A Blueprint May Be Emerging for the Case Management of Securities Litigations in England and Wales

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Case management; False statements; Further information; Securities; Split trials

Abstract

A blueprint may be emerging for the case management of securities litigations in England and Wales. In recent years a suite of s.90A claims brought against various listed companies is indicative of the emergence of a growing market for these actions.

Section 90A of and Sch.10A to the Financial Services and Markets Act 2000 (FSMA), pursuant to which claims can be brought for compensation of losses caused by misleading statements or omissions in (or the delayed publication of) information issued to the market by listed companies (s.90A claims), have previously been described as an "underutilised remedy".[1]

In recent years, however, a suite of s.90A claims brought against various listed companies is indicative of the emergence of a growing market for these actions. Defendants include household names, such as Tesco plc (Tesco), Glencore plc and Standard Chartered plc. A unique s.90A claim was also brought against the former directors of Autonomy Corporation Plc (Autonomy) in connection with its acquisition by the Hewlett-Packard Group.

This article focuses on three recent case management decisions in s.90A claims brought against: (i) RSA Insurance Group Ltd[2] (RSA); (ii) G4S Ltd[3] (G4S); and (iii) Serco Group Plc[4] (Serco). It examines the extent to which those decisions have set out a case management framework by which s.90A claims may, in future, make their way through the English courts.

Background

In broad terms, there are five key issues that a claimant must prove to succeed in a s.90A claim (many important aspects of which are yet to receive full judicial consideration):

- *Issue 1 (defective information)*: information issued to the market by the defendant issuer was defective, because it: (i) contained untrue or misleading statements; (ii) omitted required information; or (iii) was delayed.
- *Issue 2 (PDMR knowledge)*: a "person discharging managerial responsibility" within the defendant issuer (a PDMR) had the required state of mind with respect to that defective information.[5] More specifically:
  - — in the case of untrue or misleading statements, a PDMR must have known or was reckless as to the untrue or misleading statement;
  - — in the case of omissions, a PDMR must have known that the omission was a dishonest concealment of a material fact; and
  - — in the case of a delay, a PDMR dishonestly delayed the information being published.

  The question of which individuals within a defendant issuer can be PDMRs was considered in the *G4S* proceedings, with Miles J concluding that the definition of a PDMR is restricted to *de jure*, *de facto* and (arguably) shadow directors.[6]

  As for the meaning of dishonesty, para.6 of Sch.10A to FSMA was intended to codify the historic common law test for dishonesty from *R. v Ghosh* (though in *Autonomy*—the only s.90A claim to have reached trial—no point was taken by the defendants about the difference between the statutory test and the objective test articulated by the Supreme Court in *Ivey*).[7]
- *Issue 3 (standing)*: it acquired an "interest in securities" issued by the defendant issuer at the relevant times, which requirement was considered by Hildyard J in Tesco.[8]

[1] See P. de Verneuil Smith QC, P. Hinks and D. Kennelly, "Claims under s 90A of FSMA for dishonest statements made to the market: an underutilised remedy?" [2019] *Butterworths Journal of International Banking and Financial Law* 154.
[2] Claim Nos FL-2019-000017; FL-2021-000004; FL-2021-000006.
[3] Claim Nos FL-2019-000007, FL-2020-000035, FL-2021-000022.
[4] Claim Nos FL-2019-000006; FL-2021-00023.
[5] *Various Claimants v G4S Ltd* [2022] EWHC 1742 (Ch), per Falk J at [3]: "Essentially, dishonesty is required".
[6] *Allianz Global Investors GmbH v G4S Ltd* [2022] EWHC 1081 (Ch); [2022] Bus. L.R. 566.
[7] *ACL Netherlands BV v Lynch* [2022] EWHC 1178 (Ch), per Hildyard J at [472].
[8] *SL Claimants v Tesco Plc* [2019] EWHC 2858 (Ch); [2020] Bus. L.R. 250.

- *Issue 4 (loss and causation)*: it suffered loss as a result of the defect in the information. Key questions as to the applicable principles for these issues, including the appropriate methodology for calculating loss, remain untested.
- *Issue 5 (Reliance)*: there was reliance in respect of the untrue or misleading statements and omissions, and that reliance was reasonable at the time of suffering loss. This reliance requirement was examined by Hildyard J in Autonomy,[9] albeit in the context of a private, bipartite transaction following a traditional due diligence process (and therefore arguably distinguishable from investors dealing on public equity markets following pre-acquisition analysis).

Investigations into Issue 1 (defective information) and Issue 2 (PDMR knowledge) (together, the Defendant Issues) concentrate on the activities of the defendant issuer. Presuming that the relevant proceedings move into the evidence phase (on the basis that the claimants' case would survive any strike-out application), the burden in producing documentary and witness evidence relating to the Defendant Issues falls almost entirely upon the defendant issuer. For Issue 3 (standing), Issue 4 (loss and causation) and Issue 5 (reliance) (together, the Claimant Issues), the position effectively reverses, though certain discrete categories of relevant documents may be held by the defendant issuer.[10]

Split trials in English litigation

English courts are increasingly prepared to tackle complex cases through the flexible use of procedural directions. They have substantial discretion in this regard. The resolution of disputes by mechanisms such as split trials (where certain issues are dealt with in a first trial, with other issues dealt with in one or more later trials) is increasingly common.

Pursuant to CPR 3.1(2)(i), the court's general case management powers include the power to "direct a separate trial of any issue". In determining whether to order a split trial, the court typically considers the factors identified in *Electrical Waste Recycling Group Ltd v Philips Electronics UK Ltd*[11] including:

- whether a single trial of all issues is possible;
- whether two trials would inevitably be required if a split trial is ordered;
- any evidence about costs savings;
- the risk of a bifurcated appeal process;
- the relative advantages and disadvantages in terms of trial preparation and management;
- the ease of defining the split;
- whether witnesses will need to be called on multiple occasions; and
- the need to ensure that the whole matter is adjudicated as fairly, quickly and efficiently as possible.

In other cases, the court has highlighted that:

- It would be incorrect to say that the court "leans against split trials", given there are a number of instances for which a split trial is "axiomatic".[12]
- A relevant consideration is whether a particular trial structure may drive settlement.[13]
- Long trials impose significant burdens on judges (including after the hearing has finished), and judges are entitled to seek to "reduce these enormous cases to manageable portions … by robust case management".[14]

S.90A claims may be considered strong candidates for split trials. Issues are often sufficiently discrete, allowing separate sets of issues that can be examined at different trials to be identified. Moreover, certain issues—such as Issue 4 (loss and causation)—are effectively contingent on the court's determinations on other issues. Without a split trial, the resolution of those "contingent issues" would likely be extremely difficult and time-consuming because all possible permutations must be examined to account for different factual findings that might be made on the other issues.

With group securities litigation at a relatively nascent stage in England and Wales, claimants and defendants alike are watching closely for case management decisions that could provide the roadmap for the conduct of future s.90A claims. One key case management question for s.90A claims is the way in which trials of these claims should be split (if at all).

The answer to this question is important, given the impact of a split trial on the parties' evidential obligations and the cost issues associated with the split. Moreover, given the disparate evidential burdens described above, there are strategic advantages for each side in s.90A claims to securing a split that ensures that the other party is required to discharge their burden at the earliest possible opportunity.

[9] *ACL Netherlands* [2022] EWHC 1778 (Ch), per Hildyard J at [478]–[523].
[10] For example, a defendant issuer's internal shareholder records may be probative in relation to Issue 3 (Standing) and records of investor meetings with management and/or investor relations departments may be probative in relation to Issue 5 (Reliance).
[11] *Electrical Waste Recycling Group Ltd v Philips Electronics UK Ltd* [2012] EWHC 38 (Ch), per Hildyard J at [5]–[7].
[12] *Maddox RP LLP v Grey GR Ltd Partnership* [2021] EWHC 3563 (Ch), per Deputy Master Marsh at [20].
[13] *Hook v Sumner* (2016, unreported), per Norris J at [54].
[14] *Dar Al Arkan Real Estate Development Co v Majid Al-Sayed Bader Hashim Al Refai* [2014] EWCA Civ 749, per Longmore LJ at [7], upholding a first-instance decision that sought to avoid a 16-week trial.

Split trials and the first s.90A claim—Tesco

The first *Tesco* litigation involved the first set of s.90A claims brought in England and Wales. It was the first instance in which a court considered the appropriate split (if any) for the trials of s.90A claims.

Two separate groups of claimants had commenced claims following Tesco's 2014 accounting scandal.[15] At the first case management conference, the claimants sought a split trial that would see a first trial (Trial 1) focus only on the Defendant Issues, with a second trial (Trial 2) examining the Claimant Issues (if required).

Hildyard J rejected that request, and instead ordered a single trial of all issues (but reserved a question about the calculation of quantum). He would later conclude that, if needed, issues relating to the calculation of the claimants' loss should be dealt with separately following Trial 1.

"The Tesco Split"

- Trial 1—Issue 1 (defective information), Issue 2 (PDMR knowledge), Issue 3 (standing), Issue 4 (loss and causation), Issue 5 (reliance)
- Trial 2—"*Issues of quantum calculation*"

Split trials and recent s.90A claims—RSA, G4S and Serco

It appears that judicial thinking on split trials in English securities litigation has moved on since *Tesco*. Three judgments delivered during 2022 arguably point towards the creation of a framework for the case management of future s.90A claims.

RSA

The *RSA* litigation (recently reported settled[16]) concerned claims brought against RSA, a former UK-listed company that operates a global insurance business through various subsidiaries. At issue was the conduct of RSA's Irish trading subsidiary, RSA Insurance Ireland Limited (RSA Ireland), which—as admitted by RSA—engaged in inappropriate accounting practices and a deliberate manipulation of insurance claims reserves through under-reserving between 2009 and 2013. These matters were disclosed to the market by RSA in November and December 2013, following which the price of its securities dropped significantly.

The claimants alleged that information published by RSA prior to those disclosures contained statements that were untrue or misleading and/or omitted to disclose: (i) the occurrence of the relevant misconduct within RSA Ireland; and (ii) the inadequacy of the corporate governance and controls within RSA Ireland and RSA. The claimants also alleged that RSA delayed publishing information to the market in respect of these matters. The claimants identified senior individuals within RSA who they alleged were PDMRs with the requisite knowledge.

At the first case management conference, Miles J ordered the following split trial:

"The Original RSA Split"

- Trial 1—Issue 1 (defective information), Issue 2 (PDMR knowledge), Issue 3 (standing), Issue 5 (reliance)
- Trial 2—Issue 4 (loss and causation)

The judge's reasons for ordering the Original RSA Split included:

- *Promoting settlement*—the determination of more issues at Trial 1, including Issue 5 (reliance), was more likely to promote settlement.[17]
- *Timing for reliance*—the Original RSA Split would result in a faster determination of the factual issues concerning reliance, saving around a year. The judge rejected the claimants' submission that this period was "marginal" and observed that the longer the delay, the more difficult it would be "to determine what had happened on a true factual basis".[18]
- *Length of Trial 1*—in a case of "this scale and importance", having a shorter first trial was not a "particularly telling factor". The judge observed that: (i) the claimants "must be ready to take part in [the case] fully"; and (ii) a trial of 25–30 court days was unlikely to be excessively onerous, including for claimants being supported by a litigation funder.[19]
- *Reliance/causation overlap*—while there was a potential overlap between Issue 5 (reliance) and the causation aspect of Issue 4 (loss and causation)—such that "in an ideal world", a spilt trial that cleanly separated the Claimant Issues from the Defendant Issues was preferable—a pragmatic way forward should be adopted. In reaching this conclusion, the judge noted that: (i) this overlap was unlikely to create a serious risk of inconsistencies; and (ii) though calling the same witnesses twice

[15] Claim Nos FL-2016-000019 and FL-2017-000001. Some years later, a second set of claims by further groups of claimants were brought, being FL-2020-000028; FL-2020-000029; FL-2020-000030 and FL-2020-000031.
[16] J. Poultney, "Investors Settle £150M Shareholder Suit Against RSA" (29 September 2022), *Law360*, *https://www.law360.com/articles/1534725/investors-settle-150m-shareholder-suit-against-rsa*.
[17] *Persons Identified in Schedule 1 to the Particulars of Claim v RSA Insurance Group Plc* [2021] EWHC 570 (Ch), per Miles J at [52].
[18] *RSA* [2021] EWHC 570 (Ch) at [53]–[55].
[19] *RSA* [2021] EWHC 570 (Ch) at [56].

might be unsatisfactory, causation evidence at Trial 2 was likely to be short and self-contained.[20]

- *Appeals*—any appeal would be facilitated by the court considering as many issues as possible, particularly to avoid further delays to the determination of Issue 5 (reliance).[21]
- *Litigation burden*—having brought the claim, the claimants "should be prepared to undertake substantial work in ensuring the expeditious progress of the proceedings to resolution". The judge characterised the Original RSA Split as offering a fair allocation of the litigation burden between the parties (while noting that the litigation burden was not a "determinative factor on its own").[22]

However, in a ruling dated 28 February 2022,[23] the judge acceded to the claimants' application to move Issue 5 (reliance) to Trial 2. As a result, the *RSA* litigation was due to proceed based on the following revised split:

"The Revised RSA Split"

- Trial 1—Issue 1 (defective information), Issue 2 (PDMR knowledge), Issue 3 (standing)
- Trial 2—Issue 4 (loss and causation), Issue 5 (reliance)

In ordering the Revised RSA Split, the judge acknowledged the importance of the court retaining "the flexibility to revisit its earlier orders, particularly orders made at a very early stage in the litigation". The judge accepted the need to "bear in mind the expectations that any order might generate", but also observed that this consideration "can only go so far, as otherwise case management decisions of this kind become set in stone and there is no room for properly active case management".[24]

In this respect, the judge accepted the claimants' contention that there had been "significant changes in the shape and nature of the case" that justified this course of action.[25] This included the following changes:

- *PDMRs*—the number of alleged PDMRs with the requisite knowledge had reduced from four to two. This meant that the extent to which Trial 1 would be "devoted to the PDMR issues has obviously reduced",[26] so that "a relatively short trial" predominantly focused on Defendant Issues "could be decisive of the entire litigation".[27] As the claimants submitted orally at the hearing of their application on 28 February 2022 (the RSA Hearing):

> "PDMR knowledge is foundational to any section 90A claim [such that] if this element were knocked out by the defendant the whole cause of action fails. It would save considerable costs if that issue were determined before the reliance issue. If RSA wins, it avoids the waste of court time and party resource on the reliance issue."[28]

  In making this argument, the claimants also relied on open correspondence in which RSA's solicitors stated the claimants' case on Issue 2 (PDMR knowledge) was "extremely weak".[29]
- *Reliance*—while the reliance issues had previously appeared to be "relatively straightforward" and involving "fairly simple questions of fact",[30] both parties had since advanced more complex arguments. This included the introduction of a novel concept by the claimants (Indirect Reliance), and RSA's contention that s.90A claims required conscious awareness of the type envisaged in *Leeds City Council v Barclays Bank Plc*.[31] The parties were also now adducing expert evidence on reliance. Against that background, the judge accepted that the reliance cases had become "a great deal more elaborate and complex, both factually and legally".[32] Moreover, the claimants' witnesses (namely, the individuals responsible for the claimants' investment decisions) would need to be examined on counterfactuals that would increase the "blurring of the lines" between Issue 5 (reliance) and the causation aspect of Issue 4 (loss and causation).[33]

The judge also rejected arguments raised by RSA in relation to:

[20] *RSA* [2021] EWHC 570 (Ch) at [57].
[21] *RSA* [2021] EWHC 570 (Ch) at [62].
[22] *RSA* [2021] EWHC 570 (Ch) at [64].
[23] *Persons Identified in Schedule 1 to the Particulars of Claim v RSA Insurance Group Ltd* unreported 2022.
[24] *RSA* unreported 2022 at [39].
[25] *RSA* unreported 2022 at [40].
[26] *RSA* unreported 2022 at [40].
[27] *RSA* unreported 2022 at [40].
[28] Transcript of the RSA Hearing, p.5.
[29] Transcript of the RSA Hearing, p.13.
[30] *RSA* unreported 2022, per Miles J at [23].
[31] *Leeds City Council v Barclays Bank Plc* [2021] EWHC 363 (Comm), per Cockerill J.
[32] *RSA* unreported 2022, per Miles J at [40].
[33] *RSA* unreported 2022, per Miles J at [41].

- *Appeals*—RSA submitted that certain novel issues—such as who might be a PDMR and the types of permissible reliance—may be appealed to higher courts. RSA relied on prior comments from the judge, who had previously noted that if Issue 5 (reliance) was moved to Trial 2 and there was an appeal arising out of Trial 1, "the reliance questions [would] get pushed even further off".[34]
  The judge rejected this argument, noting it was "not a factor which weighed heavily with me [previously], and it does not now".[35] He also noted that any appeals in relation to the Defendant Issues were largely on questions of fact, which "always have an uphill struggle".[36]
- *Litigation burden*—RSA referred the judge back to his prior comments about the need to ensure a "fairer allocation of the litigation burden", and cautioned against allowing the claimants to evade "any substantive engagement at trial 1". RSA asserted that the claimants had only reached "the absolute foothills of proper engagement" with the proceedings.[37] The judge rejected this argument, doubting the need for the court to take an approach of "trying to throw an equal amount [of] costs onto the two parties".[38] He noted that he would maintain the requirement on the claimants to provide disclosure.

Having regard to those points, the judge found the cost consequences of the Revised RSA Split persuasive. He weighed up "the potential cost savings, both for the parties and for the court, in the event that [the Defendant Issues] go against the claimants"[39] and noted that, once the first group of issues are determined at Trial 1, "a relatively speedy timetable"[40] could be adopted for the resolution of the outstanding issues at Trial 2.

G4S and Serco

The second and third recent judgments of relevance were handed down by Falk J at the first case management conferences in *G4S* and *Serco*. Those decisions are examined together because, as observed by the judge in her judgment in *Serco* :

> "There are strong parallels between these proceedings and the proceedings against G4S, which are also ongoing. The similarities in the issues raised, both factual and legal, are striking …"[41]

The *G4S* and *Serco* litigations are each brought by large groups of institutional investors (in some cases, the same claimants are participating in both litigations) against G4S Ltd and Serco Group plc,[42] both of which operate global outsourcing businesses through various subsidiaries.

The claims relate to matters involving contracts between subsidiaries of G4S and Serco and the UK government for the provision of services in respect of inter alia the electronic tagging of offenders (the EM Contracts). In 2013, G4S and Serco each entered into settlements with the UK government in respect of alleged overbilling under the EM Contracts. Subsequently, the relevant subsidiaries entered into separate deferred prosecution agreements in relation to fraudulent conduct relating to the EM Contracts. Those agreements were announced in 2019 (for Serco) and in 2020 (for G4S).

The claimants allege that information issued by G4S and Serco prior to the disclosures to the market contained statements that were untrue or misleading and/or omitted to disclose the fact that the relevant misconduct within the relevant subsidiaries was occurring. The claimants also allege that G4S and Serco delayed in publishing information to the market in respect of these matters. The claimants have identified senior individuals within G4S and Serco who they allege were PDMRs with the requisite knowledge.

The G4S order

The first case management conference in *G4S* took place on 29 and 30 June 2022, almost three years after the first set of proceedings were issued.

The claimants invited the court to order a similar split trial to the Revised RSA Split. They relied on the similarities between *RSA* and *G4S*, and contended that they had already provided a significant volume of information about their claims. That information included:

- *Further Particulars of Standing*—a document setting out each claimant's case in relation to Issue 3 (standing);
- *Further Particulars of Quantum*—a document setting out the compensation claimed by each claimant and the underlying methodologies, relevant to Issue 4 (loss and causation); and

[34] Transcript of the RSA Hearing, p.60.
[35] *RSA* unreported 2022, per Miles J at [53].
[36] Transcript of the RSA Hearing, p.63.
[37] Transcript of the RSA Hearing, pp.63 and 65.
[38] *RSA* unreported 2022, per Miles J at [54].
[39] *RSA* unreported 2022, per Miles J at [46].
[40] *RSA* unreported 2022, per Miles J at [55].
[41] *Various Claimants v Serco Group Plc* [2022] EWHC 2052 (Ch), per Falk J at [13].
[42] Serco is a UK-listed company. G4S (formerly known as G4S plc) was listed on the London Stock Exchange until 5 May 2021 and the Nasdaq Copenhagen until 16 April 2021.

- *Individual Particulars of Reliance*—for certain (but not all) claimants, documents setting out their cases on Issue 5 (reliance), including information as to their investment strategies and processes.

The claimants' secondary position, if the court was not prepared to order the Revised RSA Split, was to invite the court to order that Issue 5 (reliance) be tried by reference to sample/lead claimants. They contended that the information already provided to G4S meant that the parties had sufficient information to engage in a sample selection process.

G4S, criticising the quality of the information provided by the claimants, contended that debating the split trial question was premature and argued that a sampling exercise was impossible in light of the alleged information deficiencies. G4S asked the court to postpone determining those questions until a second case management conference, pending the provision of further information (namely, witness statements from all claimant witnesses and disclosure from sample claimants). G4S suggested that the court should pre-emptively list a 10-week trial, the length of which could be reduced if required.

In an *ex tempore* judgment dated 30 June 2022,[43] the judge sought to strike a middle ground. She ordered the split trial sought by the claimants (being the Revised RSA Split) with the addition of a specific issue regarding direct communications and meetings between representatives of the claimants and G4S on which the claimants relied (Specific Communications):

"The G4S Split"

- Trial 1—Issue 1 (defective information), Issue 2 (PDMR knowledge), Issue 3 (standing), Specific Communications
- Trial 2—Issue 4 (loss and causation), Issue 5 (reliance)

However, the judge also ordered "a parallel process to establish sampling" that required the claimants to provide further information to allow sample claimants to be selected.[44] Those sample claimants would then be required to give disclosure prior to Trial 1. She also ordered the listing of a second case management conference in December 2022, at which the court could "take stock" and determine inter alia what (if any) witness statements should be taken from claimants prior to Trial 1 and whether any other specific questions of law could helpfully be considered at Trial 1.[45]

In ordering the Revised RSA Split, the judge examined the guidance in *Electrical Waste Recycling*[46] summarised above. In doing so:

- The judge observed that the Revised RSA Split could be "defined fairly readily [because on] the whole, the common issues are largely discrete and can be considered separately from other issues such as reliance".[47]
- The judge noted that it was not clear that "a single trial is either realistic or necessarily possible". This was because, inter alia, questions of quantum seem likely to be put off, and the reliance cases advanced by the claimants were—as Miles J had observed in *RSA*—elaborate and complex.[48]
- The judge concluded that the Revised RSA Split coupled with a "proper process of sampling and provision of information" might be best for "facilitating settlement" and creating "real scope for settlement discussions".[49]
- The judge observed "if the claimants fail at the trial 1, there will be a substantial saving in costs on any basis".[50]
- While there was always a risk of bifurcated appeals (being appeals from separate trial), the judge accepted that Trial 1 would deal with fact-heavy points for which there is "significantly less scope for appeal".[51]
- The judge observed that "there will be limited expert evidence, if there is expert evidence at all, for trial 1".[52]

The judge was clear that the claimants needed to provide further information to facilitate sampling and to "flush out specific reliance claims".[53] In this regard, the judge's decision was likely informed by the comments of Mr Justice Hildyard in the *Tesco* litigation on which G4S relied (and to which the judge would later refer in *Serco*[54]):

> "… on a matter which is absolutely central to the statutory form of action, that is to say, the issue of reliance, the court should be properly astute to ensure that sufficient particularity is supplied [so] that the defendant knows precisely what is alleged, or sufficiently precisely what is alleged, and also to focus the mind of each of the individual claimants,

[43] *G4S Ltd* [2022] EWHC 1742 (Ch).
[44] *G4S Ltd* [2022] EWHC 1742 (Ch), per Falk J at [13].
[45] *G4S Ltd* [2022] EWHC 1742 (Ch), per Falk J at [13]. The parties would subsequently agree that: (i) the sample claimants would provide witness evidence on their reliance cases prior to Trial 1; and (ii) a specific question of law concerning G4S's limitation defence would be considered at Trial 1.
[46] *Electrical Waste Recycling Group Ltd v Philips Electronics UK Ltd* [2012] EWHC 38 (Ch).
[47] *G4S Ltd* [2022] EWHC 1742 (Ch), per Falk J at [63].
[48] *G4S Ltd* [2022] EWHC 1742 (Ch), per Falk J at [53].
[49] *G4S Ltd* [2022] EWHC 1742 (Ch), per Falk J at [58], [59] and [67].
[50] *G4S Ltd* [2022] EWHC 1742 (Ch), per Falk J at [57].
[51] *G4S Ltd* [2022] EWHC 1742 (Ch), per Falk J at [61].
[52] *G4S Ltd* [2022] EWHC 1742 (Ch), per Falk J at [65].
[53] *G4S Ltd* [2022] EWHC 1742 (Ch), per Falk J at [73].
[54] *Serco Group Plc* [2022] EWHC 2052 (Ch), per Falk J at [22].

> who have brought very serious allegations, as to precisely the basis on which individually they have proceeded.
>
> Joinder of claimants to Group actions … should not be a matter of subscription but of orderly and careful assessment in respect of each claimant that the statutory requirements to establish liability are appreciated and satisfied … there is a danger in the case of group actions that people do subscribe to the action in the expectation, or at least hope, of settlement, without at that stage giving sufficient focus to the need for its case to be tested with the same degree of particularity as would be the case if they were fewer in number."[55]

The judge set out a number of points that she considered the claimants ought to address when providing the further information to facilitate sampling.[56] Those points predominantly related to the different reliance cases being advanced by the claimants, but also explored the availability of documentary evidence[57] and information about Specific Communications.[58]

Based on that guidance, the judge required the parties to agree a list of questions to be answered by the claimants. As described in the judge's decision in *Serco* ,[59] the questions ultimately agreed by the parties aimed to establish:

- the nature of the reliance cases advanced by each claimant;
- whether the claimants rely on Specific Communications; and
- the availability of documentary evidence for each claimant.

The claimants also agreed to provide a further explanation about the Indirect Reliance cases that they intended to advance.[60]

In giving these directions, the judge rejected G4S's contention that these case management decisions should be postponed: she noted the benefits of "implementing a clear plan now" so that the proceedings (which "had already been on foot for some time") could proceed.[61]

The Serco order

The first case management conference in the *Serco* litigation took place before Falk J on 26 July and 27 July 2022, again some three years after the first set of proceedings had first been issued.

As noted above, in her *ex tempore* judgment dated 27 July 2022,[62] the judge had observed the strong parallels between the *G4S* and *Serco* litigations. That included the information that had been provided by the claimants prior to the hearing, and the fact that the claimants in *G4S* and *Serco* were represented by the same legal team.[63]

Having regard to those parallels, the claimants in *Serco* invited the judge to take a similar approach in these proceedings. For its part, Serco accepted that the G4S Split should be ordered. However, Serco also invited the court to modify the G4S Split to include, as a question of law for specific determination at Trial 1, whether Indirect Reliance can provide a basis for a s.90A claim. This proposal, after discussion at the hearing, was ultimately not pressed.[64]

With the defendant having accepted the appropriateness of the G4S Split, the debate at the case management conference related primarily to the timing for sampling. The judge rejected Serco's contention that sampling should only follow the provision of disclosure and witness statements from all claimants,[65] and ordered the split trial and the further information gathering process in near identical terms to the order in *G4S*:

"The Serco Split"

- Trial 1—Issue 1 (defective information), Issue 2 (PDMR knowledge), Issue 3 (standing), "Specific Communications"
- Trial 2—Issue 4 (loss and causation), Issue 5 (reliance)

She concluded that:

> "The process set in G4S was carefully designed as a proportionate means of ensuring proper particularisation of the claimants' reliance case before trial 1, to facilitate the selection of the optimum range of claimants as sample claimants, to achieve balance in the litigation burden before trial 1, including by ensuring proper engagement by claimants, to promote the chances of overall settlement through an improved understanding by the defendant of the claimants' case, and, with disclosure and, potentially, witness statements from sample claimants at least, to allow the case to progress from trial 1 to trial 2 without undue delay."[66]

[55] *Manning and Napier Fund Inc v Tesco plc* [2017] EWHC 3296 (Ch), per Hildyard J at [29].
[56] *G4S Ltd* [2022] EWHC 1742 (Ch), per Falk J at [35]–[41].
[57] *G4S Ltd* [2022] EWHC 1742 (Ch), per Falk J at [23].
[58] *G4S Ltd* [2022] EWHC 1742 (Ch), per Falk J at [24].
[59] *Serco Group Plc* [2022] EWHC 2052 (Ch), per Falk J at [17].
[60] *G4S Ltd* [2022] EWHC 1742 (Ch), per Falk J at [47].
[61] *G4S Ltd* [2022] EWHC 1742 (Ch), per Falk J at [75].
[62] *Serco Group Plc* [2022] EWHC 2052 (Ch).
[63] *G4S Ltd* [2022] EWHC 1742 (Ch), per Falk J at [13].
[64] *G4S Ltd* [2022] EWHC 1742 (Ch), per Falk J at [16].
[65] *G4S Ltd* [2022] EWHC 1742 (Ch), per Falk J at [21]–[25].
[66] *G4S Ltd* [2022] EWHC 1742 (Ch), per Falk J at [25].

The judge further concluded that requiring all claimants to provide disclosure and witness statements on reliance would be "disproportionate and not consistent with the overriding objective".[67] She was also clear that "the process for sampling ought not to be allowed to drift", meaning a "clear process towards identification of sample claimants" should be put in place.[68]

Conclusion

As further s.90A claims progress through the courts, increasing clarity and guidance on the appropriate case management directions is emerging, particularly on the topics of split trial and sampling.

At first glance, it might be suggested that the journey from the split trial adopted in *Tesco* through the Original RSA Split and the Revised RSA Split to the process now being employed in *G4S* and *Serco* is illustrative of a shift towards claimant-friendly decisions (on the basis that Trial 1 in those proceedings will focus primarily on the Defendant Issues).

However, in each of *RSA*, *G4S* and *Serco*, the court imposed obligations on the claimants to particularise and/or evidence their reliance cases, with the claimants being required:

- in *RSA*, to give disclosure;[69] and
- in *G4S* and *Serco*, to provide additional information on the reliance cases to enable a sampling exercise.

Perhaps the more accurate characterisation of the *RSA*, *G4S* and *Serco* decisions are as natural progressions from the recent Supreme Court decision in *Lloyd*,[70] which emphasised the advantages of bifurcating common issues and claimant-specific issues (albeit in the context of a representative action under CPR 19.6) on the basis that there are:

> "advantages in terms of justice and efficiency … where common issues of law or fact are decided through a representative claim, leaving any issues which require individual determination, where they relate to liability or the amount of damages, to be dealt with at a subsequent stage of the proceedings."[71]

It is also evident that the facilitating of settlements is an important consideration for the court. Both Miles and Falk JJ explicitly cited the promoting and facilitating of settlements as justifications for their decisions in *RSA*, *G4S* and *Serco*.

Ultimately, it is likely that the *RSA*, *G4S* and *Serco* decisions will be treated as important guidance for the case management of future s.90A claims. Policy considerations will likely come into play in that regard: there is a strong argument that similar cases, particularly in the Financial List, should be managed in a consistent manner, in the interests of certainty for all financial markets litigants. In all, this may point towards the emergence of a roadmap for the conduct of future s.90A claims, albeit one that remains in faint outline.

Future claimants may seek to draw lessons from the *RSA*, *G4S* and *Serco* decisions. This may take the form of claimants following the example set by the claimants in those litigations, in terms of providing certain information prior to the first case management conference, with the goal of positioning their proceedings in a similar procedural posture by the time of that hearing. For their part, defendants may request that claimants engage with something akin to the information-provision process laid down in *G4S* and *Serco*.

More creative options for achieving the bifurcation of s.90A claims—drawing on the reasoning articulated by Miles and Falk JJ (along with the Supreme Court in *Lloyd*)—may also come into play. Funders and litigants alike will continue to explore and test the procedural ways in which these cases can progress in an efficient and cost-effective manner, as the court continues to rule on the substantive issues that will determine the claims themselves.

[67] *G4S Ltd* [2022] EWHC 1742 (Ch), per Falk J at [28].
[68] *G4S Ltd* [2022] EWHC 1742 (Ch), per Falk J at [29].
[69] *RSA* unreported 2022, per Miles J at [54].
[70] *Lloyd v Google LLC* [2021] UKSC 50.
[71] *Lloyd* [2021] UKSC 50, per Lord Leggatt at [81].