# GROUP LITIGATION ORDERS
## ONLY PART OF THE PICTURE 25 YEARS ON

Alan Watts, Gregg Rowan, Rachel Lidgate and Maura McIntosh of Herbert Smith Freehills LLP look at how class actions have become an established part of the litigation landscape in England and Wales in the 25 years since the introduction of the group litigation order.

The group litigation order (GLO) has been part of English civil procedure since May 2000. In those 25 years, a total of around 125 GLOs have been made (*see box "History of the group litigation order*). That is an average of five per year, which represents only a small part of the picture of class action litigation in England and Wales. Over that same time period, class actions have become far more prominent in the English courts, with an increase both in the number of cases being brought, and in their size and value.

This trend has been driven in large part by a significant increase in the availability of funding, with litigation funders and claimant law firms often willing to share the risks, and eager to share the rewards, of these cases. The key players in the market are always on the lookout for potential new claims and types of claim, and use sophisticated marketing campaigns to recruit businesses and consumers. A glance at the websites of some of the claimant firms that are practising in this area shows the variety of cases that are being pursued by or on behalf of multiple claimants, ranging from alleged data breaches, defective products and breaches of competition law to environmental damage and mis-sold investments.

Against that background, questions arise as to why there have been so few GLOs and how most class actions are brought. This article discusses:

- The procedures available for bringing class actions.
- How, in many cases, the GLO procedure is being bypassed in favour of bespoke case management.
- How some claimants, and their law firms and litigation funders, are seeking opt-out alternatives to a GLO.

## CLASS ACTION PROCEDURES

There are four main ways of bringing claims on behalf of large groups of claimants in the English courts (*see feature article "Class actions in England and Wales: key practical challenges", www.practicallaw.com/w-015-9333*).

### The GLO

A GLO is essentially a case management framework for managing individual claims that give rise to common or related issues of fact or law, which are known as the GLO issues. The rules relating to GLOs are set out in section III of Part 19 of the Civil Procedure Rules (CPR). The GLO operates on an opt-in

## History of the group litigation order

The rules establishing the group litigation order (GLO) procedure took effect on 2 May 2000 as a result of recommendations made by Lord Woolf following his Access to Justice Inquiry in the mid-1990s (*see feature article "Commercial disputes: the practical impact of the Woolf reforms", www.practicallaw.com/8-101-2625*). The Woolf reforms led to sweeping changes, with the Rules of the Supreme Court being replaced by the Civil Procedure Rules in April 1999, and the rules relating to GLOs being added a year later.

Before the GLO was introduced, a number of claims had been brought in the English courts by large groups of claimants with similar claims, most often relating to pharmaceutical products that were alleged to have caused various personal injuries to consumers, such as thalidomide. As there was no formal procedural mechanism for bringing group or class actions, these cases were managed on an ad hoc basis; for example, with courts directing that certain claims would be tried initially and the remaining claims stayed pending their outcome.

Lord Woolf recommended the creation of a new procedure to manage cases where the number of claimants and the nature of the issues involved meant that the cases could not be managed satisfactorily under normal procedures, and to provide access to justice where there were large numbers of potential claimants but the losses that they had each suffered were too small to make individual actions economically viable.

His recommendations included that the court should be able to direct these actions to proceed either on an opt-in or an opt-out basis. However, the GLO procedure that was ultimately introduced is solely an opt-in mechanism; that is, the action is brought on behalf of only those claimants who have taken positive steps to join. In contrast, with an opt-out regime an action can be brought on behalf of all those who meet the class definition, without individual claimants having to join the case or be named in it.

In general, an opt-out procedure will be more attractive to those bringing a claim as it removes the need to recruit potential claimants to join the action, which can be time-consuming and expensive, and may ultimately meet with limited success. This is particularly true where the claims are relatively low value so that individual claimants stand to gain little. With an opt-out procedure, the entire class is included unless individuals take steps to opt out, so that difficulty does not arise and very large claims can be brought with greater ease.

basis, with each individual claimant having to be named in a claim form issued by the court, although it is not necessary that each claimant has issued an individual claim form (*see "Bespoke case management" below*).

The GLO issues must be specified in the GLO. The only jurisdictional requirement is that there are, or are likely to be, a number of claims that give rise to the GLO issues (*CPR 19.22*). As long as that threshold is reached, the court has a discretion to make a GLO. However, Practice Direction 19B (Parties and group litigation) states that, in considering whether to apply for a GLO, the applicant should consider whether any other order would be more appropriate, in particular, an order for the claims to be consolidated or for the rules relating to representative actions to be used.

The GLO will also specify the court that will manage the GLO and contain directions about establishing a group register which will set out the details of the individual claims included in the GLO. Importantly, under the relevant court rules, where a judgment or order is made in a claim on the group register in relation to a GLO issue, it is binding on the parties to all other claims on the group register at the time when it is made.

GLOs have been made in a wide variety of cases, with the number of claimants ranging from a small number, such as the Corby Group Litigation, which related to just 18 claims for the mismanagement of toxic waste in the reclamation of a steelworks in Northamptonshire, to hundreds of thousands, such as in the various GLOs relating to diesel emissions (*see box "Group litigation orders by claim type"*). Individual claim values have also varied widely, ranging from a few hundred pounds to more than £1 billion.

### Bespoke case management

There is nothing to stop the courts from dealing with multiple claims together using informal procedures, as they did before the GLO was introduced. In some cases, a large number of claims may be issued using a single claim form, which is sometimes referred to as an omnibus claim form, or several omnibus claim forms. Alternatively, claim forms may be issued separately for each claimant, or for small numbers of claimants, who may be represented by different firms of solicitors.

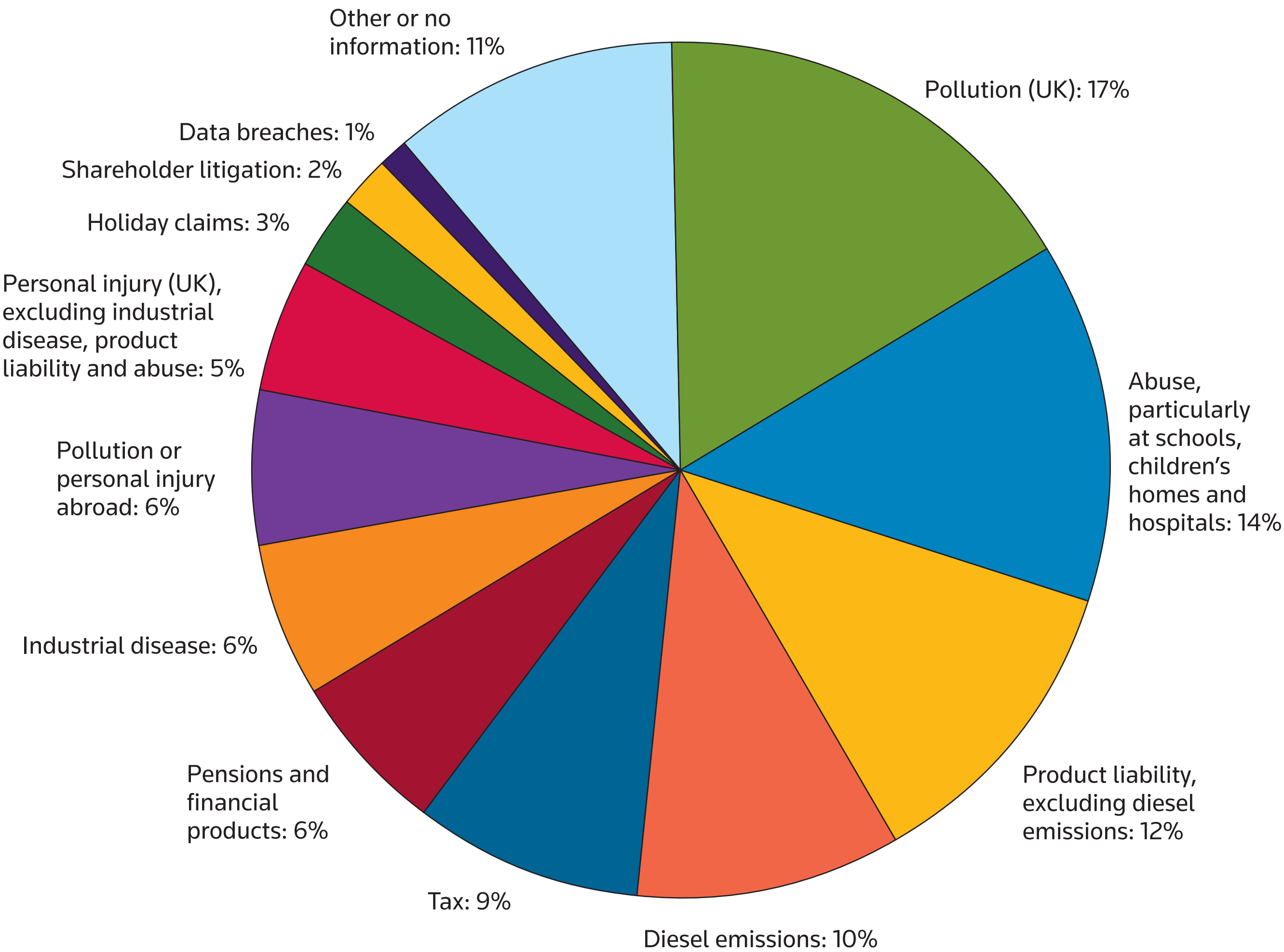
A recent line of cases has considered when an omnibus claim form can be used, rather than each claimant having to issue a separate claim form. Any number of claimants or defendants may be joined as parties to a claim and a claimant may use a single claim form to start all claims that can be conveniently disposed of in the same proceedings (*CPR 19.1 and CPR 7.3*). In *Morris and others v Williams & Co Solicitors and others*, the Court of Appeal held that the rules in CPR 19.1 and CPR 7.3 mean what they say: there is no separate, exclusionary test by which the court must consider whether a determination of common issues will be binding on the other claims, be of real significance to them or constitute real progress toward their determination (*[2024] EWCA Civ 376; www.practicallaw.com/w-043-4008*).

The court therefore has a broad discretion to determine what is convenient in a particular case. *Morris* was applied in *Angel and others v Black Horse Ltd* to overturn a High Court master's decision that 5,800 claims relating to discretionary commission arrangements in motor finance broker cases would have to be brought using separate claim forms (*[2025] EWHC 490 (KB)*). Omnibus claim forms can also be used where the claims are subject to a GLO, as confirmed in *Abbott and others v Ministry of Defence* (*[2023] EWHC 1475 (KB); www.practicallaw.com/w-040-1846*).

Whether the claims are brought using an omnibus claim form or a large number of separate claim forms, the courts can use a range of bespoke orders to seek to manage the claims efficiently. These may include:

- Formally consolidating claims or directing them to be heard together.

**Group litigation orders by claim type**




The pie chart gives a breakdown of the types of claims in which group litigation orders have been made (based on data from the gov.uk website).
The percentages in the table add up to more than 100% due to rounding.

- Ordering a trial of preliminary issues.
- Ordering one or more claims to be tried as test cases and the remaining claims to be stayed to await the outcome.
- Ordering the service of generic statements of case.
- Ordering costs-sharing arrangements between the parties.

### Representative actions

The representative action has existed in various forms for many years, since long before the introduction of the CPR (*see News brief "Representative actions: lessons learnt from two recent cases", www.practicallaw.com/w-045-9395*). It is currently set out in CPR 19.8, which provides that a claim may be begun, or continued, by or against one or more persons as representatives of any others who have the same interest in the claim. A representative action is typically brought on an opt-out basis so that the represented persons are not identified or joined as parties to the action, but the court's permission is needed to enforce a judgment or order against anyone who is not a party to the action.

Historically, the same interest test was interpreted strictly, so that it was generally considered to be inapplicable where the remedy sought included damages, as these will typically require an individualised assessment. However, in *Lloyd v Google LLC*, the Supreme Court noted that there is no bar to bringing a damages claim as a representative action if the entitlement can be calculated on a basis that is common to all the members of the class; for example, if it is alleged that every member of the class was wrongly charged a fixed fee, although this is likely to be rare (*[2021] UKSC 50; see feature articles "Lloyd v Google: the upshot for data class actions", www.practicallaw.com/w-034-4674 and "Data class actions: the outlook after Morrison", www.practicallaw.com/w-026-2617*).

More significantly, the court in *Lloyd* recognised the potential for adopting a bifurcated process in which truly common issues are determined through a representative action and any issues that require individualised assessment, whether they relate to liability or damages, can be dealt with subsequently (*see "Bifurcated claims" below*). In effect, this introduces a halfway house between a fully opt-out representative action and an opt-in procedure such as a GLO or bespoke case management, as individual claimants only have to be identified once the common issues have been determined. However, there are a number of unanswered questions that may affect whether bifurcated claims are economically viable.

### Collective competition proceedings

The Consumer Rights Act 2015 introduced a separate regime that allows collective actions in competition law claims to be brought on behalf of businesses or consumers in the Competition Appeal Tribunal (CAT) (*see feature article "Consumer Rights Act 2015: a step in the right direction", www.practicallaw.com/6-618-1992*). The CAT can make a collective proceedings order (CPO) where certain criteria are met, including that the claims raise the same, similar or related issues of fact or law (*see "The CPO regime" below*). A CPO can be made on either an opt-in or opt-out basis, but the vast majority of CPOs issued to date have been brought on an opt-out basis (*see Briefings "Collective proceedings regime: CAT at the gate", www.practicallaw.com/w-040-7963 and "Class actions in the CAT: a rising tide", www.practicallaw.com/w-043-6847*).

## WHEN IS A GLO APPROPRIATE?

The court has the discretion to make a GLO where the jurisdictional requirement for a GLO has been met; that is, when there are, or are likely to be, a number of claims that give rise to the GLO issues (*see "The GLO" above*). This requirement does not represent a high hurdle: there is no minimum number of claims and there is no requirement that the GLO issues predominate over other issues that will need to be determined individually. However, these factors are likely to feed into the court's discretion as to whether ordering a GLO is the most appropriate way forward. Where there are very few claims, the court may decide that a GLO will add little to its ability to manage the cases together. Where the claims have little in common and the key issues can only be determined on a case-by-case basis, the court may decide that there is no benefit in them being managed together at all.

### Decline in GLOs

The use of bespoke case management procedures to deal with large numbers of similar claims, without making a GLO, appears to be a growing trend. To put this in perspective, according to the list of GLOs maintained on the gov.uk website, 16 GLOs have been made in the past five years, but ten of these are diesel emissions cases. Excluding the diesel claims, that is just over one per year. The gov.uk list is not necessarily comprehensive and cases are not always added quickly: to give an extreme example, the Phurnacite Workers GLO was made in 2009 but appears to have been added to the list only in 2019. However, this does suggest that the GLO may be becoming less popular as a means of bringing class actions, particularly when compared to the early days of the regime, when just over 25 GLOs were made in the first two years alone.

In many multi-party cases, there has simply been no GLO application, with the court and all of the parties content for the court to manage the case using existing case management powers without a GLO. This will often be the case where the claimants are represented by a single law firm, or by a small number of firms that are co-operating to bring the claims, so that the GLO machinery for corralling separate claimants or claimant groups may seem unnecessary. This is very often the case in shareholder class actions. For example, the two cases that are listed on the gov.uk website, the RBS Rights Issue Litigation and the Lloyds/HBOS Litigation, represent only a small fraction of the claims that have been brought in this area in the past decade (*[2019] EWHC 3078 (Ch); see News brief "Shareholder class actions: some comfort for boards", www.practicallaw.com/w-022-9647 and feature article "Securities class actions: a gathering storm?", www.practicallaw.com/w-008-9923*).

In a number of cases in various contexts, an application has been made for a GLO, typically by the claimants, but the courts have opted instead for bespoke case management that replicates many of the features of a GLO.

### Relevant factors for court

Some decisions that shed light on the factors that the courts will take into account in deciding between these alternatives are considered below.

In *Moon and others v Link Fund Solutions*, the High Court considered an application for a GLO in respect of claims by investors following the suspension of dealings in an investment fund (*[2022] EWHC 3344 (Ch)*). There were approximately 3,000 named claimants, but the solicitors involved claimed to represent more than 20,000 investors. The typical investment was between £10,000 and £25,000, with some claimants having invested several hundred thousand pounds.

The court declined to grant a GLO. It agreed that there are some advantages in the dedicated case management procedures provided for by the GLO regime, including:

- The assignment of a managing judge, although in *Moon* the case was proceeding in the Financial List, where a managing judge is assigned in any event.
- The mechanisms for costs sharing.
- The binding nature of judgments and orders.

However, the court stated that these advantages could be achieved through the court's general case management powers, without the need for a GLO.

The court described the most significant distinguishing characteristics between a case that is run under a GLO and one where no GLO is made as:

- The establishment of the group register, with the consequential directions for publicity.
- The appointment of lead solicitors and a steering group of solicitors.

It concluded that there was no need for a GLO to be made in order to further the overriding objective in the circumstances in *Moon*. There were only two groups of claimants who were in a position to proceed and they were represented by the two firms that were proposed as joint lead solicitors. Since those firms had indicated that they would co-operate in the conduct of the proceedings and there was some doubt as to whether any separately represented groups would emerge, there was no need for the appointment of lead solicitors or a steering committee.

As for the group register, it was common ground that, as established in previous cases, the GLO procedure was not intended to encourage potential claimants to litigate. In any event, the likelihood was that those investors who wished to bring a claim had already instructed solicitors so there was only a limited prospect that a group register would be helpful to enable future claimants to join the proceedings in a structured way.

Similarly, in *Hammon and others v University College London*, the High Court considered an application for a GLO in respect of claims brought by students alleging that their university had breached its contracts with them by failing to provide in-person, campus-based tuition and access to facilities during periods affected by the COVID-19 pandemic and periods of industrial action by teaching staff (*[2024] EWHC 1744 (KB)*).

The court accepted that the threshold requirements for a GLO had been met but declined to order a GLO. It noted that the court's conventional case management powers under CPR 3.1 are wide and include the power to take any other step or make any other order for the purpose of managing the case and furthering the overriding objective. It commented that, with co-operation and creativity, these powers can be used to replicate almost any feature of a GLO.

In *Hammon*, more than 5,000 claimants were represented by two firms of solicitors and, on the evidence, it was unlikely that other claimant groups would come forward. In the circumstances, the court considered that there was little advantage in establishing a group register. Further, all parties agreed that there should be a trial of test cases and the court accepted the defendant's submission that decisions in those test cases on common contractual terms would bind the other claimants in the consolidated actions, whereas claimant-specific issues relating to individual damages could never have been resolved by the trial of generic GLO issues. To the extent necessary, it agreed with the court's conclusion in *Moon* that decisions on other issues could be made binding by way of bespoke case management directions. The claimants had conceded that costs-sharing provisions could also be included in a case management order, which the court described as an important factor.

Overall, the court considered that making a GLO would delay the progress of the claims and add unnecessary cost. It was preferable simply to move forward with the test cases, following which either the defendants would be successful and the claims would come to an end, or the basis of liability and principles for setting damages would be identified with a view to facilitating settlement of the remaining claims.

The potential costs of a GLO are often a factor in the court's decision making, particularly where the claims are low value. In *Beck and others v The Police Federation of England and Wales*, the High Court considered the appropriate order for costs where the claimants had applied for a GLO, but ultimately had not pursued that application as they had accepted the defendant's position that the case could be managed appropriately through lead cases without the need for a GLO (*[2023] EWHC 685 (KB)*).

The court considered that the claimants should have recognised at an earlier stage that a GLO may not be proportionate, as many of the claims were likely to fall into the category of moderate to less severe data breaches. This meant that there were legitimate concerns about incurring the upfront costs of establishing and maintaining the group register, advertising the claims, and providing individual particulars of claim or schedules of information from all of the claimants. Taking a broad-brush approach, the court ordered the claimants to pay 50% of the defendant's costs of the GLO application.

That is not to say, however, that claims must be high value in order for a GLO to be appropriate. In *Tongue and others v Bayer PLC*, the High Court granted a GLO in respect of claims by around 200 claimants relating to Essure contraceptive devices (*[2023] EWHC 1792 (KB)*). The relatively low value of the claims was said to militate in favour of a GLO, although it seems likely that the value of the claims would not be as low as for data breaches of the sort referred to in *Beck*. In *Tongue*, the court noted that the value of the claims meant that the claimants might face difficulties funding them individually, whereas funding was in place to bring the claims on a group basis.

The court accepted that the costs of conducting group litigation can be high, but said that the costs of running the group register and advertising the claims would be minimal on the facts of the case, particularly as a single firm of solicitors would be running the litigation so the costs that would be involved in larger group actions requiring a steering group did not arise. This contrasts with the decisions in *Moon* and *Hammon*, where the absence of multiple claimant law firms was considered to count against making a GLO, rather than for it.

The court in *Tongue* recognised that the case could be run by way of bespoke case management similar to a formal GLO, but without making a GLO; an option that it referred to as "GLO Lite". However, it considered that making a GLO:

- Would facilitate the efficient selection of appropriate lead cases.
- Would not significantly increase costs.
- Would bring advantages in the form of a group register, a cut-off date for claimants to join the action, and the fact that findings on generic issues would bind other claimants on the group register.

## OPTING FOR OPT-OUT

As the GLO is solely an opt-in mechanism, it is generally less attractive to those bringing a claim and, crucially, to those funding it, than an opt-out alternative. The two available mechanisms for bringing class actions on an opt-out basis are the CPO regime for competition claims in the CAT and the CPR 19.8 representative action regime. In recent years, claimant law firms and litigation funders have been testing the boundaries of both mechanisms to seek to bring cases within their scope.

### The CPO regime

The CPO regime had a relatively slow start following its introduction in 2015 but has gained considerable momentum following the Supreme Court's landmark decision in *Mastercard Incorporated and others v Walter Hugh Merricks CBE*, which set a low bar for the certification of claims (*[2020] UKSC 51; see News brief "Mastercard competition damages: Supreme Court boosts collective action regime", www.practicallaw.com/w-029-3477*). Since then, there has been an ongoing wave of CPO applications, the great majority of which have sought certification on an opt-out basis. At the time of writing, certification has been granted in around 20 cases, with applications pending in a similar number. Certification has been refused in cases relating to alleged anti-competitive agreements for the pricing of electronic products and alleged overcharging by water and sewage companies.

Importantly, the regime is not limited to follow-on claims; that is, those based on an existing decision by a competition regulator finding that there has been a competition law breach. Claims can also be brought on a standalone basis where there has been no such finding, and there appears to be a growing trend towards standalone claims. In some cases, these are claims that would not traditionally have been brought as competition law claims at all. However, they have been framed as claims for alleged abuse of a dominant position, seemingly in an attempt to shoehorn them into the CPO regime so that they can be brought as opt-out claims for aggregate damages.

### Representative actions

Similarly, the CPR 19.8 regime has attracted increased levels of interest in recent years, perhaps most prominently in relation to data class actions. In *Lloyd*, a former executive director of the UK Consumers' Association sought to bring an opt-out representative action on behalf of more than four million UK-resident iPhone users who were seeking damages for the unlawful processing of their data under the Data Protection Act 1998 (DPA 1998). To try to get round the strict same interest test, the representative claimant disavowed any reliance on the individual circumstances of those represented, arguing instead that damages could be awarded based on a standard tariff for each class member.

The Supreme Court held that the claim could not succeed, as a claim for compensation under the DPA 1998 requires proof of damage, which must be distinct from the breach of the data protection legislation that has caused it. Accordingly, an attempt to bring a representative action for compensation on behalf of all those affected, without any reliance on the individual damage suffered, was doomed to fail.

A similar fate befell an attempt to bring an opt-out representative action for the misuse of private information in *Prismall v Google UK Ltd and another* (*[2024] EWCA Civ 1516*). Although in that context, in principle, damages can be awarded for the loss of control of data, the Court of Appeal held that the question of whether any particular claimant had a reasonable expectation of privacy would depend on all of the relevant circumstances and, therefore, require an individualised assessment. The court commented that, because of this, it would always be difficult to bring a representative action for the misuse of private information.

The upshot is that CPR 19.8 is unlikely to be a promising route for bringing data class actions either under the DPA 1998 or for misuse of private information. It remains an open question whether the same is true for claims based on the retained EU law (also known as assimilated law) version of the General Data Protection Regulation (*679/2016/EU*) (UK GDPR), which specifically refers to non-material damage. A representative action was brought against TikTok seeking compensation under the UK GDPR but was withdrawn in May 2022 before the question of whether *Lloyd* could be distinguished was resolved. Therefore, there may be some prospect of using CPR 19.8 to bring an opt-out claim in that context.

### Bifurcated claims

On any basis, the claims that can be brought to final judgment using the CPR 19.8 representative action procedure will inevitably be limited: in most cases, it will simply not be feasible to avoid any reliance on claimants' individual circumstances. In these cases, the court may allow the case to be brought using a bifurcated process, as recognised in *Lloyd*, so that common issues are resolved through a representative action and individual issues are left to be determined, if necessary, at a later stage.

The obvious question for these cases is how they will be funded. A decision on common issues is unlikely to result in any pot of damages to incentivise a litigation funder to back the case. The individual claims may result in damages, but there is no guarantee that class members will enter into a funding agreement, at any rate, with the same funder, at that stage. In *Lloyd*, the court commented that a representative action could have been brought to determine liability only, but the claimant had not proposed a bifurcated process "doubtless because success in the first, representative stage of such a process would not itself generate any financial return for the litigation funders or the persons represented".

Important questions affecting the financial viability of bifurcated cases were due to be tested in a preliminary issues trial in *Commission Recovery Ltd v Marks & Clerk LLP and another,* which related to claims for secret commissions for referral to an intellectual property rights renewal services provider. The court was expected to consider whether, in a CPR 19.8 representative action, the court can award damages or other compensation to the representative claimant for the benefit of all class members, and whether deductions can be made to pay lawyers and funders without the consent of class members. However, the case settled in autumn 2024.

In an earlier judgment in the case, the High Court had suggested, somewhat tentatively, that it may be possible to allow a funder to be paid out of recoveries before distribution to

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*For subscription enquiries to Practical Law web materials please call +44 0345 600 9355* class members, by analogy with the position of insolvency practitioners being paid out of assets recovered (*[2023] EWHC 398 (Comm)*). The Court of Appeal did not comment directly on this point but said that it was not immediately obvious how the representative claimant could obtain a money judgment on claims that did not belong to it, but rather to each class member (*[2024] EWCA Civ 9*).

The resolution of these important questions will now have to wait for another suitable case. Until that happens, there is much uncertainty as to whether those funding claims that are brought on a bifurcated basis can be confident of obtaining a share of any class recoveries, unless the class members consent.

## A DIMINISHED ROLE?

The introduction of the GLO, now a quarter century ago, no doubt played a significant role in the development of class action litigation in England and Wales. It established, for the first time, a procedural framework to manage multi-party litigation, with default rules relating to various important aspects, such as liability for costs and the binding effect of judgments and orders.

Over the years, it has increasingly been recognised that the courts' conventional case management powers can be used to achieve the main benefits of a GLO without necessarily having to adopt the full procedural machinery of a GLO, such as a group register or the appointment of lead solicitors or a steering committee, where that is not necessary or desirable in the particular case at hand. This has led to many cases being managed through bespoke procedures similar to a GLO, but without a formal GLO being made.

In addition, there has been a trend for claimant firms and funders to seek alternative procedures that might allow claims to be brought on an opt-out basis to avoid the challenges and costs of having to recruit claimants to join the case at an early stage.

The role of the GLO has therefore diminished over the years. It remains an important part of the picture of class action litigation in England and Wales, particularly in cases that involve large numbers of claimants who are represented by separate law firms, where the full procedural machinery may be needed. However, it seems unlikely to regain its place as the most common route for pursuing class actions, given the widespread perception that, in many cases, bespoke case management can achieve similar benefits at a lower cost.

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