Securities Litigation

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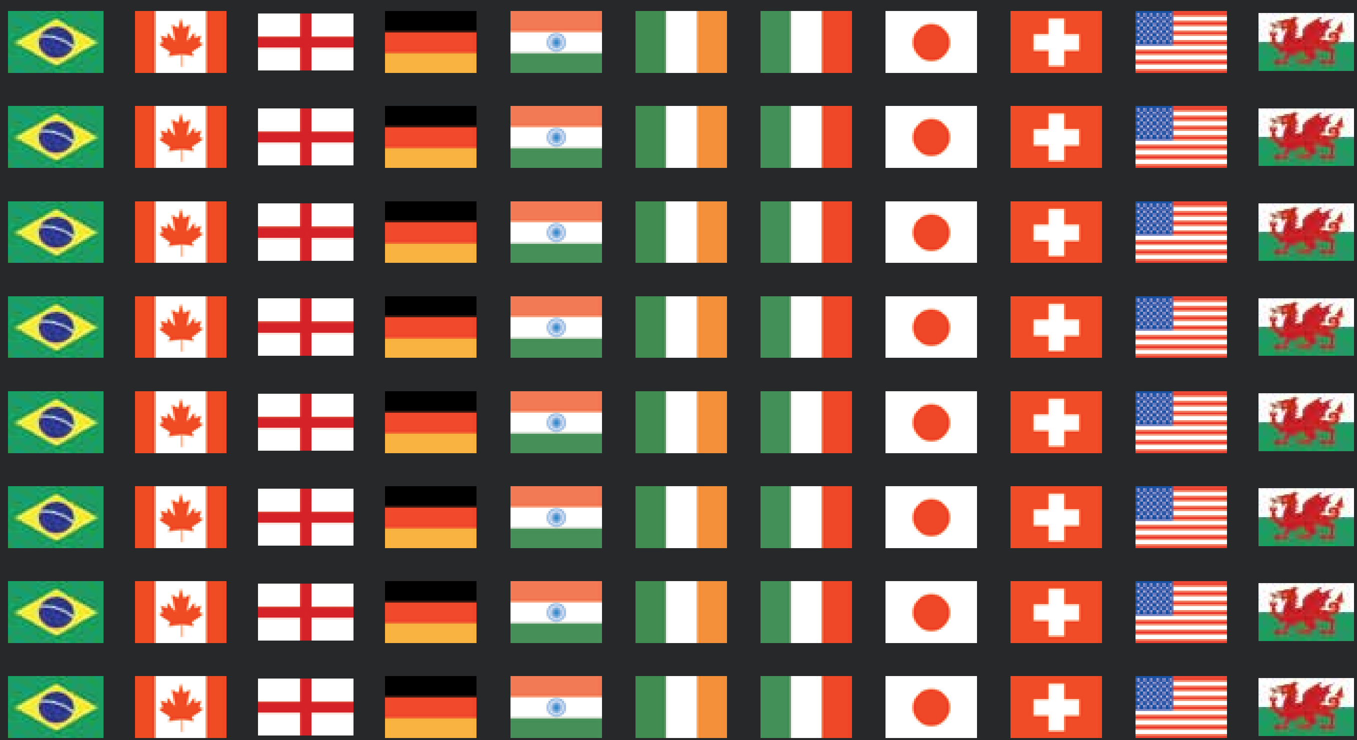

2018

GETTING THE DEAL THROUGH

GETTING THE
DEAL THROUGH

Securities Litigation 2018

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Fourth edition

Getting the Deal Through is delighted to publish the fourth edition of *Securities Litigation*, which is available in print, as an e-book and online at www.gettingthedealthrough.com.

Getting the Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique **Getting the Deal Through** format, the same key questions are answered by leading practitioners in each of the jurisdictions featured.

Getting the Deal Through titles are published annually in print. Please ensure you are referring to the latest edition or to the online version at www.gettingthedealthrough.com.

Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Getting the Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to Antony Ryan of Cravath, Swaine & Moore LLP and Philippe Selendy of Selendy & Gay PLLC for their continued assistance with this volume.

GETTING THE
DEAL THROUGH

London
January 2018

England & Wales

Keith Thomas and Laura Jenkins

Stewarts

1 Describe the nature and extent of securities litigation in your jurisdiction.

The amount of securities litigation being pursued through the courts of England and Wales has increased significantly in the past few years. Headline cases, including the *RBS Rights Issue Litigation*, the *Tesco Litigation* and the *Lloyds/HBOS Litigation,* have been closely followed for developments in the law and procedure affecting securities claims. However, significant uncertainties in the law in this area remain.

The combined jurisdiction of England and Wales does not presently have an American-style opt-out class action system within which securities litigation can be easily pursued. However, the procedures and practice for opt-in group actions are becoming more developed.

For simplicity throughout this chapter, where we refer to the law, courts and jurisdiction of England we are referring to the law, courts and jurisdiction of England and Wales.

2 What are the types of securities claim available to investors?

In England, the primary causes of action for securities claims are statutory. Those causes of action are derived from the Financial Services and Markets Act 2000 (FSMA), section 90 and section 90A.

Section 90 gives rise to a non-fraud based liability and is designed to compensate investors who bought securities issued pursuant to a misleading prospectus. Section 90A gives rise to an 'open market' liability for securities bought, held or sold in reliance on untrue or misleading statements in or omissions from certain publications by listed companies.

Pursuant to Schedule 10A FSMA, a section 90A claim cannot be brought where a section 90 claim is available. Further, if a claim under section 90A is available, save for express exclusions set out in paragraph 7, Schedule 10A (including breach of contract and claims under the Misrepresentation Act 1967), an issuer is not liable for claims made on any other basis. This exclusion of other liability does not apply to claims brought pursuant to section 90.

This chapter will focus on the statutory claims applicable to listed securities.

Notwithstanding the decision in *Sharp and others v Blank and others* [2015] EWHC 3220 (Ch) (referred to as the *Lloyds Litigation*) which applied and supported the long-standing position in *Caparo v Dickman* [1990] 2 AC 605 that a duty of care is only owed where advice is given for the particular purpose of the recipient relying on it, there may be instances where common law claims are appropriate.

Unlike the FSMA claims above, these causes of action can be brought by shareholders in both private and public companies. The potential claims include:

- claims in the tort of deceit (known as fraudulent misrepresentation);
- claims for negligent misstatement;
- claims for contractual misrepresentation under the Misrepresentation Act 1967; and
- claims for breach of contract (where a misrepresentation has been incorporated as a contractual term), mistake and various trust or equitable claims against any person who acted as a fiduciary to the investor.

Further, derivative claims pursuant to section 206(3) of the Companies Act 2006 can be brought against a company by a shareholder. A derivative claim permits a shareholder to pursue actions on behalf of the company in relation to wrongs committed by the company's directors, typically breaches of duty by the director. However, the remedy is the company's and not the shareholder's and therefore the benefit to the shareholder is only any increase in value of his or her shareholding in the company resulting from, for example, damages paid by the director (or directors' and officers' insurers) to the company as a result of the derivative action.

In addition, minority shareholders can bring unfair prejudice claims pursuant to section 994 Companies Act 2006, if the facts support such a claim. The usual remedy is for the minority shareholder's shares to be bought out or bought back by the company.

3 How do claims arising out of securities offerings differ from those based on secondary-market purchases of securities?

Section 90, which applies to securities offerings, does not preclude a secondary or aftermarket claim from being brought. There has been no case law directly on this point. However, in *Possfund Custodian Trustee Ltd v Diamond; Parr v Diamond* [1996] 1 WLR 1351 (*Possfund*), Lightman J (obiter) considered a section that is similarly worded to section 90 (Financial Services Act 1986 section 166) and concluded that: '[The] reference to the "person who has acquired the securities to which the prospectus relates", as it seems to me, naturally refers to the placee in respect of the shares originally allotted to him.' In *Hall v Cable & Wireless plc* [2009] EWHC 1793 (Comm), Teare J restated this position but confirmed that [Lightman J's judgment in *Possfund*], 'noted that protection was afforded by [section 150 of the Financial Services Act 1986] to all purchasers of listed securities (whether placees or after-market purchasers) "who had relied on the continuing and updated representations in the listing particulars and the updates". I assume that the cause of action created by section 90 of the 2000 Act is likewise for the benefit of all purchasers of listed securities.' Academic opinion is also largely in favour of the application of section 90 to aftermarket purchases in so far as the 'after-market' is the after-market in the prospectus shares as opposed to the issuer's securities at large.

Section 90A applies to open market claims and is not therefore limited to those securities acquired in a securities offering.

4 Are there differences in the claims available for publicly traded securities and for privately issued securities?

The statutory claims under section 90 and section 90A are only available in relation to publicly traded securities. The common law claims, including the derivative claims and unfair prejudice claims identified in response to question 2, may be available against both public and private companies.

5 What are the elements of the main types of securities claim?

Section 90 provides that any person responsible for listing particulars or a prospectus is liable to pay compensation to a person who has:

- acquired securities or any interest in securities offered by the listing particulars or prospectus; and
- suffered loss as a result of any untrue or misleading statement or omission of information from the listing particulars or prospectus where that information was necessary to enable investors to make an informed assessment of the issuer and the rights attaching to the securities.

Persons responsible for a prospectus will always include the issuer of the relevant securities but may also include directors and sponsors.

Claims brought under section 90 do not require a claimant to show that it relied on the alleged misstatements or omissions (or even show that they read the prospectus). This interpretation of the statute was followed in the *RBS Rights Issue Litigation*.

Section 90A addresses open market claims. An issuer of securities is liable to pay compensation to persons who have suffered loss from buying, selling or holding securities as a result of reliance on an untrue or misleading statement in, or omission from, certain publications made by the issuer or a dishonest delay by the issuer in publishing such information. Relevant publications would include annual reports and accounts and interim results but may also include any information published by means of a recognised information service.

6 What is the standard for determining whether the offering documents or other statements by defendants are actionable?

In a section 90 claim it is necessary to establish that the listing particulars or prospectus contained untrue or misleading statements or omitted any matter required to be included by section 80 or 81 FSMA (with regard to listing particulars) or section 87A or 87G FSMA (with regard to a prospectus). For both listing particulars and the prospectus, the required information is, broadly, the information necessary to enable investors to make an informed assessment of (i) the assets and liabilities, financial position, profits and losses, and prospects of the issuer of the securities; and (ii) the rights attaching to the securities. With regard to listing particulars, but not a prospectus, there is a reasonableness requirement and the reasonable requirements of a professional adviser can be relied upon by the defendant issuer in establishing the standard of information required to be included.

In a section 90A claim, the wording of the statute provides only that any untrue or misleading statement can trigger liability or the omission of any matter required to be included in the publication; there is no explicit requirement for such statements or omissions to be material, but they must have been relied upon.

7 What is the standard for determining whether a defendant has a culpable state of mind?

There is no requirement in a section 90 claim to prove that the defendant had a culpable state of mind. The statement being made can therefore be innocent, in the sense of it not being intentional, reckless or negligent. However, the defendant to a section 90 action can escape liability if it can make out the defence that it reasonably believed, having made such enquiries, if any, as were reasonable, that the statement made was true or not misleading or the matter omitted was properly omitted.

In a section 90A claim the standard required is more than mere negligence. The claimant must establish that a person discharging managerial responsibility (PDMR) knew or was reckless as to whether the statement was untrue or misleading or knew the omission to be a dishonest concealment.

8 Is proof of reliance required, and are there any presumptions of reliance available to assist plaintiffs?

There is no requirement for a claimant in a section 90 claim to establish that they relied on, or in fact read, the offending listing particulars or prospectus.

Under section 90A there is a higher threshold. The claimant must demonstrate that they relied on the published information in deciding whether to buy, hold or sell the securities. It is currently unclear, as this issue has not been determined by the courts, whether or not a 'fraud on the market' theory (ie, that an efficient market prices all available information into a share price and therefore in acquiring the shares the purchaser is relying on all of that available information in paying the price that they pay for the shares) is available to establish reliance.

9 Is proof of causation required? How is causation established?

The use of 'as a result of' in the wording of both section 90 and section 90A suggests that it is necessary to show a causal link between the misleading statement or omission and the loss suffered by the claimant. However, there is no direct case law on this point. It therefore remains unclear whether or not the rules on remoteness, found in tort cases, would apply to these statutory claims.

There is no direct case law on the measure of loss in section 90 claims. Analogous case law suggests that to avoid difficult questions of causation in the loss of value of a security, a date of transaction measure be adopted (ie, price paid less 'true value' at the date of transaction). There is no current case law that suggests that loss be calculated by reference to an event study, which would attempt to eliminate losses not related to the issuer and the complained of events. There is also no case law on the measure of loss in section 90A claims, analogous case law suggests that the deceit measure may be appropriate.

10 What elements present special issues in the securities litigation context?

With, in particular, the *RBS Rights Issue Litigation* settling prior to the determination of many of the contested legal issues, the elements of a section 90 claim remain relatively untested. The same can be said for section 90A claims. The concept of what is 'necessary information' in the context of section 90 and the relevance of the materiality or otherwise of a misleading statement or omission remain to be determined. So too does the appropriate measure of loss in both section 90 and section 90A claims.

A further and fundamental issue in both section 90 and section 90A claims is the identity of the persons at the issuer who have the requisite knowledge or responsibility for the prospectus, listing particulars or statement. This is fundamental to the 'reasonable belief' defence in a section 90 claim (as set out in question 7) and to establishing the identity of the PDMRs in a section 90A claim.

11 What is the relevant limitation period? When does it begin to run? Can it be extended or shortened?

The limitation period for the statutory claims is six years from the date of accrual of the cause of action. For section 90 claims, the cause of action is likely to accrue from the date on which the securities were acquired pursuant to the listing particulars or the prospectus, typically the closing date on a London Stock Exchange issue. However, arguments have been run that the cause of action accrues once the claimants are aware of the misstatements or omissions. For section 90A claims, the cause of action is likely to accrue on the date the misleading, untrue or omissive publication was made or, if the fact that it was untrue, misleading or omissive could not be known, for example, because this had been concealed, on the date this could be known, for example, on corrective disclosure.

It is also possible, with all parties' agreement, to extend the limitation period by entering into a standstill agreement. This, however, gives rise to the risk of losing a potential claim where the standstill agreement does not identify all possible claims or parties.

12 What defences present special issues in the securities litigation context?

The main defences to a section 90 claim are set out in Schedule 10 to the FSMA. They include the 'reasonable belief' defence referred to in question 7. Further, it is a complete defence for the defendant to show that the claimant acquired the securities in question with knowledge that the statement was false or misleading, or of the omitted matter, etc, as the case may be.

There are no specific special defences to a section 90A claim. However, defences are likely to focus on the claimant's reliance on the relevant publication, the dishonesty or recklessness of the relevant PDMRs or materiality.

13 What remedies are available? What is the measure of damages?

The measure of damages under section 90 and section 90A is largely free from authority. Both section 90 and section 90A simply refer to 'compensation'. It is generally understood that compensation would be based on the common law measures of damages in misstatement and deceit claims. However, to date, compensation claims in securities cases under these statutory provisions have pleaded various loss methodologies in the alternative.

The court may draw comparisons between the requisite knowledge requirements in section 90 and section 90A and the measures of damages used in claims in the torts of negligence and deceit. The latter is more likely to be applicable in a section 90A claim where it is necessary to prove knowledge, recklessness or dishonesty. However, related case law indicates that the measure of loss applied in fraud cases might also be applicable to a section 90 claim.

In section 90 claims, loss measures put forward include loss at the date of transaction, loss based on the market price at the date of discovery, and loss crystallised at the date of sale. If a date of transaction measure is applied, loss is measured as the difference between the price paid and the 'true value' of the shares on allotment. This avoids the issue of whether the fraud or negligence based measures of loss ought to be applied and costly evidence as to the foreseeability or causal link between the loss caused by the misstatement or omission and the loss caused by general market movement. However, assessment of 'true value' would undoubtedly be complex and there is no approved methodology for such a calculation. Similar measures of loss have been pleaded in section 90A claims.

14 What is required to plead the claim adequately and proceed past the initial pleading?

For claims made in English courts it is necessary to file and serve a statement of case that sets out the claimant's standing to bring the claim, the nature of the claim, the facts on which the claimant relies and the remedy sought, including costs and interest.

The general rule is that the losing party bears the winning party's reasonable costs. This can be determined on an issue by issue basis. It is therefore generally not to a party's advantage to bring a claim, or part of a claim, that it does not consider to be capable of succeeding as it is likely to result in an adverse costs award if that claim fails.

Notwithstanding the fact that claims brought in the English courts are generally targeted and supportable, there are options available to a defendant (and a claimant) should the claims brought be considered inadequately pleaded. These are considered at question 15.

While there is no amendment to the usual civil law rule that requires facts to be determined on the balance of probabilities, there is a heightened requirement for pleading fraud in English law claims. Solicitors' and barristers' professional rules of conduct provide that they must not draft any document containing an allegation of fraud unless they have clear instructions to do so and reasonably credible evidence that establishes an arguable case of fraud. It has been argued that fraud standards are applicable to section 90A cases owing to the requirement to show dishonesty or recklessness of PDMRs.

15 What are the procedural mechanisms available to defendants to defeat, dispose of or narrow claims at an early stage of proceedings? What requirements must be satisfied to obtain each form of pretrial resolution?

Once a claim has been filed and served on a defendant, the defendant may apply to strike out the claim, in whole or in part, or to obtain summary judgment.

The court uses its powers to strike out a claim sparingly. It is only applied in plain and obvious cases. A strike out application against the whole or part of a case will only be successful where the claimant is pursuing a case that has no reasonable prospects, discloses no proper cause of action or the claim amounts to an abuse of process.

To succeed on a summary judgment application against a claimant it is necessary to show that, even without the benefit of document disclosure, witness evidence and expert reports, the claim has no real prospect of success at trial and that there is no other compelling reason why the case or issue should be disposed of at a trial.

While it does not result in preventing a claim being brought, if there are gaps in a claimant's statement of case a defendant can request further information from the claimant pursuant to Civil Procedure Rules Part 18.

Owing to the nature of the statutory causes of action under section 90 and section 90A and the complexity of the subject matter, it is unlikely that a properly pleaded securities action would be struck out or disposed of by summary judgment. However, experience has shown that Part 18 applications are likely.

16 Are the principles of secondary, vicarious or 'controlling person' liability recognised in your jurisdiction?

Vicarious liability refers to a situation where someone is held responsible for the actions or omissions of another person. In English law this usually arises in an employment context. A two-stage test is applied to establish vicarious liability. The first limb involves consideration of the relationship between the primary wrongdoer and the person alleged to be liable, and whether that relationship is capable of giving rise to vicarious liability. The second requires the court to determine whether there is a sufficiently close connection between the wrongdoing and the employment for it to be fair and just to hold the employer vicariously liable for the wrongdoer's actions.

The concept of secondary liability exists in the English common law. With regard to securities actions and in particular the statutory claims, the extent of secondary liability is unclear. The Prospectus Directive and the Prospectus Regulation on which section 90 is based makes any person responsible for the prospectus liable to pay compensation. This would include the directors, any person who has accepted, and is stated in the prospectus as having accepted, responsibility for the documents and any person who has authorised the contents of the prospectus or listing particulars. This could result in successful claims being brought against the issuer, the directors and the advisers, including the auditors and the underwriting or sponsoring banks.

Arguably, where certain common law claims are brought against the directors by the shareholders but not the issuer, the issuer could be liable for those claims as the employer of the directors.

While there is no directly translatable concept of 'controlling person liability' in relevant English law, the knowledge requirements in the statutory claims (in defence of a section 90 claim and in pursuit of a section 90A claim as explained at questions 6 and 12) are likely to have the same effect.

17 What are the special issues in your jurisdiction with respect to securities claims against directors?

Claims against directors are available under section 90 as explained in response to question 16. Section 90A claims are limited to claims against the issuer itself.

18 What are the special issues in your jurisdiction with respect to securities claims against underwriters?

As indicated at question 16, section 90 permits claims to be brought against persons stated in the prospectus as having accepted responsibility for the documents and any person who has authorised the contents of the prospectus or listing particulars. However, in practice, underwriters will ensure that they are not named as having accepted responsibility for the content of the statement. Disclaimers to that effect are usually expressly included.

19 What are the special issues in your jurisdiction with respect to securities claims against auditors?

In *Caparo Industries v Dickman* [1990] 2 AC 605, the House of Lords held that auditors only owe a duty of care in respect of a specific transaction and a specific shareholder if they have provided information to that shareholder for a particular purpose that the auditors are aware of, and which the shareholder relied on and acted upon. This is generally understood as a principle, known as the requirement for there to be a 'special relationship' with the auditor, which limits the potential liability of auditors.

Similar to underwriters (see question 18), an auditor may be liable for the contents of a prospectus or listing particulars pursuant to section 90. However, significant caveats and disclaimers are likely to be used to attempt to avoid this.

20 In what circumstances does your jurisdiction allow collective proceedings?

England does not presently have an American style opt-out 'class action' system. For a claimant to be bound by or benefit from a decision it must opt-in to litigation by issuing an individual claim. There are methods of multiparty case management available in circumstances where a volume of claimants' claims are the same or similar. The two main types of such collective action are: a representative action and a group litigation order (GLO). The court can also manage claims through the exercise of its normal discretionary case management powers.

Representative actions are conceptually similar to the American class action. In a representative action, one claimant can represent other parties with an identical interest. However, representative actions are rarely used in practice (especially in a securities context) as they are not available where the interests of the claimants diverge in any way, for example, seeking different measures of loss or being subject to different defences.

By contrast, a GLO can be used to case manage multiple claims that give rise to common or related issues of fact or law, known as the GLO Issues, but that also include individual issues. Within the terms of the GLO it is also possible to make provision for test claims on particular lead issues that are then determined and applied to the broader claimant group. All parties to the GLO are bound by any judgments made on the GLO Issues and by any orders made in the GLO claims.

An alternative to a GLO is for multiple cases to be run concurrently and potentially heard together. The court will then exercise its general case management powers to ensure efficiency and fairness as between the different claimants and as against the defendant(s).

In a recent judgment in the *Tesco Litigation*, the claimants' application for a GLO was refused primarily on the ground that there was not a sufficiently large body of claimants that had already issued proceedings or, in the court's opinion, were likely to issue claims to make case management by any other method within the court's discretion so difficult as to make a GLO necessary. It is unclear whether or not this precedent will be followed in future cases.

21 In collective proceedings, are claims opt-in or opt-out?

As indicated in question 20, for a claim to be pursued in the English courts each claimant must file and serve a claim. The collective procedures identified above are therefore most akin to opt-in procedures in the US. The exceptions are certain representative actions commenced in the Competition Appeal Tribunal (CAT) pursuant to the Consumer Rights Act 2015. This introduced a discretion for the CAT to certify that particular consumer claims can continue on behalf of, for example, victims of a cartel, on an opt-out or opt-in basis, and to approve collective settlement, where appropriate. These are known as collective procedure orders. However, initial applications for certification of classes in this context (see *Gibson v Pride Mobility Scooters* [2017] CAT 9 and *Merricks v Mastercard* [2017] CAT 16) have been unsuccessful, with the court taking a narrow approach to its application. As this jurisdiction matures, it is possible that it may be extended to other collective redress claims such as securities actions, especially if there is an anticompetitive aspect to the alleged wrongdoing.

22 Can damages be determined on a class-wide basis, or must damages be assessed individually?

As noted in response to question 20, the English system does not recognise a 'class' as a claimant but recognises each individual claim. Damages are therefore calculated on a per claimant basis.

23 What is the involvement of the court in collective proceedings?

As indicated in question 20, it is for the court to determine the appropriate case management mechanism. The court will also, among other matters, make directions as to the timetable to trial, the extent of evidence, including the scope of disclosure and the number and disciplines of any necessary testifying experts, the admissibility of a claim onto the Group Register in the event that a GLO is ordered, including if a claim is issued after any ordered cut-off date, and the extent of cooperation between claimant solicitors where there is more than one representative.

The details of the terms of settlement of individual claims within a group action do not need to be approved by the court. However, claims can only be withdrawn by order of the court, usually by agreement following settlement. Such orders will, where costs are being shared between claimants within a claimant group, have express terms as to the settling claimants' and defendants' cost liability with regard to that claim.

24 What role do regulators, professional bodies, and other third parties play in collective proceedings?

Regulators and professional bodies have no role as of right in collective proceedings.

As with other proceedings, a third party may intervene in proceedings where it is appropriate for it to do so.

Where there are broad issues of consumer protection a regulator such as the Financial Conduct Authority (FCA) or what was previously the Office of Fair Trading can pursue a claim as a representative action or as a matter of principle to determine an issue. These are collective claims in so far as they have an indirect impact on the operation of a particular consumer market. They are, however, brought in the name of the regulator and do not give rise to compensation payments.

In March 2017, the FCA announced a compensation scheme, administered by KPMG, for shareholders who purchased Tesco shares and bonds on or after 29 August 2014 as a result of the FCA's finding, which Tesco accepted, that Tesco PLC issued a false and misleading trading update constituting market abuse. This is the first time the FCA has used its powers under section 384 of FSMA to require a listed company to pay compensation for market abuse. However, the scheme itself has limitations. For example, it only applies to net acquirers of shares in a very limited three-week period and does not therefore prevent litigation under section 90A from being pursued. The extent to which the FCA might instigate further and other compensation schemes pursuant to section 384 FSMA is unclear.

25 What options are available for plaintiffs to obtain funding for their claims?

While claimants generally pay for litigation themselves, the relatively high cost or relatively low recovery (on an individual claimant basis) in group actions means that private funding may not be the most appropriate.

The litigation funding market in England remains relatively young but is very well capitalised and maturing rapidly.

Third party funders will typically fund some or all of the costs of the litigation on a non-recourse basis in return, on a successful action, for a multiple of the funding provided or a percentage of the damages awarded (or a combination). While the English courts still retain some rules against champerty, these do not apply to third-party funding, which is recognised as providing access to justice.

Another method of funding available to claimants is a conditional fee agreement pursuant to which a solicitor, and often the barristers, will work on either a no fee or reduced fee basis throughout the case in return for an uplift to full hourly rate plus a success fee in the event that the claim is successful.

Since April 2013, it has also been possible for solicitors to act on a contingent basis (known as a damages-based agreement (DBA)). The law firm agrees to act for no upfront cost in return for a percentage of damages recovered. The early uptake of DBAs has been low owing to issues with the regulatory regime governing them, but they are becoming more common.

26 Who is liable to pay costs in securities litigation? How are they calculated? Are there other procedural issues relevant to costs?

The general rule in English litigation is that the loser pays the winner's reasonable costs, although the court has the discretion to make any different order it sees fit or to define the 'winner' or 'loser' on an issue-by-issue basis, or both. Usually, costs are awarded on the 'standard basis', meaning that the court will only order reasonable and proportionate costs to be paid. The alternative is costs on the 'indemnity basis', where a court will assess costs without reference to proportionality and place the burden on the paying party to show costs were unreasonable. The indemnity basis does not mean a full indemnity for costs, but results in a higher proportion of costs being recovered by the winning party. An award for indemnity costs is unusual and tends only to arise where one of the parties has behaved in a materially unreasonable way.

The general rule applies in all the multiparty case management situations identified at question 20.

The main issue in collective actions is the apportionment of costs: as between the claimants (own side costs) and as between the claimants and the defendant (adverse costs) (all referred to as 'common costs of the litigation'). The starting position where a GLO has been ordered is that all common costs are shared equally, with each claimant being liable for an equal proportion of the common costs. (For example, where there are 100 claimants each claimant would bear 1/100th of the common costs.) However, where there is a reason to depart from that prima facie rule, the court will do so. In the *RBS Rights Issue Litigation*, the significant discrepancies between the value of each individual claim warranted a departure from this rule and a pro rata allocation of common costs, relative to the acquisition cost of each claimant's rights issue shares, was ordered. Importantly, under a GLO, common costs liability is several and not joint (as is the normal position in multiparty litigation) so costs risks for each claimant are smaller and more certain.

A defendant may apply for security for costs against a claimant or claimants. The usual circumstances in which security for costs are ordered include the claimant being impecunious or based in a jurisdiction where it is difficult to enforce any order made. However, the defendant must show that it is likely the claimant will not pay a costs order. This will be difficult in respect of most institutional claimants in a securities action.

Most securities actions are multiple claimant actions and, as noted above, are funded. Such funding is likely to include adverse costs cover. Evidence of such insurance or other protection is likely to be sufficient to prevent a security for costs order being made. However, security for costs can and has been awarded against funders themselves.

27 Are there special issues in your jurisdiction with respect to interests in investment funds? What claims are available to investors in a fund against the fund and its directors, and against an investment manager or adviser?

There are multiple types of investment funds in this jurisdiction including: private investment funds, bank or asset manager owned or managed investment funds, active and passive funds and many different structures including unit trusts, OEICs, REITS, investment trusts and UCITS.

The types of claims available to investors in a fund will depend on the fund's structure. Where the fund is a company there are likely to be claims arising from any breach in the exercise of the directors' duties, for example, breach of fiduciary duty claims or, where appropriate, insolvency based claims against the directors. Where the investors are shareholders in the fund they might also be entitled to bring a derivative claim on behalf of the company or to bring a minority shareholder claim should they be unfairly prejudiced by the directors or other shareholders. Alternatively, and in particular in relation to investment trusts, which are listed companies, when marketing securities they will also be subject to the statutory and common law claims identified in this chapter.

28 Are there special issues in your country in the structured finance context?

There are many types of structured finance vehicles including securitisation structures, asset-backed security structures and collateralised obligations, such as CDOs, CLOs and their derivatives. Many kinds of assets may back the relevant securities, including residential and commercial mortgages, leveraged loans, car loans, student debt and credit card debt. Trading in structured finance products is usually over the counter. The claims available in any given situation will depend on the contractual structures implementing the relevant structures.

29 What are the requirements for foreign residents or for holders of securities purchased in other jurisdictions to bring a successful claim in your jurisdiction?

The English courts would need to have jurisdiction to hear the claim (discussed further below) and determine that the courts of this country are the appropriate forum to bring the claim. Otherwise, there is no bar to foreign residents or the holders of securities purchased in other jurisdictions bringing claims in England. In section 90A claims, the securities in issue must, with the consent of the issuer, be admitted to trading on a securities market where the market is situated or operating in the United Kingdom or the United Kingdom is the issuer's home state. The location or residence of the claimant is irrelevant for these purposes. It is generally understood that section 90 claims may only be brought in relation to prospectuses that fall to be approved by the 'competent authority' in the United Kingdom, the FCA, and so section 90 does not have extra-territorial effect.

The conflict of laws rules are complex and the law applicable to other claims could be dependent on many factors including where the loss was suffered, the law of any underlying or consequent contract, the place where the majority of the facts arose, and many others.

30 What are the requirements for investors to bring a successful claim in your jurisdiction against foreign defendants or issuers of securities traded on a foreign exchange?

The requirements depend on the location of the defendant and its operations, where securities are listed, where a transaction such as a capital raising took place and whether there is an exclusive jurisdiction clause in, for example, a prospectus. The court can decline jurisdiction where it does not consider itself to be the appropriate jurisdiction.

The current European regime is made up from Regulation (EU) No. 1215/2012 and the Lugano and Brussels Conventions. These rules apply to defendants in EU member states and Norway, Iceland and Switzerland. The general rule is that a defendant should be sued in its home state, unless, for example, the parties have reached an agreement to confer jurisdiction on the court of another member state.

Where the European regime does not apply, there are common law rules governing jurisdiction. In the UK, these rules are founded on the ability of the English court to permit service of process on a defendant who is not in the jurisdiction.

31 How do courts in your jurisdiction deal with multiple securities claims in different jurisdictions?

The English court's approach will depend on the other jurisdiction in which claims have been brought and the order in which the claims were brought in those other jurisdictions.

Where the European regime applies, any court other than the court 'first seised' (ie, the court in which the claim is first issued) must stay its proceedings until the court first seised has determined the claim or decided that it is not the appropriate jurisdiction to hear the claim.

STEWARTS

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Where the common law rules apply because the other jurisdictions are not bound by the European regime, it is considered to be an abuse of process to sue a party for damages in more than one jurisdiction. Therefore, if proceedings have already been issued elsewhere, the English court is likely to refuse jurisdiction. In some situations, a stay of proceedings is ordered, for example, where jurisdiction is being challenged in the other courts.

32 What are the requirements in your jurisdiction to enforce foreign-court judgments relating to securities transactions?

The jurisdiction in which the judgment has been made will affect the approach applied by the English courts. Enforcement of judgments between EU member states is governed by Regulation (EC) 805/2004, which sets out the procedure for enforcing uncontested judgments, and Regulation (EC) No. 44/2001 and No. 1215/2012 for contested judgments. Generally, no re-examination of the merits is permitted in these procedures.

Enforcement of judgments from other jurisdictions will depend on whether statute provides for reciprocal enforcement arrangements with the foreign jurisdiction, or whether no mutual arrangement is in place, as is the case with the United States. In the latter case, the usual requirement is that proceedings are brought in England on the foreign judgment. Subject to certain public policy exceptions (such as the non-enforceability of punitive damages awards), summary judgment will be granted, which can then be enforced.

33 What alternatives to litigation are available in your jurisdiction to redress losses on securities transactions? What are the advantages and disadvantages of arbitration as compared with litigation in your jurisdiction in securities disputes?

There are many alternative dispute resolution mechanisms in England and use of alternative methods, in particular to enable settlement, is encouraged. The alternative procedures include mediation, arbitration, early neutral evaluation and expert determination.

There is also a Financial Ombudsman Scheme that can determine claims up to £150,000 in value. The Ombudsman's decisions are binding on the firm but not the complainant and a complaint to the Ombudsman does not prevent a court claim from being brought.

While arbitration is a commonly used dispute mechanism in England, we are not aware of any attempt to impose arbitration agreements into, for example, prospectuses or company constitutions. It is also doubtful whether regulators would permit this, owing to the potential to restrict access to justice. However, there is nothing to prevent an issuer and individual shareholders from agreeing to submit a securities dispute to arbitration.

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