



Neutral Citation Number: [2023] EWHC 656 (KB)

Case No: QB-2020-003655

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

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 23/03/2023

**Before :**

**SENIOR MASTER FONTAINE**

**Between :**

<b>SPORTCAL GLOBAL COMMUNICATIONS LIMITED (1)</b>	<b><u>Claimants</u></b>
<b>GLOBAL DATA PLC (2)</b>	
<b>- and -</b>	
<b>MICHAEL JOHN LAFLIN</b>	<b><u>Defendant</u></b>
<b>-and-</b>	
<b>HOWARD KENNEDY LLP</b>	<b><u>Applicant</u></b>

**Nicholas Siddall KC** (instructed by **Keystone Law**) for the **Claimants**  
**Mark Vinall** (instructed by **Kastle Solicitors**) for the **Defendant**  
**Charles Phipps** (instructed by **Clyde & Co**) for the **Applicant**

Hearing dates: 8 November 2022

**Approved Judgment**

This judgment was handed down remotely at 10.30am on 23<sup>rd</sup> March 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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SENIOR MASTER FONTAINE

**Senior Master Fontaine :**

1. This judgment deals with the appropriate costs order in respect of the Applicant's application dated 16th December 2021, which was the subject of my judgment in this matter reference [2022] EWHC 1665 (QB) ("the first judgment"). This judgment should be read in conjunction with the first judgment which sets out the factual background, and I will not repeat matters included in that judgment, save where necessary to explain my decision on costs. The same abbreviations are used as in the first judgment.
2. The order sought by HK is as follows:
  - i) The Claimants pay HK's costs up to and including 27th June 2022 (the date the first judgment was handed down) subject to assessment on the standard basis if not agreed;
  - ii) The Claimants pay HK's costs of the hearing on 8th November 2022;
  - iii) Subject to the above, no order for costs incurred from 28 June 2022.
3. The order sought by the Claimants is as follows:
  - i) HK pay the Claimants' costs of the application;
  - ii) In the alternative, HK pay a contribution to the Claimants' costs by reason of their conduct in the application;
  - iii) In the further alternative, there be no order for costs, save that HK pay the Claimants' costs of the hearing on 8th November 2022.
4. The Defendant participated in the hearing through counsel, but seeks no order in respect of his costs, and neither the Claimants nor HK seek any order for costs against him. Accordingly I must decide what order is appropriate for the costs of the application as between the Claimants and HK.
5. HK were the successful party in the application. The general rule under CPR 44.2 (2) is that the unsuccessful party will be ordered to pay the costs of the successful party, but the court may make a different order. CPR 44.2 (4) provides that the court will have regard to all the circumstances in deciding what order to make about costs, including the matters set out at (a) to (c) of the rule.
6. In this case the circumstances do provide good reasons for the court to make a different order from that set out in the general rule. The primary reason is that this was not usual party and party litigation, as HK are a third party seeking either agreement from the Claimants or an order from the court in order to progress their interests in the Related Proceedings. Further, HK were seeking permission to use, not only confidential documents on the court file, but documents that HK has on its electronic client file as a result of its previous representation of the Defendant in these proceedings, that are confidential to the Claimants. Those are documents and recordings which the Defendant took from the Claimants when he was employed by them, which actions constituted the reason why the Claimants brought this claim against him (which has

since settled). Such documents, I am told, include business plans, M&A draft contracts, minutes of meetings and business critical conversations recorded without consent.

7. In the first judgment I disagreed with the Claimants' criticisms of HK for making the application, and did not conclude that it was premature, as submitted by the Claimants, for the reasons given. That point was nevertheless pursued by the Claimants in submissions at this hearing. I therefore emphasise that HK were put in the position of having to make an application before 19 December 2021 or risk being found to be in breach of the Relevant Orders, if the Claimants had been correct in their construction of those orders.
8. The correspondence between solicitors for the Claimants and HK, both before and after the application was issued, was in my view unnecessarily combative. The primary reason for that was the approach of the Claimants' solicitors, and in particular their reliance on the terms of the Relevant Orders, which proved to be unsustainable. Their initial reluctance to engage with HK as to how agreement might be reached to permit HK to use the documents as sought provided suitable protections were put in place was expressed on the basis that HK were bound by the terms of the Relevant Orders. In some respects that reluctance was understandable, in circumstances where the confidentiality of those documents had already been breached by the Defendant, and the Claimants have had to go to great lengths to retrieve that position, spending, I am told some £350,000 in costs to do so, only to be confronted with the Defendant's former solicitors, who had access to that documents only for the purpose of advising and representing the Defendant, seeking to retain the documents and use them for the Related Proceedings. I accept the submissions on behalf of the Claimants that they regard the confidentiality of these documents as very important to them. However, the issue of a party seeking permission to make use of documents disclosed during the course of separate proceedings is not novel, and is anticipated in CPR 31.22 (1). It is an issue that occurs not infrequently in proceedings concerning commercially sensitive information; see for example the comments of Floyd LJ in *OnePlus and ors v Mitsubishi and ors* [2020] EWCA (Civ) 1562 at [1]. Further, the court expects parties to co-operate with each other to assist the court, and the correspondence reveals an initial lack of co-operation and intransigence by the Claimants, which unnecessarily increased the costs, and the language used in the correspondence from the Claimants was on occasions intemperate.
9. The Claimants have criticised HK for failing to make concrete proposals in respect of the terms on which a "confidentiality club" could be established at an early stage, and because they did not provide draft undertakings until 11 March 2022. Correspondence between the parties then did engage with the wording of such undertakings and a proposed draft order in the period thereafter before the hearing date on 31 March, but unfortunately agreement could not be reached before the hearing. The time allowed for the hearing was insufficient to deal with all issues before the court, and the Claimants have criticised HK for providing an inadequate time estimate to deal with all issues. However, the resolution of the issue of construction of the Relevant Orders was sufficient to break the deadlock between the parties, and agreement has now been reached on the terms of a confidentiality club, including undertakings, so that HK can use the confidential material without breaching the Claimants' confidentiality in the documents. Thus the determination of the remaining issues has proved to be unnecessary, and some costs will have been saved as a result. I am told that the extent

of the agreement to keep documents confidential relates to the entirety of HK's client file, in other words beyond what could have been achieved by an order on the application, as the Claimants' documents of course constitute only part of that file.

10. Thus the Claimants' alternative argument, as to whether HK had any right to continue to retain the Claimants' documents after they had ceased to represent the Defendant, under the *Brandeaux* principles, was never determined. However this issue was never, in the correspondence, the issue between the parties that prevented an agreement being reached. The issue as detailed in the correspondence which prevented agreement was the difference between the Claimants and HK as to whether the Relevant Orders bound HK.
11. In the end, whether HK should have ceased to retain the Claimants' confidential documents under the terms of the Relevant Orders or under the *Brandeaux* principles was a sterile argument, because there had to be a pragmatic basis on which the issue could be resolved. The Defendant's solicitors recognised this and aptly summarised the situation in their letter to both other parties of 25 March 2022, when they stated:

“In principle, it is apparent to us that both Sportcal and Howard Kennedy have genuine and legitimate concerns about how the Claim should proceed. We understand that Sportcal legitimately wishes to protect its confidential information, whilst Howard Kennedy has a legitimate interest in being able to defend itself against the professional negligence counterclaim and in the detailed assessment proceedings.”

12. Ultimately both parties were able to achieve this, and the Claimants submit that the resolution of the issue of interpretation of the Relevant Orders was a necessary step on the way to doing so, and that the order on costs should reflect that.
13. I consider that in so far as the costs of the issue determined at the hearing, the Claimants bear some responsibility in respect of matters of conduct, namely:
  - i) the unclear drafting of the Relevant Orders which led ultimately to the need for a judicial determination;
  - ii) the manner in which they dealt with HK about the return of the confidential documents after settlement was reached with the Defendant, as outlined at Paragraphs 42-44 and 49 of the first judgment;
  - iii) their lack of a constructive response to the offer by HK before issue of HK's application on 29 November 2021 to draft a confidentiality club agreement, and after the proposal was made again on 8 February 2022;
  - iv) the lack of recognition that the order dated 12 November 2021 in the Related Proceedings preserved the Defendant's confidentiality and legal privilege, which limited the information that HK was able to provide the the Claimants without the Defendant's agreement;
  - v) the wholly unnecessary (in my view) insistence on obtaining a determination as to whether HK were in contempt of court, when HK had taken the proper step

in the light of the disagreement between the parties, of taking the issue to court for a resolution;

- vi) the underlying but unstated threat that HK were in breach of the penal notice in the order of 20 December 2021, without clarification;
  - vii) the refusal to properly engage with HK about the interpretation of the Relevant Orders, or the categorisation of the confidential documents, when HK sent suggested categorisation on 8 February 2022.
14. Equally, HK, as the party who were seeking to use the Claimants' confidential documents in other proceedings, could have made the running at an earlier stage in proposing draft undertakings and a draft order, and in explaining the particular issues in the Defendant's Counterclaim in the Related Proceedings that HK needed to address, so that the Claimants could have taken a more considered view about the protection of their confidential documents at an earlier stage, which could have saved costs. But the correspondence shows that HK's solicitors were trying to alleviate the Claimants' concerns, but making little headway.
15. The Claimants would be entitled in any event to their costs of considering HK's request and a proportion of the costs of dealing with the application, to reflect the fact that such costs were incurred only because of HK's involvement in the Related Proceedings.
16. Both parties have submitted that the orders ultimately agreed are not very different from the competing draft versions that they each provided during the course of negotiations prior to the hearing. I do not find such submissions of any particular assistance as the parties clearly needed more time to reach a compromise acceptable to both of them.
17. Taking all those factors into account, I consider that the appropriate order in respect of the costs of the application is as follows:
- i) The Claimants pay a contribution to HK's costs of the application, in so far as they do not relate to the Settlement Documents, (as defined in the Order dated 8 November 2022) up to the handing down of the first judgment on 27 June 2022, and of the costs of the hearing on 8 November, which I consider should be 15%; save that the Claimants do pay 100% of HK's costs of dealing with the written submissions made between 6 and 11 May 2022 and for permission to appeal dated 13 June 2022.
  - ii) Subject to the above, no order for costs incurred from 28 June 2022.
  - iii) Such costs to be the subject of detailed assessment if not agreed.
  - iv) The Claimants to pay an interim payment on account of costs in the sum of £10,000.