Neutral Citation Number: [2020] EWHC 918 (QB)

Case No: QB-2018-0000225

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 20/04/2020

**Before**:

**PETER MARQUAND**
**(SITTING AS A DEPUTY HIGH COURT JUDGE)**

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**Between:**

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|---|---|
| **CAMILLA BONSOR** | **Claimant** |
| **- and -** | |
| **BIO COLLECTORS LIMITED** | **Defendant** |

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**David Sanderson** (instructed by **Pennington Manches Cooper LLP**) for the **Claimant**
**Simon Browne QC** (instructed by **DWF LLP**) for the **Defendant**

Hearing dates: dealt with on the papers

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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.

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MR PETER MARQUAND

***Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email, release to BAILII and publication on the Courts and Tribunals Judiciary website. The date and time for hand-down is deemed to be 10:30am on 20 April 2020.***

## Peter Marquand:

1. This Judgment concerns a dispute between the Parties over costs. On 20 March 2020 judgment on liability ('the Liability Judgment') was handed down following a two-day trial. The neutral citation number is: [2020] EWHC 669 (QB). I found that the Defendant's employee, Mr Rodrigues, drove his Renault Premium lorry negligently and caused the Claimant's injuries. The Defendant, having accepted vicarious liability for Mr Rodrigues is therefore liable to pay damages, which will be assessed, if necessary, at a later trial. I found no contributory negligence on the Claimant's part.

2. The Claimant also pursued allegations against the Defendant itself relating to three pieces of additional equipment, which she stated should have been fitted to the Renault Premium. First, proximity sensors, secondly, a Fresnel lens and thirdly, a speaker warning that the lorry was turning left (paragraph 20(l) of the Particulars of Claim). In opening the case, Mr Sanderson, for the Claimant, stated that the allegations relating to the proximity sensors and speakers were not being pursued because causation could not be established. The allegation concerning a Fresnel lens was pursued and I dismissed that part of the claim (see paragraphs 93 to 96 of the Liability Judgment). In those paragraphs I stated that: 'I found the state of the evidence on the Fresnel lens very unsatisfactory.' and I concluded that, on the evidence, the Claimant had failed to prove breach of duty or causation.

3. The Parties were able to agree an order following receipt of the Liability Judgment, apart from the Defendant seeking an issue-based cost order limiting its liability to 80% of the Claimant's costs. This was to reflect the Claimant's failure to prove the allegations pleaded at paragraph 20(l). This was disputed by the Claimant. The Parties agreed that I should determine this issue on the papers following receipt of written submissions.

4. I circulated a draft judgment to the parties on the morning of 23 March 2020 inviting them to submit a schedule of corrections of typographical errors. The Claimant responded substantively applying for permission to make further submissions. This was on the basis that there was a mistake of fact and a mistake of law in the draft judgment. In particular, first, that I had over assessed the amount of time taken up at the trial by the litigation of the Fresnel lens issue. Secondly, I had misstated the law in *J Murphy & Sons Limited v Johnston Precast Limited* [2008] EWHC 3104 (TCC).

### The legal position on reconsidering a draft judgment

5. The Parties are agreed that I have a discretion whether or not to receive further submissions and reconsider a draft judgement. I was referred to the notes in the White Book following CPR 40.2 and in particular to the cases of *Re Barrell Enterprises* [1971] 1 WLR 19, CA and *Re L (Children) (Preliminary Finding: Power to Reverse)* [2013] UKSC 8. In rejecting the need for exceptional circumstances derived from *Re Barrell*, at paragraph 27 Baroness Hale of Richmond JSC stated:

> "[The] overriding objective must be to deal with the case justly. A relevant factor must be whether any party has acted upon the decision to his detriment, especially in a case where it is expected that they may do so before the order is formally drawn up. On the other hand, in *re Blenheim Leisure*

> *(Restaurants) Ltd*, Neuberger J gave some examples of cases where it might be just to revisit the earlier decision. But these are only examples. A carefully considered change of mind can be sufficient. Every case is going to depend upon its particular circumstances."

6. The situation here is different as it concerns a draft judgment. This situation is covered in the White Book at paragraph 40.2.1.2. I was specifically referred to *Egan Motor Services (Bath)* [2008] 1 WLR 1589 at paragraph s 50 and 51 where Smith LJ stated that it is only in the most exceptional circumstances that it is appropriate to ask the judge to reconsider a point of substance in a draft judgment. Examples of such circumstances were given. First, where the judge had not given adequate reasons for some aspect of the judgment. Secondly, where the judge had decided the case on a point that was not properly argued, or relied on an authority which was not considered.

**Discussion and decision on reconsideration**

7. In his original submissions on costs, Mr Sanderson, made a number of points in support of his argument that the issues in paragraph 20(l) made a negligible influence on the quantum of the Claimant's and Defendant's costs. In particular, he argued that the trial was not lengthened by the issue of the Fresnel lens and the case would have required 2 days of court time in any event. Mr Browne submitted that the Fresnel lens issue extended the preparation and trial time and that the 'majority of the (not inexpensive) evidence of the experts was devoted to the Fresnel lens issue.' Mr Browne did not make any submissions on how I should reach a conclusion on what proportion of the costs were attributable to the Fresnel lens issue.

8. In the draft judgment I stated 'The vast majority of the evidence given on the second day of trial by the 2 experts related to the issue concerning the Fresnel lens. In the event of that issue had not been pursued Mr Sanderson's opening would have been shorter and taking it in the round, I consider that the trial would have been completed within one day.' I also used the front sheet of the precedent Hs in the trial bundle to reach a conclusion that 50% of the trial costs were attributable to the Fresnel lens issue and that represented, when taken with trial preparation costs, 8% of the Claimant's total costs as claimed.

9. Accompanying his further submissions, Mr Sanderson provided an analysis prepared by his pupil which records the timing of sittings during the 2 days and the events that were taking place. A column is headed 'approximate time spent on issue of Fresnel lens.' According to those figures the court sat for approximately 510 minutes and approximately 80-85 minutes was spent on the issue the Fresnel lens.

10. Mr Sanderson's submission on this issue was that my conclusion was plainly wrong on the facts. The draft judgment was founded upon my assessments that first, the trial would have concluded a day early and secondly, on the amount of time spent by the experts on the Fresnel lens issue on day 2. Mr Browne's submissions were that the Claimant had become hidebound by the timetable of the trial. The length of trial was one factor relied on in the draft judgment, a substantial part of the evidence on day 2 was on the Fresnel lens and the Court's conclusion was correct.

11. There is a significant difference between my estimation of 50% of trial time being occupied by the Fresnel lens issue and the 17% (rounded up) from the analysis in the note from Mr Sanderson's pupil. The analysis in the draft judgment of the proportion of costs that the Defendant was to pay the Claimant was not solely based on the percentage. However, I will consider Mr Sanderson's further submissions on this point in order to deal with the case justly as first, there is significant difference between the estimations of trial time, even though it is only one consideration. Secondly, my use of the percentage figures was not something on which I had received submissions. I conclude that these amount to exceptional circumstances.

12. Mr Sanderson in his further submissions made a number of points on why I had misstated the law in *Murphy*. Mr Browne submitted that the Claimant's reliance on the dicta of Mr Justice Coulson (as he then was) in *Murphy* as an overriding authority was overly dependent to the exclusion of other factors. To some extent, Mr Sanderson's further submissions on *Murphy* are related to his further submissions concerning the percentage of court time. On the one hand, Mr Sanderson's further submissions may be seen as an attempt to re-argue a point. On the other hand, they may be read as a request for further reasons. I will consider Mr Sanderson's further submissions in the context of providing further reasons for my conclusion and because they are related to the issue at paragraph 11 above.

13. I reiterate, as is made clear in the authorities, this is an exceptional course of action, based on the particular circumstances arising in this case.

**The legal position on issue-based cost orders**

14. The Civil Procedure Rules (CPR) at Rule 44.2 set out the relevant provisions:

> "44.2— Court's discretion as to costs
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> (1) The court has discretion as to—
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> (a) whether costs are payable by one party to another;
>
> (b) the amount of those costs; and
>
> (c) when they are to be paid.
>
> (2) If the court decides to make an order about costs—
>
> (a) the general rule is that the unsuccessful party will be ordered to pay the costs of the successful party; but
>
> (b) the court may make a different order.
>
> …
>
> (4) In deciding what order (if any) to make about costs, the court will have regard to all the circumstances, including—
>
> (a) the conduct of all the parties;

(b) whether a party has succeeded on part of its case, even if that party has not been wholly successful; and

(c) any admissible offer to settle made by a party which is drawn to the court's attention, and which is not an offer to which costs consequences under Part 36 apply.

(5) The conduct of the parties includes—

(a) conduct before, as well as during, the proceedings and in particular the extent to which the parties followed the Practice Direction—Pre-Action Conduct or any relevant pre-action protocol;

(b) whether it was reasonable for a party to raise, pursue or contest a particular allegation or issue;

(c) the manner in which a party has pursued or defended its case or a particular allegation or issue; and

(d) whether a claimant who has succeeded in the claim, in whole or in part, exaggerated its claim.

(6) The orders which the court may make under this rule include an order that a party must pay—

(a) a proportion of another party's costs;

(b) a stated amount in respect of another party's costs;

…

(f) costs relating only to a distinct part of the proceedings; and

….

(7) Before the court considers making an order under paragraph (6)(f), it will consider whether it is practicable to make an order under paragraph (6)(a) or (c) instead. [(6)(c) is not relevant]"

15. I was referred to the notes in the White Book at 44.2.7, 44.2.8 and 44.2.10 and a decision of Mr Justice Coulson (as he then was) in *J Murphy & Sons Limited v Johnston Precast Limited* [2008] EWHC 3104 (TCC). The Defendant was the successful party in a claim against it concerning issues over a contract and a burst water main. Mr Justice Coulson concluded that notwithstanding the Defendant being unsuccessful on all of its arguments it was not an appropriate case for an issue-based cost order or a percentage reduction. At paragraphs 6, 9 and 10 in particular the judge stated:

> "6. One of the advantages of the CPR, in the words of Lord Woolf MR in *A.E.I. Rediffusion Music Limited v Phonographic Performance Limited* [1999] 1 WLR 1507:
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> > "….is to require courts to be more ready to make separate orders to reflect the outcome of different issues. In doing this, the new Rules are reflecting a change of practice which has already started. It is now clear that too robust an application of the 'follow the event' principle encourages litigants to increase the costs of litigation, since it discourages litigants from being selective as to the points they take. If you recover all your costs as long as you win, you were encouraged to leave no stone overturned in your effort to do so."
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> …
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> 9. During the course of his helpful submissions, Mr Lewis took me to the decision of the Court of Appeal in *Fleming v Chief Constable of Sussex Police Force* [2004] EWCA Civ 643 in which the Court of Appeal tested the costs order made at first instance by asking themselves whether they felt "able to say that there was any discrete issue or matter pleaded which added sufficiently to the length of the trial to necessitate displacing the prima facie rule that costs should follow the event". He noted that this approach was followed by Beatson J in *Shore v Sedgewick Financial Services Limited* [2007] EWHC 3054 (QB). Mr Lewis submitted that, as a matter of principle, this was the question which the court had to ask itself in every case in which an issue-based costs order was sought.
>
> 10. I do not accept that submission. It seems to me that, in a case like this, where a Defendant has defeated the Claimant on contract terms, breach and causation, an issue-based costs order is inappropriate, so that the question posed in *Fleming and Shore* simply does not arise. In civil litigation it is almost inevitable that there will have been some point or argument, raised by the otherwise successful party but rejected by the judge, which will have added to the length of the trial. In my view, the mere fact that the successful party was not successful on every last issue cannot, of itself, justify an issue-based costs order."

## The Parties' submissions

16. Mr Sanderson submitted that there needed to be a reason based on justice to depart from the general rule that the unsuccessful party will be ordered to pay the costs of the successful party. He submitted that justice was strongly in favour of the Defendant paying all of the Claimant's costs for a number of reasons relating to the conduct of the case by the Defendant. These included running a hopeless defence, refusing to make an interim payment, refusing to engage in the Rehabilitation Code, making a

part 36 offer to the Claimant of 20% of the damages and contesting and losing on primary liability and contributory negligence. Relying on *Murphy* he argued that just because the successful party was not successful on every last issue cannot of itself justify an issue-based costs order. He also submitted that an issue-based cost order was not appropriate for a number of additional reasons including: no dispute over the recommendation by relevant bodies of the equipment in paragraph 20(l) and that it was reasonable for the Claimant to raise the allegations. He also stated that the issues had a negligible influence on the quantum of the Claimant's and Defendant's costs and in particular the same amount of court time would have been required. Mr Sanderson also pointed to his opening note where he stated that the experts did not answer 2 questions in the joint statement, the second of which related to paragraph 20(l). If the experts had answered those questions, there would have been no need for them to attend trial and he said the reason those questions were not answered was because of the Defendant's conduct in not co-operating with attempts to have them answered.

17. For the Defendant, Mr Browne's submissions were that the Defendant sought a reduction in the Claimant's costs to 80% (or such sum as the court deemed fit) based on the Claimant being unsuccessful on the allegations in paragraph 20(l). He made the point that the effect of those allegations, if proven, would have been felt throughout the industry. He submitted there was a good reason to depart from the general rule and the conduct of the Claimant was relevant. A proportion of the costs should be awarded to the Claimant, given the wasted time and cost of pursuing the failed allegations, in particular because they were a distinct part of the proceedings. The court had a discretion to order that a party pays a proportion of another party's costs, which was a broad-brush exercise where detailed analysis of court time and documents may be of little assistance. Mr Browne pointed out the late stage at which some of the allegations were abandoned and that this caused the Defendant to incur costs. It was for the Claimant to prove her case and he pointed out the Defendant produced the Dodd Report (see the Liability Judgment) for the purposes of cross examination. The Fresnel lens issue extended trial time and preparation time and he pointed to the comments in the Liability Judgment at paragraphs 86 to 94, the conclusion of which I have referred to at paragraph 2 above.

## The approach to an issue-based costs order

18. In the draft judgment in answer to the question: 'Do the allegations in paragraph 20(l) represent a discrete issue?' I stated that: 'There is no dispute that the Claimant was the successful party overall. Notwithstanding, I have to consider whether the Claimant was unsuccessful on a discrete or circumscribed issue.' Further on in the draft judgment, as part of the determination of whether it was 'appropriate in all the circumstances, not to award the Claimant the costs of the issue?' I asked myself the question posed in *Fleming* and quoted in *Murphy*: 'am I able to say that there was any discrete issue or matter pleaded which added sufficiently to the length of the trial to necessitate displacing the prima facie rule that costs should follow the event?'

19. Mr Sanderson submits this was the wrong approach and that at Paragraphs 9 and 10 of *Murphy* Mr Justice Coulson specifically rejected a submission that the court had to consider whether to make an issue-based costs order in all cases where the successful party had been unsuccessful on a discrete issue. He stated that Mr Justice Coulson was clear that, after a party had been successful at trial, an issue-based costs order

would not usually be made, even if the points on which the Claimant had been unsuccessful had increased length of the trial.

20. Mr Sanderson stated that relying on the judgment of Mr Justice Coulson in *Murphy*, the editors of the White Book summarise the position at law in proposition 4 of at the conclusion of section 44.2.10 (p1364 of the White Book):

> "4. There is no automatic rule requiring an issue-based cost order in the form of a reduction of a successful party's costs if he loses on one or more issues (HLB *Kidsons v Lloyds Underwriters* [2007] EWHC 2699 (Comm); [2008] 3 Costs L.R. 427 (Gloster J) at para.10). The mere fact that the successful party was not successful on every last issue cannot, of itself, justify an issue-based costs order (*J Murphy & Sons Ltd v Johnson Precast Ltd (No.2)* [2008] EWHC 3104 (TCC); [2009] 5 Costs L.R. 745 (Coulson J) at para.10)."

21. Mr Browne distinguished the present case from *Murphy* as it was not one where the Claimant succeeded on some allegations of negligence and failed on others. The wholly separate allegations against the Defendant itself (as opposed to those based on vicarious liability) were quite distinct.

22. There is no application that the Claimant pays the Defendant's costs of defending the paragraph 20(l) allegations. The issue is whether the Claimant should be deprived of a proportion of her costs of bringing the allegations. There are a number of the parts of the notes in paragraph 44.2.10 which are relevant that I was not referred to and given Mr Sanderson's submissions it is now necessary for me to set them out:

    i) Based on an analysis of the Court of Appeal in *Johnsey Estates (1990) Ltd v Secretary of State for the Environment* [2001] EWCA Civ 535; [2001] L. & T.R. 32, CA, and *Summit Property Ltd v Pitmans* [2001] EWCA Civ 2020; [2002] C.P.L.R. 97, CA the notes state that amongst other matters the judge '(a) may make different orders for costs "in relation to discrete issues", and (b) should consider doing so where a party has been successful on one issue but unsuccessful on another issue… (3) It was no longer necessary for a party to have acted unreasonably or improperly before he can be required to pay the costs of the other party of a particular issue on which he (the 1st party) has failed...'

    ii) There are two aspects to the policy objectives behind the issue-based approach to costs. First, breaking down issues which make up litigation means the court has to be prepared to make different orders for costs in relation to different issues. Secondly, a change in the approach that costs should be treated as a whole and should follow the event to support the conduct of litigation in a proportionate manner and to discourage excess. This note also refers to *Rediiffusion* and the quote from Lord Woolf at paragraph 15 above.

    iii) In referring to 'a modern industry' relating to issue-based costs orders the notes state: 'Routinely, judges approach the matter by asking themselves 3 questions: first, who has won?; secondly, has the winning party lost on an issue which is suitably circumscribed so as to deprive that party of the costs of

that issue?; and thirdly, is it appropriate in all the circumstances of the individual case not merely to deprive the winning party of its costs of an issue in relation to which it is lost, but also to require it to pay the other side's costs? (*Hospira UK Ltd v Novartis AG* [2013] EWHC 886 (Pat) (Arnold J).'

iv) 'Criticism has been made of "a growing and unwelcome tendency" by first instance courts and by the Court of Appeal to depart from the "starting point" of the general rule "too far and too often" (*Fox v Foundation Piling Ltd* [2011] EWCA Civ 790; [2011] C.P. Rep. 41, CA, at para.62, per Jackson LJ). That criticism applies principally to departures from the general rule by the adoption of an issue-based approach.'

v) There are 4 further propositions set out at the end of the note in the White book in addition number 4, referred to by Mr Sanderson. The 3rd proposition is not relevant to the issues raised by Mr Sanderson. The 1st proposition makes it clear that the rules themselves impose no requirement for an issue-based costs order only to be made in a 'suitably exceptional case'. There needs to be a reason based on justice for departing from the general rule and the extent to which costs of a particular issue are to be disallowed should be left to the evaluation and discretion of the judge, 'by reference to the justice and circumstances of the particular case.' The 2nd proposition is that the reasonableness of taking failed points can be taken into account and the extra costs associated with them should be considered. The 5th proposition is that the courts recognise in any litigation, including personal injury litigation that any winning party is likely to fail on one or more issues in the case.

23. I reject Mr Sanderson's submission that it is wrong to ask if the issue on which the party lost was a discrete issue. There must be an issue or else there could not be an issue-based costs order. The authorities referred to in the White Book refer to it as a discrete issue. A discrete issue is distinct from 'an issue'. For example, the Claimant in this case made 11 allegations of negligence against the driver, they might all be described as 'issues'. However, the allegations overlapped and were not discrete issues as they all related to the driver and his driving. If the Defendant's application were in relation to those issues, I would have rejected it. Identification of the discrete issue is also an aspect of the approach suggested as routine in the White Book (see paragraph 22(iii)) and consistent with the policy objectives to which the White Book refers. It is also consistent with limiting the departure from the starting point, as issue-based orders will only apply where there is a discrete issue. It does not however, follow that just because a discrete issue has been identified that an issue-based costs order should be made. As the 4th proposition and authorities state, such an order is not automatic.

24. I also reject Mr Sanderson's submissions on *Murphy* to the extent that the test in *Fleming* is not to be followed. First, *Fleming* is a Court of Appeal authority and I have not been told why I am not bound by it. Secondly, *Murphy* bears some close analysis.

25. The submission Mr Justice Coulson rejected was: 'as a matter of principle, [the test in *Fleming*] was the question which the court had to ask itself in every case in which an issue-based costs order was sought.' Mr Sanderson has changed this to: 'a submission

that the court had to consider whether to make an issue-based costs order in all cases where the successful party had been unsuccessful on a discrete issue.'

26. Mr Justice Coulson having been referred to the case of *Fleming* and the test which it contains, concluded at paragraph 10 of *Murphy* that 'in a case like this' an issue-based cost order was inappropriate. What sort of case was it? Previously at paragraph 8 the judgment stated: '…there is no difficulty in identifying [the defendant] as the successful party. The claimant recovered nothing and lost each of the significant issues (as to contract terms, breach and causation in fact and law) along the way.' It was an 'all-or-nothing case.' Mr Justice Coulson concluded by analogy to other cases to which he had been referred, that it was not an appropriate case for an issue-based costs order. Those other cases had significant elements where the relevant party had lost and there was a difficulty in identifying the successful party.

27. Mr Justice Coulson went on, nevertheless, to consider the application of the test in *Fleming* in the subsequent paragraphs. Although framed in the context of the application of the test in *Fleming*, they make it clear that there were no discrete issues in *Murphy*. At paragraph 12 Mr Justice Coulson deals with the Claimant's submission on the two issues on which it was said the Defendant was unsuccessful. First, the argument as to the existence of a contract and secondly, an issue about 'alkaline attack.' As to the first issue at paragraph 13 Mr Justice Coulson stated: 'I am in no doubt that it would be wrong to characterise the contract/no contract issue as an issue in its own right which had a significant effect on costs…the [Defendant's] argument that there was no contract was part of a much wider series of contentions designed to demonstrate that [the Defendant] owed no fitness for purpose obligation to the [Claimant]..' As to the second issue at paragraph 15 Mr Justice Coulson makes it clear that the argument concerning the alkaline attack was part of the overall argument on which the Defendant was ultimately successful. It is evident that the conclusions were that the matters on which the Defendant was unsuccessful were not discrete issues. Nor did the issues analysed add materially to the length of trial.

28. The statement in the last sentence of paragraph 10 of the judgment is: 'In my view, the mere fact that the successful party was not successful on every last issue cannot, of itself, justify an issue-based cost order.' In *Murphy*, the case arose out of a claim for breach of contract and although the defendant was not successful in all of its arguments, those issues where not discrete. The claimant had lost on all the significant issues. In those circumstances, the key was that the 'mere fact' of being unsuccessful on some of the issues was not enough to justify an issue-based costs order. There needed to be more to justify an issue-based order.

**Do the allegations in paragraph 20(l) represent a discrete issue?**

29. On the basis of my analysis, I consider the above question. There is no dispute that the Claimant was the successful party overall. Notwithstanding, I have to consider whether the Claimant was unsuccessful on a discrete or circumscribed issue. The allegations at paragraph 20(l) were pursued against the Defendant in its own right, as opposed to as a matter of vicarious liability. In relation to breach of duty there was no overlap with the evidence concerning the other allegations. The evidence on causation overlapped with the other allegations on which the Claimant succeeded. The Claimant would have recovered 100% of her losses even if she had been successful on the paragraph 20(l) issues alone. They added nothing to the quantum of the claim.

However, in contrast to the position in *Murphy*, those allegations related to a distinct and separate set of circumstances, namely the absence of warning equipment and were pursued against the Defendant in its own right and upon which the Claimant was unsuccessful. I am satisfied that paragraph 20(l) represented a discrete issue, namely, the failure to have additional safety equipment, as opposed the negligence of the driver.

**Is it appropriate in all the circumstances, not to award the Claimant the costs of the discrete issue?**

30. In any case, CPR 44.2(4) requires all the circumstance of the case to be taken into account including the conduct of the parties and that includes CPR 44.2(5)(b) and (c). It was reasonable for the Claimant to raise the allegations in paragraph 20(l) in the sense that, at first sight, they appear to be issues worthy of determination. However, as I stated in the Liability Judgment the Claimant's evidence was in an unsatisfactory state and insufficient to prove the allegations. It was not reasonable to pursue those allegations on the basis of the evidence presented at trial, despite what Mr Sanderson submitted about the experts' agreement on relevant bodies recommending the use of the equipment to which they refer. This is a feature in favour of not awarding the Claimant the costs. I reject any criticism that is made of the Defendant in relation to the state of the evidence, as it is for the Claimant to prove her case. The complaints Mr Sanderson makes about the Defendant's conduct in contesting liability for the driver and the weakness of the defence, whilst indicative of the Defendant's conduct in relation to the other allegations, add little to my consideration in relation to the unsuccessful allegations. I also do not accept Mr Sanderson's submission that if the experts had addressed the 2 questions in the expert agenda that they would not have been required at trial. As Mr Browne says, this was a significant issue for the industry as a whole and it is likely that pursuing these issues meant that the experts were going to be giving evidence on them. Furthermore, 2 of the allegations in paragraph 20(l) were abandoned at a very late stage. Mr Sanderson says in his written submissions that this occurred once the Claimant was clear that she could not establish causation and in particular as the Court found because the Defendant driver had negligently failed to indicate the turn, until he had already committed to his manoeuvre. I do not accept that submission, the Claimant could have reached that conclusion at an earlier point, not least at the time of the experts' joint statement. These are features in favour of not awarding the Claimant the costs.

31. Mr Sanderson complains that the Defendant's part 36 offer was inadequate. As it has turned out that is true. However, I have no information on any offers made by the Claimant. Furthermore, the Defendant did not have a mechanism to dispose of the paragraph 20(l) allegations separately as the damage caused, if proved, was the same as with the remaining allegations. These features I treat as neutral on the question.

32. I also ask myself the question posed in *Fleming* quoted in *Murphy*: am I able to say that there was any discrete issue or matter pleaded which added sufficiently to the length of the trial to necessitate displacing the prima facie rule that costs should follow the event? The factual evidence was concluded early on the first day of trial. Mr Browne's submission and my recollection were that the significant issue on day 2 was the expert evidence on the Fresnel lens and this is consistent with my notes of evidence. However, Mr Sanderson's pupil's assessment gives a different quantitative analysis of time spent and although I do not accept it as being definitively accurate, I

accept that it is better evidence of the time spent on the Fresnel lens issue than my recollection. As stated above (paragraph 11), this indicates that approximately 17% of the trial time was spent on the Fresnel lens issue, which equates to £4,425 (rounded up) of the trial costs based on the sums claimed for that phase in the Claimant's precedent H[1]. This is a significant increase in trial time, or put another way a material increase in trial time, that has incurred increased costs and leads me to answer the question as: 'yes.' This is a feature in favour of not awarding the Claimant the costs.

33. I bear in mind that there is no automatic rule that the Claimant's costs should be reduced. Furthermore, it is necessary to take into account all the circumstances, including those I have referred to from paragraph 31 onwards. These are circumstances that take the case outside the 'mere fact' that the Claimant was not successful on every last issue. In doing so, I conclude it is appropriate to reduce the Claimant's costs, the reason based on justice for departing from the general rule is that time and costs would have been saved on preparation and trial, if these discrete allegations had not been pursued. I note in particular the comments of Lord Woolf MR quoted at paragraph 5 above and find them particularly relevant to the circumstances of this case.

34. Accordingly, I find that this is a case in which an issue-based cost order may be made. However, it is necessary for me to consider, before making any such order, whether it is practicable to make an order that the Claimant receives a proportion of her costs (CPR 44.2 (7)). Making an issue-based order in this case may lead to difficulties on any detailed assessment in disentangling the costs, in particular as they relate to causation. It is therefore appropriate to consider whether or not an award of the proportion of the costs is practicable.

**Is an award of a proportion of the costs practicable?**

35. In light of Mr Sanderson's further submissions, it is necessary to expand upon the law in this area looking at the submissions that Mr Browne made concerning the exercise being a broad-brush one and the cases referred to in the notes in the White Book paragraph 42.2.8. In particular *Sycamore Bidco Ltd v Breslin* [2013] EWHC 583 (Ch) Mr Justice Mann stated:

> "Having indicated that I would be minded to make an issue-based costs order in respect of the major issues on which the claimant lost, I am required by CPR 44.3(7) to consider making a proportionate order instead. I shall do so. Having said that, it is a difficult exercise. Assessing the court time involved in the various issues is a quasi-scientific way of starting on the activity, but it is less than wholly satisfactory because it is not necessarily a guide as to the pre-trial costs which, in this case, would be very significant. As more than one judge has said, the exercise has to be a broad brush one. Quasi-scientific exercises such as that carried out by the parties in relation to the trial timetable are only a starting point."

[1] £26,027 x 0.17

36. In *Budgen v Andrew Gardner Partnership* [2002] EWCA Civ 1125 the appellant was seeking an issued based order rather than a percentage reduction, a different situation to the one in this case. However, at paragraph 28 Lord Justice Simon Browne stated:

> "Of course, as the judge below expressly recognised, he himself was only able to make "a very broad brush" assessment of the costs attributable to the HIS issue. He cannot be forced, however, by the parties' failure to provide him with more precise information into making an issue-based order and he was not, of course, invited to adjourn for further information."

37. *Smithkline Beecham plc v Apotex Europe Limited* [2004] EWCA Civ 1703 was a patent case and the proportion of costs had to be decided after resolution of the substantive issues and Lord Justice Jacob stated:

> "*The impossibility of great precision*
>
> 27. Before turning to this particular case I should say something about this. Although an issue-by-issue approach is likely to produce a "fairer" answer and is likely to make parties consider carefully before advancing or disputing a particular issue, it should not be thought that it is capable of achieving a "precise" answer. The estimation of costs, like that of valuation of property, is more of an art than a science. True it is that one can measure certain things (such as pages of witness statements or transcript devoted to a particular issue) but they can only be indicia to be taken into account. It would be dangerous to rely upon them as absolutes. Indeed brevity of a document, or a cross-examination, may be the result of great care: was it Hazlitt who apologised for the length of a letter, excusing himself on the grounds that he had not enough time to compose it?
>
> 28. It follows that there is no "precise" figure of costs which, in theory with perfect measurement tools, one could reach. The best that can be achieved is an estimate which is necessarily going to be somewhat crude. The costs in this case are very great, reflecting the much larger sums at stake. We were told the total figure is about £8m for both sides all in (trial, appeal, interlocutory matters). This reflects the much bigger sums at stake for a top-selling pharmaceutical. Mr Watson pointed out that a 1% difference given to one side or the other could amount alone to £80,000. He is right, but that does not mean that anything like an accuracy of 1% can be achieved."

38. Mr Sanderson submitted that in relation to the Fresnel lens issue that there was absolutely no evidence that it occupied any significant time before trial. In relation to the other two direct allegations, which were not pursued, he submitted that there was no evidence, at all, that any significant cost was incurred on these issues pre-trial. These issues occupied a few lines only of the Claimant's expert report and the Defendant's expert's report did not deal with them. The Defendant served no witness

evidence addressing the allegations. The experts' joint statement mentioned the allegations in a single line to point out, correctly and uncontroversially, that the lens, sensors and warnings speakers were not required by law. The decision to abandon these two allegations was made, not because they lacked merit, but rather because it was not necessary to pursue them in the light of the evidence of the independent witness, which the Court accepted, that the driver did not indicate left until late in the manoeuvre. It is difficult to see how a decision not to pursue these allegations, which avoided unnecessary time being spent on them at trial, can be the subject of proper criticism from the Defendant.

39. Mr Browne submitted that the paragraph 20(l) allegations were made against a haulage company insured by a commercial vehicle insurer; the industry consequences of findings based on those allegations are accepted in the draft judgment. It was therefore a somewhat bold submission by the Claimant to analyse the written evidence to suggest the allegations did not add to the workload. It was a perfectly acceptable approach for the Defendant to take the stance that the Claimant proves her case on these topics. Two allegations were abandoned on the first day of trial. Given that the Fresnel Lens allegation remained alive it was quite obvious that the Defendant incurred time and effort to discredit it, and successfully so. That surely is sufficient evidence for the Court to be satisfied that time and expense was incurred in resisting all the allegations against the company, including those abandoned and the remaining issue contested at trial.

40. I find it is practicable to make an award of a proportion of the costs. One of the considerations in coming to the appropriate proportion is the amount of trial time that the Fresnel lens occupied. I note in *Sycamore* calculations relating to the trial timetable were referred to as the 'starting point.' I do not view it as appropriate to apply the 17% proportion identified above to the entirety of the Claimant's costs (any more than I viewed it appropriate to apply the 50% that I had concluded in my draft judgement). The experts had reached agreement on a number of points relating to the other issues in this case. This would therefore have increased the proportion of time occupied by the Fresnel lens issue at trial in comparison to the amount of time/cost it would have incurred in the case overall.

41. Looking at the 17% of trial costs as a proportion of the total costs claimed gives a figure in the region of 2% (rather than the 8% in the draft judgment)[2]. In the same way that it is not appropriate to rely solely in this case on the proportion of trial costs as a measure of the overall costs of this issue it is not appropriate to rely on this percentage either. This will be an underrepresentation of the total costs incurred and adds just over £200 to the proportion of trial costs. It is not realistic to suppose that this is an accurate measure of the costs incurred. What the percentage figures do provide, in this case, is extreme endpoints, in other words the appropriate proportion is likely to lie somewhere between those figures.

42. Mr Sanderson says there is no evidence upon which to base any assessment of the pre-trial costs of the two abandoned issues. This information is in the Claimant's control and I note the comment in *Budgen.* I am not invited to make an issue based order by the Parties, but similar considerations must apply in that I cannot be put in the position of making no award of a proportion on the basis that there is no evidence

[2] (£4,425/£231,348)*100

on which to base a conclusion, when that evidence is in the control of the party making that argument. There is also illogicality in Mr Sanderson's submission that it was reasonable to pursue these allegations, but at the same time to argue that so little time was spent on them that there was no impact on costs that would justify a reduction. Nevertheless, the evidence of the costs of the two abandoned issues and the Fresnel lens issue come from the fact that they are included in the pleadings, they formed a part of the expert agenda and they formed a part of the Claimant's expert report. I note that the Claimant's expert only dealt with the matters in 4 paragraphs, but he must have, at least, considered the Dodd Report and extracted and analysed the 3 tables to which he referred (see the comment in *Smithkline*). I can reasonably infer that advice must have been given to the Claimant by her solicitors and by counsel about the paragraph 20(l) issues and the prospects of success in relation to them. In addition, the manner in which the issue was pursued at trial is a relevant factor, not in terms of the time spent, but the seriousness with which the issue was pursued. That indicates time and costs will have been incurred in preparation. As the authorities above state, the exercise is a broad-brush one and has to be based upon the materials available to me. It is necessary to stand back and look at all the circumstances based on the evidence that I have referred to above in order to come to the view on an appropriate percentage. Standing back and looking at the case as a whole 10% is appropriate. This is a modest, but significant, percentage of the total costs. It is within the "boundaries" indicated by the percentage figures I have referred to above. Accordingly, I award the Claimant 90% of her costs.

## Conclusion

43. Following a trial on liability the Claimant succeeded in her claim against the Defendant, but was unsuccessful in relation to a discrete issue concerning allegations about the failure to have warning equipment fitted on the lorry that collided with her. I have concluded that the Claimant is entitled to recover 90% of her costs from the Defendant, with the 10% difference representing those costs attributable to the allegations on which she was unsuccessful.