The *Safari Workaround* decision

By Noel Dilworth

On 8 October 2018, Warby J handed down judgment rejecting a representative claim against Google on behalf of a class of iPhone users (*Lloyd v Google LLC* [2018] EWHC 2599 (QB)). Whilst the principal conclusion was that the particular form of damage claimed – breach of data protection rights - was not actionable per se, the wider comments on representative actions will force claimants and funders to think carefully about the future of class actions generally.

Breach of Data Protection Principles

1. Data protection is the means by which rights of privacy are respected. It might be assumed that, wherever there is a breach of data protection principles, privacy is infringed and there ought to be some practicable remedy in law available for that infringement. That proposition looks in doubt following Warby J's decision (in which Henderson Chambers' Oliver Campbell QC appeared for the Claimants). The Claimants' allegation was that, over some months in 2011-2012, Google acted in breach of that duty by secretly tracking the internet activity of Apple iPhone users, collating and using the information it obtained by doing so, and then selling the accumulated data. The method by which Google was able to do this is generally referred to as "the Safari Workaround". Thus it was that Warby J had to determine whether, as a matter of principle, the breach itself was sufficient to sound in damages.

2. The nub of Warby J's decision on the actionability of damages was contained in paragraphs 54 – 57. Having identified three potential alternative bases: "*[1] the infringement of their data protection rights, … [2] the commission of the wrong and [3] loss of control over personal data*" (para 23), his Lordship held that none of them was sufficient to justify compensation under the DPA. Focusing on the statutory construction of section 13(1) of the Data Protection Act 1998 (the "DPA"), he held that the necessary conditions were (a) there had to be a contravention of a DPA requirement and (b) as a result, the claimant needs to have suffered damage. The right to compensation was defined by reference to "that damage". Thus, "*The infringement and the damage are thus presented as two separate events, connected by a causal link.*" (para 55)

3. Contrasting it with Tugendhat J's decision in relation to individual actions for distress on similar underlying facts in *Vidal-Hall v Google Inc* [2014] EWCA Civ 311, Warby J observed, "*the Court of Appeal concluded that the Charter requires the remedy of compensation where distress has been suffered as a result of a breach of duty. It cannot realistically be said that the same is true where the breach of duty has caused neither material loss nor emotional harm, and has had no other consequences for the data subject.*" (para 57) The distinguishing feature was the seriousness of the breach as it affects the subject's Article 8 rights.

Representative Actions

4. Although the claim was disposed of primarily on DPA grounds, it was the Court's approach to the availability of the representative action that was of more interest to group litigation specialists.

5. It is worth bearing in mind the specific circumstances of the particular claim:
    a. Mr Lloyd was the only named claimant, suing not only on his own behalf, but also in a representative capacity on behalf of a class of other residents of England and Wales who are also said to have been affected by the Safari Workaround in this jurisdiction ("the Class").
    b. The claim was for, in the language of the DPA, "compensation".
    c. No other remedy was sought. No financial loss or distress was alleged.
    d. The claim was for an equal, standard, "tariff" award for each member of the Class, to reflect the infringement of the right, the commission of the wrong, and loss of control over personal data.
    e. Alternatively, each Class member was said to be entitled to the value of the use to which the data were wrongfully put by Google.
    f. On either basis of recovery, more than nominal damages was said, in each case, to be recoverable. Ranges for the tariff were mooted in argument, and a figure of £750 was advanced in the letter of claim.

6. There was no dispute that the Representative Claimant, Richard Lloyd, a former Executive Director of Which?, was appropriately qualified to act in the interests of the represented Class. He had the benefit of an advisory committee (including Sir Christopher Clarke and luminaries of the financial services world). A "Notice and Administration Plan" had been devised, by which the Class would be notified of any significant developments in the case; the administration of requests to withdraw from the claim; and proposals for each class member to make their claim, if the representative action succeeds. The authors of this plan were an international communications consultancy; a provider of legal services and technology; and "class action notice experts". Funding was adequate and appropriate measures were taken for adverse costs insurance and for distribution to self-identifying claimants, or as appropriate.

7. Thus, turning to CPR r.19.6, Warby J noted that, in contrast to group litigation, a representative action may be brought without first seeking the permission of the court, although it would be subject to the Court's control. Moreover, the Court's control could extend to ousting the representative role played by a Claimant (para 44). Warby J conclusions on the facts are set out at paragraph 82ff. In summary:
    i. The essential requirements for a representative action were absent. The Representative Claimant and the Class do not all have the "same interest" within the meaning of CPR 19.6(1).
    ii. There were insuperable practical difficulties in ascertaining whether any given individual is a member of the Class.
    iii. The Court's discretion would in any event be exercised against the continuation of the action as a representative action.

8. There was no dispute that the sheer number of persons falling within the class (estimated to be between 4.4 million and 5.4 million) would not preclude the making of a representative action (para 86). Rather, Warby J focussed on three submissions. First, in order to have the "same interest", persons falling within the class represented needed to have a common interest and a common grievance. Second, the existence of disagreements between the class and even on the quantum of damages did not preclude a representative action. Third, a representative claimant may represent a class, even if the members of that class have been affected by the defendant's actions in different ways.

9. Warby J concluded (para 92) that it could not be supposed that the breach of duty or the impact of it was uniform across the entire Class membership; on the contrary, it was "*inevitably the case that the nature and extent of the breach and the impact it had on individual Class members will have varied greatly.*" Moreover, as

regards the requirement to identify all the class members, Warby J decided (para 94) that, on the evidence before him, it was "*not possible to identify and exclude unaffected users.*" Further, he identified (Para 95) two risks in the implementation of the scheme: "*A person might come forward honestly to claim compensation which was not in fact due. Or there might be abuse.*"

10. Even on the question of the discretion to be exercised, Warby J indicated that he would not have exercised his discretion in favour of representative status. The main purpose of CPR 19.6 is "*to provide a convenient means by which to avoid a large number of substantially similar actions*" which would not have been satisfied. He recognised that the individual claims were not viable as stand-alone litigation, and a GLO was impracticable, so that this representative action was, in practice, the only way in which these claims can be pursued. However, he rejected the argument that this favours the continued pursuit of the representative action. His description of the litigation as "officious" was perhaps harsh.

Implications

11. The decision is not immune to criticism. Much of the discussion of the representative action is predicated on the Judge's findings under the DPA. If, however, breach of the DPA were found to be actionable per se, then the arguments militating against a representative action are very much emasculated. It cannot be the case that disagreements within a class should weigh against the making of a representative action where a tariff was, in any event, recoverable, for the breach per se. The natural "workaround" for the risk of persons falling within the class suffering damage in excess of the breach would have been either to decline the payment from the representative action or to seek permission to claim further damages. In any event, given the expiry of the limitation period, such a

fear was, in practice, illusory. As to the risk of abuse, it is, of course, open to the Court to set conditions requiring self-identifying claimants to meet stringent evidential criteria for proof of entitlement to payment.

12. A more far-reaching and even more controversial argument curried the Court's favour, when it was accepted that, for the purposes of a representative action, every member of the class had to have suffered "*the same damage (or their share of a readily ascertainable aggregate amount is clear).*" (para 86). That requirement constitutes a step beyond the wording of CPR r.19.6 and is difficult to reconcile with other authorities, such as *Millharbour Management Ltd & 79 ors v Weston Homes Ltd & anr* [2011] EWHC 661 (TCC), where Akenhead J held that the threshold of "same interest" was established for various owners of flats in buildings with one communal entrance where complaint was made about hot water supply, creating excessive heat in the common parts. The Claimants there had not suffered the "same damage", as exemplified by the complaint about rotting wood on the balconies as a result. To the extent that an aggregate amount could be claimed, it was neither readily ascertainable, nor clear.

13. This decision marks another road-block in the development of class actions this side of the Atlantic (see previous Alerter from the Product Liability and Group Actions practice group). Whilst the Judge considered that the way in which the Claimants had gone about administrative arrangements for funding and adverse costs and in their selection of a Claimant was nigh on impeccable, funders and Claimants need to pay heed to a number of factors to which Warby J had particular regard. In particular:
    1. The definition of the class needed constant re-evaluation in the light of the complexity of the underlying facts;

2. A more principled approach to calculating the tariff might have been more attractive. The disdain with which Warby J characterised the figure of £750 mooted by the Claimants was thinly veiled.
3. Measures to protect against abuse of any winnings is vital for the fair and principled distribution in the event of success.

14. Warby J refused permission to appeal. Mr Lloyd has made public statements to the effect that he is considering an appeal.

Noel Dilworth is Secretary of Henderson Chambers

Product Liability and Group Actions Practice Group

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