Feature

KEY POINTS

- The popularity of Representative Actions under r 19.8 CPR as a real and viable alternative to Group Litigation Orders (GLOs) seems only likely to increase. The High Court is due to consider their use in s 90/90A Financial Services and Markets Act 2000 (FSMA) claims at the end of this year.
- The Court of Appeal has confirmed the availability of opt-out class actions in the Competition Appeal Tribunal to classes containing large and sophisticated businesses.
- Whichever mechanism is selected, claimants will likely be expected to have considered with some care the rationale underpinning their choice.

Authors Rachel Tandy and Chris Haan

Collective stress or collective redress? Examining available mechanisms for securities litigation in England and Wales

It has been a turbulent few years for mass litigation in England and Wales. The advent of new collective procedures and revival of old ones has seemingly gifted claimant investor groups an abundance of choice. But the precise boundaries of the various mechanisms available seem to be in a constant state of flux. This article examines the current state of play through the prism of securities litigation and seeks to identify key considerations and future trends.

AVAILABLE MECHANISMS FOR LAUNCHING A GROUP CLAIM

Three formal procedures are available to claimants *en masse*. In brief summary they are as follows.

First, the Representative Action procedure under r 19.8 CPR:

- Only the representative claimant is party to the claim,[1] and is responsible (with their solicitors) for the conduct of the litigation.
- Represented claimants[2] must have "the same interest in a claim" (r 19.8(1) CPR); the court also retains a residual discretion as to the use of the procedure.
- A claim can be "opt-in" or "opt-out", according to the court's discretion (*Lloyd v Google LLC* [2021] UKSC 50 at [77]).
- Those in the class are bound by any judgment or order made. Enforcement by or against them requires the court's permission (r 19.8(4) CPR).
- Usually, only the representative claimant is liable to meet any costs order made in the defendant's favour. However, the court may make costs orders against others in the class in limited circumstances (*Google* at [79] and see *Chandra v Mayor* [2016] EWHC 2636 Ch, [2017] 1 WLR 729).

Second, an application for a Collective Proceedings Order (CPO) in the Competition Appeal Tribunal (CAT), pursuant to s 47B Competition Act 1998 (CA 1998):

- The procedure is only available in relation to the competition claims specified in s 47A CA 1998.
- The threshold criteria require that:
  (i) it be just and reasonable for the proposed class representative to act as representative in the proceedings;
  (ii) the claims raise the same, similar, or related issues of fact or law; and
  (iii) the claims are suitable to be brought in collective proceedings (s 47B (5)-(8) CA 1998).
- The class representative is responsible (with their solicitors) for the conduct of the claim.
- The procedure can be "opt-in" or "opt-out", at the court's discretion (s 47B(7)(c) CA 1998, and r 79(3) CAT rules).
- Any judgment or order made in collective proceedings is binding on all those in the class (s 47B (12) CA 1998).
- In opt-out proceedings, any damages awarded by the CAT must be paid to the representative claimant or other appropriate person (presumably for dissemination to the wider class). Damages unclaimed by the wider class within a given period must be paid to charity; alternatively, the Tribunal can order that they be used to meet costs associated with bringing the claim (s 47C CA 1998). These rules do not however apply to settlement of opt-out claims.
- Costs may be awarded to or against a representative claimant (r 98 CAT Rules); their ability to meet any costs liability will be a key question for the CAT when considering whether to make a CPO (r 78(2)(d) CAT Rules).
- Costs may not be awarded to or against other members of the class, save in some limited circumstances (eg if there is a represented sub-class, or if individual issues or applications are to be decided separately): r 98 CAT Rules.

Third, an application for a Group Litigation Order (GLO) in accordance with r 19.22(1) CPR:

- There must be: (i) multiple claims (there is no prescribed minimum number, although a GLO is less likely to be made where there are very few[3]), giving rise to; (ii) common or related issues of fact or law, known as the "GLO Issues" (r 19.21 CPR). Thereafter, the making of a GLO will be a matter for the court's discretion.[4]
- Lead Solicitors may be appointed to act on behalf of the claimant group, and be responsible for conduct of the litigation.
- The procedure is "opt-in"; claimants must each issue a claim, usually before a given cut-off date. Claims are recorded on a group register and managed together, such that (for example) disclosure by any party is treated as disclosure to all on the register (r 19.23(4) CPR).

- Lead cases will usually be selected for the trial of the GLO Issues, but other approaches can be taken (eg a trial of preliminary issues).
- Any judgment or order relating to GLO Issues is binding on all claimants whose claims appear on the group register (those added later may avoid this: r 19.23(3) CPR).
- Liability for costs common to the group will generally be shared severally (not jointly) in equal proportions[5] between the members of the group (r 46.6(3)-(4) CPR). Individual members of the group will be liable for costs incurred in relation to their individual claims (save where their individual claim is proceeding as a lead case, the costs of which are regarded as common costs).

In addition to these formal procedures, a further option is simply to utilise the court's general powers of case management:

- Since these powers will be exercised in accordance with the overriding objective at r 1.1 CPR, this approach will generally be adopted where it is regarded as the most appropriate and proportionate.
- Claimants will be required to "opt-in" by issuing a claim; claims can then be case managed together. Any number of claimants can be joined as parties (r 19.1 CPR); all can be included on a single claim form if their claims can be "conveniently disposed of' in the same proceedings" (r 7.3 CPR). Claims not commenced on the same claim form can nevertheless be consolidated and managed together, at the court's discretion (r 3.1(2)(g) CPR).
- Responsibility for the day-to-day running of the case and co-ordination between claimants will be a matter for agreement or court order.
- The court may give directions allowing for generic and/or individual pleadings, disclosure of documents, trial of test cases or of preliminary issues, and/or for the stay of the remaining cases in the group.
- All claimants will generally be jointly and severally liable for any adverse costs in the usual way, unless the court makes a costs-sharing order limiting their liability so as to be several only (which is relatively common in cases of this type): see eg *Rowe v Ingenious Media Holdings Plc* [2020] EWHC 235 (Ch).

BENEFITS AND RISKS IN INSTITUTIONAL INVESTOR CLAIMS

Representative actions

The popularity of representative actions amongst claimant groups has enjoyed something of a resurgence in recent years, no doubt fuelled (in part) by the publicity surrounding *Google*.

Cases requiring determination of issues specific to each claimant (including those where damages must be assessed individually) are less likely to be suitable for this framework, since individualised assessment "raises no common issue and cannot fairly or effectively be carried out without the participation in the proceedings of the individuals concerned" (*Google* at [80]). However, it is sometimes possible to assess damages generically: either "top down" (where the total loss suffered by the class can be calculated without reference to individual losses: see *EMI Records Ltd v Riley* [1981] 1 WLR 923) or "bottom up" (where all claimants are entitled to the same sum, hypothetically discussed in *Google* at [82]). Similarly, there will be claims with limited or no individualised elements (for example, where there are admitted or agreed facts).

Investor claims regarding securities are often brought under ss 90 or 90A/Sch 10A Financial Services and Markets Act (FSMA) 2000. Some of these do not require proof of individual reliance (eg claims regarding prospectuses/listing particulars under s 90, and those regarding dishonest delay in publishing information under para 5 of Sch 10A); for these, a "top down" assessment of damages may be possible (based on the inflation in a security's price and the total trading in the security during the affected period).

Others (eg claims for misleading statements and dishonest omissions under para 3 of Sch 10A) require proof of individual reliance. For these claims (or where damages are considered too individualised), one option may be to adopt a two-stage "bifurcated" process (discussed in *Google* at [81]), with generic issues decided by way of a claim for declaratory relief under r 19.8, and individual issues tried separately at some later date. For some, that may present funding challenges: in *Google*, the low value of individual claims combined with predicted low take-up rates at the second stage meant this approach was economically unviable ([85]). But others (including, often, large or sophisticated investors) with claims of significantly higher value may find it possible to build a sufficient book to make a claim worth funding and pursuing, even via a two-stage model.

Where it can be accessed, this procedure may offer considerable advantages to the parties and the court, including:

- the resolution of key generic issues more quickly and cost-effectively than via an "all-issues" trial;
- the postponement of (typically resource-heavy) investigation of individual issues until clearly necessary (if determinative generic issues are decided in the defendants' favour, this stage will never be reached, resulting in significant costs savings for both claimants and defendants); and
- the ability to ensure that factual and expert evidence gathered for the second stage is correctly directed only to relevant issues (for example, to a specific time period during which the market has been found to be misled), and therefore used most efficiently.

Collective Proceedings in the CAT

For those competition law claims which can use this procedure, it offers a notable advantage: in a departure from traditional compensatory principles, aggregate damages are available which do not require individual losses to be assessed (s 47 C (2) CA 1998, and see *Mastercard Incorporated v Walter Hugh Merricks CBE* [2020] UKSC 51 at [77]). Claimants need only establish that loss has been suffered by the class as a whole. Further, since the cause of action in competition claims typically only accrues upon damage,

Feature

Biog box
Rachel Tandy is a barrister at Henderson Chambers. She is listed as a leading junior for commercial litigation by the Legal 500, and a leading junior for group actions by the Legal 500 and Chambers & Partners. Email rtandy@hendersonchambers.co.uk

absolving claimants of the need to prove that damage (on an individual basis) means they are also freed from needing to establish *liability* on an individual basis, if they can prove loss to the class as a whole (per the minority in *Mastercard* [95], confirmed by the Court of Appeal in *London and South Eastern Railway Ltd v Gutmann* [2022] EWCA Civ 1077 at [35]).

Further, large and sophisticated investors embarking upon this process may be cheered to learn that the "opt-out" procedure remains available to them. A (majority) decision in the CAT suggesting otherwise[6] was recently overturned by the Court of Appeal,[7] which emphasised that access to justice "is not just about the size and sophistication of the class members" [122]. The "opt-out" procedure offers many benefits: the hassle, delay and costs of individual institutional investors needing to assess the risks and merits of the claim and funding package and needing to build a sufficient book to share costs and fund an action are avoided, the fact that an individual claimant has not taken a positive decision to litigate may be viewed as beneficial in circumstances where the defendant is also an existing commercial counterparty, and the ability to pay costs from unclaimed damages may result in larger individual recovery. All these advantages mean that a much larger proportion of the affected class should recover compensation if the claim succeeds.

However, there is a high price to pay for these: a CPO application is heavily front-loaded in terms of cost and time. The proposed class representative is expected to file full details of their case with their claim form, including budget, funding and ATE details, witness statements, litigation plan, class notice plan, expert reports and so on; this can pose particular challenges where limitation is imminent. In a contested application, defendants will need to resource and commit to the close scrutiny of that case, and (to that extent at least) show their hand even before any defence is filed.

Further, whilst a larger overall damages pool can support larger funding packages, funding an opt-out action by way of a damages-based agreement is *not* permissible (s 47C (8) CA 1998). Importantly, this prohibition may now capture a funding arrangement where the funder charges an amount determined by reference to the amount of financial benefit obtained by the claimant (following the recent Supreme Court decision in *R (PACCAR) v Competition Appeal Tribunal* [2023] UKSC 28).

GLOs and general case management

Typically viewed as the traditional approach to class actions in England and Wales, in fact just 112 GLOs are listed by the HM Courts and Tribunal Service as having been made since the procedure was introduced in 2000.

The procedure can be used to manage and determine wide-ranging and varied claims across a diverse claimant pool: the group register allows even very large claimant groups[8] to be run and managed on an "opt-in" basis. It also helps to avoid conflicting judgments (since it will typically provide that all claims raising one or more GLO issues be managed together), so can be particularly useful where further claims are expected but have not yet been issued.

However, the process tends to be heavily front-loaded. Each claimant will be required to provide key details about their individual claims within a certain period after the making of the GLO, usually in a schedule of claimant information (SOCI). This information informs case management, disclosure, and the selection of lead cases, but its provision and scrutiny can represent a significant initial outlay in terms of time and cost for claimants and defendants alike.

The GLO procedure has been used in large shareholder claims (eg the *RBS Rights Issue Litigation*, a claim under s 90 FSMA, and *Sharp v Blank* [2019] EWHC 3096 Ch, a personal claim against directors of Lloyds arising out of its takeover of HBOS). But in these types of cases, which may involve less diverse claimant groups and/or claims of greater individual value, it is also not uncommon for the court to fashion a bespoke procedure from its general case management powers. In *Manning & Napier Fund Inc v Tesco Plc* [2017] EWHC 2203 (Ch) (a claim under s 90A FSMA), an application for a GLO was rejected on grounds that further claims were unlikely to be issued,[9] and those already on foot could be actively case managed together without a GLO, by giving appropriate directions for work allocation between solicitors, trial of lead cases and the like. In *RSA Insurance Group* [2021] EWHC 570 (Ch), also a s 90A claim, the court essentially ordered a bifurcated process, but included reliance at stage 1; thus, the claimants were still expected to "undertake substantial work in ensuring the expeditious progress of the proceedings" [64] including disclosure, witness evidence, and trial preparation. (The court later varied this approach in view of developments which would have resulted in the reliance issue adding significantly to the complexity and length of any preliminary trial).

FUTURE TRENDS AND FLASHPOINTS

We expect the court's *renewed focus on representative actions* and their role in modern litigation to continue. In *Commission Recovery Ltd v Marks & Clerk LLP* [2023] EWHC 398 (Comm), a secret commission case, Knowles J commented that: "we are still perhaps in the foothills of the modern, flexible use of [this procedure] … in a complex world, the demand for legal systems to offer means of collective redress will increase not reduce" [91]. This may have been in part prompted by his view of the case as one in which a generic "top down" damages assessment was possible [71]. The fact that the claim was brought in the tort of bribery will also have limited the scope for individual issues (thus highlighting the importance of early choices about how claims are to be framed and pleaded). Note, however, that the Court of Appeal will hear an appeal against this decision in November. At around the same time, the High Court will consider (it is thought for the first time) the suitability of the r 19.8 procedure in the context of a s 90/90A FSMA claim, brought by shareholders against Indivior and Reckitt Benckiser arising out of the Suboxone scandal in the US. The securities litigation market will be watching these developments with interest.

Whichever procedure is adopted, claimants will likely be expected to have

Biog box
Chris Haan is Head of UK at Phi Finney McDonald and specialises in collective actions.
Email: chris.haan@phifinneymcdonald.co.uk

considered with some care the *rationale underpinning their choice*. This has always been a formal part of the GLO procedure (PD19B § 2.3, noted recently in *Moon v Link Fund Solutions* [2022] EWHC 3344 (Ch), in which an application for a GLO was refused in favour of general case management). But recent cases have made clear its relevance to the other mechanisms discussed above:

- in deciding whether to make a CPO, the CAT must consider whether the claim is suitable for an aggregate award of damages (s 47B(6) CA 1998 and r 79(2) CAT Rules), as compared to individual proceedings (*Mastercard* at [56]-[57]); thus "it may be relevant to assess which form of proceedings is better suited to securing justice at proportionate cost" (*Mastercard* at [117]);
- where other proceedings offer no real alternative, that is likely to weigh heavily in the balance: "if the choice is this or nothing, then better this" (per Knowles J in Commission Recovery at [81]; see also [76]). See also the Court of Appeal judgment in *Evans*: "where there would be no proceedings save on opt-out terms, that is a powerful factor in favour of a claim being certified as opt-out" (at [122]).

This comparative approach means that cases decided in the context of one regime may well consider (and may draw on) principles applying to another. For example: in *Google* the CPO regime was considered relevant context to the Supreme Court's analysis of representative actions ([26] and [29]-[32]). Equally, the Court of Appeal in *BT Group Plc v Le Patourel* [2022] EWCA Civ 593 (a CPO case) relied on *Google*'s analysis of opt-out procedures and low take-up rates. Thus, large and sophisticated investors pursuing a representative action may be able to rely on the recent Court of Appeal dicta regarding the need to preserve access to justice for this type of claimant (*Evans* at [122]).

Finally, there is scope for a continuing quasi-philosophical debate about the *proper role of group litigation*. Where does the balance lie between (on the one hand) enabling access to justice, with due recognition of the role of lawyers and funders in facilitating this (*Google* at [72], *Evans* CAT minority judgment at [415]) and (on the other) the perceived risk that a cause of action will be exploited for profit, despite the class itself showing little interest (see eg *Mastercard* at [98])? The different regimes seem to offer different answers. In the CPO context, the Court of Appeal in *Evans* has emphasised that the regime is underpinned by the need for rights to be vindicated and wrongdoers to be brought to book ([127], drawing on Supreme Court dicta in *Mastercard*). An argument that the opt-out regime was potentially oppressive and should be strictly applied in favour of defendants was accordingly roundly rejected. Further, the class representative is actively encouraged to have a plan for publicising the action to class members.[10] By contrast, in the GLO context, there is dicta to the effect that: "one does not make a GLO on the basis that to do so would be likely to attract a significant number of additional claimants or … to bring claimants out of the woodwork": *Tesco* at [55]. These differing approaches seem to sit uncomfortably alongside each other.

It may be that increasing cross-pollination between the regimes will mean one or other of these approaches is further revised or developed in due course. However, for the present (and as Knowles J observed in *Commission Recovery*), when it comes to class actions in the modern era we remain in the foothills. There may yet be a mountain to climb. ■

1 Although the Supreme Court has suggested (obiter) that the represented class are each treated as having "brought" a claim for the purposes of limitation: *Google* at [81].
2 A claim can also be brought against parties who share the same interest (r 19.8(1) CPR), but use of the procedure against a representative defendant is beyond the scope of this article.
3 The Court of Appeal has suggested that "… far more than two claimants are necessary to constitute a viable group action" (per Jackson LJ in *Austin v Miller Argent (South Wales)* [2011] EWCA Civ 928 at [38]).
4 *Austin v Miller Argent (South Wales)* [2011] EWCA Civ 928 at [35].
5 Although in securities litigation, a fairer solution may be to require claimants bear a costs liability proportionate to the size of their economic interest or shareholding, as the claimant groups proposed and was ordered in the *RBS Rights Issue Litigation*.
6 The majority in the CAT in *Evans and O'Higgins v Barclays Bank plc* [2022] CAT 16 had concluded that sophisticated businesses with sizeable individual claims could fairly be expected to opt in should they wish to do so. Thus, where attempts to build a book on an "opt-in" basis had failed for lack of engagement, the CAT inferred a deliberate choice by such investors not to participate [385(2)].
7 *Evans and O'Higgins v Barclays Bank PLC* [2023] EWCA Civ 876.
8 For example, the *VW NOx Emissions Litigation* included some 90,000 claimants.
9 Although in fact many more claimants emerged after settlement of the original actions.
10 CAT *Guide* at p 73.

Further Reading:

- Securities class actions in England and Wales: the challenges for funders and a perspective from Australia (2020) 8 JIBFL 559.
- Intermediated securities in a securities class action context (2021) 4 JIBFL 260.
- Lexis+® UK: In-House Advisor: Practice Note: Getting the deal through: Class Actions 2023.