Neutral Citation Number: [2022] EWHC 1487 (QB)

Case No: QB-2021-000266

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 20/06/2022

Before :

SENIOR MASTER FONTAINE

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Between :

Neil Bennett and ors	**Claimants**
- and -	
Equifax Limited	**Defendant**

- -
- -

Oliver Campbell QC, Gareth Shires and Trudi Moore (instructed by **Keller Lenkner Solicitors**) for the **Claimants**
Marcus Pilgerstorfer QC and Robin Hopkins (instructed by **Hogan Lovells International LLP**) for the **Defendant**

Hearing date: 22 March 2022

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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SENIOR MASTER FONTAINE

Senior Master Fontaine :

1. This was the hearing of an application by the Claimants for a Group Litigation Order ("GLO") dated 22 January 2021. The application is supported by the first witness statement of Kingsley Hayes dated 22 January 2021, (Hayes 1), responded to by the Defendant by the first witness statement of Ivan Shiu dated 23 April 2021 (Shiu 1) and replied to by the Claimants by the second witness statement of Kingsley Hayes dated 30th April 2021 (Hayes 2) and the first witness statement of Simon Ridding dated 15 March 2022 (Ridding 1).

2. Documents before the court are referred to as follows:
Hearing bundle - HB tab number/page number;
Extracts from the Monetary Penalty Notice – MPN paragraph number; Authorities bundle – AB page number.

Summary of the claim and factual background derived from the statements of case and the evidence

3. The Claimants claim compensation for alleged contraventions of the Data Protection principles in s. 4 and Schedule 1 of the Data Protection Act 1998 ("DPA") by the Defendant. The Defendant is a major credit reference agency, offering credit reference products and services to enable its corporate clients to verify and authenticate their consumers' identities: Shiu 1 para. 38 HB 4/173. The Defendant's parent company, Equifax Inc., is based in the United States. The claim arises out of a cyber attack perpetrated by criminal actors whose identities are not known, on computer systems of Equifax Inc. over the period 13 May to 30 July 2017 ("the data breach incident"). Equifax Inc. had performed certain data processing services for the Defendant, and therefore held personal data for which the Defendant was a data controller within the meaning of section 1 DPA, some of which was affected by the data breach incident. The Claimants are all individuals resident in England and Wales whose personal data was accessed by persons carrying out the cyber attack.

4. The Particulars of Claim rely heavily on findings made by the Information Commissioner's Office ("ICO") following an investigation into the data breach incident with its findings summarised in a Monetary Penalty Notice ("MPN") issued on 19 September 2018. The ICO made findings in respect of two databases, the Equifax Identity Verifier ("EIV") dataset, and the Global Consumer Solutions ("GCS") dataset". The EIV is a product that allows clients of Equifax to verify a consumer's identity. The GCS provides direct to consumer online credit reporting services, and the data affected consisted of data processed to carry out password analysis for the purpose of fraud prevention: Shiu 1 para. 38 HB 14/173.

5. The EIV dataset had originally been managed in the US but had subsequently been transferred to the Defendant in the UK, but the data was not deleted by Equifax Inc. from their US servers. The ICO found that the GCS data was held in a standard fraud daily report file which was not encrypted, that some of the UK data was stored together with the US data, and that there was "…..*no adequate evidence or explanation indicating that this was a valid reason for this data not being processed in accordance with Equifax's data handling and cryptography standards…….*" MPN §25

6. The Claimants' solicitors have been able to identify, from letters sent to those affected by the data breach incident by the Defendant, subcategories of the data breached in each of the EIV and the GCS datasets, as follows:

   i) EIV 1: date of birth, telephone number and driving licence details were compromised;

   ii) EIV 2: Name, date of birth and telephone number were compromised;

   iii) EIV 3: Name and date of birth were compromised;

   iv) GCS 1: Email address connected to an Equifax account in 2014 was compromised; and

   v) GCS 2: Account information for Equifax's credit services including name, address, date of birth, username, password (in plain text) secret question and answer (in plain text), credit card number (obscured) and some payment amounts were compromised.
   Hayes 1 paras. 37-38 HB 2/15.

7. The Claimants fall into EIV 1, EIV 2 and GCS 2 categories only, i.e the most serious data breaches: Hayes 1 paras. 37-38 HB 2/15. The ICO found that 19,993 UK individuals were affected by the EIV 1 dataset breach, 637,430 by the EIV 2 dataset breach, 12,086 by the GCS 1 dataset breach and 14,961 by the GCS 2 dataset breach: Hayes 1 paras. 15-17 HB 2/9.

8. The ICO found that the Defendant had contravened five out of the eight data protection principles set out in Schedule 1 to the DPA, namely data protection principles 1, 2, 5, 7 and 8. The ICO imposed a fine of £500,000 on the Defendant, the maximum fine that could be imposed at that time: Hayes 1 para 20 HB 2/11. The Defendant does not accept the ICO findings, and in any event points out that this court is not bound by them: Shiu 1 para. 41 HB 4/173.

The procedural position

9. At the time the application was issued 297 Claimants had instructed the Claimants' solicitors, and I was informed at the hearing that a total of 977 Claimants have now issued claims. The most recent evidence is that the Claimants' solicitors are instructed by 1,485 clients who wish to bring claims, are awaiting the return of CFAs from a further 201 clients and anticipate being instructed by at least 5,000 Claimants: Ridding 1 para. 9 HB 8/398. Although there has been correspondence with other firms who represent potential claimants (Your Lawyers Ltd ("YLL"), HEDS Law, Umbrella Legal and SSB Legal) it is unclear at present how many claims have been issued in other courts, if any, but the number of potential claims may be in the region of 10,000.

10. The position of the other firms who have responded is as follows. YLL have instructions from 93 potential claimants, of whom the vast majority are in the EIV 2/EIV 3 datasets, with 10% in the EIV 1 dataset and 4% in the GCS 1 dataset. YLL are opposed to a GLO being made: letter from YLL to Hogan Lovells dated 21 March 2022, (although YLL state in that letter that there are "*undeniable breaches of duty*" when in fact the Defendant does deny liability). Of the other firms, HEDS Law have indicated that they

support the GLO application, Umbrella Legal have no objection and SSB have not responded: Hayes 1 para 121: HB 2/28; Hayes 2 paras. 25-26: HB 2/337. There is also one claimant in a High Court claim *Ward v Equifax Ltd number* QB-2020-004570 represented by Pure Legal, although that firm is now in administration and the claim is stayed pending the outcome of this application.

11. Generic Particulars of Claim, a Generic Defence and a Generic Reply have been served, as have individual Particulars of Claim, Defences and Replies in nine claims chosen as exemplars of different categories of Claimants, by agreement between the parties: Hayes 2 para 54 HB 4/345.

12. The draft GLO provided by the Claimants sets out a list of eight proposed GLO issues. There is no agreement between the parties as to the GLO Issues. The Defendant proposes that if, contrary to its submissions, a GLO is made, the GLO issues should be considered at the first CMC.

Summary of Grounds relied on by the Claimants

13. There is no dispute that the claims brought by the Claimants give rise to common or related issues of fact and law, and both parties have been able to plead their cases generically. It would not be proportionate for these claims to proceed by way of individual unitary actions. A form of collective management of the claims is necessary. The Claimants submit that a GLO is the best mechanism for case managing this group of claims for the following reasons:

    i) Almost 1,000 Claimants have already issued claims against the Defendant which give rise to the proposed GLO issues. That number of Claimants is likely to increase significantly.

    ii) A GLO will enable the court to make findings and reach conclusions on the generic issues which are binding on all the parties, whereas conclusions reached by the court on test or lead cases without a GLO would be only advisory.

    iii) A GLO would enable the creation of a group register which will identify exactly which claims fall within the court's collective management and who is to be bound by the court's decisions. It will allow for a cut off date for entry onto the group register. This assists transparency, clarity and effective case management of the group.

    iv) A GLO will allow the court to make orders for cost sharing, so that liability for costs is divided fairly. If test cases are dealt with separately without a GLO, the non-lead Claimants would have no entitlement to common costs or risk of adverse costs despite the fact that the lead cases were being litigated in order to solve generic issues relevant to the claims, which would be unsatisfactory.

    v) A GLO will enable the court to make orders for proper case management of claims that give rise to the GLO issues but are not lead cases, such as provision for the transfer of existing proceedings raising any of the GLO issues to the management court and requiring future claims to be issued in the management court.

vi) A GLO enables advertisement on the Government website and other advertising, and a copy of the order being provided to the Law Society, so that other Claimant firms or courts would be aware of the order.

vii) There would be an injustice to Claimants who were not lead Claimants in having their claims stayed if they do not have the benefit of a GLO and knowing that a trial of the generic issues will determine the issues in their claims.

viii) A GLO would be the most obvious route to ensure that directions are put in place for the orderly and coordinated management of the claims which would bind all relevant parties to the findings made on generic issues, with an order that would make provision for costs sharing.

ix) Although the Defendant has expressed concerns that a GLO would be likely to increase costs, the only additional costs are likely to be the establishment of a group register and those will be modest but will provide the benefit of identifying the members of the group and who will be bound by the decisions of the management called. The Claimants propose that the claim be cost budgeted so that such concerns can be alleviated.

Costs Position

14. Mr Hayes' evidence is that ATE insurance policy cover has been obtained for all Claimants represented by his firm up to an indemnity limit of £1million, which can be increased if a GLO is ordered. The Claimants' solicitors are funding all disbursements: Hayes 1 para. 128: HB 2/29.

Summary of the Defendant's position

15. The Defendant opposes the application for a GLO. The Defendant does not accept that there have been any breaches of its data protection obligations for which it should be held liable: Shiu 1 para. 41, HB 4/173. Further the Defendant does not accept that the Claimants will be able to prove at trial that they have suffered any recoverable damage nor any damage that can be causally attributed to the breaches alleged, even if those breaches were proven (which is not accepted by the Defendant will be the case) Shiu 1 paras. 42-100, HB 4/174-184. Its position is that no GLO should be made at this stage.

16. The Defendant does not agree that a GLO is appropriate for the following reasons:

i) There are serious doubts about the viability of the Claimants' damages claims, based on relevant case law, the nature of the Claimants' affected data, the damage they assert and the speculative nature of their case on causation: Shiu 1 paras. 23, 24, 26 and 54 HB 4/170-173.

ii) The nine exemplar claims demonstrate that the damage suffered is to a significant extent trivial and therefore incapable of meeting the requisite threshold of seriousness to engage a right to compensation under the DPA.

iii) If the number of Claimants in the issued claims in each dataset (as explained in Hayes 1 at para 39 HB 2/15) is analysed, 99.8% of those affected are in the EIV

dataset and the remainder in the GCS data set. Even with datasets EIV 3 and GCS 1 excluded, this still leaves 98% of claims in datasets EIV 1 and 2, and of that percentage 94% are in EIV 2, leaving a very small proportion of Claimants in datasets EIV 1 and GCS 2. Thus the number of claims likely to succeed, even if liability is established, is likely to be small. (It is accepted that there is no breakdown of other claims/potential claims so it is not known if this spread of claims will be reflected in such other claims). Claims in the EIV 1 dataset will be unlikely to meet the threshold required, and the EIV 2 dataset, containing the vast majority of claims, suffered a data breach only of their name, date of birth and telephone number (in many cases, landline telephone number), information which was in many cases likely to have been a matter of public record: Shiu 1 paras 46-48 HB/4/175. For these reasons many of the Claimants will have difficulty demonstrating that they suffered distress rather than mere inconvenience.

iv) The Claimants will face difficulty in demonstrating that the alleged loss and distress can be causally attributed to the data breach incident, rather than any other web based activity.

17. Instead, the Defendant proposes an alternative case management approach involving a trial of remedy issues in the nine pleaded sample cases, as explained in Shiu 1 at paras 101-105 HB 4/184-186.

18. It is proposed that the court should order a trial of preliminary issues addressing causation and quantum of damage in a limited number of Claimant cases, possibly the nine claims pleaded, prior to, and subject to, any trial of liability. It is submitted that such a determination in each of the sample cases would be likely to inform the Claimants as to which groups of claims it will be realistic to pursue. The court's valuation of claims in the different data subsets would also assist the parties to resolve the litigation without further recourse to the court. It would also be likely to reduce the numbers of Claimants/potential claimants, and make the exercise of populating the group register more manageable and less costly.

19. It is submitted that this would be a better way to further the overriding objective in the context of the DPA, in the following circumstances:

i) the nature of the data at issue is anodyne, has no privacy implications and is highly unlikely to have caused any pecuniary loss: see Generic Defence §§4, 7, 21, 24, and 25, HB 22/ 516-530; see judgment of Lord Hamblen and Lord Stephens in *Bloomberg v ZXC* [2002] UKSC 5 at [55], albeit in the context of an Article 8 claim:

"In general, there will be no reasonable expectation of privacy in trivial or anodyne information.";

ii) the nature of the damage said to be attributable to the Defendant's alleged contraventions of the DPA very substantially comprises only inconvenience see e.g. Particulars of Claim of Deborah Deighton at §19 HB 480-481; only three Claimants assert any pecuniary loss, and these are very minor: Hawkins £539.64 HB 16/475, Quinn £75 HB 20/505 and Sutherland £73 HB 21/512;

iii) the data in the EIV 1 and 2 and GCS 2 datasets is essentially innocuous and it is difficult to see why access to such information exposed the Claimants to material risk, so the real issue is the extent to which any distress can be said to have been caused;

iv) the case law on entitlement to compensation under the DPA which addresses the requisite threshold of seriousness and the need to engage, including at early case management stages, with the question of realistic compensation: *Vidal-Hall v Google* [2015] EWCA (Civ) 311; *Rolfe and ors v Veale Wasbrough LLP* [2021] EWHC 2809 (QB), *Johnson v Eastlight* [2021] EWHC 3069*; Lloyd v Google LLC* [2021] UKSC 50;

v) the real likelihood that the Claimants or at least a very substantial proportion of them, would not receive any compensation even if they were to win on liability;

vi) there are other factors that would potentially affect damages; when the Defendant learnt about the cyber attack it took steps, after discussion and agreement with the ICO, to write to categories of potentially affected data individuals to notify them, and to offer a number of products and services, free of charge, to assist them in protecting their data and mitigate any potentially negative consequences of the data breach incident; not all of those individuals took advantage of those products or took steps to protect their online data, so compensation, to which such individuals might otherwise be entitled, may be reduced by a failure to mitigate their losses: Shiu 1 paras 52-52 HB 176;

vii) Mr Shiu also gives evidence that not all of the information provided about data affected in the claims of the nine exemplar Claimants is correct; he explains that this means that the Defendant would need to search its data specifically against each individual to provide accurate information of the data fields potentially affected for any given data subject: Shiu 1 paras 55-100 HB4/177-184;

viii) the very substantial costs implications of the Claimants' proposal for a GLO with liability tried first, followed by issues of entitlement to compensation, with a trial on liability and breach, which the Defendant estimates at US$4.4 million, compared to its costs estimate of US$1.5 for preliminary issue trials of causation and quantum in sample cases: Shiu 1 para 110 HB4/187; the Defendant also estimates that its costs associated with a GLO would be US$500,000: Shiu 1 para 112(b) HB 4/190;

ix) the real likelihood that the Defendant's proposal would result in liability costs being avoided altogether, or alternatively significantly reduced, in line with recent cogent observations from the Supreme Court in *Lloyd v Google* that GLOs are disproportionate in such cases: see judgment of Lord Leggatt at [25] and [28];

x) there is no compelling reason to make a GLO at this stage; the main reason advanced is that a GLO would bind all Claimants on the common issues, but the practical impact of a judgment in individual sample cases on the onward management of other similar cases would equally assist the resolution of the claims; in any event the formal binding effect is only relevant as regards

liability, as compensation claims are fact sensitive: Hayes 2 para. 6(b) HB 332; Ridding 1 para. 18 HB 8/401;

xi) in practical terms the parties' approach to the litigation will be shaped by what compensation (if any) the court awards to exemplar Claimants and given that questions of compensation are pivotal to the likely settlement of the claims it is preferable that parameters are established as soon in the process as possible; the result would "unlock" the progress of the litigation by reducing the scope of the issues to be put to the court, reduce numbers on the register, allow the parties to get a grip on the real issues and assist the parties to achieve a resolution;

xii) the Defendant recognises that its alternative case management proposal would have an impact not just on the Claimants in the current application but also on other individuals who have asserted and/or issued proceedings against the Defendant in respect of the data breach incident; the Defendant's solicitors wrote to law firms who had contacted it representing individuals said to have been affected by the data breach incident, notifying them of the GLO application, explaining the Defendant's alternative case management proposal and informing them of the hearing listed on 12th May 2021 (that hearing was adjourned).

20. In the event that the court is minded to make a GLO, Mr Shiu suggests ways in which the proposed draft schedules of information provided by the Claimants could be improved: Shiu 1 para. 114(b) HB 4/191.

Summary of the Claimants' grounds of opposition to the Defendant's Case Management Proposal

21. The Claimants oppose the proposal for a trial of preliminary issues and submit that the proposals for a trial of 18 preliminary issues, all relating to causation and loss, are unworkable and inappropriate, would not further the overriding objective, would cause serious delay and are likely to increase the costs of the litigation significantly. They refer to the many criticisms there have been in relation to inappropriate use of trials of preliminary issues in the authorities, and to the judicial guidance in *McLoughlin v Grovers* [2002] QB 1312 (CA) AB 380 and *Steele v Steele* [2001] CP Rep 106 AB 444.

22. It is submitted that the Defendant's proposed preliminary issues are contrary to almost all of the principles in those decisions:

i) sixteen of the proposed preliminary issues are issues of fact, one is an issue of mixed fact and law and one issue is not in fact an issue between the parties as the Claimants do not claim to be entitled to compensation simply for inconvenience;

ii) the issues are particularly Claimant specific issues of fact, concerning what aspects of the Claimants' personal data was compromised, and what distress or loss an individual claimant suffered as a result which would not be helpful for the resolution of the generic issues between the parties;

iii) there will be some issues of law relating to quantum e.g. whether there is a threshold of seriousness, and determination of such issues should be binding on

all claims; the Claimants do not accept that there is a "threshold of seriousness" that a Claimant must satisfy where there is no Art. 8 claim, but accepts the need to establish distress and/or financial loss; the Claimant submits that the references to "material damage" relate only to financial loss and not to distress, relying on the distinction made by Lord Leggatt in *Lloyd v Google* at [115] AB 293 and [138] AB 370, and the fact that there is no *de minimis* threshold in the DPA for "distress" caused by a data breach;

iv) if the Defendant were to succeed in full on the preliminary issues then this would be dispositive of the claims of the nine lead cases but not necessarily of the other claims in the group given that the quantum issues are fact sensitive and individual; in any event it is unlikely that the Defendant would succeed in full because it is unlikely that the court would find that none of the nine lead claimants was entitled to compensation;

v) the court would have to consider Claimants in both affected datasets, the EIV datasets and the GCS dataset;

vi) the assumptions on which the court is invited to try the preliminary issues are unclear and uncertain; further, the Defendant's "*agreed premises for the preliminary issues trial*" at Schedule 1 of its draft order, which the court is invited to assume for the purposes of the preliminary issues trial, are all hotly contested: Ridding 1 at para. 14 HB 8/400 identifies the conflict between the Defendant's Generic Defence and the findings of the ICO; and the court is being invited to make findings on causation and loss on an assumed, but disputed, set of breaches;

vii) causation and quantum issues will require significant disclosure and some of this will overlap with liability as there will be the same group of custodians and the same categories of documents for both liability and quantum issues; there may also be the same lay witnesses and expert evidence in the same disciplines for liability, causation and quantum trials;

viii) the proposed course of action proposed runs the risk that at a liability trial after the preliminary issues trial, the court may find in favour of the Claimants, but on a different set of breaches to those which had been assumed for the purposes of the preliminary issues trial. For example, the court could conclude that the Defendant had wrongly failed to delete some of the data, but not all of it. That may then undermine the findings of causation and/or loss made at the preliminary issues trial;

ix) neither party has been able to identify any occasion on which a court has ordered a trial of causation and quantum ahead of a trial of liability, in circumstances where liability is denied. Such a course carries obvious and serious risk.

Discussion

The Defendant's proposal for a trial of preliminary issues

23. I agree with the Defendant that there are real concerns about the entitlement to compensation under the DPA for a significant proportion of these claims and other

potential claims. The Claimants accept that the claims are all small value claims and have put an average range of values on the claims of £750 -£3,000: Ridding 1 para. 29 HB 8/406.

24. Many (much smaller) groups of claims for minor breaches of the DPA have been brought in this court where compensation is sought limited to either £1000 or £3000, where in many cases a much smaller amount for each claim is likely to be awarded, or nothing at all; see *Rolfe and ors v Veale Wasbrough Vizards LLP* [2021] EWHC 2809 (QB) AB 431 and *Johnson v Eastlight* [2021] EWHC 3069 AB 255. The claims in this case, and other potential claims, will consist of a much larger group of Claimants and will need careful case management, but group claims are not always dealt with by the GLO regime and many cases are managed together as a multi party action.

25. I acknowledge that whichever way these claims are dealt with, a manner of determining quantum for individual cases will have to be determined. In both group and multi party litigation, it is often the case that once liability issues are determined, then the parties can work out a mechanism or formula for settlement for different types of Claimant. In this particular group of claims the Defendant's case management proposal has considerable attraction as a way in which the group of Claimants might be reduced to those which are likely to be viable, and identifies a practical manner of determining the parameters of quantum for claims in the different subsets. The determinations would not, of course be binding on other claims without a GLO, but they would be highly informative, potentially enabling settlement for many claims with or without an admission of liability: see the comments of Fancourt J. and Master Kaye in *Lancaster v Peacock* [2020] EWHC 1231 (Ch) at [2] AB 271 to the same effect. That factor, in my view, would outweigh the disadvantage to the other Claimants in having their claims stayed whilst the preliminary issues in the exemplar claims were determined.

26. However, the Defendant's submissions as to the costs advantages of the proposal would only work if there were to be no liability trial, i.e. if the Defendants either conceded liability, alternatively accepted that it would pay damages without admission of liability to those Claimants whose claims succeeded on causation and quantum, or where an agreed formula for damages for different classes of claim was reached. Otherwise, whatever determination of damages was made in sample cases, the parties would still have to incur the substantial costs of a liability trial, so there would only be a limited costs saving, and none at all if the Defendant were to be successful in its defence on liability. As presently formulated the proposal has no attraction to the Claimants because none of the exemplar claims will be finally determined, even if successful on causation and damages, unless and until liability is either conceded or determined in their favour.

27. So I do not rule out the Defendant's proposals, but I consider that this important decision should be dealt with by a managing judge, whether a judge appointed by the President of the Queen's Bench Division under the provisions of CPR 19BPD.16, or by way of managed multi-party litigation outside the group litigation process.

28. I therefore suggest that the Defendant should consider, in the time before a CMC is heard, how it might vary its proposal so as to avoid the additional costs of a liability trial, whether it still considers that causation should be included in any preliminary issue trial and any proposal it can offer in respect of the Claimants' risk of adverse costs. The parties should also discuss and try and reach agreement on the preliminary issues that

could usefully be determined. Of course the managing judge may disagree that this is an appropriate course, but in my view it is a constructive proposal to manage a large group of claims each likely to be of small value. The Claimants are just as entitled to obtain a remedy for claims of low value as claimants with high value claims, but where there are substantial numbers of such claims with common or related issues, an efficient and proportionate way of managing such claims must be found.

Whether a GLO should be made

29. The additional costs of a GLO, principally establishing, populating, and maintaining the Group Register, can be considerable, particularly where there are a very large number of claimants. In *Lloyd v Google*, in the Supreme Court, Lord Leggatt said at [25]:

> "Where the individual claims are of sufficiently high value, group actions can be an effective way of enabling what are typically several hundred or thousands of claims to be litigated and managed together, avoiding duplication of the court's resources and allowing the claimants to benefit from sharing costs and litigation risk by obtaining a single judgment which is binding in relation to all their claims. However, the group action procedure suffers from the drawback that it is an "opt-in" regime: in other words, claimants must take active steps to join the group. This has an administrative cost, as a solicitor conducting the litigation has to obtain sufficient information from the potential claimant to determine whether he or she is eligible to be added to the group register, give appropriate advice and enter into a retainer with the client. For claims which individually are only worth a few hundred pounds, this process is not economic, as the initial costs alone may easily exceed the potential value of the claim." AB 312

30. Lord Leggatt also identified that the advantage of being able to advertise the GLO so that other potential claimants can come forward and be included in the group action, is in fact not so beneficial as is commonly thought. At [26] –[27] AB 313, he identified previous cases and research which demonstrated that only a relatively small proportion of those eligible to join the group are likely to do so, particularly if the number of people affected is large and the value of each claim relatively small.

31. And at [28] Lord Leggatt said:

> "A further factor which makes group litigation impractical in cases where the loss suffered by each individual is small even if in aggregate it may amount to a very large sum of money, is the need to prove the quantum of loss in each individual case. Not only are eligible individuals less likely to opt into the proceedings where the potential gain to them is small, but the costs of obtaining evidence from each individual to support their claim is again likely to make group litigation uneconomic in such cases." AB 314

32. Many of the authorities mention what is referred to either as a threshold of seriousness or proof of material damage for such claims: see *Vidal Hall v Google* [2015] EWCA Civ 311 at [82] where the court, after concluding that "… *it is in any event unnecessary in practice to distinguish between cases which reach the Article 8 threshold of seriousness and those which do not*", said that was because:

> "If a case is not serious in terms of its privacy implications, then that by itself is likely to rule out any question of recovery of compensation for mere distress."

33. And in *Lloyd v Google LLC* in the Court of Appeal [2019] EWCA Civ 1599 at [55] Sir Geoffrey Vos C. (as he then was) said:

> "... I understood it to be common ground that the threshold of seriousness applied to section 13 as much as to MPI. That threshold would undoubtedly exclude, for example, a claim for damages for an accidental one-off data breach that was quickly remedied." AB 293

34. In the Supreme Court in *Lloyd v Google* Lord Leggatt said at [115] considering the interpretation of s. 13 of the DPA, said:

> "Those words, however, cannot reasonably be interpreted as giving an individual a right to compensation without proof of material damage or distress whenever a data controller commits a non-trivial breach of any requirement of the Act in relation to any personal data of which that individual is the subject……. The wording of section 13(1) draws a distinction between "damage" suffered by an individual and a "contravention" of a requirement of the Act by a data controller, and provides a right to compensation "for that damage" only if the "damage" occurs "by reason of" the contravention. This wording is inconsistent with an entitlement to compensation based solely on proof of the contravention." AB 359

See also [138] and [153] AB 370, 375 to the same effect.

35. I accept that the claims in this case are not cases of "*an accidental one-off data breach that was quickly remedied*" as referred to by Sir Geoffrey Vos MR in *Lloyd v Google* (see Paragraph 32 above), in comparison to the factual situations in *Rolfe v Veale Wasbrough LLP* and *Johnson v Eastlight* mentioned above. The intention and consequences of a cyber attack are usually, although not always, to enable fraud. However it may be unlikely that the entirety of the Claimant cohort will be able to establish either financial loss or distress to enable compensation to be awarded. This will be particularly the case for Claimants in the EIV 1 and EIV 2 datasets, but possibly also for at least some Claimants in the GCS 2 dataset. Hayes 1 at para. 39 HB 2/15 provides an analysis of the claims of the 297 Claimants in January 2021 (and there are now considerably more since that witness statement was made– see Paragraph 9 above), which concludes that only 19 Claimants are in the GCS dataset, 8 Claimants are in EIV 1 dataset and 186 in EIV 2 dataset. There were 84 Claimants where the category of data breached has not yet been identified.

36. It is accepted that many claims will be of very low value, and some may not reach any "*threshold of seriousness*" (as explained in the authorities at Paragraph 31 to 33 above) found to be required to enable any damages to be awarded for distress or establish any financial loss. This is recognised by the Claimants, but it is said that:

> "Whilst I accept that some Claimants may fail for causation or fail to establish loss, it is highly unlikely that this will be the case for all the Claimants, and so the suggested preliminary issues will not be dispositive." Ridding 1 para. 18 HB 8/401

37. The words of Lord Leggatt in *Lloyd v Google* at [25] (quoted in Paragraph 28 above) sound a note of caution to large number of claimants in low value claims, but the court has experience of dealing with such claims, for example in the Diesel Emissions group litigation. I note also Lord Woolf's comments *in Boake Allen v Revenue and Customs Commissioners* [2007] UKHL 25 at [31]:

> "All litigants are entitled to be protected from incurring unnecessary costs. This is the objective of the GLO regime. Primarily, it seeks to achieve its objective, so far as this is possible, by reducing the number of steps litigants, who have a common interest, have to take individually to establish their rights and instead enables them to be taken collectively as part of a Group. This means that irrespective of the number of individuals in the group each procedural step in the actions need only be taken once. This is of benefit not only to members of the group, but also those against whom proceedings are brought. In a system such as ours based on cost shifting this is of benefit to all parties in the proceedings." AB 98-99

38. Warby J. (as he then was) in *Ames v Spamhaus Projects Ltd* [2015] 1 WLR 10 3409 at [34] quoted (in the context of the *Jameel* Principles) the view of the Court of Appeal in *Sullivan v Bristol Film Studios Ltd* [2012] EWCA Civ 570 at [29] [32] and[36]:

> "29….The mere fact that a claim is small should not automatically result in a court refusing to hear it at all. If I am entitled to recover a debt of £50 I should, in principle, have access to justice to enable me to recover it if my debtor does not pay. It would be an affront to justice if my claim were simply struck out. The real question, to my mind, is whether in any particular case there is a proportionate procedure by which the merits of a claim can be investigated……
>
> 32….. When in future a judge is confronted by an application to strike out a claim on the ground that the game is not worth the candle he or she should consider carefully whether there is a means by which the claim can be adjudicated without disproportionate expenditure.
>
> 36……. The general principles stated in the *Sullivan* case apply nonetheless, and CPR Pt 1 imposes a duty on the court to seek to deal with cases justly and at proportionate cost. Since the

> decisions in the *Jameel* and *Sullivan* cases, costs budgeting procedures have been implemented to help the court perform that duty." AB 13

39. The issue of costs is a very relevant consideration when managing claims of low value. The GLO regime was created "*to enable the court to deal with this sort of litigation in a more efficient and economic manner than would otherwise be possible*." (Lord Woolf MR in *Taylor v Nugent Care Society* [2004] EWCA Civ 51; [2004] 1 WLR 1129 at [9]). But a GLO requires the additional costs of establishing, populating and monitoring the Group Register to add and remove claims. Mr Hayes says that these are likely to be modest, but does not provide an estimate. He says that some of the costs will depend upon how much information is to be provided in the schedules of information, and the parties could agree to proceed initially with the nine pleaded claims, without further schedules being provided at this stage. That would also save the costs of a selection process. He states that the draft GLO only provides for advertising in the Law Society Gazette, on the lead solicitors' own website and on social media, the costs of which will be very modest: Hayes 2 paras. 50-55 HB 4/344-345.

40. I have concerns both in respect of the Defendant's estimate of a preliminary issue trial for nine claims put at US$1.5million, or c. £1.2million, (which the Claimants say is an underestimate), and of a liability trial of $4.4m, or c. £3.2million. If the managing judge orders a trial of preliminary issues in sample cases, the parties should consider how to conduct such trial at proportionate cost, and if a liability trial is required, that same consideration must be given.

41. I consider it likely that the parties will be able to form a more informed view about the likely viability, and overall value, of the claims, once it is known which number of claims fall into which category of dataset.

42. As stated at Paragraph 26 above, my view is that this claim, and other claims made arising out of the data breach incident, must be managed together, either by a GLO or a managed multi party claim, in either case with a managing judge. It is not in dispute that there are common issues of fact and law. It is not feasible to manage this number of claims, and potential claims, as unitary claims. It is also not in dispute that the claims must be case managed proportionately and in accordance with the overriding objective, and not as unitary claims.

43. The advantages of a GLO rather than a managed multi party claim, are:

    i) the GLO can be advertised, so that other potential claimants can be identified;

    ii) orders made will bind all members of the group;

    iii) claims made in other courts can be ordered to be brought into the group action; and

    iv) a cut-off date can be given which provides a reasonable degree of comfort to the Defendant as to the likely final number of claimants.

44. Generally, the type of group actions most suited to being managed as multi party claims without a GLO being made are those where either the group of claimants has already

been identified, or is restricted to a particular class so that identification of potential claimants is possible without extensive advertising; for example claims by a large group of employees can be reached via their trade union, or a group of residents in a nuisance claim in a defined location can be readily identified.

45. This is not such a claim. There are potentially many thousands of Claimants, and the task of managing such claims, which may be brought in courts all over the country, would be better handled by a judge of the Media and Communications List who has experience of data breach claims, and perhaps ultimately, as a group action in accordance with Section III of Part 19 and 19BPD.

46. However, I consider that the issue of whether to make a GLO should be deferred at present. I propose to ask the President of the Queen's Bench Division to appoint a managing judge, and for a case management conference to be listed before the managing judge. If the Defendant's proposal for preliminary issue trials on exemplar cases finds favour with the managing judge, the costs of populating a group register with hundreds, and potentially thousands, of Claimants, many of whose claims may not succeed, or which can be settled on a commercial basis without the necessity for a liability trial, may be avoided. If sufficient numbers of Claimants remain after that exercise the question of whether to make a GLO can be revisited if appropriate.

47. In the meantime the parties should give more thought to the following issues:

    i) the likely costs of obtaining information from all Claimants and potential claimants required to populate a group register, and establishing populating and maintaining a group register for that number of Claimants;

    ii) a way in which sample cases could be determined, either by ADR, or as preliminary issues, in such a way as to overcome the supervening problem of liability not being conceded, referred to above at Paragraph 25, and how the issue of causation could be dealt with;

48. Unless these factors are given more consideration by the parties the progress of the litigation will not be "unlocked" without the litigation incurring disproportionate costs. Both parties have a duty to consider how to best deal with these claims proportionately, including the Defendant's obligation to consider a proportionate and less costly way of dealing with liability and causation.

Claimants' Disclosure Application

49. The Claimants also seek disclosure from the Defendant, by way of informal application at the hearing, of three categories of documents:

    i) All documents that the Defendant refers to in its Generic Defence and Individual Defences, listed in the schedule to the Claimants' draft order; the Claimants have a right to inspection of such documents pursuant to CPR 31.14;

    ii) All known adverse documents; this would enable the Claimants to make a more informed decision as to what further disclosure may be required and would not require any search to be made by the Defendant (PD 51U para.2.8);

iii) Documents provided to the Information Commissioner following the data breach incident; the documents would clearly fall within the ambit of standard disclosure and ought to be capable of being provided to the Claimants at a limited cost.

It is submitted that the disclosure requested is targeted and a cost effective way of progressing the proceedings.

50. The Defendant resists this application on a number of grounds:

i) No proper application has been made, and the issue was raised only in Ridding 1 served shortly before the hearing listed to consider a GLO application, not foreshadowed in any inter partes correspondence;

ii) There is no good reason why the particular disclosure requested should be given early at this stage:

a) If a GLO is made the appropriate disclosure order will depend upon how the GLO is to be managed which will be for determination at a subsequent CMC; it is not appropriate to pre-empt that determination by making orders for disclosure now;

b) If the Defendant's case management proposal is adopted disclosure is provided for in the draft order and there is no good reason for the chronology to be altered; the documents will not be required for the preliminary issues trial suggested by the Defendant;

c) To identify, locate, review, gather, and collate the documents sought by the Claimants will require significant work which is likely to be duplicative of work to be undertaken during a subsequent disclosure exercise;

d) There would be no unnecessary delay involved in receiving disclosure at the usual time within the lifetime of the litigation;

e) Confidentiality issues are likely to arise in respect of disclosure and it is not appropriate to deal with such matters on the hoof, when the Claimants have given no proper warning of this informal request.

iii) The first category of documents is not a list of identified documents but an open request for categories of documents by reference to points made in the Generic Particulars of Claim;

iv) The second category of documents is not appropriate as the Disclosure Pilot in PD 51U is not applicable to the Queen's Bench Division.

Discussion

51. I agree with the Defendant's submissions. There is no pressing need for specific disclosure at this stage and none has been identified. Specific disclosure applications are better made by way of application notice, so that the court can identify why they are required separately from standard disclosure, and where sought before standard

disclosure the reason why. That has not been done. The court also expects the parties to have engaged in correspondence on an issue before making an application. The CMC will be the appropriate forum to consider orders for disclosure. In any event the manner of disclosure will depend upon the directions given , and in particular whether the managing judge decides to accede to the Defendant's case management proposal, or order liability to be tried first. Unnecessary costs would be incurred in ordering the disclosure sought at this stage.

52. The following reasons are also applicable to the first two categories:

i) Although CPR 31.14 permits inspection of a document mentioned in a statement of case, it is clear from the commentary in the White Book Vol I that the right is not unqualified and the overriding objective, in particular proportionality, is applicable (Note 31.14.8). The request for documents in 12 categories is not proportionate at this stage and before disclosure has been considered by the court at a case management conference.

ii) With regard to the second category, it will be a matter for the managing judge to decide whether the Disclosure Pilot in PD 51U should be applied to the claims.

Claimants' application for a variation of confidentiality arrangements

53. The Claimants seek what are described as "modest variations" to the confidentiality arrangements to make them less onerous, but to ensure that confidentiality is still maintained between the parties: Ridding 1 para. 39 HB 8/408; Hayes 2 paras. 45-48 HB 4/343. This application has been agreed by consent.