Neutral Citation Number: [2022]EWHC 2308 (Ch)

Claim No: IL-2020-000040

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

7 Rolls Building
Fetter Lane,
London, EC4A 1NL

Date: 26 and 27 July 2022

Before:

THE HONOURABLE MR. JUSTICE MARCUS SMITH

Between:

Claimants

(1) GENIUS SPORTS TECHNOLOGIES LIMITED (previously known as Genius Sports Limited)
(2) BETGENIUS LIMITED
(3) GENIUS SPORTS SERVICES LIMITED
(4) GENIUS SPORTS ANZ PTY LIMITED (a company organised and existing under Australian law)
(5) GENIUS SPORTS MEDIA INC (a company organised and existing under the law of Delaware)
(6) GENIUS SPORTS EOOD (a company organised and existing under Bulgarian Law)
(7) GENIUS SPORTS SERVICES EESTI OU (a company organised and existing under Estonian Law)
(8) GENIUS SPORTS SERVICES COLOMBIA SAS (a company organised and existing under Colombian Law)
(9) GENIUS SPORTS NETWORK ApS (a company organised and existing under Danish Law)
(10) GENIUS SPORTS DANMARK ApS (a company organised and existing under Danish Law)
(11) DATA PROJECT SRL (a company organised and existing under Italian Law)
(12) GENIUS SPORTS LT (a company organised and existing under Lithuanian Law)
(13) GENIUS SPORTS ASIA PTE LIMITED
(a company organised and existing under Singaporean Law)
(14) GENIUS SPORTS CH SARL (a company organised and existing under Swiss Law)
(15) GENIUS SPORTS GROUP LIMITED

-and-

(1) SOFT CONSTRUCT (MALTA) LIMITED
(2) ROYAL PANDA LIMITED
(3) VIVARO LIMITED (all companies organised and existing under Maltese law)
(4) SOFT CONSTRUCT CJSC (a company organised and existing under Armenian law)
(5) SOFT CONSTRUCT UKRAINE LLC (a company organised and existing under Ukrainian law)
(6) SOFT CONSTRUCT LIMITED (a company organised and existing under the law of the Isle of Man)
(7) BASKETLIGAEN (an association organised and existing under Danish Law)
(8) IMG DATA LIMITED
(9) FOOTBALL DATACO LIMITED
(10) LIGA SUPER BASKETBALL (a private association organised and existing under Brazilian Law)
(11) BOSNIA AND HERZEGOVINA FOOTBALL FEDERATION (an entity organised and existing under the law of Bosnia and Herzegovina**)**
(12) FEDERAȚIA ROMÂNĂ DE VOLEI (an entity organised and existing under Romanian law)

Defendants

MR. IAN MILL QC, MR. GEORGE McDONALD, MR. CHRISTOPHER HALL and **MR. TIMOTHY LAU (instructed by Fieldfisher LLP**) appeared for the **Claimants.**
MR. AIDAN ROBERTSON QC, MR. PHILIP ROBERTS QC, MS. ALAINA NEWNES and **MR. GREG ADEY** (instructed by **Reynolds Porter Chamberlain LLP**) appeared for the **1st to 6th Defendants (SCM).**
MS. IONA BERKELEY (instructed by **Arnold & Porter Kaye Scholer (UK) LLP)** appeared for the **7th Defendant.**
MS. IONA BERKELEY AND MS. KENDRAH POTTS (instructed by **Arnold & Porter Kaye Scholer (UK) LLP**) appeared for the **8th Defendant.**
MR. HENRY EDWARDS (instructed by **DLA Piper LLP**) appeared for the **9th Defendant.**
MS. IONA BERKELEY (instructed by **Arnold & Porter Kaye Scholer (UK) LLP)** appeared for the **11th Defendant.**

Approved Judgment

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MR. JUSTICE MARCUS SMITH:

Introduction

1. As the title to this action indicates, these are complex proceedings. The main protagonists are the claimants – I shall refer to them collectively as "Genius" – and the first to sixth defendants – who I shall refer to as "SCM" (after the first defendant, Soft Construct (Malta)). The seventh to twelfth defendants have been joined, by Genius as representative parties. I shall refer to these parties as the "Representative Defendants".

2. I dismissed the first attempt to join certain representative parties in late 2021: I gave my reasons in a reserved judgment dated 1 December 2021 ([2021] EWHC 3200 (Ch)). I am not going to say anything about that application, save this: I was sympathetic to the need for the application, but (for the reasons I gave) the application was misconceived and inappropriate and could not properly be acceded to.

3. The application to join the Representative Defendants was renewed before me, and was successful: see my order of 29 March 2022. Some of these Representative Defendants have now been served; in other cases, Representative Defendants are in the process of being served.

4. I have, on a number of occasions, expressed a degree of concern that I am being asked to progress to trial proceedings that have not fully been constituted (in that not all of the parties are – as yet – actually before the Court), but I am satisfied that it would be unfair to Genius not to enable their claims to proceed, and that it is possible to ensure that the Representative Defendants are not prejudiced by the Court's attempts to progress these proceedings as quickly as possible. That is, however, a matter that I am keeping carefully under review. It goes without saying that if a fair trial for all interested parties cannot be achieved within the time frame desired by Genius, that time frame will not have the Court's sanction and the trial date will have to be revisited. The proper and fair joinder of all Representative Defendants is, of course, a matter for Genius.

5. These proceedings are related to other proceedings, straddling this division and the Competition Appeal Tribunal, which are due to be heard in October 2022 before me (as a Justice of High Court) and before a panel in the Competition Appeal Tribunal (chaired by me as President of the Competition Appeal Tribunal). I shall refer to these proceedings as the "October Proceedings", and some sense of the complexity of and relationship between these proceedings and the October Proceedings can be discerned from my ruling at [2022] CAT 12.

6. I say this, by way of introduction, to emphasise that these proceedings are complex and difficult, both in terms of procedure and in terms of substance. It is not surprising that both Genius and SCM have extensive and experienced legal teams, and that the cost of litigating the issues in dispute will be high. Not only are the proceedings complex and difficult, the outcome of these proceedings is of particular importance to both Genius and SCM. I accept that the outcome of the proceedings could without exaggeration be described as "existential" for both these parties, and that the value at

risk is high. I am not going to be drawn on how high the value at risk might be – that is a matter of substance for trial – but I want to be clear that I accept Genius's submissions about the business and financial importance of its claims. The point matters, because Genius used it to support and justify the very high costs it has already incurred in these proceedings and – more to the point – proposes to incur as the proceedings progress.

7. Given these issues concerning costs, the question of costs budgeting has been raised by SCM and been the subject of a great deal of exchange between these parties. As I explained in yet another ruling in these proceedings – [2022] EWHC 1067 (Ch) – I was initially sceptical about the utility of costs budgeting and costs control generally, given the very complex and multi-jurisdictional nature of these proceedings. However, the quite extraordinary level of "burn" disclosed in the application I heard on 4 May 2022, which resulted in my ruling at [2022] EWHC 1067 (Ch), "informed my thinking on the Costs Budgeting Application and the value of *ex ante* cost control": [2022] EWHC 1067 (Ch) at [3].

8. This judgment contains the *ex tempore* rulings that I gave during the course of a two-day case management conference, conducted remotely, on 26 and 27 July 2022. The case management conference was, thus, a heavy one. Both Genius and SCM put in substantial written submissions, and the CMC itself ran for the full two days. Even then, with the hearing running past 4:30pm, SCM's submissions on what was probably the most contentious point – a costs cap – had to be curtailed to about 15 minutes (which was significantly less than the time taken by Genius), and my *ex tempore* judgment was rather shorter than I would have liked, due to the need to conclude the hearing by 5:15pm.

9. I am satisfied that the process was a fair one – and that it was right to shoehorn the question of costs management into this hearing – despite Genius receiving the bulk of the time for submissions on this point. Because Genius has indicated a desire to appeal my ruling in regard to the costs cap I have imposed, I have considered it appropriate to combine the transcriptions of my various rulings into a single judgment with a common introduction.

Points of background concern

10. I have already expressed a degree of concern about the costs incurred and to be incurred in these proceedings: see, for example, paragraph 7 above. The manner in which issues came before me at the case management conference did not assuage that concern, but exacerbated it. For instance, there was considerable debate (both in writing and orally) about a split trial of the proceedings (see, for instance, paragraphs 34*ff* of Genuis' written submissions and paragraphs 45*ff* of SCM's written submissions), the debate being less directed to the utility of hearing the competition issues separately from the intellectual property issues and more directed to a jockeying for position in terms of when the substantive trial should take place. In the event, when the Court sought to understand precisely why a split trial was being advocated, and made suggestions as to when a single trial might be heard in 2024, the question of splitting the competition issues from the intellectual property issues disappeared.

11. On the one hand, I commend the parties for adjusting their position in light of the other side's submissions, and the Court's interventions. On the other hand, this was a point which really should not have taken the time (and related cost) that it did. I raise this simply as an example – without wishing to point the finger of blame at any party, which I do not do – of why the conduct of this litigation overall has inclined me to accepting SCM's submission that cost control was a critically important feature to case management in these proceedings.

12. That was not Genius' position until well into the oral hearing. Genius' initial position, as expressed in paragraph 100 of their written submissions was that:

> "The Claimants invite the court to dispense with costs budgeting. Costs budgeting is unsuitable for these proceedings, given their unpredictability, complexity and inter-relationship with [the October Proceedings.]"

13. To be clear, Genius opposed all forms of cost control – not just cost budgeting, but cost capping also – until the eleventh hour, when (through somewhat gritted teeth) Genius advocated for a cost cap, albeit at a level far higher than the cap I have in fact imposed.

14. I shall come to cost control in due course. Before I do so, I must deal with an "application" – for want of a better term – by Genius to join the Representative Defendants to the counterclaim pleaded by SCM as part of SCM's Defence and Counterclaim in response to Genius' statement of case. I shall refer to the issues and parties to SCM's defence as the "Defence" and the issues and parties to SCM's counterclaim as the "Counterclaim".

Joinder to the Counterclaim

15. This concerns what I am going to call a "non-application" (for no application has been issued by anyone) to join the eighth defendant ("IMG Data") and the ninth defendant ("Football Dataco") to SCM's Counterclaim. Only four Representative Defendants are before me today – the seventh defendant ("Basketligaen"); IMG Data; Football Dataco; and the eleventh defendant ("BHFF").

16. All three of these Representative Defendants accept, and have stated in terms to me, that the effect of their joinder is they are going to be bound by any and all findings that the court makes in due course in so far as they arise out of the Defence as it has been pleaded by SCM. That Defence has been amended several times (it is at the moment the Re-Re-Re-Amended Defence), but all points that arise out of that pleading for determination will bind these parties. That is explicitly stated by all of the representatives before me today and it is, if I may say so, quite obvious that is the case. The consequence of being joined to the proceedings as defendants to Genius' claim is that what the court decides in relation to those proceedings binds the persons who are identified as defendants. That seems to me is so trite that it almost does not need stating.

17. The issue that has arisen is the extent to which these Representative Defendants should be made defendants to the Counterclaim pleaded by SCM against Genius. They are not at the moment so named, and the party advancing the Counterclaim, SCM, does not seek to have them joined as defendants to the Counterclaim. What is

more, the persons representing the Representative Defendants state with some force that they do not want to be joined. They have articulated a number of good reasons why this is their position, one of which concerns their incurring of and exposure to costs.

18. It seems to me that in circumstances where the party advancing the counterclaim (SCM) does not seek to have the Representative Defendants joined, and where the Representative Defendants themselves oppose joinder, I should not be bringing these parties in unless there is a compellingly good reason to do so. Significantly – and very surprisingly, given that Genius was the only party advocating joinder (albeit under the guise of threatening a strike out application, which was never made) – no application to join the Representative Defendants to the Counterclaim has been made by anyone.

19. Mr Mill, QC who appears for Genius, tells me (and he is right) that I have jurisdiction to make the Representative Defendants defendants to the Counterclaim. I have that power under CPR 19.2, and in an appropriate case I would exercise that power. But it seems to me that there is no reason in this case to do so. If there were a concern that the non-joinder of the Representative Defendants to the Counterclaim might in some way affect the bindingness of any decision or determination of matters arising out of the Defence, then I would think again. But that is not the case here, and no-one contended to the contrary. The Representative Defendants will be bound, as they say, by my determination of the issues between Genius and SCM as they arise on the pleadings as articulated in Genius' statement of case and SCM's Defence. The Counterclaim is an irrelevance. To the extent that there is overlap between Defence and Counterclaim – and, unsurprisingly, there is – that means that certain averments in the Counterclaim will be determined for or against the Representative Defendants (as well as the other parties) because of the coincidence of issues between the Defence and the Counterclaim. But the reason the Representative Defendants are bound is because of the disputes identified in the Defence.

20. As I have said, there is, in fact, no application (not even by Genius) to join the Representative Defendants to the Counterclaim, and it is difficult to see why this matter has troubled the Court. But, I make clear, had Genius made this application, I would have refused it, for the reasons I have given. As it is, there is no order that I can make, and no application that I can refuse.

Costs management

21. There are two questions which arise in relation to this matter. The first is what I can call a jurisdictional question as to the sort of costs regime that I can and should impose in this case. The second is the precise formulation of that regime. This section of my judgment deals only with what I term the jurisdictional question.

22. The parties are now agreed that some form of cost control regime is required. That was not initially Genius's position, but that position has changed during the course of oral submissions. The argument instead has been as to whether costs budgeting or costs management is the more appropriate course, rather than a costs cap. Both parties have emphasised to me that a costs cap is the last route that should be taken by a court when considering costs control regimes, and I accept that. It is quite clear from CPR 19.5 that a costs capping order should be imposed only when all other options have been considered and found in some way or another wanting.

23. It is appropriate to consider CPR 3.19(5), which says that the court may, at any stage of proceedings, make a costs capping order against all or any of the parties if:

i) *It is in the interests of justice to do so*: CPR 3.19(5)(a). I am entirely satisfied it is in the interests of justice to make some form of costs control order, including (if necessary) a costs capping order, and I do not think that this was seriously disputed by either side by the time submissions had finished. As I have indicated, I am concerned that the costs of these complex proceedings be appropriately controlled, and I no longer think that it is an option (if it ever was) to leave matters without any form of intervention apart from *ex post facto* detailed assessment.

ii) *There is a substantial risk that without such an order, costs will be disproportionately incurred*: CPR 3.19(5)(b). As to this:

a) In the run-up to the 4 May 2022 hearing – referred to above – I asked the parties each to provide me with an indication of their incurred costs and their future estimates costs. Genius' figures were amended once, and have now been disavowed by them at this case management conference. Nevertheless, it is important that I set out Genius' figures (as they then stood) and SCM's figures (which have remained broadly consistent over time):

	Genius	**SCM**
Costs incurred to 31 March 2022	c. £3m	c. £1.5m
Estimated future costs	£3.75m to £4m	£2m to £2.75m
Total	c. £6.75 to £7m	c. £3.5 to £4.25m

b) I treated these estimates (and they were no more than that) as accurate estimates, and to that extent relied on them. Genius' disavowal of its own figures after the event means that I cannot place particular reliance on Genius' figures, and that is a matter I will have to return to. The costs are obviously large, but not – using a broad brush – out of the range of figures that I would expect in proceedings of this nature (which I have described in the opening paragraphs of this judgment). Of concern, even at this stage. was the fact that SCM's estimate was significantly lower than Genius', but that would have been a matter for further investigation. It is certainly an indicator pointing in favour of some form of costs control.

c) In preparation for this CMC, each party produced a Precedent H, setting out the costs position as at 30 June 2022:

	Genius	**SCM**
Costs incurred	£3.1m	£1.6m
Estimated future	£10.2m	£3.1m

costs		
Total	£13.3m	£4.7m

The increase in Genius' estimated future costs is entirely unacceptable without the most cogent explanation and justification (which has not been provided in any remotely satisfactory way). I will revert to this in due course, but three factors arising out of these figures show there to be a substantial risk that without some form of *ex ante* costs control order, costs will be disproportionately incurred:

i) The total figure of £13.3m is extremely high. I do not say that it could never be justified: but careful justification would be required.

ii) The mismatch between Genius' and SCM's figures is now far greater and so even more concerning.

iii) The mismatch between Genius's own previous estimates is of great concern.

I regard it as essential that there be some form of costs control imposed and imposed at this stage of the proceedings. I consider that this, second, condition, is satisfied. But this condition does not provide me with any assistance as to whether costs management in the form of a budgeting process or a costs cap should be imposed. All it does is make very clear that some form of control is needed.

iii) *The third condition*: CPR 3.19(5)(c). This provides that a costs capping order may be made where the court is "…not satisfied that the risk in subparagraph (b) can be adequately controlled by (i) case management directions or orders made under this Part; and (ii) detailed assessment of costs". This provides a very clear signpost that the court must consider costs capping as the last resort rather than the first resort, and I have borne in mind the injunctions of both parties in this regard. More specifically:

a) It seems to me that it is quite clear that a detailed assessment will provide a helpful control, but not the complete control of the risk of a disproportionate incurring of costs going forward from now. I very much hope that a detailed assessment will ensure that costs are recovered only to a proportionate and reasonable extent. That is the whole point of the regime. The reason I do not think it is adequate in this case is because I consider that the parties need to have upfront a very clear understanding of what the court will regard as reasonable. The fact that Genius feels able to put forward a costs budget of the sort that it has tells strongly in favour of some sort of *ex ante* costs management regime.

b) The fact is that there is a massive difference between what the parties are budgeting for their costs on each side. Genius's budgeted costs, as claimed in the costs budgets that have been exchanged for the future,

> amount to some £10.1 million. That is several times greater than SCM's assessment of its future costs. The disparity is vast and it does seem to me that all of the parties are entitled to an understanding of what is regarded and what is not regarded as reasonable. That means that detailed assessment, although an important part of the solution, is not the only part and in no sense a complete solution. On its own, it falls far short of what is required in this case. The real question is whether I can achieve the elimination of the risk of disproportionate incurring of costs in the future by making a case management direction other than a costs capping order or whether costs capping is the only route forward. It is to that specific question that I now turn.

24. The real difference between the costs management approach advocated by Mr Roberts, QC on behalf of SCM, and the costs capping approach advocated by Genius (for that, in the end, was Genius' position), is this. Under the costs management approach, one has a broad brush siloing of the costs that can be expended in various future stages of the case. I am looking now at the very helpful table contained at paragraph 163 of SCM's written submissions. What one has is various headings – "disclosure", "witness statements", "experts' reports", "PTR", "trial preparation" and "trial", and the estimated costs for each stage are set out. SCM have set out the budgeted costs claimed by Genius at each stage, and then stated what they, SCM, say are reasonable and proportionate costs in the next column along. Unsurprisingly, there is an enormous mismatch between what Genius have budgeted for and what SCM say they should have budgeted for. As I say, the Genius' budget is £10.1m going forward. SCM's assessment of Genius' reasonable proportionate costs going forward is £3.069m, about a third of the sum Genius have budgeted for.

25. The key question that I must address is how robust I consider the siloing of costs at each stage of the proceedings going forward would be, for the estimate of each stage in itself constitutes a "mini-cost-cap" not to be exceeded for that stage. What is more, any "surplus", where the estimate is not exceed, cannot without more be re-deployed to a later stage, where the estimate is overshot.

26. I do not consider that I can sensibly predict, to take an example more or less at random, that the costs of disclosure will be a reasonable and proportionate cost at £242,000. That seems to me almost certainly to be too low. On the other hand, I very much doubt, and I sincerely hope, that the costs are not the £3.637m that Genius have budgeted for. The fact is I do not know with any confidence what a reasonable or proportionate cost might be; that is because the disclosure in this case is liable to be complex, difficult, and unpredictable. Not only that, but there are different ways in which disclosure may be undertaken, which may entail reduced costs on disclosure but increased costs (e.g. by experts) elsewhere in the budget. The disclosure regime in these proceedings is yet to be finalised, and looks as if it is going to be contentious. One might find, depending on the regime adopted, that the disclosure figure will be lower than it otherwise would be with the expert costs higher. That is an immediate indicator that siloing is not going work in this case.

27. The question of costs management through a budget will actually only work in this case if I delay the budgeting process until we have more certainty about how disclosure and experts' reports are going to pan out. I am not going to do that. It is pointless to have a budget imposed some time in 2023 or late in 2022, when the costs

have already been incurred. What we need now is a control that the parties can work to and I do not consider that any siloing of costs is going to be in any way reflective of how costs are actually going to be spent in the future. I consider that for that reason I should look at the end product, which is an overall costs cap that seems to me to be a fair and proportionate one given the issues and work that needs to be done between now and the trial in early 2024 (which is the date I have set, with the parties' agreement).

28. I stress that I have used disclosure as an example: substantially the same point could be made in respect of other line items in the budget that Genius has drawn and SCM critiqued.

29. So, for all those reasons, I consider that I am not satisfied that the risk in CPR 3.19(5)(b) can remotely adequately be controlled by case management directions or orders other than a cost cap made under CPR 3. I consider that the only way to achieve an outcome consistent with the overriding objective and my duty to appropriately control costs is to do this is by way of a costs cap. I intend to make an order along the following lines (and I stress this is not a final draft):

> "(1) Each party's future costs, i.e. as from 28th July 2022, are capped at [then an amount will have to be inserted, to which I will come to: £X] excluding the costs of any third party document management provider. This sum has been calculated on the basis that the litigation proceeds, as reasonably expected, as at 26th July 2022, and that each party uses best endeavours to comply with its procedural obligations.
>
> (2) When assessing costs, the costs judge may permit recovery on a detailed assessment in excess of the cap if satisfied: (a) there is good reason to do so, and (b) that it was not reasonable for the party seeking to recover a higher figure to make an application under CPR 3.19(7)."

£X: the level of the cap

30. I turn to the question of what figure or figures should be inserted into the terms of the costs capping order I am going to make. I am going to refer to two figures because it seems to me that I ought to consider the cap independently in relation to both Genius and SCM, even if I end up with the same figure in each.

31. I should make it clear that the Representative Defendants are not subject to this regime, as I have made clear in the course of submissions and as I make clear again now.

32. The essence of the question before me is what cap I should impose as regards future costs, that is to say costs that will be incurred from close of play tomorrow. Past costs incurred should simply be subject to a detailed assessment in the future. We are therefore talking about costs incurred from 28 July 2022 until the last day of trial.

33. The trial, as I have ordered, is going to be a five Commercial Court week trial commencing in February 2024. That is substantially the shape of the trial that was envisaged when the parties, at my clerk's invitation, provided estimated costs in May 2022. I have already set these out. I stress again that they have been disavowed by Genius, and that too is something I will return to.

34. Let me, first, though, go through the factors that are playing on my mind in terms of assessing what is the appropriate cap going forward. I have in mind a cap that is not going to be easy to increase. It will be susceptible of increase by application of CPR 3.19(7) and that provision only. It is, therefore, incumbent upon me to ensure that I identify a figure that sits just above the costs that would be recoverable on a detailed assessment, assuming standard basis costs and not indemnity basis costs. What I want to achieve is a figure that is just above what would be recoverable by the successful party in those circumstances. Inevitably, of course, this involves a high degree of uncertainty because costs budgeting and costs capping is an art, not a science.

35. I take into account, in assessing all these figures, the fact that this is a very important piece of litigation for both sides. In particular, I accept that the value at risk in terms of future business interests and past damages is particularly important for Genius. I also take into account that this is complex litigation by any standards. However:

    i) The mere fact that the value at risk is high, and the case hugely important to one or both of the parties does not, and cannot, justify costs in any amount. In any case, no matter how important, there is an appropriate limit, and it is not for the parties, unilaterally, and without reference to objective fact, to set their own budgetary limits. That would be oppressive to the other party or parties to the litigation.

    ii) I accept that these are complex proceedings, but not uniquely so. I have made the point in the course of submissions that this is the sort of litigation that is the bread and butter of the Competition Appeal Tribunal and the sort of cases that I try in the Chancery Division. I should not minimise the fact these proceedings are going to involve an enormous amount of work on the part of both sides. But, again, there is an objective limit to what costs can properly be incurred, and complexity is not a blank cheque.

36. I also take into account that there is going to be a significant amount of disclosure and that the disclosure regime, as we have discussed in the course of the hearing, is a matter that is for further debate and order. I also take into account that there are going to be translations of foreign language documents which is going to add to the costs.

37. Nevertheless, I have reached the firm conclusion that the costs budget of Genius, which projects total <u>future</u> costs (leaving on one side the massive costs already incurred) north of £10m, is a wantonly excessive figure that I am going to place very little reliance on. In the course of oral submissions, apart from repeated reference to the value at risk (which I acknowledge, and take fully into account), Genius did not justify on any objective basis why costs on this scale were in any way reasonable and/or proportionate.

38. I say that without reference to the mismatch between SCM's own budgeted figures and the remarkable mismatch with Genius' own prior estimate. Simply viewed on their own, the figures in Genius' budget are indefensible.

39. The question is how far above the estimates that were provided in May am going to go. In this regard:

i) SCM's position on costs has been consistent, and consistently lower than Genius's estimates. SCM's position is that the future costs can be capped at about £3 million or less. I regard that as a useful guide, because I consider that Genius and SCM are sitting in, broadly speaking, similar positions. It seems to me that although there have been disparate costs incurred in the past, possibly justifiably (I say nothing about this) when one looks at the mountain that has to be climbed by each side going forward, that mountain is broadly speaking the same, whichever party one looks to.

ii) So it is very tempting to cap future costs at £3m for both parties. Genius disavowed its estimate produced in the run-up to the 4 May 2022 hearing, which I have described. That estimate would justify a cap of £4m, but I have to be careful in placing reliance on Genius' figures. That is because Genius' disavowed them, saying that the estimates were gross understatements of what Genius actually thought the costs should be. Reluctantly, because the estimate actually looks quite realistic, I will discount the estimate. But I am not going to permit the disavowal of this estimate, on the unsubstantiated ground that it was erroneously produced and was too low, to justify an estimate, subsequently produced, that I have found to be indefensibly high.

40. So I am really left with only SCM's figures. My concern – and I base this on my general experience of this sort of litigation – is that SCM's estimate is a tight one. I do not say that it is in any way unachievable by a capable firm of solicitors, but it is (I think) on the low side of reasonable. I consider there to be a significant risk that SCM's estimates of future costs will be exceeded by the end of the trial by one side or the other.

41. On the other hand, I do consider that the figure of £4 million for future costs that was originally provided by Genius represents what I think is a proper assessment of the costs going forward, albeit this this is not Genius' present position.

42. Looking at all of the figures in the round, and bearing in mind that I am aiming for a cap that sits just above the amount that would be recovered by a successful party on a detailed assessment on the standard basis, I conclude that a cap of £4.5m is actually the figure that I ought to be imposing. But because I have in mind a cap that will be very hard to shift, I am going to put a little bit more wriggle room into the figure. I hope that it will not be needed, and that assessed costs will fall below this – but I want a certain precautionary contingency. So, I am going to order a cap on each side of £5m for all future costs, and that will be the cap for both Genius and SCM.

43. I want to put on the record that I consider that to be a high figure, but it contains within it a safety margin which ensures that there is fairness to both sides going forward. I appreciate that that is not how Genius see it, but I am afraid, having listened very carefully to the submissions in particular of Mr McDonald, for Genius, I am satisfied that that is the fair figure that I ought to impose as the cap, subject of course to any application that is made in the future under CPR 3.19(7).