Neutral Citation Number: **[2022] EWHC 1067 (Ch)**

Claim No: IL-2020-000040

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
INTELLECTUAL PROPERTY LIST (ChD)
Royal Courts of Justice

The Rolls Building

7 Rolls Building, Fetter Lane

London, EC4A 1NL

Date: 6 May 2022

Before:

THE HONOURABLE MR JUSTICE MARCUS SMITH

BETWEEN:

(1) – (15)	**GENIUS SPORTS TECHNOLOGIES LIMITED (previously known as Genius Sports Limited) AND 14 OTHERS**
	Claimants
-and-	
(1) – (6)	**SOFT CONSTRUCT (MALTA) LIMITED (a company organised and existing under Maltese law) AND 5 OTHERS**
-and-	
(7) – (12)	**BASKETLIGAEN (an association organised and existing under Danish law) AND 4 OTHERS (all joined as representative parties)**
	Defendants

Mr Tom de la Mare, QC , **Ms Jessie Bowhill** and **Mr Timothy Lau** (instructed by **Fieldfisher LLP**) appeared for the **Claimants**

Mr Philip Roberts, QC , **Ms Jennifer MacLeod** and **Mr Greg Adey** (instructed by **Reynolds Porter Chamberlain LLP**) appeared for the **First to Sixth Defendants**

Hearing date: 4 May 2022

Approved Judgment

This judgment is handed down remotely by circulation to the parties' representatives by email and release to The National Archives. The date and time for hand-down is deemed to be 4:00pm on 6 May 2022.

Mr Justice Marcus Smith:

1. On 4 May 2022, I heard and determined two applications made by the above-named Claimants, who I shall refer to as **Genius Sports**. The first application was that the First and Third Defendants (part of a group of six defendants that I shall collectively refer to as the **SCM Defendants**) pay Genius Sports' costs in relation to their application to strike out and/or for summary judgment in relation to the Defence filed by the SCM Defendants. I shall refer to this application as the **Costs Application**. Although it is more accurate – in the context of the Costs Application – to refer to the First and Third Defendants, I will adopt the less accurate, but easier to follow, term SCM Defendants in all cases. But, to be clear, the only defendants involved in the Costs Application were the First and Third Defendants.

2. The second application was for an order that costs budgeting be dispensed with (the **Costs Budgeting Application**). I had, on a previous occasion, expressed a purely provisional view that, given the somewhat unusual nature of these proceedings – they are for various reasons (unnecessary to set out) extremely complex – costs budgeting might be more trouble than it was worth. Largely as a result of these applications, I am persuaded that, despite the undoubted complexity of these proceedings, it is right and proper not to dispense with costs budgeting, so that the Court is in a position to consider whether to make a costs management order and/or a costs capping order. I stress that whether such orders should be made is for another day: the question before me on the Costs Budgeting Application was simply whether the Court should or should not put itself in a position where it could, after hearing argument, make such orders if appropriate. After hearing the parties, I reached the firm view that these were options that the Court at least ought to look at and, in his reply submissions, Mr de la Mare, QC, for Genius Sports, did not seek to push back on that.

3. Accordingly, there is nothing more I need say about the Costs Budgeting Application, save to record my concern at the level of costs these applications have generated. The Costs Application application notice bore a time estimate of one hour, which I think was a correct one, given the matters in issue (to which I will come). The Costs Budgeting Application application notice gave a time estimate of 2 hours, which (with hindsight) seems to me overly generous, given the matter that was in issue. Even so, the determination of both applications took a full day, plus pre-reading, plus writing this (necessarily) reserved judgment. The summary statements of costs on both sides set out grand totals as follows:

	Costs of Genius Sports	**Costs of the SCM Defendants**
Costs Application Costs	**£60,954-00**	**£38,295-50**
Fieldfisher LLP (solicitors retained by Genius Sports)	£39,522-50	
Macfarlanes (solicitors retained by Genius Sports on competition issues)	£21,431-50	
		£38,295-50

Reynolds Porter Chamberlain LLP (solicitors retained by the SCM Defendants)		
Costs Budgeting Application Costs	**£108,569**	**Not available**
Fieldfisher LLP (solicitors retained by Genius Sports)	£73,411-00	
Macfarlanes (solicitors retained by Genius Sports on competition issues)	£35,158-00	
Reynolds Porter Chamberlain LLP (solicitors retained by the SCM Defendants)		It was the position of the SCM Defendants that these costs should be in the case in any event, and so no costs schedule was filed in regard to this application.
TOTAL	**£169,523**	**Not available**

These figures speak for themselves: and I will therefore say no more, save that they informed my thinking on the Costs Budgeting Application and the value of ex ante cost control.

4. At the conclusion of the hearing, I ruled on the Costs Application, with reasons to follow. This Judgment sets out those reasons.

5. The defence of the SCM Defendants in these proceedings was served on 6 August 2020 (the **Defence**). Genius Sports made a request for further information on 9 October 2020, to which the SCM Defendants responded on 23 November 2020. Request 32 sought further particularity of the competition law defence that had been pleaded by the SCM Defendants. The SCM Defendants' response (in Response 32) was essentially that this was an inappropriate request.

6. A Reply was served by Genius Sports in the course of December 2020 and – on 13 January 2021 – Genius Sports applied to have large parts of the Defence struck out as "unarguable" and/or for summary judgment. I shall refer to this as the **Strike-out Application**. The paragraphs sought to be excised related to the SCM Defendants' competition law defence. The application notice attached a draft order and was supported by a statement of a Mr Nicholas Rose, a solicitor and partner in Fieldfisher LLP, the firm instructed by Genius Sports. That statement runs to 31 paragraphs, and to 7 single spaced pages, plus exhibits.

7. On or about 31 March 2021, the SCM Defendants responded to the Strike-out Application. That response had two elements:

(1) First, in a statement of a Mr Benjamin Mark (a solicitor and partner in Reynolds Porter Chamberlain LLP, the firm instructed by the SCM Defendants), the factual reasons why the application

was opposed were set out. It is unnecessary to say much about the content of this statement, save to quote paragraph 5:

“For the reasons to be developed in the SCM Defendants’ legal submissions in due course, the SCM Defendants strongly disagree that their competition law defences should be struck out on either of the bases set out in [Mr Rose’s statement].”

(2) Secondly, a **draft Amended Defence**[1] was provided to Genius Sports. The amendments proposed essentially related to the paragraphs that Genius Sports was seeking to excise from the Defence and – whilst not a “cancel and re-write” of the old pleading – these proposed amendments represented a significant re-articulation of the SCM Defendants’ competition law defences, involving both deletion of old points and insertion of new points. The draft Amended Defence was supported by an expert report, the obvious purpose of which (the document is confidential, and I do not need to refer to its substance) was to ensure that no application to strike out the draft Amended Defence could possibly succeed.

8. The hearing of the Strike-out Application was listed for hearing before Zacaroli J on 17 and 18 May 2021. Entirely unsurprisingly, given the draft Amended Defence and the expert report supporting it, that application was ineffective and never took place. Rather, the parties, entirely sensibly, sought to move the proceedings on. Thus:

(1) Genius Sports agreed to the amendments, and in due course an order was made (by me) giving permission to amend. The **Amended Defence** (in fact a Re-Amended Defence) is dated 5 July 2021.

(2) Agreement was reached regarding the amendment of the Reply. This was done on the usual terms that the costs of and arising out of the amendments were to be Genius Sports’ in any event. The amended Reply – which, inevitably, contained a series of major amendments and changes – is dated 27 August 2021. Thus, even though the draft Amended Defence had been in circulation since the end of March, Genius Sports required nearly two further months to finalise the amendments to their Reply. That is a reflection of the significant changes to the Defence, and will no doubt be reflected in the costs that the SCM Defendants will (in due course) have to pay to Genius Sports.

9. What could not be agreed was the payment of the costs of the Strike-out Application. This was the subject of a great deal of correspondence between the solicitors. The SCM Defendants proposed (see their letter of 20 April 2021) costs in the case. The SCM Defendants considered that to litigate costs only before Zacaroli J would “clearly be a waste of the Court’s and the parties’ time and resources, particularly in circumstances where the proposed draft amendments are now agreed”.

10. Genius Sports’ position was that a new case had been pleaded in lieu of an old unarguable one. In a letter dated 28 April 2021, it is stated that the old case “was unsustainable and would have been struck out. In its place, you have pleaded an entirely new, far narrower, case of infringement of the Chapter II Prohibition…This case has not been previously pleaded. There is also a new, entirely parasitic, Article 101/Chapter I defence…”.

11. In a later letter, dated 17 May 2021, Genius Sports doubled-down on this position:

“We refer to our client’s application to strike out and/or for summary judgment dated 13 January 2021 (the “Application”).

In our letter dated 28 April 2021, we set out our clients’ position regarding the costs of the Application and that your clients, having abandoned their original competition defence (the

“Abandoned Competition Defence”) which was the subject of the Application, must now pay our clients’ costs. We informed you that there were no grounds to resist an order for costs and that unless you indicated by return that this was agreed then our clients will be seeking an order for indemnity costs from the date of your letter of 20 April due to your unreasonable conduct. In your letter of 5 May, you stated you would revert separately on the issue of the costs of the Application. You have not done so and so there is no agreement.

…

We now enclose by way of service:

1. Our Statement of Costs, which includes the costs of the IP counsel in relation to work done considering issues raised in the Abandoned Competition Defence and in relation to the Application; and

2. Macfarlanes’ Statement of Costs, which includes the costs of the competition counsel in relation to the Abandoned Competition Defence and the Application.

The enclosed Statements include all the wasted costs in dealing with the Abandoned Competition Defence since it was served and the Application, including the costs of considering the evidence and materials served on us on 31 March.”

12. This letter (the **Letter**) sets out what proved to be the substance of Mr de la Mare, QC’s submissions before me in relation to the Costs Application. Before I come to those points, it is worth setting out the costs identified in the statements of costs referenced in the Letter:

(1) Fieldfisher LLP’s costs were £148,128.00.

(2) Macfarlanes LLP’s costs were £145,429.07.

The total is £293,557.07. As the Letter makes clear – as did Mr de la Mare, QC in his submissions to me – these costs embrace far more than simply the costs incurred by Genius Sports in respect of the Strike-out Application. The statements of costs appear to include all work done by the lawyers (there are no disbursements regarding expert economists, for instance) in considering, analysing, advising upon and responding to the Defence.

13. It is not clear to me why, given that the question of costs was unresolved, the Strike-out Application was removed from the lists. Doubtless, there are occasions where it is appropriate to adjourn an issue that has been listed for determination to another, later, date, but this was not such a case. Generally speaking, if an application is only largely ineffective, with costs unagreed, it should not be pulled. If the parties to such an application really want to argue about costs, then they should do so before the judge listed to hear the application. Finality in such matters is important, and generally it does not assist if outlying points (like costs) are left to accumulate like barnacles, impeding the efficient future progress of the proceedings.

14. I turn, then, to the substance of the Costs Application. I can deal with it relatively shortly:

(1) It is commonplace that cases change over time, and such changes are reflected in amendments (including consequential amendments) to the statements of case. Whether amendments (that are not consequential) are granted turns on a variety of factors – prejudice to the other parties, arguability, prejudice to proper case management – that it is unnecessary to spell out. Where amendments are

granted, the general rule is that the costs of and arising out of the amendments must be paid by the amending party.

(2) Amendments can take many forms, but generally speaking and in substance they will either be deletions from or accretions to that which has previously been pleaded. Accretions will (generally) require a response, and the costs of such a response will be paid for by the party making the amendments which have necessitated the response or consequential amendment. Deletions will (generally) not require a response.

(3) There is no general rule that where deletions to a pleading have been made, all of the costs incurred by the other parties to the proceedings in considering such points are to be paid by the amending party. I have no doubt that the jurisdiction exists to make such an order, in an appropriate case, but such cases will be rare:

(a) Parties to civil proceedings are entitled to one "free shot" at articulating their case. Of course, the costs incurred in considering, framing and responding to statements of case are in no sense "free". They are dealt with at the conclusion of the action, and the courts have all manner of tools at their disposal (issues based costs orders, etc) to ensure a proper outcome.

(b) Changes to pleadings, where they cause consequential changes to other statements of case must be paid for in the manner that I have described.

(c) The notion that as a case progresses, the court should be involved in monitoring and permitting recovery for costs thrown away because points have been abandoned is antithetical to this regime. That is for obvious reasons. The process of identifying, in the course of proceedings, what costs relate to which deletions will be time consuming, cumbersome and (generally speaking) unjust.

(d) A good example arises on the facts of this case. If "abandoned" points generate a costs obligation on the amending party in the manner suggested by Genius Sports, then Genius Sports cannot be really be entitled to claim the costs of a reply to a defence they later say should be struck out. Here we have the following time-line:

6 August 2020: Service of the Defence.

9 October 2020: Service of Genius Sports' request for further information.

December 2020: Service of the Reply.

13 January 2021: Issue of the Strike-out Application.

Why should Genius Sports, in this case, recover both the costs of consequential amendments to the Reply and the costs of the original Reply? They should not. In Kompaktwerk GmbH v. Liveperson Netherland, [2019] EWHC 1762 (Comm), Mr David Edwards, QC, sitting as a deputy judge of the High Court said at [16] in respect of a similar application to this:

"So far as the suggested wasted costs are concerned, the defendant says that these include costs incurred in reviewing and taking instructions on the original particulars of claim, drafting the defence and reviewing the reply. I am not prepared to make an order for the claimant to pay these costs. It seems to me that the defendant will be adequately compensated in relation to the additional costs that it will incur by the order that I have just indicated I will make, that the claimant pay the costs of and occasioned by the amendments. The effect of the defendant's proposal, if I were to accede to it, would

be that the claimant would end up, however this action turned out, paying the costs of both the original defence and the amended defence which, in my judgment, cannot be right."

(4) I agree, and for this reason the proposition articulated in the Letter and in the submissions of Genius Sports before me is wrong. It follows – since this was the basis on which the Costs Application was put – that it must be dismissed, which is what I ordered at the conclusion of the hearing on 4 May 2022.

(5) The more conventional argument for costs – namely that Genius Sport should have the costs of the Strike-out Application – has not been articulated before me, and those costs never specifically identified. The following points, however, are clear:

(a) Unless the outcome of the (substantially) ineffective application will quickly become clear to a busy judge in a hurry, a court should not attempt to predict what the outcome of the application would be or might have been. That may mean – it often will – that the most appropriate order will be that which was suggested by the SCM Defendants in this case, namely costs in the case: see BCT Software Solutions Limited v. C Brewer & Sons Ltd, [2003] EWCA Civ 939 at [23]; and Promar International Limited v. Clarke, [2006] EWCA Civ 332 at [21], [28] and [31]. That is as true of applications, as it is of trials.

(b) Here, Zacaroli J was to determine a complex strike out application over a two day period. No busy judge in a hurry could reach a view as to what the outcome was going to be without long and serious reflection. If and to the extent that Genius Sports was contending that the outcome of the Strike-out Application was obvious in the sense I have described, then I reject that contention.

(c) Other factors may come into play – arising out of the conduct of the parties – which may enable a different costs order to be made, even if the outcome cannot be predicted in the manner I have suggested. I was not addressed on these points in the Costs Application which (as I have noted) was put on a different basis. It would therefore be inappropriate to say anything more.

15. For all these reasons, the Costs Application is dismissed.

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[1] In fact, these were re-amendments. However the initial amendments resulting in an Amended Defence are immaterial.