DOLMANS INSURANCE BULLETIN

Welcome to the November 2021 edition of the Dolmans Insurance Bulletin

in this issue we cover:

REPORT ON

- Dolmans successfully repudiate a living mesothelioma claim by a 22 year old - *S H v Cardiff Council*

FOCUS ON

- Strike out of 'failure to remove' negligence claims upheld - *HXA v Surrey County Council* and *YXA v Wolverhampton City Council*

RECENT CASE UPDATES

- Costs - fixed recoverable costs - exceptional circumstances
- Data breach - compensation - de minimis threshold
- Data Protection Act 1998 - compensation - proof of damage
- Nuisance - audio recordings - CCTV - data processing - privacy

If there are any items you would like us to examine, or if you would like to include a comment on these pages, please e-mail the editor,
Justin Harris, Partner, at **justinh@dolmans.co.uk**

DOLMANS
SOLICITORS

REPORT ON

Dolmans Successfully Repudiate a Living Mesothelioma Claim by a 22 Year Old

S H v Cardiff Council

Dolmans have recently successfully concluded a living mesothelioma claim on behalf of Cardiff Council which arose in highly unusual alleged circumstances. The claim was successfully denied and service of substantive proceedings was avoided (albeit protective proceedings had been issued), but the underlying facts were tragic in many senses of the word.

In June 2018, Dolmans received instructions to represent Cardiff Council in regard to a living mesothelioma claim intimated against the Local Authority by 'SH', a (then) 19 year old woman who had been diagnosed with peritoneal mesothelioma (in March 2018). The Claimant alleged that her condition arose consequent upon historic asbestos exposure, inevitably, but the alleged factual circumstances of that exposure were highly unusual. Additionally, the Claimant was the mother of a 2 year old child and, therefore, the value of the claim was significant. The Insurer, albeit notified of the claim, had reserved their position (see below) and, therefore, the claim was, potentially, one which would, if proven, be paid from Local Authority funds. The Letter of Claim put the claim's value *"in excess of £1 million"*.

The Insurer on risk at the point of exposure relied upon the dicta in ***Bolton MBC v Municipal Mutual Insurance***, which (as readers may recollect) found that the relevant insurer in a public liability mesothelioma claim is the insurer on risk at the point of manifestation of the condition, which was considered to be 10 years before commencement of symptoms (i.e. in this case, the insurer on risk in circa 2007-2008). As readers may be aware, there is reason to suspect, particularly following the Employers' Liability Trigger Litigation, that the so called '10 year rule' (established in ***Bolton v MMI***) may not, in fact, be consistent with the aetiology of the condition. However, thus far, there has been no reported legal challenge to this ***Bolton*** principle. The insurer on risk at the point of manifestation by reference to ***Bolton*** relied upon a liability exclusion clause for asbestos exposure within the policy. As above, therefore, this is a claim which would have likely been paid, if liability was established, from Local Authority funds, subject to any further discussion with the Insurers.

Initially, the allegation as to exposure made against the Local Authority was that the Claimant had lived between 2001 and 2012 in a 3 bedroom property owned by the Local Authority and rented to her parents pursuant to a Council Tenancy Agreement, and believed she came into contact with asbestos dust and fibres from asbestos containing materials at the property. No further particulars were given.

REPORT ON

The Claimant's Solicitors made a request for disclosure of a number of classes of documents; notably, the Tenancy Agreement, all other documents produced in connection with the tenancy and/or given to the Claimant's parents, any records relating to inspections of the property prior to or during the tenancy, asbestos surveys for the property and all documents relating to repairs, maintenance and building works at the property prior to and during the Claimant's parents' tenancy thereof.

We responded to the effect that the particulars of alleged exposure were insufficient and far too widely drawn to enable the Defendant to properly investigate this claim. We, therefore, requested proper particulars of exposure on the basis that *"the Claimant must know how she was exposed to asbestos and, moreover, is required to prove her case in that regard"*. We also requested full particulars of the specific duty or duties which it was said that the Defendant had breached towards the Claimant in the context of her alleged exposure, given that the allegation was, in effect, that asbestos containing materials were merely present in the property. There were no particulars given of maintenance or other works which would have led to exposure having taken place.

Naturally, we made the obvious point that we would, nevertheless, and within the spirit of the CPR Disease Protocol, seek to investigate the claim and respond appropriately to the Letter of Claim. We requested disclosure of the Claimant's medical records consistent with the CPR Disease Protocol.

After exchanges of chasing correspondence, on 15 August 2018, the Claimant's Solicitors set out further detail of the allegations made as to exposure. It was alleged, at that stage, that the Claimant was exposed (once again) to asbestos containing materials in the property, particularly in the bathroom there; specifically, an asbestos containing bath panel and Artex ceiling coatings throughout the property.

The Claimant also alleged that whilst she was living at the property, she was present in the garden of the property when a shed comprised of wooden walls and an asbestos cement sheet roof was demolished by her father. This building was demolished, it was said, because of its dilapidated and dangerous state.

In response, we provided disclosure of the Type II Asbestos Survey for the property in question. This demonstrated extremely low numbers of asbestos containing materials within the property. We awaited further and/or proper allegations of exposure. In the meantime, we conducted some preliminary enquiries with members of management within the Council's Housing function. However, there was then a further delay in progression of the claim.

REPORT ON

On or about 28 August 2019, what is best described as a full Letter of Claim was received.

This letter concentrated upon the asbestos roofed shed in the garden. It was asserted that this shed was old and dilapidated and was, in fact, a dangerous structure. It was alleged that the Claimant's father had repeatedly complained about this shed to the Defendant as Landlord and, having failed to obtain action from them as to the same, in around 2001-2004, the Claimant's father and her (older) sister knocked the shed down. This, allegedly, involved breaking up the asbestos cement roof sheets with a hammer.

The Claimant relied upon a lack of warnings as to the composition of the shed and the risks presented by it in this regard. Allegedly, the Claimant was present as the demolition of the shed was carried out and to dispose of the debris, and the Claimant's father set fire to it, which included the remnants of the asbestos cement sheet roof. Thereafter, the Claimant and her family sat around the fire and the ashes were swept up and disposed of, again with the Claimant present during this operation.

Further, the Claimant alleged that the property contained asbestos materials, including an asbestos bath panel, thermoplastic floor tiles in the bathroom and asbestos containing textured decorative coatings in the ceilings and walls of the property. It was alleged that throughout the course of the tenancy, these materials were damaged. For example, the Claimant's sister accidentally kicked a hole in the bath panel which also frequently fell down. Moreover, the Claimant recollected sitting on the floor in the bathroom picking at the corners of asbestos containing floor tiles. Additionally, items (like Christmas decorations) were frequently pinned to the walls and ceiling at the property.

Allegations were made pursuant to the Landlord and Tenant Act 1985 and/or the Defective Premises Act 1972. The Occupiers' Liability Act 1957 was also relied upon.

Further disclosure was sought at this point comprising:

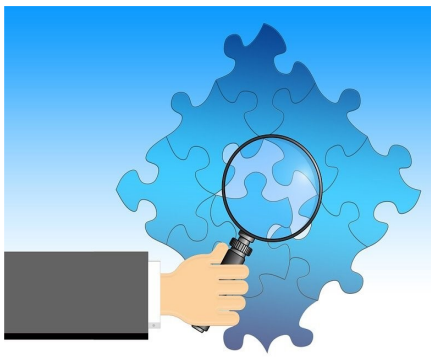
- The Tenancy Agreement in place between the Council and the Claimant's parents.
- All other documents produced in connection with the tenancy, such as tenant handbooks, tenants' fact sheets and the like.
- All records relating to inspections of the property following the end of the previous tenancy and during and after the tenancy of the Claimant's parents.
- All asbestos surveys relating to the property, or, alternatively, confirmation that the previously disclosed Type II Survey dated 2009 was the only such survey in existence.

REPORT ON

The Claimant's Solicitors, accompanying this letter, disclosed signed Witness Statements of both the Claimant and her elder sister which confirmed the factual matrix outlined above. The shed demolition, in particular, was described in detail. No witness evidence was provided from the Claimant's parents and it appeared that, following the marital breakdown of her parents, the Claimant's father had died, albeit the details surrounding that death were unclear. Similarly, the work history of the Claimant's parents (and, therefore, the potential for exposure as a consequence of the same) was unclear.

It was represented that medical evidence was being obtained to support the claim.

At this stage, investigations of the Claimant's (detailed) allegations could begin in earnest. On 28 October 2019, we responded in detail with appropriate disclosure on behalf of the Local Authority, notably, a copy of the tenancy file for the property (redacted to remove personal data where appropriate), a repairs printout covering the period 1995-2006 and a further repairs printout covering the period 2006-2018. We addressed, in detail, the further requests for disclosure made by the Claimant's Solicitors.



We repeated, at this point, our request for a copy of the Claimant's medical records, which, hitherto, had remained elusive (in breach of the pre-action protocol for disease claims). In November 2019, we eventually received the Claimant's medical records, which we began to consider. We also began further enquiries in relation to the matter which, inevitably, stretched into 2020 and, further inevitably, were (then) significantly disrupted by the COVID-19 pandemic from March 2020 and the successive lockdowns imposed by the Government in regard to life in general. It was the delay in investigating matters in consequence of the COVID-19 pandemic which, in part, led to us agreeing an extension of time for service of proceedings (see below).

However, we were, during 2020, able to finalise five Witness Statements on behalf of the Local Authority dealing with the issues in the case. This evidence demonstrated that it was inherently extremely unlikely that a structure of the type referred to by the Claimant could have existed in the Claimant's parents' garden. Indeed, several witnesses involved in the construction and maintenance elements of Local Authority housing stock indicated that they had never seen a structure of the unusual type reported by the Claimant (wooden walls and an asbestos cement sheet roof). Moreover, other management witnesses in the Housing Department asserted that complaints of the type allegedly made by the Claimant's father about this structure would not have gone unheeded had they been made, albeit there was no record of any such complaints in the repairs history anywhere.

REPORT ON

We were advised that tenants would be explicitly advised, via terms and conditions and a tenant handbook (copies of which were provided), that they were not permitted to undertake alterations or engage in demolition of parts of a property without the specific consent of the Local Authority. Thus, it was maintained that the demolition of the garden shed structure by the Claimant's father (who, as above, had since died and was, therefore, unable to give evidence) was unauthorised. Moreover, it was contended that part of the reason for the prohibition of the demolition of such structures was explicitly because of the potential asbestos exposure risk. The Local Authority wished to control such activities and ensure that, where necessary, they could be conducted by reference to relevant asbestos control legislation in force from time to time. In that sense, the unauthorised actions of the Claimant's father had, in fact, circumvented the very control measures instigated by the Local Authority.

We obtained evidence as to those control measures, touching on the methodology of removal of asbestos cement corrugated sheets from Council outbuildings (where necessary), in the material period (2001-2004). This evidence confirmed that, at that stage, the Local Authority would have used appropriate recommended methods for the removal of such materials, which would have included steps to minimise dust exposure. As above, the Local Authority was precluded from taking these steps because of the apparent failure to report the shed. Indeed, the presence of anything but asbestos cement corrugated sheets would have involved the use of specialist asbestos removal contractors.

In view of the persistent lack of medical evidence on behalf of the Claimant, a desktop review of the case by Dr John Moore Gillon, based around the available medical records, was commissioned. Dr Moore Gillon provided a preliminary view, confirming the diagnosis of diffuse peritoneal mesothelioma (which, on the medical records, was in doubt, initially, not least because of the Claimant's young age). However, he expressed extreme scepticism as to causation in terms of asbestos exposure given the history provided. His firm view was that this was one of those rare cases of spontaneous mesothelioma where there would be no explanation for the condition referable to measurable asbestos exposure.

We submitted papers to Counsel (Mr Patrick Limb QC) for a preliminary view of matters, having concluded our evidential enquiries. Counsel's view was that this was a claim to be contested, albeit, as always, matters would need to be kept under constant review given the prospect of evidential development and evolution.

REPORT ON

The progression of the claim continued, periodically, throughout 2020 and into 2021. By reference to the date of diagnosis, limitation would expire by mid March 2021. We awaited developments with interest.

Ultimately, no proceedings appeared and the last communication we had received from the Claimant's Solicitors was on 2 January 2021. In response to that, we, anticipating formal proceedings, issued a formal CPR Protocol Response denying liability on behalf of the Local Authority. By this point (early 2021), we had resolved to obtain an engineer's report to further bolster our evidence in the context of the inevitable show cause hearing once proceedings were received. The Institute of Occupational Medicine (Dr Alan Jones) were instructed in that regard and a draft report was produced and considered in conjunction with Counsel.

This report also refuted breach of duty and causation, having regard to the evidence seen by the engineer from the various witnesses. We continued to await proceedings, knowing that if proceedings were served, Qualified One Way Costs Shifting would not apply to the same and the Local Authority's costs would be recovered if the claim was unsuccessful. In that regard, the Claimant had an After the Event Insurance Policy for legal expenses (readers might remember those from the pre-Jackson world!). Additionally, the Local Authority had the benefit of a Collective Conditional Fee Agreement retainer which provided for a success fee.

In early June 2021, having heard nothing further from the Claimant's Solicitors since January 2021, we received a communication to the effect that they had, in fact, issued proceedings in the Asbestos List of the Queen's Bench Division of the High Court and requesting an extension of time for service of the proceedings to September 2021, ostensibly to obtain medical evidence in relation to the claim.

We took instructions on this and, in light of the pandemic situation and the nature of the claim as a whole, we were instructed to accede to this request. A Consent Order was, therefore, signed extending time for service of the proceedings to 5 September 2021. Now we were in possession of a formal Claim Number for the case, we were able to serve a Notice of Funding in relation to our Collective Conditional Fee Agreement basis of funding. We, therefore, did so.

We then awaited developments, armed with our five Witness Statements, medical report from Dr Moore Gillon and engineer's report from Dr Alan Jones. Again, no medical evidence appeared on behalf of the Claimant. Moreover, on 26 August 2021, prior to expiry of the 5 September 2021 deadline, we received confirmation that the Claimant no longer wished to proceed with the claim and was, in effect, discontinuing the same.

Comment

Given the insurance situation, which is a position which we have previously predicted may well impact Local Authority Defendants because of the unresolved issues left by *Bolton v MMI* and the EL Trigger, this represents a very good result for this particular Local Authority which, otherwise, faced a very significant claim payable from its own reserves in a post-pandemic environment.

Mesothelioma claims, particularly living mesothelioma claims, remain very challenging to fully defend. Often Defendants face the perfect storm of allegations which date back years, if not decades, and a (very) limited timeframe in which to investigate the same, given the expedited nature of proceedings. All of this, coupled with the robust approach to defensibility taken by the Masters in the Asbestos List in London, at the show cause stage, serves to make these cases very challenging.

However, in the correct case, the identification of which requires careful evaluation, a robust defence can be offered. Here, the combination of careful assembly of a raft of witness evidence, having decided, explicitly, to 'hold our nerve' and await the full and proper case on behalf of the Claimant before seeking to investigate, and expert evidence, paid dividends in terms of the confidence we had in our defence. Moreover, this material had been assembled with a view to dealing with a show cause situation, if required.

It is tempting in cases like this to simply sit back and await the Claimant's case in full, as it were. The profound danger in that approach is that by the time one knows the case to be met, it is (ironically) too late to marshal the evidence to meet it in a show cause environment. Therefore, in cases like this, Defendant clients are constantly faced with having to analyse and balance the cost of further preparation against the risk that a claim will, ultimately, not materialise. Given the tragic circumstances of this case, we and our clients were persuaded that the investment in time, legal costs and effort was worth it given the potential for a claim to be litigated. In the event, however, the claim was successfully repudiated and a very considerable saving achieved.

Had the claim litigated however, we had some powerful evidence to deploy which, in an environment without QOCS protection for the Claimant, would have been very interesting in terms of its impact.

On any view, however, this was a terribly tragic case and represents the youngest diagnosed mesothelioma victim which the writer has ever dealt with.

Peter Bennett
Partner
Dolmans Solicitors

For further information regarding this article, please contact
Peter Bennett at **peterb@dolmans.co.uk**
or visit our website at **www.dolmans.co.uk**

FOCUS ON

Strike Out of 'Failure to Remove' Negligence Claims Upheld

***HXA v Surrey County Council* and *YXA v Wolverhampton City Council* [2021] EHWC 2971 (QB)**

Stacey J handed down her Judgment in the appeals from the first instance decisions on 8 November 2021 dismissing the Claimants' appeals against the striking out of their 'failure to remove' claims in negligence against the Defendant Local Authorities.

The first instance decisions were reported upon in the February 2021 and June 2021 editions of Dolmans Insurance Bulletin respectively.

HXA, who was born in 1988, suffered neglect and physical and sexual abuse perpetrated by her mother and her mother's partner. Surrey County Council had extensive involvement with the family from at least 1993. HXA ultimately moved out of the family home herself in 2004.

YXA, who was born in 2001, is disabled, has epilepsy, learning disabilities and autistic spectrum disorder. Wolverhampton City Council became involved in 2007 and identified concerns regarding his parents' ability to care for him. From 2008, there was a pattern of the Local Authority receiving YXA into its care for approximately 1 night every 2 weeks and 1 weekend every 2 months with his parents' agreement pursuant to s.20 of the Children Act 1989. There were concerns of the parents excessively over medicating and hitting YXA, and issues with the parents misusing alcohol and substances. In December 2009, YXA was received into care under s.20, where he remained, with a final Care Order being made in March 2011.

Grounds of Appeal

The Claimants appealed on the grounds that:

(1) The first instance Judges were wrong to strike out parts of the Particulars of Claim because they should have found that it was at least arguable that a duty of care arose on the basis that the Local Authority had assumed responsibility for the welfare and protection of the Claimants:

- In HXA's case when:
  - The Defendant placed her name on the Child Protection Register on 28 July 1994; or
  - The Defendant decided in November 1994 to undertake a full assessment with a view to initiating care proceedings, but failed to do so; or
  - On 27 January 2000, the Defendant resolved to undertake keep safe work with HXA, but failed to do so.
- In YXA's case when he was given intermittent accommodation under s.20.

(2) It was wrong to strike out the negligence claims on the basis that the law in this area is a developing area of law.

(3) It was wrong to strike out the negligence claims when certain aspects of each claim would remain, even if the negligence claim were struck out.

Judge's Analysis

The Judge found that all the allegations relied on were unquestionably allegations of negligent omissions. The real question, therefore, was whether the Claimants could distinguish the assumed facts in their claims from those in binding, decided cases where Claimants were unsuccessful in establishing that the Defendant had assumed responsibility so as to bring them within the exception to the general rule against liability for negligently failing to confer a benefit. It was beyond doubt that a Local Authority '*investigating and monitoring'* a child's position, '*taking on a task'* or exercising its general duty under s.17, placing a child on the Child Protection Register or investigating under s.47 does not involve the provision of a service to the child on which they can be expected to rely; (*CN v Poole Borough Council [2019]* and *DFX v Coventry City Council [2021]*); '*something more'* is required (*X v Hounslow LBC [2008]* and *DFX*). The Defendants are '*merely operating a statutory scheme'* which does not create a common law duty of care.

In relation to the factors relied upon by HXA, for the reasons set out in *DFX* and *Poole*, placing a child on the Child Protection Register does not amount to '*something more'*. The making of a Care Order is sufficient because at that point the Local Authority has parental responsibility which is the '*something else'* sufficient to amount to an assumption of responsibility. Resolving to seek legal advice and undertake a full assessment is not sufficient to amount to '*something more*'.

In relation to the failure to do keep safe work, the Particulars of Claim did not suggest that if the work had been done HXA would have been able to protect herself; it was alleged that if the keep safe work had been done, care proceedings would have resulted. This allegation was expressly framed as an omission / failure to confer a benefit by not doing the keep safe work, not an allegation of a positive act that amounted to an assumption of responsibility. The criticism was the failure to institute care proceedings and was, therefore, indistinguishable from the reasoning in *Poole* and *DFX* and failed for the same reason. As noted in *DFX*, even if a duty of care was generated by direct work, the scope of that duty would be limited to performing the direct work competently. It does not amount to the necessary '*something else'*.

As regards YXA's case, the provision of s.20 accommodation does not amount to the *'something else'* needed to indicate an assumption of responsibility to take care proceedings, merely an assumption of responsibility of a duty of care in relation to the accommodation itself. The 'Burning Building' line of cases were not of assistance as the facts alleged in YXA's case did not support such a claim.

The Judge rejected YXA's argument that the first instance Judge had been wrong to find that his case was not analogous to *Barrett v Enfield LBC [2001]*; the issue in *Barrett* was not an alleged failure to remove, but the Local Authority's failings after the Claimant had been placed in its care. It was an allegation of causing harm, not an allegation of not conferring a benefit. By the same reasoning, *D v East Berkshire Community NHS Trust [2003]* and the so-termed 'wrongful removal' cases were not comparable.

The Judge dismissed the argument that this was a developing area of law. The Supreme Court had clarified the approach to be taken to ascertain whether a duty of care is owed in its Judgments in *Michael v Chief Constable of South Wales Police [2015]*, *Robinson v Chief Constable of West Yorkshire Police [2018]* and *Poole*. The facts alleged in these two appeals were on point and closely analogous to these recent Supreme Court Judgments and now *DFX*. Whilst there were other first instance decisions to the contrary, the Judge considered that these were either incorrect (*A v Attorney General of St Helena [2020]*), decided prior to *DFX* and should, therefore, be treated with caution; (*Champion v Surrey CC [2020]*, which is also under appeal); or were distinguishable (*AA v CC [2020]*, in which the Judge found it was arguable that it was not a failure to confer a benefit claim).

Accordingly, the Judge concluded that the first instance Judges were correct to conclude that the claims were bound to fail.

As regards the criticism that the Master erred in YXA in exercising his discretion to strike out as there would be little saving of time or cost as the evidence would be required for a parallel HRA claim that was not subject to the strike out application, the Judge considered that was a matter for the Master and fell comfortably within his wide discretion over the exercise of his case management powers. The argument was weaker still in HXA where there was an ongoing claim against the Defendant for alleged disclosure to her school which would involve little by way of overlapping evidence. There was no error in the exercise of the court's discretion to strike out parts of the claim in either case.

Accordingly, the appeals were dismissed.

Comment

This is clearly a very helpful Judgment for Defendants. As Stacey J firmly stated, '*post Poole and DFX*, the *question of assumption of responsibility by a Local Authority so as to give rise to a duty of care to remove children from their families in child protection proceedings is not a developing, but a settled, area of law.*' These are 'omissions' cases and it would appear on the basis of the decisions to date that it will need to be a particularly exceptional case for a Claimant to be able to establish the '*something more'* required to establish an assumption of responsibility.

Whilst there are other exceptions to the general rule against liability for negligently failing to confer a benefit (adding to the danger, preventing others from protecting the Claimant and failing to exercise control over the source of the danger), these have been given short shrift at first instance thus far and were not pursued in *DFX* or on the appeals in *HXA* and *YXA*.

There are a number of cases still moving through the Courts and we will, of course, continue to report on developments.

Claims in relation to alleged failings after a child has been made the subject of a Care Order and claims under the Human Rights Act 1998 remain unaffected and Claimants do appear to be turning their focus to these aspects, albeit they face numerous hurdles in respect of HRA claims.

Amanda Evans
Partner
Dolmans Solicitors

For further information regarding this article, please contact
Amanda Evans at **amandae@dolmans.co.uk**
or visit our website at **www.dolmans.co.uk**

RECENT CASE UPDATES

Costs - Fixed Recoverable Costs - Exceptional Circumstances

William Lloyd v 2 Sisters Poultry Limited (Costs) [2019]

The Claimant's employers' liability claim was submitted via the portal and conducted under the Pre-Action Protocol for Low Value Personal Injury (Employers' Liability and Public Liability) Claims, but left the portal on 2 September 2016, with Part 7 proceedings issued in October 2016. Following the initial orthopaedic evidence, the case appeared a run of the mill FastTrack injury claim. Matters changed, however, on receipt of a second report, where a finding of a permanent disability and disadvantage on the labour market formed part of the diagnosis. The Claimant's claim then included a detailed 27 page Schedule of Loss claiming £71,500, including Ogden calculations and Billet considerations. This was supported by a detailed Witness Statement.

The Claimant's claim was settled prior to allocation, following acceptance of a Part 36 Offer of £50,000 by the Claimant. The Claimant served a Bill of Costs which totalled over £45,000. The Defendant sought to argue that the case fell within the Fixed Recoverable Costs scheme and that costs should, therefore, be limited to £16,384. Both parties accepted the principle set out in *Qader v Esure Services Limited & Ors [2016] EWCA Civ 1109*, whereby a case which starts in the portal and concludes without allocation will be restricted to fixed recoverable costs. The Claimant, however, cited *'exceptional circumstances'* existed to justify an award of further costs beyond those available within the Fixed Recoverable Costs regime, pursuant to CPR 45.9J.

Upon Provisional Assessment, the Deputy District Judge held that there were exceptional circumstances, made an assessment on a *'traditional basis'* and awarded costs accordingly; those costs being 60% more than would have been permitted under the Fixed Costs regime.

The Defendant appealed and the Court was asked to consider if the Deputy District Judge had made an error in law or had exceeded the broad ambit of his discretion in finding that there were exceptional circumstances.

Grounds of Appeal

The Defendant argued that:

(1) There was nothing within the case that made it exceptional.

(2) The reasoning of the Deputy District Judge was unclear and the fact that the claim would have been allocated to the multi Track was irrelevant given the principal in *Qader*.

(3) The fact the costs were significantly in excess of Fixed Recoverable Costs was not a relevant factor.

(4) The Deputy District Judge did not undertake the test under CPR r45.29J correctly.

The Court considered how the test under CPR r45.29J should be approached.

The applicability of and how that test should be approached had been dealt with by Leveson LJ in the case of *Costin v Merron [2013] 3 Costs LR 391*, where he stated, "*I, for my part, have no difficulty in concluding that the exceptional circumstances to which 45.2 refer must be exceptional in the sense that the case is taken out of the general run of this type of case by reason of some circumstances which means that greater costs are, in fact, incurred than would reasonably be expected to be incurred*". He went on to say, "*In my Judgment, the phrase 'exceptional circumstances', in the context of 45.12, speaks for itself. It cannot possibly mean anything other than that for reasons which make it appropriate to order the case to fall outside the fixed costs regime exceptionally more money is had to be expended on the case by way of costs than would otherwise had been the case*".

Decision

The Court found that *Costin* was good law and the applicable test in cases where additional costs are sought under CPR 45.29J.

It was held that the Deputy District Judge had correctly applied the *Costin* test. He specifically found that the reason for finding the case exceptional was a result of the considerable additional work and costs incurred, and not the potential future allocation to the Multi Track. The Claimant's case had changed in nature substantially when the second medical report was obtained and due to the fact that the Claimant was permanently disabled. The case bore no resemblance to a run of the mill Fast Track case which one would expect to have been concluded under the portal and the Claimant had had to expend further sums of money on this claim than otherwise would have been done in a standard Fast Track claim.

A 60% increase in costs beyond the Fixed Recoverable Costs was considered *'exceptionally more money'* and, thus, it should be appropriate to order the case to fall outside the fixed costs regime. The Deputy District Judge, in considering all the circumstances, found that the case required extensive witness evidence and a Schedule of Loss which justified an additional 60% in costs. This finding formed a reasonable basis for the Deputy District Judge, concluding that there were exceptional circumstances as it was both in accordance with the test in *Costin* and within the broad ambit of the discretion he had.

The appeal was dismissed.

RECENT CASE UPDATES

Data Breach - Compensation - De Minimis Threshold

Rolfe v Veale Wasbrough Vizards LLP
[2021] EWHC 2809 (QB)

The Defendant Solicitors, 'D', represented a school to whom the Claimants, 'C', owed school fees. The school instructed D to write to C demanding payment. D sent an email consisting of a letter and a copy of the statement of account but, due to one letter difference in the email address, the letter went to the wrong person. That person responded promptly indicating that the email was not intended for them. D replied promptly requesting that the message be deleted, which the recipient confirmed she had done. The recipient was unknown to C personally.

C issued a claim for damages for misuse of confidential information, breach of confidence, negligence, damages under s.82 of the GDPR and s.169 of the Data Protection Act 2013, plus a declaration and injunction. D applied for Summary Judgment, submitting that the damage and/or distress caused, if any, was so low as not to satisfy the de minimis threshold.

C submitted they had lost sleep worrying about the possible consequences of the data breach and they had spent extensive time dealing with the issue. A Trial was required to consider these factual issues and they had reasonable prospects of showing that loss and damage crossed the de minimis threshold.

The Judge considered this was a case of minimally significant information, a very rapid set of steps to ask the incorrect recipient to delete it and no evidence of further transmission or any consequent misuse. There was a plainly exaggerated claim for time spent dealing with the case and an inherently implausible suggestion that the minimal breach caused significant distress and worry; '*No person of ordinary fortitude would reasonably suffer the distress claimed arising in these circumstances in the 21st Century in a case where a single breach was quickly remedied'*. There was no credible case that distress or damage over a de minimis threshold would be proved.

Summary Judgment granted.

Johnson v Eastlight Community House Limited
[2021] EWHC 3069 (QB)

The Defendant, 'D', is a provider of low cost social housing and the Claimant, 'C', one of its tenants. A third party had requested a rent statement from D. D's employee replied by email providing the information, but inadvertently attached a compilation of rent statements of other tenants, including C. The third party immediately notified D of the error and was asked to delete the email which the third party confirmed had been done. D emailed C to inform her of the error, apologised and stated that the matter had been reported to the ICO. The ICO confirmed a few weeks later that no action was required or would be taken.

RECENT CASE UPDATES

The Claimant, 'C', issued a claim in the High Court claiming damages, limited to £3,000, including aggravated damages, for misuse of private information, breach of confidence, negligence, breach of Article 8 ECHR rights and damages under Article 82 GDPR and s.169 of the DPA 1998, injunctive relief and a declaration of breach. C's Solicitors filed a Directions Questionnaire indicating a 2 day Trial was required and filed a Costs Budget just in excess of £50,000.

D applied to strike out the claim and/or for Summary Judgment on the grounds that C had suffered no loss or damage above the de minimis threshold and, therefore, had no real prospect of success and, even if damage were to be found above the de minimis threshold, the '*game is not worth the candle'* applying the principle in *Jameel v Down Jones & Co Inc [2005]*.

C submitted that the *Jameel* principle only applied to non-statutory torts and neither the de minimis principle nor *Jameel* applied under the GDPR. In any event, the de minimis threshold had been crossed. C submitted that she had moved to the property let to her by D to escape an abusive relationship and avoided making her new address public for fear of further contact with her former partner. Therefore, upon learning her address had been given to an unknown third party, the concern that her former partner might receive this information, the chances of which she accepted were extremely low, had caused her stress, worry and anxiety and had played on her pre-existing depression and anxiety.

The Judge noted this was an inadvertent disclosure to a single person, who took no issue with it, and lasted less than 3 hours. The Judge also noted that C's former partner was far more likely to be able to locate her through publicly available channels as C had not elected to make her details on the BT Phone Book website or 192.com 'ex-directory'. Further, C had issued her claim in a publicly identifiable form. The claim for an injunction was misconceived as there was no ongoing threat to C's personal data. There was no need for a declaration. This was a claim for, at best, modest damages.

The Judge found that the *Jameel* principle and the de minimis principle apply to GDPR claims.

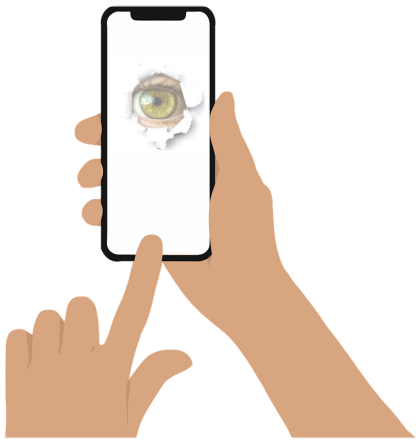
At the hearing, C accepted that there was no claim in negligence and withdrew this element of the claim. The Judge found that the various claims pleaded collateral to the breach of the GDPR claim (which had been admitted) added nothing and should be struck out. There was no basis for this claim having been issued in the High Court. The Judge was satisfied that the real point in this case was whether C's entitlement was for purely nominal or extremely low damages. Mindful that the Court should strive to provide a remedy to any litigant if it can, the claim ought not to be struck out entirely, but, instead, should be transferred to the more appropriate forum, the County Court. Everything about the case had the hallmarks of a Small Claim Track claim that should have been issued in the County Court and so allocated.

RECENT CASE UPDATES

Data Protection Act 1998 - Compensation - Proof of Damage

Lloyd v Google LLC
[2019] EWCA Civ 1599

The Claimant, 'C', issued a claim seeking compensation under s.13 of the Data Protection Act 1998 against the Defendant, 'Google', alleging breach of its duties as a data controller under s.4(4) of the DPA 1998 on grounds that for several months in late 2011 and early 2012, Google secretly tracked the internet activity of millions of Apple iPhone users and used the data collected for commercial purposes without the users' knowledge or consent. C claimed to represent everyone resident in England and Wales who owned an Apple iPhone at the relevant time and whose data was obtained in this way, and to be entitled to recover damages on behalf of all of these people, estimated to number more than 4 million, pursuant to CPR 19.6 (whereby a claim can be brought by one or more persons as representatives of others who have 'the same interest' in the claim).



C accepted that he could not use this procedure if the compensation recoverable by each user would have to be individually assessed. However, C contended that individual assessment was unnecessary because compensation can be awarded under the DPA 1998 for 'loss of control' of personal data without the need to prove that the Claimant suffered any financial loss or mental distress as a result of the breach. C submitted that a 'uniform sum' of damages could be awarded to each person, which he suggested should be £750, amounting to total damages in the claim in the region of £3 billion.

As Google is in the US, C needed the Court's permission to serve the Claim Form on Google outside the jurisdiction. Google contested the Application on the grounds that the claim had no real prospect of success as (1) damages cannot be awarded under the DPA 1998 for 'loss of control' of data without proof that it caused financial damage or distress and (2) the claim, in any event, was not suitable as a representative action. Google were successful at first instance, but that decision was reversed in the Court of Appeal. Google appealed to the Supreme Court.

The Supreme Court allowed Google's appeal. The Court concluded that s.13 of the DPA 1998 cannot reasonably be interpreted as conferring on a data subject a right to compensation for any (non-trivial) contravention by a data controller of any of the requirements of the Act without the need to prove that the contravention has caused material damage or distress to the individual concerned. Whilst damages may be awarded for the misuse of private information itself in a claim in tort for misuse of private information, no such claim was advanced here. The only claim advanced was under the DPA 1998.

Further, even if, contrary to the Court's finding, it were unnecessary to show that an individual had suffered material damage or distress as a result of the unlawful processing of his or her personal data, proof of what wrongful use was made of an individual's data was required to establish that the threshold of seriousness giving rise to an entitlement to compensation under s.13 was crossed and in order to be able to assess damages.

In the way the claim had been framed in order to try and bring it as a representative action, the Claimant sought damages under s.13 of the DPA 1998 for each individual member of the represented class without attempting to show that any wrongful use was made by Google of personal data relating to that individual or that the individual suffered any material damage or distress as result of a breach of the requirements of the Act by Google. Without proof of these matters a claim for damage could not succeed.

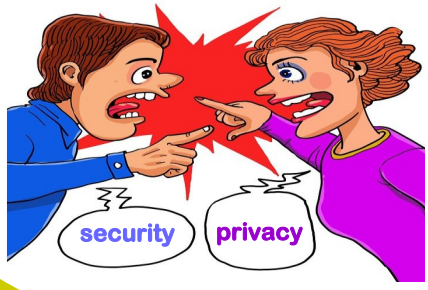
Appeal allowed.

Nuisance - Audio Recordings - CCTV - Data Processing - Privacy

Fairhurst v Woodward
[2021] 10 WLUK 151

The Claimant brought claims against the Defendant (her neighbour) in harassment, nuisance and breach of the Data Protection Act 2018 arising from his use of security cameras and lights at and around his property.

Both the Claimant's and the Defendant's houses backed onto a shared car park and the Claimant's house backed onto a parking space owned by the Defendant. The Defendant's house backed onto the Claimant's parking space. The Defendant had installed a number of devices, including (i) a floodlight and sensor on his shed, facing the car park; (ii) a video and audio surveillance camera, with an integrated motion sensitive spotlight on his shed; (iii) a combined doorbell and video ('Ring' Video Doorbell) on his front door; and (iv) a 'Nest' camera on his front windowsill. He had also installed (with permission) a second 'Ring' spotlight camera on the gable end wall of another neighbour's property, which pointed down a shared driveway.



The dispute arose after the Defendant had shown the Claimant his shed camera and had apparently boasted to her that he could view footage from it at any time via his mobile phone or smartwatch. The Claimant was alarmed at the Defendant's disregard for others' privacy and several incidents followed which crystallised the Claimant's concerns. The relationship between the two neighbours became more strained.

It was the Claimant's case that the Defendant had consistently failed to be open and honest with her about the cameras, had unnecessarily and unjustifiably invaded her privacy by his use of the cameras and had intimidated her when challenged about that use. When the Claimant had raised her concerns with the Defendant, he had responded by threatening to install more cameras, including concealed cameras, as well as threatening to send images of her captured on the cameras to the police. She claimed the Defendant's actions had caused her such distress that she had left her home. She sought damages and injunctive relief, mandating the removal of the Ring doorbell and shed camera, and forbidding the installation of further surveillance cameras.

Throughout the proceedings, the Defendant maintained that the cameras were installed for security purposes and asserted that he had installed the devices to protect his property after a criminal gang had tried to steal his car. He also claimed that some of the devices were 'dummy' devices, installed merely as a deterrent.

Decision

When the case came before the Oxford County Court, the Judge found in favour of the Claimant.

It was held:

(1) The Defendant's behaviour was found to have crossed *"the boundary between that which is unattractive and even unreasonable, and that which is oppressive and unacceptable"*; *Iqbal v Dean Manson Solicitors [2011] EWCA Civ 123, C.P.Rep. 26, [2011] 2 WLUK 279* followed. The Judge was satisfied that a reasonable person would consider that to go from living in harmony with his neighbours to the level of belligerence, dishonest threats and oppressive behaviours exhibited by the Defendant over, initially, the course of a few days was unusual and alarming behaviour amounting to harassment under the Protection from Harassment Act 1997. The Claimant was entitled to damages for distress. The Judge rejected the Defendant's submission that the cameras were in place for the purpose of preventing or detecting crime, a defence under Section 1(3)(a) of the Act.

(2) Mere overlooking from one property to another was not capable of giving rise to a cause of action in private nuisance. Accordingly, the claim in nuisance caused by loss of privacy could not succeed; *Fearn v Tate Gallery Board of Trustees [2020] EWCA Civ 104, [2020] Ch. 621, [2020] 2 WLUK 108* followed. A claim for nuisance caused by light from the driveway camera also failed.

(3) Images and audio files of the Claimant were personal data within the meaning of the General Data Protection Regulation 2016 art.4(1). The transmission of such data to the Defendant's phone, computer or other device, and the retention of that data and its onward transmission to others, amounted to processing of personal data within the meaning of art. 4(2). The Defendant was a data controller within the meaning of art.4(3) and, therefore, had to comply with the principles set out in art 5.1(1).

(4) The Defendant could not be said to have processed data fairly or in a transparent manner given the way in which he had sought to actively mislead the Claimant about how the cameras operated, which amounted to a breach of requirement under art.5(1)(b) of the GDPR that data only be collected for '*specified, explicit and legitimate purposes*'.

(5) Any video personal data of the Claimant from the Ring doorbell was likely to be collected only incidentally as she walked past the property. The Defendant's legitimate interest in protecting his home, whether he was there or not, was not overridden by the Claimant's right to avoid such incidental collection of video data on a public street, albeit in the vicinity of her own home.

(6) The driveway camera, which was trained on the Claimant's side gate, garden and car parking spaces, was not necessary for the purposes of the Defendant's legitimate interests and was unlawful and without justification. The Defendant's interests were overridden by the Claimant's right to privacy in her own home, to leave from and return to her home and entertain visitors without her video personal data being captured. There were other less intrusive ways that the Defendant could ensure his cars (parked in the communal car park) could be kept safe.

(7) The processing of audio personal data by the Defendant from the shed camera, driveway camera and Ring doorbell was unlawful. The Claimant presented evidence to the Court suggesting that the camera was able to capture audio from over 60ft away, far beyond the boundaries of the Defendant's home and covering a radius encompassing nearly the whole of the Claimant's property. The extent of the audio range meant that personal data could be captured from people who were not even aware that the devices were there. This was entirely disproportionate to the needs of protecting the Defendant's home. The legitimate aim for which the devices were said to be used, namely crime prevention, could be achieved by something less (and even if the doorbell camera had no audio capabilities at all).

The Court has not yet determined what relief the Claimant will be awarded and has invited further submissions from the parties in relation to appropriate level of damages for the harassment and data protection breaches, and injunctive relief relating to the removal of the shed camera, the Ring doorbell and preventing the reinstallation of the driveway camera.

For further information on any of the above cases, please contact:

Amanda Evans at **amandae@dolmans.co.uk** or
Judith Blades at **judithb@dolmans.co.uk**

DOLMANS
SOLICITORS

DOLMANS

TRAINING OPPORTUNITIES

At Dolmans, we want to ensure that you are kept informed and up-to-date about any changes and developments in the law.

To assist you in this, we can offer a whole range of training seminars which are aimed at Local Authorities, their Brokers, Claims Handlers and Insurers.

All seminars will be tailored to make sure that they cover the points relevant to your needs.

Seminars we can offer include:

- Apportionment in HAVS cases
- Bullying, harassment, intimidation and victimisation in the workplace – personal injury claims
- Conditional Fee Agreements and costs issues
- Corporate manslaughter
- Data Protection
- Defending claims – the approach to risk management
- Display Screen Regulations – duties on employers
- Employers' liability update
- Employers' liability claims – investigation for managers and supervisors
- Flooding and drainage – duties and powers of landowners and Local Authorities for drainage under the Land Drainage Act 1991. Common law rights and duties of landowners in respect of drainage
- Flooding and drainage – duties and powers of Highway Authorities for drainage and flooding under the Highways Act 1980. Consideration of case law relating to the civil liabilities of the Highway Authority in respect of highway waters
- Highways training
- Housing disrepair claims
- Industrial disease for Defendants
- The Jackson Reforms (to include : costs budgeting; disclosure of funding arrangements; disclosure of medical records; non party costs orders; part 36/Calderbank offers; qualified one way costs shifting (QWOCS); strikeout/fundamental dishonesty/fraud; 10% increase in General Damages)
- Liability of Local Education Authority for accidents involving children
- Ministry of Justice reforms
- Pre-action protocol in relation to occupational disease claims – overview and tactics
- Public liability claims update

If you would like any further information in relation to any of our training seminars, or wish to have an informal chat regarding any of the above, please contact our Training Partner, **Melanie Standley** at **melanies@dolmans.co.uk**