London Dispatches: Collective Redress in Banking Litigation

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Abstract

The financial services sector is a major contributor to the UK economy. This article considers how collective redress and the financial sector have collided to date, by traversing the various procedural mechanisms by which collective claims can be brought in this jurisdiction, and how that relationship might be more harmonious in the future.

The financial services sector is a major contributor to the UK economy. The sheer volume of financial transactions concluded, the large sums involved, the complex web of financial instruments through which the market operates and the prevalence of standard-form documentation mean that, in this sector, when things go wrong, they do so on a massive scale such that thousands (or even millions) of consumers, shareholders or investors can be affected. Therefore, one would have thought that group litigation and banking and financial services disputes would be inseparable bedfellows. However, at least in this jurisdiction, that is not the case. This article considers how collective redress and the financial sector have collided to date, by traversing the various procedural mechanisms by which collective claims can be brought in this jurisdiction, and how that relationship might be more harmonious in the future.

Multiparty litigation detractors will suggest that group actions are the purview of overly litigious claimant attorneys who concoct vexatious claims that are the thorn in the side of corporate giants and a free market economy. However, for financial services players, many necessarily exposed to a large market of investors, shareholders, clients or customers, collective redress can be a less costly, more certain and more manageable way to deal with the claims that are the inevitable consequence of commerce. They allow in-house litigation teams to streamline some of their workload and simplify internal stakeholder management. Indeed, it was the Defendant, British Airways Plc that applied for (and was granted in October 2019) the Group Litigation Order in relation to the British Airways Data Event Group Litigation. Group actions eliminate the risk of different courts reaching different decisions on the same issues and allow the defendant legal team to direct its attention, time and resources on a larger target which moves at its own pace (and, thereby, kill many birds with one stone so to speak). Multiple claimants may consider commencing proceedings against entities in the financial services sector for, say, information contained or allegedly absent from a prospectus, mis-selling of financial products, or alleged benchmark manipulation. Large financial institutions are also potential targets for claims unrelated to the sector in which they practise such as data breach and employment claims, a risk faced by any large corporate. In such instances, the defendant's position becomes less cumbersome, costly and uncertain where those claims proceed collectively.

We discuss below the main procedural routes available when considering collective redress and how these have affected the financial services sector.

The test case

Where multiple smaller claims have been commenced in the County Courts (regional courts handling claims below specified financial limits), a presiding judge may refer a test case to the Commercial Court which is asked to decide certain preliminary issues of law as a test case. Many banks dealing with high street customers have seen an increase in the number of claims made pursuant to the Consumer Credit Act 1974 in recent years. This legislation sets out a consumer-protection framework with which credit institutions must comply. *McGuffick v The Royal Bank of Scotland Plc*[1] was the first Consumer Credit Act 1974 test case. Mr McGuffick entered into a fixed-sum loan agreement, the bank served a default notice. Under s.77 of the Act, if requested, a lender must provide the debtor with a copy of the executed agreement and certain other documentation and information. Following termination of his loan, upon the request of his solicitors, the bank could not find a copy of the agreement to provide to Mr McGuffick. Because a large number of consumer credit claims started in Chester, the presiding judge referred a number of cases (including *McGuffick*) to the London Commercial Court for determination of the meaning and effect of s.77 (and related issues about bank conduct which impacts on consumer credit ratings). The facts were agreed, meaning the hearing focused only on legal arguments and lasted no more than two days. In this instance, the Commercial Court's decision was in favour of the banks and, through a public airing of issues affecting multiple Claimants, this allowed all the retail banks to dispose of a huge number of existing and future claims in a short hearing of focused argument. When it makes sense for multiple claims to be managed and disposed of together, it saves time and resource for all parties, and the courts.

[1] *McGuffick v The Royal Bank of Scotland plc* [2009] EWHC 2386 (Comm); [2010] Bus. L.R. 1108.

Multiple joint claims for claims that can be "conveniently disposed of in the same proceedings"

This is the most common form in which multiple claims involving the financial services sector have proceeded to date. For example, litigation brought by scheme members against the government to test the adequacy of the implementation of the insolvency directive (*Robins v Secretary of State for Work and Pensions*[2] (the "ASW litigation")). Rule 7.3 of the Civil Procedure Rules ("CPR"), governing civil litigation in England and Wales, permit any number of parties and claims to be covered by a single claim form (and rr.19.1–19.5 deal with the addition of parties to existing claims). The threshold test is whether those claims can be "conveniently disposed of in the same proceedings" (CPR r.7.3). Similarly, the court can use its case management powers to order multiple individual claims already commenced to be processed and heard together where they relate to the same issue and it will be more efficient (CPR r.3.1). Both of these procedures should save time and costs and also avoid the risk of potentially conflicting decisions on the same issue emanating from different courts.

The limitation of the consolidation of claims is that it requires the commencement of individual claims and the identification of who could be potentially affected by the decision at the outset. This may not be possible when awareness of a market-wide issue or product develops over time. The consolidation of multiple individual claims would dispose of those particular claims more efficiently than if they were heard separately, however, it falls far short of dealing with the universe of parties affected by a particular market-wide issue.

While court permission is not required to start a joint claim, it is needed to change the parties once the claim form has been served (CPR r.19.4(1)). For example, exercising its case management powers, the court conjoined numerous proceedings in *Re LB Holdings Intermediate 2 Ltd (in administration) and Re Lehman Bros Holdings plc (in administration)*[3] in which two sets of administrators appointed over related companies sought the court's guidance as to the relative levels of subordination of various subordinated debts. When two Defendants applied under CPR r.19.2(2) to be joined as respondents to proceedings brought by the administrators of a company in the Lehman group, the court allowed the joinder of Deutsche Bank AG but not Lehman Brothers Ltd. Mann J described the job of the Defendants wanting to be added to the proceedings thus: "It is for each of them to justify their joinder by showing that they can, or might with sufficient certainty, be able to bring something to the party without at the same time imposing any unnecessary, unfair or disproportionate burdens on the other parties or the proceedings" (at [11]).

That is all well and good but the party in question remains, effectively, a private one. Specific claimants may bring individual claims on one claim form, specific parties may be added to proceedings already commenced where they can justify their joinder to the courts and the court can case manage individual claims together. But what about where a financial instrument has been entered into with hundreds of thousands, or even millions of people, the industry is aware of it, the broader public may not be yet but litigious rumblings can be heard from several quarters, and industry leaders and regulators are trying to plan for the future? In terms of identifying the size and shape of the problem as well as any future business practice adaptation, simply sitting back and waiting to see how many claims come in, how long they take to resolve and whether they are successful is rather unsatisfactory.

Group Litigation Order for claims which "give rise to common or related issues of fact or law"

The primary procedural mechanism for multiparty litigation in England and Wales is the Group Litigation Order ("GLO"). CPR r.19.6 and 19.11 allow the court to make an order for the case management of claims which give rise to "common or related issues of fact or law" (known as the "GLO Issues"). These sections are quite sparsely worded and GLOs are a relatively new proposition in this jurisdiction.

Once made, the GLO will contain directions about the establishment of a group register on which the claims to be managed will be entered; specify the GLO issues which will identify the claims to be managed as a group under the GLO; and specify the management court which will manage those claims (CPR r.19.11(2)). Judgments, orders and directions of the court will be binding on all the parties to the other claims within the GLO unless the court orders otherwise (CPR r.19.12). An appeal against the judgment may only be made with the permission of the court. The court will consider how to deal with generic issues, for example by selecting particular claims as test claims (CPR r.19.13(b)).

If the group claim is lost, the general rule is that the common costs (incurred in relation to the GLO issues) will be divided equally amongst the group members who will be severally liable for them. The individual costs of a particular claim will be that claimant's responsibility. Therefore, a group claimant who loses will usually be responsible for paying the winning side's costs together with the costs of their own claim and their share of the common costs.

What the GLO issues are, the procedural timetable, the information from claimants needed to be included in the group register are all matters negotiated with defendants. Therefore, defendants have arguably a larger degree of

[2] *Robins v Secretary of State for Work and Pensions* (C-278/05) EU:C:2007:56; [2007] E.C.R. I-1053; [2007] 2 C.M.L.R. 13.
[3] *Re LB Holdings Intermediate 2 Ltd (in administration)* [2018] EWHC 2017 (Ch).

control over defining the claimant cohort and the thresholds for compensation than if individual claims were commenced against them.

So far, the GLO procedure has not been widely used for claims arising in the banking, finance and investment sectors. The government maintains a full list of GLOs made which, at the time of writing, comprises 112 (the most recent being made on 31 May 2022 in relation to the Bill and Ogale Group Litigation concerning environmental pollution via oil spills).[4]

There are two examples of pensions-related disputes that proceeded by way of GLO:

QROPS: Members of a Recognised Overseas Self-Invested International Pensions Retirement Trust were granted a GLO in 2012 to bring proceedings for judicial review of tax assessments issued by HMRC following the removal of the scheme from HMRC's approved list of QROPS. The case was ultimately settled.[5]

Foreign Income Dividends (FID) group litigation: This related to claims by a large number of pension funds and life companies in respect of their pension business for compensation where those claimants have received FIDs which, unlike domestic dividends, carried no right to a tax credit. The GLO was made on 20 July 2004. The High Court action was stayed pending the outcome of an appeal to the tax tribunal on the same issues by the test Claimant (the trustees of the BT Pension Scheme). Ultimately, the matter was considered by the ECJ during the course of the tax tribunal proceedings.

The law firm Harcus Parker has recently commenced a group action on behalf of alleged "mortgage prisoners".[6] These are thousands of homeowners said to be trapped paying excessively high interest rates on their mortgages, after uncertainty caused by the global financial crisis in 2007 and 2008 meant numerous lenders essentially stopped offering new introductory rates to their existing customers or stopped actively competing in the mortgage market for new customers. At the time of writing, the matter is at a preliminary issues stage. However, it seems this is a financial services case which may proceed on a collective basis.

"Same interest" representative action

Where it is difficult for all those affected by the claim to be parties to the proceedings, such as where the claimant group would be too large, the court can order that individuals can be made parties to the claim in a representative capacity. Pursuant to CPR 19.6, a claim may be brought by or against multiple parties who have the same interest as those being represented. This mechanism is intended to avoid a proliferation of claims where it is easier to identify a representative of the claimant class instead of trying to join all the affected members. The most notable use of this mechanism is in the case of *Lloyd v Google* in which Richard Lloyd sought to bring a claim on behalf of approximately 4.4 million iPhone users against Google for misuse of their browser-generated information without consent. Whether the representative action could be used in the case of a data breach case such as this was a question closely followed by the legal and mainstream press and which was appealed to the Supreme Court. Ultimately, it was decided that Mr Lloyd's claim against Google could not proceed. The court did not completely close down the possibility of a representative action for a data breach case. However, since that decision, it seems it will stay a novel procedural mechanism whose future application remains to be seen.

This procedure has not yet been used in the financial services sector and the "same interest" test is a more difficult hurdle than the "common issues of fact or law" threshold required for a GLO. However, if the claimant class were large enough, a common interest and common grievance existed and it were possible to identify a remedy which would be beneficial to all, then there is no reason in principle why it could not be deployed in an appropriate financial markets case.

The requirement for a GLO is a common or related issue of fact or law which is wider than the "same interest" requirement in CPR r.19.6. One can see the cost-saving and certainty to be gained by allowing one over-the-counter LIBOR-referenced swap counterparty to bring a representative action on behalf of others in a similar situation to those affected by a data breach.

At least in the pensions space where it might be difficult or impossible for all beneficiaries to be named as parties to proceedings, there have been several cases involving representatives appointed to make submissions on behalf of their classes, see: *PNPF Trust Co Ltd v Taylor*.[7] *Premier Foods Group Services Ltd v RHM Pension Trust Ltd*[8] saw the trustee argue the opposing case on behalf of affected members instead of having one of their number appointed as a representative defendant. Similarly, fictitious representative defendants (John Doe and Richard Roe) were used to save costs in *Alexander Forbes Trustee Services Ltd v Doe*.[9]

Competition Appeal Tribunal (CAT) regime which provides for both opt-out and opt-in group actions for breaches of competition law

The US class action is a procedure for combining hundreds of thousands or even millions of claims in a single proceeding with the named plaintiff representing

[4] Gov.uk, "List of group litigation orders", *https://www.gov.uk/government/publications/group-litigation-orders/list-of-group-litigation-orders*.
[5] See Legal update, QROPS: Singapore pension scheme members to seek judicial review and Pensions news round-up for the week to 27 June 2013: HMRC reportedly settles with QROPS claimants following court hearing.
[6] Mortgage 'prisoners' commence group action", *Law Society Gazette*, *https://www.lawgazette.co.uk/news/mortgage-prisoners-commence-group-action/5102550.article*.
[7] *PNPF Trust Co Ltd v Taylor* [2010] EWHC 1573 (Ch); [2010] Pens. L.R. 261.
[8] *Premier Foods Group Services Ltd v RHM Pension Trust Ltd* [2012] EWHC 447 (Ch); [2012] Pens. L.R. 151.
[9] *Alexander Forbes Trustee Services Ltd v Doe* [2011] EWHC 3930 (Ch); [2012] Pens. L.R. 231.

a class of person with a similar interest. Once the class is defined by the court, any person falling within that definition is entitled to a share of the damages unless they actively opt out of the action. The CAT regime is the closest equivalent the UK has to this. It is the result of legislative reform in the last decade and the competition sphere is the only realm in which the UK currently has a true opt-out collective redress mechanism.

Since October 2015, it has been possible for consumers, businesses and their authorised representatives to bring private damages actions for breach of competition law in the CAT pursuant to ss.47A and 47B of the Competition Act 1998. This bespoke regime permits opt-out class actions (properly so called) in the sphere of competition law only. To date, there have been a handful of s.47B claims and perhaps the most well-known of which was the financial services case of the *Merricks v Mastercard Inc*[10] litigation in which Mr Merricks sought to represent a class of 46 million British consumers in relation to allegedly inflated interchange fees that have been passed on to them (transaction fees that a merchant's bank account must pay whenever a customer uses a credit/debit card to make a purchase). The CAT held that the case was not appropriate for the collective proceedings regime on the grounds that the claims were not suitable for an aggregate award of damages and there was no way to apportion damages so as to properly compensate affected consumers. The Supreme Court, however, found that the CAT was wrong to apply such a demanding test when considering whether to grant a Collective Proceedings Order ("CPO"). In August 2021, the CAT certified the action, paving the way for the trial of a matter potentially relating to every sector of the UK economy, requiring analysis of data from 1992–2008 and concerning almost every person in the UK aged over 16 during that period. This may seem a deeply unattractive prospect for the payment processing giant but years of fighting off data subject access requests, individual claims in small courts all over the country, complaints escalated to the regulator and reputational harm might be worse.

The leading judgment of the Supreme Court in December 2020 noted that the collective proceedings regime was introduced to provide an alternative procedure in circumstances whereby traditional proceedings are "unsuitable" for obtaining redress at the individual consumer level. It is easy to make the case for such a regime beyond the realm of strict competition law breaches.

In May 2019, the European Commission found that a number of banks operated two separate cartels in the foreign exchange market, in breach of EU competition law. The first (known as "Three Way Banana Split") was operated by Barclays, Citigroup, JPMorgan, RBS and UBS and took place between December 2007 and January 2013. The second (known as "Essex Express") was operated by banks including Barclays, RBS and UBS, and took place between December 2009 and July 2012. The banks in question exchanged current and forward looking commercially sensitive information and trading plans, and coordinated their trading strategies through online chat rooms. These information exchanges allowed the banks to make informed market decisions on whether to sell or buy the currencies they had in their portfolios and to identify opportunities for coordination, such as temporarily refraining from trading to avoid interfering with another trader's activities.

Although the European Commission fined the banks more than €1 billion collectively, those fines are not used to compensate victims of the banks' illegal conduct. Michael O'Higgins FX Class Representative Ltd is seeking to bring a collective action claiming compensation on the victims' behalf. The claim is a collective action against (1) Barclays Bank Plc; (2) Barclays Capital Inc.; (3) Barclays Execution Services Ltd; (4) Barclays Plc; (5) Citibank NA; (6) Citigroup Inc; (7) JPMorgan Chase & Co; (8) JPMorgan Chase Bank, National Association; (9) J.P. Morgan Europe Ltd; (10) J.P. Morgan Ltd; (11) NatWest Markets Plc; (12) The Royal Bank of Scotland Group plc; and (13) UBS AG.

A CPO has been applied for and the case awaits certification. Anyone (including businesses) domiciled in the UK who has entered into relevant FX trades is automatically included within the claim, though they can opt out of the claim if they choose to.

Both *Merricks v Mastercard* and the FX cases follow findings by the European Commission. Obviously, post-Brexit, the status of European Commission infringement decisions will change. Commission decisions based on proceedings initiated prior to the end of the transition period will still be binding on the English courts. However, decisions outside of that window will no longer have the same binding status and follow-on cases will be limited to reliance upon decisions taken by the UK's own Competition Markets Authority.

A recent development in this sphere is the rise of "stand-alone" claims which do not rely on a regulatory finding to establish liability. This means that anti-competitive behaviour, not yet subject to a finding of a competent regulator, may nevertheless be the subject of a claim for loss and damages arising out of anti-competitive behaviour.

Financial market participants can therefore expect that any anti-competitive behaviour, whether it is investigated by a competent authority or otherwise, runs the risk of not only a fine from the regulator but also a claim in the CAT for compensatory damages on behalf of those who were affected by the anti-competitive conduct.

[10] *Mastercard Inc v Merricks* [2020] UKSC 51; [2021] Bus. L.R. 25.

The Financial Markets Test Case procedure for the determination of issues of general importance to the financial markets which require immediate resolution

Available as part of a pilot scheme since 2015, the Financial Markets Test Case Procedure pursuant to CPR Pt 63A has only been used once to date, in the much-reported COVID-19 Business Interruption Insurance Test Case.[11] The Financial Markets List was introduced to the CPR as a procedural avenue designed for any claim which:

> "(a) principally relates to loans, project finance, banking transactions, derivatives and complex financial products, financial benchmark, capital or currency controls, bank guarantees, bonds, debt securities, private equity deals, hedge fund disputes, sovereign debt, or clearing and settlement, and is for more than £50 million or equivalent;
>
> (b) requires particular expertise in the financial markets; or
>
> (c) raises issues of general importance to the financial markets." (CPR r.93A.1(2).)

Such claims are handled by judges with particular expertise in the financial markets, being assigned to an individual judge with relevant experience from issue of proceedings to trial, and if necessary, any enforcement action. The test case procedure was intended to "support the work of the Financial List to uphold London's position as a global leader in efficient, specialised, and high quality financial dispute resolution".[12] Where a Financial List claim raises issues of general importance to the market which require immediate resolution, market participants can apply to the court for determination of the issues without the need for a present cause of action between the parties to the proceedings (see s.6 of Practice Direction 63AA). This test case procedure was used to excellent effect in proceedings instigated by the Financial Conduct Authority ("FCA") to determine whether insurers should cover losses flowing from business disruption caused by COVID-19.

Insurers said they never intended to insure losses flowing from the unprecedented COVID-19 pandemic and policyholders said they paid for BI insurance which does cover their COVID-19 losses. It was a potentially definitive crisis for both sides of the market. The relevant market players and the FCA were able to get judgment from the Supreme Court in just over half-a-year which has given guidance on how those insurance claims are to be dealt with. Following the demonstrable success of the BI test case, we would expect that this procedure will be called upon again in appropriate cases. It involves close supervision of the court and possibly the joinder of a relevant trade, professional or regulatory body or association (like the FCA) as such a case decides the fates of hundreds of thousands of parties who did not directly participate in the proceedings and it is vital that their interests are fairly presented to the court.

The financial markets test case procedure can rapidly and efficiently get definitive court guidance in the face of a potentially catastrophic event for the financial markets. Insurers argued that they did not contract to insure COVID-19 business interruption losses and retrospectively forcing them to could potentially cripple the global insurance and reinsurance markets. In those circumstances, it was very much in the interests of all Claimants and Defendants to obtain a quick, definitive decision from the courts to an issue affecting hundreds of thousands of businesses and many potential defendant insurers. Without that guidance, Defendants could have been facing a barrage of individual claims for years where the costs and logistics of defending them individually would be very difficult to manage, the outcomes uncertain and the resulting jurisprudence potentially conflicting.

The future of collective redress in the financial services sector

The nature of the financial markets is such that, certainly at the very least its consumer-facing disputes, lend themselves to multiparty litigation. Reform in this area has been mooted many times by the UK and European governments. The CAT regime was a major development and thereby the competition sphere has gained a degree of procedural certainty which benefits claimants, courts and defendants. However, there seems to be resistance to implementing an opt-out class action procedure of broader application. There is much talk about how the expansion of collective redress procedures in Europe and the UK increases the litigation risk for corporate defendants. However, if it is the procedure which creates the risk, then this would indicate that large businesses should have been pulling out of markets with these procedures in favour of those where it is less developed. Have banks, asset managers and funds reduced trade in the US, Australia, Canada? No. Litigation risk is a consequence of trading not of civil procedure. We would argue that the procedure merely has the potential to crystallise a risk more readily and to facilitate its resolution.

The recurrent refrain regularly heard against the introduction of a more permissive collective redress regime in the UK is that it would lead to waves of unmeritorious claims. However, provided defined threshold tests must be met before group actions are brought, the legal profession remains highly regulated and the courts are closely engaged, any speculative claims would not get off the ground. Further, cost-shifting

[11] *Financial Conduct Authority v Arch Insurance (UK) Ltd* [2021] UKSC 1; [2022] 2 P. & C.R. 1.

[12] See Minutes of the Civil Procedure Rule Committee (5 June 2020), *https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/901212/cprc-5-jun-mins.pdf.*

procedures discourage unmeritorious claims. Canada, Australia and New Zealand, former English colonies whose legal systems share a common foundation with the English legal system, have more developed collective redress regimes and litigation funding markets which have so far managed to avoid a stream of spurious class actions, unduly hampering commerce or overburdening the legal system. If used properly, collective redress is a powerful consumer-protection tool but also a means by which major players in the financial services market can obtain certainty and a degree of convenience. Predictability and efficiency have always been key advantages of the UK legal system. If the London courts wish to retain their privileged status, then they must have procedural tools in their armoury to handle mass claims in the financial markets. In a similar way, a demonstrably regulated, certain, adequately policed financial services market is similarly vital for attracting confidence and investment.

Perhaps the most obvious advantages for financial services defendants in having claims proceed by way of collective redress are efficiency of scale, certainty of outcome and the elevation or smaller claims (which otherwise may have been dealt with by regional courts) to the London commercial courts which are experienced in dealing with these types of claims.

We may look to other jurisdictions to see how they fare. The arrival of the EU Representative Actions Directive in the middle of 2023 may encourage further cases and increased cohesion across the market. This directive obliges Member States to enact or adapt domestic laws to permit collective proceedings for consumer redress. The devil will be in the detail as questions about defining the not-for-profit entities qualified to lead such actions on behalf of consumers, the choice of opt-in or opt-out etc abound.

The UK's collective redress regime continues to develop apace. Claimant litigators and consumer rights groups argue for its expansion. It may be that corporate defendants should join the discussion. Doing anything to facilitate large groups of claimants bringing large group actions may seem counter-intuitive for potential target defendants in the financial services sector. However, the alternatives may be more unpalatable: piecemeal litigation in regional courts, self-administered redress schemes instigated by regulatory investigations, uncertainty of quantum as to total liability following any adverse finding. Regardless of whether the outcome is a decisive defendant victory in the courts, a payment to claimants pursuant to an order or a confidential commercial settlement, management time and business funds can be most efficiently deployed where a potential "problem" is efficiently formulated into a civil claim which is managed centrally by the courts on one timetable, the whole claimant cohort swiftly identified, any losses coherently and consistently quantified, allowing financial services corporates to elect how best to deal with a crystallised risk. Further, like financial services, legal services are a huge contributor to the UK economy and the London commercial courts remaining a preferred dispute resolution venue will significantly bolster that economy, to the advantage of consumers, investors and financial institutions. Even where one party loses, in terms of efficiency, collective redress is a win-win.