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Litigation & Arbitration Group

Collective Redress and the Government's Reforms on Competition and Consumer Policy: An Opportunity Missed?

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On 10 November 2021, the UK Supreme Court handed down the much-anticipated decision in *Lloyd v Google*,[1] reversing the Court of Appeal's earlier finding that a loss of control over data, in breach of the Data Protection Act 1998 ("**DPA98**"), may be compensated even in the absence of any pecuniary loss or distress. The claim, which the Supreme Court found to have no real prospect of success in the form that it had been framed,[2] was brought by Mr. Lloyd on behalf of some four million consumers as a representative action under Part 19.6 of the Civil Procedure Rules ("**CPR**").[3] In considering the viability of the claim, the Supreme Court looked generally at the availability of different forms of collective redress in the UK,[4] including an extensive consideration of the authorities on representative actions. However, despite its length, the decision left a number of unanswered questions.

Five months later, on 20 April 2022, the Department for Business, Energy and Industrial Strategy published the outcome of its July 2021 consultation on "*Reforming competition and consumer policy*", which looked at ways in which the UK's competition and consumer policies could be reformed to increase enterprise, innovation, productivity and growth. Nearly 200 responses were received to the consultation, which focused on three key themes: (i) promoting competition; (ii) updating consumer rights; and (iii) strengthening the enforcement of consumer law by individuals and regulators. The consultation included looking at whether the UK's collective redress regime could be strengthened in order to increase access to justice for individuals whose consumer rights had been infringed.

In this article, we look at the UK collective redress regime, the impact of *Lloyd v Google*, and the outcome of the Government's consultation.

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1 *Richard Lloyd v Google LLC* [2021] UKSC 50.
2 Ibid at [159].
3 The nature and requirements of representative actions are considered in greater detail below.
4 See the following section for an explanation of the different forms of collective redress that are available in the UK.

The UK's collective redress regime

In addition to the powers that regulators have to seek redress on behalf of the public when consumer law has been broken, the UK has established various mechanisms for groups of individuals to bring private actions on a collective basis in order to seek damages for infringements of consumer and/or competition law. This includes the ability for claimants to (i) apply for a group litigation order (or 'GLO'), where claims that give rise to "*common or related issues of fact or law*" are brought together on an 'opt in' basis under section III of CPR 19; (ii) pursue *representative actions*, where a named claimant pursues an action both on its own behalf and on behalf of a class of individuals who have the "*same interest*" in the claim and who have not 'opted out'; and (iii) bring *collective proceedings* (i.e., a class action) for damages in relation to competition law infringements,[5] which can be brought on either an 'opt in' or 'opt out' basis.[6]

Representative actions and collective proceedings have been at the heart of two seminal decisions handed down by the Supreme Court over the last 18 months. In the first of those decisions, *Merricks v Mastercard,*[7] the Supreme Court was asked to consider – in the context of competition law claims – the legal test for the certification of claims as eligible for inclusion in collective proceedings, and the correct approach to questions regarding the distribution of an aggregate award of damages. The decision in *Merricks* made the regime for competition law class actions in the UK significantly more claimant-friendly and a number of collective proceedings have since been certified by the Competition Appeal Tribunal.[8]

In contrast, the Courts have historically taken a much stricter approach to representative actions, requiring that members of the represented class all have the same interest in the claim and, to the extent that a remedy is sought (i.e., where the representative proceedings are not limited to questions of liability), the class members must all seek the same remedy. That is a high bar and, as a result, the procedure for representative actions under CPR 19.6 has rarely been invoked. It was therefore of significance that a representative action came before the Supreme Court in 2021, with the Court being asked to consider the merits of bringing the claim under CPR 19.6. That gave the Supreme Court an opportunity to seek to clarify the "*same interest*" test and to consider whether relaxing that test would open the floodgates to more representative actions (in a similar way to that which happened in relation to collective proceedings for competition law infringements following *Merricks*). The decision in *Lloyd v Google* is, therefore, an important backdrop to the Government's recent consultation concerning collective redress.

The Supreme Court decision in *Lloyd v Google*

Background

The claim brought by Mr. Lloyd (a former executive director of the UK Consumers' Association and consumer rights campaigner) on behalf of around 4.4 million iPhone users concerned allegations that Google LLC had, in breach of its obligations under the DPA98, tracked and used the browser generated information of iPhone users without their consent. Having formulated the claim as a representative action, Mr. Lloyd claimed that each class member had the "*same interest*" in the claim, namely the loss of control of their personal data, and that it was possible to identify the "*irreducible minimum harm*" suffered by each member for which a uniform sum of damages could be awarded.

The appropriateness of the claim being pursued under CPR 19.6 came before Mr. Justice Warby at first instance when he was asked to consider an application for permission to serve Google out of the

5 Collective proceedings are currently limited to actions for infringements of competition law.

6 Opt-in proceedings are where each class member is required to notify the representative that their claim should be included in the action; whereas an opt-out action is brought on behalf of all members of the class, except for those that actively choose not to participate.

7 *Mastercard v Merricks* [2020] UKSC 51.

8 For more information on the *Merricks* decision, please see our Client Alert of 10 November 2021 ("Flurry of collective proceedings certified by the Competition Appeal Tribunal: are US-style class actions coming to the UK?").

jurisdiction.[9] In dismissing the application, Warby J. held that: (i) Mr. Lloyd had failed to demonstrate that the represented class had suffered any damage under section 13 of the DPA98; (ii) the class members did not have the "*same interest*" within the meaning of CPR Part 19.6(1) so as to justify the claim proceeding as a representative action; (iii) the litigation was arguably officious, taking into account the modest recovery of each individual and the substantial resources that the litigation would consume; and (iv) in any event, the Judge exercised his discretion under CPR Part 19.6(2) against allowing the claim to proceed.

With the Court of Appeal overturning the first instance decision, Google appealed to the Supreme Court, and, on 10 November 2021, the Supreme Court published its judgment, unanimously allowing the appeal.

The "same interest" test

One issue before the Supreme Court was whether the claims of the class members satisfied the "*same interest*" test under CPR 19.6(1), which essentially requires class members to have "*a common interest and a common grievance,* [and] *the relief sought* [is] *in its nature beneficial to all whom the plaintiff propose*[s] *to represent*".[10] Before addressing the specific claims brought by Mr. Lloyd, the Supreme Court set out a number of overarching principles in relation to the "*same interest*" requirement:

- The test under CPR 19.6(1) should be interpreted purposively in the light of the overriding objective and the rationale behind the representative procedure (which is to enable individual claims that raise common issues to be brought together in a single action).[11] This required the representative to have the "*same interest*" in the claim so as to ensure that he/she "*can be relied on to conduct the litigation in a way which will effectively promote and protect the interests of all the members of the represented class*".[12] As such, it is essential that there be no conflict of interest between the members of the class.[13]
- That strict approach does not necessarily mean that class members with diverging interests have to be excluded from a representative action. There may, for example, be issues that arise in relation to some class members, but not others. However, "*so long as advancing the case of class members affected by the issue would not prejudice the position of others, there is no reason in principle why all should not be represented by the same person*".[14]
- Further, if it were considered inappropriate for one person to represent two groups in relation to whom different issues arose, any procedural objection could be overcome by bringing two or more representative claims in the same action. Proceedings could also be bifurcated where, for example, common issues of liability arise, but an individual assessment of damages is required.[15] In *Lloyd*, this could have allowed issues of liability to be determined on a collective basis, with damages being determined individually.[16]

In this case, the Supreme Court found that: (i) there was no objection, in principle, to a representative action being brought to establish whether Google was in breach of the DPA98 and, if so, seeking a declaration that members of the represented class who suffered damage by reason of the breach were entitled to compensation; (ii) if brought on an individual basis, that claim would give rise to common issues of liability; and (iii) there was no suggestion of any conflict of interest between the class members and no debate as to whether Mr. Lloyd was a suitable person to act in the capacity of representative claimant. In those

9 *Richard Lloyd v Google* LLC [2018] EWHC 2599 (QB).
10 Per Lord Macnaghten in *Duke of Bedford v Ellis* [1901] AC 1, cited by Lord Leggatt in *Lloyd v Google LLC* [2021] UKSC 50 at [38].
11 Ibid at [71].
12 Ibid at [71].
13 See, for example, *Emerald Supplies Ltd v British Airways plc* [2010] EWCA Civ 1284, where the court found that there was a conflict of interest between direct and indirect purchasers of air freight services.
14 *Lloyd v Google LLC* [2021] UKSC 50 at [72].
15 See, for example, *Prudential Assurance Co Ltd v Newman Industries Ltd* (No 2) [1981] Ch 204 and *Lloyd v Google* [2021] UKSC 50 at [48].
16 Ibid at [84].

circumstances, all members of the represented class would have the "*same interest*" in the claim for the purposes of CPR rule 19.6(1).

However, even if liability was established, the claim for damages (which was part of the claim) required an individual assessment of loss which, of itself, was inconsistent with the class members all having the "*same interest*" in the claim. In this regard, the Supreme Court declined to depart from the general common law principle that damages should compensate for the loss actually suffered by each represented party and move towards allowing an aggregate award of damages.[17] This is in contrast to the Competition Act regime, which Lord Briggs found in *Merricks* "*radically alters the established common law compensatory principle by removing the requirement to assess individual loss*"[18] (as to which, see our previous article here). Therefore, where "*the assessment of damages depends on circumstances personal to each individual claimant… it is unlikely to be practical or fair to assess damages on a common basis and without each individual claimant's participation in the proceedings*".[19] In those circumstances, the Supreme Court concluded that the "*same interest*" test was not met in *Lloyd v Google*.[20]

The impact of *Lloyd v Google* and the Government's consultation

Although the Supreme Court was unwilling to allow a representative action which sought a "*uniform sum*" of damages under DPA98 for each class member in a way that did not require the member to prove its actual loss, the Supreme Court offered guidance on the circumstances in which representative actions are likely to be considered appropriate. This included, for example, where all claimants have suffered the same loss (e.g., by being charged a fixed fee or having purchased the same product with the same defect).[21] Further, the Supreme Court considered that there should be no difficulty in taking a 'top down' approach to the calculation of damages even where that might give rise to issues of distribution (e.g., where damages are claimed for pirated music, it would be permissible to calculate the total loss of earnings caused by the pirating of music and, in those circumstances, issues of distribution to individual musical artists would not prevent a representative action from proceeding).[22]

More broadly, the Supreme Court noted that while "*a detailed legislative framework would be preferable*", the absence of this was no reason to "*to decline to apply, or to interpret restrictively, the representative rule which has long existed*". In these circumstances, the Supreme Court's 'purposive' approach has arguably pushed the boundaries of representative actions under CPR 19.6 as far as the court felt able. However, in the absence of legislative change, it seems likely that the number of representative actions where claims for damages that need to be considered on an individual basis will remain low, with the attractiveness of such claims to litigation funders also being curtailed.

Against that background, the Government's July 2021 consultation on the extent to which it was necessary to open up further routes to collective consumer redress in the UK was particularly well timed. Responses to the consultation varied and, although there was some support for providing alternative means for collective redress that would increase compliance with consumer rights, a number of respondents raised concerns regarding the financial burden of bringing such claims and the potential for consumer organisations to be put off seeking collective redress if the success rate was low.[23]

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17 Ibid at [80].

18 *Mastercard v Merricks* at [76].

19 Ibid at [50].

20 See also *Jalla & Anr v Shell International Trading & Anr* [2021] EWCA Civ 1389 where the Court of Appeal held that the need for an individualised assessment of the damage to each claimant's land from an oil spill meant that the claimants did not have the *"same interest"* in the claim.

21 *Lloyd v Google* at [82].

22 *EMI Records Ltd v Riley* [1981] 1 WLR 923, and *Independiente Ltd v Music Trading On-Line* (HK) Ltd [2003] EWHC 470 (Ch). See also *'The Irish Rowan'* where it was held in a claim against a Lloyds insurance syndicate that there was no difficulty in awarding damages for or against the representative in such proceedings as "*the calculation of any damages which the members of the syndicate are collectively entitled to recover or liable to pay does not depend on how the risk is divided among the members of the syndicate*".

23 "*Reforming competition and consumer policy*", paragraph 3.103.

Respondents also highlighted concerns regarding regulation and whether sufficient safeguards were in place to protect against consumers being exploited opportunistically and to prevent "*vexatious or speculative claims, guard against the risk of encouraging a claims culture and ensure transparency*".[24]

In addition, the Government consulted on the impact on both consumers and businesses of private and consumer organisations being allowed to seek collective redress in addition to public enforcers, such as the Competition and Markets Authority. Again, the responses were mixed, with respondents commenting on how a strengthened collective redress regime could be a "*significant step forward for consumers' rights and that businesses would be more likely to work with consumer groups where the possibility of failing to do so would result in collective redress*".[25] It was also thought that there would be an increase in businesses complying with consumer law and, thus, increased consumer trust and satisfaction. However, there was a real concern about protecting businesses against vexatious claims and striking "*an appropriate balance between facilitating such redress and protecting defendants' rights*".[26]

In light of those diverging views, the Government declined to take any immediate action to strengthen the UK's collective redress regime.

Conclusion

The Government's consultation on consumer and competition policy has come at a time when the UK's collective redress regime has been subject to detailed scrutiny by the Supreme Court and when questions remain as to whether the more claimant-friendly approach to collective proceedings in the competition sphere will eventually be extended to other forms of collective redress, such as representative actions under CPR 19.6(1). However, the Government's decision not to open up further routes to collective redress perhaps signals its concern that doing so would open the floodgates to US-style class actions. It remains to be seen whether a detailed legislative framework for collective redress will be introduced by future governments but, for now, it seems unlikely that representative actions for breaches of consumer law will take off in quite the same way as collective proceedings under the Competition Act 1998 have done over the last 18 months.

[24] Ibid, paragraph 3.104.
[25] Ibid, paragraph 3.105.
[26] Ibid, paragraph 3.106.

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