

Neutral Citation Number: [2022] EWHC 2052 (Ch)

Case Nos: FL-2019-000006 and FL-2021-000023

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

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

Date: 27 July 2022

**Before :**

**Mrs Justice Falk**

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**Between :**

**Various Claimants**  
**- and -**  
**Serco Group plc**

**Claimants**

**Defendant**

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**Andrew Onslow QC, Shail Patel and Calum Mulderrig** (instructed by **Morgan, Lewis & Bockius UK LLP**) for the **Claimants**  
**Richard Hill QC and Andrew Rose** (instructed by **Clifford Chance LLP**) for the **Defendant**

Hearing dates: 26 and 27 July 2022  
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**RULING**

**Ruling by MRS JUSTICE FALK**

**Introduction**

1. This is a case management decision made at the first CMC of two sets of claims, issued in 2019 and 2021 respectively, under section 90A of and Schedule 10A to the Financial Services and Markets Act 2000.
2. The claim is for compensation in respect of losses said to have been suffered in relation to shares in the defendant, Serco Group Plc ("Serco"), acquired, disposed of or held by the claimants between 2006 and 2013, being losses suffered arising 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 information.
3. One requirement of the legislation relates to the state of mind of one or more persons discharging management responsibilities ("PDMRs"). In essence, dishonesty is required.
4. For present purposes, there is no material difference between the two sets of claims. The second was issued to address potential procedural deficiencies in the first. They are being case managed together and the parties have agreed to use a single set of pleadings for the future. There are 70 so-called Master claimants operating 107 distinct funds or accounts.
5. The Serco group provides services to branches of Government that include the electronic tagging of offenders and prisoner escort and custody services. In July 2013, the Government announced an immediate review of contracts entered into by Serco relating to billing practices in respect of electronic monitoring. This was followed by further announcements in respect of alleged fraudulent behaviour relating to contracts for prisoner escort and custody.
6. In December 2013, Serco agreed settlements with the Ministry of Justice in respect of issues arising under the electronic monitoring contracts since 2005 and prisoner escort and custody contracts since 2011. The claimants refer to this as "wrongful billing", although Serco disputes the label and says that most of the settlement amount related to distinct operational issues.
7. In July 2019, a Serco subsidiary called Serco Geografix Limited ("SGL") entered into a deferred prosecution agreement ("DPA") with the Serious Fraud Office in respect of electronic monitoring contracts entered into in 2004 by its immediate parent Serco Limited, relating to charges levied by SGL which suppressed Serco Limited's profits, with the effect that the profit margin specified in the contracts, which was relevant for the purposes of provisions designed to ensure that costs efficiencies were shared, was not exceeded. The claimants refer to this as the "accounting fraud". Specifically, the DPA related to the fact that between 2011 and 2013, four financial models were prepared and submitted to the MoJ that included bogus charges from SGL to Serco Limited of £500,000 a month. SGL accepted responsibility for three offences of fraud and two offences of false accounting.

Criminal proceedings against two individuals who are not alleged to be PDMRs of Serco subsequently collapsed due to disclosure failings.

8. The claimants also rely on charges levied by SGL in earlier periods between 2006 and 2011 that were also referred to in the DPA judgment. They also now rely on there being five PDMRs, although none of those was a *de jure* director of Serco.
9. Serco's defence relies, among other things, on an absence of untrue statements, a lack of materiality, the absence of any PDMRs with requisite knowledge (they say the alleged PDMRs did not have the requisite status or knowledge), an absence of a causal link with any loss, an absence of reliance, and on limitation. Except in respect of conduct between 2011 and 2013 which was the subject of the DPA, Serco denies any fraudulent behaviour.
10. There is an agreed list of issues between the parties, which includes the standing of the claimants, limitation, whether there was fraudulent conduct between 2006 and 2011 and in respect of the alleged wrongful billing, whether there were untrue or misleading statements or omissions in published information and whether there is a materiality requirement in the legislation in respect of that, whether there was dishonest delay, whether the alleged PDMRs were PDMRs or had the requisite level of knowledge, reliance, causation and loss.
11. The pleadings have already been amended on a number of occasions and a number of claimants have discontinued their claims. There was a strikeout application in the first set of proceedings, which contributed to the delay in this CMC being heard. That application was ultimately resolved by consent.
12. Serco also has an outstanding application for further information which it issued on 8 March 2021. That application covers the identity and status of the claimants, reliance and loss in particular. The reliance element of this application is the most relevant for present purposes.
13. There are strong parallels between these proceedings and the proceedings against G4S, which are also ongoing. The similarities in the issues raised, both factual and legal, are striking. The claimants have the same legal team in both sets of proceedings, and a number of claimants claim in both proceedings.
14. At this CMC, the claimants' counsel, Mr Onslow, made extensive reference to my decision in *Various Claimants v G4S* [2022] EWHC 1742 (Ch) ("*G4S*"), a decision at the first CMC in those proceedings which I heard on 29 and 30 June. That decision did not accept the submissions of either the claimants or the defendant in that case on the issues the decision addressed, instead adopting something of a middle ground. The claimants in these proceedings say that they accept the terms of the judgment in those proceedings. They say that the two cases are on a similar track and that I should take a similar approach in these proceedings to the one I took in that decision.

### **Split trial and further information**

15. 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 2 would cover so-called

individual issues related to the claimants, being reliance, causation, loss and quantum, and limitation.

16. Mr Hill for Serco has also proposed that the question whether so-called indirect reliance (see *G4S* at [47] and [48]) can provide a basis for a claim under the legislation as a matter of law should be determined as a discrete issue at trial 1. Following discussion at the hearing, this is not being pressed by Serco at present.
17. It was also agreed during the hearing that the claimants would complete their provision of documents called "Individual Particulars of Reliance" ("IPORs"), and further that each claimant would answer questions in an annex to the draft order, by 30 November 2022. The annex is largely derived from the decision in *G4S* and the order made in that case, but with some modifications. The questions cover, among other things: whether the individual claimant advances a case based on reliance on specific statements in published information, and, if so, by what individual, and some details in relation to that; whether the claimant advances a case based on reliance on published information as a whole, and, if so, what documents; whether a claimant advances a case based on indirect reliance, and specifically an element of knowing of and relying on the price of the shares and believing that to reflect their value; whether a claimant advances a case based on a general or invariable practice of reviewing information of a similar nature to the published information before making an investment decision; whether a claimant advances a case based only on relying on omissions; and whether a claimant relies on specific communications with the defendant, including meetings, and, if so, details of those.
18. The parties have also agreed in principle that the second trial in the split trial should be by reference to sample claimants.

### **The issues**

19. The three issues that I have to determine now are the process for sampling, a linked point of Serco's request that I should order disclosure and witness statements from all claimants and should do so prior to sampling occurring, and the claimants' request that Serco should respond to their amended further particulars of quantum.

### **Sampling, disclosure and witness statements**

20. I deal with the first two issues together. The claimants say that I should follow the approach in *G4S*. The process for sampling there involves the provision of the remaining IPORs, and answering questions in the annex to the draft order. That is to be followed by the parties using best endeavours to agree a sample of claimants, and determination of the sample at a second CMC if not agreed. Following that, all claimants would give disclosure on standing and on any specific communications or discussions with the defendant that they rely on, but sample claimants would give disclosure on all issues. Witness statements would be provided from all claimants in respect of standing and any specific communications or discussions, and there would be scope for the court at the second CMC to direct that more witness statements should be produced, including witness statements from non-sample claimants.
21. Serco's position is that all claimants should give disclosure and witness statements not only on standing but on reliance. Under their proposal the decision about which claimants should

be in the sample would be deferred, potentially until after trial 1 (at least if the legal issue regarding indirect reliance is heard then).

22. Serco says that it is necessary to order disclosure and witness statements from all claimants, and to do so before sampling, in order for it fully to understand the case and evaluate it, as well as to allow sampling choices. It says it wants to test the cases of the various claimants against the documents and the witness statements, and it points to what it says is the standardised nature of the IPORs. It relies on a paragraph of the decision of Hildyard J in *Manning and Napier Fund Inc v Tesco plc* [2017] EWHC 3296 (Ch) at [29], where the judge referred to the need for the court to be properly astute to ensure that sufficient particularity is supplied by claimants, and referred to that being necessary to ensure that the defendant knows precisely what is alleged, but also to focus the mind of each of the individual claimants.
23. Serco claims that the process would not be onerous, because the claimants should have identified relevant documents anyway and they would need to look at them to answer the questions in the annex. Serco also points to the claimants being institutional investors, the relative burden on the defendant for trial 1, which it says is exceptionally heavy, and overall fairness. It says its approach would not defeat the point of sampling. It wants the discipline of a responsible person at each claimant signing a witness statement, and it wants to cover the risk of fading memories.
24. If I am not prepared to make the order it requests now, Serco suggests that the position is revisited at the second CMC, by which time all the IPORs and answers to the questions in the annex would have been supplied.
25. I am not persuaded by Serco's arguments. The process set in *G4S* was carefully designed as a proportionate means of ensuring proper particularisation of the claimants' reliance case before trial 1, to facilitate the selection of the optimum range of claimants as sample claimants, to achieve balance in the litigation burden before trial 1, including by ensuring proper engagement by claimants, to promote the chances of overall settlement through an improved understanding by the defendant of the claimants' case, and, with disclosure and, potentially, witness statements from sample claimants at least, to allow the case to progress from trial 1 to trial 2 without undue delay.
26. I accept the claimants' argument that ordering disclosure and witness statements from all claimants on reliance is likely to involve a very substantial amount of work. While it would not wholly negate sampling, it would materially reduce the benefits of it in terms of costs and efficiency. The questions in the proposed annex in this case are carefully crafted to draw out information to allow the defendant to understand the case properly and achieve effective sampling, and also to achieve an appropriate balance between the claimants and the defendant. For example, individual claimants will have to identify any individuals who are said to have relied on particular statements, when they did so, and following discussion during the hearing to that would be added information about what action was taken in consequence. Among other things, this ought to address any concerns about standardised responses in IPORs. Further, details will be required of all communications and meetings with Serco that are relied on. In my view, the information provided ought to be sufficient to allow a proper understanding and evaluation of the case, as well as to allow effective sampling, but, importantly, to do so in a proportionate manner.

27. As I indicated in *G4S* (see in particular [46], [67], [72] and [73]), the witness statements ordered at the second CMC may go beyond sample claimants, especially in respect of the recollection of specific events or specific reliance and in respect of direct communications or meetings. That is similarly contemplated by the draft order in this case. Those points help to address concerns in respect of fading memory, and they also help address to concerns over potential prejudice, if evidence adduced by the claimants could otherwise be affected by findings at trial 1.
28. In contrast, ordering all claimants to provide disclosure and witness statements on reliance would, in my view, be disproportionate and not consistent with the overriding objective. The fact that the claimants are institutional investors, and perhaps better resourced than many claimants, is not, in my view, a material factor in favour of ordering such a significant amount of work to be done.
29. I also agree with the claimants that the process for sampling ought not to be allowed to drift. As already indicated, the process in *G4S* involves the provision of information, as also agreed here, and then best endeavours to agree the sample. If a sample is not agreed, I would expect the sample to be determined at the second CMC, together with the issue of witness statements. However, like any CMC direction, that cannot be set in stone, and it will be reviewed if there is a good reason to do so. But for now, I think it is better to put in place a clear process towards identification of sample claimants.

### **Response to FPQs**

30. I now move to the third issue, which is whether the defendant should serve a response to the amended further particulars of quantum. This document is quite a detailed document provided by the claimants in response to one aspect of Serco's request for further information. It sets out various potential methodologies for assessing loss and provides some initial calculations.
31. The subject matter is on any basis complex, and there is limited case law authority that is relevant. The document addresses, among other things, the need to match, or pair, sales and purchases of shares in assessing loss. It covers three ways of doing this: LIFO (last-in, first-out), FIFO (first-in, first-out) and a weighted average approach. It discusses different categories of damage by reference to so-called "event dates", being dates of relevant announcements by the Government or Serco, and when shares were acquired, held or sold in relation to those dates. It also refers to alternative possible methodologies for calculating loss.
32. The claimants say that Serco should respond to this document as if the matters covered had been set out in pleadings, so that the claimants know the case they have to meet, for example by understanding whether particular methodologies are or are not accepted.
33. On this issue, I prefer Serco's submissions. I note that it is not conventional to require a response to a Part 18 response, but the main point is that I cannot see that there is likely to be a material advantage in accelerating work that would otherwise be done only at the stage of assessing quantum, and, obviously, only if the case gets that far. Even if the case does get that far, the work required on quantum could be affected by the outcome of trial 1, for example by a restriction of the claim to more limited periods.

34. Having read the document, I agree with Serco that a formal response by it is likely to require material expert input as well as legal work. I note that Serco already has a material burden in preparing for trial 1, and I cannot see that any potential benefit could justify adding this particular work stream to that burden.
35. The claimants also make the point that much of what is in the note is untested legally, and I would question how much further forward they really would be with Serco's response, as opposed to a judicial determination. Further, the claimants' document is not comprehensive, it has already been amended and, in important respects, it reserves the claimants' position. If understanding Serco's position would really make a difference, in particular to settlement discussions, that would no doubt be covered in correspondence.

### **Summary**

36. So in summary, the process for sampling should proceed. I am not going to order full disclosure or witness statements on reliance from all claimants at this stage, and I am not going to require Serco to respond to the further particulars of quantum.