IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
OF ENGLAND AND WALES
TECHNOLOGY AND CONSTRUCTION COURT (KBD)

Nos. HT-2022-000113 and HT-2022-000420

Neutral Citation: [2023] EWHC 1420 (TCC)

Rolls Building
Fetter Lane
London EC4A 1NL

Wednesday, 3 May 2023
Thursday 4 May 2023

Before:

MRS JUSTICE O'FARRELL DBE

B E T W E E N :

(1) INTERNATIONAL GAME TECHNOLOGY PLC
~~(2) IGT GLOBAL SERVICES LIMITED~~
(3) GLOBAL SOLUTIONS CORPORATION
(4) IGT (UK3) LIMITED
(5) IGT UK INTERACTIVE LIMITED
(6) IGT UK LIMITED — Claimants

- and -

THE GAMBLING COMMISSION — Defendant

- and -

(1) ALLWYN ENTERTAINMENT LIMITED
(2) ALLWYN INTERNATIONAL AS — Interested Parties

J U D G M E N T

A P P E A R A N C E S

MR P MOSER KC, MR E WEST, MS J COYNE and MS C KELLEHER (instructed by Osborne Clarke LLP) appeared on behalf of the Claimant.

MISS S HANNAFORD KC, MR J NEILL, MISS R GROGAN and MR B McCAY(instructed by Hogan Lovells International LLP) appeared on behalf of the Defendant.

MR J BARRETT and MR M BIRDLING (instructed by Quinn Emanuel Urquhart & Sullivan UK LLP) appeared on behalf of the Interested Parties.

MR Z SAMMOUR (instructed by Linklaters LLP) appeared on behalf of Camelot.

MRS JUSTICE O'FARRELL:

Preliminary Issue Application

1 This is an application which has been made by the defendant, the Gambling Commission, dated 4 April 2023, for the court to determine at a hearing the preliminary issue which has been identified as follows:

> "Whether the claimants or any of them lack standing to bring a claim under Regulation 52 of the Concession Contracts Regulations 2016 and/or whether the claim in the re-re-re-re amended particulars of claim is not actionable by the claimants or any of them because they are not, in respect of the competition, economic operators to whom a duty is owed by the defendant under the CCR16."

2 The application is supported by Allwyn, the interested party. It is opposed by the IGT claimants. I have a very helpful crib sheet which has been produced by Mr Moser KC, leading counsel for the IGT claimants, which identifies the nature of the claimants still active in the litigation:

i) Claimant 1, International Game Technology Plc, is a UK company and is the ultimate holding company for all of the other defendants.

ii) The second claimant is no longer a party to the proceedings.

iii) The third claimant, IGT Global Solutions Corporation, is a US company that would have been a sub-contractor if Camelot had won the competition for the fourth licence.

iv) The fourth claimant, IGT UK3 Limited, is also a UK company and was initially a bidder in its own right in the competition, but subsequently withdrew.

v) The fifth claimant, IGT UK Interactive Limited is a UK company and, like the third claimant, would have been a sub-contractor if Camelot had been the successful bidder.

vi) The sixth claimant, IGT UK Limited, is also a UK company; it is said by the claimants that the third and fifth claimants would have used the sixth claimant as a sub-contractor, i.e. it would have been a sub-sub-contractor, if Camelot and IGT had been successful in the competition.

3 In short, the third and fifth claimants were key sub-contractors for the purposes of the bid; the first, fourth and sixth claimants were not key sub-contractors as part of the bid and therefore have a different interest, if any, in the outcome of the competition.

4 The defendant's position is that none of the claimants is an economic operator and none of the claimants has an actionable claim against the defendants because they were not owed any duty by the defendant under the regulations and they have no right to claim damages in these proceedings. The position of the defendant is helpfully summarised in the skeleton argument and oral submissions of Miss Hannaford KC, leading counsel for the defendant.

5 Regulations 50 and 51 of the Concession Contracts Regulations 2016 ("the Regulations") provide that contracting authorities owe duties to: (a) economic operators from the UK or another EEA state; and (b) a GPA state (a country, other than an EEA state, which is a signatory to the Agreement on Government Procurement) where the GPA applies to the procurement concerned. Under Regulation 52(1), breaches of the duties owed in Regulations 50 and 51 are actionable by any economic operator who, in consequence of those breaches, suffers or risks suffering loss or damage.

6 It is the defendant's case that the IGT claimants are not economic operators to whom a duty is owed by the Commission under the Regulations and therefore they have no actionable claims. Reliance is placed on the Remedies Directive, Article 1(3) of which provides that:

> "Member States shall ensure that the review procedures are available, under detailed rules which the Member States may

> establish, at least to any person having or having had an interest in obtaining a particular contract and who has been or risks being harmed by an alleged infringement."

7 The defendant's position, supported by Allwyn, is that the Regulations go no further than the minimum requirement required by the Remedies Directive. The claimants did not have an interest in obtaining the contract in question, namely the fourth licence. As a result, they are not economic operators to whom there is any relevant duty owed under the Regulations and they do not have a right of action for a breach of those Regulations.

8 The defendant and Allwyn submit that they have a stronger argument in relation to the first, fourth and sixth claimants because they were not involved in the competition as potential contractors or sub-contractors (once the fourth claimant had withdrawn its bid). Although the third and fifth claimants were key sub-contractors for the purpose of Camelot's bid, they did not have any interest in obtaining the contract and therefore they, too, are excluded from bringing any claim against the defendant in these proceedings.

9 The point in dispute, namely, whether any of the claimants have sufficient standing and/or a cause of action against the defendant in these proceedings, was pleaded in the re-amended defence served on 27 January 2023. Therefore the claim has been raised as an issue between the parties on the pleadings. Mr Moser submits that the application for a preliminary issue has been raised too late. However, I accept the reasons given by Ms Hannaford for not raising this matter before today. When the proceedings were started a year ago, the initial focus was on an application by the defendant to lift the automatic suspension which was hotly contested and likely to form the subject of an appeal to the Court of Appeal. Although that subsequently fell away, from August 2022 the parties were focussed on an expedited trial, having regard to the possibility that if the appeal succeeded, the suspension would remain in place pending the final determination of the claims. Given that the expedited trial was then due to take place in January 2023, it was fairly clear that there would be no room

for any preliminary issues. Following the merger of the parent companies of Camelot and Allwyn, the adjournment of the trial to 2024 and the discontinuance of the Camelot claims, the landscape and timetable for the litigation is very different and allows for consideration of a trial of the preliminary issues forward today.

10 Mr Moser makes the valid point that as early as December 2022, the claims by Camelot were stayed on the basis that it was likely that there would be a merger between the Allwyn and Camelot parent companies, which would result in Camelot dropping out of the proceedings altogether, as has proved to be the case. However, until the merger had received regulatory approval and it had been established whether or not Camelot would remain an active claimant in the proceedings, it was prudent for the parties to wait before considering the way forward and the value of trying any preliminary issues. The issue of standing/actionability did not arise in respect of Camelot because it was an unsuccessful bidder in the competition and had a clear interest in the outcome. Therefore, if Camelot remained an active claimant in the proceedings, there would be a full trial in relation to all issues of liability in any event and the value of any preliminary issues would be reduced.

11 For those reasons, I do not criticise the defendant for waiting until the position was clear as to who was left in the litigation before deciding to make the application that it has made today.

12 The court has power to order a preliminary issue at any time in any set of proceedings but, when considering whether or not to do so, the court must consider whether or not the preliminary issue as identified will determine either the whole proceedings or a significant issue in the proceedings and, if it does so, whether it would dispose of that issue and if that issue is a significant or substantial matter in the trial. The TCC court guide states that the proposed preliminary issue should be capable of: (a) resolving the whole proceedings or a

significant element of the proceedings; (b) significantly reducing the scope and therefore the costs of the main trial; or (c) significantly improving the possibility of settlement of the whole proceedings.

13 Both parties have drawn the court's attention to *McLoughlin v Grovers* [2001] EWCA Civ 1743 per Steel J at [66] and *Steele v Steele* [2001] C.P.Rep 106 per Neuberger J (as he then was), setting out principles which are not controversial. The court must consider whether the determination of the preliminary issue will dispose of the case or at least one aspect of the case; whether the determination of the preliminary issue will significantly cut down on court time involved in pre-trial preparation and/or in connection with the case itself; whether, if it is a point of law, how much effort would be involved in identifying the relevant facts for the purpose of the preliminary issue; if it is a point of law, whether it can be determined on agreed or assumed facts. The court must also consider factors such as whether an order for a preliminary issue will increase costs or, crucial in this case, whether it would delay the trial.

14 As Mr Moser has submitted, given that this trial has already been postponed by a year, the court should be very reticent in ordering the trial of a preliminary issue if it would affect the postponed trial date. The court must also consider how likely it is that the issue will have to be determined by the court. The more likely it is, the more appropriate it is to have it determined as a preliminary issue. Finally, the court must consider whether it is just and right in all the circumstances to order the determination of the preliminary issue.

15 Miss Hannaford and Mr Barrett, counsel for Allwyn, both submit that this is a short point of law that can be determined in a hearing of one to two days and that it could decide the case in its entirety if the court found in their favour, namely, that none of the claimants would have an actionable right against the defendant. Mr Barrett submits to the court that there is

already Supreme Court and other authority on the issue and that it would be a relatively straightforward matter for the court to deal with.

16 The claimants' position is that it is not so straightforward. Mr Moser submits that in order for an economic operator to pursue an action for breach of the regulations, it is necessary for it to be an economic operator (as defined in Regulation 2(1)), to whom a duty is owed (as defined in Regulations 50, 51 and 51(A)), and which has suffered or risks suffering loss or damage as a consequence of the breach (Regulation 52). He submits that each of the relevant provisions requires determination of matters of fact and that the proposed preliminary issues are not simple questions of law; at the very least they raise mixed questions of fact and law.

17 Mr Moser also raises what appears to be a rather vexed issue as to whether or not the third claimant is a GPA party. Miss Hannaford submits that this is a matter that will form the subject of the defendant's application to amend its defence; if that application succeeds, it raises an issue that could, and should, be included in the preliminary issue. Mr Moser's position is that it is not a straightforward issue because one would have to look in detail at the relevant regulations and that that could affect whether or not a party in the position of the 3rd claimant, namely a US company, would be entitled to a remedy as a GPA sub-contractor party in the circumstances that arise in this case.

18 It is clear that there is a dispute between the parties as to whether the claimants, collectively or individually, have an actionable cause of action against the defendant so as to give them a right to damages or other relief as a result of any breach of the Regulations if proven. That is a matter that clearly can be determined as a separate issue prior to the full trial which is set to begin in January 2024. I consider that, even if the precise formulation of the issue requires some further thought or tweaking, the substance of the issue is defined, as currently

pleaded in the re-re-re-amended defence, whether the claimants have sufficient standing, or a right of action, to bring a claim under the Regulations.

19 The nature of this issue is potentially decisive of the action as a whole; even if not, is clearly going to be decisive on the issue whether any of these claimants has the right to sue the defendant for damages. As a result, it is likely that it will narrow the scope of any trial. It will also, in all likelihood, make the prospect of a settlement much more likely. It is, on any view, a relatively short point, or points, of law.

20 I accept that there may be some limited factual issues that need to be ventilated. The court would be reluctant to allow this to go forward on assumed facts because, regardless of the court's finding, that would leave it open to the parties to decide to try and persuade the court that different facts, as it transpired, applied; that could mean that any preliminary issue was of no practical effect. However, I note that there is no real factual dispute as to the status of the claimants or their role, if any, in the competition. There is a potential question mark over the status and role of the sixth claimant but that could be dealt with by permitting the parties to exchange any evidence that they wish to rely upon as being necessary for determination of the issue.

21 Having decided that, in principle, this is an issue of law that could be decided without substantial dispute of fact and would have a potentially decisive impact, the court must then consider how that would fit in to the overall timetable for trial. The starting point is that any preliminary issue should not be allowed to further delay the trial on liability that has already been fixed for January 2024. Fortunately, following recent settlements in other matters, the court is able to accommodate a preliminary issue hearing at the end of June 2023. There is a realistic prospect that any judgment could be produced in time to allow the parties to prepare for the full liability trial, if necessary; alternatively, to avoid significant costs in preparing

for the liability trial. The time estimate should be conservative to ensure that the hearing can be completed within the relevant timescale. Therefore I will fix the hearing of the preliminary issue for Monday, 26 June 2023. The first day will be a reading day for the court. The hearing will then take place on Tuesday 27, Wednesday 28 and a potential third hearing day on Thursday, 29 June 2023.

22 The court will hear the parties on the appropriate directions leading up to that hearing date in one moment. The court has considered the prospect of a potential appeal and how that might impact on the remaining timetable for trial. If a judgment could be obtained by the early part of the Autumn term, then it would be possible to fit in any expedited appeal before the trial is due to commence. The parties might have to incur the costs of preparing for the liability trial in parallel to any appeal but the court considers that it is a risk that is worth taking. Of course, it would be open to the parties to come back to the court to revise the trial timetable or hearing date so as to accommodate any appeal, if considered appropriate. However, at the moment, the court considers that it is possible to fit in both the preliminary issue and the current trial date, with a limited amount of parallel planning as and where necessary.

23 It is significant that this matter was almost ready for trial when the hearing was stayed/adjourned by the orders made in November/December 2022. Therefore, although there remain some outstanding steps to be taken, including disclosure and witness statements arising out of new claims, the court does not consider that the time and cost associated with those tasks are so significant so as to outweigh the clear benefits of having an early determination of the question of whether or not these claimants in fact have any cause of action at all.

24 For all of those reasons, the defendant's application for a preliminary issue is granted.

Use of Camelot Documents

25 This is an application by the IGT claimants dated 14 April 2023 for permission, if they need it, to use three trial witness statements served on Camelot's behalf on 25 November 2022 and also for documents disclosed by Camelot in October 2022.

26 The application refers to seeking an order that the relevant witness statements and documents stand as admissible evidence in the IGT claims, but Mr Moser KC, leading counsel for IGT, clarified that, in fact, the application at this stage is for permission, if needed, to use or rely on the relevant documents, leaving to one side for current purposes the issue of admissibility.

27 The application is made on alternative bases. IGT's primary position is that the relevant witness statement and documents are available to IGT to use and/or rely on without permission. There is no collateral use of those documents because they were served within the jointly managed proceedings. As such, the IGT claims were part of the proceedings in which those documents were served for the purposes of CPR 31.22, and CPR 32.12. In the alternative, if the court does not accept that primary position, Mr Moser submits that, as an alternative, IGT seeks the court's permission to rely on the relevant Camelot documents under CPR 31.22(1)(b) and 32.12(2)(b).

28 The application is opposed by the defendant, the Gambling Commission and also by Camelot. The submission made by Ms Hannaford KC, leading counsel for the defendant, is that Camelot's witnesses have not consented to the use of their witness statements or disclosed documents. The proceedings have not been consolidated and therefore the Camelot and IGT proceedings remain separate. Therefore IGT must seek the court's

permission. Ms Hannaford submits that IGT does not meet the high threshold test identified in *Lakatamia Shipping Co Ltd v Su* [2020] EWHC 3201 (Comm), [2021]. IGT has not identified special circumstances which demonstrate cogent and persuasive reasons for granting permission for the collateral use sought. In those circumstances it is said that the court should refuse permission.

29 Mr Sammour, counsel for Camelot, opposes the application on the same grounds as the defendant. In addition, he submits that Camelot would suffer prejudice if permission were given to IGT to make use of the witness statements and documents. Camelot would be required to maintain legal representation in order to protect its position throughout these proceedings and, further, it raises the prospect of the Camelot witnesses potentially being required to give evidence in the case.

30 The starting point is the relevant provisions of CPR 31.22, and CPR 32.12. CPR 31.22 relates to the use of disclosed documents, and provides that:

> "(1) a party to whom a document has been disclosed may use the document only for the purpose of the proceedings in which it is disclosed, except where –
>
> (a) . . .
>
> (b) the court gives permission."

31 A similar provision applies in relation to witness statements at 32.12 (1), which provides:

> "(1) Except as provided by this rule, a witness statement may be used only for the purpose of the proceedings in which it is served.
>
> (2) Paragraph (1) does not apply if and to the extent that–
>
> (a) . . .
>
> (b) the court gives permission for some other use . . ."

32 The issue has arisen in rather unusual circumstances. Separate claims have been made by Camelot and by the IGT claimants. By consent the court made an order that all the claims should be case managed and tried together but there has been no order for consolidation. Therefore the claims remained separate sets of proceedings. However, when giving directions in August 2022, the court expressly ordered (with the consent of the parties) that: (i) the claims should be case managed together; (ii) there should be a single trial; (iii) disclosure should be given by each party (not limited to specific proceedings); and (iv) witness statements should be served by each party (not limited to specific proceedings). No one raised any concern or attached any caveat to the basis on which Camelot disclosed documents, not only to the defendant but also to the other parties, including the IGT claimants. The IGT claimants gave disclosure not only to the defendant, and the other parties, but also to Camelot. No concern was raised by the fact that Camelot served its witness statements on the IGT claimants as well as the other parties, and the IGT claimants served their witness statements on Camelot as well as the other parties. The matter has only arisen because Camelot has now discontinued its proceedings against the defendant. The issue is whether the IGT claimants are entitled to continue to make use of the disclosed documents and witness statements provided by Camelot.

33 I start by considering whether IGT is, in fact, precluded by CPR 31.22 and/or 32.12 in relying on or making use of the documents and witness statements absent any permission of the court. I am inclined to the view (but do not reach a final conclusion) that IGT is entitled to continue to rely on and make use of the documents. Although the IGT claims and the Camelot claims remained separate proceedings, the orders made by the court and the steps taken by the parties were based on a common understanding that the claims were being treated as joint proceedings. Camelot disclosed documents and witness statements to IGT

pursuant to the order made by the court that was common to both the Camelot and IGT proceedings. Therefore, the documents and witness statements were disclosed to IGT for the purpose of both the Camelot and IGT proceedings. It follows that IGT is entitled to use those documents and witness statements for the purpose of the IGT proceedings.

34 The suggestion by Mr Sammour, that the disclosure and witness statements served by Camelot on IGT were subject to implied consent that IGT could read and review the documents but not make any use of them or rely on them without Camelot's consent or the court's permission, does not reflect the basis on which the parties were proceeding. The idea that IGT, through its legal representatives and client representative in the confidentiality ring, should read the documents and therefore be able to give secondary evidence about those documents, but then potentially be refused permission to rely on the documents themselves is not a practical solution to the position that must be inferred from the free and consensual exchange of documents and witness statements by all these parties within proceedings that were being case managed together. I do not accept that the disclosure of documents and witness statements in these proceedings were intended to be anything other than a shared approach to the litigation, particularly having regard to the extent of the overlap in the factual and legal issues raised in the claims. Otherwise, there was little to be gained by having common directions that were applicable across the board to all active parties.

35 However, without reaching a final conclusion on that, even if IGT did need the court's permission, such permission would be granted and is hereby granted if needed. The relevant test is as set out in *Tchenguiz v The Serious Fraud Office* [2014] EWCA Civ 1409 in which Jackson LJ explained the nature of the rule that documents should not be used for any purpose other than for use in the proceedings in which they were disclosed, stating at [56]:

> "First, a party receiving documents on discovery impliedly undertakes not to use them for a collateral purpose. Secondly, the obligation to give discovery is an invasion of the litigant's right to privacy and confidentiality. This is justified only because there is a public interest in ensuring that all relevant evidence is provided to the court in the current litigation. Therefore the use of those documents should be confined to that litigation. Thirdly the rule against using disclosed documents for a collateral purpose will promote compliance with the disclosure obligation."

36 At [66] Jackson LJ set out the general principles applicable when the court is faced with an application for permission to use disclosed documents:

> "i) The collateral purpose rule now contained in CPR 31.22 exists for sound and long established policy reasons. The court will only grant permission under rule 31.22 (1) (b) if there are special circumstances which constitute a cogent reason for permitting collateral use.
>
> ii) . . .
>
> iii) There is a strong public interest in facilitating the just resolution of civil litigation. Whether that public interest warrants releasing a party from the collateral purpose rule depends upon the particular circumstances of the case. Those circumstances require careful examination . . .
>
> iv) . . .
>
> v) It is for the first instance judge to weigh up the conflicting public interests. The Court of Appeal will only intervene if the judge erred in law . . . or failed to take proper account of the conflicting interests in play . . ."

37 In this case I consider that there are cogent reasons for permitting a collateral use if that is, in fact, the correct characterisation in this case.

38 Firstly, the parties have been acting in the same litigation, albeit under separate sets of proceedings, and that condition would have continued but for the fact that the Camelot claimants have discontinued their claims.

39 Secondly, the order for directions was made on the basis that all documents, including witness statements would be served on all parties. That order applied across the board and at no point did any party suggest that there was any caveat to the basis on which that was being done.

40 Thirdly, the witness statements and disclosure were given by Camelot and must have been given on the understanding that they could be relied on by the IGT claimants, otherwise, there was no point in serving those documents on IGT. Likewise, IGT served its documents and witness statements on Camelot with a view and understanding that use would be made of those documents by Camelot if it saw fit.

41 Fourthly, there would be significant prejudice to IGT if it were not permitted to rely on, or otherwise use, the documents disclosed by Camelot. It is quite clear from the pleadings that there has been very great alignment as between the Camelot claimants and the IGT claimants. IGT has incorporated and relied on significant parts of the Camelot pleadings (although, as an aside, the pleadings need to be tidied up moving forward to reflect the discontinuance of the Camelot claims). Until now IGT has proceeded on the basis that it is entitled to rely on the documents and witness statements disclosed by Camelot and it would be unfair if its litigation strategy for over a year now had to be changed.

42 Finally, I accept that there is an additional burden on the Camelot claimants in that it may well be that they need, or feel the need, to maintain legal representation in order to protect their position, particularly as regards confidentiality. But that minor prejudice, which arises as a matter of course in relation to interested parties in procurement litigation, is a relatively small matter of concern when compared with the significant prejudice to IGT if it were now shut out from using documents to which it has been freely given access by Camelot.

43 For all those reasons the court considers that this would be an appropriate case in which to give permission for collateral use of the documents and witness statements if, indeed, such permission is required.

Defendant's Application for Further Information and Disclosure

44 This is the defendant's application for further information and disclosure of documents relied upon in support of the claimants' claims for damages. The application was made on 21 April 2023 and relates to the claimants' prayer in its pleaded case, claiming damages for loss of profit, and/or contribution to overheads, and/or wasted tender costs, and/or damages for loss of reputation, goodwill and the ability to win and earn profits on other similar contracts.

45 The request for further information was issued by the defendant on 16 March 2023. In it the defendant seeks further information in relation to the prayer for damages set out in the particulars of claim, including the following:

i) Request 2 seeks an explanation, including key assumptions and calculation, together with key documents relied on in support thereof, of each claimants' claim for damages for: (a) loss of profit; (b) loss of contribution to overheads; (c) wasted tender costs; (d) loss of reputation; (e) loss of goodwill; (f) loss of the ability to win and earn profits on other similar contracts.

ii) Request 4 seeks an explanation as to the basis, both factual and legal, on which it is alleged that the claimants, or any of them, are entitled to damages in categories (d) to (f).

iii) Request 5 states,

"Please identify the other similar contracts to which the claimants refer".

iv) Request 6 states,

"Please explain in relation to the other similar contracts why the claimants have not tendered, are not tendering, or will not tender for such contracts".

v) Request 7 requests an explanation of all steps taken to mitigate the claimants' loss.

46 There has been correspondence between the parties in relation to the information and documents sought. On 31 March 2023, the claimants provided a formal response to the Part 18 request for further information. In relation to Request 2, the claimants stated that they had provided their response in a confidential schedule. The court will not read out the contents of the confidential schedule but notes that it contains a very high level breakdown of the key heads of cost and/or projected profits which form the basis of the claims for loss of profits, wasted tender costs and the other heads of damage.

47 The defendant is dissatisfied with the level of detail provided in response to the request and, therefore, in its application it seeks further information and documents in relation to requests 2, 4, 5, 6 and 7.

48 IGT accepts that the defendant is entitled to the information and documents sought but raises two concerns. Firstly, it is concerned that the information sought includes confidentially sensitive information and there should be adequate protection in place in respect of such confidential information. Secondly, there is an issue of proportionality. IGT's position is that it has already provided significant information in relation to its claim for damages. In circumstances where there is a trial on liability, but not quantum, in January 2024, and there is a forthcoming trial of preliminary issues in June, which may either

confirm or reject the claims in relation to some or all of the claimants, it is premature for much of this information to be provided.

49 The court has before it a balancing exercise to carry out. On the one hand, the defendant has an entitlement to such information and key documents in support of the claim for substantial damages. It has a legitimate entitlement to detailed information and supporting documents in relation to quantum in circumstances where that information could well promote or encourage settlement negotiations. On the other hand, the claimants have legitimate concerns about confidentiality and a reasonable wish to avoid incurring costs in providing quantum documents and information given the impending preliminary issues trial, one of the purposes of which is to avoid unnecessary costs.

50 Balancing those factors, I turn to Request 2, the key area in which further information is sought. Primarily, the defendants are concerned to receive further information in relation to the loss of profit claim, which is a very substantial figure. In the confidential schedule the claimants have set out what the figure is, they have set out key assumptions on which that figure has been arrived at, and they have set out a breakdown, but the breakdown is, as I have already alluded to, a very high level breakdown, identifying heads of loss rather than providing any further detailed information. It seems to me that the defendants have a legitimate expectation that they should be given additional information and documents in relation to that claim, and it is a reasonable and proportionate request that such documents and information should be provided now rather than at the quantum stage.

51 The categories of document that have been sought in correspondence, as has fairly been conceded by the defendants this morning, are very broad. What the court would be minded to do is to order a further breakdown of the figures set out in the confidential schedule, together with key documents relied upon in support of those figures, such documents to include IGT internal financial models for the project and management accounts. It seems to

me that those are the key documents that will enable the defendants to consider the reliability of the figures that have been pleaded.

52 In terms of confidentiality, the starting point is that it is not appropriate for the relevant documents, and/or pleaded response to the further information, to be put into the current confidentiality ring (even Tier 1) because Allwyn is a member and the information is only required at this stage by the defendant. Therefore, I would invite the parties to agree an alternative method of delivery of the information and documents so as to preserve the confidential information.

53 If the parties are unable to reach agreement on an alternative procedure for the supply of the confidential information, they should refer any further dispute on that matter to the court for determination on the papers.

54 As to the other requests, the court considers that the information is not needed at this stage. The other heads of claim are subsidiary to the main claim for loss of profit. The defendant has the burden of proving any failure to mitigate, a matter which has not today been pleaded in the defence. Although the defendant may well be entitled to this information at a later stage, it is not reasonable or proportionate for further information or documentation to be provided in relation to that part of the quantum claim at this stage.

55 For those reasons, I will order that the further information and key documents be provided in response to Request 2 of the RFI.

Allwyn's participation in the Preliminary Issue

56 When the directions for trial were first made by the court, permission was given to Allwyn, as an interested party, to participate in the liability trial, limited to issues that were not raised by the defence and to other issues only in so far as Allwyn might have a separate interest to the defendant.

57 The preliminary issue was not at that point ordered to be determined separately but has always been part of the liability case. If it were not going to be decided as a preliminary issue, it would form part of the liability trial. The court must consider whether it is necessary and proportionate for Allwyn to attend as an interested party at the preliminary issue trial.

58 Mr Barratt, counsel for Allwyn, has persuaded the court that there is a separate interest on the part of Allwyn in the outcome of the preliminary issue trial. If any or all of the IGT claims are dismissed at that point, then it will reduce or avoid altogether the very substantial estimated costs of the main trial on liability and the management time within Allwyn that will be tied up if this matter goes to a full trial.

59 It is also material that the preliminary issue trial will consider matters of legal principle on which there is no direct authority in this jurisdiction, at least in the context of the factors that are present in this case.

60 No one has demurred from the fact that the preliminary issue raises significant points of construction and law. In those circumstances, the court should give Allwyn an opportunity to be represented and to make submissions.

61 However, I am concerned to maintain a level playing field. Therefore, time shall be shared as between the IGT claimants, on the one hand, and as between the defendant and Allwyn on the other. There should be no duplication of effort in terms of submissions, both written and oral, as between the defendant and Allwyn.

62 The court reserves all matters of costs associated with the preliminary issue trial, including whether or not Allwyn would ultimately be responsible for any part of the costs or entitled to recover any of its costs. All of those matters will be left over to the judge hearing the preliminary issue trial.

Timetable

63 The starting point is that the court has ordered the preliminary issue trial to take place on 26 June 2023. The hope is that the parties will not have to incur substantial additional costs in relation to other issues in the trial prior to the determination, at least at first instance, of that preliminary issue. However, balanced against that is the very clear interest for all parties in ensuring that the liability trial set for January 2024 is not lost, if and in so far, of course, as it is needed. The court also bears in mind that the preliminary issue trial could result in an expedited appeal which, if it took place, is likely to be in the Autumn term.

64 For the parties to have the benefit of the preliminary issue trial, and to avoid as many costs as possible, the date for supply of documents for confidentiality review should be 1 September, as suggested by the defendant. Any earlier date would require the defendant to carry out a substantial amount of work on disclosure during the course of the preliminary issue trial. There then needs to be a sufficient period between that date and the disclosure date so that all parties have an opportunity to properly scrutinise and identify their confidential information. I think that 22 September is too soon; I wish push that back to 6 October 2023, allowing a period of about five weeks for that process.

65 The claim 2 witness statements should be served by 20 October 2023. That is getting quite late but although claim 2 raises substantial facts, the pleaded allegations arise out of disclosure that has already been given. Therefore, the parties would be in a position to start preparing their witness statements as early as they choose, following determination of the preliminary issue, because they already have the documents on which the allegations are based. Further, claim 2 is relatively limited, in terms of scope when compared with the overall liability claim issues. That still would enable the claim 2 Tier 2 witness statements to be produced by 3 November. I do not think that a significant period of time is going to be needed for that, and I notice that the claimants had only allowed one week for that. That

would allow the reply statements in claims 1 and 2 into Tier 1 by 10 November, reply statements, non-confidential versions in Tier 2 by 17 November. The index to the trial bundle can be agreed by 24 November, bringing everything into line by 1 December 2023. The skeleton arguments should be filed by 12 January 2024.

Costs

66 This hearing was fixed as a CMC in order to take stock after Camelot's exit from the litigation, although they have returned as an interested party today and yesterday. During the course of preparation for the CMC a number of applications were issued that were dealt with by the court over the last two days, raising varied and interesting points, and the issue now is for the court to determine the costs outcome.

67 The costs of the amended defence are not in issue. The usual rule on costs applies as the parties have agreed.

68 Turning to the preliminary issue application, this has taken up the most time over the two-day CMC. It is said by the defendant that it has been successful - that is supported by Allwyn - in that the court has ordered the preliminary issue as requested. However, I note that it was a matter properly to be raised at a CMC. It seems to me that the proper approach by the court when considering the costs of an application for an order for a preliminary issue at a CMC is to order that those be costs in the preliminary issue itself. If the claimants turn out to be correct, they will have justified opposing the application on the ground that there would be no saving of time or cost. If the defendant and Allwyn are successful, then they will have strong grounds on which to recover their costs. So I order that that the application costs are costs in the preliminary issue.

69 In relation to the other issues, the claimants were the victors on the application for use and/or reliance on the Camelot documents and witness statements; the defendant was the

winner on the RFI. Therefore, there is an element of a score draw. On the CCRO, the court is not really in a position to judge who gave what ground and on what basis. The parties have clearly worked very hard over the last few days in order to reach agreement on a sensible alteration to the confidentiality ring arrangements so as to make them work as efficiently as possible whilst maintaining the protection of confidentiality where necessary. The parties are to be commended on that exercise and it does not seem to me that it is appropriate to either penalise or reward a party in relation to costs.

70 For those reasons, the court orders that the other costs of the applications should be costs in the case, save for the outstanding application in relation to the witness statement, which will be stood over.

CERTIFICATE

Opus 2 International Limited hereby certifies that the above is an accurate and complete record of the Judgment or part thereof.

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