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# Arif and others v Berkeley Burke SIPP Administration Ltd: guidance on GLO publicity and defendant financial disclosure

**by Matthew Patching and Edward Argles, Harcus Parker Ltd**

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In this article, Matthew Patching and Edward Argles of Harcus Parker Ltd consider individual notice and the issue of requiring a defendant to give disclosure around its ability to fund the litigation to trial and beyond regarding an application for a group litigation order under CPR Part 19, following the High Court's decision in *Arif and others v Berkeley Burke Sipp Administration Ltd [2018] EWHC 4096 (Comm)* (the transcript for which has only recently become available).

Often one of the more contentious issues arising during an application for a group litigation order (GLO) under CPR Part 19 is whether the court should give directions for publicising the GLO under CPR 19.22(3)(c) and, if so, what form the publicity should take.

Claimants will want to ensure any publicity is as effective as possible, enabling those who might be eligible to bring claims as part of the GLO but who have not yet done so to be informed about their ability to claim. Defendants, on the other hand, are naturally keen to limit any potential additional liabilities that might be caused by an increase in the number of claims they face. It is often said that effective publicity facilitates access to justice, especially where it may be impractical for claims to be brought on an individual basis, so in the pursuit of effective publicity, claimants have sought directions that individual notice of a GLO be given to all members of the group of eligible claimants.

The GLO judgment in *Arif and others v Berkeley Burke SIPP Administration Ltd [2017] EWHC 3108 (Comm)* (the Berkeley Burke SIPP Litigation) is a significant case in the context of GLO publicity and the issue of individual notice. As part of their GLO application, the claimants sought an order directing individual notice be given to potential claimants in the form of a letter sent by the defendant, but the judge held that it would not be right to make this order. Instead, the judge directed for an advert to be placed in newspapers.

This decision has often been cited by defendants resisting individual notice, and it was cited by Trower J in his recent GLO judgment in *Moon v Link Fund Solutions [2022] EWHC 3344 (Ch)* (the Woodford investor group litigation). However, what appears to have been missed from subsequent consideration of the GLO judgment in the Berkeley Burke SIPP Litigation is that the judge returned to the issue of individual notice at a later stage in an *ex-tempore* judgment (*Arif and others v Berkeley Burke Sipp Administration Ltd [2018] EWHC 4096 (Comm)*) which, although dating from June 2018, has only recently become widely available. This later judgment provides further guidance on when the court may exercise its discretion to make an order directing a defendant to give individual notice of a GLO to potential claimants.

Alongside the issue of individual notice, the later judgment considers the issue of making an order requiring a defendant to give disclosure around its ability to fund the litigation to trial and beyond. This is obviously significant for claimants who want a better understanding of the risks and costs of pursuing a claim and the likelihood of making a recovery.

## Individual notice

After the GLO was made, the defendant in the Berkeley Burke SIPP Litigation sent a letter to a group of investors who were eligible to bring a claim as part of the GLO (those who had an interest in a certain type of investment called the "store pod investment") which enclosed an FAQs document.

The defendant's letter stated that the FAQs addressed "all matters relating to your investment complete with answers detailing all the information we know on the subject which is enclosed for your reference", and "we do not know anything beyond what is included in this update and we are unable to make any further comments thereon". Significantly, the FAQs document made no reference to the GLO. It also contained comments about the dispute resolution mechanisms available to investors, such as through the Financial Services Compensation Scheme. The letter assured the

investors that the defendant would "let you know should we become aware of any developments".

Following the circulation of the defendant's letter, the claimants made an application asking the judge to reconsider whether individual notice should be given to members of the affected class. The judge agreed, finding that "it would now be right and in accordance with the overriding objective for [the defendant] to let the store pod investors know of the existence of the GLO and, indeed, the cut-off date for joining the litigation". He considered that the letter had "diluted" the intended effect of the earlier publicity he had ordered at the GLO stage.

The judge ordered the defendant to send a letter to each of the store pod investors to notify them. Considering the burden and costs of this exercise which would be borne by the defendant, the judge considered that the fact that the defendant had already written to the investors and failed to mention the GLO counted against the defendant. However, the judge did limit the requirement to give individual notice only to those investors who had received the letter, that is, the investors with a store pod investment and not all investors who could bring claims as part of the GLO.

It is conceivable that similar reasoning may apply to make it appropriate for individual notice to be given where, before the making of a GLO, the defendant has a habit of communicating with its investors or customers who are eligible to bring claims to inform them about the dispute resolution mechanisms available to them or where it has committed or has a commitment to keep those investors or customers informed about matters relevant to their investment or product. If so, it may be incumbent on the defendant to write to update them that the court has considered it appropriate to make a GLO and that they have the ability to bring a claim as part of the GLO.

## Defendant financial disclosure

The claimants applied for the defendant to be ordered to produce a witness statement providing information on whether it could fund the litigation to trial and beyond. They relied on Thirlwall J's decision in *XYZ v Various (PIP Breast Implant Litigation) [2013] EWHC 3643 (QB)*.

In its judgment on this application, the court in the Berkeley Burke SIPP Litigation noted that it "does not either by reference to Part 18 or by reference to any more general "cards on the table" type of reasoning have the power or jurisdiction to order disclosure of financial or matters going to the financial wherewithal, or lack of it, of a litigant". Accordingly, the only jurisdictional basis available to the court was its case management powers under CPR Part 3.

The judge distinguished the *XYZ* case on the basis that it was necessary for the court in that case to have information about the financial status of one of several defendants as this was relevant to its case management directions, such as around the identification of lead defendants. Where, as in the Berkeley Burke SIPP Litigation, there was only one defendant, the same did not apply. The judge explained that "whether or not [the defendant] is good for any judgment that might be obtained against it at the end of case is not a question that relates directly or sufficiently to the directions that fall to be made in managing the case towards that end". As the judge could not see the case being managed any differently if the financial information sought by the claimants was provided, he found that it would not be appropriate to use case management powers to order the defendant to provide this information.

This may be a surprising conclusion to have reached when considering the position from a holistic perspective: the court's case management powers are intended to allow it to further the overriding objective, including to save expense and allocate an appropriate share of court resources, and it was likely only going to be worthwhile for the claimants to pursue the claim and incur the costs of doing so if there was a reasonably good prospect of the defendant being able to meet any damages award in their favour. If the disclosure sought did not show this, then this may have encouraged an early resolution, which is an outcome very much in line with the overriding objective.