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# Who will rid me of these troublesome data protection claims?

Defending data protection litigation

**Matt Lewin, John Fitzsimons and Dr Christina Lienen**

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# Overview



**Responding to  
claims**

**Litigation  
Strategy**

**Compensation**



## Responding to claims

# The case law prompting this webinar



**Warren v DSG  
Retail Ltd** [2021]  
EWHC 2168 (QB)

**Rolfe v Veale  
Wasbrough  
Vizards LLP**  
[2021] EWHC  
2809 (QB)

**Adrian Ashley  
v Amplifon  
Limited** [2021]  
EWHC 2921 (QB)

**Johnson  
v Eastlight  
Community  
Homes Ltd**  
[2021]  
EWHC 3069  
(QB)

# Warren v DSG Retail Ltd



- The Defendant had been the victim of a cyber-attack. The Claimant claimed that his name, address, phone number, date of birth and email address had been obtained in the attack.
- The Claimant's claim was for damages in the amount of £5,000 in respect of distress on the basis of breach of confidence, misuse of private information, breach of the Data Protection Act 1998, and common law negligence.
- The Defendant made an application for strike out/summary judgment.
- Where there is an alleged failure to keep personal data secure from unauthorised third-party access, this cannot amount to a breach of confidence or misuse of private information, so these causes of action were struck out.
- No duty of care exists, and a state of anxiety produced by some negligent act or omission falling short of a clinically recognisable psychiatric illness does not constitute damage sufficient to complete a tortious cause of action → negligence claim struck out.
- Only the breach of the 7<sup>th</sup> data protection principle (accountability) survived, which was transferred to the County Court.

# Johnson v Eastlight Community Homes Ltd



- The Defendant was the Claimant's landlord.
- One of the Defendant's other tenants requested a rent statement and was, in reply, sent the Claimant's rent statement. The Claimant's name, email address, and recent rent payments made to the Defendant were shared.
- On the day of the breach, the other tenant notified the Defendant, who asked them to delete the email sent in error. The third party confirmed they had done so the same day. The Defendant informed the Claimant.
- The Claimant's claim was for an injunction, declaration and damages <£3,000.
- The Defendant made an application for strike out/summary judgment.
- The claims collateral to the GDPR claim would likely obstruct the just disposal of these proceedings and be disproportionate and unreasonable and were struck out.
- The question whether the Claimant's entitlement is to purely nominal or instead extremely low damages to be determined by the County Court.

# Rolfe v Veale Wasbrough Vizards LLP



- The Defendants represented an educational trust. They accidentally sent an email to an incorrect recipient. The Claimants' names, address and account of school fees was disclosed, which showed fees were owed. The recipient responded the same day, indicating they thought the email was not intended for them. The defendants replied the following day, asking that the message be deleted. The recipient confirmed they had done so that same day.
- The Claimants brought claims for damages (unspecified amount), a declaration, and an injunction pleading misuse of private information, breach of confidence, common law negligence, and damages under s. 82 GDPR and s. 169 DPA 2018 saying the breach had made them “feel ill”, in part due to the “fear of the unknown”.
- The Defendants applied for summary judgment
  - The court dismissed the case. The claim was exaggerated and lacked credible evidence of distress, and was speculative given its de minimis nature.
  - *“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.”*

# Adrian Ashley v Amplifon Limited



- The Defendant was the Claimant's previous employer. They accidentally sent his employment contract to another employee, who informed the Claimant he had received it. The Claimant contacted the HR department which replied the same day:  
*“Please be assured that we **will** reach out to the [employee] 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.”*
- The claimant then appeared to have heard nothing more about it, and started proceedings, saying he had been shocked and upset that he had no way of knowing if it was an isolated incident or if his information had been shared more widely. His claim was based on the UK GDPR, negligence, breach of confidence and misuse of private information.
  - Claim for negligence struck out, breach of confidence claim adds nothing to the claim for breach of the UK GDPR or the tort of misusing private information
  - Rest of the claim transferred to the County Court small claims track due to legal points to be determined and evidence to be established via disclosure and cross-examination

# Pre-action: getting it right from the start

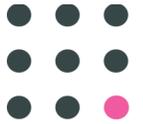


**Act promptly, take the matter seriously and show that you take it seriously**

→ A simple apology or future promises won't do: *Ashley v Amplifon*

- In general, you should, without any delay (“very rapid set of steps”: *Rolfe*):
  1. Rectify the breach
  2. If personal data was inadvertently sent to the wrong person:
    - Ask them, by email, not to read/open it, to delete it, to confirm in writing, as soon as possible, whether they have read it, that they have deleted it including from their trash folder, and that they have not passed it on to others: *Johnson v Eastlight*
  3. Record what you have done to rectify the breach
  4. Consider if you can produce any evidence to show the breach was a one-off
  5. Inform the potential claimant, in writing, **as quickly as possible**, of the steps you have taken, when you took them, why the systems you have in place will ensure a similar mistake won't happen again, and whether you will contact them again.
  6. Check whether the data that was inadvertently disclosed was freely available online and, if so, make a record of it.

# Following these steps may...



**Sufficiently  
reassure the  
data subject**

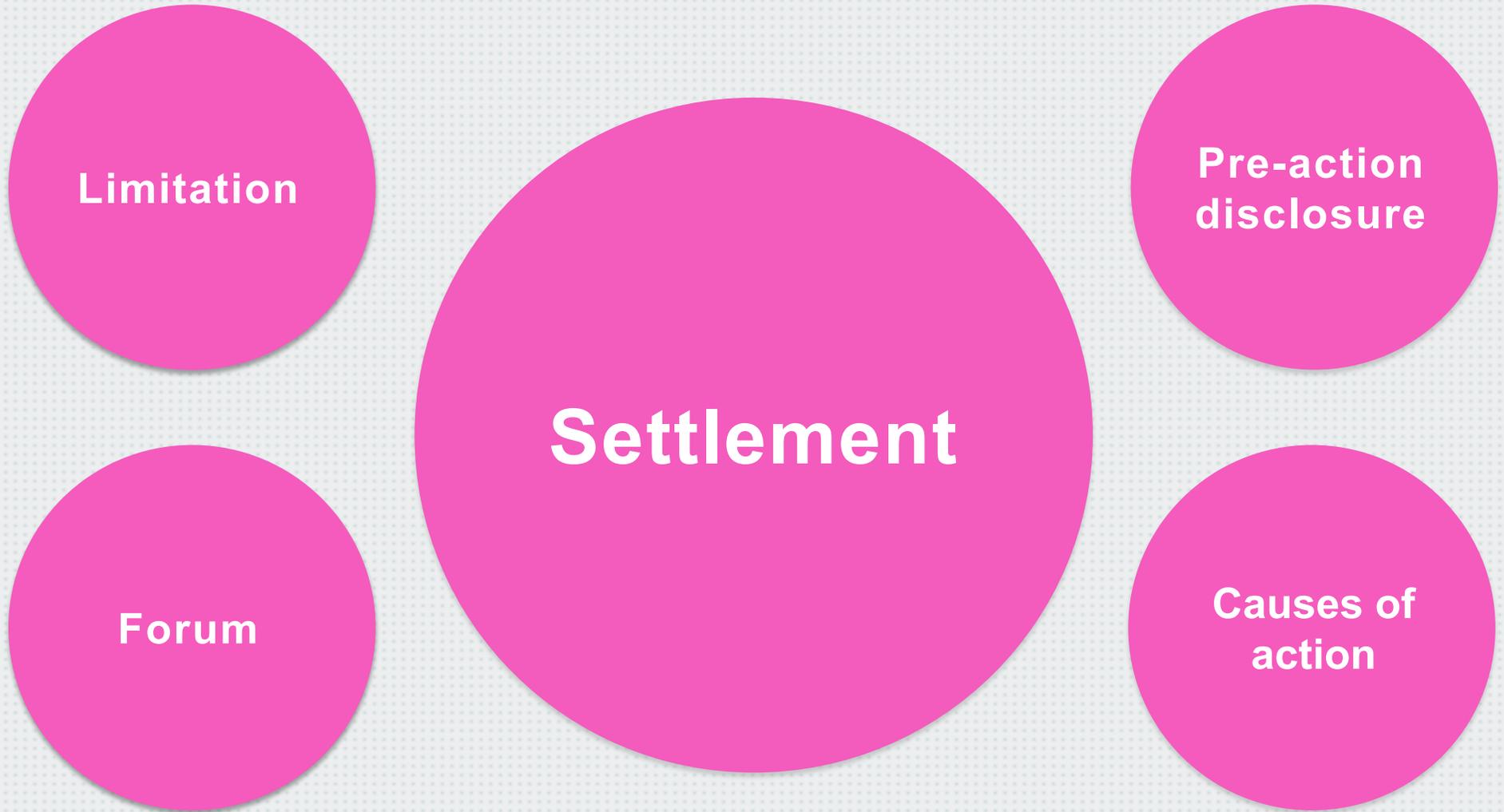
**Help you put forward  
your best case as far as  
compensation is  
concerned because you  
minimise any distress  
the breach may have  
caused**

**Impress  
the judge**

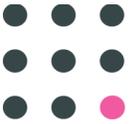
**Help you  
prove  
your case**

**Help you narrow down  
the factual issues left for  
trial, thereby making an  
application for summary  
judgment or strike out  
more prone to success**

# Other pre-action matters



# Pleadings



- Declarations and Injunctions:

*Johnson v Eastlight, at [7]:*

*“An injunction is a discretionary remedy granted usually only where it is demonstrated a defendant threatens to commission further torts: Monir v Wood [2018] EWHC 3525 (QB) at [237]. There is no evidential basis put forward to maintain that this was anything other than a one-off error. The prospect of an award of an injunction seems non-existent. I am quite satisfied the pleading of a claim for an injunction is merely an attempt to add credibility to the claim and to convey a greater impression of its importance. As does, for the same reasons, the claim for a declaration. I recognise no such need.”*



# Litigation strategy

# Litigation Strategy - Preliminary Matters



**Was there  
actually a  
breach?**

**Was the breach  
“notifiable”?**

**Part 36 Offers**

# The claim is issued



**Forum**

**Funding/  
Costs**

**The claim is  
issued**

**Summary  
Disposal**

**Role of the  
Regulator**

# Forum: High Court v County Court



**s180 DPA 2018  
v  
Media and  
Communications  
PAP/CPR 53**

**CPR PD 7A 2.1 –  
2.4**

***Johnson v  
Eastlight* [2021]  
EWHC 3069**

# Forum: High Court v County Court



**-Predictability**  
**-Complexity/Cost**  
**-Profile**

**Ameyaw v  
McGoldrick  
[2020] EWHC  
3035 (QB), at  
para 124**

**Rolfe v Veale  
Wasbrough  
Vizards [2021]  
EWHC 2809 (QB)**

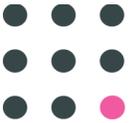
# Summary Disposal



- ***Johnson v Eastlight* [2021] EWHC 3069**

- *“By a very narrow margin, however, I am satisfied that the real point in this case is whether the Claimant’s entitlement is to purely nominal or instead extremely low damages. It is never going to be much more, a point that surely was [or ought to have been] obvious to the Claimant and her advisors from the outset. Nonetheless, mindful that the court should strive to provide a remedy to any litigant if it can [“to fashion any procedure by which that claim can be adjudicated in a proportionate way”], the claim ought not to be entirely struck out but instead redirected to the more appropriate forum, the County Court. As distinct from defamation, where the game may not be worth the candle because there is only one permitted venue for the match, this very modest claim can and should proceed but be concluded elsewhere.”*

# Summary Disposal



- ***Rolfe v Veale Wasbrough Vizards [2021] EWHC 2809 (QB)***
  - *“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 21st Century, in a case where a single breach was quickly remedied. 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 law will not supply a remedy in cases where effectively no harm has credibly been shown or be likely to be shown.”*

# Summary Disposal



- ***Warren v DSG Retail Ltd [2021] EWHC 2168 (QB)***
  - *“[T]he Claimant’s claim is that the DSG failed in alleged duties to provide sufficient security for the Claimant’s data. That is in essence the articulation of some form of data security duty. In my judgment, neither BoC nor MPI impose a data security duty on the holders of information (even if private or confidential). Both are concerned with prohibiting actions by the holder of information which are inconsistent with the obligation of confidence/privacy. Counsel for the Claimant submitted that applying the wrong of MPI on the present facts would be a “development of the law”. In my judgment, such a development is precluded by an array of authority.”*
  - *“I accept that a ‘misuse’ may include unintentional use, but it still requires a ‘use’: that is, a positive action.”*

# Summary Disposal



- ***Ashley v Amplifon Ltd* [2021] EWHC 2921 (QB)**
  - *“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. 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.”*

# Funding/Costs



**ATE Insurance –  
*Warren***

**CFA**

**Costs Recovery –  
Forum Important**

# Role of the Regulator



**Data Subject  
Complaint**

**Was the breach  
reported to the  
ICO?**

**ICO Monetary  
Penalty – Apply  
for a Stay?  
*Warren***



# Compensation

# Compensation



**When is it  
payable?**

**How much  
should we pay?**

# When is it payable?



**Fraud**

**Time spent**

**Financial loss**

**Lost  
earnings**

**Out of pocket  
expenses**

# When is it payable?



**Psychiatric/  
physical  
harm**

**Distress**

**Non-financial  
loss**

**Loss of  
control**

**“De minimis”**

# When is a claim for distress “de minimis”?



**Accidental, one-off, quickly remedied**

**Slight significance, generally expressed, anodyne**

**Nothing especially personal, disclosure to one person**

# Compensation



**When is it  
payable?**

**How much  
should we pay?**

# How much should we pay?

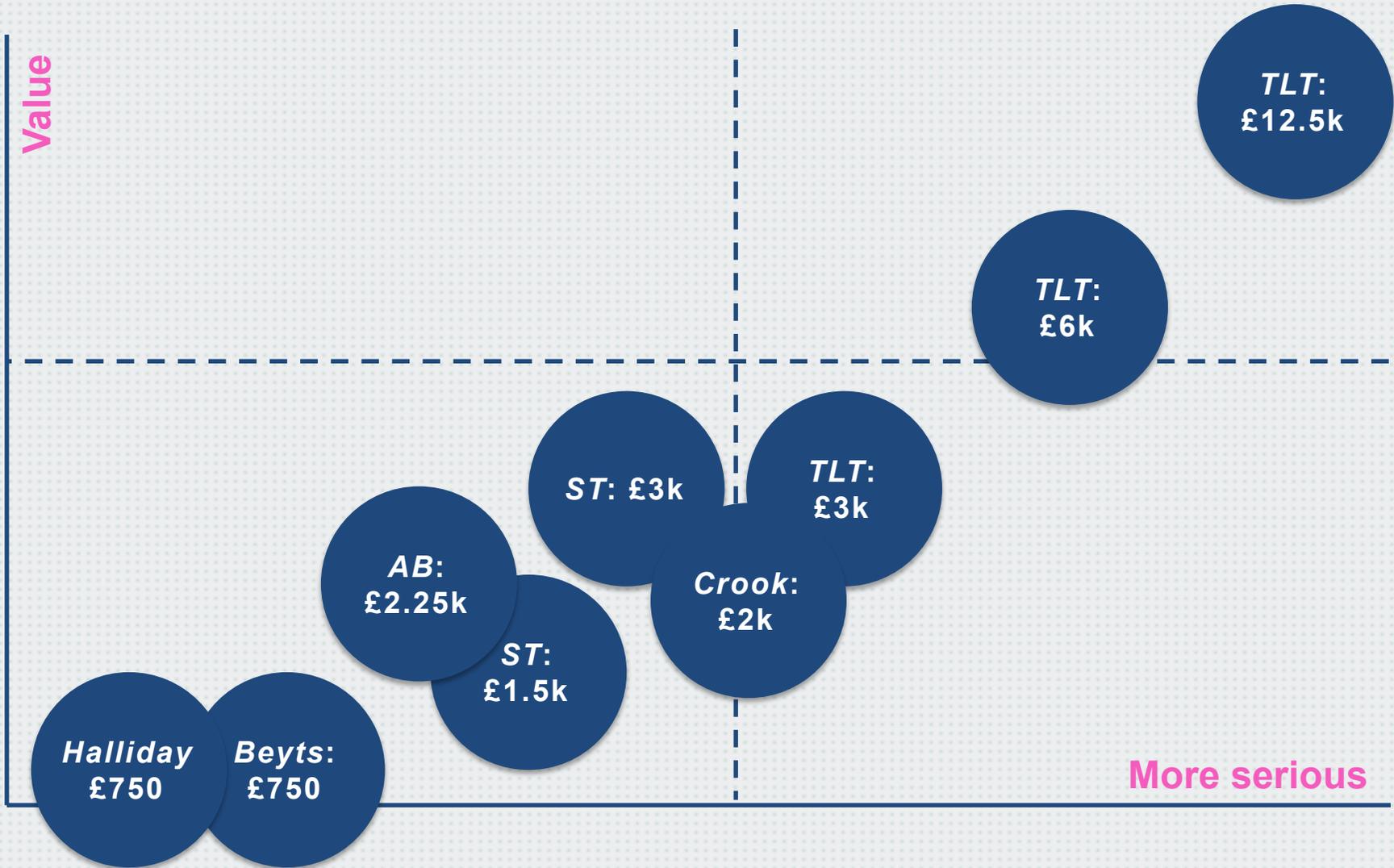


Awards not supposed to be “substantial”

Multiple causes of action generally make no difference

Informal tariff in *TLT v Home Office*

# How much should we pay?





**Your questions answered**

# Q&A



- What policy should controllers adopt to reporting personal data breaches to the ICO?
- Will routinely agreeing to low-level payouts only encourage more claims?
- Can we claim legal professional privilege over our investigation/review of a personal data breach?
- Can claimants use CFAs? Does this change the approach to defending the claim?

# Q&A



- How do we make sense of the Pre-Action Protocol for Media and Communications claims? What about the Media and Communications List (CPR Part 53)?
- Do recent cases mean that the risk of successful claims against controllers has reduced?
- Have you seen claims challenging the sharing of information between organisations?
- What about *Llyod v Google*?



**Ask us more questions:**

**[events@cornerstonebarristers.com](mailto:events@cornerstonebarristers.com)**

**For instructions and enquiries:**

**[elliottl@cornerstonebarristers.com](mailto:elliottl@cornerstonebarristers.com)**

**[dang@cornerstonebarristers.com](mailto:dang@cornerstonebarristers.com)**

**[dhughes@cornerstonebarristers.com](mailto:dhughes@cornerstonebarristers.com)**