Compensation for "distress-only" claims under the DPA

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In an important ruling, the Court of Appeal confirms that the cause of action for misuse of private information is a tort and rules on the meaning of "damage" under s13 of the Data Protection Act, allowing claimants to recover compensation for "distress" resulting from a breach of the Act without also having to prove pecuniary losses.

Details and commentary

Case: *Google Inc v (1) Judith Vidal-Hall (2) Robert Hann (3) Marc Bradshaw* [2015] EWCA Civ 311.

In a heavily anticipated judgment handed down on 27 March 2015, the Court of Appeal made a decision that has the potential to significantly expand the scope of data protection rights in this jurisdiction.

The appeal raised two important issues of law. Firstly, it confirmed that misuse of private information is a tort. Secondly, it considered the meaning of "damage" under section 13 of the Data Protection Act 1998 (the "DPA"), and whether claimants may claim compensation under section 13 for distress resulting from a breach of the DPA without also having to prove pecuniary losses.

The appeal has also brought "browser generated information" ("BGI") into the judicial spotlight; in particular the extent to which individuals are "identified" by their BGI in such a way that it amounts to personal data for the purposes of the DPA. This has particular interest for those involved in online behavioural advertising (eg the ad networks).

The claim in *Vidal-Hall* is based on an allegation that Google used cookies to collect BGI from users of Apple's Safari web browser. The BGI allowed Google to recognise a user's browser and this information could be aggregated and used as part of Google's "doubleclick" advertising service, which allowed advertisers to tailor or target advertisements to the claimants' particular interests.

Targeted advertising is not a new phenomenon. The distinguishing feature of *Vidal-Hall* is the claimants' allegation that the collection of BGI occurred without their knowledge or consent. As well as claiming that this amounted to a misuse of their private information and breach of confidence, the claimants sought compensation under section 13 of the DPA on the basis that Google's actions amounted to a breach of the DPA.

Any comments or queries?

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This appeal itself did not involve any final determination of the substance of the claimants' allegations, but rather related to the claimants' application to serve proceedings on Google outside the United Kingdom. The claimants had obtained permission to serve the claim out of the jurisdiction from the Master, and Google applied to have that permission set aside, first to the High Court and then to the Court of Appeal when Tugendhat J ruled against them.

Even at this preliminary stage, the matters the court was being asked to rule on broke new ground. The court concluded that misuse of private information constituted a tort (this being relevant to the question of eligibility to serve proceedings outside the jurisdiction). As misuse of private information was a cause of action borne out of breach of confidence (an equitable remedy), it was argued that it was not a tort. However the Court of Appeal held that, regardless of where it came from, there was no "satisfactory or principled" argument against the cause of action now being considered a stand-alone action, the true nature of which amounted to a tort.

Although the Court of Appeal's classification of "misuse of private information" as a tort is significant, of greater impact for consumers and businesses operating online are the court's findings in relation to section 13 of the DPA. The claimants disclosed no pecuniary loss for Google's alleged breaches of the DPA, compelling the Court to revisit an old question: could a claimant recover damages under section 13 DPA in respect of losses which were solely non-pecuniary?

It is helpful first to explore the status quo. The Data Protection Directive (Directive 95/46/EC) is the foundation of the European data protection regime. Article 23 of the Directive requires that EU member states allow a person who has "suffered damage" as a result of a data protection offence (as created by a state's domestic legislation) to obtain compensation from the responsible data controller. The UK implemented this requirement through section 13 of the DPA.

Where a data controller has contravened the DPA, section 13 provides an affected individual with a remedy in damages. However, there is a catch. Section 13 draws a distinction between "damage" and "distress". An individual who has suffered "damage" as a result of the breach may recover compensation from the data controller under section 13(1). In contrast, under section 13(2), an individual who has suffered "distress" may only recover compensation for that distress where he or she also suffered damage (unless the contravention related to the processing of personal data for journalistic, artistic or literary purposes). In almost all cases, a victim must therefore show pecuniary loss to recover compensation under section 13.

Johnson v MDU [2007] EWCA Civ 262 was previously the leading case on the interpretation of section 13. In *Johnson*, the High Court rejected the argument that the inability to recover for standalone non-pecuniary losses under the DPA was inconsistent with the requirements of the Directive. The claimant had argued that the term "damage" as used in the Directive was not restricted to pecuniary loss, since it referred to any sort of damage recognised by member states' domestic laws. The Court disagreed and found that there was no compelling reason for the term "damage" to be extended beyond pecuniary loss – meaning that, according to *Johnson*, section 13(2) DPA was compatible with the Directive.

In revisiting section 13 DPA, the Court of Appeal in *Vidal-Hall* first looked to the Directive. The aim of the Directive (as stated in the Directive and repeatedly emphasised in its recitals) was to protect individuals' right to privacy, not their economic rights. On this basis, it would be odd if a data subject could

not recover compensation for an invasion of his or her privacy purely because there was no pecuniary loss.

The Court observed that where EU legislation made no specific reference to domestic legislation, terms used in the European instrument were to be given an autonomous meaning which would not necessarily accord with their meaning in domestic law. This was necessary in order to ensure consistency of interpretation across the EU. Notably, the ECJ had previously interpreted the term "damage" as including non-material damage, providing that genuine and quantifiable damage had occurred.

When prior case law and the stated aim of the Directive were considered, the Court of Appeal decided that the natural meaning of "damage" ought to cover both pecuniary and non-pecuniary damage. This conclusion was supported by Article 8 of the Convention, which permitted recovery of non-pecuniary losses arising from breaches of privacy rights. It would be irrational for the Directive to provide a more limited remedy than that already recognised under the Convention. For these reasons, it was held that the word "damage" in the Directive should be read as including non-pecuniary loss.

Having made this determination, the Court was able to circumvent Johnson by holding that the High Court's findings on the interpretation of section 13 had been obiter dicta. Nonetheless, section 13 DPA presented the Court with a conundrum. Interpreted literally, section 13 plainly did not allow for standalone non-pecuniary damages, and was therefore not an effective transposition of the Directive into domestic law.

The Court first attempted to reconcile section 13 with the Directive using the principle established by the ECJ in *Marleasing*. Under this principle, a domestic court must interpret a national law enacted pursuant to an EU directive in a manner which achieves the result sought by the directive itself, as far as this is possible. However, the *Marleasing* principle cannot be used to interpret national legislation in a manner which is inconsistent with a fundamental feature of that legislation. Parliament must retain the right to enact legislation which is inconsistent with EU law, where it so chooses. In the present case, the Court of Appeal held that the limitation upon damages for non-pecuniary loss was a fundamental feature of the DPA; it was therefore impossible to interpret section 13 compatibly with the Directive using the *Marleasing* principle.

But where there is a will, there is a way. The Court considered Article 8(1) of the EU Charter of Fundamental Rights, which afforded EU citizens with a right to the protection of their personal data. Article 47 of the Charter required a domestic court to ensure an effective remedy where the rights enshrined in the Charter had been violated. Where national law precluded an effective remedy, the domestic court was required to disapply the offending provision, where this was possible without redesigning the legislation entirely. In the present case, the DPA could be rendered compatible with the Directive simply by disapplying section 13(2) – and so section 13(2) bit the dust.

In reaching its decision, the Court was clearly influenced by public policy concerns. The Court found that whilst damages awarded for breaches of the DPA have typically been modest, "the issues of principle are large".

The demise of section 13(2) means that compensation for non-pecuniary losses may be claimed under section 13. However, in order for the particular claimants in this case to make out a successful claim, it will still be necessary to show that any BGI collected by

Google from them represented "personal data" as defined in section 1(1)(a) of the DPA. The Court was not required to determine this issue finally at this stage – only to establish that there was a clearly arguable case. The Court ruled that it was clearly arguable that the BGI constituted personal data because it 'individuates', or singles out the individual, and distinguishes him from others. This was regardless of the fact that the BGI did not name the individual, and in spite of Google's assertion that it had no intention of linking the BGI with other data that Google held and which could lead to the individual being identified. If the case does go to a full trial for resolution, then data practitioners can look forward to some valuable guidance on this issue and questions on "identification" more generally.

Commentary

This decision is likely to have significant repercussions with respect to data protection claims in the UK (assuming that it survives any further appeal by Google). The ability to claim damages for breaches of the DPA without showing pecuniary loss clearly broadens the scope for such claims. This judgment could well result in a significant increase in the volume of civil actions brought by individuals under the DPA, and the legal resources expended by businesses in fighting them. Claims could be brought on an individual basis, or as a group (as in *Vidal-Hall*). We also expect that "distress" claims might be added to wider claims such as defamation and employment disputes.

Whilst the courts' approach to damages in "distress-only" cases remains to be seen, the mere possibility of such cases may prove an unwelcome distraction to data controllers. It is now more important than ever to guard against breaches of the DPA, even those that may previously have been seen as "low-level" risks.

The Court's use of Article 47 of the Charter to disapply section 13(2) DPA is equally interesting, since it might render other sections of the DPA vulnerable to future challenges. For example, the wording of section 10(1) of the DPA allows an individual to object to the processing of his or her personal data only if the processing is likely to cause substantial damage or distress and that damage or distress is unwarranted. As this has generally been viewed as a high hurdle, could one argue this is a restrictive interpretation of Article 14 of the Directive? If so, is it possible that Article 47 could kick in again to provide claimants with broader rights to object than section 10 currently provides?

Watch this space.

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