SA2271/16

# SHERIFFDOM OF LOTHIAN AND BORDERS AT EDINBURGH

JUDGMENT OF SHERIFF DONALD CORKE

in the cause

CAROL ROHAN BEYTS

Pursuer

against

TRUMP INTERNATIONAL GOLF CLUB SCOTLAND LIMITED

Defenders

(SMALL CLAIM)

**Pursuer: Dailly**
**Defenders: Motion**

**Edinburgh, 5 April 2017**

The Sheriff finds the following facts to be admitted or proved:

1. The pursuer is a 62-year-old retired social worker who resides in Montrose.

2. The defenders have a registered office in Edinburgh. They own and operate a golf course on the Menie Estate in Aberdeenshire.

3. On 11 April 2016 the pursuer and a friend, S, used the public right of access to cross the golf course to walk on the dunes and beach at Menie.

4. S was a person known to the defenders' employees. Both the pursuer and S are known for their opposition to the defenders' development at Menie.

5. The pursuer and S entered the golf course and walked over the access, pausing to take photographs next to the flagpole. The flagpole was the subject of a disputed planning application.

6. S was recognised as they took photographs of the flagpole by the defenders' employee and witness E, a 23-year-old irrigation technician. He immediately informed his line manager, the links superintendent W, of the presence of S and the pursuer.

7. E and W drove onto the course to keep an eye on S and the pursuer. Along the way they met a senior security officer, and took him along for the same purpose.

8. At the material time, the pursuer was suffering from a problem with urinary incontinence. When she crossed the Menie Burn, she realised she had to relieve herself urgently. She shouted to S that she needed a private moment and looked for a private place.

9. She squatted down in the dunes, further concealed by marram grass, and relieved herself. She did not intend to be seen and did not think that she was being observed.

10. Unbeknown to her, the pursuer was under surveillance from a distance of about 230 metres by E, W and the security officer.

11. E took a digital photograph on his own mobile telephone of the pursuer squatting in the dunes. He was permitted to use his mobile telephone in the course of his employment. He subsequently deleted the photograph when the police indicated there was sufficient evidence without it.

12. As the pursuer and S crossed the course to leave, they were approached in a vehicle by a course employee and a press photographer. They had a polite conversation and photographs were taken of them by the photographer.

13. On 14 April 2016, at about 10 pm, two police officers arrived at the pursuer's home and charged her with a contravention of section 47 of the Civic Government (Scotland) Act 1982 ("the 1982 Act").

14. The pursuer was distressed by the time at which she was charged and the concern it caused her about family members. She was distressed at possibly having unknowingly spoken to one of the men who had watched her. She was and remains distressed by the fact that men had watched her urinating, and because she had been photographed in the act.

Finds in fact and law:

1. It was lawful for the pursuer and her friend to use the public right of access across the golf course as they did, in terms of the Land Reform (Scotland) Act 2003.

2. Section 47 of the 1982 Act provides that any person who urinates in such circumstances as to cause, or to be likely to cause, annoyance to any other person shall be guilty of an offence.

3. It was lawful and in accordance with the Scottish Outdoor Access Code made in terms of the 2003 Act for the pursuer to urinate where she did.

4. The defenders were not at the material time registered with the Information Commissioner's Office under the Data Protection Act 1998 ("the 1998 Act") and were accordingly in breach of section 17 thereof.

5. In taking a digital photograph of the pursuer squatting in the dunes, E was acting in the course and scope of his employment.

6. The data controller in terms of the 1998 Act was the defenders.

7. The digital photograph constituted personal data in terms of the 1998 Act. The pursuer could be identified from those data and other information likely to come into the defenders' hands from their employees.

8. Those data were processed in terms of the 1998 Act.

9. In terms of section 13 of the 1998 Act, as properly understood, the pursuer is entitled to compensation from the defenders where she has suffered distress by reason of any contravention by them of any of the requirements of that Act.

10. The only requirement of the 1998 Act upon which the pursuer founds is the breach of section 17 (ICO registration).

11. The penalty for breach of section 17 is prosecution under section 21 of the 1998 Act. The pursuer has not suffered any distress "by reason of" the contravention by the defenders of their admitted breach of the registration requirement.

12. Had the pursuer established liability, compensation would have been awarded in the sum of £750.

THEREFORE assoilzies the defenders from the claim of the summons; awards expenses to be paid by the pursuer to the defenders as a small claim in the sum of £300.

Note:

*Introduction*

[1] This action proceeded by way of a small claim summons, seeking the sum of £3,000 with interest and expenses. Parties were agreed that expenses would follow success.

[2] The case raised novel and difficult questions of law under the Data Protection Act 1998. It has attracted a degree of media interest. There were written submissions and extensive authorities. Oral evidence was heard on the first day and submissions on the morning of the second. Despite this being a small claim and in order to do it justice, it was continued overnight.

*The law*

[3] The Civic Government (Scotland) Act 1982 and the Land Reform (Scotland) Act 2003, insofar as relevant, have already been referred to above.

[4] The pursuer further founded upon section 2 of the Civil Evidence (Scotland) Act 1988 for the admissibility of the statements recorded in the police notebooks, and section 6 for production of copy documents.

[5] In making a case under the Data Protection Act 1998, the pursuer relied upon section 1, section 13, section 17 and section 21 thereof. The effect of these has already been considered.

[6] She did not rely on breach of any the eight data protection principles of schedule 1 of the 1998 Act. These were summarised in the note to *Woolley v Akram* [2017] SC Edin 7 at [1] as follows:

> 1. Processing must be fair and lawful;
> 2. Processing of personal data must be for one or more specified purposes;
> 3. Processing of personal data must be adequate, relevant and not excessive;
> 4. Processing of personal data must be accurate and up to date;
> 5. Personal data shall not be kept for longer than is necessary;
> 6. Personal data will be dealt with in accordance with the data subject's rights;
> 7. Appropriate technical or organisational measures must be taken to keep the data secure;
> 8. Data transferred outside the EEA should be subject to an adequate level of protection.

[7] The defenders relied for completeness on section 29 of the 1998 Act, which provides *inter alia* a limited exemption from the first data protection principle for the prevention and detection of crime and the apprehension or prosecution of offenders.

[8] Parties were agreed that paragraph [112] of the *Woolley* case was an accurate statement of the law. Quoting the preceding paragraphs for context, this reads:

> [110] Section 13(1) of the Act allows compensation for any damage suffered. It is not claimed here that any physical damage has been suffered.
>
> [111] Section 13(2) allows compensation for distress, but only if two conditions apply. Those conditions do not apply here. At first appearance, it would appear that the pursuers have no remedy in compensation.
>
> [112] It has now been settled, however, and parties agreed, that the pursuers do qualify for compensation if they have suffered distress only. The case of *Google Inc* v *Vidal-Hall & Others* [2015] EWCA Civ 311 established that section 13(2) could not be interpreted compatibly with article 23 of Directive 95/46/EC, and therefore required to be read as if it gave such a right to compensation for distress only.

[9] The *Google Inc* case was produced.

[10] Various cases were produced on quantum, but none analogous.

[11] I was not referred to any case in which there has been a right of compensation under section 13 of the 1998 Act on the basis that a data controller was not registered with the ICO, as required by section 17, when it processed personal data.

*The factual background*

[12] The factual position is as set out in the findings in fact. In short, the pursuer and her friend S accessed the dunes and beach at Menie across the defenders' golf course. S was recognised by a junior employee, E, as being an opponent of the development. He, his manager W, and a security man kept an eye on the pursuer and S. They saw, at some distance, the pursuer making an emergency toilet stop in the dunes. She had taken reasonable precautions not to be seen but instead of giving her any privacy, E (and possibly another) took a photograph of her. In due course this escalated into a frivolous criminal complaint which was acted on by the police

but was ultimately dropped. The pursuer has suffered distress, some of which is attributable to finding out she had been photographed.

*Witnesses*

*[13]* I have used initials for everyone apart from the pursuer. Only the pursuer gave evidence on her behalf and there was only one witness for the defence (E, a junior member of staff). I assess the pursuer as credible and reliable, notwithstanding her public stance against the development at Menie. She is entitled to her views. I preferred her evidence to that of E where it differed. He did candidly admit he took a photograph, but was somewhat evasive on whether anyone else with him had. As a loyal employee he was in a very difficult position. He had immediately reported seeing S and the pursuer to his manager. I did not believe his denial of what was recorded in his statement and signed by him, that he and W were keeping an eye on the pursuer and S. He was also in the very embarrassing position of having to justify taking a photograph of a woman urinating in circumstances where she would have a reasonable expectation of privacy, similar to the men the same witness described as relieving themselves on the golf course without the same consequences.

*Documents*

[14] It is obviously not necessary in a case like this to produce photographs that are uniquely within the control of the errant data controller or have been destroyed. E admitted taking a photograph and justified it by stating that it was to provide evidence of a criminal offence. He says he deleted it. If any photographs had been

passed to the police, no doubt they would have been recovered under the specification of documents that led to recovery of police notebook entries.

[15] Mr Motion for the defenders took objection to the production and use of the statements made by defenders' employees in making their complaint to the police. These had to be taken as evidence in terms of the rules and the 1988 Act but I reserved the position on the weight to be given to them. Each of them was a signed statement confirmed as true and accurate. I have received these as evidence in the case while taking account of the fact that not all of the authors were called as witnesses and subject to cross-examination.

[16] Clearly there could be no objection to copies of the police notebooks being produced per section 6 of the 1988 Act.

*Submissions*

[17] I was very much obliged to both sides for their written submissions, which they relied upon and went through orally. The submissions are extensive and do not require to be quoted here; rather, I have taken account of them in this short small claim judgment.

*Discussion*

[18] Notwithstanding the use of the police statements, these are not particularly clear on what photographs are being referred to. In the case of the female employee who made the complaint to the police, she had stated that W had taken photographs (of "the female who urinated" as opposed to "the female urinating") and she had

recognised the pursuer from these. As the only direct evidence as to the vantage point was that it was at a considerable distance, it seems unlikely that she was talking about one of the images complained of. W told the police that he recognised the pursuer from photographs uploaded to Facebook. In the case of E, his candid admission of taking a photograph of the pursuer urinating came in his oral evidence. This would give a basis to the investigating officer telling the pursuer that there was mobile telephone "footage" but it clearly did not in fact form the basis of the charge as it would appear that the police did not see or retain any photograph or footage.

[19] What must specifically be noted is that the pursuer based her case on section 17 of the 1998 Act. Her solicitor advocate was specific in stating that were it not for the failure to register, we would not have been here considering the case.

[20] The argument was not, then, about the data protection principles. Both sides were represented and it was not for me to go looking for some different basis of the case which might have been arguable. It would have been a different argument.

[21] It follows that however unattractive an argument under section 29 of the 1998 Act might be (that the photograph was taken with a view to the prosecution of an offender), no decision is required as none of the data protection principles is pled. I must say, however, that I do not find the defenders' examples of men urinating in shop doorways or of shoplifters at all useful. The pursuer should not have been photographed. I have to emphasise that officious bystanders taking pictures of females urinating in the countryside put themselves at very real risk of prosecution, whether for a public order offence or voyeurism.

[22] As indicated in the findings in fact and law, the only requirement of the 1998 Act upon which the pursuer founds is the breach of section 17 (ICO registration). The penalty for breach of section 17 is prosecution under section 21 of the 1998 Act. It follows that the pursuer has not suffered any distress "by reason of" the contravention by the defenders of their admitted breach of the registration requirement. That is a matter between the defenders and the registration and prosecution authorities. There is no causal connection between the lack of registration and the distress that I accept the pursuer has suffered.

[23] As to compensation, there are no cases of direct assistance. All that can usefully be said is that this was distress arising out of a single event, and not all the distress was due to the photographing of the pursuer. Were compensation to be awarded, it would be much less than in *Woolley*, which involved CCTV and an extended period of distress of about two and a half years. The sum sought, at £3,000, is not a proper valuation but is simply based on the small claim limit. Fair compensation would have been fixed at £750.

[24] However, the pursuer has failed in her claim. Parties were agreed that expenses as a small claim were to follow success and this is reflected in the interlocutor.