ISSUE 31

serlespeak

RAISING THE BAR IN CHANCERY & COMMERCIAL

Corporate Fraud & Insolvency

"one of the very best commercial chancery sets"

Chambers and Partners, 2023

Welcome to the 31st edition of Serlespeak on Corporate Fraud and Insolvency.

In this edition, Lance Ashworth KC and Matthew Morrison explore the adage that "knowledge is power" when they discuss potential avenues provided by insolvency legislation for obtaining information in pursuit of fraud claims without the onerous task of first obtaining a freezing injunction.

Daniel Lightman KC and Charlotte Beynon explain the lessons learned from the BHS litigation, in particular the importance of selecting a date (or multiple dates) of knowledge (on which the director knew or ought to have known insolvent liquidation could not be avoided) in order to bring a successful wrongful trading claim against former directors.

In his article, Jonathan McDonagh considers the growing trend of group litigation in commercial disputes and the potential to litigate large scale corporate frauds by way of group action. He comments on the Court's willingness to determine allegations of corporate fraud on a collective basis in order to hold corporations to account for large scale deceits.

Sophie Holcombe
Editor

Chambers News & Events

People

Jonathan Adkin KC, Rupert Reed KC, Daniel Lightman KC, Zahler Bryan, Charlotte Beynon and Tim Benham-Mirando are featured in the Lawyer's Top 20 cases for 2023. The full article is available here for Litigation Tracker subscribers.

Congratulations to James Brightwell who on Monday, 30th January 2023 was appointed as a Chancery Division Master.

Congratulations to Dan McCourt Fritz KC who was appointed King's Counsel on 27 March. At 15 years' call, Dan is among the very first of his cohort to take silk. The 2023 KC appointments were the first made by King Charles III. Dan's appointment brought the number of King's Counsel at Serle Court up to 28. The silks ceremony took place on Monday, 27 March 2023.

We recently welcomed Jennifer Meech as a full-time member of chambers. Jennifer is an experienced chancery commercial barrister renowned for her work in insolvency, company and property litigation. She regularly acts for public companies, SMEs and individuals, and is experienced in dealing with matters on behalf of clients in the public eye.

Serle Court also welcomed Michael Walsh and Sparsh Garg and to the team. Michael has significant experience in commercial and contractual disputes across various sectors, including financial services, leisure, and the hospitality industry. Sparsh is a chancery and commercial practitioner. He has a varied practice with a particular focus on trusts and estates litigation, company law, insolvency and commercial disputes.

Congratulations to Niamh Herrett and Stefano Braschi who became Serle Court tenants on 1st October 2022 after they successfully completed their pupillages.

Serle Court is delighted to welcome Paul Johnson, alongside Beverly-Ann Rogers, as a full-time mediator tenant. Paul hails from Exchange Chambers in Manchester, where he remains a door tenant. Both Paul and Beverly are recommended warmly and consistently in the various legal directories for mediation. Our highly-regarded Jennifer Haywood is likewise engaged full time in ADR; together, the three are at the core of Serle Court's expertise in mediation. Altogether, Serle Court has 12 accredited mediators, amongst them Elizabeth Jones KC, another top-tier choice. To read more about our mediation services, please click here.

We were also delighted to welcome Harry Martin as a member of chambers in June 2023. Harry has a busy junior practice specialising in Chancery, Commercial Chancery and Art and Cultural Property work. He advises in relation to contentious and non-contentious matters, both in England & Wales and in other jurisdictions. Harry is ranked as a leading barrister in the Chambers UK Bar and Chambers High Net Worth guides, which describe him as "a rising star", and "very bright and commercial in his advice". In 2019 he received the "star junior" award at the Chambers High Net Worth Awards.

Rupert Reed KC, a leading member of our Middle East team, has been appointed to the Dubai International Arbitration Centre (DIAC) Court recently formed under DIAC's new statute. The Board is made up of 13 senior international practitioners from a diverse range of legal and professional backgrounds.

Equality, Diversity & Inclusion

Serle Court is participating in the 10,000 Black Interns scheme, a programme aimed at transforming the horizons of young Black talent with paid internships across over 25 sectors. The scheme was set up in 2022 in response to the stark underrepresentation of Black talent in the founders' industries. Initially the group aimed to place 100 Black students and graduates in internship positions within investment managing – a goal that was quickly eclipsed.

In September, to mark 'Happiness at Work Week', Serle Court co-hosted a roundtable event with BUCKLESconnect titled 'Getting women and their advocates on-board in law'. Senior leaders in the legal industry shared their experiences balancing career and home life and illustrated why having a diverse workforce with a women-smart culture improves workplace performance. An article responding to the event appeared in LegalWomen magazine. More on our commitment to CSR can be found here.

Awards and Rankings

Serle Court received two awards at The Legal 500 Bar Awards 2022. Chambers was awarded **'Commercial Litigation Set of the Year',** and Jonathan Adkin KC won the **'Chancery Silk of the Year'** award. Serle Court also took home the **'Chancery Set of the Year'** Award at the Chambers and Partners UK Bar Awards 2022. Congratulations to Dakis

Chambers News & Events

Hagen KC who was shortlisted for **Chancery Silk of the Year.**

Described as *"a go-to chancery set,"* Serle Court has been ranked in 11 practice areas in the Chambers UK Bar Guide 2023. In five of those areas Serle Court is ranked in band 1, including Chancery: Commercial, Chancery: Traditional, Fraud: Civil, Offshore and Partnership.

Described as *"probably the best of the commercial chancery sets"* Serle Court received Tier 1 rankings in Civil Fraud, Private Client: Trusts and Probate, and Partnership in the 2023 edition of The Legal 500. 60 Leading Silks and 63 Leading Juniors received individual recommendations across 18 practice areas.

For a second year running, Serle Court has been ranked as a Band 1 set for Dispute Resolution: The English Bar - United Arab Emirates in Chambers Global 2023. In addition, three members of Chambers have received individual rankings: Rupert Reed KC (Band 1), Zoe O'Sullivan KC (Band 2) and Gregor Hogan (Up and Coming). Serle Court's outstanding client service has also been noted: *"The clerks are first-rate. They are always very responsive and helpful."*

We are delighted to be shortlisted for 'Set of the Year' at the Chambers High Net Worth Awards 2023. Stephanie Thompson has also been shortlisted for the 'Junior Under 10 Years' Call' award.

Serle Court was shortlisted in the following three categories at the Legal Cheek Awards 2023; 'Best chambers for training', 'Best chambers for quality of work', and 'Best chambers for colleague supportiveness'. The awards ceremony took place in March 2023.

Congratulations to Constance McDonnell KC who won the **'Barrister of the Year'** Gold Award at the Citywealth Magic Circle Awards 2023. For over 17 years the Magic Circle Awards have been attracting the leading professionals from the top firms, recognising the achievements of the industry during the past year.

Richard Wilson KC, Dakis Hagen KC, Giles Richardson KC, Adil Mohamedbhai, Emma Hargreaves, and Stephanie Thompson have all been ranked in Legal Week's Private Client Global Elite Directory 2023, a list of the world's elite lawyers advising UHNW clients.

Expert texts

The 6th edition of *Dicey, Morris & Collins on the Conflict of Laws* was published in October 2022. The text is renowned worldwide as the foremost authority on private international law and it explains the rules, principles and practice that determine how the law of England & Wales relates to other legal systems. The 16th edition includes two hardback volumes and a companion volume on EU withdrawal transitional issues, spanning over 2,500 pages in total. Prof. Jonathan Harris KC (Hon.) and Lord Collins of Mapesbury are the joint general editors of the 16th edition, leading a team of specialist editors. Prof. Jonathan Harris KC (Hon.) has been joint general editor with Lord Collins of Mapesbury since 2015 and is only the 5th general editor since the book was first published in 1896. Serle Court together with Essex Court Chambers, hosted a drinks reception in Inner Temple to celebrate the publication.

In December the 11th Edition of Tudor on Charities (Sweet & Maxwell, Thomson Reuters) was published. The leading work on the law of charities has been completely updated to take account of all the relevant changes in legislation and case law since the supplement to the previous (10th) edition was published in 2018. Key recent developments include the Charities Act 2022 and important decisions of the Supreme Court and Court of Appeal.

Serle Court barristers William Henderson, Jonathan Fowles, Gregor Hogan alongside Julian Smith and Laetitia Ransley (Farrer & Co) are authors of the 11th edition.

Andrew Moran KC and Anthony Kennedy have published the second edition of 'Commercial Litigation in Anglophone Africa', a leading text which details the broad framework of the private international law rules in operation in each of the sixteen Anglophone jurisdictions considered; Botswana, Gambia, Ghana, Eswatini, Kenya, Lesotho, Liberia, Malawi, Namibia, Nigeria, Sierra Leone, South Africa, Tanzania, Uganda, Zambia and Zimbabwe.

In the press

News of eight members of Serle Court acting in the landmark case on fiduciary powers before the *Privy Council, Grand View Private Trust Co Ltd and another (Respondents) v Wong and others* [2022] UKPC 47, was published in The Legal Diary and eprivateclient.

David Blayney KC authored an article, published in The Barrister, on how his experience of the growing challenges faced by litigation teams that led him to develop Associo, an innovative litigation workflow management software.

Wilson Leung and Ryan Tang authored a case analysis of *Dusoruth v Orca Finance,* published in New Law Journal, discussing whether the absence of a liquidated debt automatically leads to the annulment of a bankruptcy order.

New York Conference

Our 5th International Trusts and Commercial Litigation Conference in New York last November was met with rave reviews; *"The venue was nothing short of spectacular," "It is an excellent showpiece for chambers," "...it sits head and shoulders above the competition."* Our barristers are looking forward to welcoming clients and colleagues to the 6th International Trusts and Commercial Litigation Conference which will take place on Monday, 6 November 2023. In keeping with tradition, this will once again be held at the iconic Rainbow Room, Rockefeller Center for what promises to be another stimulating and in-depth look at the key legal issues faced in the international trusts and commercial litigation world. Watch this space for further updates.

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Serle Court Events

FraudNet

Andrew Moran KC spoke at the 36th ICC FraudNet International Conference & Meeting on Saturday, 29th October in Miami, Florida. Practice Directors, Nicholas Hockney and Dan Wheeler also attended. Andrew also spoke at the 37th ICC FraudNet International Conference & Meeting which took place in Accra, Ghana, from 27 - 29 April 2023.

Lance Ashworth KC, Wilson Leung, Sophie Holcombe, and Oliver Jones had the pleasure of participating in an ICC FraudNet Strategic Partner presentation to FraudNet members and the FraudNet Futures community on 'How to instruct English barristers from anywhere in the world'. The speakers engaged their listeners with examples of how foreign lawyers can instruct our barristers on fraud and asset tracing matters, and gave examples of recent notable cases that our Civil Fraud barristers have recently been involved in, which can be found here.

Events

Serle Court sponsored the Trust & Estates Litigation Forum 2022 in Marrakech from 30 November. Dakis Hagen KC co-chaired the conference. Richard Wilson KC spoke on Thursday, 1st December in the roundtable discussions outlining, 'strategies for multi-jurisdictional trust litigation' and Giles Richardson KC spoke on Friday 2nd December at the 'Good Morning session'. We look forward to sponsoring the conference once again this year!

Members of Serle Court Rupert Reed KC, Zoe O'Sullivan KC, James Weale, Gregor Hogan and Practice Director Dan Wheeler visited Dubai in November for the ThoughtLeaders4 FIRE Middle East and Dubai Arbitration Week. Rupert Reed KC and Zoe O' Sullivan KC both spoke at the TL4 conference at the Shangri-La Hotel.

Zoe O' Sullivan KC spoke at The Balkan Arbitration Conference 2022, that took place from in September at the Rogner Hotel in Tirana, Albania. The conference consisted of a keynote speech, followed by panel discussions covering a range of the most relevant topics in arbitration for the Balkan region.

Seminar & Webinar Programme

Serle Court is committed to delivering a high-quality programme of talks in 2023, to assist our clients with knowledge development and training sessions. On request, we can offer our clients and contacts thought-provoking expert seminars across all areas of commercial chancery practice.

If you would like to discuss any of the topics listed in the 2023 programme of talks, and/or arrange a convenient time for our barristers to present them to your team, please contact our Business Development Director, Charlotte Davidson or our Marketing Manager, Shana Garioch.

For more information regarding our upcoming events and where you can see us next, please click here.

Maximising insolvency investigation powers in the pursuit of fraud claims

Anyone who has been involved in fraud litigation knows well the truth of the phrase "knowledge itself is power".

In a fraud case, it is often possible to obtain an information order attached to a freezing order. But in order to get the freezing order, you have to be able to show a good arguable case on the merits against particular defendants, as well as a real risk of dissipation.

However, if (as is commonly the case) the fraud involves an insolvent company which you can get into liquidation or administration, that brings into play the far reaching powers that insolvency office-holders have to examine officers of the company or others who might have information about its affairs.

The first of these is s.234 IA 1986, which gives the court power to order the delivery up to the office-holder of any property, books, papers or records to which the company appears to be entitled, when those items are in the possession or control of any person. This would include books, papers and records held by the company's solicitors, accountants and former directors. It does not extend to the solicitors' or accountants' own papers as they will not be books and records to which the company is or appears to be entitled. It is, however, an extremely broad power as it extends to any person. This power will allow the office-holder to reconstitute much of the knowledge of the company and is likely to be a first step in pointing him/her in the right direction so that control can be exercised.

The next relevant power is s.235 IA 1986. This imposes a duty to co-operate by providing information about the company's business, dealings, affairs or property. The office-holder can summons persons to attend on him/her without obtaining a court order. The people who are subject to this obligation are a relatively wide group. They include not only the directors of the company at any time but, importantly, the directors of a corporate director and employees both current and in the year prior to the onset of the insolvency process. Further, employment for these purposes includes "employment under a contract for services".

This means that the office-holder can summons, for example, the financial controller of a company and subject him/her to what is, in effect, a cross-examination as to what was going on in the company, including who was giving which instructions and when in respect of payments made to further the fraud. Because of the way that employment is defined, this is also wide enough to cover solicitors, accountants and others who have provided professional services to the company.

The final power is s.236 IA 1986. Under this provision, the office-holder can apply to the Court for it to summon to appear any officer of the company; anyone known or suspected to have in his/her possession any property of the company or supposed to be indebted to the company; and (far more broadly) any person whom the court thinks capable of giving information concerning among other things the business, dealings, affairs or property of the company. Any order made for attendance will be for a private examination, not a public examination.

The court's discretion under this section is unfettered, although it is generally exercised along fairly well-settled lines. There are overriding requirements that the examination should be necessary in the interests of the winding up, and that it should not be oppressive or unfair to the respondent (*British & Commonwealth Holdings plc (Joint Administrators) v Spicer & Oppenheim, Re British & Commonwealth Holdings plc (No.2)* [1993] A.C. 426). The onus of establishing a case is on the office-holder, but the views of office-holders that an examination should be ordered "are normally entitled to a good deal of weight" (*Joint Liquidators of Sasea Finance Ltd v KPMG* [1998] B.C.C. 216 at 220; contrast *Re XL Communications Group plc* [2005] EWHC 2413 (Ch)). The section is not to be used just to give the office-holder special advantages in ordinary litigation (*Re Atlantic Computers plc* [1998] B.C.C. 200). It has accordingly been said that as a general (but not invariable) rule, an office-holder may not apply for examination if he/she has made a firm decision to commence proceedings against the respondent (*Re Castle New Homes Ltd* [1979] 1 W.L.R. 1075). There are frequent disputes about whether the office-holder has made that firm decision, but if he/she puts in a witness statement saying he/she has not, it is very difficult for the Court to go behind that.

The court has to balance the importance to the office-holder of obtaining the information against the degree of oppression to the person sought to be examined. The court may also take things in stages, for example by first ordering a third party to produce documents with the decision as to whether to permit an oral examination deferred.

There is, at least as far as officers or former officers are concerned, no privilege from self-incrimination. Thus an officer or former officer cannot assert such a privilege as a reason for not complying with an order under s.236 (*Bishopsgate Investment Management Ltd (in provisional liq.) v Maxwell* [1993] Ch. 1). However, the fact that the privilege against self-incrimination has been impliedly abrogated by statute is a factor which can be taken into account when the court exercises its discretion whether or not to make an order.

Properly deployed these three powers will give any office-holder a great deal of knowledge, power and control without the risk, cost and aggravation of a freezing order. They may also well bring the guilty parties to the table pretty swiftly when the come to realise they have nowhere to hide.

Lance Ashworth KC, Matthew Morrison

Wrongful trading claims: a reappraisal

In his recent judgment in *Chandler v Wright* [2022] EWHC 2205 (Ch); [2022] Bus LR 1510. Mr Justice Edwin Johnson has clarified the law relating to the identification of a 'knowledge date' (or multiple dates) for the purposes of a claim under section 214 of the Insolvency Act 1986 (IA 1986). His judgment also examined the court's jurisdiction to find that such a claim succeeds by reference to a different date to the one initially selected by the liquidator.

These issues arose in the high-profile BHS litigation, which is currently making its way through the courts.

The BHS case

The BHS group of companies was once a major presence on the British high street. Founded in 1928, at the time of its collapse BHS had 164 stores across the UK.

BHS was previously owned by Sir Philip Green before it was sold to Mr Dominic Chappell, a former bankrupt, for £1 in March 2015. Mr Chappell is currently serving a prison sentence for tax evasion. The BHS group went into administration in April 2016 leaving a significant deficit in its pension schemes. Sir Philip Green eventually paid £363 million to help fill this hole.

The collapse of BHS was a major news event and widely publicised. It prompted an investigation by Parliamentary Select Committees. Sir Philip Green gave evidence before those Select Committees and was the subject of bracing criticism in their report. The liquidators of BHS have brought claims against the former directors for alleged wrongful trading and misfeasance. They are claiming up to £163 million.

The liquidators' wrongful trading claims

The liquidators' wrongful trading claims have been made pursuant to section 214 of IA 1986.

A successful claim under section 214 succeeds by reference to a particular date by which the director is found to have known or ought to have known that the company had no reasonable prospect of avoiding an insolvent liquidation – the 'knowledge date'. In their Points of Claim the liquidators had identified one such 'knowledge date', which constituted their primary case under section 214. However, they had also hinted at a wider case, by pleading that section 214 was satisfied *'alternatively by some later date'* within a defined period of approximately one year. This wider case was referred to as the 'overarching case'.

In a response to a request for further information under CPR Part 18 made by Mr Chandler (one of the former directors and a respondent to the claims), the liquidators doubled down on the 'overarching case' and also identified five alternative specific 'knowledge dates' on which they alleged section 214 was satisfied. They declined to plead causation or loss for either the 'overarching case' or any of the new 'alternative date' claims.

Mr Chandler applied to strike out the alternative claims and 'overarching case'. His application was dismissed by Deputy ICC Judge Schaffer ([2021] EWHC 3501 (Ch); [2022] 2 BCLC 145; [2022] BCC 457), essentially on the basis that in his assessment Mr Chandler knew – or knew sufficiently for present purposes – the case he had to meet.

Selecting a "knowledge date"

On appeal, Mr Chandler contended that it was unfair and inappropriate to allow the liquidators to run their 'overarching' case to trial since it did not identify a specific 'knowledge date' or dates, but effectively asserted that a complete cause of action under section 214 arose against Mr Chandler and his fellow former directors on each of the days in a year-long period.

While this point had not previously been considered by a court at the pleading stage of a case, in earlier cases the court had been asked to consider at the start of or even during the trial whether it would be open to a liquidator to contend for a different 'knowledge date' to that initially selected. For example, in *Re Sherborne Associates Limited* [1995] BCC after the evidence in the case had been heard the liquidator sought to argue for subsequent 'knowledge dates' if his primary case failed. HH Judge Jack QC (later Jack J) held that it would not be fair to the respondents to permit the liquidator either to pick a series of subsequent dates or to invite the court to pick a subsequent date.

Similarly, in *Re Continental Assurance Co of London plc (in liquidation) (No. 4) [*2007] 2 BCLC 287, the court was asked at the start of the trial to rule on whether it would consider a later date than the one pleaded in circumstances where the pleaded position was suggestive of a wider case: with reference to the 'knowledge date' it contained the words 'alternatively at such other date as the court may determine'. Park J held that he would not consider any later dates, finding that in a complex case it would be unsatisfactory for the 'knowledge date' to remain at large.

In their submissions in response to Mr Chandler's appeal, the liquidators pointed to two cases in which they contended the 'knowledge date' had been entirely 'at large': *Re DKG Contractors Ltd* [1990] BCC 903 and *Re Purpoint Ltd* [1991] BCC 121. However, both were relatively low value cases of no great complexity in which the respondents failed to take any point as to the date for the knowledge requirement. Both cases also both pre-dated *Re Sherborne Associates.*

Edwin Johnson J allowed Mr Chandler's appeal on this point. He held that there is no absolute rule requiring a specific date or dates to be pleaded. However, in a case of the complexity and magnitude of the BHS case it was unfair and inappropriate for the claims to be pleaded 'at large' in this manner. The liquidators' 'overarching case' therefore ought to be struck out.

The court's jurisdiction to select a different date

The liquidators had sought to rely on earlier authorities on the question whether the court had jurisdiction to depart from the knowledge date that had been pleaded or relied upon. For example, in *Re Continental* Park J had held that it would not matter if the chosen date is *'just a bit too soon'* (in that case, a couple of weeks too early); the liquidator could still succeed because the court has jurisdiction to find that section 214 was satisfied on a date other than the date that the liquidator had selected.

Further, the liquidators placed reliance on the fact that in a number of cases the court had found that a section 214 claim succeeded by reference to a date different to that pleaded or relied upon by the liquidator: *Rubin v Gunner* [2004] EWHC 316, *Official Receiver v Doshi* [2001] 2 BCLC 235 (though *Re Sherborne Associates* had not been cited in either of those cases), *Roberts v Frohlich* [2011] EWHC 257 (the court found for a date two weeks later than the one relied on) and *Hooper v Patterson* (unreported, 9/2/2015) (concerning a litigant in person).

The liquidators argued that applying the logic of these lines of authority, it was unnecessary for them to plead or pick specific 'knowledge dates'.

Edwin Johnson J held that the liquidators' reliance on these authorities confused two separate issues: the *procedural requirements* on a party to plead their case under section 214 and the *court's jurisdiction* when adjudicating such claims. He reaffirmed the court's jurisdiction to find for a different 'knowledge date' or dates, exercisable to the extent it is fair to do so on the facts of a particular case. The existence of that jurisdiction, however, has no bearing on a party's obligation to plead and advance their case by reference to an identified date or dates.

Edwin Johnson J's judgment gives a sense, helpful to practitioners, of how many dates it would be appropriate to plead in a complex, high-value case such as the BHS case. Six alternative dates over a year-long period was held to be in principle reasonable in this case, but an 'overarching' case – where every day in that period effectively constituted a 'knowledge date' – was not.

Conclusion

Useful confirmation has been given in Edwin Johnson J's judgment in *Chandler v Wright* that (i) at least in a large and complex case, the specific 'knowledge date' or dates on which a liquidator seeks to rely for the purposes of a section 214 claim must be identified in the pleading, and (ii) causation and loss must be pleaded for each such claim. It should be noted that, whilst Edwin Johnson J acceded to Mr Chandler's strike out application, nevertheless he held that some of the liquidators' claims (those relating to the alternative dates) should be allowed to progress in the event that they were pleaded properly, and he offered the liquidators the opportunity to apply for permission to amend their statements of case to achieve this. In doing so, he made clear that the court will generally wish to give serious claims an opportunity to progress to trial notwithstanding initial pleading defects if it is fair in the circumstances of the case for it to do so.

Daniel Lightman KC and Charlotte Beynon, both of whom have a broad commercial chancery practice, successfully appealed the first instance decision in Chandler v Wright. Together with Tim Benham-Mirando, they represent Mr Chandler in the BHS litigation, the trial of which is one of The Lawyer's Top 20 cases for 2023.

Daniel Lightman KC, Charlotte Beynon

Collective redress for corporate frauds

Are the English courts now more willing to entertain class actions where fraud is a central issue in dispute? Or do issues of individual knowledge and a representee's reliance on false statements mean that fraud cases are unsuitable for group litigation?

As the number of class actions has increased over recent years, responding to greater appetite for such claims amongst litigation funders, there has been a series of important decisions highlighting the scope of the various routes to achieve collective redress before the English courts: *Merricks v Mastercard* [2020] UKSC 51 emphasised that the purpose of opt-out proceedings under the Competition Act 1998 was to provide effective access to justice for wronged consumers; *Lloyd v Google* [2021] UKSC 50 explained the potentially wide scope of the 'same interest' test for bringing representative proceedings under CPR r 19.8[1]; and *Município de Mariana v BHP* [2022] EWCA Civ 951 confirmed that the expansive case management powers of the court under the CPR were sufficient to handle even the very largest and most complex group claims.

The *RBS Rights Issues* litigation will also be familiar to practitioners in this area: a class action brought by shareholders alleging that a prospectus contained untrue and misleading statements, and wrongful omissions. It was the first claim under section 90 of the Financial Services and Markets Act 2000 to reach trial, but it settled shortly before that trial opened.

1. CPR r 19.6 prior to 6 April 2023.

The view has been expressed that outside of the statutory framework of s. 90 FSMA, group shareholder actions based on false statements may prove challenging.[2] There are likely to be two factors in play, both relating to the need to prove reliance: (1) different types of representations made across a range of representees; and (2) different types of claimants claiming to have been misled. Both these factors might be said to militate against demonstrating common issues of fact and law[3] at a group level, and instead might require claimants in such cases to make out their claims at an individual (or much smaller group) level. In the Lloyds/HBOS Group Litigation, the claimants' case was criticised on precisely the basis that statements were said only 'in the abstract' to be misleading, without any grounding in what anyone had actually read, or in what sense the individual claimants had relied upon them.[4]

Are fraud claims therefore inherently unsuitable for collective proceedings, sensitive as they are to evidential questions of knowledge and reliance at an individual level? Two recent decisions suggest not; and highlight that, if appropriately framed, there is no reason why issues of knowledge and reliance cannot be tried in a group context.

2. Class Actions in England and Wales, 2nd edn., §12-090
3. See CPR r 19.21; previously CPR r 19.11
4. *Sharp v Blank* [2019] EWHC 3096 (Ch) at [796]

The VW NOx Emissions Group Litigation

In the group litigation arising from the VW 'dieselgate' scandal, c. 86,000 owners of VW vehicles sued the manufacturers for (inter alia) fraudulently misleading statements relating to their vehicles. The defendant manufacturers applied to strike out these deceit claims relying, in particular, on the decision of Cockerill J in *Leeds City Council v Barclays Bank plc* [2021] EWHC 363 (Comm). That case, which concerned representations in respect of LIBOR, was said to confirm that as part of the proof of reliance in the context of a deceit claim, each representee must plead and prove that he was "consciously aware" of the representation in question.[5] VW argued that given the need to establish this 'awareness condition' there was no prospect of the generically pleaded case succeeding at trial.

That application came before Waksman J in December 2021 and was dismissed: *Crossley v VW* [2021] EWHC 3444 at [94]-[99]. The representations relevant to the VW deceit claim were *"very different from Leeds"* and were in fact *"relatively simple"*. Further, there were *"real questions arising from what is to be drawn from the fact that an implied representation from conduct is established which means that the reasonable representee would assume or infer the content of the representation from the conduct observed."* While there may be a line to be drawn between (a) formulating an objective standard such as this, and (b) satisfying a subjective enquiry into the state of mind of a representee, it would be an odd result if a reasonable representee was found to have made that assumption or inference and yet such an assumption or inference was not sufficient on the part of the actual representee.

5. The correctness of this proposition has been debated subsequently: see, for example, Clerk & Linsell, 23rd edn., §17-35 and footnote 179. Cockerill J gave permission to appeal her decision, but that appeal was not pursued.

The effect of this decision is to show that there will be cases where deceit can be pleaded and brought to trial as a group issue; and it may be that cases where representations are to be implied, made by conduct, or are made to the market at large will all be particularly suitable. Much will turn on how the generic case can be pleaded: once that is established, there is ample scope within the court's case management powers for sub-group issues, test claims, and even individual issues to be tried at an appropriate stage.

CRL v Marks & Clerk [2023] EWHC 398 (Comm)

The recent decision of Robin Knowles J in *CRL v Marks & Clerk* also arose from an application to strike out collective proceedings. The claimant, CRL, brought proceedings in two capacities: as an assignee of claims against the defendants, and as a representative under CPR r 19.8 of current and former clients of the first defendant. It was said that such clients had claims against the defendants arising from secret commissions paid to the second defendant.

Against the claims brought in the representative capacity, the defendants argued that CRL's pleadings did not even *"purport to plead facts and matters that would constitute a cause of action on the part of each member of the purported class."* Accordingly, it was said, the claimant fell far short of

satisfying the 'same interest' test for permission to sue in a representative capacity; instead, each claim should have been brought (if at all) with details of the date and terms of relationship with the First Defendant, the facts and matters giving rise to fiduciary duties and their content, the knowledge and expertise of the client, individual particulars of loss and quantum, and not least, individual particulars going to knowledge of the receipt of commission.

Robin Knowles J, with heavy reliance on the opinion of Lord Leggatt JSC in *Lloyd v Google*, disagreed. The short point, from the judge's point of view, was whether the 'same interest' requirement was met; and he addressed this by asking whether there were issues involving class members which, if pursued, would prejudice individual claimants within the class. The judge concluded that there were no such issues identified. Insofar as further particulars would be required about the client relationships, *"an exercise will lie ahead to improve available information about what commission was paid in respect of what client, and there may be amendments required, but that does not prejudice the interests of some clients at the expense of others."* Further, and perhaps most striking, is the reasoning at [58] of the judgment: *"It is clear enough that the class is only intended to comprise those to whom the commission was not disclosed, but there is an evidential basis for non disclosure being the starting position for the position of all clients concerned. Any to whom it was disclosed are not in a position of conflict with those to whom it was not disclosed."*

Conclusions

At the Endnote of his judgment, Robin Knowles J remarked that the English courts are *"still perhaps in the foothills"* of the modern, flexible use of CPR r 19.8; and *"In a complex world, the demand for legal systems to offer means of collective redress will increase not reduce."* That is certainly borne out by the rise of group litigation in recent years, and its growing prominence in commercial disputes. The suitability of fraud-based claims to be pursued through one of the various class action mechanisms now available will ultimately be fact sensitive. However, the cases highlighted above show there is no reason in principle why claims involving questions of knowledge and reliance cannot be pursued as group claims; and *CRL v Marks & Clerk* arguably goes further by applying the 'same interest' test in a manner which prioritises the lack of a conflict between claimants over a homogenous set of facts and legal issues.

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