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Strength in numbers

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Leigh Callaway on group claims & the future of claimant litigation

The ability of a group or groups of multiple claimants to bring joint claims—a class action—has long existed in a number of legal jurisdictions. The best known jurisdiction is perhaps, the US, which is renowned, perhaps unfairly, for big ticket group claims, involving many dozens if not hundreds of claimants, with damages in the millions. Class actions in England, referred to in this jurisdiction as group litigation orders (GLOs) were brought into law following Lord Woolf's *Access to Justice* report, with the CPR establishing a relatively flexible framework for the management of cases involving multiple claims by different parties. Historically, however, the GLO procedure has not been widely used.

The reason why is unclear, but is perhaps attributable to the English cultural approach to litigation—typically as a nation we do not litigate for the sake of litigating—and certainly the "loser pays" principle militates against speculative claims. However, with the rise of litigation funders, who necessarily approach litigation with more of a "business eye", businesses are becoming increasingly alive to the possibility that litigation can be used as an unexpected source of revenue rather than merely a tool to use when something has gone wrong.

The benefits of GLOs

Where claims give rise to "common or related issues of fact or law" the court has the discretionary power to make a GLO to manage the claims governed by the GLO in a co-ordinated fashion. Once the GLO has been made, all claims which fall within the issues identified in the GLO (known as "the GLO issues") will be recorded on the GLO group register and thereafter case managed together. Those claims will also be bound by any judgment made in respect of the GLO issues. It is a prerequisite of joining a GLO that the prospective claimant had first issued a claim, which can be done in common with a number of other claimants, that involves the GLO issues, ie they must opt in/elect to join the GLO proceedings. This is in direct contrast to the US procedure, where parties falling within the same class do not have to participate in the litigation in order to be entitled to share the damages awarded, ie there is an automatic opt-in, though claimants can of course opt out of the proceedings.

The procedure for creating a GLO can be complex and time consuming but there are benefits: foremost among them, access to justice and costs. Claimants who would not normally have the financial ability or resources to litigate are able to join forces to pursue common claims under a GLO, benefiting from a shared pool of knowledge and funds, and with "strength in numbers" may enjoy a stronger position in the conduct of proceedings and the pursuit of settlement. Each individual claimant is also only liable for an equal proportion of the "common" costs (being those costs which are incurred in respect of the GLO issues and not specific to any one party), those costs typically forming the vast bulk of the legal costs involved. There is no joint liability for costs and a party is not obliged to pay the proportion of other claimants' costs if those claimants do not or cannot pay.

In short, the GLO process can provide claimants with the ability to pursue proceedings that would otherwise have been ignored by claimants as being unviable financially and/or a managerial drain. The use of litigation as a business tool rather than a problem-solving apparatus, and the role that GLOs have to play in that process, is shown by the increased number of multi-claimant actions in recent years. The RBS rights issue litigation, the Lloyds Bank shareholder action, the claim by Tesco shareholders in connection with its overstated accounts, the Volkswagen emissions scandal, and the Morrisons data breach claim, all demonstrate the ability of the GLO process to permit claimants to seek recovery for losses which would perhaps previously have been written off.

A changing landscape

The changing landscape of litigation, and particularly GLOs, has been further altered with the enactment of the Consumer Rights Act 2015. The Act provides that where multi-claimant proceedings are brought before the Competition Appeal Tribunal, and the Tribunal makes a collective proceedings order, the Tribunal can elect to declare those proceedings either "opt-in" or "opt-out"; a first in English litigation. As to whether this represents the beginning of a sea change in the law governing GLOs in litigation generally, only time will tell. It is unlikely change will occur in the short term, but the fact that lawmakers now recognise the advantage of the "opt-in" US approach to group litigation, at least in certain circumstances, can only benefit claimants—providing another means by which they can seek redress.

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