IN THE ROYAL COURT OF JUSTICE – QUEEN'S BENCH DIVISION
Neutral Citation Number: [2020] EWHC 1816 (QB)

Case No: QB-2020-001860

Royal Courts of Justice
Strand
London
WC2A 2LL
(remote hearing)
Tuesday, 9th June 2020

Before:

THE HONOURABLE MRS JUSTICE EADY DBE

B E T W E E N:

BARTHOLOMEW HAWKINS ASSET MANAGEMENT LIMITED

and

BARTHOLOMEW HAWKINS LIMITED

MR D BURGESS (instructed by SQUIRE PATTON BOGGS) appeared on behalf of the Claimant
MR M TONNARD (instructed by HERRINGTON CARMICHAEL) appeared on behalf of the Defendant

JUDGMENT
(Approved)

See: 2nd Judgment

See: Costs Judgment

MRS JUSTICE EADY DBE:

Introduction

1. This is the hearing of the claimant's on notice application, filed on 1 June 2020, for interim injunctive relief. The parties attended by counsel: Mr Burgess for the claimant, Mr Tonnard for the defendant; both had provided skeleton arguments for this hearing, for which I am grateful.
2. In support of its application, the claimant relied on the statement of its director, Mr Cantlay, and documents exhibited thereto. On the evening before the hearing, the defendant filed and served its evidence, resisting the application, in the form of a statement from its director, Mr Lord.
3. It is the claimant's case that, following its purchase of the defendant's assets and goodwill, pursuant to a business purchase agreement dated 21 June 2019 ("the BPA"), the defendant has wrongly withdrawn the claimant's access to the software platform containing the data of all the clients it has acquired pursuant to the BPA. The claimant says that is in clear breach of the BPA and has left it unable to properly advise some 842 clients, with severe and ongoing prejudice being caused to those clients and to the claimant. By this application, the claimant seeks an interim injunction requiring the defendant to maintain the status quo and restore its access to the software platform.
4. The defendant resists the application on the basis that it has only acted consistently with the BPA; access to client data ceased when the claimant was granted relevant permissions from the Financial Conduct Authority ("the FCA") and previous secondment arrangements then ended, pursuant to the BPA. The defendant had sought to work with the claimant to ensure the necessary consents were obtained for the claimant to then access client data. There was no arguable breach of the BPA and the claimant was not seeking to restore the status quo, but to obtain access to data on an entirely new basis; while new arrangements were put in place the defendant was able to manage client interests on behalf of the claimant and injunctive relief should not be granted, not least as it risked putting the defendant in breach of the General Data Protection Regulations 2018 ("the GDPR").
5. Given restrictions necessitated by the current coronavirus pandemic, and with the parties' agreement, this hearing has taken place remotely. It was originally intended to take place by video but IT difficulties initially rendered this impossible, and with the cooperation of all attending, yesterday's hearing was converted into a telephone hearing; it remained, however, a public proceeding and details had been published in the cause list, giving relevant information for any person who wished to attend. Due to the technical difficulties thus experienced, the start of the hearing had also been delayed and it was not practical to give judgment on the same day. It was duly arranged that the hearing would resume, for judgment to be given the following day (the hearing now taking place by video).

The Parties

6. The claimant and defendant are companies within the Bartholomew Hawkins Group ("the group"). Both are regulated by the FCA; the claimant provides asset management services, the defendant financial planning advice. Mr Burgess, acting for the claimant, has explained to me that in 2019 a third party - Independent Wealth - sought to acquire the group and it was determined that that should be affected by a transfer of assets from the defendant to the claimant; Independent Wealth would then acquire the claimant by way of share purchase.

The BPA

7. That explains the background to the BPA of 21 June 2019, which is expressly stated to be an agreement 'relating to all the Business and Assets of [the defendant]'. By clause 2.1, the defendant agreed to sell, and the claimant purchase, the 'Business' (which is defined as the 'business of providing regulated activities and financial advisory services carried on by [the

defendant]') and the 'Assets' of the defendant 'as a going concern'.

8. At clause 6.3, the defendant warranted that the 'Assets' 'comprise all the assets, contracts and rights now used in the Business and which are necessary for the effective operation of the Business and the [defendant] does not make use of any other asset in the operation of the Business'. It is the claimant's case that, as a result of the BPA, the defendant is thus, in effect, a shell company. For the defendant it is said this is not an accurate description as the defendant still holds legal title to assets of the business, albeit these are held on trust for the claimant. This is a point to which I return, below.

9. Relevantly, for the purposes of the BPA, 'Assets' include (see the definitions at clause 1 and schedule 1 of the BPA):
    a. 'The Computer Systems' (not defined in the BPA);
    b. 'The benefit of the Contracts, the goodwill and the records, where the 'Contracts included all 'contracts, engagements and arrangements to which [the defendant] is a party relating to the Business … and including without limitation the ongoing advisory client agreements entered into by [the defendant]';
    c. 'The Business Intellectual Property' which included 'information of whatever nature and howsoever arising which was 'used or for use by [the defendant] predominantly in the conduct of the Business or which relates to any of the Assets'; and
    d. 'The Moveable Assets' which included the 'computer … software…owned and used or for use by [the defendant] predominantly in connection with the Business'.

10. What was excluded from the sale was set out at schedule 2 of the BPA, which listed the 'Excluded Assets' and 'Excluded Liabilities', as follows:

> 'Part 1 - Excluded Assets
>
> 1. The Cash Balance.
> 2. The [defendant's] accounts and accounting records which do not relate exclusively to the Business.
> 3. The benefit of any Claims and the professional indemnity insurance policy maintained by [the defendant] in respect of the Business conducted prior to the Effective Time.
>
> Part 2 - Excluded Liabilities
>
> 1. All indebtedness of [the defendant] to [the defendant's] bankers existing at the Effective Time.
> 2. Any liability for any taxation relating to the Business to which [the defendant] is or will become liable (whether or not such liability has arisen at the Effective Time.
> 3. Any liability that arises directly or indirectly from the advice provided or services undertaken pre-Completion by [the defendant] and/or [the defendant's] employees direct or consultants to any clients of [the defendant] including, without limitation, any fines, penalties, awards or costs incurred in relation to the same.
> 4. All liabilities relating to the Excluded Assets.
> 5. PI Claims.'

11. At the date of the BPA, it was further provided that:
    a. Beneficial ownership of the Assets (together with 'all rights and benefits attached to or accruing to them') passed to the claimant (clause 4.1);

b. Legal title to all Assets that could be 'transferred by delivery' passed to the claimant (clause 4.2) and any Assets which were not capable of transfer by delivery, but could be assigned by the defendant without the consent of a third party (and without breach of contract), were assigned to the claimant (clauses 4.4 and 4.5);
c. The defendant was required to deliver up any Assets capable of delivery (clause 5.2.1); and
d. In respect of any of the Assets that could not be transferred or assigned to the claimant, the defendant was required to procure 'such transfers, assignments, novations or other documents as may reasonably be required by [the claimant] to vest in [the claimant] title to all of those Assets which are not capable of transferring by delivery' (clause 5.2.2).

12. Pending the transfer of any Assets, clause 4.3 of the BPA provides that the defendant is required to:

> 'Hold those assets on trust for [the claimant] until title in them can be vested in [the claimant]'.

13. Additionally, clause 4.3 provides:

> 'For this purpose, [the defendant] shall (at the request and cost of [the claimant]) do and execute each act or document reasonably required to vest title to the assets in [the claimant]'.

14. To the extent that assets could not be delivered or transferred to the claimant upon completion of the BPA, clause 4.6 further provides, as follows:

> '4.6.1 the parties should each use their respective reasonable endeavours to obtain any third party consent required to the transfer of the Asset; and
> 4.6.2 from the Effective Time unless and until the Asset is delivered or formally transferred to [the claimant]:
> (a) [the defendant] shall hold such Asset on trust for [the claimant] and its successors in title absolutely and will account to [the claimant] for any sums or other benefits received by [the defendant] in relation to such Asset without any deduction or withholding of any kind;
> (b) [the claimant] shall, as [the defendant's] agent, perform all obligations of [the defendant] under such Asset which is a Contract or Claim.
> (c) [the defendant] shall do each act and thing reasonably requested of it by [the claimant] to provide for [the claimant] the benefit, use and enjoyment of the Asset for the right to receive any income from such Asset and to enable the buyer to enforce any claim in relation to such Asset'.

15. Clause 4.7 then provides for an indemnity from the defendant against any losses that the claimant may suffer in connection with the non-performance of obligations under each client contract, where that is due to the defendant's act or omission. Additionally, clause 4.8 addresses the position where relevant consents are not obtained requiring the parties to use, 'all reasonable endeavours to achieve an alternative solution', pursuant to which the claimant will, 'receive the full benefit of the relevant Asset'.
16. Clause 7 of the BPS addressed the position of the employees of the Business. As I understand the position, there were around 21 employees at the relevant time, each of whom acted as financial advisors to clients of the Business. Acknowledging the application of the Transfer of Undertakings (Protection of Employment) Regulations 2006, the employees thus transferred to the claimant, albeit it was then provided that they would be seconded back to the defendant for the secondment period (see clause 7.6 BPA).
17. As already noted, pursuant to clause 4.6.2 (b) of the BPA, pending the transfer of the client contracts, the claimant was to act as the defendant's agent in servicing those contracts

through its employees. This was effected by the employees of the claimant being seconded to the defendant and, as such, they were granted access to the relevant client data. The BPA provided that the secondment period would be:

> 'the period from the date of this agreement until the earlier of (i) the date on which [the claimant] received advisory and product permissions from the FCA under which the Employees (where necessary) may be regulated; or (ii) 2 January 2020'.

18. Because of delays obtaining FCA consents, it was subsequently agreed by the parties that the secondment period would end when those permissions were granted.

The Dispute

19. The relevant data of the defendant's clients is stored on a software platform for financial advisors called Intelligent Office ("the IO platform"), which is licensed from a third-party company.

20. For the defendant it is said that the IO platform is not itself an asset for the purposes of the BPA; it is merely a licence and contains thousands of clients' data, only some of which are the subject of the BPA. It is the defendant's case that the Business Intellectual Property Asset, for the purposes of the BPA, is limited to the data on the IO platform ("the IO data") and not the IO platform itself. The claimant says, however, that it is plain that the IO platform is an asset as defined by the BPA, falling under multiple of the relevant definitions. It observes that, if this were not the case, the defendant would be in breach of its warranty at clause 6.3. In any event, the claimant points out that the defendant has accepted that the IO data is an Asset and submits that, by clause 4.6.2 (c), it was thus required to do what was reasonably requested of it to ensure that the claimant had the benefit, use and enjoyment of that Asset; the reasonable request was to grant the claimant's employees access to the defendant's IO platform.

21. It is agreed between the parties that it is the IO platform that holds all the data necessary to provide advice to clients, including: client contact information, 'know your client' information, client 'fact finds' and details of client plans and policies serviced by the advisory business; it thus holds documentation relating to the financial advice that the clients have received, and the ongoing services provided to them by their advisor. For the defendant it is said that the IO platform also holds historic data, which the claimant is not entitled to access.

22. As I have already indicated, following the BPA there was a delay in transferring the client contracts to the claimant as a result of the time taken for the FCA to grant the variation of permission ("VOP") necessary for the claimant to carry out the services required under those contracts. Mr Cantlay has explained that the FCA imposed a condition to the VOP, that Mr Lord and Mr Davies - who had both previously been directors of the claimant - stand down from their positions before such permission was granted. I understand that Mr Lord and Mr Davies were therefore removed as directors of the claimant and are presently placed on garden leave, pending disciplinary proceedings, albeit they still serve as directors of the defendant. In the meantime, however, pursuant to the secondment arrangements under the BPA, the financial advisors that had transferred to the claimant were able to access the defendant's systems, in particular the IO platform, and to continue to service their clients.

23. On 21 May 2020, the FCA advised the claimant that the VOP had been approved. On 26 May 2020, Mr Lord, acting on behalf of the defendant, emailed the claimant stating that, as the VOP had now been granted, the defendant expected a swift conclusion of the interim arrangements, confirming that the defendant would: 'begin closing down the various operations that have allowed it to support the claimant'; those 'operations' included access

to the defendant's systems such as the IO platform.

24. Mr Lord stated it was the defendant's understanding that the claimant had been 'preparing to re-paper' its clients, and he confirmed that the defendant would 'now be engaging with all clients directly to make clients aware of the situation' and would 'use its reasonable endeavours to ensure a successful completion of the re-papering whilst ensuring full compliance with its GDPR requirements'. Confirming that the defendant would continue to hold income from clients on trust for the claimant, pending the formal re-papers which would reasonably be completed by the end of June, Mr Lord stated that, as a result of the VOP being approved, the claimant would no longer be authorised to ask as agent for the defendant in relation to its clients; it could now only act in its own name.

25. There followed correspondence between the parties, with the claimant seeking that its access to the IO platform be reinstated. The defendant declined to agree to this. On 1 June 2020, the claimant issued this application.

Discussion and Conclusions

26. The court's jurisdiction to deal with this matter derives from its general power to grant interim injunctions, pursuant to Section 37 of the Senior Court Act 1981, and CPR Part 25. The approach I am to adopt is that laid down by the House of Lords in *American Cyanamid Co -v- Ethicon Limited* [1975] A.C. 396, as follows:

    a. First, it must be shown that there is a serious question to be tried. Specifically this means the court must be satisfied that the claim is neither frivolous nor vexatious (see per Lord Diplock in *American Cyanamid* at page 407).

    b. Secondly, the court must consider whether damages would be an adequate remedy for a party injured by the court's grant of, or its failure to grant, an injunction.

    c. Thirdly, where the question in respect of damages is finely balanced, the court should consider the balance of convenience. This has also been referred to as 'the balance of the risk of doing an injustice', requiring the court to consider 'which course carried the lower risk of injustice' (see per Lord Diplock in *NWL Limited -v- Woods* [1979] 1WLR 1294 at page 1306).

    I consider each of these questions in turn.

Serious Issue to be Tried

27. As Mr Tonnard submitted, the question here is whether the claimant has demonstrated a serious - that is, not frivolous or vexatious - issue to be tried in its assertion that the defendant has been acting in breach of the BPA. The defendant says it is plain that it has not: once the FCA granted VOP, the claimant could no longer act as its agent and the secondment arrangements automatically fell away; the obligation was then on the claimant to work with the defendant, each party using all reasonable endeavours to obtain the necessary client consents. In the meantime, the defendant continued to service the client contracts and to hold any income on trust for the claimant.

28. The claimant's case is premised on clause 4.6.2 (c) of the BPA. That provision is engaged where an Asset is still to be delivered or transferred to the claimant. Here, the Asset is the client data held on the IO platform, for which the defendant holds the licence. Although there has been some argument on the point, whether the Asset is the platform, the licence or the data seems to me to be an unnecessary distraction given that it is common ground that the data itself is an Asset for the purposes of the BPA and would plainly fall within the definition of Business Intellectual Property under the BPA. Were it necessary for me to form any view on the point, however, I am satisfied that, in any event, a serious triable issue has been identified that the IO platform - the means of accessing client data – is, itself, an Asset. Whether that is as part of the 'Computer Systems' of the Business or as one of its 'Moveable Assets', which include the 'computer … software … owned and used by or for

use by [the defendant] predominantly in connection with the Business'. Indeed, if the IO platform were not included within the assets under the BPA, I agree with the claimant that a serious triable issue would arise as to whether there had been a breach of warranty under clause 6.3 BPA.

29. Turning then to clause 4.6.2 (c), in relation to the Asset in question, the defendant is obliged to do each and everything reasonably requested of it by the claimant, to provide for the claimant the benefit, use and enjoyment of that Asset. Here, the claimant is requesting continued access to client data by means of access to the IO platform. There is no dispute that this would enable it to benefit, use and enjoy the Asset. The only question is whether it has shown a serious triable issue that its request in this regard is reasonable.

30. The defendant says the claimant has failed to meet this threshold requirement: the parties had agreed arrangements that were in place up to the grant of VOP - the secondment arrangements – but the BPA expressly provided that those would fall away once VOP was in place; the claimant could no longer act as the defendant's agent and needed client consents; clause 4.8 provided for how the parties were to cooperate to achieve an alternative solution in the interim.

31. Acknowledging that clause 4.8 makes specific provision for the parties to use reasonable endeavours to agree an alternative solution if the necessary consents were not obtained (which included the FCA's consent to VOP), I do not read this as in some way rendering the obligation imposed on the defendant at clause 4.6.2 (c) irrelevant. Again, I am satisfied that the claimant has demonstrated that there is a serious triable issue that, by refusing its request to access the IO platform - the means of accessing relevant client data - the defendant is acting in breach of that obligation.

32. In reaching this view, I have taken into account the defendant's further argument - albeit (i) raised late in the day, and (ii) directed at a later stage of the *American Cyanamid* test (that of considering comparative prejudice) - that granting the claimant access to client data might place the defendant in breach of its obligations under the GDPR.

33. If the defendant is correct that the claimant can no longer act as its agent, that would change the position previously in place under the secondment arrangements: the claimant's employees would be accessing data directly on behalf of the claimant and not as agent for the defendant. By Article 6(1) of the GDPR, however, it is provided that the processing of data will be lawful if one of six situations apply. One of those is that the data subject has given consent. Assuming that is not the case here - i.e. that client consents have not been obtained - access to data is also allowed where 'processing is necessary for the performance of a contract to which the data subject is party' (see Article 6(1) (b)) or where 'processing is necessary for the purposes of the legitimate interests pursued by the controller or a third party, except where such interests are overridden by the interests or fundamental right and freedoms of the data subject which require protection of personal data' (see Article 6(1) (f)). In this case, I am satisfied that the claimant has again demonstrated a serious triable issue that its access to the data in question would be lawful under these alternative provisions, either because it is necessary for the performance of client contracts or because it is in the interests of the claimant that the claimant has access to the client data in order to service its clients and maintain its business; additionally, those interests are not overridden by the interests of the clients, who have a shared interest in the claimant's employees being able to continue to provide them with financial advice.

Adequacy of Damages

34. On the question of adequacy of damages, the defendant says it is apparent that little prejudice has in fact been suffered by the claimant: the defendant continues to hold the underlying client contracts and Mr Lord and Mr Davies - who still hold relevant FCA

approvals – have been able to service such enquiries that have arisen (albeit, on Mr Lord's evidence, very few have in fact been made - only four since 26 May 2020). The defendant also points out that it will hold any income received, on trust, for the claimant. Moreover, if there were any losses, the defendant says these would, in any event, have arisen only as a result of the claimant's failure to cooperate in obtaining client consents and putting alternative arrangements in place. Yet further, and to the extent that the defendant had caused any such losses, the claimant would be protected by the indemnity provision under the BPA.

35. There is a dispute on the evidence in this regard, with Mr Cantlay stating that there were in fact 67 documented instances where the claimant's financial advisors needed to access the IO platform to assist clients in the week before 26 May 2020. I cannot resolve that dispute at this stage, but I am satisfied that the potential damage arising from the claimant's inability to access the IO data could be considerable and would be hard to quantify. It is hard to predict what assistance clients might need at a time such as the present and I do not consider it is an answer to say that Mr Lord and Mr Davies can deal with client enquiries: clients are likely to want to speak to the financial advisor with whom they have already been dealing; those advisors, in turn, will need to be able to access their client's records. Where that cannot be achieved, clients may well go elsewhere; goodwill may be lost. At present, the claimant is effectively unable to provide financial advice to some 842 clients in circumstances where, given the current situation, such advice might urgently be sought and required. There is, therefore, clearly a customer flight risk for the claimant: without advice, the clients may well decide to seek another advisor who can assist them if the claimant cannot. The claimant contends that the overall commercial, financial, and reputational harm it is suffering is therefore substantial and will be difficult to quantify in damages; I am persuaded that that is indeed the case.

36. I am also satisfied that there is a very limited prospect of the defendant being able to meet any claim for damages. The evidence before me suggests that the defendant is indeed now a shell company, whose only asset is a limited cash reserve (£380,000 as at the date of the BPA); it may hold the legal title to certain assets, but the benefit of those assets has now passed to the claimant. There is nothing in the evidence adduced by the defendant that has properly countered the account given by Mr Cantlay of the resources left within the defendant and that, it seems to me, is insufficient to provide the claimant with the necessary indemnity.

37. On the other hand, should it transpire that the injunction should not have been granted, it is unclear what damage the defendant would suffer. The only matter raised by the defendant relates to the potential risk of it having been found to have acted in breach of its GDPR obligation and I have already addressed that question, in dealing with the first part of the *American Cyanamid* test. As for the claimant's ability to meet such costs, the evidence before me confirms that it has the necessary resources to do so; the claimant's most recent return to the FCA records that it had total assets of £1.572 million as at 31 December 2019.

Balance of Convenience

38. Without wishing to repeat points already made, I am further satisfied that the balance of convenience would also point in favour of granting the injunction. At present the claimant is unable to service some 842 clients who, in turn, are unable to access proper advice regarding their portfolios from their existing financial advisors. This is a time of huge financial uncertainty, when clients are likely to want to be able to secure advice and will no doubt wish to do so from people they have been using before. Without access to the IO platform, the claimant has none of the data regarding the clients' affairs necessary for it to provide that advice. It seems to me likely that this is what the defendant agreed to facilitate

by clause 4.6.2 (c) of the BPA. Whilst I accept Mr Tonnard's point that this is not precisely the status quo - because the position changed when the FCA granted the VOP – the claimant's request seeks to put something in place that is analogous to the status quo ante. Before the grant of the VOP the secondment and agency arrangements ensured that financial advisors could deal with their clients. On my reading of clause 4.6.2 (c) at this stage, that requires that the defendant continues to provide the claimant access to client data, so that their financial advisors can carry on providing that service. The provision of assistance from the directors of the defendant, whose interests are not currently aligned with those of the claimant, does not provide a suitable alternative.

39. For all those reasons, therefore, and subject to certain additional matters relating to the terms of the order, I grant the injunction sought.

End of Judgment

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This transcript has been approved by the judge.

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B E T W E E N:

BARTHOLOMEW HAWKINS ASSET MANAGEMENT LIMITED

and

BARTHOLOMEW HAWKINS LIMITED

MR D BURGESS (instructed by SQUIRE PATTON BOGGS) appeared on behalf of the Claimant
MR M TONNARD (instructed by HERRINGTON CARMICHAEL) appeared on behalf of the Defendant

SECOND JUDGMENT
(Approved)

MRS JUSTICE EADY DBE:

1. Turning to the terms of the order, I have received further submissions from both parties as to the draft that is before me. For the claimant it is asked that the first term of the order - requiring the respondent to take all steps necessary to restore to the applicant such access to the IO platform as existed prior to access being removed - should be by four o'clock tomorrow (10 June 2020); it is explained that this should not be problematic as it is a fairly simple matter to provide that access.
2. Mr Tonnard, for the defendant, does not take issue with that but says that his client's interest is to have a common mechanism in place for that access, which he says should be restored by means of the reinstatement of the secondment period. He makes the point that, until the claimant enters into direct contracts with clients, the defendant has an interest and that would be protected by the secondment arrangements being reinstated, such that the claimant's employees then can access the data on behalf of the defendant.
3. That proposal is resisted by the claimant, not least because of its concern that its permissions (under which it will now operate) have been obtained from the FCA subject to the condition that Messrs Lord and Davies should not be involved; whilst they are directors of a separate company, if the claimant is seeking to access the data under its own permissions, that would be a concern.
4. The defendant also raises a concern relating to the second part of the order, which simply states that, until further order of the court or agreement between the parties, the defendant shall not restrict the access of the claimant to the IO platform. The defendant says that could continue for some time and there should be a backstop, which the defendant says should be 31 July, because otherwise it carries on incurring costs by way of continuing overheads and there is no incentive for the claimant to secure the necessary consents to enable the defendant to cease incurring those overheads.
5. For the claimant it is said that this is unnecessary: once access has been restored it will enter into direct contracts with its clients and the issue will fall away.
6. Addressing the first issue raised by the defendant, it seems to me that the restoration of the secondment arrangements does not provide a sensible solution in this regard. As my judgment recognised, life changed for the claimant once it was granted the VOP by the FCA, and that was on the condition that Messrs Lord and Davies were no longer directors of the claimant. It is not consistent with those permissions for arrangements to go back to those which were in place with the secondment of the employees, who then worked as agents for the defendant. The effect of the injunction I have granted is to put in place an arrangement which is analogous to, but not the same as, the secondment. I therefore make the order on this point in the terms sought, amended to include the variation sought by the claimant (not resisted by the defendant), which is that access be restored by 10.00am on 10 June 2020.
7. As to the second point, it seems to me that there does need to be some kind of check on the relief granted at this stage: (1) to keep the parties on track and to encourage them to resolve the outstanding matters, including the need to re-paper the client contracts, and (2) because, should there be any issue relating to GDPR requirements, it is right that that is resolved as quickly as possible. In my judgement, this is best achieved by directing that there be an expedited trial of this matter.

End of Judgment

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This transcript has been approved by the judge.

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B E T W E E N:

BARTHOLOMEW HAWKINS ASSET MANAGEMENT LIMITED

and

BARTHOLOMEW HAWKINS LIMITED

MR D BURGESS (instructed by SQUIRE PATTON BOGGS) appeared on behalf of the Claimant
MR M TONNARD (instructed by HERRINGTON CARMICHAEL) appeared on behalf of the Defendant

COST JUDGMENT
(Approved)

MRS JUSTICE EADY DBE:

1. The claimant seeks an order for its costs of this application. This is resisted by the defendant, arguing that the appropriate order is for costs to be in the case.
2. The defendant observes that the claimant's schedule of costs fails to differentiate between the costs incurred specific to this application and those which relate to the claim more generally. In the circumstances, the defendant says the appropriate order therefore is claimant's costs in the case.
3. For the claimant it is said that the reason why there is no differentiation between the costs of the claim and the cost of the application is because the substance of the claim is the same as this application. From the claimant's point of view, it considers this dispute is now likely to be resolved. It has had to bring the application to restore access to client data, but has no interest in continuing the claim and says it would be unsatisfactory to put those costs off for trial. That, it says, wrongly incentivises the continuation of this matter to trial purely to resolve the issue of costs. In the alternative, the claimant says that I should make an order for part of the claimant's costs and direct that the remainder be the claimant's costs in the case.
4. The difficulty in this case is that the costs sought by the claimant relate to the entirety of the costs incurred in the claim so far and if I try to carry out a summary assessment at this stage, I am faced with a very difficult task in trying to work out that which relates solely to the application and that which is more generally incurred for the claim. The claimant may have no interest in continuing the claim, but I have to have regard to the interests of both parties before me and the defendant has raised concerns relating to the GDPR, which may have to be resolved at trial. I cannot reach a final view as to the merit of that point at this stage and, whilst I would encourage the parties to seek to reach an agreement in this matter, I cannot discount the possibility that this matter has to go to trial and be resolved there.
5. I have considered the possibility of making some kind of order for part of the claimant's costs but again it then seems to me that what I would be doing would not be a summary assessment as such, but a much more detailed exercise. In the circumstances, exercising my discretion in this particular matter given the Schedule before me, I consider that the appropriate order is for the claimant's costs to be in the case. If the matter is resolved before trial, the parties can reach an agreement about costs or costs might have to be assessed at that stage.

End of Judgment

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