Neutral Citation Number: [2023] EWHC 3114 (Comm)

Case Nos: FL-2022-000018
FL-2022-000020

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
COMMERCIAL COURT (KBD)
FINANCIAL LIST

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 5 December 2023

Before:

THE HON MR JUSTICE MICHAEL GREEN

- -

Between:

Wirral Council as administering authority of Merseyside Pension Fund (the Representative Claimant)	**Representative Claimant**
- and –	
Indivior PLC	**Defendant**
And Between:	
Wirral Council as administering authority of Merseyside Pension Fund (the Representative Claimant)	**Representative Claimant**
- and –	
Reckitt Benckiser Group PLC	**Defendant**

- -
- -

Graham Chapman KC, Alex Barden and **Joseph Leech** (instructed by **Mishcon de Reya LLP**) for the **Representative Claimant**
Conall Patton KC (instructed by **Freshfields Bruckhaus Deringer LLP**) for **Indivior PLC**
Helen Davies KC, Tony Singla KC and **Jonathan Scott (**instructed by **Linklaters LLP)** for **Reckitt Benckiser Group PLC**

Hearing dates: 20 & 21 November 2023

- -

Approved Judgment

This judgment was handed down remotely at 10.30am on Tuesday 5 December 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

.....

Mr Justice Michael Green:

Introduction

1. The Supreme Court in *Lloyd v Google LLC* [2022] AC 1217 ("***Lloyd v Google***") shone a light on the availability of representative proceedings under (what is now) CPR 19.8. This led the Representative Claimant in both these proceedings, Wirral Council as administering authority of Merseyside Pension Fund ("**Wirral**"), to begin "**Representative Proceedings**" against each Defendant, Reckitt Benckiser Group plc ("**Reckitt**") and Indivior plc ("**Indivior**" and collectively the "**Defendants**"), to pursue claims under ss.90 and 90A and Schedule 10A of the Financial Services and Markets Act 2000 ("**FSMA**"). The Defendants have issued applications to strike out the Representative Proceedings (or that Wirral may not act as a Representative Claimant, but this amounts to the same thing) on the basis that the Representative Proceedings are not the appropriate procedure for these claims under FSMA. The Defendants say that the claims should be brought in the usual way by ordinary multi-party proceedings with each purportedly represented person being a claimant.

2. This is the first time that this has been attempted for securities claims under ss.90, 90A and Schedule 10A FSMA. There have been a number of such claims brought by way of ordinary CPR Part 7 proceedings in recent years and these have been actively case-managed by Judges sitting in the Financial List, in a largely consistent way. In fact multi-party claim forms have been issued against both Defendants by many of the investors who have opted-in to the Representative Proceedings alleging the same causes of action under FSMA ("**the Multi-party Proceedings**"). Those proceedings have been stayed pending resolution of these applications.

3. There is no dispute that the applications are to be resolved by the exercise of a discretion so as to give effect to the overriding objective. The Defendants' main point is that if the Representative Proceedings are allowed to continue they would prevent the Court from case-managing the proceedings in the manner it has done in other similar cases and will allow Wirral, the Representative Claimant, to dictate the structure of the proceedings, in particular as to what issues are to be tried at the bifurcated first stage trial and whether there should be some preparation for the next stage in the process before that first trial. Wirral says that it is entitled to issue such claims and that *Lloyd v Google* effectively endorses such an approach. Unless the Defendants can show some fundamental flaw in the route it has decided to follow, Wirral maintains that the Court should not strike out the claims.

4. Ms Helen Davies KC, leading Mr Tony Singla KC and Mr Jonathan Scott, appeared for Reckitt and made the bulk of the submissions on behalf of the Defendants. Mr Conall Patton KC appeared for Indivior and largely adopted Ms Davies KC's submissions. Mr Graham Chapman KC, leading Mr Alex Barden and Mr Joseph Leech appeared for Wirral. I am grateful to them and their teams for their clear and helpful submissions.

Background

5. It is unnecessary to explain in great detail the factual basis for the claims. They are founded on the allegation that there was a "**Scheme**" in which the Defendants participated, through a US subsidiary called Reckitt Benckiser Pharmaceuticals, Inc, ("**RBP**") in relation to the marketing of a drug under the brand name "**Suboxone**" for

the treatment of opioid addiction. In 2002, the US Food and Drug Administration approved an application by RBP for the sale of Suboxone in tablet form and it was granted a 7-year period of orphan drug exclusivity.

6. The Scheme is said to have taken place between 2006 and 2013 when the Defendants carried out a plan to switch the market for Suboxone from the tablet form to a sublingual film version. This is alleged to have been done because the tablet form was losing its protection, allowing in generic competition, whereas it was hoped that the sublingual film version would have an added period of protection. The Scheme was effected by making allegedly fraudulent claims that the film version was safer for children when the Defendants knew that it was potentially more dangerous. The Scheme did have the effect that competition from generic manufacturers of Suboxone tablets was thwarted, despite their tablets being cheaper and probably safer for children (although neither Particulars of Claim contain any allegation to this effect).

7. On 9 April 2019, the US Department of Justice publicised details of a federal indictment brought against RBP (then known as Indivior Inc) and Indivior. (Indivior had demerged from Reckitt in December 2014.) Wirral says that this revealed details of the Scheme. There were also related Federal Trade Commission lawsuits. In or around July 2019 (in the case of Reckitt) and July 2020 (in the case of Indivior), settlements were reached by the Defendants with the US authorities whereby Indivior agreed to pay US$600m and Reckitt US$1.4bn in settlement of their liabilities. A US subsidiary of Indivior, Indivior Solutions, Inc, and Indivior's former CEO and medical director all pleaded guilty to certain criminal charges brought against them in relation to the Scheme.

8. The Defendants will apparently deny that they engaged in the Scheme. They will say that the settlements were entered into without any admission of liability. They have not yet put in a Defence to the claims because of these applications.

The claims brought against the Defendants

9. The Representative Proceedings were issued on 21 September 2022. On the same day and the day after, there were three Claim Forms issued against the Defendants (two against Reckitt and one against Indivior) on behalf of a large number of Claimants in the Multi-party Proceedings. Those Claims Forms have not been formally served and, as stated above, they have been stayed by consent pending resolution of these applications. The Claimants have however provided (not by way of service) draft Particulars of Claim in the Multi-party Proceedings.

10. Under s.90A and Schedule 10A FSMA issuers of securities are potentially liable to investors who have suffered loss as a result of misleading statements or dishonest omissions in certain "*published information*" relating to the securities or a dishonest delay in publishing such information. Wirral's case is that the facts and potential consequences of the Scheme were information that the Defendants were required to disclose in published information (and in a prospectus issued by Indivior which is also subject to a claim under s.90 FSMA) and the Defendants knew that disclosure of the information would cause huge damage to their market capitalisation, as happened on the day the US indictment became public.

11. It is a condition of liability under s.90A and Schedule 10A FSMA that a person discharging managerial responsibility (a "**PDMR**") within the issuer knew the

published information contained an untrue or misleading statement or was reckless as to the same. In relation to omissions from the published information, a PDMR within the issuer has to have known that this was a dishonest concealment of a material fact. A PDMR means essentially a director of the issuer, including an alleged *de facto* director – see *Allianz Global Investors GmbH & Ors v G4S Ltd* [2022] EWHC 1081 (Ch). It is clear that a case under s.90A and Schedule 10A FSMA requires the dishonesty of a PDMR to be proved.

12. Further, the effect of paras 3(1) and 3(4) of Schedule 10A FSMA is that an issuer is only liable to pay compensation to a person who acquires, continues to hold or disposes of the securities in reasonable reliance on published information to which Schedule 10A applies and suffers loss in respect of the securities as a result of any untrue or misleading statements in that published information or the omission from that published information of any matter required to be included in it.

13. By the Representative Proceedings, Wirral seeks to try what it calls the "*common issues*", which are those related to the Defendants and which are not dependent on any issue that is particular to any individual investor. Therefore issues such as an investor's standing to sue, reliance, causation and quantum are not common or defendant-side issues and are not therefore part of the Representative Proceedings. This can be seen from the declarations that Wirral seeks as set out in the Reckitt Claim Form that:

> "(a) The Defendant's published information between 2006 and the present (i) omitted information which it was required to include, including a full and fair description of the Scheme, and/or (ii) contained statements that were untrue or misleading in light of the Scheme and/or (iii) delayed in the publication of a full and fair description of the Scheme.
>
> (b) One or more persons discharging managerial responsibilities within the Defendant (i) knew such omissions to be a dishonest concealment of a material fact, and/or (ii) knew or was reckless as to whether such statements were untrue or misleading, and/or (iii) acted dishonestly in delaying publication of the information."

14. The Claim Form goes on to make clear that the claims for declarations are made by Wirral in a representative capacity under CPR 19.6 (which this year became CPR 19.8) on behalf of a "*group or groups of persons with the same interest*" that is those who held, acquired or disposed of interests in securities of the Defendant between 2006 and the present date. These have been described as "*opt-in*" Representative Proceedings because not only do the represented persons have to have standing to bring their own claims but they also will have had to sign up to a Costs Sharing and Governance Agreement and have had their identities made known by Wirral's solicitors to the Defendants' solicitors. Wirral proposes that a cut-off date for signing up be set by the Court for some time in 2025. So these are not "*opt-out*" proceedings in which all investors in the Defendants' securities are to be represented. Rather it is limited to those who have been identified and agreed to the costs sharing and governance arrangements that have been put in place.

15. The draft Particulars of Claim in the Multi-party Proceedings are materially identical to the Representative Proceedings in the way that they deal with the defendant-side issues. However, they are brought on behalf of numerous institutional investors who are listed in schedules to the respective Claim Forms – a total of 286 in the Reckitt Claim Forms and 153 in the Indivior Claim Form. The draft Particulars of Claim also plead the Claimants' reliance on the published information and the alleged untrue or misleading statements or omissions contained therein. And they seek damages rather than the declarations sought in the Representative Proceedings. The pleas of reliance were much criticised by the Defendants who say that they do not work in law.

16. It is a striking feature of these applications that all the institutional investors who are Claimants in the Multi-party Proceedings are also signed up to the Representative Proceedings (save for a small number who subsequently withdrew) and would prefer, for the perhaps obvious reasons I will come on to, that those proceedings be allowed to continue. They are joined in the Representative Proceedings by a present total of 302 retail investors (although, because of duplication, there are some 233 different retail investors across both claims) who have signed up and been accepted and agreed to the funding arrangements in place for the Representative Proceedings. Mr Chapman KC told me that the retail investors are not parties to the Multi-party Proceedings because the litigation funders are not prepared to allow them to join the Multi-party Proceedings. The reasons for this are unclear but it is prayed in aid of Mr Chapman KC's argument that such retail investors would otherwise be denied access to justice if the Representative Proceedings are not allowed to go ahead. Mr Chapman KC also suggested that the number of retail investors joining the Representative Proceedings is likely to increase if Wirral succeeds in its opposition to these applications.

17. The distinct advantage of the Representative Proceedings from Wirral's and the Multi-party Proceedings Claimants' point of view is that there will be no front-loading of costs on claimant-side matters, such as standing and reliance. All the burden will be on the Defendants to deal with the common issues and defend the relief sought in the Representative Proceedings, namely the two declarations set out above. The Defendants say simply that it should be for the Court to decide how to case manage the proceedings and what should be done and when, taking into account both sides' positions and more generally the administration of justice and the overriding objective.

18. Therefore I think it is helpful first to look at how these sorts of securities claims have to date been managed by the Court; and then consider whether it is appropriate to proceed in the way Wirral has done, by reference to *Lloyd v Google*.

The management of securities claims

19. There have not been many securities claims under s.90A and Schedule 10A FSMA since its introduction in 2010. Mr Chapman KC would put that down to the disinclination of investors to litigate in the UK requiring a heavy front-loading of costs. Furthermore, none of the s.90A and Schedule 10A FSMA claims have actually reached a trial, even of a first stage issue. Some have settled and others are progressing towards a trial.

20. Like any other forms of civil litigation, securities claims must be case managed and tried in accordance with the overriding objective, in particular so that the Court can deal with cases justly and at proportionate cost. The Court's duty of active case management

specifically includes, by CPR 1.4(2), "*deciding the order in which issues are to be resolved*", "*helping the parties to settle the whole or part of the case*", "*fixing timetables or otherwise controlling the progress of the case*" and "*dealing with as many aspects of the case as it can on the same occasion*".

21. Case management issues that commonly arise for determination in securities claims include whether there should be a split trial and, if so, what split; and, if there is a split trial, whether and to what extent progress should nevertheless be made on the deferred issues in the meantime, e.g. by requiring the provision of further information, disclosure or witness evidence. The Court weighs the different options by reference to the particular circumstances of the case and after there has been a debate between the parties and the Court at a CMC, normally after the close of pleadings. Critically it is down to the Court to decide for itself what the appropriate case management should be for the case before it.

22. In *Manning & Napier v Tesco plc* [2017] EWHC 3296 (Ch) ("*Tesco*"), Hildyard J was concerned about the lack of particularisation in the Claimants' plea of reliance. At [29], Hildyard J said as follows (underlining added):

> "I am satisfied in this case that, on a matter which is absolutely central to the statutory form of action, that is to say, the issue of reliance, the court should be properly astute to ensure that sufficient particularity is supplied. That is both in order to ensure that the defendant knows precisely what is alleged, or sufficiently precisely what is alleged, and also to focus the mind of each of the individual claimants, who have brought very serious allegations, as to precisely the basis on which individually they have proceeded. Joinder of claimants to Group actions, whether or not subject to a GLO, should not be a matter of subscription but of orderly and careful assessment in respect of each claimant that the statutory requirements to establish liability are appreciated and satisfied. I would note parenthetically, without in any way suggesting that this applies in the particular case, that there is a danger in the case of group actions that people do subscribe to the action in the expectation, or at least hope, of settlement, without at that stage giving sufficient focus to the need for its case to be tested with the same degree of particularity as would be the case if they were fewer in number."

Hildyard J's concerns about inadequate assessment of individual claims at the outset and joinder as "*a matter of subscription*" could be a description of what the Representative Proceedings in this case seek to achieve.

23. In *Allianz Global Investors GmbH & Ors v RSA Insurance Group plc* [2021] EWHC 570 (Ch), Miles J initially ordered a split trial with the issue of reliance to be determined in the first trial. He noted at [52] that *"more rather than fewer issues should be tried at the first trial"* which, he thought, would make a settlement of the remaining issues more likely. At [55] he said that "*the claimants have chosen to bring this case late in the limitation period and the more time that passes the more difficult it will be for the parties and the court to determine what happened on a true factual basis"*. At [56], Miles J emphasised that *"*[t]*he claimants have brought this claim and must be ready to take part in it fully"*, and at [64] he said this (underlining added):

> "The next point concerns the allocation of the litigation burden as between the parties. The defendants are entitled to examine and scrutinise the claimants' case, just as the claimant is entitled to examine the defendant's conduct. The claimants' proposal would effectively mean postponing their burden until a later stage, while placing almost all the work on the defendant. Sometimes, by its nature, litigation is lopsided in that way: the claimant has no evidence to give and the case entirely concerns the conduct of a defendant. But, here, the imbalance would be created by the proposed order splitting the trial. It seems to me that the claimants, having brought the action, should be prepared to undertake substantial work in ensuring the expeditious progress of the proceedings to resolution."

24. Subsequently (in a Ruling dated 28 February 2022), Miles J revisited the split of issues, ordering that reliance should be determined at the second trial rather than the first. However, he also ordered (in the face of opposition from the claimants) that a sample of claimants should give disclosure in relation to reliance in advance of the first trial. He made that order for several reasons, including that the disclosure could be *"helpful for the purposes of settlement"*, that it would mitigate the risk posed by witnesses' memories fading, that it would lead to a more appropriate allocation of the litigation burden, and that such disclosure would mean that *"the parties and the court would not be starting from a standing start in the event that the claimants succeed"* at the first trial.

25. In *Various Claimants v G4S Limited* [2022] EWHC 1742 (Ch), Falk J, as she then was, ordered a split trial, but ordered the claimants to take several material steps in relation to issues to be the subject of the second trial in advance of the first trial, including:

    (a) a process of claimant sampling on the issue of reliance, which she anticipated would be followed by disclosure from sample claimants (with the scope of that disclosure to be determined at a further CMC before the first trial).

    (b) all claimants were ordered to "*clarify their individual cases about what individuals relied on, when, and on what statements, and to disclose or provide details of any specific meetings or communications on which they rely*". Falk J anticipated that this information would be used in the sampling exercise and would assist the defendant in understanding the reliance case, which would "*promote the potential for settlement*".

    (c) Falk J also anticipated, subject to discussion at a further CMC, that the sample claimants (and possibly others) would provide witness statements in advance of trial 1, at least as regards any case on reliance by particular individuals on particular statements or documents.

26. In the course of her judgment Falk J emphasised that "*some progression of the claimants' case is needed, in my view, to ensure that settlement discussions can best be facilitated*", that there was "*a point about ensuring proper engagement by the claimant*", and that by ordering the claimants to progress matters that are the subject of the second trial in advance of the first trial she hoped "*to reduce, so far as possible, the gap between trials, ensure, as already indicated, that matters relevant to defendant disclosure are brought out, and try to ensure an appropriate balance and fairness in the burden between the parties*": [43] – [44]. Falk J made similar orders in the related case of *Various Claimants v Serco Group plc* [2022] EWHC 2052 (Ch).

27. I have also had occasion to hear argument on these matters of case management in *Various Claimants v Standard Chartered* [2023] EWHC 2756, but I deferred the issue of split trial to a later CMC. The point is that these are very much live issues before the Court upon which a decision has to be made to suit the particular circumstances of that case.

28. The Representative Proceedings however predetermine those issues of split trial and other matters of case management in the Claimants' favour without being put before the Court. Whether that is appropriate or not needs to be determined by reference to the scope of CPR 19.8 and *Lloyd v Google*.

CPR 19.8 and *Lloyd v Google*

29. CPR 19.8 has been in the same or similar terms for many years. It relevantly provides as follows:

> "(1) 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.
>
> (2) The court may direct that a person may not act as a representative.
>
> (3) Any party may apply to the court for an order under paragraph (2).
>
> (4) Unless the court otherwise directs any judgment or order given in a claim in which a party is acting as a representative under this rule –
> (a) is binding on all persons represented in the claim; but
> (b) may only be enforced by or against a person who is not a party to the claim with the permission of the court.
> (5) This rule does not apply to a claim to which rule 19.9 applies."

30. CPR 19.9 provides for representation orders to be made by the Court in certain specified claims, namely those concerned with the estates of deceased persons, property subject to a trust or the meaning of a document including a statute. This is particularly aimed at representation of persons who cannot be ascertained or who are unborn, which situation normally arises in those contexts. In those cases, an order is required from the Court and there is no automatic right to begin such proceedings as under CPR 19.8. Nevertheless, as Ms Davies KC submitted, the Court will, in the exercise of its discretion, still apply the overriding objective.

31. Mr Chapman KC placed great emphasis on the fact that, so long as the "*same interest*" threshold requirement is met, Wirral is entitled "*as of right*" to bring the Representative Proceedings. It is correct to say that, because it is accepted that the "*same interest*" threshold requirement is satisfied, Wirral was entitled under CPR 19.8(1)(a) to commence the Representative Proceedings. But that has no bearing on the question as to whether the Court's discretion, which arises on an application under CPR 19.8(2)

and (3), should be exercised in favour of allowing the proceedings to continue. As Ms Davies KC submitted, the Defendants did have to issue such an application in order to bring the matter before the Court, but once it is there, the Court has to exercise its discretion as described by Lord Leggatt in [75] of *Lloyd v Google*, which I will come on to. In other words, as this is the same discretion as would arise under CPR 19.8(1)(b), or indeed CPR 19.9, no presumption arises in favour of the Representative Proceedings by reason of their having been started "*as of right*" under CPR 19.8(1)(a).

32. There is no doubt that Lord Leggatt's extensive consideration of the history and availability of the representative action in *Lloyd v Google*, albeit all *obiter*, suggests that a bifurcated process can be appropriate for such an action. Mr Chapman KC submitted that the use of the Representative Proceedings in this case, with effective bifurcation of the issues so that claimant-side issues are deferred to what he called "*follow-on*" claims, has been effectively endorsed by the Supreme Court in *Lloyd v Google*. As he rightly said, the Supreme Court were unanimous, Lord Reed PSC, Lady Arden, Lord Sales and Lord Burrows JJSC agreeing with Lord Leggatt's judgment.

33. But it is important to note at the outset, that in *Lloyd v Google*, the claimant, Mr Lloyd, was not seeking bifurcation, because his proceedings were unworkable and unviable unless all issues, including damages, could be resolved at the trial of the representative action. The Supreme Court however held that, because there would need to be an individual assessment of damages for every represented person, the representative action could not resolve those issues without some form of bifurcation. It is Lord Leggatt's explanation as to how bifurcated representative proceedings are possible that Mr Chapman KC most relies on from the case. It is necessary however to understand how Lord Leggatt got to that position.

34. Mr Lloyd was claiming, with financial backing, as a representative of the class of Apple iPhone users in England and Wales at the material time. That class was estimated to be in excess of four million people and it was proposed on an "*opt-out*" basis. The claim on behalf of that class was against Google which was said to have breached the Data Protection Act 1998 in secretly tracking the internet activity of Apple iPhone users and using the data for commercial purposes without the users' knowledge or consent. As Lord Leggatt said in [3] class actions are readily available in the United States, Canada and Australia, but in the UK the only sector in which a statutory regime has been established is for competition claims. So Mr Lloyd sought to use the representative procedure under CPR 19.8. The issue arose not on an application under CPR 19.8(2) but in the context of considering an application for permission to serve the proceedings out of the jurisdiction.

35. In [24] to [32], Lord Leggatt explained the other forms of collective actions: group actions which have the disadvantage that they have to be "*opt-in*" (although this is an "*opt-in*" case); and collective proceedings, which can be either "*opt-in*" or "*opt-out*", but are presently limited to competition claims and which have a carefully calibrated regime that allows for an "*aggregate award of damages*".

36. Lord Leggatt then embarked on a detailed historical survey of representative actions under what is now CPR 19.8, but which has been available for "*several hundred years*" – [33] to [66]. He explained that the origins of the rule were as a solution to the "*complete joinder rule*" whereby all persons materially interested in the subject-matter of the suit had to be parties to it. He also showed how whenever the Courts attempted

to narrow the rule, this tended to be corrected by later appellate decisions that emphasised its broad nature – see, for example, *Duke of Bedford v Ellis* [1901] AC 1.

37. Lord Leggatt, importantly for this case, referred to *Prudential Assurance Co Ltd v Newman Industries Ltd* [1981] Ch 229 ("*Prudential*") which he described as an example of a bifurcated process being used in a representative action. At [48], Lord Leggatt said of *Prudential* as follows:

> "This decision was important in demonstrating the potential for a bifurcated process whereby issues common to the claims of a class of persons may be decided in a representative action which, if successful, can then form a basis for individual claims for redress. More generally, the *Prudential* case marked a welcome revival of the spirit of flexibility which characterised the old case law."

Prudential was also relied on in [58] and [81] of Lord Leggatt's judgment and he clearly regarded it as an important decision, albeit that it was overturned by the Court of Appeal on the substantive point as to whether the shareholders had a personal cause of action against the directors. I will deal with *Prudential* in more detail below.

38. In [49] to [55], Lord Leggatt went on to consider whether the fact that damages were being claimed which were necessarily personal to the members of the represented class was a bar to the use of the representative action. He concluded that it was not. And he explained that *Emerald Supplies Ltd v British Airways plc* [2011] Ch 345 did not decide that a representative action could not be brought if damage is an ingredient of the cause of action. Rather he suggested that the difficulties that the Court of Appeal identified in the representative action could have been solved by either adjusting the class or by adopting the *Prudential* form of bifurcation.

39. Lord Leggatt placed some reliance on Commonwealth authorities and some academic articles. Mr Chapman KC highlighted a quote from an Australian case in [60] in which it was said that: "*the simplicity of the rule is also one of its strengths, allowing it to be treated as a flexible rule of convenience in the administration of justice and applied 'to the exigencies of modern life as occasion requires'…The court retains the power to reshape proceedings at a later stage if they become impossibly complex or the defendant is prejudiced*". Furthermore, Mr Chapman KC submitted that I should have regard to the evidence Wirral has adduced in relation to the experience of Commonwealth jurisdictions in dealing with securities claims, in the same way that Lord Leggatt did.

40. The heart of Lord Leggatt's judgment on the availability of the representative procedure is contained within [67] to [84]. It should not be forgotten that the only way that Mr Lloyd could bring his claim on behalf of over four million Apple iPhone users was by way of representative action. If that were not available, then there would be no claim. It was the representative action or nothing. As Lord Leggatt said in [67]: "*it is better to go as far as possible towards justice than to deny it altogether and that, if you cannot realistically make everyone interested a party, you should ensure that those who are parties will "fairly and honestly try the right*"". So as he makes clear in [68], the Court should strive to allow such a claim to be brought with a broad interpretation of the rule. In particular, as he explains in [69] to [74] the "*same interest*" threshold requirement should be interpreted purposively in the light of the overriding objective and the rationale for the rule.

41. All parties rely on [75] which summarises the Court's discretion. It says as follows:

> "(ii) The court's discretion
>
> 75 Where the same interest requirement is satisfied, the court has a discretion whether to allow a claim to proceed as a representative action. As with any power given to it by the Civil Procedure Rules, the court must in exercising its discretion seek to give effect to the overriding objective of dealing with cases justly and at proportionate cost: see CPR rule 1.2(a). Many of the considerations specifically included in that objective (see CPR rule 1.1(2)) - such as ensuring that the parties are on an equal footing, saving expense, dealing with the case in ways which are proportionate to the amount of money involved, ensuring that the case is dealt with expeditiously and fairly, and allotting to it an appropriate share of the court's resources while taking into account the need to allot resources to other cases - are likely to militate in favour of allowing a claim, where practicable, to be continued as a representative action rather than leaving members of the class to pursue claims individually."

42. Ms Davies KC submitted that Lord Leggatt was there confirming that once the matter is before the Court the discretion has to be exercised so as to give effect to the overriding objective. She said that Lord Leggatt does not say that where the representative proceedings have been started as of right because the "*same interest*" threshold has been passed there is any presumption in favour of allowing them to continue. Rather Lord Leggatt dealt with it in a quite general way without regard to how the matter had come before the Court. While Mr Chapman KC did not expressly disagree with that, he did refer to Lord Leggatt saying that the overriding objective factors "*are likely to militate in favour of allowing a claim, where practicable, to continue*". It seems to me that Lord Leggatt was simply making clear that the Court needs to exercise its discretion so as to further the overriding objective and that has to be done by reference to the particular circumstances pertaining to the case before it.

43. Lord Leggatt considered four further aspects of representative actions: (i) no requirement for the consent of each member of the represented class (ie it can be "*opt-out*"); (ii) the definition of the class; (iii) the liability for costs; and (iv) "*the scope for claiming damages*". The latter section is contained in [80] to [83] and includes the paragraph most relied on by Mr Chapman KC. It is important to recognise that, as explained in [80] and in the section's title, Lord Leggatt was dealing with the fact that representative actions can be used even where the represented persons have their own separate cause of action and claim for damages. Lord Leggatt concluded that the assessment of individual claims to damages can be left to another stage by use of a bifurcated process.

44. He explained this in [81] as follows (underlining added):

> "In cases where damages would require individual assessment, there <u>may</u> nevertheless be advantages in terms of justice and efficiency in adopting a bifurcated process - as was done, for example, in the *Prudential* case [1981] Ch 229 - whereby common issues of law or fact are decided through a representative claim, leaving any issues which require individual determination - <u>whether they relate to liability or the amount of damages</u> - to be dealt with at a subsequent stage of the proceedings."

The paragraph then continued to deal with limitation and [82] and [83] explained the difficulties of dealing with individual damages claims in a representative action.

45. As one can see, in proposing the bifurcated process, Lord Leggatt referred again to *Prudential*, but he expressly limited his comment to cases "*where damages would require individual assessment*". He also said that there "*may*" be advantages, not that there always will be. Having said that, he did go on to suggest that not only damages issues but also issues related to liability could be dealt with at another stage. That seems a little inconsistent to the opening words and with the fact that the section was only seemingly dealing with damages. The point is relevant to this case because it is not only damages issues that Wirral wants to avoid at the trial of the Representative Proceedings, but also issues related to standing, reliance, causation and limitation.

46. Furthermore, as Mr Chapman KC fairly accepted, there is no development in Lord Leggatt's judgment as to the nature of the bifurcation process and how the second stage of the proceedings would work. Nor is there any reference to the case management issues that might arise as a result of bifurcation, in particular whether such a representative action might deprive the Court of its ability to case manage the claims from start to end. In this case, Wirral has been very reticent about how the follow-on claims would work – whether they would be fresh claims, or part of the Representative Proceedings or the Multi-party Proceedings – and it was only in his oral submissions that Mr Chapman KC offered some possible options for that second stage. It seems to me important that both the parties and the Court are clear as to exactly how the process will work through to a conclusion so as to be able to judge whether that is an appropriate course to take.

47. Lord Leggatt did not need to deal with these matters because they were not before the Supreme Court. While he thought that the representative claim could have been brought with bifurcation of the individual damages claims (see [84]), Mr Lloyd did not want that because a bifurcated process would not be practical and it would not have funding because there would be no financial return at the end of the representative stage of the process (see [85]). In the circumstances, bifurcation was not in issue in the case, and Lord Leggatt's suggestions as to possible bifurcation in other cases really were *obiter*. Nevertheless they come from the highest authority and are due the utmost respect. There is no doubt that Lord Leggatt 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.

48. But one does have to be careful about the consequences. One can perfectly understand that the Court should try to ensure that there is appropriate access to justice for those who would not be able to bring claims save by way of representative action. But 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. I do not think that Lord Leggatt would have been contemplating the use of representative proceedings that would effectively deprive the Court of being able to decide which is the best way to case manage such cases based on their own particular circumstances.

49. I also think that some caution needs to be exercised over undue reliance on *Prudential* as a justification for bifurcation in this case. *Prudential* was a very unusual case where the issue as to representation by the plaintiff of all other shareholders in their personal

actions against the directors for damages in respect of a misleading circular and conspiracy only arose at the beginning of the trial. Vinelott J was, in any event, going to try the underlying factual issues both in the context of the plaintiff's own personal action and in the derivative proceedings. So by allowing the plaintiff to bring the claim also in a representative capacity this did not cause any disruption to the trial or require any particular element of case management.

50. It is true to say that Vinelott J adopted a bifurcated process in allowing declarations to be made as to liability but with individual shareholders having to establish their damages claims "*in a separate action*". At p.256F, Vinelott J said as follows:

> "The practical effect of such a declaration would, it seems to me, be no greater and no less than the effect of declarations, first, that the circular was tricky and misleading; secondly, that the individual defendants conspired to procure its circulation in order to procure the passing of the relevant resolution; and thirdly, that in so doing they conspired either to injure the plaintiff and the other shareholders at that date or to commit an unlawful act, or to induce a breach by the first defendant company of its contractual duty to the shareholders…The members of the class who share a common interest in obtaining the declarations I have outlined are shareholders other than the second and fourth defendants as at July 29. A person coming within that class will be entitled to rely on the declarations as res judicata, but will still have to establish damage in a separate action".

The nature of such a separate action was not described and it never reached that stage because the Court of Appeal overturned the declarations on the personal action as being misconceived. But it was clearly limited to damages issues.

51. While *Prudential* was influential in Lord Leggatt's survey of representative actions and the possible use of a bifurcated process and even though there are parallels with the present causes of action under s.90A and Schedule 10A, albeit that these are against the issuing company not its directors, it does not really help on the question of case management and in particular when a decision has to be made at the outset of proceedings, rather than at the trial itself.

52. There have been two reported first instance decisions subsequent to *Lloyd v Google*: (i) *Commission Recovery Ltd v Marks & Clerk LLP* [2023] EWHC 398 (Comm) a decision of Robin Knowles J ("*Commission Recovery*"); and (ii) *Prismall v Google UK Ltd and ors* [2023] EWHC 1169, a decision of Heather Williams J ("*Prismall*"). Both are under appeal and I understand that the appeal in *Commission Recovery* was heard by the Court of Appeal at the same time as this hearing.

53. In *Commission Recovery*, Robin Knowles J refused to strike out a representative claim brought on behalf of clients of patent attorneys in respect of undisclosed commissions for referrals to a service provider. The issue was largely concerned with the "*same interest*" requirement and class composition which is not of relevance to the present cases. Robin Knowles J did deal with discretion and referred to the importance of the overriding objective, in the context of each case's own facts and circumstances (see [79] and [80]). It also seemed to be the case that a representative action was the only way the claims in respect of the secret commissions could be brought, as Robin Knowles J said at [81]: "*If the choice is this or nothing, then better this*". In that sense

it was the same as *Lloyd v Google*, in that the only way the case could proceed was by way of representative action.

54. Mr Chapman KC repeatedly referred to Robin Knowles J's statement that "*we are still perhaps in the foothills of the modern, flexible use of CPR 19.6*" at [91]. That is clearly right but it still should only be considered on a principled basis by reference to the particular circumstances of the case. *Commission Recovery* does not deal with bifurcation or the case management consequences if there were any such bifurcation, including how the follow-on claims would be managed and tried.

55. In *Prismall*, Heather Williams J struck out the representative action being brought purportedly on behalf of some 1.6m persons for the tort of misuse of private information, namely their medical records. This was similar to *Lloyd v Google* in that the representative claimant was seeking to argue that the Court could award "*lowest common denominator*" damages, which avoided any issue about the individual assessment of damages by members of the represented class. Heather Williams J rejected that notion and hence the claim could not proceed. Again there is no discussion of bifurcation as that was not being sought.

56. Returning to *Lloyd v Google*, it seems to me that the Supreme Court was advocating for greater use of the representative action, principally where it would provide access to justice that would not otherwise be available to that class of claimants. Lord Leggatt dealt in passing with bifurcation as a potential way round the problem that individual claims to damages could not be tried in the representative action. He did not however explain how bifurcation would work in any particular case and made it clear that the Court should decide each case by reference to the overriding objective. Importantly I do not think that he was suggesting that claimants should be able to bring representative actions in order to bifurcate and thereby avoid what they would otherwise be required to do if they had brought ordinary multi-party claims. Bifurcation is a solution to a particular problem with representative actions; but it is not the purpose of representative actions. Yet bifurcation is the sole purpose and stated advantage, put forward by Wirral, of these Representative Proceedings.

The Applications

57. The applications have been brought principally under CPR 19.8(2) and (3), as Ms Davies KC made clear in her oral submissions. As explained above, such an application brings into play the Court's discretion to decide whether it is appropriate for the Representative Proceedings to continue by reference to the overriding objective. It is accepted that if the Court decided under CPR 19.8(2) that Wirral should not act as a Representative Claimant, then the Representative Proceedings would be struck out.

58. Both application notices also sought to strike out the Claim Forms under CPR 3.4(2). This must have been CPR 3.4(2)(b) which is on the grounds of abuse of the Court's process or that "*it is likely to obstruct the just disposal of the proceedings.*" Ms Davies KC said that this was only included as "*belt and braces*" and that the real question for the Court is the exercise of its discretion under CPR 19.8(2). Mr Chapman KC sought to make something of the Defendants' reliance on CPR 3.4(2) by suggesting that they had a very high hurdle to get over in establishing that, in issuing the Claim Forms "*as of right*", Wirral was in some way acting to abuse the Court's process.

59. Nothing turns on this point and I will proceed to consider the applications on the basis that I am exercising a discretion so as to give effect to the overriding objective.

The exercise of discretion in these cases

Wirral's arguments in favour of the Representative Proceedings

60. Wirral's main overarching point is that it does not need to justify the bringing of the Representative Proceedings because it is doing what it is entitled to do under CPR 19.8(1) and that these are entirely the sorts of cases envisaged by Lord Leggatt in *Lloyd v Google* as being appropriate to be brought in this way. Mr Chapman KC did condescend to the particular advantages of the Representative Proceedings, being principally that they would be less risky, costly and burdensome for the represented persons, and would provide access to justice for retail investors who would not otherwise be able to bring such claims in their own names.

61. These benefits arise as a result of the bifurcation inherent in the Representative Proceedings, in which there will only be declarations on the common defendant-side issues. That means that there will be no front-loading of costs on the part of the represented persons. Mr Chapman KC was quite open about this, that it would mean that the represented persons will get the benefit of the findings on the common issues without having been required to plead their case, provide disclosure or other evidence and without being at risk of being a selected test claimant who might have to provide evidence of reliance before the trial of the Representative Proceedings. Furthermore, it means that an investor would be able to defer any decision on whether to bring their claim until after the declarations have been made or if the declarations are not made, they would save the time and expense of bringing their own claim. Mr Chapman KC also suggested that this process would be more likely to lead to a settlement of these cases, although it is not clear what the evidence for that was.

62. In relation to the institutional investors, Wirral's case is that there are legitimate advantages of the Representative Proceedings in terms of efficiency and access to justice. It perhaps goes without saying that institutional investors would prefer to minimise their risks, costs and expenditure of resources and wait and see if the Representative Proceedings succeed. To that end Wirral adduced evidence from two US attorneys to say that their institutional investor clients are deterred from pursuing securities claims in England and Wales because of the procedures here requiring them to bring proceedings in their own names and provide information, evidence and disclosure about their cases. Both of these attorneys have a few clients who have signed up to the Representative Proceedings and therefore also the Multi-party Proceedings. But their evidence was not about those clients. I am therefore unclear as to its status and relevance. In any event, what they said was as follows:

    (1) Mr Michael G. Lange is a Massachusetts attorney working for what is called a third-party claims filer called Financial Recovery Technologies, LLC ("**FRT**"). FRT represents some 2500 institutional investors worldwide and Mr Lange says that they give very careful consideration to the cost and benefit of taking part in securities class actions and they make rational decisions, being "*more likely to join efforts when recovery prospects are higher, and the related risks and burdens are lower*." Apparently, according to Mr Lange, the UK is the only worldwide jurisdiction for litigation that is seen as high-risk for FRT's clients

and that is because of the requirement to sign up publicly to a claim, to provide documents and information, such as reliance questionnaires, at an early stage and also the risk of an adverse costs order. Mr Lange said that an average of over 12 FRT clients register for any proposed Australian securities claim whereas only just over 2% sign up for any UK action.

(2) Ms Elisa Mendoza is an Oklahoma attorney who also works for a third-party claims filer called Securities Class Action Services, LLC ("**SCAS**"). SCAS represents some 600 institutional investors on the possibility of bringing claims in numerous jurisdictions. She says that a number of SCAS' clients have decided not to pursue claims in the UK despite being advised that they have potentially good claims. Ms Mendoza said that only 29% of clients with a potential claim sign up for UK claims as compared to 79% for New Zealand claims and 62% for Australian claims. Ms Mendoza opined that the "*bifurcated approach…may remove or mitigate some of the barriers which I believe limit participation rates today.*"

63. Mr Chapman KC fairly accepted that this evidence did not show that any institutional investors had been deterred from joining the Multi-party Proceedings in this case. But he did also maintain that the evidence is compelling that institutional investors are generally put off from litigating in the UK unless their claims are very large because of the prohibitive costs and risks of doing so.

64. Wirral also sought to rely on a report from Professor Andrew Higgins, who is Professor of Civil Justice Systems at Oxford University, and a member of the Civil Justice Council. Professor Higgins' report explains the comparative position of bifurcated securities claims in Australia, New Zealand and Canada (he is qualified to practise in Australia, but not New Zealand and Canada, which is why he concentrates on Australia in his report). The admissibility of his 67-page "*expert report*" was challenged by the Defendants. On 3 August 2023, Foxton J ruled that it could not be admitted as expert evidence because it did not meet the requirements for such evidence. However, he did say that it could be relied upon "*as if Professor Higgins had published an article in these terms or produced a report as part of some independent project*".

65. Mr Chapman KC said that just as Lord Leggatt relied on the comparative position in other Commonwealth jurisdictions to inform the debate in *Lloyd v Google*, so I can do the same by reference to Professor Higgins' report. In my view, it carries limited weight as to the exercise of my discretion in this case.

66. Professor Higgins focused on the Australian class action regime which has been established by Federal statute, perhaps similar to that in respect of competition claims in the UK, although there is no certification procedure. He did not really give evidence in relation to the representative action in Australia, as that has become what he described as "*in effect a historic relic*".

67. Professor Higgins stated that the class action regime in Australian securities claims have been working well and have been "*cautiously welcomed*" by the Australian Securities and Investments Commission as "*maintaining the integrity of the equity capital market*" and Australian judges believe that they have had a "*disciplining effect on corporate behaviour*".

68. Mr Chapman KC particularly relied on the statistics produced by Professor Higgins as showing, I think, that the securities class action claims in Australia, which have a bifurcated process, have proved popular with institutional and retail investors. Professor Higgins referred to 122 shareholder class actions filed between 1992 and 2019, although this was only in respect of 63 different companies. Most of the claims were settled and the data in respect of 84% of those settlement agreements showed that some 95,000 shareholders received individual compensation amounting to an average of AUS$9,362 per class member.

69. Mr Chapman KC concentrated on the retail investors which were the vast majority in number of the shareholders in both Defendants: according to their 2019 Annual Reports, some 68% or 11,552 shareholders in Reckitt; and 89% or 10,566 shareholders in Indivior. Mr Richard Leedham, a partner in Mishcon de Reya LLP, Wirral's solicitors, stated in his witness statement that there are disincentives to retail investors participating in such claims which would mean having to instruct lawyers, particularise their cases including on limitation, reliance and loss and provide disclosure and factual evidence. Mr Leedham said that these requirements of ordinary proceedings are a "*substantial chilling factor on the participation of investors in securities actions (and on the willingness of litigation funders to fund such actions)*." He relied on the fact that there has been no claim brought under s.90A FSMA by retail investors.

70. As to the funding of claims by retail investors, Mr Leedham said that litigation funders are not prepared to do so as it is not "*economically viable*" for them to do so, "*prior to a finding of liability being made*". In these proceedings, there is funding for the Representative Proceedings provided by two subsidiaries of Woodsford Group Limited ("**Woodsford**"). ATE insurance is also in place to cover adverse costs orders of up to £10m in relation to each Defendant. However, Woodsford is not apparently prepared to fund retail investors who may want to join the Multi-party Proceedings. This is said to be a barrier to access to justice for the retail investors. (The institutional investors have secured funding for the Multi-party Proceedings.)

71. More generally, Mr Chapman KC submitted that the Defendants' position that investors with potential claims under ss.90 and 90A FSMA must pursue multi-party proceedings with all their procedural disadvantages will necessarily limit those claims to large sophisticated institutional investors and the smaller, retail investors who have equally good claims will be unable to participate. He said that this situation was exactly what the Supreme Court in *Lloyd v Google* wanted to avoid. Mr Chapman KC said there is no unfairness on the Defendants because they can still fight every substantive point in both the Representative Proceedings and in the follow-on claims if they occur.

72. After being pressed to do so, Mr Chapman KC spelt out in his oral submissions four "*options*" as he called them for the second stage of the Representative Proceedings, assuming that Wirral is successful in getting the declarations that it seeks. Those four options are as follows:

    (1) The Representative Proceedings are amended to bring in the represented persons as claimants and to pursue their individual claims;

    (2) New Claim Forms would be issued by the represented persons, relying on the declarations and pursuing their own individual follow-on claims;

(3) The parties to the Multi-party Proceedings apply to lift the stay and pursue their claims in those revived proceedings; or

(4) The represented persons in the Representative Proceedings apply to join the Multi-party Proceedings and they all proceed with their individual follow-on claims.

73. Mr Chapman KC emphasised that no decisions had been taken and that the Court may very well have something to say in due course about which option should be adopted. He said that options (3) and (4) are particular to this case, because of the existence of the Multi-party Proceedings, but he accepted that there is no authority where the nature of the follow-on claims has been considered. In *Lloyd v Google*, Lord Leggatt seemed to be contemplating amendments to the representative action if it had gone ahead on a bifurcated basis because of the limitation issue – see [81] and the discussion of *Moon v Atherton* [1972] 2 QB 435.

74. I do find it surprising that there is no clear strategy for taking these claims through to a conclusion, by which I mean the investors actually receiving some compensation. The funders must have contemplated funding the investors all the way through to such recovery (there would be no sense in doing otherwise) and yet they apparently have no idea how the proceedings will work save up to the obtaining of the declarations in the Representative Proceedings.

75. Nevertheless Mr Chapman KC submitted that the Defendants can have no principled objection to Wirral pursuing the Representative Proceedings through to a conclusion and the suggested disadvantages of those proceedings, such as the difficulties of settlement without knowing much more about the individual claims, really amount to nothing very much and certainly not enough to justify the striking out of the Representative Proceedings.

Defendants' arguments against the Representative Proceedings

76. The Defendants' main argument is that the Representative Proceedings would prevent the Court from being able to exercise its case management powers in relation to the procedural structure, such as a bifurcated process, and its general control over the shape of the proceedings prior to trial. They say that it should be open to the Court to decide whether the proceedings should be bifurcated and, if so, what should be tried at the first stage and whether progress should be made on second stage issues ahead of the first stage trial. The Court should be able to decide whether in this particular case the same approach as was adopted in the other securities cases of *G4S*, *RSA* and *Serco* (as described above) by Miles and Falk JJ should be adopted in this case or whether an alternative approach is more suitable. It will still be open to the Claimants to argue that there should be bifurcation and no progress on what would be second stage issues. But it would be up to the Court to decide this, rather than Wirral and its represented persons, who have presented this as a *fait accompli* with which the Court cannot interfere.

77. Ms Davies KC submitted that the inability of the Court to control its own procedure has a number of disadvantages. First, she said that not having details of the individual claimant issues at an early stage will make settlement more difficult. Particulars of standing, reliance and quantum will enable the Defendants properly to assess the claims and value them for settlement purposes. Wirral has offered to share some trading data in relation to all represented persons (who will have had to provide such information to

Wirral) but the Defendants say that such voluntary disclosure would be inadequate and unenforceable. Further no such orders for disclosure or the like can be made against represented persons who are not parties for such purpose – see *Ventouris v Mountain* [1990] 1 WLR 1370.

78. Second, Ms Davies KC submitted that there was a serious risk of fading memories in this case because some of the published information relied upon goes back to 2006 and investors may wish to say that they relied on such statements. The Court could do something to mitigate this, as Miles and Falk JJ did in *G4S* and *RSA*, by having earlier disclosure and witness statements. This would also prevent subsequent evidence being overinfluenced by the findings of the Judge in the first trial – see [72] in *G4S*. However, this would not be possible if the Representative Proceedings went ahead.

79. Ms Davies KC's third point follows on from the second. Case management orders dealing with such matters as disclosure and witness statements before the first trial means that the parties and the Court would not be "*starting from a standing start*" in terms of preparation for the second stage trial. Not only would this not be possible in the Representative Proceedings but also it is one of the reasons why the investors wish to run the proceedings in this way.

80. Fourth, Ms Davies KC relied on the allocation of litigation burden, something that was referred to in the other securities cases. She said that as the other Judges recognised, claimants who bring such claims should be prepared to undertake substantial work to progress the case and to engage properly with it in order to ensure that it is resolved fairly and expeditiously. This lack of engagement is actually put forward by Wirral as an advantage of the Representative Proceedings saving the investors' time and money. But Ms Davies KC submitted that it is self-evidently not in the interests of justice or consistent with the overriding objective or fair to the Defendants that the burden should be so lop-sided against them. These would all be issues that could be addressed by the Court in ordinary proceedings but not in the Representative Proceedings.

81. As to the institutional investors being deterred from litigating in the UK, Ms Davies KC submitted that Mr Lange's and Ms Mendoza's evidence is not particularly helpful or relevant. It is clear from the existence of the Multi-party Proceedings in this case, that institutional investors have not in fact been deterred from such proceedings against the Defendants. Furthermore, it is obvious that they would want to avoid any sort of front-loading of costs if at all possible and would prefer to wait and see the outcome of the trial on common defendant-side issues before putting together and engaging with the claimant-side issues. But merely because they would prefer to be involved in litigation in that minimal way does not mean that it is consistent with the fair administration of justice or the overriding objective.

82. As for the retail investors, Ms Davies KC submitted that their position has been exaggerated for the purpose of supporting the Representative Proceedings. The Defendants have been notified that, as at the date of the hearing, some 302 retail investors, 203 in Reckitt and 99 in Indivior (there is some duplication, as explained in [16] above), had signed up to the Representative Proceedings. By letter dated 16 November 2023 from Mishcon de Reya LLP to Linklaters LLP, Reckitt's solicitors, they confirmed that none of those retail investors had joined the Multi-party Proceedings and that Woodsford was not willing to fund them should they have wished to do so. This was said to be because of the "*economic and administrative burden*" of

pursuing such claims, which burden is said to apply to the funders and the retail investors themselves. However, that seemingly does not apply to the institutional investors who have funding for both forms of proceedings.

83. The actual funding agreement has not been disclosed. But Ms Davies KC did show me the Costs Sharing and Governance Agreement which contains the terms upon which investors are able to become represented persons in the Representative Proceedings. The represented persons have to agree to costs sharing in order to opt-in to the Representative Proceedings. They have to provide "*valid, accurate and complete trading data*" presumably to prove that they have *prima facie* standing to pursue a claim. By clause 14, unless Wirral agrees otherwise "*for example because the Third Party has put in place other funding arrangements acceptable to [Wirral]*", the Third Party (meaning the party signing up to the Representative Proceedings) has to pay its estimated share of the incurred Action Costs and Adverse Costs (as those terms are defined) and make arrangements to secure its estimated share of the future Action Costs and Adverse Costs through to the conclusion of the proceedings. That must be either (i) by way of a written and binding obligation that an English company with at least 3 years of audited financial statements and net assets of at least £10m, or an equally creditworthy entity, will indemnify the payment of those costs as they are incurred on a month-by-month basis; or (ii) pay up front and in full a sum corresponding to the investor's estimated share of future costs.

84. These are quite stringent requirements and any retail investors that can satisfy them must be fairly substantial in themselves. Mr Chapman KC pointed to the beginning of the clause and suggested that retail investors may come to a different agreement with Wirral, but there is no evidence before me that that has happened. On the contrary, as Ms Davies KC submitted, the clause indicates that retail investors with small claims would be unlikely to be able to participate in the Representative Proceedings, which would deprive them of access to justice. Even though there are a large number of retail investors, the value of their shareholdings was only some 0.02% to 0.03% of each Defendant's total share capital. Accordingly, Ms Davies KC submitted that there is no proof that these Representative Proceedings are actually beneficial to retail investors. And the fact that they have been excluded by the funders from participating in the Multi-party Proceedings is something that is inexplicable and because of the attitude of Woodsford.

85. As to Professor Higgins' report, Ms Davies KC submitted that little reliance can be placed on it. In any event, she said that it did not support Wirral's arguments. That is principally because Professor Higgins only deals with Australia's statutory class action procedure. There is no automatic bifurcation of those actions and indeed Professor Higgins explains that the initial trial of such proceedings will normally involve the full trial of all issues in at least one lead claim. That would be very different to the situation if the Representative Proceedings in this case went ahead, because there would not be any resolution of any standing, reliance, limitation or quantum issues in relation to any claim, including Wirral's. Professor Higgins also refers to the considerable case management powers that the Australian Court would have prior to the first trial, including the power to order sampling and disclosure. There are also powers to approve collective settlements. Ms Davies KC therefore submitted that this evidence supported the Defendants' position of allowing the Court to case manage these proceedings all the way through. She also questioned Professor Higgins' statistics, saying that the number

of actions in a 27-year period was small – approximately 4 a year, or 2.5 a year based on the number of companies – which meant it did not prove anything about their availability to retail investors. (Mr Chapman KC maintained that the figures were high in proportion to the much smaller population and economy of Australia.)

86. Mr Patton KC adopted all of Ms Davies KC's submissions with some additional observations on the policy underlying s.90A and Schedule 10A FSMA. That new statutory regime derived from a review carried out by Professor Paul Davies KC, who produced a Discussion Paper dated March 2007, followed by a Final Report dated June 2007. Professor Davies KC's terms of reference from the Government were to consider the impact of the new regime on "*issuers, markets, investors and others; the quantity and quality of information disclosed; the competitiveness of the UK as a good place to do business*". Professor Davies KC focused on the requirements of reasonable reliance and fraud as setting a high bar for liability, that would hopefully prevent the private securities litigation culture that had developed in the US.

87. In his Final Report, Professor Davies KC was keen to stress that it would not be beneficial for the UK financial markets for private securities litigation to follow the course taken in the US, where the availability of funding and lower thresholds for liability had led to extensive private securities actions. He recognised that recent changes in litigation funding rules in the UK may exacerbate the risk of unmeritorious claims being pursued but he considered that this risk could be tempered by making liability fraud-based, rather than negligence-based, and dependent on reasonable reliance by the investors. In other words, he wanted to avoid speculative collective litigation in the UK. The Government agreed, stating in its impact assessment of the new regime that it had "*deliberately been shaped, principally by selecting a demanding fraud test for liability, to minimise the potential for speculative litigation and the corresponding pressure on issuers to settle in order to terminate litigation, rather than compensate for harm done to shareholders*". (Ms Davies KC also referred to *Mastercard Inc v Merricks* [2021] 3 All ER 285, at [154] in the judgment of Lord Sales and Lord Leggatt, who referred to the significant risk of flawed collective proceedings being held over the defendant's head "*in terrorem to extract a substantial settlement payment without a proper basis for it*".)

The exercise of discretion in this case

88. I have received a lot of evidence that seems to me to be more related to policy reasons for exercising my discretion one way or another. Thus the evidence of Mr Lange and Ms Mendoza and Professor Higgins' report are directed at whether representative actions in securities litigation under FSMA should be allowed to proceed and, I assume, become the normal way for such claims to be brought. The reference to the policy behind the introduction of s.90A and Schedule 10A FSMA in Professor Paul Davies KC's papers is to similar effect, although there is no discussion therein as to procedure or the use of representative actions to enable such cases to be brought.

89. However, I am not deciding these applications on policy grounds or to say that this is how securities claims in general should be brought. (I do not know if the Government has considered legislating for class actions in this area, but that does not affect whether the flexibility of the representative action should apply to these sorts of claims – see [68] of *Lloyd v Google*.) I am deciding how my discretion should be exercised in the particular cases before me. In fairness to Ms Davies KC, she did say that she was not

advocating for all securities cases under FSMA and was not saying that they can never be brought using the representative action under CPR 19.8. But in this particular case, and perhaps most significantly because of the existence of the Multi-party Proceedings, she was saying that the Representative Proceedings are not appropriate and will not further the overriding objective.

90. While *Lloyd v Google* might be understood to have presaged a new look at the utility of representative actions, I do not think that Lord Leggatt would have contemplated that his judgment would be used to oust the ability of the Court to case manage these sorts of claims from the start. Mr Chapman KC said that if Lord Leggatt had had concerns about the effect of bifurcation on case management, he would have said so. But the trouble with that is that the issue was not before the Supreme Court and it is unclear whether any submissions were made about it. The case was more about whether the representative action could be used where otherwise a very large number of persons would not have any access to justice and where bifurcation simply would not work.

91. As I said in [56] above, I do not believe that the availability of a bifurcated process in representative actions is the reason for using representative actions. Rather, a bifurcated process can be used in order to enable a representative action to proceed and particularly where there would be no other way that the proceedings could be brought by or on behalf of such a large number of claimants whose claims are likely to be too small to bring individually. It provides a means of access to justice for those individuals. That is not to say that the claimants have to show that they could not bring their claims in any other way. But I do question whether it is appropriate to be using the representative action for the express purpose of bifurcation so as to remove any possibility of the Court being able to require the represented persons to do anything in relation to their claims at their initial stages.

92. Mr Chapman KC and Wirral's evidence on the applications were perfectly and creditably candid about this being the purpose of the Representative Proceedings. The investors and their funders do not want the risk and costs of pursuing the Multi-party Proceedings where the Judge managing the case may require them to provide information or disclosure or witness evidence before a first trial takes place on the common defendants-side issues. While I understand that desire, I do not believe that it is a legitimate basis for depriving the Court of its power to case manage such claims.

93. The Representative Proceedings cannot be looked at in isolation from what is to follow their resolution. The only point of the Representative Proceedings is to succeed at the end of the day in recovering compensation for the losses alleged to have been suffered by the represented persons. They obviously hope to succeed in the Representative Proceedings in order then to pursue their follow-on claims, in whatever form they later decide they should take. So from both the parties' and the Court's perspective, the proceedings all the way through to the recovery of compensation have to be considered as effectively one set of proceedings. There is an element of manipulation in framing the Representative Proceedings in the way they have been in order to say that the Court only need look at Wirral's entitlement to start such Proceedings under CPR 19.8(1)(a) and consider how the issues raised in those Proceedings should be tried. But that would be shutting one's eyes to reality, which is that the Representative Proceedings are merely the first stage of the investors' route to recovery.

94. There should be nothing to fear on behalf of the investors in putting case management into the hands of the Court. If they have a good case for asking that there be a bifurcation of the common defendant-side issues from the individual claimant-side issues and that nothing should be done about the latter before the former is decided, then that case can be made to the Judge managing the case. That Judge will weigh the arguments, including perhaps the difficulties of obtaining funding for the front-loading of costs to do that sort of work at the initial stages, and decide what is in the best interests of the parties, the Court and the administration of justice to require the claimants to do.

95. When looked at like that, Wirral's proposition does seem quite extraordinary. It is asking the Court to accept that it should have no control over whether the proceedings should be bifurcated in the way that the Representative Proceedings will dictate that they are. One can see from the judgments in *G4S* and *RSA* how the Judges have carefully balanced all the competing interests in deciding how those cases should be managed. But Wirral is saying that the investors should be able, unilaterally, without any input from the Defendants or the Court, to bifurcate the proceedings in the way they want them to be. I do not think that *Lloyd v Google* gives them that entitlement; nor that the Court is bound to accept that this is in accordance with the overriding objective.

96. The Court is required actively to case manage claims so as to further the overriding objective (CPR 1.4(1)). But the Representative Proceedings effectively prevent the Court from doing that, certainly in relation to the Multi-party Proceedings. I do 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.

97. The existence of the Multi-party Proceedings shows that institutional investors have not been deterred from pursuing their claims in England and Wales by the way that securities cases are managed here. The fact that they would prefer not to expend cost and effort in preparing and putting forward their cases until after the first trial has been completed is unsurprising but contrary to the way litigation is normally conducted in this jurisdiction and will necessarily mean that the proceedings will not be brought to a final conclusion expeditiously. As the judgments in *Tesco* and *G4S* make clear, claimants must properly plead and particularise their cases from the beginning and it should not be as simple as subscribing to litigation without any risk or cost being incurred. I do not think that the position of the institutional investors affects the appropriateness of the Representative Proceedings.

98. The position of the retail investors is a little different and I was concerned, if it is true, that they might be deprived of access to justice if the Representative Proceedings cannot go ahead. But as it emerged from the evidence and the hearing, the retail investors are inexplicably not being allowed to participate in the Multi-party Proceedings because of the attitude of the funders. Even though the retail investors who have signed up to the Representative Proceedings, including satisfying the stringent financial conditions, have been allowed to participate in them, including presumably to take their claims to a conclusion in the follow-on claims (although the commitment in the Costs Sharing and Governance Agreement is limited to the Representative Proceedings), they have been denied funding and the opportunity to participate in the Multi-party Proceedings.

99. But this situation has been engineered by the funders. And it has enabled Wirral to say that the retail investors cannot pursue their claims otherwise than through the

Representative Proceedings and will be denied access to justice. But without any adequate and coherent explanation from the funders as to why they have apparently discriminated against the retail investors in relation to the Multi-party Proceedings, I am not prepared to accept that they can only seek redress through the Representative Proceedings. There is no evidence that retail investors who have opted-in to the Representative Proceedings would not be able to obtain their own funding and issue their own proceedings, which could then be consolidated or at least managed together with the Multi-party Proceedings.

100. Furthermore Ms Davies KC referred to the *RBS Rights Issue litigation* pursuant to s.90 FSMA which included thousands of retail investors, and the *Lloyds/HBOS Group Litigation* that involved claims from around 6,000 investors, both institutional and retail. These show that retail investors have been able to bring their claims under the current procedural structure and have had access to justice in similar securities claims, albeit not under s.90A FSMA. I therefore think that the evidence does not show that retail investors are unable to bring their claims otherwise than through the Representative Proceedings. In fact the evidence may indicate that the financial conditions to participation in the Representative Proceedings may be a disincentive to join them.

101. In terms of the overriding objective, it seems to me that the case management of the other securities claims have shown how the Court can deal with these cases fairly, proportionately and by allotting an appropriate share of the Court's resources to them. If the Claimants are required to provide material in support of their individual claims and to engage with the proceedings from an early stage, it is more likely that the proceedings will be dealt with expeditiously overall. It will mean that there will not be a standing start after the first trial and with fading memories it may be important that the final trial is not delayed too long and that their evidence is recorded at an earlier stage. There was not much discussion at the hearing about the possible disruption as a result of appeals. But this can be factored in by the Court in making sensible, practical case management directions, including by putting the parties on an equal footing.

102. Wirral suggested that an advantage of the Representative Proceedings would be that if it did not succeed in obtaining the declarations, then the time, effort and costs of the potential follow-on claims would be saved. It also said that settlement would be much more likely if it succeeded in the Representative Proceedings, although as I noted above, there was no real evidence to support this. But more fundamentally is that these considerations can be taken into account by the Judge case managing the proceedings from the start and the suggested advantages would be equally applicable if that Judge directed bifurcation in the same or similar way that Wirral is hoping to achieve in the Representative Proceedings.

103. There was discussion in all the parties' skeleton arguments about limitation. Wirral relied on [81] of *Lloyd v Google* and said that there may be an advantage in respect of limitation for late joiners to the Representative Proceedings. The Defendants disagreed that late joiners could defeat a limitation defence by relation back to the issue of the Representative Proceedings. In any event, those who are parties to the Multi-party Proceedings are protected. However, at the hearing, all parties seemed to accept that the arguments in relation to limitation were actually neutral on the applications before the Court and as to the exercise of the Court's discretion.

104. So I return to the main point that these issues should be for the Judge managing the claims to consider. That will be done by reference to the overriding objective. To allow the Representative Proceedings to continue would mean that a Judge has no power to decide the best way to manage the claims from start to end by reference to all relevant factors, including the respective positions of the parties, the appropriate use of the Court's resources and the administration of justice. They take away from the Court one of its prime functions to manage and deal with cases justly and at proportionate cost.

105. I therefore conclude that, in the circumstances of this case, my discretion should be exercised against the Representative Proceedings and in favour of the Multi-party Proceedings, should the Claimants wish to proceed with them. They can be managed in the normal way so as to further the overriding objective and in particular the Claimants can argue for the same bifurcated process, with no progress on claimant-side issues in the meantime and it will be up to the Judge managing that case to decide whether that is appropriate or not. But I think it would be unfair and unjust, and contrary to the overriding objective, to allow the Representative Proceedings to oust the jurisdiction of the Court to case manage the claims from the start.

Conclusion

106. For the reasons I have set out above, I allow the Defendants' applications which means that I order as follows:

(1) That Wirral may not act as a representative pursuant to CPR 19.8(2); and

(2) That therefore the Claim Forms and Particulars of Claim in the Representative Proceedings be struck out.

107. I would hope that the parties will be able to agree a draft Order in respect of that outcome. If there are any consequential matters that cannot be agreed, I am happy to deal with them in writing or, if necessary, at a further oral hearing to be arranged through the usual channels.