23 January 2025

PRESS SUMMARY

Wirral Council (as Administering Authority of Merseyside Pension Fund) v (1) Indivior Plc & (2) Reckitt Benckiser Group Plc [2025] EWCA Civ 40
On appeal from [2023] EWHC 3114 (Comm)

Court of Appeal (Civil Division): Sir Julian Flaux (Chancellor of the High Court), Lord Justice Nugee, Lady Justice Falk

BACKGROUND

This appeal concerns the use of representative actions in the context of a securities class action brought under sections 90 and 90A and Schedule 10A of the Financial Services and Markets Act 2000.

The case arises from an alleged fraud (the "Scheme") by the defendants, Indivior Plc ("Indivior") and Reckitt Benckiser Group Plc ("Reckitt"). The Scheme related to the manufacturing of an anti-addiction medication, Suboxone, and alleged misleading statements made about its safety. In 2019, Indivior and Reckitt settled related prosecutions brought against them by the authorities in the United States for US$600 million and US$1.4 billion respectively.

On 21 September 2022, Wirral Council ("Wirral") commenced the current representative claim on behalf of the defendants' shareholders ("the representative proceedings"). Also on 21 September 2022, three further claim forms were issued against the defendants on behalf of a large number of institutional shareholders ("the multi-party proceedings"). The multi-party proceedings are stayed pending the outcome of this appeal.

The defendants applied to strike out the representative proceedings. By his judgment dated 5 December 2023, Michael Green J granted the application and struck out the representative proceedings. Wirral appealed.

The question raised by this appeal was whether it is appropriate—following the Supreme Court's decision in *Lloyd v Google LLC* [2022] AC 1217 and that of the Court of Appeal in *Commission Recovery* [2024] EWCA Civ 9—for Wirral to pursue a representative action seeking declarations as to common issues relating to the defendants while all claimant issues are excluded.

JUDGMENT

The Court of Appeal unanimously dismissed the appeal.

REASONS FOR JUDGMENT

Representative actions are governed by CPR 19.8. They involve a person bringing a claim as a representative of a class of other persons who have the "same interest" in the claim. Any resulting judgment is binding on the class unless the court orders otherwise. Under CPR 19.8(2), the court may direct that the person bringing the claim cannot act as a representative. Such an order usually results in the claim being struck out.

The use of representative actions was recently addressed by the Supreme Court in *Lloyd v Google*. The Supreme Court struck out Mr Lloyd's representative claim against Google because the represented class did not have the "same interest" in the claim as each member of the class had suffered an individual (and thereby different) loss. The Supreme Court did, however, suggest that Mr Lloyd's representative action might have succeeded if he had bifurcated the claim whereby common issues were resolved first. Non-common issues might then have been addressed in separate, follow-on claims brought by each class member. This bifurcated approach was followed by Knowles J in *Commission Recovery*, which was upheld on appeal.

However, *Lloyd v Google* and *Commission Recovery* are clear that the starting point for the appeal is that the judge had a discretion under CPR 19.8 as to whether to allow the representative proceedings to continue. That discretion is unfettered other than by reference to the overriding objective. The judge's exercise of his discretion fell within the generous ambit afforded to him with which the Court of Appeal has no basis to interfere [123].

Lloyd v Google does not stand as authority for representative actions being preferred to other procedures [124]. Where other forms of procedures are available, the judge was right to assess the relative advantages and disadvantages of each. The ability to order the progression of claimant issues in multi-party proceedings is one factor that is relevant to that assessment [125]. In the present case, this was a material point following the recent decision of Leech J in *Allianz Funds Multi-Strategy Trust v Barclays plc* [2024] EWHC 2710 (Ch). There, Leech J held that so-called "fraud on the market" reliance was unavailable under English law [127]. Here, all the claimants in the multi-party proceedings plead "fraud on the market" reliance and only some rely on direct and/or indirect reliance (which are available under English law). It is, therefore, possible that a significant number of the represented class might have no claim, but that would go untested for several years under Wirral's proposal, which decreases the scope for settlement [128].

Wirral's approach would also allow it and its funders to engage in book-building in a manner disapproved by the Courts. Wirral's submission that it is in fact aimed at facilitating access to justice for retail claimants was problematic because it relied on the funders being unwilling to fund retail claimants in the multi-party proceedings without the funders adequately explaining why [131]. Those reasons given by the funders were unevidenced and incoherent. To the extent there were legitimate concerns, they could be dealt with in the multi-party proceedings through appropriate case management [134].

The judge gave appropriate consideration to the other points made by Wirral and was entitled to come to the conclusion that he did [138]-[142]. The Court of Appeal agreed with him that the use of the multi-party procedure was in accordance with the overriding objective and most likely to promote settlement [143].

References in square brackets are to paragraphs in the judgment.

NOTE
This summary is provided to assist in understanding the Court's decision. It does not form part of the reasons for the decision. The full judgment of the Court is the only authoritative documents. Judgments are public documents and are available at: https://caselaw.nationalarchives.gov.uk/