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Permission to serve out in representative actions

4 October 2019

Court of Appeal gives green light to consumer rights campaigner in 4 million person strong representative action against Google

On 2 October 2019, the Court of Appeal, in a unanimous judgment given by Sir Geoffrey Vos, Chancellor of the High Court, upheld the Claimant's appeal in the case of *Richard Lloyd v Google LLC* [2019] EWCA Civ 1599. The Court of Appeal reversed the decision of the court below and gave Mr Lloyd permission to serve Google LLC outside the jurisdiction (in the US), enabling him to proceed with his representative action. The class he represents is composed of an estimated 4 million Apple iPhone users. Any substantive judgment will prove interesting in demonstrating the role of representative and group actions in the space of consumer rights at the intersection of tech and information rights. Google LLC, however, has confirmed that it intends to appeal this procedural point to the Supreme Court.

Oliver Campbell QC was instructed by Mishcon de Reya LLP for the Appellant / Claimant.

BACKGROUND

1. Richard Lloyd, the Claimant, campaigns for consumer rights. He is a former director of the consumer rights group Which? and in April 2019 became a member of the board at the FCA.

2. He alleges that Google LLC secretly tracked aspects of the internet activity of some 4 million Apple iPhone users between 9 August 2011 and 15 February 2012.

3. Many readers will be familiar with the concept of 'cookies'. These enable the placer of the cookie on a website to identify and track internet activity undertaken by a device. 'DoubleClick Ad Cookies' were developed by Google LLC to enable the delivery and display of internet based adverts. Exceptions created to Safari's default settings (an Apple designed browser) in place until March 2012, enabled Google LLC to devise and implement the 'Safari Workaround': "*Stripped of its technicalities, its effect was to enable Google to set the DoubleClick Ad cookie on a device, without the user's knowledge or consent, immediately, whenever the user visited a website that contained DoubleClick Ad content.*" (Warby J in the court below at paragraph 10).

4. Put even more simply, Google LLC were allegedly able to collect information about visits made by the devices to websites which contained adverts from Google's advertising network. Ultimately, Google were able to identify not just details such as period of time spent on a particular website, but, in some cases, approximate geographical location of the device and even information as to race, religion, ethnicity and sexual orientation.

5. Mr Lloyd's claim alleges breach of statutory duty under section 4(4) of the Data Protection Act 1998 and seeks, on behalf of the represented class, damages under section 13 of the Data Protection Act 1998 for infringement of data protection rights commission of the wrong and loss of control over data protection rights.

DECISION AT FIRST INSTANCE – [2018] EWHC 2599 (QB)

6. The issue before Warby J was a procedural one – whether permission should be given for service out of the jurisdiction.

7. The judge provided an uncontroversial summary of the various aspects of the law governing service of tort claims out of the jurisdiction. The only point he identified as needing consideration was paragraph 3.1(9) of PD 6B – in essence whether the Safari Workaround caused damage or counted as damage for the purposes of that paragraph such that the Claimant could be given permission by the court to serve out.

8. This led to further questions – whether the claim identified any reasonable basis for seeking compensation under the Data Protection Act and whether there was any real prospect that the court would permit the claim to continue as a representative action under CPR Part 19.6. As to the first, the Judge decided there was no basis. As to the second (which the judge said he did not need to decide owing to his initial conclusion but would consider in any event) the judge found that the "*non-bendable*" (paragraph 83) threshold point was whether all the claimants had the same interest in the claim. The judge found that the breach of duty and the impact was not uniform across the class such that there was no realistic prospect that the court would permit the claim to continue.

THE COURT OF APPEAL'S DECISION – [2019] EWCA Civ 1599

9. The Court of Appeal, with a bench composed of Dame Victoria Sharp, President of the Queen's Bench Division, Sir Geoffrey Vos, Chancellor of the High Court, and Lord Justice Davis found unanimously in favour of Mr Lloyd.

10. The Court of Appeal considered three issues and its conclusions in relation to each appear at paragraphs 70, 81 and 87, as confirmed at 88-90. The analysis of each issue is addressed below.

11. **Issue 1:** Was the judge right to hold that a claimant cannot receive uniform per capita damages for infringement of their data protection rights under section 13 without proving pecuniary loss or distress?

    a. The Court of Appeal read section 13 in the context of the Data Protection Directive 95/46/EC, Article 8 of the Charter of Fundamental Rights of the European Union 2012/C 326/02 and the case of *Gulati v MGN Limited* [2015] EWHC 1482 (Ch); [2015] EWCA Civ 1291 (CA).

    b. *Gulati* was a phone hacking case brought in the tort of misuse of private information. Mr Lloyd relied heavily on an analogy with the current case. The Court of Appeal agreed: *Gulati* is "*(a) relevant, albeit strictly not biding on us as it was not a decision on the SPA, and (b) applicable by analogy for three main reasons. First, both MPI and section 13 derive from the same core rights to privacy. Secondly, since loss of control over telephone data was held to be damage for which compensation could be awarded in Gulati, it would not be wrong in principle if the represented claimants' loss of control over BGI data could not, likewise, for the purposes of the SPA, also be compensated. Thirdly, the EU law principles of equivalence and effectiveness point to the same approach being adopted to the legal definition of damage in the two torts which both derive from a common European right to privacy*." (paragraph 57)

    c. In the event, the Court of Appeal determined that it was possible for damages to be awarded under the Data Protection Act even if there was no pecuniary loss or distress.

12. **Issue 2:** Was the judge right to hold that the members of the class did not have the same interest under CPR Part 19.6(1) and were not identifiable?

    a. The Court of Appeal found that he was not: "*the judge applied too stringent a test of "same interest", partly I think because of his determination as to the meaning of "damage". Once it is understood that the claimants that Mr Lloyd seeks to represent will all have had their BGI – something of value – taken by Google without their consent in the same circumstances during the same period, and are not seeking to rely on any personal circumstances affecting any individual claimant (whether distress or volume of data abstracted), the matter looks more straightforward. The represented class are all victims of the same alleged wrong, and have all sustained the same loss, namely loss of control over their BGI…once the claim is understood in the way I have described, it is impossible to imagine that Google could raise any defence to one represented claimant that did not apply to all others. The wrong is the same, and the loss claimed is the same.*" (paragraph 75)

    b. The Court of Appeal went on to conclude that the members of the class were identifiable.

13. **Issue 3:** Can the judge's exercise of discretion be vitiated?

    a. The Court of Appeal found that the judge below had taken two irrelevant matters into account in exercising his discretion: (1) the inability to identify the members of the class and (2) that the members of the class had not authorised the claim.

    b. The Court of Appeal disagreed on the first – the class was identifiable – and it relied on authority which confirmed that no such authorisation was necessary as to the second.

KEY TAKE AWAY POINTS

14. The decision has important ramifications for data protection law and also for collective proceedings. Breaches of the Data Protection Act are common place, and often inadvertent. The Court of Appeal concluded such breaches may be actionable even if the data subject has not suffered any financial loss or distress.

15. The potential ramifications for collective actions are, arguably, even more significant. A representative action has never previously been permitted to proceed for anything like this size of group. Further, as accepted by the Court of Appeal, the members of the group have been affected by Google's alleged breach in different ways. The Court has concluded that, although they have been affected by the breach in different ways, they have the same interest in the claim because they are claiming the same uniform loss. Mass tort claims where each of the claimants has suffered a modest loss are often unviable or uneconomic as group actions subject to a GLO. This decision may open the way for some mass-tort claims to be brought as representative actions.

CONCLUSION

16. The Court of Appeal rejected the judge below's characterisation of this claim as "*officious litigation*" stating:

> "*To the contrary, this case, quite properly if the allegations are proved, seeks to call Google to account for its allegedly wholesale and deliberate misuse of personal data without consent, undertaken with a view to commercial profit. It is not disproportionate to pursue such litigation in circumstances where, as was common ground, there will, if the judge were upheld, be no other remedy. The case may be costly and may use valuable court resources, but it will ensure that there is a civil*

> *compensatory remedy for what appear, at first sight, to be clear, repeated and widespread breaches of Google's data processing obligations and violations of the Convention and the Charter.*" (paragraph 86)

17. Although the judgment concerns an early procedural issue in a claim which is likely to take some time to run its course, the Court of Appeal's judgment gives indications as to how representative actions may be used, especially in the developing space of tech and information rights but also potentially in other fields.

Beatrice Graham
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