Claim No: HC-2016-001680

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION

B E T W E E N:

GROUPM UK LTD

MINDSHARE MEDIA UK LIMITED

MEDIACOM HOLDINGS LIMITED

MEDIAEDGE: CIA UK LIMITED

MAXUS COMMUNICATIONS (UK) LIMITED

Claimants

– and –

FIRMDECISIONS LIMITED

Defendant

DEFENCE

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1. Definitions issued in the Particulars of Claim are adopted in this Defence for convenience. The headings used in the Particulars of Claim are not accepted and are therefore not adopted.

2. Paragraph 1 to 3 are admitted, save that:

   2.1. FirmDecisions has no knowledge as to whether GroupM has authority to represent or manages the Second to Fifth Claimants, or whether the Claimants are wholly-owned subsidiaries of WPP, and does not admit any of those allegations.

2.2. The WPP Group is a leading communication services group but the allegation that it is the world leader is not admitted.

3. As to paragraph 4

3.1. Customers (i.e. advertisers) who purchase media for advertising from GroupM Agencies typically contract on terms which entitle them to require the agency to permit and facilitate a periodic third party review and audit in order to verify that the contractual arrangements between the customer and the agency, including but not limited to those relating to cash flows and rebates, have been properly performed ("contractual compliance reviews").

3.2. From time to time, FirmDecisions is contracted by such customers to undertake contractual compliance reviews.

3.3. GroupM Agencies typically require compliance specialists, including FirmDecisions, to conclude non-disclosure agreements ("NDAs") before being permitted access to the information necessary to conduct the review.

3.4. The NDA is in each case concluded with the principal relevant agency ("the counterparty agency") or the subsidiary holding the documents and not with GroupM, and governs (amongst other things) the provision of information relevant to the particular contractual compliance review by both the counterparty agency and its affiliates.

4. As to paragraph 5, the terms of each NDA are customised by specifying the relevant parties, client and purpose, with the result that the NDAs are not simply identical. The remaining allegations in this paragraph are admitted.

5. As to paragraph 6, it is admitted that the definition of Confidential Information in the NDAs expressly includes the content of the relevant NDA itself, and that annexure B to the Particulars of Claim contains a transcription of substantive clauses of the generic NDA which are relevant for purposes of these proceedings. The right to rely on the full agreement in each case is reserved.

6. As to paragraph 7 and 8:

6.1. When carrying out any GroupM Agency contractual compliance review, FirmDecisions is and was bound by the terms of the relevant NDA with the relevant counterparty agency, including the obligations of confidence which they set out.

6.2. FirmDecisions will rely on the full terms of each relevant NDA, but admits that the NDAs provide that FirmDecisions was under a duty in general terms not to use Confidential Information for anything other than the limited purpose of the relevant contractual compliance review, was obliged not to disclose Confidential Information to third parties, and was obliged upon request to account for or return to the relevant agency any materials in its possession or control containing or derived from Confidential Information disclosed for purposes of the contractual compliance review in question.

6.3. Whether information was provided by the relevant counterparty agency or one of its affiliates, FirmDecisions' duties were owed to the relevant counterparty agency in each case, and not to GroupM or to GroupM Agencies generally.

6.4. The remaining allegations are denied.

7. As to paragraph 9:

7.1. Mr Broderick of FirmDecisions and Mr Smith and Mr Brook of GroupM have historically kept an informal channel of communication open between them in order to resolve difficulties and protect the relationship between the parties as well as their respective commercial interests. In an email chain in May 2016 pursuant to that practice:

7.1.1. Mr Broderick followed up on a meeting with Mr Brook on 4 May 2016, sought to arrange a further meeting, and complained about an email sent by the Fourth Claimant's Mr Shill to a customer, which had implied that FirmDecisions was guilty of unprofessional practices including breaches of confidentiality.

7.1.2. Mr Smith sought to justify Mr Shill's email on the basis of an isolated historic incident in Australia in 2014 in regard to FirmDecisions' client and Mediacom

Australia Limited, which had long since been resolved and settled between its parties ("the Mediacom Australia incident"), explained in further detail below.

7.1.3. Mr Broderick replied saying amongst other things that the Mediacom Australia incident was not relevant. He illustrated what had been a co-operative working relationship between FirmDecisions and the GroupM Agencies by noting

> *"... – we have 4 or 5 instances this year where your agencies have sent us confidential information for other clients by mistake – we don't make a meal of it. In one instance this year, your agency sent us the whole list of "media differences" by mistake...* [we] *complied with our NDA. We never called any client on that list..."*

7.2. In the Mediacom Australia incident:

7.2.1. In July 2014, in the course of a contractual compliance review, a then employee of FirmDecisions was provided with an invoice for television costs charged to FirmDecisions' client by an employee of FinancePlus, an Australian shared services centre acting on behalf of Mediacom Australia Limited. The FinancePlus employee mistakenly attached to the invoice a spreadsheet listing monthly billings to each of Mediacom's clients with a reconciliation against "AVD" (which FirmDecisions understood to mean Annual Volume Discount).

7.2.2. The employee did not notify Mediacom Australia of the mistake but for a brief period retained the spreadsheet provided. FirmDecisions' draft report to its client was made available to Mediacom for comment prior to distribution, in a form which included a marked up comment suggesting internally that while it was important not to breach the relevant NDA it might be "*best to keep it up our sleeve when needed*".

7.2.3. After this was detected, the relevant employees were reprimanded, Stephen Broderick of FirmDecisions issued a formal apology to Mediacom Australia Limited (through its solicitors, Norton Rose Fulbright) and any electronic or paper copies of the spreadsheet were destroyed.

7.2.4. Mediacom Australia accepted the apology, and treated the issue as closed.

7.3. The reference in the 5 May email to "*4 or 5 instances this year...*" was transparently an approximation, conveying and intending to convey only that this had occurred several times. The reference to an agency having sent the "*the whole list of media differences*" was a loose and imprecise reference to an incident where Mediacom Australia Limited erroneously provided FirmDecisions with a media billings list for all of Mediacom's clients during a contractual compliance review for a client ("the media billings list") (the "Media Billings Australia incident"). These incidents (excluding the Mediacom Australia incident) are collectively referred to below as "the relevant incidents".

8. Further particulars of the relevant incidents are set out below:

8.1. In the Media Billings Australia incident:

8.1.1. In September 2014, in the course of a contractual compliance review on behalf of a client, an employee of FirmDecisions requested media billings for the relevant client. An employee from FinancePlus, an Australian shared services centre acting on behalf of Mediacom Australia Limited, mistakenly provided the media billings list which included information relating to other Mediacom Australia clients.

8.1.2. The FirmDecisions employee notified FinancePlus of that error, and deleted the relevant emails attaching the media billings list.

8.2. In October 2015 during a contractual compliance review project for a client in Sweden, an employee of Mindshare Sweden mistakenly sent billing information for other agency clients to a FirmDecisions employee over email. The agency subsequently notified the FirmDecisions employee of its error and the information was removed from FirmDecisions' sampling and analysis. The information was not referred to in FirmDecisions' report to its client and has been deleted from the relevant employee's email folder.

8.3. In November 2015 during a contractual compliance review project for a client in the UK, an employee of the Second Claimant mistakenly sent an annual volume bonus listing document to a FirmDecisions employee by email. The agency later informed FirmDecisions that the contract review project did not include a review of annual

volume bonuses and that the information ought not to have been sent. The information was not referred to in FirmDecisions' report to its client and has been deleted from the relevant employee's email.

8.4. In May 2015 during a contractual compliance review project for a client in Turkey, a MindShare Turkey employee mistakenly showed a FirmDecisions employee hard copy un-redacted contracts with media vendors, certain of which contained details relevant to other agency clients who were expressly named in those contracts. The FirmDecisions employee did not receive copies of the documents.

8.5. In November 2015 during two separate contractual compliance review projects in Turkey, a local agency employee mistakenly showed a FirmDecisions employee hard copy un-redacted contracts with media vendors, certain of which contained details relevant to other agency clients who were expressly named in those contracts. The FirmDecisions employee did not receive copies of the documents.

8.6. In October 2015 during a contract review project for a client in the UK, an employee of the Second Claimant mistakenly showed a FirmDecisions employee a hard copy un-redacted document which contained media spend data for a number of the agency's other clients. The FirmDecisions employee did not receive a copy of the document.

8.7. In February 2016 during another contract review project for a client in the UK, an employee of the Third Claimant mistakenly showed a FirmDecisions employee hard copy un-redacted contracts with media vendors certain of which contained details relevant to other agency clients who were expressly named in those contracts. The FirmDecisions employee did not receive copies of the documents.

8.8. None of these incidents involved any breach or potential breach of the relevant NDAs by FirmDecisions.

9. Paragraph 10 is admitted. The letter dealt with other issues as well, and made other demands. The other allegations set out in it are denied. In regard to the portions of the letter relevant to the present claim:

9.1. The allegations in the letter that there were "recent" incidents (i.e. in the year preceding the date of the letter) where FirmDecisions had retained confidential information belonging to GroupM (including the media billings list) and that Mr Broderick so admitted, are denied.

9.2. The letter suggested that there was reason to question FirmDecisions' attitude to the protection of information under the NDAs. That allegation was not properly particularised and is denied.

9.3. The letter contended that FirmDecisions did not have a choice and was obliged by clause 4(b) of the NDAs to notify GroupM and "*reasonably cooperate with [GroupM's] efforts to ...prevent or curtail...or recover its confidential information*" and demanded the particulars referred to in paragraph 10 upon that premise. The premise was misstated and incorrect:

9.3.1. Clause 4(b) of each NDA obliges FirmDecisions to notify the relevant counterparty agency of any actual or threatened breach of the NDA (including by unauthorised use or disclosure of Confidential Information) or in the event of loss of or inability to account for Confidential Information received, and then to cooperate with that agency to assist it in preventing or curtailing any breach and recovering its Confidential Information.

9.3.2. The letter did not identify or particularise any actual or threatened breach of the NDA. The "recent" incidents were in their own terms not breaches of the NDAs. FirmDecisions had therefore not come under any relevant obligation under clause 4(b).

9.3.3. In any event, any obligation under clause 4(b) of any NDA is owed to the relevant counterparty agency and not to GroupM. Disclosure of the information called for to GroupM instead of the agency would or might in law have constituted a breach of that NDA.

10. As to paragraph 11:

10.1. The terms of the 5 May 2016 email did not justify any reasonable inference that urgent action to protect confidential information was required, and the demand for a detailed response by 13 May 2016 was unreasonable.

10.2. In a letter of 12 May 2016, FirmDecisions recorded that its relevant officers were travelling and that the matter could not be investigated until later, but that a response would be provided in due course.

10.3. In the letter of 23 May 2016, GroupM's solicitors for the first time specifically made a request for return of confidential information under clause 9 of an unspecified NDA. No particulars of the information requested were provided, but when read with the letter of 11 May 2016 it was reasonably understood to have requested return of the media billings list.

10.4. Under clause 9 of each NDA, the relevant agency (not GroupM) was entitled to request return of confidential information in FirmDecisions' possession or control. The letters assumed without prior inquiry that FirmDecisions continued to have the media billings list in its possession or control.

10.5. As set out above, the media billings list had been mistakenly sent by email to FirmDecisions by FinancePlus on behalf of Mediacom Australia; FirmDecisions had notified the agency of that fact and had subsequently deleted the copy of the email in the relevant employee's email folder.

11. As to paragraphs 12 and 13

11.1. On 27 May 2016 FirmDecisions responded to both letters.

11.2. The allegation that it "*for the first time ... asserted that both the List and `the documents' had been deleted*" is misleading and is denied. The letter records that the relevant documents had been deleted, but:

11.2.1. FirmDecisions had not previously expressly or impliedly suggested that the documents remained in its possession;

11.2.2. Where information had been provided to FirmDecisions over email the relevant agencies in each underlying incident had at the time been informed of what had been received and what had been done or FirmDecisions was advised by the agency of the agency's own error.

11.2.3. Where FirmDecisions was mistakenly shown hardcopy un-redacted documents containing information about other customers it did not refer to that information in its reports and it did not retain any confidential information.

11.2.4. This was the first time that FirmDecisions was in substance called on to address that question to GroupM.

11.3. FirmDecisions properly sought undertakings confirming that the counterparty agencies under each relevant NDA and GroupM would not contend that the provision of the requested particulars would be regarded as a breach of the NDAs in question. It is denied that that request was inexplicable.

12. Paragraph 14 is denied.

12.1. The relevant agency had been told of what had happened at the time in each case where a document had been sent or FirmDecisions was advised by the agency of the agency's own error. No hard copy documents had been retained. It was open to GroupM to make enquiries of its agencies but it appears to have failed to do so.

12.2. In any event, the obligations under each NDA are owed to the counterparty agency in each case, and only it could enforce them. No dispute had yet arisen, but if there had been one the relevant contracting parties would have had to bring the claims in any event.

13. The language of paragraphs 15 and 16 is misleading, since it implies wrongdoing on FirmDecisions' part. On each occasion, where an agency mistakenly provided copies of confidential documents or confidential information to FirmDecisions, FirmDecisions detected and communicated the fact that it had done so or was advised by the agency of its own error, and has deleted or returned any information received to the relevant agency.

14. Paragraph 17 is denied. Without limiting the generality of that denial:

14.1. FirmDecisions had not refused to return or account for any confidential documents in its possession or control.

14.2. FirmDecisions had already accounted to the underlying agencies at the time of the underlying incidents and had not been asked to do so again (although it has now done so once more, as explained below).

14.3. FirmDecisions had offered to provide GroupM with information upon receipt of appropriate confirmations and undertakings.

14.4. There was no live confidential information issue relating between the parties at all.

15. Paragraphs 18 and 19 are denied. The facts set out above do not disclose that any breach took place. While the historic Mediacom Australia incident involved a potential future breach of an NDA to which none of the Claimants are party, it was detected, avoided and remedied at the time. The suggested inferences are wholly without justification.

16. Paragraph 20 is denied.

16.1. The last four lines of this paragraph describe the internal communication in the historic Mediacom Australia incident explained above, which has no lasting relevance and in particular no relevance to any of the relevant incidents.

16.2. There is no reasonable basis for the inferences which the Claimants seek to draw and no real risk of breach of the NDAs or misuse of any Confidential Information.

16.3. These proceedings are and were at the time of their issue unnecessary and disproportionate, and fall to be dismissed with indemnity costs.

16.4. In a letter of 13 June 2016 FirmDecisions set the position out in more detail, again sought the confirmations and undertakings necessary to enable it to provide more particulars to GroupM and invited the Claimants to withdraw these proceedings.

16.5. On 21 June 2016 GroupM provided confirmation that any disclosure of the relevant particulars to it would not be construed as a breach of any NDA. Following

receipt of that letter fuller particulars of each incident were sent to GroupM on 22 June 2016, including the details set out above as well as further particulars including the identity of the FirmDecisions' client in each case.

17. Paragraphs 21 to 23 are predicated on there being underlying breaches of the NDAs. The allegations of breach are denied, and the possibilities canvassed in these paragraphs do not arise.

THOMAS PLEWMAN QC

28 JUNE 2016

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STATEMENT OF TRUTH

The Defendant believes the facts stated in this Defence to be true.

Signature: _____ Date: 28 JUNE 2016

Name: ANDREW WATKINS Position: COMPANY SECRETARY