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Case No: SC-2022-BTP-000872

IN THE HIGH COURT OF JUSTICE
SENIOR COURTS COSTS OFFICE

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 11/07/2023

Before:

COSTS JUDGE JAMES

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Between:

X	**Claimant**
- and -	
MINISTRY OF JUSTICE	**Defendant**

- -
- -

MR DAVID BOYLE (instructed by the Claimant's law firm) for the **Claimant**
MR PAUL JOSEPH (instructed by the **Government Legal Department)** for the **Defendant**

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JUDGMENT

COSTS JUDGE JAMES :

1. I am grateful to the parties for their submissions and also for the time to read some of the papers. It is a well presented file and I have been able to find what I needed. I am very acutely aware that what I have includes privileged and non-privileged documents. I will read aloud as little as necessary to show that I have exercised my discretion correctly. I make very clear that I have not opened this envelope, nor have I looked at what it contains.

2. With regard to the question of the Data Protection Act and whether I should read the documents in the sealed bundle, I have looked at four particular documents and the first of those, which I will quote from very briefly because it is privileged, is a note from the claimant to his, as he would now be, King's Counsel, Mr Epstein dated in September 2019 and in that he states that:

> "The case involves an Equality Act claim against the MoJ regarding the failure to provide a hearing loop and claims against the Ministry as a result of failure to respond to subject access requests subsequent to those that were dealt with in *AB v MoJ*."

Those are his words in those instructions to counsel.

3. The next document which I have looked at is a note and I apologise, it is not clear to me who made that note, whether that is counsel's note of HHJ Freeland's judgment or a note that has come from the judge himself but it is a detailed note and it appears to give information by reference to numbered paragraphs. So if I give you a numbered paragraph, that may be the numbered paragraph in the learned judge's judgment, then again it may not and from that note, which I would say although the note itself may be a document that counsel has generated, obviously Freeland J's (sic) judgment would be a document of public record so I will read aloud from that.

4. He is talking about damages for delay in a subject access request under 8.2, 13 of DPA 1998, section 13 compensation:

> "Entitled to compensation from data controller for that damage, *Vidal v Google* cases, common ground that damage in Article 23 of the Directive includes both material and non-material, *AB v MoJ*."

And then later – and that is referred to as paragraph 57(3). Whether that correlates to a paragraph in the learned judge's judgment, I am not sure. Then at paragraph 129 under "conclusions", which I think are the judge's conclusions, again I am not working from the judgment, I am working from what is apparently a note of the judgment, it refers to the fact that the claimant's application for judgment in default should be struck out, the claim against HMCTS should be struck out, Article 6 claim against the MoJ should be struck out but it does say that the Equality Act claim and DPA claims against the MoJ are to proceed to trial. So that is those two.

5. The other two documents which I have seen are the statement, particulars of claim of 17 August 2018 and at paragraph 59 of that, the claimant states that:

> "The second defendant has a history of non-compliance with previous subject access requests made by the claimant. Indeed, the claimant has obtained declaratory relief, damages and costs from the High Court."

6. And finally in its defence dated 24 July 2019 the Ministry of Justice says, it talks about the Data Protection Act of 1998 and in particular under reference to the Data Protection Act makes various admissions on subject access requests and the like but of particular interest says at paragraph 19(c) that:

> "The failure of the Chancellor's clerk to pass on the claimant's email did not amount to unfair processing within the meaning of the first data protection principle under Part 1, Part 1 of Schedule 1 to the Data Protection Act 1998."

7. Now, those are all pieces of evidence in the way of contemporaneous documents on the claimant's own very well kept and well presented file for which I am grateful and from those, two things are very clear indeed. First of all, data protection certainly was an issue in these proceedings and continued to be so up to the mediation. That judgment makes that very clear. However, the other documents read aloud make very clear that this was to do with subject access requests after *AB v MoJ* and, as we are already aware, these documents (the sensitive materials) were destroyed under an undertaking back in 2014 as part of the outcomes of *AB v MoJ*.

8. I do not accept that I should read the documents in closed bundle AB2 or AB1 and I do not accept that the contents of closed bundle AB2 and AB1 were of relevance in these proceedings. These were subject access requests after *AB v MoJ* as the claimant in his own papers makes clear. He has had, and I am sure continues to have, concerns about how his data has been processed but he has been told repeatedly that Mr Joseph has not seen these papers, Mr Sivarayan, as I understand it, has not seen these papers, I have not seen these papers and I have no wish to see these papers.

(For proceedings after judgment see separate transcript)

9. So before the lunch adjournment, the issue was whether the sensitive materials had been destroyed by the defendant and whether the claimant knew that. I am going to read aloud from certain documents, all of which if not in the common – if not in the public domain are certainly common to the parties and therefore not privileged in that sense.

10. The first thing is the judgment of Jeremy Baker J from February 2014, further submissions July and September 2014, and this is his judgment on the costs and what he has to say there that is of relevance:

> "Nothing that I am going to say is going to describe the sensitive materials other than by calling them the sensitive materials."

He talks about, in paragraph 20 of his judgment the learned judge talks about:

> "In written submissions the claimant argued his entitlement to be awarded his costs upon an indemnity basis. This is largely based upon those matters set out under paragraph 21 of the claimant's most recent witness statement which have been responded to by the defendant in the witness statement from Duncan Henderson dated 29.8.2014. Although a number of issues are raised for consideration, the main ones appear to be the attitude of the defendant to the requested destruction of the disclosed and withheld material, the attitude of the defendant towards the claimant and the defendant's failure to resolve matters appropriately by way of compromise. I do not need to deal with those too (?)[1]"

In paragraph 21 he says the following:

> "In relation to the first of these, it is of relevance that under section 14 destruction is dependent upon the data being inaccurate. However, because of the defendant's agreement to destroy the material post trial this issue was not a matter which had to be determined. Indeed, if it had, then in my judgment it was not necessarily a conclusion which would have been determined in favour of the claimant. Moreover it seems to me that the position taken by the defendant was a reasonable one, namely that for as long as the claimant continued to pursue damages for delay in providing this material, then it was necessary to retain it in order to allow the court to reach its judgment."

So that is what the learned judge had to say about those materials.

11. The next thing I found is a letter from the GLD dated 26 January 2017 from somebody called Caroline Featherstone and it is a letter about costs but in that letter at paragraph – she is responding to an email of the claimant's, so paragraph 7 is actually only the fourth main paragraph on the page and in that she says:

> "I understand that the concern set out in paragraph 7 of your email relates to the contents of your bill which you are yet to serve. We have invited you on a number of occasions to set out your concerns in detail so that we can consider them and respond. If I have understood correctly, your concern appears to be as to who will have sight of your

[1] See para 20 of the relevant Judgment

> bill or be aware of the contents once it has been served. That will be dependent on when you serve your bill."

She talks about the personnel there, talks about Mr Sivarayan, talks about Mr Henderson and talks about Mr Joseph:

> "It is our usual practice to send a copy of the bill to our instructing client. The identity of that person will depend upon when the bill is served."

She goes on, however, in the same paragraph to say:

> "As the sensitive material has been destroyed in accordance with the court order, we do not anticipate that there will be any reason to depart from our usual practice. However, if it is your intention to include details of the sensitive material or explicit reference to it in your bill, we will consider retention on a password protected drive."

So that is the next thing.

12. Now, I have then got a number of items from a bundle. I am going to give you the bundle page number before describing the document. You will see why in a moment. So the first item on page 37 of the bundle is a letter of 25 September 2014 to the claimant signed by Sarah Goom, head of division A litigation group at the GLD Treasury Solicitor's department – sorry, 25 September 2014 and she says:

> "I can confirm that all copies, hard and electronic, of the sensitive material held by the Treasury Solicitor have been destroyed. We are awaiting confirmation from counsel that he too has destroyed his sensitive material but he is currently away from chambers for religious holidays. The administrator within the MoJ who is responsible for this case has been on annual leave and returns next week. We will ask him to confirm promptly that he has destroyed those copies held by the MoJ. He will be asked to confirm what steps he has taken to locate any copies held by other government departments and ensure their destruction. I will write further once I have received a response from him."

13. The next item is again a letter from the Treasury Solicitor. This time it is from Duncan Henderson and this is a letter dated 8 October 2014 and he says:

> "I confirm that on 12 June 2014 I contacted those instructing me at the MoJ and counsel for the MoJ regarding the process for identifying and destroying the sensitive material that was to be destroyed in accordance with the order of Mr Justice Jeremy Baker."

There is some discussion of the fact that:

> "On 11 July, further to your counsel's request for an extension of time both parties' submissions on costs were provided to the court. Your submissions were accompanied by a lengthy witness statement and an equally voluminous exhibit. Most of the content of your statement went to the issue of costs. However, at paragraph 22 you seemed to seek to revisit the issue of whether there was other material of a sensitive nature which might not be covered by the undertaking and the order for destruction. In light of that development, as I have explained at paragraph 36.21 of my witness statement dated 29 August 2014 *[I think these are the witness statements referred to in Mr – I will come back to that]* the Ministry of Justice felt itself compelled to suspend destruction of the sensitive material pending clarification as to whether you were indeed seeking a further oral hearing in that regard."

There is some discussion then about final submissions and so on and so forth. At paragraph 12 he says:

> "By 22 September *[I am taking it this is 2014]* I believe that I had destroyed all hard and electronic copies of the sensitive material that I was holding and signed a note of action to that effect. On 24 September I sought to contact counsel for the MoJ to confirm that he too had destroyed his copies but I received a message indicating that he was away. He contacted me on 1 October to confirm to me that he *[I take it that is you, Mr Joseph]* had destroyed his copies."

MR JOSEPH: No, it is Mr Hilton.

JUDGE JAMES: Mr Hilton, I am grateful, all right:

> "And I subsequently received a signed note of action from him to that effect. Also on 1 October following his return from leave, my Ministry of Justice client contacted me to confirm that to the best of his knowledge the Ministry of Justice had destroyed all the electronic and hard copies of the sensitive material that the MoJ had been holding separately."

At paragraph 14 he says:

> "However, he drew my attention to the fact that you had included a significant quantity of the disclosed material in exhibit B to your

> witness statement of 13 February 2014 and sought my advice as to the action the MoJ should take in that regard."

I think that is my reference to it having been destroyed and then being served again:

> "On inspecting exhibit B, I noted that that was indeed the case."

At paragraph 18 he goes on to say:

> "After being alerted to the sensitive material contained within exhibit B, this is to the claimant's witness statement, I arranged for it to be permanently removed from our case management system. I traced all the emails I had sent forwarding it to my clients, counsel for the MoJ and line managers and double deleted it from their system. I also destroyed the hard copies of the sensitive material contained in my only copy of exhibit B. My MoJ clients, counsel and line managers all confirmed to me yesterday, 7 October 2014, that they too have likewise destroyed all the hard and electronic copies of exhibit B in their possession. Accordingly, to the best of my knowledge and belief the Ministry of Justice has now complied with the terms of the undertaking it gave to the court on 20 January 2014 and to Mr Justice Jeremy Baker's order of 11 June 2014."

Now, those are from the bundle, pages 38, 39 and 40.

14. I then go on to page 86, 87, 88, 89, 90, 91 and 92. In fact, it goes on to page 94 of the bundle and this is a witness statement of Hayley Allen, head of disclosure team at the MoJ, dated 12 May 2020 and it says:

> "Paragraph 6 of the Tomlin order required the Ministry of Justice to provide proof of destruction of any personal data which would have fallen within paragraph 5.9 of the Tomlin order but which has been destroyed in accordance with the AB destruction order. I exhibit copies of three certificates of destruction as exhibit HA2."

So that is a witness statement over a statement of truth,

15. The last thing I want to read from that bundle is a letter dated 17 August 2020 and this is from Mr Sivarayan to the claimant:

> "Your letter of 5 August 2020 regarding the above has been passed to me to deal with. As you know, I am the day-to-day case handler."

The heading is "undertaking contained in the order of 25 February 2014":

> "I enclose further copies of two letters which were sent to you dated 25 September and 8 October 2014 respectively. Those letters set out in some considerable detail the steps which were taken by the MoJ and the Treasury Solicitor, the predecessor to the GLD, both to comply with the undertaking which had been given and to ensure that others also complied. It is clear from those letters that you were kept fully informed of those steps. I am unable therefore to understand why you consider it appropriate to ask for information which you received in 2014 some six years after receipt of it. It is, and was, clear from those letters that the Ministry of Justice has complied with the undertaking. I am unclear as to what might be meant by the assertion that the undertaking was in perpetuity. The undertaking was to destroy documents. Following the destruction of those documents in 2014 there was nothing more for the Ministry to do in order to comply with the undertaking. Consequently the statement in the submissions made on behalf of the Ministry in opposition to your ultimately unsuccessful application to set aside the order of 2 April 2020 was entirely accurate and in no way erroneous or misleading."

Now, that letter and the sort of signature page to it appear on pages 120 and 121 of the bundle, 17 August 2020 that is.

16. Now, let me just get back to the front. Based on the correspondence from 2014 and 2017 and based on the correspondence and the witness statement from 2020, as I understand it – let me just double check that again, yes – I am satisfied so that I am sure that the claimant knew as long ago as September/October 2014 and throughout this process and certainly long before issuing the proceedings under number E11 that the Ministry had destroyed the material. I accept that he does not choose to believe that, or is unable to believe that but the fact is the Ministry has done what it was required to do. It has told him that repeatedly in correspondence, it has told him that in a witness statement with a statement of truth above it and I am satisfied so that I am sure that he knew about all of this because those bundle reference numbers that I have given are from the claimant's injunction bundle of 11 September 2020. So he put

those before Cavanagh J when he tried to prevent me from hearing this case, so there is no way that he did not know that those existed.

17. So I stand by the judgment that I gave this morning. The sensitive materials form no part of the litigation under E11. The data access issues in E11 were to do with not forwarding timeously requests from the claimant regarding appropriate adjustments for his disability and the position is as Mr Joseph indicated this morning and that is how I will approach this detailed assessment.

(For proceedings after judgment see separate transcript)

18. I am going to reserve costs and the reason I am going to reserve costs, I think it is the right thing to do. I hope that there may be scope for a commercial resolution of this and if there is, I think costs reserved is going to be the more helpful order but perhaps on a more substantive basis, I think there was no intention, in my view, to mislead but Mr Joseph this morning, we did spend a bit of time talking about whether there was anything in the particulars of claim to do with DPA and we established that there was and then there was obviously a considerably greater amount of time dealing with what that DPA should have been about and I think that the best way forward is to reserve the costs of today and that is what I propose to do.

(For proceedings after judgment see separate transcript)