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IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
MEDIA & COMMUNICATIONS LIST

The Royal Courts of Justice
Strand
London

Before MR JUSTICE NICKLIN

THOMAS COLE (Claimant)

- v -

MARLBOROUGH COLLEGE (INCORPORATED BY ROYAL CHARTER) (Defendant)

JEREMY REED KC appeared on behalf of the Claimant
ROBIN HOPKINS appeared on behalf of the Defendant

JUDGMENT
13 DECEMBER 2024
(APPROVED)

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MR JUSTICE NICKLIN:

1. This is a data protection claim. The Claimant alleges that the Defendant has failed properly to comply with a subject access request dated 26 September 2022. The Defendant school provided a substantive response on 25 November 2022 and enclosed with it various documents, some of which were redacted.

2. Correspondence between the solicitors acting for the Claimant and the solicitors acting for the school led to some further documents being provided on 22 December 2022. The claim form in the claim was issued on 5 January 2024. In summary, the Claimant contends that the Defendant has failed to provide a full and proper response to his subject access request.

3. The Claimant seeks first a declaration that the Defendant has acted unlawfully by failing to comply with the Claimant's right of access to his personal data. And second, an order requiring the Defendant to comply with the subject access request. There is no claim for damages. As I understand it, a two-day trial has been, or is very likely soon to be, fixed for 1 May 2025.

4. The issue to be resolved today is a discrete point on the parameters of inspection in the disclosure exercise that was adjourned by Master Eastman to be considered by a Judge of the Media and Communications List. The Particulars of Claim, originally dated 23 January 2024, set out the background and circumstances of the claim. A Defence was filed by the Defendant on 8 March 2024. The statements of case have been amended subsequently.

5. To put the current issue that is before the court in its context, it is necessary to set out some of the background to appreciate the documents that the Defendant holds in respect of which the Claimant has made his subject access request. In summary, the Claimant used to be a pupil at the Defendant school having started there in year 9 in September 2017.

6. What the Claimant describes as "*an incident*" happened at the school on 10 June 2022. The Claimant and Pupil A were both in year 13 – the is the upper sixth – and were in the midst of sitting their 'A' Level exams. Pupil C was in year 11 and was taking his GCSE exams. The Claimant, Pupil A and Pupil C were all boarders in House C3.

7. The Claimant alleges that Pupil C had for a period been taunting Pupil A during the evening of Friday 10 June 2022. The upper sixth pupils in House C3, including the Claimant and Pupil A, had their evening meal in the boarding house. At about 11 pm, there was a physical altercation between Pupil A and Pupil C. The Claimant states that he heard a commotion and entered the room to see what was happening, whereupon he says that he witnessed a physical altercation between Pupil A and Pupil C within a bedroom in the boarding house.

8. When there was a lull in the fighting, and just before he felt that Pupil C was going to lash out again at Pupil A, the Claimant states that he intervened to keep them physically separate by pushing and holding back Pupil C. Pupil A and at least one other pupil were present in the bedroom at that time. The Claimant's case is that the altercation and the aftermath were witnessed, in whole or in part, by various pupils including Pupils D, E, F and G, who were in the same year as Pupil C, and Pupils H, I and J who were upper sixth pupils.

9. It is the Claimant's case that several teachers from the school became involved in the immediate aftermath and thereafter in the investigation of what had happened. Following the incident, during the late evening of 10 June and early morning of 11 June 2022, the Claimant and Pupil A provided handwritten statements. It is the Claimant's case that other pupils who were potential witnesses to the incident would have similarly given statements.

10. On 11 June 2022, one of the deputy heads of the school began in investigation into the incident ("the Investigating Teacher"). As part of that investigation, the Claimant was interviewed during the morning of 11 June. It is the Claimant's case that all other pupils that were involved in or witnessed the incident, namely Pupil A and Pupils C to J inclusive, were also interviewed and notes made of what they said.

11. Thereafter, the Claimant alleges that the investigating teacher made a note on the school's child protection online monitoring system in relation to the Claimant with various other pupils having a "linked" status. In an email, sent on 20 June 2022, the Investigating Teacher informed the Claimant's parents that, having reviewed the evidence, he had concluded that it would be necessary for the Claimant to attend a disciplinary hearing in relation to the incident.

12. The Claimant's case is that his parents spoke on the telephone with the Investigating Teacher on the morning of 21 June 2022, after which he emailed them, at about 11.52 am, giving a summary of some of the information provided by the various witnesses. The Claimant's parents requested copies of the witness statements, including that from the Claimant, but it is alleged that the Investigating Teacher informed them that they would be provided only with the investigation report which would follow shortly.

13. It is claimed that the Investigating Teacher stated that the disciplinary meeting, before a senior member of staff, would be held the following week. The Claimant alleges that the Investigating Teacher told his parents that, given the severity of the incident, and based on sanctions imposed in comparable incidents in the past (not involving the Claimant), expulsion was the likely outcome. The Claimant alleges that the Investigating Teacher then explained that if a pupil were to be expelled then all school support would cease and they would not have "Old Marlburian" ("OM") status, whereas if a pupil were to be voluntarily withdrawn prior to the disciplinary hearing then school support would remain (e.g. in relation to University 'clearing') and the pupil might have OM status (at the school's discretion). If a pupil was withdrawn, then the any disciplinary process would cease immediately.

14. The Claimant sat his final 'A' Level examination at the school on 21 June 2022 and the investigation report was completed on 26 June. The report included details of the "facts" that had been established in relation to the incident, a relevant extract from the report is relied upon in the defence. It is not necessary to set it out in this judgment.

15. The school provided a copy of the report to the Claimant's parents on 27 June. They were informed that there was a disciplinary case for the Claimant to answer and were notified that a disciplinary hearing would take place on Friday 1 July 2022, being, at that stage, the last day of term and the date on which the Claimant was due to leave the school permanently having completed his 'A' Levels.

16. In a letter, dated 28 June, the Claimant's parents notified the school they were withdrawing the Claimant from the school with immediate effect. It is alleged by the Claimant that they did so because they had lost confidence in the disciplinary process. The effect of the Claimant's withdrawal from the school was that the disciplinary process ceased immediately and there was no disciplinary hearing.

17. The Claimant's case is that in those circumstances, the matter rested with the apparent conclusion of the investigation report that there was a disciplinary case for the Claimant to answer, but there was no conclusive finding as to the facts as to what did or did not take place in respect of the incident, at least in respect of what the Claimant did or did not do. As both parties to the proceedings recognise, what happened during the incident is not an issue in these proceedings.

18. It is common ground between the parties that, in responding to the Claimant's subject access request, the Defendant withheld some documents – and redacted others – that contained the Claimant's personal data on the ground that the relevant data fell within paragraph 16 of schedule 2 of the Data Protection Act 2018. In respect of these withheld or redacted documents, the Claimant contends that the Defendant was not entitled to withhold or redact these documents from the response to the subject access request on the ground relied upon by the Defendant.

19. Paragraph 16 provides as follows:

> "(1) Article 15(1) to (3) of the UK GDPR (confirmation of processing, access to data and safeguards for third country transfers), and Article 5 of the UK GDPR so far as its provisions correspond to the rights and obligations provided for in Article 15(1) to (3), do not oblige a controller to disclose information to the data subject to the extent that doing so would involve disclosing information relating to another individual who can be identified from the information.
>
> (2) Sub-paragraph (1) does not remove the controller's obligation where—
>
> (a) the other individual has consented to the disclosure of the information to the data subject, or
>
> (b) it is reasonable to disclose the information to the data subject without the consent of the other individual.
>
> (3) In determining whether it is reasonable to disclose the information without consent, the controller must have regard to all the relevant circumstances, including—
>
> (a) the type of information that would be disclosed,
>
> (b) any duty of confidentiality owed to the other individual,
>
> (c) any steps taken by the controller with a view to seeking the consent of the other individual,
>
> (d) whether the other individual is capable of giving consent, and

(e) any express refusal of consent by the other individual.

(4) For the purposes of this paragraph—

(a) "information relating to another individual" includes information identifying the other individual as the source of information;

(b) an individual can be identified from information to be provided to a data subject by a controller if the individual can be identified from—

(i) that information, or
(ii) that information and any other information that the controller reasonably believes the data subject is likely to possess or obtain."

20. Substantially, the issue to be resolved in these proceedings is whether the Defendant was entitled to rely upon the paragraph 16 exemption. The Defendant's case is that it was so entitled, but, in the alternative, the Defendant argues that, even if the Claimant were to demonstrate an entitlement to some relief, the Court should refuse relief on the grounds that such relief would be disproportionate, would not further the purpose of subject access requests and would cause unjustified interference with the rights of other individuals –principally, the other pupils of the school who gave evidence of the incident during the investigation.

21. The claim was listed for a CMC before Master Eastman on 24 October 2024. The Master made several case management directions leading, as I have said, to the two day trial after Easter next year.

22. Those directions included the conventional phases of disclosure and inspection. In the context of inspection, the master's order directed as follows:

> "The following issue shall be stood over to be determined by a high court judge in the media and communications list. Time estimate: half a day. Whether the Defendant is entitled to withhold from inspection in whole or in part, documents which contain the Claimant's personal data, but which the Defendant asserts that it was or would have been entitled to withhold in the Defendant's response to the Claimant's data subject access request dated 26 September 2022 on the grounds of the exemption in paragraph 16 of schedule 2 of the Data Protection Act 2018."

23. On this issue, the Defendant's submission is straightforward. Relying upon ***X -v- The Transcription Agency LLP*** **[2024] 1 WLR 33**, Mr Hopkins argues that, as a matter of principle, the Defendant is entitled to withhold from inspection the very documents that contain the information, the original withholding of which is being challenged in these proceedings. To provide inspection of these documents would deliver to the Claimant precisely the relief he is seeking before having established any entitlement to it.

24. In ***X***, the issue arose in a slightly different context. The question to be resolved was the procedure to be adopted for the trial and whether the Claimant ought to be provided with the documents that were subject to challenge that had been included in closed bundles. The point arose because s.15(2) Data Protection Act 1998 had contained an express provision that the documents containing the challenged information could be

considered by the court but were not to be provided to the applicant or his or her representatives.

25. As Farbey J noted, the Data Protection Act 2018 contained no similar provision: [48]. Nevertheless, relying upon ***Browning -v- the Information Commissioner*** **[2014] 1 WLR 3848** and ***Lin -v- Commissioner of Police of the Metropolis*** **[2015] EWHC 2484 (QB)**, the Judge held that the Claimant was not entitled to the documents during the trial:

> [106] It would defeat the purpose of the legislation if a person challenging the application of an exemption were to be given sight of the material for the purpose of advancing his or her arguments (***Lin*** [41]). It would bring about a situation in which a party seeking personal data "*would have obtained the very thing which the hearing was designed to decide*" (***Browning*** [29]). Parliament cannot have intended to protect judicial independence by enacting the judicial exemption and at the same time to have sanctioned the revelation of the data in a court. Such an absurd result cannot properly be regarded as the legislative intention.
>
> [107] This absurdity means that the lacuna in the DPA 2018 should not be resolved by permitting the claimant to have sight of the closed bundles. The anomaly is best resolved on the basis that, as Mr Bates submitted, the court has an implied power (i) to inspect the personal data; (ii) to seek any necessary clarification from those asserting the exemption; and (iii) to carry out these functions in the absence of the claimant and his legal representatives. To the extent that the implication is statutory (in that it may be derived from the scheme of the DPA 2018), I would regard it as part and parcel of section 167. If I am wrong about that, I would regard the implication as being that there is no statutory bar to the exercise of the High Court's inherent jurisdiction to review evidence in a party's absence: the inherent jurisdiction fills the statutory lacuna.

26. Although not strictly relevant for the issues that I have to decide, I would note in passing that Parliament clearly had intended to resolve this lacuna. The Data Protection and Digital Information Bill was before the last Parliament before it was pro-rogued before the election. Clause 47 of that Bill would essentially have reintroduced the restrictions that had previously been imposed in s.15 Data Protection Act 1998 by insertion of a new s.180A to the Data Protection Act of 2018.

27. I have been shown today the Data (Use and Access) Bill which has been introduced in the House of Lords, clause 103 of which, if implemented, would have the same effect of introducing section 180A into the Data Protection Act 2018. I simply note this in passing. Mr Reed is quite correct that the Court does not anticipate any legislative change. Nevertheless, it is a matter of record that the Data Protection Act 1998 did contain an express restriction on the access to the disputed documents and information in data protection litigation, which restriction was omitted in the 2018 Act. It is reasonably clear that that omission was an error, rather than deliberate.

28. In ***X***, Farbey J pointed to that removal, which looked odd for the reasons that she explained. Subsequently, Parliament moved to correct the position. From that, it is not difficult to infer that Parliament recognised that that lacuna was unintentional and had

taken steps to deal with it. The new Parliament has reintroduced a bill which would resolve the lacuna.

29. Mr Reed argues that the Claimant needs to be able to consider the relevant document(s) when assessing, and making submissions on, whether the balance struck by the Defendant, relying upon the paragraph 16 exemption, has been applied correctly. He submits that the Claimant ought to be able to make submissions at trial with the benefit of knowing the information contained in the documents. He contends that any confidentiality that attaches to the withheld information can be protected by the use of a 'confidentiality club' or by restrictions that could be imposed by the Court.

30. Separately, the Claimant has obtained the documents relating to Pupil A which allow him to make certain arguments as to the way in which the Defendant has carried out the balancing exercise when approaching the paragraph 16 exemption. He submits he ought to be similarly entitled to make submissions based on the contents of the other documents relating to the other pupils.

31. Mr Reed argues that the ***X*** decision can be distinguished on the basis that the case concerned a different exclusionary ground – the judicial exemption under paragraph 14 of schedule 2. That exemption engaged a very high-level public interest which justified the Court adopting the procedure that it did.

32. I do not accept that submission. The principles identified by Farbey J are not limited to the judicial exemption relied upon in ***X***. The justification for withholding from the Claimant the documents and/or information that he contends should have been disclosed to him, pursuant to a subject access request, applies whatever the exemption relied upon to justify the original refusal to disclose. The Claimant is not entitled as part of the disclosure or trial process to obtain the very information the withholding of which he is challenging in the proceedings.

33. That disposes of Mr Reed's primary submission, and it is unnecessary to go on to consider the Claimant's arguments as to how such information could be provided to him, whether by means of a confidentiality club or otherwise. Mr Reed's argument is that, rather than the adopting a closed procedure at any trial, the better option is for the Court to fashion a way that would enable the Claimant's lawyers to continue to represent him, whilst not providing to the Claimant the information or documents that are the subject of the claim.

34. In my judgment, confidentiality clubs prevent a very significant challenge to the conventional way on which adversarial litigation is conducted. First, and obviously, Further, a confidentiality club is only a viable option where the parties are legally represented. For self-represented litigants of which there is a significant number in information litigation, confidentiality clubs will not provide a solution which, if Mr Reed is correct, would arise in most, if not all, claims in which a challenge is made to the withholding of data pursuant to a subject access request. A proposal that is only viable for one category of litigant is not a workable solution. The Court does not provide a two-tier approach to disclosure in litigation, dependent on whether the party is represented or not.

35. Next, most confidentiality clubs operate on the basis that the lawyers of a client will gain access to documents or information that are withheld from the client. No doubt a

client can consent to such a situation, but it is well-recognised to be fraught with dangers. It may be possible for lawyers to navigate these difficulties where the information is peripheral to the main issue to be resolved in the dispute. In this case, the risks are increased because the information is the very focus of the litigation: see ***Browning*** [24(j), (k) and (m)]. Confidentiality clubs which mean only the lawyers know some information was described by Fraser J in ***SCRL Limited -v- NHS Commissioning Board*** **[2019] PTSR 383** [72] as

> "An extreme situation that would have to be justified by extraordinary facts."

36. Confidentiality clubs are also generally limited to the disclosure phase. In ***Al Rawi -v- Security Service*** **[2012] 1 AC 531** [64], Lord Dyson observed that he was,

> "… not aware of a case in which a court has approved a trial [in a trade secrets case] proceeding in circumstances where one party was denied access to the evidence which was being relied on at trial by the other party."

37. This is not a point on which I need to say very more. Confidentiality clubs exist because the court is satisfied that the relevant party is entitled to the disclosure, but such disclosure must be limited because of the essential and legitimate issues concerning confidentiality. That is not the position here. The Claimant has no entitlement to the information. That is the inevitable conclusion reached by application of the principles from the ***X*** decision. It is not therefore necessary to go on to consider how that entitlement is to be achieved.

38. Therefore, the answer to the question posed by the Master is in the affirmative: the Defendant is entitled to withhold from inspection, in whole or in part, documents which contain the Claimant's personal data, but which the Defendant asserts that it was or would have been entitled to withhold in the Defendant's response to the Claimant's data subject access requested dated 26 September 2022 on the grounds of the exemption in paragraph 16 of schedule 2 of the Data Protection Act 2018.

39. I should say in closing that this judgement deals only with the inspection phase of the litigation. The issues to be dealt with at a trial and the extent to which, for example, the Court may need to look at the disputed documents and how the Court approaches the fair resolution of issues at trial, and whether, for example, those would require a closed procedure and the attendance in that event of a special advocate, are matters to be dealt with by the trial judge. I am dealing with the inspection phase of the documents in this litigation as directed by the Master and my decision is as I have explained.

(There followed further proceedings – please see separate transcript)

40. I now deal with the issue of costs. Mr Reed submits that this is an issue that was adjourned over from the CMC and therefore he submits that it ought to be costs in the case. Mr Hopkins says it is a discrete point which has required a separate hearing and on which his clients have been successful, and the costs should follow the event in the usual way.

41. I accept Mr Hopkins submission. In my judgment, there is no reason to depart from the usual rule. This was a discrete issue that was isolated for consideration at a separate

hearing. It has required up to a half day hearing in order for it to be resolved. There are specific costs attributable to it. If the Claimant had not adopted the position that he had, this hearing would not have been necessary.

42. As I say, I am not satisfied there is any reason to depart from the ordinary principle which is costs should follow the event. Therefore, I order the Claimant to pay the Defendant's costs of this hearing.
