Case No: 226MC647

IN THE COUNTY COURT AT READING
SITTING AT THE COUNTY COURT AT OXFORD

St Aldate's
Oxford
OX1 2TL

Date: 2 November 2022

B e f o r e:

HER HONOUR JUDGE MELISSA CLARKE

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B e t w e e n:

KENNY JOHNSTON **Claimant**

- and -

GIVING.COM LIMITED **Defendant**

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Mr Farhan Asghar (instructed on a direct access basis) for the **Claimant**
Miss Claire Darwin and Miss Roisin Swords-Kieley (instructed by Womble Bond Dickenson) for the **Defendant**

Hearing date: 20 May 2022
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JUDGMENT

This judgment was handed down by the Judge remotely by circulation to the parties' representatives by email. The date and time for hand down is deemed to be 2 November 2022 at 2pm.

Her Honour Judge Melissa Clarke:

A. Introduction

1. This is my judgment following a trial of the following preliminary issues, heard on 20 May 2022:

   i. Whether the Claimant's claim is one that relates to a contravention of Part 3 of the Equality Act 2010 ("EA 2010") and therefore one that the County Court has jurisdiction to hear pursuant to s114 EA 2010 (the "**Jurisdiction Issue**"); and

   ii. Whether the Defendant owed a duty of care in negligence to the Claimant (the "**Duty of Care Issue**").

2. The Claimant is a founder and CEO of a charity called Counselling Life Advice Suicide Prevention Ltd, or CLASP ("**CLASP**"). CLASP was registered with the Charity Commission on 29 October 2013.

3. The Claimant says that CLASP was initially focussed on working with the NHS and public health services in local areas to assist people with mental health disabilities from self-harm and suicide prevention via a telephone service, but now focuses on the rights of people with mental health issues, learning disabilities and hidden disabilities. He says that he has first-hand understanding of, *inter alia*, mental health issues and suicidal ideation and is himself disabled by reason of his mental health issues. It is not necessary for me to make any findings on these points for the purposes of the preliminary issues trial.

4. The Defendant operates a charitable giving and collection platform called JustGiving. Its pleaded case is that the Defendant provides different services for different types of customers:

   i. A service that allows registered charities (which must provide the Defendant with a registered charity number) and non-profits (which must provide the Defendant with a Gift Aid number) to join the Defendant's fundraising platform as a charity customer ("**Charity Customers**") and

utilise services to assist it in maximising its fundraising capabilities ("**Charity Customer Services**");

ii. Corporate fundraising and event partnerships for companies and partners ("**Corporate Clients**"); and

iii. Fundraising, crowdfunding and donation collection services to individual members of the public to allow them to fundraise, crowdfund or donate to Charity Customers ("**Public Services**").

5. It is not disputed that the Claimant registered CLASP as a Charity Customer of JustGiving on 27 November 2013 and it remained a Charity Customer until 2 July 2021, nor that the Claimant was the main point of contact for CLASP with the Defendant.

6. The Claimant claims that in providing services, the Defendant:

i. discriminated against him by failing to make reasonable adjustments and treated him unfavourably as a consequence of something arising from his disability; and

ii. breached a common law duty of care which the Claimant says that the Defendant owes to him.

7. The Claimant says that he has suffered personal injury from mental health distress, and loss and damage to the CLASP charity arising from the discrimination and breach of duty.

8. The Defendant denies that it has discriminated against the Claimant, or breached any duty of care owed to him. On 6 September 2021 the Defendant applied to strike out the claim on the basis that, inter alia, the Claimant's claim is outwith the scope of Part 3 EA 2010 because the Defendant was providing services to CLASP and not to the Claimant and so was not acting as a service provider when dealing with the Claimant, the claim was out of time, and either the claim disclosed no reasonable grounds for being brought or the Claimant had no real prospect of succeeding on the claim.

9. The Claimant filed amended particulars of claim on 1 November 2021. The Defendant's strike out application was heard on 8 November 2021 by Deputy District Judge Child. He refused to strike out the claim, finding that "… it is at least arguable that that is a service that JustGiving is providing to Mr Johnston as an ancillary part of its general service to CLASP and that that service to Mr Johnston is effectively something that it extends to all members of the public who are then accessing its services on behalf of other people" (the "**Ancillary Services Argument**").

10. The Defendant then successfully applied to have the questions set out at paragraph 1 above determined as preliminary issues, those are before me now. I have had the benefit of helpful and focussed skeleton arguments and submissions from Mr Farhan Asghar for the Claimant and Miss Claire Darwin and Miss Roisin Swords-Kieley for the Defendant, for which I thank them.

B. The Legal Framework

The Discrimination Issue

11. The EA 2010 replaced in a single Act several previous anti-discrimination laws including the Sex Discrimination Act 1975, the Race Relations Act 1976 and the Disability Discrimination Act 1995. The long title of the EA 2010 is:

> "An Act to make provision to require Ministers of the Crown and others when making strategic decisions about the exercise of their functions to have regard to the desirability of reducing socio-economic inequalities; to reform and harmonise equality law and restate the greater part of the enactments relating to discrimination and harassment related to certain personal characteristics; to enable certain employers to be required to publish information about the differences in pay between male and female employees; to prohibit victimisation in certain circumstances; to require the exercise of certain functions to be with regard to the need to eliminate discrimination and other prohibited conduct; to enable duties to be imposed in relation to the exercise of public procurement functions; to increase equality of opportunity; to amend the law relating to rights and responsibilities in family relationships; and for connected purposes."

12. Part 3 of the EA 2010 prohibits discrimination in the provision of goods and services to the public. Under s114 EA 2010 the County Court has jurisdiction to determine a claim relating to a contravention of Part 3.

13. The key section, so far as the Discrimination Issue in this case is concerned, is s29(1) EA 2010, which is within Part 3. It provides that:

> "A person (a "service-provider") concerned with the provision of a service to the public or a section of the public (for payment or not) must not discriminate against a person requiring the service by not providing the person with the service."

14. S29(1) tracks very closely the wording in s20 of the Race Relations Act 1976 ("**RRA 1976**"):

> "It is unlawful for any person concerned with the provision (for payment or not) of goods, facilities or services to the public or a section of the public to discriminate against a person who seeks to obtain or use those goods facilities or services - …"

and in s2(1) Race Relations Act 1968 ("**RRA 1968**") which preceded it :

> "It shall be unlawful for any person concerned with the provision to the public or a section of the public (whether on payment or otherwise) of any goods, facilities or services to discriminate against any person seeking to obtain or use those goods, facilities or services by refusing or deliberately omitting to provide him with any of them or to provide him with goods, services or facilities of the like quality, in the like manner and on the like terms in and on which the former normally makes them available to other members of the public."

15. From comparing these sections, it can be seen that each of the EA 2010, the RRA 1976 and the RRA 1968 make it unlawful for any "person concerned with the provision of" "a service" (or "services") "to the public or a section of the public" whether for payment or not, "to discriminate". Key in all three provisions is the requirement that the person concerned provides a service "to the public or a section of the public". These were described by Lord Reid in *Race Relations Board v Charter* [1973] AC 868 at 885 (which was concerned with s2 RRA 1968) as *"words of limitation"* in order to delineate between services that are provided in the public sphere and those that are private. He said

that if they were not limiting, *"there would have been no point in inserting in the section the words "the public or a section of the public". The section would read perfectly well without them…"* but then cases which were intended to fall outside the legislation would be within the scope of it.

16. S31 EA 2010 contains a section entitled 'Interpretation and exceptions'. It provides in s31(2) EA 2010 that a reference to the provision of a service includes a reference to the provision of goods or facilities; in s31(6) that a reference to a person requiring a service includes a reference to a person who is seeking to obtain or use the service; and in s31(5) that:

> "(5) Where an employer arranges for another person to provide a service only to the employer's employees –
>
> a) The employer is not to be regarded as the service-provider, but
>
> b) The employees are to be regarded as a section of the public."

17. S5 of the Interpretation Act 1978 provides, under the heading 'Definitions':

> "In any Act, unless the contrary intention appears, words and expressions listed in Schedule 1 to this Act are to be construed according to that Schedule."

18. Schedule 1 to the Interpretation Act 1978 provides that the word *"person"* includes *"a body of persons corporate or unincorporate"*. It is common ground that no contrary intention for the meaning of the word *"person"* appears in the EA 2010, and I am satisfied that for the purposes of s29(1) EA 2010 the word *"person"* includes both individuals and bodies corporate and unincorporate.

19. The Equality and Human Rights Commission (the "**EHRC**") has published a Statutory Code of Practice on Services, public functions and associations ("**the Code**"). This contains the following guidance of potential relevance to this case:

i. At paragraph 3.6:

> "The Act imposes obligations on everyone concerned with the provision of s.29 services to the public, or to a section of the public, whether in the private public or voluntary sectors. It does not matter if services are

provided free of charge, such as access to a shopping mall, or in return for payment, for example a meal in a restaurant…"

ii. At paragraph 11.4:

"A provider of services is anyone who is concerned with the provision of services to the public or to a section of the public, whether or not for payment. Services include the provision of goods and facilities".

iii. At paragraph 11.6:

"It is important to remember that it is the provision of the service that is affected by the Act and not the nature of the service or business or the type of establishment from which it is provided. In many cases, a service provider is providing a service by a number of different means. In some cases, however, each of those means of service might be regarded as a service in itself and subject to the Act."

20. Both parties made submissions in relation to authorities which pre-date the EA 2010. Of particular relevance, in my judgment, is *Dockers Labour Club v Race Relations Board* [1976] A.C. 285.

21. In *Dockers*, the House of Lords (Lord Reid, Viscount Dilhorne and Lord Diplock) affirmed the guidance of *Race Relations Board v Charter* [1973] AC 868 that the words *"the public or a section of the public"* in s2(1) of the RRA 1968 were deliberate words of limitation indicating that the Act applied to discrimination in the public as opposed to the private sphere. As Lord Reid held in *Charter* at [pg. 885-886], without the words *"to the public or a section of the public"* s2(1) would read perfectly well, but it would alter the meaning so that matters which were intended to be kept outside the scope of the legislation were brought within it.

22. In *Dockers*, the appellants were a working men's club, belonging to a union of working men's' clubs. Under the rules of the union, any members of a club within the union could become associates on payment of a fee, which allowed them to enter any other club in the union and enjoy the rights of members of that club. Some of the clubs in the union had a colour bar. One associate who was a person of colour ("S") entered into the appellants' premises as an associate, but was asked to leave because of his colour. The House of Lords

held that each working men's' club in the union remained in the private sphere when electing its members; that a club did not go out of the private sphere into the public sphere in offering admittance to members of associated clubs in the union; and that, accordingly, s2(1) of the RRA 68 did not apply to the club, and the appellants had not unlawfully discriminated against S when asking him to leave. As Lord Diplock explained in his judgment at page 297 A – C [emphasis in the original]:

> "For there to be a "situation" to which section 2 applies, the discriminator must be a person "concerned with the provision to the public or a section of the public (whether on payment or otherwise) of any goods, facilities or services" and the person discriminated against must be a "person seeking to obtain or use those goods, facilities or services." That he must be seeking them in his role as a member of the public follows from the description of those persons whose treatment by the discriminator provides the standard of comparison, as "*other* members of the public" to whom the discriminator "normally makes them" (sc. The goods, facilities or services) "available. …"

23. He continued at page 297 D – E:

> "…The closest analogy at common law to this situation is to be found in the relationship between the common carrier or common innkeeper and those who seek the services that he provides. It is wider in that it extends to all persons who hold themselves out as providing to the public or a section of the public any goods or any of the facilities or services described in section 2(1). It is narrower in that it does not prohibit discrimination on any other ground than that of the colour, race or ethnic or national origins of the member of the public seeking those goods, facilities or services. **What is essential, however, is that the discriminator should hold himself out as providing the goods, facilities or services to the public or a section of the public.** As this House held in Race Relations Board v Charter [1973] A.C. 868, this excludes a situation in which the relationship between the provider and the seeker of the goods, facilities or services by virtue of which provision is sought is of a private or personal character." (my emphasis)

24. At page 297 F Lord Diplock gave the following well-known guidance:

> "… The test as to whether a particular transaction is one to which the code applies ought to be simple and readily comprehensible by ordinary men and women. I venture to suggest that the test could be put in a way which everyone could understand by putting the question: "Would a notice 'Public

> Not Admitted,' exhibited on the premises on which the goods, facilities or services were provided, be true?"

25. Mr Asghar in his skeleton for the Claimant submits that Parliament responded to the ruling in *Dockers* by outlawing discrimination in private clubs by way of the RRA 1976, and Miss Darwin accepts that, as do I. However, he further submits that little assistance can be obtained from pre-EA 2010 authorities including *Dockers*, as:

    i. Those cases were decided in a different era under a different statutory regime where restrictive and literal constructions were used. This Court should give a purposive construction to the EA 2010, and had that been done in *Dockers*, a different result would have been reached;

    ii. The RRA 1968 sought only to deal with race and not disability, and did not impose an anticipatory duty as did the EA 2010;

    iii. Parliament expressly legislated to undo the mischief caused by the earlier authorities and in passing the EA 2010 it must have intended that what it already legislated to undo would no longer apply;

    iv. *Dockers* concerned the relationship between a private union of clubs and its own internal members, not a private club or entity and external persons, or members of the public.

26. As Miss Darwin notes in her skeleton and oral submissions, and as I have described, Parliament has not, through various iterations of anti-discrimination legislation resulting in the EA 2010, amended the definition of *"service provider"* to remove the requirement that it be a person "*concerned with the provision of a service to the public or a section of the public"* (s29(1) EA 2010). Parliament must be taken to have understood, some 37 years after Lord Reid first noted it in *Charter*, that if it wished to remove the distinction between the public and private sphere it could do so by removing those words.

27. I asked Mr Asghar in closing what he says is the purpose of the words *"to the public or a section of the public"* in s29(1) EA 2010 in the purposive construction he submits I should be carrying out – did he mean I should treat

them as though they were not there? He submits that I should. That seems to me to be not a purposive construction, but an anti-purposive construction which seeks to subvert the meaning of the very words chosen by Parliament, and thereby the will of Parliament. It would bring into the scope of the legislation the very matters that those words seek to exclude. That would not be right, in my judgment.

28. I prefer Miss Darwin's submission for the Defendant that Parliament did not amend the definition to remove reference to providing a service to the public or a section of the public, because it wished to keep those words of limitation and did not intend to widen the meaning of "service provider" to exclude consideration of whether services were provided to the public or not; or, to put it another way, it did not intend to extend protection for discrimination from the public sphere to the private sphere.

29. I have already set out above that whether a service is provided to the public or a section of the public is just as central to s29(1) EA 2010 as it was to s2(1) RRA 1968 with which the House of Lords in both *Charter* and *Dockers* was concerned. Accordingly, in my judgment, Lord Diplock's guidance in *Dockers* and his test for determining whether or not the provision of a service is to the public or a section of the public, is still applicable when considering whether the provider of such a service is a "service provider" for the purposes of s29(1) EA 2010.

30. That deals with Mr Asghar's submissions (i) and (iii) in paragraph 24 above.

31. In relation to his submission set out at (ii): although the RRA 1968 does not deal with disability discrimination, very similar wording appears in the Disability Discrimination Act 1995 ("**DDA 1995**") at s19. This makes it unlawful for a provider of any goods or facilities (s19(2)(a) DDA 1995), concerned with the provision in the UK to the public or a section of the public (s19(2)(b) DDA 1995), with or without payment (s19(2)(c) DDA 1995), to refuse to provide, or deliberately not provide to the disabled person any services it is prepared to provide to members of the public (s19(1)(a) DDA 1995). The point is, in my judgment, that Parliament has continued to require in s29(1) EA 2010 the same

gateway to discrimination (of whether or not services are provided to members of the public or a section of the public), as is seen earlier anti-discrimination legislation, including disability discrimination legislation. Whether or not the EA 2010 goes on to impose an anticipatory duty on service providers (which the Race Relations Act 1968 does not) is not, I think, relevant to consideration of what a service provider is under the EA 2010. That is a first step before going on to then consider what rights and obligations such a service provider has to members of the public to which it offers services.

32. In relation to submission (iv) above, this is the very point of the decision in *Dockers*. If the facts of that case concerned the relationship between a private club and members of the public, then section 2 RRA 68 would have applied.

Common Law Duty of Care

33. The Claimant submits that the starting point for determining the existence of a duty of care is the three-fold test in *Caparo Industries v Dickman* [1990] 1 All ER 568: (i) is the damage foreseeable; (ii) is there a sufficiently proximate relationship between the parties and (iii) is it fair, just and reasonable in all the circumstances to impose a duty of care?

34. In fact, the Supreme Court told us in 2018 that this was not the starting point. Lord Reed in *Robinson v Chief Constable of West Yorkshire Police* [2018] UKSC 4 said at [21]:

> "The proposition that there is a *Caparo* test which applies to all claims in the modern law of negligence, and that in consequence the court will only impose a duty of care where it considers it fair, just and reasonable to do so on the particular facts, is mistaken. As Lord Toulson pointed out in his landmark judgment in *Michael v Chief Constable of South Wales Police (Refuge and others intervening)* [2015] UKSC 2;… para 106, *"that understanding of the case mistakes the whole point of Caparo, which was to repudiate the idea that there is a single test which can be applied in all cases in order to determine whether a duty of care exists, and instead to adopt an approach based, in the manner characteristic of the common law, on precedent, and on the development of the law incrementally and by analogy with established authorities."*"

35. He went on at [29] to explain:

> "Properly understood, *Caparo* thus achieves a balance between legal certainty and justice. In the ordinary run of cases, courts consider what has been decided previously and follow the precedents (unless it is necessary to consider whether the precedents should be departed from). In cases where the question whether a duty of care arises has not previously been decided, the courts will consider the closest analogies in the existing law, with a view to maintaining the coherence of the law and the avoidance of inappropriate distinctions. They will also weigh up the reasons for and against imposing liability, in order to decide whether the existence of a duty of care would be just and reasonable. In the present case, however, the court is not required to consider an extension of the law of negligence".

36. The first step, therefore, is to consider whether the courts have previously considered whether a duty of care arises from the provider of services similar to those provided by the Defendant to CLASP, to the employees, officers or agents of such an entity obtaining such services. The Claimant does not put any such authorities before me, and nor does he put before me any authorities which he says are the closest analogies in the existing law. Accordingly, although Mr Asghar in his skeleton asks me to consider developing novel categories of negligence incrementally and by analogy with established categories, the Claimant has not provided any detail of established categories from which he says such incremental development should flow.

37. Instead he asks me to consider the test in *Henderson v Merrett Syndicates Ltd* [1995] 2 AC 145 which asks whether the defendant has undertaken a responsibility towards the claimant to exercise reasonable care and skill, and asks me to apply *Caparo*.

38. The Defendant submits that there is no analogous situation. It relies on the reasoning of HHJ Worster sitting as a Judge of the High Court in *Michelle Kerrigan and Ors v Elevate Credit International Limited (t/a Sunny)* [2020 EWHC 2169 (Comm) who considered a claim in negligence by a borrower who took out 112 high cost short term loans in a 3.5 year period, 24 of which were from the defendant. The claimant sought damages for psychiatric injury he says he suffered as a result of the defendant's breach of a duty to take reasonable care in undertaking creditworthiness assessments (and in taking the lending decisions which followed) not to cause him psychiatric injury. He said that the

breach caused him an aggravation of his previously diagnosed clinical depression.

39. HHJ Worster noted at [166] that the claim was one for pure psychiatric injury, not the consequence of a physical injury nor the consequence of damage to property, nor the consequence of physical or temporal proximity to some terrible event or a close relationship with a primary victim of a tortious act. He noted at [167] that claimants had recovered damages for psychiatric injury as a result of occupational stress in the context of a well-established duty of an employer to provide an employee with a reasonably safe system of work, but that there was no employer or employee relationship in *Kerrigan*. He noted at [168] that in *Butchart v Home Office* [2006] EWCA Civ 239, the Court of Appeal considered a claim for damages for psychiatric injury suffered by the claimant while a prisoner arising from the suicide of his cellmate, but that it did so in the context of a well-recognised duty of care owed by the Home Office (at that time) to prisoners in its charge. At [169] he said:

> "The relationship between this claimant and the alleged tortfeasor was a financial one. Whilst Mr Clark [for the claimant] would characterise this claim as concerning psychiatric harm, that harm is consequent upon the financial loss caused by the Defendant's negligence. The better analogy here is with a claim for financial loss. It is also relevant to note that the courts have taken a more restrictive approach to the imposition of a duty of care in relation to pure financial loss claims than in relation to cases of physical damage. There is a helpful summary of the reasons for that in Clerk and Lindsell on Torts 22nd ed at para 8-97".

40. HHJ Worster then went on to discuss whether the fact that the defendant was carrying out a statutory duty (the creditworthiness assessment) could bring about a relationship which gives rise to a duty of care at common law, which is not a matter which is directly relevant to this case. He found that:

i. there was no decided case where the court had found a duty of care existed from a decision of a defendant to lend a claimant money leading to a worsening of a debt problem and aggravation of depression, or anything analogous to it (at [166]);

ii. that the claimant in his case was *"far away… from decided authority"* such that *"[t]here would be nothing incremental about the extension of the law to cover the duty contended for"*, distinguishing several cases where a duty has been found in financial relationships (at [173]); and

iii. there was *"neither the closeness of relationship nor the reliance upon advice or representation that are seen in cases where the courts have found that a duty of care exists in the context of the provision of some sort of financial service"* (at 175]).

41. HHJ Worster then went through a *Caparo* analysis and found at [179], for the reasons given at [176] to [178], that there were difficulties with foreseeability and proximity which meant that an extension of the common law was not justified. He identified the relationship between the parties as *"not one of trust and confidence, but more akin to a commercial relationship"* but noted previous authority that a relationship may arise from which a duty can be spelt out. He also held at [181] that it was also not just and reasonable to impose a duty to *"plug a gap"* in the statutory regime, so that he should find a common-law duty which goes beyond the statutory duty provided for by Parliament.

C. Evidence

42. The Claimant Mr Johnson filed a witness statement dated 10 May 2022 and gave oral evidence himself. He was cross-examined by Miss Darwin for the Defendant and re-examined by Mr Asghar. I found him to be a good witness; he was, once or twice a little defensive and unwilling to answer quite straightforward questions, such as when he was asked whether anyone who wished to do so could donate money to CLASP through JustGiving once CLASP had been set up by the Defendant as a Charity Customer with a webpage on that website. However, I put that down to nerves and unfamiliarity with the process of being cross-examined. I consider that he came to court to give honest answers to the best of his ability, and I found him to be both credible and reliable as a witness.

43. The Claimant was taken very carefully through all his interactions with JustGiving during his cross-examination by Miss Darwin. He said that he had

used the Defendant's JustGiving website to fundraise for Breast Cancer Research as an individual member of the public between 2008 to 2011. However, he confirmed that all his interactions with the Defendant after 2013 (when CLASP was registered) had related to the provision of Charity Customer Services by the Defendant to CLASP, not to him personally; and that he had at all such times interacted with the Defendant in his capacity as a representative of CLASP (whether as CEO, director or trustee). He agreed that since 2013 the Defendant had never provided him personally with any services.

44. Ms Natalie Roberts filed a witness statement also dated 10 May 2022. She was cross-examined by Mr Asghar for the Claimant. She too was a good witness: straightforward, not evasive, careful to limit her evidence to what was within her actual knowledge, and apparently both credible and reliable. Mr Asghar does not suggest otherwise.

45. Ms Robert's evidence was that the Defendant only provided Charity Customer Services to registered charities with a charity number or non-profits with a gift aid number; that although those services were provided to charities/non-profits by interacting with their employees, directors, trustees or agents, those services were provided to the charity not to those individuals on their own account as members of the public; that the Charity Customer Services were provided on a fee-paid basis pursuant to a contract with the relevant charity or non-profits; and such a contract had been entered into by CLASP who paid the relevant fees from its own bank account by way of a direct debit set up by the Claimant (as a director of CLASP) for that purpose.

D. Determination of the Jurisdiction Issue

To whom did the Defendant provide services?

46. As I have set out above, on the Claimant's own evidence he did not seek to obtain any services from the Defendant in his personal capacity after CLASP was set up in 2013. Mr Asghar for the Claimant accepts that is his evidence. However, Mr Asghar submits that it is a matter of law whether, when providing services to a Charity Customer, the Defendant when dealing with an employee or officer of the charity is also providing services to the employee or officer

individually. He does not put any authority before me in support of this contention nor does he develop any argument that the Defendant provided the sort of Ancillary Services to the Claimant that District Judge Child identified as being arguable when he dismissed the Defendant's application for strike out. In those circumstances I am satisfied that as a matter of law the Defendant provided Charity Customer Services to CLASP pursuant to a contract with CLASP and not any other services to the Claimant personally, as in fact the Claimant accepted in cross-examination.

Is the Defendant a service provider?

47. The Defendant's case is that when it is providing Public Services to members of the public, it is acting as a service provider for the purposes of s29(1) EA 2010 and is subject to obligations under Part 3 EA 2010; but when it is providing services to Charity Customers, such customers and their employees, officers and agents through whom they act are not members of the public or a section of the public and so it is not acting as a service provider for the purposes of s29(1) EA 2010.

48. The Defendant submits that Charity Customers are not the public or a section of the public because:

    i. they are not individuals, which the public or a section of the public must be;

    ii. to become a Charity Customer requires the provision of a charity registration number or a Gift Aid number, which are not available to the public or a section of the public; and

    iii. per Lord Diplock's test in *Dockers*, a notice reading "Public Not Admitted" in respect of the Defendant's services for Charity Customers would in all likelihood be true.

49. I do not understand the Claimant to disagree with these submissions to the extent that they are limited to the Charity Customers themselves (i.e. the incorporated or unincorporated bodies holding the charity registration number or Gift Aid

number). However he disagrees with the Defendant's extension of those arguments to the individual employees, officers and agents of the Charity Customers with whom the Defendant deals.

50. The Claimant submits that since the main purpose of the EA 2010 is to eliminate discrimination, it is wrong to deny rights to an individual dealing with the Defendant because he is an employee or officer, when that individual would enjoy rights if he was dealing with the Defendant as an individual. He uses as an example the case of *Royal Bank of Scotland v Allen [2009] EWCA Civ 1213*, in which Mr Allen, an individual with Duchenne Muscular Dystrophy who used an electric wheelchair, was unable to gain access to the bank branch in Sheffield at which his bank account was held, as it was physically inaccessible due to steps at its entrances. The bank offered a combination of internet and telephone banking, as well as the use of other branches within the Sheffield area. Mr Allen brought a claim of disability discrimination on the grounds of breach of s19(1)(b) DDA 1995. He was successful at first instance and this decision was upheld on the Bank's appeal. Mr Asghar asks why a disabled individual should be protected from discrimination if he wishes to enter a bank to deal with his personal bank account, and not be protected from discrimination if he enters it to deal with the bank account of a company of which he is an employee, or perhaps the sole director and shareholder.

51. I accept that such consequences may seem arbitrary. However that is the law as Parliament has explicitly stated it to be. Parliament by s29(1) EA 2010 has chosen to distinguish between services provided in the public sphere and the private sphere, as Lord Diplock put it in *Dockers*, and that is the consequence.

52. Of course a body corporate or unincorporate must act through an individual, whether that is an employee, officer or agent, as although it has a legal persona it has no physical person. If it was intended that services provided to such a person who was not a member of the public or a section of the public would nonetheless be caught because the services were deemed to be provided to employees, officers or agents through whom it acted, who were to be regarded as members of the public or a section of the public, that would undermine the

entire distinction between the public and private sphere that s29(1) EA 2010 by its wording has chosen to retain.

53. In addition, I do not accept the premise that employees or officers of a body corporate or unincorporate when dealing with a service provider on behalf of that body are members of the public or a section of the public. I note that Parliament felt it necessary in s31(5) EA 2010 to set out that:

> "(5) Where an employer arranges for another person to provide a service only to the employer's employees –
>
> a) The employer is not to be regarded as the service-provider, but
>
> b) **The employees are to be regarded as a section of the public**." (my emphasis)

54. The Defendant submits that it can be inferred that Parliament considered this exception to be necessary because without it, employees would *not* be regarded as a section of the public for the purposes of the EA 2010 because they would fail Lord Diplock's test "Public Not Admitted". I agree. Although a number of higher courts have accepted that the words *"member of the public or a section of the public"* are very general so, in the words of Lord Wilberforce in *Applin v Race Relations Board* [1975] AC 259 *"they can be made to cover operations of almost any scale…"*, they have not taken a very narrow view. Lord Wilberforce went on to say *"…they do suggest, to my mind, something which is generally available to whoever wants it"*. Lord Hoffmann in *Carter v Ahsan* [2008] 1 AC with whom the other members of the Court agreed, finding that a Labour Party member is not a member of the public or a section of the public, held *"members of the general public are not free, either in theory or in practice, to attend party meetings"*. Similarly, members of the public or a section of the public could not deal with the Defendant on behalf of CLASP: only employees, officers and agents could do so.

55. For those reasons I accept the Defendant's submission that the services provided by the Defendant to CLASP, albeit provided through the Claimant as CLASP'S employee or officer or agent, were not services to the public or a member of the public within the meaning of s29(1) EA 2010.

56. Mr Asghar argues for the Claimant that it would be absurd to suggest that the EA 2010 intended that the Defendant could, theoretically, discriminate against the Claimant and either fail to provide reasonable adjustments or even refuse to work with CLASP or the Claimant due to, for example, the Claimant's disability or race. I accept the Defendant's submission that the House of Lords in *Dockers* was clear that the alleged victim of the discrimination must be an individual seeking to obtain the goods, services or facilities in question as a member of the public: see Lord Diplock at 297A-B and Viscount Dilhorne at 295D-E. However I also accept Mr Asghar's submission that the EA 2010 has moved things forward by introducing anticipatory duties to make reasonable adjustments for disabled persons, and making associative discrimination unlawful, for example. In the circumstances that Mr Asghar describes, that might give rise to a claim by CLASP for associative discrimination resulting in detrimental treatment to CLASP because of the protected characteristic of the Claimant (see *EAD Solicitors LLP v Garry Abrams [2016] ICR 380* relied on by the Defendant), but that is not the claim which is before me. This claim has been brought by the Claimant.

Conclusion on the Jurisdiction Issue

57. **For those reasons, I find against the Claimant on the Jurisdiction Issue. The Claimant's claim is not, in my judgment, one that relates to a contravention of Part 3 EA 2010 and so is not one that the County Court has jurisdiction to hear pursuant to s114 EA 2010.**

E. Determination of the Duty of Care Issue

58. I can deal with this quite shortly.

59. The Claimant's pleaded case on duty of care is at paragraphs 13 -14 of the particulars of claim:

> "13. Having regard to the history of Claimant's mental health disabilities and previous suicide attempts, his subsequent ill health and vulnerability; plus the acknowledgement by the Defendant of the Claimant's disabilities on various occasions. The Defendant came under a common law duty since

> the Claimant's registration of CLASP Charity to take reasonable care not to expose the Claimant to the risk of injury or loss.
>
> 14. Given the history of the matter and the prior communications between the parties, it was foreseeable that negligent acts or omissions by or on behalf of the Defendant might cause mental health and/or psychiatric as well as physical injury to the Claimant".

60. As I have previously set out, the first step following *Robinson* is to consider whether the courts have previously considered whether a duty of care arises from the provider of services similar to those provided by the Defendant to CLASP to the employees, officers or agents of such an entity obtaining such services, but the Claimant does not put any authorities before me, and the Defendant submits there are no such authorities. The Claimant submits that CLASP owed duties of care to the Claimant as its employee, officer or agent, and Mr Asghar in closing was careful to make clear that he does not say that because CLASP owes a duty of care to the Claimant, there is an identical duty of care on the Defendant. He was right not to do so, in my judgment.

61. The next step is to consider analogous authorities, but the Claimant does not put any such authorities before me. Those put before me by the Defendant, which of course can be distinguished on their facts but may justify incremental development of the law, do not in fact lead me towards a finding of a duty of care in my judgment.

62. In *Kerrigan*, HHJ Worster treated the situation in that case as novel, but still found that a duty of care did not arise. In that case there was a direct commercial relationship between the claimant and the defendant, which there is not in this case. The defendant was carrying out statutory duties in relation to the claimant and making decisions which directly affected the claimant's financial liabilities, neither of which can be said to be the case here, where the commercial relationship was between CLASP and the Defendant. The Claimant argues that although the Defendant's direct relationship was with CLASP, it was for all intents and purposes dealing with the Claimant and so the relationship between the parties is sufficiently proximate to impose a duty of care, but I do not agree that it is, and the Claimant has not put before me any authority on the point. In

terms of both proximity and foreseeability this case is even weaker than that in *Kerrigan*, in my view.

63. The Defendant submits that analogies can be drawn with a line of cases where claims in negligence have been brought arising out of data breaches. In *Warren v DSG Retail Ltd* [2021] EWHC 2168 where a claim was brought in negligence arising from a cyber-attack on a 'point of sale' computer system, the High Court found that no duty of care was needed or warranted in circumstances where statutory duties under the Data Protection Act 1998 operate (applying *Smeaton v Equifax Ltd* [2013] 2 All ER 959). The Defendant submits, and I agree, that as in those cases, here there is a comprehensive statutory regime. In this case it is the EA 2010 which sets out whether and when there is a duty to make reasonable adjustments or not treat an individual unfavourably because of something arising from disability. I further agree, per *Warren v DSG Retail* and as HHJ Worster found in *Kerrigan*, the Court should not impose a common law duty to fill any perceived 'legislative gap' as this would be to subvert parliamentary intent and as such, would not be just and reasonable.

64. Drawing all this together, I do not consider that there is any existing precedent for a duty of care in the circumstances of this case, nor can one be sensibly drawn as an incremental development from the existing authorities, or at least not from any authority which has been put before me. There is an argument to be had whether, in these circumstances a full *Caparo* analysis should be undertaken at all: I would say following *Robinson* and in the circumstances of this case it is not necessary to do so. In case I am wrong however:

    i. I consider that it is not arguable that it is reasonably foreseeable that a negligent act of the Defendant in the provision of Charity Customer Services could cause an employee, officer or agent of a Charity Customer pure economic loss in his personal capacity, or psychiatric injury even assuming that, as the Claimant says, the Defendant was aware of the Claimant's mental ill-health and psychiatric history at that time that he was acting as an employee, officer or agent of CLASP;

ii. I consider that it is not arguable that the relationship between the Defendant and the Claimant was sufficiently proximate to found a duty of care in circumstances where the commercial relationship was with CLASP and the Claimant was on his own evidence dealing with the Defendant only in his capacity as employee, officer or agent of CLASP;

iii. I consider that it is not arguable that it would be fair, just or reasonable to impose a duty of care in circumstances where Parliament has enacted a statutory scheme in the EA 2010 which by s29(1) imposes statutory duties on the Defendant in the context of provision of services to the public or a section of the public, but not otherwise, and where it is (a) not providing services to the Claimant at all; and (b) dealing with the Claimant in his capacity as an employee of a private, commercial customer, not in the public sphere covered by s29(1) EA 2010.

65. Finally, I note that in closing the Claimant sought to argue that there was an additional or new duty of care owed by the Defendant to the Claimant, namely *"the duty to exercise reasonable care and skill when liaising with HMRC on behalf of CLASP to ensure that Mr Johnson's needs are met".* This is not pleaded or even addressed in the skeleton argument and the Defendant had no opportunity to marshal its arguments about it (for example to research whether there was such an existing or analogous duty previously determined by the Courts). It is in my judgment too late to argue it now.

Conclusion on the Duty of Care Issue

66. **For those reasons I find against the Claimant on the Duty of Care Issue, and find that the Defendant did not owe a duty of care in negligence to the Claimant.**