A BLOW FOR COLLECTIVE REDRESS IN THE UK?
Lloyd v Google [2021] UKSC 50

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Those familiar with Competition law will be aware that collective proceedings before the Competition Appeal Tribunal are burgeoning. And it might have been hoped that the Consumer Rights Act 2015, and the recent flurry of collective proceedings that have been certified by the Tribunal following the Supreme Court judgment in *Mastercard v Merricks* [2020] UKSC 51, would have blazed a trail for collective redress in the United Kingdom – that where the Consumer Rights Act led, CPR Rule 19 might follow. There is a sore need in the UK for an effective mechanism for collective redress:

> *"...The mass production of goods and mass provision of services have had the result that, when legally culpable conduct occurs, a very large group of people, sometimes numbering in the millions, may be affected. As the present case illustrates, the development of digital technologies has added to the potential for mass harm for which legal redress may be sought." Lloyd v Google* [2021] UKSC 50, para 67

The Supreme Court's judgment in *Lloyd v Google* [2021] UKSC 50 has provided much needed clarification of the scope of the representative action procedure in CPR Rule 19.6, and for some types of claim the way is now clear for claimants to seek collective redress in the High Court. For other types of claim, however, and for data protection claims in particular the judgment has severely curtailed the prospect of the common law providing a solution.

[1] The comments made in this case note are wholly personal and do not reflect the views of Monckton Chambers, its members or its clients.

The procedural lacuna

The need for a collective redress mechanism has two facets.

The first is that where legally culpable conduct affects a very large number of people, those affected often do not have sufficient incentive to bring claims individually. For example, one would not expect to see an individual claim brought by a consumer who has paid a few more pennies on their electricity bill because of a cartel in the provision of gas insulated switchgear to National Grid; or who has paid a few more pennies on their food shop at Marks & Spencer because of HMRC incorrectly categorising teacakes as standard rated for VAT purposes; or, as in the *Lloyd v Google* case, who has had their personal data surreptitiously harvested by Google and sold to advertisers. Such claims are simply not large enough to justify the costs of proceeding individually.

The second is that it is often not practical for all those affected to join together and participate in a single claim. The cost of the legal team liaising with any one claimant in order to bring them into the proceedings may exceed the value of their individual claim; and, experience has shown that in practice many of those eligible to join a claim will choose not do so. In England & Wales, the procedure in CPR Rule 19.11 for a group litigation order made on an 'opt-in' basis is therefore of limited use.

The facts *Lloyd v Google*

The alternative procedure, which the claimant in *Lloyd v Google* hoped to utilise, is for a 'representative action' under CPR Rule 19.6. This Rule provides:

> (1) Where more than one person has the same interest in a claim –
>
> (a) the claim may be begun; or
> (b) the court may order that the claim be continued,
>
> by or against one or more of the persons who have the same interest as sentatives of any other persons who have that interest.

Mr Lloyd, with backing from a litigation funder, sought to bring a

representative action against Google LLC for breach of section 4(4) of the Data Protection Act 1998. The breach consisted of Google secretly tracking the internet activity of Apple iPhone users between August 2011 and February 2012, and collecting and selling their personal data.

Mr Lloyd's claim failed. The Supreme Court, agreeing with the High Court and overturning the Court of Appeal, held that permission to serve the proceedings on Google out of the jurisdiction should be refused, as the claim had no real prospect of success for the purposes of CPR Rule 6.36.

The scope of the representative action procedure

The importance of the Supreme Court's judgment in *Lloyd v Google* lies in its clarification of the scope of this procedure as it applies to claims for damages. Four particular points emerge:

1. This procedure is available when damage is an ingredient of the cause of action. The suggestion that the Court of Appeal's judgment in *Emerald Supplies v British Airways* [2010] EWCA Civ 1284 is authority to the contrary is not correct (paras 58 and 80);

2. If the damages can be calculated on a basis that is common to all the members of the class, then they can be claimed in a representative action. For example, where the members of the class were charged a fixed fee, or where the members of the class acquired the same defective product at the same price, or where the loss suffered by the class as a whole can be calculated without reference to the loss suffered by individual members of the class (para 82);

3. In the majority of cases, the compensatory principle will require that the damage suffered be assessed individually. This individualised assessment "*...raises no common issue and cannot fairly or effectively be carried out without the participation in the proceedings of the individuals concerned. A representative action is therefore not a suitable vehicle for such an exercise*" (para 80); and

4. In those cases where an individualised assessment of damages is required, there may be advantages in bifurcated proceedings, whereby a representative action is brought seeking a declaration on the common

issues, and individual determinations are dealt with subsequently (para 81).

In practice, the key question going forward will be: does this claim require an individualised assessment of damages? Is there any way of doing it on a common basis?

For some types of the claim, the answer may be yes. For data protection claims, the answer is that each case will need to be considered on its own facts, but probably no.

The representative action procedure in data protection claims

The essential problem faced by Mr Lloyd's claim was that the effect of Google's conduct was not uniform across the represented class. Some used the internet more heavily than others and therefore their data was processed unlawfully to a greater extent, and different information of different levels of sensitivity was taken from different users. That may or may not hold true on the facts of future cases. For example, if personal data were to be gathered at the point at which an app was downloaded then one can envisage that the effect of the conduct might be uniform across the class of people who downloaded the app.

In a case where the personal data which has been gathered is not uniform, in quality and in quantity, the Supreme Court's judgment makes clear that a representative action cannot be pursued other than on a bifurcated basis. The Justices rejected the claimant's attempts to calculate damages on a common basis across the members of the class:

a. It is not possible to determine damages on a uniform per capita basis by reference to the seriousness of the breach of the Data Protection Act 1998. Although it is possible to claim for a "loss of control" of private information, under the tort of misuse of private information (following *Gulati v MGN* Ltd [2015] EWCA Civ 1291), it is not possible to bring an equivalent claim for "loss of control" of personal data under section 13 of the Data Protection Act 1998. The legislation requires either "damage" or "distress", and "*cannot reasonably be interpreted as conferring on a data subject a right to compensation for any (non-trivial) contravention by a data controller of any requirements of the Act without the need to*

prove that the contravention has caused material damage or distress to the individual concerned" (para 138);

b. It is also not possible to determine damages on a uniform per capita basis by reference to the amount which the class members could reasonably have charged Google for releasing it from its duties under the Data Protection Act 1998. Although a claim for misuse of private information would lend itself to an award of "user damages", a claim under section 13 of the Data Protection Act requires proof of damage or distress (paras 141 and 143); and

c. The Supreme Court did not rule on whether it was open to the court to approve a representative claim to be pursued for only part of the compensation that any member of the class was entitled to; the 'irreducible minimum harm' that each had suffered (as Mr Lloyd called it), or the 'lowest common denominator' (as the Court of Appeal called it). However, it held that in that particular case even if it were not necessary to establish "damage" or "distress" for the purposes of section 13 of the Data Protection Act 1998 it would still nonetheless have been necessary to establish the extent of the unlawful processing in each individual case, in order to establish that members of the class were entitled to damages (para 147).

Much of the commentary that has emerged following the judgment has observed that Mr Lloyd's claim was brought under section 13 of the Data Protection Act 1998, and that the judgment is therefore confined to claims brought on that basis. That observation is strictly true. However, it is difficult to see any material difference in the wording of Article 82 of the GDPR that would lead to a different outcome in a claim based on the current regime. It is also difficult to see how the tort of misuse of private information could fill the gap in most cases: as the Justices observed (para 106), in *Vidal-Hall v Google* [2015] EWCA Civ 311 evidence was produced to demonstrate that the information was private in nature, and in Mr Lloyd's claim the view may have been taken that it would be necessary to adduce evidence of facts particular to each individual claimant to establish a reasonable expectation of privacy. Further, a determination of user value would require an assessment of the extent of the wrongful use actually made of the private information (para 157). The net result is that it is difficult to see much scope for representative actions for data protection claims going forward.

Conclusion

The judgment is, in legal terms, significant but not dramatic. The Justices have clarified the circumstances in which damages can be claimed using the representative action procedure, and the scope of damages that can be claimed under section 13 of the Data Protection Act 1998, but they have, in terms, declined to "*break new legal ground*" (para 108).

The impact of the judgment is, rather, the practical one that many species of legally culpable conduct affecting a very large number of people in the UK will continue to be unaddressed. For now, we have no effective mechanism for collective redress beyond the Competition law sphere, and the handful of cases that, on their facts, will be compatible with damages being calculated on a common basis across all the members of the class. In respect of data protection claims at least, the Supreme Court's judgment perhaps highlights one respect in which a departure from the European regime, post-Brexit, would be welcome and on which one might hope to see legislation being considered in the near future.

Gerry Facenna QC and Nikolaus Grubeck appeared for the Information Commissioner

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