on the understanding that he would be allowed to carry out promotional and other work which did not fall within the scope of his employment.

HH Judge Halliwell held that Shua Ltd was consequently the owner of the copyright in the Logos.

Did the parties reach a binding agreement at or following the meeting in June 2015?

HH Judge Halliwell referred to the witness evidence suggesting that the meeting was not long, lasting between half an hour and an hour, and held that in that length of time, the parties did not have "any realistic prospect of negotiating and concluding a contract on terms that properly disposed of the issues under consideration".

The only thing which they could have hoped to achieve was the continuation of the status quo in relation to Bongo's Bingo events being held at the Venue, albeit without the benefit of contractual commitments.

HH Judge Halliwell also found that the provisions set out in the email sent to Mr Burke following the meeting in respect of "exclusivity" and "a 15% share" were "vague and inchoate" such that the parties "could not reasonably be expected to treat them as contractual obligations until incorporated in a coherent contract". It was therefore held that the parties did not reach a binding contract at the June 2015 meeting.

Having found that Shua Ltd was therefore under no relevant legal constraints, HH Judge Halliwell also held that it was not subject to any of the constraints characterised as "equitable constraints" (being "equitable considerations which make it unfair for those conducting the affairs of the company to rely on their strict legal powers"[3]) by C&F in its petition under the Companies Act 2006 s.994, and the petition failed accordingly.

Shua Ltd was consequently found to be the sole owner of the goodwill in the Bongo's Bingo brand and the copyright in the Logos following the assignments in May 2019, and was entitled to injunctive relief against C&F in the absence of appropriate undertakings from C&F.

Comment

Some may find this decision surprising in light of Mr Burke's employee status at material times, and the fact that the parties seem to have reached at least some form of oral agreement at the meeting in June 2015.

Performers and artists will take assurance from the fact that judges seem to be taking a pragmatic approach in the absence of unequivocal (and detailed) written commitments, assessing how artistic concepts were developed and placing significant emphasis on the public perception of an entertainment persona.

Venues on the other hand should be taking care to ensure that any arrangements with employees and performers are appropriately documented in detailed, written contracts which leave no room for interpretation.

Scott v LGBT Foundation Ltd: Do Phone Conversations Amount to "Processing" of Personal Data?

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Data processing; Disclosure; Mental health; Sensitive personal data; Sexual orientation; Summary judgments; Telephone calls

The High Court has granted a charity, which supports the needs of lesbian, gay, bisexual and transgender communities, defendant's summary judgment against a claim that it unlawfully processed sensitive personal data when it disclosed details regarding the claimant's mental health and ongoing substance abuse over the phone to his general practitioner (GP).[1] Saini J was clear that the disclosure of personal data by speech alone does not constitute processing of personal data under the UK Data Protection Act 1998 (DPA 1998) and found that the DPA 1998 did not therefore apply to the charity's purely verbal communications with the claimant's GP.

In addition to the claim under the DPA 1998, the claimant also contended that the defendant's disclosure to the GP amounted to a breach of confidence (as well as a violation of the claimant's rights under the Human Rights Act 1998, which is beyond the scope of this article). This breach of confidence claim was also struck out on the basis that the defendant's duty of confidence to the claimant was qualified to allow such disclosure where there were serious concerns about the claimant's welfare.

Background

The LGBT Foundation is a charity which provides a wide range of services including counselling, as well as advice in relation to health and wellbeing. The claimant, David Scott, completed a self-referral form on 30 May 2016 in

[3] *O'Neill v Phillips* [1999] UKHL 24.
[1] *David Scott v LGBT Foundation Ltd* [2020] EWHC 483 (QB); [2020] 4 W.L.R. 62.

order to access the Foundation's services. In the self-referral form, Mr Scott disclosed details of his substance abuse and mental health issues, including that he was "seriously considering stopping taking my [deletion] meds because I just don't want to be alive anymore" and detailing a previous suicide attempt. The self-referral form set out the Foundation's policy for routinely contacting the GPs of its service users. If service users did not want the Foundation to contact their GP, they could opt out by ticking a box, which Mr Scott did not do. The form also stated as follows:

> "Please note that as part of our confidentiality policy, if there is reason to be seriously concerned about your welfare, we may need to break confidentiality without your consent to help you stay safe. We will try to get your consent first but this may not always be possible."

Mr Scott's case was allocated to Ms Sophie Lambe, a Sessional Health and Wellbeing Officer at the Foundation, to ascertain what the best support would be for him. On 25 July 2016, Ms Lambe conducted an oral intake assessment session (in person) with Mr Scott during which she informed him about the Foundation's policy regarding confidentiality, and explained that any information disclosed by him during the intake assessment would be passed on if the Foundation believed that he or a third party was at risk. On the evidence, Mr Scott confirmed he understood and agreed to this. During the intake assessment, Mr Scott gave further details of his drug use and mental health issues. Becoming concerned about Mr Scott's welfare, Ms Lambe paused the assessment and consulted a colleague who advised her to inform Mr Scott that they would be contacting his GP.

Ms Lambe phoned Mr Scott's GP and, speaking to a receptionist, disclosed Mr Scott's suicidal thoughts and use of drugs as a coping strategy but also as a way of self-harming. On the evidence, while the call was entered into the GP's records, no documents or written records were shared with the GP by the Foundation, and communications with the GP practice were entirely verbal.

Mr Scott claimed that the Foundation's communication with the GP's practice involved unlawful disclosure of "sensitive personal data" within the meaning of the DPA 1998 s.2 and amounted to a breach of confidence. The Foundation sought summary judgment and/or a striking out of the claims.

Decision

Claim under the DPA 1998

The judge agreed with the Foundation that the claim under the DPA 1998 should be struck out because the DPA 1998 does not apply to purely verbal communications such as Ms Lambe's disclosure. To fall within the scope of the DPA 1998, DPA 1998 s.1 requires that the personal data in question must be processed or recorded in either electronic or manual form.[2] As such, a verbal disclosure did not constitute the processing of personal data, and thus could not give rise to a claim under the DPA 1998.

Mr Scott sought to argue that the material was in effect "stored" in Ms Lambe's mind with a view or intention to it being put into an automated record/filing system in due course, and therefore it was "data" as defined in the DPA. The judge rejected that submission as it did not fit within the DPA 1998 scheme, which was based around records and processing by automatic means.

The judge was also clear that, even if the DPA 1998 applied to the telephone disclosures by Ms Lambe to Mr Scott's GP, the processing would not be unlawful since it was necessary to protect Mr Scott's vital interests, as per condition 3(a) under Sch.3 to the DPA 1998. Mr Scott sought to challenge this by arguing that he was not at "imminent" risk. In the judge's view, however, there was no basis for reading a qualifier as to "imminent" risk into the "vital interests" processing conditions under the DPA. But even if there were, a reasonable professional faced with the facts disclosed to Ms Lambe would find the risk to be imminent enough to at least make a limited notification to a healthcare professional.

Breach of confidence claim

The judge also struck out the breach of confidence claim. The Foundation's case was that, while the information was clearly confidential, it was not imparted in circumstances importing an obligation of confidence.[3] The judge put the matter differently, however, finding that the reason Mr Scott's claim failed was that the duty of confidence, which was undoubtedly owed to him, had a qualifier to confidentiality, or "carve out", which permitted the very limited disclosure to his GP. Specifically, the referral form made it clear that the Foundation would disclose confidential information to an individual's GP if it had serious concerns about that individual's welfare. Mr Scott completed the forms and provided his GP's details. The judge also accepted that at the outset of their consultation, Ms Lambe made this specific fact clear to Mr Scott.

On this issue, Mr Scott's case was that as a matter of construction of the language in the referral forms (in particular, the words "We will try to get your consent first, but this may not always be possible"), the Foundation had to seek his consent unless it was, for example, practically impossible, and that the Foundation in fact made no effort. The judge disagreed. The referral forms were not to be read as contractual instruments and as a matter of practical common sense they were indicating to the user that there might, in extreme

[2] See *Durant v Financial Services Authority* [2003] EWCA Civ 1746; [2004] F.S.R. 28.
[3] See *Coco v AN Clark (Engineers) Ltd* [1968] F.S.R. 415; [1968] F.S.R. 415.

circumstances, be a breaking of confidentiality if that was needed to help the individual "stay safe". Moreover, the judge considered that even if Mr Scott had in fact formally been asked for consent and had declined, the Foundation would have been acting lawfully in making the disclosure.

Comment

Although this case was examined under the previous UK data protection regime, it may nonetheless provide useful judicial authority for the position that processing of personal data under the current rules (i.e. the UK Data Protection Act 2018 (DPA 2018 and EU General Data Protection Regulation (GDPR)[4]) does not include purely verbal communications.

However, the question of whether the alleged processing would otherwise have been lawful, in any event, because it was necessary to protect the claimant's vital interests, may have raised other issues under the GDPR. GDPR art.9(2)(c) permits processing of "special category" personal data where it is "necessary to protect the vital interests of the data subject or of another natural person where the data subject is physically or legally incapable of giving consent". As the ICO explains in its Guidance on the Processing of Special Category Data,[5] this condition is very limited in its scope, and generally only applies to matters of life and death. In Mr Scott's case, the processing will arguably have been justified on that basis. The circumstances of this case, should they have occurred under the GDPR, however, would have afforded the court an opportunity to clarify what is meant by "where the data subject is physically or legally incapable of giving consent" and to look, alternatively, at one of the substantial public interest conditions for processing special category personal data under the GDPR, namely "support for individuals with a particular disability or medical condition".

Amazon Out of Hot Water After CJEU Ruling on Storage of Unlawfully Imported Davidoff Perfumes

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EU law; Infringement; Knowledge; Perfumes; Storage; Trade marks; Warehouses

The Court of Justice of the European Union has ruled that Amazon is not liable for trade mark infringement in respect of the storage of infringing goods at an Amazon-owned warehouse.[1] The mere storage of infringing goods, without knowledge of the infringement, does not constitute an "active role" in, or pursuance of, the relevant infringing acts (namely, offering the goods or putting them on the market).

Background

Coty Germany GmbH (Coty) distributes DAVIDOFF-branded perfumes in the EU. It is the licensee of an EU trade mark for DAVIDOFF, which is registered for (among other goods and services) "perfume, essential oils and cosmetics" (the Mark).

On 8 May 2014, a third party acting for Coty test-purchased a bottle of "Davidoff Hot Water EdT 60 ml" perfume from *www.amazon.de*. This item was sold by a third-party seller via Amazon Marketplace (under Amazon's standard terms, the third-party seller was the legal seller of record). The order was dispatched by Amazon under the "Fulfilment by Amazon" scheme. The relevant item turned out to be an unlawful parallel import ("grey" goods). Amazon did not have knowledge of the infringement at the time of sale.

The Fulfilment by Amazon scheme offers various services to third-party sellers operating via Amazon Marketplace, which enable such sellers to get goods to customers more easily. These services include the storage of goods in warehouses. The infringing item in this case was stored in a warehouse operated by Amazon FC Graben GmbH (Amazon FCG). However, Fulfilment by Amazon services go further than simple warehousing,

[4] Regulation 2016/679 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46 [2016] OJ L119/1.
[5] See *https://ico.org.uk/for-organisations/guide-to-data-protection/guide-to-the-general-data-protection-regulation-gdpr/special-category-data/what-are-the-conditions-for-processing/#conditions3* [Accessed 10 June 2020].
[1] *Coty Germany Gmbh v Amazon Services Europe Sàrl* (C-567/18) EU:C:2020:267; [2020] Bus. L.R. 777.