Herbert Smith Freehills on class actions

Herbert Smith Freehills' Damian Grave, Gregg Rowan and Maura McIntosh investigate how in-house lawyers can tackle the increasing threat of class actions in the English Courts

Class actions represent an increasing area of risk for UK corporates, with increasing numbers of high-profile and high-value group claims being brought, or threatened to be brought, in the English courts.

The principal mechanism used to litigate these claims differs from the 'opt-out' class action familiar from the US, where claimants who fall within a defined class are automatically included unless they take steps to opt out. In contrast, claims in the English courts normally proceed on an 'opt-in' basis, with claimants issuing claims which are then managed together by the court under a Group Litigation Order (or GLO).

WHY THE INCREASED FOCUS?

There are many factors contributing to the rise in class or group litigation in England and Wales. One is the increased activity of claimant firms and third party litigation funders in this area. Class actions are attractive for those looking to invest in litigation as an asset class; whilst the costs may be high, the potential returns may be commensurately very attractive. Another factor, in relation to shareholder actions in particular, is a shift in mindset on the part of institutional investors, who have become much more open to the possibility of participating in group actions where appropriate, and the emergence of shareholder action monitoring services that will assist investors to identify relevant actions globally.

The increased focus on class actions in this jurisdiction has been given further impetus by a number of high profile claims to hit the English courts in recent years, including two major shareholder actions brought under GLOs (the RBS rights issue litigation, which settled last year, and the Lloyds/HBOS litigation, which came to trial earlier this year) and the high-profile claims by thousands of motorists in the VW Emissions litigation, in which a GLO has recently been granted. There is also an increasing trend towards 'class action tourism' in which UK corporates, typically in the mining and energy sectors, are sued in the English courts based on the operations of their subsidiaries abroad. Over the past decade or so, claims have been brought in London based on incidents that took place in such widespread locations as the Ivory Coast, Colombia, Zambia, Nigeria and Peru.

Other expected growth areas for class actions include claims relating to data breaches, particularly given the heightened focus on data protection issues generally with the recent implementation of the General Data Protection Regulation (GDPR), and competition law breaches under the controversial opt-out regime for claims in the Competition Appeal Tribunal introduced by the Consumer Rights Act 2015.

AN OUNCE OF PREVENTION?

There is no magic bullet for defendants to avoid being on the receiving end of such claims, but there are steps that can be taken to minimise the risks.

The first, and obvious, point is to have robust procedures in place to minimise the likelihood of an incident occurring that may lead to liability on a mass scale, including putting in place robust health and safety, data protection and competition compliance programmes.

The second line of defence, where an incident does occur that could give rise to liability, is to take early steps to rectify the issue and consider ways to provide redress to those affected.

DEFENDANT STRATEGIES

If all else fails and a class action is launched, what strategies can defendants bring to bear to improve their position in the litigation? Clearly much will depend on the particular case, but there are a number of points for defendants to think about.

Challenging jurisdiction: Where there are good arguments to suggest that the English court is not the appropriate forum in which to bring a claim, a defendant may wish to consider a jurisdiction

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challenge. At present, where the defendant is a UK company, there may be little chance of successfully challenging jurisdiction on this basis, due to EU case law to the effect that a defendant can be sued as of right in its 'home' member state. That could change, however, either because of the UK's impending exit from the EU (and depending on the arrangements agreed between the UK and the EU going forward) or because of case law – the Supreme Court is due to consider the effect of the EU jurisprudence in the context of a potential group action relating to alleged environmental pollution in Zambia.

Challenging the grant of a GLO

The court has a discretion to make a GLO where there are a number of claims that give rise to common or related issues of fact or law. In some cases, it may be in the interests of the defendant, as well as the claimants, to have the claims managed under a GLO so as to maximise efficiency and cost-effectiveness. As an obvious example, if the common issues are determined in favour of the defendant, the need to determine potentially thousands of individual claims may be avoided. In some circumstances, however, particularly where the claims are very fact-sensitive, a defendant may wish to challenge the grant of a GLO as it may simply increase costs to no real benefit.

Applying for strike out or summary judgment

In some circumstances, the court has the power to strike out a statement of case or grant summary judgment, either in whole or in part and in favour of the claimant or defendant. Given their drastic impact, the bar for the exercise of these powers is set high, but they have been used to good effect by defendants in the group action context. In the Lloyds/HBOS group litigation, for example, the defendants successfully applied to strike out the claimants' allegation that directors owed shareholders a series of broad fiduciary duties, thereby narrowing the issues that had to be addressed at trial.

Ensuring appropriate investigation of individual issues

In any group action the court will need to strike a balance between addressing generic issues, which are common to all or most of the claims, and individual issues, which are distinct to the individual claimant. In a shareholder action, for instance, the generic issues may include the question of whether particular statements made by the company were true, whereas issues of reliance and quantum may have to be considered individually. In general terms, the claimants will be keen to focus on generic issues, so as to put maximum pressure on the defendant at minimum cost; the defendant will be equally keen to investigate individual issues, which will likely be just as important in determining whether it is liable and to what extent.

Applying for security for costs

Where a GLO has been made, the claimants' liability for the defendant's costs will typically be several, not joint. In other words, each claimant will be liable only for a proportion of those costs, making it significantly more difficult for a defendant to recover its costs in full at the end of the litigation. An order for security for costs, particularly against a third party litigation funder, may therefore provide important protection for the defendant. The courts have shown themselves willing to order claimants to disclose the identity of those funding the litigation, to allow a defendant to consider an application for security for costs, and indeed to order funders to provide security where appropriate. Such an order was made, for example, in the RBS rights issue group litigation.

Settlement considerations

In group litigation as in any other, the defendant's preference may be to reach a settlement, assuming reasonable terms can be agreed, so as to manage its risk and avoid further costs. However, it may be difficult or impossible to agree a settlement until the relevant limitation period has expired, or at least until any cut-off date in the GLO has passed. Until that point, the defendant will not know how many more claims might come out of the woodwork, and therefore may be understandably reluctant to do a deal. Settlement dynamics may also be complicated, in the group litigation context, by the presence of different claimant groups who may have different interests or expectations in terms of recovery, as well as by the involvement of third-party funders, or indeed claimant solicitors, with a financial stake in the litigation. All of these factors must be carefully managed. ■

Damian Grave, Gregg Rowan and Maura McIntosh are the general editors of Class Actions in England & Wales*, recently published by Sweet & Maxwell. Written by lawyers from Herbert Smith Freehills, the text provides practical guidance for those looking to bring or defend class action litigation in the courts of England and Wales.*