



Neutral Citation Number: [2024] EWHC 3035 (Comm)

Case No: CL-2021-0000051

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
KING'S BENCH DIVISION
COMMERCIAL COURT

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 27/11/2024

Before :

MR JUSTICE FOXTON

Between :

**(1) 4VVV LTD and the (2) to (435) Claimants listed in
Schedule 1 to the Claim Form**

Claimants

- and -

**(1) NICHOLAS SPENCE and (2) DEREK KEWLEY
and (3) to (6) and (8) to (13) Defendants**

Defendants

**Neil Hext KC and Matthieu Grégoire (instructed by Trowers & Hamlins LLP) for the
Claimants**

**Matthew Collings KC (instructed by Simon Burn Solicitors) for the First, Second, Sixth and
Eighth to Eleventh Defendants**

Hearing Date: 19 and 20 November 2024
Draft Judgment Circulated: 21 November 2024

Approved Judgment

This judgment was handed down remotely at 10.00am on 27 November 2024 by circulation
to the parties or their representatives by e-mail and by release to the National Archives.

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MR JUSTICE FOXTON

The Honourable Mr Justice Foxton:

1. I handed down judgment following a substantial trial in this matter on 27 September 2024 ([2024] EWHC 2314 (Comm)). In the course of the hearing to address consequential matters, Mr Collings KC has raised the contention that the Claimants are not entitled to costs orders or an interim payment on account of costs because they are not subject to any enforceable liability to pay costs to their solicitors (“**the Solicitors**”). I accept that if that is the case, then the indemnity principle would indeed mean that there could be no costs recovery (as was the case in *Cox v Woodlands Manor Care Home* [2015] EWCA Civ 415).
2. Mr Collings KC relied, for this purpose, on the alleged contravention of Regulations 13 and 14 of the Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013/3134 (“**the 2013 Regulations**”). The Claimants have conceded, for the purpose of this hearing, that there was arguably a failure to comply with Regulation 13. It became apparent in the course of the hearing that there was no arguable case that the only potentially relevant sub-paragraph of Regulation – Regulation 14 – was breached, and Mr Collings KC did not pursue that argument.
3. Mr Hext KC advanced a number of responses to this contention, of which it is necessary to address two:
 - i) The assumed breach of Regulation 13 did not make the contract of retainer between each claimant and the Solicitors unenforceable.
 - ii) It was common ground that the 2013 Regulations did not apply to the five corporate lead claimants (“**the Corporate Claimants**”), who, it was said, were jointly and severally liable for all the costs. Mr Collings KC accepted that if there was indeed such a joint and several liability on the part of the Corporate Claimants, his argument by reference to the indemnity principle would be overcome. However, he denied that, on the proper construction of the relevant contracts between the Corporate Claimants and the Solicitors, there was joint liability. He also relied on the terms of the costs sharing order made by Mr Justice Calver on 15 June 2022 (“**the Costs Sharing Order**”).
4. For completeness, Mr Hext KC’s other arguments involved:
 - i) The argument that the Claimants had already paid “some £5.5m” to their solicitors, even if not legally liable to do so, and this was sufficient to satisfy the indemnity principle. However, that argument was capable of raising issues as to whether the indemnity principle is satisfied by the making of a payment which can be recovered in law and fact from the recipient and whether the Defendants would, on that hypothesis, be subrogated to the Claimants’ claim to recover the amount paid to the Solicitors. These issues were not explored in legal argument.
 - ii) The argument that the legal costs would be recovered by the Solicitors in any event from damages recovered, under the “waterfall” provision which applied to litigation recoveries, and the indemnity principle thereby satisfied. However, the relevant documents were not before the court, and it was not possible to determine whether the Solicitors’ right to payment under the waterfall was limited to costs to which they had a legal right.

The construction of the 2013 Regulations

5. Regulation 13(1) provides:

“13.— Information to be provided before making a distance contract

- (1) Before the consumer is bound by a distance contract, the trader—
 - (a) must give or make available to the consumer the information listed in Schedule 2 in a clear and comprehensible manner, and in a way appropriate to the means of distance communication used, and
 - (b) if a right to cancel exists, must give or make available to the consumer a cancellation form as set out in part B of Schedule 3.
- (2) In so far as the information is provided on a durable medium, it must be legible.
- (3) The information referred to in paragraphs (l), (m) and (n) of Schedule 2 may be provided by means of the model instructions on cancellation set out in part A of Schedule 3; and a trader who has supplied those instructions to the consumer, correctly filled in, is to be treated as having complied with paragraph (1) in respect of those paragraphs.
- (4) Where a distance contract is concluded through a means of distance communication which allows limited space or time to display the information—
 - (a) the information listed in paragraphs (a), (b), (f), (g), (h), (l) and (s) of Schedule 2 must be provided on that means of communication in accordance with paragraphs (1) and (2), but
 - (b) the other information required by paragraph (1) may be provided in another appropriate way.
- (5) If the trader has not complied with paragraph (1) in respect of paragraph (g), (h) or (m) of Schedule 2, the consumer is not to bear the charges or costs referred to in those paragraphs.
- (6) If the contract is for the supply of digital content other than for a price paid by the consumer—
 - (a) any information that the trader gives the consumer as required by this regulation is to be treated as included as a term of the contract, and
 - (b) a change to any of that information, made before entering into the contract or later, is not effective unless expressly agreed between the consumer and the trader.”

6. The issue between the parties is whether the words “Before the consumer is bound by a

distance contract” in Regulation 13(1) have the effect that compliance with Regulation 13(1) is a pre-condition to the conclusion of a binding contract, or whether they simply define the time for performance of the trader’s obligation, with the consequences of non-compliance being addressed in other ways.

7. Reviewing the 2013 Regulations as a whole, I am wholly satisfied that the latter construction is correct.
8. First, that construction fits best with Regulation 13. Regulation 13(5) contemplates that the effect of non-compliance with particular parts of Regulation 13 will be that the consumer is not liable for particular costs arising under the contract. That provision would be superfluous (and its limited scope positively misleading) if the effect of non-compliance with Regulation 13(1) was that there was no binding contract at all. Regulation 10, which is similarly structured in relation to “off-premises” contracts, uses the same introductory paragraph (“Before the consumer is bound ...”), and a specific and narrow provision identifying when non-compliance overrides a particular and identified contractual obligation (Regulation 10(4)). On Mr Collings KC’s construction of the words “before the consumer is bound”, the same difficulty would arise.
9. Second, Regulation 14(2) addresses a sub-set of the contracts addressed by Regulation 13(1) – distance contracts concluded *by electronic means*. It contains an obligation to comply in a particular way with some (but not all) of the paragraphs referred to in Regulation 13(1). It also includes certain further obligations in Regulations 14(3) and (4). Regulation 14(5) provides that “if the trader has not complied with paragraphs (3) and (4), the consumer is not bound by the contract or order”. There is no similar language for breaches of Regulation 14(2), and no such language in Regulation 13, save for the specific provision in Regulation 13(5) which does not apply here.
10. Third, Regulation 18 provides that “every contract to which this Part applies is to be treated as including a term that the trader has complied with the provisions of – (a) regulations 9 to 14.” As Mr Hext KC submitted, that regulation only makes sense if a failure to comply with the requirements of Regulations 13 and 14 do not preclude a binding contract coming into existence. Instead, the effect of non-compliance with those requirements is that the consumer can sue the trader for breach of contract.
11. Finally, Regulation 31(1) addresses what happens “if the trader does not provide the consumer with the information on the right to cancel required by paragraph (1) of Schedule 2, in accordance with Part 2.” That is one of the items of information which Regulation 13(1) requires the trader to provide “before the consumer is bound by a distance contract”. Regulation 31 provides that if the information is provided in the period of 12 months beginning with the first day of the 14 days mentioned in regulation 30(2) to (6) (i.e. 14 days “after the contract is entered into” or, for sales contracts, after certain goods are delivered: “**the Regulation 30 date**”) then the cancellation period will be 14 days after the information is provided. Otherwise, the cancellation period will end 12 months after the Regulation 30 date. It will be apparent that Regulation 31 contemplates that a contract will be binding even if the Schedule 2(1) information is not provided to the consumer before it is entered into, or indeed if it is never provided.
12. That is sufficient to defeat Mr Collings KC’s argument. But in case matters should go further,

I will go on to address the question of whether the Corporate Claimants have joint and several liability for the Solicitors' costs.

The Joint and Several Issue

13. The present proceedings involved claimants who had entered into transactions with Alpha Group entities joining an action group ("**the Group**") which managed the litigation. Most of the Claimants were natural persons, but some investments were made by SPVs, with the result that the claimants were legal persons.
14. It is common ground that Claimants who joined the Group and became parties to this action signed a number of documents in order to do so. Some of those documents were revised after the decision of the Supreme Court in *R (on the application of PACCAR Inc) v Competition Appeal Tribunal* [2023] UKSC 28 but the present argument does not turn on any differences in the two sets of terms, and I have addressed it by reference to the pre-PACCAR documents.
15. There was a client care letter ("**the CCL**") which expressly incorporated the Solicitors' Terms of Engagement ("**the Terms of Engagement**") which it is accepted were incorporated into the CCL. The CCL noted that the Solicitors would take instructions directly from the Group's managing committee ("**the Committee**") "as per the Constitution document". The CCL said "the terms of our engagement and fees are subject to a Conditional Fee Agreement which we will enter with the [Committee] on your behalf." The "Terms of Engagement" provided:

"You will be responsible for payment of our fees and any disbursements or VAT. If you instruct us on any matter together with any other person or persons, all of you shall be jointly and severally liable to pay our invoices. This means you will be liable separately, together or in any combination".

Mr Collings KC accepts that if the CCL stood alone, the Corporate Claimants have joint and several liability to the Solicitors for the Solicitors' Costs

16. There was a "Discounted Conditional Fee Agreement" ("**the DCFA**"). Mr Collings KC had originally suggested that the Claimants were not parties to the DCFA because the Committee lacked authority to enter into it on their behalf. That argument was adroitly revised between the first and second days of the hearing, when it became apparent that the Terms of Engagement provided for joint and several liability for the Solicitors' costs, and Mr Collings KC now accepts that the DCFA was entered into by the Committee on behalf of all of the Claimants with the Solicitors. This provided:
 - i) At clause 4.1, that the provisions in the CCL continued to apply "save as varied by the terms of this Agreement".
 - ii) At clause 4.2, "this Agreement is entered into by the [Committee] on behalf of the individuals who sign up to the Constitution Agreement dated 6 July 2020. Any liability for costs arising under this Agreement and the client care letter is shared equally between all individuals (jointly and severally) who have signed up to the Constitution".
 - iii) Clause 18.1 provided that "where there is a conflict between this Agreement and the

client care letter, this Agreement shall prevail.”

17. Third, there was the Constitution of the Group (“**the Constitution**”). Clause 4 of the Constitution provides “an individual or company who invested money” in the schemes who were the subject of the proceedings “may be considered for membership of the Group.”
18. It is accepted that these three documents form a suite of agreements entered into by Claimants contemporaneously or virtually contemporaneously, and that they fall to be read together under the principles summarised in Sir Kim Lewison, *The Interpretation of Contracts* (8th) at [3.06]-[3.12].
19. Mr Collings KC’s construction argument proceeds as follows:
 - i) The terms of the DCFA have priority over and vary the terms of the CCL in the event of a conflict.
 - ii) The DCFA provides for the joint and several liability for costs of individuals.
 - iii) It is clear from the Constitution, which forms part of the same suite of documents as the DCFA, that a distinction was drawn between individuals and companies.
 - iv) As a result, the DCFA imposes joint and several liability for costs on members of the Group who are natural persons, and hence individuals, but no liability whatsoever on the Corporate Claimants (this last being an inevitable consequence of Mr Collings KC’s argument, rather than an articulated element of it).
20. I am unable to accept this argument. Taken on its own literal terms, it fails because clause 4.2 provides that “this Agreement is entered into by the [Committee] on behalf of the individuals who sign up to the Constitution ...”. On Mr Collings KC’s approach, the DCFA was not entered into on behalf of the Corporate Claimants and cannot therefore vary their liabilities under the CCL. More seriously, it is clear that the word “individual” is not used in the DCFA in contradistinction to company, and that the use of the word “individual” in both the first and second sentences of clause 4.2 covers both members of the Group who are natural and legal persons. The use of the word “individual” is used to distinguish between the individual members and the Group as a whole (c.f. the reference in clause 33.1 to the members of the Committee not owing a duty “to individual Members, but only to the Group as a whole”). I am satisfied that the joint and several obligation created by clause 4.2 of the DCFA applies to all the individual members of the Group, including Corporate Claimants.
21. The contrary construction would have the wholly improbable consequence that non-corporate claimants would have joint and several liability for all the Solicitors’ costs and the success fee, including those referable to the Corporate Claimants, but the Corporate Claimants would have no similar liability for costs, and logically no liability for costs or the success fee at all.
22. Mr Collings KC had one final shot in his locker, and it is the most formidable. This arose from the terms of the Costs Sharing Order made by Mr Justice Calver on 15 June 2022. This includes a lengthy section on “costs sharing” providing “save as otherwise ordered, the liabilities for costs for the claims are to be determined in the following manner.” The paragraphs which followed included this paragraph:

“The liability of each Claimant for costs, *and each party's entitlement to recover costs*, shall be several and not joint. Unless ordered otherwise, each Claimant's share of the Common Costs shall be calculated by reference to the value of a Claimant's claimed individual losses as against the total claimed losses by all Claimants.”

(emphasis added).

23. I accept that the principal purpose of this provision was to address adverse costs orders against the individual Claimants, providing that an individual Claimant would not be liable for all of the Defendants' costs, and that the share of common costs would be calculated on pro rata to the amount claimed rather than (for example) per capita basis. Mr Collings KC argues that the words “each party's entitlement to recover costs” means that no Claimant can be liable for costs on a joint basis.
24. I do not accept that Calver J's order can vary the contractual rights of the Solicitors under their contracts with the Claimants. The Solicitors were not parties to the proceedings, and in any event a procedural order of this kind could not affect another Claimant's contractual rights. As a result, Mr Collings KC's argument on the indemnity principle does not work.
25. I am much more troubled, however, by the issue of whether the effect of the Calver J order was to prevent a Claimant seeking a costs order against the Alpha Defendants other than on a several basis (it being a necessary element of this part of the Claimants' case that the Corporate Claimants can seek an order on the basis of their joint liability for costs). I have reviewed the skeleton arguments filed for the hearing before Mr Justice Calver, and there is nothing in them which suggests that any order was to be made limiting whether a Claimant could seek a costs order against the Defendants on the basis of a joint and several liability on its part for the Claimants' costs. The entire focus was on adverse costs orders against the Claimants.
26. However, the wording of the order – and in particular the words “each party's entitlement to recover costs” – seems perfectly clear to me, and it may well be that the quid pro quo for the absence of joint liability for inwards orders is the inability to claim costs on a joint liability basis from a counterparty. The effect of this provision is, in my view, to prevent the Corporate Claimants recovering costs on the basis of a joint liability on their part.
27. The words “save as otherwise ordered” would permit me to make an order on a different basis now. However, I would not lightly depart from the structure put in place at the first CMC so that all parties would know where they stood at an early stage in the case, and I am not persuaded that an attempt to get round what has been assumed to be non-compliance with the 2013 Regulations is a sufficient reason for doing so. The variation I am asked to make would have a significant (and retrospective) impact, on paper at least, on the Corporate Claimants, and would involve, on the assumed facts, placing them in a very different position from the other Claimants, which seems very far from the original spirit of the Costs Sharing Order.
28. Had it been necessary for the Claimants to rely upon the entitlement of the Corporate Claimants to obtain a costs order in their favour on the basis of their joint liability for all of the Claimants' costs, that argument would not have succeeded.