IN THE COURT OF APPEAL — Appeal No. A2/2014/0403

ON APPEAL FROM THE HIGH COURT OF JUSTICE

Claim No. HQ13X03128

QUEEN'S BENCH DIVISION

B E T W E E N:

(1) JUDITH VIDAL-HALL
(2) ROBERT HANN
(3) MARC BRADSHAW

Claimants/Respondents

and

GOOGLE INC.

Defendant/Appellant

APPELLANT'S SUPPLEMENTARY SKELETON ARGUMENT

Introduction

1. The Appellant seeks permission pursuant to paragraph 32 of Practice Direction 52C to rely on this Supplementary Skeleton Argument in order to bring to the attention of the Court of Appeal certain authorities decided since the Appellant's main Skeleton Argument was lodged and permission to appeal granted, and to draw attention to proposed amendments to the draft EU Data Protection Regulation recently approved by the EU Parliament. The Appellant submits that both the new authorities and the proposed amendments to the draft EU Data Protection Regulation shed light on the second important issue of law raised by this appeal, namely the meaning of "damage" in section 13 of the Data Protection Act 1998.

Recent Authorities

2. In *Information Commissioner v Niebel* [2014] UKUT 0255 (AAC) the Upper Tribunal (Administrative Appeals Chamber) considered an appeal in relation to section 55A of the Data Protection Act 1998 which refers in sub-section 55(1)(b) to a contravention "of a kind likely to cause substantial damage or substantial distress". The Upper Tribunal Judge (Judge Wikeley) noted at [14] that the Information Commissioner's statutory guidance issued under section 55C of the Act states that "damage" means "any financially quantifiable loss such as loss of profit or earnings, or other things". At [52]-[53] the Upper Tribunal declined to follow the view of Tugendhat J at first instance in the present case that "damage" included non-pecuniary damage, noting that the legislation in section 55(1)(b) refers disjunctively to "substantial damage or substantial distress". Judge Wikeley observed at [53] that:-

> "If "damage" was meant to encompass emotional turmoil, then there would have been no need to refer separately to "distress"."

3. At [63] of the Judgment in *Niebel* Judge Wikeley accepted counsel's submission that Tugendhat J's reasoning in the present case "appears to collapse the distinction between "damage" and "distress"", and recognised that this submission was supported by the judgment of Buxton LJ in *Johnson v Medical Defence Union Ltd (No. 2)* [2008] Bus LR 503 at [74]. Judge Wikeley refused to apply the reasoning of Tugendhat J to section 55(1)(b) of the Act. The Appellant submits that the reasoning of Judge Wikeley in the specialist tribunal is to be preferred to that of Tugendhat J in the present case. The words "damage" and "distress" are used disjunctively in section 13 of the Act just as they are in section 55(1)(b). There is no basis for interpreting "damage" differently in sections 13 and 55 of the same Act.

4. In *AB v Ministry of Justice* [2014] EWHC 1847 (QB) the claimant, a solicitor, claimed that breaches of the Data Protection Act 1998 had caused him damage and distress, and sought compensation under

section 13. The claim for damage comprised his loss of professional time: [12]. Jeremy Baker J held at [55] that although the claimant had expended a considerable amount of time and expense in pursuing his data subject access requests he had not sought to quantify the time and expense or allocate it to the particular breaches of the Act established. In those circumstances he held that the claimant had established that he had suffered damage for the purposes of section 13(1), but awarded nominal damages of £1. Having found that the claimant had suffered damage in the form of "some relevant loss", the Judge went on to award compensation for distress under section 13(2)(a) in the sum of £2,250 – see [56]-[58]. It is submitted that this analysis is consistent with the Appellant's case on this appeal: compensation for distress under section 13(2)(a) cannot be awarded unless the claimant has also suffered damage in the sense of pecuniary loss.

5. *AB v Ministry of Justice* [2014] EWHC 1847 (QB) was cited by Coghlin LJ delivering the judgment of the Northern Ireland Court of Appeal in *CR19 v Chief Constable of the Police Service of Northern Ireland* [2014] NICA 54. However in that case no issue arose about the entitlement of the claimant to compensation for distress under section 13 of the Data Protection Act 1998. The only issue was whether the award made at first instance under other heads of claim encompassed any distress suffered as a result of the defendant's admitted breach of the DPA: [24].

6. Finally, an Irish first instance decision which has come to our attention since permission to appeal was granted contains a discussion of whether Article 23 of Directive 95/46/EC requires compensation to be available for non-pecuniary loss. In *Collins v FBD Insurance Plc* [2013] IEHC 137 Feeney J held that section 7 of the Irish Data Protection Act, which implements Article 23 of Directive 95/46/EC, does not allow the recovery of an award of damages for non-pecuniary loss. In that case there was an unquantified claim for loss of earnings and alternative transport but no special damage or pecuniary loss was proved, and the issue was whether the claimant could recover general damages in those circumstances:

[2.11]. Feeney J considered at [4.4] and [5.1] the implementation of Article 23 of the Directive in section 7 of the Irish Data Protection Act, and contrasted it with section 13 of the English Data Protection Act 1998 which allows for compensation for distress in certain limited situations. He held at [4.4] that section 7 of the Irish Act did not enable a claimant to recover damages for non-pecuniary loss and that this was consistent with the requirements of the Directive. At [5.1] he held that insofar as section 13 of the English Data Protection Act 1998 provided for the recovery of compensation for distress in certain limited situations this went beyond the requirements of the Directive.

Proposed amendments to the draft EU Data Protection Regulation

7. The court will know that a review is currently being undertaken of EU data protection law.

8. On 12 March 2014 after permission to appeal was granted in this case the EU Parliament approved certain amendments, proposed by the Civil Liberties, Justice and Home Affairs Committee, to the draft Data Protection Regulation which is intended to replace the existing Directive.

9. For present purposes the material amendments are to Recital 118 to, and Article 77 of, the draft Regulation. Both amendments provide for compensation in the case of a person who has suffered damage, including non-pecuniary damage.

10. The amended text of Recital 118 reads as follows:-.

> "(118) Any damage, ***whether pecuniary or not,*** which a person may suffer as a result of unlawful processing should be compensated by the controller or processor, who may be exempted from liability ***only*** if ***he proves*** that ***he is*** not responsible for the damage, in particular where he establishes fault on the part of the data subject or in case of force majeure."

11. The amended text of Article 77(1) reads:-.

> "1. Any person who has suffered damage, ***including non-pecuniary damage,*** as a result of an unlawful processing operation or of an action incompatible with this Regulation shall have the right to ***claim*** compensation from the controller or the processor for the damage suffered."

12. The words "including non-pecuniary damage" do not appear in Article 23 of the existing Directive.

13. The proposed amendment might be thought to suggest that the wording of the existing Directive does not require compensation to be available to a person who has suffered non-pecuniary damage. That would be consistent with the view of Buxton LJ in *Johnson v Medical Defence Union Ltd (No. 2)* [2008] Bus LR 503 at [74], with whose judgment on this point Arden LJ agreed at [81] and Longmore LJ also agreed at [153]. It would be inconsistent with the approach of Tugendhat J at first instance in the present case.

14. The Appellant submits that its challenge to the jurisdiction must be determined on the basis of the law as it presently stands, and not on the basis that a potential change to EU data protection law in the future might render the claimants' claims for compensation for distress arguable. See *Baird Textiles Ltd v Marks and Spencer Plc* [2002] 1 All ER (Comm) 737 at [39], [55].

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