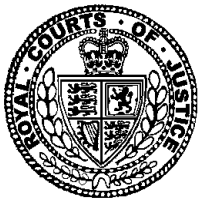

Neutral Citation Number: [2023] EWHC 61 (KB)

Case No: QA-2021-000204

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION

ON APPEAL FROM THE SENIOR COURTS COSTS OFFICE
DEPUTY MASTER HAWORTH

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 25 January 2023

Before :

THE HONOURABLE MRS JUSTICE HEATHER WILLIAMS DBE

- -

Between :

ANTONY WILKINS	**Claimant/ Respondent**
- and -	
SERCO LIMITED	**Defendant/ Appellant**

- -
- -

Mr R Mallalieu KC (instructed by **DWF Costs Limited**) for the **Appellant**
Mr PJ Kirby KC and Mr M Griffiths (instructed by **TV Edwards LLP**) for the **Respondent**

Hearing dates: 13 January 2023

- -

Approved Judgment

.....

Mrs Justice Heather Williams:

Introduction

1. Antony Wilkins sued Serco Limited in false imprisonment in respect of a delay of four and a half days before he was released from prison after receiving a suspended sentence. After proceedings were issued, the claim was settled on terms that involved Serco paying £3,000 by way of damages and paying costs, but the basis on which costs were to be assessed was left open. On 17 August 2021 Deputy Master Haworth ("the Master") determined that if the claim had been allocated to a track, it would have been allocated to the fast track ("FT") rather than the small claims track ("SCT"). Serco were granted permission to appeal this decision by an order of Bourne J dated 15 March 2022. I am very grateful for the assistance of Costs Judge Brown, who was appointed as a costs assessor in relation to the appeal pursuant to CPR 35.15.

2. The grounds of appeal were formulated as follows:

> "**Ground 1**: the Deputy Master was wrong to hold that this was a case which properly would have been likely to have been allocated to the Fast Track, had it proceeded to the issue of proceedings. The Master should instead have upheld his earlier conclusion that the claim would probably have been allocated to the SCT, the normal track for such claims, and should have assessed costs accordingly (as he originally did).
>
> **Ground 2**: to the extent that the decision was an exercise of judgment or of discretion the Deputy Master went outside the bounds of a reasonable exercise of the same and was wrong."

3. At the hearing of the appeal the parties indicated that they agreed that it concerned a case management decision. Mr Mallalieu KC preferred to characterise the Master's conclusion as the exercise of an evaluative judgement, whereas Mr Kirby KC described it as the exercise of a discretion. Nothing turns on this distinction for present purposes, as both counsel were agreed that the approach this court should take to the appeal was as described by Lewison LJ at para 51 of *Broughton v Kop Football (Cayman) Limited* [2012] EWCA Civ 1743, as follows:

> "Case management decisions are discretionary decisions…The discretion is entrusted to the first instance judge. An appellate court does not exercise the discretion for itself. It can interfere with the exercise of the discretion by a first instance judge where he has misdirected himself in law, has failed to take relevant factors into account, has taken into account irrelevant factors or has come to a decision that is plainly wrong in the sense of being outside the generous ambit where reasonable decision makers may disagree. So the question is not whether we would have made the same decision as the judge. The question is whether the judge's decision was wrong in the sense that I have explained."

4. Accordingly, the assertion in Ground 1 of the grounds of appeal that the Master's decision was "wrong" is to be understood in this context. In his oral address to the court,

Mr Mallalieu's over-arching submission was that the appeal should be allowed as no reasonable costs judge, properly directing themselves as to the law, could have concluded that this claim would have been allocated to the FT rather than the SCT. In support of that over-arching contention he made a number of criticisms of the Master's reasoning, which I have summarised in para 29 below.

5. In the interests of clarity, I will refer to the parties as they were known below.

The material circumstances

6. The claimant was remanded in custody following his arrest on a charge of common assault. He pleaded guilty and on 9 February 2017 he attended a sentencing hearing by video link. A suspended sentence was imposed and so he ought to have been released immediately as there was no longer any authority to detain him. In the event he was not released until four and a half days later on 14 February 2017.

7. The claimant's solicitors sent a letter of claim to the defendant dated 11 May 2017. Serco were responsible for the prison where he had been detained. The reply, dated 17 December 2017, denied liability and asserted that the claim should be directed to the Magistrates' Court as they had been responsible for delay in providing the relevant paperwork to the prison where the claimant was held.

8. The claimant's solicitors had obtained a public funding certificate on 22 May 2017 in respect of the proposed claim in false imprisonment. In light of the denial of liability and the one year limitation period for claims under the Human Rights Act 1998, proceedings were issued on 7 February 2018. The claim was brought in false imprisonment and as a breach of rights guaranteed by Article 5 of the European Convention on Human Rights ("ECHR"). Various extensions of time were then obtained for service of the particulars of claim.

9. On 28 February 2019 the defendant made a without prejudice save as to costs offer to settle the claim in the sum of £3,000 including costs. In response the claimant made a Part 36 offer to settle the clam for £3,000 damages plus payment of costs. Thereafter the claim was settled on the basis of payment of the sum of £3,000 in full and final settlement and with the defendant to pay the claimant's costs, with the basis for assessment and the amount of costs to be determined at a detailed assessment, if not agreed. The settlement was contained in a Tomlin Order which recorded that "neither party be precluded from raising arguments on costs in relation to the allocation of track".

10. Agreement on costs was not reached and a bill of costs and points of dispute and replies were submitted. On 27 April 2021 the Master carried out a provisional assessment. The first preliminary point for his consideration concerned the defendant's contention that the claim would have been allocated to the SCT had the case proceeded to the allocation stage. The Master's provisional determination said:

> "Applying Rule 26.6(3) CPR that is a small claim. Costs are limited to the costs recoverable on a small claim. Bill to be re-cast accordingly."

11. The parties are agreed that the effect of this decision, had it stood, was that Mr Wilkins would not recover his legal costs. However, the claimant requested an oral review hearing in relation to this and also a second preliminary point which I am not concerned with. On 17 August 2021, after hearing submissions from counsel, the Master determined that had the case proceeded to the allocation stage, it would have been allocated to the FT. He gave a short *ex tempore* judgment explaining his reasons for this conclusion, as follows:

> "1. On a provisional assessment of this bill of costs, having read the only documents before me which the rule permits, namely the bill, the points of dispute and replies. I formed the view this was a claim which settled the [sic] £3,000 and accordingly should have been suitable to be determined on the small claims track. Therefore, pursuant, to CPR 46.13(3), I restricted the recoverable costs to those which would have been allowed on that track.
>
> 2. Having heard the submissions of learned counsel today and having read their skeleton arguments I have concluded in the circumstances, I put too much emphasis on the value of the claim and insufficient emphasis on the complexities and the issue of the State interfering in a person's human rights.
>
> 3. That being the case, it follows that I prefer the submissions of Mr Griffiths to those of Mr Innes. Pursuant to CPR 26.8, I have to have regard to several factors on allocation which includes complexity (Rule 26.8(1)(c)). Another factor is the importance of the claim to persons who are not parties (Rule 26.8(1)(g)). In the present case when one looks at the possible complexities and the fact, that in false imprisonment claims, there is still in the County Court the right to trial by jury, it seems to me that the District Judge Avent who has a great deal more experience than me in allocating cases to track was right in the conclusions that he reached in *Maguire* [sic], albeit I am not bound by his decision."

12. Mr Griffiths had represented the claimant at this hearing. As the Master referred to his submissions in this passage, I will summarise their contents. When I come to discuss the grounds and set out my conclusions, I will address the extent to which the points made by Mr Griffiths formed part of the Master's reasoning.

13. Mr Griffiths prepared a skeleton argument for the hearing on 17 August 2021. It began with what he said was a brief summary of the "Relevant Background" and he said that the fuller background was "contained within the narrative to the Bill of Costs and to avoid repetition is not recited here". The central submissions that he then made were as follows:

    i) It was hard to imagine a litigant in person being able to consider the complexities of a strict liability tort without the assistance of legal representation. Further, the defendant had denied liability, alleging that responsibility lay with the

Magistrates' Court. The quantification of general damages for loss of liberty was not straightforward (para 8);

ii) There was an inherent importance of the claim to non-parties given it concerned potential intrusion by organs of the state into the lives of private individuals. Parliament had seen fit to retain the right to a jury trial for claims of false imprisonment in section 66 of the County Courts Act 1984 ("CCA 1984") (para 10);

iii) The claimant had been granted public funding. If the claim was allocated to the SCT the application of the statutory charge would mean that all of his damages would be subsumed by his legal costs. Whilst allocation remained a matter for the court, the fact that public funding remained available for claims for false imprisonment demonstrated the broader importance that Parliament has placed on such claims (para 11); and

iv) The reasoning of the District Judge in *McGuire v Ministry of Justice*, unreported, 8 July 2019, Central London CC should be followed.

14. Mr Griffiths expanded upon these points in his oral submissions and, broadly, he made the following additional points:

i) The valuation the claimant had placed on the case was £3,000 - £8,500 (transcript, 5A);

ii) It was more complicated for a litigant in person to deal with a false imprisonment case where liability was denied than with a straightforward consumer dispute or accident claim. Had a litigant in person been faced with a denial of the kind that was made here in response to the letter of claim, it is likely that they would have presumed the defendant's solicitors knew the legal position better than they did and tried to claim against the Magistrates' Court, who would in turn have been able to deny liability (transcript 5G – 6C); and

iii) In this sort of case there would be a severe imbalance if a judge were to be faced with an unrepresented litigant and a legally represented defendant, particularly given the infrequency with which these sorts of cases came before the court, meaning that Judges and District Judges would be less able to assist the litigant in person than would be the case with claims that were litigated more regularly (transcript, 14B-C).

15. Counsel were agreed that although the possibility of a claim for aggravated and exemplary damages was mentioned in the bill of costs, it was not referred to in the letter of claim, nor raised by Mr Griffiths in the submissions that he made to the Master. It was not suggested that such damages were included on the claim form. The bill of costs suggested that a systemic issue arose in respect of the claim, as there was "a serious failure by the Defendant to impose an effective system of releasing prisoners after sentencing", but this does not appear to have featured in the submissions made to the Master.

16. As I have already indicated, the Master expressed agreement with the reasoning of District Judge Avent in *McGuire*. Whilst there is no approved transcript of this *ex*

tempore judgment, only a note prepared by Mr McGuire's solicitors, it was the reasoning contained in this document that the Master adopted.

17. *McGuire* was concerned with an application by the claimant to set aside an order allocating his claim to the SCT. The District Judge noted that Mr McGuire was publicly funded, that his solicitors had already put a great deal of work into the case and that if it remained on the SCT, any damages that he recovered would be likely to be swept up in legal costs, whereas if the matter was allocated to the FT there would be no application of the statutory charge and he would feel vindicated by the award of damages (page 1 of the note). The District Judge explained that the claim concerned a delay in Mr McGuire's release from custody of around 28 hours after his application for bail had been granted; that liability had been admitted; and that the defendant contended the value of the claim was £250, whereas the claimant said £1,500 (note, page 3). According to the note, the core of the District Judge's reasoning was follows:

> "9. …This is not a case where Mr McGuire can contend that he has taken a prized shirt to the dry cleaning and it had been wrecked. In this instance he would undoubtedly require some assistance in bringing a claim. It is instructive that public funding has been granted, not least because the principle of non-interference with a person's liberty by the state does fundamentally touch upon the civil rights of the citizen. It is very unusual for public funding to be granted, and there is an exception for false imprisonment by the state.
>
> 10. I consider that cases of this nature do fall within the public interest. It is important that when competent courts make orders for people to be released from custody that that happens straight away. It seems to have taken an awfully long time to get here and I am concerned that without the assistance of solicitors Mr McGuire may have fallen by the wayside a long time ago…
>
> 11. False imprisonment does not fall squarely into the factors mentioned in CPR 26.8(1). There is a concern that if it remains on the small claims track then solicitors would not take these matters on in the first place, alternatively any damages recovered by Mr McGuire would be obliterated by the statutory charge. There would be no incentive for Claimants to make these claims and solicitors would be deterred from taking them on. That is a slippery slope as it allows permeation of that view to filter down to the people who should be releasing people on time. One can see a laxity in getting someone out of a cell in short order and an approach of 'perhaps another hour or two won't make any difference'. In this area it does, in my view. It can't be left to the Ministry of Justice to make well pitched offers. I consider that Mr McGuire is justified in engaging solicitors, and that this is an important matter of public policy. It is right that if the Ministry of Justice has slipped up that they should have the spectre of costs hanging over their heads. The way round that is to make sensible offers at the outset. I propose to reallocate the matter to the fast track."

The legal framework

Costs and allocation

18. The track that a claim would have been allocated to may be relevant to the assessment of costs because CPR 46.13(3) provides:

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

19. Pursuant to CPR 26.5(1), the decision on allocation is usually made after the parties have filed their directions questionnaires ("DQs").

20. CPR 26.6 addresses the scope of the three tracks. CPR 26.6(3) says that "the small claims track is the normal track for any claim which has a value of not more than £10,000". However, CPR 26.6(1) provides bespoke thresholds for personal injury claims and claims made by tenants of residential premises against their landlords. As regards the former, the SCT is the normal track for personal injury claims where the overall value of the claim is not more than £10,000 and the value of the damages sought for personal injuries is not more that £5,000 in a road traffic accident case (with certain exceptions) and not more than £1,500 in other claims. As regards the latter, the SCT is the normal track where a residential tenant seeks an order requiring their landlord to carry out repairs if the costs of the works are estimated to be no more than £1,000 and the value of any other claim for damages is no more than £1,000. CPR 26.7(4) provides that the court will not allocate a claim to the SCT if it includes a claim by a tenant of residential premises against their landlord for a remedy in respect of harassment or unlawful eviction. Special allocation rules also apply to possession claims by virtue of CPR 55.9.

21. CPR 26.7(1) indicates that in considering whether to allocate a case to the normal track for that claim, the court will have regard to the matters mentioned in rule 26.8(1). Counsel accepted that this list is non-exhaustive. The listed matters are:

> "(a) the financial value, if any, of the claim;
>
> (b) the nature of the remedy sought;
>
> (c) the likely complexity of the facts, law or evidence;
>
> (d) the number of parties or likely parties;
>
> (e) the value of any counterclaim or other Part 20 claim and the complexity of any matters relating to it;
>
> (f) the amount of oral evidence which may be required;
>
> (g) the importance of the claim to persons who are not parties to the proceedings;

(h) the views expressed by the parties; and

(i) the circumstances of the parties."

22. The Practice Direction to Part 26 contains some further guidance in respect of allocation. Paragraph 8.1(1) states:

> "(a) The small claims track is intended to provide a proportionate procedure by which most straightforward claims with a financial value of not more than £10,000 can be decided, without the need for substantial pre-hearing preparation and the formalities of a traditional trial, and without incurring large legal costs…
>
> (b) …
>
> (c) Cases generally suitable for the small claims track will include consumer disputes, accident claims, disputes about ownership of goods and most disputes between a landlord and tenant other than opposed claims under Part 56, disputed claims for possession under Part 55 and demotion claims whether in the alternative to possession claims or under Part 65."

Claims for false imprisonment

23. As Baroness Hale observed in *R (Jalloh) v Secretary of State for the Home Department* [2020] UKSC 4, [2021] AC 262 (para 1):

> "The right to physical liberty was highly prized and protected by the common law long before the United Kingdom became party to the [ECHR]. A person who was unlawfully imprisoned could, and can, secure his release through the writ of habeas corpus. He could, and can, also secure damages for the tort of false imprisonment."

24. The tort of false imprisonment involves the imprisonment of a person without lawful authority. Once the fact of imprisonment is established, liability will follow unless those responsible in law for the detention show that there was lawful authority for it. As Lord Steyn explained in *R v Governor of Brockhill Prison ex parte Evans (No. 2)* [2000] 3 W.L.R. 843 at 847H:

> "It is common ground that the tort of false imprisonment involves the infliction of bodily restraint which is not expressly or impliedly authorised by the law. The plaintiff does not have to prove fault on the part of the defendant. It is a tort of strict liability."

Similarly, Lord Hope said at 855B-C:

> "The authorities are at one in treating it as a tort of strict liability. That strikes the right balance between the liberty of the subject

> and the public interest in the detection and punishment of crime. The defence of justification must be based upon a rigorous application of the principle that the liberty of the subject can be interfered with only upon grounds which a court will uphold as lawful."

25. As regards the quantification of damages for false imprisonment, Laws LJ summarised the principles that could be derived from the authorities in *MK (Algeria) v Secretary of State for the Home Department* [2010] EWCA Civ 980 (at para 8):

> "…There are three general principles which should be born in mind: 1) the assessment of damages should be sensitive to the facts and the particular case and the degree of harm suffered by the particular claimant: see the leading case of Thompson v Commissioner of Police…and also the discussion at page 1060 in R v Governor of Brockhill Prison Ex Parte Evans…; 2) Damages should not be assessed mechanistically as by fixing a rigid figure to be awarded for each day of incarceration: see Thompson at 516A. A global approach should be taken: see Evans 1060E; 3) While obviously the gravity of a false imprisonment is worsened by its length the amount broadly attributable to the increasing passage of time should be tapered or placed on a reducing scale. This is for two reasons: (i) to keep this class of damages in proportion with those payable in personal injury and perhaps other cases; and (ii) because the initial shock of being detained will generally attract a higher rate of compensation than the detention's continuance: Thompson 515E-F."

26. In *Thompson v Commissioner of Police of the Metropolis* [1997] 3 W.L.R. 403 the Court of Appeal identified guidance that should be given to juries in false imprisonment and malicious prosecution cases when assessing awards of damages. The same principles are applied by judges when they sit without a jury and determine quantum. In para (5) of the guidance, the court indicating a starting point figure of £500 for the first hour of detention in a straightforward case of wrongful arrest and imprisonment, indicating that after the first hour an additional sum should be awarded on a reducing scale. A guideline figure of about £3,000 was given for the first 24 hours of unlawful imprisonment, with a progressively reducing scale for detention thereafter. (The figures require upwards adjustment for subsequent inflation.)

27. In light of these authorities, counsel were agreed that the evaluation of basic damages for false imprisonment did not involve the mechanistic application of a daily or hourly tariff rate. They also agreed that in a case such as the present factors of potential relevance to the level of the award would include not only the period of detention, but: the length of any period of lawful detention that preceded the period of false imprisonment; the claimant's awareness / lack of awareness of the unlawful nature of their detention; and the extent to which they had previous experience of custody.

Public funding

28. Counsel agreed that a claim for false imprisonment was within the scope of legal aid funding. In the circumstances it is only necessary to refer to regulation 39 of The Civil Legal Aid (Merits Criteria) Regulations 2013 which provides (as material):

> "An individual may qualify for legal representation only if the Director is satisfied that the following criteria are met-
>
> (a) The individual does not have access to other potential sources of funding (other than a conditional fee agreement) from which it would be reasonable to fund the case;
>
> (b) The case is unsuitable for a conditional fee agreement;
>
> (c) …
>
> (d) …
>
> (e) There is a need for representation in all the circumstances of the case including –
>
> (i) The nature and complexity of the issues;
>
> (ii) The existence of other proceedings; and
>
> (iii) The interests of other parties to the proceedings; and
>
> (f) The proceedings are not likely to be allocated to the small claims track."

The submissions made in support of the appeal

29. As I indicated earlier, Mr Mallalieu relied upon the combined impact of a number of criticisms of the judgment below as supporting his over-arching submission that the Master's decision was not one that a court could reasonably have come to. He submitted that the only legitimate conclusion that the Master could have arrived at was that on allocation the case would have been allocated to the SCT. In summary, his points were that:

i) The value of the claim was plainly below £10,000. Accordingly, pursuant to CPR 26.6(3), 26.7(1) and 26.8(1) the starting point was that it should be allocated to the SCT;

ii) The claim was straightforward, given that false imprisonment is a tort of strict liability, the period of Mr Wilkins' detention was not in issue and the defendant had not suggested that it had a lawful justification for the detention. Similarly, the quantification of basic damages for four and a half days' detention was also relatively straightforward. In the circumstances it was unlikely that any oral evidence would need to be given at a trial of the claim beyond, possibly, some limited evidence from the claimant himself;

iii) Although the Master said that his provisional decision had given insufficient emphasis to the complexities, he did not identify what those complexities were; and this was because there were none;

iv) In so far as the Master had taken into account the claimant's right to elect for a jury trial as a "possible" complexity, this was an error of law, given that there had been no indication that Mr Wilkins was intending to exercise this right and the Master should have focused on what was likely to occur, as opposed to what was "possible";

v) CPR 26.8(1)(g) required that the importance for non-parties arose from "the claim", so that it was wrong in principle to focus upon the general nature of false imprisonment claims, rather than importance arising from the specifics of the particular case. Both the Master in this case and the District Judge in *McGuire* fell into error in basing their decisions upon generic characteristics of false imprisonment claims and the wider implications of deciding that the SCT was the appropriate track for such cases. These policy considerations were matters for the legislature, who had not created a specific exception for false imprisonment claims to the normal allocation rules, in turn indicating that it was envisaged that at least some such cases would be appropriate for the SCT; and

vi) Accordingly, the two features identified by the Master, complexity and importance to non-parties, had no real application to the present case and none of the other factors listed in CPR 26.8(1) assisted the claimant. In the circumstances there was nothing to displace the starting point that the claim should be allocated to the SCT.

Discussion and conclusion

General observations

30. As I have already identified at para 3 above, the question for me is whether the Master's decision fell outside the boundaries of a reasonable exercise of his case management decision making.

31. CPR 46.13(3) (para 18 above) refers to the track to which the claim "would have been allocated". However, in a case such as the present which did not get as far as the filing of particulars of claim, a defence or DQs, the court's assessment will inevitably involve a degree of imprecision. There will be uncertainties and unknowns. The costs judge will do the best they can, but in terms of the amount of information about the case that is available to them, they will not be in the same position as a judge making an allocation decision pursuant to CPR 26.5, where the pleadings and DQs will be in front of them. Additionally, an assessment pursuant to CPR 46.13(3) involves making a prediction as to what would have happened on the notional basis that the case did not in fact settle and proceeded to the allocation stage. I bear these features in mind when considering the application of the non-exhaustive factors identified in CPR 26.8(1) in the present context.

32. Whilst CPR 26.8(1)(c) refers to "the likely complexity of the facts law or evidence" (para 21 above), in making this composite assessment, the decision maker is not

confined by this provision or otherwise to only consider those aspects of a case that are shown to be more likely than not to arise.

33. Accordingly, I do not consider that there is anything objectionable in principle in the Master taking into account the "possibility" of there being a jury trial of Mr Wilkins' claim when he considered complexity (a topic I return to at para 42 below).

34. On any view the Master's *ex tempore* judgment was succinct. However, it is important not to lose sight of the context. He was giving his decision on two points of dispute concerning a bill of costs. In such circumstances it would not be at all unusual for a concise indication of the decision and supporting reasons to be provided, without explicit reference being made, for example, to the narrative history of the proceedings contained in the bill of costs. The Master identified the twin planks on which he based his conclusion, namely complexity and the importance of the claim to non-parties. He supported these features by reference to the submissions made by Mr Griffiths and the reasoning of the District Judge in *McGuire*. I can see nothing inherently objectionable in this approach and there is no reasons challenge brought in this case. In turn, it follows that when considering whether the Master was "wrong" (in the sense I have explained), it is legitimate for this court to refer to those materials as forming part of the reasons for his conclusion. In so far as Mr Mallalieu suggests there is uncertainty as to which of Mr Griffiths' submissions were adopted by the Master, it appears relatively clear from paras 2 and 3 of his judgment that it was the submissions made in respect of both complexity and the importance of the claim to non-parties. I have already summarised the central points advanced by Mr Griffiths at paras 13 - 14 above. Alternatively, even if the Master's judgment is to not to be read as adopting these points (contrary to my primary conclusion), they are still relevant for me to consider, as I have to decide whether a reasonable costs judge in the Master's position could have arrived at the same decision.

35. Whilst it appears that the claimant valued the case at more than £3,000 when the claim was issued (para 14 above), it was in any event at a figure under £10,000. Accordingly, the applicable starting point was that the SCT was the appropriate track. However, it is apparent from his judgment that the Master did take this as his starting point, before weighing the other factors, including the impact of complexity and the importance to non-parties.

36. I do not accept Mr Mallalieu's contention that the Master relied entirely upon generic features of false imprisonment claims in deciding that the FT would have been the appropriate track in this case. As I discuss more specifically below, the Master's decision was based on the combined effect of features specific to this case and those that were of more general application to false imprisonment cases.

37. In turn, I can see nothing objectionable in the Master relying upon the general characteristics of false imprisonment claims. It does not follow from the fact that CPR 26 does not specifically exclude false imprisonment actions from the SCT, nor make bespoke provision for their allocation (as is done with certain types of commonly litigated claims, summarised at para 20 above), that the general nature of this cause of action is irrelevant to the suitability of a particular track. There is nothing in CPR 26.6 – 26.8 that states or indicates that such generic matters cannot be taken into account and it would be a surprising proposition if so narrow an approach were required either in relation to false imprisonment or in relation to the many other types of claim that are

not specifically addressed in the allocation rules. Indeed, in my judgment, this aspect is explicitly catered for by CPR 26.8(1)(g), as I do not read the "the importance of the claim" to non-parties, as confined to considerations arising from the particular circumstances of the case; the wording is capable of including importance arising from the nature of the cause/s of action relied upon. When asked to indicate the sorts of circumstances that could be taken into account in relation to a false imprisonment claim under his interpretation of CPR 26.8(1)(g), Mr Mallalieu instanced where there were other claims or potential claims challenging the same practice at the same custodial establishment. Whilst that would certainly be an example of where a claim could be important to non-parties, I do not see any basis for limiting the wider words of 26.8(1)(g) in this way. In any event, even if I were thought to be wrong on that point, the CPR 26.8(1) factors are non-exhaustive and other matters of apparent relevance may be considered save where they are expressly or implicitly excluded by the rules.

Complexity

38. As I have already noted, the Master had to consider complexity by reference to the pre-action correspondence, as described in the bill of costs, since neither party had pleaded their case before settlement was achieved. As was clear from the bill of costs and from Mr Griffiths' written and oral submissions to the Master, this was a case where liability was denied and the defendant had positively asserted that an identified third party, Thames Magistrates' Court, was liable for the detention. This was a legally flawed proposition, given that Serco was the detaining authority and the fact of Mr Wilkins' imprisonment was admitted. Mr Mallalieu contended that establishing liability was very straightforward because this was so evidently a bad point to take. However, this is a less than compelling point in circumstances where Serco's own lawyers thought it a sufficiently viable contention to deny liability on this basis and to positively point blame towards the Magistrates' Court, as opposed to promptly admitting the claim after receipt of the letter of claim. There was nothing to indicate that the defendant had subsequently resiled from this position in the period prior to settlement of the claim many months later. If Mr Wilkins was litigating the claim on the SCT without the assistance of solicitors (assuming for present purposes that he had not been side-tracked into suing the Magistrates Court after receiving the defendant's letter) he may well have faced a liability hearing at which he had to argue over legal principles about false imprisonment against an experienced lawyer and in front of a judge who was not necessarily familiar with this tort.

39. These were matters pertaining to complexity that were before the Master and which he was entitled to take into account. His reference to Mr Griffiths' submissions in the context of complexity indicates that he did.

40. I accept that there is also some force in the contention that the evaluation of general damages is not a straightforward matter. Unlike a claim for special damages, evidenced by a receipt, invoice or some other documentary material indicating the value or cost in question, quantification of general damages usually requires some reference to and understanding of the principles identified in the relevant case law. I have summarised the position in respect of false imprisonment claims at paras 25 – 27 above. It is a more nuanced exercise than a simple application of a universal hourly or daily rate.

41. For the avoidance of doubt, I do not place any significance on the possibility of a claim for aggravated or exemplary damages, since whilst this is briefly mentioned in the bill

of costs, it does not appear to have formed any part of Mr Griffiths' written or oral submissions before the Master.

42. I have already indicated that I do not consider that the Master erred in taking into account the possibility that there would be a jury trial (para 33 above). CPR 26.11(1) provides that an application for a jury trial must be made within 28 days of the service of the defence. Pursuant to section 66(2) CCA 1984, such a request gives rise to a jury trial as of right in a false imprisonment case (save where the trial requires "any prolonged examination of documents or accounts or any scientific or local investigation which cannot conveniently be made with a jury"). Accordingly, whether or not a jury was to hear the case would usually be known by the time of allocation. However, Mr Wilkins' case had not got to that point. The pre-action correspondence did not indicate whether an application for a jury would be made. It therefore remained a possibility in the notional scenario that the claim proceeded to the allocation stage. I accept that this possibility was a relevant factor for the Master to take into account, given that the involvement of a jury would plainly make the matter unsuitable for the SCT, albeit it carried less weight than an instance where a claimant has clearly indicated that a jury would be sought if the matter proceeded.

43. In summary therefore, I reject Mr Mallalieu's submission that there was no basis for the Master to have identified complexity as one of the factors supporting allocation to the FT in this case. In particular: liability had been denied; the defendant's lawyers had identified a specific third party as responsible for the period of detention and had not resiled from that position; the determination of quantum involved the identification of and application of case law principles to a period of four and a half days' imprisonment; and jury trial was a possibility. Furthermore, as I have already indicated, the Master did not rely upon complexity alone, but upon complexity in tandem with the other factor he identified, which I will examine next.

Wider importance of the claim

44. I have already explained that when considering the importance of the case to non-parties, the Master was not limited to considering the specifics of the particular claim brought and was also entitled to have regard to generic features of the cause of action in question (para 37 above). I therefore reject the submission that the Master erred in principle in relying upon "the issue of the State interfering in a person's human rights" and the factors identified by District Judge Avent. Furthermore, the latter involved an element that was specific to the circumstances of both Mr McGuire's and Mr Wilkins' claims (rather than generic to all false imprisonment claims) in terms of the failure of the detaining authority to effect their release after the court had made an order / passed a sentence that removed the basis of lawful detention.

45. Accordingly, the Master was entitled to take into account the points made by Mr Griffiths and by District Judge Avent as relevant to the allocation decision, in particular:

    i) The inherent importance of a claim for false imprisonment, given the significance that the common law attaches to liberty and to the infringement of fundamental constitutional rights. Further, that in running the relevant prison, Serco was discharging a delegated function of the State and the claim related to the intrusion of State power upon the claimant's liberty and human rights;

ii) The general importance of it being clearly understood by those responsible for detention that court decisions affecting a person's liberty and release from custody were to be actioned on a timely basis;

iii) If claims such as this were treated as suitable for the SCT, rather than the FT, solicitors would be deterred from taking on these sorts of claims, so that unrepresented claimants would face State institutions, invariably represented by experienced lawyers and in front of courts who did not necessarily have regular experience of these types of cases. In turn, this would impact on the degree to which detaining bodies would be held to account, with a likely knock-on effect on their practices (described by District Judge Avent as "a slippery slope"); and

iv) There were indications of the importance that Parliament attached to false imprisonment claims generally in terms of the section 66 CCA 1984 right to jury trial (applicable to few causes of action) and the fact that this was one of the areas where legal aid still remained available (albeit subject to the regulation 39 criteria I have set out at para 28 above).

Other factors

46. It is clear that a number of the CPR 26.8(1) factors did not assist the claimant's position in terms of allocation, in particular there were only two parties, there was no counterclaim and oral evidence was likely to be limited.

47. However, in terms of other factors, Mr Kirby emphasised that the Legal Aid Agency had seen fit to grant legal aid in this case, but a decision that the case would have been allocated to the SCT would mean that no costs would be payable and in consequence, the damages otherwise due to Mr Wilkins would be subsumed by the statutory charge. This would leave him without vindication for the false imprisonment in circumstances where legal costs had been incurred through Serco unjustifiably denying liability and delaying in making an offer of compensation for a substantial period of time. This aspect was part of Mr Griffiths' submissions below and capable of being considered pursuant to CPR 26.8(1)(i) as part of "the circumstances of the parties" or as a relevant factor additional to those listed in CPR 26.8(1).

Conclusion

48. For the reasons that I have identified, I do not consider that the grounds of appeal are made out. The Master was entitled to arrive at the decision he did, which was based on the combined effect of complexity and wider considerations going beyond the parties, as he indicated. His reasoning involved no error of law and in light of the circumstances that I have identified and discussed, a decision that the case would have been allocated to the FT was not outside of the bounds of a reasonable exercise of his case management decision making.

Outcome

49. In the circumstances, the appeal is dismissed. The judgment was circulated in draft and the parties have had the opportunity to make written submissions on consequential matters, which I have addressed in the order I have made.