

# CLASS ACTIONS: RECENT UK DEVELOPMENTS

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Civil Action No.: 04

**CLASS ACTION**  
**DEMAND FOR A JURY**

# OVERVIEW

- I. The opt-out class action in the UK Competition Act 1998
- II. Recent cases certifying classes
- III. “Overlap” cases: competition and other consumer-facing issues
- IV. New consumer powers -- > New class actions?

## THE OPT-OUT CLASS ACTION

Special competition law-only power introduced in 2015 –

*Opt out class action*

*Pre-Brexit* – i.e., can be done within EU damages directive

Contrasts with existing *opt-in* “representative” class action (CPR)

DIFFERENT FROM  
“REPRESENTATIVE  
ACTIONS”



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## Case details

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### Lloyd (Respondent) v Google LLC (Appellant)

Case ID: UKSC 2019/0213

#### Case summary

##### Issue

Whether the respondent should have been refused permission to serve his representative claim against the appellant out of the jurisdiction (i) because members of the class had not suffered 'damage' within the meaning of section 13 of the Data Protection Act 1998 ('DPA'); and/or (ii) the respondent was not entitled to bring a representative claim because other members of the class did not have the 'same interest' in the claim and were not identifiable; and/or (iii) because the court should exercise its discretion to direct that the respondent should not act as a representative.

##### Facts

The respondent has issued a claim alleging that the appellant ('Google') has breached its duties as a data controller under the DPA to over 4m Apple iPhone users during a period of some months in 2011- 2012, when Google was able to collect and use their browser generated information. The respondent sued on his own behalf and on behalf of a class of other residents in England and Wales whose data was collected in this way. He applied for permission to serve the claim out of the jurisdiction. Google opposed the application on the grounds that (i) the pleaded facts did not disclose any basis for claiming compensation under the DPA and (ii) the court should not in any event permit the claim to continue as a representative action.

##### Judgment appealed

[\[2019\] EWCA Civ 1599](#)

# THE OPT-OUT CLASS ACTION

- **How does it work?**
  - A class rep is appointed (s.47B(2)) – must be a person (natural or legal)
  - Rules on publicity – cannot be a “secret” rep: (CAT rule 79(2); 91(1)).
  - Must raise “same, similar or related issues of fact or law” (CAT Rule 73(2))
- Major debating point: **what counts as a common “issue of fact or law”?**
  - *Merricks v MasterCard* (UK Supreme Court, Sept 2021)
  - **Common methodology vs common damage**
  - **Reasonable** methodology suffices at the certification stage (*McLaren Ro-Ro shipping*)



MERRICKS V  
MASTERCARD

TRUCKS





# LE PATOUREL V BT

- First standalone class certification
- Excessive landline pricing claim under Ch 2 CA (= Article 102)
- Up to 2.3 million customers affected
- Approximately £600 million in claim
- Average loss is £140 each



GUTMANN V  
LONDON &  
SE RAILWAY





# GORMSEN V META

Claim for £2.3 bn re “excessive” data collection

# WHY SO MANY AT ONCE?



 Harbour

 WOODSFORD

 Burford

 AUGUSTA

## HOW MUCH DOES IT COST?

*Gutmann*: £1.7m claimed to class certification; Tribunal awarded 1m; 65% attributed to class certification; 35% to failed summary judgment defence by D

*Merricks*: claimant spent 1.75m; defendant tried to claim nearly 2m in costs at an interim stage (costs on account) but this was sharply reduced to c. £0.5m by the court

Price to class certification: c. 0.5m  
A typical *full* class action will cost £5-10m in legal and expert fees

But the recovery, and societal benefits, may be multiples of this (14bn in *Merricks*)

## “OVERLAP” CASES

Many cases seem to use the competition class action for other purposes:

- Consumer protection: *Gutmann*
- Data protection: *Meta*

Is there an argument for a broader class action?

## NEW CONSUMER CLASS ACTION?

“This means that even if the rights we have discussed above— become valuable tools ... it is still up to individual data subjects to exercise them. This is not easy, as we noted in our section IV.A on “notice and choice” and transparency fallacies. This is even truer perhaps in the EU where consumers are on the whole far less prepared and empowered to litigate than in the US. The UK and many other EU nations have no generic system of class actions. Although this has been viewed as a problem for many years, attempts to solve it on an EU wide basis have repeatedly stalled. Individuals are further hampered in meaningfully attaining civil justice by a general prejudice against contingency lawyering combined with dwindling levels of civil legal aid.”

Edwards and Veale (2017)

# NEW CONSUMER CLASS ACTION?

Difficulties in proving loss relating to diffuse data harms:

*German Competition Authority (FCO) v Facebook (German Supreme Court)*

*Lloyd v Google (UK Supreme Court)*

*Spokeo v Robins; Transunion (US Supreme Court)*

See Citron and Solove (2021) on possible diffuse harms to consumers –  
but how strong is the case for compensation here?



# FAILINGS IN PUBLIC ENFORCEMENT?

- Some major failures in proving consumer harm
  - Office of Fair Trading v Abbey National and others (overdraft fees)
  - CMA v Care UK (hidden care home fees)
- Is a pipeline of private claims more promising?

Press release

## CMA welcomes government proposals on new powers

The CMA has responded to the government's proposals to enhance its ability to tackle breaches of competition and consumer law, and empower the Digital Markets Unit (DMU).

From: [Competition and Markets Authority](#)

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- Changes would see the CMA given power to declare companies in breach of consumer law, without taking them to court first, and levy fines accordingly.
- Proposals would also enhance the CMA's competition powers, increasing their speed and effectiveness.
- Separately, planned powers for the CMA's Digital Markets Unit include creating enforceable codes of conduct for the biggest tech firms.

THANK YOU FOR YOUR ATTENTION

