



Neutral Citation Number: [2023] EWHC 119 (Ch)

Case No: FL-2019-000006, FL-2021-000023

**IN THE HIGH COURT OF JUSTICE**  
**BUSINESS AND PROPERTY COURTS OF ENGLAND & WALES**  
**FINANCIAL LIST (Ch)**

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

Date: 26 January 2023

**Before :**

**MR JUSTICE TROWER**

**Between :**

**VARIOUS CLAIMANTS**

**Claimants**

**- and -**

**SERCO GROUP PLC**

**Defendant**

**SHAIL PATEL, CALUM MULDERRIG AND KATHERINE BOUCHER**  
(instructed by **MORGAN, LEWIS & BOCKIUS UK LLP**) for the **CLAIMANTS**  
**RICHARD HILL KC AND ANDREW ROSE** (instructed by **CLIFFORD CHANCE LLP**)  
for the **DEFENDANT**

Hearing date: 23 JANUARY 2023

**Approved Judgment**

This judgment was handed down remotely at 10.30am on 26 January 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives

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MR JUSTICE TROWER

**Mr Justice Trower :**

1. In these proceedings, the claimants seek compensation in respect of losses said to have been suffered in relation to shares in the defendant, Serco Group Plc. Their claims are made under section 90A of and Schedule 10A to the Financial Services and Markets Act 2000. The shares were acquired, disposed of or held by the claimants between 2006 and 2013. They allege that the losses they suffered arose either from actions taken in reasonable reliance on certain published information which it is said contained untrue or misleading statements, or which omitted information required to be included, or where it is said that there was a dishonest delay in publishing that information.
2. At the first CMC held on 26 and 27 July 2022 Falk J gave directions for a split trial. She directed that issue 1 and issues 3 to 11 in the list of issues be tried at trial one and that issue 2 and issues 12 to 17 in the list of issues be determined at a further trial but in respect of a sample of the claimants or sample funds only.
3. In her judgment explaining the order she made ([2022] EWHC 2052 (Ch) at [15]) Falk J summarised the effect of her order:

“There is, rightly, no dispute over the principle that there should be a split trial in this case, as in *G4S*, with a broadly similar split. The first trial would cover the standing of the claimants and so-called common issues relating to Serco, namely whether there was fraud, the content of or omissions from published information, the issue of dishonest delay, the PDMR issue and whether any PDMR had the requisite knowledge. Trial two would cover so-called individual issues related to the claimants, being reliance, causation, loss and quantum, and limitation.”
4. Although Falk J ordered a split trial, she made a number of orders directed at the conduct of trial two. In particular, she ordered that any claimant advancing a reliance case was to file and serve their individual particulars of reliance (“IPR”) and that the parties should use their best endeavours “to agree the number and identities of the sample claimants which are representative of the various characteristics of the remaining claimants”. It was contemplated that once the sample claimants had been selected they would give extended disclosure before the commencement of trial one not just in relation to the issues which arise at the first trial but also in relation to the issues which are only to be determined at trial two.
5. Falk J also directed that the parties should seek to cover six identified sampling criteria to the extent that doing so furthered the purpose of sample case selection. Those criteria were the time periods covered by the sample claimants, any material differences between their cases on reliance, any relevant characteristics related to their limitation defences, the extent to which contemporaneous documents have been retained, quantum and whether the relevant claimant relied on meetings or discussions with the defendant.
6. The differences that have emerged from the IPRs mean that it is possible to categorise the reliance placed by the claimants on the defendant’s published information as direct reliance and two forms of indirect reliance: market reliance and price reliance. This terminology has been adopted by the parties for the purposes of this hearing and in

some respects for the case more generally, and provides a guide to the way in which they propose to advance their cases which is sufficient for present purposes.

7. The extent of any claimant's case that they directly relied on published information was not clear at the time of the first CMC. However, it is now apparent that, where direct reliance is alleged, it is limited to reliance on the defendant's published information as a whole, not on individual statements within the published information. The claimants have described what they mean by the two categories of indirect reliance as follows:
  - i) Market reliance is "[a] decision, including an automated decision to acquire, continue to hold or dispose of shares in the market at the (inflated) price at which they were in fact acquired and held."
  - ii) Price reliance is market reliance in circumstances in which the claimant was also aware of "(a) the price of the shares and (b) the published information being true, complete and accurate."
8. Twelve claimants advance no reliance case, but allege dishonest delay by the defendant in disclosing certain matters during the relevant period.
9. The purpose of sampling in a case such as the present is to try to ensure that decisions made in respect of individual issues provide as much guidance as is possible, while recognising that the court's decision will not be binding as against other claimants. This requires a balance to be struck between ensuring that appropriate similarities are identified in order to maximise the number of cases which will in practice be resolved, while not at the same time having so many sample cases that the exercise becomes unwieldy and fails to achieve the purpose for which it was imposed. I also agree with Falk J when she said in her judgment at the conclusion of the first CMC (confirming her own earlier decision in *Various Claimants v GAS Plc* [2022] EWHC 1742 (Ch)), that the construction of a sample should seek to ensure that facts that could make a material difference and differentiate claimants in a marked way are picked up and covered by the sample.
10. Since the CMC, the parties have made some progress in agreeing the number and identity of the sample claimants. The issues between the parties on constitution continued to narrow during the period up to the hearing of the second CMC. It now includes 7 master claimants and 24 separate funds as members of the sample group. It is common ground that claims made in respect of each of the funds listed in schedules put before the court against each of the master claimants will be included. There are however two significant issues that remain outstanding. In large part they relate to questions of reliance.
11. The first of these is that the defendant proposes that all claimants who do not advance direct reliance cases should be included in the sample. Mr Hill KC submitted that the court should approach this question on the basis that the shape of the case is now very different from the shape of the case as it appeared to Falk J at the first CMC. He said that this was more than just an increase in the sample size. It was a departure from a pure sampling approach.
12. In justification for this, Mr Hill pointed out that the direct reliance cases are much more limited than appeared to be the case a year ago, a material number of claimants have

dropped out and those claiming on the basis of market reliance (30) and price reliance (6) have great difficulties in the light of Hildyard J's decision in the *Autonomy* litigation (*ACL Netherlands BV et al v Lynch et al* [2022] EWHC 1178 (Ch) at [501]-[506]). It was therefore now proportionate for all of the non-direct reliance cases to be tried at trial two and it will achieve certainty if they can be disposed of. That is a result which the court should strive to achieve.

13. So far as proportionality is concerned, the defendant says that, in the case of indirect reliance claims, the differences between them are very limited. Mr. Hill identified three respects in which it might be said that there were material differences which would make it disproportionate to add all of the indirect reliance claims to the cohort of sample claimants for the purposes of trial two. They can be summarised as limitation issues, quantification issues and issues relating to the six price reliance claims.
14. So far as limitation is concerned, the claimants allege that facts relevant to their rights of action have been deliberately concealed from them by Serco: section 32(1)(b) of Limitation Act 1980 ("LA 1980"). This is capable of giving rise to differences in individual cases, but that is said to be very limited because the claimants advance a similar case overall, which is to the effect that they could not have discovered the fraud they have alleged before specific identifiable public announcements were made by the defendant.
15. So far as quantum is concerned, it is of course accepted that the quantum claimed will differ from case to case, but the defendant says that the differences are of no real materiality for these purposes because the quantification methodologies are comparable. The differences in amount will be resolved by a simple arithmetical exercise the burden of which will be borne by the experts but which is not of itself a significant consideration.
16. The defendant does not dispute that there will be more substantial differences between the six claimants where their cases depend on establishing price reliance than will be the case where the claim is put only on the basis of market reliance. There will be additional elements of the evidence required in those categories of case, but it is submitted that the extent of the additional evidence is light and the court can assume that the work has already been done.
17. The claimants' position was that there was no basis on which to resile from the agreement in principle at the first CMC that the second trial should be by reference to sample claimants (see [18] of Falk J's judgment). They submitted that to include all non direct reliance claims in trial two would be to move away from the sampling approach and would be wrong in principle. Sampling is not about a concession from the trial in which all claimants would otherwise participate. It is the other way around. It is said that, if this was the right way forward, it should have been dealt with at the first CMC and the developments in the case since then did not amount to a fundamental shift in the case and did not justify a different approach.
18. I accept that, in some respects, the developments which have occurred since the first CMC have been significant. Most particularly, the fact that no claimant seeks to advance a direct reliance case based on specific statements in the defendant's published information is material. This type of development was always a possibility and, for that reason alone, I do not consider that the court should regard itself as bound by what was

decided at the first CMC when considering whether it remains appropriate for a particular procedural course to be persisted in. The question now is whether, having regard to the overriding objective, a shift away from the sampling approach is justified in the current circumstances. In answering that question, appropriate weight must be given to the fact that the parties have proceeded for the past year on the course set by Falk J's order.

19. In my judgment, such developments as there have been do not justify an inclusion of all of the indirect reliance cases to the existing cohort of sample claimants. The effect would be to add 27 master claimants and 43 funds to the list of those participating at trial two and I think that this would detract from a just and effective resolution of the dispute and from costs efficiency, both from the court's perspective and from that of the parties. I do not agree with the defendant's submission that it can be seen that evidence from indirect reliance claimants will be more limited to a sufficient extent. While it is true that the further evidence from market reliance claimants will be limited, because such reliance as is claimed will have been entirely passive, the same cannot be said of the price reliance claims in respect of which the evidence required may not be straightforward and may well be challenged.
20. I also think that the defendant underestimated the extent of the evidence and disclosure that may be required from each indirect reliance claimant in order to discharge the burden under section 32 of LA 1980. This will be required to establish when each of them first discovered such facts relevant to their cause of action as are said to have been deliberately concealed from them. As Mr Patel submitted, I think that, if a sampling approach to all indirect reliance claimants is effectively abandoned, it will add materially to the burden if this process has to be done 27 times by the 27 new master claimants. The same point can be made about the expert evidence required for quantification.
21. Mr Patel submitted, and I agree, that each of these claims would have to be treated as a separate claim. He said that the addition of these extra indirect reliance claimants would only add a further 10% of claim amounts. He submitted that the additional burden imposed by their inclusion did not justify the limited benefit of a final resolution of that level of claims at a trial in which each claimant had actually participated. I agree with that submission. In short, I consider that a sampling approach for both indirect and direct reliance claims remains the right way forward.
22. The second significant issue was more granular in form. The defendant submitted that, even if I were to reject its argument that all of the indirect reliance claims be tried at trial two, the existing body of sample claimants should be expanded to add five more claimants, which were described in the schedules prepared for the purposes of the hearing as MC5 and MC31-33 (which are market reliance only claimants), MC21 (which is a dishonest delay only claimant) and MC27 and MC47-48 (which are direct, market and price reliance claimants).
23. The justification for adding MC5 and MC31-33 is that they are what the defendant called pure market reliance claimants in that no other form of reliance is claimed, unlike the majority of the market reliance claimants in the existing sample where market reliance is advanced as an alternative case. In the case of MC5 the relevant fund was an index tracker fund and in the case of MC31-33 the relevant fund was not an index tracker fund. There were also distinguishing characteristics based on when Serco shares

were disposed of and acquired (or reacquired). In both instances the claims are substantial (in excess of £2.4 million in the case of MC5 and in excess of £1.1 million in the case of MC31-33). It was submitted that it is desirable for the larger claims to be resolved at trial two if at all possible.

24. However, there are many other examples in the existing cohort of sample claimants of cases in which market reliance is advanced to justify the claim. It is said that for every sample claimant, market reliance is combined with a case based on direct reliance and price reliance as well, but even that is not a complete answer. There is one case in which a single fund of a multiple fund sample claimant advances only a market reliance case. In my view, that is sufficient to cover the factual matrix in any event.
25. The justification for seeking to ensure that there is sufficient market reliance only coverage in the sample is that, if a claimant were to succeed on direct reliance but fail on market reliance, there would be no opportunity for it to appeal the market reliance decision and therefore the precedent value of that decision would be much diminished. I do not consider this to be a very persuasive submission. As Mr Patel pointed out, this would have to happen in all cases in which market reliance was asserted as an alternative. I agree that the prospects of this occurring is relatively slim and does not outweigh the practical downsides of increasing the cohort.
26. I also do not consider that the size of claim should bear the weight for which Mr. Hill contends. I agree that, all other considerations being equal, it is preferable for the sample to include the larger of two otherwise similar claims. I do not think, however, that the mere fact that a claim is a large one should cause the court to direct that it be included within the sample group if there were otherwise to be no justification for doing so.
27. In my view the existing sample is appropriately balanced and provides for sufficient opportunity for guidance to be given on the market reliance argument. I also think that the same can be said about adding MC21 as a dishonest delay only claimant. This argument is run by many other claimants already captured by the sampling exercise. I do not consider that it is necessary or desirable for the sample size to be increased on those grounds.
28. As to the proposed addition of two more direct reliance claimants, (MC27 and MC47-48), the justification is said to be that the relatively small size of the burden is now apparent and can be justified given the size of the claims (c.£5.8 million and c.£1.5 million respectively). Mr Hill submitted that this was a real benefit for the defendant and the court, in particular given the fact that the burden is so attenuated compared to what appeared to be the case at the first CMC. He submitted that this was a significant factor.
29. It was also said, not just that their inclusion would only lead to modest additional effort in exchange for the earlier resolution of what were substantial claims, but also that the differences in investment approach and investment manager would give a different perspective from the other claims which would otherwise fall into the same category. Mr Hill pointed out that in the case of MC27 the investment of the fund was constrained by specific investment limits which would have had a material effect on the investment and trading decisions, none of which applied to the existing cohort of sample claimants. It was also said that it is relevant that the fund was managed by a different investment

manager from the other funds, including in particular the other funds managed by Invesco, which had been included in the existing sample.

30. I do not think that these distinguishing characteristics, which at the end of the day reflect differences in investment strategy and investment manager identity, are sufficient to justify the addition of these claimants as members of the sample group. It is commonplace amongst the claimants as a whole for different investment strategies to be adopted and, as Mr Patel pointed out, the use of benchmarks for these purposes is well covered by others (e.g., MC2). He submitted, and in my view there was force in this submission, that it was difficult to identify what guidance the inclusion of these additional claimants would therefore give over and above the guidance which would be obtained from resolution of the cases already included in the sample group.
31. Stepping back and looking at the group of sample claimants as a whole the court must always recognise that not every difference between the position of individual claimants and funds can be captured by a sample and no answer is perfect. The key is to try to pick those cases which appropriately represent a wider body of claimants and common issues without overcomplication, recognising that not every fine detail can be captured. I am satisfied that the sample for which the claimants seek the court's approval includes facts applicable to the position of the different sample claimants which could make a material difference and differentiate the claimants in a marked way, but otherwise adopts an appropriately proportionate approach in accordance with the overriding objective.
32. For these reasons, I explained at the conclusion of the CMC that the group of sample claimants the court would approve in accordance with paragraph 14(1) of Falk J's order at the first CMC would be the group agreed by the claimants, i.e., MC2, MC3, MC4, MC9, MC12, MC13 and MC22-23. This is to include each of the funds or accounts listed in the papers in respect of each such claimant.