Data Privacy and Cybersecurity

Over Before They'd Begun: The End of the Road for Data Protection Class Actions? The UK Supreme Court in *Lloyd v Google LLC* [2021] UKSC 50

By: Kelly Hagedorn, Tracey Lattimer and Oliver Thomson

On 10 November 2021, the UK Supreme Court handed down its long-awaited decision in *Lloyd v Google LLC*[1]. In what will be seen as a landmark decision in the fields of data protection and collective actions in the UK, the Supreme Court found unanimously for Google and overturned the decision of the Court of Appeal. The Supreme Court's decision was also contrary to the Information Commissioner's preferred outcome. The claim will not now proceed (at least as currently formulated).

The judgment rejects the proposition that data subjects affected by a non-trivial breach of data protection law may recover compensation for the "loss of control" of their personal data under the Data Protection Act 1998 ("**DPA 1998**").[2] The Supreme Court decided that such claims may only succeed where each data subject, on an individual basis, can evidence some form of damage, such as distress or financial loss. The requirement that each claimant individually must show (i) a breach of their individual data rights, and (ii) damage as a result, is likely to prevent future large-scale representative actions for data protection breaches. Many such representative actions have been waiting on the sidelines pending the outcome of *Lloyd*. It seems likely that they will not now be funded and pursued.

Background

The case saw Richard Lloyd, a consumer activist, attempt to bring a claim against Google on behalf of approximately four million individuals allegedly impacted by a workaround affecting certain mobile phones in the period April 2011 to February 2012. Mr Lloyd sought damages from Google on behalf of the entire class, with a suggested award of £750 per claimant. Had he been successful in his claim, the total value of the claim would therefore have been in the region of £3 billion.

The workaround enabled Google to place an ad cookie on users' devices without their knowledge or consent. The cookie collected browser-generated information about those users, which Google then offered to subscribing advertisers.

Mr Lloyd commenced his claim under the representative claims procedure found in Civil Procedure Rule 19.6.[3] Because Google is incorporated in Delaware, Mr Lloyd needed the permission of the English High Court to serve his claim out of the jurisdiction. In October 2018, the High Court refused that permission, holding that (i) the claim failed to identify a basis for Mr Lloyd, on behalf of the class of claimants, to claim compensation under the DPA 1998; (ii) the claim had no real prospect of success; and (iii) it should not be allowed to continue as a representative action.

Mr Lloyd appealed this decision, and, on 2 October 2019, the Court of Appeal agreed that the High Court had got it wrong. The Court of Appeal held that:

- Damages may be awarded, in principle, for the loss of control of personal data pursuant to s.13 of the DPA 1998, even if pecuniary loss or distress cannot be shown.

- Mr Lloyd's decision to bring a collective, "opt-out" style, claim was unusual, but permissible.

- The High Court should have used its discretion differently, to allow the action to proceed.

We reported on the Court of Appeal decision, in the context of wider risks to data controllers following data breaches, here.

The Supreme Court has now allowed Google's appeal and the claim will not be allowed to proceed, at least as currently formulated.

The Decision

The Supreme Court's judgment was given by Lord Leggatt, with whom the other judges all agreed.

Lord Leggatt's judgment first considered the historical background to representative actions. He noted that damages in English law are concerned with correcting an identified wrong by financial means; to place the claimant in the pecuniary position that they would have been, had the wrong not occurred. In practice, therefore, one must be able to identify the size of the loss in order to match it to the appropriate level of damages. Lord Leggatt noted that representative actions at scale are conceptually possible where each claimant is functionally identical – that their circumstances and losses are uniform and indistinguishable from each other. Such cases, however, are likely to be exceptional in practice. In most cases, an individual assessment of loss would be required for each claimant.

In order to navigate the above framework, Mr Lloyd argued that pursuant to the Court of Appeal's decision in *Gulati v MGN*[4], a breach of data rights that is non-trivial gives rise to an entitlement to compensation for "loss of control" of personal data. Lord Leggatt rejected this approach, pointing to the wording of s.13 DPA 1998, which provides:

> *"(1) An individual who suffers damage by reason of any contravention by a data controller of any of the requirements of this Act is entitled to compensation from the data controller for that damage.*
>
> *(2) An individual who suffers distress by reason of any contravention by a data controller of any of the requirements of this Act is entitled to compensation from the data controller if – (a) the individual also suffers damage by reason of the contravention…"*

Lord Leggatt interpreted the above such that (i) in paragraph 1, the "damage" suffered as a result of the breach was logically distinguishable from the breach, i.e. one caused the other; and (ii) in paragraph 2, the "damage" suffered was distinct from distress. That damage must be "material damage" (not distress), for example financial loss. The "damage" referred to could therefore not be "loss of control" alone.

Lord Leggatt's findings have the effect that each claimant in a representative action must be able to point to identifiable damage in the form of material damage or mental distress, and that the damage must be distinct from, and caused by, the breach of data rights in each case. It is not simply possible to assert that a breach of the DPA 1998 results in an automatic right to damages for affected data subjects.

Lord Leggatt also noted that comparisons with the tort of misuse of private information (such as in *Gulati v MGN*) are not persuasive. The tort of misuse of private information involves strict liability for deliberate acts. Breaches of data protection law routinely concern negligence, i.e., they are caused by acts that are not deliberate on the part of the party who is to compensate the victims. Consequently, and contrary to the claimants' arguments, the two causes of action do not necessitate identical remedies.

Looking forward

The Supreme Court's judgment did suggest that representative actions such as Lloyd could be brought effectively under a "bifurcated" process. Lord Leggatt noted that there could be *"no legitimate objection to a representative claim brought to establish whether Google was in breach of the DPA 1998 and, if so, seeking a declaration that any member of the represented class who has suffered damage by reason of the breach is entitled to be paid compensation"* [84].

A class of individuals could, in theory, bring a claim in respect of a breach of data protection law, seeking to prove the circumstances of the breach and the defendant's liability in a general sense. Thus, armed with the court's decision, data subjects could thereafter bring claims individually to evidence their loss and recover appropriate compensation. As noted above, damages too may be claimed in a representative action if they are genuinely common to all those represented, however unlikely that may be in reality.

A bifurcated process is unlikely to be popular in practice, however. Large representative actions of this type, in the majority of cases, are only feasible with the support of third-party funding. As no damages – nor the funders' prospective return – would be recovered until the second, individual step of the bifurcated process, funders may not consider the matters to be economically viable. Certainly, Lord Leggatt considered that the way Mr Lloyd had put his case here owed a lot to the fact that he was in receipt of third-party funding.

The judgment represents good news for data controllers, who will have been watching this case proceed through the English courts with concern. It is a blow to claimant firms and their funders, who will have wished for a different result.

Whilst the judgment focused on the DPA 1998 and did not discuss the UK General Data Protection Regulation ("UK GDPR") or Data Protection Act 2018 (Lord Leggatt stated specifically that his judgment would not consider them), it is likely that the Supreme Court's reasoning will apply equally to the newer legislation, as the two frameworks deploy similar language on this issue. The EU General Data Protection Regulation (which is the base document for the UK GDPR), however, unlike the DPA 1998, does refer to personal data breaches[5] causing "non-material damage to natural persons such as loss of control" (Recital 85). Article 82(1) UK GDPR holds that a data subject who has suffered "material or non-material damage" as a result of a breach of data protection law should have the right to compensation. With the potential sums involved, we suggest that it is highly likely that there will be a future test case or cases under the UK GDPR and the Data Protection Act 2018, to determine if the English courts will come to the same conclusion again.

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[1] [2021] UKSC 50
[2] The DPA 1998 has now been superseded by the Data Protection Act 2018. However, since the acts complained of by Mr Lloyd took place in 2011 and 2012, the DPA 1998 is the relevant legislation for the purposes of this case.
[3] This procedure is somewhat akin to US style opt-out class actions, albeit not identical.
[4] [2015] EWHC 1482 (Ch); a case concerning the English law tort of misuse of private information and not breaches of data protection law.
[5] As distinct from a breach of data protection law, which was the basis for Mr Lloyd's claim against Google.

Contact Us

Kelly Hagedorn
khagedorn@jenner.com | Download V-Card

Tracey Lattimer
tlattimer@jenner.com | Download V-Card

Oliver Thomson
othomson@jenner.com | Download V-Card

Meet Our Team

Practice Leaders

David Bitkower
Co-Chair
dbitkower@jenner.com
Download V-Card

Madeleine V. Findley
Co-Chair
mfindley@jenner.com
Download V-Card