CLASS ACTIONS IN ENGLAND AND WALES
KEY PRACTICAL CHALLENGES

Damian Grave, Gregg Rowan and Maura McIntosh of Herbert Smith Freehills LLP look at how claims by large groups of claimants are litigated in England and Wales and consider some key practical challenges that can arise for both claimants and defendants.

In recent years there has been a marked increase in the focus on class action litigation in England and Wales, with some very large and high-profile claims going through the courts. The types of claim that have been attracting attention include:

- Shareholder actions, such as the *RBS Rights Issue Litigation* which settled in 2017 and the *Lloyds/HBOS Litigation* in which judgment is awaited (*for background, see News brief "Legal advice privilege: who is the client?", www.practicallaw.com/3-638-0479; and feature article "Securities class actions: a gathering storm?", www.practicallaw.com/w-008-9923*).

- International environmental and human rights-based claims against companies in relation to their, or their subsidiaries', activities abroad, such as *AAA and others v Unilever plc and Unilever Tea Kenya Limited* in which the Court of Appeal recently refused jurisdiction over claims relating to injuries suffered on a tea plantation operated by Unilever's Kenyan subsidiary during post-election violence in 2007 (*[2018] EWCA Civ 1532, see News brief "Parent company liability: a different formulation", www.practicallaw.com/w-015-8854*).

- Product liability cases, such as the *VW NOx Emissions Litigation* brought by owners of vehicles fitted with emissions test defeat devices (*see feature article "Product liability class actions: a vision of the future?", www.practicallaw.com/3-556-5412*).

The controversial opt-out regime for competition claims in the Competition Appeal Tribunal (CAT), introduced by the Consumer Rights Act 2015, has also generated a lot of interest (*see News briefs "Competition litigation: radical reform ahead?", www.practicallaw.com/8-524-3631; and "Private competition actions: EU proposals", www.practicallaw.com/3-532-4192*) (*see "Opt-out basis" below*).

Class actions seem set for further growth, not least due to the increased activity of claimant firms and litigation funders in this area, which they see as an attractive, and potentially very lucrative, business opportunity. In addition, the very existence of recent high-profile claims tends to attract further attention; interest breeds interest, in this as in many areas.

This article:

- Outlines the available procedures for litigating class actions in the UK.

- Focuses on the group litigation order (GLO) procedure and the practical issues

and challenges that may arise, including when the court will make a GLO, costs and funding, statements of case, the trial, disclosure and evidence, effect of the judgment, appeals and settlement.

AVAILABLE PROCEDURES

The main mechanism for litigating class actions in the English courts is the GLO under Part III of Civil Procedure Rule (CPR) 19 (*see box "What is a group litigation order?"*). The GLO is an opt-in procedure, so individual claimants have to take positive steps to join the action and be identified in the claim. There are other procedures that are available for bringing a group claim, some of which proceed on an opt-in basis, and others proceed on an opt-out basis so that claimants who fall within the relevant class of individuals are automatically included in the claim unless they opt out.

Opt-in basis

Alternatives to the GLO that proceed on an opt-in basis include:

Single claim form. It is possible to litigate large numbers of claims together simply by listing all the claimants on a single claim form, so long as the court is satisfied that the claims can conveniently be disposed of in the same proceedings. Perhaps the best-known example is the Railtrack litigation, in which over 48,000 former shareholders of Railtrack Plc brought claims against the government following its decision to put the company into administration in 2001 (*Weir and others v Secretary of State for Transport and another [2005] EWHC 2192*).

Informal test case. An informal test case procedure can also be used to manage a large number of similar claims without a GLO. A high-profile example is the bank charges litigation in 2008, in which the then competition authority, the Office of Fair Trading, brought a case against various banks relating to unauthorised overdraft charges (*Office of Fair Trading v Abbey National plc and others [2009] UKSC 6; see News brief "Bank charges test case: fair play", www.practicallaw.com/3-382-0127*).

Opt-out basis

There are two procedures that can be used to bring claims on an opt-out basis:

Claims in the CAT. Bringing an opt-out claim in the CAT is the newest procedure for bringing claims on a collective basis (*see box "Collective competition claims"*).

Representative action procedure. This is the oldest procedure for bringing group claims in the English courts and is now embodied in CPR 19.6. It allows a claim to be brought by a representative claimant on behalf of all those with the "same interest" in the claim, with no need for the represented parties to be named or joined to the action in any way.

The representative action procedure has not been widely used, largely due to the strict manner in which the courts have interpreted the same interest requirement (*Emerald Supplies Ltd and others v British Airways plc [2015] EWCA Civ 1024*). This has generally been thought to preclude the procedure being used to bring damages actions, as losses tend to vary between individual claimants. The procedure could, however, see something of a revival following the case recently launched against Google in respect of data privacy issues on behalf of around 5.4 million people in the UK who used Google's iPhone between June 2011 and February 2012 (*Lloyd v Google Inc*).

Judgment is currently awaited on Google's challenge to jurisdiction and to the use of the representative action procedure. If the claim is allowed to proceed, it could be a significant development in terms of how data and privacy actions are brought. However, it would not necessarily mean an expansion in the use of the representative action procedure in other types of case. It may be that data and privacy cases are better suited to the use of this procedure than other cases, particularly where the claims are for distress rather than financial losses that vary between individuals. The GLO is therefore likely to remain the main procedural mechanism for bringing collective claims for the foreseeable future.

What is a group litigation order?

A group litigation order (GLO) is an order that provides for the case management of claims that give rise to common or related issues of fact or law, referred to as the GLO issues. The claims managed under the GLO are listed on a group register, and a judgment or order made in one claim on the group register in relation to one or more of the GLO issues will be binding on the parties to all other claims on the group register at the relevant time.

To date, there have been around 100 GLOs since the procedure was introduced in May 2000. In many respects, GLO cases proceed just as any other litigation. There are the same procedural stages, such as the service of statements of case, the disclosure of documents, the exchange of factual and expert evidence and, ultimately (unless the case settles), trial and judgment, possibly followed by an appeal. However, some particular challenges tend to arise at each of these stages, given the typical size and complexity of GLO cases and the inevitable complications that arise from having large numbers of claimants. There are also features that are unique to these actions, including how to define the GLO issues and how to determine the effect of a judgment on the individual claims on the group register.

WHEN WILL THE COURT MAKE A GLO?

The court has a discretion to make a GLO where there are, or are likely to be, a number of claims giving rise to the GLO issues, that is, the common or related issues of fact or law identified in the GLO (*see box "Defining the GLO issues"*). The GLO application must be served on the respondent, typically the defendant, who may make submissions to the court as to why the GLO should not be made.

Number of claims

There is no minimum or maximum number of claims that may be included in a GLO. The numbers of claimants have varied widely, from as few as 18 claimants in the *Corby Group Litigation* to tens of thousands in the *Abidjan Group Litigation* and the *Kenyan Emergency Group Litigation*.

There is also no requirement for claims to have been issued when the GLO application is made, but the court may refuse an application where it is not satisfied that there will be a sufficient number of claimants to make a GLO an efficient way of proceeding. In *Austin v Miller Argent*, the Court of Appeal upheld the High Court's refusal to grant a GLO, commenting that the court will not make a

GLO before it is clear that there is a sufficient number of claimants who seriously intend to proceed (*[2011] EWCA Civ 928*).

Issues in the claim

As well as the GLO issues, the claims grouped together under a GLO will generally involve issues that are unique to each claimant, referred to as individual issues. There is no requirement that the GLO issues predominate over the individual issues. In general, however, the court will be less likely to grant a GLO where there are few common issues, or they are relatively unimportant.

The classic GLO tends to involve a single action or event, or chain of events, in respect of which large numbers of claimants may be entitled to claim, such as a major environmental incident, a drop in share values or anti-competitive conduct. In these cases there is obvious scope for common or related issues of fact or law. If the key issues in the case must be determined individually for each claimant, the benefits of a GLO may be limited.

Other factors

In exercising its discretion as to whether to grant a GLO, the court may take into account other factors, including whether the claims could be dealt with more efficiently or cost-effectively using an alternative procedural mechanism. For example, in *Hobson v Ashton Morton*, the High Court considered that the underlying claims could be dealt with at a fraction of the cost by funding a suitable test case outside the GLO procedure (*[2006] EWHC 1134 (Admin)*). The court will also consider the claimants' ability to fund the litigation through to a conclusion and to meet any order for payment of adverse costs.

COSTS AND FUNDING

Most group actions will not be able to go forward without some sort of funding mechanism in place, both to pay the claimants' costs and to cover the claimants' potential liability for adverse costs if the claim fails. Potential claimants are unlikely to come forward to join the GLO if they have to take on the costs risk themselves, unless perhaps there are strong prospects of success, the individual claims are high-value, and the potential costs are relatively modest.

Funding sources

The principal sources of funding that may be used, individually or in combination, are:

- An agreement with a third-party litigation funder to finance the costs in return for an agreed return payable out of any damages.
- A no win, no fee agreement with solicitors or counsel, or both, which could be either a conditional fee agreement (CFA) involving a success fee uplift on normal hourly rates (up to 100%) or a damages-based agreement (DBA) where the fees are agreed as a percentage of damages (up to 50% including VAT).
- An after-the-event (ATE) insurance policy, which will typically cover the claimants' liability for adverse costs and their own disbursements, and may also cover some proportion of their legal fees.

The claimants' ability to put in place any of these types of funding will depend on the claim having sufficiently high prospects of success to justify the risk taken on by the lawyers, insurers or funders (*see Briefing "Third-party litigation funding: when it all goes wrong", www.practicallaw.com/2-640-1000*).

Defendants' cost liability

The good news for defendants is that, since the implementation of the Jackson reforms in 2013, none of these methods of funding will increase the defendant's potential costs liability if the claims succeed, as CFA success fees and ATE premiums are no longer recoverable from a losing opponent (*see feature article "Jackson reforms: what commercial parties need to know", www.practicallaw.com/3-524-7405*). Similarly, where there is a DBA or a third-party funder, the defendant will be liable for costs only on a conventional basis; any additional amount the claimants owe to the lawyers or the funder must be paid out of damages.

Recovery of costs

There are some particular complications that arise in relation to the recovery of costs in GLO

Collective competition claims

A new collective redress regime for competition claims was introduced on 1 October 2015 under the Consumer Rights Act 2015, providing for the first time an opt-out regime for damages for breaches arising out of competition law. Claims may also be brought on an opt-in basis.

Collective claims may only be continued if the Competition Appeal Tribunal (CAT) makes a collective proceedings order (CPO). It will only do so if it: is satisfied that the claims raise the same, similar or related issues of fact or law and are suitable to be brought in collective proceedings; and considers that it is just and reasonable for the person applying for the CPO to act as representative.

To date, two claims have proceeded to the certification stage. In *Dorothy Gibson v Pride Mobility Products Ltd,* Ms Dorothy Gibson applied for an opt-out CPO on behalf of individuals who had bought mobility scooters from Pride Mobility Products Ltd during the period in which the Office of Fair Trading had found that the company had infringed competition law (*[2017] CAT 9*). The CAT declined to grant a CPO but invited Ms Gibson to reformulate the claim. She later decided not to pursue the action.

In *Walter Hugh Merricks CBE v Mastercard Incorporated,* Mr Walter Hugh Merricks applied for an opt-out CPO on behalf of a class of around 46 million individuals who had bought goods and services from businesses that accepted MasterCard during a specific period in which the European Commission had held that MasterCard infringed competition law (*www.practicallaw.com/4-380-5174*). The damages were estimated at around £14 billion. The CAT dismissed the application, finding that it was not suitable to be brought in collective proceedings (*[2017] CAT 16, www.practicallaw.com/w-010-0391*). The Court of Appeal is due to hear an application for permission to appeal this decision in October 2018.

Other claims, relating to the trucks cartel, have been announced very recently (*UK Trucks Claim Limited v Fiat Chrysler Automobiles NV and others, Case No 1282/7/7/18* and *Road Haulage Association Ltd v Man SE and others, Case No 1289/7/7/18*).

cases. The general rule is that group members will each be liable for the individual costs relating to their own claims and for an equal proportion of the common costs; essentially, these are costs incurred in relation to the GLO issues and any test claims. The court may, however, make a different order. The question is what fairness demands. For example, in shareholder cases where there may be a considerable disparity between the values of the claimants' claims, the court may order that liability will be split in proportion to individual shareholdings. This was done in the *RBS Rights Issue Litigation* (*[2014] EWHC 227 (Ch)*).

In contrast to other types of litigation, under CPR 46.6(3), the claimants' potential liability for adverse costs is several, not joint, unless the court orders otherwise. The upshot is that a successful defendant will normally be able to recover from each individual claimant only that claimant's own share of the common costs; it cannot choose to enforce the entire costs order against the better resourced group members and leave the group to sort things out between themselves. This is likely to make it much more difficult for a defendant to recover its costs in full, unless it can obtain payment through the claimants' ATE cover, a third-party costs order against a litigation funder, or security for costs.

The potential difficulties in recovering costs at the conclusion of the case may make an order for security for costs particularly valuable in the GLO context. The court has power under CPR 25.14(2) to order security for costs against a third party that has contributed, or agreed to contribute, to the claimant's costs in return for a share of any proceeds in the litigation, that is, in effect, a third-party funder.

The court also has a power, inherent in CPR 25.14, to order the claimants to disclose the identity and address of a third-party funder so that the defendant can make an application for security under that provision. These orders have been made in the GLO context. For example, in the *RBS Rights Issue Litigation,* the High Court ordered the claimants to disclose the identity of the funder and went on to grant an order for security for costs against it (*[2017] EWHC 463 (Ch); [2017] EWHC 1217 (Ch), www.practicallaw.com/w-008-7827*).

STATEMENTS OF CASE

Typically, each claimant will need to plead only the individual elements of its claim and may rely on group particulars for elements that are common to group members. The group particulars of claim will usually set out general allegations relating to all of the claims, and contain a schedule specifying for each individual claim which of the general allegations are relied on and any specific facts relevant to that claimant, such as particulars of damage suffered.

Detail of pleadings

There may be a temptation to plead the case at a very high level of generality, given the potential complications and a desire to save costs. However, the Court of Appeal in *CFC and Dividend Group Litigation* criticised this approach, commenting that important matters of contention were not identified in the pleadings, so they gave very little indication as to what was actually in issue (*[2016] EWCA Civ 376*). The court emphasised that, in group litigation as in any other, relevant facts must be pleaded; either in group particulars if they are facts generally applicable to all claimants or in a schedule if they are specific to a particular claimant.

Questionnaires

In some cases, specific facts relating to each claimant may be obtained by using a questionnaire, which may be set up for claimants to complete online where that is feasible. The completed questionnaires may be used in place of individual particulars. Defendants will wish to scrutinise this process carefully to ensure that sufficient details of the claimants' claims are given to allow those claims to be investigated and challenged where appropriate.

In the *Chagos Islanders Group Litigation*, the High Court criticised the questionnaires which accompanied the group particulars of claim on the basis that they did not enable the court to understand how each individual claim related to the various issues raised in the proceedings (*[2003] EWHC 2222 (QB)*). The court commented that, if it had not entered summary judgment in favour of the defendants, it would have been minded to stay the action and require the claimants to complete a new, court-approved questionnaire, with more specific and detailed questions relating to the issues raised and identifying which issues related to which claimants (*see box "Early disposal of claims or issues"*).

Pleading a defence

Whether and when the defendants must plead a defence to the individual particulars varies from case to case. In some cases, it will only be necessary for defendants to plead a defence in response to the group particulars of claim, for example if preliminary issues are determined against the claimants and the action does not proceed further. However, where there is to be a trial of test claims (*see "Test cases" below*), the defendant is likely to have to plead a defence at least in respect of the issues that arise in those claims.

Defining the GLO issues

The group litigation order (GLO) issues are the common or related issues of fact or law that, when decided, will bind all parties grouped together under the GLO. Where a claim is issued which gives rise to one or more of the GLO issues, it will typically be transferred to the court managing the group litigation and stayed pending further order. It is therefore crucial that the GLO issues are drafted clearly and concisely, so that there is no doubt as to which claims are properly subject to the GLO and which aspects of the court's decision will be binding on all parties.

In defining the GLO issues, care must be taken to avoid the extremes of over-simplifying or over-complicating the issues. Over-simplification could mean that too broad a range of claims are caught by the GLO, when in fact the similarities are superficial. This approach might seem tempting to the claimants in order to maximise numbers, exert greater pressure on the defendant, and potentially make the case more attractive to a litigation funder. However, it may backfire, particularly if the broader pool includes weak claims that may undermine the viability of the case as a whole, damaging credibility, escalating costs and making it more difficult to achieve settlement. Over-complicating the issues, on the other hand, could mean that claimants whose claims ought properly to be subject to the GLO are discouraged from joining the proceedings.

Early disposal of claims or issues

In certain circumstances, the court has the power to strike out a party's statement of case or grant summary judgment, in full or in part, enabling it to dispose of a case (in either party's favour) or otherwise narrow the issues in dispute before trial. This will almost certainly save time and costs, but these are draconian measures which will not be deployed lightly.

A statement of case can be struck out under Civil Procedure Rule (CPR) 3.4(2) on various grounds, including if it discloses no reasonable grounds for bringing or defending the claim. Summary judgment may be granted under CPR 24.2 if the court considers that there is no real prospect of success and no other compelling reason why the matter should be disposed of at trial. A strike-out application will often be brought together with an application for summary judgment.

These applications can provide a significant tactical advantage in the context of group litigation orders, and have been made successfully by both claimants and defendants. For example, in the *Lloyds/HBOS Litigation*, the defendants successfully applied to strike out the claimants' allegation that the Lloyds directors owed shareholders a series of broad fiduciary duties, thereby narrowing the issues to be tried (*[2015] EWHC 3220 (Ch)*). In the *Franked Investment Income Group Litigation*, which concerned claims against HM Revenue & Customs for restitution of advance corporation tax, the Court of Appeal granted summary judgment to seven groups of claimants for approximately £160 million following the resolution of various test claims (*[2016] EWCA Civ 1180*).

TRYING THE CASE

In any group litigation, the court will need to strike an appropriate balance between addressing generic or common issues, which will affect the resolution of all or a significant number of the claims on the group register, and individual issues, which may be equally important in resolving individual claims.

In general terms, the claimants will tend to want to focus on common issues, with a view to putting maximum pressure on the defendant at minimum cost, whereas the defendant will tend to want to ensure that individual issues that arise in the claims are also investigated. Claims that may appear strong when looking only at the issues that are common to all, such as whether a defendant has been negligent, may well falter at the stage of considering individual issues, such as whether the negligence has caused the particular claimants to suffer loss.

In trying the GLO issues, the court will typically deploy at least one of these case management tools: preliminary issues or test claims. The court may direct a separate trial of any issue under CPR 3.1(2) or may direct one or more of the claims to proceed as test claims under CPR 19.13(b). These tools will often be used in combination. For example, where the court has ordered the trial of a preliminary issue, it may identify a number of test cases to supply the necessary facts.

Preliminary issues

Although the power to direct a separate trial of a preliminary issue is not specific to group litigation, the nature of group litigation tends to lend itself to the trial of preliminary issues as there are, by definition, common or related issues which arise in the various claims and which are identified and recorded in the GLO. These form a natural starting point for identifying issues that may be hived off for determination before other issues are tried.

Where the court's decision on a preliminary issue has resulted in the whole case falling away, it will almost certainly have saved time and costs. Where, however, the trial of the preliminary issue has not disposed of the claims, it is likely to mean that the trial of the remaining issues will take place later than it otherwise would, and costs may be increased overall. This potential for delay and additional cost may be further exacerbated by the possibility of an appeal against the court's decision on the preliminary issue. The question is whether this is justified by the potential benefits of the preliminary issue.

Where there is no prospect that a decision on a particular issue will dispose of the entire case, the court will tend to be more cautious in directing that it should be tried as a preliminary issue. A preliminary issue may still be ordered where it will dispose of some discrete aspect of the case, even if not the entire case, but the courts have emphasised on a number of occasions that the issue should be one that can sensibly be separated from the remainder of the case, and should be formulated clearly and precisely (*Rossetti Marketing Ltd v Diamond Sofa Co Ltd [2012] EWCA Civ 1021, www.practicallaw.com/0-521-0700*). In the GLO context, if preliminary issues are not defined with precision, there is an increased risk of confusion, including in determining how the outcome of the preliminary issues affects the various claimants.

Test cases

Where the court directs one or more of the claims to proceed as test claims, the remaining claims will typically be stayed while the test cases are resolved. This power applies specifically to GLOs, although outside that context the court has an inherent power to order the trial of a test case in any event.

When it comes to test cases, perhaps the greatest potential pitfalls are in the process of selecting the test claims, in particular in ensuring that these appropriately represent the group of claimants and the range of issues. Not all of the GLO issues will necessarily be common to all claimants; some may arise only in relation to particular sub-groups. Even where the issues are common to all claims, there may be factual differences which result in those issues being determined differently. In these circumstances, it will be crucial to select test cases that adequately cover all of the GLO issues and represent the spectrum of factual scenarios, but without having so many test cases as to run up unnecessary costs and reduce efficiency.

The court will typically direct the parties to select the test cases, either by agreement or by each side identifying a specified number. In terms of litigation strategy, it will almost certainly be in the interests of the claimants to select the strongest claims to go forward, and in the interests of the defendants to select the weakest. Where the test claims are selected in this way, therefore, they may tend to represent opposite ends of the spectrum rather than an even spread.

DISCLOSURE AND EVIDENCE

In many GLO cases, the defendant will have most of the documents, as the enquiry, at least so far as the common issues are concerned, is likely to be focused on what it did or did not do. The corollary is that the defendant will typically wish to limit disclosure as far as possible, whereas the claimants will often push for broad disclosure (*see box "The claimants' legal representation"*).

Privilege

Where the disclosure burdens are not equally shared, this also tends to lead to more disputes regarding the extent to which a party is entitled to rely on legal professional privilege to withhold documents that would otherwise be disclosable. It seems no coincidence that a number of significant decisions relating to the ambit of privilege have arisen in the class actions context, including most notably the controversial decision in the *RBS Rights Issue Litigation* as to who is the "client" for the purposes of legal advice privilege (*[2016] EWHC 3161 (Ch), see News brief "Legal advice privilege: who is the client?", www.practicallaw.com/3-638-0479*).

This point is currently being considered by the Court of Appeal following the appeal in the high-profile case of *Director of the Serious Fraud Office v Eurasian Natural Resources Corporation Ltd* (which is not a class action) that was heard in July 2018 (*[2017] EWHC 1017, see News briefs "Investigations and privilege: a restrictive scope", www.practicallaw.com/w-008-3720 and "Litigation privilege: increasing tensions", www.practicallaw.com/w-013-3473*).

Claimants' documents

In some cases, the claimants may also have significant numbers of documents that are important for the proper resolution of the issues. Obtaining disclosure from very large numbers of individual claimants may give rise to obvious logistical challenges. Where there is to be a trial of test claims, however, disclosure will often be limited to the issues that arise in the test claims and, on the claimants' side, to documents in the control of the test claimants rather than the entire claimant group.

In the *Visteon Group Litigation*, for example, which involved claims by around 1,400 former employees relating to the transfer of their accrued pension benefits, the High Court ordered the parties to give standard disclosure limited to the claims of the ten test claimants (*Varney v Ford Motor Company Ltd, Order of Mr Justice Asplin dated 18 December 2013*).

Witness evidence

As in other types of case, the parties will normally be directed to exchange witness statements setting out the evidence they intend to rely on in relation to any issues of fact to be decided at the trial. Again, where there is to be a trial of test claims, the witness evidence will typically focus on the issues that arise in the test claims and there will be no need for the non-test claimants to give evidence.

This is not an invariable rule, however. In the *Kenyan Emergency Group Litigation*, an issue arose as to whether evidence from around 50 non-test claimants should be permitted for the trial of the 25 test claims. The High Court refused to exclude the evidence, noting that if the evidence was of substantial probative value (which could not be determined at that stage) then it could not be excluded on the basis that the relevant witnesses had not been randomly selected as test claimants (*Kimathi and others v Foreign and Commonwealth Office [2015] EWHC 3432 (QB)*).

Where there will not be a trial of test cases, the claimants will need to decide who among their number should provide witness evidence in order to establish their case on the GLO issues, or any subset being tried as preliminary issues. There is no requirement to provide evidence from all claimants and it will normally be impracticable to do so.

Expert evidence

Expert evidence must be "reasonably required" to resolve the proceedings before the court will grant permission for it to be adduced (*CPR 35.1*). Expert evidence in the GLO context proceeds largely as in any other litigation, although the typically complex nature of GLO cases means that there may be more expert disciplines than in the average case.

One issue that may arise more frequently in group litigation is a perceived inequality of arms between the parties in relation to technical matters, as the defendant may have in-house expertise that is lacking among the claimant group. In these circumstances, the court may be more sympathetic to an application by the claimants to submit expert evidence. In the *Ocensa Pipeline Group Litigation*, for example, this concern influenced the High Court's decision to allow the claimants to call expert evidence in the field of pipeline project and engineering management, given that the claimants had

The claimants' legal representation

Where the claimants in group litigation are represented by a number of different firms, the court can appoint lead solicitors under Civil Procedure Rule (CPR) 19.13(c) to manage the conduct of the group litigation order issues. This may be a single firm or, less commonly, multiple lead solicitors may be appointed. This needs to be carefully managed, with clear delineation of roles and responsibilities, given the potential for duplication and disagreements between the different firms as to how to conduct the litigation. It can also cause complications if some lead solicitors settle claims on behalf of their clients, leaving others to take on the conduct of elements of the case that they have not previously dealt with.

In many cases, the claimants' solicitors may agree among themselves who will act as lead solicitor(s), but disputes do arise. In these circumstances, the court is likely to consider the respective firms' ability to manage large numbers of claims efficiently, the number of claimants they represent and the quantum of claims, and which was first to issue proceedings.

In the *British Steel Coke Oven Workers Litigation*, where two lead firms had been appointed, the High Court refused an application for the appointment of an additional firm (*[2017] EWHC 2647*). The court said that the burden was on the firm wishing to be joined to demonstrate that this would further the overriding objective, given the potential for duplication, increased costs, and an increased risk of delays and disagreements. The number of claimants represented by each firm was a factor to be considered but was not determinative.

no knowledge of these matters and the defendant had substantial in-house expertise (*[2013] EWHC 3173 (TCC)*).

EFFECT OF THE JUDGMENT

For test claimants whose claims will have been heard fully or in part on their individual facts, the position in relation to a court judgment is relatively straightforward. They will generally be in the same position as if their claims had been heard individually. The judgment will be binding on them and neither they nor the defendant will be permitted to bring a separate action on the claims or issues that have been determined between them. If they wish to challenge the judgment, it must be by way of an appeal (*see below*).

For other claimants, the starting point under CPR 19.12 is that a judgment or order on the GLO issues is binding on the parties to all the claims under the GLO at the relevant time, unless the court orders otherwise. Take, for example, a group action where the claimants allege that they have suffered personal injuries from exposure to a chemical negligently released by the defendant. One GLO issue might be whether the defendant was negligent as a matter of law, which applies equally to all of the claims. If the court answers this question in the negative, none of the claims will be able to proceed. If the court finds that there has been negligence, this will be equally binding for all of the claims. It will then be necessary to look at individual circumstances to determine questions of causation and quantum.

Determining the effect of a judgment may be a particular challenge where the court uses illustrative test cases to provide the factual background for its decisions in relation to the GLO issues. In the example posed above, the court might run a number of test cases to examine whether exposure to the chemical caused the relevant injuries. This is an obvious example of where the court must be careful about drawing general conclusions in relation to all of the GLO claimants based on the individual facts in the test claims. Even where the court's findings are not strictly binding, they may result in the non-test cases being withdrawn or settled.

APPEALS

Any party adversely affected by a judgment or order which is binding on that party may seek permission to appeal (*CPR 19.12(2)*). However, permission to appeal will be granted only where the appeal would have a real prospect of success or there is some other compelling reason for the appeal to be heard.

Appeals in relation to decisions made under a GLO can raise some difficult questions of procedure, particularly where non-test claimants wish to appeal general findings. As noted above, non-test claimants will only be bound by a decision insofar as it relates to the common issues. Any findings on individual issues are not binding on other claimants. Continuing the example discussed above of a group action for personal injuries allegedly due to chemical exposure, suppose the court were to conclude that none of the test claimants' injuries were caused by exposure to the chemical in question. That conclusion relates to the particular circumstances of the individual claimants. It will not bind the other claimants under the GLO, and so they cannot bring an appeal against it.

In contrast, if the issue was framed as whether the chemical was capable of causing

Related information

This article is at practicallaw.com/w-015-9333

Other links from uk.practicallaw.com/

Topics

Appeals	topic/4-203-6793
Case management	topic/2-203-6794
Costs – Litigation	topic/1-203-6799
Disclosure: litigation	topic/4-103-1193
Early determination	topic/5-203-6797
Evidence	topic/5-103-1197
Experts	topic/3-203-6798
Funding litigation	topic/5-381-9613
Privilege	topic/7-635-9367
Settlement and Part 36	topic/0-203-6808
Starting a claim	topic/3-381-9614

Practice notes

Appeals: an overview	w-003-5884
Case management: an overview	7-500-4589
Conditional fee agreements entered into from 1 April 2013: an overview	2-369-8962
Consumer Rights Act 2015: overview	3-531-6248
Costs: an overview	7-203-1181
Damages actions in the Competition Appeal Tribunal	8-248-2955
Damages-based agreements in civil litigation (other than employment tribunal matters): overview	1-524-3093
Disclosure: an overview	5-203-8758
Early determination: an overview	3-203-1178
Expert evidence: an overview	1-203-0900
Legal professional privilege in civil litigation: an overview	2-205-2977
Multi-party disputes: toolkit	7-517-3134
Multi-party litigation: overview	9-509-2801
Settlement of disputes involving multiple parties	8-501-4093
Third party litigation funding in England and Wales: an overview	8-521-3304

Previous articles

Securities class actions: a gathering storm? (2017)	w-008-9923
Product liability class actions: a vision of the future? (2014)	3-556-5412
Section 90 of FSMA: time for collective action? (2012)	1-520-2511
Collective claims: learning from the US experience (2008)	2-380-5212

For subscription enquiries to Practical Law web materials please call +44 0345 600 9355

personal injuries of the type complained of, that would ordinarily be a genuinely common issue. If the court answered that question in the negative, the decision would be binding on all GLO claimants. However, the court would have reached that decision by considering the facts of the particular test claims. On appeal, as well as arguing that the court had made an error of law when determining the test cases, a non-test claimant might also wish to argue that its own case can be distinguished on the facts so that, even if sound for the test cases, the conclusion reached should not apply to it.

An argument of this kind necessarily involves non-test claimants advancing facts relating to their own particular circumstances that were not considered at the original trial. This raises difficult questions as to how the new facts should be dealt with, as appellate courts are not generally well equipped to make findings of fact based on new evidence.

SETTLEMENT

In any group action, and particularly where there are large numbers of claimants, it will be important for the claimant group to have clear decision-making structures so that decisions can be made quickly and without prejudicing the orderly conduct of the litigation. These structures are essential in the context of settlement negotiations, as an unwieldy process for obtaining instructions may make it difficult to reach a settlement (*see also Briefing "Settling group claims with a scheme of arrangement: breaking new ground", www.practicallaw.com/w-010-4987*).

The involvement of other parties with a financial interest in the claims, whether they are lawyers acting under CFAs or DBAs, ATE insurers, or third-party litigation funders, can also complicate the settlement process. This is due to the differing interests at play and the need to ensure that there is sufficient scope in any settlement to provide a reasonable return for all parties, not least the claimant group.

It will be important to ensure that the parties to any settlement agreement are clearly identified. In some cases, defendants may not be willing to settle unless all the claimants are parties, or may insist on a certain percentage of claimants participating in a settlement before it becomes binding. A provision of this kind was included in the *Abidjan Personal Injury Group Litigation*, where at least 75% of claimants had to accept before the settlement became enforceable (*[2011] EWCA Civ 1150*).

Where the settlement is not universal, the settling claimants may seek to incorporate a most favoured nation clause into the settlement agreement, to prevent the defendant offering better terms to any other claimants without offering those terms also to the settling claimants.

The settlement sum may be expressed as an aggregate amount to be paid to the whole group, so that it is up to the claimants to determine how the sum should be distributed, or separate payments to individual claimants. The option of an aggregate amount may be attractive to a defendant but may put the claimants' solicitors in a difficult position in resolving the various conflicts between their clients. Where a formula for individual payments has been agreed, the defendant may wish to put in place a claims validation process so that only claimants with genuine claims receive payment.

The parties must also agree how costs will be dealt with in any settlement. There may be an all-inclusive figure for both damages and costs, or the defendant may agree to pay costs in addition to the damages amount. Claimants are likely to prefer the latter approach, so that it is clear how much they will receive from the settlement without needing to factor in a deduction for costs.

Where the defendant agrees to pay costs as well as damages, the amount payable in respect of the costs liability may be quantified, or the agreement may simply provide that the defendant will pay the claimants' reasonable costs, although this can be a dangerous route for the defendant. In the *Abidjan Personal Injury Group Litigation,* for example, the defendants were "dismayed" to find that the claimants were seeking costs of almost £105 million, although that included CFA success fees and an ATE insurance premium, which are no longer recoverable from a losing party (*[2011] EWCA Civ 1150*).

Damian Grave and Gregg Rowan are partners, and Maura McIntosh is a professional support consultant, in the dispute resolution team at Herbert Smith Freehills LLP. They are also the general editors of Class Actions in England and Wales, a new textbook published by Sweet & Maxwell, which is co-authored by number of lawyers from the firm.