[GB] First English “right to be forgotten” trial against Google LLC

IRIS 2018-6:1/20

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On 13 April 2018, the English High Court made its first de-listing order against Google LLC. The Court gave judgment after the trial of two claims based on the right to have personal information “de-listed” or “de-indexed” by the operators of Internet Search Engines (for the pre-trial hearing, see IRIS 2018-3/16).

The two unrelated claimants, NT1 and NT2, who were anonymised, received convictions many years ago in relation to their business activities. The convictions in these cases are now “spent”, that is to say, can be effectively ignored after a certain amount of time under the terms of the Rehabilitation of Offenders Act 1974. Both claimants complained of results returned by Google Search that featured links to third-party reports about their convictions. They sought orders requiring the blocking and/or erasure of their data on the grounds that such information was “not just old, but out-of-date, irrelevant, of no public interest and/or otherwise an illegitimate interference with their rights.” Google argued that the inclusion of such results was and remained legitimate.

NT1’s claim related to three links returned by Google Search, providing information about his conviction in the 1990s of conspiracy to account falsely and his four-year custodial sentence. NT2 sought to de-list eleven links to publications about his conviction more than ten years ago of conspiracy to carry out surveillance and his imprisonment for six months. The two claims were tried separately and in turn. They involved, however, the same judge (Warby J.) and the outcomes with respect to each cause of action matched each other.

Warby J. dismissed Google’s argument that either claim was a defamation claim in disguise and an abuse of the Court’s process. The judge also ruled that NT1 had failed to make out any of the complaints of inaccuracy he had made in respect of the three links, but upheld NT2’s single inaccuracy complaint in relation to a “misleading” national newspaper item about the claimant’s criminality. The Court assessed NT2 as “an honest and generally reliable witness,” whose evidence was accepted on most of the points of dispute.

A significant ruling in the judgment was that Google could not rely on the section 32 exemption of the Data Protection Act 1998 (DPA) regarding the “special purposes” of journalism. Google had not processed this data for journalistic

purposes, or alternatively, not only for these purposes. Warby J. accepted Google's argument that the concept of journalism in EU law is a broad one, but concluded that it is "not so elastic that it can be stretched to embrace every activity that has to do with conveying information or opinions".

Google had difficulty in showing the existence of a condition in Schedule 3 of the DPA which justified its processing of "sensitive" personal data (in these cases, relating to criminal convictions). The judge found that only condition 5 was satisfied: "the information contained in the personal data has been made public as a result of steps deliberately taken by the data subject." Warby J. held that, in line with the open justice principle, a claimant's criminal conduct is a positive step towards making information about that offence public.

In Warby J.'s analysis, the issue of whether Google's processing breached the remaining requirements of the DPA collapsed into the application of the CJEU's Google Spain balancing exercise (see IRIS 2014-6/3). On the facts of NT1's case, some weight was attached to the claimant's post-conviction conduct: NT1 had shown difficulty in accepting his guilt, had misled the public and the Court, and had shown no remorse over any of these matters. He remained in business and, according to the judge, the information served the purpose of minimising the risk that he would continue to mislead, as he had done in the past. Ultimately, NT1 was not successful in obtaining orders requiring Google to de-list. The claim for the misuse of private information also failed and there could be no question of compensation.

A de-listing order was, however, made in the case of NT2, whose conviction was not one involving dishonesty and was based on a guilty plea. He had expressed genuine remorse and there was no evidence of any risk of repetition. His ongoing business activities were in a field quite different from that in which he had been operating at the time. His past offending was of little relevance to anybody's assessment of his suitability to engage in relevant business activity now (or in the future) and there was no real need for anybody to be warned about that activity. However, Warby J. ruled in NT2's case that his claim for misuse of private information had been successful but no award of damages was appropriate because Google was entitled to rely on the s 13(3) DPA defence that it took reasonable care.

NT1 & NT2 v Google LLC [2018] EWHC 799 (QB) (13 April 2018)

https://www.judiciary.gov.uk/wp-content/uploads/2018/04/nt1-Nnt2-v-google-2018-Eewhc-799-QB.pdf