Neutral Citation Number: [2005] EWHC 1335 (QB)

Case No: HQ04XO2221

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 27th June 2005

Before :

MR JUSTICE TUGENDHAT

- -

Between :

Abayomi Sofola	**Claimant**
- and -	
Lloyds TSB Bank	**Defendant**

- -
- -

The Claimant in Person
Sarah Palin (instructed by **Cameron McKenna**) for the **Defendant**

Hearing dates: Wednesday 6th April 2005

- -

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

.....

MR JUSTICE TUGENDHAT

Mr Justice Tugendhat :

1. There is before me an appeal by permission of Mitting J against the order of Master Tennant dated 5th November 2004 striking out the Claimant's claims pursuant to CPR Parts 3.4 and 24.2. The Master's Order is stated to be made under both Part 3.4 (no reasonable grounds for bringing the claim) and Part 24 (which is set out below).

2. Mitting J's Order of 2 February gave permission only in respect of one of a number of claims, namely the claim for injury to the Claimant's reputation by reason of an alleged slander which took place on 3 June 2004.

3. Unfortunately no reasons are available for the judgment of Master Tennant. Ms Palin attended the hearing, and she has informed me that the Master did not give any formal reasons. I have, since the hearing, and at my invitation, been provided with a transcript of the reasons for the order of Mitting J, in circumstances described below. Since the hearing there have also been two exchanges of written submissions at my invitation, as explained below.

4. The background and the facts alleged by the Claimant include:

    i) On 3 June 2004 he went to the Bank to pay some bills. He had written two cheques at home one for BT in the sum of £132. He handed this to the cashier, together with both bills that he wanted the Bank to pay and the other cheque.

    ii) While the cashier was swiping the cheques through a machine, the Claimant decided to ask her to tell him the balance on his account. In response to that request, the cashier asked him for proof of identity. He offered a number of cards, which were not acceptable, and then she asked if he had a driving licence. He did have on him a colour photocopy of his driving licence, which he handed to the cashier.

    iii) The cashier handed this to a supervisor, who came to the counter and asked the Claimant for his signature, which he gave to her twice over. She then gave him the balance on his account, which was more than £1,500 in credit.

    iv) The Claimant then asked for the return of his license document. The cashier told him that there was a note on his account and that the supervisor was checking with his branch. He was asked to wait, and did so for about 45 minutes.

    v) The police then arrived and he was kept waiting or talking in public for a further 20 to 30 minutes. The police officer told the Claimant that the supervisor had told him that the Claimant had had a mortgage offer withdrawn by the Bank in 1996 after he had been sacked for fraud. The Claimant said it was untrue that he had been sacked for fraud. The police accepted that the copy of the licence was a photocopy and not a forgery, and that he was not trying to withdraw money with it. They then left.

    vi) There was at that time a record on the Claimant's file with the Bank which was dated 31 October 1996 and which read:

> "Phone call received from Lisa Morgan at Customer Care in Birmingham, regarding an ongoing complaint by Mr Sofola in respect of his declined mortgage application. After an Offer Letter had been issued, but prior to completion of the mortgage, the Bank discovered that Mr Sofola had been dismissed from his job for alleged fraud and Homeloans withdrew the offer of advance".

5. There was subsequently added to that file the following entry dated 3 June 2004:

> "customer came into Camberwell green branch to withdraw funds using a photocopy of a drivers licence. Due to previous notes on screen the police were called. Police advised no offense had been committed. Customer requested to speak to the manager to discuss matter further. ve"

THE CLAIM

6. The Claimant complained to the Bank. By letter dated 7 July 2004 the Bank wrote a letter including:

> "You were unhappy that on the day in question the staff in the branch were unable to see that the document you produced for identification was a photocopy of your driving licence and not a forgery. It was because of this together with information that was contained on your account notes that the police were called. Please accept my apologies… I will arrange to have the information removed from your account notes …
>
> You have also pointed out that our records are incorrect as it is noted that you came to withdraw funds from your account when you say that you did not…"

7. In the Claim Form, settled by himself, the claimant alleges:

   i) Unlawful processing of data, identifying the Data Protection Act 1998, and in particular principles 1, 2, 4, 5, 6 and 7;

   ii) Breach of confidence;

   iii) Interference with his right under Art 8 and the Human Rights Act 1998;

   iv) Damages for defamation.

8. The data protection principles, which are set out in Sch 1 to the Act, include:

> "1. Personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless-
>
> (a) at least one of the conditions in Schedule 2 is met, and

> (b) in the case of sensitive personal data, at least one of the conditions in Schedule 3 is also met.
>
> 2. Personal data shall be obtained only for one or more specified and lawful purposes, and shall not be further processed in any manner incompatible with that purpose or those purposes.
>
> 3. Personal data shall be adequate, relevant and not excessive in relation to the purpose or purposes for which they are processed.
>
> 4. Personal data shall be accurate and, where necessary, kept up to date.
>
> 5. Personal data processed for any purpose or purposes shall not be kept for longer than is necessary for that purpose or those purposes.
>
> 6. Personal data shall be processed in accordance with the rights of data subjects under this Act.
>
> 7. Appropriate technical and organisational measures shall be taken against unauthorised or unlawful processing of personal data and against accidental loss or destruction of, or damage to, personal data."

9. By s.1 of the 1998 Act "processing" is defined to include both holding and disclosure of information. By s.2 of the 1998 Act it is provided that:

> ""sensitive personal data" means personal data consisting of information as to-... (g) the commission or alleged commission by [the data subject] of any offence".

10. It is not necessary to set out Schedules 2 and 3 of the Act at this stage. In a letter dated 7 July 2004 the Bank wrote that: "This information was given to the police officers to help to prevent or detect crime… In paying your bill you have withdrawn funds from your account to credit your bill account". There appears to be implicit in this a contention that the Claimant had produced the document for the purpose of instructing the Bank to pay his bills ("…to withdraw funds using a photocopy of a drivers licence"), whereas one of the points made by the Claimant in his Particulars of Claim is that the document was produced only subsequently and for the purpose of obtaining an account balance (he also makes a separate point that the cheques did not constitute withdrawal of funds at all). If the Bank were saying that he used the photocopy driver's licence to support the request that his bills be paid (and it is not clear that they were, or are now, contending that), then there is an issue of fact. In a letter dated 12 August 2004 the Bank refer specifically to s.29 of the 1998 Act. This provides that personal data processed for the purposes of prevention or detection of crime are exempt from the first data principle (except to the extent to which it requires compliance with the conditions in Schedules 2 and 3).

11. Art 8 provides for respect for private and family life. Art 8 adds nothing to this claim, since the Bank is not a public authority, and, as between private persons, such as the Claimant and the Bank, the 1998 Act gives substantial effect to its provisions.

12. In the Particulars of Claim he claimed damages or compensation. The essential averments in relation to 2004 are:

    i) The bank officials made false statement to the police

        a) When they called the police, that the photocopy of his driving license which he had provided to them was a fake;

        b) After the police had arrived, the supervisor told them that he had "had a mortgage offer withdrawn by the bank in 1996 after [he] was sacked for fraud"

    ii) That these allegations were false because it was not true that he was sacked for an alleged fraud and the photocopy was not a fake;

    iii) That the bank officials said this maliciously, to attempt to justify their having called the police when they had no justification for having called them;

    iv) The bank then entered a further statement on their records relating to June 2004, which he alleges is false in the respects set out in para 10 above.

13. Further, in relation to the period since 1996 the claimant alleges that the bank had caused him damage in 1996 by withdrawing the mortgage offer, and since then by "shar[ing] sensitive information" about him with other financial institutions. He states that he had been refused mortgages several times, and refused a current account by another bank.

14. The provision in the 1998 Act for compensation is in s.13, which includes:

> "(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…."

15. In Section 8 of his Appellant's Notice the Appellant gives the following arguments in support of his grounds of appeal. He contends that the record of the allegation of fraud recorded in October 1996 was inaccurate and had been kept longer than necessary (that is a reference to principles 4 and 5). He also contends that he had a right to be informed that the bank held this information. He also contends that the release of the information was not authorised by the data controller. The basis for this is unclear,

and it may be a misunderstanding of the terms used in the Act. There are provisions for keeping a register of data controllers, namely Part III of the Act. By s.1 of the Act it is provided that:

> "'data controller' means, subject to subsection (4), a person who (either alone or jointly or in common with other persons) determines the purposes for which and the manner in which any personal data are, or are to be, processed".

16. In Section 9 of the Appellant's Notice the Claimant asks for an order that the Bank withdraw the records of 3 June 2004 and 31st October 1996. That appears to be a claim for relief under s.14 of the Act. He also asks for an order that the Bank apologise, which is not relief which the Court can order. S.14 of the Act includes the following provisions:

> "(1) If a court is satisfied on the application of a data subject that personal data of which the applicant is the subject are inaccurate, the court may order the data controller to rectify, block, erase or destroy those data and any other personal data in respect of which he is the data controller and which contain an expression of opinion which appears to the court to be based on the inaccurate data.
>
> (2) Subsection (1) applies whether or not the data accurately record information received or obtained by the data controller from the data subject or a third party but where the data accurately record such information, then-
>
> (a) if the requirements mentioned in paragraph 7 of Part II of Schedule 1 have been complied with, the court may, instead of making an order under subsection (1), make an order requiring the data to be supplemented by such statement of the true facts relating to the matters dealt with by the data as the court may approve, and
>
> (b) if all or any of those requirements have not been complied with, the court may, instead of making an order under that subsection, make such order as it thinks fit for securing compliance with those requirements with or without a further order requiring the data to be supplemented by such a statement as is mentioned in paragraph (a).
>
> (3) Where the court-
>
> (a) makes an order under subsection (1), or
>
> (b) is satisfied on the application of a data subject that personal data of which he was the data subject and which have been rectified, blocked, erased or destroyed were inaccurate,

> it may, where it considers it reasonably practicable, order the data controller to notify third parties to whom the data have been disclosed of the rectification, blocking, erasure or destruction.
>
> (4) If a court is satisfied on the application of a data subject-
>
> (a) that he has suffered damage by reason of any contravention by a data controller of any of the requirements of this Act in respect of any personal data, in circumstances entitling him to compensation under section 13, and
>
> (b) that there is a substantial risk of further contravention in respect of those data in such circumstances,
>
> the court may order the rectification, blocking, erasure or destruction of any of those data.
>
> (5) Where the court makes an order under subsection (4) it may, where it considers it reasonably practicable, order the data controller to notify third parties to whom the data have been disclosed of the rectification, blocking, erasure or destruction. ”

THE APPROACH TO BE ADOPTED BY THE COURT TO THE APPEAL

17. Civil Procedure Rules r 24.2 provides:

> “The court may give summary judgment against a claimant … on the whole of a claim … if--(a) it considers that--(i) that claimant has no real prospect of succeeding on the claim …; or (ii) ….; and (b) there is no other reason why the case or issue should be disposed of at a trial”.

18. What these words mean was stated in *Swain v Hillman* [2001] 1 All ER 91, 92 and 94-5, where Lord Woolf MR said:

> "Under r 24.2, the court now has a very salutary power, both to be exercised in a claimant's favour or, where appropriate, in a defendant's favour. It enables the court to dispose summarily of both claims or defences which have no real prospect of being successful. The words 'no real prospect of being successful or succeeding' do not need any amplification, they speak for themselves. The word 'real' distinguishes fanciful prospects of success or, …, they direct the court to the need to see whether there is a 'realistic' as opposed to a 'fanciful' prospect of success….
>
> It is important that a judge in appropriate cases should make use of the powers contained in Part 24. In doing so he or she

> gives effect to the overriding objectives contained in Part 1. It saves expense; it achieves expedition; it avoids the court's resources being used up on cases where this serves no purpose, and, I would add, generally, that it is in the interests of justice. If a claimant has a case which is bound to fail, then it is in the claimant's interests to know as soon as possible that that is the position. Likewise, if a claim is bound to succeed, a claimant should know this as soon as possible ... Useful though the power is under Part 24, it is important that it is kept to its proper role. It is not meant to dispense with the need for a trial where there are issues which should be investigated at the trial. …, the proper disposal of an issue under Part 24 does not involve the judge conducting a mini trial, that is not the object of the provisions; it is to enable cases, where there is no real prospect of success either way, to be disposed of summarily." "

19. In *Three Rivers DC vBank of England (No 3)* [2003] 2 AC 1 at p260 Lord Hope of Craighead explained further (with the agreement of the majority):

> "94 For the reasons which I have just given, I think that the question is whether the claim has no real prospect of succeeding at trial and that it has to be answered having regard to the overriding objective of dealing with the case justly. But the point which is of crucial importance lies in the answer to the further question that then needs to be asked, which is--what is to be the scope of that inquiry?
>
> 95 I would approach that further question in this way. The method by which issues of fact are tried in our courts is well settled. After the normal processes of discovery and interrogatories have been completed, the parties are allowed to lead their evidence so that the trial judge can determine where the truth lies in the light of that evidence. To that rule there are some well-recognised exceptions. For example, it may be clear as a matter of law at the outset that even if a party were to succeed in proving all the facts that he offers to prove he will not be entitled to the remedy that he seeks. In that event a trial of the facts would be a waste of time and money, and it is proper that the action should be taken out of court as soon as possible. In other cases it may be possible to say with confidence before trial that the factual basis for the claim is fanciful because it is entirely without substance. It may be clear beyond question that the statement of facts is contradicted by all the documents or other material on which it is based. The simpler the case the easier it is likely to be to take that view and resort to what is properly called summary judgment. But more complex cases are unlikely to be capable of being resolved in that way without conducting a mini-trial on the documents without discovery and without oral evidence. As Lord Woolf said in *Swain v Hillman*, at p 95, that is not the object of the

> rule. It is designed to deal with cases that are not fit for trial at all."

THE CONTENTIONS OF THE PARTIES ON THE APPEAL

20. In support of their application for summary judgment and for the claims to be struck out, the Bank contended that there is a defence of qualified privilege.

21. It is submitted that the law is correctly stated in Gatley on Libel & Slander 10th ed para 14.35 (itself based on *Lightbody v Gordon* (1882) R. 934, 937 cited in footnote 5). The passage in Gatley reads:

> "… it is for the purpose of privilege, the duty of everyone who knows or believes that a crime has been committed to assist in the discovery of the wrongdoer. Any complaint made, or information given, for that purpose to the police… will, in the interests of society, be privileged and the mere fact that the defendant volunteered the information will make no difference".

22. The claim in qualified privilege would be defeated if there were a case in malice. At least since *Horrocks v Lowe* [1975] AC 135 it has been clear that, to establish malice in this context, a claimant must have evidence to put before a jury to show that it is more likely than not that the defendant had the dominant intention of injuring the claimant. In practice in a case such as this, that means evidence that the defendant did not believe what she said to the police was true, or was reckless as to whether it was true or false. But it is equally plain that an unreasonable belief, or a conclusion leapt to on the basis of inadequate evidence, is not malice in law.

23. The claimant has set out his case in malice in his Particulars of Claim in the context of his case in malicious falsehood. It is an allegation that the Bank's officials acted initially out of ignorance and stupidity, and that they released the information dating from 1996 to cover up their mistake in saying that the photocopy driving licence was a forgery. He also makes a reference to racism, although that is not supported by particulars.

24. Miss Palin submits that there is no real prospect of this plea of malice succeeding, and that there is no basis for allowing the appeal against the Master's decision on that basis. The facts that the Bank's mistake might have had much more serious consequences than in fact it did, or that the consequences it did have were very unpleasant, does not mean that the Claimant has a case in malice. That, she submits, disposes of the claim in so far as it relates to what was said to, or disclosed to, the police.

CONCLUSION ON THE APPEAL

25. In the circumstances of this case, and applying the guidance given in the House of Lords in *Three Rivers*, the overriding objective of dealing justly with cases seems to me to require that the action be allowed to proceed.

26. There is no statement before me from the Bank's staff who called the police. There is a witness statement dated 17 August 2004 from the Bank's solicitor, but it does not make clear to what extent, if at all, the account of events given by the Claimant is disputed. There is no first hand evidence that the individual who called the police did believe that a crime had been committed, or what crime she might have had in mind. On the statement of the facts advanced by the Claimant it is not clear what crime she might have thought had been committed. On his case the photocopy licence was not put forward by him to procure the payment of funds, whether by way of honouring the cheques or in any other way, but only to procure a response to his balance enquiry. For the purposes of CPR Part 3 I must assume that the Claimant's factual case is truly stated. For the purposes of CPR Part 24 I note that it is uncontradicted. The action of the staff in calling the police in these circumstances is sufficiently surprising for me to consider that this matter is one which should be allowed to proceed at least as far as disclosure and exchange of witness statements. An application under Part 24 might be appropriate at that stage. I leave that matter open.

EVENTS SINCE THE HEARING OF THE APPEAL

27. At the end of the hearing, in the absence of any record of the reasons for the Master's or Mitting J's decisions, I remained concerned about this case.

28. In the witness statement for the Bank it is said that due to the passage of time the Bank are unable to retrieve any further files or documentation relating to the mortgage application referred to in the file record of 1996. I take this to mean that the Bank has nothing relating to the alleged fraud either.

29. In their letter of 12 August 2004 the Bank's solicitors devote most of the four pages to the claim based on what was said to the police on 3 June 2004, and why that does not give rise to a claim against the bank, whether in breach of confidence, defamation or malicious falsehood. Four lines of the letter relate to the complaint of breach of the data protection principles by holding the information from 1996 until 2004. The letter states that this part of the claim is based on "bald assertion" and that: "In any event, as you were informed by our client by letter dated 7th July 2004, the information has now been removed from your account notes". In fact the letter of 7th July 2004 had said no more than: "I will arrange to have the information removed from your account notes".

30. At the hearing before me the Claimant complained that he had not been provided with the data relating to him as amended.

31. Further, it did not seem to me that that part of the claim could be dismissed in that way. First, it is not "bald assertion" for the claimant to say, as he does, that it is untrue that he was sacked for an alleged fraud. That statement from him is admissible evidence. Second, it seemed to me to be arguable, with a real prospect of success at this stage of the proceedings, that for the Bank to hold the record of such an allegation on the customer's file for a period after 1996 to June 2004 (and in fact to April 2005,

as it is has subsequently emerged), without there being any further information to support it, might be a breach of the data protection principles. The fact that the Bank promptly said they would remove the information does nothing to suggest the contrary.

32. Moreover, the Claimant told me that there were discussions before the Master which resulted in the Bank agreeing to alter the entry for 3 June 2004. This might have been relief under s.14, and recorded as part of the order of the court, or as an agreement referred to in the order, but it was not. The fact that such an agreement was reached (if it was) is not inconsistent with the claimant having a claim under s.14 of the 1998 Act.

33. The allegation in the Particulars of Claim that the claimant has, since 1996, been refused banking facilities seemed to me, at this stage, to be an arguable basis for a claim of damage under s13 of the Data Protection Act 1998. The Bank has said that the record was not published to any third party. But that is a contention of fact at this stage, and it is unclear whether the record might have been the basis of, or otherwise affected the content of, any communication to a third party which did not disclose the contents of the note. For reasons given by Lord Hope of Craighead in *Three Rivers DC v bank of England (No 3)* [2001] UKHL 16 para 95, that is a matter which might properly be investigated.

34. It seemed to me that the claimant might have a real prospect of success on this part of his claim, and yet he had been refused permission to appeal on this point.

35. The Master has struck out the whole claim, and Mitting J has refused permission to appeal, save on the slander point. My concerns were that the claimant, acting in person as he is, might not have made clear to Mitting J, as he has to me, that his claim is not solely related to the disclosure in June 2004, and might have an entirely independent basis in relation to the original recording and subsequent retention of the 1996 record.

36. I therefore offered the parties the opportunity to put before me a transcript of the reasons given by Mitting J, and of the Bank's customer records relating to the claimant, as they now stand.

37. The Claimant took this opportunity. By letter dated 9 April 2005 the claimant sent to me a copy of the record he produced from the Bank's file concerning him. What he sent omits the 1996 entry, but the 2004 entry remains as set out above. The Claimant continues to maintain that he was not withdrawing funds, merely asking the Bank to pay bills, and that the copy driving licence was not in any event requested or produced for the purpose of paying the bills, but only for the purpose of answering his balance enquiry. The 2004 entry gives a false impression, he submits, and should be rectified or erased.

38. By letter dated 16 April 2005 the Claimant also provided me with a transcript of what Mitting J said in his judgment given on 2nd February. In para 5 of his judgment Mitting J set out the claims made by the Claimant as (1) breach of the Bank's duties under the 1998 Act, (2) libel by reason of the electronic storage of the false accusation of fraud and its likely dissemination to other financial institutions; (3) malicious falsehood in the allegation made to the police and (4) slander in so telling the police.

39. Because Mitting J had no record of the Master's reasons he considered the matter afresh.

40. In para 8 of the judgment there is the following passage, which are the reasons why Mitting J said the claim would fail under the 1998 Act:

> "Mr Sofola's case is not that the person or persons appointed by Lloyds TSB as data controller in respect of the data which I have identified was in breach of his or her duty, and it therefore follows that under s.13 he would have no claim against Lloyds TSB for breach of a duty by its data controller or data controllers. Further, he would have no claim under s.13 because of the nature of the damage that he claims to have suffered… In this case Mr Sofola does not allege that the distress, as he puts it embarrassment, and psychological and personal distress was caused to him on an occasion by reason of a breach of duty by the data controller which also caused him damage. There is no claim under s.13 to a free-standing award for distress, however termed, in the absence of proof as well of damage of a kind that the law would recognise".

41. I find this passage hard to follow for two reasons. First, as to the point about the data controller, as I understand his case the Claimant is contending that that Bank has been, and still is, in breach of its duty (under s.4(4) of the Act) to comply with the date protection principles. The Particulars of Claim include: "… the bank has no right to divulge any information about me to a third party without my consent, thereby violating the 'data protection act' 1998".

42. Second, as set out above, the Claimant is claiming damage in the form, first, of refusal of banking facilities between 1996 and 2004, and second the time exceeding one hour he was detained at the instigation of the bank awaiting, and then being questioned by, the police.

43. A claim for refusal of banking facilities would appear arguably to fall within the meaning of the word 'damage' in s.13. Mitting J does not mention this claim at all.

44. Mitting J, in para 4 of his judgment, records that the Claimant's claim is not that he was physically detained so as possibly to give rise to a claim for damages for false imprisonment. But a claim for the loss of his time over the call out of the police bears some comparison to the claim which did involve physical detention which was considered by the Court of Appeal in *Ogle v The Chief Constable of the Thames Valley Police* [2001] EWCA Civ 598. In that case the claimant had in fact been arrested in consequence of circumstances somewhat similar to those of the present case, and had accepted a sum in settlement for that claim from another party. The claim in *Ogle* was therefore dismissed. But Simon Brown LJ said this:

> "17. I add by way of footnote this. In a judgment I gave (and with which Longmore LJ agreed) on 16 January 2001 in Gary Lee Hough v Chief Constable of the Staffordshire Constabulary (where we held that in the circumstances of that case an arresting police officer could properly rely on a PNC entry and

> so should not have been found liable for wrongful arrest) I suggested, in paragraph 18:
>
> > "Perhaps, however, a claim in negligence would lie against the officer making the entry in the first place (or perhaps for failing later to remove it) if it could be established that he had no proper basis for ever having made it."
>
> 18. I was unaware at that time of the provisions of section 22(1) of the Data Protection Act 1984. Now that this section has been drawn to my attention, it would seem to me to provide an altogether better basis for such a claim than the tort of negligence.
>
> 19. For the reasons I gave earlier, however, it cannot avail a claimant like this appellant, whose claim for damages for wrongful arrest has already been met. "

45. S. 22(1) of the 1984 Act is in terms which are not materially different from those parts of s13 of the 1998 Act which relate to the present case, namely:

> "An individual who is the subject of personal data held by a data user and who suffers damage by reason of the inaccuracy of the data shall be entitled to compensation from the data user for that damage and for any distress which the individual has suffered by reason of the inaccuracy."

46. By a third letter to me dated 20 April 2005, the Claimant intimated an intention of applying for permission to amend his claim to include one for what he calls "an unlawful detention of me in the bank against my will", which I take to be a claim for false imprisonment. That application is not before me, but I have no reason to differ from Mitting J's view that his case does not include one for physical detention. Physical detention is necessary for the tort of false imprisonment. The question whether detention otherwise than by physical restriction of liberty can amount to damage for the purposes of s.13 of the 1998 Act seems to me to be arguable with a real prospect of success.

47. Further, Mitting J makes no reference to the claims for rectification or erasure, which are independent of the claim for compensation.

48. So far as the libel claim is concerned, Mitting J held that that was bound to fail. Even assuming the 1996 file note was published to third parties, that publication would be covered by qualified privilege, and the Claimant could not establish malice. Likewise Mitting J held that the claim in malicious falsehood would fail because the Claimant could not prove malice. He allowed the claim in slander to proceed.

49. The Bank has also made further submissions to me, which include a Supplemental Skeleton Argument and a second witness statement from their solicitor.

50. In his second witness statement Mr Hayllar discloses that investigations following the hearing on 6th April 2005 have revealed that the 1996 record on the Claimant's file

had not in fact been deleted. He says that when he referred to the two letters of 7 July and 12 August 2004 in his first witness statement dated 17 August 2004 his understanding was that the record had been removed. He explains the matter saying:

> "This was due to an oversight by my client, and also the fact that to remove such historic notes is extremely complicated and time consuming and involves the writing of a bespoke programme by two IT technicians to access the historic data and remove or alter it… It is not clear whether there had been an earlier attempt to remove these notes which had been unsuccessful… There was of course no intention to mislead the Court or Mr Sofola…".

51. Mr Hayllar states that the 1996 record was removed on 7th April 2005.

52. As to the note of 3 June 2004, and what the Claimant contends was an agreement to remove it, Mr Hayllar says:

> "I do not believe that any such agreement was reached between the parties, and my client was not ordered by the Court to amend the notes"

He says that that, and the possibility of adding additional words to the note were canvassed at the hearing, that it had been intended to raise the matter with the Claimant in correspondence following that hearing, and that "any amendment or addition to the account notes for 3rd June 2004 has been delayed pending the outcome" of the appeal.

DISCUSSION ON THE EVENTS SINCE THE HEARING OF THE APPEAL.

53. It follows that in so far as the Master and Mitting J considered the Claimant's claim under ss13 and 14 of the Act in relation to the 1996 record, they did so on the mistaken basis that that record had been deleted in about August 2004.

54. Moreover, for the legal reasons that I have given, I remained concerned about the dismissal of the claim under the 1998 Act. There is no record of any reason given by the Master for striking this out and entering summary judgment. And Mitting J has not, so it seemed to me, given reasons why that claim is bound to fail. He has given no reasons at all why the claim in respect of the recording and retention of the 1996 note was bad, most probably because he was led to believe that the note had already been deleted. His reasons in respect of the disclosure in 2004 are not easy to follow in so far as they refer to the data controller. His reasons are incomplete in relation to s.13. He omits any reference to the claim for non-provision of financial services, and he does not say why the period during which the Claimant was kept waiting does not arguably count as damage for the purpose of s.13.

55. On 6th April Miss Palin had no reason to address me on any claim other than the slander claim, and she did not have the further material that I have since been sent at my invitation.

56. In her Supplemental Submissions Ms Palin submitted that this Court now has no jurisdiction to entertain an application that the order of Mitting J be reconsidered in so far as it relates to the claim under the 1998 Act. As to the merits of the point, she submitted that in relation to the claim for compensation under s.13, Mitting J was correct for the reasons he gave. She quotes from para 8 of Mitting J's judgment, including the words "the persons appointed by Lloyds TSB as data controller", although without stating who the Bank contend the data controller to be. She submits that the entry for 3rd June is not inaccurate, that "these matters of rectification were by paragraph 9(1) of the Appellant's Notice squarely before Mitting J in the Appellant's notice, and that he correctly declined to give permission to appeal". She does not suggest that on this point Mitting J gave any reasons.

57. In support of her submission as to jurisdiction, Ms Palin referred me to Paragraph 4.21 of the Practice Direction to CPR Part 52 (52PD11). This reads:

> "4.21 If the appeal court refuses permission to appeal on remaining issues at or after an oral hearing, the application for permission to appeal on those issues cannot be renewed at the appeal hearing. See section 54(4) of the Access to Justice Act 1999."

58. The Access to Justice Act 1999 s.54(4) provides:

> "(4) No appeal may be made against a decision of a court under this section to give or refuse permission (but this subsection does not affect any right under rules of court to make a further application for permission to the same or another court)."

59. Part 52.17 includes the following provision:

> "(1) The Court of Appeal or the High Court will not reopen a final determination of any appeal unless –
>
> (a) it is necessary to do so in order to avoid real injustice;
>
> (b) the circumstances are exceptional and make it appropriate to reopen the appeal; and
>
> (c) there is no alternative effective remedy.
>
> (2) In paragraphs (1), (3), (4) and (6), "appeal" includes an application for permission to appeal. …
>
> (4) Permission is needed to make an application under this rule to reopen a final determination of an appeal even in cases where under rule 52.3(1) permission was not needed for the original appeal.
>
> (5) There is no right to an oral hearing of an application for permission unless, exceptionally, the judge so directs.

> (6) The judge will not grant permission without directing the application to be served on the other party to the original appeal and giving him an opportunity to make representations.
>
> (7) There is no right of appeal or review from the decision of the judge on the application for permission, which is final.
>
> (8) …..

60. In support of her submission Ms Palin cited *Fieldman v Markovic* (July 4, 2001) Sir Andew Morritt V-C, which in turn is cited with approval by May LJ in *James v Baily Gibson & Co* [2002] EWCA Civ 1690. However, these authorities must now be read subject to CPR52.17 which was introduced by the Civil Procedure (Amendment No 4) Rules 2003 (SI 2003 No 2113).

61. In addition, I considered the overriding objective. One consideration of particular concern in a case such as this is CPR1.1(2)(c), the need to deal with a case in ways which are proportionate to the amount of money involved, the importance and complexity of the case and the financial position of each party. By way of comparison, where false imprisonment is established against the police (as was the case in *Ogle*), the guideline for damages for the first hour of detention is £500 (*Thompson v Commissioner of Police for the Metropolis* [1988] QB 498).

62. I also considered the judgment of the Court of Appeal delivered on 16th March 2005 in *The Convergence Group plc v Chantrey Vellacott* [2005] EWCA Civ 290. In that case the Court considered that where the Judge had not in terms addressed a particular question, then that was a "compelling reason" within CPR 52.3(6) why permission to appeal should be given (alternatively, under CPR 52.13(2), for the Court of Appeal to permit an appeal from the High Court which was itself made on appeal).

63. I formed the provisional view that the circumstances of this case are truly exceptional:

    i) There is no record of any reasons given by the Master;

    ii) The Master and Mitting J had to proceed on what the Bank now accept to be the mistaken basis that the 1996 record had been deleted when in fact it had not;

    iii) No doubt in large measure as a result of the foregoing, Mitting J gives no reasons for holding that the claim under s.14 had no real prospect of success, and the reasons he gave for holding that the claim under s.13 had no real prospect of success appear to be based on a mistaken view of the nature of the claim.

64. Accordingly, I considered whether I should treat the Claimant as having made an application under CPR52.17(4) to re-open the determination of his application for permission to appeal pursuant to CPR52.17(1) and (2).

65. Before reaching a final judgment I provided a copy of this judgment in draft to both parties, and offered the Bank an opportunity to make further representations pursuant to CPR52.17(6), if so advised, such representations to be addressed in particular to the

questions why I should not take the view that each of the conditions in CPR52.17(1)(a), (b) and (c) is satisfied, and that the Claimant has a real prospect of success in his claims under ss13 and 14 of the 1998 Act, both in relation to the period 1996 to 2nd June 2004 and in relation to the disclosure made to the police on 3rd June.

66. In response to that invitation both parties made further written submission, a Second Supplemental Submission for the Defendant dated 5th May and one by the Claimant dated 5th June (time having been extended to him). I have made some alterations to the draft of the preceding paragraphs of this judgment after reading these further submissions.

67. Ms Palin submitted that the Claimant's application for permission to appeal could not be re-opened consistently with the guidance of the Court of Appeal in *Taylor v Lawrence* [2002] EWCA Civ 90; [2003] QB 528 and *Re U (a child)* [2005] EWCA Civ 52. The latter was a case involving fresh evidence and at para 22 the Court said:

> "In our judgment it must at least be shown, not merely that the fresh evidence demonstrates a real possibility that an erroneous result was arrived at in the earlier proceedings (first instance or appellate), but that there exists a powerful probability that such a result has in fact been perpetrated. That, in our view, is a necessary but by no means a sufficient condition for a successful application under CPR 52.17(1). It is to be remembered that apart from the requirement of no alternative remedy, "[t]he effect of reopening the appeal on others and the extent to which the complaining party is the author of his own misfortune will also be important considerations" (*Taylor v Lawrence*, 547). Earlier we stated that the *Taylor v Lawrence* jurisdiction can only be properly invoked where it is demonstrated that the integrity of the earlier litigation process, whether at trial or at the first appeal, has been critically undermined. That test will generally be met where the process has been corrupted. It may be met where it is shown that a wrong result was earlier arrived at. It will not be met where it is shown only that a wrong result may have been arrived at."

68. The present case does involve fresh evidence in so far as the Bank have informed the Court that the record they had previously said had been deleted had not in fact been deleted.

69. Secondly, Ms Palin submits that there is no jurisdiction to re-open the application for permission to appeal because CPR Part 52.17(8) states "The procedure for making an application for permission is set out in the practice direction" and the Practice Direction provides:

> "25.4 The application for permission must be made by application notice and supported by written evidence, verified by a statement of truth. "

70. The Claimant has now made an application by his letter dated 5th June. It does not seem to me that the Practice Direction goes to jurisdiction. The matter having

progressed in the way I have described in this judgment, no purpose would be served by requiring the Claimant to issue an application notice. In any event, the fresh evidence has emerged from the Bank's side, and the Claimant has nothing to add to that.

71. The Claimant's points under ss.13 and 14 of the Act require to be considered separately, because the fresh evidence is fundamental to the s.14 point, but very much less important to the s.13 point.

72. So far as the point under s.14 is concerned, Ms Palin makes a number of points, of which the following seem to me to be the most important. First she submits that this is not a case where the process or integrity of the proceedings has been critically undermined. I shall return to this point.

73. Further, she submits that the Bank's mistake in misleading the Claimant and thus the court was an honest one. While I do not wish to suggest that I doubt that, I have to say that neither can I accept it simply on the documentary evidence from the Bank. The Claimant is suspicious, and would wish to test that contention. I cannot say that the events that have occurred have been fully explained.

74. Further, Ms Palin submits that "there is no reference in the Claim Form or Particulars of Claim to an order for rectification". As noted above, she has also submitted that it was squarely before Mitting J, because it was expressly set out in the Appellant's Notice. It is true that the pleading suffers from the lack of precision that is common, and understandable, where a complicated statement of case is drafted by a litigant in person. But if the action were to go to trial the court would not refuse relief by way of rectification on the sole ground that it is not pleaded. The relevant data protection principles are pleaded (principles 4 and 5). Further it seems to me that this pleading point cannot assist the Bank. If (contrary to my view) it be the case that Mitting J did not have to give reasons rejecting it, because the point is not sufficiently pleaded, then it would be open to the Claimant to start fresh proceedings.

75. So far as the point under s.13 is concerned, the disclosure that the 1996 record had not in fact been deleted adds little to the Claimant's claim. He does not claim that he has been refused financial services since July 2004. On this point the only defect in the procedure is that the Master gave no reasons at all, and that the reasons of Mitting J do not cover all the points. I accept that it cannot suffice for the purposes of CPR 52.17 that a judge hearing an appeal on a point for which permission was given takes a different view on a second point from the judge who gave permission on the first point but refused permission to appeal on the second point. Something more is clearly required.

76. However, Ms Palin accepts that Mitting J does not say why the facts that the Claimant was kept waiting at the Bank, and his claim to have been refused banking facilities since 1996, should not count as damage for the purposes of s.13. She does not submit that the Bank is not the data controller. She submits that there are reasons that could be given for dismissing the claim under s.13 as having no real prospect of success. I am not told whether these were reasons that were advanced before the Master, or indeed what arguments were advanced before the Master. No reasons could have been advanced by the Bank before Mitting J, because the Bank were, of course, not represented at that hearing. The main point advanced is that the Claimant has no

evidence that the information was disclosed by the Bank, or that the Bank gave any responses to enquiries about the Claimant which were adverse to him. However, that seems to me to be a point which is fit for investigation, on the principles stated in *Three Rivers*. The allegation that he has been refused banking facilities has been made by the Claimant, and cannot be dismissed at this stage.

77. In relation to the overriding objective, Ms Palin draws my attention to offers that have been made by the Bank to compensate the Claimant. An open offer was made in the total sum of £520 by letter dated 12th July 2004. She submits that the case is now within the principles set out in *Dow Jones v Jameel* [2005] EWCA Civ 75, "the game will not be worth the candle".

78. Finally Ms Palin submits that if I were otherwise minded to re-open the application for permission, I should instead remit the matter to Mitting J to give further reasons, as suggested in *English v Emery Reimbold* [2002] EWCA Civ 605 at para 25. That does not seem to me to be the appropriate course in this case. Mitting J was hearing an application for permission attended by the Claimant litigant in person alone on what is a new and difficult area of the law. I have had the benefit of extensive submissions from counsel, as well as the Claimant. A trial judge will almost always be in a better position to give reasons than an appellate court hearing an application to re-open an appeal. The same cannot always be said for a judge who refused permission to appeal on a hearing attended only by the applicant.

79. In my judgment the present case is exceptional for the reasons given in paras 62 and 63 above. Taken together these points do appear to me sufficiently to undermine the process to make it necessary to re-open the appeal on the points under ss13 and 14 of the Data Protection Act 1998. Whether in the event the Claimant can make good his claim, and if so, whether any compensation awarded is likely to exceed the sums already offered is not a matter on which I can express any view. The only question before the Master was whether the claims should be struck out or dismissed under CPR Parts 3 or 24. But likewise I cannot say that the game is not worth the candle. If justice is to be done, and seen to be done, I can see no alternative.

80. It follows that I shall take the exceptional course of ordering that the appeal be re-opened in relation to these two points only. The submissions in this case appear to me to have covered not only whether the appeal should be re-opened, but how it should be disposed of. However, I shall hear submissions on that, if requested to do so, when this judgment is handed down. Subject to any further submissions that may be available to be made at that time, I would be minded to grant permission and allow the appeal in so far as it relates to these two points only, in addition, of course, to the slander point which I decided separately in para 25 above.