Google defeated in English Court of Appeal – Landmark decision opens door for litigation by millions of British Apple users

The Court of Appeal has dismissed an attempt by Google to prevent British computer users from being able to sue it in England.

The landmark hearing, presided over by the Master of the Rolls, the Rt. Hon. Lord Dyson, sitting with Lady Justice Sharp and Mr Justice McFarlane, followed an earlier defeat for Google in the High Court in which it was unsuccessful in preventing three British Internet users from having the right to sue it for breach of privacy, after the tech giant ignored users wishes not to have tracking cookies placed on their computers. Google took the matter to appeal, arguing that the issue was not serious and, in any case, that it was important that the claimants could not demonstrate they had lost out financially as a consequence of the company's actions. The Court of Appeal disagreed, stating in its judgment:

"These claims raise serious issues which merit a trial. They concern what is alleged to have been the secret and blanket tracking and collation of information, often of an extremely private nature… about and associated with the claimants' internet use, and the subsequent use of that information for about nine months. The case relates to the anxiety and distress this intrusion upon autonomy has caused."

One of the three claimants against Google, Judith Vidal-Hall welcomed the decision:

"This is a David and Goliath victory. The Court of Appeal has ensured Google cannot use its vast resources to evade English justice. Ordinary computer users like me will now have the right to hold this giant to account before the courts for its unacceptable, immoral and unjust actions."

The Court of Appeal also confirmed the Mr Justice Tugendhat's judgement in the High Court that breach of privacy is a tort, dismissing Google's argument that it should only be actionable is there is a financial loss, concluding: "Article 23 of the Directive does not distinguish between pecuniary and non-pecuniary damage. There is no linguistic reason to interpret the word "damage" in article 23 as being restricted to pecuniary damage… such a restrictive interpretation would substantially undermine the objective of the Directive which is to protect the right to privacy of individuals with respect to the processing of their personal data."

The judgment set out clearly how Google profits from its advertising service that relies on tracking cookies, stating that the company "makes an annual profit of billions of dollars from the DoubleClick service" and setting out how the DoubleClick ID Cookie, when placed onto a user's browser, gathered data such as surfing habits, social class, race and ethnicity, sexual interests, trade union membership, religious and political beliefs, mental and physical health and financial situation. This information was gathered through what is known as the 'Safari workaround' in spite of the Apple Safari web browser's default privacy settings, that opted out of permitting tracking cookies for nine months in [year]: "As a result of the operation of the Safari Workaround during the Relevant Period the Defendant, without Safari users' knowledge or consent thereby obtained and recorded the private and personal information referred to [above]."

Dan Tench, partner at Olswang, acting for the Claimants, welcomed the decision: "This is an important decision by the Court of Appeal that prevents Google from evading or trivialising these very serious intrusions into the privacy of British consumers. Google, a company that makes billions from advertising knowledge, claims that it was unaware that was secretly tracking Apple users for a period of nine months and had argued that no harm was done because the matter was trivial as consumers had not lost out financially. The Court of Appeal saw these arguments for what they are: a breach of consumers' civil rights and actionable before the English courts. We look forward to holding Google to account for its actions."

The decision potentially opens the door to litigation by millions of Britons who used Apple computers, iPhones, iPods and iPads during the relevant period of Summer 2011 and Spring 2012. Jonathan Hawker represents the Google Action Group, a not-for-profit company set up to manage claims against the internet giant for breach of privacy through the Safari workaround:

"Anyone who used the Safari browser during the relevant period now has the right to join our claim against Google. Whilst it has the resources to fight individual claimants, together we have the resources and funding to bring this serious matter before the English courts and to attempt to recover damages for Safari users. We urge all Safari users to join us in this battle to hold Google to account for its actions in the only way it understands."

Google faced further criticism from the Court of Appeal for its predicted cost of a trial of this matter and its failure to answer what it felt were "reasonable questions" from the Claimants in pre-action correspondence: "[Google] has put forward an estimate for its trial costs of £1.2 million. These figures seem to us to be extremely high, in particular because some of the technical issues in this claim may already have been addressed by the defendant in other litigation concerning the Safari workaround it has had to deal with in the USA. In August 2012, the defendant agreed to pay a civil penalty of US$22.5 million to settle charges, brought by the United States Federal Trade Commission that it misrepresented to users of the Safari browser that it would not place tracking cookies or serve

targeted advertisements to those users. In November 2013 it agreed to pay US$17 million to settle US state consumer-based actions brought against it by the attorneys general representing 37 states and the District of Colombia. Whether that is so or not, we think the costs of this litigation should be capable of appropriate control".

Whilst Google has disposed of this matter in the United States, it has attempted to prevent Britons from having their case heard in this country. The Court of Appeal decision will prevent Google from brushing this matter under the carpet.

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Notes to Editors

The Google Action Group is a not-for-profit company set up to manage the claims of consumers against Google. Founded by the Google Governance Campaign, it has funding and a specialist law firm instructed to bring an action at the earliest possible opportunity. The Group's website – www.googleactiongroup.com - will be launched on Monday and any consumer wishing to join the action should contact the Group via that vehicle.

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