Neutral Citation Number: [2023] EWHC 1628 (KB)

Case No: QB-2022-003928

**IN THE HIGH COURT OF JUSTICE**
**KING'S BENCH DIVISION**

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 03/07/2023

**Before** :

**MR JUSTICE KERR**

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**Between :**

**(1) KEW GREEN GROUP LIMITED** **Claimants**

**(2) KEW GREEN HOTEL (MANAGEMENT) LIMITED**

**- and –**

**(1) JAMESON LAMB** **Defendants**
**(2) ALEX PRITCHARD**
**(3) AXIOM HOSPITALITY LIMITED**
**(4) ANAEL PEU**
**(5) GRAEME PARKER**
**(6) NICK O'KEEFFE**
**(7) JLAP INVESTMENTS LIMITED**

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**Thomas Croxford KC** and **Sean Butler** (instructed by **KWM Europe LLP**) for the **Claimants**
**Paul Nicholls KC** and **Usman Roohani** (instructed by **DAC Beachcroft LLP**) for the **First, Second, Third and Seventh Defendants**
The **Fourth, Fifth** and **Sixth Defendants** did not appear and were not represented.

Hearing dates: 16 and 17 May 2023; 28 June 2023

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# Approved Judgment (2) (consequential matters)

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MR JUSTICE KERR

This judgment was handed down remotely by circulation to the parties' representatives by email and will be released for publication on the National Archives caselaw website. The date and time for hand-down is 09:30am on 3 July 2023.

**Mr Justice Kerr :**

## Introduction and Summary

1. This is my judgment on consequential matters, following the hand down of my main judgment on 30 May 2023. Abbreviations and definitions are as in my main judgment and as indicated below. This supplemental judgment should be read together with the main judgment, *Kew Green Group Ltd et al. v. Lamb et al.* [2023] EWHC 1289 (KB).

2. To recap, as explained in the main judgment, four of the seven defendants brought the present application to strike out or for summary judgment in respect of large swathes of the claims against them brought by their former employers, Kew Green. Where I refer to "the defendants" below, I mean the four who brought the application.

3. There are claims for breaches of three different contracts, breaches of fiduciary duties, inducing or procuring breaches of contract, conspiracy to cause harm by unlawful means, knowingly assisting breaches of fiduciary duty, knowing receipt of trust property, the return of sums paid, equitable compensation and an account of profits. There is a counterclaim for sums unpaid.

4. Messrs Lamb and Pritchard, formerly employed as senior managers, were also directors of numerous Kew Green companies. Axiom and JLAP Investments are the corporate vehicles they used after they ceased to be employees of Kew Green and resigned their directorships of Kew Green companies.

5. For the reasons given in the main judgment, I concluded that the following paragraphs (and part of a paragraph) of the POC are bound to fail and suitable for summary judgment or to be struck out: paragraph 23.2A; the reference to "contracts of employment" in paragraph 38; and paragraphs 42, 50, 53 and 54.

6. Subject to hearing counsel on consequential matters, I concluded that the most appropriate remedy is to strike out the words there pleaded, rather than to grant summary judgment in respect of them. I have since received written and oral submissions on consequential matters and will make the order that accompanies this supplemental judgment.

## The Appropriate Order

7. The appropriate relief is, subject to one point, not disputed. The parties accept that striking out is the appropriate remedy. However, the claimants contend through Mr Croxford that paragraph 42 of the POC should not be struck out, even though I decided, as set out in the last sentence of paragraph 98 of the main judgment that "[p]aragraph 42 falls to be struck out".

8. Nothing daunted, Mr Croxford submits optimistically that paragraph 42 should not be struck out. He says it should be amended instead. He proposes a form of amendment which would plead, ingeniously, that Messrs Lamb and Pritchard formed an intention to set up in competition with Kew Green not by, at the latest, November 2019 (as paragraph 42 states) but by, at the latest, August 2019 (which it does not state).

9. In my main judgment, I considered which defective parts of the POC could be saved or cured by a modest, not too radical amendment. Paragraph 42 of the POC was one that I considered could not be saved. I thought that was clear from paragraph 98 of my main judgment. Changing "November" to "August" is not a modest amendment.

10. It would mean, conveniently, that the two men could be in breach of a duty to inform Kew Green of their intentions, performed that same month by announcing their departure. I reject Mr Croxford's attempt to persuade me to change my decision and allow him to change his case. My order will include the striking out of paragraph 42.

## Costs Issues

11. I will consider, first, the costs of the strike out application (**the SO application**); second, the costs in respect of one abandoned part of the SO application, and of a linked disclosure application (**the SD application**); and, third, the costs of the action in so far as incurred in respect of the struck out parts of it, i.e. the "struck out allegations" costs (**the SOA costs**). There is some overlap between the first and second of these kinds of costs; and between the first and third.

*Costs of the SO application:*

12. Inevitably, both parties strove to persuade me that it was they who were successful and the other side that had in substance failed.

13. The defendants pointed out that they had eliminated the free standing post-employment fiduciary duty; and the contention that it was unlawful *per se* to have decided in November 2019 to set up in competition. The claim in respect of Dragonglass was "much diminished", said Mr Nicholls; while other paragraphs, not struck out, had been reduced to mere narrative. The statutory duty under section 170(2) of the 2006 Act had been invoked in argument but not pleaded.

14. The defendants submitted that it was enough that they had succeeded in striking out some paragraphs of the POC to found an award of costs in their favour. The issues for trial had narrowed substantially. The claimants refused in pre-application correspondence to pare down the POC in a manner that might have led the defendants to forego making the SO application.

15. Mr Nicholls submitted that the compass of the trial would be significantly reduced; it would no longer be necessary to go into matters such as the setting up of a PAYE

reference or the taking of other preliminary steps towards establishing a rival business to that of Kew Green. The scope of disclosure and witness statement evidence will be reduced accordingly, he argued.

16. The defendants relied on the well known case law often cited for the proposition that just because a party loses on certain issues or points (as is almost inevitable in complex litigation), it should not lightly be deprived of its costs where it has in essence succeeded; and that the court should always have at the forefront of its mind the general rule that the unsuccessful party will be ordered to pay the costs of the successful party.

17. Finally, Mr Nicholls argued that an issues based costs order would be wrong (neither side seeks one). He submitted that the hearing lasting the best part of two days, without judgment, was mainly taken up with issues, in particular the free standing fiduciary duty point, on which the defendants succeeded. The hearing could not have occupied less than a day of court time even without the points on which the defendants failed.

18. While noting that the appellate courts have emphasised the fact sensitive nature of the enquiry and the limited utility of citing case law that does not stand for any general proposition, Mr Nicholls drew from the cases he cited the proposition that "[t]he law is that a successful party should recover its costs and can only be deprived of such costs, applying an issues based approach, if either the party acted unreasonably in raising points or the points added materially to the costs".

19. For the claimants, Mr Croxford approached the concept of success and failure differently. He submitted that the claimants had set out to eliminate a large part of the claim but had managed only to trim it at the edges. The factual allegations that remain as narrative have survived because they support causes of action that also survive; for example, the allegations of breach of the obligations of Messrs Lamb and Pritchard under the settlement agreement.

20. A party is not "successful", Mr Croxford submitted, merely because they may succeed in striking out a small number of allegations from a claim that largely survives intact and is destined for trial. Such an approach would encourage speculative strike out applications; if one out of hundreds of paragraphs were struck out, the applicant would enjoy protection in respect of costs.

21. That cannot be right, he suggested. The application was misconceived, if only because a substantial trial of the settlement agreement breach issues was unavoidable on any view. The important arguable issues of misuse of confidential information and solicitation of employees have survived; a major setback for the defendants, he submitted. The claimants are the "substantial victors" in the SO application. The part of it that sought to strike out paragraphs 42A and 42B of the POC (concerning the HMAs, as I will explain further below) was not even pursued.

22. Consequently, the claimants say, the case management benefits contended for have also failed to materialise. All the major factual allegations remain in place and will have to be aired in disclosure and witness evidence and at trial; while those that have gone (for example, setting up a PAYE reference) are minor and their removal will

have little impact on case management or the scope of the trial. There will be no reduction in costs budgets, Mr Croxford submitted.

23. In my judgment, neither party has clearly succeeded or clearly failed in the application. The general rule that the successful party gets its costs therefore cannot straightforwardly provide the answer. The outcome was, in my judgment, an expensive score draw. To explain why I reach that conclusion, I must first provide some background and context.

24. First, the separation arrangements between the parties were always likely to break down and lead to disagreements with a litigious potential. The defendants wished to leave Kew Green because they were dissatisfied with their remuneration and considered that they could earn more by setting up their own business. But the separation arrangements enabling that, ultimately, to happen, included an awkward transition period of over a year during which Messrs Lamb and Pritchard were unable fully to pursue their own business interests at the expense of Kew Green.

25. During that transition period, the settlement agreement terms placed them in a position of conflict of interest. The complexity of the settlement arrangements, their interaction with surviving post-directorship fiduciary duties (under section 170 of the 2006 Act) and the uncertainty of the divide between legitimate and illegitimate post-employment competition, together created a strong likelihood of litigious disagreements arising.

26. Both sides must share equal responsibility for that state of affairs; they chose to enter into the arrangements, with full knowledge of their terms and with the benefit of expert legal advice. Their starkly differing understanding of the separation arrangements is not surprising and there is no intrinsic legal or moral high ground on either side, as a starting point.

27. Next, on the claimants' side, the pleading was overloaded and not always clear. That is partly a function of the complexity of the interlocking series of contracts that governed the parties' relations, to which I have just alluded. But it also included a number of unrealistic contentions which did not properly recognise the boundary between lawful and unlawful competition with a former employer.

28. In particular, the fiduciary duty pleaded was unrealistic, confusing, provocative and apt to complicate an already complicated trial. If accepted, it could have put the claimants in a winning position because it would undermine the freedoms to compete restored to the defendants once the restrictive covenants had expired. The defendants were justified in challenging the free standing fiduciary duty (paragraph 23A of the POC) and their success in striking it out is the high point of their success in the SO application.

29. Having said that, the defendants' victory of sorts in the SO application is, in other respects, Pyrrhic. I agree with the claimants that major obligations and arguable breaches of them conspicuously survive to trial; namely, the misuse of confidential information claim, the soliciting of Kew Green employees claim and the claim for failure to use best endeavours to secure continuation or renewal of the HMAs.

30. I also agree with the claimants that the impact of the defendants' limited success on the compass of the trial, case management and preparation, will be minimal and unlikely to lead to lower costs budgets. The factual matrix remains largely unchanged and will have to be explored at trial to nearly the same extent as if the SO application had not been made. The narrative paragraphs in the POC have survived largely intact because they are relevant to the surviving causes of action.

31. The making of the SO application has done some good but also some ill. On the one hand, it has served to clarify the issues, focussed minds and eliminated the free standing post-termination fiduciary duty. That has happened without unduly delaying the trial, which on my initiative has now been listed to take place in April 2024. On the other hand, the SO application has cost the parties a lot of money while leaving many of the main issues unresolved.

32. Taking account of the above points, I would say the outcome is honours about even. I agree that an issues based costs order would be counterproductive and neither side asks for one. I have concluded that the appropriate order is no order as to the costs of the SO application. I should make clear that in so deciding, I take into account the overlap between the costs issue in relation to the SO application and the other two costs issues, to which I will turn next.

*Costs of the SD application:*

33. The claimants have explained in detail the procedural history of the SD application and its interaction with the SO application. The short point is that the defendants sought specific disclosure of certain communications said to be relevant to whether (as contended in paragraphs 42A and 42B of the POC) Messrs Lamb and Pritchard had manipulated the HMAs by procuring the insertion of key manager provisions into them, so that the HMAs could be terminated and diverted to Axiom once they, the key managers, had departed.

34. The defendants then persuaded Master Sullivan to delay a CMC listed for 20 April 2023 and instead on that date to hear the SD application. Four days before the hearing date, on 16 April (a Sunday), the defendants withdrew the SD application and that part of the SO application which attacked paragraphs 42A and 42B of the POC. The defendants criticise this conduct and seek costs on an indemnity basis, not just of the SD application but of the related withdrawn parts of the SO application.

35. I have already covered the latter point. As to the costs of the SD application itself, it is clear to me that having abandoned it, the defendants should pay the claimants' costs of resisting it. I do not accept Mr Nicholls' submission that the defendants should be excused from paying the claimants' costs of the SD application (or that those costs should be dealt with in some other way) because the defendants sagely benefitted the management of the case and saved costs by deciding not to take the disclosure point.

36. Mr Croxford submitted that the costs of the SD application (and related part of the SO application) should be awarded on the indemnity basis. He relied on CPR rule 44.2(5)(b) and (c) ("whether it was reasonable for a party to raise, pursue or contest a particular … issue"; and "the manner in which a party has pursued … its case or a particular issue"); and on the discretion to award indemnity costs under rule 44.3

where the paying party's conduct conducts the proceedings other than in an ordinary and reasonable way, taking the case out of the norm.

37. Numerous authorities were cited but the defendants' conduct is a factual matter for the court's evaluation. The conduct complained of is: bringing the SO application late, causing the CMC listed for 20 April 2023 to be vacated and disrupting the management of the case and progress towards trial; pursuing the SD application when it was hopeless and bound to fail; and using the SD application as a delaying tactic, an inference to be drawn from the absence of any other good explanation of the defendants' conduct.

38. I do not take as dim a view of the defendants' conduct as the claimants do and I decline to award costs on the indemnity basis. The claimants' SD application costs will be payable on the standard basis. The tone of the correspondence was not particularly cool on either side. I have already explained the background and context. I do not draw the inference that the SD application was never intended to be pursued and that it was made in order to displace the CMC listed for 20 April 2023 and to disrupt trial preparation.

39. To be clear, I do not include, in my costs order arising from the SD application, an order that the defendants should pay the costs of the related SO application in so far as it sought to strike out paragraphs 42A and 42B of the POC. Those paragraphs plead the factual narrative about what happened with the HMAs. They support the cause of action for breach of the settlement agreement but do not themselves plead a cause of action for breach of that agreement. That plea comes later, at paragraph 71 of the POC.

40. I fully appreciate that the attack on those paragraphs was not pursued by the defendants, but, as explained above, I have already taken that factor into account in my assessment that the just costs outcome of the SO application is that there should be no order as to the costs of it.

41. It follows that in a detailed assessment, individual items of costs will have to be attributed either to the SD application (payable by the defendants to the claimants on the standard basis); or to the SO application including the part of it relating to paragraphs 42A and 42B (each side paying their own costs). I appreciate that disentangling the two may in some instances be difficult given the overlapping issues, but I think that price must be paid to secure what I consider to be the just outcome.

42. Mr Croxford sought an interim payment on account of the costs of the SD Application, in a sum amounting to some 75 per cent of the figure in the claimants' costs schedule for that application, which is just short of £52,000. I do not think it would be appropriate to award an interim payment on account in the unusual circumstances prevailing here.

43. I reach that view for two reasons. The first is that it may be difficult to separate out costs properly attributable to the SD Application from those properly attributable to the SO Application. The second related reason is that pending a detailed assessment (and not being in a position to undertake a summary assessment now) I therefore cannot judge accurately whether the figure of just under £52,000 in the schedule is justified.

44. I will, however, permit set-off of the defendants' liability to pay the claimants' costs of the SD Application against any other costs liabilities going the other way following the trial (and, if the trial judge so orders, against any other non-costs liabilities such as damages or an account of profit). The costs judge undertaking a detailed assessment after trial is best placed to attribute individual items of cost to the different components of the litigation.

*The SOA costs:*

45. Mr Nicholls submits that the defendants are entitled to recover, as he puts it in his written submissions:

> "the costs attributable to defending those parts of the claim which have been struck out to include, for example, pleading to those claims and providing advice as to them. This is not therefore to do with the cost of any application but rather the costs of the litigation attributable to claims that have been struck out."

46. I agree that in principle a party who succeeds in striking out parts of a claim is entitled, other things being equal, to that party's costs of the action attributable to the struck out parts of the claim and not just the costs of going to the trouble of striking them out.

47. However, here I do not think the defendants' costs of litigating the struck out parts of the claim are readily severable from the costs of the action generally or that they are likely to have been materially increased by the struck out allegations having been made. As I have already explained, I accept the claimants' contention that the compass of the trial and case management will be largely unaffected by the SO application.

48. I therefore do not accede to Mr Nicholls' invitation to make any separate award in respect of the SOA costs. I have taken into account in my decision on the costs of the SO application, as a factor in the defendants' favour, that they are in principle entitled to any costs attributable to their success in respect of the struck out parts of the POC.

*Conclusion:*

49. For those reasons, I will make no order as to the costs of the SO application. The first, second, third and seventh defendants must pay the costs of the SD application, on the standard basis, and must bear their own costs of that application. All other costs will be in the case unless and to the extent otherwise ordered by the court. I am not in a position to undertake any summary assessment. The hearing lasted nearly two days, followed by a detailed reserved judgment. There will be a detailed assessment of costs after the end of the trial, unless the court directs otherwise or the parties agree otherwise.

## Other Directions

50. Having consulted the court listing office and the parties, I will direct a trial of the action in a window from 9 to 30 April 2024, with a time estimate of up to three weeks. Management of the case will otherwise proceed as directed at the next CCMC. I understand it is listed on 19 July 2023.