Neutral Citation Number: [2025] EWCA Civ 40

Case Nos: CA-2024-000149 and 000155

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
COMMERCIAL COURT (KBD)
FINANCIAL LIST
MR JUSTICE MICHAEL GREEN
[2023] EWHC 3114 (Comm)

Royal Courts of Justice
Rolls Building, Fetter Lane, London EC4A 1NL

Date: 23/01/2025

Before :

SIR JULIAN FLAUX CHANCELLOR OF THE HIGH COURT
LORD JUSTICE NUGEE
and
LADY JUSTICE FALK

- -

Between :

WIRRAL COUNCIL (As Administering Authority of MERSEYSIDE PENSION FUND)	**Appellant**
- and -	
INDIVIOR PLC	**Respondent**

-and-

WIRRAL COUNCIL (As Administering Authority of MERSEYSIDE PENSION FUND)	**Appellant**

-and-

RECKITT BENCKISER GROUP PLC	**Respondent**

- -
- -

Graham Chapman KC, Alex Barden and Joseph Leech (instructed by **Mishcon de Reya LLP**) for the **Appellant**
Conall Patton KC (instructed by **Freshfields LLP**) for **Indivior PLC**
Helen Davies KC, Tony Singla KC and Jonathan Scott (instructed by **Linklaters LLP**) for **Reckitt Benckiser Group PLC**

Hearing dates: 10 and 11 December 2024

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Approved Judgment

This judgment was handed down remotely at 10.30am on 23 January 2025 by circulation to the parties or their representatives by e-mail and by release to the National Archives

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Sir Julian Flaux C:

Introduction

1. The question raised by this appeal is whether the claimant ("Wirral") can bring representative proceedings under CPR 19.8 on behalf of institutional and retail investors in the defendants who claim under sections 90 and 90A and Schedule 10A of the Financial Services and Markets Act 2000 ("FSMA") in respect of alleged fraudulent statements and dishonest omissions in published information. Wirral sought to rely upon the decision of the Supreme Court in *Lloyd v Google LLC* [2022] AC 1217 to pursue a representative action seeking declarations as to common issues relating to the defendants. Issues as to the individual investors such as standing to sue, reliance, causation and quantum, which are not common issues, do not form part of the representative proceedings. Wirral contended that this bifurcated approach was endorsed by the Supreme Court and was appropriate in the present case.

2. The defendants applied to strike out the representative proceedings on the basis that this was not an appropriate procedure for these claims under FSMA, contending that the claims should be brought in the usual way by ordinary multi-party proceedings with each investor being a claimant. Such multi-party proceedings had in fact been brought at the same time as the representative proceedings by many of the investors who had opted in to the representative proceedings.

3. By his judgment dated 5 December 2023, Michael Green J sitting in the Financial List acceded to the application and struck out the representative proceedings. Wirral now appeals against that decision with the permission of Males LJ. In giving permission, he said that although this was an exercise of discretion by the judge for what appear to be sound reasons, his decision may have wider significance for other cases and merits consideration by the Court of Appeal.

Factual and procedural background

4. The judge set out a summary of the background at [5] to [15] of his judgment. The essential features are as follows. The case arises from the decades-long opioid crisis in America. Indivior is the manufacturer of anti-addiction medication, Suboxone, aimed at combatting that crisis (and was previously a subsidiary of Reckitt known as Reckitt Benckiser Pharmaceuticals Inc). Between 2006 to 2013, the defendants are alleged to have been involved in a fraudulent scheme (the "Scheme"). The essence of the Scheme is said to have been to extend the period of patent protection over Suboxone. The defendants are alleged to have done so by changing Suboxone from tablet form to a film version and by making allegedly fraudulent claims that the film version was safer for children.

5. On 9 April 2019, details of the alleged Scheme were made public in a US federal indictment against Indivior. Following the indictment, and related Federal Trade Commission investigations, Indivior agreed to pay US$600 million in settlement of its civil and criminal liability. Its US subsidiary, former CEO and Medical Director all pleaded guilty to criminal charges related to the Scheme. Reckitt agreed to pay US$1.4 billion in settlement of its own potential liability.

6. On 21 September 2022, the current representative claims were commenced by Wirral. Also on 21 and 22 September 2022, three further claim forms were issued against the defendants on behalf of a large number of claimants ("the multi-party proceedings"). Those claim forms have not been served and the multi-party proceedings are stayed pending the outcome of this appeal.

Relevant provisions of the CPR

7. CPR 19.8 provides as follows:

> "(1) Where more than one person has the same interest in a claim–
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> (a) the claim may be begun; or
>
> (b) the court may order that the claim be continued,
>
> by or against one or more of the persons who have the same interest as representatives of any other persons who have that interest.
>
> (2) The court may direct that a person may not act as a representative.
>
> (3) Any party may apply to the court for an order under paragraph (2).
>
> (4) Unless the court otherwise directs any judgment or order given in a claim in which a party is acting as a representative under this rule –
>
> (a) is binding on all persons represented in the claim; but
>
> (b) may only be enforced by or against a person who is not a party to the claim with the permission of the court."

The judgment below

8. At the outset of the judgment at [3] the judge noted that: "There is no dispute that the applications are to be resolved by the exercise of a discretion so as to give effect to the overriding objective." The fact that the judge's decision involved an exercise of discretion is an important consideration in the determination of this appeal. In the same paragraph, the judge set out what he saw as the essential difference between the parties as being between (i) the defendants' submission that allowing the Representative Proceedings would deprive the Court of its case-management powers by having a bifurcated procedure imposed on it by Wirral, and (ii) Wirral's submission that it was entitled to commence proceedings under r.19.8 and, unless the defendants can show that there was a fundamental flaw in it doing so, the Court should not strike out the claim.

9. At [17] the judge said:

> "The distinct advantage of the Representative Proceedings from Wirral's and the Multi-party proceedings Claimants' point of view is that there will be no front-loading of costs on claimant-side matters, such as standing and reliance. All the burden will be on the Defendants to deal with the common issues and defend the relief sought in the Representative Proceedings, namely the two declarations set out above. The Defendants say simply that it should be for the Court to decide how to case manage the proceedings and what should be done and when, taking into account both sides' positions and more generally the administration of justice and the overriding objective."

10. The judge considered it helpful to look first at how securities claims under section 90A and Schedule 10A of FSMA had been managed by the Court since the provisions were introduced in 2010 and then to see if it was appropriate to proceed as Wirral had by reference to *Lloyd v Google LLC.* He observed at [20] that securities claims, like any other form of civil litigation, were to be case managed and tried according to the overriding objective (i.e., justly and at a proportionate cost) and at [21] that they typically gave rise to similar issues, including whether there should be a split trial.

11. The judge then reviewed the various previous cases of securities claims including Hildyard J in *Manning & Napier v Tesco plc* [2017] EWHC 3296 (Ch), Miles J in *Allianz Global Investors GmbH & Ors v RSA Insurance Group plc* [2021] EWHC 570 (Ch), and Falk J (as she then was) in *Various Claimants v G4S Limited* [2022] EWHC 1742 (Ch). The common theme which he drew from them was that a split trial was regularly ordered with the issue of reliance to be determined in the second trial. However, the Court would also typically require the claimants to provide sample disclosure, further particularisation and/or witness evidence on reliance in parallel with the first trial. This was to ensure that the claimants did not bring speculative claims, were required to undertake substantial work in prosecuting their cases, to mitigate against fading memories, and to assist with settlement efforts. He concluded at [28]:

> "The Representative Proceedings however predetermine those issues of split trial and other matters of case management in the Claimants' favour without being put before the Court. Whether that is appropriate or not needs to be determined by reference to the scope of CPR 19.8 and *Lloyd v Google*."

12. He then set out CPR 19.8. He noted at [31] that Mr Chapman KC for Wirral placed great reliance on the fact that so long as the *"same interest"* threshold is met, it was entitled *"as of right"* to bring the representative proceedings. He accepted that because that threshold was met, Wirral was entitled under CPR 19.8(1)(a) to commence the proceedings but considered that had no bearing on whether the court's discretion, which arises on an application under 19.8(2) and (3), should be exercised in favour of allowing the proceedings to continue.

13. The judge then considered *Lloyd v Google* in detail. He noted at [32] that there was no doubt that Lord Leggatt's extensive consideration of the history and availability of representative actions, albeit *obiter*, suggested that a bifurcated process could be appropriate for actions such as in *Lloyd v Google*. However, the judge said it was important to note that in that case the claimant was not seeking bifurcation because the

proceedings were unworkable and unviable unless all issues, including damages, could be resolved at the trial of the representative action. The claim was on behalf of some four million iPhone users for breach of the Data Protection Act 1998. Class actions not being available in this jurisdiction other than in competition claims, the claimant sought to use the representative procedure under CPR 19.8. However, as the judge noted at [34] the issue arose not in an application under 19.8(2) but an application for permission to serve the proceedings out of the jurisdiction.

14. At [36], the judge noted that Lord Leggatt in his historical survey had explained that the origins of what is now CPR 19.8 were as a solution to the "*complete joinder rule"* whereby all persons materially interested in the subject-matter of the proceedings had to be parties to them. He also stated that Lord Leggatt had noted that whenever the Courts attempted to narrow the availability of representative proceedings, that tended to be corrected by later appellate decisions which emphasised its broad nature, for example *Duke of Bedford v Ellis* [1901] AC 1.

15. At [37] the judge said that importantly for the present case, Lord Leggatt placed particular emphasis on the decision of Vinelott J in *Prudential Assurance Co Ltd v Newman Industries Ltd* [1981] Ch 229 ("*Prudential*") which was an example of a bifurcated process being used in a representative action. Lord Leggatt clearly regarded this as an important decision, albeit it was overturned by the Court of Appeal on the substantive point as to whether the shareholders had a personal cause of action.

16. At [38] he noted that Lord Leggatt had concluded that the fact that damages were necessarily personal to the members of the representative class was not a bar to a representative action and explained that the decision of the Court of Appeal in *Emerald Supplies Ltd v British Airways plc* [2011] Ch 345 did not decide that a representative action could not be brought if damage was an ingredient of the cause of action. The difficulties identified by the Court of Appeal could have been solved by adjusting the class or by adopting the *Prudential* form of bifurcation.

17. At [40] the judge noted that the only way the claimant in *Lloyd v Google* could bring the claim was by way of representative action. As Lord Leggatt said at [67] of his judgment: "it is better to go as far as possible towards justice than to deny it altogether and that, if you cannot realistically make everyone interested a party, you should ensure that those who are parties will 'fairly and honestly try the right'." At [68] he makes clear that the Court should allow such a claim to be brought with a broad interpretation of the rule, explaining at [69] to [74] that the *"same interest"* threshold requirement should be interpreted purposively in the light of the overriding objective and the rationale for the rule.

18. At [41] the judge noted that all parties relied on [75] of Lord Leggatt's judgment which provides:

> "(ii) The court's discretion
>
> 75 Where the same interest requirement is satisfied, the court has a discretion whether to allow a claim to proceed as a representative action. As with any power given to it by the Civil Procedure Rules, the court must in exercising its discretion seek to give effect to the overriding objective of dealing with cases

> justly and at proportionate cost: see CPR rule 1.2(a). Many of the considerations specifically included in that objective (see CPR rule 1.1(2)) - such as ensuring that the parties are on an equal footing, saving expense, dealing with the case in ways which are proportionate to the amount of money involved, ensuring that the case is dealt with expeditiously and fairly, and allotting to it an appropriate share of the court's resources while taking into account the need to allot resources to other cases - are likely to militate in favour of allowing a claim, where practicable, to be continued as a representative action rather than leaving members of the class to pursue claims individually."

19. At [42] the judge rejected any suggestion that Lord Leggatt was saying there was a presumption in favour of representative proceedings where the *"same interest"* threshold is satisfied:

> "It seems to me that Lord Leggatt was simply making clear that the Court needs to exercise its discretion so as to further the overriding objective and that has to be done by reference to the particular circumstances pertaining to the case before it."

20. At [43] the judge noted that Mr Chapman KC relied particularly on [80]-[81] where Lord Leggatt said: "Finally, as already discussed, it is not a bar to a representative claim that each represented person has in law a separate cause of action nor that the relief claimed consists of or includes damages or some other monetary relief." As the judge said, Lord Leggatt concluded that the assessment of individual claims for damages can be left to another stage of the proceedings by use of a bifurcated process. The judge said at [44] that Lord Leggatt explained this at [81]:

> "In cases where damages would require individual assessment, there <u>may</u> nevertheless be advantages in terms of justice and efficiency in adopting a bifurcated process - as was done, for example, in the *Prudential* case [1981] Ch 229 - whereby common issues of law or fact are decided through a representative claim, leaving any issues which require individual determination - <u>whether they relate to liability or the amount of damages</u> - to be dealt with at a subsequent stage of the proceedings." (the judge's underlining).

21. The judge continued at [45]-[46]:

> "45 As one can see, in proposing the bifurcated process, Lord Leggatt referred again to *Prudential*, but he expressly limited his comment to cases '*where damages would require individual assessment*'. He also said that there '*may*' be advantages, not that there always will be. Having said that, he did go on to suggest that not only damages issues but also issues related to liability could be dealt with at another stage. That seems a little inconsistent to the opening words and with the fact that the section was only seemingly dealing with damages. The point is relevant to this case because it is not only damages issues that

> Wirral wants to avoid at the trial of the Representative Proceedings, but also issues related to standing, reliance, causation and limitation.
>
> 46 Furthermore, as Mr Chapman KC fairly accepted, there is no development in Lord Leggatt's judgment as to the nature of the bifurcation process and how the second stage of the proceedings would work. Nor is there any reference to the case management issues that might arise as a result of bifurcation, in particular whether such a representative action might deprive the Court of its ability to case manage the claims from start to end. In this case, Wirral has been very reticent about how the follow-on claims would work – whether they would be fresh claims, or part of the Representative Proceedings or the Multi-party proceedings – and it was only in his oral submissions that Mr Chapman KC offered some possible options for that second stage. It seems to me important that both the parties and the Court are clear as to exactly how the process will work through to a conclusion so as to be able to judge whether that is an appropriate course to take."

22. The judge noted at [47] that Lord Leggatt did not need to deal with these matters as the claimant was not seeking bifurcation, so his suggestions about bifurcation were *obiter* though coming from the highest authority and due the utmost respect. He said that no doubt Lord Leggatt wanted to see more use of the representative action in the absence of class action rules as a flexible method of getting cases before the Courts. However, at [48], the judge advised caution as to the application of *Lloyd v Google*:

> "But one does have to be careful about the consequences. One can perfectly understand that the Court should try to ensure that there is appropriate access to justice for those who would not be able to bring claims save by way of representative action. But where there are perfectly feasible non-representative proceedings, the Court should be able to weigh whether those are preferable to representative proceedings both from the parties' and the Court's point of view. I do not think that Lord Leggatt would have been contemplating the use of representative proceedings that would effectively deprive the Court of being able to decide which is the best way to case manage such cases based on their own particular circumstances."

23. The judge also advised caution over undue reliance on *Prudential* as a justification for bifurcation in the present case saying at [49]:

> "*Prudential* was a very unusual case where the issue as to representation by the plaintiff of all other shareholders in their personal actions against the directors for damages in respect of a misleading circular and conspiracy only arose at the beginning of the trial. Vinelott J was, in any event, going to try the underlying factual issues both in the context of the plaintiff's own personal action and in the derivative proceedings. So by

> allowing the plaintiff to bring the claim also in a representative capacity this did not cause any disruption to the trial or require any particular element of case management."

24. He noted at [50] that whilst it was true to say Vinelott J adopted a bifurcated process in allowing declarations to be made as to liability but with individual shareholders having to establish their damages claims in a separate action, the nature of such a separate action was not described and it never reached that stage because the Court of Appeal overturned the declarations on the personal action as being misconceived. Also, the bifurcation was clearly limited to damages issues. At [51] the judge pointed out that *Prudential* did not really help on the question of case management at the outset of proceedings (as it had concerned a representative order made at the beginning of the trial).

25. The judge then dealt with the two reported first instance decisions subsequent to *Lloyd v Google* (both of which have been upheld by the Court of Appeal since the judge's judgment). In *Commission Recovery Ltd v Marks & Clerk LLP* [2023] EWHC 398 (Comm); [2024] 2 All ER (Comm) 949, Robin Knowles J allowed the representative action to proceed on a bifurcated basis on the basis that it was the only way the claims in respect of the secret commission could be brought. The judge noted at [54] that: "*Commission Recovery* does not deal with bifurcation or the case management consequences if there were any such bifurcation, including how the follow-on claims would be managed and tried."

26. In *Prismall v Google UK Ltd & Ors* [2023] EWHC 1169; [2024] 1 WLR 879, Heather Williams J struck out the representative action brought purportedly on behalf of 1.6 million individuals for the tort of misuse of private information, being medical records. The representative claimant sought to argue that the Court could award "lowest common denominator" damages to avoid any issue about individual assessment of damages, which was rejected by the judge. It should be noted that during the hearing of the appeal in the present case the Court of Appeal handed down judgment dismissing the appeal by the claimant in *Prismall* ([2024] EWCA Civ 1516). It was common ground that there was nothing in the judgment of the Court in that case which was of assistance in relation to the present appeal.

27. Finally in relation to *Lloyd v Google* the judge said this at [56]:

> "Returning to *Lloyd v Google*, it seems to me that the Supreme Court was advocating for greater use of the representative action, principally where it would provide access to justice that would not otherwise be available to that class of claimants. Lord Leggatt dealt in passing with bifurcation as a potential way round the problem that individual claims to damages could not be tried in the representative action. He did not however explain how bifurcation would work in any particular case and made it clear that the Court should decide each case by reference to the overriding objective. Importantly I do not think that he was suggesting that claimants should be able to bring representative actions in order to bifurcate and thereby avoid what they would otherwise be required to do if they had brought ordinary multi-party claims. Bifurcation is a solution to a particular problem

> with representative actions; but it is not the purpose of representative actions. Yet bifurcation is the sole purpose and stated advantage, put forward by Wirral, of these Representative Proceedings."

28. In considering the exercise of his discretion, the judge set out first at [60] and following the arguments of Wirral in favour of the representative proceedings, being principally that: "they would be less risky, costly and burdensome for the represented persons, and would provide access to justice for retail investors who would not otherwise be able to bring such claims in their own names." Bifurcation would mean that there would only be declarations on the common defendant-side issues which would mean no front-loading of costs for represented persons. The judge said at [61]:

> "Mr Chapman KC was quite open about this, that it would mean that the represented persons will get the benefit of the findings on the common issues without having been required to plead their case, provide disclosure or other evidence and without being at risk of being a selected test claimant who might have to provide evidence of reliance before the trial of the Representative Proceedings. Furthermore, it means that an investor would be able to defer any decision on whether to bring their claim until after the declarations have been made or if the declarations are not made, they would save the time and expense of bringing their own claim. Mr Chapman KC also suggested that this process would be more likely to lead to a settlement of these cases, although it is not clear what the evidence for that was."

29. In relation to institutional investors, the judge said at [62] that: "It perhaps goes without saying that institutional investors would prefer to minimise their risks, costs and expenditure of resources and wait and see if the Representative Proceedings succeed." He referred to the evidence Wirral adduced from two US attorneys, Mr Lange and Ms Mendoza, who said that their institutional investor clients are deterred from pursuing securities claims in this jurisdiction because of procedures requiring them to bring proceedings in their own names and provide information, evidence and disclosure about their cases. The judge said he was unclear as to the status and relevance of their evidence, but summarised what they said. At [63] he noted that Mr Chapman KC fairly accepted that their evidence did not show that any institutional investors had been deterred from joining the multi-party proceedings in this case but maintained that their evidence was compelling that institutional investors are generally put off from litigating here unless their claims are very large because of the prohibitive costs and risks of doing so.

30. Wirral also relied on a report from Professor Andrew Higgins of Oxford University explaining the comparative position of bifurcated securities claims in Australia, New Zealand and Canada focusing on Australia, where he is qualified to practise. In August 2023, Foxton J ruled that it could not be admitted as expert evidence as it did not meet the requirements for such evidence but could be relied upon as if Professor Higgins had published an article in these terms. The judge considered at [65] that this report had limited weight in the exercise of his discretion.

31. At [69] the judge noted that Mr Chapman KC concentrated on the retail investors who are the vast majority of shareholders in the defendants, 68% or 11,552 in the case of Reckitt and 89% or 10,566 in the case of Indivior. His solicitor, Mr Leedham of Mishcon de Reya, stated in his witness statement that there are disincentives to retail investors participating in securities claims which would mean instructing lawyers, particularising their cases, including on limitation, reliance and loss and providing disclosure and factual evidence. He said that those requirements of ordinary proceedings are a "*substantial chilling factor on the participation of investors in securities actions (and on the willingness of litigation funders to fund such actions)*." The judge recorded Mr Leedham's evidence that litigation funders were not prepared to fund claims by retail investors as it was not economically viable for them to do so prior to a finding of liability being made. In the representative proceedings, there is funding provided by Woodsford but it is not apparently prepared to fund retail investors who may want to join the multi-party proceedings, which is said to be a barrier to access to justice for retail investors.

32. At [72] the judge said that, after being pressed to do so, Mr Chapman KC spelt out in oral submissions four options for the second stage of the representative proceedings. At [74] the judge expressed surprise that there was no clear strategy for taking these claims through to a conclusion of investors actually receiving some compensation. As he said:

> "The funders must have contemplated funding the investors all the way through to such recovery (there would be no sense in doing otherwise) and yet they apparently have no idea how the proceedings will work save up to the obtaining of the declarations in the Representative Proceedings."

33. The judge then set out the arguments of the defendants against the representative proceedings, saying at [76]:

> "The Defendants' main argument is that the Representative Proceedings would prevent the Court from being able to exercise its case management powers in relation to the procedural structure, such as a bifurcated process, and its general control over the shape of the proceedings prior to trial. They say that it should be open to the Court to decide whether the proceedings should be bifurcated and, if so, what should be tried at the first stage and whether progress should be made on second stage issues ahead of the first stage trial. The Court should be able to decide whether in this particular case the same approach as was adopted in the other securities cases of *G4S, RSA* and *Serco* (as described above) by Miles and Falk JJ should be adopted in this case or whether an alternative approach is more suitable. It will still be open to the Claimants to argue that there should be bifurcation and no progress on what would be second stage issues. But it would be up to the Court to decide this, rather than Wirral and its represented persons, who have presented this as a *fait accompli* with which the Court cannot interfere."

34. He set out the arguments of Ms Helen Davies KC for Reckitt as to the disadvantages of the inability of the court to control its own procedure. First was that not having details

of the individual claimant issues would make settlement more difficult. Particulars of standing, reliance and quantum would enable the defendants properly to assess the claims and value them for settlement purposes. Wirral had offered to provide trading data for the represented persons but she submitted that this was inadequate.

35. The judge noted at [78] her second point that there was a serious risk of fading memories because some of the published information relied on goes back to 2006. The Court could do something to mitigate this, as had Miles and Falk JJ in *RSA* and *G4S* by having earlier disclosure and witness statements, which would also prevent subsequent evidence being overinfluenced by the findings of the judge at the first trial, a point made at [72] of *G4S*. Her third point followed on from the second, that case management orders on matters such as disclosure and witness statements before the first trial means the parties and the Court would not be starting from a standing start in terms of preparation for the second trial.

36. At [80] he noted Ms Davies KC's fourth point which was allocation of litigation burden, something which was referred to in other securities cases. As other judges had recognised, claimants bringing such claims should be prepared to undertake substantial work to progress the case and engage properly with it to ensure it is resolved fairly and expeditiously. She submitted that it was self-evidently not in the interests of justice or consistent with the overriding objective or fair to the defendants that the burden should be so lop-sided against them.

37. As to institutional investors being deterred from litigating here, she submitted that the evidence of the two US attorneys was not helpful or relevant. It is clear from the multi-party proceedings that institutional investors have not in fact been deterred from such proceedings against the defendants. The fact that they would prefer to be involved in the litigation in a minimal way through the representative proceedings does not mean that is consistent with the fair administration of justice or the overriding objective.

38. As for the retail investors, the judge noted at [82] Ms Davies KC's submission that their position had been exaggerated for the purpose of supporting the representative proceedings. As at the date of the hearing, 231 retail investors had signed up to one or both of the representative proceedings. In a letter sent a few days before the hearing Mishcon de Reya had said none of these retail investors had joined the multi-party proceedings, saying Woodsford was not willing to fund them should they wish to do so because of the "economic and administrative burden" of pursuing such claims said to apply to the funders and retail investors, although that seemingly does not apply to the institutional investors who have funding for both forms of proceedings.

39. At [83] the judge noted that the actual funding agreement had not been disclosed. He continued:

> "But Ms Davies KC did show me the Costs Sharing and Governance Agreement which contains the terms upon which investors are able to become represented persons in the Representative Proceedings. The represented persons have to agree to costs sharing in order to opt-in to the Representative Proceedings. They have to provide '*valid, accurate and complete trading data*' presumably to prove that they have *prima facie* standing to pursue a claim. By clause 14, unless Wirral

> agrees otherwise '*for example because the Third Party has put in place other funding arrangements acceptable to [Wirral]*', the Third Party (meaning the party signing up to the Representative Proceedings) has to pay its estimated share of the incurred Action Costs and Adverse Costs (as those terms are defined) and make arrangements to secure its estimated share of the future Action Costs and Adverse Costs through to the conclusion of the proceedings. That must be either (i) by way of a written and binding obligation that an English company with at least 3 years of audited financial statements and net assets of at least £10m, or an equally creditworthy entity, will indemnify the payment of those costs as they are incurred on a month-by-month basis; or (ii) pay up front and in full a sum corresponding to the investor's estimated share of future costs."

40. At [84] the judge pointed out that these were quite stringent requirements and any retail investors that could satisfy them must be fairly substantial in themselves. Although the clause suggested that retail investors could come to a different agreement with Wirral, there was no evidence that this had happened. He said: "On the contrary, as Ms Davies KC submitted, the clause indicates that retail investors with small claims would be unlikely to be able to participate in the Representative Proceedings, which would deprive them of access to justice." Though there were large number of retail investors, the value of their shareholdings was only some 0.02% to 0.03% of each defendant's share capital. Accordingly she submitted that there was no proof that the representative proceedings are actually beneficial to retail investors and the fact that they had been excluded by the funders from participating in the multi-party proceedings was something inexplicable and was because of the attitude of Woodsford.

41. At [85] the judge noted Ms Davies KC's submission that little reliance could be placed on Professor Higgins' report and in any event it did not support Wirral's arguments. In the Australian statutory class action procedure, there was no automatic bifurcation and indeed Professor Higgins explained that the initial trial would normally involve the trial of all issues in at least one lead claim. Professor Higgins also referred to the considerable case management powers of the Australian Court prior to the first trial, including to order sampling and disclosure. This supported the defendants' position that the Court should be allowed to case manage the proceedings all the way through.

42. At [86] the judge noted that Mr Patton KC had adopted all Ms Davies KC's submissions with some additional observations on the policy underlying section 90A and Schedule 10A of FSMA by reference to a Discussion Paper and Report of Professor Paul Davies KC in 2007. The judge summarised this at [86]-[87] in these terms:

> "…That new statutory regime derived from a review carried out by Professor Paul Davies KC, who produced a Discussion Paper dated March 2007, followed by a Final Report dated June 2007. Professor Davies KC's terms of reference from the Government were to consider the impact of the new regime on '*issuers, markets, investors and others; the quantity and quality of information disclosed; the competitiveness of the UK as a good place to do business*'. Professor Davies KC focused on the requirements of reasonable reliance and fraud as setting a high

> bar for liability, that would hopefully prevent the private securities litigation culture that had developed in the US.
>
> 87 In his Final Report, Professor Davies KC was keen to stress that it would not be beneficial for the UK financial markets for private securities litigation to follow the course taken in the US, where the availability of funding and lower thresholds for liability had led to extensive private securities actions. He recognised that recent changes in litigation funding rules in the UK may exacerbate the risk of unmeritorious claims being pursued but he considered that this risk could be tempered by making liability fraud-based, rather than negligence-based, and dependent on reasonable reliance by the investors. In other words, he wanted to avoid speculative collective litigation in the UK. The Government agreed, stating in its impact assessment of the new regime that it had '*deliberately been shaped, principally by selecting a demanding fraud test for liability, to minimise the potential for speculative litigation and the corresponding pressure on issuers to settle in order to terminate litigation, rather than compensate for harm done to shareholders*'."

43. The judge then set out his conclusions on the exercise of discretion in this case. He commented at [88] that a lot of the evidence he had received seemed to him to be more related to policy reasons for exercising his discretion one way or another (which included the reference to the policy behind section 90A and Schedule 10A in Professor Paul Davies KC's papers to which he had just referred) and said at [89] that he was not deciding the application on policy grounds or to say that this is how securities claims in general should be brought, but he was deciding how his discretion should be exercised in this particular case.

44. At [90] he said:

> "While *Lloyd v Google* might be understood to have presaged a new look at the utility of representative actions, I do not think that Lord Leggatt would have contemplated that his judgment would be used to oust the ability of the Court to case manage these sorts of claims from the start. Mr Chapman KC said that if Lord Leggatt had had concerns about the effect of bifurcation on case management, he would have said so. But the trouble with that is that the issue was not before the Supreme Court and it is unclear whether any submissions were made about it. The case was more about whether the representative action could be used where otherwise a very large number of persons would not have any access to justice and where bifurcation simply would not work."

45. He repeated the point he had made at [56], (cited at [27] above) that he did not believe that the availability of a bifurcated process in representative actions was the reason for using them. He questioned whether it was appropriate to be using the representative action for the express purpose of bifurcation so as to remove any possibility of the Court being able to require the represented persons to do anything in relation to their claims

at the initial stages. He said at [92] that although he understood the desire of the investors and their funders to avoid the risk and costs of pursuing the multi-party proceedings, he did not believe that was a legitimate basis for depriving the Court of its power to case manage such claims. This is particularly so where it is desirable for the Court to set down a procedure at the outset of the proceedings that would take the parties all the way through to a monetary judgment. He said at [94] the investors had nothing to fear in putting case management in the hands of the Court. If there is a good case for bifurcation, that case can be made to the judge managing the case who will decide what is in the best interests of the parties and the administration of justice.

46. He said at [95] that Wirral's proposition does seem quite extraordinary. It asks the Court to accept that it should have no control over whether the proceedings should be bifurcated, unlike in *G4S* and *RSA* where the judges had carefully balanced all the competing interests in deciding how those cases should be managed. Yet Wirral was saying the investors should be able unilaterally, without any input from the defendants or the Court, to bifurcate the proceedings as they wanted to, depriving the Court of the ability to apply the overriding objective in case managing the claim.

47. At [97] he noted that the existence of the multi-party proceedings showed that institutional investors had not been deterred from pursuing their claims here by the way securities claims are managed. The fact that they would prefer not to expend cost and effort in preparing and putting forward their cases until after the first trial is unsurprising but contrary to the way litigation is normally conducted in this jurisdiction.

48. At [98] he said that he had been concerned about the position of the retail investors and the fact that they might be deprived of access to justice if the representative proceedings cannot go ahead. He continued:

> "…But as it emerged from the evidence and the hearing, the retail investors are inexplicably not being allowed to participate in the Multi-party proceedings because of the attitude of the funders. Even though the retail investors who have signed up to the Representative Proceedings, including satisfying the stringent financial conditions, have been allowed to participate in them, including presumably to take their claims to a conclusion in the follow-on claims (although the commitment in the Costs Sharing and Governance Agreement is limited to the Representative Proceedings), they have been denied funding and the opportunity to participate in the Multi-party proceedings.
>
> 99. But this situation has been engineered by the funders. And it has enabled Wirral to say that the retail investors cannot pursue their claims otherwise than through the Representative Proceedings and will be denied access to justice. But without any adequate and coherent explanation from the funders as to why they have apparently discriminated against the retail investors in relation to the Multi-party proceedings, I am not prepared to accept that they can only seek redress through the Representative Proceedings. There is no evidence that retail investors who have opted-in to the Representative Proceedings would not be able to obtain their own funding and issue their own proceedings, which

> could then be consolidated or at least managed together with the Multi-party proceedings."

49. He also noted that Ms Davies KC had referred to the *RBS Rights Issue Litigation* pursuant to section 90 of FSMA, which included thousands of retail investors and the *Lloyd/HBOS Group Litigation* which involved claims from some 6,000 investors, both institutional and retail, which showed that retail investors had been able to bring claims under the current procedural structure and had access to justice in similar securities claims, albeit not under section 90A. The evidence did not show that retail investors are unable to bring their claims otherwise than through representative proceedings.

50. In relation to the overriding objective, the judge said at [101]:

> "In terms of the overriding objective, it seems to me that the case management of the other securities claims have shown how the Court can deal with these cases fairly, proportionately and by allotting an appropriate share of the Court's resources to them. If the Claimants are required to provide material in support of their individual claims and to engage with the proceedings from an early stage, it is more likely that the proceedings will be dealt with expeditiously overall. It will mean that there will not be a standing start after the first trial and with fading memories it may be important that the final trial is not delayed too long and that their evidence is recorded at an earlier stage. There was not much discussion at the hearing about the possible disruption as a result of appeals. But this can be factored in by the Court in making sensible, practical case management directions, including by putting the parties on an equal footing."

51. He noted at [102] Wirral's suggestion that an advantage of the representative proceedings was that if it did not obtain the declarations then the time, effort and costs of follow-on claims would be saved and that settlement would be much more likely if it succeeded in the representative proceedings. The judge said there was no real evidence to support this, but more fundamentally, these considerations could be taken into account by the judge case managing the proceedings from the start.

52. The judge concluded at [104]-[105]:

> "104 So I return to the main point that these issues should be for the Judge managing the claims to consider. That will be done by reference to the overriding objective. To allow the Representative Proceedings to continue would mean that a Judge has no power to decide the best way to manage the claims from start to end by reference to all relevant factors, including the respective positions of the parties, the appropriate use of the Court's resources and the administration of justice. They take away from the Court one of its prime functions to manage and deal with cases justly and at proportionate cost.
>
> 105 I therefore conclude that, in the circumstances of this case, my discretion should be exercised against the Representative

> Proceedings and in favour of the Multi-party proceedings, should the Claimants wish to proceed with them. They can be managed in the normal way so as to further the overriding objective and in particular the Claimants can argue for the same bifurcated process, with no progress on claimant-side issues in the meantime and it will be up to the Judge managing that case to decide whether that is appropriate or not. But I think it would be unfair and unjust, and contrary to the overriding objective, to allow the Representative Proceedings to oust the jurisdiction of the Court to case manage the claims from the start."

Grounds of appeal

53. Wirral contends that the judge erred in law and fact and in the exercise of his discretion in ordering that it should not continue to act as representative and in striking out the representative proceedings. His approach did not properly reflect or apply the decision of the Supreme Court in *Lloyd v Google* as further explained by the Court of Appeal in *Commission Recovery* [2024] EWCA Civ 9. The main point in the judgment, that in a bifurcated representative action the Court cannot manage the second stage of the proceedings from the outset, is an inherent feature of any action structured in the way contemplated by the Supreme Court. If this were a bar to such actions or a heavy factor in the exercise of discretion, few or no such claims could proceed.

54. Wirral contends that the characterisation of the representative action as ousting the case management powers of the Court was misconceived as it does not oust the powers but provides a different procedural regime. The judgment also wrongly treated representative actions as limited to cases where access to justice would not otherwise be available and/or where the bifurcation was only in respect of damages. *Lloyd v Google* does not support an approach based on such a hierarchy of actions.

55. Wirral also contends that the judgment failed to give sufficient weight to the evidence that striking out would preclude 302 existing claims by retail investors, as well as an unknown number of other potential retail claimants. The judgment also accorded too much weight to the "usual way" in which previous claims under section 90A have been brought and managed, as a multi-party action with limited bifurcation.

56. The judge had disclaimed reference to policy grounds but he should have had regard to such matters, including the particular benefits of a bifurcated representative claim and the difficulties associated with multi-party proceedings, which apply to most section 90A claims. The appeal raises a question of principle and/or practice.

The submissions of the parties

57. Mr Chapman KC began his submissions with that alleged issue of principle, which he said was recognised by Males LJ in granting permission to appeal. If a representative action is not to be permitted here and for the reasons given by the judge, it was difficult to see in what circumstances it might ever be permitted. He submitted that, so far as the ability of the retail investors to bring claims at all was concerned, this was an all or nothing situation, but as I pointed out in argument, there is no evidence from the funders that they are not prepared to fund the retail investors.

58. He submitted that the judge misapplied and misunderstood the law particularly as found in *Lloyd v Google*. He did not grasp its significance, dismissing it as *obiter* with only passing treatment of the representative action. That starting point infected most of the judge's subsequent analysis which treated a representative action as the exception to the conventional manner of case managing securities claims.

59. Mr Chapman KC turned to the law, noting that if the threshold requirement of same interest is met, the claimant can commence a representative action as of right and does not have to obtain the permission of the Court, although he accepted that the Court has a discretion whether to allow a representative action to continue.

60. He then took the Court in detail through *Lloyd v Google*. He noted that at [8] of the judgment Lord Leggatt had said that the claim was doomed to fail because the claimant sought to claim damages on behalf of the members of the class without individual assessment. However, the Supreme Court indicated that, if he had sought to employ a representative action and a bifurcated approach seeking declaratory relief first and individual assessment of damages second, that would have been a permissible approach. Although what follows on the topic of representative actions is *obiter* it is powerful guidance which ought to be followed.

61. Lord Leggatt turned to collective redress at [24], starting with group actions pursuant to GLOs, noting that the disadvantages of that procedure are that it is opt-in with low participation rates and that the need to prove loss on an individual basis can have the effect of not making the procedure cost-effective. He then dealt with collective proceedings, only available in respect of competition claims. He then turned to representative actions at [33], setting out the history including the correction of the restrictive approach in *Temperton v Russell* [1893] 1 QB 435 by the House of Lords in the *Duke of Bedford* case. In his historical survey, Lord Leggatt got to *Prudential* at [47], saying at [48]:

> "This decision was important in demonstrating the potential for a bifurcated process whereby issues common to the claims of a class of persons may be decided in a representative action which, if successful, can then form a basis for individual claims for redress. More generally, the *Prudential* case marked a welcome revival of the spirit of flexibility which characterised the old case law."

Mr Chapman KC submitted that the judge overlooked this endorsement of the importance of *Prudential* in demonstrating the potential for a bifurcated process.

62. Lord Leggatt went on to deal with claims for damages and the decision of the Court of Appeal in *Emerald Supplies*. Mr Chapman KC addressed the various options so far as individual claims for damages were concerned if Wirral were successful in obtaining declaratory relief. He noted that what Lord Leggatt seemed to be contemplating in this part of the judgment was a representative action in which declarations were obtained, followed by further proceedings in which individual claimants relying on the declaratory relief would seek to prove their individual claims for loss and damage. This was a possibility which was canvassed in *Prudential* as well. He submitted that this was the first option, fresh proceedings. The second option would be for the represented persons to apply to be joined as parties to the multi-party proceedings. The third option,

which is what seems to have happened in the New Zealand case of *Credit Suisse v Houghton* [2013] NZSC 25 is to amend the claim in the representative action to specifically name the represented persons as claimants. As the members of the Court pointed out in argument, all three of these options might well raise limitation issues, as Mr Chapman KC accepted.

63. After dealing with Commonwealth cases, Lord Leggatt dealt with the principles applicable to the representative procedure, saying at [68]: "I agree with the highest courts of Australia, Canada and New Zealand that, while a detailed legislative framework would be preferable, its absence (outside the field of competition law) in this country is no reason to decline to apply, or to interpret restrictively, the representative rule which has long existed (and has had a legislative basis since 1873)." He then referred to the "same interest" threshold requirement, which is satisfied here.

64. Mr Chapman KC then referred to [75] of *Lloyd v Google* dealing with the Court's discretion (quoted at [18] above) pointing out that, as Nugee LJ had also said in *Commission Recovery*, application of the overriding objective was likely to militate in favour of the representative action continuing. In relation to discretion, Lord Leggatt then dealt with matters of discretion such as limiting the represented class and class definition. Mr Chapman KC submitted that it was striking that these did not include the type of case management concerns raised here which are really stage 2 issues: problems of recollection, litigation burden and so on which one would expect to see if they were relevant to deciding whether the claim should proceed by way of representative action. In any event, by starting from the wrong starting point, the judge elevated those case management concerns to a prominence they did not warrant. He submitted that the Court should be looking for knock-out blows not matters of procedural preference before exercising the discretion to strike out the action as the judge did, although he accepted, in answer to Falk LJ, that one did not get that concept of knock-out blow from Lord Leggatt's judgment.

65. Mr Chapman KC then relied upon [80]-[81] of Lord Leggatt's judgment, to which I have referred at [20] above, submitting that the answer which he gave to the difficulty that damages would need to be assessed on an individual basis was the bifurcated process by reference back to *Prudential* as an available option. [81] also provided a steer as regards the limitation issue, based on *Prudential* and the decision of the Court of Appeal in *Moon v Atherton* [1972] 2 QB 435, that so far as the individual claims by represented persons are concerned, the limitation clock will have stopped running when the representative action was commenced.

66. Mr Chapman KC then made submissions about the decision of Vinelott J in *Prudential*. He referred to the section on discretion at [1981] Ch 229, 255-6 where the judge said:

> "Then it is said that the effect of allowing the action to proceed will be to add numberless claims founded on fraud and that the court should therefore be slow to admit the amendment as it always is slow to allow an amendment alleging fraud. In my judgment, that submission is misconceived. Allegations of misconduct on the part of the individual defendants as directors and of conspiracy are made in the statement of claim. The effect of allowing the plaintiff to sue in a representative capacity is that if those allegations are proved any member of the class will

> be entitled to rely on the judgment as res judicata. The amendment, therefore, does not add causes of action. It allows a common element in the causes of action of all members of the class to be established in one representative action."

He submitted that this was the position here in terms of the common issues in respect of which Wirral seeks declarations.

67. He also relied upon the next paragraph of the judgment at 256B:

> "Next, it is said that if the claim had been originally formulated as a representative claim the defendants might have wished to adduce evidence that no member of the class has suffered damage. That objection is, in my judgment, also misconceived. The court cannot in a representative action make an order for damages, though, of course, the plaintiff in its own non-representative capacity will be entitled to pursue its claim for damages."

68. He noted that the judge took issue with the formulation of the declaratory relief sought in proposed amendments to the pleading but indicated he would permit the declaratory action to continue if the amendments were recast as he suggested, saying at 256F-G:

> "The practical effect of such a declaration would, it seems to me, be no greater and no less than the effect of declarations, first, that the circular was tricky and misleading; secondly, that the individual defendants conspired to procure its circulation in order to procure the passing of the relevant resolution; and thirdly, that in so doing they conspired either to injure the plaintiff and the other shareholders at that date or to commit an unlawful act, or to induce a breach by the first defendant company of its contractual duty to the shareholders. It would, I think, be better that those declarations, which constitute the common element of any claim by any member of the class for damages for conspiracy, should be so spelt out."

69. Mr Chapman KC submitted that the Supreme Court in *Lloyd v Google* had not qualified its approval of *Prudential* by saying it was a case where the representative action was only brought at trial, so one did not need to worry about case management concerns as the judge did. It did not say *Prudential* is an example of how a bifurcated process might work, but you have to be careful using it because you don't know anything about the individual positions on reliance or the total value of the shareholders' claims or there might be issues about starting from a standing start. He submitted that it was difficult to identify a material distinction between *Prudential* and its endorsement in *Lloyd v Google* and the present case.

70. In answer to questions from the Court about situations such as the present where another procedure in the form of the multi-party proceedings is available and why it should not be for the Court rather than the claimant to determine which procedure was the more appropriate, Mr Chapman KC accepted that this could feature in the exercise of

discretion, but it could not weigh so heavily as to forestall the procedural option of representative proceedings which the claimant has shown it is entitled to use.

71. He submitted that one of the advantages of the bifurcated approach is that the parties and the Court can move much more quickly and efficiently to a determination of the common issues which are the only issues at play at stage 1. He accepted that one could try to persuade a Court to adopt the same approach of bifurcation in multi-party proceedings but a bifurcated representative action has this advantage built in from the outset and investors know what they are letting themselves in for.

72. Mr Chapman KC then made submissions about the decision of the Court of Appeal in *Commission Recovery*. He noted that one objection to the continuation of the representative claim was a pleading point, that there should be an individualised pleading of each represented person's claim. This was rejected by this Court in [69] of the judgment of Nugee LJ:

> "Mr Machell did not spend much time on this ground, and I consider that he was right not to do so. Pleadings are intended to aid in the just resolution of disputes, not obstruct their just resolution. I do not see that at this stage of the proceedings it is necessary for there to be any individualised pleading of the claim of each member of the class, or that any useful purpose would be served by such pleading. The whole point of CRL's core proposition is that it is not necessary at this stage to have an individualised assessment of each claim, as proof of contracting on the standard terms and of payment of commission is enough; what the position will be thereafter depends on whether CRL is right about this, what issues remain to be decided, to what extent individualised assessment is required, and if so whether and to what extent individualised pleadings are required for that purpose. These are all future questions. They are not a reason to regard the pleading as it currently stands as deficient."

Mr Chapman KC submitted that this paragraph was important because it addresses many of the points relied on by the judge in the present case and, consistently with *Lloyd v Google*, suggests matters such as the pleading of individualised claims and other matters related to the individual claimant are stage 2 issues.

73. From [71] onwards Nugee LJ dealt with discretion. The point made by Mr Machell KC set out at [72] about it being uncertain whether any individual claimant will come forward let alone make a monetary recovery echoed points made in the present case. This was addressed by Nugee LJ at [74] and [75]:

> "74 I think there is a short answer to these points. In general it is a matter for a claimant to decide if the claim he advances is worth pursuing. The Court no doubt does have a discretion to prevent its resources being wasted on pointless litigation, where the game is simply not worth the candle, but save in clear cases I think the Court should be slow on such grounds to prevent a claimant with an arguable case from taking it forward. CRL's very purpose is to advance the claims in this litigation…

> 75 It may be noted that the application under CPR r 19.8(2) is not premised on CRL being an unsuitable representative, or as having shown itself to be unfit to take on the role. In seeking a direction from the Court that CRL 'may not act as a representative', M&C LLP and LAR are not trying to have CRL replaced by someone more suitable, but to prevent the litigation being taken forward at all. If CRL cannot act as a representative it is not to be supposed that it will pursue the case for the sake of some £6,000, nor is it suggested that others are likely to come forward to take it over. So in effect the question is whether, under the guise of an application under CPR r 19.8(2), the defendants to a claim should be able to have the claim stopped in its tracks entirely. Here I think it is worth recalling the guidance given by Lord Leggatt in *Lloyd v Google* at [75] (paragraph 38 above) that many of the considerations included in the overriding objective:
>
> > 'are likely to militate in favour of allowing a claim, where practicable, to be continued as a representative action rather than leaving members of the class to pursue claims individually.'
>
> That seems to me applicable to the present case."

74. Mr Chapman KC submitted that eight points of importance and relevance emerge from these cases. First, the representative action is a well-established procedure which has existed for centuries. Second, it is a flexible tool of convenience to be used to advance the interests of justice. Third, the only threshold requirement that must be met is the "same interest" requirement. Fourth, that requirement must be given a purposive and pragmatic interpretation. Fifth, once it has been met, the Court has a discretion as to whether to allow the representative action to continue. Sixth, that discretion must be exercised by reference to the overriding objective, the requirements of which will often militate in favour of allowing the representative claim to continue. Seventh, for a defendant to be able to stop the representative claim in its tracks, there would ordinarily have to be a successful challenge to the representative action itself, such as the suitability of the representative claimant acting as such, problems with the definition of class or, as in *Lloyd v Google*, a representative claimant seeking lowest common denominator damages or even if the common issues were not sufficiently dispositive. Eighth the fact that the represented persons have individual claims for damages requiring individual proof is not a bar to a representative action but it may be appropriate to have a bifurcated process of establishing liability first.

75. He next submitted that the presence of the multi-party proceedings should not cloud the analysis of whether the representative action is appropriate and should be allowed to continue. If the multi-party proceedings route is in practice not available to particular claimants that is an important factor when it comes to the exercise of discretion. He identified what he submitted were the key benefits of the representative action. The first was that it reduces the burden of litigation at the initial stage so an investor can be a represented person and receive the benefit of any findings on common issues without being required to provide detailed pleadings or disclosure and without the risk of being selected as a test claimant.

76. Second, that reduction in the litigation burden saves time and expense in terms of what follows the determination of the common issues. If the representative action fails at that first stage, no costs or Court time need to be expended on stage 2 issues. By contrast if liability is established at stage 1, there is likely to be a settlement. The judge erred in concluding that had not been established as experience, particularly in other jurisdictions, is that settlements tend to be the rule. He referred to the evidence of Professor Higgins about this. His instructions were also that the parties in *Commission Recovery* had now settled.

77. His third point was that the representative action provides legitimate advantages of efficiency and access to justice particularly for the smaller institutional investors and retail investors. He submitted that in terms of cost benefit the game was not worth the candle for them in multi-party proceedings, essentially for four reasons. The first was the point made by this Court at [78] of *BT Group plc v Le Patourel* [2022] EWCA Civ 593 about judicial common sense. If it were rational for smaller investors to bring their claims and for commercial funders to fund them, they would do so. Second and relatedly, no other section 90A claim in the 15 years that such a claim has been available has included retail investors in the claimant group. The most natural explanation for that is such claims are not viable to bring.

78. The third reason was in the evidence of Mr Leedham at [29]-[34] of his witness statement to the effect that the litigation burden is a powerful disincentive to the participation of institutional investors and retail investors in securities claims, even if they have a strong prima facie claim. The fourth reason was that the multi-party route was not as a matter of economic or administrative burden worthwhile pursuing for retail investors or the funders, so that retail investors had not been given the opportunity to join the multi-party proceedings. Mr Chapman KC accepted that that was a decision of the funders and, even in the representative proceedings, funding for retail investors was only on the terms of the cost-sharing agreement. He admitted in answer to questions from the Court that there was no explanation from the funders as to the position they had taken.

79. Mr Chapman KC reiterated that the pattern from other jurisdictions is that the bifurcated approach encourages overall settlements. The judge had erred in giving insufficient weight to that factor, saying at [89] that he was not deciding the case on policy grounds. He also submitted that the judge's assessment that the position of retail investors had been engineered by the funders was not fair or accurate.

80. He submitted finally that the case management objections to the representative action were not a sound basis for striking it out. The judge was wrong to consider that the representative action was ousting the case management powers of the Court. It was just a different procedure. The lack of advancement of stage 2 issues would necessarily have arisen in the bifurcated proceedings contemplated in *Lloyd v Google* and in fact taken forward in *Prudential* and *Commission Recovery*. Neither the Supreme Court in *Lloyd v Google* nor this Court in *Commission Recovery* regarded the hiving off of stage 2 issues as some sort of obstacle, let alone an impermissible feature justifying the striking out of the representative action.

81. Ms Helen Davies KC made the principal oral submissions on behalf of the defendants. She submitted that the starting point in relation to this appeal was that the Court had a discretion under CPR 19.8, as was confirmed by this Court in *Commission Recovery* at

[38], to determine whether in accordance with the overriding objective, the claims should be permitted to continue by way of representative proceedings. The existence of the discretion meant that Wirral had no unfettered right to choose the procedural manner in which it advanced its claim and, as a matter of principle, there can be no presumption in favour of allowing a claimant to proceed in the procedural manner it alone has chosen or requirement that the defendant demonstrate some kind of knock-out blow or, as Mr Chapman KC had put it, some structural deficiency in the use of the representative procedure. Wirral's various formulations would involve what Falk LJ had described during his submissions as a reverse hierarchy, giving Wirral's choice greater weight than what the case requires in terms of justice and proportionate cost. Given the considerations forming part of the overriding objective, the exercise of the discretion must depend on the particular facts of the case.

82. She submitted that, in his careful and detailed judgment, the judge had clearly conducted the very multi-faceted analysis required by the overriding objective and concluded in the exercise of his discretion, that in the light of the existence of the parallel multi-party proceedings and his analysis of the evidence about retail investors, it was not appropriate to allow the representative proceedings to proceed. Ms Davies KC submitted that no error of approach had been identified in relation to the judge's analysis and his decision was plainly one well within the generous ambit of his discretion. Accordingly, on well-established principles, there is no basis for this Court to interfere.

83. Ms Davies KC emphasised that, in claims under section 90A and Schedule 10A of FSMA, there were five elements a claimant must prove to establish a claim. First, standing, which is a twofold test, that the claimant has the requisite personality to sue (for example the trustee of a pension fund should be suing, not the pension fund) and that the claimant has acquired, held or disposed of the relevant securities. Second, that there is an untrue or misleading statement or omission in published information to the knowledge of a person discharging managerial responsibilities ("PDMR"). Third, that there has been reliance on the published information by the claimant in deciding to acquire, hold or dispose of the relevant securities. Fourth, causation, that the claimant would have acted differently in the absence of the information and fifth, that the claimant has suffered loss.

84. She pointed out that the element of reliance was important in controlling the extent of claims which can be brought under this section, as was recently emphasised by Leech J in *Allianz Funds Multi-Strategy Trust v Barclays plc* [2024] EWHC 2710 (Ch). That case provides a clear illustration of the sort of steps that can be taken in multi-party proceedings to prevent the pursuit of claims by claimants who do not meet those statutory requirements which are simply not available in representative proceedings such as the present. Leech J was able to determine how much of the claim should be struck out because, as part of case management by the Court, the claimants had been ordered to produce particulars of reliance which identified three categories of reliance: A, those who read and relied upon the relevant published information; B, those who relied on the published information indirectly through other sources which acted as a conduit for the substantive contents of the published information; and C, claimants who are alleged to have suffered losses as a consequence of the level of or movements in the share price of the defendant bank, so-called Price/Market Reliance, equivalent to the concept of fraud on the market in the United States. 60% of the total value of the claims

were in Category C. The particulars of reliance enabled the defendant to successfully strike out the Category C claims on the ground that such Price/Market Reliance does not amount to reliance as a matter of English law (see [129] of the judgment). As Ms Davies KC went on to submit, exactly the same issue arose in the present case.

85. Ms Davies KC submitted that where, as here, there were parallel multi-party proceedings, the judge was right to look critically at what the representative proceedings would actually achieve and what issues would be left over. She submitted that here the representative proceedings would only determine one of the five elements required under section 90A of FSMA, whether there had been untrue or misleading statements or omissions.

86. She emphasised that all the institutional investors (including the smaller ones to which Mr Chapman KC had referred) were also party to the multi-party proceedings. She referred to the draft Particulars of Claim which had been provided in the multi-party proceedings which are identical to those in the representative proceedings until Section G, an additional section on reliance. [73] stated that all the claimants plead that they acquired, held or disposed of the relevant securities on the basis of Price and/or Index reliance as defined, certain claimants plead that they acquired, held or disposed of the relevant securities on the basis of Conduit reliance as defined and certain claimants plead that they acquired, held or disposed of the relevant securities on the basis of Direct reliance. [74] and [75] then defined Price Reliance and Index Reliance which she submitted were essentially the same as Category C struck out by Leech J in the *Barclays* case. She submitted that if the multi-party proceedings were continuing the defendants could apply to strike out the claims of those claimants who only relied upon Market/Index Reliance. It was not known how many claimants were in each category and although the defendants' solicitors had asked for this information since the *Barclays* judgment, it had been refused on the basis that it was not relevant for the purposes of the representative proceedings.

87. Given that the representative proceedings would only deal with the issue of whether there had been untrue or misleading statements or omissions and there would be unlikely to be a trial of those proceedings until sometime in 2026, that would lead to further delay in dealing with the other elements of the section 90A claim where some of the published information and meetings date back to 2006. Ms Davies KC submitted that the whole point of the representative proceedings was so that the claimants could avoid having to investigate matters relating to the other elements required under section 90A, including reliance and she said that the defendants suspect that Wirral itself does not know how many of the claimants rely only on Market/Index Reliance as, under the governance arrangements, the represented persons only had to produce trading data. The judge had been right to emphasise at [22] of the judgment that the concerns expressed by Hildyard J in *Manning & Napier v Tesco plc* [2017] EWHC 3296 (Ch) about inadequate assessment of individual claims at the outset and joinder to proceedings *"as a matter of subscription*" could be a description of what the representative proceedings in the present case were seeking to achieve.

88. Ms Davies KC submitted that it appeared that Wirral and its funders were using the representative proceedings for "book-building". It would be in the interests of the funders because the greater the number of claims, the greater the return to the funders. This approach has been deprecated by the Courts. In *Manning & Napier v Tesco plc* [2017] EWHC 2203 (Ch), Asplin J (as she then was) at [55] said that one does not make

a GLO on the basis that to do so would attract a significant number of additional claimants or to bring claimants out of the woodwork. This was relied upon and endorsed by Trower J in *Moon v Link Fund Solutions* [2022] EWHC 3344 (Ch) at [64]:

> "In particular, Mr Handyside submitted that the possibility or likelihood that a GLO will lead to an increase in the number of claimants is not a legitimate reason for making one. This submission is supported by Mrs Justice Asplin's judgment in *Manning* at [55], and in broad terms I agree with what she says in that passage. GLOs are to facilitate the case management of existing and prospective claims through providing 'access to justice where large numbers of people have been affected by the conduct of others, but individual loss is so small that it makes an individual action economically unviable': see the White Book, paragraph 19.10.0, citing the Access to Justice report. I have seen no support for any suggestion that the procedure is designed to encourage claims to be brought, and Mr Dale essentially eschewed any such submission."

Ms Davies KC submitted that it should equally not be possible to use the representative procedure, where there are nowhere near the same protections as identified in a GLO, to book-build.

89. Ms Davies KC then turned to the principal grounds of appeal and Wirral's contention that the judge erred in law because the approach he adopted did not properly reflect the decision of the Supreme Court in *Lloyd v Google* or the decision of this Court in *Commission Recovery*. She submitted that it was difficult to identify from Wirral's submissions precisely what error of law it was being suggested the judge had made. What seemed to be being suggested is that *Lloyd v Google* requires the starting point to be that the representative procedure is open to a claimant if the same interest criterion is satisfied and if the claimant decides to use that procedure it should be entitled to do so unless there was some good reason not to or a structural defect, in other words that there is a hierarchical presumption in favour of the representative procedure.

90. She submitted that at [31] of the judgment (referred to at [12] above), the judge had said that the discretion to which Lord Leggatt referred at [75] was the same discretion as would arise under CPR 19.8(1)(b) or 19.9 and no presumption arises in favour of the representative proceedings by reason of their having been started "as of right" under 19.8. Mr Chapman KC did not take issue with that paragraph nor could he do so. As Lord Leggatt said at [68] the representative procedure is a flexible tool of convenience in the administration of justice which is to be applied as the occasion requires. She submitted that as was clear from [67] what Lord Leggatt had in mind was that in appropriate circumstances the use of the representative procedure could alleviate issues of inconvenience or complete impracticality of multi-party litigation. However, she submitted that where multi-party litigation was neither inconvenient nor impractical, that is to be considered as part of the determination as to whether to allow the representative proceedings to proceed. It was clear that the representative procedure is subject to control by the Court in the exercise of its case management powers.

91. Ms Davies KC said that it would be quite wrong to treat Lord Leggatt as saying that in effect the Court should be slow to prevent a claimant with an arguable representative

claim from pursuing it. In [75] and [81] he is making it clear that whether or not it is appropriate to do so in any given case is a matter for the Court's discretion. Whilst the defendants recognised, as they had before the judge, that at [75] Lord Leggatt had said that certain aspects of the overriding objective were likely to militate in favour of allowing a claim, where practicable, to be continued as a representative action, he was not saying those aspects would always lead to that conclusion. He was not seeking to prejudge the exercise by the Court of its discretion and it would have been inappropriate for him to do so. The judge's assessment at [42] (quoted at [19] above) of what Lord Leggatt was saying about the exercise of discretion was entirely correct and is incapable of disagreement. The judge also recognised at [47] that Lord Leggatt wanted to see more use of the representative action in the absence of class action rules as a flexible way of getting such cases before the Court.

92. Ms Davies KC submitted that in circumstances where there were feasible multi-party proceedings available, it is difficult to see how an exercise of discretion in accordance with the overriding objective could be conducted other than by weighing the prospective advantages and disadvantages of the potential procedural routes available. As Falk LJ pointed out in argument, had the judge not done so, there would have been an appeal on the ground that he had not taken into account all relevant considerations.

93. She submitted that in weighing the respective advantages of the available procedures, the judge had taken account of the case management decisions made in other section 90 and 90A cases including *G4S* and *Serco*. Whilst this approach was criticised by Wirral, she submitted it was unimpeachable because each of those other case management decisions was seeking to further the overriding objective, recognising that if there was to be a split trial with the defendant-sided issues determined at stage 1, there should nevertheless be some progress in tandem on claimant-sided issues for a number of reasons including preservation of documents and evidence, avoiding duplication of evidence and promotion of settlement, together with avoiding a standing start after stage 1 and ensuring an appropriate balance and fairness in the proceedings. The judge took all those matters into account in this case. She said that Wirral's submissions were quite candid. It was employing the representative procedure to avoid the prospect of the Court taking those sorts of case management decisions in relation to the claim and requiring it to do some work, even though that was thought by the Court to be appropriate to further the overriding objective. Ms Davies KC submitted that was not a particularly attractive position to be presenting. However, whatever the position as a matter of generality, none of those concerns have led to institutional investors declining to participate in the multi-party proceedings. As Mr Chapman KC accepted before the judge, there is no evidence that any institutional investor has been deterred from joining the multi-party proceedings.

94. Ms Davies KC submitted that what Wirral and the funders were seeking to achieve by the representative proceedings was a situation where the claims were being pursued without even the most basic assessment in relation to each claimant of whether there was any prospect that the statutory requirements for establishing liability can be established, effectively a free ride. There was undoubtedly prejudice to a defendant being presented with claims that in fact had no merit but the defendant is not in a position to ascertain that until a long way down the track. There was a risk of a claim of exaggerated magnitude being held over a defendant's head in order to extract a

substantial settlement where there may be no basis for it. That was a risk specifically emphasised by the Supreme Court in *Mastercard v Merricks* [2020] UKSC 51 at [154].

95. In the grounds of appeal, Wirral then assert that the judge started from the wrong premise that the multi-party claim is the default position. Ms Davies KC submitted that this was an unfair characterisation of the judge's reasoning. He was simply weighing the respective advantages and disadvantages of the different procedures available. He was making the point that in the context of the multi-party proceedings, the Court has a whole range of case management tools available to it in relation to the claims as a whole whereas in the representative proceedings the only case management tools are in relation to the common issues identified in the claim form. That must have been a relevant factor in the exercise of his discretion.

96. The grounds of appeal also asserted that the judge wrongly treated representative actions as limited wholly or mainly to cases where access to justice would not otherwise be available to a class of claimants. Ms Davies KC submitted this was misconceived. From a number of passages in the judgment, it was clear that the judge understood that the representative procedure was not so limited. Just because the bifurcated approach is available in principle, it does not mean it is appropriate in every case and the judge was entitled to conclude, after careful consideration of all the factors, that in this case it was not appropriate.

97. In relation to *Prudential,* Ms Davies KC submitted that the judge pointed out quite rightly at [49] the unusual features of that case and had in mind the importance attached to it by Lord Leggatt but concluded that it did not really help on the question of case management particularly at the outset of the proceedings rather than, as there, at trial. She submitted his analysis was perfectly correct. She asked the Court to note from the statement of facts at [1981] Ch 232-3 that, in that case the plaintiff had already pleaded as part of its derivative action, that the relevant circular was tricky and misleading and contained statements the second and third defendants could not honestly believe to be true. Those defendants sought at the beginning of the trial to prevent that claim going forward on the basis that it was a purely derivative one. Vinelott J gave judgment on that application on the third day of the trial, 18 June 1979, concluding that it was unnecessary to decide the question since the plaintiff had made it clear that, whatever the outcome of the derivative action, it wished to pursue a personal claim against the second and third defendants for conspiracy and as a representative of all shareholders for a declaration that the circular was tricky and misleading.

98. The following day, the plaintiff applied to amend its claim to bring that representative claim. That application was heard over five days and Vinelott J gave judgment on 28 June 1979. This was the judgment relied on by the Supreme Court in *Lloyd v Google*. Ms Davies KC referred to the passage in the section on discretion which I have already quoted at [66] above in the context of Mr Chapman KC's submissions. She submitted that one could understand the appropriateness of allowing the amendment in circumstances where the very issue as to whether the circular was tricky and misleading was already before the Court in the trial and the judge was about to hear evidence on it so it was appropriate to make the conclusions on that binding on a broader class. That case demonstrates the use of a representative procedure in a bifurcated way, but she submitted that what one cannot do, as Mr Chapman KC sought to do in his submissions, is to jump from that to suggesting that case management consequences are just not relevant. In that case it would have been hopeless for the defendants in *Prudential* to

raise the sort of points the defendants are raising here because the issues were already before the judge and he was about to hear evidence on them and determine them.

99. Ms Davies KC submitted that a related point was that Mr Chapman KC had sought to draw assistance from the fact that in *Lloyd v Google* there was no reference to the case management advantages of multi-party proceedings but that is scarcely surprising since that was a case where there was no prospect of a multi-party action with four million individual claimants. It was simply not in contemplation. What one does see at [75] and [81] is Lord Leggatt emphasising the need to exercise the discretion in accordance with the overriding objective.

100. She submitted that *Commission Recovery* was another case where the choice was representative proceedings or nothing, so it is not surprising the case management considerations the judge took into account in this case were not considered because there were not alternative multi-party proceedings on foot.

101. The next point in the grounds of appeal was the suggestion that the judge failed to give sufficient weight to the evidence that striking out the representative proceedings would preclude the claims of retail investors and make it not economically viable for them or smaller institutional investors to bring a claim, the access to justice point. Ms Davies KC submitted that the judge did consider the access to justice point in the exercise of his discretion but concluded the concerns raised were not made out, so that one is in the territory where Wirral needs to establish the judge's analysis was so wrong as to be outside the ambit of an assessment that could reasonably be made.

102. In relation to the retail investors, she noted that 203 of the retail investors in Reckitt signed up to the representative proceedings but not the multi-party proceedings shortly before the hearing before the judge. They were not parties to the representative proceedings when those proceedings were issued or when the strike out application or the evidence in support of it were served. There is no explanation in evidence or correspondence as to how it is they were only signed up to the representative proceedings very shortly before the hearing and, absent such an explanation, the question must legitimately arise as to whether this was a tactic designed solely by the funders to bolster their position on the strike out application or, as this Court said in *Le Patourel,* to game the system.

103. Ms Davies KC referred to the judge's analysis in relation to the retail investors. This had two parts, the first of which was consideration of the position of the retail investors themselves. The judge noted in [99] (quoted at [48] above) that there was no evidence from those who had joined the representative proceedings that they would not be able to obtain their own funding and issue their own proceedings. The second part was that there was no adequate or coherent explanation as to the decision of the funders not to fund retail investors to participate in the multi-party proceedings.

104. She emphasised the stringent financial conditions of the cost sharing and governance agreement requiring a participating claimant to pay up front its share of the claimant costs and adverse costs incurred to date and provide an indemnity from an English company with at least £10 million of net assets in relation to future costs (or pay up front its estimated share of future claimant costs and adverse costs). She submitted that if a retail investor was in a position to satisfy those conditions, even if, as Nugee LJ pointed out, its proportionate share of costs might be modest if it had a small

shareholding, it would be in a position to join the multi-party proceedings where a cost-sharing agreement would presumably apply, although there is no evidence about that. Furthermore, as the judge had said at [84], although the opening words of clause 14 of the cost sharing agreement said investors could come to a different arrangement with Wirral, there was no evidence any of them had and this finding was not challenged on the appeal.

105. Ms Davies KC pointed out that Mr Leedham's witness statement pre-dated any retail investors being allowed into the representative proceedings and does not address the terms on which they have been allowed into those proceedings. There is no transparency about that as there would have to be in the context of a GLO or collective proceedings in the CAT where the Court or the CAT would be scrutinising the funding arrangements. There was no evidence from the funders themselves explaining why they would not fund the retail investors to participate individually in the multi-party proceedings, only a letter from Mishcon de Reya saying that Woodsford was not willing to do so. It was not clear whether its position is that it will not fund the retail investors in any circumstances, for example if the appeal is refused.

106. In relation to the suggestion that the judge was not entitled to conclude that the position of the retail investors had been engineered by the funders, Ms Davies KC submitted that he was plainly entitled to scrutinise with care the limited materials put before him and not take at face value whatever was said, particularly when there was no evidence from the funders at all. She referred to the letter from Mishcon de Reya, which said Woodsford was not willing to fund the retail investors because of the "economic and administrative burden" but, as she pointed out, if administrative burden meant the burden of producing details of individual claims, that burden would not fall on the funders but on the claimants and their lawyers. As far as the funders are concerned, this must all collapse into the economics of including these additional claims by retail investors in the multi-party proceedings they have already agreed to fund in relation to institutional investors.

107. The evidence about economic burden is vague and general. Mr Leedham says no more than that it would not be economically viable to fund individual claims at the first stage prior to a finding of liability, but it would be economically viable at the second stage. This assumes that the Court would require significant costs to be incurred by retail investors if afforded the ability by the funders to participate in the multi-party proceedings, but as Ms Davies KC pointed out, this could be addressed at the first case management conference and the Court might be persuaded that the retail investors should only provide limited evidence, for example as to which category of reliance they were alleging, or might order sampling.

108. In relation to Mr Leedham's suggestion that funders would have more confidence in funding at stage 2 because liability has been established, Ms Davies KC submitted that this ignored the other elements of the cause of action which need to be established. If one posited a situation, as in the *Barclays* case, where only a fraction of the retail investors could establish direct or conduit reliance, there would be no liability to those who could only establish market/index reliance.

109. Mr Chapman KC had suggested that if claimant-sided costs were only incurred after determination of the common issues, it would reduce the risk of costs being wasted in relation to claimants who only had investments at a time when the Court determined at

stage 1 that no misstatements were made. Ms Davies KC submitted that it was not clear whether a significant proportion of retail investors had claims confined to particular time periods but, in any event, given that the funders were willing to fund all the claimants to bring wide ranging claims in the representative proceedings, it does not lie in their mouth to say by this route we can protect ourselves from adverse costs orders. The reality is what the funders want to achieve is a licence to bring the broadest possible allegations of fraudulent misrepresentation in circumstances where liability might only ever attach to some of the matters pleaded without any constraint on the claimants to investigate other key matters such as reliance.

110. The other point Mr Leedham made was that the funders' confidence in funding would be increased by the prospects of settlement after success at stage 1, but Ms Davies KC submitted that the judge rightly concluded there was no evidence to support that assumption. Furthermore, it is contrary to the views expressed by every single judge in other securities claim cases. She referred to the judgment of Leech J on the first CMC in the *Barclays* case ([2024] EWHC 235 (Ch) at [14]:

> "I accept the general proposition that the Claimants ought to be required to plead out their individual cases on reliance as a matter of general procedure. But the critical question remains one of timing: when? It seems to me that the answer to this question is a case management decision and that it involves an imperfect balancing exercise. In an ideal world, all of the Claimants would be required to plead out their case in full now. Moreover, this would be a salutary exercise designed to compel the Claimants and their funders to engage with the litigation and commit time and internal resources to it. As Falk J indicated in *G4S* it would also promote settlement by shaking out those cases which are clearly hopeless or where the individual Claimants are simply along for the ride. To use the phrase which I used in argument, it will keep the Claimants (and, perhaps more importantly, their funders) honest."

111. Because the class of claimants was so large, Leech J in fact ordered (see [17]) a sample of 100 claimant funds to complete a reliance questionnaire as well as requiring all claimants to identify into which of the three categories of reliance they fell, information which enabled Barclays to make the successful application to strike out the claims of 60% of the claimants whose reliance was only market or price reliance. Ms Davies KC submitted that the claimants were adopting the representative procedure here because they do not want to provide the materials that in other cases the Courts have thought it appropriate should be provided. She repeated that Mishcon de Reya had declined to answer how many of the claimants in the representative proceedings were alleging direct or conduit reliance, on the basis that reliance issues do not arise in the representative proceedings or on this appeal. As I said in argument, that is deeply unsatisfactory given that, if the decision of Leech J in *Barclays* stands (which in any event followed Hildyard J in *ACL Netherlands BV v Lynch* ("*Autonomy*") [2022] EWHC 1178 (Ch)), the investors here who only had market/price reliance do not have a claim.

112. Ms Davies KC submitted that the reality was that, without an ability to progress the claimant-sided issues in tandem with the common issues, the prospects of settlement

must be significantly reduced, certainly prior to the resolution of the representative procedure. The only material relied on by Mr Leedham in support of his suggestion that the claim will in all likelihood not proceed to stage 2 but the parties will be assisted in reaching a settlement is the commentary by Professor Higgins on the position in Australia. She pointed out that there are material differences between the class action system in Australia and the representative procedure here. To begin with the representative claimants' claim is usually tried in full at stage 1 in Australia and issues of quantum and of market reliance would be tried at that stage. There are also powers to order disclosure by class members or particulars of claims to facilitate settlement.

113. Mr Chapman KC sought to place emphasis on the fact that there had been no claims by retail investors in other section 90A claims. The judge had noted that there were claims by retail investors in the *RBS Rights Issue* case and in *Lloyds/HBOS* but Mr Chapman KC sought to distinguish these as being section 90 cases where there is no requirement for reliance to be established. Ms Davies KC submitted that it was an unsettled question as a matter of English law whether section 90 does require reliance to be established. Also, *Lloyds/HBOS* was not a section 90 or 90A case at all but a claim based on equitable principles in relation to listing particulars and issues as to standing and reliance did arise, in relation to which certain retail investors gave evidence at trial.

114. Furthermore, *Moon v Link Fund* is another case where all the investors are retail investors making claims in respect of untrue and misleading statements in the prospectus for what was a Woodford Fund under section 138D of FSMA. It appears from the judgment of Trower J in relation to the GLO sought that the retail investors had obtained funding.

115. In relation to institutional investors, Ms Davies KC submitted that the fact that some of them might be categorised as small institutional investors, which was unclear, was irrelevant, as they are all signed up to both the representative proceedings and the multi-party proceedings. Any point Mr Chapman KC was making about small institutional investors could thus only relate to prospective investors, so this only relates to the potential for book-building, not a legitimate reason for representative proceedings.

116. Mr Patton KC adopted Ms Davies KC's submissions, but had one further point which was a contingent one raised by his Respondent's Notice which is that if the Court is getting into questions of policy, it should also look at the policy behind Schedule 10A. He submitted that this was the answer to the points raised by the US attorneys that they consider the way securities litigation is conducted in this jurisdiction not as good as in other jurisdictions whose model we should therefore follow. Mr Patton KC referred to the reports of Professor Paul Davies KC ("the Davies Review") which are widely regarded as shedding light on the policy behind Schedule 10A of FSMA and which had been relied upon by Hildyard J in *Autonomy* and by Leech J in *Barclays*. He submitted that what one got from the Davies Review was that the overriding concern was to guard against creating a securities litigation culture like that in the US. Schedule 10A sought to avoid that consequence by requiring proof of reliance as an essential ingredient of the cause of action.

117. In his Discussion Paper dated March 2007, Professor Davies said at [110]:

> "During the course of this Review there has been a considerable body of criticism emanating from the United States about the

> way that private securities litigation, especially private securities class actions, operate in that country."

He continued at [111]:

> "There are strong reasons for thinking that a fraud-based investor action would operate very differently in the UK from the way in which private securities litigation operates in the US."

He made a point first about how fraud in English law as defined in section 90A and modelled on the tort of deceit was much narrower than in US law.

118. At [113] he identified the availability of strike out as an important procedural issue, saying:

> "An important procedural issue is how easy it is for a defendant to have the claim against it struck out at an early stage of the litigation, i.e. at the point when the claimant has simply formulated its claim but there has been no (expensive) pretrial disclosure, let alone a trial. It is relatively costless (both financially and in terms of management time) to defend an action up to strike-out. If, however, a strike-out is not available, the costs of the litigation begin to mount and so do the pressures on the defendant to settle the claim (and thus avoid the costs and distractions of the litigation), even if the defendant thinks the claim lacks merit."

Mr Patton KC pointed out that in multi-party proceedings such as *Barclays* there was an ability to strike out unmeritorious claims, as Leech J had done with 60% of the claims which was an important consideration.

119. In what Mr Patton KC submitted was an important passage at [116], Professor Davies emphasised the importance of the reliance requirement as a deterrent to the sort of securities litigation culture that has developed in the US:

> "In connection with the formation of the class, it is also important to revert again to the reliance requirement in section 90A (see para 55 above). In the United States a typical class is constituted by those who bought shares after the misleading statement was made and still held the shares at the point the truth emerged. Under the 'fraud on the market' theory, adopted in the US for misleading continuing disclosures as well as for misstatements in prospectuses, it is not necessary for the claimant to show knowledge of and reliance on the misstatement in question. Thus, class formation is easier and classes are larger than where reliance has to be shown."

120. Much the same points were made in Professor Davies' final report in June 2007 in which he said that he remained convinced that fraud-based liability would not give rise to a serious threat of speculative litigation, as in the US. At [17] he said:

> "If one assumes that the financial incentives to law firms and others to fund litigation are likely to change significantly in the UK, then more weight falls on the other two factors mentioned above to discourage speculative litigation in the securities field. In particular, basing liability on fraud gives defendants scope to secure the strikeout of unmeritorious cases at an early stage, in a way which is not likely to be possible in negligence cases because of their fact-specific nature."

121. Mr Patton KC submitted that the risk of speculative litigation was thus a key concern underlying this legislation and it was addressed by having a fraud-based threshold for liability. This was picked up in the Treasury response to the Davies Review in the Impact Assessment in which it was stated:

> "The purpose of the statutory regime [i.e. Schedule 10A] is to clarify the existing common law position with regard to issuer liability in damages for inaccurate statements made to the market. The proposed extension of the statutory regime, working in conjunction with the FSA public law regime, aims to ensure optimal incentives for prompt and accurate disclosures, without encouraging costly speculative litigation and settlements by issuers based on a desire to terminate litigation, rather than on the harm done to shareholders."

122. Later the point about the aim of avoiding speculative litigation is made:

> "The statutory regime has deliberately been shaped, principally by selecting a demanding fraud test for liability, to minimise the potential for speculative litigation and the corresponding pressure on issuers to settle in order to terminate litigation, rather than compensate for harm done to shareholders. Accordingly, we do not anticipate incremental costs from speculative litigation."

Discussion

123. I agree with Ms Davies KC 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, as is clear from both *Lloyd v Google* and *Commission Recovery*. Furthermore, nothing in either of those authorities begins to suggest that the discretion to decide that the representative proceedings should not continue is somehow fettered or limited, as Mr Chapman KC submitted, to matters which might be described as structural deficiencies of the representative procedure, such as the suitability of the representative claimant to act as such or problems with the definition of the class. The discretion is quite unfettered, other than that it is to be exercised in accordance with the overriding objective. That is exactly how the judge did exercise his discretion in the careful and detailed analysis in his judgment. His decision was well within the generous ambit of his discretion and there is no basis for this Court to interfere. It follows that the appeal must be dismissed, although I will set out in more detail my reasons for reaching that conclusion.

124. In my judgment, there is no hierarchy of different procedures where a representative action is somehow to be preferred to other available procedures and nothing in *Lloyd v Google* which suggests that. Where, as in the present case, another form of procedure is clearly available in the form of the multi-party proceedings, the judge was clearly right that, in exercising its discretion, the Court must assess the advantages and disadvantages of each, with no predilection towards one form of procedure rather than another. Mr Chapman KC's submission that, whilst the existence of the multi-party proceedings was relevant to the exercise of discretion, it could not weigh so heavily as to preclude the use of representative proceedings in the present case reveals the fallacy in Wirral's case involving the reverse hierarchy to which Falk LJ referred in argument. There is no support for that reverse hierarchy giving preference to representative proceedings in any of the authorities.

125. In making his assessment, the judge was entitled to have regard to the case management decisions of other judges in section 90A cases, since in all those cases, what emerges is that the Court is seeking to strike a fair balance between the parties and to further the overriding objective. Thus, where the Court has ordered a split trial with defendant-sided issues to be determined at the first stage, it has invariably also ordered some progress in tandem on claimant-sided issues for a variety of reasons, including the need to preserve documents and evidence and the need to be even-handed.

126. As Ms Davies KC submitted, Wirral had been quite candid about why it wanted to proceed by way of representative proceedings. It wanted to avoid the Court taking the sort of case management decisions which have been taken in other section 90A claims and requiring the claimants to make some progress on claimant-sided issues, if only by identifying which head of reliance each claimant relied upon and/or providing sample disclosure or witness evidence.

127. The importance of seeking to make some progress, if appropriate by ordering disclosure, pleadings and evidence in a sample of the claims before the Court, is demonstrated by the approach of Leech J in *Barclays*. As noted at [111] above, he ordered a sample of 100 funds selected by the parties to complete a reliance questionnaire and also ordered all the claimants to identify into which category of reliance their claims fell: direct reliance (category A), indirect or conduit reliance (category B) or Market/Price or Index reliance (category C). That exercise had enabled the claims where reliance was only in category C (60% of the claims by value) to be struck out on the basis that the "fraud on the market" concept which that alleged reliance entailed is not one known to English law. Mr Chapman KC sought to argue that the Court of Appeal might give permission to appeal in *Barclays*, but the case in fact settled last month.

128. It is telling that the draft pleading produced by Wirral in the multi-party proceedings discloses the same three categories of reliance and that all the claimants allege Market/Index reliance, but only some allege Direct or Conduit reliance. As I said in argument, it is extremely unsatisfactory that Wirral has declined to identify which claimants rely on which category of reliance and how many fall into each category, on the basis that this information is contended not to be relevant in the representative proceedings. One obvious advantage to the pursuit of the multi-party proceedings would be that the Court could make similar orders to those made by Leech J and, if it emerged that a number of claimants only relied in the market reliance sense, the defendants could apply to strike out those claims on the same basis as in *Barclays* and

Autonomy. That is one of the ways in which it seems to me the exercise by the Court in the multi-party proceedings of its case management powers could facilitate settlement, as indeed has now happened in *Barclays*. In contrast, if the representative proceedings continued with the defendants remaining in ignorance as to how many of the claimants had a sustainable claim, I consider settlement would be less, not more, likely.

129. Mr Chapman KC placed considerable reliance on what Lord Leggatt said in *Lloyd v Google* at [84]:

> "even if only a few individuals were ultimately able to obtain compensation on the basis of a declaratory judgment, I cannot see why that should provide a reason for refusing to allow a representative claim to proceed for the purpose of establishing liability."

He submitted on the basis of that statement that the fact that a substantial proportion of claimants might not recover damages at the end of the day because they could not establish reliance as recognised by English law should not detract from the suitability of the representative procedure to determine the common issues.

130. However, it does not seem to me that Lord Leggatt had in mind a case such as the present, where reliance is an essential ingredient of the cause of action and, if not established, might well mean that a substantial proportion of the claimants had no claim at all. To allow them to pursue a claim in respect of common issues when in reality they have, on this hypothesis, no claim at all, would seem inimical to the overriding objective rather than furthering it, yet it is clear from [75] of his judgment that Lord Leggatt was envisaging that use of the representative procedure would further the overriding objective. To allow the representative proceedings to continue without the Court being able to require the claimants to identify how many of them only rely on Market/Index reliance would be to encourage precisely the sort of speculative litigation which, as the Davies Review confirmed, the fraud-based and reliance requirements of section 90A and Schedule 10A of FSMA are designed to avoid.

131. The approach envisaged by Wirral would also encourage the joinder of claimants to proceedings by subscription deprecated by Hildyard J in *Manning & Napier* referred to at [87] above. I also agree with Ms Davies KC that this approach enables Wirral and its funders to engage in the sort of "book -building" which gets as many claimants as possible joined up to the representative proceedings without having to engage in any work relating to their individual claims in relation to the claimant-sided issues such as reliance and causation unless and until the common issues are decided in the claimants' favour. Such book-building has been discouraged by the Courts, as set out in [88] above. Mr Chapman KC sought to address that point in his reply submissions by reiterating the access to justice point, that this is not book-building, but providing a practicable route to redress which would not otherwise exist for the class of retail investors. The problem with that argument is that, as further set out at [134] below, the reason why the representative proceedings route is alleged to be the only practicable one for retail investors is because the funders for some unexplained reason refuse to fund their participation in the multi-party proceedings.

132. It would also not be just or in accordance with the overriding objective for the claimants to be able, through deploying the representative procedure, to pressurise the defendants

into an overall settlement, if in reality some of the claimants (how many of them remains completely opaque because of the refusal to provide information) do not have a claim at all. I consider that the judge was right to conclude that there was no evidence to support the assertion by Wirral that the adoption of the bifurcated representative procedure would increase the prospects of settlement after stage 1. It is also contrary to the views and experience of the judges who have case managed other securities claims, a point neatly encapsulated by Leech J in *Barclays* in the passage from his CMC judgment quoted at [110] above. To the extent that what is relied upon is the Australian experience to which Professor Higgins refers, it is important to have in mind that the class action procedure available in that jurisdiction differs considerably from the representative procedure in this jurisdiction, not least because, as set out at [112] above, the claim of the representative claimants in the class could be tried in full at stage 1 in Australia and the Court has powers to order disclosure by class members or particulars of claims in order to facilitate settlement, powers of which the Court here would be deprived if Wirral were able to dictate that the representative procedure should be followed.

133. In my judgment, Wirral's submissions on *Lloyd v Google* demonstrate the danger of reading too much into that case. Whilst it is true that Lord Leggatt wanted to encourage more use of the representative procedure as a flexible tool to achieve justice, he was not saying that the representative procedure would always be appropriate. Clearly whether it is or not will always depend upon the circumstances of the case. Furthermore, he was not considering a case such as the present where there is a potential alternative procedure which can be pursued in the form of the multi-party proceedings. Whilst it is correct that Lord Leggatt did not discuss the possibility of multi-party proceedings or the case management advantages they might entail, that is scarcely surprising, since multi-party proceedings involving four million claimants were not feasible and were simply not in contemplation. It follows that nothing in his judgment assesses the relative merits of representative proceedings and multi-party proceedings as the judge did in the present case, let alone suggests that, in that comparative exercise, representative proceedings should always prevail, which in effect is what Wirral contends.

134. Mr Chapman KC sought to challenge the conclusion that the multi-party proceedings provide an appropriate alternative procedure to the representative proceedings by relying upon the fact that the retail claimants who were allowed into the representative proceedings shortly before the hearing before the judge and any prospective further retail claimants will not be funded by the funders to participate as claimants in the parallel multi-party proceedings. The problem with this argument is that there is no evidence from the funders explaining why this course has been adopted and no cogent or coherent explanation for it. The suggestion made by Mishcon de Reya in correspondence that the funders are not willing to fund retail investors in the multi-party proceedings because of the "economic and administrative burden" is not a coherent explanation. As Ms Davies KC pointed out, any administrative burden of producing details of individual claims would fall on the retail investor claimants and not the funders. It is also difficult to see what economic burden the funders would be facing beyond that of including the retail investors in the multi-party proceedings in circumstances where they have already agreed to fund them in the representative proceedings, hardly a major economic burden. In all probability, if that alleged burden exists, it could be alleviated by the Court making an order at the first CMC similar to

that made in other section 90A claims, that the investors should only provide limited evidence, for example as to which category of reliance they were alleging, or the Court might order sampling. As I pointed out in argument, if there were complete transparency, the Court could engage in case management which would ensure an undue burden was not placed on small individual investors.

135. The additional point made by Mr Leedham in his witness statement about the incremental costs of the individual claims being lower at the second stage if the first stage proceeded by way of representative proceedings is not explained. These are the costs of matters such as standing, reliance, causation and quantum which should surely be broadly the same at whatever stage they are incurred and whichever form of procedure is adopted. There is force in Ms Davies KC's submission that, if anything, delay could increase the cost, as the passage of time could make matters such as document retrieval or the production of evidence more difficult, particularly in circumstances where some of the published information relied upon dates back to 2006. Mr Chapman KC contended in reply that, if the claimants had to give limited disclosure (for example on the reliance issue) or there was sampling at the same time as stage 1, the cost benefit for the claimants and the funders somehow shifts. With respect that is unconvincing, not least because, as Falk LJ pointed out, the cost of all the claimants answering a question as to which category of reliance they relied upon and a sample of claimants then answering a fuller questionnaire (as in *Barclays*) is hardly likely to be expensive in this electronic age.

136. In my judgment, the judge was entitled to conclude, in the absence of any evidence from the funders or cogent or coherent explanation as to why they were not prepared to fund participation of the retail investors in the multi-party proceedings, that this situation where the retail claimants will be funded in the representative proceedings but not in the multi-party proceedings has been engineered by the funders who, as Ms Davies KC submitted, are gaming the system. The suggestion by Wirral that the judge failed to give sufficient weight to the fact that the retail investors would not have access to justice unless the representative proceedings continue is an artificial construct only brought about by this tactical position adopted by the funders. As the judge said at [99], there is no evidence that the retail investors who have been allowed into the representative proceedings could not obtain their own funding to join into the multi-party proceedings.

137. There has been a complete lack of transparency as to the circumstances in which the retail investors have been allowed into the representative proceedings and as to why the funders will not also fund them in the multi-party proceedings. As Ms Davies KC pointed out, the cost sharing and governance agreement for participation in the representative proceedings contains stringent financial conditions requiring a participating claimant to pay up front its share of the claimant costs and adverse costs incurred to date and to provide an indemnity from an English company with at least £10 million of net assets. If a retail investor who is participating in the representative proceedings is able to meet those conditions (and as Nugee LJ said if its shareholding were a small one, its share of the costs will be modest), it is difficult to see why it would not be equally able to meet any cost-sharing requirements of the multi-party proceedings which are likely to be on the same or a similar cost-sharing basis. Whilst the cost sharing and governance agreement did provide that investors could come to a

different financial arrangement with Wirral, as the judge said, there is simply no evidence that any of them has done so.

138. I do not consider that there is anything in *Prudential* which assists Wirral in its case that the judge erred in the exercise of his discretion. The judge noted the reliance Lord Leggatt placed upon it, but concluded it was an unusual case which did not really assist in making a case management decision at the outset of proceedings, as opposed to during the trial. As Ms Davies KC submitted correctly, it is not surprising that, at the beginning of the trial, Vinelott J allowed the amendment to bring the representative claim, given that the essential factual issue as to whether the circular was tricky and misleading was already before the Court and he was about to hear evidence on it. In those circumstances, the defendants could not have raised the sort of the points being raised by the defendants in the present case. Whilst that case does demonstrate the possibility of using a bifurcated procedure in an appropriate case, it does not in any sense compel the conclusion that the bifurcated procedure which Wirral advocates should have been adopted in the present case.

139. I also consider that there is nothing in the decision of this Court in *Commission Recovery* which suggests that the judge erred in the exercise of his discretion. That was another case where the choice for the claimants was representative proceedings or nothing, so it is not surprising that the Court did not take into account the case management advantages of multi-party proceedings upon which the judge relied here. Furthermore, that was a case where the common issues to be determined at stage 1, that the class represented were clients of the defendant patent attorneys who contracted on the latter's standard terms of business and that secret commission payments were made to third parties, would be determinative of many of the claims (see [58] of the judgment of Nugee LJ). It is true that potential defences, of (i) disclosure and informed consent and (ii) limitation would be left over to be determined on an individual basis at stage 2, but as Nugee LJ pointed out at [52] it is doubtful how significant an issue the first of these would be in circumstances where there was no suggestion of a routine practice of informing clients about commission. On limitation, he noted at [53] that a significant number of claims would not be statute barred. There is an obvious contrast between the outstanding stage 2 issues in that case and the outstanding issues here, specifically reliance, causation and quantum. As I have already pointed out the reliance issue is one which may well mean that a substantial proportion of the represented claimants do not have a claim at all.

140. Like the judge, I am unclear as to the status and relevance of the evidence of the two US attorneys, Mr Lange and Ms Mendoza, on which Mr Chapman KC continued to rely. Whatever the position generally as regards institutional investors, as the judge recorded at [63] Mr Chapman KC fairly accepted that their evidence did not show that institutional investors in the present case had been deterred from participating in the multi-party proceedings.

141. I also consider that the judge was right to give the report or commentary of Professor Higgins limited weight in the exercise of his discretion, first because as a consequence of the order of Foxton J its status was only that of an academic article and second because it focuses on the class action regime in Australia, which is a different procedure to the representative procedure in this jurisdiction.

142. Like Leech J in *Barclays* at [108] I consider that the Davies Review and Treasury Consultation (including the impact assessment), on which Mr Patton KC particularly placed emphasis, should not be given decisive weight in interpreting Schedule 10A. However, I agree with what Leech J said in that paragraph:

> "But in my judgment, those materials do no more than confirm the obvious interpretation of Paragraph 3. They disclose the background to Schedule 10A and identify the purpose of the independent requirement of reliance, namely, to limit recovery to those investors who can prove that they relied on the published information in which the untrue or misleading statement was made or from which any matter which should have been included in that published information was omitted."

This confirms the importance of the issue of reliance in these securities claims which, as I have said, Wirral seeks to relegate to a later stage by the use of representative proceedings. The requirement of reliance is a significant controlling mechanism in relation to what claims can be brought under section 90A of FSMA, as *Barclays* demonstrates. The effect of the representative proceedings is, as I have said, to deprive the Court of its case management powers to strike out speculative unmeritorious claims, which is inimical to the overriding objective.

143. In my judgment, the continued pursuit of these securities claims by way of the multi-party proceedings is not only feasible but is in accordance with the overriding objective. Whilst the judge's description of the use of the representative proceedings as ousting the case management powers of the Court is perhaps somewhat emotive, there is no doubt that one of the objects of using the bifurcated representative procedure is to avoid the Court using its case management powers to order Wirral and the represented claimants to advance some of the claimant-sided issues in parallel with the defendant-sided common issues. Pursuit of the claims by way of the multi-party proceedings will not prevent Wirral from seeking to persuade the Court at the first CMC to adopt a bifurcated approach of ordering the trial of common issues as stage 1 and the Court may order that approach if it considers it appropriate to do so, but the Court will still have case management powers to order some disclosure or evidence in relation to individual issues to be produced in tandem. The availability of those powers is an obvious advantage of the multi-party proceedings and will further the overriding objective, in terms of dealing with the case expeditiously and fairly, ensuring that the litigation burden is not one-sided at stage 1 and that stage 2 does not have to proceed from a standing start. Importantly, the availability of those case management powers will enable the Court, as in *Barclays*, to determine at an early stage whether some of the claimants only rely on market/price or index reliance and therefore, on the current state of the law, do not have a claim at all. It also seems to me that, as I have said, the use of those case management powers is more likely to facilitate settlement.

144. For all the reasons I have given, I consider that the appeal should be dismissed.

Lord Justice Nugee

145. I agree.

Lady Justice Falk

146. I also agree.