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Collective Actions in the UK and EU Two Years On: The Groundswell Continues

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Introduction

Events of the past 12 months have shown that predictions about a wave of collective actions could become a reality. For the last two years we have explored the dynamics of the UK and EU collective actions regimes and their potential for growth. In this third year we have seen clear momentum from claimants and litigation funders, and an increase in tangible risks for businesses.

Developments have taken place in a number of areas: securities litigation; data breach; competition; and environmental, social and governance ("**ESG**") issues, to name but a few. In this chapter we focus on several specific areas that are both interesting in their own right, but also highlight trends of wider interest.

The trends and their drivers are not new, although are both more visible and more ingrained in the marketplace. The organisation and funding of collective actions is increasingly advanced and enables enhanced coordination of large groups of claimants, as well as financing them. Specialist funders, law firms and service providers are on the rise in the UK market and elsewhere. Consumers are ever more aware of the opportunities afforded to them to participate in collective actions. The changes being implemented across the EU are attracting greater interest from these and other parties.

These changes have been steadily occurring for some years and are important when seen in context. The UK and EU collective actions systems have historically been perceived to be constrained by their own dynamics, including the opt-in system and "loser pays" costs regime. Avenues exist for pursuing claims, but practitioners have had to be flexible and inventive in pursuing group claims in an economically viable way. Funding for actions has often not been available, particularly when contemplating actions against well-funded defendants, leading to the possibility of large adverse costs orders.

The operation of the opt-in system has also meant that those contemplating action will be aware that settlement within limitations periods might be unattractive for defendants seeking finality while faced with potential claims from those not part of the claimant group. There has also been a relatively low level of experience at practitioner level of successful pursuit of collective actions, particularly compared to the US. It would appear that claimants and their funders are addressing each of these historical hurdles.

One area that highlights these developments is securities litigation. We focus on this area in the UK, although there are increasing signs that some EU jurisdictions are seeing – and will see – these actions being brought more frequently.

Another area of interest is litigation arising from ESG considerations. Many foresee a significant increase in these actions, which can interrogate a wide range of a corporation's activities and policies. We consider, in particular, the important area of pay equity as an example of where global employers can take steps to mitigate the risk of collective actions.

We discuss a Court of Appeal decision in the largest group claim to be brought before the courts in England and Wales. This important decision provides an example of the approach of the courts to procedural issues in UK collective actions, where courts are faced with proceedings with very significant case management challenges.

Finally, we look to the future and some of the key issues on the horizon. These include litigation funding, ESG (this time in the context of climate change litigation), and future developments in the EU following the implementation of the 2020 Directive on Representative Actions.

While there have been significant developments in other related fields, including competition and data breach, we hope this chapter adds to existing commentary on those areas and provides insight into the development and drivers of this important and interesting area of the market.

Securities Litigation is on the Rise in England and Wales

Claims under Section 90A and Schedule 10A of the Financial Services and Markets Act 2000 ("**FSMA**") (a "**S.90A Claim**") for misleading statements or omissions in (or the delayed publication of) information issued to the market by listed companies had long been considered by the investor community as an underutilised remedy.

A suite of recent S.90A Claims is indicative of the emergence of a growing market for these actions. To date, S.90A Claims are known to have been commenced against issuers including Tesco plc, Serco Group plc, RSA Insurance Group Limited, G4S Limited 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 ("**HP**").

Recent case law – guidance on uncertainties

Accompanying this rise of activity has been a steady flow of High Court decisions interpreting various aspects of Section 90A and Schedule 10A, including on significant points of uncertainty.

Who is a PDMR?

Identifying a 'person discharging managerial responsibility' ("**PDMR**") within an issuer who, in broad terms, was aware that the issuer's published information was defective is a fundamental requirement of a S.90A Claim.

Paragraph 8(5) of Schedule 10A sets out a three-limbed definition of PDMR. For most defendants to S.90A Claims (i.e. public limited companies), the relevant limb of that definition is "*any director of the issuer (or person occupying the position of director, by whatever name called)*".

In the *G4S* litigation, Mr Justice Miles considered this limb as part of a summary judgment/strike-out application brought by the defendant. The claimants argued for an expansive interpretation derived from European legislation, whereas the defendant advocated for a narrower definition rooted in English company law and based on the language of the statute. Mr Justice Miles found in favour of the defendant, holding that a PDMR of a corporate defendant was restricted to *de jure*, *de facto* and (arguably) shadow directors.

Though Mr Justice Miles dismissed the claimants' expansive interpretation, he declined to strike out their case on the basis that an inquiry as to whether an individual is a *de facto* director of a company is "*intensely fact-specific*". He also noted: (i) the "*potential for elasticity in the application*" of the concept of *de facto* directorship; and (ii) that prior case law on the concept had concentrated on "*relatively simple corporate structures*" and not explored more complex structures typically operated by large, listed companies.

When does limitation begin?

S.90A Claims are subject to the ordinary primary six-year limitation period under the Limitation Act 1980 ("**LA**").

Information regarding matters that could underpin a S.90A Claim often enter the public sphere in a fragmented manner. Accordingly, to overcome the six-year limitation period, claimants may seek to rely on Section 32(1)(a) of the LA, which provides that in cases of fraud or concealment the six-year period will not begin until a claimant discovered, or could with reasonable diligence have discovered, the fraud or concealment.

The application of Section 32(1)(a) of LA in the context of S.90A Claims was considered by Mr Justice Miles in the *RSA* proceedings. The defendant sought to strike out claims brought in May and June 2021, contending they were time-barred because information about the relevant misconduct was made available by news reports from late 2013 and its own announcements in January 2014.

Mr Justice Miles declined to strike out the claims. He concluded that the Court lacked sufficient evidence about what institutional investors acting with reasonable diligence normally do with respect to reading official market announcements from, and monitoring press reports about, their investee companies. Further, he observed: (i) the issue of reasonable discoverability requires a factual enquiry; and (ii) the position may be different for different institutional investors depending on their investment process.

Reliance and *Autonomy*

In the *Autonomy* litigation, Mr Justice Hildyard found in favour of HP. In doing so, Mr Justice Hildyard considered a number of fundamental questions relating to S.90A Claims, including questions concerning the requirement of reliance:

- **On what must a claimant rely?** Mr Justice Hildyard concluded that a claimant must show reliance on a particular statement or omission, rather than on an item of Published Information (such as an Annual Report) in a general sense. He did, however, accept that in combination, statements (or omissions) may create an impression that could underpin a S.90A Claim.
- **Awareness**: Mr Justice Hildyard concluded that a S.90A Claim could not be founded on: (i) a misstatement at which a claimant did not look, or to which it did not apply its mind; or (ii) a piece of published information that a claimant did not consider at all. He determined that a claimant must show there was an "*impact on their mind*" or an "*influence on their judgement*" in relation to the investment decision.

The significance and relevance of Mr Justice Hildyard's judgment to other ongoing and future S.90A Claims is likely to be hotly contested, particularly in group actions brought by large groups of institutional investors. Claimants in such claims are likely to seek to distinguish *Autonomy* on its facts, contrasting its unique fact pattern (which saw claims arising from a private, bipartite transaction following a due diligence process) against S.90A Claims brought by investor groups in respect of their investments in securities purchased in the public equity markets following pre-acquisition analysis, including investors who may have operated tracker or index-based funds. Claimants may also highlight the points that Mr Justice Hildyard did not decide, as noted below.

Other issues

Despite *Autonomy* having covered significant new ground, there are a number of uncertainties relating to S.90A Claims that remain undecided and untested before the English courts. This includes, crucially, questions concerning causation and the calculation of quantum, along with the topic of reliance in relation to published information containing omissions.

Recent decisions – case management of S.90A claims

A number of other recent High Court decisions also appear to have laid out a case management framework by which S.90A Claims may, in future, make their way through the English courts.

Mechanisms such as split trials (whereby certain issues are considered at a first trial, with other issues dealt with at one or more later trials) are increasingly favoured by parties and the courts as a means to tackle complex cases.

S.90A Claims are good potential candidates for split trials. Claimants will typically argue that the points of dispute are often sufficiently discrete that it is possible to identify separate groups of issues for determination at different trials. Moreover, there are certain issues – such as the calculation of quantum – that are arguably contingent on the Court's determinations on other issues, meaning that resolving those issues would likely be extremely difficult without a split trial.

A split trial was used in the first set of *Tesco* proceedings, whereby all issues except causation and loss were to be dealt with at Trial 1. That form of split trial was adopted in the *Autonomy* litigation and, initially, in the *RSA* proceedings.

However, there now appears to be a shift towards another form of split trial. In February 2022, Mr Justice Miles varied his original split trial order in the *RSA* proceedings and moved the issue of reliance into Trial 2 (along with causation and loss). Accordingly, Trial 1 (due to commence in October 2022) will now deal with – in effect – the 'Defendant-side' issues, plus the discrete issue of standing.

The split trial question was then considered by Mrs Justice Falk at the first case management conference ("**CMC**") in the *G4S* proceedings. The *G4S* proceedings were at a markedly different stage to the *RSA* proceedings. While the claimants had provided a significant volume of information to the defendant, they had done so on a voluntary basis prior to any direction from the Court.

The claimants asked Mrs Justice Falk to make an order for the RSA Split. The defendant contended that the information provided by the claimants (especially on the topic of reliance) was deficient and incomplete (particularly in light of the decision in *Autonomy*), and therefore advocated the postponement of case management decisions pending the provision of further information on reliance by the claimants.

Mrs Justice Falk rejected the defendant's position, noting the benefits of "*implementing a clear plan now*" so that the proceedings (which "*had already been on foot for some time*") could proceed. She made an order for the RSA Split (with some minor modifications), but "*with a parallel process to establish sampling*" for which further information from the claimants on reliance would need to be provided. She also indicated that she would require disclosure from sample claimants, and schedule at least one further CMC before Trial 1 to "*take stock*" and decide what – if any – witness statements should be taken from claimants. A largely identical approach was taken by her at the first case management conference in the *Serco* proceedings soon afterwards.

Conclusion

As further S.90A Claims progress through the courts, an increasing level of clarity and guidance on key legal questions and appropriate case management directions is emerging. With those decisions providing parties with guidance on the targets they must meet for S.90A Claims, such that the likely demands on both sides of a S.90A Claim come more clearly into focus, we are likely to see a further rise in S.90A Claims. What may change is the demographics of the claimant groups pursuing those claims.

ESG – Focusing on the "S" Amidst the Risk of Collective Claims

It is widely reported that global employers are facing a challenging, rapidly changing landscape. Amid a range of considerations, there is a growing emphasis on "ESG" issues, with a particular spotlight shone on the "social" element. Although there are currently no set metrics or prescribed areas of focus for the "S" in ESG, businesses tend to pinpoint issues relating to human rights, health and safety, diversity and inclusion, equal pay, and stakeholder engagement.

Employers are taking steps to analyse their practices in this regard to ensure that they meet the growing reporting obligations around the world, and can mitigate the risk of collective actions if close attention is not paid, which can be costly and reputationally damaging. We take a closer look at how ESG is measured and practical considerations to avoid collective claims, with a focus on pay equity.

Reporting and regulatory requirements

Reporting related to social issues remains largely voluntary in many places worldwide. There are, however, some mandatory reporting requirements in certain jurisdictions. For example, in the UK, large private and voluntary sector employers (employers with 250 or more employees) are required to analyse their gender pay gap each April. In France, companies with 50 or more employees are required to analyse and publish their gender pay gap every year on March 1st.

In Germany, corporate employers with more than 500 employees are required to report every three or five years on the actions they have taken to advance gender equality, the effect of such measures, and the steps taken to establish gender pay equity.

Recent years have seen regulatory environments across the globe (particularly in the financial services sector) place greater emphasis on ESG disclosures, with many jurisdictions taking steps to make more ESG disclosures mandatory. This trend is expected to continue.

UK

In July 2021, the Financial Conduct Authority, the Prudential Regulation Authority and the Bank of England published a joint discussion paper, entitled "*Diversity and inclusion in the financial sector – working together to drive change*", aimed at engaging financial firms and other stakeholders in discussion around how to accelerate meaningful change on diversity and inclusion in the financial sector. The paper clearly stated regulators' intentions to build on existing requirements to support and monitor diversity and inclusion progress in the UK financial sector, and it is expected that additional diversity and inclusion metrics will soon become part of how the regulators operate, and how they expect the UK financial services sector to operate.

EU

In Europe, the European Pay Transparency Directive is due to be implemented in 2024 and is intended to strengthen the application of the principle of equal pay for equal work or work of equal value between men and women, through pay transparency and enforcement mechanisms. The proposals will require publication of a number of elements of an employer's pay practices, including allowing job applicants and current workers access to information about pay levels and reporting on gender pay gaps, and employers will be prevented from asking candidates about prior pay history.

Pay equity – a critical "S" factor

From a global perspective, pay equity laws present a complex regulatory landscape, giving rise to the risk of significant, collective-style litigation in some jurisdictions. Further, new legislation continues to be introduced with more detailed and comprehensive reporting requirements, which increases the risk of claims, particularly where the reports are published and available to employees and/or the public. Employers should take proactive measures to understand the pay equity landscape within their organisation, and to be prepared to defend against such claims and, ideally, avoid such claims altogether.

Practical considerations

Organisations can take several steps to mitigate the risk of collective pay equity claims. Firstly, they should consider their pay practices and structures carefully and ensure that their policies and values appropriately address equal pay rights. Further, broadly speaking, the more public transparency employers can give to their pay policies, and the more able they are to respond to unequal pay issues and/or complaints, the lower the chance of such claims. If employees clearly understand how their pay might increase and their eligibility for bonuses and can see for themselves that decisions in this regard are based on objective and quantifiable factors, they are less likely to issue pay equity claims.

A. Privileged pay equity audits

Employers should consider regularly conducting a pay equity analysis on a legally privileged basis. This will assist employers in understanding the compensation landscape within their organisations, including any potential defensible pay factors, and whether there are any unexplained pay differences that the company should address proactively. Employers should work to establish and maintain privilege in any pay equity audits that they undertake, and thoroughly analyse how potentially defensible pay factors impact employees' compensation and how best to address any unexplained pay differences.

Further, because statistical analyses play a critical role in any class or collective pay equity actions, conducting a proactive pay equity analysis under privilege allows the company to understand how such data might be used in potential litigation.

B. Pay equity reporting

The UK requirement for companies with 250 or more employees to report annual gender pay statistics will further assist in revealing the discrepancies that may be used as the basis for an equal pay claim. Where employers are not required to disclose these figures, it may still be a useful theoretical exercise that can then be used to identify potential issues with respect to the way that different groups and individuals are paid. Any decision to increase pay to correct any imbalances will need to be carefully implemented and communicated, to reduce the risk of any potential liability arising out of the rectification process itself.

C. Addressing workplace equality

Effectively managing and working towards closing the gender pay gap is a question of fairness and plays a key role in tackling systematic workplace inequality. Employers are likely to encounter regulatory, legal, financial and reputational risk from inequity in gender pay, but addressing these issues proactively will help to minimise such risks and will also play an important role in a company's ability to retain and attract more women in senior management roles and higher-paying positions.

Conclusion

It is clear that ESG considerations are now top of mind for the world's leading organisations, with diversity, equity and inclusion, and particularly fair pay practices, being at the forefront of this agenda. By tackling these issues head-on, employers can create a fairer, more productive workforce and can mitigate the risk of financially and reputationally costly collective claims.

Fundão Dam Class Action Succeeds at Court of Appeal

Introduction

The recent Court of Appeal judgment in *Mariana and others v. BHP Group PLC and another* [2022] EWCA Civ 951 has revived the largest group claim to be brought before the courts in England and Wales. The claim was previously struck out by the High Court as an abuse of process by a judgment in November 2020. However, recognising the complexity and importance of the case, the Court of Appeal granted permission to appeal, and it has now overturned the lower court's decision.

Case background

The claimant group includes the following: over 200,000 individuals; over 500 micro and small businesses; 13 larger businesses, 145 members of an indigenous community; 25 municipalities in Brazil; 15 churches; and five utility companies. The claimants' collective £5 billion action against BHP Group Plc ("**BHP**") arose from the collapse of the Fundão Dam in Brazil in November 2015, which released toxic iron ore residue over the surrounding area. The collapse killed 19 people, destroyed entire villages, and caused damage to the River Doce system over its entire course to the sea over 400 miles away, polluting local water supplies.

The dam was owned and operated by Samarco, a Brazilian company jointly owned by Vale and BHP Billiton Brazil, part of the BHP group. After the catastrophe, Vale and BHP set up the Renova Foundation to compensate victims and carry out repair work. In 2018, dissatisfied with the legal redress available in Brazil, the claimants commenced proceedings before the English High Court.

Previous judgment

At first instance, the High Court struck out the claim as an abuse of process. The Court was satisfied that the claim would not merely be challenging but also "*irredeemably unmanageable*" if it was allowed to proceed in England.

Some of the considerations noted in the High Court's judgment included: (i) the level and rate of turnover of claimants was likely to be unmanageable; and (ii) "*claims involving very considerable numbers of parties and issues inevitably place a burden on the court which may be very much greater than that which would be assumed in the context of a unitary action*". The judgment also highlighted that the "*challenge of managing a GLO, even in the most favourable of forensic conditions, is often by no means straightforward*", but that simultaneous proceedings in Brazil increased this burden.

The importance placed upon these factors in deeming the claim an abuse of process, if upheld by the Court of Appeal, would have significance for future group actions of similar complexity.

In addition, the High Court agreed the claimants had access to an adequate compensation process in Brazil and, as litigation was underway in Brazil, the risk of irreconcilable judgments was too high.

The appeal

At appeal, Charles Gibson KC, representing BHP, argued "*it is an abuse of process to allow these circa 200,000 appellants now to sue these two respondents in England, seeking the same full redress under Brazilian law*". However, the Court of Appeal concluded the majority of claimants who have recovered damages have only received "*very modest sums in respect of moral damages for interruption to their water supply*". The remedies available to the claimants in Brazil were not obviously sufficiently adequate to render the English proceedings wasteful.

The Court of Appeal also disagreed with the other procedural conclusions made in the High Court's judgment. In overturning the earlier decision, the Court of Appeal noted that the fact a claim, properly advanced, is said to be "*unmanageable*" does not, as such, make it an abuse of the Court's process. The mere fact that litigation would place a significant burden on the courts could not be an independent basis for a finding of abuse.

Also of wider relevance to group litigations is the Court of Appeal's guidance for determining whether a claim is "*pointless and wasteful*": it observed that this should be made in relation to each individual claimant or group of claimants, not the claimants as an "*indivisible group*".

Conclusion

Multi-jurisdictional group litigation is inherently complex. The volume of claimants and nature of the claim in the *BHP* case provides a clear demonstration of this point. However, the Court of Appeal's ruling suggests that these factors and the potential for a claim to be "*unmanageable*" should not in themselves be considered a barrier by the courts, as "*unmanageability does not fall within any of the abusive mischiefs identified in the authorities*".

The decision signals that English courts will, in the right circumstances, accommodate large and complex group litigation. Furthermore, when handling *forum non conveniens* arguments, the judgment emphasises that English courts should consider whether the claim would yield a "*real and legitimate advantage*" for the claimants. The ruling provides encouragement for groups of claimants seeking redress in complex claims against multinational corporations in the English courts.

BHP has stated it will continue to defend the group action and is considering an appeal to the Supreme Court.

On the Horizon: Future Developments in Collective Actions in the UK and EU

The dam may not yet have burst but the foundations are now firmly in place for the continued expansion in, and development of, group and collective actions in the English courts and across the EU.

Predicting the future is never easy, and doing so for particular types of group and collective actions in the English courts is almost impossible given the sparsity of case law in this area. However, although group and collective actions in the English courts are in the infancy when compared, in particular, to the well-developed systems that exist in the US and Australia, we consider that two important factors will drive the increase in such actions. Courts in the UK and EU will need to address many of the conceptual and case management issues that the US courts have addressed in different ways over the last half-century.

The first is litigation funding – group and collective actions frequently (if not always) require litigation funding, given that it is often not economical for a single claimant to 'go it alone'. The litigation funding market in England continues to develop with: (i) new entrants to the market; and (ii) existing funders becoming even more sophisticated in analysing and assessing group and collective actions. This development is supported by the increasing numbers of specialist legal and other service providers.

In circumstances where there is an increase in both available capital in the market and the level of sophistication of both suppliers (the funders) and users (claimant groups), it seems almost inevitable that group and collective actions will increase.

Another factor likely to drive the increase in group and collective actions in the English courts is the focus (at almost every level of society) on ESG. Looking only at the environmental aspect, litigation resulting from climate change and extreme climate events is increasing worldwide (more than doubling since 2015). Factors such as the entry by states into national and international agreements on climate change (for example, the Paris Agreement), the adoption by governments of climate-related policymaking, and commitments by corporations to tackle climate change, are likely to have fuelled the global rise in climate change litigation.

Worldwide, the data demonstrates an increase in litigation. 'Only' around 800 climate-related cases were filed in courts between 1986 and 2014, while over 1,000 cases have been brought in the last six years. According to data from the Climate Change Laws of the World database and the United States Climate Litigation Database, as of May 2021, there were 1,841 ongoing or concluded cases of climate change litigation globally. Of these, 1,387 cases had been commenced in US courts, 454 were filed in 39 other countries and 13 had been brought in other international or regional courts and tribunals. The UK had seen 73 cases and there were 58 cases in the EU.

Although many instances of climate change litigation are centred on regulation by governments and national policymaking, private sector litigation and case law is also pertinent to companies. It could result in, for example, governments legislating to require more rigorous greenhouse gas emissions standards, higher reporting and disclosure obligations, and impacts on permits, planning permission, and licences. It would not be a surprise to see litigation arise in circumstances where companies fail to comply with those more exacting requirements. For example, shareholders (one of the prime candidate groups for litigation funding) may seek redress from companies in circumstances where that company is subject to fines or sanctions as a result of breaching regulations, and this has an impact on share price and/or their decision to invest.

The continued ESG drive is likely to be the focus of potential claimants and litigation funders alike.

Finally, the EU Directive on Representative Actions (EU Directive 2020/1828) obliges all EU Member States to amend their own national civil procedure rules to allow qualified entities to file collective actions on behalf of consumers. This must be done by 25 December 2022. While there will be some variation in how this is done in different Member States, and some will be more attractive to litigants than others, there can be little doubt that there will be an uptick in EU consumer collective actions over the next year and beyond.

It might well be that the consideration of developments in EU collective actions will itself be an important part of this chapter in a year's time.

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