Introduction

Class action lawsuits have historically played a relatively small role in English litigation and an even smaller one in the financial institutions sector. Generally, class actions have been more common in the field of personal injury.

However, there has been an increase in Group Litigation Orders (GLOs) in connection with financial institutions and breaches of regulatory obligations (most notably, perhaps, being the RBS Rights Issue Litigation).

A GLO is a form of ‘class action’ available under English law. Unlike in the US, where class action litigation is an established business, collective action has not been the preferred method of achieving consumer/customer or investor redress in the UK. This article explores the framework and development of Group litigation in England & Wales.

Legal framework behind collective action and group litigation orders

In the absence of long-standing statutory provisions, group litigation in the UK has not developed in the same way as US class actions. That said, the appetite for such claims in the UK is changing and there is a shift towards utilising the provisions of Part 19 of the Civil Procedure Rules.

GLOs were developed as part of reforms to English litigation in connection with the collective redress advocated by Lord Woolf in the late 1990s and were added to the English Civil Procedure Rules in 2000. The High Court has the power to make a GLO where there are or are likely to be a number of claims which “give rise to common or related issues of fact or law” (CPR r19.11). The UK regime is an “opt-in” procedure whereby a prospective claimant must sign up to the relevant GLO register to participate in the claim.

GLOs can have wide application to a variety of claims. Traditionally, they have played a larger role in personal injury, product liability, and competition claims and pension disputes; however, the past few years have seen a number of high-profile GLOs in the finance sector.

More recently, the Consumer Rights Act 2015 facilitates collective proceedings in the Competition Appeal Tribunal for breaches of competition law through the introduction of an “opt-out” approach. This type of collective action is restricted to breaches of competition law, but is suggestive of a broader policy to facilitate effective and economic access to redress for consumers. However, the controls regarding awards of costs and damages suggest that developments are limited and the government is unwilling to introduce US-style class action lawsuits beyond breaches of antitrust legislation.
Types of collective action in England and Wales

**High Court**

- **Joint claims**: claims that can be conveniently dealt with together can be brought jointly or consolidated by the court using its normal case management powers (CPR r.3.1(2)).
- **Representative action**: claims can be brought by representative claimants where more than one person has the “same interest” in a claim and the claim is brought by or against one or more of those persons (CPR r. 19.6).
- **Group litigation order**: a group litigation order can be made by the court if the claims share “common or related issues of fact or law” (CPR r.19.10). This is wider than the requirement for representative action.

**Competition Appeal Tribunal**

- **Collective action**: collective action can brought by multiple claimants or by a specified body on behalf of consumers (e.g. Which?). Such claims must be as a result of a competition law infringement that raises common issues of fact or law among the claimant consumers.
- **Collective proceedings order**: the Competition Appeal Tribunal (CAT) must make a Collective Proceedings Order certifying a group claim before it can proceed (under the Consumer Rights Act 2015). When making an order, the CAT must consider a number of factors, including whether: (i) it is “just and reasonable” for the representative to act on behalf of the class; (ii) the claims concern the “same, similar or related” issues of fact or law and are “suitable” to be brought in collective proceedings; and (iii) whether the action should be on an opt-in or an opt-out basis.

**Comparisons with the USA**

One distinct difference between collective action in the UK and the US is the way in which a class is formed. A US class operates on an “opt out” basis, in which a member of a class has to opt out of proceedings. In US class action, any decision or settlement is binding on the whole class, unless a member has opted out. By contrast, members of a class in the UK generally have to “opt in” to be included in proceedings. To opt in, a prospective claimant has to notify the class representative that their claim should be included in the proceedings. This positive obligation on a prospective claimant to elect to join a class is, arguably, one of the reasons that English class action is less common and on a lower scale than US class actions.

Another reason that English group litigation does not emulate the class actions of the US is the prohibitive costs rules. Traditionally, English law costs rules provide that the “loser” pays (CPR r.44.3(2)). If there are multiple parties to an adverse costs order, conventionally, they will be held jointly and severally liable. This costs risk dissuades many potential claimants from embarking on what could be a risky litigation process involving exposure to unknown costs. Interestingly, in *RBS Rights Issue Litigation*, the Court diverted from the usual costs rules and ordered that each claimant should bear a pro rata and several share of costs (both common costs and adverse costs). A central part of the court’s reasoning was the issue of fairness (i.e. the liability of a claimant who purchased 100 shares would be the same as a claimant with 10,000 shares).

Whilst arguably more relevant in financial, rather than, for example, a product liability context, it will be interesting to see whether this logic translates into future GLOs involving financial institutions. The motivation behind the Court’s decisions in *RBS* regarding cost allocation was one of even-handedness in respect of the individual shareholders. This parallels wider government policy concerning the accessibility of redress and legal action for consumers/shareholders. Following these recent high-profile financial cases, there is a general perception that group litigation in the UK is set to increase. We set out below the recent high profile examples:
Recent collective action

High Court group litigation

- RBS Rights Issue Litigation – action brought by RBS shareholders against RBS and four former directors, under s90 of the Financial Services and Markets Act 2000 (“FSMA 2000”) for compensation as a result of allegedly false or misleading statements made by the RBS in connection with its 2008 rights issue. Shareholders alleged that the bank misled them into participating in the 2008 rights issue which took place just before the bank was bailed out by the government.

- Lloyds Bank Shareholder Action – GLO granted by the High Court in favour of claimants seeking compensation in respect of alleged losses suffered as a consequence of Lloyds TSB’s acquisition of HBOS Plc in January 2009 and the subsequent recapitalisation of the merged bank. The claimants alleged breach of fiduciary duty and that the prospectus failed to present the financial position of HBOS accurately. The case began in the High Court in London mid-October 2017 with an estimate hearing time of 12 weeks. Closing submissions concluded early March 2018.

- Tesco faces legal action from 60 large investors (including asset managers, hedge funds and pension funds) following misstated profits in 2014, allegedly in breach of s90A FSMA 2000. Under s348 FSMA 2000, the FCA has required Tesco to set up a compensation scheme to provide redress to investors. It is unclear what impact this will have on the claimants’ appetite for class action litigation.

- The British Steel Coke Oven Workers Litigation – GLO issued by the High Court in January 2017 for personal injury claims suffered by employees arising out of their employment at various coke ovens owned and operated at various times by British Steel or other companies for whom British Steel have liabilities.

Applications to the Competition Appeal Tribunal for a collective proceedings order (CPO)

The approach of the CAT when faced with applications for a CPO suggests that such applications will be rigorously tested before an Order is made.

- Pride mobility scooters – this was the first application for a CPO brought under the collective redress scheme under the Consumer Rights Act 2015. The claimants (consumers who purchased mobility scooters between 2010 and 2012) sought damages as a result of a breach of competition law by Pride in a form of resale price maintenance. The CAT adjourned the application for a CPO to enable the claimant to revise the approach to damages. It appears from recent announcements that this claim is no longer being pursued.

- Mastercard - the claimants alleged that cross-border charges on the use of MasterCard debit and credit cards were a significant cost for retailers. This cost was then passed on to consumers in the form of higher prices for goods and services. The application for a CPO was blocked by CAT in July 2017, as being deemed unsuitable for the collective action regime due to the size of the class (over 45 million) and difficulties in collecting evidence. The lawyers for the claimants are seeking to reverse the decision of the CAT and, in October 2017, filed an appeal against the decision of the CAT in the Court of Appeal and an application for judicial review in the High Court.
Growth of group litigation in the financial sector

In the light of these developments we consider below a number of factors which are likely to impact on the development of GLOs in the financial services sector:

1. Obligations on company directors
   English legislation places a great deal of responsibility on the directors and officers of a company (for example in the Companies Act 2006). Not only is personal accountability a very real legal and regulatory feature, it is also emphasised by the focus of the media on the directors of high-profile financial institutions. Scrutiny of the actions of senior management, particularly following the implementation of the Senior Managers & Certification regime is bound to continue.

2. Growth in third party litigation funding
   There has been significant growth in third party litigation funding and funders are now playing an active role in the FI and wider litigation market. Correspondingly there are a number of Law Firms based in the UK now actively seeking to market group based investor and consumer redress litigation. The wider availability of funding, with litigation financing firms such as Burford and Harbor reporting strong profits and a high level of financing to potential claimants may reduce claimant concerns regarding financial risks of litigation and be attractive to shareholders considering whether to participate in a class. Litigation funding is proving to be a profitable business and activity in this area is only expected to increase.

   That said there are some limitations on litigation funding, particularly in the context of high value group action. In The RBS Rights Issue Litigation [2017] EWHC 1217 (Ch), the Court ordered the litigation funder to pay a sum of £7.5 million on account of costs. The facts of the case are unusual and the judge expressed his concern at the level of costs being incurred by all parties. However, the decision indicates that a court may take into account the fact that a party is funding litigation on a commercial basis and seeking to profit from the litigation. Arguably, the imposition of the costs order caused the funder to re-evaluate the risks of continuing the litigation and was a factor influencing the settlement reached in June 2017.

   In contrast to the current development of litigation funding in the UK, in jurisdictions such as Australia the majority of class actions are already routinely third-party funded. One of the reasons for the rise in litigation funding in the class action sphere in Australia and also in the Netherlands relates to restrictions on law firms from entering into CFAs to fund the litigation. In addition, the Netherlands does not permit the other side to recover costs in full from the losing party - costs are granted by the court based on certain standard amounts for certain standard activities and the value of the claim. Accordingly, third party funders play an important financial role in group action, where the legal fees can be high. By way of example, the Australian funder IMF Bentham reports a 90% success rate on cases funded and that most of its claims are settled. Significantly, a large number of class actions in Australia involve shareholder/securities action alleging corporate misconduct – a development which is occurring in the UK, albeit more slowly, under FSMA 2000.

3. Government/ policy support
   As mentioned above, there has been policy support for collective action and redress schemes. In the finance sector, this has so far been focussed on regulatory-led redress schemes (such as the review of the sale of IRHPs). In contrast, the Consumer Rights Act 2015 facilitates collective litigation for breaches of antitrust legislation, including “opt out” action. It is not clear whether this is indicative of a broader policy which will extend to financial institutions.

4. New and developing risks
   Operating in a global environment presents a huge range of risks to financial institutions. In particular, liability stemming from breaches of data protection legislation and cyber security is only likely to rise. Shareholders and customers are increasingly seeking personal redress/damages from breaches of such regulatory obligations. Exposure of directors to liability as a result of regulatory breaches is likely to rise with growing reliance on technology.
It is uncertain how the factors identified above will impact on group litigation. For example, whether there will be a change to “opt-out” claims in connection with shareholder action (in the same way as competition collective action under the Consumer Rights Act 2015). Such a shift would be a significant cultural step away from the current way in which multi-party actions are currently run. The FCA’s role conducting extensive investigations into companies appears, for the time-being, the preferred way of regulating corporate behaviour and providing redress to customers.

The progress of the RBS and Lloyds class actions was closely followed across the financial and legal sector, but we suggest that the development of this type of litigation will continue to be a somewhat specialist area. Whilst the evidence given in the High Court by the former Lloyds directors in the Lloyds class action may provide an important insight into the operation of the bank in 2008, it remains a unique claim originating in exceptional circumstances. It is important to note that the RBS and Lloyds claims are rooted in the highly unusual facts surrounding the financial crisis. In the UK, IRHP mis-selling claims and the regulator-imposed reviews have to date been addressed on an individual basis, rather than by group action.

Overall, the specific circumstances giving rise to the recent group litigations suggest that we are unlikely to see an explosion of group litigation in the financial industry. However, investor behaviour has changed since the financial crisis and, combined with the wide availability of funding options, we may see these well-informed, dynamic investors and or groups of consumers pursuing more group litigation in the UK.