Best in class?

Andrew Hogan examines the issues surrounding representative actions under CPR 19.8

Since the landmark judgment of the Supreme Court in *Lloyd v Google LLC* [2021] UKSC 50 there have been a number of instances where a representative claim has been brought, or attempted to be brought under CPR 19.8. Although arising in a wide range of contexts, CPR 19.8 representative claims can be said to appear where disputes share similar issues: very large classes of potential claimants, modest losses at the individual level, and a defendant with deep pockets and an equally deep objection to being treated as an accidental public compensation scheme.

The attraction of a representative claim is obvious. If the rule can be made to work, it offers something English civil justice does not usually provide outside the sphere of competition litigation: a means of determining genuinely common issues, and sometimes securing a remedy, without the heavy, opt-in administrative machinery of a group litigation order (GLO).

Such claims are sometimes funded by litigation funders. Funding is both the engine and the achilles heel of the modern representative claim. Without third-party funding, and usually after-the-event insurance, many CPR 19.8 cases would never get out of the blocks.

Yet the funding model sits awkwardly with a procedural rule built around a single party litigating on behalf of many people who have not signed anything, or indeed may be blissfully unaware of the dispute being litigated on their behalf. Without the comforting scaffolding of competition proceedings, many key issues may have to be resolved on a case-by-case basis.

Even if the representative wins, it may not be obvious who owes the funder money, how the class is to receive and share the benefit, and how the court is meant to supervise a distribution exercise in a system that has no general 'common fund' jurisdiction.

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REPRESENTATIVE CLAIMS

A representative claim is at heart a procedural tool. One claimant (or one defendant) represents others who have the 'same interest' in the claim. The basics are easy to state, and harder to satisfy in the messy reality of pleaded remedies and contested facts. There is only one express gateway requirement, 'same interest'. The judgment binds the represented persons, subject to the court's power to direct otherwise.

The court retains control throughout: it may order that the claimant may not act as representative, and it may order that a person may not be represented. Trouble, more often than not, arrives when the pleaded remedy demands individualised assessment, or when individual defences fracture the class so that a representative cannot fairly advance everyone's position in a single set of pleadings.

Much of the modern 'representative action revival' draws on an older equity-style conception of representative procedure: where it is practically impossible, or at least practically oppressive, to join everyone, the court may permit one to stand in for the rest, provided the represented class is sufficiently aligned.

In *Lloyd v Google LLC*, the Supreme Court endorsed a purposive construction of the rule and reminded everyone why it exists. But it also removed the easy shortcut that many claimant teams, and funders, hoped would convert CPR 19.8 into a general, opt-out damages mechanism.

The 'same interest' requirement is not a technicality. It exists to ensure that the representative can be relied on to conduct the litigation in a way that promotes and protects the interests of the whole class, which will not be possible where there is a relevant conflict. The Supreme Court also identified why damages claims are a point of friction. Where liability and quantum turn on individual circumstances, a representative action that tries to flatten those differences into a 'lowest common denominator' risks becoming either unfair or meaningless.

The court floated bifurcation as a potentially sensible way of doing justice, with common issues tried first and individual issues dealt with later, but this is perhaps easier to articulate in principle than to apply in practice. The procedure remains discretionary, and the court must be satisfied it is appropriate, fair, and workable in the real world, not merely elegant on paper.

That analysis has fed directly into the post-Lloyd authorities. The courts have not simply cited *Lloyd*; they have used it as a toolkit to separate cases where 'same interest' is genuinely present and the remedy fits the procedure, from cases where a claimant is - to use the familiar phrase - 'shoehorning' a multi-party dispute into CPR 19.8 to gain a tactical advantage.

RECENT CASES

Commission Recovery Ltd v Marks & Clerk LLP

The case of *Commission Recovery Ltd v Marks & Clerk LLP* [2023] EWHC 398 (Comm) and [2024] EWCA Civ 9 has attracted much attention, as it is a good illustration of CPR 19.8 functioning effectively; albeit that the case was compromised before a substantive trial. The case arose out of alleged 'secret commission' arrangements.

At first instance, Robin Knowles J allowed the claim to proceed, but he did so with a careful emphasis on the court's continuing control and the capacity to revisit the representative structure as the litigation develops. On appeal, Nugee LJ treated Lloyd's 'same interest' analysis as the organising principle. The question is not whether every class member has identical facts, but whether the interests are aligned such that the representative can fairly and effectively litigate for all.

Two points in *Commission Recovery* are particularly relevant to funders. First, the Court of Appeal accepted that certain forms of relief may sit more comfortably within the representative procedure than individualised compensatory damages.

Restitutionary or account-type relief may focus on the defendant's gain, or on a common measure, rather than on each claimant's bespoke loss. That does not abolish individual issues, but it can reduce them to something more manageable and, crucially, something that does not fracture 'same interest' at the outset. Second, the Court of Appeal acknowledged the awkwardness that sits at the end of many representative actions: even if the representative obtains relief, it may not be obvious how a money judgment is to be obtained for the class, or how any benefit is to be distributed. The court was careful not to invent a mechanism that the rules do not provide.

Prismall v Google UK Ltd

Prismall v Google UK Ltd [2024] [2023] EWHC 1169 (KB) and EWCA Civ 1516 illustrates the other side of the coin: a claim with the scale and moral pull to attract funding, but where the 'same interest' requirement, and the underlying individualised issues, make the representative structure brittle. In the High Court, Mrs Justice Heather Williams DBE struck out the representative misuse of private information claim.

If not every class member has a viable claim on the pleaded irreducible minimum scenario, the class cannot satisfy 'same interest'. And the 'lowest common denominator' approach cannot conjure away the need for individual assessment where the tort itself is circumstance-sensitive.

The Court of Appeal upheld that outcome. It accepted that there are unattractive optics in a defendant relying on the fact that some class members have put matters into the public domain, but it treated that as illustrating a structural problem: whether there is a reasonable expectation of privacy is fact-sensitive, and those differences are capable of fracturing 'same interest'.

Wirral Council v Indivior

Wirral Council v Indivior [2025] 2023] EWHC 3114 (Comm) and EWCA Civ 40 illustrates a different problem. It is not 'this cause of action is too individualised', but 'this is not what CPR 19.8 is for'. Green J used CPR 19.8(2) to prevent Wirral acting as representative where the claim was framed to obtain declarations on 'common' issues while postponing the costly parts - and much of the litigation risk - until later.

The point was not that bifurcation is impermissible in theory. It was that the proposed deployment would, in substance, displace ordinary case management and operate as a proxy opt-out group mechanism in a way the judge considered inappropriate.

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Smyth v British Airways Plc

Smyth v British Airways plc [2024] EWHC 2173 (KB), and the linked easyJet claim, show a further theme that is becoming increasingly important: discretion and suitability. The judgment is marked by concern with whether CPR 19.8 is being deployed to serve the interests of the class, or to serve a litigation business model.

CPR 19.8 is not equivalent to the analogous regime in competition proceedings: it is not a general opt-out damages regime, and the courts are policing that boundary with some enthusiasm

In striking out the claims, Master Davison treated 'same interest' and manageability as central issues, but he also addressed the representor's suitability and the structural concern that the proceedings were being driven by a commercial backer whose interests did not obviously coincide with every represented person's best outcome.

CPR 19.8 VERSUS A GLO?

Why choose CPR 19.8, rather than a GLO? Administrative friction is perhaps the most compelling reason. A GLO is opt-in. It requires book-building, claimant onboarding, usually individual funding documents, and a structure for steering the litigation. That takes time, costs money, consumes management bandwidth, and creates an early participation hurdle that tends to shrink the class.

By contrast, CPR 19.8 holds out the possibility of an opt-out class definition from the outset, with a single set of pleadings and a single costs budget. Limitation risk can sometimes be handled more cleanly. Settlement dynamics can change too: an opt-out representative claim can produce a 'class size' narrative that is difficult for a defendant to ignore, even where the individual damages are modest.

But the preference is often an exercise in optimism over experience. If the claims require individual reliance, individual causation, individual defences, or bespoke damages assessment, a GLO is usually the correct procedural tool. Representative actions are at their strongest where the dispute is genuinely common: a declaration as to a contract term, a restitutionary account, a status question, or a binary liability issue that does not depend on individual histories.

Defendants tend to attack CPR 19.8 claims along predictable lines, and they do so with a decent success rate where the claim is damages-heavy or the class is internally fractured. The recurring weak points are class definition, particularly where it is too broad, internally inconsistent, or dependent on the merits; divergent interests, including different limitation positions or different defences; individualised causation or reliance; damages quantification and the mechanics of distribution; and the practical questions of manageability and fairness.

CPR 19.8 adds problems that are not present, or are at least easier to manage, in opt-in group litigation. The first is contractual privity. Who owes the funder money? If most of the class never signed up to anything, a conventional funding agreement cannot bind them. One can attempt to solve that by building an opt-in funding arrangement on top of an opt-out representative claim, but it is not a clean solution. It reintroduces onboarding, and it can create tension within the class between those who have signed and those who have not.

The second problem is the absence of a straightforward 'common fund' mechanism in ordinary High Court procedure. The Supreme Court in *Lloyd* acknowledged that distribution issues arise, and it noted that distribution would ordinarily require the class members' consent because a representative cannot generally compromise others' rights to money without an appropriate mechanism. This is where the funder's problem becomes acute. The funder wants a share of recoveries. The court will not readily invent a recovery channel that bypasses the autonomy of absent class members.

Third, remedies matter, not just legally but economically. If the representative action delivers only declaratory relief, or a restitutionary account that still requires individual follow-on steps, there can be a funding gap between winning the common issues and monetising them. Funders can price that risk, but it often makes a case unattractive unless there is a clear, funded path to the second stage, or a realistic settlement model that captures value at the first.

Fourth, distribution and administration costs are real, and they are often weaponised by defendants. Who pays for identifying class members, verifying eligibility, filtering fraud, and paying out? If the claimant's answer is that it can be dealt with later, the defendant's response is that 'later' is where the entire practicality of the litigation lives.

Finally, there is an optics problem that courts have become willing to address explicitly. *Smyth* is a useful illustration that motive and control in a CPR 19.8 claim may be scrutinised more closely than in ordinary two-party litigation, precisely because absent persons are being bound by what the representative does. The harder a claimant team leans into a 'class action' marketing posture, the greater the risk of judicial scepticism about whether the representative can truly be relied on to act for all.

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For funders, diligence on 'same interest' should be treated as a merits issue, not as a procedural footnote. Class fracture points and individualised elements must be identified and priced. An enforceable recovery pathway should be demanded from the outset, addressing who pays the funder, from what pot, and by what mechanism where most of the class has not contracted.

A distribution and administration plan should be insisted on, including an honest model of its costs and the likely defendant attack points. Bifurcation should be priced candidly: stage one success can still be cash-negative without a funded stage two or a credible settlement model that captures value early. Governance must be built to survive judicial scrutiny, particularly on control provisions, conflicts management, transparency, and communications.

CPR 19.8 is not equivalent to the analogous regime in competition proceedings: it is not a general opt-out damages regime, and the courts are policing that boundary with some enthusiasm. Where the claim is truly common and the remedy fits, the procedure can be powerful and, in the right case, fundable. Where it is a disguised GLO with the difficult parts deferred, it is likely to be cut down early.

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