



Neutral Citation Number: [2022] EWHC 2518 (Ch)

Claim No.IL-2020-000040

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
INTELLECTUAL PROPERTY LIST (ChD)

Competition Appeal Tribunal
8 Salisbury Square
London
EC4Y 8AP

Date: 28th September 2022

Before:

MR JUSTICE MARCUS SMITH

Between:

(1) GENIUS SPORTS TECHNOLOGIES LIMITED **Claimants**
(2)-(15) OTHERS
- and -

(1) SOFT CONSTRUCT (MALTA) LIMITED **Defendants**
(2)-(12) OTHERS

MR IAN MILL KC, MS JESSIE BOWHILL and MR CHRISTOPHER HALL (instructed by **Fieldfisher LLP**) appeared for the **Claimants**.

MR PHILIP ROBERTS KC, MR CONALL PATTON KC and MS ALAINA NEWNES (instructed by **Reynolds Porter Chamberlain LLP**) appeared for the **First to Sixth Defendants**.

MR HENRY EDWARDS (instructed by **DLA Piper UK LLP**) appeared for the **Ninth Defendant**.

Approved Judgment

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MR JUSTICE MARCUS SMITH:

1. I have before me an application by the Claimants in these proceedings for permission to appeal a costs management order which was made by me in the form of a costs cap. This is self-evidently a case management decision, whereby I imposed a costs cap of £5 million on both the Claimants' future costs and the First to Sixth Defendants (who I shall refer to as the "Defendants") future costs. The substantial costs already incurred by both sets of parties are unaffected by this order, although of course any costs order made is almost certainly going to be subject to a detailed assessment. It is worth pointing out that the Defendants' future costs are budgeted at win the cap I have imposed, whereas the Claimants' future costs are budgeted at nearly 2½ times the cap.
2. Three grounds of appeal. The attack on the order is not in relation to the imposition of a costs cap in principle (the Claimants accepting that a cap is appropriate), but as to the level of the cap imposed.
3. It is important to understand the context in which submissions on the cap's level were made on the day I made this order. The submissions regarding the cap were the last (major) item considered during the course of a two-day case management conference. Submissions from the Claimants began just after the short adjournment and concluded at around 5:15pm, when (for reasons that do not matter) the hearing had to end.
4. Of the three or so hours available, the lion's share was taken up by the Claimants, leaving about 15 minutes for the Defendants and 15 minutes for my *ex tempore* judgment, which I have revised for sense but not expanded. The asymmetry in time for submissions granted to the Claimants and the Defendants is concerning: it is explicable by the fact that the Defendants were far less concerned about the imposition of a cap than the Claimants. The thrust of the Defendants' submissions on costs management was that I should impose a budget not a cap, but the Defendants did not resist the imposition of a cap if I was minded to order one. Hence the manner in which the timing of the afternoon session on the second day was handled, but I recognise that this was less than ideal time management on my part. The compression of the Defendants submissions and of my ruling are matters which, I hope, will be taken into account when any future application for permission to appeal is considered. For myself, I am in no doubt that permission to appeal should be refused, and this ruling briefly sets out my reasons for that refusal.
5. It seems to me that the grounds of appeal articulated by the Claimants are not such as to be likely to cause or to cause at all an appellate court to overturn my case management decision. I consider that there are no reasonable prospects of my decision being overturned on appeal, and I consider this to be *par excellence* an instance where the Court of Appeal should determine whether this matter should go any further.
6. Taking the grounds of appeal as framed by the Claimants in reverse order, the suggestion that the court placed no weight on Genius' detailed estimate of future costs is simply fanciful. The material was before me, and I took it into account. Indeed, the Claimants' costs budget was the primary reason I imposed that order that I did, because it seemed to me that the level of costs budgeted for were far in excess of what was reasonable or proportionate, but that it was difficult to impose a stage-by-stage costs budget (for reasons which I gave). I heard the Claimants on the question of a cap over the course of most of the afternoon, and of course the thrust of those submissions was

that the cap should be far higher. I took the view that the quantum of costs articulated in the detailed estimate of future costs was disproportionate and excessive.

7. I turn to the second point, which concerns my conclusion that the mountain each party had to climb in terms of preparing for trial was the same. The Claimants take exception to this, and say that I should have articulated my thinking more clearly during argument so as to enable counsel to push back on this point. That, of course, leaves out of account the fact that this point did form part of the Claimants' submissions, to which I listened very carefully: I simply reached a different view, and concluded that the future burden was equal. That is the conclusion I expressed in my judgment, and I consider it a conclusion that any judge was entitled to reach on the materials before me.
8. What is more, the point actually goes nowhere. As my ruling makes clear, I considered separately the cap to be applied to both Claimants and Defendants separately – although, in the end, I imposed a cap of £5 million on each. Even if the Claimants are right, and there are different and lesser burdens on the Defendants going forward, the notion that I would have adjusted the £5 million cap upwards so as to favour the Claimants is fanciful.
9. It is fair to say, given that a £5 million cap exceeded the Defendants' cost budget, which was significantly less than this amount, I would – had there been time – have explored with the Defendants the potential of reducing the Defendants' £5 million cap. That was on my mind at the time, and I can see that an outcome of different caps - £5 million for the Claimants and £4 million for the Defendants – might well be a defensible outcome. Had there been time, that is something I would have wanted to explore with the Defendants. Given the time constraints, however, I simply did not think it was fair to Mr Roberts, QC to impose a cap of £4 million, and this is not something that features in my ruling. However, for these reasons I consider that the first ground of appeal is unsustainable also.
10. For these reasons, I refuse permission to appeal.
