

Insights

DISPUTES IN FOCUS: QUICK Q&A ON GROUP CLAIMS

CLARE REEVE CURATOLA SPEAKS TO BEN BLACKLOCK AS PART OF HER QUICK Q&A SERIES

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SUMMARY

There are various ways in the English High Court to bring a claim, including as a group or representative action. Historically they have been underused but that is changing. Businesses are becoming increasingly interested in this ability to bring group actions and mass claims in the English High Court.

In this blog, Clare Reeve Curatola outlines different ways to bring a civil commercial claim in the English High Court and asks fellow Litigation and Investigations partner, Ben Blacklock, to share his insights into the changing approach to group or class actions and mass claims in the English courts.

Ben shares his thoughts on the key developments and changes that may be driving an increase in group actions, the challenges and the important considerations for Claimants and Defendants to consider in this area.

Short on time? Jump to our [key considerations](#).

QUICK Q&A WITH BEN BLACKLOCK

Ben is a Litigation and Investigations partner who deals with a wide range of complex and high value commercial disputes with a particular emphasis on finance and securities litigation and competition litigation. He has a Postgraduate Diploma in EU Competition Law and has acted on cases in the High Court, the Competition Appeal Tribunal, and the Court of Appeal in England. He also has experience litigating in the Grand Court and Court of Appeal of the Cayman Islands.

BRIEF SUMMARY: DIFFERENT WAYS TO BRING A CIVIL COMMERCIAL CLAIM IN THE ENGLISH HIGH COURT

1. **Individual claims** can be issued by a single entity or individual against a single or multiple defendant entities or individual.
2. **Group claims** are possible where multiple entities group together and issue one claim (as co-claimants) against the defendant. Alternatively, different entities can issue separate claims and then apply to the court to have the claims heard and managed together (in what the Court has recently referred to as a “GLO-Lite” process), or to be officially grouped and case managed together in a Group Litigation Order.
3. A **Group Litigation Order** will only be made if the Court is satisfied that (i) the different claims give rise to common or related issues of fact or law; and (ii) there are a sufficient number of claimants who seriously intend to proceed in their claims giving rise to those issues.
4. A **Representative Action** is another alternative under the English Civil Procedure Rules. This involves one person bringing a claim on behalf of a wider class of parties who have the same interest in the claim.

These ways of bringing group claims in the High Court differ from the “opt in” and “opt out” collective actions that can be brought in the Competition Appeal Tribunal for cases concerning alleged breaches of competition law. [See an insight by my colleagues Ed Coulson and Ben Bolderson for more detail.](#)

GLOS AND REPRESENTATIVE ACTIONS HAVE BEEN UNDERUSED HISTORICALLY

WHAT ARE THE KEY DEVELOPMENTS AND CHANGES YOU’VE SEEN THAT MAY DRIVE AN INCREASE IN THESE GOING FORWARDS?

I have seen three key developments:

- First, there are **indications from the Courts that they are prepared to consider a more liberal approach to the procedural rules governing Representative Actions**. In a recent case, the Court explained that a flexible approach to the same interest test can be applied. The judge in that case emphasised that *“we are still perhaps in the foothills of the modern, flexible use of [representative actions], alongside the costs, costs risk and funding rules and practice of today and still to come. In a complex world, the demand for legal systems to offer means of collective redress will increase not reduce.”*
- Second, the **litigation funding** market has developed significantly over the last few years. This has resulted in many claimants, who may otherwise have chosen not to pursue claims at all due to the legal costs involved, teaming up with litigation funders and pursuing claims as part of a larger group of class. That said, the Supreme Court has recently issued a seminal judgment that found certain types of litigation funding agreements to be unenforceable. This

judgment is likely to impact the way in which litigation funding is structured in the future and may cause some complexities for claims that have already commenced using litigation funding or further challenges by Defendants to the validity of such funding agreements. [See an insight by my colleagues, Georgia Henderson-Cleland and Ben Bolderson for more details.](#)

- Third, **Claimants are seeking to bring such actions in novel ways**. For example, representative proceedings are now being issued on an “opt in” rather than an “opt out” basis. This means that the initial claim is framed by reference to a set list of Claimants but with the option for that list to be expanded in due course if and when other claimants opt to be added to the group. The claims are also being issued to seek declarations of liability in the first instance with determinations of the separate levels of loss that may have been caused to the different individual claimants being left for later proceedings. Defendants are challenging the appropriateness of this and so we are likely to see in the next year further judgments in this area that clarify the ways in which Representative Actions can or cannot be brought.

WHAT ARE THE TYPICAL CHALLENGES THAT DEFENDANTS CAN CONSIDER MAKING TO GROUP ACTIONS?

I think the typical challenges can be divided into three categories:

- **Procedural** challenges that can be made to certain group claims. For example, Defendants can seek to challenge Representative Actions on the basis that the claimants do not share the same interest.
- **Litigation funding** related challenges. As explained above, the Supreme Court has recently issued a judgment finding that certain funding agreements are unenforceable and so Defendants can consider challenging the litigation funding that is in place.
- **Substantive** challenges to parts of the claim. For example, Defendants can argue that parts of a claim that have been framed overly broadly and can issue strike out applications to try and narrow the scope of the claims they are facing.

WHAT ARE THE KEY CONSIDERATIONS FOR PARTIES THINKING ABOUT A GROUP CLAIM?

I would say consider:

- **the pros and cons of using litigation funding** that typically comes with joining a larger claimant group. Whilst litigation funding may well be useful for certain parties, it comes with the cost of agreeing to pay the funder more money if you are successful in your claim. It is also key to ensure that any litigation funding agreement that is entered into is valid in light to the recent developments in this area referenced above.

- **what level of control you want over the strategic decisions made in the claim.** Pursuing a claim individually will ensure that a claimant retains full control over the decisions made when pursuing the claim. In contrast, in group litigation there is inevitably the need for certain decisions to be made as a group. Test claimants are also sometimes used by the Courts to determine key issues common to the group as a whole and so it will be important to consider whether a test claimant model is appropriate and, if so, whether you are likely to be one of the test claimants selected; and
- the extent to which you do share the **same interest** in the claims as the other claimants **or common or related issues of fact or law**. As explained above, representative actions require claimants to have the same interest in the litigation and GLOs require the claims to share common or related issues of fact or law. If there are parts of the claims which do not meet these requirements then this could lead to the Court refusing to allow the claim to proceed as part of the group. It could also give rise to **privilege issues** as common interest privilege only arises in respect of communications between parties that do, in fact, share a common interest in what is being discussed.

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