IN THE HIGH COURT OF JUSTICE
QUEENS BENCH DIVISION
IN THE MEDIA AND
COMMUNICATIONS LIST
[2021] EWHC 2921 (QB)

No. QB-2020-000943

Royal Courts of Justice
Strand
London, WC2A 2LL

Monday, 11 October 2021

Before:

MR JUSTICE KERR

B E T W E E N :

ADRIAN ASHLEY

Claimant

- and -

AMPLIFON LIMITED

Defendant

MR ALEX WILLIAMS (instructed by Pure Legal Limited) appeared on behalf of the Claimant.

MR MATTHEW FLINN (instructed by BLM LLP) appeared on behalf the Defendant.

J U D G M E N T

MR JUSTICE KERR:

Introduction

1 This is an application to strike out a claim, or for summary judgment in respect of the claim, by the defendant on the ground that it has no reasonable prospect of success or is an abuse of process. Alternatively, the defendant applies to transfer the "residue" of the claim, i.e. whatever may survive, to the county court.

The Facts

2 The claimant is aged 51 and lives in the Telford area. In about 2004 he became employed by the defendant. Its business is providing hearing aids. In 2006 the claimant became a qualified hearing aid dispenser working for the defendant. The claimant's terms of employment over the years are set out in various documents. They are in the hearing bundle because of what happened later on in the history.

3 Those documents were as follows. First, there was a trainee hearing aid dispenser contract for two and a half years from June 2006. It included the usual terms one would expect as to pay, confidential information, holidays, a restrictive covenant, pension, use of a car, termination provisions, and so forth. It also included rates of commission and the content of a bonus scheme set out in the first schedule, which also included provision for allowances, expenses and the like. In the second schedule, the percentages of training costs repayable to the defendant, if the claimant's employment should terminate within specific periods, was set out in a table.

4 Then there was a letter in April 2008 confirming the claimant's registration with the Hearing Aid Council and a consequent move to fully registered terms, which included improved salary and enhanced terms. A revised first schedule attached to that letter contained details of the revised terms, including the bonus scheme and some other terms in a second schedule.

5 There was a further version of the first and second schedules with revised terms effective from 1 November 2009, and a further version of a third schedule defining confidential information, i.e. information confidential to the defendant. A fourth schedule set out the terms of the restrictive covenant, with a radius of ten miles from the claimant's home. Finally, there were similar documents updated in a version effective from 2010 onwards.

6 It is not disputed that those documents were personal data and not seriously disputed that they, or at least part of their content, were impressed with an obligation of confidentiality owed by the defendant to the claimant, containing as they did details of his terms of service including not just personal details, i.e. his name and address (though not his date of birth), but also his contractual rights and obligations.

7 In early 2020 the claimant was involved in a legal dispute with the defendant, his employer. The parties have rightly not troubled the court with the details of that dispute. I therefore know no more about it. The claimant said, and the defendant does not dispute, that it was a stressful time for the claimant. I pause to observe that the early months of 2020 were difficult not just for these parties but for everyone else, because of the then prevalence of the Covid-19 virus.

8 In the course of the dispute the claimant emailed the defendant on 21 February 2020, asking for a copy of documents stating his terms and conditions of service. Unbeknown to the claimant at the time, on 26 February Ms Rachael Keogh of the defendant's human resources

(HR) department, sent an email to one Adrian Bickle. He shares the first name of the claimant and his last name begins one letter of the alphabet after the claimant's last name. The email began, "Hi Adrian," and continued:

> "I am aware that you have asked for further copies of your contract/terms. Please see attached."

9 There were indeed attached the contract terms described above from 2006, 2008, 2009 and 2010 in four separate attachments. The titles of the attachments referred to the claimant's last name, Ashley, so it would have been apparent even without opening them that they were not intended for Mr Bickle, as long as one read the title of the attachment which not everybody does.

10 Mr Bickle is, or was at that time – as I can see from his signature block in a later email he sent - a hearing aid dispenser like the claimant, working for the defendant out of the latter's Southampton office.

11 On 28 February 2020 the claimant received an email from Mr Bickle. Neither party has produced that email and I have not seen it. The claimant's account of it is in his witness statement at paragraph 10 as follows:

> "I received an email from Mr Adrian Bickle (who also works for the defendant). He explained to me that he had received a copy of my employment contract by email."

12 The claimant said in his witness statement that he was shocked and upset that he had no way of knowing if it was an isolated incident or if his confidential employment information had been shared more widely. Later in his witness statement at paragraph 22, responding to the allegation that a certain phone call had been made - to which I am coming later - he said this:

> "The defendant alleged that a phone call had been made to me suggesting that I had been informed that the unintended recipient had not opened my documents and had deleted them. I was amazed. This is simply not true."

13 The claimant emailed a Ms Annette Passley in the defendant's HR Department on 28 February 2020 as follows:

> "Hi Annette. Not impressed my contract info was emailed to another dispenser [in] clear breach of GDPR and will be added to the list of issues being dealt with by my legal counsel."

14 The same day Ms Passley replied:

> "Adrian.
>
> Thank you for your email below and for bringing this to our attention.
>
> I have investigated this today and can see that you are correct; your requested contractual documentation was shared with another HAA [Hearing Aid Audiologist] in error.

> Whilst I appreciate that nobody wants their information shared in this way, I am sure that you can understand that human error does sometimes occur when managing a large scale administrative exercise such as the consultation process we are currently in.
>
> Please be assured that we will reach out to the HAA concerned to request they immediately delete your information and that nothing is retained by them, furthermore we will put measures in place and therefore aim to prevent this from occurring again.
>
> Finally, this incident has been reported to the Data Protection Officer who has recorded it to ensure it is dealt with appropriately.
>
> Please accept our apologies for the error.
>
> Regards, Annette."

15 The claimant says he then heard nothing more about the matter and was very annoyed. He felt he would have been disciplined if he had disclosed confidential information about someone else. He says that at the time he was anxious and distressed. He had an ongoing legal issue and was in the middle of Covid restrictions. His case is that the data breach and the defendant's failure to confirm what had been done about it increased his already distressed state.

16 There is no further email correspondence between the claimant and the defendant on this subject. His case is that he heard nothing further. What is clear is that the defendant must have contacted Mr Bickle about the matter.

17 According to the defendant's solicitor, on instructions, in a witness statement made later on 3 August 2021, the defendant then contacted Mr Bickle about the error in order to ask him to delete the material that had been sent to him in error. There are no documents evidencing any written communication from the defendant to Mr Bickle.

18 A much later witness statement from Ms Rachel Keogh from the defendant's HR Department dated 30 September 2021 - 12 days ago - states at paragraph 10:

> "I then contacted Mr Bickle via telephone to the clinic [within] an hour of the HR Department email in order to ask him to delete the material that had been sent to him in error. Mr Bickle came across as very supportive and understanding that errors do occur and confirmed to me that he would delete the email and attachments and in addition he voluntarily shared with me the information that he had in fact never opened them. I then asked Mr Bickle to send me confirmation via email once he had deleted these documents."

Pausing there, Ms Keogh is referring to the events of 28 February 2020.

19 Mr Bickle did respond by email, evidently to a request of some kind from the defendant. He did so in an email dated 6 March 2020 to Ms Keogh saying:

> "This email is to confirm that I have deleted the email incorrectly sent to me. I am happy to confirm that I did not open the attachments addressed to Adrian Ashley."

That email was not copied to the claimant and there is no evidence that it was forwarded to him.

20 According to Mr Ward, the defendant's solicitor, in his later witness statement at paragraph 23, he (Mr Ward) was "told that an employee ... called the claimant to notify him accordingly. I understand the claimant may dispute that he was contacted ..." He did not name either his source or the employee or give any further particulars of the alleged call. According to the recent evidence from Ms Keogh, however, she made that call which the defendant disputes. The claimant made clear that he disputes that the call was made in a responding witness statement, sworn very recently in October 2021.

21 Going back to the narrative, in September 2020 the claimant says that he was signed off work, as he was "unable to deal with anything." He clarifies that "this was not due specifically to the data breach but it certainly contributed to it." He says he was prescribed antidepressants. Soon after that he gave notice to resign, and again he says in his witness statement that the data breach was a contributing factor to that and continues to this day though "at a reduced level in comparison to the initial months"; and he says that he was able to stop taking antidepressants.

22 According to the statement of Mr Ward, the defendant's solicitor, it was in about October 2020 that the claimant left the defendant's employment. A letter before claim was sent on behalf of the claimant on 1 December 2020. On 2 February 2021 the defendant responded to that seeking further information. Proceedings were then issued in this court on 16 March 2021.

23 The pleaded case on behalf of the claimant included a claim under the UK GDPR, as it has become, citing article 5(1)(a), the definition of processing; article 5(1)b), the purpose limitation; and article 5(1)(f) on integrity and confidentiality. The pleaded claim also asserted negligence, breach of confidence and misuse of private information.

24 On 7 May 2021 the defendant filed its defence. The defence pleaded included the averment that Mr Bickle had sent the email of 6 March 2020 to Ms Keogh, to which I have already referred. The claimant's case is that this was the first time he learned of the existence of Mr Bickle's email, when he saw the defence. The defence did not include any assertion that the defendant had subsequently contacted the claimant about that email.

25 On 8 June 2021, Mr Coyle, the claimant's representative, emailed the defendant's solicitors asking for clarification of whether the defendant relied on any communication by them to the claimant about Mr Bickle's email of 6 March 2020, as the claimant was instructing that he had heard nothing about it at the time.

26 Mr Coyle's witness statement, produced recently in response to Ms Keogh's, produced that email. Mr Coyle does not mention in his statement any response from the defendant to that query. The defendant has not produced any response to it. The defendant therefore did not rely at that time (i.e. in June 2021) on any response to Mr Coyle's email asserting a contemporaneous communication back to the claimant about Mr Bickle's confirmation of having deleted the claimant's personal data.

27 At the end of June 2021, there was a notice of proposed allocation to the multi-track. On 3 August 2021, the defendant filed the present application for strike out and/or summary judgment, supported by the witness statement of Mr Ward, the defendant's solicitor, to which I have already referred. As I have said, he did mention at paragraph 23 of that

statement that he understood that an employee, not then named, had contacted the claimant at the time. That assertion appears in the statement very much *en passant*, in a part of it dealing with law and argument, rather than factual history.

28 The next day, 4 August 2021, Mr Coyle again emailed the defendant's solicitors, courteously probing what the defendant's case was in more and clearer detail. He commented that in Mr Ward's statement:

> "Notification of the deletion by Bickle is ... skirted over rather briefly."

He went on to suggest that one would expect confirmation in writing and a statement from the individual. He added that he would be obtaining the claimant's phone records to check whether there was a log of the call from the appropriate number once he knew the details of the call that, the defendant was alleging, was made.

29 On 9 August 2021, the claimant filed his directions questionnaire. It stated that he would be the sole witness and could agree to the transfer of the claim to the County Court at Telford with allocation to the fast track. It follows that he would not be calling any medical evidence.

30 On 7 September 2021, this application was listed for hearing today. On 15 September, Mr Coyle followed up with a further email noting that he had not had a response to his email of 4 August, nor to two further emails, presumably chasing for such a response. He repeated his request for details of the alleged phone call made to the claimant: "[o]n what number was the call made from and to, time and date."

31 On 30 September 2021, the defendant rose to the challenge set by Mr Coyle. Although they did not provide any written telephone log evidence they did produce, as I have said, a witness statement from Ms Keogh.

32 In the claimant's response witness statement of 5 October 2021, as I have said, he denies ever receiving the alleged call and also adds that his distress has been exacerbated by the defendant choosing to "fabricate a phone call" in the course of defending these proceedings.

Submissions

33 Mr Flinn, for the defendant, made the following main arguments in support of his application to strike out and/or for summary judgment.

34 First, he submits that the negligence claim is bad because it alleges only vexation and distress, falling short of injury, loss or damage known to the law, and sounding in damages. As for breach of confidence, he relies on a well-known authority, which I do not need to recite here, emphasising the importance of pleading breach of confidence claims with specificity. He submits that the defendant needs to understand precisely what information is alleged to be confidential and what confidential information has been disclosed.

35 He submits further that the disclosed documents contain largely standard terms and conditions, which would likely have been familiar to Mr Bickle, to whom they were initially sent, and would be assumed by him to apply to someone in the claimant's role. Mr Flinn points out that private information for the purpose of the tort of misusing it, and confidential information for the purpose of an action for breach of confidence are two different things

and not, he submits, adequately differentiated. He refers to the explanation of Lord Nicholls in *OBG Ltd v. Allen* [2008] 1 AC 1 at [255].

36 Mr Flinn submits further that the breach of confidence claim is otiose and adds nothing to the claim for breach of the UK GDPR or the tort of misusing the claimant's private information.

37 As for the latter, misuse of private information and breach of the UK GDPR, Mr Flinn submits, taking them together, that various questions arise as to the merits of this claim. First, was the claimant's personal data "misused" or "processed" when documents were sent but deleted without being opened, and without the information being read? However, the defendant accepts that such questions would be suitable for trial and they are not in themselves urged upon the court as a basis for strike out or summary judgment.

38 Rather, the argument is that applying *Jameel v. Dow Jones & Co. Inc*. {2005] QB 946 CA, the court should consider the objectives of the claimant against the resources of time and expense that would be involved in pursuing the claim. Mr Flinn says that even if liability were established in the claimant's favour, it is clear that no damages would be awarded and no other remedy granted. Accordingly he says this litigation is a pointless waste of resources and disproportionate and should not be allowed to continue, even using the small claims track procedure.

39 As to damages, he points out that the *de minimis* principle applies both to claims for distress (see *TLT & Ors v. The Secretary of State for the Home Department & Anor* [2016] EWHC 2217 (QB), per Mitting J at [15]) and also to claims for loss of control of information (*Lloyd v. Google LLC* [2020] QB 747 CA). In that case it was common ground that if a court decided the alleged misuse of private information or infringement of the Data Protection Act 1998 in issue was trivial or *de minimis,* the court would be entitled to refuse to make an award of "loss of control damages."

40 At [55], Sir Geoffrey Vos C said:

> "As I have said, I understood it to be common ground that the threshold of seriousness applied to s.13 [of the DPA 1998] 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."

41 Mr Flinn went on to submit that the fact the claimant was involved already in a stressful employment dispute with the defendant meant that any distress would be difficult or impossible to disentangle from pre-existing feelings towards the defendant and could only, at the most, have exacerbated the distress he was already experiencing.

42 Mr Flinn relies on the point that the claimant does not say in terms whether he asked Mr Bickle if he had read the documents or, if he did, how Mr Bickle responded. He submits that even if the court were to accept that the call by Ms Keogh was not made - a fact that is in dispute - the claimant did not himself take any steps to establish whether the information contained in the attachments was disclosed.

43 The irresistible inference, he submits, is that either the claimant knew the documents had not been read, either from Ms Keogh or Mr Bickle, or he was not particularly concerned about it. Rather, he immediately saw the error as something he could use to advantage by taking it

up with his lawyer, as shown by his email of 28 February 2021. Mr Flinn does not allow, even at this preliminary stage, for the possibility that the claimant was not told by either Mr Bickle or Ms Keogh what the true position was.

44 Although the claimant says he was initially concerned, says Mr Flinn, that his information could have been shared with a group of people, this concern was not expressed in his email to the defendant. In any event, the same day, it was confirmed to him that the documents were sent to a single recipient in error.

45 As to the seriousness of the breach, this was plainly a claim resulting from an accidental one off data breach that was quickly remedied. The error was unintentional, acknowledged immediately, action was taken and an apology offered. The information in the attachments was not disclosed because the documents were not opened by Mr Bickle. Even if he had opened them, at least a substantial part of the information therein was already known to him because he was himself a dispenser and thus familiar with the standard terms and conditions of the defendant.

46 The claimant, Mr Flinn went on to submit, could not hope to obtain a declaration or an injunction. These would serve no purpose and add nothing to a finding of liability, with or without an award of damages, because the claimant no longer works for the defendant. He should not be allowed, says the defendant, to use up court time and resources in a claim which is not worth the wick let alone the candle.

47 For the claimant, Mr Williams submitted as follows, taking it briefly. He accepted that the negligence claim was not sustainable and should not proceed to trial. His solicitor had already indicated as much in email correspondence months earlier. That aside, he contended that the claimant has reasonable grounds for bringing the claim, that the case is not an abuse of the court's process, and that it has real prospects of success.

48 He contended that the defendant's continuing denial of breaching article 5(1)(a) of the UK GDPR is not sustainable in circumstances where the defendant admits to having sent the claimant's personal data to an unauthorised third party. He points to the width of the definition of "processing," which includes "disclosure by transmission" and "dissemination or otherwise making available." That, says Mr Williams, would undoubtedly include sending an email regardless of whether or not attachments to it were opened.

49 On article 5(1)(b), Mr Williams points out that the personal data collected was explicitly linked with and collected for a purpose relevant to his employment, while the sending of it to a third party was incompatible with that purpose.

50 On article 5(1)(f), which is concerned with integrity and confidentiality and in particular the presence of safeguards against erroneous disclosure, Mr Williams submits that the fact that the disclosure was a case of simple human error is not a defence, and the defendant has not put forward any evidence about safeguards or security systems in place.

51 As for the claim for breach of confidence and misuse of private information, Mr Williams points out that the defendant has admitted the information disclosed constituted personal data, that it was information about which the claimant had a reasonable expectation of privacy and that such information "would attract a duty of confidence" (see paragraph 14(b) of the defence, albeit that that paragraph also states that the plea to which it is responding is "embarrassing for want of particularity").

52 Mr Williams points to the well established practice of the court permitting an amendment to cure a defect comprising only a want of particularity (see paragraph 3.4.2 of the White Book, vol. 1, citing *Soo Kim v. Youg* [2011] EWHC 1781 (QB).

Reasoning and Conclusions

53 It is customary at this point in a judgment of this kind for the judge to set out the principles governing the striking out jurisdiction under CPR 3.4 and the Practice Direction, and the summary judgment jurisdiction under CPR Part 24. I am going to spare readers of this judgment; they are too well known to bear ritual repetition each time an application of this kind is made. They are set out in the skeleton arguments and are not controversial.

54 I agree that the negligence claim is bound to fail for want of any pleaded injury or damage recoverable as such. The claimant confirmed in his directions questionnaire that he did not intend to call expert evidence therefore there will be no medical evidence that might elevate the distress he asserts into something more that counts as an injury known to the law. I will therefore not allow the negligence claim to go forward to trial and I will strike it out, a course not seriously opposed by the claimant.

55 I come next to the claim for breach of confidence. I do not find much real world merit in Mr Flinn's suggestion that the defendant is unable to respond properly to the pleaded case because it is too vague. The defendant says the claimant has not made clear what confidential information was disclosed, or what information of that which was disclosed was confidential. But there is no dispute about what was disclosed, nor that it is personal data within the data protection legislation.

56 If there needs to be a dissection of what parts of that disclosed information are confidential and what parts are not, that could have been - or could still be - the subject of a request for further information. It is not, in my judgment, a matter for striking out or summary judgment at this stage. I understand that private information and confidential information are different things, but I do not think any failure in the pleading adequately to differentiate between the two is, on its own, fatal to the viability of the breach of confidence claim.

57 I do, however, accept Mr Flinn's point that the breach of confidence claim adds nothing to the claim for breach of the UK GDPR and the tort of misusing the claimant's private information. I therefore agree with the argument that the breach of confidence claim is otiose and that there would be no real point in exercising my discretion to allow an amendment to cure any defect in the pleading.

58 The claimant cannot be criticised for pleading all causes of action open to him, but as a matter of proportionality, an issue to which I shall shortly return, there is no need for a cause of action to go to trial which could only succeed if the more appropriate and convenient cause of action - which I am about to consider next - succeeds. I then come to the claim for breach of the UK GDPR and misuse of private information.

59 These are taken together in the defendant's submissions and I am content also to deal with them together. The defendant accepts that the issue whether the claimant's data was processed is a matter, in principle, suitable for trial. I agree and gratefully accept that concession. I do not agree that the issue of whether personal data was processed necessarily raises complex arguments.

60 The defendant may well have no defence to claim for breach of the UK GDPR. I do not decide that now but doubt that there is merit in the point that because Mr Bickle deleted the email without opening the attachments, there was no processing. I suspect that point is relevant to quantum rather than liability, as a matter of principle. I add that it is undisputed that the title to the attachments already disclosed the identity of the claimant without the need to open them.

61 Next, I agree with the defendant that the claimant has no prospect whatever of achieving any remedy at trial other than damages. As is customary, the pleading includes a claim for a declaration and an injunction to restrain repetition of the data breach. Mr Flinn is right to submit that these remedies would be wholly superfluous and pointless. The claimant does not work for the defendant any more. There is no evidence of any risk of repetition.

62 The real issue before the court today is whether I can be fully confident now, without a trial, that the breach was *de minimis*, or to put it another way, in the Chancellor's words in *Lloyd v. Google LLC*, a one off data breach that was quickly remedied. That question is likely to yield the same answer as asking the question, also found in authorities such as *Jameel*, whether this is a case where no damages would be awarded, or damages so wholly disproportionate to the costs of the litigation that the game is not worth the candle, with or without the wick.

63 On the latter point the law is expressed with merciful succinctness by Nicklin J in *Alsaifi v. Trinity Mirror plc* [2018] EWHC 1954 (QB); [2019] EMLR 1 at [39]:

> "The Court should only conclude that continued litigation of the claim would be disproportionate to what could legitimately be achieved where it is impossible '*to fashion any procedure by which that claim can be adjudicated in a proportionate way*': *Ames v. Spamhaus Project Ltd* [2015] 1 WLR 3409 [33]-[36] per Warby J citing *Sullivan v. Bristol Film Studios Ltd* [2012] EMLR 27 [29]-[32] per Lewison LJ."

64 I should also mention the decision of the Court of Appeal in *Halliday v. Creation Consumer Finance Ltd* [2013] 3 CMLR 4, where the Court of Appeal awarded a claimant £750 damages for wrongful processing of data on appeal from the decision of a judge below who had awarded but £1. That decision is cited by the learned Chancellor in *Lloyd v. Google LLC* at [59]; although, as Mr Flinn pointed out, the decision predated the Data Protection Act 2018 and clarification that the law allowed recovery for distress alone.

65 In the light of those strands of authority the decision for me today comes down to choosing between two alternative courses; to end the action now or to transfer it, or some of it, to the county court with the intention that it be tried in the small claims track. I have decided on the latter course because I am not sure, at this stage, that the damages available would be as minimal as the defendant would have it. I remind myself that I must not conduct a mini trial. The defendant's assertion that the claim is not worth the candle would carry more conviction if it had put more of its cards on the table.

66 As to the factual points I make the following observations. First, the existence of the parallel employment dispute is a point that cuts both ways. From the defendant's perspective, they say the claimant's email complaining about the disclosure must lead the court to conclude, even at this stage, that any technical data breach was no more than that and was tactically exploited by the claimant in the employment dispute. That is certainly a possible finding at the trial. But it is not a conclusion I am prepared to draw at this stage.

67 From the claimant's perspective, the finding at trial could be (hypothetically) that the fact of the employment dispute made the breach more serious, not less, given that it was committed at a time when mutual trust and confidence was at a low point and the defendant knew the claimant was vulnerable. He may seek to invoke the eggshell skull principle and it might be part of the court's finding that the claimant was, as it were, kicked when he was down. I do not say that is so by any means but nor do I accept at this stage the submission that any distress suffered was either unreasonable or inseparable from the employment dispute.

68 Was the data breach, if there was one, a one off? It certainly appears so at this stage in advance of disclosure. Was it quickly remedied? On such evidence as I have, relatively quickly. But there remain unanswered questions. For example, what if Mr Bickle has forwarded the email and attachments, without opening them, before deleting them? What communications took place in the six days it evidently took for him to provide the email confirmation that he had deleted the email without opening the attachments? That email is clearly not sent in reply to an email that is before the court. It is sent in reply to some undisclosed communication, or communications.

69 Next, if it is correct that the claimant was left in a state of distress not knowing the position until receipt of the defence some 14 months later, that could seriously aggravate the breach. The claimant's case is that as far as he was aware his personal information was "out there" from February 2020 until he left in about October 2020, and then beyond that until receipt of the defence in May 2021. For all he knew Ms Passley's assurances of a follow up investigation and remedial action may have been empty.

70 I ask myself also, why the defendant did not simply forward Mr Bickle's email of 6 March 2020 to the claimant? Ms Keogh, Mr Bickle and the claimant all worked for the same organisation at the time. It would have been a good way to help restore trust and reassure the claimant.

71 I accept that Ms Passley's apology, before anything had been done about the breach, was expressed in gracious though succinct terms:

> "Please accept our apologies for this error."

But she did not say she would keep the claimant regularly updated and, on the claimant's case, did not do so. The apology came before not after the breach was rectified.

72 These are, in principle and subject to proportionality, factual issues for trial. I also note that there has been no disclosure yet of any written communications from the defendant to Mr Bickle as distinct from the one communication going the other way; his email of 6 March 2021.

73 As for Ms Keogh's alleged reassurance, a phone call to the claimant on 6 March 2021, I am struck by the timing of the defendant's evidence on the point. I agree with Mr Coyle that it is strange to find no written confirmation and no telephone log or other record of the call, and that it took so long for Ms Keogh to make her statement after Mr Coyle's probing and Mr Ward's oblique *en passant* reference to the issue in his witness statement.

74 In my judgment, the defendant is essentially asking me to conduct a mini trial, leading to the conclusion that damages will be nil or nominal. But I have to take the claimant's case at its highest for the present purposes. Even on the defendant's case, while an assurance was

given that the breach would be rectified no written confirmation was ever provided to the claimant that it had been. I also bear in mind the possibility that if the call from Ms Keogh was not made that could be an aggravating feature of the breach in the form of putting wrong evidence before the court, whether mistakenly or otherwise, about the call.

75 In my judgment, these matters take the case outside the category of those which are worth neither the candle nor the wick. That is not to downplay the force of what may, for all I know, prove at trial overwhelming factual points in the defendant's favour. Thus, the defendant says the claimant must have been told by Mr Bickle that he, Mr Bickle, had not opened the attachments. It is true the claimant does not give a full account of his conversation with Mr Bickle. That is a cross-examination point and may be a powerful one.

76 The same is true of the defendant's other points: that Mr Bickle would have learned nothing new, being in the same business, that the claimant must have been tactically exploiting the error for his own ends in the employment dispute and that he did not carry out any investigations of his own.

77 It seems to me that in a case such as this, if a defendant admits making a disclosure in error but is unsure whether a court would consider the breach purely technical and *de minimis*, or whether the court would regard it as fit for trial, the defendant can protect itself by making a modest Part 36 or other offer to the claimant, in an amount which is likely to be less than would be the defendant's legal costs of contesting the claim.

78 I just would add, for the sake of completeness, that I have considered rounded and approximate figures in respect of the likely, or budgeted, costs of this claim and of the present application, insofar as these are yet known. I do not place a large amount of weight on those figures because costs budgets are not agreed and there may well be scope for reducing the costs.

79 In conclusion, I would not deny the claimant access to the county court, probably the small claims track, to litigate the claim particularly in circumstances where the defendant appears not to have revealed the whole of its hand and has, at the same time, sought to rid itself of the action in a manner that prevents its disclosure obligations from arising.

80 Access to justice includes the right to litigate modest claims for amounts that may seem trivial to lawyers but are not to the party seeking not just the money but to vindicate their rights. Whether the claim is worth the candle must be seen in that light.

81 For those reasons I dismiss the application for striking out and for summary judgment.

82 Apart from the negligence claim, which I strike out, I will direct a trial of the misuse of private information claim together with the claim for breach of the UK GDPR. Those parts of the claim will be transferred to the Central London County Court. I propose also formally to transfer the breach of confidence claim, which is in principle viable, but with an indication that it does not need to be tried in the county court, or at all, because it could only succeed if the two live claims also succeed.

(Submissions and a ruling on costs followed)

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