



Neutral Citation Number: [2023] EWHC 2204 (SCCO)

Case No: SC-2022-BTP-000352

IN THE HIGH COURT OF JUSTICE

SENIOR COURTS COSTS OFFICE

Thomas More Building
Royal Courts of Justice
London, WC2A 2LL

Date: 1 September 2023

Before :

DEPUTY COSTS JUDGE ROY KC

Between:

MRS CLAIRE STEPHENSON

**Claimant/
Receiving Party**

-and-

PAYMASTER (1836) LTD (T/A EQUITINI)

**Defendant/
Paying Party**

Tom Morris (instructed by **Keller Postman**) for the **Claimant**

Stephen Innes (instructed by **Freeths LLP**) for the **Defendant**

Hearing date: 24 August 2023

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.

This judgment has been handed down remotely by circulation to the parties or their representatives by email and release to the National Archives.

Introduction

1. At on oral hearing on 24 August 2023 I informed the parties of my decision that the After the Event insurance (“ATE”) premium claimed by the Claimant was not recoverable in principle.
2. I advised the parties that I would provide my reasons later in writing.
3. This is I now do.
4. The point is not a straightforward one. It is not directly covered any existing authority, or least none which counsel or I have been able to identify.
5. Mr Morris appeared for the Claimant, Mr Innes for the Defendant. I have been greatly assisted by counsels’ submissions and the constructive approach taken by them to cooperate and narrow the issues. The point has been well (and engagingly) argued on both sides.
6. This judgment is structured as follows:
 - (1) Background.
 - (2) The issue.
 - (3) Question (1): does a spurious claim for misuse of private information (“MPI”) engage the statutory exception?
 - (4) Question (2): was the MPI claim here a genuine (as opposed to a spurious) one?
 - (5) Conclusion.

(1) Background

7. The Claimant worked as a police officer until her retirement. She was entitled to certain retirement benefits.
8. The Defendant was responsible for processing and administering those benefits.

9. The Claimant's factual case (the essentials of which do not appear to have been seriously in dispute) was that an estimated retirement benefits pack for the Claimant containing private information was accidentally included in a pack sent to a fellow police officer. I understand that this other officer forwarded the Claimant's pack on to her, making no further use of the information contained within it.

10. This generated proceedings for (as per the Claim Form issued on 13 April 2021):

... damages for breach of statutory duty pursuant to the UK General Data Protection Regulation and the Data Protection Act 2018 and/or misuse of private information arising from the Defendant's failure to keep the Claimant's personal and pension data (consisting of private and confidential information) secure by posting the same to incorrect postal addresses

11. There were thus two elements to the claim as whole:

- (1) A statutory claim for breach of the Data Protection Act ("DPA").
- (2) A common law MPI claim.

12. The Defence denied most elements of these claims. In particular it disputed that there was a valid MPI claim.

13. On 2 September 2021 the Claimant made a Part 36 Offer of £2,000. The Defendant served notice of acceptance of that offer on 6 September 2021.

(2) The issue

14. **Section 46 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012** amended **section 58 of the Courts and Legal Services Act 1990** by adding a **section 58C**. The effect of this is that ATE premiums became generally irrecoverable inter partes.

15. However, some exceptions were carved out in respect of which ATE premiums would remain recoverable. These included an enumerated closed list of certain types of "*publication and privacy proceedings*". The relevant exception for present purposes is stipulated at **article 4(d)** of the **Legal Aid, Sentencing and Punishment of Offenders**

Act 2012 (Commencement No. 5 and Saving Provision) Order 2013 (SI 2013 No 77).

This excludes:

proceedings for - ... misuse of private information.

16. The issue before me is whether the instant claim constitutes “*proceedings for misuse of private information*” within the meaning of the statutory instrument. If it does, the ATE premium is recoverable in principle. If it does not, the ATE premium is irrecoverable.

17. In my view, resolution of this issues turns on two questions:

(1) Does a spurious (as opposed to a genuine) MPI claim satisfy **article 4(d)**?

(2) If not, was the MPI claim here a genuine (as opposed to a spurious) one?

18. By “spurious” I mean a claim which has no realistic prospect of success. This means a claim which, even accepting the Claimant’s factual case as pleaded (or at least at its realistic highest), has no more than a fanciful chance of being established.

19. By contrast, a “genuine” claim in this context simply means one that discloses some real prospect of success. The description of claim as not being genuine in the sense I am defining it does not carry any pejorative connotations beyond this.

20. If the answer to either of these questions is yes, the ATE premium is recoverable in principle. If the answer to both of these questions is no, it is not.

(3) Question (1): does a spurious MPI claim engage the statutory exception?

21. The Claimant contends that it does. This contention is highly counterintuitive. It would elevate form and subjective labelling over objective substance. It produce absurd, indeed, perverse consequences.

22. This second point is starkly illustrated by Mr Morris’ response when I asked him whether, on his interpretation, the pleaded addition of a spurious MPI claim to matter which had nothing to do with private information or data whatsoever (for example, a

personal injury claim) would satisfy **article 4(d)**. He confirmed, logically with the position he was advancing, that it would.

23. Mr Morris sought to draw the sting from this by arguing that the solution would be for the Defendant to apply to strike out the MPI claim. However, this is a partial answer at best. Moreover, I do not consider it to be a sound one even on its own terms:

- (1) A large proportion, if not the majority, of such claims should be expected to settle pre-issue. For such claims, there is no possibility of the problem being remedied by way of strike out.
- (2) In many such cases such an application would not be commercially worthwhile or at least sensible.
- (3) The need to make such applications for later costs purposes would generate undesirable costs and use of court resources being expended on satellite litigation.
- (4) It is in any event doubtful that striking out the MPI claim would take the proceedings outside **article 4(d)** if they originally came within it. See *Achille v Lawn Tennis Association Services Ltd* [2022] EWCA Civ 1407; [2023] 1 WLR 1371.

24. As a matter of logic and common sense, the question of whether a claim falls within **article 4(d)** must in my view be a question of substance, rather than form or labelling. As Mr Innes put it, if you did not suffer injury in an accident, merely labelling your claim one for personal injury would not make it one. I consider this analogy to be pertinent, as whether or not a claim is one for personal injury would have important costs consequences. In particular if it were a claim for personal injury, it would engage the qualified one way costs shifting regime at **CPR rules 44.13-44.17**.

25. I cannot accept that it was the drafter's intention that a claimant should obtain a forensic costs benefit by bringing a spurious MPI claim by way of contrived and artificial labelling. I cannot accept that it was intended that a claimant could unilaterally grant himself extra costs protection by self-serving labelling and without any reference to the objective substance and reality of the matter. The unlikelihood of this is reinforced by the fact, on Mr Morris' argument (as he conceded), a claimant would obtain such a benefit even if he did so in a positively abusive way.

26. Such an interpretation would be contrary to established canons of construction. The following, taken from *Bennion, Bailey and Norbury on Statutory Interpretation* (8th edition) are pertinent here:

(1) A purposive approach is required (s.11.1):

(1) In construing an enactment the court should aim to give effect to the legislative purpose.

(2) A purposive construction of an enactment is a construction that interprets the enactment's language, so far as possible, in a way which best gives effect to the enactment's purpose.

(3) A purposive construction may accord with a grammatical construction, or may require a strained construction.

(2) It is therefore necessary to ascertain the purpose in question (ss.10.1, 13.1):

Parliament intends that an enactment shall remedy a particular mischief. It is presumed therefore that Parliament intends the court, in construing the enactment, to endeavour to apply the remedy provided by it in such a way as to suppress that mischief.

The courts prefer a construction which furthers the legislator's aim of providing a remedy for the mischief against which the enactment is directed to one that attempts to find some way of circumventing it.

(3) Absurdity is to be avoided (s.13.1):

The court seeks to avoid a construction that produces an absurd result, since this is unlikely to have been intended by Parliament. Here the courts give a very wide meaning to the concept of 'absurdity', using it to include virtually any result which is unworkable or impracticable, inconvenient, anomalous or illogical, futile or pointless, artificial, or productive of a disproportionate counter-mischief.

27. The last of these tells very heavily against the Claimant's interpretation for the reasons set out above.

28. Mr Morris sought to meet these points by reference to *Rakusen v Jepsen & Ors* [2023] UKSC 9; [2023] 1 WLR 1028. The proposition he drew from this is that it is not legitimate for the court to rewrite a statute in order to close a loophole or otherwise avoid undesirable consequences.

29. I of course fully accept that proposition insofar as it goes. However, in my view it falls far short of compelling the interpretation advanced by the Claimant in this case:

- (1) *Rakusen* simply confirms that there are limits to purposive interpretation. It does not say that purposive factors are to be disregarded entirely and that the focus must be purely on the literal meaning of the words in question. It cannot sensibly be suggested that it purports to overturn trite and well-established principles endorsed at the highest levels. See for example per Lord Sumption JSC in *Uber BV & Ors v Aslam & Ors* [2021] UKSC 5; [2021] ICR 657 at [70]

The modern approach to statutory interpretation is to have regard to the purpose of a particular provision and to interpret its language, so far as possible, in the way which best gives effect to that purpose.

The caveat “*so far as possible*” is in my view entirely consistent with *Rakusen*.

- (2) Indeed, even on the Claimant’s case a purely literal interpretation of **article 4(d)** could not be the correct one. On such an interpretation, genuine claims for MPI which settle pre-issue would not fall within **article 4(d)** as there would have been no “*proceedings*” in the purely literal meaning of the word. Yet it is common ground, and correctly accepted by Mr Morris, that such a claim would fall within **article 4(d)**.
- (3) In this case, the Defendant’s interpretation does not involve rewriting or otherwise inflicting undue violence upon the statutory wording in the manner deprecated in *Rakusen*.
- (4) Indeed, if anything, I consider that the Defendant’s interpretation accords more closely with the natural and ordinary meaning of the statutory wording. Where there is a requirement that something must possess a certain characteristic, that would normally mean that the thing in question must genuinely, objectively and as a matter of substance possess that characteristic.

30. I have therefore come to the clear view that the statutory intention was to provide extra protection (in the form of recoverable ATE premiums) only to genuine MPI claims and not to spurious ones.

(4) Question (2): was the MPI claim here a genuine (as opposed to a spurious) one?

31. An essential element of a MPI claim is the private information is misused. This requires that the information has been used; *Warren v DSG Retail Ltd* [2021] EWHC 2168 (QB); [2022] 1 All ER (Comm) 1191 per Saini J at [26-27]. (If so, the nature of the usage will determine whether or not it constitutes misuse).

32. The Concise Oxford English Dictionary defines use as follows insofar as relevant:

v. take, hold, or deploying as means of achieving a something

n. the action of using or state of being used.

33. Therefore, as I see it, the defining characteristic of “use” is doing something with an object with the purpose of achieving or obtaining a particular result or objective.

34. This definition moreover is satisfactory not only at a literal level but also a purposive one. It is highly unlikely that the drafter intended that doing anything with private information in any manner whatsoever should qualify. That would entail an implausibly and undesirably wide concept of (mis)use.

35. I do not consider that the act complained of here (sending the pack to the wrong officer) falls within that definition. The act of sending the pack to the wrong officer was not intended to achieve anything. Indeed, the act was not intended at all. Moreover, it was incapable of achieving any aim or objective the Defendant might conceivably have wished for.

36. Granted, in general terms, the sending of such packs would constitute use of private information. However, that is not the subject matter of the Claimant’s claim. His complaint is in respect the specific one-off act of sending a pack to the wrong recipient.

37. I therefore do not consider that the act in question on proper analysis constituted use of private information in the true sense of the word. It follows that it cannot constitute misuse.

38. Although I would have reached this view independently, in my judgment this is confirmed beyond doubt by *Stadler v Currys Group* [2023] EWHC 976 (KB). In that case the claimant returned a smart TV to the defendant. The defendant then re-sold it to a third party, but without erasing the claimant's private information stored therein. Someone else then purchased a movie for £3.49 by using the claimant's Amazon account via the smart TV.

39. HHJ Lewis, sitting as a High Court Judge held that, held whilst there was an arguable DPA claim, the MPI claim had no real prospect of success. His key reasoning is at [58]:

I accept the defendant's argument that there is a fundamental defect with the claims for MOPI and BOC. In passing the Smart TV to a third party the defendant was not making use of the data or information that is the subject of this claim. In fact, there is no evidence that the defendant had any actual knowledge of the information in question or made use of it. It follows that there cannot have been any unauthorised use (or misuse) of the information by the defendant. It would be artificial to characterise the disposal of the Smart TV as a misuse of the information itself. At best, it could be said that in failing to wipe the device, the defendant was responsible for breaching a duty of data security, but this is insufficient on the facts of this case to make out claims for either BOC or MOPI.

40. I can see no material distinction between the facts of this case and those in *Stadler*. In both cases the defendant positively and illegitimately conveyed the claimant's private information to a third party. In both cases they did so without any intention to use the information to achieve any objective.

41. Indeed, the case for a genuine MPI claim was if anything stronger in *Stadler*. As regards intentionality, Currys obviously intended to convey the smart TV to a third party with the objective of thereby obtaining a profit, even if it did not appreciate that doing so entailed conveying private information. The defendant here by contrast did not intend to send the pack to the other officer at all; the act itself was pure inadvertence. As regards harm, in *Stadler* there was tangible and clearly identifiable harm in the form of the movie purchase. There was no such here.

42. It follows that the Claimant's characterisation of the act in question as misuse of private information is no less artificial than that in *Stadler*. If anything, it is significantly more so. As *Stadler* is binding upon me, that is dispositive.

43. This conclusion is further reinforced by the fact that, as far as I can see (having pressed Mr Morris on the point), the MPI claim adds nothing to the DPA one. I can see no scope for the Claimant to have succeeded on the MPI claim but failed on the DPA claim. Conversely, she was virtually certain to succeed to some degree on the DPA claim but had no real prospect of doing so on the MPI claim. Nor, as far as I can ascertain, even had she somehow succeeded on both claims would the Claimant have received any higher damages or different remedy by the inclusion of the MPI claim.

44. It follows that the addition of the MPI claim to the DPA one added nothing to the substance, merits or value of the claim/proceedings as a whole. These would have been exactly the same had the MPI claim not been included or had been deleted.

45. In light of this I consider the following characterization at §17 of Mr Innes' skeleton to be accurate:

The Claimant tacked on a claim for misuse of private information ("MPI") at para 9 of the Particulars of Claim, for which, at 10.2, exactly the same relief was claimed as in the claim for breach of statutory duty.

46. I likewise agree that Saini J's characterisation of the claim in **Warren v DSG Retail Ltd** supra at [27] as "*an unconvincing attempt to shoehorn the facts of the data breach into the tort of MPPI*" is equally apt here, notwithstanding the significant factual differences between this case and **Warren**. I make mutatis mutandis the same observation in respect of Saini J's characterisation of the claim in **Smith v TalkTalk Telecom Group Plc** [2022] EWHC 1311 (QB); [2022] 1 WLR 5213 at [48] as "*a negligence action masquerading as a claim for MPPI*".

47. In short, the addition of the MPI claim appears to have been contrived purely for the purposes of enabling proceedings to be issued in the High Court and/or enabling the Claimant to seek recovery of an ATE premium. The clear theme which emerges from **Warren**, **Stadler** and **Smith** is that the courts should be astute not to permit a Claimant to benefit from labelling a claim as one for MPI when as a matter of substance it is not.

48. Finally, whilst Mr Morris in his skeleton argument sought to suggest that the terms of the settlement precluded the Defendant from contending that this was not a MPI claim, he sensibly did not seek to press this point with any vigor orally. The settlement did no more than compromise the substantive claim and give the Claimant an entitlement in principle to her costs. I can see no basis for reading into it a provision that the Defendant somehow waived its right to challenge that the claim was a MPI one for the purposes of recovering costs. In my view the settlement clearly envisaged and permitted the Defendant to challenge on assessment the recoverability of any given item of costs.

Conclusion

49. For the reasons set out above, and despite Mr Morris' able and attractive submissions, I find that the ATE premium is not in principle recoverable in this particular case.