



JUDICIARY OF
ENGLAND AND WALES

2 October 2019

Richard Lloyd v. Google LLC [2019] EWCA Civ 1599

SUMMARY

1. The Court of Appeal (Dame Victoria Sharp, President of the Queen’s Bench Division, Sir Geoffrey Vos, Chancellor of the High Court, and Lord Justice Davis) have handed down their judgments in this appeal today. The central question was whether the claimant, Mr Richard Lloyd (“Mr Lloyd”), who is a champion of consumer protection, should be permitted to bring a representative action against Google LLC, the defendant, a corporation based in Delaware in the USA (“Google”). Mr Lloyd makes the claim on behalf of a class of more than 4 million Apple iPhone users. He alleges that Google secretly tracked some of their internet activity, for commercial purposes, between 9th August 2011 and 15th February 2012.
2. Mr Lloyd alleges that Google was able to identify visits to any website displaying an advertisement from its vast advertising network, and to collect considerable amounts of information. It could tell the date and time of any visit to a given website, how long the user spent there, which pages were visited for how long, and what advertisements were viewed for how long. In

some cases, by means of the IP address of the browser, the user's approximate geographical location could be identified. Over time, Google could and did collect information as to the order in which and the frequency with which websites were visited.

3. Mr Lloyd alleges that this tracking and collating of Browser Generated Information ("BGI") enabled Google to obtain or deduce information relating not only to users' internet surfing habits and location, but also about such diverse factors as their interests and habits, race or ethnicity, social class, political or religious views or affiliations, age, health, gender, sexuality, and financial position. In addition, it is said that Google aggregated BGI from browsers displaying sufficiently similar patterns, creating groups with labels such as "football lovers", or "current affairs enthusiasts". Google's DoubleClick service then offered these groups to subscribing advertisers, allowing them to choose the type of people to whom they wanted to direct their advertisements.
4. The first instance judge, Mr Justice Warby, had dismissed Mr Lloyd's application for permission to serve Google outside the jurisdiction in the USA, so preventing the claim getting under way.
5. The Court of Appeal has reversed the judge's decision and given Mr Lloyd the right to proceed with his representative proceedings against Google in the Media and Communications Court in London.
6. The Court of Appeal decided three legal questions as follows:

- i) First, that a claimant can recover damages for loss of control of their data under section 13 of Data Protection Act 1998 (“DPA”), implementing article 23.1 of the Data Protection Directive (the “Directive”),¹ without proving pecuniary loss or distress;
 - ii) Secondly, that the members of the class that Mr Lloyd seeks to represent did have the same interest as one another under Part 19.6(1) of the Civil Procedure Rules and were identifiable; and
 - iii) Thirdly, that the judge ought to have exercised his discretion to allow the action to proceed as a representative action.
7. The appeal raised important issues that were not decided by the Court of Appeal in *Vidal-Hall v. Google Inc* [2015] EWCA Civ 311 (“*Vidal-Hall*”). Although *Vidal-Hall* was argued on the basis of analogous underlying facts, there was one crucial difference. In that case, the individual claimants claimed damages for distress as a result of Google’s breaches of the DPA. In this case, Mr Lloyd claims a uniform amount by way of damages on behalf of each person without seeking to prove any distinctive facts affecting any of them, save that they did not consent to the abstraction of their data.
8. The court relied on the decision in the phone hacking case of *Gulati v. MGN Limited* [2015] EWCA Civ 1291 (CA) (“*Gulati*”) to decide that, if damages are available without proof of pecuniary loss or distress for the tort of misuse of

¹ 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data. The Directive was replaced by the General Data Protection Regulation (EU) 2016/679 (the “GDPR”) after the events to which these claims relate.

private information, they should also be available for a non-trivial infringement of the DPA, as both claims are derived from the same fundamental right to data protection contained in article 8 of the Charter of Fundamental Rights of the European Union 2012/C 326/02 (the “Charter”): “[e]veryone has the right to the protection of personal data concerning him or her”.

9. The Court of Appeal rejected Google’s main argument that both article 23.1 of the Directive and section 13(1) of the DPA require proof of causation and consequential damage. The words in section 13 “[an] individual who suffers damage by reason of [a breach] is entitled to compensation” justify such an interpretation, when read in the context of the Directive and of article 8 of the European Convention on Human Rights and article 8 of the Charter, and having regard to the decision in *Gulati*. Only by construing the legislation in that way could individuals be provided with an effective remedy for the infringement of such rights.
10. The claim was an unusual use of the representative procedure, but the Court held that it was permissible on the authorities. 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 were not seeking to rely on any personal circumstances affecting any individual claimant (whether distress or volume of data abstracted). The represented class were all victims of the same alleged wrong, and had all sustained the same loss, namely loss of control over their BGI. Mr Lloyd’s concession that he would not rely on any facts affecting any individual

represented claimant had the effect of reducing the damages that could be claimed to the lowest common denominator. But it did not mean that the represented claimants did not have the same interest in the claim. It was impossible to imagine that Google could raise any defence to one represented claimant that did not apply to all others.

NOTE: This summary is provided to assist in understanding the Court of Appeal's decision in this case. It does not form part of the reasons for the decision. The full judgments of the court are the only authoritative reasons for the decision. Judgments are public documents and are available at: <https://www.judiciary.uk/judgments/> and <http://www.bailii.org/>