Case No: B2/2012/1124

Neutral Citation Number: [2013] EWCA Civ 333
IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM CAMBRIDGE COUNTY COURT
(HIS HONOUR JUDGE MOLONEY)

Royal Courts of Justice
Strand
London WC2A 2LL

Date: Friday, 15 March 2013

Before:

LADY JUSTICE ARDEN
LORD JUSTICE LLOYD
and
MR JUSTICE RYDER

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Between:

HALLIDAY

Appellant

--and--

CREATION CONSUMER FINANCE LIMITED

Respondent

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(DAR Transcript of
WordWave International Limited
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Tel No: 020 7404 1400 Fax No: 020 7831 8838
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The **Appellant** appeared in person
Mr Philip Capon (instructed by Overburys) appeared on behalf of the **Respondent**

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JUDGMENT

Lady Justice Arden:

1. On 11 August 2008 District Judge Stuart, sitting in the Cambridge County Court, made an order granting Mr Mark Halliday, the appellant, judgment in default of defence against Creation Consumer Finances Limited ("CCF") for breach of various provisions and principles of the Data Protection Act 1998.

The damages to be assessed

2. On the assessment of damages Mr Halliday claimed damages for damage to his reputation and damages for distress. The assessment of damages came before District Judge Pelly. Having considered the evidence, District Judge Pelly awarded purely nominal damages. Mr Halliday appealed to the county court judge, HHJ Moloney QC. HHJ Moloney QC dismissed the appeal. Mr Halliday did not appeal further against the award of nominal damages, but he sought and obtained permission from this court to appeal on the question whether the judge was right to reject his claim for substantial damages on the grounds that he did, namely on the grounds that he had to show that he was entitled to substantial damages before he could obtain damages for distress.

3. That point involved consideration of the expression "damage" in Directive 95/46/EC. Relevantly, section 13 of the Data Protection Act is designed to implement the relevant provision of the Directive and so that section has to be interpreted, so far as possible, in conformity with the Directive. However, this issue, which was the main issue of the proposed appeal to this court, is now academic as the respondent, CCF, concedes an award of nominal damages is "damage" for the purposes of the Directive and for the purposes of section 13(2) of the Data Protection Act 1998.

4. There is no issue as to the principle of equivalence in European Union law, which would have the effect that this court might be required to award more than it would do otherwise because of some provision of domestic law and some domestic remedy for tort, as permission on that ground has been refused. There was an argument raised at an earlier stage about exemplary damages, but that likewise does not, as such, arise.

5. The court therefore communicated with the parties to the effect that the only real issue in its provisional view which remained in the appeal was the question whether or not it should deal with the remedies sought for distress under section 13(2) of the 1998 Act and, if so, what the amount of that award should be.

The sitting of the court

6. Mr Halliday raised three points. First, he requested that the amount of the nominal damages be established by this court. District Judge Pelly had awarded nominal damages but not fixed an amount. Mr Philip Capon, who appears for CCF, has not made any submissions on this point, and, as it is a very brief one, I will give my immediate answer. This is conventionally a very minor sum, and I would award the sum of £1.

7. The second point raised by Mr Halliday was that the remedy granted by this court for nominal damages was not an effective remedy for the purposes of European Union law and therefore did not comply with the Directive. He relied in particular on the well-known authority of Von Colson & Kamann v Land Nordrhein-Westfalen [1994] ECRR 1892. In that case, German legislation provided that, in the event of a successful claim for discrimination, the complainant should be reimbursed any expenses, but went no further, and the Court of Justice held that that was not an effective remedy. The position, however, in this case is that the violation of the data protection principles of the Act led to a claim not simply for nominal damages, but also for other damages, which was not successful. The position, therefore, was that national law did provide an effective remedy for the breach of European Union law that was complained of. What happened was that proof fell short in relation to the question of damage to reputation and credit. So that initial point, to my mind, does not carry the matter any further.

8. The third submission which Mr Halliday laid on a preliminary basis was that this court also had to award a sanction under Article 24 of the Directive 95/46. Article 24 is set out at page 18J in tab 3 of the appeal bundle. It reads as follows:

> **"Article 24 - Sanctions**
>
> The Member States shall adopt suitable measures to ensure the full implementation of the provisions of this Directive and shall in particular lay down the sanctions to be imposed in case of infringement of the provisions adopted pursuant to this Directive."

9. Mr Halliday submits that merely to award nominal damages, and indeed nominal damages plus damages for distress, would not meet Article 24. The court also ought to impose a penalty. Mr Halliday points out that the expression "Member State" would include organs of the Member State including its courts.

10. In my judgment, there are three answers to this point. Firstly, this provision is about the adoption of measures, by implication legislative measures. The Member State (the United Kingdom) has done that by enacting the Data Protection Act 1998, which contains a large number of provisions designed to implement the Directive in a variety of ways. This particular provision is not, in my judgment, directly enforceable by an individual in private law proceedings. In order for it to be directly enforceable the provisions of the Directive relied on must be "unconditional and precise". They refer there to Van Duyn v Home Office [1974] ECR 1337 at paragraph 12. It is a well-known principle, and there is nothing which is specific in this Article to enable Mr Halliday to enforce it.

11. The second point that I would make in answer to the argument under this Article is that it is not the function of the civil court, unless specifically provided for, to impose sanctions. That is done in other parts of the judicial system.

12. Thirdly, “measures”, and going back therefore to the wording of Article 24, would include all sorts of measures, for example administrative remedies or provisions for records and so on, and criminal penalties. They would not simply be limited to an award of a monetary amount in favour of a particular complainant in civil proceedings. Indeed, it might well be thought that that was not an appropriate way to impose a sanction as such, as opposed to compensation.

13. Having therefore addressed those three preliminary points, I move to consider the question which is now the sole subject of this appeal, namely the possibility of an award for damages for distress. The specific provision is made in the 1998 Act for this award and I will come to it shortly.

14. The threshold question is whether this court should embark on this question or remit the matter to the county court. Mr Halliday was content for this court to deal with it in order to avoid personal costs and delay which would result from a remittal back to the county court, and the respondent certainly asked for the matter to be dealt with now in this court so as to bring these long running proceedings to an end.

15. Before I consider the award in detail, I will set out very briefly the relevant facts. I have already referred to the judgments of District Judge Stuart and District Judge Pelly and also HHJ Moloney. The events had come about in this way. Mr Halliday had purchased a television set and, when he did so, he entered into a credit agreement with CCF. He brought proceedings against CCF on the basis of some earlier breaches of the Data Protection Act: that is, earlier to those in issue in these proceedings. That led to an order by District Judge Temple on 26 February 2008. District Judge Temple sat in the Bury St Edmunds County Court and he approved a consent order which in essence was that the credit agreement between Mr Halliday and CCF would be discharged; secondly, that CCF would pay Mr Halliday £1,000 without admission of liability together with £500 court costs. CCF agreed to delete all data relating to Mr Halliday and to provide him with a list of any third parties to whom they released his data. And fourthly, CCF agreed to ensure the deletion of Mr Halliday's data by any third party to whom they had released it.

16. Events went on and CCF sought to pay the £1,500 pursuant to the consent order by crediting it to what it thought was Mr Halliday's account at the Bank of Scotland. Unfortunately that account was closed. They settled the sum again with him privately and then sought to recover the money back from the Bank of Scotland, who refused to pay it back and thus CCF tried to recover the sum from Mr Halliday and the Bank of Scotland in new proceedings. In the process of dealing with this matter, Mr Halliday discovered that CCF made incorrect data entries on its system and forwarded its data to a credit referencing agency, Equifax. This produced a document which was available to those interested in receiving information which it published which showed that Mr Halliday had, in each of the months February to September 2008, a sum owing of £1,500 without a credit limit. That information appeared on the data produced by Equifax, which provides, as I understand it, this information as a form of credit rating agency.

17. Mr Halliday was undoubtedly very concerned to discover this and it was undoubtedly a breach of the order of District Judge Temple. As I have explained, CCF brought fresh proceedings against Mr Halliday and the Bank of Scotland. Mr Halliday responded with a Part 20 counterclaim against CCF alleging the new breaches of the Data Protection Act. There was then subsequently a discontinuance of the claim against the Bank of Scotland and Mr Halliday, but Mr Halliday's Part 20 counterclaim against CCF was allowed to proceed.

18. Mr Halliday's allegations were that, between February and October, CCF had continued to process data relating to Mr Halliday which falsely stated that Mr Halliday owed CCF £1,500 under the terminated agreement and then, at least twice between March and October 2008, CCF processed the data by transferring it to Equifax, and the data falsely stated that Mr Halliday owed this sum and that he was in excess of his credit limit. That claim was one which CCF did not defend, and, as I explained at the start of this judgment, it was judgment in default of defence entered by Deputy District Judge Stewart in the Cambridge County Court, and that led to a judgment for damages to be assessed. The assessment of damages was by District Judge Pelly, and he declined to award any substantial damages. He declined to consider the claim for damages for distress on the basis that there was no substantial claim to damages and therefore no sufficient damages shown to enable an award of damages for distress to be made. As I have already explained, the appeal to HHJ Moloney QC was unsuccessful, leading to the dismissal of the appeal on 30 April 2012, and the judge did not disturb the finding of the District Judge on the matter that there was no damage shown to reputation and credit. Likewise, he declined to consider the distress claim.

19. Those, therefore, are the essential facts. The position is that I must now go to section 13 of the Data Protection Act 1998:

> **"13. Compensation for failure to comply with certain requirements.**
>
> (1)An individual who suffers damage by reason of any contravention by a data controller of any of the requirements of this Act is entitled to compensation from the data controller for that damage.
> (2)An individual who suffers distress by reason of any contravention by a data controller of any of the requirements of this Act is entitled to compensation from the data controller for that distress if—
> (a)the individual also suffers damage by reason of the contravention, or
> (b)the contravention relates to the processing of personal data for the special purposes.
> (3)In proceedings brought against a person by virtue of this section it is a defence to prove that he had taken such care as in all the circumstances

> was reasonably required to comply with the requirement concerned.

Subsection (3) is set out for completeness but is not in issue in these proceedings.

20. Focusing on subsection (2), it is clear that the claimant has to be an individual, that he has to have suffered distress, and that the distress has to have been caused by contravention by a data controller of any of the requirements of the Act. In other words, this is a remedy which is not for distress at large but only for contravention of the data processing requirements. It also has to be distress suffered by the complainant and therefore would not include distress suffered by family members unless it was also suffered by him. When I say that it has to be caused by breach of the requirements of the Act, the distress which I accept Mr Halliday would have felt at the non-compliance of the order is not, at least directly, relevant because that is not distress by reason of the contravention by a data controller of the requirements of this Act. If the sole cause of the distress had been non-compliance with a court order, then that would have lain outside the Act unless it could be shown that it was in substance about the non-compliance with the Data Protection Act.

21. The important question is what evidence was filed by Mr Halliday on this issue. He filed a witness statement on 26 October 2010 in which he said:

> "I find [CCF's] continued disregard of District Judge Temple's order highly distressing especially when coupled with the court's seeming inability to protect its process from abuse."

22. Now, that is the only evidence that we actually have from Mr Halliday. Mr Halliday has asked us to bear in mind that, because the court below never got to the issue of damages for distress, he did not have the opportunity to give evidence. I certainly consider that is a matter which is relevant to weight, although, as we made clear to him in argument, we were not prepared to hear evidence from him. It is, it seems to me, in substance a complaint intended to fall within section 13(2). What Mr Halliday was finding distressing was the underlying complaint that had led to the court order, and the underlying substance of the issue and cause of his distress seems to me to have been the non-compliance with the data protection requirements. That has been manifested in his pursuit of CCF with very detailed arguments about the extent and importance of the data protection legislation. It is, of course, a very important measure of protection for the individual and I do not underestimate it.

23. Mr Halliday has also relied on his Convention rights, in particular his right under Article 8 to respect for his private life, but that is not directly relevant. The data protection requirements encompass respect for private life. That might be said to be their rationale, but it is not necessary for us to be satisfied as to his sense of distress at any violation of those rights. We are dealing with his claim under section 13(2) and 13(2) alone.

24. Mr Halliday took us to a number of authorities, but the significant point is that there is no authority that we are aware of which deals with a claim under section 13(2) of the 1998 Act. In my judgment, the most important authority which Mr Halliday produced for us to consider was the case of Vento v Chief Constable of West Yorkshire Police [2013] 1 ICR 31. In this case this court set out three bands of award linked to the degree of seriousness of discrimination claims in order to provide guidance to tribunals, and the court said that they should be updated for inflation. They were subsequently done in a case called Da'Bell v NSPCC [2010] IRLR 19. So currently the bands are as follows. The lowest band is £600 to £6,000 for the less serious cases involving isolated incidents of unlawful conduct. The middle range is £6,000 to £18,000, which this court has stated should be used for serious cases which do not merit an award in the highest band. The highest band was between £18,000 and £30,000 using the updated figures. This court said that sums in this range should be awarded in the most serious cases such as where there has been a lengthy campaign of discriminatory harassment on grounds of sex or race. This court went on to say that only in the most exceptional case should an award of compensation for injury to feelings exceed. They then said £25,000, but for which one should read £30,000.

25. Mr Halliday put his case, by analogy, into the middle range, saying that this was a serious case and that therefore an award between £6,000 and £18,000 (as now uprated) should be made.

26. In answer to that point, the field of discrimination is, it seems to me, not a helpful guide for the purposes of data protection. Discrimination is generally accompanied by loss of equality of opportunity with far-reaching effects and is liable to cause distinct and well-known distress to the complainant. In those circumstances, while I am grateful for Mr Halliday producing this to us, I do not think that it will really assist us in deciding this case.

27. Those, therefore, were the principal submissions relied on by Mr Halliday. Mr Capon submits a number of detailed points on the evidence. He submits that the contraventions of the data processing requirements were, on their proper analysis, limited, that the entries made by Equifax did not indicate that Mr Halliday was in default under any credit agreement. That seems to me to be strictly true, but nonetheless a somewhat technical approach, since it showed that he had taken time for payment and was in arrears without having any agreement from the credit provider.

28. Then Mr Capon submits that Mr Halliday discovered the entries in May 2008 and that they were removed at the beginning of October 2008, so there was only a four-month period, and that is correct. Those are the periods when Mr Halliday was conscious of there being a wrongful entry as a result of unlawful processing.

29. Then Mr Capon submits that, on discovering the entry in May 2008, Mr Halliday did not write to CCF or to Equifax pursuant to section 10 of the 1998 Act or otherwise complaining about the entries or stating that they caused him distress. He did not write in fact until July, and this is, on his submission, some indication that the matters did not weigh heavily upon him. That is a matter that I think should be taken into account.

30. Then Mr Capon submits that Mr Halliday checked with the Equifax entry again on 24 June, but did not write to the CCF or Equifax complaining about the entries. That is the same point. I should add Mr Halliday said that they would not have done anything anyway. But, with respect to him, that is not a complete answer to not writing it at all. It does not take very long to write a letter of protest.

31. Then Mr Capon submits that Mr Halliday's response to the entries was to seek to recover damages for breaching the 1998 Act, particularly damages for injury to reputation and credit. Those damages have been assessed as nominal, and that is undoubtedly right. The principal part of his case was directed to injury to reputation and credit. It is the case that they were assessed as nominal.

32. Lastly, Mr Capon submits that there is no judgment against CCF for any contravention of the Data Protection Act after 1 October 2008. On that basis, it can be said, as it seems to me, that this is a case which could be called a single episode case. There were a repetition of entries (that is correct) by Equifax, but they all arose from the same technical error.

33. Coming to my conclusion, it is undoubtedly correct that there was wrongful processing of Mr Halliday's data, but the object of the award to be made by the court under section 32 is to compensate, neither more nor less. The breach was, as I see it, of a limited nature. It did not lead to loss of creditor reputation. There may well be other cases where there is a loss of some housing benefit or opportunity or credit facilities and so on. That was not this sort of case. Likewise there is no proof of any fraudulent or malicious intent on the part of CCF.

34. As I have explained, I have also taken into account that this breach was, as I see it, a single episode case. There was one error. It has been explained how it occurred. It does not to my mind matter greatly how it occurred, but it seems to be more of a mechanical than technical error than anything else.

35. There is, in addition, no contemporary evidence of any manifestation of injury to feelings and distress apart from what one would normally expect from frustration at these prolonged and protracted events. I bear in mind the authority produced by Mr Halliday from the Court of Justice, that it is important to mark violations of this kind where there has been frustration with some kind of remedy. He referred us to Franchet and Daniel Byk v the Commission of the European Communities (Case T-48/05), EU:T:2008:257 included in volume 1 of the bundle of authorities at tab 5. I refer particularly to paragraph 400 and to the fact that the complainants had been unable to defend themselves had necessarily produced feelings of injustice and frustration. I would accept as a general principle that, where an important European instrument such as data protection has not been complied with, there ought to be an award, and it is to be expected that the complainant will be frustrated by the non-compliance.

36. However, having borne all those points in mind, in my judgment the sum to be awarded should be of a relatively modest nature since it is not the intention of the legislation to produce some kind of substantial award. It is intended to be compensation, and thus I

would consider it sufficient to render an award in the sum of £750. It seems to me that that sum is appropriate and sufficient.

37. Mr Halliday made, finally, a number of submissions about necessity of references to the Court of Justice in the European Union. In my judgment, that is not necessary. The principal points in this case are the application of the law to the facts, which is the responsibility of the national court, not an appropriate case for reference to the court of justice.

Lord Justice Lloyd:

38. I agree. Mr Halliday brought his proceedings by his counterclaim in the circumstances that Arden LJ has described, claiming on the one hand damages for unspecified damage to his reputation and credit under section 13 of the 1998 Act, which is the case under section 13(1), and secondly damages for distress under the same section, which is the claim under section 13(2). In his counterclaim, setting out with admirable succinctness the history of the proceedings, he complained of the failure by CCF to process data in accordance with his rights under the Act. He asserted in paragraph 10, "All this did unspecified damage to his reputation and credit", and at paragraph 11 he asserted that "The continued and repeated processing of false data in open defiance of the order of District Judge Temple and that the Data Protection Act caused distress to the defendant and his family". He also said at paragraph 13, in a passage on which he sought to rely, that CCF had a long history of ignoring communications and statutory notices from the defendant, which is why he sought enforcement of the order, and that CCF did not delete the data until just before the hearing of the enforcement application. That Statement of Case was of course verified by a Statement of Truth. It was on the basis of that Statement of Case that, by the order of Deputy District Judge Stuart, he obtained judgment in default for an amount to be determined by the court, and that was the matter that came before District Judge Pelly in December 2010. In support of that, he put in the evidence via the witness statement to which Arden LJ referred. For present purposes, the relevant passage is paragraph 14:

> "I find [CCF's] continued disregard of District Judge Temple's order highly distressing especially when coupled with the court's seeming inability to protect its process from abuse."

39. So that was the material on which the matter came before District Judge Pelly, and the District Judge considered the evidence put before him and the arguments put before him. We have the benefit of the skeleton arguments that were before him. He concluded that arguably a variation downwards in Mr Halliday's credit score as a result of this incorrect entry would have affected to some extent his financial reputation, but he then said this:

"I have no idea how much. I do not have evidence of that and it is for Mr Halliday to prove it. The burden of proof is on him."

40. So he went on to say that damages for that could only be nominal damages, but they would be general damages, not damages reflecting any actual quantified loss. That was the basis on which he assessed the damages at nil and declined, because of the view the law had taken, to proceed to consider damages for distress.

41. Before HHJ Moloney the same position was taken, but, as Arden LJ has said, before us, permission to appeal having been given principally on the question of whether pecuniary damage has to have been shown to have been suffered in order that damages for distress can be recovered under section 13(2), that point is now conceded in favour of Mr Halliday by CCF and we therefore do not have to determine, and we cannot determine, that arguably interesting point of law. We proceed on the footing that it is not necessary for Mr Halliday to prove any ascertainable financial loss under section 13(1) in order that damages for distress can be recoverable under section 13(2).

42. I agree with Arden LJ that the appropriate consequence of the finding of a contravention of the Act, but no identifiable financial loss, is an award of nominal damages, and I would agree that that which is purely nominal should be quantified in the sum of £1. The importance of that, taken with CCF's concession, is that it opens the way to an assessment of the damages for distress, which the District Judge did not undertake because of the view of the law that he understandably took.

43. So far as the quantum of the damages for distress is concerned, I agree with my Lady that it is appropriate in the circumstances, especially given the modest sums which at best could be at stake, for this court to proceed make such an assessment. Mr Halliday told us, as my Lady has said, that he would have wished to give oral evidence in addition to his witness statement if the District Judge had ruled the other way or had been willing to enter into the question of the quantum of damages for distress, even contingently. But he had put in his witness statement, and that is at first sight the evidence on which he sought to rely. If he wanted to put in more evidence, it should have been in that or a further witness statement.

44. So what we have is the paragraph in the counterclaim, verified by the Statement of Truth and reinforced to a modest extent by the paragraph in the witness statement, which is uncontested and which has to be taken as it stands, that he found CCF's disregard for the order, which we know from the counterclaim involved the continuation of a breach of the Act, "highly distressing". We also have the context of his frustration at the court's seeming inability to protect its own process and the history of the matter to which he had referred in the counterclaim, with the difficulty that he had had in getting any sense out of CCF at the earlier stage.

45. In those circumstances, I entirely agree with Arden LJ as to the right approach of the court to the quantification of damages for distress. It is a matter which is particularly fact-sensitive. It is perhaps an unusual case in which, on the one hand, the evidence for the claimant, Mr Halliday having been in the position of the claimant, is distinctly generalised, but on the other hand it is not controverted or challenged at all by the defendant in that he was able to obtain judgment in default and, as I say, because at the

assessment of damages before District Judge Pelly the question was really not gone into at all beyond the bare statements in the Statement of Case and the witness statement.

46. In those perhaps unusual circumstances, but taking all the factors into account to which I have referred, the history of the matter and the period during which the contravention persisted, it seems to me that the award of £750, which Arden LJ has indicated, is an entirely appropriate figure.

47. I confess that I was somewhat impressed at one point by Mr Capon's submission that it was a surprise, if Mr Halliday was so distressed by this contravention, that he did not immediately protest upon discovering, in response to his first credit reference enquiry, the fact of the contravention, and indeed he did not protest until about a month after the second report had been obtained. But I bear in mind, in response to that, Mr Halliday's comment that he had had such difficulty in getting any sensible response, or indeed any response, out of CCF at the earlier stage, that it is perhaps less surprising that he did not immediately protest. In any event, the period in question is not a very lengthy one between his discovery of the contravention by his first reference request and his taking action in July. Accordingly, it does not seem to me that that is a matter that should be taken to reduce my assessment of the degree of distress that he suffered.

48. He says in his witness statement that he was highly distressed. In the circumstances, accepting that as it stands, I agree that the award should be in the sum of £750 for damages for distress under section 13(2), in addition to the £1 under section 13(1).

Mr Justice Ryder:

49. I agree with my Lady, Arden LJ, and with my Lord, Lloyd LJ. I, too, would quantify nominal damages in the sum of £1 and damages for distress in the sum of £750 for the reasons they have given.

Order: Appeal allowed