Data protection claims and "damage": Lloyd v Google LLC [2018] EWHC 2599 (QB)

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Introduction

In **Lloyd v Google LLC** [2018] EWHC 2599 (QB), the court has shed further light on the limits of a claim for compensation for breach by a data controller of its statutory duty to comply with the data protection principles in relation to personal data. The duty is set out in section 4(4) of the Data Protection Act 1998 ("the DPA").

This was a claim brought against Google by Richard Lloyd, a former director of *Which*? and leader of the campaign group "Google You Owe Us" as a representative claimant representing a class of unknown individuals affected by the "Safari Workaround". The Safari Workaround was also the subject of the earlier claim in **Vidal-Hall v Google Inc** [2014] EWCA Civ 311 in which the Court of Appeal refused to strike out a claim for misuse of personal data and under the DPA. (That claim was settled pending an appeal to the Supreme Court).

Warby J held that the Representative Claimant was unable to show that the claim had a reasonable prospect of success, because he could not show that any individual had suffered any "damage" within the meaning of section 13 of the DPA. The court also made adverse observations on the attempt to use the representative action under CPR Part 19 as a form of US-style class action.

The Safari Workaround

In brief, Google had a cookie known as the DoubleClick Ad Cookie which it would place on a device such as an iPhone if the user visited a site which included content from Google's DoubleClick domain. Apple, the developer of the Safari browser, set the browser to block all third party cookies by default. However, Apple had also created some exceptions to that default setting, the so-called "Safari Workaround", which were in place between 9 August 2011 and 15 February 2012. As a result, during that period Google was able to collect significant amounts of personal data known as Browser Generated Information from users of the Safari browser without their consent. That data obviously had significant commercial value for advertisers.

The claim

Mr Lloyd therefore sought to bring a representative claim on behalf of the class of users affected by the Safari Workaround. Third party funding and ATE insurance were put in place, and the Claimant devised a plan for members of the class to make their claim if the representative action succeeded. The Claimant was advised by a distinguished Advisory Committee including a former Court of Appeal judge, Sir Christopher Clarke.

The claim came before the court in the form of an application for permission to serve Google with proceedings out of the jurisdiction. Since Google is a Delaware corporation with its principal place of business in California, the permission of the court was required. There was a fully contested application with argument on both sides.

The test applied

In order to obtain permission to serve out of the jurisdiction, the claimant has to show three things under CPR 6.37(1):

(1) that the claim has a reasonable prospect of success;
(2) that there is a good arguable case that each claim falls within at least one of the "gateways" in Practice Direction 6B, paragraph 3.1; and
(3) that England is clearly or distinctly the appropriate forum for the trial of the action.

Argument focused on the first two of these requirements, since Google did not dispute, and the judge found, that England was the most appropriate forum. The hurdle for the first requirement ("reasonable prospect of success") is a fairly low one: the claim must have a real and not fanciful prospect of success. The hurdle for the second requirement (that the claim falls within a gateway) is somewhat higher, and requires a "good arguable case", which means that the claimant has the better of the argument on the issue.

The relevant "gateway" relied upon was PD6B para 3.1(9) which permits service of a claim in tort where damage has either been sustained within the jurisdiction or results from an act committed in the jurisdiction. There is authority that a claim for breach of DPA section 4(4) is a claim in tort: see the first instance decision of Tugendhat J in **Vidal-Hall v Google Inc** [2014] EWHC 13 (QB) at [50]. The argument thus turned on whether the Claimant could show a good arguable case that the members of the class had suffered "damage". It was not disputed by Google that it was at least arguable that Google had committed breaches of statutory duty.

"Damage"

The Claimant did not contend that any of the members of the class had suffered pecuniary loss, or (as in **Vidal-Hall)** that the gathering of their personal data had caused them distress. The claim for damage was said to arise in three different ways:

(1) for infringement of data protection rights;
(2) for the commission of the wrong itself; and
(3) loss of control over personal data.

Each argument was dismissed by Warby J as not giving rise to a good arguable claim for "damage" within the meaning of the DPA.

Warby J said that the first two ways of putting the claim were merely descriptions of the tort itself (see paragraph 58). He held that the claim required proof not just of a contravention of the DPA but also of consequent damage. Damage need not be pecuniary: the Court of Appeal in **Vidal-Hall** held that "damage" could include the distress caused to the claimants as a result of being targeted to receive unwanted advertising. (The details were kept confidential, but it is not difficult to envisage a scenario in which, say, one member of a family carries out searches on the family computer which results in unwanted or embarrassing advertising being displayed to other users of the computer. It does not have to be porn: a surprise holiday or Christmas present might be ruined.).

However, there was no allegation of distress in the present case, and no suggestion that any particular individual had been targeted by unwanted advertising in a way which infringed the right to respect for their autonomy. Although it was said that the affected class of individuals had been

targeted to receive advertising by reference to their interests, as revealed by their browsing history, it was not suggested that this amounted to "damage".

It was also argued by the Claimant that the damage consisted in the individuals' loss of control over their personal data. That was an argument based on the phone-hacking case of **Gulati v MGN Ltd** [2015] EWHC 1482 (Ch), in which damages were awarded to the claimants for the tort of misuse of private information. The Court of Appeal upheld the decision and found that the claimants were entitled to compensation for "loss of control" of their private information: [2017] QB 149 at [45] to [48].

However, Warby said that the two torts (misuse of private information and breach of the DPA) were not the same, despite having a common source in Article 8 of the European Convention on Human Rights. He said that in **Gulati** the court had not awarded damages merely for the commission of the tort, without regard to the impact on the individuals affected, but as compensation for their loss of ability to control private information which was of real value to them, including the fact that one claimant had taken legal advice on a divorce (paragraphs 66 to 70). The court cannot and should not make an award of "vindicatory" damages to mark the fact that a wrong has been committed (paragraph 68).

Finally, it was argued by the Claimant that affected users were entitled to "user damages" reflecting the market value of the data which was misused by Google (or "negotiating damages", as they were referred to in **One Step v Morris-Garner** [2018] UKSC 20). This argument had already been rejected by Patten J in **Murray v Express Newspapers** [2007] EWHC 1908 (Ch) on the basis that the DPA does not create property rights in personal data, but merely establishes the way in which it can be processed. The claim was not analogous with cases where the defendant has wrongfully "helped itself" to the claimant's property right (such as a right to object to the building of houses in breach of a restrictive covenant).

Warby J said that it was "wholly artificial" to envisage some sort of bargaining process in which individuals negotiated for the fee they were willing to accept for the use of their personal data. Google does not offer a fee: what it offers is the opportunity to receive targeted communications. If the users do not wish to accept this, their only realistic option would be to refuse consent, in which case the premise of the "hypothetical negotiation" is unworkable. See paragraph 80.

Accordingly, Warby J found that the claim had neither a real prospect of success nor was there a good arguable case that it fell within the tort "gateway" in Practice Direction 6B.

Representative actions

Warby J also found that the claim had no reasonable prospect of success because the court should not permit it to proceed as a representative action. Representative claims can be brought where all the claimants have the "same interest": CPR 19.6(1). That requirement was not met in the case of the proposed class. The class might include users who had suffered "damage" in the form of distress, like the **Vidal-Hall** claimants, but it would also include users who had not. It would include both heavy users who had suffered multiple breaches, and people who used the internet relatively little. Google might therefore have a defence in relation to some users, but no defence in relation to others.

Further, it was not possible to identify the class with sufficient certainty, because it would not be possible to show which of the users had the Google Double-Click Ad Cookie placed on their device during the period when the Safari Workaround was in operation.

Finally, the judge had some harsh words for the attempt to bring what was in effect a class action on behalf of an unidentified group of people, none of whom had made a complaint on an individual basis. He said at paragraph 103:

> *"It would not be unfair to describe this as officious litigation, embarked upon on behalf of individuals who have not authorised it, and have shown no interest in seeking any remedy for, or even complaining about, the alleged breaches."*

Why was this claim dismissed when the claim in Vidal-Hall was not?

This claim could be seen as a failed battle by a consumer protection David against a big data Goliath. It sought to build on the success of the individuals in the **Vidal-Hall** case to seek redress for a much wider class of users in respect of the commercial exploitation of their personal data without their consent. It is an attempt by an experienced consumer rights campaigner to use the civil law to hold big data companies like Google to account for their actions in circumstances where an individual user will lack the appetite or resources for the battle. It is also worth noting that while Google has been fined US$22.5 million by the US Federal Trade Commission in respect of the Safari Workaround issue, no action has been taken by the English regulator, the Information Commissioner.

That was clearly not how the judge saw it, however. For him, there was a clear distinction between the **Vidal-Hall** case, in which named and identified claimants provided specific details as to how the unlawful use of their data had caused them distress, and the present case, which was generic and did not rely on any actual facts relating to particular claimants. It was particularly striking that, other than the **Vidal-Hall** claimants, no other user had complained about the Safari Workaround. He was also sceptical of the premise that unauthorised use of personal data of itself necessarily causes harm:

> "*I do not believe that the authorities show that a person whose information has been acquired or used without consent invariably suffers compensatable harm, either by virtue of the wrong itself, or the interference with autonomy that it involves*."

As far as Warby J was concerned, the role of the DPA is to protect those who have suffered actual damage (in the wide interpretation given to that term by the Court of Appeal in **Vidal-Hall**) and not to censure data companies for the mere fact of such breaches. If a public mark of disapproval is required, that is the role of the regulator, not the court. If the regulator's response is perceived to be inadequate: "*I do not believe the remedy is to fashion a means of imposing a further penalty by bringing a class action for compensation, based on an artificial notion of "damage*"(paragraph 75).

The size of the potential claim may have been its undoing. The class of affected users was estimated at different times as comprising between 4.4 million and 5.4 million people. At a suggested tariff of £750 per user, Google's potential liability (as it pointed out) was between £1 and £3 billion. No wonder the judge commented rather acidly that the main beneficiaries of the award would be the funders and the lawyers (paragraph 102). The judge also considered that the cost and

the considerable amount of court time which would have to be devoted to the case was disproportionate given the modest recovery proposed for individuals.

The lesson to be drawn from this case is that actions seeking to recover compensation for breaches of the DPA must focus on the position of the individual rather than inviting the court to make generic findings against the data processor. This case also underlines the continuing absence of any remedy of the class action in English law (outside the specific regime in competition cases introduced by the Consumer Rights Act 2015).

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