Case 7
Weaver and Others

v

British Airways plc

[2021] Costs LR 121

Neutral Citation Number: [2021] EWHC 217 (QB)
High Court of Justice, Queen's Bench Division
2 February 2021

Before:
Saini J

Keywords:
costs budgeting, group litigation

Headnote

A group litigation order (GLO) had been made in October 2019 in relation to claims brought against the defendant consequent on a cyber-attack on its electronic systems and 22,230 claimants were currently within the group litigation, and had instructed the lead claimant solicitors. However, there were approximately 500,000 individuals who had received notifications from the defendant informing them that their data might have been affected by the attack. The GLO required the lead solicitors to take reasonable steps to publicise the group litigation in accordance with CPR 19.11(3)(c) in the form attached to the order. The claimants' solicitors had incurred £443,000.00 to date in advertising the proceedings to seek joiners, and sought provision for a further £557,000.00 for future advertising. The court considered that the costs were not being incurred pursuant to the GLO, but were general overheads as costs incurred in obtaining business, and were therefore not recoverable per

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Motto v *Trafigura Ltd* [2011] 6 Costs LR 1028. They would therefore be removed from the budget.

Cases Cited

Arif v *Berkeley Burke* [2017] EWHC 3108 (Comm)
Holloway and Others v *Transform Medical Group (CS) Ltd and Others* [2014] EWHC 1641 (QB)
Motto and Others v *Trafigura Ltd and Another* [2011] 6 Costs LR 1028; [2011] EWCA Civ 1150; [2012] 1 WLR 657
Pearce v *Secretary of State for Energy and Climate Change* [2015] EWHC 3775 (QB)
Ross v *Owners of the Bowbelle (Review of Taxation Under RSC Order 62 Rule 35)* 2 *Lloyd's Reports* 196 (Note)

Judgment

Saini J:

I. Overview

1. This is a CCMC in the British Airways Data Event Group Litigation. My judgment addresses two discrete issues which have arisen within the course of the CCMC today: (i) the claimants' application to extend the "cut-off" date to join the litigation through entry on the Group Register; and, (ii) the recoverability of advertising costs incurred, and to be incurred, by the claimants' solicitors, in publicising the claims in the media. The second issue arises as a matter of dispute in the costs budgeting process which the parties have agreed to apply to this claim. Before turning these issues, I will provide a broad overview of the proceedings.

2. The litigation concerns claims for damages brought against the defendant, BA, consequent upon a cyber-attack on BA's electronic systems that was identified in September 2018. That attack affected systems containing customer personal data on BA's website and on its mobile application.

3. By way of high-level summary, the damages claims brought against BA fall into essentially three parts:

(1) First, it is said that the attack resulted in the persons responsible for the attack obtaining identifiable customer data including (but not limited to) certain payment card data and, in turn, resulted in BA sending notifications to all of the claimants that their data may have been affected by the attack.
(2) Second, it is said that the attack succeeded as a result of BA failing to put in place appropriate or sufficient security measures aimed at safeguarding relevant data. It is said that that failure was a breach of BA's obligations under the General Data Protection Regulation 2016/679 and/or a breach of certain contractual obligations said to be owed to the claimants and/or a breach of confidence.
(3) Third, harm is alleged to have been suffered as a result of the said breaches. That harm is said to flow in terms of distress and/or pecuniary loss and/or loss of control of data.

4. BA denies the claim in its entirety and, specifically, also denies that the alleged breaches were causally relevant to the compromising of customer data. It also puts in issue whether any of the claimants have suffered compensable harm as a result of the alleged breaches.

II. Cut-Off Date

5. The relevant procedural history is as follows. On 14 June 2019, following correspondence with law firms representing potential claimants who were customers of BA potentially affected by this attack, BA issued an application for a group litigation order (GLO).

6. On 4 October 2019, Warby J made a GLO ("the GLO"). Paragraph 29 of the GLO provided that in order to enter onto the Group Register, a claimant had to have issued and served a claim form (or have been named on an issued and served claim form), and the final date for such entry was specified as a cut-off date of 17 January 2021.

7. On the basis of the materials and arguments before me, it appears to be common ground that: (i) all parties agreed that there should be a cut-off date (it not being a mandatory requirement for such litigation); and (ii) the specific date was also agreed. Paragraph 9 of the GLO was accordingly made by consent and without argument. The fact that this matter was dealt with by consent means that there are no

facts before me which might expose the reasons behind the making of this part of the order.

8. I was however told that the date agreed was intended to be a date expiring twelve months following service of the intended generic particulars of claim. The cut-off date was in due course extended once, again by consent, and will expire on 3 April 2021. At the CMC on 25 November 2020, I directed a split trial of liability and quantum issues.

9. The claimants apply to extend the cut-off date to a date expiring one year after the proposed trial on liability in the summer term of 2022, and say that this period is intended to allow for final determination of the trial on liability, including judgment and any appeal.

10. On behalf of the claimants it is submitted that, on their side at least, it was contemplated that this claim would proceed as quickly as possible to a combined trial dealing with both liability and quantum issues, and it is said that in those circumstances it made good sense to impose a cut-off date because it was anticipated that there would need to be a process of selection of test claimants. The sign up and validation process in the GLO is said to have been structured with that in mind, with each claimant being required to provide a schedule of information. It is argued that it made good sense to impose a cut-off date because it was anticipated that there would need to be a process of selection of test claimants: the information required to be provided would assist in this selection process and the cut-off date would ensure that the full cohort of potential claimants was available suitably early in the process.

11. On BA's part, reference is made to the fact that they did not know, nor would Warby J have known, what was in the mind of the claimants' representatives when they agreed to the cut-off date.

12. There has been a change of a relevant nature in these proceedings following the making of an order for a split trial in November 2020. This change is one of the main factors relied upon by the claimants in the application that they have made before me this morning.

13. For its part, BA opposes that application and its overall submission is that no good reason has been advanced by the claimants for a variation of the cut-off date, and it also makes the point that the original cut-off date (and indeed the extended cut-off date) were generous to the claimants' representatives.

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14. Before turning to the competing arguments, I should refer to some of the case law. Both parties have cited a similar range of cases, including *Pearce* v *Secretary of State for Energy and Climate Change* [2015] EWHC 3775 (QB), and *Holloway and Others* v *Transform Medical Group (CS) Ltd and Others* [2014] EWHC 1641 (QB).

15. In addition to those two cases, reference has been made to the decision of Hildyard J in the *RBS Rights Issue Litigation* [2014] EWHC 227 (Ch), and to the helpful discussion in the text, *Class Actions in England and Wales* at paras 3-075 to 3-078. I also note that a cut-off date is not required by the terms of CPR rule 19.13(e) which specifies only that a cut-off date "may" be ordered.

16. In terms of a summary of the overarching principle to be derived from these various cases, it seems to me that the decision whether to impose a cut-off date, or indeed whether to maintain or vary a cut-off date, is essentially a pragmatic case management decision which must focus on the specific advantages and disadvantages of imposing a cut-off date or maintaining a cut-off date.

17. That case management decision has to be made guided by the overriding objective in CPR 1.1. I will return to the overriding objective in due course since it has been the focus of certain submissions.

18. There is a threshold issue between the parties based upon the history of these proceedings. On behalf of the claimants, it is argued that I should look at the facts as they are at today's date and assess whether an extension to the cut-off date in the terms asked for is justified, putting aside essentially what has happened earlier and asking myself what furthers the overriding objective at this point in time. By contrast, on behalf of BA it is submitted that one cannot ignore the history in terms of existing orders (and existing variations of the cut-off date) and there has to be good reason to justify a departure from what had been ordered by consent at an earlier stage given reliance on this by the parties.

19. In my judgment, the correct approach is to require the claimants to justify a departure from what had previously been ordered and agreed. They need to establish that there is some development or feature which justifies an extension of the cut-off date.

20. So, I proceed on the basis that BA is in principle correct in its submission that a variation needs to be justified and that one cannot simply ignore the history and proceed as if one were starting with a

blank sheet. That having been said, I accept that if the furtherance of the overriding objective and achieving a fair outcome to both parties would justify a variation, then the mere fact that there has been a prior agreement, or indeed an order, does not present a substantial hurdle in the face of a variation.

21. In terms of what has happened in the litigation thus far, the evidence before me is that (as of 1 February 2021) a total of 22,230 clients (including 4,352 claimants who already have claims on the Group Register), are currently within the group litigation (and have signed with the lead claimant solicitors). In addition, the evidence is that these solicitors are aware that approximately 1,000 clients have signed up with other claimant firms.

22. While these are substantial numbers, it is said that these figures still only represent approximately 5% of the 500,000 or so individuals who received notifications from BA and who are therefore in principle eligible to bring a claim. The evidence from the claimants' solicitors' firm is that it is currently averaging approximately 3,000 sign-ups per week and that it expects that running total to continue while its current advertising campaign continues. It says that a further 20,000 clients may sign up between now and mid-March 2021.

23. In total, it is said that there may be a total of 43,230 claimants eligible to join the litigation by the end of March 2021 but even that number would only represent approximately 8% of potential total eligible claimants.

24. I turn then to the arguments put forward to justify an extension. Counsel for the claimants essentially made three points justifying extension within the context of the overriding objective. They were, first, the access to justice argument, second, proportionality, and thirdly, a saving of costs. Both proportionality and a saving of costs in a sense speak for themselves because the more claimants there are in a claim at this stage, the more cost-effective the case becomes.

25. But I need to address access to justice in more detail. The broad overall argument of counsel for the claimants is that extension will promote access to justice, that is an important aspect of the overriding objective and indeed one of the rationales for the existence of the GLO process itself. In principle, that seems to me to be correct. However, as against that, one needs to remind oneself of why cut-off dates are imposed at all. In that regard, there are statements of principle from Turner J in the *Pearce* case and from Thirlwall J in the *Holloway* case.

26. In summary, the principle is that cut-off dates secure the good case management of claims and they assist parties in litigating by providing some level of certainty. That assists in deciding how parties deploy their resources. I would add that they also promote potential for settlement by fixing to some extent the "size" of a claim faced by a defendant.

27. I should mention that Turner J expressed the view in the *Pearce* case that cut-off dates are essential in GLOs, but in the light of other case law to which reference has been made, and as a matter of general principle, it is certainly possible for group litigation to proceed without a cut-off date, depending on the circumstances.

28. Turning to the submissions of counsel for BA, in addition to making the point, to which I have already made reference, about there being no good reason or material change of circumstances since the GLO hearing justifying the variation, the most powerful point made was that it is important that BA has certainty as to the shape and the extent of the group. This, it is said, will allow it to assess the size and extent of the claim and make [a] decision as to how to deploy their resources. Any long further extension will create uncertainty.

29. As explained in the evidence of Mr Williams, on behalf of BA:

> "In effect, therefore, the claimants seek to create a situation in which there is no control on the number of claimants joining the group at any point until after final determination of liability (including any appeals). The effect of this is that neither the court, nor the defendant, will have any informed view of the number of claimants, and the defendant no ability to assess its exposure in the litigation (which will inevitably in part inform its approach to it, as well as to any settlement discussions which may take place)."

30. In my judgment, these are points of substance.

31. Turning to the overriding objective, which refers to the court dealing with cases justly and at proportionate cost, an important part of any modern litigation process is ensuring that procedural rules exist to enable both parties to know what is at stake.

32. In the context of this case, subject to some qualifications to which I will return, it seems to me as a matter of principle that BA is entitled to know, even if we are only at the liability stage, what the extent is of its potential exposure, if it lost these claims.

33. The reasons why it is entitled to have knowledge of such matters

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are in some respects obvious. First, it seems to me that any litigant will make its resource allocation decisions depending upon potential exposure. Second, and this is particularly important in the context of these proceedings, the approach that a party in BA's position will take in settlement discussions will also be fundamentally dependent upon the size and extent of a claimant group and potential financial exposures.

34. The qualifications to which I made reference are as follows: even if a cut-off date is imposed, and subject to the issue of limitation, it is right, as explained by counsel for the claimants, that BA does not have ultimate certainty because there may be additional claimants or indeed a further GLO down the line. I accept those points.

35. However, there is a degree of certainty for BA once the group in this litigation is closed, and in my judgment part of the overriding objective is seeking to promote settlement of litigation. The court should ensure that a defendant knows the value and extent of potential claims it is facing, even if there is some continuing uncertainty because of the potential for new claims outside the group in the future. There is certainly a value, and a substantial value, on a defendant having certainty.

36. That having been said, I cannot ignore the fact that on the basis of the evidence of the claimants' solicitor, there are potential new claimants who, as a matter of access to justice, should be able to form part of this group.

37. What I have to do is balance BA's interests under what I call the certainty principle against ensuring that there is access to justice for those people who may wish to join this litigation in the relatively near future.

38. I will come back to how I strike the balance, but I should just say straightaway that, as I expressed in argument, I was not attracted by the application to extend the cut-off date to one year after the commencement of the liability trial. It seems to me that this would create a very substantial level of uncertainty on the part of BA and would work against the general principle that a defendant should know the level of its exposure, and also be able to "cut its cloth" appropriately – by which I mean devote appropriate resources, according to the potential level of liability.

39. On the basis of the arguments that have been made to me, I consider it appropriate and just to vary the order and extend the cut-

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off date so that the recent burst of advertising on behalf of the claimant solicitors be allowed to bear fruit. I accordingly propose to extend the cut-off date for a modest period of two months from the existing cut-off date of 3 April 2021, which will take one to 3 June 2021.

40. In coming to that decision, I take into account the fact that those who wish to join the claim after that date are able to apply to join. They are not permanently shut out, subject of course to what any such new claimants say in their applications.

III. Advertising

41. A further issue which arises in this CCMC concerns the claim for advertising costs in the claimants' budget. In summary, in advertising these proceedings to seeker joiners, the claimants' firm has incurred thus far a sum of £443,000 and intend to incur another £557,000 on future advertising. An issue accordingly arises in relation to the budget for the future costs.

42. A threshold point has been argued before me in relation to the recoverability as a matter of principle of these costs, both the historically incurred costs and the intended costs to be incurred in the future.

43. In para 41 of the GLO there was provision made under the heading "Publication" for the lead solicitors to take reasonable steps to publicise the GLO in accordance with CPR rule 19.11(3)(c) in the form attached to that order as schedule 3. Schedule 3, in summary, contained a form of advertisement for publication which described the terms of the GLO and referred to the data breach. It also provided the contact details of the lead solicitors.

44. The costs which are the subject of the budget, as well as those which have been historically incurred, arise from very substantial media publicity of these proceedings. BA argues that, as a matter of law, these costs are not recoverable and relies principally upon the decision of the Court of Appeal in the case of *Motto* v *Trafigura* [2012] 1 WLR 657 (CA).

45. BA argues, in summary, that the ratio of that case, and in particular what was said by Lord Neuberger MR at para 110 of that decision, precludes any claim for advertising costs. It is accepted, however, for the purposes of the argument before me, that the costs

incurred pursuant to para 41 of the GLO would in principle be recoverable.

46. Turning then to the position of the claimants, reliance has been placed upon a number of cases including *Ross* v *Owners of the Bowbelle (Review of Taxation under RSC Order 62 Rule 35)* 2 Lloyd's Reports 196 (Note), as well as the well-known case *Re Gibson's Settlement Trusts* [1981] Ch 1789, per Megarry V-C at 185. It is said that under well-established principles, these advertising costs constitute work done "for use and service in the litigation". These are said to be costs relevant to an issue in the claim and/or attributable to the paying party's conduct. The claimants also rely upon the decision in *Arif* v *Berkeley Burke* [2017] EWHC 3108 (Comm) at para 40.

47. I have in addition been referred to the text to which I have already made reference, *Class Actions*, at para 3-065.

48. In my judgment, it is clear as a matter of binding authority that these are not recoverable costs. I quote from the *Motto* case:

> "The expenses of getting business, whether advertising to the public as potential clients, making a presentation to a potential client, or discussing a possible instruction with a potential client, should not normally be treated as attributable to, and payable by, the ultimate client or clients. Rather, such expenses should generally be treated as part of a solicitor's general overheads or expenses, which can be taken into account when assessing appropriate levels of charging, such as hourly rates."

49. BA are right to contend that what was being said here by Lord Neuberger MR was essentially a reflection of the well-known indemnity principle. In my judgment, the reasoning of Lord Neuberger MR applies directly to the facts before me. The costs which have been incurred and which are to be incurred by the claimant solicitors are, in my view, essentially general overheads, albeit that they are incurred in the context of a GLO. They are not the costs that are being incurred pursuant to the GLO, para 41, to which I have already made reference, but are, rather, more accurately described as the costs incurred by the claimant solicitors of "getting the business in". They are not for the account of BA, should BA be unsuccessful in the litigation. See also *Friston on Costs* (3rd edition), para 65-100 which seems to me to reflect the correct position in law.

50. As to the reliance placed by the claimants upon the decision in

the *Arif* case, it does not seem to me that there was any argument before the judge in that case in relation to the specific matters argued before me. Specifically, the judge's observations that are relied upon by the claimants in para 40 of that judgment appear to have been a matter of common ground before him. I note also that the judge was not referred to the *Motto* case. For completeness, I should say that I do not draw assistance on the issue of principle from the *Bowbelle* case.

51. So, for those reasons, the advertising costs in issue are not recoverable and therefore they would fall out of the budget.

David Blayney QC, *Andrew Nicol* and *Sophia Hurst* (instructed by Excello Law Ltd, trading as PGMBM) appeared for the claimant.

Anya Proops QC, *Benjamin Williams QC* and *Rupert Paines* (instructed by DWF Law LLP) appeared for the defendant.

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