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Recent guidance on when the English court may grant a Group Litigation Order

Introduction

In the light of recent cases including the RBS rights issue litigation, collective actions in the English courts have been the subject of significant attention. Group redress in the financial services industry has historically been achieved by way of regulatory intervention and compensation, but increasingly banks are seen as potential deep-pocket defendants for group actions, usually backed by litigation funders. Group litigation orders ("**GLOs**") are one means by which multiple claimants can join together. While the framework for GLOs has been in existence for some years, it has not been particularly widely used until more recently, and there has been relatively limited guidance as to how and when the test for ordering a GLO might be satisfied. A recent Bristol Circuit Commercial Court decision gives helpful guidance on when GLOs are an appropriate means by which to allow collective actions to proceed.

Background

There are three principal procedures available through which to pursue multi-party litigation in the UK: (i) multiple joint claims (governed principally by CPR 7.3, and CPR 19.1 to CPR 19.5 for the addition of parties); (ii) same interest claims (governed principally by CPR 19.6); and (iii) multiple claims sharing "*common or related issues of fact or law*" managed under a court-issued GLO (governed principally by CPR 19.10 to CPR 19.15 and Practice Direction 19).

The philosophy underlying GLOs, articulated first in Chapter 17 of Woolfe LJ's final "Access to Justice" report in 1996, is that justice should not be denied either to multiple individuals who have suffered as a result of the same conduct but whose individual loss is insufficient to make an individual action economic (or, indeed, viable), or in circumstances where the sheer number of claimants with a commonality of grievances is such that individual actions could not be managed within the normal procedures, whilst balancing the rights of claimants and defendants to litigate individually on the one hand with the interests of a group of commonly situated parties in litigating an action in a more efficient manner.

The test for granting a GLO, which requires the relevant claims to share "*common or related issues of fact or law*", was considered in cases such as *Tew and others v BoS*[1]; and *Various v Barking, Havering & Redbridge University Hospitals NHS Trust*[2].

In *Tew*, the court considered the methodology for defining the GLO issues (that is, the common or related issues of fact or law) in a case. Rejecting the 100-plus claimants' proposed GLO issues (which themselves revised proposed GLO issues formulated by Chief Master Winegarten), Mr Justice Mann noted that it was important to appreciate that GLO issues define common elements in the litigation; the scope of the GLO will be determined by reference to those common elements. It was important not to confuse the GLO issues with formulations of the issues that would ultimately have to be determined in order to decide the litigation. The claimants' proposed GLO issues were too detailed, and reflected a "*confusion with issues arising in the litigation*". Significantly, Mr Justice Mann acknowledged that the GLO issues can be identified at a relatively "high level" at the outset of the litigation and can be refined as the case proceeds.

1 Tew & Others v Bank of Scotland (Shared Appreciation Mortgages) No 1 plc and others [2010] EWHC 203 (Ch)

2 Various v Barking, Havering & Redbridge University Hospitals NHS Trust (QB) (21 May 2014)

In *Barking, Havering & Redbridge*, the multiple claimants (all patients or personal representatives of deceased patients who had attended a particular hospital) applied for a GLO on the basis that the alleged systemic failure of management in nursing care which had led to various alleged failures of care constituted a sufficiently common or related issue. Master Leslie disagreed; each of the individual "incidents" were "*different and may arise from a completely different systemic failure*". This was not comparable to the "classic GLO" scenario, such as where a factory discharges noxious substances and fumes which caused neighbours of the factory to suffer, in which case "*there is only one thing that has happened*".

The Arif v Berkeley Burke case

Arif and others v Berkeley Burke[3], an ongoing case in the Circuit Commercial Court in Bristol, concerns claims brought against the administrator of various self-invested pension plans ("**SIPPs**"), alleging that the SIPPs were mis-sold by various introducers – in a joint enterprise with the defendant – who were not appropriately authorised by the Financial Conduct Authority ("**FCA**"). The claims were based on:

a. An alleged breach of section 27 Financial Services and Markets Act 2000, whereby if an agreement is made by an authorised person but in consequence of something said or done by a third party in the course of a regulated activity carried on by the third party in contravention of the general prohibition, the agreement is unenforceable and the counter-party is entitled to recover any money or other property paid or transferred by him under the agreement and compensation for any loss sustained by him as a result of having parted with it.

b. A right of action under section 138D FSMA said to arise from alleged breaches of the FCA's Conduct of Business Sourcebook, specifically: COBS 2.1.1R (the duty to act honestly, fairly and professionally) and COBS 2.2.1R(1)(b) (the duty to provide appropriate information in a comprehensible form).

c. A claim against the defendant as a joint tortfeasor with the introducers who were said to have negligently advised the claimants to invest in the defendant's SIPP.

Eight claims were issued, including both claims by individual claimants and claims by claimants grouped together, and various other putative claims were said to be "*in the pipeline*".

On the face of it, this was prime territory for a GLO because there appeared to be a commonality of, or related, issues of fact or law amongst multiple aggrieved parties. The judge, HHJ Russen, decided, in a recent case management decision, that a GLO should be granted, and issued a recommendation to the President of the Queen's Bench Division (whose consent is required under Practice Direction 19B) to that effect.

The defendant had objected to the claimants' application for a GLO on the basis that the proposed GLO issues were too vague and would decide too little in the wider litigation. The claimants, however, relied on Mr Justice Mann's judgment in *Tew* to argue that the GLO issues could be refined as the matter progressed.

The basis of the court's decision was as follows:

1. First, there was a sufficient commonality of issues of fact or law linking each of the claimant's claims. It did not necessarily matter, for the purposes of satisfying the test for a GLO, that those common issues might not finally decide all of the cases; it was sufficient that the issues might be dispositive of some cases and would provide a sufficient steer to the judge to apply the relevant principles to determine the other cases. The common issues, in other words, were more significant than the individual issues and the individual claimants' cases would be advanced by deciding the common issues.

2. Secondly, there were a sufficient number of claims (more than 70) and potential claims (possible in excess of 100 and perhaps as many as 200) to justify making a GLO.

3 Arif and others v Berkeley Burke Sipp Administration Limited [2017] EWHC 3108 (Comm)

3. Thirdly, it would be preferable from a case management perspective for all of the claims to be dealt with together in one locality, as opposed to multiple legal teams acting in different localities and on different bases. Similarly, it would obviously be advantageous for the defendants' disclosure on GLO issues to be available to all of the claimants.

The decision in *Arif* is also interesting as an early example of the court declining the defendant's application for the case to be transferred from the regional district registry to the Royal Courts of Justice in London on the basis of the guidance on the transfer of proceedings set out in the new Business and Property Courts Practice Direction and Advisory Note. There were, said the judge, no persuasive reasons to transfer the proceedings away from Bristol. No case should be too big for the regions and a core tenet of the Business and Property Courts' structure was to give due recognition to regional specialism and expertise; the present litigation was not beyond Bristol's resources.

Key points to note

GLOs remain somewhat rare in English litigation and judicial guidance on when they might be granted is to be welcomed. What can be drawn from the *Arif* judgment as to when GLOs may or may not be granted? The test that must be satisfied is that there are "*common or related issues of fact or law*". This is ultimately a balancing exercise. As HHJ Russen noted, when considering this test, the greater number of common or related issues as against claimant-specific ones, the greater the chances of a GLO being awarded. However, he also cautioned that while a GLO may initially appear attractive in cases involving large numbers of claimants, it may transpire that the value of a decision on the common issues is ultimately outweighed by the litigation resources required to address the claimants' individual circumstances. The court should consider critically the extent to which a determination of the common issues will in fact advance the determination of the individual claims.

What of the wider implications of GLOs, and the apparent increasing willingness of the courts to grant such orders, for corporate defendants? Germane to Russen HHJ's decision in *Arif* that a GLO should be made was the number of actual, and potential, claimants. Of particular note, the judge suggested that if a GLO was issued "*and publicised*", the number of claimants could increase significantly. To this end, he stipulated that the GLO should be advertised on the claimants' solicitors' websites, in the Law Society Gazette, and in national and regional papers. The cost of doing so was estimated by the claimants' counsel to be possibly as much as £100,000.

Alarming as that might sound for potential defendants, it is perhaps of some comfort that the judge stopped short of requiring the defendant to contact all of its clients individually to alert them to their potential claims against it. Of course, as the claimants' counsel argued, the FCA does have the power in an appropriate case to require a firm suspected of mis-selling to engage in a customer contact exercise. However, the FCA Enforcement Guide identifies requiring a firm to write to clients as a potentially more effective way of remedying a contravention than an application by the FCA for injunctive relief under section 380 of FSMA. The court noted that this power is not used by the FCA to solicit potential complainants where no breach of the FCA Handbook or legislation has yet been established.

The unwelcome adverse publicity that attends GLOs is perhaps one of the features of these orders that is most stark, often (indeed usually) in the context of contested claims.

If you have any questions or comments in relation to the above, please contact the authors or your usual Mayer Brown contact.

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