Neutral Citation Number: [2022] EWHC 2617 (Ch)

Claim No: BL-2022-001362

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

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL
Date: 20 October 2022

Before:

STUART ISAACS KC (sitting as a Deputy Judge of the High Court)

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Between:

The Bank of London Group Limited

Claimant

Simmons & Simmons LLP

Defendant

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Mr Daniel Margolin KC (instructed by Joseph Hage Aaronson LLP) appeared on behalf of the Claimant.

Mr Charles Hollander KC (instructed by CMS Cameron McKenna Nabarro Olswang LLP) appeared on behalf of the Defendant.

Hearing date: 28 September 2022

Approved Judgment

This judgment was handed down by the judge remotely by circulation to the parties' representatives by e-mail and release to The National Archives. The date and time deemed for hand down is deemed to be 10.30am on 20 October 2022.

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

Stuart Isaacs KC:

Introduction

1. The claimant is a start-up clearing bank - one of only six clearing banks in the United Kingdom in over 250 years. It received its banking licence in 2021 and is currently in so-called mobilisation pending completion of the final aspects of its set-up and operations which are due to be completed later this month. The defendant is a firm of solicitors which was approached by the claimant in March 2022 to provide advice and which did subsequently provide advice on certain regulatory work. The defendant reviewed and advised on a draft service agreement between the claimant and the provider of its patented technology and a draft service order form with the provider, on the claimant's conflicts policy and on its chain outsourcing document in the period between March and July 2022. There was no formal engagement letter.

2. Unbeknown at that time to the defendant's team dealing with the claimant, the defendant also had a long-standing relationship with another client, Bank of London and The Middle East Plc ("BLME") on whose behalf the defendant, on 5 August 2022, had written a letter of claim to the claimant threatening to bring a passing-off claim against the claimant relating to the use of the name "Bank of London" and demanding that the claimant immediately cease using the name. The defendant was instructed in that matter in December 2021.

3. On 23 August 2022, the claimant issued a claim form against the defendant essentially seeking to prevent the defendant from continuing to act for BLME in the passing-off claim and to restrain the misuse of allegedly confidential information in the defendant's possession relating to the claimant's business acquired while the claimant was a client.

4. The claimant brings six applications before the court: (1) the principal application, which is for injunctive relief against the defendant (the "Injunction Application"); (2) an application for the hearing to be held in private (the "Privacy Application"); (3) an application to exclude certain evidence adduced by the defendant (the "Exclusion of Evidence Application"); (4) an application to consolidate the Injunction Application with the substantive claim in the proceedings (the "Consolidation Application"); (5) an application to extend the time for service of particulars of claim (the "Extension of Time Application"); and (6) an application to vary an order of Master Kaye made on 14 September 2022 relating to costs (the "Variation Application").

5. The Privacy Application was not opposed by the defendant. At the start of the hearing and exceptionally, I granted the Privacy Application, in view of the allegedly confidential nature of the information in the defendant's possession and the disruption and consumption of court time in a hearing fixed for only one day which would inevitably have occurred had it been necessary repeatedly to clear the court during the course of the oral submissions.

6. I then heard argument on the Exclusion of Evidence Application. By that application, the claimant sought, in exercise of the court's alleged power under CPR 32.2, to exclude six witness statements served on 9 September 2022 on the defendant's behalf (the "Further Statements") on the ground that they had not been served in compliance with the timetable for the service of evidence agreed between the parties and could and

should have been served earlier. The claimant submitted that, in consequence, it had been prejudiced by "having to meet a moving target". The defendant opposed the application on the grounds that CPR 32.2 was irrelevant, the claimant itself had not complied with the agreed timetable, there was no breach of any court order, the original timetable was based on the hearing of the Injunction Application taking place on 1 September 2022 when in fact it was adjourned due to lack of time and the absence of any prejudice. For the reasons given at the time, I refused the Exclusion of Evidence Application, in particular due to the complete absence of prejudice to the claimant by the admission of the Further Statements in circumstances where the claimant had adduced evidence in response in the third witness statement dated 20 September 2022 of Mr Simon Robertshaw, the claimant's Chief Operating Officer, and did not allege that it had insufficient opportunity to address the evidence contained in the Further Statements.

7. The parties agreed that the hearing should be treated effectively as the trial of the action. In those circumstances, the parties were also in agreement that the Consolidation Application and the Extension of Time Application could be granted, subject to costs. The court duly granted the applications, without hearing argument.

8. What remains is therefore the Injunction Application, the Variation Application and the determination of the costs of the Exclusion of Evidence Application and the Extension of Time Application. Apart from the Injunction Application, the parties agreed that the court could deal on paper with all those matters. To that end, they served written costs submissions on 30 September 2022 and responsive costs submissions on 4 October 2022. No issue arises as to the costs of the Consolidation Application, which the claimant has suggested should be dealt with as costs in the Injunction Application and should follow the event of that application. The defendant's position is that there are no costs of the Consolidation Application.

The Injunction Application

9. By the Injunction Application, the claimant seeks an injunction to restrain the defendant from (1) continuing to act on BLME's behalf in or in relation to the passing-off claim; and (2) divulging any confidential information received from the claimant. The full terms of the relief claimed are set out in paragraphs 3(1) and 3(2) respectively of the application notice dated 23 August 2022.

10. Following the refusal of the Exclusion of Evidence Application, Mr Margolin KC on the claimant's behalf informed the court that the claimant was no longer seeking the injunction to restrain the defendant from acting on BLME's behalf in and in relation to the passing-off action claimed in paragraph 3(1) of the application notice. He stated that, in the light of the Further Statements, the claimant was satisfied that such relief was not required. I observe in passing that it is difficult to understand why, that being the case, the claimant should have persisted with the Exclusion of Evidence Application in the first place. In view of the claimant's position, the defendant applied to be released from its undertaking given to the court following the adjournment of the 1 September 2022 hearing in relation to the injunction claimed in paragraph 3(1) of the application notice. The claimant rightly did not oppose that application, which I granted. Mr Hollander KC on the defendant's behalf confirmed that the undertaking given by the defendant in relation to the injunction claimed in paragraph 3(2) of the

application notice continues pending the determination of the claimant's entitlement to that injunction.

11. The claimant relies in support of the Injunction Application on Mr Robertshaw's third statement and two earlier statements made by him dated 23 and 26 August 2022 respectively, together with a statement dated 28 August 2022 of Mr John Holtrichter, the claimant's Associate General Counsel. Mr Robertshaw states that there is no protocol in place to ensure the confidentiality of the information in question. Mr Holtrichter explains in his evidence how he came to instruct the defendant. His dealings were with Mr Alexander Ainley, a partner in the defendant's Regulatory team, and another member of the team, Mr William Clarke.

12. Mr Ainley made two statements dated 30 August and 9 September 2022 respectively. He says that, in his initial call with Mr Holtrichter, he would have discussed the claimant's business activities in general terms and the scope of the review which the defendant was being asked to carry out. He received drafts of the conflicts policy and services agreement and provided a quote for the work involved which set out the scope of the work and requested some further information about the claimant's business. The defendant then set about the process of onboarding the claimant as a client and conducting a conflicts check. According to Mr Ainley, in the case of UK regulated clients, it is not unusual for the defendant to start initial work of a non-contentious and non-transactional nature before the onboarding process is finalised. He hoped that, by doing the small piece of work required quickly and efficiently, the defendant would go on to develop a long-term relationship with the claimant.

13. The present proceedings stem from a human error made by Mr Ainley in relation to the conflicts check. A conflicts check was done on the claimant's matter but Mr Ainley, whose responsibility it was to review the conflicts report, failed to spot it in his email inbox. Had he done so, he would have seen that a file on the passing-off claim matter had already been opened by one of his partners, Mr Darren Meale, who runs the defendant's UK trademarks practice. Mr Ainley did not become aware of the passing-off claim matter until 9 August 2022.

Confidential information

14. The first question which arises is whether the information which the claimant seeks to protect is of a confidential nature. The allegedly confidential information is contained in four documents, namely a document entitled The Bank of London Proposition (the "Proposition") and drafts of the draft service agreement, the service order form and the client outsourcing document. The defendant submitted, by reference to Mr Robertshaw's second statement and the claimant's skeleton argument for the adjourned hearing on 1 September 2022, that the claimant's case focused on the information contained in the Proposition and that its reliance on the other documents only surfaced in Mr Robertshaw's third statement. I accept that the thrust of the claimant's case is based on the Proposition but I do not consider it correct to say that reliance is not also being placed by the claimant on the other documents. Mr Robertshaw's second statement alleged, in paragraph 7, that the draft service agreement and draft service order form were "confidential and commercially sensitive" and, in paragraphs 8 and 9, that the work product which resulted from the defendant's instructions to review the conflicts policy and chain outsourcing document were also confidential. I also bear in

mind that, in the normal course, communications between a client and solicitor which pass for the purpose of receiving or giving professional advice will be regarded as confidential, see e.g. *Minter v Priest* [1930] AC 558 at 581 and *Toulson & Phipps on Confidentiality* (4th edition, 2020) para. 3-043 to 3-046, citing *Coco v AN Clarke (Engineers) Ltd* [1968] FSR 415, at 421.

15. The defendant criticised the lack of specificity by the claimant as to what precise material contained in the documents provided to the defendant was alleged to be confidential. It exhibited to the statement dated 9 September 2022 of Ms Amy Ramsay, a senior associate at the defendant's solicitors, which is one of the Further Statements, a comparison document compiled by her and a trainee solicitor in her team which compared the information contained on each page of the Proposition with information in the public domain. The comparison document had previously been sent to the claimant as an enclosure to the defendant's solicitors' letter dated 31 August 2022. The defendant relies on that document as showing that the material in the Proposition was "*substantially*" in the public domain. The defendant does not, however, allege that all the material is in the public domain. In Mr Robertshaw's third statement and at the hearing, the defendant drew attention to those parts of the Proposition which it alleged contain specific confidential information. As discussed with counsel at the hearing and with their agreement, since this judgment is being made public it does not identify the specific parts of the documentation alleged to be confidential but those parts were made known by the claimant at the hearing.

16. As stated in *Toulson & Phipps on Confidentiality* at para. 4-047, "*in each case, the question for the court is whether the degree of accessibility of the information is such that, in all the circumstances, it would not be just to require the party against whom a duty of confidentiality is alleged to treat it as confidential*". In my judgment, in the circumstances summarised above, it is entirely just to require the defendant to treat the material contained in the documents provided to it by the claimant as confidential. The material was provided to the defendant in the context of a solicitor and client relationship. The defendant itself only goes so far as to say that the material is substantially in the public domain. The lack of specificity of the allegedly confidential information does not mean that the information is not confidential, although it does go to the extent to which it is relevant and, therefore, to the degree of risk of it being disclosed. Those aspects are considered below.

17. For those reasons, I conclude that the defendant is in possession of confidential information in terms of the documents relied on by the claimant.

Relevance of the confidential information

18. The next question is whether the documents relied on by the claimant comprise confidential information relevant to the passing off claim. In *Re a Firm of Solicitors* [1997] Ch 1 at 10E-G, Lightman J said:

> "*On the issue whether the solicitor is possessed of relevant confidential information: (a) it is in general not sufficient for the client to make a general allegation that the solicitor is in possession of relevant confidential information if this is in issue: some particularity as to the confidential information is required: see Bricheno v Thorp, Jac 300 and Johnson v Marriott (1833) 2 C. & M. 183. But*

the degree of particularity required must depend upon the facts of the particular case, and in many cases identification of the nature of the matter on which the solicitor was instructed, the length of the period of original retainer and the date of the proposed fresh retainer and the nature of the subject matter for practical purposes will be sufficient to establish the possession by the solicitor of relevant confidential information. (b) it may readily be inferred that confidential information is imparted to members of the firm having conduct of the client's matter. Such information may, however, be imparted to other members in the course of partnership meetings or social meetings of members of the firm: see In re A Firm of Solicitors [1992] QB 959, 978C. (c) The court attaches weight to the evidence of the solicitor as to his state of knowledge and whether he received confidential information, in particular where there is no challenge to his integrity and credibility: see Robinson v Mullett (1817) 4 Pr. 353 (solicitor); In re A Solicitor (1987) 131 SJ 1063, per Hoffmann J and Pavel v Sony Corporation, 12 April 1995 (barrister). "

19. In a passing-off claim, the claimant must establish a goodwill attached to the goods or services which he supplies, a material misrepresentation by the defendant to the public (whether or not intentional) leading to or likely to lead to the public believing that the goods or services offered by him are the goods or services of the claimant and that he suffers or is likely to suffer damage by reason of the erroneous belief engendered by the defendant's misrepresentation that the source of the defendant's goods or services is the same as the source of those offered by the claimant: *Clerk & Lindsell on Torts* (23rd edition, 2022) para.25-01.

20. In Mr Robertshaw's first statement, he stated that the claimant's solicitors' letter dated 9 August 2022 outlined the relevance of the confidential information to the claimant's intended defence to the passing-off claim and was explained in more detail in their letter dated 16 August 2022. In short, said Mr Robertshaw, the confidential information included "*detailed information regarding the Bank's business and operations which would plainly be relevant to the Passing-Off Claim, inasmuch as there would need to be a detailed consideration of the business of the Bank and BLME respectively and their respective products and services*", in particular in relation to the issues whether the public have been or will be misled into believing that the claimant's services are in fact BLME's or that the claimant is connected with or authorised by BLME such that BLME's clients' goodwill has been or will be endangered; and as to what, if any, damage to its goodwill BLME has suffered or would be likely to suffer. That evidence was repeated in his second statement. In his third statement, Mr Robertshaw highlighted particular details in the Proposition which made it relevant to the passing-off claim.

21. For its part, the defendant disputed the relevance of the confidential information relied on. It accepted that the nature of the claimant's business is, in a broad sense, relevant to the passing-off claim but submitted that it was far-fetched to argue that the details of the internal operation of and technology used in the claimant's business in the confidential information were of relevance. In this context, as I have already stated, the degree of particularity of the confidential information in question is relevant. In that regard, I am not satisfied that the claimant has identified, other than in the broadest of terms, the confidential information which is said to be relevant to the passing-off claim. That degree of identification is insufficient, in my judgment, to conclude that such

information is relevant to the passing-off claim. The claimant argued, by reference to Mr Robertshaw's third statement, that if the passing-off claim were pursued, it would be necessary in due course to adduce evidence to show the lack of overlap between its and BLME's respective businesses. If that is so, it is difficult to see the basis for an injunction to restrain the divulgence of the information in question since the claimant would positively wish to bring it to the attention of BLME.

22. There is one further point. It is clear from Mr Robertshaw's third statement that the claimant's concern is not related to its defence to the passing-off claim but to the confidential information in question falling into the hands of its competitor UK clearing banks. The statement also goes further in making it clear that the claimant does not see BLME as a competitor but rather as a potential client. His particular concern is his belief, for which no basis is advanced, that there is a high risk of the information finding its way into the hands of Lloyds Banking Group which he says BLME uses for its CHAPS payments.

23. As Lightman J said in *Re a Firm of Solicitors*, in the passage quoted above, identification of the nature of the matter on which the solicitor was instructed, the length of the period of original retainer and the nature of the subject matter are pertinent considerations when determining whether the solicitor possesses relevant confidential information. In the present case, the defendant's fees for the limited regulatory work done for the claimant over a limited period amounted to the very modest sum of £5,435 (plus VAT).

24. In the result, for the above reasons, the claimant has not satisfied me of the relevance of the confidential information.

Real risk of disclosure

25. Related to the relevance of the confidential information is the degree of risk, if any, of its disclosure. Each case must depend on its own facts. As Lord Hope pointed out in the leading case of *Prince Jefri Bolkiah v KPMG* [1999] 2 AC 222, at 227G, the court will not intervene by granting an injunction if it is satisfied that there is no risk of disclosure. To the same effect, Lord Millett, with whose speech all the other members of the House of Lords agreed, stated at 236A-B that in the case of a former client there is no basis for granting relief if there is no risk of the disclosure or misuse of confidential information. The risk must be a real one and not merely fanciful or theoretical but it need not be substantial: see at 237A.

26. I accept the claimant's submission that it is for the defendant in the present case to demonstrate, based on clear and convincing evidence, that any information barriers are sufficient to eliminate the risk. In *Bolkiah*, Lord Millett said at 237G-H that while there is no rule of law that what were then called Chinese walls or other arrangements of a similar kind were insufficient to eliminate the risk, "*the starting point must be that, unless special measures are taken, information moves within a firm*".

27. Mr Ainley's evidence is that he, Mr Clarke, Ms Sophie Sheldon and Ms Viktorija Kasper of the defendant's Digital Business team and Mr Tom Harkus of its Regulatory team read the Proposition and that those other lawyers had confirmed that it was not discussed with anyone else other than those persons directly involved in the review of

the claimant's documentation. It was not discussed with Mr Meale or anyone in his team. Mr Clarke's and Ms Sheldon's review was high-level. When Mr Ainley became aware of the passing-off claim matter on 9 August 2022, he requested the defendant's IT department to lockdown the electronic workspace containing the claimant's file, with the consequence that from the following morning only he is able to access it.

28. The other lawyers at the defendant who worked on the claimant's matter were Ms Nina Obreshkova in the Regulatory team and Mr Neil Westwood in the Digital Business team who, according to Mr Ainley, have confirmed that they had not discussed and would not discuss the work with anyone who had not worked on it, that they hold no papers on the matter and that they have not discussed the matter with Mr Meale's team. Mr Ainley's evidence is that all who worked on the claimant's matter have confirmed that they have not discussed it with Mr Meale's team.

29. In a statement dated 30 August 2022, Mr Meale states that the members of his team who are or were involved in the passing-off claim matter have all confirmed that they have not been contacted by or received any documents from anyone in the Regulatory or Digital Business teams between March and July 2022 in respect of the claimant. The 5 August 2022 letter of claim was prepared in ignorance of the claimant's file, of which Mr Meale and his team were unaware prior to 9 August 2022.

30. The above evidence is confirmed in the statement dated 30 August 2022 of Mr Simon Watson, the defendant's General Counsel. His statement gives further information about the information barrier set up by the defendant's IT department and the effect of an information barrier once established: the only people who can access the electronic file are those who were identified on the initial request form or additional staff members who become involved in the matter as it progresses on submission of a further request form. The statements of Mr Clarke, Mr Sheldon, Mr Harkus and Ms Kasper forming part of the Further Statements also support the evidence of Mr Ainley and Mr Meale.

31. The claimant submitted that the correspondence between its solicitors and the defendant since the letter of claim on 5 August 2022 was strongly suggestive of a failure on the defendant's part to appreciate the importance of ensuring that effective measures were taken to protect the allegedly confidential information. According to the claimant, this was particularly so given the apparent casualness of the defendant's approach to the erection of an information barrier, the delay in doing so, the apparent lack of rigour of the measures grudgingly implemented and its lack of openness in explaining what steps had been taken and were proposed. The claimant also submitted that it could be inferred from the defendant's failure at the outset to offer undertakings in the terms of paragraph 5 of the claim form that there was a real risk of disclosure.

32. In my judgment, on the evidence before the court, any criticism of the defendant's approach to the situation cannot be sustained. No challenge is made to the integrity of the solicitors at the defendant who have served statements and considerable weight should be attached to those statements. An effective information barrier was established as soon as practicable. There is no real risk of leakage of information, similar to the situation in, for example, *Gus Consulting GmbH v Leboeuf Lamb Greene & MacRae* [2006] 2 CLC 88 and unlike the situation in, for example, *Re a Firm of Solicitors* [1992] 1 QB 959. In the light of that evidence, I reject the claimant's submission that

the court should conclude that all effective measures have not been taken to prevent disclosure.

33. On the facts of the present case, for the reasons set out above, there is in my judgment therefore no real risk of disclosure of the information in question to BLME.

Conclusion

34. For the above reasons, the Injunction Application is dismissed. As the parties have agreed that the hearing should be treated effectively as the trial of the action, the question of the costs of the Injunction Application (and of the action) will be determined at a subsequent hearing or on paper if not agreed between the parties.

The Variation Application

35. On 9 September 2022, the defendant made an application for a direction that the hearing of the Injunction Application be treated as the trial of the substantive claim and that the claimant should file reply evidence by 20 September 2022. On 14 September 2022, Master Kaye ordered, on paper and allegedly on a without notice basis, *inter alia* that the claimant was to file reply evidence to the defendant's evidence served on 9 September 2022 in response to the Injunction Application and that the claimant should pay the defendant's costs of the defendant's application. The order gave the claimant permission to apply to set aside or vary it within seven days of its service. By the Variation Application, the claimant contends that the appropriate costs order in relation to the defendant's application was that the costs should have been reserved or else in the case. The claimant seeks its costs of the Variation Application. The defendant argues that the Variation Application should be dismissed with costs.

36. On 26 August 2022, the parties agreed in relation to the Injunction Application that the claimant would serve its further evidence on that day, that the defendant would serve its responsive evidence on 30 August 2022 and that the claimant would serve any reply evidence the following day. On 9 September 2022, the Further Statements were served. The claimant submitted that there was no reason why agreement could not have been reached as to the time for service by the claimant of evidence in reply to the Further Statements and that the defendant's application, which was made without notice, for the filing by the claimant of such evidence by 20 September 2022 was unnecessary. Since the application was made without notice, the defendant owed a duty of full and frank disclosure which the defendant breached in the numerous respects set out in paragraph 21 of the claimant's costs submissions served on 30 September 2022. The duty was still owed if the application was made on short notice rather than without notice. Had Master Kaye been properly informed of the matters in question, it would have been apparent that the claimant had no objection to an abridged deadline for service of its reply evidence and that the application was unnecessary.

37. The defendant submitted that there was no duty of full and frank disclosure because the application was put before Master Kaye as an *inter partes* application with a request that it be dealt with urgently and on paper but not on short notice, although Master Kaye treated it as such and so gave the claimant an opportunity to apply to set her order aside or to vary it. The defendant also submitted that there was no need to raise the matters complained of by the claimant as not having been drawn to her attention since

they were irrelevant to the application: an order was still needed for the claimant to serve any reply evidence at least to the evidence which the defendant had served for the 1 September 2022 hearing; the claimant had not replied but had indicated that it wished to apply to that evidence; and Master Kaye was not being asked to make any order in relation to the Further Statements.

38. Assuming in the claimant's favour – without deciding - that the defendant owed a duty of full and frank disclosure, such duty was in my judgment not breached: I accept the defendant's submission to the effect that the matters complained of by the claimant as not having been drawn to Master Kaye's attention were not required to have been drawn to her attention. In the circumstances, it was also sensible for the application to have been made in the absence of an agreed date for the service of any reply evidence, irrespective of where the fault, if any, lay for the absence of agreement. However, having considered the claimant's submissions, of which Master Kaye did not have the benefit when making her order, I consider that the appropriate order to have made would have been that the costs should have been in the Injunction Application. The Variation Application is therefore granted. I vary paragraph 3 of Master Kaye's order by ordering that the costs of the defendant's application described in the order as the Timetable Application be in the Injunction Application. The claimant is entitled to its costs of the Variation Application. In circumstances where the Injunction Application has been dismissed, the claimant's success in the Variation Application may turn out to be pyrrhic if it is ordered to pay the costs of the Injunction Application. However, that is not a matter which should affect the order to be made in respect of the costs of the Variation Application.

The costs of the Exclusion of Evidence Application

39. The claimant and the defendant each submitted that it should be awarded the costs of and occasioned by the Exclusion of Evidence Application. The defendant seeks its costs on an indemnity basis.

40. The claimant accepts that the application was refused but seeks to justify it on the grounds set out in paragraph 27 of its costs submissions served on 30 September 2022 and the existence of procedural uncertainty if evidence were served without agreement or with the court's permission.

41. I do not repeat in this judgment the reasons given at the time for the refusal of the Exclusion of Evidence Application. For the same reasons, the costs of the application should follow the event. However, I do not consider that an award of costs on an indemnity basis would be appropriate since the application, although not well-founded, was not so out of the ordinary or unreasonable as to justify such an order. Accordingly, the defendant is entitled to its costs of the application on the standard basis.

The costs of the Extension of Time Application

42. By the Extension of Time Application issued on 7 September 2022, the claimant applied for an order that the deadline for service of particulars of claim be extended to 5 October 2022 and that the defendant should pay the costs of the application on the indemnity or alternatively the standard basis. The claimant submitted that the application was only made necessary by the defendant's conduct. Since the parties were

in agreement that the determination of the Injunction Application should be dispositive of the claimant's claim, on 6 September 2002 the defendant's solicitors recognised in a letter of that date that the claimant would not want to incur the costs of preparing particulars of claim and proposed that the parties agree an extension of time until 5 October 2022 for service of the particulars of claim, that is, after the present hearing. The letter stated that the defendant's agreement to that course of action was conditional on a consent order being made for the service of further evidence. The claimant had on 1 September 2022 sought the defendant's agreement to dispense with particulars of claim but by 5 September 2020 the defendant's solicitors were without instructions from the defendant and stated that they were unlikely to be in a position to respond substantively before the following day. The claimant submitted that it had no option but to issue the Extension of Time Application prior to the existing time for service of the particulars of claim being due to expire.

43. The defendant submitted that the particulars of claim, which the claimant's solicitors had said were almost completed, could have been served without the need for the Extension of Time Application, with any discussion about confidentiality undertakings being held over, and that a more sensible route would have been to extend time until after the hearing of what would have been the trial of the action, which would have made service of particulars of claim unnecessary.

44. In my judgment, the defendant's submissions gloss over the fact that its agreement to extend until 5 October 2022 the time for service of particulars of claim was made conditional on a consent order being made for the service of further evidence. The defendant had had sufficient opportunity to respond to the claimant's request made on 1 September 2022 that the defendant should agree to dispense with particulars of claim but had not responded substantively. The time for service of particulars of claim was due to expire imminently. Agreement on an extension of time did not need to be made dependent on the claimant's consent to the Further Statements being served. I accept that the absence of a confidentiality protocol may have impacted on the contents of the particulars of claim such that it did not follow from the fact that they were almost completed that they ought to have been served. The fact that the Exclusion of Evidence Application has been unsuccessful and that the claimant has been ordered to pay the defendant's costs of that application is not a reason for also ordering the claimant to pay the defendant's costs of the Extension of Time Application.

45. In the circumstances, the claimant is entitled to its costs of the Extension of Time Application.