



In the County Court at Liverpool

Case number G10LV303

Case number G08LV918

On Appeal from District Judge Jenkinson (Appeal No 59 of 2021):

BETWEEN

**(1) NATALIE TREVENA
(2) FREYA TREVENA
(3) HALLIE PARRIE
(4) ANDREA HEWITT**

Respondents/Claimants

and

VENOVA COMMUNITY INTEREST COMPANY LIMITED

Appellant/ Defendant

Before His Honour Judge Graham Wood QC

Hearing 20th May 2022

Mr Robert Marven QC (instructed by BLM Solicitors) for the Appellant

Mr Benjamin Williams QC (instructed by Hayes Connors Solicitors) for the Respondents

APPEAL JUDGMENT

Introduction

1. This is an appeal against the decision of the regional costs judge, District Judge Jenkinson on 12th July last year whereby he determined a preliminary issue in a detailed assessment in favour of the Respondents that they were not limited to the recovery of small claims costs in respect of their data breach claims.
2. Permission to appeal was granted by Her Honour Judge Sykes following an oral renewal on 9th November and an initial refusal on the papers by His Honour Judge Gregory.
3. The matter came before me for a full hearing on 20th May 2022 and I reserved my judgment having heard argument from both counsel for most of the day. Whilst it was not stated that there were significant points of principle involved in this case, with the value of the claims and the costs sought in the detail assessment proceedings being relatively low and ostensibly disproportionate to justify the instruction of Queen's Counsel on both sides, clearly the parties regard this as a matter of some importance and potentially impacting on other claims yet to be brought. However, I make it clear at the outset that where an appeal seeks to challenge a discretionary case management decision it is rarely appropriate for the county court level appeal judge to lay down guidance for future application, as each case will turn on its own merits.
4. My decision, therefore, will be focused on whether or not the learned district judge exceeded the reasonable bounds of that discretion or made an error of law or principle.
5. I will refer to the Appellant and Respondents respectively as Defendant and Claimants for ease of understanding.

Background

6. There were four separate claimants, or potential claimants, with a number of others waiting in the wings, in the potential data breach claim. They were Natalie Trevena, (NT) her daughters Freya (FT) and Hallie, (HP) and Andrea Hewitt (AH) who is not associated with that family. They were notified by the Defendant management company, which appears to be responsible for the relevant GP surgeries, that an employee had obtained unlawful access to sensitive information in their computerised medical records without the consent of the data controller. This gave rise to data breaches which entitled the identified individuals to seek damages under the Data Protection Act 1998. The Claimants involved solicitors who sent letters of claim on behalf of each in early June 2020. These have been scrutinised during the course of counsels' arguments, and I shall refer to them in a little more detail below.

7. Immediately following the letters of claim, settlement offers were made in the respective sums of £2000, (NT) £1750, (FT) £1500 (HP) and £1750 (AH) purportedly pursuant to CPR Part 36. At the time the Defendant was not represented, but acting through an insurance claims handler, and included in the offer letter was the following paragraph for each claimant:

“... This offer is intended to have the consequences of section 1 part 36. The relevant period for the offer is 21 days from the deemed date of service within which the Defendant will be liable for the claimant’s costs in accordance with rule 36.13 or 36.20 if the offer is accepted.”

8. The offers were accepted by return and in doing so on behalf of three of the Claimants (NT, FT, and HP) their solicitors wrote, on 24th June 2020 in these terms:

“... The settlement is conditional upon payment of our client’s damages within 21 days and payment of our client’s reasonable legal costs on the standard fast track basis to be subject to a detailed assessment if not agreed”.

9. On behalf of AH a similar letter was written, but instead of using the formula “standard fast track basis” reference was made to reasonable costs on the “standard basis”.

10. The court has not been made privy to the correspondence between the parties following this acceptance and the commencement of Part 8 costs proceedings. It is plain that there was no agreement in relation to costs, although not clear to what extent the points now raised on this appeal were the subject of discussion. The issues, however, became crystallised when a Notice of Commencement of Bill of Costs (N252) for each separate claimant was issued with the broken down itemised bill. The Defendant served its points of dispute identifying a number of areas of challenge, not least in relation to the quantum of the respective bills, but also disputed the proportionality of individual assessments with the commonality of costs in relation to the civil claims, and relied upon CPR 46.13 with the restriction of costs to small claims costs. The points of dispute also anticipated arguments from the Claimants’ solicitors in respect of the application of CPR 36 as precluding such a restriction and challenged proportionality.

11. The arguments which have been pursued before this court were presaged in the costs pleadings with both the points of dispute and the points of reply by the receiving party and were considerably detailed. It is unnecessary to set them out here, because they are addressed below ¹ although I observe that both sides were clearly anticipating that the result of the detailed assessment challenges would have an impact beyond what on any interpretation were simple and swiftly resolved data breach claims.

¹ See paras 33ff

12. When the detailed assessment came on for hearing, DJ Jenkinson decided that some of these issues should be resolved on a preliminary basis, and he made the determination of costs recoverability not limited to the small claims track, which is the subject of this appeal, providing further directions for the balance of the detailed assessment. Obviously that detailed assessment has now stalled pending the result of this appeal.

13. There are a number of other claims waiting in the wings (approximately 17 in total) which it is assumed will eventually be resolved, but in respect of which I understand offers have yet to be made.

The judgment of District Judge Jenkinson

14. At the outset, the judge addressed two arguments which had been pursued by the Claimants which were said to restrict the court's discretion in limiting costs to the small claims track (SCT). He observed that the first of these was not pursued "with vigour" by Mr Pilling, counsel for the Claimants, which was to the effect that the acceptance of an offer under Part 36 precluded the exclusion of costs recovery, or made it limited to Part 27 (SCT) costs. The judge expressed himself satisfied that he had the power under Part 46.13 and the associated practice direction. The second was that this species of claim required issue in the Media and Communications list in the High Court in London, regardless of the financial value of the case. It was noted during the hearing that High Court issue was permissive rather than mandatory, and that such claims could be issued in the County Court. District Judge Jenkinson then proceeded on the basis that had the claims been issued in the High Court, a master would have transferred them to the County Court by reference to their value, as it would otherwise have been a disproportionate use of High Court resources. Accordingly District Judge Jenkinson was satisfied that the position would have been the same, and that he was required, pursuant to CPR 46.13, to have regard to the matters set out in CPR 26.8 and he proceeded to address the several factors in that sub-rule.

15. The first of these was financial value. Whilst noting that all claims settled within the small claims limit, the judge made this comment in respect of potential psychiatric evidence:

".....if, at allocation stage, a claimant was given permission to rely upon psychiatric evidence, it is unlikely, in my judgment, that unless the expert was not prepared to attribute any injury to the data breach complained of, the general damages, having regard to the Judicial College guidelines to which I have been referred, would have fallen below the requisite £1,000, above which, of course, allocation to the small claims track would be unlikely."

In other words some, if not all the claims had the potential to involve a personal injury element.

16. In respect of the remedy, factor (b) it was noted that as well as damages, a claim for declaratory relief had been sought under the GDPR and the HRA / ECHR, which were unusual features for the small claims track.

17. The learned judge did not find any likely complexity of the facts, or evidence, when addressing factor (c) save in two respects. The first of these was that whether or not the claim had been issued in the High Court or the County Court, the Media and Communications pre-action protocol applied which was detailed and relatively technical, and although it envisaged the possibility of claims by litigants in person it was acknowledged that without representation full compliance with the protocol was difficult. The second was the possibility of anonymisation, which was potentially complex and could not be achieved by consent. He remarked on the Defendant's position as advanced by their counsel that this had been an internal data breach making an application for anonymity unlikely, but went on to say this at paragraph 15 of his judgment:

"...But, of course, the anonymity order is to protect the privacy of the claimants in the context of what would otherwise be public litigation. I can see why an anonymity order may well have been applied for when claimants, including infant claimants, had their medical records wrongly scrutinised, and that would be a matter out with the small claims track."

18. In dealing with factor (d), at paragraph 16, the number of parties or likely parties, this was considered to have no application or relevance, and a similar consideration applied in relation to (e), the value of any counterclaim.

19. In respect of (f) which required a consideration as to the amount of oral evidence involved in the claim, the learned judge considered that the admission of a breach made it unlikely that this would have been extensive.

20. In considering factor (g), the importance of the claim to non-parties, and the wider public interest in the investigation of potential breaches of confidentiality, the judge accepted that the breach in question had been reported and no action taken, and went on to consider that the settled claims were potentially test claims. At paragraph 21 he remarked:

"But there is more weight, it seems to me, in the submission made by Mr Pilling, that these were potentially test claims. There are, I am told, a large number of claims waiting in the wings. If, at allocation stage, the court was informed that there were potential issues to be determined here that would narrow the issues and possibly avoid litigation in related cases that were being held back pending the outcome of this case, that is a factor that the court is likely to have taken into account in the allocation process."

21. He discounted factor (h) as being of any relevance, and in relation to the final factor (i) the learned judge referenced the overriding objective and the potential for inequality between the parties because of the Defendant's professional representation. His comments are pertinent:

“23.....If this matter was to be allocated to the small claims track, with the consequential inability to recover costs, what the Defendant is effectively saying is that these claims could have been pursued by the claimants and litigant friends as litigants in person.

24.....But there are complexities in these cases where there are potential anonymity orders sought, there are different limitation periods that apply, and there are declarations sought. It seems to me that in ensuring that the parties are on an equal footing, there is a risk the parties would not be if litigants in person are forced to go into battle in the small claims track arena against the represented Defendants.”

22. In other words, applying a broad brush and considering some of the previous factors in the context of the circumstances of the parties the learned judge was giving weight to the need for representation on the part of the Claimants.

23. In paragraph 25 he summarised this assessment in these terms:

“25. Stepping back and looking at all of the matters in CPR 26.8 as a whole..... I am satisfied that on balance the issues are such that this matter would not have been allocated to the small claims track, and that the likely allocation would have been the fast-track. It follows, therefore, that I am not persuaded, on a balance of probabilities, that the claimant ought to be limited to Part 27 small claims track costs.”

The grounds of challenge and Respondent's Notice

24. There are three grounds of appeal pursued by the Defendant and in respect of which permission to appeal has been granted. The first of these challenges the exercise of discretion in not limiting the claims to small claims costs or the making of errors of law and/or principle. The second expands on this and asserts that there were factors not taken into account or given inappropriate weight in the overall balance of the judge's discretion, namely immediate acceptance below the small claims limit, that they were claims of little complexity, the number of parties, the absence of any counterclaim, and the need for limited if any oral evidence. In other words these were factors which should have been persuasive. In respect of the third ground, the challenge is to those factors which the judge did find persuasive, namely that these might be personal injury claims, the nature of the remedy sought, the prospect of anonymity orders being sought, and the potential test claim nature of the claims.

25. It seems to me that all these challenges are effectively criticisms of the balancing exercise which the learned judge undertook and the respective attribution of weight to the 28 (6) factors, although it is said that they amount to errors of principle.

26. The Claimants provided a Respondents' notice. It was drafted by Mr Williams QC, who has appeared on their behalf on this appeal. It was asserted that the decision of the district judge should be upheld for additional reasons than those provided in his judgment. First of all, reference was made to the basis on which the offer been accepted, namely that costs should be paid on the fast track standard basis, which either provided a binding matter

of contract, or alternatively was a consideration germane to the exercise of the court's discretion. Second, damages for distress which were allowable under the GDPR and the 2018 Act amount to damages for personal injuries, a factor relevant to the judge's finding that these were PI claims that were being pursued. Third, in relation to the group of three claimants who belonged to the same family, NT had expressly intimated a claim for aggravation of a pre-existing anxiety condition, and had a reasonable expectation of damages for personal injury exceeding £1000. As she was the mother of the other two claimants, these would have been grouped together (FT and HP) in a single action which would have been allocated to the fast track. Fourth, even if the claim should have been allocated to the SCT on a hypothetical basis there was a discretion which would have led to an award of costs in excess of the small claims track costs for the reasons already referred to by the judge. Finally the need for the obtaining of at least initial legal advice would have justified the recovery of pre-allocation costs on a conventional rather than a small claims track basis.

Applicable law

27. The starting point is CPR 36.13 which deals with the costs consequences of accepting a Part 36 offer. This provides:

'(1) Subject to paragraphs (2) and (4) and to rule 36.20, where a Part 36 offer is accepted within the relevant period the claimant will be entitled to the costs of the proceedings² (including their recoverable pre-action costs) up to the date on which notice of acceptance was served on the offeror.....
(2)
(3) Except where the recoverable costs are fixed by these Rules, costs under paragraphs (1) and (2) are to be assessed on the standard basis if the amount of costs is not agreed.'

28. On the face of this provision, it might be thought that there was an automatic entitlement to costs, including pre-action costs, other than in the limited circumstances prescribed, and that in the absence of the claim being a small claims track claim there could be no further restriction or conclusion. However there is a specific provision which has been central in this case which affords the court a discretion in the event of non-allocation, in CPR 46.13 (3), which provides:

'(3) Where the court is assessing costs on the standard basis of a claim which concluded without being allocated to a track, it may restrict those costs to costs that would have been allowed on the track to which the claim would have been allocated if allocation had taken place.'

29. Some elaboration is provided in the associated practice direction.

'8.2 Where a settlement is reached or a Part 36 offer accepted in a case which has not been allocated but would, if allocated, have been suitable for allocation to the small claims track, rule 46.13 enables the court to allow only small

² My emphasis

claims track costs in accordance with rule 27.14. This power is not exercisable if the costs are to be paid on the indemnity basis.’

30. CPR rule 26.8, which deals with matters relevant to track, as a checklist of matters to which the court should have regard when deciding allocation (the list to which the judge directed himself in this case):

- (1) When deciding the track for a claim, the matters to which the court shall have regard include –
- (a) the financial value, if any, of the claim;
 - (b) the nature of the remedy sought;
 - (c) the likely complexity of the facts, law or evidence;
 - (d) the number of parties or likely parties;
 - (e) the value of any counterclaim or other Part 20 claim and the complexity of any matters relating to it;
 - (f) the amount of oral evidence which may be required;
 - (g) the importance of the claim to persons who are not parties to the proceedings;
 - (h) the views expressed by the parties; and
 - (i) the circumstances of the parties.

31. The right to compensation for a data breach is derived from article 82 of the EU regulation (GDPR) at paragraph 1:

“1. Any person who has suffered material or non-material damage as a result of an infringement of this Regulation shall have the right to receive compensation from the controller or processor for the damage suffered.”

32. Non-material damage is qualified in section 168 of the 2018 Act in these terms under the subheading “remedies in court”:

“In Article 82 of the GDPR (right to compensation for material or non-material damage), “non-material damage” includes distress.”

Summary of respective arguments.

Defendants

33. Mr Robert Marven QC appeared on behalf of the Defendant appellants. He provided a skeleton argument which was supplemented with his oral submissions. It was accepted that this was an appeal against the exercise of a discretion, but his challenge involved an identification of errors of principle as well as the submission that the decision landed outside the generous scope of the judge’s discretion.

34. He invited the court to consider the context of the potential litigation which settled. The data breaches involved access only and remained internal, with only the employee who had carried out the searches implicated, the facts of the breach were straightforward and

immediately admitted with the Defendant informing the Claimants directly, lawyers were not involved when the offers were made within a very short time of notification, but the data breach was being handled by the Defendant's insurers, and as the judge observed, the individual claims settled well below the SCT level.

35. On the basis of the court's acknowledged jurisdiction under CPR 46.13 (3) to restrict costs where a claim had not been allocated, this was an obvious situation where there should have been a limit to small claims costs.

36. Mr Marven then proceeded to deal with each of the factors which were considered by the learned district judge, starting with the value of the claim, and here he was critical of his view that these were potentially personal injury claims, let alone PI claims which might have exceeded £1000. Section 168 of the 2018 Act allowed the recovery of compensation for distress, but it did not define it as an injury; it was merely a head of loss, and in the respective letters of claim it could have been noted that there was only vague *pro forma* wording used in relation to the emotional consequences, such as "upset and distressed" or "shock, distress and anxiety", which fall some way short of being a recognised psychiatric injury. He referred to the definition provided by the House of Lords in **McLoughlin v O'Brien [1983] 1 AC 410** in this regard. Whilst Mr Marven accepted that the Claimant NT, that is the mother of FT and HP did have a pre-existing mental health vulnerability, this did not enable the district judge to conclude that at the putative allocation permission would have been granted for psychiatric evidence. There was simply insufficient material to arrive at such a conclusion and it was wrong for the judge to speculate on what might have happened if the claims had not settled.

37. In respect of factor (b) the learned judge, it was submitted, should not have considered the potential remedy of declaratory relief as relevant so as to remove the claim from the small claims track. The touchstone for such relief in claims of this nature is whether it would be useful, and it is highly unlikely that it would have been granted bearing in mind the immediate admission by the Defendant, the acknowledgement of a data breach and the steps taken by the surgery. He relied upon **Financial Services Authority v John Edward Rourke [2002] CP Rep 14** to establish the principle that declaratory relief was only granted where it was considered appropriate, and upon **Aven & Others v Orbis Business Intelligence Limited [2020] EWHC 1812 (QB)** that if there was no point in making a declaration, the court will not make it.

38. Mr Marven submitted that although the letters of claim were extensive and detailed, they were largely formulaic, and the learned judge did accept that there was little complexity in the facts or the evidence. He took the court through the letters of claim to identify that substantial parts were *pro forma* and not individualised, and that letters of this nature are provided as part of an exercise for making the claims more complicated than they actually are. Accordingly, when considering factor (c) the focus was only whether the application of the pre-action protocol for media and communications claim was relevant and the potential

for an anonymity order. Mr Marven took the court to the protocol itself which he submitted was clearly intended to apply to those claims which are apt for the High Court (by reference to the media and communications list) which these were never going to be, and even in the High Court the involvement of a litigant in person is anticipated as indicated in paragraph 1.4 of the introduction.

39. In respect of anonymity, reference was made to paragraph 3.3 of the protocol, to which the district judge's attention had been drawn, and in relation to which he considered that a litigant in person (i.e. if the Claimants had been unrepresented) might struggle with the technicalities of the protocol by applying to dispense with the requirements of the statement of case and/or apply for anonymity. Mr Marven submitted that this was appropriate to privacy and breach of confidence claims, and there was no equivalent provision in respect of the requirements for a letter of claim in data protection claims, which supported his contention that an anonymity order was highly unlikely in such claims. He placed reliance on two authorities which confirmed the narrow scope of an anonymity order and the limited circumstances in which it might be granted, namely **Various Claimants v Independent Parliamentary Standards Authority [2021] EWHC 2020 (QB)** and **Khan v Khan [2018] EWHC 241 (QB)**. In the latter case it was confirmed that there were far less extreme instruments than anonymity orders, which were contrary to the principles of open justice, and which would protect the interests of a claimant, including some reporting restrictions and withholding information from publication in open court.³

40. The next matter which appears to have influenced the learned district judge, says Mr Marven was the possibility of these being test claims. Quite apart from the fact that they were simple in fact and in law and there was no need for a test decision to resolve the balance of any claims, it was noteworthy that in the points of reply, the Claimants had disputed that there were any common costs, and that should have been sufficient to dispose of the matter.⁴

41. The final factor taken into account, in the context of the circumstances of the parties, was the professional representation of the Defendants. It was submitted that this could never by itself justify a departure from the small claims track regime, because a party could effectively determine the track by choosing not to be represented.

42. Mr Marven responded to the submissions made on the respondent's notice and I shall summarise his argument below after dealing with the contents of the respondent's notice.

³ Para 95 (iii) of judgment

⁴ Reply to general point one, Bundle, page 83

Claimants

43. On behalf of the Claimants, Mr Ben Williams QC, as indicated, adopts as his primary position a defence of the reasons provided by District Judge Jenkinson for allowing costs on the standard basis. He reminded the court of the limited scope of the appellate review and that interference should only occur in the event of some vitiating error of principle or a decision which was effectively perverse.

44. In relation to the operation of the power of the court under CPR 46.13, he submitted that it provided a more comfortable fit in the hinterland of fast track and multitrack cases, but bearing in mind that the SCT did not allow the recovery of any costs at all, and the court was effectively undertaking an exercise of determining the *proportionality* of costs, the court in such circumstances should be slow to deny recoverability altogether. He referred to the decision of the Court of Appeal in **O’Beirne v Hudson [2010] 1 WLR 1717** where it was held that a costs judge had no power to vary a consent order and direct that costs should be assessed on the small claims track basis (where no costs are awarded) when there had been an agreement for standard basis assessment costs (analogous to the present situation following the early settlement), although he accepted that SCT costs were not necessarily precluded on assessment. CPR 46.13 was the codification of this approach, and did not contradict it.

45. He identified the key points which underlay the decision of the district judge, being the potential financial value, the nature of the claims, the protocols to which they were subject, the fact that they were part of a wider cohort of cases, and potentially asymmetric litigation.

46. In respect of the value of the claim, whilst the position of three claimants was specifically reserved in the pre-action letter, a PI claim on behalf of NT was expressly intimated on the basis of the exacerbation of a pre-existing anxiety disorder. It did not follow that the other claims might not have had similar PI aspects, simply because no medical evidence would have been obtained, and in any event the claims of FT and HP would have been linked to those of their mother, and on the same claim form, (acknowledging, however, that this was not a matter specifically relied upon or mentioned by the district judge). In any event, the judge was only saying that these *might* have been PI claims, not necessarily that they would have exceeded the PI limit. This was not an irrelevant factor for the judge to take into account, submitted Mr Williams, when considering the balancing exercise undertaken. Further, personal injury damages claims by their very nature required legal advice for the working out of quantum.

47. It was submitted that during the course of the argument before the district judge there was no dispute that the protocol applied, as paragraph 11 of his judgment confirmed, and there was no basis for the Defendant’s contention that it was limited to High Court claims.

The protocol applied regardless of where the claim started, and it was relatively technical giving rise to potential problems of compliance for litigants in person, a factor which clearly influenced the judge.

48. Anonymity, submitted Mr Williams, was but one of the features to which reference was made, but it could not be said that the judge placed excessive weight on the prospect of an application; his point was simply that it is a matter which the Claimants might have wanted to consider in conjunction with privacy.

49. In relation to the possibility of test claims, a factor taken into account by the judge at paragraph 21, there is every reason to suppose that if the instant claims had not been settled, they would have been managed together.

50. In dealing with the final matter, “all the circumstances of the case”, the judge was effectively touching upon the asymmetry between the parties which may be a relevant consideration for allocation, on the application of the overriding objective. The essential question was whether there was a reasonable need for representation, notwithstanding the fact that the value of the claim fell within the small claims track limit, and the approach taken by the judge was consistent not only with the reasoning of the Court of Appeal in **O’Beirne v Hudson**,⁵ but also the more recent case involving the decision of Judge Keyser QC in **Elias v Blemain Finance Ltd [2021] EW Misc 14 (CC)**, where there had been issues of consumer credit law raised against commercial lenders.

51. Mr Williams’ secondary position is based upon his Respondent’s notice, where heavy reliance is placed upon the Defendant’s implied agreement to pay reasonable costs on the standard FT basis in three out of the four claims, and on a standard basis in the fourth.⁶ There are two principal points made. The first is that this gave rise to a contractual arrangement or context, because acceptance of the offer was made conditional upon the payment of those costs, and this should have precluded the Defendant pursuing any argument in relation to SCT costs; the second is that it was a matter which was highly germane to the exercise of the discretion in any event. Counsel pointed out that the correspondence was not drawn to the attention of the judge during the course of the first instance hearing. In support of this submission he relies upon the fact that the use by the Defendants of the Part 36 procedure to limit their exposure to any costs risk was inconsistent with the subsequent position adopted by them that there would have been SCT allocation, which carries with it no costs risk.

52. Applying the subsidiary test in **O’Beirne**, it is submitted that the Defendant could not show that it was unreasonable to incur legal costs in circumstances whereby the claimants

⁵ *Supra* para 44

⁶ NT, FT, HP. See paragraphs 7 & 8 above

were induced into a settlement and it would and should have been persuasive for the district judge on the exercise of its discretion if pursued as an argument before him.

53. Aside from arguments in relation to the basis of acceptance, Mr Williams QC makes three ancillary points. The first is that the compensable element for a data breach claim involves “distress” under section 168 of the Act. This is therefore statutorily derived rather than from common law but that does not preclude such a claim being one of personal injury damages within the meaning of the CPR. He refers to CPR 2.3(1) for the definition, which includes any impairment of a person’s “..... mental condition”. If substantial damages are awarded (i.e. other than a nominal sum) for such a state of mind this could only be on the basis that there had been such an impairment, and thus the statutory scope of such claims is enlarged within the data protection setting. Insofar as they were PI claims, by this process, it was the £1000 limit which became relevant for the purposes of SCT allocation.

54. The second is that CPR 46.13 (3) anticipates a discretion in the event that the court is of the mind that these would have been small claims track proceedings. In other words the judge was not bound to apply SCT costs, but *may* do, and taking into account all the circumstances, specifically the agreement to pay legal costs as well as the reasonableness of legal representation, it is a discretion which should be exercised in favour of the claimants.

55. Finally, and the ultimate fallback point relied upon by the Claimants, it would have been open to the court to apply 46.11(2) and consider disapplying the general rule if these had been small claims, by at least allowing the Claimants their initial legal costs, bearing in mind the complexities of data protection law, the asymmetric nature of the litigation and the initial advice which led to early settlement.

56. Mr Marven QC responded to the Respondent’s notice. He addressed the question as to whether distress amounted to a personal injury, and submitted that the concept of “impairment” had to be construed in accordance with the substantive law. He referred to the recent decision of the Court of Appeal in **Brown v Commissioner of Police for the Metropolis [2020] 1 WLR 1257**, in which Coulson LJ, when dealing with the application of QOCs in an action against the police where the claimant had only partially succeeded, and which included some PI elements and some which were not, remarked that it was trite law that distress, fear upset and other similar human emotions did not constitute personal injury. In the context of data protection damages, distress is compensated only because of the statutory reservation, and there cannot be a widening of the definition of impairment as suggested by counsel for the Claimants. In any event, if this had been a claim for personal injury, this should be in compliance with the low value protocol, which would have limited costs recovery to fixed costs.

57. In respect of the Claimants' reliance on the acceptance letters, and the points raised about contract or broader discretion, Mr Marven submitted that whilst in some circumstances new points can be raised on appeal, it was inappropriate in this case to do so, not least because there was no background evidence before the court as to whether these words meant anything. In any event, in terms of a contractual context they were meaningless, and if there had been an agreement to oust the power of the court there was a requirement for clear wording. It was incumbent upon the claimants in such circumstances to indicate through the solicitors that they were not accepting but making a counter offer. Part 36 was a rules-based code where contractual analysis was not appropriate.

58. Furthermore, said Mr Marven, reliance on the qualified acceptance had been developed by leading counsel for the Claimants in response to this appeal and played no part in the reply to the points of dispute, where it is expected that it might have been raised if valid. This was also germane to the question of the exercise by the court of its discretion. The relevant order from 11th November 2020⁷ directing a detailed assessment in the absence of agreement was not qualified and it did not restrict all the powers which were available to the court for the purpose of the assessment. This included the power under 46.13, which enabled the court to preclude the payment of costs in a non-allocated claim which would have been commenced in the SCT.

Discussion

59. First of all, I make some general observations.

60. Although the court has been presented with elaborate arguments from counsel in respect of the interplay between CPR 46.13 and the CPR 26.8 and the principles which might apply when considering the allocation of a claim to track, it seems to me that the judge's task in this case boiled down to a balancing exercise where he was arriving at an overall assessment after taking into account those matters which might be relevant *had* the claims proceeded beyond the early settlement stage. This in itself could not be detailed for reasons of proportionality not least because at a stage where formal proceedings had not been issued on the claims (as opposed to costs proceedings) the basis of those claim would only be known in outline and is bound to involve a degree of speculation and hypothesis. In this respect I am unable to accept a criticism that the judge was wrong to "speculate", if that implies that he was considering the likely course the litigation would have taken without a settlement. There was no alternative but to do this. Further, the process is a somewhat unusual one and there is an implicit broad discretion.

⁷ Bundle page 157

61. I agree with Mr Williams that the wording of 46.13 appears to require a two-stage process, the first of which is a consideration of the potential track to which the unallocated claim might have been allocated with considerations which go beyond the mere value of the claim because of CPR 26.8. This is discretionary analysis where the judge is required to consider those matters that are relevant and irrelevant, although there is a clear steer given by the nine subheadings. The second appears to be what is described as the “step back” discretion where a judge, even if deciding that the claim would have been allocated to a specific track, can make an order for costs which does not limit recoverability to the costs which would be awarded on that track. It is inevitable, however, that any judge is going to approach an assessment utilising his 46.13 power with a broad brush, giving primary effect to the hypothetical analysis of the likely track allocation had the matter proceeded and a situation in which he might depart from the consequence of that analysis is not obvious.

62. Where a judge is dealing with a number of factors in a checklist to determine which might be relevant and which might not, and the weight to be attached to each factor on the available material, inevitably there is a cumulative assessment undertaken. It cannot be a precise exercise, and on any appeal review it is not a helpful approach for the appellate court to be drawn into a determination as to the weight attached to individual factors, unless it is obvious that the first instance court has made a fundamental error of law or has taken into account matters which no reasonable tribunal would have considered relevant or of any importance. Ultimately the question for me is whether or not the learned district judge’s overall assessment, which is undoubtedly informed by the cumulative approach he has taken to the individual factors on the balancing exercise, was one which was outside the reasonable ambit of his broad discretion.

63. The third general observation is that it is clear in this case that not all the factors were considered to carry any weight, and whether the judge’s conclusion was correct in his overall assessment, there is no doubt that he carried out a careful evaluation which was comprehensive and proportionate against the background of all the issues which had to be determined.

64. The Defendant’s first criticism, and it seems to me the one pursued with the most force, relates to the potential value of these claims and in particular whether they carried personal injury elements. As I made plain to counsel during the course of the submissions, if these were statutory distress claims, i.e. the claimants were entitled to an element of damages which did not require specific proof or medical evidence, and which was attributable to the experience of having their private data accessed unlawfully, as opposed to potential personal injury claims, the court would have been required to consider the higher limit for SCT hearings. I do not accept the submissions of Mr Williams, which would require an extension of the definition of mental or physical impairment beyond that established by authority over very many decades, and in respect of which procedural rules have been carefully crafted to distinguish between those claims which are for personal injury and those which are not. The award of damages for a state of mind as a result of a wrongful act falling short of a

recognised personal/psychiatric injury has been acknowledged by several statutory provisions and of course can arise as an element in certain contractual situations. Although this is Mr Williams' additional point pursued by the Respondent notice, it is quite clear that the district judge was dealing with this as a potential personal injury claim which might be supported by medical evidence, and a broadening of the definition of personal injury was not in his contemplation.

65. I have already indicated above that the judge's analysis under CPR 46.13 will involve a degree of speculation because of the dearth of material available. In my judgment, however, there was sufficient available to him to enable a conclusion that the primary claimant, NT, might have been entitled to pursue a personal injury claim for the exacerbation of an anxiety condition. He did not need medical evidence to come to such a conclusion, and that it was enough for the assertion to be made. I did not agree with Mr Marven that this was not open to the district judge. It is inevitable that when claims settle at an early stage the parties will consider the "bird in the hand" advantage of a more modest sum of damages to avoid litigation, but considering the potential for the claim of NT, in my judgment it was a perfectly appropriate assessment that if this had been an allocation decision, a claim for psychiatric injury was more than just feasible, but was likely.

66. I agree that the potential claims of the two younger claimants were somewhat more unlikely, and it is difficult to see how a more robust younger person might have had any notable impairment of mental condition so as to qualify as a personal injury. It would have been preferable if the judge had sought to break down the potential claims, but the point is validly made that the two younger claimants FT and HP would have "piggybacked" on the claim of the mother, who would have been litigation friend, and even if specific personal injury claims were not pursued by them, there would have been a single action with three claimants. In this respect, in my judgment District Judge Jenkinson was entitled to regard the potential value of a potential personal injury claim exceeding £1000 and to attach weight to it as a factor.

67. The second challenge relates to the nature of the remedy, and the learned judge's reference to the possibility of declaratory relief being sought. I agree with Mr Marven on the basis of the authorities referred to that the Claimants were unlikely to have obtained declaratory relief and in the light of the admissions and early resolution, such relief would not have been considered useful. However here the point is simply made that the Claimants were *entitled* to seek declarations in relation to the data breaches. Again, the court has only the barest of material and it would have been inappropriate for the judge to embark upon extensive speculation as to the merits or demerits of a declaration prayer in any proceedings. Of course if the matter had not settled this would have presupposed, potentially, an absence of agreement as to the nature of the unlawful acts, or responsibility of the Defendants for the conduct of the person accessing the data, and it is difficult to imagine that a declaratory relief prayer would be struck out. In his assessment, I do not regard the judge as attributing significant weight to this factor, in any event, merely acknowledging that potential claims for

declarations were unusual within the small claims track. In my judgment this was not an irrelevant factor for the judge to take into account.

68. In relation to the application of the protocol, whilst there remains a disagreement between counsel arguing this appeal as to the extent of the various protocol provisions, the issue here is in the context of the availability of an anonymity order. On taking the court to the protocol, Mr Marven correctly points out that there is a distinction to be drawn between privacy and breach of confidence claims, and those relating to data breach, with the processes for anonymity applications is considered more appropriate in relation to the former. Thus there is merit in the submission that an anonymity order was unlikely in this type of case. Nevertheless, it has not been suggested that it was entirely precluded, and as I read the judgment of District Judge Jenkinson, it seems to me that he was more engaged by the procedural implications of making such an application, including compliance with the protocol and being named in the statement of case, rather than the likelihood that such an order would be made. This, in my judgment, was a relevant consideration, having particular regard to the relatively little material which was available before the judge. I cannot accept that on appeal review, even if it can be established that there was little or no prospect of an anonymity order, the judge's approach in this respect was wrong, or can be impugned.

69. When dealing with the importance of the claims to persons who were not parties, the judge was not influenced by the wider public interest because of the absence of any involvement of the relevant authorities, but instead addressed the possibility that these were potentially test claims. Mr Marven submits that he was wrong to do so, because they were simple claims, and the point of any commonality of costs had not been taken in the response to the points of dispute. I do not accept the submission that this was an irrelevant consideration. As the judge made clear he was considering hypothetically an allocation stage and the fact that the court might be informed of potential issues to be resolved in other claims that were "waiting in the wings". It is axiomatic that if there had been an allocation stage there would not have been a resolution based upon early admissions and a realistic offer of damages, and it seems to me that if a court had been informed of several dozen other cases which had not yet been issued but which were awaiting the outcome of the unresolved case to be allocated, factor (g) would have been considered to carry some relevance. I cannot accept that the judge was wrong to weigh it in the balance.

70. The final persuasive factor, namely the circumstances of the parties, is one in which the question of professional representation arises. This is a controversial area, and I agree with Mr Marven that the court should not be cajoled into allocating a case which is otherwise clearly suitable for the small claims track to the fast track, simply because one of the parties chooses to be represented. However, that is not how I interpret the assessment of the district judge here. He has carefully considered the overriding objective, and the need to ensure that the parties are on an equal footing in a case which had the potential to be complex, because of a number of features including those with which he had already dealt (anonymity, declarations, potential different limitation periods, protocol compliance etc).

71. In paragraph 25 of his decision, the learned judge clearly outlines the approach that he has taken to the weighing of the various factors on the hypothetical exercise that he has been required to undertake, and in concluding that on balance the claims would not have been allocated to the small claims track.

72. On the basis of the reasoning which I have set out above, in my judgment his approach was entirely appropriate, he took into account relevant matters, and he arrived at a conclusion which was within the reasonable and ambit of his discretion.

73. In such circumstances it should not be necessary to consider the Respondent's notice in respect of the so-called "qualified" acceptance of the Part 36 offer. I have already dealt with Mr Williams' submission in respect of his bold attempt to redefine distress as personal injury, which I have rejected. However I should address, albeit briefly, his primary submission in respect of the contractual point, or the broader discretion which might have been available to the judge.

74. In my judgment the point is validly made by Mr Marven that the court was here engaged, on the basis of a consent order, with a detailed assessment without any reference in the pleading that its powers were precluded under CPR 46.13 by a prior agreement. Further, I agree that if this had been a qualified acceptance, it should have been made clear, or expressed in terms of a counter-offer, and I reject the suggestion that the judge would have been bound to accept that he had no alternative but to award costs on the fast track basis because of the correspondence. Thus there is no merit in the contract point.

75. In respect of the discretion which might have been available to the judge, I agree that even if there had been a determination that this matter would have been allocated to the SCT, it was still subject to a broader discretion. It is perhaps surprising that not only was this point not taken within the reply to the points of dispute, but also not raised before the district judge with reference to the correspondence. In my judgment, on the application of his broader discretion, it would have been a relevant consideration that the Claimants' legal advisers had chosen to accept three out of the four offers on the basis that the Claimants would be paid fast track costs. I cannot see that this is a fettered discretion in any way, and in the event that the judge had not made the decision which he did, it is a factor which I have little doubt that he could have taken into account. Whether it would have been persuasive is an academic and moot point, but I have addressed the submission of Mr Williams for the purposes of completeness.

Conclusion

76. It must follow that this appeal is dismissed. The Respondents' notice and the points raised on behalf of the Claimants have no bearing on that determination. However, I should make it clear, acknowledging that this appeal has been vigorously contested with leading specialist Counsel on both sides, that my determination is not intended to provide any guidance as to how the court might approach the issue in any future case and in particular whether low value data protection claims would justify fast track costs. It is clearly a fact specific issue, and when applying a broad discretion on the basis of an accumulation of factors it would have been open to the judge to attribute weight differently and arrive at a different conclusion which was still entirely acceptable.

77. It is also to be noted that the question of proportionality remains, the district judge having expressed provisional views in relation to some of the figures which he had seen. Clearly this is a matter which will be returned to him for the purposes of the assessment and it does not follow that allowing for the recoverability of costs in these claims in principle will open the door for a significant award. Obviously many of the points made by counsel for the Defendant will be valid in the context of that assessment. It is inappropriate for me to provide any further comment in this regard.

78. I invite the parties to agree the terms of any final order, including the costs consequences of this decision.

HHJGWQC

20th June 2022