and injunctive relief accordingly, which mirrored the injunctive relief I granted in relation to the post-termination restriction in Clause 21.2; and

(4) There was no actionable misuse of confidential information.

4. I should add that the position that was taken by the Defendants throughout was that, even if there had been a breach of Clause 21.1, the losses suffered by the Claimants as a result of that breach was minimal. The Claimants, on the other hand, submitted that the losses were very significant, in the region of £1.9 million. The Claimants also indicated that they intended to apply to amend the Particulars of Claim to add claims for unlawful means conspiracy and unlawful interference. These additional claims were to be concerned with the allegation that the First Defendant had encouraged other MCs to act in breach of the equivalent Clause 21 restrictions in their Trading Agreements with the Claimants.

5. Since the Main Judgment was handed down, there have been three major developments in the litigation between the parties.

6. First, on 6 July 2021, after hearing further argument, I handed down a further judgment ("the Consequentials Judgment"), which dealt with costs and other matters. I awarded the Claimants the entirety of the costs of and incidental to the proceedings so far, including the Speedy Trial (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). These costs were to be subject to detailed assessment pursuant to CPR 44.6(1)(b) if not agreed. I also ordered that the Defendants were required to make an interim payment on account pursuant to CPR 44.2(8) in the sum of £472,874.

7. Second, the Defendants sought and obtained permission to appeal to the Court of Appeal. On 8 August 2021, when granting permission to appeal, Bean LJ stayed the costs orders that I had made, including the order for interim payment on account. So far, therefore, the Defendants have not paid anything by way of costs to the Claimants in respect of the Speedy Trial.

8. The Court of Appeal (Underhill and William Davis LJJ, and Sir Patrick Elias) handed down its judgment on the appeal on 23 June 2022 ([2022] EWCA Civ 864). The Court of Appeal dismissed the Defendants' appeal regarding the enforceability of the pre-termination restraint in Clause 21.1, and allowed the Defendants' appeal in relation to the post-termination restraint in Clause 21.2, holding that it was not enforceable. The Defendants did not appeal against the ruling that the Undertakings were enforceable.

9. In the sealed Order that was made by the Court of Appeal on 4 July 2022, the Court made no order for costs of the appeal, and refused permission to the Claimants to appeal to the Supreme Court on the Clause 21.2 issue. As for the costs of the action up to and including the Speedy Trial, the Court of Appeal made the following order:

> "5. Mr Justice Cavanagh's costs order 6 July 2021 be discharged, and the issue of the costs of the action, including any order for interim payment, be remitted to him for re-determination in the light of the outcome of the appeal. The re-determination shall, unless Mr Justice Cavanagh directs otherwise, be on the basis of written submissions from each party (not exceeding five pages), such submissions to be filed by no later than 4 pm on 19 July 2022, with liberty to either party to file written submissions in response (not exceeding three pages) by 4 pm on 26 July, the costs of those submissions not to be recoverable by either party."

10. The Court of Appeal dealt with costs at paragraphs (1) and (2) of its Reasons for the order, as follows:

> "(1) It is just that there be no order as regards the costs of the appeal since each party succeeded on one of the two substantive issues before the Court. The Court rejects the argument that the Appellants' success as regard the validity of the post-termination restraints was insubstantial because of the Undertakings. For the reasons given in the judgment of Sir Patrick Elias, that issue cannot be regarded as academic; and it is immaterial in this context that the Appellants' defence has since been struck out (quite apart from the fact that there is apparently a pending appeal). The costs of the stay application can fairly be treated as part of the costs of the appeal.
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> (2) The same approach cannot be taken to the costs before Mr Justice Cavanagh. where the issues were wider, but in the light of this Court's decision on the post-termination restraints in the contract his order that the Appellants pay the totality of the Respondents' costs cannot stand. The argument that the issue was academic is rejected for the same reason, though it is in truth a fortiori given the prominence given to it before Mr Justice Cavanagh. This Court is not in a position to make a fair determination of what the proper order as to costs should be, and that issue (including the Appellants' submission that any order for costs be deferred) must accordingly be remitted for reconsideration in the light of the circumstances as they now are. This Court is anxious to ensure that the issue of costs is dealt with as economically as possible, hence the restrictions on the parties' submissions. Mr Justice Cavanagh is very familiar with the case, and the specifications as to length of the submissions lodged are maxima, not targets."

11. In accordance with the order of the Court of Appeal, I have received written submissions on costs from Mr Rory Brown, who represents the Defendants. Mr Brown represented the Defendants before the Court of Appeal, but not at the Speedy Trial. I have also received written submissions and brief reply submissions from Mr John Mehrzad QC and Mr Matthew Sheridan on behalf of the Claimants. Mr Mehrzad QC and Mr Sheridan appeared for the Claimants both at the Speedy Trial and in the Court of Appeal.

12. The third development in these proceedings is that, as anticipated at the time of the Speedy Trial, the Claimants amended their claims against the Defendants, by adding claims for unlawful means conspiracy and unlawful interference. In an order dated 20 May 2022, Martin Spencer J entered judgment in default against the Defendants in respect of these additional claims. He also ordered that a Case Management Conference with a time-estimate of 1/2 day should be listed on a date convenient to the parties and not before 19 September 2022 for the purpose of giving directions in relation to the assessment of the damages for which the Defendants are liable on the claims for unlawful means conspiracy and unlawful interference.

13. The judgment in default was entered because the Defendants had failed to comply with several Unless Orders made by Martin Spencer J, under which the Defendants were required to provide information to the Claimants. The Defendants have applied for permission to appeal to the Court of Appeal against Martin Spencer J's order.

14. Martin Spencer J also ordered that the Defendants were required to make an interim payment on account of the Claimants' costs of and occasioned by the claims for unlawful means conspiracy and unlawful interference pursuant to CPR 44.2(8) in the sum of £100,000, such sum to be paid by way of cleared funds to the First Claimant's bank account within 14 days of the date of this Order, with the Claimants' costs of those claims to be subject to assessment forthwith on the standard basis if not agreed.

15. In addition, Martin Spencer J ordered that the Defendants pay forthwith to the Claimant various outstanding sums which they had already been ordered to

pay in relation to matters that had arisen since the Speedy Trial. There were outstanding costs orders in the sums of £9,837, £5026.66, £8,063.33, £7,557.01, plus interest, together with the Claimants' costs of the default judgment application, in the sum of £35,000. This is a total of £65,484, plus interest.

16. I should add that, at paragraph 7(c) of their submissions to me on costs, following on from the Court of Appeal judgment, Mr Mehrzad QC and Mr Sheridan said that,

> "D1-2's Amended Defence has been struck out by the Order of Martin Spencer J dated 19 May 2022 by reason of their non-compliance with unless orders. D1-2 will therefore play no part in the determination of: (i) damages in respect of D1-2's breach of clause 21.1 of the Trading Agreement; or (ii) liability and/or damages in respect of Cs' additional claims of unlawful means conspiracy and unlawful interference."

17. I have to say that it is not clear from the order of Martin Spencer J dated 19 May 2022 that the Defendants have been debarred from taking part in the assessment of damages for the breach of Clause 21.1 and for the claims of unlawful means conspiracy and unlawful interference. The order of Mr Justice Spencer simply states that,

> "There be judgment on liability for the Claimants against the First and Second Defendants on the claims for unlawful means conspiracy and unlawful interference."

and makes provision for a CMC, attended by both parties, to be listed to make arrangements for a hearing to assess damages for the unlawful means conspiracy and unlawful interference. The order does not state in terms that the Defendants are debarred from participating in the remedies hearings, and the fact that the order provides that the Defendants shall be represented at the

CMC suggests that it is anticipated that the Defendants will take part in the remedies hearing. On the other hand, I note that at paragraph 62 of the judgment of Martin Spencer J, giving reasons for his order of 19 May 2022, he said that "The defence accordingly stands struck out and the order shall [record] that." I should make clear that the decision which I have taken about costs, as set out in the remainder of this ruling, would be the same whether or not the Defendants are barred from taking part in the assessments of damages for the breach of Clause 21.2 and/or the claims for unlawful means conspiracy and unlawful interference.

18. It follows from the above that the remaining stages in the litigation consist of the assessment of damages for breach of clause 21.1 and also the assessment of damages for the claims for unlawful means conspiracy and unlawful interference. The sole issue currently before me is concerned with the costs of the action up to and including the Speedy Trial (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), including interim payment of costs. The sums involved are very substantial. The costs claimed by the Claimants are just under £1 million.

19. It is clear from the parties' most recent submissions on costs that they take a radically different view as regards the outcome of the Speedy Trial, in light of the Court of Appeal's ruling.

The Defendants' submissions

20. The Defendants submit that, in light of the Court of Appeal's judgment, the landscape has changed entirely. They submit that, in light of the successful

appeal in relation to the post-termination restrictions in Clause 21.2, I should defer a decision on costs until after determination on quantum of damages for the breach of the pre-termination restrictions in Clause 21.1. In the alternative, if I decide to make a costs order now, the Defendants submit that I should make no order as to costs, or should make an issue-based costs order (which may have the same effect as no order as to costs, on the basis that the outcome of the Speedy Trial was a score-draw).

21. In support of the submission that I should reserve a decision on costs until after determination of the issue of damages, Mr Brown submitted that, having lost on misuse of confidential information, lost on Clause 21.2 and succeeded only on Clause 21.1 (as to enforceability and breach), the measure of the Claimants' success depends entirely on the assessment of damages. He also submitted that the breaches by the Defendants of Clause 21.1 were trivial and so the damages are likely to be very low. He drew my attention to an exchange between Underhill LJ and Mr Brown at the start of the appeal hearing, in which Underhill LJ said that damages for breach of Clause 21.1 were likely to be tiny (Transcript, page 30). Mr Brown submitted that, in these circumstances, it would only be after quantum had been determined that the Court would be in a position to decide upon an appropriate order for the costs of the Speedy Trial.

22. In support of his alternative, and secondary, submission that there should be no order as to costs or that there should be an issue-based costs order with the same effect, Mr Brown submitted that the practical reality was that the Claimants had lost in relation to a substantial part of their case. The argument

that Clause 21.2 was enforceable was a central part of the Claimants' case, and, in light of the Court of Appeal judgment, they had failed on it, as they had already done with their contention that there had been misuse of confidential information. Mr Brown said that it should not matter, in this regard, that the Claimants had succeeded in obtaining declaratory and injunctive relief in relation to the Undertakings, which covered the same ground as the post-termination restraint in Clause 21.2. This was because it was of central importance to the Claimants, in this litigation, that they obtain a ruling on the enforceability of Clause 21.2. It was a key objective in the litigation. This is demonstrated by the fact that the Claimants sought permission to appeal to the Supreme Court. Also, if the Claimants had known that Clause 21.2 was unenforceable, they would not have agreed to the Undertakings.

The Claimants' submissions

23. On behalf of the Claimants, Mr Merhzad QC and Mr Sheridan submitted that they should be awarded at least 90% of the costs of the Speedy Trial. They submitted that the fundamental governing principle is that costs should follow the event. They said that the Claimants have been almost entirely successful in the litigation. They have been successful on the issue of the enforceability of Clause 21.1 and are entitled to damages for pre-termination breaches, and they have also succeeded in securing post-termination injunctive relief. They said that it does not matter that they succeeded in the latter respect because of the Undertakings, rather than because of a ruling that Clause 21.2 was enforceable. The practical effect is the same. Also, the same evidence needed

to be adduced on the issue of the enforceability of the Undertakings as on the issue of Clause 21.2 (this is because the Defendants' Defence challenged the enforceability of the Undertakings on the basis that they were not underpinned by legitimate business interests). Also, the evidence about the way in which the Claimants' and the Defendants' businesses were organised and operated would have had to be presented to the Court even if the Claimants' claims had been limited to the pre-termination restrictions in Clause 21.1, because the same background evidence about legitimate business interests is relevant to the issue of the enforceability of Clause 21.1 as to the enforceability of Clause 21.2.

Discussion

24. I summarised the relevant provisions of the Civil Procedure Rules and set out extracts from the key relevant authorities on cost in the Consequentials judgment, and I will not repeat them here. I have taken them into account.

25. The first question that I must decide is whether to make my ruling on costs now or whether to postpone it until after the Court has made an assessment of damages for breach of Clause 21.1 (and for unlawful means conspiracy and unlawful interference, as I assume that they will be dealt with at the same time).

26. I have decided, with some reluctance, that I should indeed postpone the ruling on costs until after the assessment of damages for breach of Clause 21.1 has taken place. My reasons for doing so are as follows:

27. First, I accept the Defendants' submission that the ruling of the Court of Appeal has resulted in a very significant change to the outcome of the proceedings. I do not accept the Claimants' submissions that, in the context of this litigation, the enforceability of Clause 21.2 was of limited, if any significance, given that post-termination injunctive relief was granted in any event as a result of the Undertakings.

28. The question of the enforceability of the two restrictive covenants in the Trading Agreement, Clauses 21.1 and 21.2, was at the very heart of this litigation. There is no doubt that the Claimants were very keen, in particular, to obtain a ruling on the enforceability of the post-termination restrictions in Clause 21.2 for two reasons: (1) because, for business reasons and to assist them in their dealings with other MCs who contracted with the Claimants on the same terms, they sought a ruling that the post-termination restrictions were enforceable, and (2) because a finding that the restrictions in Clause 21.2 was enforceable would be of great benefit to the Claimants in their claims for unlawful means conspiracy and unlawful interference. This was because the Claimants wished to contend that the First Defendant had acted unlawfully in encouraging other MCs and MC owners to ignore the post-termination restrictions in Clause 21.2 of their Trading Agreement. The fact that, as it turns out, the Claimants have obtained judgment in default in relation to unlawful means conspiracy and unlawful interference does not retrospectively detract from the importance which was placed on the Clause 21.2 issue at the Speedy Trial.

29. Moreover, for reasons I will explain, I do not accept the suggestion that the enforceability of Clause 21.2 was of limited if any relevance, because the Undertakings were enforceable in any event. This does not reflect how the case was presented before me.

30. The importance of the argument relating to Clause 21.2 was recognised by the Court of Appeal in its judgment, at paragraphs 19 and 32-35, as follows,

> "19. This analysis of the Undertakings was particularly important given that this ruling of the judge has not been appealed. Credico submits that in view of this, and given that the scope of the Undertakings essentially mirrored the scope of clause 21, there was no point in the court engaging with the arguments on the validity of the covenants at all. Even if they, or either of them, were unlawful at common law, virtually identical obligations were enforceable by virtue of the Undertakings and these justified the imposition of the injunctive relief in their own right. For reasons I develop below, I consider that it is nonetheless legitimate for the court to consider the enforceability of the two covenants.
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> **Should the court engage with the legality of the covenants?**
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> 32. A preliminary question is whether the court should address the restraint of trade principles at all. As I have explained, Mr Mehrzad QC, counsel for Credico, submitted that since the Undertakings justified the relief granted in any event, it mattered not whether the covenants were enforceable or not. The declarations and injunction would stand even if the covenants were in fact in unreasonable restraint of trade.
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> 33. I recognise the obvious force of this submission; the court does not readily determine potentially difficult legal issues where this serves no useful purpose. But there are two factors in particular which lead me, albeit with some hesitation, to conclude that the court ought to consider these issues in this case. First, it seems that in the court below Credico placed great emphasis on these covenants; they do not appear to have suggested to the judge that he should first of all consider the Undertakings on the grounds that it would not be necessary to go further if the relevant relief could be granted on that basis.
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> They appear to have been keen to have a ruling on the legality of the covenants. Indeed, the judge only considered the

> Undertakings on the basis that he might be wrong in his conclusion that the covenants were enforceable. Second, the cause of action in these proceedings has now been amended so as to allow claims of unlawful means conspiracy and unlawful interference with the trade of Credico. It is accepted that argument about the applicability of these torts will require the court to engage with the question whether similarly framed restraint of trade clauses in trading agreements with other MCs are legally enforceable or not.
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> 34. Mr Mehrzad submits that this is not to the point: the ruling on the covenants in this case will not bind a court considering another case where the facts may be different: see **Virgin Atlantic Airways Ltd v Zodiac Seats Ltd** [2013] UKSC 46, [2014] AC 160 (SC) per Lord Sumption, para. 17. The circumstances of other MCs may be different and that could lead to a different conclusion about the enforceability of their covenants even if they are similarly worded.
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> 35. This is no doubt legally correct but on the assumption (not disputed before us) that in substance all MCs are subject to the same or very similar trading agreements, it is not likely that there will be material factors with respect to other MCs which will be of such weight as to justify a court departing from Cavanagh J's approach. On any view, his ruling will carry very considerable weight in the next stage of the litigation. If, as I suspect may very likely be the case, a court finds that there is no material distinction between the facts of this case and the position of the trading agreement with the MC then under consideration, the ruling of Cavanagh J will be followed. It would be unfortunate if that ruling were then to be appealed to this court when we could decide it now, having already heard extensive argument on the point. Moreover, if this court is to overturn the judge, it is better that it should be done now before the trial on the amended claims rather than afterwards. For these reasons, therefore, I would reject this preliminary submission."

31. Though the analysis of the Court of Appeal, as set out in the above extract, was directed towards Mr Mehrzad QC's submission that the Court of Appeal should not entertain the Defendants' appeal because it was academic, it is equally relevant to the question whether the Defendants' successful appeal in relation to the enforceability of Clause 21.2 made a real difference to the outcome of the Speedy Trial. It plainly did. It follows that it is no longer

appropriate to award the Claimants all, or nearly all, of their costs on the basis that they were the unequivocal victor in the Speedy Trial. They were unsuccessful in a major part of the trial.

32. The fact that the enforceability of Clause 21.2 was a centrally important part of the case, certainly from the Claimants' perspective, is made clear by the fact that the Claimants sought permission from the Court of Appeal to appeal to the Supreme Court on this issue.

33. In these circumstances, it would be difficult if not impossible for me to allocate costs at this stage. It is not possible, at this stage, to determine who is the overall winner, or to make an issues-based allocation. This is because, though the Claimants were successful in relation to the pre-termination restrictions in Clause 21.1, it is not yet clear how much they will receive by way of damages for the Defendants' breaches. There is a very real possibility that the damages for breach of Clause 21.1 will be very small indeed, as Underhill LJ noted (though he was not expressing a concluded view and had not have the benefit of Mr Mehrzad QC's submissions on this issue). If the Claimants receive only very limited damages for breach of Clause 21.1, and were unsuccessful in relation to Clause 21.2, then, notwithstanding the success in relation to the undertakings, it is at least arguable that a major cost award in favour of the Claimants would not reflect the reality of the outcome of the Speedy Trial. Accordingly, in my judgment, it would be far preferable if the issue of costs was determined only after damages had been assessed, so that the parties can make informed submissions on the matter and the Court has all of the relevant information before it.

34. The course of action which I propose to adopt is consistent with the following observation of Birss J in **Unwired Planet International Limited v. Huawei Technologies Co & Ors.** [2015] EWHC 3837 (Ch), at paragraph 24, which I cited in the Consequentials Judgment,

> "… 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."

35. Furthermore, I do not accept the Claimants' submission that it is clear that almost all of the costs of the Speedy Trial should be awarded to them because the bulk of the evidence before me, namely the evidence relating to legitimate business interests, would have been presented in any event, because it was relevant to the pre-termination restrictions and to the Undertakings.

36. So far as the pre-termination restrictions in Clause 21.1 are concerned, whilst it is true that the evidence going to its enforceability was the same as the evidence relating to the enforceability of Clause 21.2, it does not follow that Clause 21.2 played a minor or insignificant part in the Speedy Trial, or that the costs of this evidence should be regarded as being attributable primarily to the Clause 21.1 issue. The Claimants were equally as keen on a ruling that Clause 21.2 was enforceable as they were on a ruling that Clause 21.1 was enforceable, and so it is wrong to regard the bulk of the evidence as being adduced for the purpose of the pre-termination restraints issue, with the issue of the enforceability of the post-termination restraints being a side-issue or subsidiary point. The evidence was adduced because the Claimants sought a

ruling on the enforceability of both the pre- and post-termination restrictions in the Trading Agreement.

37. So far as the Undertakings are concerned, there was an issue as to whether there was any need for a party relying on contractual undertakings, voluntarily given in order to stave off proceedings, to show that they had a legitimate business interest in the restrictions. As I said at paragraph 296 of the Main Judgment, there is a public interest in holding parties to agreements that they make in an attempt to compromise threatened legal proceedings. It follows that it may very well have been unnecessary to explore the extent to which the Claimants had a legitimate business interest, arising from their working relationship with the Defendants, in the restrictions that are set out in the Undertakings (regardless of what was pleaded in the Defence). At the very least, I reject the Claimants' contention that the wide-ranging evidence about the way in which the Claimants' and the Defendants' businesses operated was equally as relevant to the enforceability of the Undertakings as it was to the enforceability of Clause 21.2. If the Defendants had only sought to obtain a ruling on the enforceability of the Undertakings, the practical reality is that it would not have been necessary for the Court to be presented with detailed evidence about the business and operations of the Claimants and Defendants. The Claimants could safely have relied upon the fact that the Undertakings were freely given in order to avert legal proceedings.

38. It is true, and it is unfortunate, that the effect of my decision will be to postpone further the date on which costs orders will be made in relation to the Speedy Trial and related costs. However, in my judgment, the benefits of the

assessment of damages being made before the costs award is decided upon outweigh the disadvantages. I am aware that I took a different view about postponement of the costs decision at the time of the Consequentials Judgment but, as I have said, things have changed significantly as a result of the Court of Appeal judgment. I also bear in mind that this is a case in which the decision as to who will pay the costs of the Speedy Trial is of great importance, given the scale of the costs which the parties have incurred.

39. There is one other matter I should mention. This is that, as Martin Spencer J put it at paragraph 61 of his judgment relating to the order of 19 May 2022,

> "The defendants have, in my judgment, been playing fast and loose with both the claimants and the courts in relation to these matters and in the process have been causing the claimants to incur more and more costs in reasonably resisting applications which have been made by the defendants."

40. The Claimants may be concerned that the Defendants are deliberately dragging out the consideration of the costs of the Speedy Trial for their own purposes. However, such a suspicion is not a good reason for me to determine the costs of the Speedy Trial at this stage. As I have said, there are strong reasons for postponing the determination of these costs, and the Claimants have been penalised for their behaviour in the litigation since the Speedy Trial by the default judgment and awards of costs incurred since.

Conclusion

41. For the reasons set out above, I have decided to postpone determination of the costs of the Speedy Trial until the assessment of damages for breach of Clause 21.1 has taken place. I will, however, give the parties liberty to apply if circumstances change between now and then. The determination of costs of

the Speedy Trial should remain reserved to me. I will also give the parties liberty to make short written submissions, after the assessment of damages has taken place, about whether there should be a short oral hearing before I make my decision.

42. The remaining issue is whether there should be an interim payment. I have decided not to order an interim payment. The range of possibilities, when I eventually come to make my decision on costs, includes that there should be no order as to costs, or that an issues-based costs order should be made which would have the same effect. Accordingly, there is at least some possibility that the Claimants might not receive any award of costs from the Defendants, and, if they do, it is not possible even to estimate the amount that may be awarded. In those circumstances, I take the view that it is not appropriate to make an order for the interim payment by the Defendants of the Claimants' costs.