Consent in digital marketing: Court of Appeal rejects a subjective test

Establishing consent in digital marketing often turns on small acts: ticking a box, accepting a cookie banner or opting in to digital marketing. In *RTM v Bonne Terre Ltd*, these familiar mechanisms came under scrutiny where an individual alleged that a betting company unlawfully profiled him and sent targeted direct marketing that fed his compulsive behaviour, increasing his gambling losses (*[2026] EWCA Civ 488*). He argued that his apparent consent was not validly or freely given due to his gambling addiction and associated vulnerability.

The Court of Appeal examined what must be proved to establish consent for cookies, personal data processing and direct marketing communications, and, in particular, whether the consent underpinning all three has a subjective aspect.

Definition of consent

In *RTM v Bonne Terre Ltd*, the relevant events occurred over a period that straddled the coming into force of the General Data Protection Directive (*2016/679/EU*) (GDPR) on 25 May 2018 (*[2026] EWCA Civ 488*). This meant that the issues engaged the Data Protection Act 1998, the Data Protection Directive (*95/46/EC*), the Privacy and Electronic Communications Regulations 2003 (*SI 2003/2426*), the e-Privacy Directive (*2002/58/EC*), and the GDPR. It was common ground that consent has the same meaning across these instruments.

The definition of consent in Article 4(11) of the GDPR is pivotal: "consent" means any freely given, specific, informed and unambiguous indication of the data subject's wishes by which, by a statement or clear affirmative action, they signify agreement to the processing of personal data. Article 7 of the GDPR places the burden on the data controller to prove that those criteria are met; in litigation, this must be proved on the balance of probabilities. Recital 43 of the GDPR says that consent should not be treated as a valid legal basis where there is a clear imbalance between the individual and the data controller.

The factual backdrop

Bonne Terre Limited and Hestview Limited operated an online betting and gaming business under the trading name Sky Betting and Gaming (SBG). RTM, who was anonymised in the proceedings, was a former problem gambler who had overcome his addiction by early 2019. The claim concerned the previous two years during which SBG placed cookies on RTM's devices or browser, processed his personal data and sent him targeted direct marketing.

RTM alleged that these activities were unlawful, caused him to gamble more and lose more than he otherwise would have done, and caused him financial loss and distress. It was accepted that RTM had taken deliberate steps indicating his consent to marketing and cookies, and that consent was refreshed after the General Data Protection Regulation (*2016/679/EU*) (GDPR) began to apply (*see box "Definition of consent"*).

High Court decision

The High Court treated the issue as whether RTM had given legally operative consent. It held that he had not, and identified three elements of valid consent:

- Good quality subjective consent.
- A fully autonomous choice.
- Minimum evidential standards for proof.

Although RTM had taken deliberate actions indicating consent, the court found that, on balance, the three criteria had not been met, including because he lacked subjective consent and the autonomous quality of his consenting behaviour was impaired to a real degree. This led to the conclusion that the consent was insufficiently freely given.

SBG appealed on a number of grounds, including that the court had erred in law in its approach to valid consent. The Information Commissioner's Office (ICO) intervened in the appeal to assist the court.

Court of Appeal's finding on consent

The Court of Appeal allowed the appeal on all of the grounds raised and set aside the High Court's decision. Its core conclusion was that, in this context, the test for consent is essentially objective.

The court explained that the main question is whether RTM gave consent. To prove consent, a data controller must show that the data subject made a statement or took some other clear affirmative action that amounts to an indication of wishes signifying agreement. These are objective questions about the quality and significance of an identifiable communication to the data controller, typically by ticking a box or taking a similar step.

The data controller must also prove that the indication was freely given, specific, informed and unambiguous. The court held that these criteria are objective and must be assessed in context, including, in particular, the communications between the parties and the structural character of the relationship between them. It rejected the High Court's three-stranded analysis as legally mistaken, finding no support in the authorities for a requirement of high-quality, individuated subjective consent.

The court stressed that the concept of consent must be uniform. While its application may depend on the context, the concept itself cannot vary according to the facts of a particular case or the category of case. For that reason, and because a subjective test would leave even well-designed consent processes exposed to what the court described as an "irreducible minimum risk", the court considered that the High Court's approach would create legal and practical uncertainty.

Critically, the court held that, in order to prove consent, a data controller does not have to prove what was actually in the individual data subject's mind at the time of the indication. It is therefore neither necessary nor relevant to explore whether the individual is vulnerable or has an impaired ability to make fully autonomous decisions. The High Court's decision on liability was therefore vitiated by error of law. The court also treated recital 43 of the GDPR (recital 43), in this context, as

being concerned with structural imbalance in the relationship between the data controller and data subject (for example, employer and employee), rather than the actual individual circumstances of a data subject.

Other grounds of appeal

The other main ground of appeal was that the procedure had been unfair because the High Court had decided the case on the grounds that the parties had insufficient opportunity to argue; that is, its three-part subjective analysis of consent. While the court's decision on consent rendered this ground of appeal "academic in one sense", it agreed that SBG had not been given a sufficient opportunity to address these points.

Another ground of appeal related to whether RTM had given his consent to direct marketing on a specific date. The court held that, on the High Court's factual findings, RTM had indicated his wishes signifying agreement to direct marketing, even though the High Court could not definitively identify the mechanism. Certainty is not required and, on the evidence, the most likely mechanism was that he had ticked a box to opt in.

SBG had argued that it had not been open to the High Court to find that cookies were used to send RTM the direct marketing that was complained of. The court agreed. There was no evidence that information derived from cookies was used for that purpose. The evidence was that SBG's user profiles were constructed in other ways, mainly from transaction data.

SBG and the ICO also argued that where a data controller knows or ought to know that a data subject is vulnerable, this may create a clear imbalance of power so that consent is unlikely to be freely given. The court rejected this approach, in part because it would place data controllers in the position of having to prove negatives once a data subject has alleged that they are vulnerable. The court also referred to Article 8 of the GDPR, which provides for additional safeguards to apply to consent where online services are offered to children, noting that where the legislation requires additional verification steps, as here, it says so expressly.

Practical implications

In its efforts to preserve legal certainty, this judgment sits slightly uneasily with the more nuanced approach reflected in the European Data Protection Board's and the ICO's guidance on consent, and in recital 43, in particular (*https://ico.org.uk/for-organisations/uk-gdpr-guidance-and-resources/lawful-basis/consent/; www.edpb.europa.eu/sites/default/files/files/file1/edpb_guidelines_202005_consent_en.pdf*). At the same time, the decision will be welcomed by businesses that rely on consent because it confirms that the analysis remains objective and capable of being applied with reasonable certainty.

The harder questions may now lie elsewhere: in the fairness requirement under Article 5(1)(a) of the UK GDPR, in the design and targeting of personalised marketing, and in sector-specific rules where vulnerability is more explicitly addressed, including under the consumer duty in the financial services sector (*see feature article "The FCA consumer duty: breaking new ground", www.practicallaw.com/w-037-6421*).

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