Neutral Citation Number: [2021] EWHC 3809 (QB)

Case No: QB-2021-002122

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
MEDIA AND COMMUNICATIONS LIST

Royal Courts of Justice
Strand, London
WC2A 2LL

Date: 25 November 2021

Before:

THE HONOURABLE MR JUSTICE NICKLIN

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Between:

JOSEPH CLEARY

Claimant

- and -

MARSTON (HOLDINGS) LTD

Defendant

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- -

Ms Lily Walker-Parr (instructed by **FD Law Limited t/a Hayes Connor Solicitors**) for the **Claimant**

Mr Golightly for the **Defendant**

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Approved Judgment

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THE HONOURABLE MR JUSTICE NICKLIN :

1. This is a case management conference in a claim brought by Joseph Cleary against Marston (Holdings) Ltd. In summary, on 9 August 2019 an employee of the Defendant sent a letter, intended to be received by the Claimant, incorrectly by email to one of his colleagues. It is common ground, that was an error. Indeed, the basic facts are not in dispute.

2. The claim was issued in the High Court. Particulars of Claim were served and were followed by a Defence. The Defence essentially admitted that what I will call the data breach. However, the Defendant maintained that the recipient of the letter had not read the document. In summary, the Defendant's position was that it admitted that it had wrongly sent the letter but it denied that it had caused any significant or real harm to the Claimant.

3. The claim has been brought on three bases: (1) breach of data protection legislation. (2) misuse of private information; and (3) breach of confidence. In the Particulars of Claim, the Claimant sought damages on all three grounds and a declaration that "the processing of the Claimant's information… constituted a misuse of private information and/or breach of data protection".

4. A conditional fee agreement was entered with the claimant and his solicitors on 25 October 2019 and, when the claim was issued in the High Court, the required notice of funding of a case or claim (Form N251), was filed and served indicating that a conditional fee agreement had been entered with the Claimant ("CFA"). The Notice also stated that the CFA provided for a success fee. That may have been a mistake. The version of the N251 that was used dates back to 2009. Success fees have not been recoverable in publication claims if the CFA was entered into after 6 April 2019.

5. The N251 also indicated that an 'after the event' insurance policy ("ATE") had been taken out to protect the Claimant in respect of any adverse costs orders that were made against him in the proceedings. The ATE policy was dated 9 February 2021 and the level of cover was provided at £25,000. The costs of the ATE insurance policy were potentially recoverable as costs against the Defendant because a claim for misuse of private information was included as part of the Claimant's claim.

6. The original letter of claim, dated 21 January 2020, set out the essential details of the Claimant's claim, but also had a section headed "Legal Costs Recovery", which included this paragraph:

> "The claimant's claim is a privacy matter and is based in statutory breach and tort. Costs on a standard basis apply. In view of this, the claim is fully cost-bearing on a standard costs basis and should any argument be put forward that the matter should be in the realms of the small claims track injury or employer liability protocol, then we reserve the right to refer to this correspondence on the issue of costs and aggravated damages based upon conduct."

7. I asked Ms Walker-Parr, who appears on behalf of the Claimant today, what was meant by that paragraph. She said to me that it was meant to indicate that, if there were protracted argument about whether the claim should be in the High Court or on the

small claims track in the County Court, this might be a matter that could be relied upon in aggravation of damages. I am wholly unpersuaded by that argument. I can scarcely conceive of circumstances where legitimate arguments as to procedural allocation of a claim could be something that could ever sound in aggravated damages. In my judgment, the Claimant's solicitors were making a threat to attempt to dissuade the Defendant from seeking to have the claim allocated to the small claims track. It was a threat that was inappropriate and without foundation. It should not have been made.

8. The inter-parties' correspondence continued for a little while. On 20 April 2021, the Defendant sent a letter in which it confirmed that it was aware of the error, had taken steps to rectify the issue and had conducted an investigation as to how it had happened. The Defendant had concluded that it was an isolated human error which was unlikely to be repeated. It contended that it was likely to have minimal impact on the Claimant and, without further explanation of what was alleged to have caused serious distress to him, liability was denied.

9. On 28 April 2021, the Claimant's solicitors sent a further letter. The letter indicated that Mr Cleary would be willing to settle for £2,000. It referred to a series of awards of damages by the Court in such claims. It indicated that if the offer were not accepted or reasonable counter proposals were put forward, then the solicitors would proceed to obtain a medical report in support of the Claimant's claim. The costs of that report were said to be approximately £1,440 and, if the medical expert recommended further treatment, the additional costs of that treatment would be incurred.

10. Then the letter said this:

> "We will also seek to obtain an after-the-event insurance premium. This is staged as follows. Stage 1: inspection to issuing of proceedings, £3,985. Stage 2: issuing of proceedings up to 45 days prior to trial, £5,105. Stage 3: from 45 days' pre-trial to the trial date, £6,225."

And added:

> "In light of the above [that is the reference to the after-the-event insurance premiums and the costs of a medical report], we believe that our offer is more than reasonable. We would advise at this stage that accepting our offer is commercially sensible as we are making every attempt to keep legal costs to a minimum in accordance with the pre-action protocol."

11. A draft statement from Mr Cleary was enclosed with that letter. The important part, given the subsequent ambit of dispute, was paragraph 7 in which Mr Cleary said:

> "The third party, the person to whom the letter was originally wrongly disclosed, confirmed to me in an email dated 29 November 2019 that she had read the correspondence containing my personal data."

12. The Defendant did not apparently request a copy of this email, which was produced at the hearing.

13. Having now become familiar with this case, the question as to whether the recipient of the letter had actually read it, is the only real factual dispute in the claim.

14. After the claim was issued in the High Court, I made an order directing this case management hearing. I directed that the Claimant's solicitor should file a witness statement ahead of this hearing explaining the following: (1) why the claim was issued in the High Court rather than the County Court; (2) the basis of the claim for a declaration in the Particulars of Claim; (3) whether the Claimant would oppose the transfer of the claim to the County Court and, if so, on what grounds; and (4) whether the Claimant disputed the contention in the Defence that the recipient of the letter had not read it and, if so, on what grounds.

15. As a result of that direction, the Claimant's solicitors filed a witness statement of Katie Knight that was dated 5 November 20221. In it, she explained the reasons why the claim had been issued in the High Court. The first was that the Claimant's claims are for misuse of private information, breach of confidence and breach of data protection which fall within the scope of the specialist Media and Communications List under CPR 53.1. The Media and Communications List was established for claims of this nature and, as such, she stated her belief that the High Court was the appropriate forum for the claim.

16. Next, the Claimant's claim included an equitable breach of confidence as one of the causes of action. Ms Knight stated that she considered that such a claim was outside the limited equity jurisdiction of the County Court pursuant to ss.23-24 County Courts Act 1984. Ms Knight accepted that the pleaded value of the claim, limited to £3,000, was relatively low and claims for such sums were typically brought in the County Court. However, she stated that it was her view that data breach claim can commonly be for relatively modest sums in damages but because of their specialist nature are brought in the High Court. She contended that the highly-specialised nature of the causes of action meant that it was desirable to have them dealt with by a specialist judge. Finally she suggested that this remains a developing area of the law which justified the claim being issued in the High Court.

17. As to the claim for a declaration, Ms Knight said:

> "The claimant has claimed a declaration in the Particulars of Claim as this is still a developing area of the law and, in such cases, the defendants often contest the applicability of the causes of action claimed. The declaration was made in the case of ST (A Minor) & Anor -v- L Primary School [2020] EWHC 1046 (QB)."

18. Ms Knight indicated that the Claimant would not oppose the transfer of the claim to the County Court should the High Court be of the view that it should be transferred. Finally, as to the factual dispute about whether the recipient of the letter had read it, she said:

> "The claimant has contrary evidence in writing from the third party from November 2019 in which they confirmed that they had, in fact, read the letter that was intended for the claimant and this evidence would be part of the claimant's case at trial."

19. The final thing to note before turning to the question of transfer today is the cost budget that has been filed by the Claimant, dated 16 September 2021. The Claimant's solicitors' estimate of the costs likely to be incurred in bringing this case to trial is £46,908.

20. The question of low-value data protection claims and where they ought to be tried has recently been dealt with by several of the Masters and, most recently, by Master Thornett in a decision that he handed down on 16 November 2021 in ***Johnson -v- Eastlight Community Homes Ltd*** **[2021] EWHC 3069 (QB)**. As Ms Walker-Parr has made clear today, it is fair to say that there are differences in the facts between the ***Johnson*** case and this case. Most importantly, as noted in the Master's decision in paragraph 6.1, the information that was the subject of the data breach in that claim was not of an obviously sensitive nature in itself. That is a point of distinction between this and Mr Cleary's claim.

21. The Master went through a number of the issues that fall to be considered in a detailed and careful judgment about the proper place for a claim brought for what has become known as low-value data breach claims. That term is not meant to, in any way, diminish the importance of the claim to the individual litigant. It merely marks them out as being different from different types of cases where there has been a substantial data breach, sometimes as a result of hacking, that can lead to a very large release of data affecting a significant number of individuals.

22. Master Thornett set out his conclusions from paragraph 24 onwards. He drew attention to the definition of a "media and communications claim" in CPR 53.1(2) as one that satisfies the requirements of subparagraphs (3) and (4). Subparagraph (3) does indeed include claims for misuse of private information and data protection. However, as the Master correctly noted, a claim in respect of such causes of action is only to be issued in the Media & Communications List if it is a "High Court claim". That is to be contrasted with claims for defamation, which *must* be issued in the Media & Communications List of the High Court.

23. On a proper reading of CPR 53.1, therefore, there exists a category of non-defamation media and communications claims that are capable of being brought and fairly tried in the County Court. Typically, those will be claims where the damages sought are relatively low and the claim does not have any particular complexity. Such claims ought properly to be commenced in the County Court. It will be a matter for the District Judge in each case, but there is no reason why straightforward claims cannot be dealt with on the Small Claims Track.

24. I need to address the point raised by Ms Knight in her witness statement about the jurisdiction of the County Court to hear breach of confidence claims. It is right that the County Court does not have original jurisdiction to hear claims for breach of confidence. If a claim is to be brought for breach of confidence, then it will have to be started in the High Court. If started in the High Court, then, depending on the nature of the claim, it may be suitable to be brought in the Media & Communications List. Matters do not end there because the High Court can, nevertheless, transfer a breach of confidence claim to the County Court.

25. Those who are advising claimants who want to bring data breach claims need to think carefully about the claims that are included. There can be and often are several overlapping claims: breach of confidence, misuse of private information and breach of data protection legislation. In many cases, this will simply represent three different ways of characterising what is essentially the same complaint.

26. In accordance with the overriding objective, and also in the best interests of the client, it is necessary to consider whether a claim in respect of all three causes of action needs to be pursued. If there is a straightforward claim, for example for a data protection breach, then it may be in the best interests of the client and the simplicity of the litigation to concentrate on only that claim. In straightforward cases, like this one, there may be no real dispute about the data breach. If so, little of any substance or real value is likely to be gained by complicating the claim by bringing additional claims for misuse of private information or breach of confidence.

27. In fact, in the classic data breach case, of which this is as good as example as many, where, as a result of human error, information being provided to a third party who should not have received it, data protection offers a straightforward remedy, that avoids getting into areas of whether the Defendant can be said to have "misused" the relevant personal information.

28. It is important that claimants (and those advising them) do not pursue claims that add little but yet have the potential to make the case more complicated and lead to increased costs ultimately to resolve what in many cases will be a straightforward claim.

29. I then come on to the question about remedies. I made a direction that the Claimant's solicitors should explain why the Claimant was seeking a declaration. Declarations are not usually remedies that are sought in claims like this. There may well be examples in the past of the Court being willing to grant a declaration, but I have yet to have advanced to me a coherent argument why such remedies should be sought or granted by the Court in cases like this. Declarations are more usually found in claims in Chancery Division, typically property cases, where there is a need to establish clearly some legal right or entitlement. Often, that is because the declaration will have some significance beyond the immediate parties the litigation.

30. In most other forms of civil litigation, the declaration that a claimant has been, for want of a better word, 'wronged', is provided by the Court's judgment on his/her claim and the Court's order flowing from that judgment. If the litigant wants something tangible to point to, to indicate that his legal rights have been vindicated by the Court, then s/he need go no further than the court's judgment and order on his claim. A formal 'declaration' supplies nothing more than the Court's decision. A claim for a declaration in a media and communications claim is unusual and should not be included unless, exceptionally, there is a justification for one.

31. I cannot see the value of the declaration sought by the Claimant in this case. If it is right that the Defendant has misused the private information of the Claimant and/or has processed his private information or personal data in breach of data protection, then that will become apparent in the court's ultimate judgment and decision and order that is granted. A declaration will add nothing of value beyond this. This was a matter that troubled Master Thornett in the ***Johnson*** case and, like him, I cannot see the value of such a remedy in a claim of this type.

32. I turn then to the alleged complexity of the claim. As to factual complexity, I have already identified in this claim, there is very little by way of factual dispute. It may be that, now the Defendant has seen the email from the third party to whom the letter concerning Mr Cleary was disclosed, it will adjust its stance. But those are matters of limited compass and, if they remain in dispute, can be fairly resolved in the County

Court. As to legal complexity, it is true, as Ms Knight observes, that there can be claims which raise elements of complexity in this area of the law. Data protection is not the most straightforward of areas of the law. So too, misuse of private information and breach of confidence. But that is not to say that every claim will be legally complicated, and I have no doubt that the judges of the County Court, both District and Circuit judges, are well able to wrestle with those issues of law that arise. It is to be remembered that District Judges, in particular, have an extensive jurisdiction over civil claims which means they have to be ready and able to deal with claims that raise all manner of legal points, some of which may have elements of complexity. But they are experienced judges who are well able and well used to deciding legal points that arise in the context of the litigation.

33. Stepping back, this is a very straightforward claim. The Defendant is not really raising any defence to the Claimant's fundamental claim that it should not have disclosed the letter relating to Mr Cleary to the other employee. I cannot see in this case there is likely to be any real dispute as to the applicable law but, if there is, it will be a matter that is capable of being dealt with fairly by the County Court.

34. In fairness, neither party is arguing against transfer. The real issue on transfer is whether I should also direct that the claim should be allocated to the small claims track or leave the decision on allocation to the District Judge once the claim has been transferred. I have come to the clear conclusion, having now looked at this case in some detail, that it can fairly be tried on the small claims track and so should be allocated there. The factors that indicate that are that there is limited factual dispute and the legal issues that arise for decision in this case are not complex and do not require a specialist judge. Most importantly, on allocation, this is a claim of a value which would usually lead to it being allocated to the small claims track. In other words, it would require a justification to allocate it to a different track. I do not consider that there is any justification for allocating it to a track other than the small claims track, and none has been advanced.

35. Ms Walker-Parr did make a wider submission that the only way of ensuring access to justice for a person like Mr Cleary was to enable him to bring a claim in circumstances where his solicitors were able to recover their costs and ATE premiums. I accept that if the Court routinely allocates low-value data breach claims to the County Court then it may mean that people in the circumstances of Mr Cleary will be unable to find lawyers that are willing to represent them and, without ATE insurance, they may be deterred from bringing a civil claim because of the risk of an adverse costs order. Those submissions raise wider policy issues, but in my judgment, they cannot ultimately affect the decision as to the proper allocation of Mr Cleary's claim.

36. In my judgment, the circumstances and nature of the Claimant's claim does not justify being allocated anywhere other than the County Court and on the small claims track. That is, in one sense, good news for Mr Cleary. Unless he is guilty of unreasonable conduct, in the small claims jurisdiction he will not be exposed to the risk of any adverse order for costs. That is one of the important safeguards available in the County Court which promotes access to justice. It means that a citizen can bring a small claim before the court and receive an adjudication upon it. If the claim does not succeed, providing s/he has not acted unreasonably, s/he will not be exposed to an adverse order for the defendant's costs (save in very limited respects provided under the small claims track).

37. As I indicated to Ms Walker-Parr during the course of argument, no ordinary litigant would incur costs approaching £50,000 in order to recover £3,000. The likely irrecoverable costs would almost certainly exceed the sum that Mr Cleary was claiming in damages. In that respect, litigation of his claim in the High Court makes no sense for Mr Cleary. The best place for the resolution of his claim is the Small Claims Track of the County Court. If he is successful in his claim, the court will award him fair and just compensation.

38. In those circumstances, the order that I will make today is to transfer the proceedings to Mr Cleary's home county court which I believe is in Manchester. It will be allocated to the small claims track. One benefit of allocating it now is that, once it is received by Manchester, the claim can move swiftly to an ultimate hearing if it is not resolved in the meantime.

This judgment has been approved by the Judge.