Neutral Citation Number: [2018] EWHC 1123 (QB)

Case No: HQ15X05099

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL
Date: 16/05/2018

Before :

THE HONOURABLE MR JUSTICE LANGSTAFF

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Between :

Various Claimants	**Claimants**
- and -	
Wm Morrison Supermarkets PLC	**Defendant**

Mr Jonathan Barnes & Ms Victoria Jolliffe (instructed by **JMW Solicitors LLP**) for the **Claimants**

Ms Anya Proops QC, Mr Benjamin Williams QC & Mr Rupert Paines (instructed by **DWF LLP**) for the **Defendant**

Hearing date: 8th February 2018

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Approved Judgment

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.

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THE HONOURABLE MR JUSTICE LANGSTAFF

MR JUSTICE LANGSTAFF:

Introduction

1. On 1st December 2017 I handed down judgment in group litigation ([2017] EWHC 3113(QB)). The trial had lasted ten days. It concerned claims that the Defendant, whom I shall call Morrisons, were directly liable for a disclosure of data relating to 99,998 employees of Morrisons, and claims they were vicariously liable for the actions of the employee of theirs (Andrew Skelton) who disclosed that data. The direct liability claims subdivided into two aspects: whether the Data Protection Act – alleged breaches of which form one of the three heads of action relied on by the Claimants (the other two being misuse of private information, a tort, and breach of confidence, an equitable action) - created absolute liability for any such disclosure, or whether liability was fault based. If the latter, the question was whether in the circumstances Morrisons were at fault in permitting or facilitating what had occurred.

2. My judgment was that the claims in respect of direct liability failed, but the claim in respect of vicarious liability succeeded. I gave permission to appeal on the latter issue: there has been no cross appeal in respect of my dismissal of the direct liability claims.

3. Broadly viewed therefore, there were two main aspects to the claim: direct liability, and vicarious liability. The result of the case was that the Claimants succeeded in obtaining that which they had set out to obtain: a finding of liability in their favour against Morrisons. Accordingly, I have no doubt that on the claim taken as a whole the Claimants were the victors – nor was it contended otherwise. This is of course, subject to appeal: but neither party has asked for this determination in respect of costs to await the decision(s) on appeal.

The Issue

4. The Defendant argues that the bulk of the time, effort, expense, disclosure and evidence was directed towards, and generally only towards, the issues of direct liability on which Morrisons succeeded and the Claimants failed. They contend that the Claimants should not be entitled to their costs of the action since they failed upon a separate issue which constituted a major part of it. They accept that the general rule is the starting point. So, here, the starting point is that the Claimants should be entitled to all of their costs for the action, for that is general rule. However, under CPR 44.2(2)(b) the court may make a different order. Mr Barnes submits and I accept that the discretion to do so is a broad based discretion, taking into account all the circumstances, but directing particular attention to the factors singled out for mention in CPR44.2(4), as amplified (so far as 44.2(2)(a) is concerned) by CPR 44.2(5).

5. In **English v Emery Reimbold and Strick Ltd** 2002 1 WLR 2409, EWCA Civ 605 the Court of Appeal said in a combined judgment at paragraph 115:

> "…we would emphasise that the Civil Procedure Rules requires that an order which allows or disallows costs by reference to certain issues should be made *only* if other forms of order cannot be made which sufficiently reflect the justice of the case: see Rule 44.3(7), above. In our view there are good reasons for this rule. An order which allows or disallows costs of certain issues creates difficulties at the stage of the assessment of costs because the costs judge will have to master the issue in detail to understand what costs were properly incurred in dealing with it and then analyse the work done by the receiving party's legal advisors to determine whether or not it was attributable to the issue the costs of which had been disallowed. All this adds to the costs of assessment and to the amount of time absorbed in dealing with costs on this basis. The costs incurred on assessment may thus be disproportionate to the benefit gained. In all the circumstances, contrary to what might be thought to be the case, a "percentage" order, under rule 44.3(6)(a), made by the judge who heard the application will often produce a fairer result than an "issues based" order under rule 44.3(6)(f). Moreover such an order is consistent with the overriding objective of the Civil Procedural Rules. 116. In general the question of what costs order is appropriate is one for the discretion of the judge and an appellate court would be slow to interfere in its exercise. But the considerations mentioned in the preceding paragraphs are ones which a judge should bear in mind when considering what form of order ought to be made in order properly to apply rule 44.3(7). These considerations will in most cases lead to the conclusion that an "issues based" order ought not to be made. Wherever practicable, therefore, the judge should endeavour to form a view as to the percentage of costs to which the winning party should be entitled or alternatively whether justice would be sufficiently done by awarding costs from or until a particular date only, as suggested by rule 44.3(6)(c)."

6. In his general review of the current state of authority as to costs orders in **Multiplex Constructions (UK) Limited v Cleveland Bridge UK Limited** [2008] EWHC 2280 (TCC) Jackson J, at paragraph 72, repeated the strong advice to hesitate before making an "issues based" order as such. That principle and five others of the eight he identified remain appropriate. They are:-

> "(i) In commercial litigation where each party has claims and asserts that a balance is owing in its own favour, the party which ends up receiving payment should generally be characterised as the overall winner of the entire action.

> (ii) In considering how to exercise its discretion the court should take as its starting point the general rule that the successful party is entitled to an order for costs.
>
> (iii) The judge must then consider what departures are required from that starting point, having regard to all the circumstances of the case.
>
> (iv) Where the circumstances of the case require an issue based costs order, that is what the judge should make. However, the judge should hesitate before doing so, because of the practical difficulties which this causes and because of the steer given by rule 44.3(7).
>
> (v) In many cases the judge can and should reflect the relative success of the parties on different issues by making a proportionate costs order…
>
> (viii) In assessing a proportionate costs order the judge should consider what costs are referable to each issue and what costs are common to several issues. It will often be reasonable for the overall winner to recover not only the costs specific to the issues which he has won but also the common costs."

7. The opening words of paragraph 72 are "in a commercial case…", and colour what follows. A distinction is drawn by authority between a case such as **Multiplex** and a personal injury action, such as that considered by the same judge in **Fox v Foundation Piling Limited** [2011] EWCA Civ 790, a personal injury case: see paragraph 48, though it was said (paragraph 49) that, in other cases, the fact that the successful party has failed on certain issues might constitute a good reason for modifying the costs order in his favour, something commonly achieved by awarding the successful party a specified proportion of its costs. There followed this observation:

> "In **Widlake** (a reference to **Widlake v BAA Limited** [2009] EWCA Civ 1256) the facts were so extreme that the successful party was ordered to bear all of its own costs."

8. Different policy considerations as to the desirability of a proportionate order based upon success or failure on the issues in a case have been articulated by the courts. In **AEI Rediffusion Music Limited v Phonographic Performance Limited** [1999] WLR 1507, decided shortly after the CPR first came into force, Lord Woolf MR noted at 1522H to 1523B:-

> "The most significant change of emphasis of the new Rules is to require courts to be more ready to make separate orders which reflect the outcome of different issues. In doing this the new Rules are affecting a change of practice which has already started. It is now clear that too robust

> an application of the "follow the event principle" encourages litigants to increase the costs of litigation, since it discourages litigants from being selective as to the points they take. If you recover all your costs so long as you win, you are encouraged to leave no stone unturned in your effort to do so."

9. In **Fox**, at paragraph 62, some 12 years later, Jackson LJ observed, however:

> "..a growing and unwelcome tendency by first instance courts and, dare I say it, this court as well to depart from the starting point set out in rule 44.3(2)(a) too far and too often. Such an approach may strive for perfect justice in the individual case, but at huge additional cost to the parties and at huge costs to other litigants because of the uncertainty which such an approach generates. This unwelcome trend now manifests itself in (a) numerous first instance hearings in which the only issue is costs and (b) a swarm of appeals to the Court of Appeal about costs…"

10. In the present case neither party asks me to make what was described as an "issue based" costs order in the sense in which that was mentioned in **English**. Rather, Ms Proops QC argues that I should take success on the issues into account in making a broad-brush assessment reflecting the balance of costs incurred in successfully defending the direct liability claims balanced against the costs broadly attributable to the vicarious liability claims. It is plain in her submission that the costs relating to the direct liability claim formed the greater proportion of the overall costs of the action, such that the Defendant's success on that issue should be reflected by an order requiring the Claimants to pay a percentage of the overall costs to the Defendant. Mr Barnes for his part recognises that a proportionate order may well be made, though his starting point is that the Claimants are entitled to their costs of the entire action. If there is to be a discount to reflect the degree of success of the Defendants it should take into account, he submits, that the bulk of the costs are common costs which would have been incurred to pursue both aspects of the Claimants' case; the Defendant throughout denied liability to the Claimants on both bases and there was such overlap between the issues of direct and vicarious liability that the common costs, which he argues formed the bulk of the costs incurred, were incurred in relation to the issue upon which the Claimants succeeded. He poses the question whether the winning party has lost an issue which is suitably circumscribed so as to deprive that party of the costs of that issue, and whether it can be appropriate in all the circumstances not merely to deprive the Claimants of their costs on the issue in relation to which they lost but also to require them to pay Morrisons' costs.

Relevant Findings

11. The award of costs is discretionary. One of the principal reasons for this is that they are peculiarly within the knowledge of the trial judge. It might therefore be sufficient for me to indicate an overall view as to where the significant costs were incurred, and what I might consider a fair adjustment to

the Claimants' recoverable costs to reflect the relative degrees of success of the parties, taking all the facts into consideration.

12. In deference to the arguments of the parties on this application for costs, however, I have come to the view it would be appropriate to say more than that as to some of the major considerations which have emerged to me as trial judge which help to explain why I am making the award I am about to indicate. Although these following matters are of particular relevance, they should not obscure the fact that I had regard to all the circumstances in reaching my conclusions:

12.1. The Claimants won overall; (that is undisputed).

12.2. The Claimants lost on the issues of direct liability (that, too, is not in issue).

12.3. The cases in respect of direct liability and the case in respect of vicarious liability were sufficiently distinct for them to be regarded in my view as substantially separate issues, to the extent that at the conclusion of the hearing I would have been surprised if an application such as the present had not been made to me by the Defendant for at least a proportion of the costs to be offset against any the Claimants sought. They were not, however, entirely distinct (such that, for instance, the trial of one had it taken place on its own would not have involved material deployed on the other, nor could it be said that some of the evidence relevant to issues of primary liability was not also relevant when considering secondary liability). There is a degree of overlap. The extent of that overlap which is in my view material to the degree of adjustment to be made to what would otherwise be the order - that the Claimants should be entitled to all their costs - is indicated by what follows.

12.4. Immediately prior to the hearing, the parties identified 14 issues, upon which the resolution of the claim depended; 13 of those (some sub-divided) related to the direct liability cases, and only one (number 14) to the vicarious liability case.

12.5. In the Particulars of Claim paragraph 25, which spelt out the direct liability claim, occupied three pages of A4 double spaced typing, and contained some 14 sub-paragraphs or allegations. By contrast, paragraph 26, which spelt out the vicarious liability claim (though it also contained a reference to "all the premises") consisted of less than three lines:

> "Further or alternatively in all the premises Mr Skelton's actions were committed within the scope of his employment by the Defendant and the Defendant is therefore vicariously liable for them."

12.6 Paragraph 27 contained a further three pages spelling out the basis of a claim against Morrisons for an injunction, which was necessarily predicated upon success in relation to one of the direct liability claims.

12.7 Comparing 13 issues with one, and 3 pages of detailed grounds of complaint (repeated when it came to a claim for injunctive relief) on the one hand, with three lines on the other, is indicative of the relative expenditure of time and effort as between the direct and vicarious claims. Though some evidence of this, it does however tend to overstate it if only by a bit. Both paragraphs 25 and 26 began with the words "In the premises…". Paragraphs 1 – 24 constituted those "premises". Of these, at least seven were introductory and explanatory, and of no assistance in indicating the relative emphasis as between one case and the other. The thrust of the remaining 17 was directed generally to what was said to be the Defendant's failure to discharge its obligations under the Data Protection Act, albeit that some of those paragraphs did refer to matters of fact which in my view it was necessary to understand in order to evaluate the vicarious liability claim. The background circumstances relating to both the direct liability and the vicarious liability claims were common. Miss Proops argues that they were capable of agreement between the parties – indeed, much was agreed on the pleadings (I shall consider this further below) – but this argument has much of the perspective of hindsight about it, and must be treated with caution.

13. It is not simply the trial itself which needs to be considered, for I am asked to deal with the costs of the action. That includes not only the pleadings I have mentioned but also disclosure. Ms Proops argues that the extent of this, and hence the cost of it, was substantially increased in scope because of the direct liability claims. For instance, they gave rise to argument about whether a report, known as "the Penetration Report", dealing with the reliability of Morrisons' systems to withstand attempts from outside the organisation to breach confidences within it, should be disclosed. These claims led to a failed attempt to broaden the scope of the claim beyond the "data event" as it was then called (the "data event" being the process of and leading to the unlawful disclosure of information relating to the claimants by Andrew Skelton, the disaffected employee, on 12 January and 14 March 2014).

Factors to which the court should have regard

14. Parts 44(4) and (5) of the CPR provides so far as relevant as follows:-

> "(4) In deciding what order (if any) to make about costs, the court will have regard to all the circumstances, including—
>
> (a) the conduct of all the parties;
>
> (b) whether a party has succeeded on part of its case, even if that party has not been wholly successful; and
>
> (c) any admissible offer to settle made by a party which is drawn to the court's attention, and which is not an offer to which costs consequences under Part 36 apply.
>
> (5) The conduct of the parties includes—

> (a) conduct before, as well as during, the proceedings and in particular the extent to which the parties followed the Practice Direction—Pre-Action Conduct or any relevant pre-action protocol;
>
> (b) whether it was reasonable for a party to raise, pursue or contest a particular allegation or issue;
>
> (c) the manner in which a party has pursued or defended its case or a particular allegation or issue; and
>
> (d) whether a claimant who has succeeded in the claim, in whole or in part, exaggerated its claim."

15. I have not had my attention drawn to any offer to settle.

16. As to "conduct", Ms Proops contends that it was not reasonable for the Claimants to raise the question whether the DPA is a statute importing absolute liability – that really had at best speculative chances of success, and realistically so few as to have none. As to direct fault-based liability, she observes that at trial the emphasis was substantially on whether Morrisons should have entrusted data to Skelton at all, because of his disciplinary history, and whether DPP 7 was observed, in particular by ensuring deletion of the relevant data once there was no longer a need to retain it. She complains that none of the other grounds of complaint held water: and that the Claimants had effectively had this pointed out to them in advance of the trial. Thus, whether the data was transferred to Skelton by email or by USB stick was largely irrelevant, given that it was common ground he got it one way or the other and the method of transmission could not realistically be said to have been a cause of the eventual disclosure; whether there was email quarantine or not was irrelevant, since it was common ground Skelton was given the relevant data; and whether the Defendant should have realised that he had sought to inquire about the TOR network was bound to fall away as an allegation once it was appreciated that there was no easy way of knowing this.

17. These points are well made, so far as the trial itself is concerned. At that stage, the Claimants could have adopted a more focussed approach, concentrating on areas which might yield success, to the benefit of the trial as a whole and shortening the length of time taken, and should have done so. As for pre-trial stages, however, this is less clear. Though the argument that the DPA created absolute liability was always close to being a non-starter, arguments as to breach of the duties resting on Morrisons themselves had more traction. It was not at all unreasonable to query whether Skelton was an appropriate person to receive the data; nor was it unreasonable to complain about the system for ensuring deletion of the data. Nor do I regard it as inconceivable that disclosure, or possibly the evidence at trial, might have justified arguments about whether systems might have been adopted which would have reduced the risks of human action exposing data to the eyes of those who should not have seen it.

18. No other factor other than 44(5)(b) in the inclusive list contained in Part 44(5) is engaged.

19. In considering whether I should make a percentage costs order, and if so the percentage I should adopt, I have taken not only all the factors already mentioned into account but also the extent to which the cases in respect of direct (primary) liability and vicarious (secondary) liability overlapped, which I have dealt with above.

20. In general terms, I accept Mr Barnes' submission that as the overall winner, the Claimants should be entitled to the costs of those matters which they had to prove to establish vicarious liability. This includes the common costs so far as referable to the findings which led to vicarious liability being established. I also, however, accept Ms Proops' submission that the percentage chosen should not simply be a figure plucked, as it were, from the air but one which attempts to balance the costs of the losing party in respect of the costs of the issues on which it succeeded (apart, that is, from that proportion of the common costs which is truly referable to vicarious liability being established) against those of the successful parties on the issues on which they succeeded.

21. Once the costs of circulating all members of the cohort with information about the latest developments in the case are allowed for on the basis which appealed to me at the interlocutory hearing to set a costs budget, rather than the exaggerated amounts in which they were originally claimed in the Claimant's draft costs budget, there is little between the overall costs of each party as budgeted. In the event, I am sceptical about the need for the Claimants to take detailed witness statements from each of 10 of those claimants for the purposes of trial when there was nothing substantive they could add to the relevant cases on liability, save to establish that they had suffered some loss (a matter which was never seriously in issue). It may be that the costs of those statements may yet be recovered following a hearing as to quantum, but so far as the costs of the action and trial are concerned I do not take that into account.

22. Of the six witness statements prepared by the Defendant, it seemed to me that three were made necessary almost entirely because of the failed case on direct liability.

23. When Mr. Barnes was asked to address the extent of overlap between the direct and vicarious cases, he did so by reference to some 6 points. Ms Proops then argued that these points simply did not establish any true overlap. Though I had had in mind a more generous allowance towards the Claimant's costs before these rival arguments were made than that which I am ultimately going to award, they demonstrated to me that the amount of time and resource spent establishing the vicarious case (including common costs) compared to that involved in defending the direct liability claims was indeed closer to the respective weight of the two cases as indicated by the length and detail of the pleadings in respect of each than the impression I was left with immediately following trial.

24. I have little doubt that if the trial had been in respect of vicarious liability alone it would have been concluded (judgment apart) in less than half the time it was.

25. The Claimants have had the indulgence of pursuing claims which were tenuous (to which the Defendant early on gave cogent answers), at unnecessary length, pursuing disclosure that was principally related to those claims. The Defendant should not in justice be required to pay for this, but rather be made subject to a costs order which reflects the fact that it succeeded in resisting those claims.

26. Starting with the position that the claimants have succeeded overall in the action, but then taking into account all the circumstances and in particular the factors mentioned above - in particular the (somewhat limited) extent to which the common costs were referable to anything it was necessary to establish at trial in order to establish the vicarious liability claim, whilst the direct liability claims occupied the bulk of the time at trial and beforehand - and accepting the desirability of making a proportionate costs order, although I:

    (a) reject Morrisons' argument that there should be a net costs order in the Defendant's favour; this pays insufficient regard to the starting point

    (b) reject Morrisons' fall-back argument that each side should bear its own costs; I see the Claimants as winners more than the Defendant,

    I nonetheless

    (c) also reject the Claimants' arguments that they should have the entirety, or alternatively a very high percentage of their costs of the action: they are unrealistic in asserting that a maximum of some 20% of time and evidence was spent on the direct liability cases alone, and have considerably overstated the extent of the issues common to both the direct and the vicarious claims. Instead, and overall, I have come to the conclusion that the proper order is that the Defendant pays the Claimants 40% of their costs of the action, to be assessed if not agreed.

27. Counsel between them should draw up the appropriate order for my approval.