CLASS ACTIONS

Presented by Simon Goldblatt QC
Vincent Nelson QC and Richard Hemmings, solicitor

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What is a class action?

1. Whilst CPR 19 goes some way towards recognising the concept of a “class action” it is not to be confused with the principle as applied in, for example, the United States of America and Canada.

2. In the English jurisdiction the expression is to be taken as referring to multi-party or group actions which give rise to common or related issues of fact or law against either one or several defendants. It is the essence of a group action that each individual has his own claim against the Defendant. However, often one or several of these individuals are selected as being ‘typical’ of all members of the group and their cases represent the generic lead actions for the common issues as regards liability or other matters of principle. In the area of medical prescribing, for example, these are likely to be the general question of causation, whether or not the drugs cause an addiction, to what extent prescribers did or were entitled to rely upon the manufacturer’s data sheets, and what was or should have been the state of knowledge of general practitioners and consultant prescribers at any one time.

3. Although group actions have been prominent mainly in tort they are not confined to that cause of action. Class actions have proliferated in insurance (the Lloyd’s litigation), and have also arisen in public law, environmental pollution and consumer claims.

4. In the United States a “class action” has a number of distinctive characteristics. Before a class can be created the following criteria have to be satisfied. These are:
1. the class must be so numerous that specific joinder of all members is impracticable;

2. there must be questions of law and fact common to the class;

3. the claims or defences of the representative parties must be typical of the claims or defences of the class; and

4. the representative parties must be shown to be those that will fairly and adequately protect the interests of all members of the class.

5. Importantly, any plaintiff lawyer can start a class action but a court has to certify it by reference to the foregoing criteria. If the class is certified claimants either have to take a positive step to join the action, or, if they fall within the defined group, they are presumed to be members of the class and entitled to share in any settlement/award unless they take a positive step to disassociate themselves. Further the US court has the right to estimate global damages for the whole class without proof of damage in individual cases.

6. The difference between the English treatment of the class action and that of the US is, however, purely procedural. In both, the class action functions solely as an aggregation device to allow the pursuit of claims that could otherwise not be brought because of the high administrative cost relative to the anticipated recovery. The class format does not alter the terms of the basic cause of action; nor does it introduce new defences or eliminate others. The substantive outcome is not distorted by the choice of the procedure.

7. The primary advantage of a class action is that it effectively and efficiently brings together claims which may be impractical to litigate individually. By aggregating such
claims, group actions lower the cost of litigation and bring greater resources to bear on
the side of claimants challenging a large organisation (as the opposite party or interest
will almost invariably be). For example, in the area of drug or medical application cases
litigation is extremely expensive and frequently the damages recoverable are only
modest.

8. But if there are a large number of claims it makes economic sense for all claimants to
join together to prosecute an action which individually or in small numbers they could
not possibly do. Secondly, it is important to have a sufficient pool of cases from which
lead actions can be drawn so that the relevant issues can be determined and the decision
in those cases will bind other cases. Thirdly, it is important for the defendants to know
the extent of the claims against them.

_How do Group Actions arise?_

9. In cases affecting a class some individuals often commence proceedings through their
own solicitors. This may lead to an awareness of the cause of action and publicity tends
to provoke further individuals to seek advice, leading to a multiplicity of claims: in the
Benzodiazepine litigation 5,000 writs were issued.

10. Typically, a solicitor representing one of the class of litigants may contact the Law
Society at the outset to obtain information about other solicitors working on similar
claims or with a view to raising public awareness of their potential cause of action. This
will often result in the Law Society drawing attention to the potential cause of action
through the Law Society Gazette or other media. An alternative approach is for solicitors
who have been approached with potential group action claims to advertise in the Law
Society Gazette or specialist journals with a view to establishing whether there are other
potential claimants and solicitors who might wish to join in a group action.

11. The inevitable consequence of such publicity is that there will not only be a multiplicity
of claimants there is also a multiplicity of solicitors. In most group actions a steering
committee of representative solicitors will be elected to prosecute the litigation. In the
various Lloyd’s litigation, however, the individual Lloyd’s Names were very proactive.
They formed their own litigation committee. That committee in turn appointed the
solicitor who was to represent the names with the result that in the vast majority of the
Lloyd’s litigation there was one firm of solicitors on the record. In the Lloyd’s and
Jaffray litigation, however, the court was faced with the Names litigation committee, who
wished to appoint their own solicitors, and individuals who wanted to be represented by a
different solicitor or represent themselves.

12. In such circumstances the court will be faced, when proceedings commence, with the
task of directing what arrangements ought to be in place for the conduct of the action. In
*Lloyd’s v Jaffray*, for example, the court directed that one firm of solicitors should be the
lead solicitors responsible for co-ordinating all other claimants and being the solicitor on
the record.

13. The next stage after the establishment of a litigation or steering committee of
representative solicitors will be the formulation of the objectives of the proceedings, the contractual or other arrangements to which the claimants should adhere and the strategy for the future conduct of the action. Of particular importance will be the funding arrangements. Where the action is to be privately funded arrangements will have to be made for the preparation of an estimate of the costs and the levy that will be made on each litigant and at what stage(s) of the litigation. In those cases where the trial is to be conducted on a conditional fee basis insurance will need to be obtained.

**Forum**

14. As a result of the decisions in *Connelly v Rio Tinto Zinc Corp. plc* [1998] A.C. 584 and *Lubbe v Cape plc* [2000] 1 W.L.R. 1545, proceedings, including group actions, can be brought in England and Wales against UK based parent companies of multinational corporations in respect of actions of their subsidiaries in foreign jurisdictions where the claimants could be denied justice in their own jurisdictions because of the non-availability of funding, legal representation, expert advice and established court procedures in group litigation.

**Attitude of the courts**

15. Group actions have been a familiar part of the litigation scenario for many years. The attitude of the courts has generally been to welcome the development of group procedures as a means of preventing a multiplicity of individual actions with similar facts and law being tried separately, thus being a clog on court time. The efficacy of the developing system has proved beneficial and increased the court’s enthusiasm and
encouragement of and for such actions. For example, the Lloyd’s litigation proved to be extremely demanding of the Commercial Court’s time. This was the case notwithstanding the fact that the vast majority of the actions were group actions; there were separate group actions by Lloyd’s members’ action groups against many different members’ agents and managing agents and also group actions against the Society of Lloyd’s. All of which spanned the 1990's and spilled over into 2002. Even at this stage a group action against the Society of Lloyd’s continues.

16. However, as with many aspects of the common law, the courts have been slow in developing the rules which narrowly define or restrict the concept of group actions. The overarching principle applied by the courts was that the court had to be flexible and innovative in devising procedures for each group action and should not fetter itself with prescribed ‘fit all’ rules. Existing procedures did not prove entirely successful when dealing with the multifarious issues that arose in relation to such action. Thus, in Davies (Joseph Owen) v Eli Lilly & Co (unreported) 8 May 1987, the Court of Appeal had to lay down rules for the awarding of costs in group actions; in AB and others v Wyeth (John) and Brothers Ltd (unreported) 13 December 1996, it had to reconsider the principle of abuse of process in the context of group actions and in Ashmore v British Coal Corporation [1990] 2 Q.B. the Court of Appeal had to decide whether a claimant who was not one of the sample (or lead) cases could subsequently insist on her individual case being tried notwithstanding that she was one of the claimants whose sample cases were tried.
17. Modern group actions are difficult, as well as expensive, to run and impose great burdens on the legal team who conduct them and judges who try them. It remains the policy of the courts to facilitate such actions in appropriate cases and adapt traditional procedures accordingly. In the Woolf Report on Access to Justice, Lord Woolf said this in relation to multi-party actions:

“It is now generally recognised, by judges, practitioners and consumer representatives, that there is a need for a new approach both in relation to court procedures and legal aid. The new procedures should achieve the following objectives: (a) provide access to justice where large numbers of people have been affected by another’s conduct, but individual loss is so small that it makes an individual action economically unviable; (b) provide expeditious, effective and proportionate methods of resolving cases, where individual damages are large enough to justify individual action but where the number of claimants and the nature of the issues involved mean that the cases cannot be managed satisfactorily in accordance with normal procedure; (c) achieve a balance between the normal rights of claimants and defendants, to pursue and defend cases individually, and the interests of a group of parties to litigate the action as a whole in an effective manner.”

18. As a result of the Woolf Report CPR Pt. 19, Section III makes provision for group litigation pursuant to a Group Litigation Order (the “GLO”). The rules contained there are unlikely to restrict or inhibit the decisions and strategy of legal teams representing a group or class that has already been assembled; but they are likely to prove very efficacious in controlling litigation across the jurisdiction when the same issues of principle arise and are being contested contemporaneously in a diversity of courts.

19. An important factor in the court’s approach is that it must be as flexible and adaptable as possible in the application of its procedures with a view to reaching decisions quickly
and economically. A GLO must (CPR 19(2):

1. contain directions about the establishment of a register (“the group register”) on which the claims managed under the GLO will be entered;
2. specify the GLO issues which will identify the claims to be managed as a group under the GLO; and
3. specify the court (“the management court”) which will manage the claims on the group register.

20. One essential requirement in achieving this result is the nomination by the court at an early stage of a judge who should take charge of all interlocutory applications which are necessary before the actions can be tried. If the appointed judge is also to be the trial judge it may be necessary to seek the appointment of a substitute judge if there is a likelihood that there are matters which may need to be resolved that should not heard by the trial judge: for example, the question whether or not the contents of particular documents are truly privileged or without prejudice.

21. The judge to whom the group action is assigned has wide inherent powers to devise procedures to deal with specific problems of the litigation before him: *AB & others v John Wyeth and Brothers Ltd & others* (1988 C.A.; unrep). Once the court is seized of the action it is not for the claimant or the defendant to insist on anything. It is for the court to decide what best would lead as effectively as possible to resolution of the litigation; and the Court of Appeal will be reluctant to adjust the controls imposed by the
judge unless it can be shown that the effect of his order was to cause unnecessary expenditure. Nevertheless, there is plenty of room for initiative by the legal teams advancing or defending a group action. If a sensible timetable and set of procedures are propounded on behalf of parties a judge will not lightly override them.

22. Among the matters that will be dealt with by the judge at the first interlocutory hearing will be directions for service of the master statement of case (obviating the need for individual claimants to incur expense pleading those aspects of the claim which are common to others) and arrangements for the selection of “lead actions” which raise common issues. The management court may also give directions for providing for one or more claims on the group register to proceed as test claims; appointing the solicitor of one or more parties to be the lead solicitor for the claimants or defendant: in practice this will occur only where the solicitors are unable to agree between themselves; specifying the details to be included in a statement of case in order to show that the criteria for entry of the claim on the group register have been met.

23. There are important practical points to emphasise here. Just as with any ordinary litigation, a group action may end prematurely for some or all of the participating claimants. Leaving aside any disposal by order of the court, those who represent claimants must be geared from an early stage to handle the departure from proceedings of litigants who lose heart, the compromise by some parties of their individual claims, and the rejection or acceptance of a comprehensive offer of settlement by the opposing interests. This means that (at least where the group claims are for money) there must be
an appreciation from an early stage by the legal advisers of the approximate value of individual and aggregated claims - irrespective of any need to plead them - and an understanding of the underlying economics of the litigation. We have mentioned funding already and deal with costs in our next section; but underlying both these, there has to be viability to a group action.

24. The opposing interests will ordinarily have large resources, strong determination, and the tactical resolve to exploit the diversity of members and interests against them. There may be procedural obstacles erected, which it is up to the claimants’ representative, and the judge, to contain, and there may be attempts to divide and conquer. There is no prescribed number of participants in a group action, but there will be a (varying) critical mass for any set of proceedings. The claimants’ advisers will need to maintain that level of support: the defendants’ advisers will strive to reduce their opponents’ number below it.

Costs

25. In the context of the critical mass required to allow the litigation to go forward or continue, a solicitor must always remember that he/she should not allow his/her client to go forward without fully explaining to him/her what the litigation may involve, both in terms of costs and prospects of success. Many group litigants are vulnerable individuals who may have their hopes raised by publicity or the prospect of combined litigation only to see them dashed when counsel’s opinion as to viability is obtained or funding arrangements cannot be secured.
26. It is important to bear in mind that where, due to a lack of resources, it becomes apparent that a group action case cannot be brought to trial the court has an inherent jurisdiction to stop further needless expense and strike out the action as an abuse of process. It is therefore vitally important that due weight be given to funding arrangements at the outset of the planning of a group action.

27. The courts have been alive to the difficulties in this area and have sought to devise means of pre-empting protracted disputes that may arise over costs.

28. In relation to the costs of group actions in the *Woolf Report on Access to Justice* Lord Woolf said:

   “If the treatment of costs is not examined from the outset, the result is either subsidiary litigation or protracted problems when the matter comes to taxation. My general proposals for information on costs to be made available at every stage when the managing judge is involved are all the more important in relation to multi-party actions, where many claimants will be legally aided and have no direct control over costs and where costs can escalate dramatically. At every stage in the management of the [multi-party action] the judge should consider, with the help of the parties, the potential impact on costs of the directions that are contemplated, and whether these are justified in relation to what is at issue. Parties and their legal representatives, as in other cases on the multi-track, should provide information on costs already incurred and be prepared to estimate the cost of proposed further work. It has been suggested that such examination should occur at intervals of three months. That must be for the managing judge to determine in each individual case.”

29. As a result of the Woolf Report CPR rule 48.6A provides for costs where a group
litigation order has been made. As a general principle the court has a discretion to make costs orders as part of its case management function making provision for future events, including costs of the trial.

30. **Costs sharing between claimants**: the general rules are that:

1. common costs (i.e. the costs as between the claimants of conducting the action excluding the defendants’ costs) are shared severally and equally between all claimants on the register;
2. common costs are determined on a quarterly basis and any claimant who leaves the action (whether by withdrawal or settlement) is liable for those costs to the end of the quarter in which the claimant left;
3. whenever a claimant joins an action he/she is treated as having been on the register from the beginning;
4. the court may designate certain issues to be wholly common and shared between all claimants, and others to be referable only to particular sub-groups of claimants and shared between them according to the foregoing principles.

31. **Inter partes Costs**: However, it is generally the practice of the court to make an order at the outset specifying that all claimants (and not just the lead claimants) are to have several and equal liability for any costs that might be payable to the defendants.

32. In the case of common issues it will generally be the case that the costs of those issues (whether paid by claimant to defendant or vice-versa) will be ordered to follow the
determination of the common issues rather than await the individual fate of each claimant’s action. No such order will generally be made at the outset of the action.

33. Likewise, in the case of discontinuer’s and settler’s liability for common costs, if any, of discontinuing claimants will generally await the determination of common issues.

34. In privately funded actions an area of relevance may be the implications for outside funders (such as friends and benefactors) in the event that the action fails. It was formerly thought that under section 51(3) of the Supreme Court Act 1981 the court had a discretion to order outside funders to pay the costs of a party who was assisted by such funder (see for example Aiden Shipping Co. Ltd v Interbulk Ltd [1986] 1 A.C. 965). However, in Hamilton v Al Fayed (No.2) [2003] 2 W.L.R. 128 the Court of Appeal held that pure funders are generally exempt from such orders provided that the essential motivation was to enable the funded party to litigate what the funders perceived to be a genuine case, as opposed to gambling on the outcome of litigation in return for a profit.

**Privity of interest and abuse of process**

35. It is important at the outset to have regard to the ambit and effect of estoppels that may arise in group actions. Where the group actions are advertised widely or are known to potential claimants whose cause of action is similar to that of the “lead claimants” and the potential claimants do not come forward to join in the proceedings they may be estopped from subsequently raising those issues in new proceedings.
36. Alternatively, if the potential claimants subsequently bring new proceedings it would be an abuse of the process of the court and contrary to justice and public policy for the issue to be re-litigated. Further, where lead cases have been selected to enable the court fully to investigate and make findings on all the relevant evidence the court will not permit a non-lead claimant subsequently to proceed with her/his own claim seeking a different or individual finding in respect of the common issues (CPR 19.12; Ashmore v British Coal Corporation [1990] 2 Q.B. 338). To permit the claimant so to do would be analogous to a collateral attack on the court’s decision and would defeat the purpose of the lead actions and be contrary to the interests of justice unless there were fresh evidence which entirely changed the issues litigated in the lead actions.