FORUM SHOPPING FOR GDPR CLASS ACTIONS

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Overview

The UK incorporated its own version of GDPR into domestic law in 2018, with further modifications made following Brexit. The provisions dealing with the jurisdiction(s) in which data subjects may pursue judicial redress do not constitute a complete code and are not so clear-cut. This potentially allows for forum shopping by UK-based data subjects who wish to pursue claims against data controllers and processors. As there is still great uncertainty on whether class actions can be pursued in the English Courts for data breaches (particularly following the Supreme Court's recent judgment in Lloyd v Google [1]), some claimants may be bold enough to pursue their claims outside the UK.

Background

The rights of individuals with respect to their personal data are governed in the UK by:

the General Data Protection Regulation ("GDPR"), now applied in the UK through the Data Protection Act 2018 ("DPA 2018") as amended, referred to as the "UK GDPR"; and

- the Data Protection Act 1998 ("DPA 1998") for all processing prior to 25 May 2018.
- Data breach claims are typically pursued in respect of:
- one-off data breaches, such as cyberattacks or security lapses where several individuals' personal data is compromised (e.g. the British Airways and Marriott International claims); or
- conduct over a sustained period of time by a data controller or processor that has involved unlawful processing or some other recurring breach to the detriment of data subjects (e.g. the Safari workaround allegedly operated by Google, which was the subject of Mr Lloyd's claim).

Under GDPR, the original text of Article 79(2) provided that:

"Proceedings against a controller or a processor shall be brought before the courts of the Member State where the controller or processor has an establishment. Alternatively, such proceedings may be brought before the courts of the Member State where the data subject has his or her habitual residence […]"

1 On 10 November 2021, the Supreme Court held that Mr Lloyd cannot pursue a representative action against Google for breaches of the Data Protection Act 1998 in connection with it collecting browser generated information of over 4 million iPhone users between 2011 and 2012 (the so-called "Safari workaround").

In other words, GDPR made it mandatory to sue in the Member State where the controller or processor is located, subject to a very useful option for claimants to sue in their home Member State. Curiously, "Member State" only covers EU Member States, so where controllers or processors had no establishment in the EU [2], there was never anything in principle under GDPR to stop data subjects suing them in countries outside of the EU.

However, the creation of UK GDPR had the effect of deleting Article 79(2) altogether. [3] The only provision addressing jurisdiction for compensation claims under UK GDPR [4] is s.180(1) DPA 2018. Yet this is not a mandatory jurisdiction provision – it simply confirms that claims for compensation under UK GDPR may be brought in England, Wales, Scotland or Northern Ireland as applicable.

Why consider forum shopping?

Most data subjects will be inclined to sue in their home jurisdiction for several reasons, including convenience, familiarity with local court processes and more established jurisprudence/ experienced judges.

Nevertheless, forum shopping could become more prevalent in due course for a number of reasons.

First, the Supreme Court's decision in Lloyd has almost entirely closed the door on class actions relating to data breaches being brought as representative opt-out actions in England (at least where the damages suffered vary between each affected individual). Although litigation pursuant to a group litigation order (GLO) is theoretically possible, this can be almost impossible to manage in cases with very large numbers of individual claimants.

Secondly, data processing is rarely a domestic matter in the online age. Controllers and processors are located all over the globe and can – at least in theory – be sued in their home jurisdictions.

Thirdly, data subjects will not always have (validly) signed up to terms and conditions with controllers/processors that contain an exclusive jurisdiction clause in favour of the English courts, so they may be free to sue in different forums. For example, until 2019, Google's terms of service were subject to the courts in Santa Clara County, California, even for UK users.

A warning shot in California

This year has already seen a UK-based data subject bring a class action outside the UK/EU. Although this attempt failed, it may be a sign of things to come.

In March 2021, Hugo Elliott, an English citizen, commenced proceedings against PubMatic Inc. in California, USA (which is the latter's principal place of business) on behalf of a class of UK residents[5]. He alleged that PubMatic had placed unique identifying cookies on individuals' devices to monitor and track their online activities, in breach of UK GDPR.

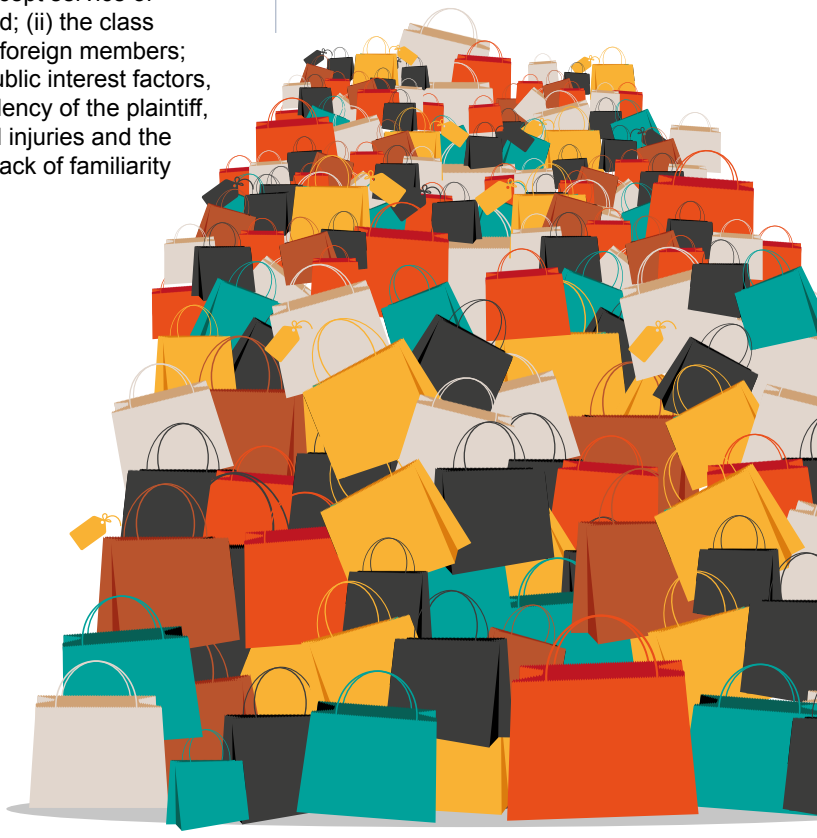
The claim was dismissed in August 2021, on grounds of forum non conveniens (with the court recognising that "there exists an adequate alternative forum", i.e. England) and international comity. The Court placed considerable weight on (i) PubMatic being willing to accept service of process in England; (ii) the class comprising solely foreign members; and (iii) various public interest factors, including the residency of the plaintiff, location of alleged injuries and the California court's lack of familiarity with English law.

Looking ahead

Despite Mr Elliott's claim failing in California, creative claimants based in the UK and their lawyers may be minded to explore foreign jurisdictions to pursue their claims, particularly if:

- following the Supreme Court's decision in Lloyd, claimants and practitioners are struggling to find alternative mechanisms by which to bring such claims in the UK;
- a defendant is not prepared to accept service in the UK; [6] and/or
- a foreign court considers itself competent to interpret and apply UK GDPR (which is not inconceivable in an EU member state).

It would take a bold claimant to roll the dice abroad given that (i) most foreign judges will not want to step on the toes of their UK counterparts and (ii) there is a paucity of settled law on the interpretation and effect of UK GDPR. Nevertheless, prospective defendants should not completely discount the risk of seeing further test cases issued outside the UK in the near future.



2 GDPR can apply to data controllers or processors not established in the EU – see Article 3(2).

3 It is somewhat unclear whether Article 79(2) can be invoked for claims which (i) were commenced after its deletion from UK law and (ii) concern historic breaches of GDPR that occurred while Article 79(2) was still in force in the UK.

4 Such claims brought under Article 82 UK GDPR.

5 Elliott v. PubMatic, Inc., 2021 U.S. Dist. LEXIS 154053 (N.D. Cal. Aug. 16, 2021)

6 Conversely, threatening foreign proceedings could ultimately force a defendant's hand in agreeing to be served in the UK.