Data Privacy and Cybersecurity

SMO v TikTok – Another UK Representative Action Survives, For Now

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A UK High Court decision of 8 March 2022 in the case of *SMO v TikTok, Inc. and Others*[1] has attracted attention in the wake of the UK Supreme Court's decision last year in *Lloyd v Google*[2]. The Supreme Court's decision put the future of representative actions for breaches of data protection law in England in doubt. *SMO v TikTok, Inc.*, another representative action, has survived an initial hurdle, but it remains to be seen whether the action will be allowed to continue to a full trial.

The SMO v TikTok, Inc. Decision

This case is brought by an anonymous individual child (known as SMO) on behalf of a class of children, supported by Anne Longfield, the UK's former Children's Commissioner, against six TikTok defendants (TikTok) under the EU and UK GDPR and Data Protection Act 2018 (DPA 2018). SMO alleges that TikTok is responsible for processing the personal data of children in a manner that breaches the UK and EU GDPR and the DPA 2018 for invading their privacy and for misusing their private information. The claim alleges that TikTok inappropriately processes and monetizes the children's personal data across a wide variety of data points. SMO is seeking damages, a declaration, an injunction, and a deletion order.

The recent decision relates to an application brought by SMO for permission to serve the claim form out of the jurisdiction on the non-UK TikTok defendants. She also requested an extension of time for doing so, pointing to the impending expiry of the claim form.

In his ruling on these two applications, Nicklin J granted SMO permission to serve the claim form out of the jurisdiction, applying the relevant procedural test and finding there was a "serious issue to be tried" in the case. Had Nicklin J not found a "serious issue", he would have had to refuse permission for SMO to serve the claim on the non-UK TikTok defendants. He also held that England was "clearly" the most appropriate forum for the claim. (SMO had agreed to carve out class members in the Netherlands from her action, as a separate claim has been brought against TikTok on behalf of Dutch children.)

Nicklin J strongly criticised SMO for her team's delay in bringing the application to serve the claim form on the non-UK defendants, noting that one particular period of delay (amongst several) was "barely explained in the evidence and [was] not justified" and that "the Claimant's side [was] entirely at fault for the position the Claimant now finds herself in [having to bring the application at issue]".

TikTok and Lloyd v Google

Timing and procedural issues aside, what is the wider significance of this decision? The main issue is the extent to which this claim – a data privacy representative action – can be distinguished from the Supreme Court's decision in *Lloyd v Google*, which we reported on here.

In *Lloyd* the Supreme Court ruled that the claimant could not bring his case as formulated on behalf of a class of mobile phone users, because he claimed – pursuant to an alleged breach of the Data Protection Act 1998 (DPA 1998) – a uniform sum on behalf of each class member. The Supreme Court suggested that Mr Lloyd's claim would only be able to proceed under a bifurcated approach, with one

trial on behalf of a class to establish liability, and then individual actions thereafter to determine quantum for each claimant. This approach would likely be uneconomic for litigation funders to support – leading observers to predict the death of the data privacy representative action (at least at scale). Importantly, the Supreme Court rejected the claimant's argument that compensation could be awarded under the DPA 1998 for a "loss of control" of personal data, where that loss of control arose as a result of a trivial contravention of a requirement of the DPA 1998.

In the *TikTok* case, in contrast, the claimant is seeking compensation under Article 82(1) GDPR, which refers to "material or non-material damage" suffered "as a result of an infringement of [the GDPR]". This wording is different from the equivalent under s.13 DPA 1998, which was at issue in *Lloyd* and which only refers to "damage" without further qualification. In *TikTok*, the claimant argues that the reference in Article 82 to "non-material" damage is key, and that "loss of control" would in this case be enough to trigger a right to compensation.

Further, the claimant in *TikTok* argues that the claimants were all children that used *TikTok* and, consequently (unlike *Lloyd*), each claimant in the representative class will comfortably pass any *de minimis* threshold that may be applied because of the scale of data processing undertaken by TikTok in respect of each of its users.

The judge emphasised that his decision to allow service of the claim form outside of the jurisdiction was made cautiously. Because of the nature of the application, he only heard argument from the claimant regarding the issues raised by *Lloyd v Google*. Nicklin J noted that TikTok's summary judgment application would be heard later in the year, when he would have opportunity to hear from both sides. On this, he said "[l]eaving aside any application to set aside my order granting permission to serve out by one or more of the [non-UK TikTok defendants], it is likely that the Court will have [the *Lloyd*] point argued fully between the Claimant and the [UK TikTok defendant, which had already been served with the claim form] at the forthcoming summary judgment/strike out application".

Where does this leave us?

Keen readers will not assume this is open season on data privacy representative actions once more. *Lloyd* will still be looming large in the Court's mind and in those of prospective claimants. The TikTok decision has not determined whether loss of control can constitute "non-material damage" equating to a potential remedy under the UK GDPR. It postpones that question. Eyes will turn to the summary judgment hearing in June, where TikTok's counsel will have an opportunity to set out their arguments for the first time.

We may also see a reversion to opt-in style class actions for data privacy infringements. A group of potential claimants is seeking to have a Group Litigation Order made in a case against Equifax arising out of its well-publicised data incident in 2017. Opt-in actions had somewhat fallen out of favour with claimant firms, but since they can potentially bypass some of the issues posed by the Supreme Court's decision in *Lloyd*, we may see a resurgence.

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[1] [2022] EWHC 489 (QB).

[2] [2021] UKSC 50

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