Neutral Citation Number: [2023] EWHC 2283 (KB)

Case No: HO5LV765

**IN THE HIGH COURT OF JUSTICE**
**KING'S BENCH DIVISION**
**MEDIA & COMMUNICATIONS LIST**
**LIVERPOOL DISTRICT REGISTRY**

Liverpool Civil and Family Courts
35 Vernon Street
Liverpool L2 2BX

Date: 15/09/2023

**Before** :

**THE HONOURABLE MRS JUSTICE FARBEY**

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**Between :**

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|---|---|
| **X** | **Claimant** |
| **- and -** | |
| **(1) The Transcription Agency LLP** | |
| **(2) Master Jennifer James** | **Defendants** |

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**Mr David S Boyle** for the **Claimant**
**Mr Dan Stacey** (instructed by **Kennedys Law LLP**) for the **First Defendant**
**Mr Will Perry** (instructed by the **Government Legal Department)** for the **Second Defendant**

Hearing date: 6 June 2023

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# Approved Judgment (Costs)

This judgment was handed down remotely at 10.30am on 15 September 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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**MRS JUSTICE FARBEY:**

## Introduction

1. This is a judgment about costs. The claimant is an individual who challenged the refusal of each defendant to provide him with his personal data. The first defendant provides transcripts of court hearings pursuant to a Framework Agreement with the Lord Chancellor relating to the provision of court reporting and transcription services ("the Framework Agreement"). The second defendant is a High Court Master and a Costs Judge. During the course of costs proceedings before the second defendant, the claimant requested transcripts of three hearings which were to be produced by the first defendant.

2. The claimant made a subject access request ("SAR") to each defendant under the Data Protection Act 2018 and the United Kingdom General Data Protection Regulation. By those requests, he sought the supply of personal data that the defendants held about him. Neither of the defendants provided him with any personal data. In refusing to do so, they relied on the judicial exemption under para 14 of Part 2 of Schedule 2 to the 2018 Act. The judicial exemption enables personal data to be withheld from an individual if (among other things) it is processed by an individual or court acting in a judicial capacity or if its disclosure would be likely to prejudice judicial independence.

3. Following a three-day trial, I upheld the defendants' reliance on the judicial exemption and dismissed the claimant's claim for relief. The reasons for dismissing the claim are set out in a judgment handed down on 9 May 2023: see [2023] EWHC 1092 (KB). I shall refer to that judgment as "the main judgment".

4. I received written submissions in respect of costs before the main judgment was handed down. However, the parties took such different positions on costs that the court was not in a position to determine questions of costs without a further hearing. By Order dated 9 May 2023, I directed that there be a costs hearing. My Order provided that the parties should by 18 May 2023 produce agreed draft directions for my approval in relation to (among other things) the filing and service of any further documents that the court would need to consider.

5. I did not receive any response to the request for agreed draft directions and so, on 24 May 2023, I asked court staff to chase the parties. On 25 May 2023, I was provided with agreed directions which I approved.

6. Under the agreed directions, the claimant's solicitors were required to file and serve an agreed bundle comprising any additional documents upon which the parties' sought to rely and which were not already in the trial bundle. The claimant filed a bundle running to 680 pages. The defendants filed and served their own joint bundle running to 159 pages on the grounds that the claimant's bundle was excessive and contained irrelevant material. On the morning of the hearing, the claimant filed an additional 217 pages of documents. An attempt to file these additional documents earlier was said to have encountered technical problems.

7. In addition to his bundle, the claimant wanted to rely on part of the evidence of Natalie Goodson who had been called at trial on behalf of the first defendant. On 25 May 2023, the claimant submitted a Form Ex 107 in order to obtain a transcript of Ms Goodson's evidence. I dealt with the Form on the same day. As it was optimistic to expect the transcript to be ready by the date of the costs hearing, I directed that the claimant should file and serve a Note of any passages of Ms Goodson's evidence on which he sought to rely. In the written reasons for my direction, I explained that the

Note could then be checked against the approved transcript when it was ready. The claimant did not provide a Note.

8. At the end of the hearing, I permitted the claimant 14 days to file and serve any transcript of Ms Goodson's cross-examination. I directed that only the relevant pages should be filed and served, and that the relevant passages should be sidelined. The claimant asked his selected transcribers to produce a short part of Ms Goodson's evidence. However, the transcribers were not willing to search for a particular part of the evidence on the audio recording.

9. By email to my clerk on 19 June 2023, the claimant's solicitors said that it was not possible to submit a transcript within the period I had directed. The claimant took the view that it was in any event disproportionate to obtain a transcript of Ms Goodson's evidence as he only wished to rely on a small part of what she had said. For these reasons, no transcript has been provided. The claimant's email to my clerk seemed to imply that I should listen to the audio recording in lieu of a transcript. I would not regard such an unorthodox approach as being an appropriate use of judicial resources.

**The main judgment**

10. The main judgment dealt with four principal issues. First, I held that there was no legal bar to the defendants' withholding the claimant's personal data on the basis of the statutory judicial exemption. Secondly, I held that the court had the power to hold a closed hearing (in the absence of the claimant and his legal representatives) in order to determine whether the personal data withheld by the defendants was covered by the judicial exemption. Thirdly, applying the judicial exemption to the facts of this case, I held that the claimant was not entitled to any disclosure and that the entirety of the withheld data fell within the judicial exemption. Fourthly, I held that the claimant had not discharged his burden of proving that the second defendant had responded to the SAR outside the statutory time period of one month. On all these issues, I found in favour of the defendants and against the claimant.

11. Having dealt with the main issues, I considered a number of other issues that the claimant had raised. I do not need to set out here all of those other issues. It suffices to mention that I considered various criticisms made by the claimant about GLD's involvement in the proceedings. I observed:

> "162. The claimant regards it as improper that the second defendant is represented by GLD (as explained in his Memorandum dated 16 December 2022 and in paras 22-24 of his witness statement). In his skeleton argument, Mr Boyle suggests that GLD is "not entitled to act for an individual unless it asserts that the government has a vested interest in the outcome of the case." He implies that the second defendant has not applied her own independent judgment to certain matters that have arisen in the course of these proceedings, having let herself be dominated by hostile government lawyers 'supposedly instructed by her'.
>
> 163. The gist of the claimant's objection to GLD appears to be a concern that the government (a party to the costs proceedings before the second defendant) would have sight of information that was disclosable in the assessment of costs but would in any other context be the subject of legal professional privilege. The claimant is concerned that his privileged material may have been deployed against him in the present proceedings.

> However, there are no proper grounds for advancing such a proposition.
>
> 164. There is no evidence before me that GLD has mishandled any information or documents relating to the claimant. Nor have I been given any reason to suppose that GLD as an organisation does not have adequate systems for conflict checks in place. While the claimant has repeatedly goaded GLD (such as by pursuing a SAR to GLD raising disputatious questions about GLD and its various instructed counsel), I cannot conceive of how I could properly interfere with the second defendant's relationship with her solicitors and independent counsel. I have not been asked to take any action or make any order in relation to the second defendant's representation. I shall not do so."

12. As I have mentioned, the claimant's claim was dismissed and he was not granted any relief. The defendants were the successful parties and the claimant was the unsuccessful party.

**The parties' positions on costs**

13. The defendants each applied in writing and orally for the claimant to pay their costs. They submitted that the award of costs should be on the indemnity basis rather than the standard basis. They each applied for an interim payment on account of costs.

14. The claimant submitted that there should be no order for costs. The court should disapply the general rule - that costs follow the event - on grounds of the defendants' conduct. Alternatively, costs should be awarded on the standard basis as there were no grounds for indemnity costs.

15. The claimant submitted that, in relation to the first defendant, any payment on account should be in a reasonable proportion to the overall sum claimed. In relation to the second defendant, the claimant submitted that she was not indemnified by the Ministry of Justice - who had arranged her legal representation by the Treasury Solicitor and counsel. (I should clarify that the Treasury Solicitor was not personally involved but delegated the conduct of the claim to GLD in the ordinary way.)

16. The claimant submitted that there was no legitimate retainer between the second defendant and the Treasury Solicitor. It was asserted that the Treasury Solicitor cannot in the normal course of events act for a private individual such that no payment on account of costs would be appropriate until (to quote Mr Boyle's skeleton argument) "the second defendant can show that she has a liability to pay costs."

**Legal framework**

17. The general rule is that the unsuccessful party will be ordered to pay the costs of the successful party (CPR 44.2(2)(a)). The court may make a different order (CPR 44.2(2)(b)). In deciding what order, if any, to make about costs, the court will have regard to all the circumstances, including (under CPR 44.2(4)(a)) the conduct of all the parties.

18. Costs may be assessed on the standard basis or on the indemnity basis (CPR 44.3(1)). As the commentary in the 2023 White Book makes plain (at para 44.3.9), the discretion to award costs on the indemnity basis is "ultimately to be exercised so as to

deal with the case justly". In *Libyan Investment Authority v King* [2023] EWHC 434 (Ch), para 3, Miles J cautioned against seeking to substitute for the overall requirement some other gloss or formulation.

19. The test or threshold for indemnity costs has been said to be that the conduct of the parties or other particular circumstances of the case must be such that takes the situation out of the norm in a way which justifies an order for indemnity costs (*Excelsior Commercial and Industrial Holdings Ltd* [2002] EWCA Civ 879, [2002] C.P. Rep. 67). I shall use the shorthand "out of the norm" to refer to that threshold.

20. Although the question of indemnity costs is fact sensitive, a broad approach was outlined in *Three Rivers District Council v Bank of Credit and Commerce International SA (In Liquidation)* [2006] EWHC 816 (Comm) where Tomlinson J held at para 25:

> "(8) The following circumstances take a case out of the norm and justify an order for indemnity costs, particularly when taken in combination with the fact that a defendant has discontinued only at a very late stage in proceedings;
>
> (a) Where the claimant advances and aggressively pursues serious and wide ranging allegations of dishonesty or impropriety over an extended period of time;
>
> (b) Where the claimant advances and aggressively pursues such allegations, despite the lack of any foundation in the documentary evidence for those allegations, and maintains the allegations, without apology, to the bitter end;
>
> (c) Where the claimant actively seeks to court publicity for its serious allegations both before and during the trial in the international, national and local media;
>
> (d) Where the claimant, by its conduct, turns a case into an unprecedented factual enquiry by the pursuit of an unjustified case;
>
> (e) Where the claimant pursues a claim which is, to put it most charitably, thin and, in some respects, far-fetched;
>
> (f) Where the claimant pursues a claim which is irreconcilable with the contemporaneous documents;
>
> (g) Where a claimant commences and pursues large-scale and expensive litigation in circumstances calculated to exert commercial pressure on a defendant, and during the course of the trial of the action, the claimant resorts to advancing a constantly changing case in order to justify the allegations which it has made, only then to suffer a resounding defeat."

21. Where the court orders a party to pay costs subject to detailed assessment, it will order that party to pay a reasonable sum on account of costs, unless there is good reason not to do so (CPR 44.2(8)). I understood it to be common ground that, if I order the

claimant to pay the defendant's costs, the amount of those costs will be determined at a detailed assessment in due course.

22. The White Book 2023 at para 44.2.12 states that the receiving party's costs budget may be a sensible starting point for determining the reasonable sum to be paid on account, citing *Thomas Pink Ltd v Victoria's Secret UK Ltd* [2014] EWHC 3258 (Ch), [2015] 3 Costs L.R. 463 per Birss J as he then was. In that case, payment on account was ordered at 90% of the claimant's approved budget. Mr Dan Stacey (who appeared on behalf of the first defendant) drew my attention to other cases in which Birss J's approach has been followed. In *Sheeran v Chokri* [2022] EWHC 1528, para 41, the court ordered 90% of budgeted costs and 55% of incurred costs. In *Richards v Speechly Bircham LLP* [2022] EWHC 1512 Comm, paras 27-32, the court awarded 90% of budgeted costs and 70% of incurred costs.

**The claimant's explanation and mitigation for his conduct of the proceedings**

23. During the costs hearing, I held a short closed session (at the claimant's request) from which the first defendant and its lawyers were excluded on solely pragmatic grounds and without any acceptance by the first defendant or the court that there was any principled reason for their exclusion. I am grateful to Mr Stacey for agreeing to such a course which had not been foreshadowed in any of the claimant's written documents.

24. I shall respect the claimant's privacy and will not set out here the details of what I was told in that session. By way of a gist, I shall go no further than to say that the claimant raised various matters and mitigating factors in order to explain his pursuit and conduct of the claim. From what I heard, the claimant is suffering from genuine distress about various matters which I do not underestimate. Nevertheless, in the circumstances of this case, the claimant's personal situation does not justify the way he conducted the case against either of the defendants.

**The first defendant**

*Should costs follow the event?*

25. Mr Stacey submitted that there was no reason to disapply the strong rule that costs should follow the event. There was in particular no evidence of misconduct on the part of the first defendant to justify a different order.

26. Mr Boyle's submissions are captured in his skeleton argument in which he criticised the conduct of the first defendant. He submitted that the first defendant had:

> "persisted with its stance that the Framework Agreement was highly sensitive and confidential when in fact it was not".

27. He submitted that the claimant:

> "believed that the First Defendant's redaction of clause 40 was designed solely to avoid the concession that there was an obligation upon the First Defendant to be insured, with which the First Defendant had failed to comply (c.f. the failure to provide insurance details pursuant to the Provision of Services Regulations 2009)."

28. Clause 40 of the Framework Agreement, to which Mr Boyle refers, is headed "Insurance." I have not seen the text of the clause because it has been redacted along with certain other parts of the Framework Agreement. At no stage did the claimant

seek any court order for clause 40 to be de-redacted or for the court to be provided with an unredacted copy of the Framework Agreement.

29. Mr Boyle's submissions have no merit. This was not a case about the Framework Agreement which (as a general contractual framework between the Lord Chancellor and suppliers of services) cannot possibly have contained any personal data of the claimant. The only relevance of the Framework Agreement was to assist the court with the question whether the first defendant was a data processor or a data controller, which was in issue. The first defendant's insurance position could have no connection to that question.

30. The first defendant provided the claimant with a copy of the Framework Agreement in the ordinary course of the disclosure process. The copy was redacted on grounds of commercial sensitivity and confidentiality. I understood Mr Boyle to submit that, as the Framework Agreement may be found on a third party website, it cannot properly be regarded as confidential. It followed that the court should conclude that the reasons given for the redactions were improper and amounted to misconduct.

31. I do not agree with Mr Boyle. The fact that a document appears on the internet does not mean that it is not confidential. Many documents are published online contrary to the wishes of those concerned or affected. I was provided with no evidence that either the Lord Chancellor or the first defendant regarded the redacted part of the Framework Agreement as anything other than confidential. The actions of a third party web site make no difference.

32. Mr Boyle levelled the further criticism that the first defendant had provided "partial disclosure of documents held on a without prejudice basis on the eve of the trial when it could and should have done so months earlier." He submitted that, had the first defendant "not taken that stance", the claimant "would have been able to resolve the litigation against the first defendant without trial."

33. It is correct that the first defendant provided the claimant and the court with schedules of some of the data that it held in relation to the claimant's transcription requests. Those schedules were provided just before the trial commenced. However, the claimant was not entitled to see the data in the schedules: the court would not have ordered it. The claimant's windfall does not sound in costs.

34. Mr Boyle made no mention at trial that the schedules had any impact on whether the claimant would have wished to continue his claim against the first defendant. As Mr Stacey submitted, the claimant continued to mount an aggressive case against the first defendant even after the schedules had been served. Mr Boyle cross-examined Ms Goodson about the content of the schedules. He made closing submissions against the first defendant in a manner that did not suggest that the schedules were dispositive of the claim against the first defendant.

35. Mr Boyle said that the schedules were dense, hard to access electronically and confusingly presented. He submitted that, given these flaws, the claimant could not have been expected to reflect on their content before the end of the trial and was effectively impelled to continue the litigation notwithstanding the schedules. If that were the case, I would have expected the claimant's lawyers to have taken some step to tell the court that his approach to the litigation might change in light of the schedules. I am not persuaded that the claimant would have compromised the claim against the first defendant if he had received the schedules at an earlier stage of the proceedings.

36. There has been no misconduct by the first defendant. There are no grounds for the claimant to avoid paying the first defendant's costs and I shall order him to pay.

*Standard or indemnity costs?*

37. Mr Stacey relied on a number of different factors in order to found his submission that costs should be awarded on the indemnity basis. I need only focus on a few of them.

38. The claimant consistently tried to force the first defendant to reveal its insurer. By letter dated 4 October 2021, Kennedys (the first defendant's solicitors) wrote to the claimant setting out their view of the legal position:

> "As to your request for information relating to insurance, your request is refused. The existence or non-existence of insurance and/or insurance information is not an issue between the parties in the Claim and neither is it a legally relevant factor. The provisions of the Third Parties (Rights against Insurers) Act 2010 do not apply to your client's Claim as there is no suggestion of insolvency on the part of the First Defendant. Moreover, there are no exceptional circumstances within the meaning of the decision of Jefford J. in *Peel Port Shareholder Finance Company Ltd. v. Dornoch Ltd.* [2017] EWHC 876 (TCC) and generally *Travelers Insurance Company Ltd v. XYZ* [2019] UKSC 48."

39. At no stage did the claimant properly engage with Kennedys' legal analysis. In correspondence, Kennedys also set out in detail their legal analysis of why the claimant's own position – which referred to the Provision of Services Regulations 2009 - was legally flawed. The claimant's solicitors referred in correspondence to the Regulations but failed properly to engage with the first defendant's position that the Regulations did not apply. Instead, the claimant's solicitors persisted in unnecessary demands relating to insurance.

40. The claimant's solicitors continued to pursue the matter of insurance after I handed down judgment. By letter dated 22 May 2023, they wrote to Kennedys in the following terms:

> "It appears that the redaction of clause 40 was to conceal the obligation upon the First Defendant to be insured had not occurred. The lack of insurance was inferred by the Claimant from the failure to provide insurance details… [and] by the fact that the 1st Defendant responded to the claim rather than passing the matter onto insurers."

41. The theme that the first defendant had not been frank about insurance was taken up in Mr Boyle's skeleton argument for the costs hearing which said:

> "[The first defendant's] obsession with hiding its lack of insurance inevitably contributed to the conduct of the proceedings: if they [i.e. the first defendant] weren't prepared to be open in that simple regard, what else might they not disclose?"

42. The allegation that the first defendant used the redactions as a cover-up is founded on no evidence. In my judgment, an unfounded allegation of concealing information in litigation amounts to conduct that was out of the norm.

43. The claimant's aggressive pursuit of unfounded allegations of misconduct was wide ranging, covering not only the first defendant but its solicitors. In a letter dated 8 February 2022, the claimant's solicitors referred to Kennedys as having a "staggering ignorance of the CPR" and an "atrocious disregard of CPR compliance" in refusing to provide the unredacted Framework Agreement. In a letter to Kennedys' Compliance Officer dated 29 September 2022, the claimant's solicitors accused Kennedys of improper conduct by "aiding and abetting" the maintenance of an action by a non-party. This produced the unsurprising response from the Compliance Officer that the claimant's solicitors were seeking to threaten Kennedys in order to deflect them from efficiently managing the claim. The unfounded assault on the professional competence of solicitors was out of the norm.

44. The claimant's solicitors required the first defendant to expend a great deal of time and energy on the question of whether the Framework Agreement was confidential and whether it should be disclosed in unredacted form. The limited relevance of the Framework Agreement took the claimant's approach out of the norm.

45. Next, as set out in the passage of the main judgment reproduced above, the claimant has constantly queried the status of the second defendant's representatives. Mr Boyle submitted that the question of GLD involvement had nothing to do with the first defendant and so cannot be regarded as out of the norm viz-a-viz the first defendant.

46. I reject Mr Boyle's submission. On 5 January 2022, the claimant's solicitors wrote to Kennedys. In that letter, the claimant's solicitors stated that they were:

> "concerned as to whether the Treasury Solicitor is permitted to conduct this litigation for the 2nd Defendant."

47. The claimant's solicitors made the following demand:

> "2. It is incumbent on Kennedys LLP to ensure that the law is upheld and it is impermissible to have a situation in which litigation may be being conducted by someone who is not permitted to do so.
>
> 3. Please provide your observations and proposals and refer this aspect to your COLP [i.e. Compliance Officer]".

48. The implication is that the claimant's dispute with the second defendant raised questions of Kennedys' professional conduct. I agree with Mr Stacey that the claimant's solicitors drew the first defendant into a dispute unrelated to the pleaded claim against the first defendant.

49. In his written and oral submissions, Mr Boyle portrayed the first defendant as falling prey to the bad influence of the second defendant. His skeleton argument went so far as to suggest that the first defendant would not have acted independently of the second defendant when providing documentation. In his oral submissions, he asserted that the claimant was concerned that the second defendant was "propping up" the first defendant in costs as the first defendant may have been uninsured. The claimant's willingness to use the first defendant as a conduit for allegations of misconduct against the second defendant was out of the norm.

50. Standing back, I have concluded that the claimant advanced and aggressively pursued the litigation against the first defendant in a manner that was out of the norm. The first defendant's application for indemnity costs succeeds.

**The second defendant**

*Is the second defendant indemnified?*

51. Mr Boyle submitted that I should not require the claimant to pay the second defendant's costs because there was no adequate evidence that the Ministry of Justice has indemnified the second defendant. Mr Boyle criticised GLD for "merely asserting" that the second defendant is indemnified rather than producing any supporting evidence of the indemnity.

52. These submissions are an extension of the claimant's submissions at trial to the effect that it is improper for the second defendant to be represented by GLD. At para 164 of the main judgment (quoted above), I described the claimant as having repeatedly goaded GLD and as having raised disputatious questions about GLD and its instructed counsel. Mr Boyle's invitation to the court to treat the second defendant as not being the beneficiary of a costs indemnity from the Crown is another example of the claimant's and his solicitors' disputatious litigation strategy.

53. GLD has said that the second defendant is indemnified. I have been provided with no reason to doubt what GLD has said. If the claimant wishes to pursue the line that GLD has misrepresented the true picture or is mistaken about some point of law relating to indemnity, he is able to make those points at the detailed assessment of costs which will in due course take place before a costs judge. I agree with Mr Perry (who appeared on behalf of the second defendant) that submissions about indemnification are better ventilated on evidence before a costs judge than on submissions before me.

54. For present purposes, the primary relevance of indemnification is that if the claimant were to succeed at the costs assessment in persuading a costs judge that the second defendant was not indemnified, any interim payment of costs that I make would need to be repaid. GLD has informed the claimant, and Mr Perry has informed me in open court, that the second defendant is backed by an indemnity from the Crown. Mr Perry has told the court that the Crown's indemnity means that the second defendant would be able to repay any payment on account of costs together with interest (if ordered). Mr Perry has told the court that, if it should transpire after any detailed assessment that any payment on account was wrongly ordered, the claimant could be fully repaid with interest. I have no grounds for doubting what Mr Perry has said in open court.

55. Mr Boyle criticised the second defendant on the grounds that she did not declare the proceedings to the Lord Chief Justice. He did not refer me to any passage within the bundle of documents or particularise any reason for treating this factor (if correct) as relevant to costs. I am not persuaded that this aspect of the claimant's submissions has any traction.

*Should costs follow the event?*

56. Mr Boyle submitted that the second defendant should be deprived of her costs because of the way in which she had conducted the proceedings. He submitted that the second defendant had failed to engage meaningfully with the claimant in the litigation. That is not correct. The second defendant filed an acknowledgement of service and a defence. She undertook the disclosure of documents in accordance with the requirements of the CPR. She responded to the claimant's request for further information under CPR Part 18. She instructed leading and junior counsel to appear at trial. It appears that attempts to mediate a compromise did not bear fruit but the suggestion that the second defendant failed to engage with any part of the proceedings in some culpable manner is unfounded.

57. Mr Boyle submitted that the claimant should not pay costs because (as expressed in his skeleton argument for the costs hearing):

> "the reality is that the Government (by the MOJ/GLD/TSol) took the opportunity of running a test case on its own obligations by inserting itself into litigation between individuals and obliging the Claimant to pursue the matter to trial to secure a meaningful response. The Claimant acknowledges that that there is an overlap between the indemnity issue and the principle, because the decision by the MOJ to fund the Second Defendant goes to the heart of the conduct of this action on the Second Defendant's part."

58. There is no evidence that anyone within Government or any Government lawyer compelled the claimant to bring or continue his claim because the Government wanted the issues tested in court. By letter dated 22 December 2021, GLD wrote to the claimant's solicitor suggesting terms of settlement of the claim as follows:

> "…we very much hope that your client:
>
> 1. Can explain whether there are any particular documents or categories of personal data that they wished to obtain when making the SAR;
>
> 2. Can agree that the part of the claim relating to personal data they already hold, or have held in the past, should not proceed; and
>
> 3. Can agree to withdraw their claim for a declaration that our client was in breach of the UK GDPR time limits for complying with the SAR.
>
> If your client is able to confirm agreement to points 1-3 then we consider it will be possible for the claim to be brought to a swift conclusion, with your client obtaining the personal data which they have sought by way of the claim."

59. GLD's proposals for settlement are inconsistent with an intention to continue the litigation at all costs.

60. There has been no misconduct by the second defendant, by the Government, or by the Government's lawyers. I was presented with no good reason why the costs should not follow the event. I shall order the claimant to pay the second defendant's costs.

*Standard or indemnity costs?*

61. Mr Boyle submitted that the litigation had been hard fought but that the claimant's conduct did not warrant the payment of the second defendant's costs on the indemnity basis. Mr Perry submitted that the claimant's conduct of the claim against the second defendant was out of the norm.

62. I agree with Mr Perry that the conduct of the litigation was out of the norm. The claimant has throughout the litigation made baseless allegations against the second defendant which imply that she has been dishonest and behaved improperly. He has advanced and aggressively pursued "serious and wide ranging allegations of dishonesty or impropriety over an extended period of time" (*Three Rivers*, para 25, above).

63. First, Mr Boyle at trial criticised the second defendant for seeking to have input into the content of the transcripts of proceedings before her. He filed a skeleton argument saying:

> "It is, of course, an offence to make any recording other than the official recording, so the idea that the Court can unilaterally rewrite the contents of the transcript *of the proceedings* (rather than any judgment), particularly when the issue is the exchanges between a party and the tribunal, is particularly alarming: the words said were said, no matter what one might otherwise wish, and there can be no judicial interference in that regard because it goes to undermine and pervert the course of justice."

64. In his oral submissions, Mr Boyle denied that this passage amounted to accusing a judge of perverting the course of public justice (which is a criminal offence). But the claimant and those who advise him know that the second defendant's career depends on integrity, honesty and promoting the course of public justice. To insinuate without any evidence that she would act in a way that perverts rather than promotes justice warrants this court's disapproval by the award of indemnity costs.

65. Secondly, in his trial skeleton argument, Mr Boyle maintained:

> "Regrettably, the impression is that the Defendants have taken the decision not to volunteer the whole truth in order to interfere with the just disposal of the case."

66. In his oral submissions at the costs hearing, Mr Boyle denied that this passage was intended to convey that the second defendant had misled the court. It is difficult to understand what else it could mean. To insinuate without any evidence that a judge whose career depends on honesty and integrity would mislead a court amounts to a grave attempt to besmirch her reputation. It warrants this court's disapproval by the award of indemnity costs.

67. Thirdly, in his trial skeleton argument, Mr Boyle stated:

> "The impression given is that the Second Defendant's position is effected [sic] by the MOJ or the [GLD] lawyers themselves."

68. This passage implies that the second defendant did not have the courage to resist improper behaviour by the Government and its lawyers but was carried along in what Mr Boyle called a State trial. To insinuate without any evidence that a judge whose career depends on fearlessness and independence of mind would not stand up to the Government amounts to a grave attempt to besmirch her reputation. It warrants this court's disapproval by the award of indemnity costs.

69. There are other, similar attempts to besmirch the judge's character and reputation. For example, Mr Boyle submitted in writing at a pre-trial stage that the second defendant had approached proceedings in a way "which has been, being generous, lackadaisical" and "at the very least, obstructive and potentially worse." The claimant's pleaded case included the averment that the second defendant had "directed" the first defendant's approach to the latter's response to the SAR and to the conduct of the claim (amended particulars of claim, para 2.8). These unfounded allegations are out of the norm.

70. Fourthly, as I have indicated, the claimant and his lawyers have persisted in saying that the Treasury Solicitor and GLD do not or cannot have a valid retainer to represent

the second defendant. The claimant raised the question of the Treasury Solicitor's involvement before District Judge Johnson ("the District Judge") at a hearing on 14 June 2022. He lost the argument and, by Order dated 15 June 2022, the District Judge recorded that the court had determined that the second defendant was entitled to be represented in the claim by the Treasury Solicitor. The District Judge's Order has not been successfully appealed and it remains in force.

71. Despite the District Judge's Order, the claimant continued to question the involvement of the Treasury Solicitor and GLD before me at trial. He made no application for a different order to the one made by the District Judge. The question of GLD involvement remained, like the sword of Damocles, hanging above the heads of the second defendant's lawyers (counsel and solicitors).

72. As I have indicated, the claimant goaded GLD and pursued a disputatious SAR to GLD raising questions about GLD and its various instructed counsel. Some of the Government lawyers felt sufficiently harassed that, after the trial had ended but before I handed down judgment, Mr Alan Bates (who led Mr Perry for the second defendant at trial but who did not appear at the costs hearing) wrote to me via email to my clerk. Mr Boyle criticised Mr Bates for using inflammatory language in correspondence to me in the period when judgment was reserved. I do not accept that a member of the Bar cannot contact a judge if he or she is concerned that an opposing party is harassing counsel or instructing solicitors. The administration of justice does not tolerate harassment and counsel was entitled to raise the matter. Mr Bates' email made no difference to my main judgment but Mr Perry was entitled to raise it in relation to costs.

73. Mr Boyle pursued the retainer allegation in his written and oral submissions at the costs hearing. According to his skeleton argument, the claimant "avers that the most likely circumstances is that because of [the Government's] intercession on the second defendant's behalf, there is no valid retainer, such that no costs fall to be recovered in any event." I agree with Mr Perry that the question of whether there is a valid retainer is a matter for the costs judge on detailed assessment. Setting aside any putative legal argument at that stage, the claimant has persistently over time – before, during and after trial – repeated arguments that were dismissed by the District Judge. He has aggressively pursued his allegation as if no judicial decision had been made. Such conduct is out of the norm.

74. For these reasons, I shall order that the claimant pay the second defendant's costs on the indemnity basis.

**Payment on account**

75. The question of whether the second defendant has a valid retainer with GLD is relevant to whether a payment of costs on account would present an undue risk of repayment at a later stage. The retainer issue has already been ventilated before a judge but the claimant would wish to have a second bite at the cherry.

76. Given that a judge has already ruled in favour of the second defendant, I do not accept that an order for a payment on account would present undue risk. It would not be just to delay the payment of costs in order for the claimant to relitigate this issue. Mr Boyle did not make any other particularised submissions about payment on account save to remind me that any such payment should be reasonable.

77. In my judgment, it is in the interests of the administration of justice that the claimant should pay some costs sooner rather than later. The early payment of some costs would narrow the scope of dispute about the amount of costs and make what is bound

to be an expensive detailed assessment less likely. These factors have particular resonance in a claim that itself arose from costs proceedings which were satellite to earlier High Court proceedings. The court is entitled to make such award of costs as will minimise yet further satellite litigation.

78. As to the amount of interim costs, Mr Boyle did not challenge the sums set out in the draft order submitted by the defendants or suggest a different approach. In the absence of any particularised opposition, I agree with the defendants that it is reasonable to order the claimant to pay:

(1) 90% of the first defendant's budgeted costs in the sum of £49,731.48 and 50% of the first defendant's incurred costs in the sum of £11,552.80; and

(2) 90% of the second defendant's budgeted costs in the sum of £27,536.62 and 50% of the second defendant's incurred costs in the sum of £10,171.50.

**Conclusion**

79. While I am grateful for Mr Boyle's assistance, the defendants' applications are allowed. I shall make an order in the terms sought by the defendants to the effect that (1) the claimant shall pay the costs of each defendant on an indemnity basis; and (2) the claimant shall make an interim payment of costs on account in relation to each defendant in the sums set out above.