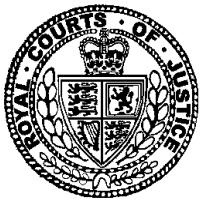

Neutral Citation Number: [2023] EWHC 1450 (SCCO)
Case No: SC-2022-BTP-000916

IN THE HIGH COURT OF JUSTICE
SENIOR COURTS COSTS OFFICE
IN THE MOBILE TELEPHONE VOICEMAIL INTERCEPTION LITIGATION ("MTVIL")

Thomas More Building
Royal Courts of Justice
London, WC2A 2LL

Date: 14/06/2023

Before:

COSTS JUDGE ROWLEY

- -

Between:

Various Claimants	**Claimant**
- and -	
News Group Newspapers Limited	**Defendant**

- -
- -

Philip Daval-Bowden (instructed by **Hamlins**) for the **Claimants**
George McDonald (instructed by **Clifford Chance**) for the **Defendant**

Hearing date: 30 May 2023

- -

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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COSTS JUDGE ROWLEY

Costs Judge Rowley:

Introduction

1. This judgment concerns the entitlement of the claimants to claim certain costs in the common costs bill which I am currently in the process of assessing. The costs in question arise from an order made by the then managing judge Mr Justice Mann on 5 March 2021.

2. By paragraph 8 of that order, a number of applications which the claimants had hoped to deal with at the two-day Case Management Conference ("CMC") had been adjourned. By paragraph 10 of the same order, the costs of the CMC were provided for as follows:

> "10. The costs of this Case Management Conference will be T4 Common Costs in the case, save that (a) the Claimants will pay 50% of the Defendant's costs of the application referred to at paragraph 1 above (and, for the avoidance of doubt, the Claimants will bear their own costs of that application) and (b) the costs of the Claimants' application for the orders referred to at paragraph 8 above are reserved."

3. The dispute between the parties concerns whether those reserved costs can be claimed by the claimants in this bill. It is a short point to describe but took up half a day of well argued submissions. The point is an unusual one and is reflected by the complete dearth of authority. It may be that where parties have had any similar dispute in other cases, they have been in a position to put their arguments to the judge making the costs orders so that matters could be resolved prior to a detailed assessment taking place.

4. However, in these proceedings, claims by hundreds of claimants have proceeded through this "managed litigation" under the guidance of the managing judge at the time. There have been three High Court judges so far who have undertaken this role and, as with all High Court litigation, the detailed assessment of costs recoverable under orders made in that litigation is carried out in the Senior Courts Costs Office.

5. My role as the costs judge dealing with the detailed assessment of such costs does not provide me with any jurisdiction to amend or substitute orders which might clarify the dispute between the parties. As has been set out in numerous cases previously, for example in the often quoted Cope v United Dairies (London) Ltd (1962) 2 QB 33, my task is, at most, to interpret the costs orders that have already been made for the purposes of assessing costs on the standard or indemnity basis.

6. When we reached the point in the detailed assessment of looking at the costs for the March 2021 CMC, I raised the possibility of an application being made to the current managing judge, Mr Justice Fancourt, regarding this dispute. Unfortunately, it transpired that any application before him would not be heard until later in the year and as such it was agreed that the point would be ventilated before me so that I could give a ruling and if appropriate, one or other party could appeal that decision to a High Court judge (which, all things being equal, would go to Fancourt J in any event.) This reserved judgment constitutes that decision.

CPR 44.2 and PD44 para 4.2

7. The court's discretion as to whether to make an order for costs is set out in CPR 44.2. The court does not have to make any order but if it does decide to do so, the general rule is that they will "follow the event" so that the losing party pays the costs of the winning party. But, as is made clear by CPR 44.2(2)(b), the court may make a different order.

8. In the Practice Direction supporting Part 44, a table describing the general effect of commonly made orders is set out after paragraph 4.2. The two orders with which this judgment is concerned are:

Costs in the case	The party in whose favour the court makes an order for costs at the end of the proceedings is entitled to that party's costs of the part of the proceedings to which the order relates.
Costs reserved	The decision about costs is deferred to a later occasion, but if no later order is made the costs will be costs in the case.

9. As the practice direction states, such orders are commonly made. There may be many reasons why a judge decides not to award the costs to any particular party at the time of the hearing. Such proceedings may then resolve before there is any further hearing and the effect of these two orders is that the successful party will be entitled to claim the costs of, for example, an application in their bill of costs without having to go back to court.

10. The claimants have taken the view that the proceedings concerning the relevant claimants have come to an end and so the costs that were reserved by the 5 March 2021 order have been converted successively into costs in the case and therefore costs to which the claimants are entitled. The defendant says that this has not yet happened and so there is, at least currently, no entitlement to the costs which come within the terms of the costs reserved saving in paragraph 10 of the order.

11. It might be thought to be fairly obvious as to whether proceedings had come to an end but that is in fact a matter of dispute. So too, is whether or not a later order could be made. Not for the first time, the "unique" nature of the MTVIL is placed before the court as explaining why orders and procedures should be interpreted in a particular way. It is also not the first time where, in my view, assumptions have grown up as to the meaning of words and phrases without them ever being tested before a court. The parties have, over time, agreed on a form of wording for, for example the Costs Arrangement Order, without, it seems to me, there previously having been any arguments actually decided as to whether the arrangements work in the manner understood by each party.

Generic and individual work and costs

12. Where litigation is carried out on behalf of a number of parties, case management by the court will involve consideration of the appropriate procedure to be adopted for the

particular proceedings. This may involve a formal Group Litigation Order or less formal methods such as lead or test cases in which general principles can be established and which are likely to apply to the remaining cases without all of them having to be heard in full.

13. However formal the case management, there are costs which are involved in the general running of the cases and there are other costs which relate solely to the individual parties. The former are described as generic or common costs and the latter as individual (or in these proceedings quite often as Claimant – specific) costs.

14. In addition to the division of the costs between common and individual costs, the statements of case in these proceedings are also divided between general matters and those relating specifically to each claimant. There are three generic particulars of claim which are intended to shorten the claimants' specific particulars of claim by reference to common issues. The facts and matters set out in the general particulars of claim would need to be proved at trial in addition to the individual facts and matters for each claimant's case. In the fifth CMC in July 2021, one of the issues for consideration by the court was the running order of whether the generic or the individual issues needed to be dealt with first at the trial.

15. There is therefore a need for the generic and individual aspects to be proceeded with in step albeit, it appears to me, that they only need to be fully synchronised as and when a trial actually took place.

16. The MTVIL has now been proceeding for more than 10 years. Some claimants have brought two claims during that period. They highlight the distinction between the proceedings as a whole and the involvement of individual claimants. The latter join the litigation at specific points authorised by the managing judge and then leave once their claims have concluded. The litigation itself continues. An application was made by the defendant shortly after the period covered by this bill of costs to bring the MTVIL to an end but that application was refused and there appears to be no end in sight to this litigation.

Submissions

17. Mr McDonald, counsel for the defendant, described the generic and individual costs as being two separate streams. When an individual case concluded so too did the individual costs of that case. However, the generic costs continued and the individual's liability for those costs did not end upon the resolution of that individual's case. The liability for generic costs only ended in accordance with the provisions of the Costs Arrangement Order ("CAO") dated 3 April 2019.

18. It was still perfectly possible for the parties to apply to the managing judge for an order to deal with the currently reserved costs. The ability to obtain a "later order" meant that the definition of costs reserved in PD 44 favoured the Defendant's approach rather than the Claimants'.

19. Mr Daval-Bowden, the costs lawyer for the claimants, also relied on the provisions of the CAO. The definition of common costs in that document is as follows:

> "1.(l). **"T4 Common Costs"** means all the costs of the T4 Claims incurred generally on or after the date of the Tranche 3 Consequentials Order on 26 March 2019 other than Individual Costs, and in particular:
>
> i. Costs incurred in relation to any procedural hearing relating to the T4 Claims generally;
>
> ii. Costs incurred in co-ordinating, managing, administrating and conducting the T4 Claims by: (1) in the case of Claimants, the Lead Solicitor and counsel and other solicitors and costs lawyers authorised to undertake work by the Lead Solicitor, or (2) in the case of the Defendant, the Defendant and its legal advisers;
>
> iii. Costs of any generic statements of case and any generic disclosure;
>
> iv. Costs incurred in relation to any common issues and/or generic issues (as may be determined by agreement of the parties or the Court) including trial costs if such are to be determined at trial;
>
> …
>
> If there is any dispute as to whether certain costs are Individual Costs or T4 Common Costs, the parties have liberty to apply to the Court to allocate such costs."

20. Costs arrangements in the CAO begin at paragraph 15 of the order which confirms a several rather than joint liability for each party. Then at paragraph 16 the CAO provides:

> "16. Unless the Court orders otherwise:
>
> a. For the purpose of the recovery of any T4 Common Costs between the T4 Claimants and the Defendant:
>
> i. By a Claimant, the recoverable costs of the Claimant shall be such a share of the T4 Common Costs of the T4 Claimants together as determined below;
>
> ii. By the Defendant, the recoverable costs of the Defendant against a Claimant shall be such share of the T4 Common Costs of the Defendant as determined below: and
>
> iii. No assessment of any T4 Common Costs or of any share of such T4 Common Costs shall take place until after the T4 Trial, with permission to apply if such a trial does not take place. The provisions of CPR 44.2(8) shall apply to enable appropriate payments on account T4

Common Costs to be made from time to time as the court shall direct.

b. The share of the T4 Common Costs referred to above will be calculated (whether for a Claimant or the Defendant) on the basis of the aggregate across all Periods for which the relevant Claimant is deemed to have been on the T4 Group Register for each Period divided by the total number of Claimants deemed to have been on the T4 Group Register for that Period.

c. For the purpose of the share of T4 Common Costs:

i. Any T4 Claimant on the T4 Group Register shall be deemed to have been on the said Group Register from the beginning of the First Period: save that any Claimant who by the T4 Cut-Off Date has not entered into a CSA as required by this Order shall be deemed never to have been on the T4 Group Register;

ii. Any T4 Claimant who is removed from the T4 Group Register by the Lead Solicitor or by order of the Court shall be deemed to have been removed from it on the end-date of the Period which included the date of removal.

d. Any T4 Claimant who settled their claim shall cease to be on the T4 Group Register by notice served on the Lead Solicitor and the Defendant. The purpose of the share of T4, Costs, a T4 Claimant shall be deemed to be on the T4 Group Register until the end of the Period during which the notice is given, and such notice must be given, and will be deemed to be given, in the Period when the settlement is reached on a Claimant's behalf.

…"

21. I have not set out the definition of "Periods" referred to in the foregoing paragraphs but it is generally a period of two months. Mr McDonald's point was that a claimant could settle their case prior to the March 2021 CMC and yet still be liable in respect of common costs at the point that that CMC took place. It could not be that the settlement order (agreements in the form of Tomlin Orders) of any particular claimant was the final order which would convert the costs reserved order into one deemed to be costs in the case so that it could found a claim for costs in a subsequent bill.

22. Mr Daval-Bowden went through the provisions of the CAO as part of his submissions as to who the relevant claimants were. He also referred to the order made on 7 September 2021 lifting the stay on claimants whose claims had been issued after the previous cut-off date. He drew attention to the line drawn between the older and newer claimants in the MTVIL in terms of liability for costs before and after the date of that order. The relevant pool of claimants who share in the benefit and burden of costs orders prior to 8 September 2021 are 83 in number. 82 claimants' claims have been concluded

and only the claim of the Duke of Sussex remains outstanding. As things presently stand, the claimants are entitled to claim 82/83 of the common costs which are being assessed. Depending upon the outcome of the Duke's case, the remaining 1/83 may also be claimed.

23. As part of his submissions, Mr Daval-Bowden referred me to the template order annexed to the order of 7 September 2021. That three paragraph template was for incorporation into settlement orders for T4 Claimants. The first paragraph confirmed the claimant was a T4 claimant as defined in the CAO and that other defined terms had the same meanings as defined in that order. The second and third paragraphs were as follows:

> "2. The Defendant shall pay the Claimant's Individual Costs of the claim up to and including [insert date] and the costs of and occasioned by the Statement in Open Court, such costs to be assessed on the standard basis if not agreed.
>
> 3. The Defendant shall pay the Claimant's share of the T4 Common Costs for all Periods of the Mobile Telephone Voicemail Interception Litigation from 6 March 2019 up to and including the end of the Period current on [insert date]."

24. I was provided with three examples of settlement orders of individual claimants where the template paragraphs were topped and tailed with standard Tomlin order provisions.

25. It was Mr Daval-Bowden's submission that these settlement orders were the final orders which were sufficient to convert any orders where costs had been reserved into orders for costs in the case insofar as they related to those particular claimants. Mr Daval-Bowden described this procedure as being the same as for any other litigation and that the conversion of reserved costs orders in favour of the successful party was a simple "building block" in each claimant's claim.

26. It was only that the defendant had sought to argue that these final orders had not picked up the reserved costs orders that matters had become complicated. The costs were reserved until the conclusion of the claimants' claims and the finite number of claimants within the MTVIL at the time of the costs reserved orders had (all but one) now concluded their claims. They were entitled to pick up the reserved costs orders as a result.

27. In response to Mr McDonald's submission about applying for a "later order" to deal with the costs reserved, Mr Daval-Bowden pointed to the ending of the costs in September 2021 for this cohort of claimants and a new cohort inhabiting the MTVIL thereafter. Any application now brought by the Defendant in relation to these costs orders would be faced by different claimants.

28. Mr Daval-Bowden contrasted this argument with the submissions that had been made by Mr McDonald about the conclusion of the MTVIL perhaps not being for another five or more years. It could not possibly be the case, submitted Mr Daval-Bowden, that claimants had to wait until then in order to convert the costs reserved orders.

29. As Mr McDonald pointed out in his reply, his position was that the end of the MTVIL was the final resolution of any outstanding costs reserved orders. There was nothing to prevent either party before then making an application to deal with the reserved costs. It was simply the case that neither side had done that as yet and therefore there was no final order available to the claimants to convert the costs reserved orders.

30. It was Mr McDonald's submission that the settlement agreements only directly ended the individual costs claims. They could not, he said, override the orders for common costs which had themselves not necessarily yet crystallised. Orders had been considered by the court when the costs had been reserved (rather than making no order as to costs). Those orders remained in position until a further order of the court or some other mechanism affected those orders. It was the defendant's position that no such order or other eventuality had as yet occurred.

31. Mr McDonald took me through the various paragraphs of the draft order which formed the wording of the applications that had been adjourned at the March CMC. Some of the paragraphs had not been pursued further as a result of correspondence between the parties. Others had been dealt with in part and others had been specifically dealt with at later hearings. In respect of that last category of applications, the order made referred to, for example "the costs of this CMC" and it was the defendant's argument that such an order was not wide enough to deal with costs reserved at a previous CMC. In one way or another, the defendant said that there had been no subsequent order made which dealt with the costs reserved in March 2021 in relation to any of the paragraphs of the draft order.

Discussion and decision

32. As I have indicated above, there are no reported cases on this issue. In my experience that sometimes means that the parties are making heavy weather of something that is in fact quite simple. I have to say that this was not my view during the course of submissions, but having now reflected on the situation, I think the answer is relatively straightforward. The structure of the costs arrangements in this litigation is sufficiently elaborate for some hypothetical anomalies to be posited which create doubt on any solution, but to the extent necessary, I respectfully adopt the phrase of Maurice Kay LJ in Crane v Canons Leisure [2007] EWCA Civ 1352 where he said that he preferred an anomalous conclusion to an unjust one.

33. I start from a different place than either of the advocates. We are in the midst of the detailed assessment of the claimants' common costs bill. In order for such a bill to be subject to detailed assessment, proceedings have to be commenced in accordance with Part 47 and that includes indicating the basis on which the claimants say they are entitled to the costs in the bill before the court. In old terminology, that would be a "reference to tax" and is currently described by paragraph 13.3 of PD47 as "the document giving the right to detailed assessment". That document is conventionally described on the front page of the bill. In this case, the description is:

> "Tranche 4 Claimants' (as listed in attached Schedule 1) Revised Bill of Common Costs incurred from 26 September 2020 to 7 September 2021 payable by the Defendant to be assessed immediately on the standard basis, if not agreed, pursuant to the Order dated 26 November 2021".

34. In fact, paragraph 4 of the 26 November 2021 Order says this:

> "There will be an immediate detailed assessment on the standard basis, if not agreed, of the T4 Common Costs of the 82 Claimants listed at Schedule B to this Order incurred from 26 September 2020 up to and including the Period ending on 7 September 2021."

35. Plainly the general thrust of the order is conveyed by the description in the bill of costs, but there is a fundamental difference. The bill wording suggests that it is clear that the defendant is to pay the claimants' costs. The order itself does not state that the defendant is to pay the costs but merely that the claimants' costs are to be assessed. The implication is obviously that the defendant will meet those costs and indeed paragraph 5 of the order refers to a further interim payment towards those costs. But there is strictly no liability on the defendant from the wording of this order.

36. That view is strengthened by the submissions of the advocates. Mr Daval-Bowden told me that he did not rely on the 26 November 2021 Order as being a final order. Mr McDonald's note for the hearing says that the order is simply one for immediate detailed assessment and not an order for payment of the March CMC costs (or, I would add, any costs in itself.) Mr McDonald stressed in his oral submissions that the operative part of the order was the "immediate detailed assessment" (rather than assessment at the end of the proceedings.)

37. This rather begs the question of what is the document which gives the claimants the right to detailed assessment of their claim to the common costs. If the 26 November 2021 Order simply entitles an immediate assessment, rather than one at the end of the proceedings, then there must be some other document. There are no orders that I can see, or have been identified by the parties, from the CMCs (or similar hearings) which would entitle the claimants to their costs from the defendant.

38. The individual settlement orders are the only documents which record the key phrase that "the Defendant shall pay…" either the individual or the common costs (see paragraph 21 above).

39. Mr Daval-Bowden made the point that the Defendant appeared to accept that these agreements were sufficient to found the bills of costs for the individual cases. As such, they would be final orders for those costs. But the defendant did not accept that the agreements amounted to final orders in the common costs which would (a) found the bills for the common costs, or at least a share of them and (b) convert costs reserved orders into costs in the case. In response, Mr McDonald pointed out a number of temporal peculiarities if the settlement agreements were final orders, but it did not seem to me that they detracted from the force of this point.

40. Similarly, I note that paragraph 11 of the March 2021 Order deals with the costs of the "Consequentials" hearing before Mann J on 20 April 2021. The costs of that hearing, according to paragraph 11 are to be apportioned:

> "(i) 50% shall be 'T4 Common Costs in the case'; and (ii) 50% shall be 'costs in the case' in the individual Claim of Sir Simon Hughes."

41. The time of Mark Thomson for attending that hearing is claimed in both this bill, as common costs, and in the individual bill of Sir Simon Hughes (apportioned between the two). The entry in this bill (line 4010) is in fact conceded.

42. The description of costs in the case in PD 44 refers to the court making "an order for costs at the end of the proceedings" which picks up the costs in the case orders. If the costs of attending the consequentials hearing on 20 April 2021 are claimed in both individual and common costs bills, it is hard to escape the conclusion that an order at the end of the proceedings i.e. a final order has been made in the claimants' favour. Where then is that order if it is not the order of 26 November 2021? It seems to me that it can only be the settlement orders such as the one agreed in the Hughes case on 28 May 2021.

43. Accordingly, whether it is the reference to tax this bill itself or the seemingly agreed entitlement to claim costs in the case which have been ordered, there is clearly the existence of final orders in the claimants' favour. There is inevitably no positive case from the Defendant as to what those orders might be, since it is the Defendant's case that they do not exist. But, having concluded that they do exist, I am driven to the conclusion that they must be the individual settlement orders as submitted by Mr Daval-Bowden.

44. For the sake of completeness, I should add that I was not entirely convinced that the Defendant could not have made a later application to crystallise the costs reserved orders even if the claimants then in the MTVIL had changed. It seemed to me that it would be possible for an application specifically against the recently concluded claimants could be countenanced by the court. As was pointed out, the settlement orders specifically reserve those parties' rights to return to court to enforce the terms of the agreement. If the parties have that right, I have no doubt that the court has the power to deal with other applications in respect of the same parties.

45. But there has to be finality to any litigation and I think the window through which the defendant might have made such an application firmly closed as of 26 November 2021 when the order for immediate detailed assessment was made.

46. It seems to be overly elaborate for each claimant to have a separate order to establish entitlement but which then needs a central order for assessment. However, that appears to me to be the way the mechanism works. For these reasons I have concluded that claimants with individual settlement orders are entitled to claim costs in respect of those aspects where costs were reserved on 5 March 2021 and the assessment of the costs for that CMC will be undertaken accordingly.