Neutral Citation Number: [2023] EWHC 685 (KB)

Case No: QB-2022-001873

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
MEDIA AND COMMUNICATIONS LIST

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 29/03/2023

Before :

SENIOR MASTER FONTAINE

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Between :

STEPHEN BECK & ORS	**Claimant**
- and -	
THE POLICE FEDERATION OF ENGLAND AND WALES	**Defendant**

- -
- -

Gerry Facenna KC and Eric Metcalfe (instructed by **Keller Postman**) for the **Claimants**
Anya Proops KC and Robin Hopkins (instructed by **Osborne Clarke**) for the **Defendant**

Hearing dates: 13 March 2023

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Approved Judgment

This judgment was handed down remotely at 10.30am on 29th March 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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SENIOR MASTER FONTAINE

Senior Master Fontaine :

1. This judgment is restricted to the determination of the Defendant's application for the costs of the Claimants' application for a Group Litigation Order ("GLO") dated 13 October 2022. At the hearing of that application on 13 March 2023 the Claimants did not pursue their application for a GLO, having agreed with the Defendant that the multi-party litigation could be appropriately managed by an agreed 'lead claimant' model. Although there were still a number of areas of dispute between the parties, I was able to deal with these at the hearing, save for the costs of the application.

2. The relevant chronology is as follows.

   i) A letter of claim was sent on 28 September 2021 and responded to by the Defendant's solicitors' ("OC") letter of 26 October 2021.

   ii) On 21 December 2021 the Claimants' solicitors ("KP") sent to OC draft grounds for a GLO, a draft GLO and an updated schedule of Claimants.

   iii) There was then an agreed stay for discussions for a period of three months.

   iv) On 11 March 2022 OC sent a letter stating that their view was it was inappropriate to deal with the claims by way of a GLO and setting out their reasons for that approach. It was suggested that the claims be transferred to the County Court and allocated to the small claims track.

   v) KP resisted that approach in its reply dated 4 April 2022, in particular the suggestion that the claims would be suitable for the small claims track given the volume of claims, the complexity of the relevant law and the number of Claimants with serious impact claims with a personal injury element to their claims.

   vi) By letter dated 4 May 2022 KP wrote to say they considered that progress and negotiations had stalled and proposed a timetable for disclosure by the Defendant, and for the Claimants to provide details of 25 "exemplar claimants" and a numbered schedule of the cohort of Claimants. It was stated that if that approach could not be agreed they would issue a GLO application, and attached a draft GLO and supporting documents.

   vii) By letter of 5 August 2022 OC reiterated that it was not appropriate to issue claims, or that if claims were issued they considered that a GLO was not an appropriate or proportionate way to manage the proposed proceedings and set out the reasons why they had reached that view. A "lead claimant model" was proposed which it was submitted had significant advantages over a GLO in the context of these claims.

   viii) KP replied the same day with some questions on the proposed lead claimant model, which were answered by OC's letter of 26 August 22, reiterating that the proper and proportionate way for the claims to be managed was through a lead claimant and stay process, and any non-lead claims being subsequently determined in the small claims track of the County Court.

ix) KP's reply of 21 September 2022 maintained that a group action was the correct procedural way forward and the best way to ensure efficient and cost effective management. The benefits of a GLO were set out in that letter.

x) KP followed this with a letter of 29 November 22 again reiterating their view that a GLO was the appropriate model and that OC's proposed "lead claimant model" was not appropriate, setting out reasons in detail. The GLO application had by then been issued on 13th October 2022.

xi) In a further letter of 6 January 2023 KP commented on OC's reference to the then recent decision in *Lloyd v Google* [2021] UKSC 50, and enclosed a copy of the front sheet of the issued claim form (specifically stated not to be by way of service).

xii) On 10 February 2023, KP wrote as follows:

> "As regards to the GLO application itself, we have had the opportunity to consider several recent decisions concerning the management of group claims, including those of Trower J. in *Edward Moon & Ors v Link Fund Solutions* [2022] EWHC 3344(Ch) and O'Farrell J. in *Municipio De Mariana v BHP Group (UK) Ltd & Anor* [2022] EWHC 330 (TCC). While we remain of the view that a GLO application is the most appropriate way to manage the issues arising from this group litigation, we will also be inviting the court in the alternative to make directions for the effective management of the claims, both existing and anticipated. We will aim to provide you with further details of these proposed alternative directions in due course, so that you will have sufficient time to consider them ahead of the hearing listed for 13-14 March."

xiii) And in their letter dated 24 February 2023 KP wrote:

> "3. Having considered your clients evidence and the recent case law, it seems to us but it ought to be possible for the parties to identify common ground and directions for the sensible future management of these claims, irrespective of whether such directions are made within the framework of a formal GLO. we therefore invite you to consider the attached draught order and, in advance of the party's finalising their skeleton arguments, to identify what parts of the proposed order are in substance disputed.
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> ……
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> "5. Accordingly, while we remain of the view that a GLO based on established practise an rules would be the most cost effective and efficient way to manage this litigation, we are anxious not to waste the court's time with arguments that are about form rather than substance, and our clients are very keen for these claims to be progressed. Accordingly, we invite you to

> consider these proposals and draught directions and indicate what matters are in dispute. We would also be content to discuss the points, without prejudice or otherwise, with a view to ensuring that the hearing on 13 March can focus on the points at the court actually needs to determine."

The position of each party in respect of the costs application

3. The Defendant's position, as set out in OC's letter of 6 March 2023, is that its approach since OC's letter of 5 August 2022 had been that the litigation should proceed on the basis of non GLO lead claimant model and that the Claimants had strongly objected to this proposal up to KP's letter of 10 February 2023. It is submitted that KP must have been aware of the possibility of an alternative approach to multi party claims, having represented claimants in the case of *Bennett and ors v Equifax Ltd* [2022] EWHC 2168 (QB), also a multi party data breach claim, where the court expressed concerns as to whether a GLO was the appropriate course, declined to make a GLO, recommended that further discussions take place, and a CMC be listed before a managing judge to determine whether it was preferable to proceed by way of a managed multi party claim or a GLO.

4. The Claimants' position is that the threshold criteria for making a GLO under CPR 19.11 is satisfied in this litigation, but following the decisions in *Moon* and *Municipio De Mariana,* referred to above, where the court had approved an alternative approach to a GLO, they took the view that they were prepared to take a pragmatic approach as to how the claims were to be case managed rather than waste the court's time in argument. In the event the parties were able to reach agreement on many issues in terms of the draft order and the hearing time was able to be reduced from two days to one day. The Claimants consider that in such circumstances the appropriate order should be that there be costs in the case.

Discussion

5. It is clear from the relevant correspondence that there were considerable discussions on many legal issues and case management issues, as would be expected in a claim with (at that time) some 10,000 to 13,000 Claimants with the potential for many more to join. I regard those discussions as part of the management of the claim on both sides in litigation where there are multiple parties. These concerned matters such as liability under the GDPR, the effect of liability concessions by the Defendant, disclosure, how lead claimants should be selected and so forth, and should be costs in the case.

6. The general rule in an application under CPR 44.2 (2) is that the unsuccessful party pays the costs of the successful party, but the court can make a different order. In my judgment there are grounds to make a different order here, but I consider that the Claimants should bear a proportion of the Defendant's costs related to the application. I set out my reasons below for that decision, and for my decision as to the proportion of costs that I consider is appropriate and fair to both parties.

7. I accept that the proceedings meet the threshold requirements for a GLO to be made, but the court has a discretion as to whether a GLO should be made even where those threshold requirements are met. CPR 19BPD Para. 2.3 says:

> "In considering whether to apply for a GLO, the applicant should consider whether any other order would be more appropriate. In particular he should consider whether, in the circumstances of the case, it would be more appropriate for –
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> (1) the claims to be consolidated; or
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> (2) II the rules in Section II of Part 19 (representative parties) to be used."

8. I consider that the Claimants should have recognised at an earlier stage that these proceedings may not necessarily be most proportionately managed by a GLO, and at least engaged with the Defendant's proposal at an earlier point. The facts of this claim are not dissimilar to those in *Equifax*, where a very large proportion of claims fell into a category of less serious data breaches, for which the likely damages, if the claims were to succeed, would be likely to be very low, under £1,000, or may not succeed at all, so there were legitimate concerns about incurring the upfront, not insubstantial, costs of establishing and maintaining the group register, advertising, providing individual particulars of claim or schedules of information from all Claimants, at least until there was some judicial guidance on quantum in respect of various categories of claim. In these proceeding, the evidence in Hayes 3 at §§21-23 is that (at the date that statement was made) some 82% of claims fall in categories that the Claimants' solicitors have identified as being 'Moderate' and 'Less Severe', only 1% in the 'Severe' category and 17% in the 'Moderately Severe' category. So there is a similar concern that until there is some guidance by way of trials of various lead Claimants' claims for damages, it will not be known what value such claims are likely to have, or indeed how many claims in that c. 82% of claims will be likely to be viable. However I also recognise that the court did not dismiss the application for a GLO in *Equifax*, but gave directions to the parties to consider further issues before a CMC before a managing judge, who should then be better informed as to whether the claims should be managed by way of a GLO or not.

9. I do not criticise the Claimants for entering into correspondence over a relatively long period. There were many issues to discuss as well as the format of case management, and it is usual for views to develop and for parties on each side to move from what are sometimes entrenched positions as the correspondence and discussions develop. There are also several letters chasing the Defendant for a response on various issues which prolonged the period of discussions.

10. There is something of a red herring introduced on the issue of whether a "lead claimant model" was opposed by the Claimants. In Hayes 4 at §26, submitted on behalf of the Claimants, it is said: "*We have never been opposed to the identification of lead claims in principle*…". Clearly a lead claimant model can be, and usually is, used as a case management tool in multi party litigation, whether a GLO is in place or not. It is possible that the parties had a misunderstanding of each other's position on this issue.

11. The matters dealt with between the parties to the application, until the Claimants accepted that they would not seek to proceed with a GLO, dealt with many other case management issues as well as whether the order to be made would be in the form of a GLO or not, and I consider that allowance should be made for that. It may be that

such matters are excluded from the statement of costs, although that seems unlikely given the very substantial amount of over £282,000 that is claimed in the Defendant's statement of costs.

12. In the circumstances I consider that the Claimants should pay 50% of the Defendant's costs of the GLO application. The hearing would have been required in any event because there were a number of issues between the parties that had to be determined. The principle of whether or not there should be a GLO had been conceded so there was no need to deal with that issue, save for submissions on the costs of the application, which did not take up a very substantial part of the hearing. I consider that a 50% proportion, a percentage arrived at after examining the correspondence and hearing submissions, but on a broad brush approach to avoid the time and cost of an issues based examination of costs, is sufficient to cover that part of the hearing that dealt with submissions on costs, and accordingly the costs of the hearing should be costs in the case.

13. The Defendant's statement of costs amounts to £282,894, inclusive of VAT, which is a extremely high figure. Leading and junior Counsel's fees for the hearing are £56,500 plus VAT, namely £67,800. Solicitors' time for attending the hearing totals £6,129 plus VAT, namely £7,354.80. When those amounts are deducted the total reduces to £207,739.20. Of that figure 50% is £103,869.60. The Defendant seeks an interim payment of 60%, but as mentioned above I regard those costs as very high. For example £119,480 is included for work on documents, three Grade A fee earners are engaged as well as two Grade Bs and a Grade D. I note also that one of the Grade A fee earners and the Grade D fee earner hourly rates are in excess of the Guideline hourly rates. Accordingly I consider that an interim payment of just under 50% would be more appropriate, namely £50,000.