

English High Court: Bifurcation in Representative Actions Is a Solution, Not the Purpose

For parties to securities claims, a recent ruling clarifies that representative actions under CPR 19.8 do not oust the High Court's jurisdiction to case manage such claims.

Key Points:

- The purpose of representative actions under CPR 19.8 is to provide a means of access to justice for individuals; not to allow claimants to dictate how claims are managed.
- Representative actions must be understood in light of the overriding objective and the Court's jurisdiction to manage claims actively from the start.
- Securities claims under FSMA may be brought using the representative action under CPR 19.8, but the purpose of the claim should not be to exploit "bifurcation" for the benefit of one party.

The Commercial Court has struck out the first attempt by a claimant to bring a securities claim under ss. 90, 90A, and Schedule 10A of the Financial Services and Markets Act 2000 (FSMA) as a representative action under CPR 19.8 (the Representative Proceedings).¹ The court held that allowing the Representative Proceedings to continue would take away one of its prime functions to manage and deal with cases justly and at proportionate cost.

The Representative Proceedings

Under ss. 90, 90A, and Schedule 10A FSMA, an issuer of securities may be liable to investors in those securities that have suffered loss because of untrue or misleading statements and/or omissions in the issuer's published information.

To date, only groups of individual claimants have brought claims under ss. 90, 90A, and Schedule 10 FSMA. However, in this case, Wirral Council (Wirral) sought to bring proceedings against Indivior PLC and Reckitt Benckiser Group PLC (the Defendants) as a "Representative Claimant" under CPR 19.8.

Such Representative Proceedings would mean that Wirral would be the only active claimant against the Defendants in respect of certain "common issues" relating to the Defendants' liability. A number of other claimants agreed to sign up (or "opt in") to the Representative Proceedings to benefit from any findings on the common issues made in favour of Wirral.

The proceedings relate to an alleged scheme by the Defendants to switch the market for a drug for the treatment of opioid addiction, including by making allegedly fraudulent claims that the replacement drug was safer for children. Wirral claimed that the Defendants were required to disclose the facts and potential consequences of the scheme in a prospectus and other published information that the Defendants issued, and that their failure to do so meant that the published information contained untrue or misleading statements and/or omissions.

On the same day and the day after the Representative Proceedings were issued, many of the claimants that had opted in to the Representative Proceedings also issued three multi-party claim forms against the Defendants alleging the same causes of action under FSMA (the Multi-Party Proceedings). These proceedings were stayed pending resolution of the Representative Proceedings. All of the institutional investors who are claimants in the Multi-Party Proceedings were also signed up to the Representative Proceedings (although a small number later withdrew).

The Scope of CPR 19.8 and Bifurcation After *Lloyd v. Google*

CPR 19.8 provides that if more than one person has the “same interest” in a claim, the claim may be brought by (or against) one or more representatives of the persons who have that same interest. However, any party may apply to the court for a direction that a person may not act as a representative, and the judge (Mr Justice Michael Green) clarified that, once the “same interest” threshold has been met, no presumption arises in favour of allowing the proceedings to continue.

In this case, Wirral, as Representative Claimant, sought declaratory relief on the common issues related to the Defendants (such as liability under FSMA), and envisaged that issues relating to individual investors (such as standing to sue, reliance, causation, and quantum) would be deferred for a subsequent stage of the proceedings or potentially a further claim or claims down the line. Accordingly, permitting the Representative Proceedings to continue would necessarily involve the court accepting a bifurcated approach to the proceedings. Such bifurcation would result in “defendant-side” issues being considered first and “claimant-side” issues to be determined subsequently and only if the court ruled against the Defendants at the first stage. This bifurcation posed clear advantages to the claimants since costs would not be front-loaded on claimant-side matters. Wirral’s evidence showed that the investors and their funders were looking to the Representative Proceedings to avoid the risks and costs of pursuing the Multi-Party Proceedings, where they may be required to provide information, disclosure, or witness evidence before a first trial.

Wirral argued that the use of the Representative Proceedings had been endorsed by the UK Supreme Court, and specifically Lord Leggatt’s judgment in *Lloyd v. Google*.² In that case, Lord Leggatt referred to *Prudential Assurance Co Ltd v. Newman Industries Ltd*³ as “important in demonstrating the potential for a bifurcated process whereby issues common to the class of persons may be decided in a representative action which, if successful, can then form a basis for individual claims for redress”. Lord Leggatt described the *Prudential* case as “mark[ing] a welcome revival of the spirit of flexibility which characterised the old case law”.⁴

However, Mr Justice Michael Green described *Prudential* as a “very unusual case” and advised that “caution needs to be exercised over undue reliance on *Prudential* as justification for bifurcation in the present case”.⁵ He further pointed out that bifurcation was not in issue in *Lloyd v. Google*⁶ and therefore Lord Leggatt had not contemplated how the second stage of the bifurcation process would work.⁷ Crucially, the judge considered that the Supreme Court in *Lloyd v. Google* was advocating for more use of the representative action “principally where it would provide access to justice that would not otherwise be available to that class of claimants”⁸ such as when claims are too small to bring individually. In that

case the only way that the representative claimant could bring a claim on behalf of over four million individuals was through representative proceedings. That was not the case here in which the Multi-Party Proceedings had also been commenced. Ultimately, the judge considered that, while bifurcation may sometimes solve a particular problem with representative actions, it is not the purpose of representative actions, which is a means of access to justice for individuals. Bifurcation was clearly the claimants' sole purpose and stated advantage in bringing the Representative Proceedings: there was no issue of access to justice, only a desire by the claimants to avoid the costs and risks of actively participating in the claim. The judge also recognised that, in effect, the Representative Proceedings would therefore “predetermine...issues of split trial and other matters of case management in the Claimants' favour without being put before the court”.⁹

Case Management Powers Affirmed

Mr Justice Michael Green clarified that the obvious benefits to the claimants in pursuing the Representative Proceedings did not form a “legitimate basis for depriving the Court of its power to case manage such claims”.¹⁰ The Representative Proceedings needed to be viewed holistically from the beginning all the way through to the recovery of compensation, and investors should not fear putting case management into the hands of the court. If there is a good case for bifurcating common defendant-side issues from individual claimant-side issues, then that case can be made to the judge managing the case. However, investors are not entitled to unilaterally bifurcate proceedings in their preferred manner without the court's input. The judge also noted that the proceedings are more likely to be “dealt with expeditiously overall” if the claimants “are required to provide material in support of their individual claims and to engage with the proceedings from an early stage”.

Mr Justice Green therefore struck out the Representative Proceedings. He held that allowing the Representative Proceedings to oust the court's jurisdiction to case manage the claims from the start would be unfair, unjust, and contrary to the overriding objective.

The Future of Representative Actions in Securities Litigation Under FSMA

Wirral had argued that institutional investors may be deterred from pursuing claims in England and Wales because of how securities cases are managed in this jurisdiction. In response, Mr Justice Michael Green pointed out that the existence of multi-party proceedings demonstrates there has been no chilling effect on claims. He also noted that retail investors had been excluded from participating in the Multi-Party Proceedings, but that this was due to the attitude of the funders of those proceedings and was not an access-to-justice issue. There was no evidence that the retail investors who had opted in to the Representative Proceedings would be unable to obtain their own funding and issue their own proceedings, which could then be consolidated and case-managed with the other Multi-Party Proceedings.

Finally, there was no suggestion in this case that securities cases under FSMA can never be brought using the representative action under CPR 19.8. However, the court will be alive to attempts by investors to exploit representative proceedings to reduce risk and save costs at the expense of the court's case management powers.

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Endnotes

¹ *Wirral Council as administering authority of Merseyside Pension Fund v. Indivior PLC; Reckitt Benckiser Group PLC* [2023] EWHC 3114 (Comm).

² *Lloyd v. Google LLC*, [2021] UKSC 50.

³ *Prudential Assurance Co Ltd v. Newman Industries Ltd* [1981] Ch 229.

⁴ *Wirral Council v. Indivior* at [37].

⁵ *Ibid.* at [49].

⁶ *Ibid.* at [47].

⁷ *Ibid.* at [46].

⁸ *Ibid.* at [56].

⁹ *Ibid.* at [28].

¹⁰ *Ibid.* at [92].