Neutral Citation Number: [2022] EWHC 227 (Comm)

Case No: CL-2020-000347 / CL-2021-000169

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

Royal Courts of Justice

Strand, London, WC2A 2LL

Date: 07/02/2022

Before :

MRS JUSTICE MOULDER DBE

- -

Between :

CHRISTOPHER BERNARD UPHAM & ORS	**Clai**
- and -	
HSBC UK BANK PLC	**Defe**
- and -	
AYODELE AKINLUYI & ORS	**Clai**
- and -	
HSBC UK BANK PLC	**Defe**

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John Jarvis QC, Nicholas Bacon QC, William Day (instructed by **Edwin Coe LLP**) for the **Claimants in CL-2020-000347**

Roger Mallalieu QC (instructed by **Stewarts Law)** for the **Claimants in CL-2021-000169**

Andrew Green QC, Simon Pritchard and Dominic Howells (instructed by **Norton Rose Fulbright LLP**) for the **Defendant**

Hearing date: Monday 31st January 2022

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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.

Covid-19 Protocol: This judgment was handed down by the judge remotely for circulation to parties' representatives by email.

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MRS JUSTICE MOULDER DBE

Mrs Justice Moulder:

1.
This is the court's judgment on the issue of recoverability of costs as explained below. This is an issue on which the court heard argument at the first CMC on 31 January 2022 and on which the court reserved judgment.

2.
There are two sets of proceedings before the court against a common defendant, HSBC UK Bank Plc ("HSBC"), which it has been agreed should be case managed together. These are the proceedings with claim numbers CL-2020-000347 and CL-2021-000169 (for convenience referred to by reference to the solicitors representing the various claimants in the two claims as the "Edwin Coe Claimants" and the "Stewarts Claimants" respectively).

3.
The court has had the benefit of written and oral submissions from leading (costs) counsel for the two sets of claimants as well as witness statements from, respectively, David Greene (dated 24 January 2022) of Edwin Coe, and James Le Gallais (dated 26 January 2022) of Stewarts.

Background

4.
It is not necessary to set out the details of the two claims. It is sufficient to note that both sets of claimants bring claims against HSBC in relation to a film finance scheme which involved the establishment by Future Films Limited ("Future", now in liquidation) of limited liability partnerships ("LLPs") and which were marketed on the basis that they would confer tax advantages to the claimants. I understood it to be common ground that the causes of action in the two claims are different (although the impact of that difference on the proceedings is not common ground) but in any event there are common issues between the claims which are identified in the Joint Agreed List of Points of Common Ground and Issues (the "List of Issues").

5.
It was the fact of common issues which led the parties to agree that the two sets of claims should be case managed together and tried together.

6.
For convenience I shall refer to the group of claimants in a particular set of claims as a "cohort".

7.
It has been agreed that, for the time being, the two sets of claims will proceed on the basis that there will be a joint trial of sample claimants selected from both cohorts having regard to the "common issues" which have been identified in the List of Issues at Section A and other issues (being those issues identified in sections B – E of the List of Issues) so far as they have common elements.

Issue

8.
The parties seek an order as to the "recoverability of costs" from claimants in the event that:

a)
an adverse costs order is made against the claimants in favour of HSBC; and

b)
the court identifies common issues across both cohorts of claimants, the costs of which the court orders should be borne across the cohorts.

9.
The parties have agreed (as reflected in the draft order which was before the court at the CMC) that:

i.
insofar as the claimants incur costs in the preparation and management of their own claims, the claimants within a cohort bear their own costs. Those costs consist of primarily common costs, that is costs which arise from the proceedings in relation to the particular cohort, including in relation to sample claimants within that cohort. In addition, claimants will be liable for their own individual costs, being costs which relate to matters which are personal and specific to an individual claimant;

ii.
in respect of any adverse costs orders, costs are to be borne severally by claimants; and

iii.
a claimant's liability for adverse costs shall be apportioned pro rata to his total investment in the capital of the Eclipse Partnerships and not on a per capita basis.

10.
Thus if a costs order were to be made in favour of a claimant within a cohort, that claimant would recover his individual costs and his pro-rata share of the common costs within the cohort.

11.
If an order for costs was made against a claimant, that claimant would be liable for the costs incurred by HSBC in relation to that individual specifically and the pro rata share of the common costs.

12.
The issue which is in dispute between the Edwin Coe Claimants and the Stewarts Claimants is as follows:

i.
whether, if an adverse costs order is made against the claimants, the share of the common costs should be the pro rata share of all costs incurred by HSBC and which have been incurred "wholly or mainly" in relation to matters which are common to both claims (the approach advanced for the Stewarts Claimants); or

ii.
whether the division between the claims should be respected such that a claimant would only be liable for his pro rata share of common costs incurred in relation to his own claim but not costs which, although they relate to common issues across the cohorts, have been incurred by HSBC in relation to the other cohort (the approach advanced for the Edwin Coe Claimants).

13.
No order for costs in favour of HSBC has yet been made in the proceedings but in essence the order is said to be sought at this stage for three reasons:

1.
to enable claimants to evaluate their liability for costs;

2.
to enable the quantum of an application for security for costs to be agreed/determined; and

3.
to allow/give guidance to HSBC (and their lawyers Norton Rose) as to how they should record time during the life of the proceedings.

Edwin Coe Submissions

14.
It was submitted for the Edwin Coe Claimants that:

i.
there should be no order now which provides for costs across cohorts;

ii.
unlike the position in Rowe v Ingenious Media Holdings plc [2020] EWHC 235 (Ch), the two proceedings are not akin to a joint venture – there is no sharing by the two cohorts of claimants of common costs incurred by the claimants and there should be no liability to share common costs incurred by HSBC which would oblige Edwin Coe Claimants to pay costs incurred by HSBC as a result of Stewarts' actions;

iii.
HSBC are currently allocating costs equally to the two actions except where HSBC take the view that particular costs result from work done in response to particular cohort; this position should be maintained;

iv.
it is unnecessary to legislate now for HSBC common costs: even though it may be necessary in future, this is not the right time;

v.
any order made at this stage should reflect the fact that the Edwin Coe claim and the Stewarts claim are separate claims – such order should not tie the cases together inappropriately;

vi.
the position is distinguishable from Greenwood v RBS [2014] EWHC 227 (Ch), given that case concerned a Group Litigation Order;

vii.
the proposed definition of common costs is unworkable and imposes a burden on Norton Rose;

viii.
the pragmatic solution reflects the law and is in furtherance of the Overriding Objective – namely, by asking what is the fair and proportionate order; and

ix.
once any order is made in this regard, it will set a "bedrock".

15.

In relation to Ingenious, it was submitted that it was open to this court not to make any order. I note in particular the judgment in Ingenious at [41]-[43]:

"[41]…Given that I have already decided that the liability of the Claimants for the Defendants' costs should be several rather than joint, it seems to me fairer that the risks to a Claimant of participating in the litigation should be proportionate to the reward that he or she might obtain from the litigation. The notion that someone who invested £36,000 (and who, if successful, might recover compensation, whether for loss of investment, penalties or interest, commensurate with that) should contribute to the common venture exactly the same as someone who invested £10.5m (and whose compensation if successful would be very much larger accordingly) seems to me plainly unfair on the most basic principles of equity.

42. It is noticeable that in Davies v Eli Lilly Sir John Donaldson MR said of Hirst J's order at 1141D: "Those who practise in the Commercial Court, of which Hirst J is one of the judges, will recognise the age old respectability of such an order, based as it clearly is upon the Rhodian Law, the Rolls of Oleron and the maritime law of general average." Those who do not practise in the Commercial Court might like to be reminded of the maritime law of general average, set out in Halsbury's Laws (vol 7 (2015), Carriage and Carriers) at §606 as follows:

606. Principle of general average. General average is part of the law of the sea founded on equity. It formed part of the Rhodian law, was based in earlier custom and existed many centuries before the existence of marine insurance. Rhodian law provided that, when cargo was thrown overboard to lighten a vessel, that which had been given for all had to be replaced by the contribution of all. The most often cited legal definition of 'general average' is 'all loss which arises in consequence of extraordinary sacrifices made or expenses incurred for the preservation of the ship and cargo losses within general average, and must be borne proportionately by all who are interested'."

The relevant word here is "proportionately". Those interested in the preservation of the vessel (generally ship, freight and cargo interests) have to make a general average contribution calculated according to the value of their interest (see op cit §608 referring to a "rateable contribution"), and there are rules as to how such interests fall to be valued for this purpose.

[43]. That principle of maritime law (incidentally said to be founded on equity) seems to me to be very similar to the principle I tried to express in my oral judgment that those who embark on a venture together should bear the risks involved in the venture proportionately to their interests in its success. Although the order made by Hirst J in Davies v Eli Lilly was in fact on a per capita basis, it suggests to me that Sir John Donaldson would have been sympathetic to an order providing for a pro rata contribution to the costs had the plaintiffs' claims differed widely in value. In fact the plaintiffs, who were mostly elderly, did not have very large claims (see at 1138E-H). It is perhaps unlikely therefore that their claims showed the same disparity between the values of claims as in the present case." [Emphasis added]

16.
In relation to the approach currently being adopted by Norton Rose, the court was referred to the correspondence in which Norton Rose gave the following explanation:

"You have asked us to "please confirm what (if any) First Phase costs have been treated as 'common costs', split between the Edwin Coe Action and the Stewarts Action, and, assuming that there are common costs, on what basis." We can confirm that shortly after service of the Edwin Coe claim at the end of September 2020, we have generally split our time equally between the two claims in respect of

workstreams that concerned both. To take a representative example, once Edwin Coe's claim was served we treated security for costs as a common issue to both claims and, in general, sought to evenly allocate our time spent in addressing security for costs through internal analysis and correspondence directed at both of you (i.e. if a given letter took 2 hours, the entry was split (1hrs: 1hrs) between the Stewarts and Edwin Coe claims). On the other hand, where responding to one claimant group on security for costs (for example) took longer than responding to the other because of how each group put their position or what questions each raised to us, then the resulting split reflected that difference. As for workstreams that only concerned Stewarts, such as preparing a Rejoinder to the Stewarts' Reply, we only charged time to the Stewarts file on our systems. Likewise with the RFI process, which only engaged Edwin Coe, we only charged time to the Edwin Coe file. [Emphasis added]

17.
It was submitted for the Edwin Coe Claimants that this approach should be maintained, that where work is common it is split between the two cohorts and that the proposition that one cohort should pay costs incurred by HSBC as a consequence of things done by the other solicitors/cohort with separate claims is inconsistent with the agreed position that both actions should be kept separate and there should not be a sharing of costs between the two.

18.
It was also submitted that the relevant proportions represented by the two cohorts could change over time if for example claimants settle and withdraw from the litigation.

Stewarts submissions

19.
It was submitted for the Stewarts Claimants that:

i.
the order which is sought is both conventional and uncontroversial; the court should decide now how costs should be apportioned; if there are common costs it is fair that the claimants should know how those costs are to be shared;

ii.
the court can be satisfied now that HSBC will incur costs which are common across the cohorts as is evident from the List of Issues and the fact that the claims will be tried together;

iii.
Norton Rose is prepared to apportion across the cohorts;

iv.
the order proposed by Edwin Coe is unsatisfactory as it does not deal with common costs incurred across the cohorts and not to apportion across the cohorts leaves a vacuum; if there are no common costs across the cohorts then the order will make no difference;

v.
the issue of cost-sharing of own costs by claimants across the cohorts is a different issue; in any event in Ingenious there was limited sharing of common costs;

vi.

if the court makes an adverse costs order against the claimants, the claimants need to know how costs will be apportioned, whilst recognising that the draft order provides that liability for common costs across the cohorts will only extend to those claimants "who are liable in respect of the same costs"; and

vii.
if the defendant is incurring costs which are common, it is fair that they should be apportioned: this is clear from Ingenious at [55], [58] and [61]:

"55. I propose at the moment to focus only on the first facet, that is the claimants' liability for costs orders in favour of the defendant. If the defendant succeeds at trial it will expect to obtain a costs order in its favour; and it may also obtain any number of costs orders at interlocutory hearings. The general principle does not seem to me to be difficult to state, which is that all the claimants who were potentially interested in the part of the case on which the costs were incurred should bear an apportioned part of the liability for the defendant's costs insofar as they were common costs.

58. But as I say I do not think that affects the principles. Of the 3 supplementary questions I have identified above, the answers I have already given effectively deal with (iii), the answer being that the apportionment should be on the basis of several liability apportioned pro rata to the relevant Claimants' cash contributions; but I cannot deal in the abstract with the other two. That depends on the circumstances in which each costs order in favour of a Defendant is made. Suppose for example there is an interlocutory hearing at which an application is unsuccessfully made against UBS, and UBS is awarded its costs. Which of the Claimants should contribute to this? The answer is all those interested in the matter that was argued. That is very unlikely (although it is not completely inconceivable) to include any Claimant who does not bring a claim against UBS. But it does not necessarily include all those who do (the 50 Stewarts Claimants and the 1 Peters & Peters Claimant). It might include only the Stewarts Claimants, arising out of a point that they took but that the Peters & Peters Claimant did not. It might not include all of the Stewarts Claimants – it might have concerned only a subset of them, or conceivably only one. None of this can be prescribed for in advance.

61. I am therefore wary at this stage of seeking to do any more than articulate the general principle that I have already set out, that where a costs order is made in favour of any of the Defendants, the relevant Claimants should be severally liable on a pro rata basis for such part of those costs as are common costs." [Emphasis added]

20.
RBS is relevant to the principle for the reasons set out in Ingenious (at [32] and [33]):

"32. In those circumstances, as I said in my short oral judgment, I have not been persuaded that the change in the legal landscape changes the fundamental equation as to where the risk ought principally to lie; nor does the fact that in this case no GLO has (yet) been made, and may never be (the Claimants are reserving their position on the point), since the case shares very many characteristics with the sort of cases which are suitable for a GLO, and in particular, the characteristic that a very large number of claimants are bringing claims together.

33. That was the basis on which I decided that in principle an order for several liability rather than joint liability should be made."

HSBC submissions

21.
HSBC stated that they were neutral on the issue before the court but expressed concern that firstly any order should not require them at this stage to alter their time recording records to date in order to allocate time to a third workstream of “common costs”; and secondly HSBC wanted to avoid a process whereby Norton Rose would have to record time against 48 separate issues (reflecting the List of Issues).

Discussion

22.
In my view:

i.
there are likely to be common issues across the cohorts – this is evident from the List of Issues;

ii.
the issues which result in costs being incurred by HSBC may be issues which are common to both cohorts but may not be limited to the agreed List of Issues (e.g. HSBC’s application for security for costs);

iii.
if HSBC is awarded all or part of its costs at the conclusion of the proceedings, the court has a discretion as to the appropriate order and may not make an issue based order;

iv.
if the court does not make an issue based order it will not as a matter of course determine what issues should be treated as “common issues” for the purposes of cost sharing. Should it be the position that common costs are agreed (or ordered) to be shared across the cohorts, the court will therefore need to make a further determination as to what proportion of the costs relate to particular issues, which of those costs relate to common issues where costs are to be shared across the cohorts and which claimants should be liable for those common issues;

v.
if the court is to retain its discretion as to costs orders (a principle accepted for the Stewarts Claimants) then it will only determine at the end of the proceedings which claimants should bear the costs of all or part of the proceedings. If the court were to determine that, even though costs were common across the cohorts it was not appropriate in light of other matters such as conduct that the costs should be borne across the cohorts, the provision currently sought as to the allocation of costs would have no application;

vi.
since it will only be after trial that the court determines whether an issue is common across cohorts, no benefit would appear to accrue to the claimants now in making an order that such costs should be borne proportionately, as absent a determination as to what is a common issue which should be shared, a claimant will be unable to quantify its likely exposure; and

vii.
Norton Rose currently records time to two workstreams reflecting each claim and allocate time equally unless in its opinion one cohort has caused them to expend more time than the other. Norton Rose does not currently therefore merely allocate time on an equal split between cohorts but use their judgement to allocate to the two cohorts based on the work generated by the respective cohorts. An

order now that common issues will be borne in pro rata shares across cohorts will not assist Norton Rose in its time recording given that common issues have not been defined (and it is not argued that they can be identified now for this purpose) so remains a matter of judgement and Norton Rose already takes into account the proposition that it is unfair for time to be allocated equally to each cohort when the work has been unevenly caused by one cohort or the other.

23.
Norton Rose could record time on common matters to a separate workstream to reflect a principle of cost sharing across the cohorts, but it would have to determine whether it was incurring time on a common issue. In practice it is already having to make that determination, but this would be open to subsequent challenge on detailed assessment as neither party would want to be bound by the time recording of Norton Rose.

24.
It seems therefore that there is no benefit in directing Norton Rose to record “common issues” as a third workstream.

25.
Even if Norton Rose were directed to allocate time in proportion to the current overall investment split of each cohort, this would not address the scenario that even where issues are found to have been common across cohorts, the issues may not have been common to all claimants. Further, any allocation would have to be reviewed if claimants were added or removed from a cohort (e.g. as a result of settlement). It is unclear what adjustment would be appropriate at that point to reflect liabilities incurred prior to settlement.

26.
I am not therefore persuaded that an order concerning apportionment would have any benefit in relation to the time recording by Norton Rose, and as such time recording is not binding on the claimants, it would have little if any benefit in relation to decisions as to the amount of costs ultimately allocated to individual claimants.

27.
The parties have been in correspondence about security for costs. It was submitted that the order concerning common costs would assist the discussions (and potentially enable the matter to be agreed) as to date HSBC have sought security for costs from both cohorts by apportioning the costs equally. If the costs budgets prepared by HSBC were to be adjusted to reflect the common costs across a cohort, one would need to identify the common costs. Merely because there is a common issue does not necessarily mean that the adjustment to the budgeted costs which flows from that common issue is obvious. The costs of (say) witness statements or trial preparation cannot easily be separated out by reference to common issues across cohorts, but to the extent that it is possible, an estimate could be made without the need for any order now as to the apportionment of common costs between claimants.

28.
Stewarts say that there is a gap in the proposed order as proposed by Edwin Coe in that it fails to address common costs across the cohorts even though such common costs are likely to arise. Stewarts submit that it is therefore fair to state that where there are common costs across the cohort, these should be borne pro rata by reference to the overall investment “by the claimants that are liable”.

29.

It is true as a matter of logic that the order does not address common costs across the cohorts. As stated above, I accept that there are likely to be common issues and costs will be attributable to those costs.

30.
I also accept (as do Stewarts) that the governing principle on the allocation of costs amongst claimants is what is fair.

31.
I note that the draft order already records in relation to joint case management that:

“the parties shall take reasonable steps to cooperate, allocate work and/or avoid duplication of costs as appropriate”

32.
I can conceive of circumstances where the fair result of such cooperation may be said to be that the claimants should bear the common costs across the cohorts – for example if at trial one counsel takes the lead for the two cohorts on an issue but the claimants are ultimately unsuccessful, it may not be fair to conclude that the Edwin Coe claimants should not be liable for a pro rata share of the costs because the costs of counsel incurred were not those of counsel for Edwin Coe.

33.
To that extent I do not accept the general proposition advanced for the Edwin Coe claimants that because each cohort has separate funders and ATE insurers who have assessed the risk based on the advice and the pleaded case for that cohort, there should never be an order for costs which relate to costs which have been incurred as a result of the actions of the other cohort’s representatives.

34.
However it seems to me that neither RBS nor Ingenious amount to binding dicta that the court should make an order for common costs to be shared pro rata across cohorts in the circumstances of this case or at this stage of the proceedings. In RBS there was a Group Litigation Order in force and the premise was that the claimants were bringing claims together; in Ingenious Nugee J held at [58] that the apportionment should be on the basis of several liability apportioned pro rata to the relevant Claimants’ cash contributions; however “the essential question” which needed to be decided on that application was whether the Claimants’ liability should be several or not (at [65(3)]).

35.
Further in my view the conclusion of Nugee J as to the basis of apportionment across the groups of claimants was on the basis, as stated at [43] of the judgment, that “ those who embark on a venture together should bear the risks involved in the venture proportionately to their interests in its success” [emphasis added].

36.
In this case the parties have not agreed to share their own costs even though they record in the order that they seek to cooperate and avoid duplication. It is unclear how such cooperation will in practice affect the costs incurred by the respective solicitors particularly on common issues and thus the costs to be borne by individual claimants within the cohorts.

37.
It seems to me likely that some form of pragmatic solution may well have to be adopted in relation to their own costs in this regard but the starting point is that the claimants have brought separate

actions with different causes of action and have not agreed merely by the fact of agreeing (for the time being) to joint case management and a single trial, to go further and to share the risk and reward in the two claims.

38.
In my view the fact that the claimants have not agreed to share costs is a significant factor in determining whether this is a case where the claimants have agreed to share the risk and reward; in Ingenious Nugee J referred to this (at [54] when setting out the "general principles") as two facets:

"In those circumstances I propose to start by setting out what I understand the general principles to be. In the simple case such as Ward, there are a number of claimants (there 99) bringing actions against a single defendant (there Guinness Mahon) which raise some common issues, and where certain claims are to be tried first. The idea behind the costs sharing order is that all the claimants should contribute to the costs that benefit them all, that is the common costs. That has two facets. One is the claimants' potential liability for the costs of the defendant. The second facet which the costs order may (but so far as I can see need not) deal with is the claimants' liability to contribute to their own solicitors' costs, both if they lose and if they win (as they will be unlikely to recover all their costs from the defendant even if entirely successful), and the recoverability of such costs from the defendant." [Emphasis added]

39.
There are other circumstances where notwithstanding that it is a common issue (e.g. the role of HSBC) the facts relied on by the particular cohort relating to that issue are specific to that cohort. In that instance it may be that the court concludes that even if the general principle is that common costs should be borne pro rata across cohorts, that principle should not apply.

40.
I am therefore not persuaded that the statement of principle that common costs will be apportioned across the cohorts by reference to the pro rata investment will in practice achieve anything at this stage and I am unwilling to make a definitive order which may prove not to be fair once the facts and circumstances of the case are known.

41.
I note the observations of Nugee J at [61] in Ingenious:

"I am therefore wary at this stage of seeking to do any more than articulate the general principle that I have already set out, that where a costs order is made in favour of any of the Defendants, the relevant Claimants should be severally liable on a pro rata basis for such part of those costs as are common costs. In any particular instance that needs filling out by identifying both who the relevant Claimants are (namely those who are interested in the particular question which gave rise to the costs), and which costs are to be treated as common costs, or to put it more simply: which costs are common? and common to whom?" [Emphasis added]

42.
Given the matters discussed above, I see no need even to seek to articulate a general principle in an order at this stage:

i.
a statement of general principle will not give useful guidance to Norton Rose since it is recognised that even where there are common issues across cohorts, not all claimants will be liable for costs

incurred in respect of those common issues; the issue of what is a common cost is a matter of judgement and ultimately a question for the court; accordingly any allocation by Norton Rose could only operate as a rule of thumb pro tem and could not be binding on the claimants;

ii.
it will not resolve the issue of security for costs as any estimate of the likely costs will have to make assumptions about common issues across the cohorts and the amount of costs that will be attributable to such common issues. That exercise is not materially assisted by an order as to the apportionment of common costs as it merely begs the question as to what costs derive from issues which are common across the cohorts and how much should be attributed to those common issues;

iii.
it will not assist a claimant to assess its liability for costs as the other elements of the calculation will not be known until a determination is made as to the common issues, the extent of the costs referable to such issues and the claimants who should bear those costs; and

iv.
a refusal to make such an order now does not preclude the court from making such an order ordering apportionment across cohorts at the end of the trial but making such an order now may suggest that after trial, if HSBC is successful, the court will make an issue based order or that when an order is made, common issues across the cohorts will be ordered to be borne pro rata when the court may determine that it is not appropriate for costs of issues to be borne across the cohorts even where common. An order now as to apportionment across cohorts of any adverse costs order thus risks operating as a constraint (even if merely indirect) on the future discretion of the court for which no benefit has been demonstrated.

Conclusion

43.
For the reasons discussed above I decline at this juncture to make the order sought by the Stewarts Claimants concerning the recoverability of common costs from claimants across cohorts in the event that an order for costs is made in favour of HSBC.