



S U M M A R Y

RTM v Bonne Terre Ltd

[2026] EWCA Civ 488

Dame Victoria Sharp, P, Lord Justice Lewison and Lord Justice Warby

NOTE: This summary is provided to help in understanding the Court’s decision. It does not form part of the reasons for the decision. The full judgment of the Court is the only authoritative document. Paragraph numbers are references to the judgment. Judgments are public documents and are available at:

<https://caselaw.nationalarchives.gov.uk/>

Introduction

1. The main question raised by this appeal was what must be proved to establish that consent was given for the placement of cookies, the processing of personal data, and the sending of unsolicited direct marketing communications? More specifically, the issue was whether the concept of consent for these purposes has a subjective aspect.
2. The issue turned on the interpretation of EU and domestic data protection legislation in force in the relevant period, between 2017 and 2019.
3. The facts were that in the relevant period the respondent (RTM), a problem gambler, dealt with the appellants (SBG), who operate an online betting and gaming business under the trading name “Sky Betting and Gaming”. SBG placed cookies on RTM’s devices or his browser, processed his personal data, and sent him targeted direct marketing; and RTM used SBG’s services and lost sums of money.
4. RTM sued SBG for compensation and declarations, contending that he was a gambling addict; that SBG had acted unlawfully in its placement of cookies, its processing of his personal data, and its direct marketing communications; that this caused him to gamble more and to lose more than he would otherwise have done; and that he had thereby suffered financial loss and distress.
5. At the trial, the judge determined that the key question on the issue of liability was whether RTM had given legally operative consent to the activities of which he complained.

The judge held that he had not done so. The judge reviewed the legislation and the case law and concluded that consent in this context was a “rather complex” idea with “three distinct strands” or criteria: (1) good quality subjective consent, depending on the individual’s actual state of mind; or (2) absent that, a fully autonomous choice by the individual about the grant of consent; and (3) some minimum evidential standards for proof of consent.

6. The judge found that although RTM had taken deliberate actions that indicated consent, none of these three criteria was met. RTM “lacked subjective consent”; “the autonomous quality of his consenting behaviour was impaired to a real degree”; and on the evidence “the quality of this Claimant’s consenting was rather lower than the standard required”. It was in particular “insufficiently freely given”, the reasons being RTM’s “gambling condition ... associated vulnerability and compromised autonomy”. The judge went on to rule that it followed that all of SBG’s activities over the relevant period were unlawful.
7. SBG appealed on five grounds, the main issue being the one identified above. The Information Commissioner (ICO) intervened to assist the court in relation to that ground.

The court’s decision

8. The Court of Appeal allows the appeal. The lead judgment is given by Lord Justice Warby, with whom the other members of the court agree.
9. On the main issue, the court holds that the judge’s decision was wrong because of a legally mistaken approach to the issue of what needs to be proved to establish that a data subject has “given consent”. The court concludes that the test of consent is objective, not subjective.
10. To prove consent, a data controller must show, first, that the data subject made a statement or took some other clear affirmative action amounting to an “indication” of their wishes with respect to the processing or direct marketing in question that “signifies agreement” to the relevant activity of the data controller. These are purely objective questions about the quality and significance of some identifiable communication by the data subject to the data controller. Secondly the data controller must prove to the necessary standard that the data subject’s “indication” met each of four criteria prescribed by the legislation, namely that it was (i) freely given, (ii) specific, (iii) informed, and (iv) unambiguous. Each of these criteria is also objective in nature.
11. The data controller does not have to prove what was actually in the mind of the individual data subject at the time of the “indication”. It is neither necessary nor relevant for this purpose to explore whether the individual data subject was vulnerable, with an impaired ability to make fully autonomous decisions.

12. The court also upholds four other grounds of appeal.

The court's reasoning

13. The judgment introduces the appeal and the court's conclusions: **[1]-[10]**. At **[11]-[22]** it sets out the relevant legislative provisions. At **[23]-[28]** the judgment summarises five relevant decisions: three of the CJEU, one of the Court of Appeal and one of the Upper Tribunal. Paragraphs **[29]-[34]** identify the issues raised by RTM and SBG in the High Court. The judge's reasoning on the issues of consent and liability is set out or summarised at **[35]-[50]**. The court's reasons follow.
14. The right approach to consent (ground of appeal 2) is dealt with at paragraphs **[53]-[84]**. The court identifies its role as interpreting the legislative provisions. It considers the language of the legislation, the case law, guidance issued by bodies established under the EU legislation, the purposes of the EU provisions and the recitals to the legislation, and the issue of legal and practical certainty. It concludes that all these factors point to an objective approach to consent. It finds that the regulatory regime governing online gambling has no bearing on that issue.
15. At **[79]-[81]** the court considers and rejects RTM's contention that the judge made sufficient findings of objective fact to justify a conclusion in his favour. At **[82]-[83]** the court considers and rejects the submission of SBG and the ICO that the data controller's actual or imputed knowledge that its customer is a problem gambler is a relevant factor when considering whether consent was given.
16. The court goes on to uphold SBG's contentions (grounds of appeal 1, 3, 4 and 5) that the judge's approach to the issue of consent was procedurally unfair (**[85]-[88]**), that the judge should have found that RTM gave factual consent to receiving direct marketing communications (**[89]-[90]**), was not entitled to find that SBG had used cookies to send RTM personalised direct marketing, and was wrong to conclude that SBG's profiling of RTM for direct marketing purposes was necessarily unlawful (**[91]-[95]**).

Outcome

17. The court sets aside the judge's decision to enter judgment on liability in favour of RTM. It concludes that the case must be remitted to the High Court but invites submissions on the scope of the issues to be remitted (**[96]-[99]**).