

IN THE HIGH COURT OF JUSTICE

[2021] EWHC 2809 (QB)

QB-2020-003939

QUEEN'S BENCH DIVISION MEDIA & COMMUNICATIONS LIST

Master McCloud

BETWEEN:

MR ALAN ROLFE

First Claimant

MRS KAREN ROLFE

Second Claimant

MISS ELIZA ROLFE (By her Litigation Friend, Mr Alan Rolfe)

Third Claimant

v

VEALE WASBROUGH VIZARDS LLP

Defendants

ORDER [With reasons]

UPON Hearing Mr Tom Clarke of counsel instructed by Forbes Solicitors for the Claimants

And upon hearing Ms Felicity McMahon of counsel instructed by the Defendants, for the Defendants

IT IS ORDERED AS FOLLOWS:

- 1) Summary judgment in respect of the Claim is granted to the Defendants.
- 2) The Claimants shall pay the Defendants costs to be assessed if not agreed. The court is of the view that, it not being possible to summarily assess costs on the day of hearing, it is disproportionate to list a further hearing for a summary assessment.
- 3) The basis for assessment of costs shall be the Indemnity Basis. The reasons for this are the strong observations of this court as to the nature of the claim in terms of exaggeration and lack of credible evidence of distress, and that the court regards the

claim as speculative given its de minimis nature, furthermore the court takes into account the Defendants' conduct in making a Part 36 offer which it beat.

- 4) The Claimants shall within 14 days of service of this order make an interim payment on account of costs in the sum of £11,000 (no VAT being claimed on the schedule), the court noting the submissions made by the Claimants as to their objections to the level of costs sought compared with the value of the claim being defended and the complexity or otherwise of the work, and the court also noting that other arguments are likely to be available to the Claimants on the issue of reasonableness at an assessment such that a conservative sum has been ordered.
- 5) Time for appeal is extended to 21 days after the handing down of the Supreme Court decision in *Lloyd v Google*.

#### REASONS

1. This case relates to a single email with attachments sent by the Defendants on 17 July 2019. The Defendants at the time represented a School run by Moon Hall Schools Educational Trust where the first two Claimants owed a sum of school fees, and the School had instructed the Defendants to write to the first two Claimants with a demand for payment. The email consisted of a letter and a copy of the statement of account for the first two Claimants' child (who is the third Claimant). The claim is for damages for misuse of confidential information, breach of confidence, negligence, damages under s82 of the GDPR and s169 Data Protection Act 2013, plus a declaration and an injunction, interest and further or other relief.
2. The simple facts are that an email was sent to the child's parents but due to one letter difference in the email address of the mother, the letter went to a person with an identical surname and the same first initial. That person responded promptly indicating they thought that the email was not intended for them. The Defendants replied promptly asking the (incorrect) recipient to delete the message. The recipient confirmed she had done so. The recipient is unknown to the Claimants personally.
3. I have an application for summary judgment dated 5 January 2021. I have statements from Mr Holt for the Defendant, and Mr Bennet, solicitor for the Claimants. I have no personal evidence from the Claimants directly. Quoting from Mr Holt:

*"The email in question attached a letter on behalf of my firm's client Moon Hall Schools Educational Trust. That letter is attached at pages 1-28 of BJH1 (pages 2, 24 and 28 are blank as they were when the letter was sent by email). ...*

*It contained the Claimants' names, their address, the amount of school fees (together with interest and surcharges) owed by the First and Second Claimants to Moon Hall Schools Educational Trust, a statement of account of school fees for the past five years, and reference to proposed legal action which would be taken if the debt was not paid. It does not contain any of the First or Second Claimant's financial information in terms of bank or card details, income or financial position. Nor does it contain any reference to the Third Claimant's location other than the school she attended and her parents' address, in particular there is no information relating to the locations of school trips or details relating to the school bus.*

*4. Due to a typographical error made by one of the firm's paralegals it was instead sent to an individual with an email address one character different to the Second Claimant. The error was realised swiftly. On the same day the email was sent, the incorrect recipient notified my firm of the error by replying to the email. My colleague asked the individual to delete the item from both their inbox and deleted items folder. They confirmed this the next day.*

*5. The email was encrypted as is standard for emails sent via our email systems. My firm's Head of IT reviewed the properties of the sent email and has confirmed to me that it was not sent via basic SMTP, but rather by TLS, confirming that transmission between our email gateway and the Gmail receiving server was encrypted and not in plain text. This means that the only person able to view that email between when it was sent and when it was deleted were those with access to the recipients email account."*

4. Other material was by way of standard documents such as the school terms and conditions.
5. It was common ground that in principle damages can be recovered and other remedies obtained for breaches of data protection regulations and misuse of private information, including simply for the distress caused even absent specific pecuniary loss. See [Vidal-Hall v Google \[2016\] Q.B. 1003](#). Similarly, it is not in dispute that in principle loss of control of personal data can constitute damage: [Lloyd v Google \[2020\] Q.B. 747](#). However there does need to be damage, one cannot succeed in a claim where any possible loss or distress is not made out or is trivial: see *Lloyd v Google* where Sir Geoffrey Vos said at [55]:  
*"I understood it to be common ground that the threshold of seriousness applied to section 13 as much as to MPI [misuse of private information]. That threshold would undoubtedly exclude, for example, a claim for damages for an accidental one-off data breach that was quickly remedied."*

6. The Defendants argued that the requirement for some damage to be shown even if only credible distress has been a part of the tort of Misuse of Private Information since its inception, and involves looking at the harm that could come from the disclosure of the information in question. In [Campbell v MGN \[2004\] 2 A.C. 457](#) per Lady Hale at [157]:

*“Not every statement about a person's health will carry the badge of confidentiality or risk doing harm to that person's physical or moral integrity. The privacy interest in the fact that a public figure has a cold or a broken leg is unlikely to be strong enough to justify restricting the press's freedom to report it. What harm could it possibly do?”*

7. I can do no better than to quote the skeleton argument of counsel for the Defendants in terms of the argument made by the Defendants here that the damage and/or distress caused, if any, was so low as not to satisfy the de minimis threshold implicit in the case law:

*“On the facts, the Cs cannot have suffered damage or distress above a de minimis level. The court must look at the reality of the personal information in question and the circumstances in which it was inadvertently sent to one third party:*

*a. The nature of the private information in question:*

- i. This is not a case where intimate information about health or a sexual relationship are in play. Names and home address are given, but no further details of home life, no phone numbers are included. There are no bank details or details of the state of the Cs finances.<sup>1</sup>*
- ii. The only financial details are the invoice for school fees (the level of fees being publicly available on the school's website), and the statement of account of school fees for the past 5 years – i.e. the amounts C1 and C2 had paid for C3's schooling. These are 25 pages into the attachments. There are documents asking for other financial information, but these are blank and contain no personal data. Whilst the letter states that C1 and C2 have not paid one term's bill, it gives no information as to why that it. It does not say they cannot do so, or anything about their financial position. It states the mere fact of non-payment of this bill, and that if payment is not made, legal action may result.*
- iii. Whilst Cs assert that there is data relating to C3's location and transport, the only reference to transport is a fee for it– not giving any details of what this transport is or where this transport takes place, contrary to the assertion at para. 9c POC. Therefore the only location data is the school and the Cs' home address.*

*b. The circumstances of disclosure:*

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<sup>1</sup> The name of the child appears and the school year which she is in also appears.

- i. *The information was disclosed to one individual only, accidentally as a result of a typographical error;*
  - ii. *The individual notified D of the error the same day. The next day, when asked to delete the email and confirm that had been done, the individual did so did so 2½ hours later. There is no reason to think that they did not act in good faith, or even that they read all of the documents in any detail.*
  - iii. *The email was encrypted;*
  - iv. *That the email went through Gmail servers is irrelevant to the claim, as C1 and C2 have Gmail accounts themselves, and therefore the email, when sent properly, went through this same system.*
- c. *No tangible harm or loss is pleaded or plausible:*
  - i. *The (unpleaded) inference in the witness statement of Mr Bennett that phishing phone messages were targeted at C1 and C2 because of this incident is an inference that cannot be drawn. Neither the Cs' phone numbers nor any information about who they bank with was in the email or attachments and therefore cannot have been exploited.*
  - ii. *In his witness statement Mr Bennett quotes from correspondence about the number of hours Mr Rolfe spent dealing with the incident. Firstly, there is no claim made for time spent dealing with the incident. Secondly, the number of hours claimed is wholly implausible. When this claim was made in correspondence D queried it (in particular in relation to an email referred to dated 11 August 2019 which did not deal with this matter but rather the matter of the unpaid fees asked for the correspondence between Cs and D/Moon Hall School. The specific point about the 11 August email was not responded to (but it is repeated in Mr Bennett's witness statement), but after chasing, D was sent the documents ... which consist of email between 19 and 31 July 2019. ... these consist of only a small number of short emails. ...This amounts to 6 short emails, the longest of which is 10 lines long (including "Dear..", "Yours sincerely" etc). Whilst Cs will have read the responses, again, these were brief, none amounting to more than approx. ½ a page and most being very brief indeed. This, it is alleged, took over 24hrs (out of a total of 46hrs which it is claimed C1 spent dealing with this matter). This is simply not plausible, and must be exaggerated. It is submitted this is reflective of the Cs' attitude to the claim as a whole, and the court is entitled to take a sceptical view of their assertions of distress. It need not and should not take them at face value.*
- d. *There was no real loss of control of the personal data: "Loss of control" means something more than one third party briefly having access to this relatively low-level personal information and then confirming they deleted it. In Lloyd it was commercial exploitation of that information on a large scale. There the Court of Appeal found*

that individuals' "browser generated information" had a value and was of commercial value to Google [at 46,47]. In [Gulati v MGN Ltd \[2017\] QB 149](#) it was disclosure to journalists who used the personal information as they saw fit, in particular by publishing in a national newspaper. This is very different.

*On the facts of this case, it is simply not plausible that Cs have suffered distress above a de minimis threshold in relation to the accidental sending of this email to one recipient who quickly deleted it. Whilst unfortunate, the incident is simply not of a sufficiently serious nature to have caused damage over the threshold."*

8. And

"21. In [Ambrosiadou v Coward \[2011\] EWCA Civ 409](#) Lord Neuberger MR said at [30]:

'Just because information relates to a person's family and private life, it will not automatically be protected by the courts: for instance, the information may be of slight significance, generally expressed, or anodyne in nature. While respect for family and private life is of fundamental importance, it seems to me that the courts should, in the absence of special facts, generally expect people to adopt a reasonably robust and realistic approach to living in the 21st century.'

22. *This was an accidental one-off incident where an email address was mistyped and sent to an incorrect recipient. The data contained in the email was not of a very private or sensitive nature. Whilst the incident is unfortunate, it was swiftly remedied – the recipient emailed the same day to say they were the wrong recipient, and quickly confirmed deletion. Incidents such as this occur regularly in organisations throughout the country. Where no harm is caused, or no harm that overcomes the de minimis threshold, no cause of action lies and no claim for compensation will succeed. If it were not so, the court would be bound up with such cases, every time a minor error occurred. This is a case of no harm done. Exactly the type of case Sir Geoffrey Vos was referring to in Lloyd. The C's have no realistic prospect of proving that they have suffered harm above de minimis, and therefore no realistic prospect of succeeding in their claim for damages."*

9. By contrast the Claimants urged me to take into account that it could not at this stage be ascertained the extent to which the information had reached third parties and that of course damages for distress are available even without proof of special damages, subject to the de minimis threshold and that the information which went to the third party was not banal. It was said (by the solicitor for the Claimants but not in the form of a statement from the Claimants directly) that they had lost sleep worrying about the possible consequences of the data breach and that it 'had made

them feel ill' and that extensive time (referred to in the extract from D's skeleton above) had been spent by the Claimants dealing with the issue. This was all a factual dispute and a trial was required and there was a reasonable prospect in showing that loss and damage crossed the de minimis threshold which is a factual issue for trial. Much of the alleged distress stemmed here from the 'fear of the unknown', too, it was said, by the parents in terms of who the recipient might have been, given Mr Rolfe's profession as an IT specialist.

## Principles

10. In a summary judgment application, I must refuse summary judgment if the claim has a 'more than fanciful' prospect of success, that is to say a realistic prospect, and that there is no other good reason for a trial. I need not recite all the principles: this is not a 'mini trial' I should take into account material reasonably likely to be before the court at trial and need not take current evidence at face value if it is contradictory or inherently implausible. See *Swain v Hillman* [2001] 2 All ER 91, *ED & F Man Liquid Products v Patel* [2003] EWCA Civ 472, *Royal Brompton Hospital NHS Trust v Hammond (No 5)* [2001] EWCA Civ 550, *Doncaster Pharmaceuticals Group Ltd v Bolton Pharmaceutical Co 100 Ltd* [2007] FSR 63, *ICI Chemicals & Polymers Ltd v TTE Training Ltd* [2007] EWCA Civ 725.
11. In this case the question boils down to the relatively simple one: given the nature of the breach and the nature of the information and the steps taken to mitigate the breach, and the material before me, is it more than fanciful to suppose either that actual loss has been suffered or that distress has been suffered above a de minimis level.
12. What harm has been done, arguably? We have here a case of minimally significant information, nothing especially personal such as bank details or medical matters, a very rapid set of steps to ask the incorrect recipient to delete it (which she confirmed) and no evidence of further transmission or any consequent misuse (and it would be hard to imagine what significant misuse could result, given the minimally private nature of the data). We have a plainly exaggerated claim for time spent by the Claimants dealing with the case and a frankly inherently implausible suggestion that the minimal breach caused significant distress and worry or even made them 'feel ill'. In my judgment no person of ordinary fortitude would reasonably suffer the distress claimed arising in these circumstances in the 21<sup>st</sup> Century, in a case where a single breach was quickly remedied.
13. There is no credible case that distress or damage over a de minimis threshold will be proved. In the modern world it is not appropriate for a party to claim, (especially in the in the High Court) for breaches of this sort which are, frankly, trivial. The case

law referred to above provides ample authority that whatever cause of action is relied on the law will not supply a remedy in cases where effectively no harm has credibly been shown or be likely to be shown.

14. I therefore grant summary judgment for the Defendants and dismiss the case with costs.

MASTER MCCLLOUD

9/7/21 in draft

2/9/21 in final version

Formal handing down in absentio 10.30am Tuesday 7 September 2021.