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U.K. Court of Appeal's Award of Compensation for Distress to an Individual Following a Breach of the Data Protection Act: Opening the Floodgates for Claims by Individuals?

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Whilst regulatory action by the U.K. Information Commissioner's Office ("ICO") is relatively commonplace and well reported following data breaches, particularly since the ICO was granted powers to issue on the spot fines for serious breaches by data controllers of up to £500,000 back in 2010, private actions for data breaches could be described as occurring "once in a blue moon".

Nevertheless, in what is a rare and groundbreaking case, the Court of Appeal recently awarded compensation to an individual for distress following a breach of Section 13(2) of the Data Protection Act 1998 ("Data Protection Act").

In *Halliday v Creation Consumer Finance Limited (2013) EWCA Civ 333*, a claim for compensation for an individual's distress under Section 13(2) Data Protection Act was considered. Significantly, the Court of Appeal clarified that, when considering compensation for distress under the Data Protection Act, it should be borne in mind that it is "not the intention of the legislation to produce some kind of substantial award".

Whilst this case would appear to provide useful guidance as to what will unlock a claim for distress under Section 13(2), it can be argued that this judgment represents the narrowest of victories for potential claimants who believe that they have suffered distress, and, further, that it is unlikely to encourage a swath of fresh civil claims being brought by individuals alone unless such distress is above and beyond mere frustration.

The Facts

Mr Halliday bought a television under a credit agreement with Creation Consumer Finance Limited ("CCF") before bringing a claim for various breaches of the Data Protection Act relating to the credit agreement.

Cambridge County Court subsequently discharged the credit agreement by consent order, ordering CCF to pay the claimant £1,000 plus £500 costs and under which CCF agreed to delete all data relating to Mr Halliday and to ensure that all third parties with whom data had been shared did the same.

However, problems subsequently arose when CCF sought to make payment into Mr Halliday's bank account, in particular, as this had been closed. CCF in-

stead paid £1,500 to Mr Halliday privately and sought to recover the same amount which had earlier been deposited with the bank. When the bank refused to pay back this money, CCF brought new proceedings against Mr Halliday and his bank.

In the context of these new proceedings, Mr Halliday discovered that CCF had made incorrect data entries on its system and had forwarded its data to a credit referencing agency that had produced a document relying on the data, which was available to those interested in receiving information which it published. Crucially, this document showed that Mr Halliday had, over a period, a sum owing of £1,500 without a credit limit and, as a result, Mr Halliday brought a counterclaim against CCF, alleging fresh breaches of the Data Protection Act and claiming compensation for damage to his reputation for distress under Section 13(2) of the Data Protection Act, *i.e.*:

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 special purposes.

The County Court

In a nutshell, Cambridge County Court made an order for Mr Halliday, awarding him purely nominal damages only.

District Judge Pelly, who dealt with the damages assessment, without fixing an amount with regards to the nominal damages which should be awarded, found that there was insufficient evidence of damage to the claimant's reputation or credit to award substantial damages. Without sufficient damages shown, it was held that the Court was unable to award damages for distress.

Mr Halliday appealed to the Court of Appeal, his arguments including 1) that the Court should establish the amount of nominal damages, and 2) that the County Court had been wrong to hold that he had to show that he was entitled to substantial damages before he could claim damages for distress.

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 should be made in respect of the distress suffered.

The Court of Appeal

The Court of Appeal (Lady Justice Arden, Lord Justice Lloyd and Mr Justice Ryder presiding), in summary, upheld Mr Halliday's appeal and assessed nominal dam-

ages in the sum of £1, noting that “this is conventionally a very minor sum”.

On the issue of compensation under Section 13(2) of the Data Protection Act, the Court noted that CCF had conceded that an award of nominal damages amounted to “damages” for the purpose of this sub-section and so, interestingly, that the claim could proceed.

It further considered that there was evidence that the claimant had suffered distress following CCF's breach and awarded Mr Halliday a sum of £750 for this distress, the Court noting that “it is undoubtedly correct that there was 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 Court's valuation of Mr Halliday's Section 32(2) claim was significantly lower than that claimed, for reasons which can be summarised as follows:

- 1) The Court considered that the breach was of a limited nature. It considered it noteworthy that the breach did not lead to loss of creditor reputation, commenting, “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”.
- 2) The Court was also persuaded by the fact that there was no proof of any fraudulent or malicious intent on the part of CCF.
- 3) It was also considered relevant that this was “a single episode case”, the Court noting that there was one “mechanical” error by CCF and that it had been duly explained how this error occurred.
- 4) Finally, the Court was swayed by the fact that there was “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 protected events”, noting that Mr Halliday did not immediately protest upon discovering that there had been a contravention of the Data Protection Act.

It followed that the Court considered that the sum to be awarded should be “of a relatively modest nature”, crucially adding that “it is not the intention of the legislation to produce some kind of substantial award”.

Comment

On the one hand, this case presents itself as a sword for those individuals who find themselves on the end of a data breach, effectively teaching us that mere nominal damage can open the gates to a claim for compensation for distress under Section 13(2) Data Protection Act.

On the other hand, because CCF conceded this point, it is regrettable that it was not discussed in any detail by the Court of Appeal, and so there arguably remains a question mark over whether such a liberal approach to the interpretation of “damage” under Section 13(2)(a) would be taken in the future and whether something

more than nominal damage would be required for the compensation under this section to kick in.

It can be further observed that a return of £751 following litigation before the High Court is likely to do little in terms of encouraging a “claims culture” for anything short of significant breaches of the Data Protection Act. It can be argued that, unless a data controller has behaved in a particularly unscrupulous manner (for example, there have been multiple breaches in respect of the same individual, the data controller has behaved in a fraudulent or malicious way, *etc.*), or the individual has

suffered distress beyond the mere frustration of bringing a claim and has challenged the data controller without delay, the merits of bringing a claim individually, rather than as part of a class action, are questionable.

The text of the judgment in Halliday v Creation Consumer Finance Limited can be accessed at <http://www.bailii.org/ew/cases/EWCA/Civ/2013/333.html>.

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