Group litigation and group litigation orders

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Practice notes | **Maintained** | England, Wales

This note focuses on the use of group litigation orders (GLOs) in multi-party litigation. It describes the circumstances in which a court may make a GLO, and the procedural steps that must be followed by the parties and their legal representatives, both to obtain a GLO and after a GLO has been granted.

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Scope of this note

Large-scale, multi-party litigation is becoming increasingly prevalent. There are several different procedures that can be used for multi-party litigation, but this note focuses on the use of group litigation orders (GLOs).

The note describes the circumstances in which a court may make a GLO, and the procedural steps that must be followed by the parties and their legal representatives, both to obtain a GLO and after a GLO has been granted, including appointing lead solicitors, and preparing statements of case, disclosure and evidence. It also looks at the differences between the trial of preliminary issues and the trial of test cases, and the implications of each of these types of trials for the parties, and considers the particular challenges of settlement in group litigation. In addition, the note lists different funding options which may be available for group litigation, and considers the court's approach to costs in GLO cases.

For an overview of all of the principal procedures that can be used for multi-party litigation, including multiple joint claims and *CPR 19.6* "same interest" claims, see *Practice note, Multi-party litigation: overview*.

Meaning of "group litigation"

There are a number of ways in which multi-party claims can be brought in England and Wales, as set out in *Practice note, Multi-party litigation: overview*.

Where there are more than just a few claimants, such actions may be referred to as "group litigation" or "class actions" or "collective redress actions", but the term most commonly used in this jurisdiction is "group litigation".

Group litigation orders

The main procedural mechanism for group litigation in the English courts is a group litigation order (GLO). *CPR 19.10* provides that a GLO:

"means an order made under CPR 19.11 to provide for the case management of claims which give rise to common or related issues of fact or law (the 'GLO Issues')".
The introduction of GLOs gave effect to the recommendations of the final Access to Justice Report (see *Lord Chancellor's Department: Access to Justice: Final Report to the Lord Chancellor on the Civil Justice System in England and Wales*) (*CPR 19.10-CPR 19.15* and *PD 19B*). Woolf LJ's report recommended that new procedures dealing with multi-party claims should be introduced with the following objectives:

- Allowing access to justice, where large numbers of people have been affected by someone else's conduct, but the individual loss was so small that proceeding with an individual action was uneconomic.
- Providing effective methods of resolving cases, where damages were large enough to justify an individual claim, but due to the number of claimants and the nature of the issues, the cases could not be managed properly within the normal procedures.
- Achieving a balance between the rights of claimants and defendants to pursue and defend cases individually, and the interests of a group of parties to litigate the action in an effective manner.

The recommendations were made with a view to addressing weaknesses in the court rules governing representative proceedings.

The relatively brief CPR provisions on GLOs establish a framework for the case management of multiple claims by different parties, whilst providing the court with the flexibility to deal with the particular logistical and legal issues created by these cases.

Other procedural mechanisms for group litigation

Other procedural mechanisms that may be used for group litigation include:

- Multiple joint claimants, using a single claim form. The CPR permits any number of claimants or defendants and any number of claims may be covered by one claim form, "if the claims can be conveniently disposed of in the same proceedings" (*CPR 19.1* and *CPR 7.3*).
- Consolidated claims where the court exercises its case management powers to have different individual issued claims relating to the same issue, transferred to one court, to be consolidated and case managed together. This is considered to be more efficient than allowing multiple claims to be processed and litigated separately, in different courts across the country. It also reduces the risk of separate claims receiving different verdicts in different courts on the same issue. This form of multiple (or mass) claims case management has typically been used in litigation involving the financial services sector. See, for example, the test case of *McGuffick v The Royal Bank of Scotland Plc [2009] EWHC 2386*.
- "Same interest" representative proceedings. This is defined as:

"where more than one person has the same interest in a claim - (a) the claim may be begun; or (b) the court may order that the claim be continued, by or against one or more of the persons who have the same interest as representatives of any other persons who have that interest." (*CPR 19.6*.)
The process allows for a claim to be brought by a claimant as a representative on behalf of all of those who have the "same interest" in the claim.

Examples of representative actions include:

- *Millharbour Management Ltd v Weston Homes Ltd [2011] EWHC 661*, in which two claimants sought to represent all leaseholders who had purchased flats from a developer in a new building where a defect was causing excessive heat. See *Legal update, Circumstances in which a party can act as a representative of other persons (TCC)*.
- *Emerald Supplies Ltd v British Airways Plc [2010] EWCA Civ 128*, in which two claimants purported unsuccessfully to represent a group of cut flower importer companies who used the air freight services of British Airways and other international airlines. See *Legal update, Court of Appeal decision on scope of representative proceedings*.
- *Lloyd v Google LLC [2019] EWCA Civ 1599*, in which the Court of Appeal ruled that the several million members of the class that Mr Lloyd sought to represent had the same interest under CPR 19.6(1) and were identifiable. See *Legal update, Representative action for DPA 1998 claim for compensation against Google appeal allowed (Court of Appeal)*.

For more detail on these other procedural mechanisms for group litigation, see *Practice note, Multi-party litigation: overview*. The rest of this note focuses on GLOs.

Types of claims that may be the subject of GLOs

The GLO procedure has not been widely used to date, with few formal GLOs being granted in recent years. Despite this, interest in using the GLO procedure appears to be increasing across a range of claim types and sectors, as diverse as:

- Product liability.
- Financial services.
- Shareholders' actions.
- Data and privacy claims.

- Environmental and human rights-based claims.

GLOs that have been granted include:

- The VW NOx Emissions Group Litigation (product liability claims).
- British Airways Data Event Group Litigation (data breach claims).
- The Berkeley Burke SIPP Litigation (financial services claims).
- Lloyds/HBOS Litigation (financial services claims).
- The Post Office Group Litigation (technology claims).
- The Hillsborough Victims Litigation (gross negligence claims).
- The PIP Breast Implant Litigation (product liability claims).

Opt-in and opt-out

GLO proceedings in England and Wales generally follow an "opt-in" model. This means that in order to join the action and become a member of the class of litigants, claimants must take affirmative action in choosing to become part of the litigation.

By contrast, the US style of "class action", which adopts an "opt-out" model pursuant to Rule 23 (Federal Rules of Civil Procedure), means that unless a member of the identified class of litigants affirmatively chooses to opt out or leave the litigation, members of the class are automatically part of the litigation. The optimum method for informing members of the class of the circumstances of the case will be approved by the court seized of the claim, but will likely involve direct post notifications to absent claimants or media publicity. The court will also set out deadlines for such notifications, and will set out how claimants can exercise their option to opt out.

There are different ways of apportioning damages between the class members of an opt-out class action in the US. Typically, the court will apportion damages based on a proposed method submitted by the claimants' experts. However, class actions often settle before reaching court. Where the case settles, the court must approve the terms of the settlement and then will typically divide the settlement by deducting legal fees and costs, apportioning a larger amount to the lead claimants (based on their participation in the claim) and then dividing the remaining amount between the class members.

A member of the claimant class may decide that they would prefer to opt out for various reasons, including:

- In order to maximise the size of the settlement, they may decide that the prospective value of their individual claim is large enough to warrant a separate claim.
- They may believe that their case individually is stronger, or that the damage they sustained was more severe, and therefore they ought to receive more in damages than would likely be obtained if participating in a class action and only receiving a share of the proceeds.
- They may believe they are likely to reach their own resolution with the defendant.

A similar opt-out process is used for group litigation in some other jurisdictions, such as Australia.

There are two procedures that can be used in England and Wales to bring claims on an opt-out basis:

- The representative action procedure, in which a party brings the claim as a "representative" of a group of litigants who have the same interest in the claim (under *CPR 19.6*). Members of the group need not be identified by name at the outset, as long as the criteria for inclusion within the group is determinable at that stage (*Emerald Supplies Ltd v British*

Airways Plc [2010] EWCA Civ 1284).

- A collective redress regime for competition claims, which was introduced on 1 October 2015 under the *Consumer Rights Act 2015*, and which provides an opt-out regime for damages for breaches arising out of competition law.

Funding options for group litigation

Most group litigation will only go ahead if there is some form of funding available, both to pay the claimants' costs and to cover their potential liability for the defendant's costs if they should lose. Without this funding, few claimants are likely to come forward to join a GLO and run the costs risks themselves.

Essentially, funding is the fuel for this form of litigation. There are several funding options available, which are described briefly below.

Conditional fee agreements

Conditional fee agreements (CFAs) are an arrangement with the provider of litigation or advocacy services, whereby the client's fees will only be paid in specific circumstances (typically where the client wins the case). They are commonly described as "no win, no fee" agreements. If the client wins, it must pay all of the fees (base costs) and expenses and usually a success fee which is calculated as a percentage uplift on the amount payable had there not been a CFA. The amount of the success fee cannot exceed 100%. The balance (if any) of any compensation after these deductions have been made will be payable to the client. If the client loses, it has comfort that it will not be liable for its own costs.

Some law firms prefer to offer a discounted CFA, whereby the law firm will be paid at a discounted hourly rate whatever the outcome of the proceedings, but will forego the balance of its base costs if the client loses, and will recover all of its base costs with or without a success fee if the client wins.

Until April 2013, claimants could recover the success fee from the losing party, however, this is no longer recoverable. For more information on CFAs, see *Practice note, Conditional fee agreements entered into from 1 April 2013: an overview*.

Damages-based agreements

An alternative fee arrangement between a legal representative and its client is a damages-based agreement (DBA). If the client is successful, they will pay their legal representative a percentage of the damages they receive. This DBA fee is capped in commercial litigation cases at 50% of the damages recovered. Where the case is unsuccessful, the client typically does not have to pay the DBA fee.

Where a client is successful, the costs are assessed by the court on an hourly rate basis and the client will be able to recover assessed costs from its opponent (this will be deducted from the DBA fee). However, expenses such as court fees and expert reports must be paid by the client in addition to the DBA Fee (unless recovered from the other party).

A DBA is not an appropriate form of funding if the claimant is seeking a non-monetary remedy.

For more information on how DBAs work, see *Practice note, Damages-based agreements in civil litigation (other than employment tribunal matters): overview*.

Third party litigation funding

A commercial funder who has no connection to the dispute (that is, a third party) may finance the costs of legal fees and expenses in return for a multiple of the funding given or a share of the damages awarded where the claim is successful.

The payment may be structured to reflect certain key stages in the litigation, with differing multiples depending on whether

the case settles at an earlier or later stage. If the claim does not succeed, the funder will not receive anything and will have lost the capital it has invested. As such, funders will typically only fund claims with a high likelihood of success. Practically speaking, this results in funders taking significant time in the preliminary stages to decide whether they wish to fund the claim. Therefore, parties must consider the time and costs of preparing the claim for consideration by funders where the provision of funding is not guaranteed.

Third party litigation funding is increasingly available as a vehicle for allowing claimant firms to mount more ambitious and complex multi-party claims.

For more information on third party funding, see *Practice note, Third party litigation funding in England and Wales: an overview*.

Legal expenses insurance

Legal expenses insurance can be taken out before or after the event.

Before the event insurance is taken out before specific litigation, in order to cover litigation of the type specified in the policy. This will then cover events which arise during the insured period. It is commonly provided in conjunction with, for example, house insurance.

After the event (ATE) insurance is taken out after a dispute has arisen. The insurance covers some or all of the party's liability in the event of an unsuccessful case (usually covering their own disbursements and their opponent's costs and disbursements). It may be taken out in conjunction with another method of funding, such as a CFA to cover the client's own legal costs. ATE insurance will only be offered to a party where there is a strong likelihood of success (typically assessed as at least a 60% chance).

The insurance premium payable may be in the form of a single payment premium or structured through a number of increasing payments as the litigation proceeds. Since 2013, parties have been unable to recover the cost of such a premium from the other side in the vast majority of cases.

For more information on ATE insurance, see *Practice note, After the event insurance (for policies taken out since 1 April 2013)*.

Funding for defendants

Funding options are typically designed for claimants, as the motive of the funder will often be payment out of a monetary award following success. However, funding options may be available for defendants in some circumstances. For example:

- A third party litigation funder may be willing to fund a defendant where their counterclaim is larger than the monetary quantum of the claim which they are defending, and the counterclaim is assessed as having a high likelihood of success.
- A third party funder may also fund a defendant where they are supporting a number of litigation matters for the same party.
- An ATE insurer may be willing to offer an insurance policy in the event that a costs order is made against a defendant. However, insurance may be subject to determining the defendant's prospects of success, and the insurer's assessment of risks in the case will have implications for the amount of the premium payable.

Circumstances in which a court may make a GLO

The granting of a GLO will enable the court to manage the claims covered by the order in a co-ordinated way. *CPR 19.11* provides that the court may exercise its discretion and order a GLO "where there are or are likely to be a number of claims

giving rise to the GLO issues". It is a matter for the court's discretion, rather than the parties' right, to proceed under a GLO. Also, if the courts are faced with a situation in which multiple individual claims have been issued in different courts that give rise to the same issues, the courts may exercise their own jurisdiction to impose a GLO of their own volition.

There is no minimum or maximum number of claims needed for a GLO to be ordered, although the Court of Appeal has made it clear that "far more than two claimants are necessary" (*Austin and others v Miller Argent (South Wales) Ltd [2011] EWCA Civ 928*). The number of claimants can vary widely, from tens of thousands in the VW NOx Emissions Group Litigation, to fewer than 20 claimants in the Corby Group Litigation. There must be a sufficient number of claims to make a GLO worthwhile, but equally it is clear that GLOs can accommodate and adapt to meet the demands of many hundreds of claimants. For example, in the Bates and others v Post Office Group Litigation, there were 584 claimants and the time period over which the relevant events took place was around 17 years. As a result of the unusually long time period involved, there were many unusual aspects to this group litigation, including the use of several judges. The court noted in *Bates and others v the Post Office Ltd (No 6: Horizon Issues) (Rev 1) [2019] EWHC 3408 (QB)* at paragraph 57 that "to deal with the litigation efficiently, cost-effectively and proportionately it is simply not feasible for the same judge to try all the claims one after the other … Such a process would take several years."

There is also no requirement for all of the claims that are subject to a GLO to have been issued when the GLO application is made. However, the court may refuse an application if it is not satisfied that there will be a sufficient number of claimants to ensure that the perceived court efficiencies kick in and warrant the use of the GLO process. Once a GLO is ordered, there will be a cut-off date for the claimants' legal representatives to attract other claimants to be added to the GLO (see *Cut-off date*).

How to define GLO issues

The claims must give rise to "common or related issues of fact or law" (GLO issues) (*CPR 19.10*).

The test is not so narrow that it requires the same interest, as required by *CPR 19.6* for same interest claims (see *Practice note, Multi-party litigation: overview: Same interest representative claims*). However, where there were different contractual arrangements between the parties, or different fact-specific allegations are made (such as alleged misrepresentations and individual differences of response to any representations), this could make it difficult to establish the requisite common or related issues (for example, see *Hobson and others v Ashton Morton Slack Solicitors and others [2006] EWHC 1134 (QB)*). Clearly, the issues at play must be similar.

Each GLO will have its own characteristics, and the GLO issues will be unique to the underlying subject matter of the litigation. However, the following points may be helpful when considering how to define the GLO issues:

- A review of the issues for each GLO on the list of GLOs which can be found on the *GOV.UK website* reveals that the issues tend to be high-level, and they do not act as a substitute for particularised pleadings.
- If there are too many issues, the court may consider that the issues are not sufficiently common or that they do not bear a relation in fact or law.
- If it is likely that there will be different issues for different categories or sub-categories of claimants (for example, certain claimants have suffered a different form of loss or harm), then it may be preferable to present these as separate "individual" issues which are unique to that category of claimant.
- It is possible for the description of the issues to be varied and adapted as the litigation progresses.

For some decisions where the court had to consider whether the claims gave rise to common or related issues of fact or law and whether to make a GLO, see:

- *Tew and others v BOS (Shared Appreciation Mortgages) No. 1 plc and others [2010] EWHC 203 (Ch)*, in which the court considered the methodology for defining GLO "common or related issues", discussed in *Legal update, Court*

considers methodology for defining Group Litigation Order issues.

- The claimants were a group of individual borrowers, who brought the claim against various branches of BoS (Shared Appreciation Mortgages) PLC, as lenders. The claimants challenged the fairness of the terms of the mortgages under the *Unfair Terms in Consumer Contracts Regulations 1994 (SI 1994/3159)* and the fairness of the relationship with the defendants under *section 140A* of the Consumer Credit Act 1974. The claimants argued that a GLO was appropriate as the fairness of the terms could be determined, without consideration of the personal circumstances of the borrowers or the actual circumstances of the loans. They also said that by excluding the individual circumstances in the case, the proceedings would be cheaper and more efficient and, therefore, more accessible to individuals of lower economic means.

- It was held that the claimants' approach was flawed: in defending the claims the defendants would undoubtedly refer to the specific individual circumstances of the loans to prove that the relationship was not unfair. The court held that an inquiry into fairness required looking into both sides of a transaction as they would be assessing the notion of fairness on each party. However, despite rejecting the GLO issues as formulated by the Chief Master and the claimants' revised formulations, the judge concluded that the advantages offered by a GLO, together with using test cases to tackle the fairness questions, made it the appropriate method for managing the litigation. The judge also provided some useful guidance on how GLO issues should be formulated. His approach was first to decide the real issues in the litigation, and then to use those real issues to define the terms of the GLO issues, which were the common elements in the litigation. However, he also emphasised that those issues were not to be confused with the issues which would ultimately have to be decided in the litigation.

- *Various v Barking, Havering & Redbridge University Hospitals NHS Trust, 21 May 2014 (QB)*, in which the court considered whether there were sufficiently common or related issues of fact or law to warrant the making of a GLO, discussed in *Legal update, Issues not sufficiently common or related to warrant GLO (High Court)*.

- *Schmitt and others v DePuy International Ltd [2016] EWHC 638 (QB)*, which considered whether there were sufficient suitable claimants, and adequate evidence of common issues of fact or law, to justify the making of a GLO. Among other things, Masters Fontaine and Cook considered that:

  - a significant number of the potential claimants would bring atypical claims;

  - the volume of anonymised claimants prevented a full assessment of whether the issues in their claims were likely to be representative of the wider group; and

  - many of the potential claimants were not from England and Wales, meaning their claims could be subject to investigation on a country-by-country basis (for instance in relation to local limitation laws).

- Accordingly, pending further details of the potential claimants becoming available, they declined to make a GLO on the grounds that the number and nature of claims currently ascertainable did not meet the threshold criteria. See *Legal update, Insufficient evidence of common issues to justify GLO (High Court)*.

- *Arif and others v Berkeley Burke SIPP Administration Ltd [2017] EWHC 3108 (Comm)*, in which the court confirmed that, if the common "elements" of the litigation could be satisfactorily identified for the purposes of making a GLO, then the GLO issues may, once the order has been made, evolve and be refined before the claim (or test cases within it) is tried. See *Legal update, Guidance on GLOS and on transfer of proceedings to London in light of B&PCs (Bristol Circuit Commercial Court)*.

For an example of the kinds of matters which have been approved as GLO issues, see the Post Office Group Litigation, in which the GLO issues were identified as:

All claims made against Post Office Ltd by the claimants:

- Who claim to have suffered losses as a result of Post Office Ltd having:

- Inappropriately attributed to them and/or inappropriately recovered alleged shortfalls in branch accounts from them;
- Suspended them, terminated or induced their resignation from their appointments or engagements, for a reason related to inappropriately alleged shortfalls in their branch accounts;
- Pursued civil or bankruptcy proceedings, criminal prosecutions and/or restraint applications against them for a reason related to inappropriately alleged shortfalls in their branch's accounts.

- Whose claims give rise to one or more of the GLO Issues in Schedule 1.

In another example, the British Airways Data Event Group Litigation involved just two GLO issues:

- Whether the defendant is liable to the claimants, or any of them, for potential damages under the English law of contract and/or pursuant to the Data Protection Act 1998 and/or the *GDPR*, as supplemented by the DPA 2018 and/or misuse of private information and/or breach of confidence in English law, arising from the breaches of British Airways' IT systems, or any of them.
- If so, which claimants are entitled to damages and on what basis?

Procedure to obtain GLO

Completing the application notice and supporting evidence

The application process is governed by both *PD 19B* and the general provisions on making applications contained in *Part 23*.

Under Part 23, the application notice must be made to the court or hearing centre where the claim was issued or, if the claim has already been transferred, to the court or hearing centre it was transferred to. Depending on the court or court division where the application is to be made, the application must be directed to the following:

- In the High Court in London, to the Senior Master of the Queen's Bench Division or the Chief Chancery Master in the Chancery Division (*PD 19B.3*). Where the claim is likely to proceed in a specific list, the application should be directed to the senior judge of that list. It is important to check the relevant court guide (see *Practice note, Court guides*).
- In a District Registry, to the presiding judge or a Chancery supervising judge of the District Registry Circuit.
- In the County Court, to the designated civil judge for the area in which the application has been issued. The applicant should request the hearing centre to refer the application to the judge who will be available to hear the application as soon as possible following the issue of the application notice. This is to allow the court to notify the appropriate higher court pursuant to *CPR 3.4*.

In addition to the standard application notice requirements contained in *Part 23*, *PD 19B.3.2* sets out the relevant information which must be included, either in the application notice or in a written statement filed with the application notice. This includes:

- A summary of the nature of the litigation.
- The number and nature of claims already issued.
- The number of parties likely to be involved.
- The common issues of fact or law which are likely to arise in the litigation (that is, the GLO issues).
- Whether there are any matters that distinguish smaller groups of claims within the wider group.

Given that *CPR 19.11(1)* provides that "the court may make a GLO where there are or are likely to be a number of claims giving rise to the GLO issues", the claimants' legal representatives will seek to demonstrate to the court that there is widespread interest in the stated GLO issues, and that there is an identifiable "class" of claimants. To do this, the claimants' legal representatives may have already issued a few claims, which can be listed on the joint GLO application. Alternatively, the GLO applicant may just identify a number of potential claimants and the size of the potential claimant class in its application, given that it is not necessary to have issued any claim forms at the time of the application (although the absence of any issued claim forms may make the application appear more speculative and make it more difficult to succeed in the application).

A GLO may not be made:

- In the Queen's Bench Division, without the consent of the President of the Queen's Bench Division.
- In the Chancery Division, without the consent of the Chancellor of the High Court.
- In the County Court, without the consent of the Head of Civil Justice.

(*PD 19B.3.3*.)

Once an application for a GLO has been made, it is for the court to which the application was sent, rather than the parties to the GLO application, to make that approach for consent (*PD 19B.3.3 and PD 19B.3.4*).

Although it is usually the claimant who issues the first claim and makes the application for a GLO, in the British Airways Data Event Group Litigation, it was the defendant who issued the application.

The application process as set out in PD 19B does not dictate that the application process is solely for the purpose and benefit of claimants.

Contents of GLO

The court may grant a GLO following completion of the application process described above.

CPR 19.11(2) specifies that 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 that will identify the claims to be managed as a group under the GLO.
- Specify the court that will manage those claims.

In relation to claims which raise one or more of the GLO issues, a GLO may also:

- Direct their transfer to the management court.
- Order their stay until further order.
- Direct their entry onto the group register.
- Direct that from a specified date claims which raise one or more of the GLO issues should be started in the management court and entered on the group register.
- Give directions for publicising the GLO.

(*CPR 19.11(3)*.)

Cut-off date

The court will also include in the GLO a "cut-off" date for claimants to opt into the GLO proceedings. Since the deadline will influence the potential volume of claims added to the GLO, the claimant representatives group is likely to ask for a longer period of time, to have the best chance of attracting the optimum level of claimants. The more claimants there are, generally the lower the costs per claimant and the higher the profile of the group litigation; both of which may help to put more pressure on the defendant.

The defendant will be seeking a shorter cut-off period, to help limit the potential claimant pool. A shorter cut-off period will also give the defendant more certainty about the number of claims it faces and its potential litigation exposure at an earlier point in time.

What to do after GLO obtained

Notifying the Law Society and QBD of GLO

Once a GLO has been made, a copy of the order must be supplied to the Law Society at 113 Chancery Lane, London WC2A 1PL and to the Senior Master of the Queen's Bench Division, Royal Courts of Justice, Strand, London, WC2A 2LL (*PD 19B.11*).

There is a list of all GLOs on the *GOV.UK website*, which includes details of the lead solicitors and the GLO issues (not all of these cases are still active).

Publicising the GLO

The GLO may give directions for the solicitors for the group to publicise the GLO (*CPR 19.11(3)(c)*). However, *PD 19B.11* only specifies that a copy of the GLO should be supplied to the Law Society and to the Senior Master. The practice direction gives no guidance on the form of the publicity, nor on who may be ordered to pay the costs of that publicity.

Given that the GLO process is usually an opt-in procedure in England and Wales, individual claimants must take positive steps to join the action and to be identified in the claim. Unless the claimants' legal representatives have already identified a limited "pool" of claimants who can be easily contacted, publicising the GLO is an important step to raise the profile of the litigation and to attract claimants to join the claim. Over the years, claimant litigation firms have used increasingly sophisticated tactics as part of their publicity and claimant "recruitment drive", including:

- Commenting in newspaper articles.
- Issuing press releases.
- Using social media.
- Placing notices on the firm's website, and/or creating a claimant specific website so that potential claimants can discover further details about the litigation and register their interest in joining.
- Holding public meetings.

Some of these advertising efforts may be on a nationwide scale, rather than being limited either to the location of the court or the operational headquarters of the claimants' legal representatives.

These publicity efforts are likely to be undertaken by each claimant representative firm involved in the GLO (not just the lead solicitors), in an effort to increase their own individual claimant portfolio and their influence in any claimant steering group.

For example, in the BA Data Event Group Litigation, the GLO contained in its schedule, a form of wording to be used for publication of the GLO. It was expressly ordered that such wording was not to restrict the lead solicitors or any other claimant firm from publicising their involvement in the litigation on any platform, as long as it was in an appropriate form.

Appointment of a lead solicitor

When identifying an issue or cause that may benefit from a GLO structure, there may be multiple claimant litigation firms involved in the litigation. Those firms may consider forming a solicitors' group and identifying a solicitor to lead the application for the GLO. They may also choose to agree a certain threshold for a firm to be involved in the group. For example, in the VW NOx Emissions Group Litigation, only those firms representing 20 or more claimants were admitted into the solicitors' group.

The appointment of a lead solicitor is intended to enable cost and process efficiencies. The selection and appointment may be done by the group itself or, alternatively, the management court of the GLO has the power to give directions relating to the appointment of lead solicitors (*CPR 19.13(c)*). *PD 19B.2.2* recommends that the role of the appointed lead solicitor is carefully defined in writing.

Multiple lead solicitors

Following the appointment of a lead solicitor, it may be that another firm wishes to be appointed either alongside or to the exclusion of the current lead solicitor.

The leading case on the appointment of several lead solicitors is *Hutson and others v Tata Steel UK Ltd and others [2017] EWHC 2647 (QB)*, discussed in *Legal update, High Court considers dispute over selection and appointment of lead solicitors in group litigation*.

In *Hutson*, a firm of solicitors (Collins) wished to be added as a lead solicitor alongside the existing lead to the British Steel Group Litigation pursuant to *CPR 19*. The application was resisted by the existing lead solicitors. Turner J dismissed the application. He held that in these circumstances, it would generally be for the applicant firm to demonstrate to the court that their appointment would enhance the achievement of the overriding objective. In this case, increasing the number of lead solicitors would be counter-productive and was more likely to produce "a long-running forensic Punch and Judy show than a focused and coherent pathway to just resolution of the claims to be achieved at proportionate cost" (*at paragraph 16*). Instead of achieving costs benefits, an additional lead solicitor would likely increase the claimants' costs and the demands upon the court's resources. Further, the increased chance of delays and disagreements was not theoretical as there was already an on-going dispute between Collins and the existing leads about the management of the case. The existing leads had already shown on other matters that they could work well together, whereas Collins had been subject to criticism for its conduct in previous GLOs.

Another example of the disruptive effect on the progress of a GLO of disagreements between lead solicitors arose in *Crossley and others v Volkswagen Aktiengesellschaft and others [2018] EWHC 2308 (QB)*. In that case, the GLO application was listed for hearing in January 2017 but, as a result of a dispute between two lead firms of solicitors which led to a separate trial and the removal of one of the firms, the GLO was not granted until March 2018 (see *When relationships among claimant representative firms go bad*). As a result, the defendants sought costs on an indemnity basis in relation to the four hearings which had taken place from November 2016 through to November 2017, as well as their costs in relation to the application to adjourn the GLO application in September 2017 and in preparing for a vacated hearing in October 2017. The defendants argued that the work undertaken in relation to those applications was unnecessary and had stemmed from the premature issuing of the GLO application.

The judge agreed, ordering that indemnity costs would be allowed due to the extraordinary circumstances of the case. The judge remarked that:

"the most likely explanation for the manner in which the solicitors for the Relevant Claimants, Harcus Sinclair, both issued and pursued the application, was because of their desire to obtain a commercial advantage in the litigation." (*At paragraph 129.*)

See *Legal update, Indemnity costs of premature, unco-ordinated GLO application awarded against claimants (High Court)*.

One way of avoiding such disputes arising in the first instance and of reducing the risk of criticism from the courts may be for certain claimant representatives to adopt separate and distinct roles in the litigation. For example, GLOs typically have a range of three to six common issues of fact or law. It could be decided that a particular claimant representative is responsible for the progress and case management of a selection of those issues, that are in line with their particular sphere of expertise, while a different claimant representative is responsible for other issues. This delineation of roles can be advantageous to the claimants, the court, and the defendants, establishing clearer lines of communication and instructions.

When relationships among claimant representative firms go bad

Harcus Sinclair LLP v Your Lawyers Ltd [2019] EWCA Civ 335 (dispute between lawyers referred to in *Crossley* case)

Background

Your Lawyers Ltd (YL) brought a group action in respect of diesel Volkswagen vehicles sold in the UK. As is common in prospective group litigation actions, YL sought third party funding from Capital Interchange Limited. The third party funder then put YL in contact with Harcus Sinclair LLP (HS) to act as a second lead lawyer on the matter. YL required HS to sign a non-disclosure agreement dated 11 April 2016 (NDA). The NDA was intended to be a preparatory step in the negotiations between the two firms, with a view to both firms being able to reach agreement on some form of collaboration regarding claimant representation in the proposed group litigation.

The NDA included a non-compete clause, pursuant to which HS undertook "not to accept instructions for or to act on behalf of any other group of Claimants in the contemplated Group Action" without the express permission of YL. Mr Parker, a partner of HS, signed the NDA, and in doing so undertook to keep confidential information secure. YL argued that there was an implied term in the NDA which also meant that HS's associated company, Harcus Sinclair UK Ltd, would not do anything in breach of the non-compete provision.

High Court judgment

The first instance judge held that HS had breached the non-compete provision when it first took instructions to act for the "HS Group" (a group of additional claimants) until the point at which it transferred the conduct of the HS Group action to its associate company. At the point of transfer, the judge held that HS was in breach of the implied term of the NDA. The non-compete clause was also held to be enforceable. From YL's perspective, it was seeking to prevent HS from setting up a rival group of claimants in the same group claim. The court noted that the benefit received by HS in relation to the non-compete provision was that it had "access into a process of collaboration with YL[L]".

Court of Appeal judgment

The Court of Appeal identified two main issues:

- At first instance, Mr Edwin Johnson QC, sitting as deputy judge of the High Court, had decided that the phrase "the contemplated Group Action" was to be interpreted widely as comprising "any actual or intended group action in the English courts involving [YL's] client group against anyone who could be held responsible in civil proceedings in respect of the diesel emissions scandal". HS argued that this was incorrect and it should be interpreted narrowly to include only the group action that was contemplated at the time the NDA was entered into and in respect of which YL proposed to disclose confidential information.
- The second issue was whether Mr Edwin Johnson QC was right to "hold that the Restriction was enforceable, on its proper interpretation, on the basis that it was not an unreasonable restraint of trade", as stated by Sir Geoffrey Vos, Chancellor of the High Court.

On the first issue, the Court of Appeal found that the judge "was right as to the proper interpretation of the Restriction, and in particular as to the meaning of the expression 'contemplated Group Action'" and went on to find that the verdict in the High Court, that HS breached this provision in the NDA, was correct.

In respect of the implied term, the court referred to the case of *Beckett Investment Management Group v Hall [2007] EWCA Civ 613*, where the Court of Appeal had interpreted the word "Company" to include its subsidiary when used in a restrictive covenant. Accordingly, it said that "whilst we would want to reserve for another occasion the question of whether it is permissible to imply terms into a restriction of this kind in order to extend its ambit, we entirely understand how the judge reached the conclusion he did".

However, the Court of Appeal went on to say that Mr Edwin Johnson QC was incorrect in his application of the doctrine of restraint of trade to the non-compete clause, and held that the provision was broader than was reasonably required to protect YL's legitimate interests. The first instance judge placed too much emphasis on "post-agreement collaboration" between HS and YL, when the purpose of the NDA was to protect confidential information rather than collaboration. The Court of Appeal therefore discharged the injunction and allowed the appeal on this point.

Issuing claim outside GLO or after cut-off date

A claim may still proceed, even if it is issued outside the GLO proceedings (for example, because the issuing representative is not part of the steering group or is not aware of the GLO proceedings) or if it is issued after the cut-off date (see *Cut-off date*).

In most instances, if a defendant is served with a separate claim which is strongly linked to the issues already raised in a GLO case, the defendant will apply for the claim to be stayed pending the resolution of the GLO proceedings. This will reduce the risk of different courts reaching different decisions on the same issues. Practically speaking, it also avoids unnecessary distractions, allowing the defendant to focus its attention, time and resources on the larger, more complex GLO proceedings.

Application for late admission to group register

If a claim is issued with the intention that it should form part of the GLO proceedings, but the cut-off date has been missed, it may be possible to apply to the relevant court for the claim to be added to the group register. It is not unusual for a significant proportion of time at a GLO case management conference to be given to applications for the late admission of claims to the group register.

When considering an application for a claim or claims to be joined into the GLO after the cut-off date, the court will look at a range of factors, including:

- The reason for the delay and failure to meet the deadline; was it a simple formality that had been missed or was there a more substantive reason?
- Will the late joining to the GLO adversely affect the court timetable?
- Will the application to join a claim or claims to the GLO significantly change the number of claimants, which will in turn have an impact on costs allocation?

Case law on applications to be added to group register after cut-off

In *Personal Representatives of Hutson and another v Tata Steel UK Ltd [2019] EWHC 143 (QB)*, the court granted various applications to extend time for entering a GLO. The claimants were seeking compensation from an employer for injuries and

loss caused by harmful fumes and dust. Some employees had died and claims were advanced by their estates. In three cases, the claims had purportedly been entered on the group register but the requisite formalities had not been complied with before the cut-off date. Turner J confirmed that fresh proceedings on behalf of a deceased could be issued, and exercised his discretion to extend time by reference to the tests for relief from sanctions established in *Denton v TH White Ltd [2014] EWCA Civ 906* and the overriding objective. Although the breaches were serious and significant and due to culpable oversight, the late inclusion did not significantly prevent the court or the parties from conducting the litigation efficiently and at proportionate cost. Further, there had not been a history of non-compliance, the timetable for the future progress of the GLO was not jeopardised, it would not save any expense to refuse and the defendant could not show real prejudice if time was extended. See *Legal update, Fresh Proceedings possible even though previous proceedings on behalf of deceased were a nullity (High Court)*.

By contrast, in *Holloway and others v Transform Medical Group (CS) Ltd and others [2014] EWHC 1641 (QB)*, Thirlwall J refused an application to add 17 claimants to the register of claims after the cut-off date specified in the GLO. She observed that a cut-off date is designed to allow good management of claims subject to a GLO, and that it was difficult to characterise the fact that new claimants could not be added after the cut-off date without the court's permission, as anything other than a sanction. She held, therefore, that *CPR 3.9* applied. The applicants had:

- Failed to have the claims added to the group register by the cut-off date.
- Failed to apply for an extension of time before the cut-off date.
- Having decided to make an application eight months after the cut-off date, failed actually to make the application for over ten months.

The judge identified these as "serious and sustained" failures, for which there was no good reason, and concluded that the applications were "hopeless", whether considered under CPR 3.9 or *CPR 1.1(2)*. Granting them would "undermine the discipline of this litigation" and render the cut-off date meaningless. See *Legal update, Relief from sanction refused in context of applications to add claimants to group litigation register after cut-off date*.

Statements of case

Claim form

Once a GLO has been made, a claim form must be issued (if no claim forms have been issued previously) before the claim can be entered on the group register. (Some claim forms may have already been issued before applying for the GLO, to demonstrate that there is widespread interest in the issues and an identifiable class of claimants; see *Completing the application notice and supporting evidence*. These claim forms should now be entered on the GLO register.)

Participating in a GLO in this jurisdiction is an "opt-in" process, whereby each claimant must proactively choose to opt in to the group (see *Opt-in and opt-out*). Once they have opted in, the claimant must be individually named as claimant on a claim form. However, it is not necessary to have separate claim forms for each claimant; it is possible to name many claimants on one claim form, and this may be done by including a schedule of parties naming the individual claimants. The use of several separate claim forms is only necessary where claimants are not ready to issue proceedings at the same time.

Particulars of claim

One of the perceived advantages of pursuing multi-party litigation by means of a GLO, is that it aims to reduce the workload and cost of multiple individual claims, so that key litigation steps (including pleadings, disclosure, witness statements, and expert evidence) are undertaken for the benefit of the collective class of claimants or defendants.

The terms of the GLO order will specify the approach that the parties should adopt for the purposes of preparing particulars of claim. In most circumstances, the GLO order will provide for the claimants' legal representatives to prepare a set of

particulars of claim that are applicable to all the claims registered on the GLO at that point in time, and address each of the GLO issues. These are "group" particulars of claim which will usually set out general allegations relating to all of the claims. In addition, they may include a schedule containing entries for each individual claim, setting out which of the general allegations are relied on and any specific facts relevant to that claimant, such as particulars of damage suffered (*PD 19B.14.1*). For example, this was done in the British Airways Data Event Group Litigation.

Alternatively, if it has already been identified that certain claims will likely require or pursue different forms of remedy or redress, it may be appropriate to prepare a number of different versions of the particulars of claim.

Detail of pleadings

Given the potential for complications and the desire to save costs, it may be tempting to plead the particulars of claim in very generic terms. Yet, the particulars of claim still need to comply with *PD 19B.14* and with any directions given by the management court as to the form that the particulars of claim should take, as well as with *CPR 16*.

Indeed, the Court of Appeal in *CFC and Dividend Group Litigation [2016] EWCA Civ 376* criticised the overly generic approach taken by the claimants in that case, commenting that important matters of contention were not identified in the pleadings, with the result that the particulars of claim gave very little indication as to what was actually in issue. This was not appropriate. Rather, in group litigation, as in any other litigation, relevant facts must be pleaded. This can be done in group particulars if they are facts generally applicable to all claimants, or in a schedule if they are specific to a particular claimant.

Alternatively, PD 19B.14.3 explains that specific facts relating to each claimant on the group register may be obtained by the defendant, from the claimants' representatives, using a questionnaire. Effectively, these completed questionnaires may be used in place of individual particulars of claim or schedules of information. Where this method of disseminating particular details of each of the claims is proposed, the management court should be asked to approve the questionnaires. The management court may direct that the questionnaires completed by individual claimants take the place of the schedule referred to in PD 19B.14.1(2).

The facts specific to individual claimants may be easily collated by means of an online tool or questionnaire on a website, whenever a claimant is expressing an interest in participating in the group litigation.

The defendant will require these basic details, whether provided in the form of questionnaires or schedules of information, so that it can understand its risk exposure to the group litigation:

- How many claimants have registered an interest in participating in the group litigation?
- Do all claimants have a similar factual matrix?
- What types of loss have the claimants suffered?
- What is the alleged quantum of that loss?
- Have the claimants provided their full names and addresses so that the defendant can properly identify them and verify their explanation of events from their records?

In other words, the defendant should scrutinise the process carefully to ensure that the questionnaires or schedules provide sufficient details of the claimants' claims to allow the defendant to investigate and challenge the claims where appropriate. For example, in a simple breach of contract claim, can an individual claimant provide sufficient evidence to establish that a contractual arrangement did in fact exist between the parties? For a data breach claim, did the defendant hold any personal data in respect of the claimant? Did the claimant receive any communication from the defendant that it was a victim of a data breach? Has the claimant in fact suffered the type of harm as alleged?

The importance of providing sufficient detail was demonstrated in the *Chagos Islanders Group Litigation [2003] EWHC 2222 (QB)*, in which the High Court criticised the questionnaires which accompanied the group particulars of claim on the

basis that they did not enable the court to understand how each individual claim related to the various issues raised in the proceedings.

Deadlines for pleadings

Deadlines will be set for issuing and service of the claim form and of the particulars of claim.

See, for example, *Viner v Volkswagen Group United Kingdom Ltd [2018] EWHC 2006 (QB)*, in which the claim form was issued in January 2016 and the defendants agreed to consecutive extensions until December 2017. At this stage, an application for a group litigation order was pending and the court therefore extended the date of service to 26 April 2018. The claimants, however, made a decision not to serve their claim form within its period of validity, instead waiting until after the service deadline set by the court. The claimants' legal representatives said that this was because they wanted to wait until outstanding group litigation issues had been resolved so they could enter into effective dialogue with the defendants.

The court refused the claimants' application for an extension of time to serve the claim form under *CPR 7.6(2)*, stating that the claimants did not have any sincere reasons for delaying service. The court noted that the same lawyer had been involved in the GLO throughout and so must have known that the purported reasons for delaying service of the claim form were "simply not credible" as the claimants had advanced a different position and attitude in the inter-parties correspondence. The court held that the deliberate refusal to serve the claim form within the time period was not the act of a competent litigation practitioner. The judge found that the solicitor's poor conduct was not relevant to the exercise of the court's discretion in granting a further extension. Given the claimants had no good reason for not serving the claim form, no extension was allowed. For more information, see *Legal update, Existence of GLO did not justify extending time for serving claim form following deliberate failure to serve within validity period (High Court)*.

As regards the deadlines for schedules of information or questionnaires, those deadlines will also usually be addressed within the terms of the GLO. Absent an agreement between the parties for an extension of time, or an application for relief, if such deadlines are missed, the individual's claim will be liable to be struck out.

Pleading a defence

Whether and when a defendant must plead a defence to the individual particulars of claim varies from one GLO to another. In some cases, it will only be necessary for a defendant to plead a defence in response to the group particulars of claim. However, where there is to be a trial of test claims, the defendant is likely to have to plead a defence at least in respect of the issues that arise in each of the test claims. This can be an extensive and time-consuming exercise, depending on how many test cases have been identified and on the differences between the issues raised in the test cases. Some particulars of claim raise complicated issues of fact and liability, often involving the use of expert evidence, even at this early stage. As a result, the defendant will often need to obtain its own expert investigation and opinion.

Given the wide range of differing issues that may arise in GLO proceedings, it may be prudent for a defendant to make certain admissions of fact or liability if it will assist to simplify or reduce the number of issues in dispute.

What type of trial?

In any group litigation, the court will need to strike an appropriate balance between addressing generic or common issues, which will affect the resolution of all the claims on the group register, and individual issues (including details of the loss suffered by individuals), which may be equally important in resolving individual claims.

Claims that may appear strong when looking only at the issues that are common to all, such as whether a defendant has been negligent, may well falter at the stage of considering individual issues, such as whether the negligence has actually led to the individual claimant suffering a loss.

The latter is an issue which has often arisen in the pursuit of mass data breach claims. This is because claims raised under the GDPR allow victims who suffer damage as a result of a data breach to claim for "material or non-material damage". An assessment of such damage for each affected individual will be factually specific to the individual claimant's particular

circumstances, and the recovery of such losses will also depend on the tests of remoteness and foreseeability. Collating that data and presenting that information is a colossal undertaking on the part of the claimants' representatives.

Claimants and defendants will naturally have different perspectives on the litigation, which will affect the weight they attach to focusing on the "common" issues in the case (usually the claimants' main area of focus), and the "individual" issues of the case (usually of more interest to defendants as they focus on the quantum of the litigation).

It will be for the court to exercise its case management powers to decide the most appropriate structure of the litigation as a means of balancing those conflicting interests. In doing so, the court may direct that one or more claims proceed as test cases (*CPR 19.13(b)*), or direct a separate trial on one or more of the issues under *CPR 3.1(2)*. The court also has an option to amalgamate the approach: for example, where the court has ordered the trial of a preliminary issue, it may identify a number of test cases to supply the necessary facts.

Preliminary issues

The nature of group litigation often lends itself to the trial of preliminary issues. The documented GLO issues form a natural starting point for identifying issues that may be hived off for determination before other issues, such as certain individual issues or issues of quantum or loss.

As an example of group litigation proceeding by way of a trial of preliminary issues, see the VW NOx Emissions Group Litigation. In the two-week preliminary issues hearing, it was common ground between the parties that the Volkswagen emissions had a function which could be used to reduce the amount of NOx that the cars released, and that the software could detect when this was being tested. The court was asked to consider two preliminary issues:

- Whether the engine's software function constituted a "defeat device", because if it was, it was prohibited (unless it fell within one of the three exceptions stated in the applicable Regulation).
- Whether, in any event, by a series of letters from the German Federal Motor Transport Authority (KBA) the KBA itself made a binding decision that there was a defeat device which bound the court (and additionally whether the UK's Vehicle Certification Agency (VCA) had made a similar binding decision).

The court held that the software function in the engine was a defeat device, that the KBA letters also found that it was a defeat device (which finding was binding on the court), but that there was no such binding decision on the part of the VCA. The court also concluded that Volkswagen's attempt to re-litigate the issue here was an abuse of process (save in the case of Skoda and SEAT vehicles). As the trial of preliminary issues has now taken place, a full trial is listed to be heard not before March 2022.

The Bates v Post Office Group Litigation provides another example where, given the complexity of the issues in the case, there were trials and hearings for the "common issues" in the group litigation (addressing the contractual circumstances and issues of six claimants), and a separate preliminary issues hearing relating to the more technical aspects of the Post Office's IT system, known as Horizon, and therefore called the "Horizon issues".

Importance of understanding issues as agreed between the parties

The importance of carefully defining the issues that are agreed between the parties in the litigation and understanding those issues cannot be overestimated. They are the means by which the judge will navigate the evidence before reaching their determination of the case. This was once again well illustrated in *Bates and others v Post Office Ltd [2018] EWHC 3408 (QB)* (discussed in *Legal update, Bates and others v Post Office: some salutary lessons on litigation practice (High Court)*), which offered numerous useful insights into the conduct of group litigation.

After the parties had agreed that there would be separate trials of the common issues and the Horizon issues, in the third case management order of 1 March 2018, leading counsel for the parties were ordered to meet and seek to agree the Horizon

issues to be tried in March 2019. This was done, the issues were agreed between the parties and were approved by the court. Out of the list of issues, which were contained in a consent order, two of those issues, proved to be problematic:

- Issue 1: "To what extent was it possible or likely for bugs, errors or defects of the nature alleged … to have the potential (a) to cause apparent or alleged discrepancies or shortfalls relating to Subpostmasters' branch accounts or transactions, or (b) undermine the reliability of Horizon accurately to process and to record transactions as alleged at para 24.1 GPOC."
- Issue 3: "To what extent and in what respects is the Horizon System 'robust' and extremely unlikely to be the cause of shortfalls in branches".

As noted, the issues were not dictated by the court. The parties had had prior opportunity to discuss the issues and understand the scope and implications of the agreed wording. However, during the trial of the Horizon issues, it became apparent that the parties had different interpretations of the issues, and were in effect, answering different questions during the trial. The claimants approached issue 1 as it was worded, focusing on the wording "had the potential to cause discrepancies or shortfalls" (our emphasis), not that the Horizon system actually did cause the discrepancies or shortfalls. The defendant adopted a different interpretation, focusing in its evidence on whether the Horizon system had in fact caused the discrepancies or shortfalls. This was considered by Fraser J to be an attempt to narrow the scope of the issues retrospectively, after the issues had already been agreed and approved by the court. The court noted that the wording of issue 1 was neutral and intended to cover a wide range of alleged problems associated with the Horizon system:

"In order to read issue 1 in the manner contended for by the Post Office, one would have to delete entirely the phrase 'to have the potential' from the issue. One would also have to substitute the term 'Sub-postmasters' branch accounts or transactions' with 'the claimants' branch accounts or transactions'. That is not what issue 1 states, it is not what the parties agreed the issue would be, and it is not the issue that the court approved and ordered. In my judgment, the approach of the Post Office to what Horizon issue 1 actually means is too narrow." (*At paragraph 33, judgment*.)

A disparity also arose between the parties about their working definition of "robustness". Given that this issue was central to the Horizon issues trial, it was essential that the parties understood what was meant by the use of the term. The claimants approached the issue by suggesting that a robust system "would be one that is extremely unlikely to be the cause of shortfalls in branches". The defendant considered that the issue of what is meant by "robustness" was a matter for expert opinion. Fraser J disagreed that expert opinion was required. The meaning ought to have been capable of being agreed between the parties, as the issues had been agreed. Ultimately it was finally considered that:

"it means the ability of any system to withstand or overcome adverse conditions. A robust system is strong and effective in all or most conditions. The robustness of a system is the effectiveness of the system in managing the risks of imperfections (which are inevitable in any system) and their consequences." (*At paragraph 54.*)

Given the importance of the description and definition of the issues in a separate preliminary issues trial, the parties must give due consideration to the framing of these issues, and ensure that the agreed list and wording minimises the scope for any ambiguity or misinterpretation. It would be detrimental to a party's case to discover at an advanced stage of the proceedings that they had prepared disclosure and evidence on the basis of a different interpretation of the purpose and effect of the issues from that of the other party.

Often in a group litigation context there is an asymmetry of information between the parties. The defendants are the custodians of the vast majority of documents, and the claimants can only surmise as to the factual cause and effects which have given rise to the alleged harm suffered. As a result, it is not always possible to limit the scope of the issues to matters which have been pleaded in either group particulars of claim, individual schedules or questionnaires, or a defence. Parties will also want to consider other sources of information and publicly available material (for example, Companies House filings, account records, company prospectuses, news articles, social media posting and commentary) as part of their resource tools, in devising the issues to be determined in a preliminary trial.

Costs implications of preliminary issues trials

Where the court's decision on a preliminary issue has resulted in the whole case falling away, it will almost certainly have saved time and costs. Where, however, the trial of the preliminary issue has not disposed of the whole case, it is likely to

mean that the trial of the remaining issues will take place later than it otherwise would, costs will have increased, and there are still the same number of claims registered in the GLO. This potential for delay and additional costs may be further exacerbated by the possibility of an appeal against the court's decision on the preliminary issue.

Test cases

As an alternative to a split trial or trial of preliminary issues, the directions made in the GLO or at the case management conference stage may provide for one or more of the claims in the group to be heard as test claims and for the rest of the claims to be stayed pending the outcome of those test cases. If such an order is made, the court may give directions as to how the costs of the test claims are to be shared between the claimants in the group. The aim of ordering each side to select a number of test cases is that this will lead to a corresponding reduction of time and costs to prepare the case for trial.

The parties will have to give due attention to the process of selecting the test cases and ensuring that the cases selected represent the interests or issues experienced by a sufficient number of the claimants. The test cases need to adequately cover all of the GLO issues and represent the spectrum of factual scenarios, but without having so many test cases as to run up unnecessary costs and reduce efficiency. Test cases may be identified and formed based on the particular issues, or based on the form or quantum of harm allegedly suffered, or a combination of both.

Usually the parties will be directed by the court to select the test cases. This may happen by the parties reaching an agreement on the cases to be selected, or by each party selecting an equal number of cases. From the point of view of litigation strategy, the claimants will wish to select the strongest cases, either in terms of fact pattern and issues, or a case that has the highest alleged quantum of damage. The defendant will seek to include the "weaker" cases in the litigation. This may result in a wide spectrum of test cases. In deciding which cases to include as the test cases, each party should consider whether it is in the best interests of the litigation to have such a wide spectrum of test cases, or whether it would be prudent to adopt a "middle ground" with a more balanced portfolio of claims.

Individual claimants who are not selected as one of the test cases will be bound by any decisions reached in the test cases.

It is quite possible that, in order to reduce their exposure to either the strengths or weaknesses of the test cases (depending on the respective party's viewpoint), the parties will continue to pursue a strategy to settle certain of the test cases. In such instances, where a test claim is settled, the management court may order that another claim on the group register be substituted as a test claim. If that happens, any order made in the test claim before substitution will be binding on the substituted claim, unless the court orders otherwise (*CPR 19.15*).

Conduct of the litigation

Disclosure

In many circumstances, the defendant will be the custodian of many, if not all, of the key documents and information, particularly in relation to the common issues. The claimants will be the primary custodians of information and documents which are relevant to their individual issues, and/or allegations of harm, damage and loss. When faced with this imbalance of information, it is likely that the claimants will place significant focus and effort on obtaining the best possible disclosure. By contrast, the defendant will seek to limit the parameters of disclosure as far as possible.

Disclosure in group litigation tends to present numerous logistical challenges, given the existence of multiple parties and multiple issues. The claimants' legal representatives will need to be prepared to accommodate and analyse a high volume of documents. If the expected disclosure is not received, the claimants should consider making an application for specific disclosure. By contrast, the defendant may not receive much by way of disclosure from individual claimants. The length of time needed to undertake disclosure must be appropriately factored into the proposed court timetable for the conduct of the group litigation. This is one of the reasons why a trial of GLO issues may not take place for a considerable period of time after the GLO order was made. It is also one of the reasons why claimants' legal representatives, may seek to prepare simple schedules or questionnaires that briefly detail key elements of the claim (for example, formation of a contract or harm suffered). Such tools allow details to be easily compiled and require limited evidential support, thus also reducing the level of

interaction needed with each of the individual claimants, and corresponding levels of time and cost. For more on the use of questionnaires or schedules, see *Detail of pleadings*.

Where relevant, the parties will also need to consider the impact of the introduction of the disclosure pilot scheme in the Business & Property courts (see *Toolkit: Disclosure Pilot Scheme*).

Bates v Post Office: disclosure pilot scheme

The Bates v Post Office Group Litigation was subject to the requirements of the disclosure pilot scheme, in which the parties agreed on "Model C" disclosure. Fraser J's judgment offers some useful guidance on disclosure obligations:

"It is important to identify, so that the parties in this group litigation are aware, the court's approach to disclosure. This is given for the purposes of guidance, and cost-effective and efficient progress of the group litigation going forwards.

- Care must be taken when explanations or submissions are made to the court. If further time is needed for accuracy to be achieved, that time should be sought. Those giving instructions to counsel must be astute to ensure that they are giving correct information.
- All the substantive issues will be resolved on the evidence, the applicable law, and taking account of submissions. A party does not obtain a preliminary advantage or "head start" on the substantive issues because of any criticisms about disclosure.
- Criticisms about the other party's disclosure should be proportionate. Depending upon the circumstances and the nature of the document, the fact that disclosure is given late might be relevant, but simply because continuing disclosure is given by one party does not mean that there is anything sinister lurking in the background.
- The court can always be asked to resolve disputes about documents. Mr Coyne sought a large number of different types of documents, but no applications were made by the claimants even though these were not provided. Criticisms of the Post Office's disclosure by the claimants has to be seen in the light that the claimants did not consider it sufficiently important at the time to make any applications to the court. This is not to encourage applications. Sensible and well-advised parties who co-operate will usually deal with almost all disclosure issues consensually.
- The parties are expected to comply with their disclosure obligations. If a document comes to light that should have been disclosed but has not been, it should be provided promptly. If this is discovered actually during a trial, it must be disclosed very rapidly indeed. As happened with the document referred to at [618] above, a document concerning the Drop and Go bug was discovered actually during the Horizon issues trial, then (as Mr Parsons put it in his explanatory witness statement) "for the next couple of months" kept by the Post Office's solicitors while "research" was done. It was then disclosed just before resumption of the trial "in a batch". This is not working to the time scale either required, or expected, by the court, and it is not the correct way to deal with disclosure during a trial. This is a laissez-faire approach to disclosure of an important document during the trial itself, and the document should have been disclosed very promptly.
- Both parties will be held to the same standards. The Post Office has, so far, and given the issues that have been tried, borne the bulk of the disclosure burden. The claimants are expected to observe their disclosure obligations in the same way, and will be expected to do so in the future when further issues and the claimants' different cases are tried in 2020.
- Witness statements will be ordered from a party when the court requires an explanation. Nothing else should be read into the ordering of a witness statement, other than it means precisely that- an explanation is required.
- It is obvious that the Post Office has had to rely upon Fujitsu to a large degree. However, given it was Fujitsu who told the Post Office what the Known Error Log contained – see further [586] above – Fujitsu has, so far, shown itself not be entirely reliable in this respect. Fujitsu are also responsible for the Post Office making a directly incorrect important statement in its EDQ about retention of KELs, which led to the disclosure of about 5,000 of these some

months after the trial closed.

- Adoption of the Model C procedure does not mean that parties can keep adverse documents to themselves and not disclose them until a specific request is made. Such adverse documents should be disclosed promptly.
- Finally, disclosure is very expensive. The court will be astute to guard against it becoming either satellite litigation or a weapon in the interlocutory arsenal."

(*Bates v Post Office Ltd (No6: Horizon Issues) [2019] EWHC 3408 (QB), Fraser J at paragraph 652.*)

In view of the ever-increasing global reach of issues and litigation, GLO proceedings in England and Wales may be running parallel with a European, US or Australian class action, on the same or broadly similar issues. In those circumstances, the parties will have to pay close regard to disclosure orders made in those separate proceedings.

As alluded to above, claimants often encounter issues relating to the formulation of issues and disclosure, as a result of an imbalance of information ownership. Accordingly, claimants may argue that documents disclosed in parallel proceedings in another jurisdiction ought to form part of the disclosure in the GLO proceedings within the jurisdiction. If the defendant disagrees, their arguments will need to be carefully formulated and will need to show why such disclosure is inappropriate, either because of the disclosure model adopted in the GLO in this jurisdiction, or because the document is not relevant or applicable to any of the specific issues to be tried under the GLO proceedings.

Witness evidence

The extent and form of witness evidence will depend on whether there is a preliminary trial or determination of the common issues, followed by a trial of "individual" issues, or whether a test case approach is used.

In the former case, the witness evidence will focus on the issues to be determined. Accordingly, the parties should give consideration to who would be appropriate witnesses, and the appropriate number of witnesses to give sufficient coverage of the issues to be tried.

In a test case scenario, the witness evidence will focus on the issues that arise in the elected test cases. No witness evidence will be required from non-test case claimants. The logistical demands and timetabling of group litigation normally render it impractical to attempt to collate witness evidence from non-test claimants or defendants.

However, in the Kenyan Emergency Group Litigation, an issue arose as to whether factual evidence from around 50 non-test claimants should be permitted for the trial of the 25 test claims. The High Court noted that, since the evidence might have "substantial probative value" (which could not be determined at that stage), then it could not be excluded on the basis that the relevant witnesses had not been randomly selected as test claimants:

"It is common ground that the random selection did not mean that there should be no other evidence supportive of the test claimants. So far, I have been dealing with the case on the basis that the additional evidence is that which is similar fact evidence to that of the test claimants. If such evidence is of substantial probative value (which I cannot determine at this stage) then it cannot be excluded on the basis that the additional witnesses were not randomly selected as test claimants. Indeed, the defendant said that had the additional witnesses not been claimants then their submission would essentially have been the same." (*Kimathi and others v Foreign and Commonwealth Office [2015] EWHC 3432 (QB), at paragraph 42.*)

Expert evidence

In conventional litigation, expert evidence must be "reasonably required" to resolve the proceedings before the court will grant permission for it to be adduced (*CPR 35.1*). The same requirement applies to expert evidence in group litigation proceedings. However, typically, the factual or technical complexities of the kinds of issues that become subject to group

litigation proceedings, render it almost certain that expert evidence will be required across a number of disciplines. For example, in a product liability dispute, it is likely that multiple experts will need to be engaged to testify as to whether the alleged flaw existed and whether that led to the harm suffered. Further experts will be needed if the claimants have suffered different categories of harm.

The other provisions relating to expert evidence set out in CPR 35 and in the relevant court guide are also applicable to expert evidence matters in group litigation. In summary:

- The parties must seek to make effective and proportionate use of experts.
- Parties should avoid incurring the costs of expert evidence on agreed or uncontroversial matters.
- Wherever possible, the parties' experts ought to co-operate fully with one another.
- Parties should give proper consideration to the availability of their experts and to the length of time that their experts will realistically require to complete the tasks assigned to them.
- The desirability of holding regular without prejudice meetings between the experts at all stages of pre-trial preparation, to narrow any differences and reach agreement as far as possible, ought to be kept in mind.
- It is the duty of an expert to help the court on matters within their expertise. This duty overrides any duty to their client(s).

As with disclosure, there is often an imbalance of information and knowledge, and the party with the most knowledge and information (usually the defendant) may seek to rely on its own in-house resources or capabilities. In these circumstances, the court may be more sympathetic to an application by the claimants for an order allowing them to obtain expert evidence.

In the *Ocensa Pipeline Group Litigation [2013] EWHC 3173 (TCC)*, for example, this concern influenced the High Court's decision to allow the claimants to call expert evidence in the field of pipeline project and engineering management, given that the claimants had no knowledge of these matters and the defendant had substantial in-house expertise. Arguably, the increased availability of litigation funding for claimants may have "levelled out the playing field" to some extent, in that the claimants can more readily fund and arm themselves with expert evidence. Equally, in order to appear independent and objective, and given that an expert's overriding duty is to the court, and not its instructing party, not every defendant will seek to rely on their own knowledge or expertise for the purposes of CPR 35.

In the context of group litigation proceedings, given the trial timetabling challenges of managing submissions and multiple witnesses, the court will be particularly appreciative of co-operation between experts and well drafted joint statements and/or individual expert reports. These may well become "go -to" documents for the court to identify the issues which remain in contention, and the focus of their determination.

For more information generally on expert witnesses, see *Practice note, Expert evidence: an overview*.

Settlement in group litigation

The claimants and defendants to any multi-party litigation will form their own assessment of the strengths and weaknesses of their case and that of their respective opponents. Regardless of the perceived merits, given the cost of litigation (especially if there is a significant disclosure exercise, numerous witnesses, requirement for expert evidence, and multiple trials), settlement, at any stage of the proceedings, will almost certainly be a matter for the parties' consideration.

The pace of group litigation, and balancing the numerous individual interests of the parties, requires that any decisions regarding either the making, or acceptance, of settlement offers, are properly considered and decided in the parties' best interests. Unless the settlement is on a universal basis and will compromise the entire litigation, aspects of the litigation will continue. Thus, unless there is a court mandated stay of the litigation, settlement considerations ought not to hinder the progress of the litigation, and decisions regarding settlement should be made as quickly as possible.

From a defendant's perspective, if there are multiple defendants, each may have different settlement strategies. Defendants with fewer claims against them will likely want to extricate themselves from proceedings at the earliest opportunity, before liability has been established, either in a test case or at a trial of preliminary issues. This would also reduce their exposure to increased costs which are highly likely to be a key factor in any settlement negotiation between the claimants and the defendants. Alternatively, some defendants may be more inclined to defend the litigation at all costs (for example, for reputational reasons or on a point of principle).

Similarly, different classes of claimants may also have different strategies. Some claimants may have a preference to receive some form of recompense at an early stage. Other claimants who are more invested in the outcome of the litigation, may wish to delay settlement with a view to having their case heard in court. If claimants have been categorised according to the level of harm alleged to have been suffered, settling cases with claimants who sit in the lower end of this spectrum may be helpful for all parties, as it will reduce the volume of cases within the litigation, and thereby focus attention and resource on the more complicated elements of the case. By the same token, the focus of settlement may be centred on one or more of the test cases (if the GLO adopts this form of trial). If such a claim is settled, it cannot be tried and it will be removed from the proceedings. It will be for the parties to then decide if the test case is to be substituted by another claim within the claims portfolio.

While settlement considerations clearly impact on the positions of the claimants and defendants to group litigation, these parties are not the only ones with a vested interest in the outcome of the litigation. Any other party with a financial interest in the litigation, be it a third party litigation funder, legal adviser acting under the terms of a CFA or DBA, or ATE insurer, will need to be factored into settlement considerations or negotiations. Such entities will seek to ensure that there is sufficient room within any settlement award to accommodate their financial interest.

Given the scope of multiple different objectives, interested parties and preferred outcomes, the potential to achieve a universal settlement is challenging, but not unobtainable. A paying party will likely prefer a universal settlement so that it can achieve finality.

In the Bates v Post Office Group Litigation, the Post Office reached settlement with approximately 550 current and former sub postmasters, for an amount of £57.7 million. The settlement was reached following two separate trials (one relating to contractual issues and the second to technical aspects of the Post Office's IT system), followed by a lengthy mediation. The timing of the settlement avoided the need for two further planned trials, and the additional legal costs associated with those trials. The settlement also provided for the success of the litigation funder, and the recovery of the legal costs of the claimants' lawyers.

The apportionment of any settlement proceeds among the individual members of the receiving party will usually be separately documented in a confidential settlement deed or settlement agreement.

When contemplating settlement, the parties will also need to consider recovery of legal costs. The paying party will generally prefer to settle on an "all-in" basis, with the settlement amount to be inclusive of costs. Alternatively, any damages settlement may factor in an additional amount payable towards legal costs on a "reasonable" basis. The receiving party may prefer the latter approach, so that it is known from the outset how much of the settlement proceeds are allocated as damages and available for distribution, without deductions. When making costs recovery proposals, any provisional consideration of costs should also presume that legal costs will be supplemented by success fees.

Effect of judgment on parties to the GLO

CPR 19.12 provides that where a judgment or order is given or made in a claim on the group register in relation to one or more of the GLO issues:

- That judgment or order is binding on the parties to all other claims that are on the group register at the time the judgment is given or the order is made unless the court orders otherwise.
- The court may give directions as to the extent to which that judgment or order is binding on the parties to any claim which is subsequently entered on the group register.

If the litigation has proceeded on the basis of a trial of test claims, any court judgment handed down in respect of those claims will bind the parties to those claims. The only means to dispute or challenge the judgment would be to request permission to appeal.

The judgment on those GLO issues determined in the test cases will also bind those claimants and defendants registered on the group litigation register, unless the court orders otherwise. If the test cases have established that the defendant is liable, the only individual aspect of the claims which may still require individual consideration will usually be as to quantum of any damages or other form of redress, which will be dependent on the claimants' individual factual circumstances.

If the court does not hold that there are any grounds for liability in the test claims, it may transpire that similar arguments will arise in the non-test claims, which could lead to those claims on the register being discontinued, settled, or otherwise withdrawn.

Similarly, if the litigation has been conducted by way of a trial on a selection of GLO issues, the determination of those issues will bind the parties to the claims registered on the GLO, for which those issues have relevance.

Costs in GLO cases

General costs rules

The general costs position, where the court has made a GLO, is set out in *CPR 46.6*. It starts by describing the difference between common costs and individual costs:

- Common costs are the costs incurred in relation to the GLO issues; the individual costs incurred in a claim that is a test claim; and those costs incurred by the lead legal representative in administering the group litigation.
- Individual costs are the costs incurred in relation to an individual claim on the GLO register (*CPR 46.6(2)*).

Unless the court orders otherwise, when making an order for common costs, each group litigant will be severally liable for an equal proportion of the common costs under CPR 46.6(3), irrespective of when they joined the group register. So, if common costs have been incurred before a litigant's claim has been added to the GLO group register, that group litigant will be liable for an equal proportion of the common costs. This is an important feature of GLO litigation. It means that a claimant who joins the GLO litigation in its infancy does not have a heavier costs burden than that of a claimant who joins the GLO around the cut-off date. The reason is that the late joining claimant will receive the benefit of the work on the common issues, already undertaken for the other claimants.

It is important for a group claimant to be aware that, if the group claim is lost, the general rule is that the common costs will be divided equally among the group members, who will be severally liable for them. In addition, the individual costs of a particular claim will be that particular 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 (*CPR 46.6(4)*).

That said, in *Greenwood and others v Goodwin and others [2014] EWHC 227 (Ch)*, Hildyard J noted that the court has a wide discretion as to the orders for costs in group litigation, and that the rules in CPR 46.6 are just the starting point. The judge noted that there was an "overriding need" for potential claimants to understand what their position would be in respect of costs if they were to decide to join the litigation. See *Legal update, Costs sharing and costs budgets in GLO proceedings (High Court)*.

Where the claimants succeed on the GLO issues but some claimants fail on their individual facts, the court may use its discretion when awarding costs. The court may award the unsuccessful claimants all of their common costs or a percentage of common costs to reflect the percentage of claims that succeeded. Alternatively, the court may allow the defendant to set-off common costs in the same proportion as that of the unsuccessful claims.

Where a direction has been given for a claim on the group register to proceed as a test claim and that claim is settled, the court can make an order substituting another claim on the group register as the test claim (*CPR 19.15*). In such circumstances, where common costs have been incurred before a claim is entered on the group register, the court may order the group litigant to be liable for a proportion of those costs (*CPR 46.6(6)*).

To offset some of the potential uncertainties about how the costs will be shared between fellow claimants, the group litigants may enter into a costs sharing agreement to share their liability for the common costs that will be incurred in respect of their claims. It was held in *Bank of Credit and Commerce International SA (In Liquidation v Ali (No. 5) [2006] EWHC 2636 (Ch)* that there was no reason for the court to interfere with an agreement made between the claimants as to the sharing of costs, despite the fact it had discretion to do so. For an example of a costs sharing agreement, see *Standard document, Costs sharing agreement: an example*.

Court's approach to "between the parties" costs

With regard to who is the paying party, as set out in *CPR 44*, the usual position in respect of costs is that the unsuccessful party must pay the successful party's costs. However, when deciding what costs order to make under a GLO, the court has a wide discretion and will have regard to any attempts by either party to settle the matter, the conduct of the parties and whether a party's claim has succeeded in whole or in part. For example:

- In *Briggs and others v First Choice Holidays and Flights Ltd (unreported), 23 September 2016 (Senior Courts Costs Office)*, at a detailed assessment of the claimants' costs, the defendants argued that some of the claimants should have used a mediation scheme that was available to them, as it was designed for the types of claims that were being made under the GLO and would have offered sufficient compensation. Master James agreed with the defendants and stated that the mediation scheme would have covered some of the claims "perfectly adequately". As a result, Master James limited the costs payable to the fees that would have been due under the mediation scheme. This was considerably less than the costs that were incurred under the GLO, particularly as a result of the significant administration costs, which Master James considered to be "neither reasonable nor proportionate". See *Legal update, Interim costs certificate refused where group litigation costs not reasonable and proportionate (Senior Courts Costs Office)*.

- In *Various Claimants v Wm Morrison Supermarkets PLC [2018] EWHC 1123 (QB)*, the judge started from the position that the claimants had succeeded overall in their claim and therefore should be entitled to all of their costs. However, the judge then gave consideration to the fact that the defendant had been successful in one material aspect of the claim. As a result, the judge ordered that the defendant pay just 40% of the claimants' costs.

- In *Arroyo and others v Equion Energia Ltd (formerly known as BP Exploration Co (Colombia) Ltd) [2016] EWHC 3348 (TCC)*, the court considered the parties' respective applications for costs following the dismissal of four lead claims in group litigation and made a costs order in the defendant's favour, including an award of indemnity costs for a period exceeding two years because the claimants' conduct took the case "beyond the norm". See *Legal update, Indemnity costs awarded in unsuccessful group litigation (TCC)*.

- In *Kalma v African Minerals [2017] EWHC 1471 (QB)*, the court approved a costs budget for the claimants (approximately £5.4 million) which was, on its face, wholly disproportionate to the settlement sum of approximately £4,500 agreed for the majority of the 142 claimants. The court noted that the detailed assessment would require a sensitive balancing exercise, weighing the interests of justice and the logistical difficulties of communicating with the claimants, many of whom were illiterate, lived in remote areas of Sierra Leone and/or did not have access to internet or telephone connections.

Costs management and costs budgeting (CPR 3.12-3.18)

The general rule is that costs budgeting is required automatically, unless a claim is worth £10 million or more. In circumstances where the amount on the claim form exceeds £10 million, the costs budgeting regime will not apply, but the court has a discretion to order what it considers to be just and appropriate and in accordance with the overriding objective (whether under *CPR 3.12(1)(a)* or *CPR 3.13*). In *Sharp (and the other claimants detailed in the GLO Register) v Blank and*

others [2015] EWHC 2685 (Ch), in which the claims together totalled over £215 million, Nugee J granted the claimants' application for an order requiring the parties to file and serve costs budgets.

The judge in *Greenwood and others v Goodwin and others [2014] EWHC 227 (Ch)* found that it was not realistic for parties to produce a detailed budget early on in the GLO proceedings. Instead, he decided that the parties should submit a statement of costs actually incurred, which would be updated throughout the proceedings.

In *Sharp and others v Blank and others [2017] EWHC 141 (Ch)*, the court allowed the claimants' application for a costs management order (CMO) under *CPR 3.15(2)*. The reason behind this was that it gave the claimants greater transparency as to their uninsured costs risks (above the amount of the ATE insurance they had obtained). Nugee J noted that the fact he had previously directed budgets to be filed did not give rise to a presumption that it was appropriate to make a CMO, but a cost benefit analysis made this an appropriate case for a CMO. See *Legal update, Circumstances justifying costs management order (High Court)*.

In *Solutia UK Ltd v Griffiths and others [2001] EWCA Civ 736*, the Court of Appeal noted that particular consideration needs to be given to costs, given the large administrative burden of GLO cases, and that control of costs is key in such cases. This was further supported by a statement made by Sir Rupert Jackson at the Civil Justice Council seminar reviewing LASPO on 29 June 2018:

"costs budgeting works particularly well in group actions … costs budgeting provides a good discipline. It forces parties to think out what work they will need to do and when."

Interim payment orders possible for non-test claims

CPR 25.7(1)(c) provides that the court may make an interim payment where it is satisfied that, if the claim went to trial, the claimant would obtain judgment for a substantial amount of money (other than costs) against the defendant.

It may be possible to obtain interim payment orders in favour of claimants in group litigation, even though their claims have not been identified as test claims and their claims are stayed under the terms of the GLO.

In *GKN Holdings plc and others v Inland Revenue and another [2013] EWHC 108 (Ch)*, the respondents opposed the applications for interim payment orders by two claimants in this position on the basis that their claims had been stayed and they were not identified as test claims. The respondents argued that an interim payment order would be inconsistent with the basic objective of the GLO, which was to ensure that individual non-test claims were only heard after the GLO issues had been resolved. The court rejected these arguments and held that very strong grounds would be needed to deprive a non-test claimant of the right to apply for an interim payment if the condition in CPR 25.7(1)(c) was satisfied. If this test was satisfied (which the court found it was on the facts), the court considered it would be unfair to deprive a non-test claimant of the opportunity to apply for an interim payment merely because, for case management reasons, the claimant was enrolled in a GLO but was not a test claimant. In reaching its decision, the court took into account the likely length of time before the test claims would be resolved and the interim nature of the payment sought which could ultimately be repaid.

Court may make immediate costs order rather than waiting until conclusion of proceedings

Given that it may be many years before claims are finally resolved in group litigation, the court may exercise its discretion and decide not to reserve costs until the conclusion of the proceedings. In *Bates and others v Post Office Ltd (Judgment (No. 5) "Common Issues Costs") [2019] EWHC 1373 (QB)*, the court rejected an application by the Post Office for the costs of a common issues trial to be reserved until the conclusion of the proceedings, noting (among other points) that the decision should not be swayed by the presence of litigation funding.

See *Legal update, Appropriate to make immediate order for costs of common issues trial in case subject to Group Litigation Order (High Court)*.

Costs where claim is removed from the group register

Under *CPR 46.6(7)*, where a claim is removed from the group register, the court may make an order for costs in that claim which includes a proportion of the common costs incurred up to the date on which the claim is removed from the group register. This includes the situation where a claim is discontinued or settled. Thus, it was held in *Sayers v SmithKline Beecham Plc (Costs Sharing Order) [2001] EWCA Civ 2017* that:

"It is…not merely more sensible but also more consonant with justice that both the recoverability of common costs and the liability (if any) of discontinuing claimants for costs of common issues should be determined at the same time as orders for common costs are made in respect of those common issues. The court then has a full picture and can make whatever order is just in all the circumstances" (*at paragraph 20*).

Costs where claim settles

If a claim settles, there is no presumptive order in relation to costs. However, costs will (or should) naturally form part of the settlement conversations and discussions, and so it is up to the parties to the settlement to reach their own costs settlement terms.

Points to consider when managing or defending group litigation

Interest in multi-party litigation is on the rise, bringing with it significant reputational and logistical risks and potential financial liability for defendants on the receiving end of a multi-party claim. For example, a data breach could easily affect several thousand individuals and, if there is an investigation by the Information Commissioner's Office which results in a fine being imposed, this may be seen as an opportunity to pursue a consequential civil action.

The availability of litigation funding (see *Funding options for group litigation*), and the ever more sophisticated techniques used to promote prospective GLO proceedings on the internet and through social media have made it possible for claimant firms to attract large numbers of interested claimant parties in a relatively short space of time. This increases the prospect that an application for a GLO will be made, or a "same interest" representative claim issued. In addition, class actions in other jurisdictions will often have a global reach: a class action brought in the US or Australia may involve issues, or relate to an alleged harm that has equal impact and application in England and Wales, and this may give rise to separate GLO proceedings in this jurisdiction.

In recent years, parties involved in a multi-party claim have carefully considered how to manage and defend such claims as that can have a significant impact on whether parties achieve their overall objectives. For instance:

- On receipt of a pre-action letter of claim, a defendant will typically seek to make a calculated assessment of the number of individuals likely to be affected, and the quantum of redress sought.
- If an application for a GLO is made, there are various examples where defendants have queried whether the issues are either too broad and lack common characteristics, or are so narrow, that they will fail to have wide-scale application. In some cases, an alternative to a GLO action may be more appropriate. For example, claimants should consider whether it is more feasible to agree to a test case, or to consolidate a number of claims to be heard collectively (under *CPR 3.1(2)(g)*) under the court's general powers of management.
- To what extent can the cut-off date or the availability and breadth of publicity impact the feasibility of a claim? Imposing a shorter cut-off date so there is less time to "recruit" claimants or limiting the extent of publicity are likely to be more advantageous to defendants.
- Will the terms of the GLO capture all claims and litigation against the defendant on the relevant issues? It is not uncommon for other claimants to issue claims in their local courts which raise the same issues, but where the claimant is not represented by a firm that is a member of the GLO steering committee or is seeking a different form of remedy. This may be an unwelcome distraction, and it will need to be determined whether it is in the defendant's interest to either stay the claim pending the resolution of the GLO proceedings, or to make an application for the claim to be transferred into the GLO.
- If other defendants are involved, is there scope to join forces? What will the impact of joining forces be on claimants

and defendants?

- Can the litigation be defeated in the early stages? This was attempted (unsuccessfully) in *Bailey and others v GlaxoSmithKline (UK) Ltd [2016] EWHC 1975 (QB)*, in which the court considered a number of case management points. The defendant submitted that the claims should not be taken to trial and that, for case management reasons, they should be struck out or, in effect, stayed permanently. Issues raised included whether it was proportionate to allow the proceedings to continue, given the information available about the value of the claims, and the adequacy of the claimants' funding arrangements. Although Foskett J was not satisfied that the nature of each claimant's case on damages had been sufficiently analysed, he held that the defendant had not demonstrated that the costs were disproportionate. Since the judge needed to give the claims some value, he made "a moderately well-informed 'stab in the dark'" that the overall quantum might be about £10 million. Similarly, he was not satisfied, for now, that there was insufficient funding to take the case to trial. The claimants had provided some information about the available funding and he had been told that some additional funding had been set aside in case it should prove necessary. He did not think that he could, or should, "go behind that at this stage". Emphasising the court's responsibility to keep the playing field as level as possible, in a noteworthy comment, the judge added:

"It is important to be cautious where the attempt to bring litigation to a halt is based upon the submission of a large corporate organisation with very significant resources that the resources of a group of individual litigants are not sufficient to be able to maintain the litigation. The responsibility of the court is to keep the playing field as level as possible."
See *Legal update, Caution needed when large corporate argues that resources of individual litigants insufficient to maintain litigation (High Court)*.

- Is it possible to settle at least some of the claims early? Each claim in a GLO is still an individual claim and is severable. What will be the impact of early settlement?
- Even after GLO litigation is complete, the defendant should be wary of follow-up or satellite litigation.
- In certain circumstances, defendants may want to consider proactively applying for a GLO (as opposed to allowing the claimant side to drive case management). In *Lungowe v Vedanta Resources Plc [2020] EWHC 749 (TCC)*, it was the defendant which sought to have a GLO made in respect of three separate sets of proceedings brought against both it and a subsidiary company by a large number of claimants (who were represented by two separate firms of solicitors). The application was made following extensive directions by the judge in order to deal with the complex procedural history of the various proceedings surrounding the dispute. Despite counsel for one set of claimants submitting that the two different 'strands' represented by the two firms should be kept separate in the GLO, the judge found that this was not an appropriate form of hybrid order. The issues were all the same for the purposes of the group litigation and hence ideally suited to the making of a group litigation order. See *Legal update, Applicable principles for competing firms of claimants' solicitors in group litigation (High Court)*.

Similarly, it was the proposed defendant who applied for a GLO in the British Airways Data Event Group litigation, in respect of a claim for damages for breach of contract, misuse of private information and breach of confidence arising from alleged breaches of data held by BA in 2018. The GLO in this matter was made in October 2019 with a cut-off date of 17 January 2021, by which date a claimant must have issued and served a claim form or be named on an issued or served claim form in order to be entitled to enter onto the group register. This gives the defendant, British Airways, certainty in terms of knowing the number of claimants and allowing it to make meaningful estimates of its potential overall exposure.

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