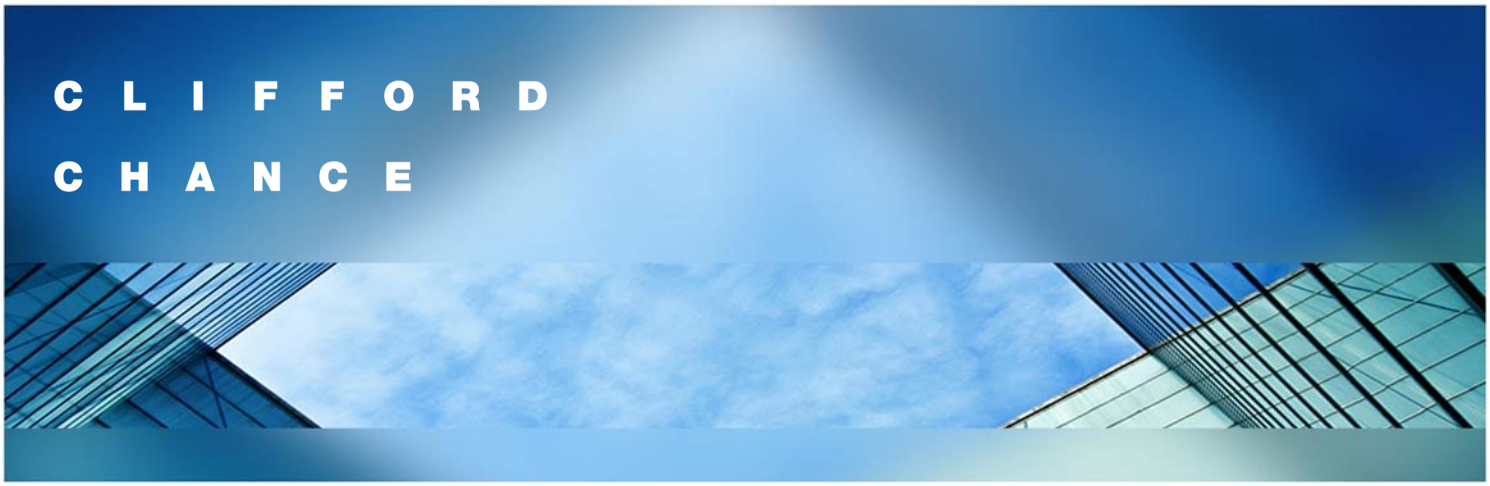

WIRRAL V INDIVIOR AND RECKITT – HIGH COURT REJECTS REPRESENTATIVE ACTION FOR "STOCK DROP" CLAIM

In *Wirral Council as administering authority of Merseyside Pension Fund v Indivior PLC and Reckitt Benckiser Group PLC* [2023] EWHC 3114 (Comm), the High Court struck out a representative action brought by Wirral Council against Indivior plc and Reckitt Benckiser Group plc under sections 90 and 90A FSMA 2000.

Following a two-day hearing in the High Court, Mr Justice Michael Green concluded that (i) the proposed representative action in respect of Wirral's shareholder claims would have unfairly and unjustly ousted the Court's jurisdiction to manage the claims as it sees fit, and (ii) the claimants' bifurcated trial proposal was not sufficient reason to justify a representative action. His judgment represents a significant blow for those hoping that Lord Justice Leggatt's remarks in *Lloyd v Google* [2021] 3 WLR 1268 had opened the door to the use of representative actions to determine issues of liability in securities claims.

After *Prismall v Google UK Ltd* and ors [2023] EWHC 1169, in which Mrs Justice Heather Williams DBE struck out a representative action in a data claim, there is now considerable uncertainty as to the circumstances in which the Courts will allow representative actions to proceed. That judgment is pending appeal, as is Mr Justice Knowles' decision to reject a strike-out application in the case of *Commission Recovery Ltd v Marks & Clerk LLP* [2023] EWHC 398 (Comm). Unlike the *Prismall* and *Commission Recovery* cases, the Wirral Council claim adopted a bifurcated approach from the outset. This was the main reason for Wirral Council's pursuit of a representative action but ultimately a key factor in the judge's decision to strike out the representative action.

WIRRAL V INDIVIOR AND RECKITT

Background

Wirral Council (acting as representative of various investors in Indivior and Reckitt) alleged that the defendants participated in a scheme to fraudulently market a drug sold to treat opioid addiction via a US subsidiary, Reckitt Benckiser Pharmaceuticals, Inc. ("**RBP**"). In April 2019, the US Department of Justice brought a federal indictment against RBP and Indivior, and settlements

with the US authorities were reached between July 2019 and July 2020. Further to the federal indictment and settlements, proceedings were brought by shareholders in the US (now settled) and in England in relation to omissions from or allegedly false or misleading statements in published information.

In England, a representative action was issued in September 2022 by Wirral Council. Three claim forms were also issued on behalf of groups of claimants in parallel multi-party proceedings. The multi-party claims were subsequently stayed by consent pending resolution of the representative action. The proceedings were brought under sections 90, 90A and Schedule 10A of FSMA whereby an issuer has liability for loss suffered as a result of misleading statements in, or dishonest omissions from, certain published information relating to securities, or as a result of a dishonest delay in publishing such information. Wirral Council argued that the fact of the scheme and its potential consequences were information which the defendants were required to disclose.

Wirral Council brought the claim in a representative capacity under CPR 19.8 (previously CPR 19.6) on behalf of a "*group or group of persons with the same interest*", being those that held, acquired or disposed of interests in securities of the defendants between 2006 and the present. Unlike other similar representative proceedings which have recently been struck out by the English Courts, namely *Lloyd v Google* and *Prismall v Google*, this case was brought on an "*opt-in*" basis meaning that represented persons needed to have standing to bring their own claims and to sign up to a Costs Sharing and Governance Agreement. The claimants comprise a number of institutional investors (in both the multi-party proceedings and the representative action) and 302 retail investors in the representative action only.

Further, unlike recent cases, Wirral Council adopted a bifurcated approach from the outset, proposing an initial representative trial of "*common issues*" of liability and of the defendants' knowledge of or recklessness to the publication of misleading information. This would leave issues not common to the parties such as (i) the claimants' standing, (ii) reliance on published information, (iii) causation, (iv) limitation, and (v) assessment of damages to be heard separately.

Wirral Council argued that because it was accepted by the defendants that the "*same interest*" threshold requirement was met, it was entitled "*as of right*" to bring a representative action. It focused on the advantages of the mechanism in avoiding front-loading costs on the represented persons – namely, they would get the benefit of findings without having to plead their case, provide disclosure or participate in the proceedings in other ways. They could also wait to decide whether to bring an individual claim until after the common issues had been decided. Wirral Council argued that the benefits in terms of efficiency and access to justice applied both to institutional investors and retail investors.

In bringing their strike-out application, the defendants argued that the representative action would prevent the Court from being able to exercise its case management powers (including making decisions on whether and how to bifurcate the proceedings). They further argued that there were general benefits to the participation of individuals in proceedings from the outset, including sharing the burden of litigation and mitigating the risk of fading memories.

What are the key aspects of stock drop claims?

The principal statutory basis for these claims is found in sections 90 and 90A of the Financial Services and Markets Act 2000 ("**FSMA**").

Under **section 90**, companies and their directors (and, perhaps, their professional advisors) can be liable to pay compensation to shareholders for any untrue or misleading statement or material omission in listing particulars or a prospectus.

Defendants to s.90 claims will not be liable if they can demonstrate that they reasonably believed the statements were true or not misleading or that any matters were properly omitted.

Section 90A provides a further basis of liability where an issuer makes an untrue or misleading statement or omission in other published information, such as annual accounts or reports. Under s90A, claimants must prove that:

- they acquired, continued to hold or disposed of shares in reliance on the published information;
- they suffered loss as a consequence of the misstatement or omission; and
- their reliance on the misstatement or omission was reasonable.

There is no cause of action against directors or advisors under s90A, although a company subject to a s90A claim can in turn bring proceedings against its directors, advisors or other third parties under other causes of action.

Key findings

The Court's powers of case management

Green J decided that allowing the representative action – in the way that it had been framed by Wirral Council – to succeed would deprive the Court of its case management powers. He stated that the Court was required actively to case manage claims so as to further the overriding objective, noting that he did not see "*how the Court can be furthering the overriding objective by depriving itself of the ability to apply the overriding objective in case managing a claim*". Allowing the representative action to proceed would mean that a judge had no power to decide the best way to manage the claims by reference to all relevant factors, and that would take away from the Court "*one of its prime functions to manage and deal with cases justly and at proportionate cost*". Green J held that it is not for the claimants to remove the discretion of the Court, a proposition that he described as "*quite extraordinary*".

Access to justice

Green J conducted a detailed analysis of Lord Leggatt's remarks in *Lloyd v Google*. He held that bifurcation may be a potential solution to a particular issue in representative actions, but the availability of a bifurcated process was not itself sufficient reason to justify a representative action. For example, bifurcated actions could be brought in circumstances where there are a number of claimants whose claims are likely to be too small to bring individually. Wirral Council had argued that there were a number of retail investors who could not bring their claims through the multi-party proceedings, and thus would be deprived of access to justice if the representative action was struck out. However, it emerged that the litigation funders had refused to provide funding to the retail investors in the multi-party proceedings without an "*adequate and coherent explanation from the funders as to why they* [*had*] *apparently discriminated against*" them. In addition, any party wishing to opt-in to the representative action had to sign up to "*quite stringent*" costs sharing provisions, and Green J noted that the financial conditions to participate in those proceedings may in themselves be a disincentive to retail investors.

Wirral Council had not, therefore, shown that claims could not be brought other than by way of a representative action, and Green J held that "*where there are perfectly feasible non-representative proceedings, the Court should be able to weigh whether those are preferable to representative proceedings both from the parties' and the Court's point of view*".

Engagement by the Claimants

Wirral Council's case was that bifurcation was *"the sole purpose and stated advantage*" of the representative action, expressly so that claimants would not have to take significant steps to advance their claims before a first trial took place in relation to the common issues. The investors and their funders did not want the risk and costs of pursuing the multi-party proceedings if they may be required to provide information, disclosure or witness evidence before that first trial.

Green J stated that this was "*not a legitimate basis for depriving the Court of its power to case manage such claims*", and claimants must be required to "*properly plead and particularise their cases from the beginning… it should not be as simple as subscribing to litigation without any risk or cost being incurred*". He drew particular attention to *Manning & Napier v Tesco plc*

[2017] EWHC 3296 (Ch), in which Hildyard J raised concerns about the lack of particularisation in the claimants' plea of reliance and cautioned that joining a group action was not "*a matter of subscription*" but it requires an "*orderly and careful assessment in respect of each claimant that the statutory requirements to establish liability are appreciated and satisfied*".

In this case, Green J held that it was more likely proceedings would be dealt with expeditiously overall if claimants were required to provide material in support of their individual claims, and to engage with proceedings, from an early stage.

Comment

Wirral Council argued that litigation funders were not prepared to fund shareholder claims on behalf of retail investors because they are not economically viable prior to a finding of liability being made. In particular, they drew attention to the requirement under s90A FSMA for each claimant to prove that they in fact relied upon the relevant statement or omission in the published information, which they claimed disincentivises funders from bringing securities claims on behalf of large numbers of retail investors. As a result, they argued, there is an access to justice issue in the UK, particularly when compared with Australia, where there is a securities class action regime with a bifurcated process.

However, Green J rejected that argument on the basis that the funders had "*engineered*" a situation in this case where the retail investor claims could only proceed by way of a representative action. Further, he drew attention to the fact that, when introducing s90A FSMA, the UK Government stated that the new regime had deliberately been shaped to minimise the potential for speculative legislation (i.e. so as to prevent the private securities litigation culture that had developed in the US).

Given Green J's emphasis on the importance of claimant engagement in litigation from the start, and the need for work to be undertaken on claimant-specific issues, it is unclear when (if ever) representative actions would be considered appropriate for s90A FSMA claims. What does, however, remain clear is that the Courts take very seriously their powers of case management. Despite the availability of various mechanisms for bringing group actions in England and Wales (including, for example, by way of Group Litigation Orders), in a number of recent cases the Courts have appeared to show a preference for using their traditional powers of case management rather than make use of the group action mechanisms.

That said, Green J did note that there "*is no doubt that Lord Leggatt* [in *Lloyd v Google*] *wanted to see more use made of the representative action, in the absence of class action rules, and for it to be a flexible method of getting such cases before the Courts*." He further noted that he was not deciding the case on policy grounds, and stated that he "*did not know if the Government has considered legislating for class actions in this area*". Claimant groups will likely pick up on the reference to the "*absence of class action rules*" and add this to a growing clamour of voices calling for further legislation on this subject.

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