IN-DEPTH

Class Actions

UNITED KINGDOM - ENGLAND & WALES

LEXOLOGY

Class Actions

EDITION 8

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In-Depth: Class Actions (formerly The Class Actions Law Review) provides practitioners and clients with a guide to class and collective actions regimes worldwide, with a particular focus on key procedures and recent developments. It offers crucial insights into the law and practice in each jurisdiction, from preliminary filing considerations to settlement, costs and funding, cross-border issues and much more.

Generated: April 12, 2024

United Kingdom - England & Wales

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Summary

Introduction

Group litigation (also known as class or collective redress actions) is, in theory, available whenever it is alleged that a wrong has caused losses to a group in a similar manner. It has been available in the English[2] courts for over a century and is an established part of modern English civil procedure, with large numbers of significant cases passing through the courts each year.[3] However, the group litigation sector has undergone rapid development and expansion in recent years. One of the catalysts for this growth has been the introduction of true opt-out class actions, as lawyers from the United States would recognise them, in the context of certain competition law claims.

The Supreme Court's landmark decision in *Mastercard Incorporated and others v. Walter Hugh Merricks CBE* (*Merricks*)[4] continues to spur development of collective actions, and 2023 represented another year of exponential growth for England's still relatively young class actions regime. Despite the decision in *R (on the application of PACCAR Inc and Ors) (Appellants) v. Competition Appeal Tribunal and Ors (Respondents)* (*PACCAR*)[5] and its potential ramifications for third-party funding arrangements, England continues to develop as one of the most attractive jurisdictions in which to commence group litigation.

The year 2023 will also be remembered for the first settlement of opt-out collective proceedings approved by the Competition Appeal Tribunal (CAT), in *Mark McLaren Class Representative Limited v. MOL (Europe Africa) Ltd and Ors* (*McLaren*).[6]

Crucially, though, developments have not been limited to the competition sphere; a combination of judicial enthusiasm and growing interest from the claimant Bar and litigation funders means that group claims have now become an attractive and feasible means of redress across a variety of sectors. For example, increased scrutiny of environmental, social and governance (ESG) issues in recent years is beginning to provide fertile ground for group litigation, and this trend is expected to continue.

The regimes available for English class or group actions broadly fall into two categories: (1) the opt-in regime, where the claim is brought on behalf of only those claimants who are identified in the proceedings and authorise the claim to be brought on their behalf; and (2) the opt-out regime, where the claim is brought on behalf of all those who fall within a defined class of claimants (unless they take positive steps to opt out) and there is no need for the individual class members to be identified or to authorise the claim to be brought on their behalf.

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i The opt-in regime – group litigation orders

A group litigation order (GLO) may be sought under Section III of Part 19 of the Civil Procedure Rules (CPRs). A GLO provides for the case management of claims that give rise to common or related issues of fact or law (referred to as 'the GLO issues'). GLOs are opt-in actions, which means that individual claimants are not included in the action unless they take positive steps to join. Since the regime was introduced in May 2000, 116 GLOs[7] have been made across a wide variety of cases, including environmental claims, product liability claims, tax disputes, claims relating to financial services, claims relating to data breaches, gross negligence claims and shareholder claims. GLOs are comparatively popular among claimants, as compared with representative actions (considered further below), not least because of the simpler procedure and lower standard of commonality between class members required. Nonetheless, their number has remained relatively modest – just two GLOs were ordered in 2023 – which may well be attributed to the fact that they are opt-in, potentially limiting their attractiveness to prospective claimants and litigation funders. Two additional GLOs have been made in 2024.[8] That is not to say that the space is not active; the court made various case management orders in December 2023, including recommending that the Mercedes litigation proceed as the lead group litigation in the NOx emissions group litigation.[9] A hearing is to be held in March 2024 to include two additional lead GLOs.

ii The opt-out regimes – representative actions and collective proceedings orders

There are two types of opt-out actions available in England: (1) representative actions and (2) collective proceedings orders (CPOs).

Under CPR 19.6, a claim may be commenced or continued by or against one or more persons as representatives of any others who have the 'same interest' in the claim. The representative action proceeds on an opt-out basis as there is no need for the represented class to be joined as parties to the action or even to be identified on an individual basis; instead, they are automatically added by virtue of qualifying as a member of the represented class. However, the court's permission is needed to enforce a judgment or order by or against anyone who is not a party to the action. Although the representative action procedure can be used for any type of action (unlike the CPO procedure, discussed below), the regime has historically not been widely used, in large part because of the restrictive manner in which the same interest requirement has been interpreted by the courts.[10]

Representative actions have proven less popular since the Supreme Court's judgment in *Lloyd v. Google LLC* (*Lloyd*),[11] which is discussed further below. Although the Court was broadly encouraging of the use of representative actions, it refused to allow Mr Lloyd's claim (which was brought on behalf of 4.4 million iPhone users) to proceed under CPR 19.6. The Court held that the starting point was that there was no reason to interpret the regime restrictively, and suggested that representative actions should be used provided that no individualised assessment of damages is necessary. As such, the Court said that the representative action model could have worked on the facts of the case if it had been deployed only to establish liability for the infringements of data protection law. Therefore, it did not rule out split actions, in which a representative is used to establish liability before an opt-in GLO is used to address quantum of damages (which requires individualised assessment). Nevertheless, although this approach remains open for future claims, it was (until very recently) difficult to see how certain types of claims could progress as representative actions given the requirement for uniform damages. Claimants and funders may, however, have been slightly encouraged by the Court of Appeal's recent decision in *Commission Recovery Ltd v. Marks and Clerk LLP and Anor* (discussed further below), which adopted a broadly permissive reading of *Lloyd*.[12]

The other opt-out mechanism available to litigants in England is the collective proceedings regime. The collective proceedings regime is relatively new, having been introduced by the Consumer Rights Act 2015 (CRA), by way of amendment to Section 47B of the Competition Act 1998 (CA). The CRA establishes a US-style class action regime in English law for the first time, although currently only for private competition litigation.[13] Under a private competition action, a CPO is sought from the CAT, which, if granted, then determines the scope of the class that will be bound by any subsequent judgment.

Despite its apparent limited application, the CPO regime remains of particular interest.

First, since *Merricks*, a significant number of CPO claims have been issued, including 13 in 2023 alone, and the announcement of new collective claims is expected to continue. Moreover, because of the attractiveness of the regime, in the past couple of years, we have seen more inventive claims brought, which are pushing the boundaries of what might traditionally be considered competition claims.

Second, the CPO regime may possibly be a harbinger of future broader, or sector-specific, class actions in England. Efforts have been made to introduce collective redress

mechanisms in sectors beyond the competition sphere, such as proposals in the Digital Markets Competition and Consumer Bill (DMCC Bill) to expand the collective regime beyond competition claims. The DMCC Bill creates a private right of action to enforce requirements where loss is sustained on non-competition grounds, primarily in respect of data breaches. As currently drafted, this would be only on a non-collective basis. A proposed amendment to expand the scope of collective actions before the CAT to include collective actions brought by consumers and small businesses for breaches of consumer protection law had been rejected in the House of Commons. However, during its second reading in the House of Lords on 5 December 2023,[14] several peers voiced support for an amendment to the same effect. The same proposed amendment would also require the Secretary of State to conduct a review to ascertain whether there are any other types of claims appropriate for collective proceedings. The DMCC Bill is yet to finish passage in the House of Lords. While the amendment has not yet been publicly debated, and, in any event, would have to be considered by the House of Commons, it may be that the expansion of collective actions for infringements of consumer law is not far beyond the horizon. Furthermore, in light of the decision in *Lloyd* and the restrictive impact this appears to have had on representative actions, there have also been growing calls by claimant law firms, funders and consumer action groups for a generic opt-out regime akin to the CPO regime that would apply to non-competition claims.

iii Consolidated claims and the court's case management powers

In addition to the three regimes described above, the courts are also able to consolidate proceedings and manage claims by multiple claimants together, if it is felt that it would be convenient to do so, by using ordinary case management powers.[15] Although this inherent jurisdiction is not novel, major claims continue to pass through the courts and highlight its use of case management powers to manage large and complex cases.

Year in review

The past 12 months have seen several significant developments in relation to each of the forms of class and group actions outlined above.

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i Opt-out proceedings

New claims in the past 12 months

The year 2023 saw continued growth in the number of claims brought under the opt-out class action procedure for competition cases. Thirteen new applications for a CPO were launched in 2023, taking the total number to 40.[16] The largest claim, *Stopford*, seeks approximately £7 billion in damages against Google for alleged abuse of its dominant position in the UK search market.[17]

In February 2024, having refused to do so a year ago, the CAT finally approved the proposed class representative's (PCR) application for a CPO against Meta Platforms, Inc and some of its subsidiaries (together, Meta) for alleged abuse of its dominant position via the imposition of unfair price and, in the alternative, unfair trading conditions on Facebook users.[18] This claim may more naturally be seen as a data privacy or consumer protection claim, but it has been framed as a competition law claim, presumably to seek to benefit from the CAT's opt-out mechanism.

Several Apple entities also face multiple CPO claims. A claim against Apple Inc (Apple) relating to the alleged loss suffered by British consumers and business entities as a result of its concealment of battery issues in certain iPhone models through software updates was certified in November 2023.[19] The PCR is claiming more than £750 million in damages. The year 2023 saw two additional claims mounted against Apple: a stand-alone claim against Apple Inc was issued in July 2023,[20] alleging that Apple abused its market position by charging excessive commission to developers using its 'App Store'. Another stand-alone collective action was issued in August 2023 against Apple and Amazon entities.[21] The PCR alleges that Apple and Amazon had, in breach of Article 101 of the Treaty on the Functioning of the European Union, engaged in anticompetitive contractual agreements in respect of Apple and Beats products.

The year 2023 was significant in that it saw the novel application of the collective proceedings regime to an ESG context: the *Roberts* claim[22] launched against six water companies seeks compensation for household customers who have allegedly paid higher water bills due to the water companies' misrepresentation to regulators about the number of pollution incidents they have been involved in (see 'ESG litigation', below).

Funding and costs: PACCAR and subsequent regulatory developments

On 26 July 2023, the Supreme Court handed down its landmark judgment in *PACCAR*. The Supreme Court ruled that litigation funding agreements that entitle litigation funders to a return based on the amount of damages eventually recovered are damages-based agreements (DBAs). By virtue of the CRA, DBAs are not enforceable where entered into for the purpose of funding opt-out collective proceedings.

PACCAR considered the question of what 'claimant management services' constituted. Disagreeing with the lower courts, the Supreme Court found that Parliament had intended for 'management services' to have a wide meaning, and that therefore a litigation funding agreement that provides for a funder's return calculable by reference to the sum of damages ultimately recovered is a DBA.

The Supreme Court's ruling in *PACCAR* could well have an impact on the substantive growth in the litigation funding market. Since having adequate funding is a prerequisite to fulfilling the 'authorisation' criteria for certification of collective proceedings, PCRs and funders face an immediate procedural challenge in both claims that are yet to be filed and those already before the CAT.

Naturally, since *PACCAR*, a large number of PCRs have updated their funding arrangements to remove language that provides for a funder's return calculable in these terms so that they do not fall foul of *PACCAR*. In *Alex Neill Class Representative Limited v. Sony Interactive Entertainment Europe Limited and Anor* (*Sony*),[23] the CAT discussed

Sony's revised litigation funding agreement – the first occasion on which the CAT had considered the implications of *PACCAR*. The CAT held that a clause in a litigation funding agreement allowing the funders to recover 'only to the extent enforceable and permitted by applicable law, a percentage of [damages]' does not render the agreement a DBA. More generally, the CAT noted arguments about the risks of perverse and unmanageable incentives of the PCR and the funder but agreed with the PCR that these issues were not to be determined at the certification stage (and should instead be dealt with if and when the PCR obtains any recovery from the proceedings). At the time of writing, the CAT has granted Sony permission to appeal in relation to its findings regarding litigation funding and *PACCAR*; the appeal is pending.

On 7 February 2024, the CAT considered a similar question in the *McLaren* proceedings.-[24] The CAT found that the relevant provisions in the revised litigation funding agreement in *McLaren* were materially similar to those in *Sony* and followed the same approach. The defendant in *McLaren* did not make submissions challenging the revised funding agreement save for a reservation of their rights pending the *Sony* appeal.

Post-*PACCAR*, the government has introduced an amendment to the DMCC Bill, which states that a litigation funding agreement that provides for a percentage of damages ultimately obtained will not be a DBA in the context of opt-out collective proceedings. However, the amendment is largely seen as inadequate. An agreement entitling a funder to a percentage of amounts recovered will still be a DBA in all other types of proceedings, including opt-in collective proceedings. The government has also pledged to reverse the 'damaging effects' of *PACCAR* at the first legislative opportunity.[25]

It therefore appears that the CAT and the government are keen not to hinder collective proceedings and to make litigation funding agreements work post-*PACCAR*. Further legislative change may therefore not be far away.

The question of carriage

A 'carriage dispute' takes place where more than one PCR brings a claim against the same defendant(s) on broadly the same grounds.

The CAT's approach to carriage disputes has also developed. Previously, in the *Trucks* and *FX Proceedings*, the CAT had decided the issue of carriage at the same time as certification in 'rolled-up' hearings.

However, the CAT has since pivoted away from bundling the question of carriage with certification. Instead, as in *Charles Arthur v. Alphabet Inc and Ors* and *Claudio Pollack v. Alphabet Inc and Ors*,[26] competing PCRs will be given the opportunity to combine their claims prior to certification. The CAT did not choose one PCR over the other but instead decided that the claim could proceed if the actions were consolidated.

More recently, consumer advocates Julie Hunter and Robert Hammond brought separate claims against Amazon,[27] alleging that Amazon's 'Buy Box' online shopping function amounted to an abuse of its market power. As seen in the proceedings against Alphabet Inc, the CAT dealt with the issue of carriage before certification. A hearing for the carriage dispute took place on 20 December 2023 and the CAT handed down its judgment on 5 February 2024.[28] The CAT decided that Hammond's claim will be able to proceed to the next stage over Hunter's. The CAT's preference for Hammond stemmed from its preference

for the approach to expert methodology. It is clear that the workability of expert methodology will be a key focus of the CAT when determining issues around carriage.

Clarification on certification standard

The CAT has showed that it is willing to exercise its 'gatekeeping role over the pursuit of collective proceedings'[29] (as proposed by Lord Briggs in *Merricks*), building on its refusal to certify the two 'opt-out' CPOs in the *FX Proceedings* (defined below) in 2022 with a further refusal in *Gormsen v. Meta* (*Meta*).[30] Indeed, in 2023, in total, five applications for CPOs were refused (although the applications were not dismissed and were instead invited to reformulate their claims).[31]

The Court of Appeal stepped in to reverse the CAT's refusal to certify the *FX Proceedings* on an opt-out basis. *Michael O'Higgins FX Class Representative Ltd v. Barclays Bank PLC and Ors* and *Phillip Evans v. Barclays Bank Plc and Ors* (together, the *FX Proceedings*)[32] are opt-out follow-on damages claims arising out of the European Commission's decisions adopted on 16 May 2019 that found that six banks had engaged in two cartels in the spot foreign exchange market. In 2022, the CAT concluded that neither PCR's claim should be certified. However, on 25 July 2023, the Court of Appeal handed down its judgment, ruling, inter alia, that the CAT was mistaken in treating the strength of a case as a sliding scale test, with weaker cases going to opt-in and stronger cases to opt-out. Instead, importantly, the Court of Appeal observed that the strength of a case is a neutral factor in the choice between opt-in and opt-out. The Court of Appeal also held that the purpose of the collective proceedings regime is to facilitate rather than impede the vindication of rights, and that the collective proceedings regime should be applied in a manner that deters future wrongdoing. These two factors further pointed in favour of opt-out. The case is remitted to the CAT. As a note, the Court of Appeal decision is subject to potential appeal to the Supreme Court.

Other judgments handed down in 2023, *David Boyle v. Govia Thameslink Railway Limited and Ors* (*Boyle*)[33] and *Mr Justin Gutmann v. Apple Inc and Ors*,[34] also shed light on how the CAT regards the certification threshold. In both cases, the CAT emphasised the focus on proposed expert methodology for the purposes of assessing suitability. In *Boyle*, the CAT emphasised that if collective proceedings are arguable and triable, they should proceed to trial. Arguability is intended to be a relatively low threshold. As for triability, the CAT circled back to the guidance given in *MOL (Europe Africa) Ltd and Ors v. Mark McLaren Class Representative Ltd*,[35] where the Court of Appeal had expounded on the CAT's gatekeeper function, the essential objective of which is to ensure that there is in place a blueprint for parties and the CAT to trial. The CAT in *Boyle* clarified, though, that the *Pro-Sys* test is a 'low order test for a blueprint to trial; no more and no less'. The CAT also noted that where the *Pro-Sys* test fails but the issue is one that can be fixed, the PCR will be permitted to do so.

Settlement of collective proceedings – Collective Settlement Approval Orders

Following the certification of opt-out collective proceedings, any settlement agreed between parties requires approval by the CAT by way of a Collective Settlement Approval Order (CSAO).[36] The CAT will grant a CSAO if it is satisfied that the terms of the settlement are 'just and reasonable'.[37] The CAT's approach at the first CSAO application hearing in

the *McLaren* proceedings[38] in December 2023 offers some insight into how the CAT will exercise its discretion in this regard.

The specific factors that the CAT will consider in exercising its discretion include the amount and terms of the settlement, the estimated number of persons likely to be entitled to a share of the settlement, the likely duration and cost of trial, any opinion of an independent expert and legal representatives of the applicants, and views of any represented person or class member. Applicants may also need to prepare in support of their application witness statements from the class representative(s) and their lawyers, defendant(s)' lawyers, claims administrators and independent counsel, as well as expert economic reports. These provide the CAT with the parties' explanations as to why the proposed settlement is 'just and reasonable', their proposals for distribution and an estimation of damages. Importantly, a settlement need not benefit the entirety of the class, though the CAT will scrutinise proposed exclusions carefully.

Class representative(s) and settling defendant(s) are required to make a joint application for a CSAO, setting out, inter alia, terms of the proposed settlement (including provisions relating to payment of costs, fees and disbursements), an evidenced statement that the applicants believe that the terms of the proposed settlement are just and reasonable, and an explanation of how the settlement sums are to be paid and distributed.

A few key takeaways of the *McLaren* settlement could be flagged: in considering whether the settlement amount put forward by the settling parties was within a reasonable range, the CAT examined the basis for calculation of costs to be paid to the class representative (and hence in part to its funder) to ensure that the costs had not been drawn out of the damages sum to the detriment of the recovery of losses by class members. The CAT also considered whether a 'barring order' (i.e., an order to prevent non-settling defendants from making contribution claims against the settling defendants in the future) should be made. The CAT held that such an order should not be made, because it would be a premature determination of the settling defendant's liability. Instead, the CAT agreed with the parties a workaround, under which the non-settling defendants would waive their right to make contribution claims on the condition that should the settling defendant's liability later be found to be higher than their market share (which was used as the basis of the settlement), the class representative would not seek to recover any such excess sums from the non-settling defendants. Similarly, in considering whether a 'first in, first out' approach should be taken to the settlement sums and whether undistributed sums could revert to the settling defendants, the CAT declined to rule on the issue, leaving it open for parties to make an application for an order to this effect closer to the conclusion of the proceedings.

The year 2024 and beyond

Following a 2017 regulatory investigation conducted by the Office of Communications that concluded that BT Group plc (BT) had been overcharging its landline customers, an opt-out collective action was launched in the CAT against BT in January 2021. In September 2021, the CAT granted the first stand-alone opt-out CPO in favour of the PCR in *Justin Le Patourel v. BT Group PLC* (*Le Patourel*).[39] The case went to full trial on 29 January 2024. This is a significant development as it is the first time that a claim under the collective proceedings regime has reached full trial. Any judgment handed down is likely to provide important guidance on the regime as a whole. *Le Patourel* will be followed in June 2024 by the

stage one trial at the CAT regarding the *Trains Applications* – the first stand-alone claims issued under the collective proceedings regime. Stand-alone claims, which now represent a significant proportion of the claims brought under the CPO regime, have traditionally been viewed as more difficult to bring successfully because of the need to show a breach of competition law (as opposed to follow-on claims, where the claimant can rely on any breaches found by the regulatory authority to prove liability).

Merricks[40] continues to gear up for trial. The CAT is currently considering whether the pass-on issues in Mr Merrick's claim should be tried in joint hearings with similar issues in numerous other claims brought against Mastercard and Visa. The CAT is also considering whether some of the claims brought are time-barred. A seven-week split trial to address issues relating to pass-on is scheduled for November 2024 and March or April 2025.

Meta has now been certified.[41] The CAT observed that the PCR's revised claims were very differently framed from the claims in her original CPO application. In particular, a number of claims, such as the allegation of abuse relating to misleading and unclear terms (which the CAT had regarded as unsustainable), were dropped in the revised application. Having commented that the CPR had 'unequivocally failed the *Pro-Sys* test' in the first CPO application, the CAT found in the revised application that the PCR had put forward arguable claims that satisfy the *Pro-Sys* test, and that the PCR had established the requisite causal link for the claim to go ahead.

On 21 November 2023, the CAT handed down its CPO judgment in *Sony*, certifying the claim.[42] In its judgment, the CAT considered a contention regarding class definition: the PCR defined the relevant period as continuing until either final judgment or settlement (hence capturing potential future class members). Sony argued, to the contrary, that the claims should be extant at the time the collective proceedings are issued. The CAT rejected the PCR's class definition, pointing to Sections 47A and 47B of the CA, and directed that the relevant period terminated as at the date of filing the claim form. Going forward, classes will have to be defined more narrowly.

The Road Haulage Association Limited v. MAN SE and Ors (*Road Haulage*)[43] and the *UK Trucks Claim Limited v. Fiat Chrysler Automobiles NV and Ors* (*UK Trucks*)[44] CPO applications continue to rumble on. On 8 June 2022, the CAT handed down a landmark judgment approving the Road Haulage Association's (RHA) application to bring collective proceedings on an opt-in basis while rejecting the UK Trucks application. On 28 October 2022, the CAT granted defendants MAN and DAF permission to appeal against the certification decision on one limited ground relating to the suitability of the RHA's claim to proceed. The Court of Appeal found that the CAT had erred in describing the conflict of interest within the proposed class (between acquirers of new trucks and acquirers of used trucks) as a 'potential' one – the Court considered the conflict to be obvious and that it must be addressed at the start of the proceedings rather than at an indeterminate point in the future. Nevertheless, the RHA could represent acquirers of both new and used trucks provided that the RHA could establish appropriate ethical walls and separate legal teams and funders represent each sub-class. The conflict, including the extent and nature of the conflict in relation to resale pass-on issues and how the RHA proposed to resolve the conflict, would also need to be explained to potential class members in RHA's notice. The RHA's CPO application was then remitted to the CAT for consideration of its arrangements for separate representation and funding.

One of the proposed defendants then appealed to the Supreme Court in relation to the RHA's litigation funding agreements. The appeal and its implications are detailed further in 'Funding and costs: PACCAR and subsequent regulatory developments', above.

Staying with the *UK Trucks* litigation, on January 2024, the Supreme Court rejected an attempt from UK Trucks Claim Limited (UKTC) to appeal against a Court of Appeal decision to uphold the dismissal of its proposed opt-out mass lawsuit in July 2023. The Court ruled that it could not hear the appeal because it did not raise 'an arguable question of law'. The tribunal rejected UKTC's rival lawsuit, which was proposed primarily on an opt-out basis with opt-in as an alternative, after finding that the RHA's methodology for calculating loss was more robust. The first trial is provisionally scheduled for between May and July 2025.

As mentioned previously, the claim against Google regarding its dominant position in relation to the Google Play Store was certified on 31 August 2022 and a trial is to be listed from the first available date on or after 1 September 2025.[45] In addition, and as noted above, Amazon is facing a claim for damages of up to £900 million over allegations that it abused its dominant position by favouring its own products on its website and app. The claim was launched on 14 November 2022 by consumer rights advocate Julie Hunter on behalf of more than 50 million UK consumers who have made purchases on Amazon since November 2016. The claim alleges that Amazon abuses its status as the dominant online marketplace and harms consumers by channelling them towards its 'featured offer'. This featured offer, prominently located in the 'Buy Box' on Amazon's website and mobile app, is the only offer considered and selected by the vast majority of users, many of whom trust Amazon and wrongly assume that it is the best deal.

Hence, as at the time of writing, the four largest global technology companies each therefore face the prospect of defending very large CPO claims in 2024 and beyond.

ii ESG litigation

The past few years have seen a substantial rise in the number of legal claims being brought in relation to ESG issues. This rise has been fuelled by intensifying regulation and increased public attention regarding such issues. The targets of these claims are also shifting to include corporations, rather than just governments, and for more than simply environmental claims. A growing trend is consumers basing their claims on consumer protection regulations and regulatory standards, as well as greenwashing claims, resulting in developments towards ESG mass actions.

Perhaps the most notable ongoing ESG case is *Município de Mariana and Ors v. BHP Group plc and Anor* (*BHP*), which illustrates the alternative routes by which UK-domiciled parent companies may resist claims brought against them for the activities of foreign subsidiaries.-[46] The proceedings were brought against BHP Group (UK) Ltd and BHP Group Limited, respectively English and Australian companies that sit at the head of the BHP group, over the Samarco dam failure. The dam was owned and operated by a Brazilian-incorporated joint venture between Vale SA and a Brazilian subsidiary of BHP Group (UK) Ltd. The action for claims with an estimated value of £5 billion was initially brought on behalf of over 200,000 claimants but has recently been amended to add several hundred thousand more claimants, making it one of the largest claims in English legal history.

Following a series of jurisdictional challenges, on 8 July 2022, the Court of Appeal allowed the claimants' appeals and allowed the claims to proceed in this jurisdiction (while making

no findings on the defendants' liability). In June 2023, the UK Supreme Court refused BHP's application for permission to appeal in respect of the strike-out application. BHP was left with no further recourse to appeal on the strike-out application, and the claim will proceed to a first-stage liability trial listed for 7 October 2024.

The defendants also brought a Part 20 additional claim against Vale SA, seeking a contribution to any damages awarded in the event that the BHP defendants are found to be liable. Vale SA's challenge to the court's jurisdiction was rejected in August 2023. Vale SA's subsequent challenge under Section 9 of the Arbitration Act in September 2023 was also rejected. Vale SA is therefore now a party to the proceedings.

A major development in 2023 was the first ESG-related claim brought under the nascent collective proceedings regime. On 9 August 2023, a claim was issued against six water companies[47] to seek compensation for household customers who have allegedly paid higher water bills due to the water companies' misrepresentation to regulators about the number of pollution incidents they have been involved in. The PCR alleges that such under-reporting of pollution incidents was an abuse of market position by each of the water companies holding monopoly positions in their respective geographical area. The case may be the first of many novel claims to apply the competition collective proceedings regime to an ESG context.

iii Securities actions

Section 90A of the Financial Services and Markets Act 2000 (FSMA) (and its successor, Schedule 10A FSMA) is the statutory regime imposing civil liability for inaccurate statements in information disclosed by listed issuers to the market. It imposes liability on the issuers of securities for misleading statements or omissions in certain publications but only in circumstances where a person discharging managerial responsibilities at the issuer knew that, or was reckless as to whether, the statement was untrue or misleading, or knew the omission to be a dishonest concealment of a material fact.

In *ACL Netherlands BV and Others v. Lynch and Ors* (*Autonomy*)[48] the High Court accepted that it should not interpret and apply Section 90A or Schedule 10A FSMA in a way that exposes public companies and their shareholders to unreasonably wide liability. The Court also confirmed that both an objective and a subjective test must be satisfied to establish liability. The objective test states that the relevant information must be 'untrue or misleading', and that the objective meaning of the disputed statement is 'the meaning which would be ascribed to it by the intended readership, having regard to the circumstances at that time'.[49]

In January 2024, the Court of Appeal handed down a landmark judgment on representative actions in *Commission Recovery Ltd v. Marks and Clerk LLP*.[50] The Court of Appeal refused (1) to strike out a representative action under CPR 19.8 on the ground that it did not adequately plead out a cause of action for each class member and (2) to order that the claimant could not act as a representative. The decision is a broadly permissive reading of the Supreme Court's decision in *Lloyd v. Google* and will be welcomed by funders and claimant lawyers looking to devise group claims that minimise upfront costs for claimants (while, conversely, front-loading costs for defendants). It contrasts with the recent first instance decision in *Wirral Council v. Indivior plc and Anor*,[51] where a claimant's attempt to bring a representative action in securities law claims under Sections 90 and 90A FSMA

was struck out. This judgment is likely to be the subject of an application for permission to appeal.

iv Data and technology claims

In *Andrew Prismall v. Google UK Limited and Ors* (*Prismall*),[52] the High Court laid down important principles in relation to the tort of misuse of private information. The claimant sought to bring a representative action on behalf of approximately 1.6 million individuals, alleging that the transfer of patients' medical records to DeepMind, a Google group company, without specific patient consent, was a misuse of private information. Google applied to strike out, and in the alternative summary judgment of, the representative claim. Google argued, inter alia, that the claimant could not show that members of the class had the same interest since their interests were varied, and therefore that the misuse of private information tort had been committed against all members of the class. Google also argued that since some members of the class had no viable claim, it could not be said that all members of the claimant group had a claim for more than trivial damages. Google was successful and the claim was struck out.

Prismall therefore confirms the principle in *Lloyd v. Google* that a representative action is inappropriate where an individualised assessment of damages is required, something the Court described as an inherent difficulty that claimants face in representative actions. The Court also held that the fact that the defendant had a defence against claims of some members of the class but not all did not preclude satisfaction of the 'same interest' test, provided that there was no conflict of interest between the class members. The Court further commented that claims in the tort of misuse of private information are individualistic in nature, and stripping out individual factors and reducing the claim to the lowest common denominator meant that the claim did not cross the *de minimis* threshold.

On 15 November 2023, the DMCC Bill was introduced to regulate competition in the digital industry. The DMCC Bill seeks to, according to the UK government, enable the Competition and Markets Authority (CMA) to intervene and maintain competition in the digital market.

Creative applications of the collective proceedings regime are expected in light of the DMCC Bill. There is scope for an increase in consumer-focused claims under the regime in the digital markets context. The DMCC Bill completed the committee stage in the House of Lords in February 2024.

v Other

In September 2023, a GLO was approved in the High Court in the Essure litigation against Bayer, a medical devices claim relating to the 'Essure device', a non-surgical form of birth control.[53] Product liability claims could provide another avenue for large groups to seek redress for harm. Bayer had previously agreed to pay around US$1.6 billion by way of settlement of around 90 per cent of the approximately 39,000 Essure claims brought in the United States in 2020.

In *Abbott and Ors v. Ministry of Defence*,[54] the court refused a GLO for military noise-induced hearing loss claims. The court held that the threshold requirements for a GLO were not met, the applicant firm had failed to comply with Practice Direction (PD)

19B, a GLO would restrict access to justice for many claimants and the lead claims in the GLO would not dispose of all or most of the other claims.

Procedure

i Types of action available

As noted in Section I, the regimes available for English class or group actions broadly fall into two categories: opt-in procedures and opt-out procedures.

ii Commencing proceedings

Representative actions

As noted above, not only can representative actions be utilised for any type of claim but also there are no requirements pertaining to the number of representees, be they claimants or defendants. The principal requirements for a representative action are that the representative is a party to the proceedings and the representative and the represented parties all have the same interest in a claim.

If a court orders that a representative action may be continued, the court's judgment will bind everyone the representative party purports to represent.[55] However, it may be enforced by or against a non-party only with the court's permission. Importantly, though, the representee need not authorise being represented,[56] as long as the same-interest requirement is met.[57]

Whether the parties are deemed to have the same interest in a claim might appear to be a narrow and restrictive concept. However, over time, the boundaries of the interpretation of the requirement have been tested. *Emerald Supplies Ltd v. British Airways plc* (*Emerald-*) provided a detailed analysis of the requirements for a representative action.[58] It was noted that the class must have a common interest or grievance and seek relief that is beneficial to all. It did not matter whether the class fluctuated, as long as at all points it was possible to determine class membership qualification. However, the attempt in this case to use the representative action as a proxy for an opt-out class action failed because of the inevitable conflicts within the claimant class that sought to be represented, which was drawn so widely that it was described by the court as 'fatally flawed'.[59] In particular, the Court found that the same interest could not be said to be present, as the sheer breadth of the class meant it was impossible to identify which members had the same interest.[60] Where core issues such as limitation, causation or damages vary between claimants, it will be more difficult to prove that the requirements for a representative action have been met. Furthermore, the overriding objective is important too in shaping its application. Concepts similar to proportionality can be distilled from the case law. Although the CPR appears to require an identical interest,[61] Megarry J stated that 'the rule is to be treated as being not a rigid matter of principle but a flexible tool of convenience in the administration of justice'.[62]

This decision can be contrasted with the decision in *Lloyd*, described above, in which the Court of Appeal found that roughly 4 million iPhone users did have the same interest

as they were victims of the same alleged wrongdoing and had all sustained the same loss: loss of control of their browser-generated information. Sir Geoffrey Vos found that the applicable test is whether it is possible to identify whether a particular person qualifies for membership of the particular class. Crucially, the claimants were not relying on facts specific to individuals (such as breaches regarding special category data), making it possible to find a same interest across the whole class. However, as also discussed above, the Supreme Court ultimately dismissed *Lloyd* on the basis that the facts that Mr Lloyd sought to prove in each individual case were insufficient to overcome any threshold of seriousness.

In light of the requirements for the courts to consider the overriding objective, particularly that the dispute is dealt with 'expeditiously and fairly',[63] the representative action regime continues to provide significant potential for effectively bringing a group action.

GLOs

GLOs are an opt-in mechanism that require an individual to have brought their own claim first to be entered upon the group register.[64] They are similarly premised on the notion that where there are similar facts and issues to be resolved, it is more efficient that these are dealt with collectively. Given the costs inherent in litigation, these efficiencies have enabled claimants to recover losses previously unobtainable. It is important to distinguish, however, between instances where the determination of a single issue is common to all the claims, and instances where a defendant is liable to numerous claimants but each is separate as to liability and quantum. Where there are no generic issues, 'nor generic issues of such materiality as to save costs in their determination',[65] a GLO will not be granted and the individual must litigate separately.

Court consent is required for a GLO, which may be obtained if the claimant can show that there are 'common or related issues of fact or law'.[66] Nonetheless, the court has discretion in granting the order.[67] There is no guidance as to how this discretion is to be exercised,-[68] though the overriding objective would still be applicable.[69] This was illustrated in the High Court judgment in *Vedanta*.[70] The first defendant sought a GLO in respect of three separate sets of proceedings, two represented by one firm and the third by another. The two claimant firms submitted that, if a GLO were made, the High Court should keep the two 'strands' separate. The judge, however, noted that the claims shared common facts and issues and were therefore ideally suited to the making of a GLO. He observed that the submissions were underpinned by the commercial advantage to the two firms in keeping the proceedings separate. This was not deemed a good reason and was contrary to the ethos of group litigation and the parties' express duty to assist the court in furthering the overriding objective. Similarly, consideration must also be given to whether a representative action would be more appropriate,[71] namely when the interests and issues of the parties are the same. It must be noted, however, that, broadly, the requirements of a GLO have not proven difficult to meet.[72] This is in part because the standard of commonality is lower.

There are no special requirements for a GLO application,[73] although the applicant should both consider the preliminary steps[74] and ensure that their application contains the prescribed general information.[75] As part of this information, the applicant must provide details relating to the 'GLO issues' in the litigation. It is important that these GLO issues are defined carefully, given that the judgments made in relation to the GLO issues will bind

the parties on the claim's group register.[76] Nevertheless, the court may give directions[77] as to the extent to which that judgment is binding on the parties that were subsequently added to the group register. The High Court judgment in *Vedanta* also set out a number of principles that apply in respect of the representation of different groups of claimants. Generally, parties to litigation are entitled to be represented by solicitors of their choice. In GLOs, however, this basic right is secondary to the advancement of the rights of the cohort. This is achieved through the role of the lead solicitor, who should apply for the GLO, act as a point of contact for the court and the other parties, and whose relationship with the other firms must be carefully defined in writing. In addition, claimants are entitled to instruct only one counsel team.

Once a GLO is granted, a deadline is set by which time the other claimants must have been added to the group register. While there have been some notable GLOs granted, in particular in respect of the mass data breach claim against Morrisons and the unsuccessful claim brought by 5,800 shareholders against Lloyds Banking Group and its former directors concerning alleged breaches of duty in acquiring HBOS plc in 2008, it is notable that, since the introduction of the GLO procedure in 2000, only 116 GLOs have been ordered to date. Whether the increased availability of funding for these types of claims will lead to an increase in GLO applications remains to be seen.

Joint case management

The courts are able to use ordinary case management powers under the CPRs to manage claims brought by multiple claimants. CPR 3.1(2)(g) and (h) allow courts to consolidate or jointly try claims. These powers afford judges significant control and flexibility over the management of claims, and the decision to use this mechanism in *BHP* indicates that this flexibility can also be attractive to claimants. The experience of the English courts in managing multiple claims is another attraction; claimants have previously pointed to the experience, resources and expertise of the English courts in managing large claims as one of the reasons for seeking to have their claims heard in England. The readiness of the courts, as can be seen in the NOx emissions group litigation, *BHP* and the CAT's joint case management of the *Trucks* claims, to utilise these powers to manage large cases is another indicator of growing judicial enthusiasm for facilitating class actions and, in particular, to ensure steady progress and efficiency of such cases.

Another novel approach to case management seen in the CAT is the granting of umbrella proceedings orders. The CAT can order that issues arising in one set of proceedings may be determined together with the same or similar issues, matters or features arising in other, unrelated proceedings.[78] These matters ('ubiquitous matters') can then be dealt with together in 'umbrella proceedings'. The cases carry on separately towards trial in relation to issues that are not ubiquitous or are not included in the umbrella proceedings. By managing cases arising from the same or similar fact patters, often at different levels of the supply chain, the CAT mitigates the risk of inconsistent judgments and approaches.

CPOs

The most significant recent change to the English class action regime resulted from the CRA, which came into effect in full in October 2015. Schedule 8 introduced changes to the competition law class actions regime under Section 47A of the CA. Collective proceedings

are proceedings that are brought by multiple claimants or by a specified body on behalf of claimants sharing certain characteristics (i.e., a class action as ordinarily understood). While collective proceedings are limited solely to competition actions before the CAT, this change is notable for two reasons. First, it is currently the only true opt-out class action regime in England. Second, it is a possible indicator of changes to come more broadly to English class actions. While claimants already have the right to bring collective actions,[79] as detailed above, these were perceived as insufficient to address the harm caused to both direct and indirect purchasers.

There are three sources that set out the procedure for obtaining CPOs: CRA Schedule 8, the Competition Appeal Tribunal Rules 2015 (the CAT Rules) and the CAT Guide to Proceedings 2015 (the CAT Guide). Notwithstanding the fact that CPOs were introduced under the CRA, both individuals and businesses can apply for a CPO. The reforms also widened the types of claims that the CAT could hear. The CAT had previously been restricted to hearing follow-on claims, while collective proceedings can be either follow-on or stand-alone. A follow-on claim is one where a breach of competition law has already been determined by a court or relevant authority such as the Office of Fair Trading or the European Commission. With the breach already having been established, the claimants are required only to show that the breach caused them loss. In contrast, a stand-alone claim is one where there is no prior decision by either body upon which the claimant can rely, and the claimant must therefore prove the breach before the CAT as well.

Similar to proceedings for a GLO, collective proceedings require certification to proceed, in this instance from the CAT. This mechanism works to remove frivolous or unmeritorious claims and enables the CAT to determine the class representative and class definitions and whether the proceedings should be opt-in or opt-out. Section 47B CA and Rule 79 of the CAT Rules detail the requirements that must be met for the CAT to make a CPO. Principally, the CAT must determine that the claims 'raise the same, similar or related issues of fact or law'[80] and that a collective proceeding would be appropriate based on a preliminary assessment of the merits and available alternative regimes.[81]

Upon certifying the class in an opt-out action, all members falling within the definition will automatically become part of the action unless they opt out before the end of the designated period. However, this will apply automatically only to members domiciled within the United Kingdom. Non-UK-domiciled claimants can still be a member of the class, though they will have to actively opt in before the end of the specified period.

iii Procedural rules

Management

Given the differing group and class action procedures that can be used under English law, the process of determining the class differs between them too. With representative actions, the court can order that an individual is, or is not, a representative of a particular person. While the representee need not authorise the representative to bring an action (or even be aware that it is being brought), a representative claimant cannot assume an unfettered right to control the litigation, because any party to the proceeding can apply for such an order. For a GLO, the court may give directions stipulating the date by which further claims cannot be added to the group register without the court's permission.[82] However, failure

to meet the deadline does not automatically mean that the claim cannot be added to the group.[83]

In contrast, with the collective proceedings regime, the CAT has a broad discretion in the certification process to outline how a CPO is to be conducted, given that it may take into account 'all matters it thinks fit'.[84] Furthermore, in considering the suitability of bringing the claim in collective proceedings, the CAT may limit the CPO to just some of the issues to which the claim relates.[85] In certifying a claim as eligible for inclusion in collective proceedings, the CPO must describe the class and any subclasses along with the provisions for opting in and out of the proceedings.[86] The CAT also has the full remit to vary the order, including altering the description or identification of class members, at any time on its own initiative or following an application by the class representative, defendant or any represented person.[87]

Process

Given the breadth of the class or group action mechanisms in England, generalities regarding the process of such actions are difficult to discern. For example, liability and quantum may be split depending on the type of claim that is brought, though in other instances, such as in follow-on claims, breach need not even be assessed. The same can be said for assessing the speed at which class actions progress. As regards collective proceedings, despite the recent increase in activity in the CAT, it is still difficult at present to draw any firm conclusions as to the rate at which these cases are to progress, given how recently they have become available and the preliminary stages that cases under the new CRA regime have reached.[88] Nonetheless, it is notable that *Le Patourel* was rushed through and certified in less than a year. This proactive approach might suggest that the CAT wants to ensure that these claims are progressed. Proceedings for GLOs and representative actions will also by their nature be context specific. Since GLOs have recently been used for notable complex securities claims, some of which have already seen significant settlements,[89] they may not provide a good benchmark from which to assess the speed and potential efficiencies of such a group action mechanism.

Disclosure

Disclosure in group litigation often presents various logistical challenges because of the existence of a large volume of parties, issues and documents. The significant amount of time often required for disclosure is one of the reasons why a trial of GLO issues may take place a considerable time after the GLO order is made.[90] Furthermore, the disclosure provisions vary between the different class or group action regimes. Taking, for instance, representative claims, because the representees are not parties to the claim, they are not subject to the ordinary disclosure standards. Instead, they must meet only the requirements that a non-party is held to. In contrast, with collective proceedings, the CAT holds comprehensive disclosure powers based on those more generally applicable in litigation in the English courts. The CAT can therefore order the disclosure of documents that are likely to support the case of the applicant, or adversely affect one of the other parties' case, from any person, irrespective of whether they are a party to the proceeding, as long as it is necessary to save costs or dispose of the claim fairly.[91] However, it remains

to be seen how such disclosure orders will be made in the context of opt-out claims where there are no identifiable claimants.

iv Damages and costs

Costs

The general rules on costs are detailed at CPR 44 and provide discretion as to the award, amount and timing of payment for costs. Given that the unsuccessful party will ordinarily be ordered to pay the other side's costs, unmeritorious class actions have traditionally been restrained. This is particularly in light of the significant costs inherent to class actions, given their size and complexity.

However, as demonstrated by *BritNed Developments Ltd v. ABB AB*, parties and their advisers should be mindful of the fact that the judiciary has shown willingness to depart from the typical loser pays costs order.[92] In this October 2018 decision, the High Court ordered both parties to pay their own multimillion-pound costs, in light of the fact that the claimant was awarded damages significantly lower than those claimed.[93] Although the case was not brought as a group claim or class action, it is notable as it demonstrates the willingness of the English courts to exercise their discretion to limit the extent of recoverable costs. In *Greenwood and Ors v. Goodwin and Ors*,[94] the wide discretion courts have over costs was noted, and it was held that the rules in CPR 46.6 are just the starting point. Hildyard J noted that, in light of this degree of unpredictability, there was an 'overriding need' for potential claimants to understand their costs position should they opt to join the litigation.

In the context of group claims, which are often subject to third-party funding, the likelihood of recoverability of costs can be a key factor in deciding to pursue a claim. The potential for a winning party to be barred from recovering their costs could act as a deterrent to litigation funders and law firms normally interested in pursuing large-scale class actions. However, the courts have also made clear that there must be cogent grounds to justify departure from the general rule. Following the claim in *BHP* being struck out for abuse of process in November 2020, although this is now subject to an appeal, the High Court considered, and then rejected, the claimants' argument for a 50 per cent reduction in the defendants' costs, on the basis that they had not been successful on every issue and had not ultimately pursued certain issues.[95] The judge noted that, especially in claims of this size and complexity, the winning party is unlikely to succeed on all the issues and that the issues conceded did not fall to be decided in the primary judgment or were not ultimately relevant, and therefore ordered that no overall reduction be made. The decision serves as a timely warning (particularly in the context of the growth in mass tort claims) of the potentially very significant sums at stake in unsuccessful claims.

There is also the added complication of how costs are to be split between the constituent members of the class. The general costs position where the court has made a GLO is set out at CPR 46.6 and distinguishes between common and individual costs. For representative actions, as the represented individuals are not parties to the action, they are not individually liable for costs. The court may nevertheless accept an application for costs to be paid by the representees.[96] There are also specific costs rules in the CPRs for proceedings governed by GLOs. The default position is that group litigants are severally,

and not jointly, liable for an equal proportion of the common costs.[97] This is irrespective of when the claimants joined the group register, and means that claimants do not bear differing costs burdens based on when they joined the litigation; this is considered to be an important feature of GLO claims.

In *Re RBS (Rights Issue Litigation) In Claims Entered in the Group Register*,[98] however, the court decided at a case management conference in December 2013 that adverse costs should be shared on a several basis in proportion to the size of the individual's subscription cost in the rights issue relative to the total subscription cost for all the claimants on the group register. More recently, following the dismissal of the shareholder claim against Lloyds, the High Court ruled that the claimants' third-party litigation funder was jointly and severally liable for the defendants' costs, rejecting the funder's submission that it should be liable only to the extent that the claimants did not satisfy the adverse costs order.[99] The funder's submission that its liability should be limited to the extent of funding it had actually provided (in accordance with the '*Arkin* cap') was also rejected. The Court noted the recent Court of Appeal judgment in *Chapelgate Credit Opportunity Master Fund Ltd v. Money and Ors*, which had clarified that the *Arkin* cap is intended as guidance for judges, rather than as a binding rule.[100] Altogether, the combined cover the claimants and the funder had the benefit of fell substantially short of the defendants' costs. Therefore, while the growth in after the event (ATE) insurance and third-party litigation funding may mean that the costs risk is less pronounced, the risk remains a considerable factor in determining whether and how a class action is brought and, as cautioned by the High Court judge in the case against Lloyds, claimants should not assume that they are litigating risk-free, even when, as in that case, funded by third-party litigation funders and with ATE insurance in place.

In the*Trains Applications*, the CAT took the view that the PCR was entitled to recover the costs he had incurred fighting the defendants' opposition to his certification application, except for deductions for costs that had been incurred in any event and additional issues that justified deductions (such as re-pleading following *Merricks* and amendments to the class definition).

Damages

One of the notable differences between civil actions in England and certain other jurisdictions, particularly the United States, is that there are no jury trials in English civil actions. This difference becomes apparent with quantum as English class action damages are typically much lower than in the United States.

With regard to damages for representative actions, the historical position was that the same interest requirement excluded damages from being recoverable for the class.[101] However, there has been an incremental liberalisation such that it is established that damages can be claimed in a representative action.[102] The damages awarded, however, in proceedings governed by a GLO or representative action will be dependent on the type of claim that is brought, although, under English law, damages are generally compensatory (e.g., breach of contract or tort).[103]

The provisions for damages in collective proceedings claims are, however, more detailed. Damages are ordinarily compensatory; exemplary (i.e., punitive) damages for collective proceedings have been statutorily excluded.[104] Punitive damages may still be sought in relation to a competition law breach; however, to seek them, the individual would need

to opt out from the collective proceedings action and bring an individual claim. The CAT will calculate damages aggregately for the class or subclass and will not undertake an assessment as to the amount of damages recoverable by each represented person. Rules 92 and 93 of the CAT Rules stipulate that the CAT may give directions for the assessment and distribution of damages respectively, for instance a formula to quantify damages. Damages are ordinarily to be paid to the class representative for distribution.[105] If all the damages are not claimed within the CAT's specified period, the CAT may order that undistributed damages are paid to the representative 'in respect of all or part of the costs or expenses incurred by the representative in connection with the proceedings'.[106] Any other remaining unpaid damages are to be paid to charity.[107]

Recently, in *Granville Technology Group Limited and Ors v. LG Display Co Ltd and Ors* (-*LCD Granville*),[108] the claimants had pleaded a total loss of over £60 million. The court's determination and the parties' consequent agreed provisional quantification, however, assess the total loss at approximately £4.4 million only, over half of which comprised interest. The provisional quantification does not yet account for effects of settlement agreements agreed between the claimants and some former defendants; these issues will be addressed at a later stage of the proceedings. *LCD Granville* is useful guidance on how claims for follow-on damages are assessed at trial. In particular, the court confirmed that defendants could, in principle, discharge the burden of establishing downstream pass-on of loss by relying on economic reasoning and factual evidence.

The CPO applications that have so far been brought, in particular *Merricks* (the claim value of which is £14 billion), indicate that significant damages may be sought through the collective proceedings regime. The sums that are potentially at stake will also be likely to provide a useful bargaining tool for claimants seeking to settle their claims instead of pursuing protracted litigation.

v Funding

Given the sheer scale of many mass claims and collective proceedings, they rely invariably on third-party litigation funding. As discussed, *PACCAR* and its wide scope may continue to have significant impacts on the litigation funding landscape. With the traditional formulation of funders' return in terms of a percentage of damages recovered now prohibited, it remains to be seen how litigation funding agreements across the country will be revised. For further information, see 'Funding and costs: PACCAR and subsequent regulatory developments', above.

vi Settlement

In common with other jurisdictions, given the cost of group litigation with its attendant significant disclosure, requirement for expert evidence and multiple trials, there is often a significant and mutual impetus for claimants and defendants to settle class actions out of court. In some instances, such as in securities litigation under Section 90A FSMA (discussed above), where the cause of action has not been frequently litigated, the absence of a clear precedent may encourage the parties to settle to avoid uncertainty. With regard specifically to follow-on actions, since the breach will have already been determined, the dispute is likely to focus on the issues of causation and quantum. Given that the

determination of causation and quantum can still be a complex and expensive process, defendants may consider it more economical to settle out of court.

In contrast, the CA contains provisions, implemented by the CRA, for a collective settlement scheme.[109] As mentioned above, once a CPO has been made and proceedings are authorised to continue on an opt-out basis, claims may be settled only by way of a collective settlement approved by the CAT. The proposed settlement must be presented to the CAT by the representative and the defendant of the collective proceedings. The CAT may make an order approving the settlement only where it deems the terms to be 'just and reasonable'.-[110] If the time frame specified in the collective settlement approval order given by the CAT has expired, the collective settlement will be binding upon all those domiciled in the United Kingdom who fall within the CPO's defined class and did not opt out, and those domiciled outside the United Kingdom who otherwise fell within the defined class and opted in.[111] Opt-in collective proceedings are not subject to these requirements, although they cannot be settled without the CAT's permission before the expiry of the time given in the collective proceedings for a class member to opt in to the proceedings.

The *McLaren* settlement provides valuable insight as the first settlement of opt-out proceedings approved by the CAT. The CAT will continue to calibrate the principle that courts should encourage early settlement against the need to ensure that class members will receive their just compensation, while at the same time ensuring that settlement does not become an expensive and time-consuming exercise. How the collective settlement regime will further develop is yet to be seen. For further information, see 'Settlement of collective proceedings – Collective Settlement Approval Orders', above.

Cross-border issues

England is a popular forum for the resolution of disputes, both domestic and international. The reasons for this include the sophistication and probity of English judges, the availability of lawyers and specialists in a range of fields and, perhaps above all, the pre-eminent place of English law in international commercial relations. While many claimants have traditionally (although unnecessarily) looked to the United States to pursue relief through class actions, the US Supreme Court's decision in*Morrison v. National Australia Bank*,[112] which effectively barred securities actions without a US nexus,[113] has caused potential claimants, including institutional investors, to reappraise the situation. The advent of opt-out actions under the CA, which are open to claimants domiciled outside the United Kingdom, and the increasing availability of third-party litigation funding, in combination with the pre-existing attractions of England as a forum, are likely to continue to drive an increase in this kind of work in the English courts.

While the United Kingdom formally left the European Union on 31 January 2020, and the transition period ended on 31 December 2020, the avowed aim is for continuity and stability, and it may be a number of years before any change in this area materialises.

On 23 November 2023, the UK government announced its intention to sign up to the Hague Convention of 2 July 2019 on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters (the Hague Convention 2019) as soon as practicable. The Hague Convention 2019 aims to provide a global framework of common rules to facilitate the recognition and enforcement of judgments from one jurisdiction to another by requiring

contracting parties to recognise and enforce civil and commercial judgments. This avoids problems posed by domestic foreign judgment enforcement rules, such as the need to relitigate certain aspects of a case; in turn, the Hague Convention promotes legal certainty and reduces costs for resolution of cross-border disputes.

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Outlook and conclusions

The number of high-profile, high-value class and group actions brought in England has continued to increase in recent years. The developments in relation to opt-out proceedings demonstrate the determination of both the legislature and the courts to develop this area. Notwithstanding an increased level of scrutiny by the CAT in exercising its 'gatekeeping role' in respect of collective proceedings, the threshold for certification remains relatively low following *Merricks*. Further, claimant law firms' and litigation funders' enthusiasm and confidence in the regime are evident from the large number of new claims filed in 2023, several of which are stand-alone claims in novel contexts.

The collective proceedings and group litigation regimes will undoubtedly continue to develop in 2024, and we predict the coming year to be as eventful as the previous year. In particular, we expect the announcement of new collective proceedings to continue, while the progress of existing claims will be closely monitored, especially the first trial under the regime in *Le Patourel*, which is likely to provide vital guidance as to how the CAT will approach trials of collective proceedings.

The number of high-profile, high-value class and group actions brought in England has continued to increase in recent years. The developments in relation to opt-out proceedings demonstrate the determination of both the legislature and the courts to develop this area. Notwithstanding an increased level of scrutiny by the CAT in exercising its 'gatekeeping role' in respect of collective proceedings, the threshold for certification remains relatively low following *Merricks*. Further, claimant law firms' and litigation funders' enthusiasm and confidence in the regime are evident from the large number of new claims filed in 2023, several of which are stand-alone claims in novel contexts.

The collective proceedings and group litigation regimes will undoubtedly continue to develop in 2024, and we predict the coming year to be as eventful as the previous year. In particular, we expect the announcement of new collective proceedings to continue, while the progress of existing claims will be closely monitored, especially the first trial under the regime in *Le Patourel*, which is likely to provide vital guidance as to how the CAT will approach trials of collective proceedings.

Endnotes

1 Camilla Sanger and Peter Wickham are partners and James Lawrence and Kazi Elias are associates at Slaughter and May. The authors would like to thank Rita Kan for her assistance in preparing this chapter. Back to section

2 For convenience, 'England' and 'England and Wales' will be used interchangeably. Back to section

3 Representative actions can be traced back to the practice of the Court of Chancery. It was a requirement that all interested parties were to be present to end a dispute, although, for the sake of convenience, certain of those individuals who held similar interests would be selected to represent the group. See*London Commissioners of Sewers v. Gellatly* (1876) 3 Ch. D. 610, at 615 per Jessel M R. Back to section

4 *Mastercard Incorporated and others v. Walter Hugh Merricks CBE* [2020] UKSC 51. Back to section

5 [2023] UKSC 28; [2023] 1 W.L.R. 2594. Back to section

6 *Mark McLaren Class Representative Limited v. MOL (Europe Africa) Ltd and Ors* (Case No. 1339/7/7/20). Back to section

7 According to the government's website: https://www.gov.uk/government/publications/group-litigation-orders/list-of-group-litigation-orders#port-talbot-steelworks-group-litigation. Back to section

8 The Jaguar Land Rover NOx emissions group litigation and Nissan/Renault diesel NOx emissions group litigation (both ordered on 22 January 2024). Back to section

9 [2023] EWHC 3172 (KB). Back to section

10 See, for instance, the Court of Appeal's decision in*Emerald Supplies Ltd v. British Airways Plc* [2010] EWCA Civ 1284. Back to section

11 *Lloyd v. Google LLC* [2021] UKSC 50. Back to section

12 *Commission Recovery Limited v. Marks and Clerk LLP* [2024] EWCA Civ 9. Back to section

13 CRA, Schedule 8, Part 1. Back to section

14 Hansard for 5 December 2023 per Lord Etherton at 5.58pm. Back to section

15 CPR 3.1(g) and (h). Back to section

16 According to the CAT website: https://www.catribunal.org.uk/cases. Back to section

17 *Nikki Stopford v. Alphabet Inc and Ors* (Case No. 1606/7/7/23). Back to section

18 *Dr Liza Gormsen v. Meta Platforms, Inc and Ors* (Case No. 1433/7/7/22). Back to section

19 *Mr Justin Gutmann v. Apple Inc and Ors* [2023] CAT 67. Back to section

20 *Dr Sean Ennis v. Apple Inc and Ors* (Case No. 1601/7/7/23). Back to section

21 *Christine Riefa Class Representative Limited v. Apple Inc and Ors* (Case No. 1602/7/7/23). Back to section

22 *Professor Carolyn Roberts v. United Utilities Water Limited and Anor* (Case No. 1628/7/7/23); *Professor Carolyn v. Yorkshire Water Services limited and Anor* (Case No. 1629/7/7/23); *Professor Carolyn Roberts v. Northumbrian Water Limited and Anor* (Case No. 1620/7/7/23); *Professor Carolyn Roberts v. Anglian Water Services Limited and Anor* (Case No. 1631/7/7/23). Back to section

23 [2023] CAT 73. Back to section

24 [2024] CAT 10. Back to section

25 Justice Secretary Alex Chalk speaking to the*Financial Times*, as reported by the *Financial Times* on 15 January 2024 (UK government vows to protect litigation funding that helped sub-postmasters (ft.com) accessed 16 January 2024). Back to section

26 *Ad Tech Collective Action LLP v. Alphabet Inc and Ors* (formerly (1) *Charles Arthur v. Alphabet Inc and Ors* (Case No. 1582/7/7/23) and (2) *Claudio Pollack v. Alphabet Inc and Ors* (Case No. 1572/7/7/22)) [2023] CAT 65. Back to section

27 *Robert Hammond v. Amazon Inc and Ors* (Case No. 1595/7/7/23) and *Julie Hunter v. Amazon.com, Inc and Ors* (Case No. 1568/7/7/22), respectively. Back to section

28 [2024] CAT 8. Back to section

29 *Merricks v. Mastercard Inc* [2020] UKSC 51, §4. Back to section

30 *Gormsen v. Meta* [2023] CAT 10. Note that the claim has now been certified: [2024] CAT 11. Back to section

31 See, for example,*Commercial and Interregional Card Claims I Limited v. Mastercard Incorporated and Ors* [2024] CAT 3 (CICC I). Back to section

32 Respectively*Michael O'Higgins FX Class Representative Ltd v. Barclays Banks PLC and Ors* (Case No. 1329/7/7/19) and *Phillip Evans v. Barclays Bank Plc and Ors* (Case No. 1336/7/7/19). Back to section

33 [2023] CAT 63. Back to section

34 See footnote 18. Back to section

35 [2022] EWCA Civ 1701 at [47]. Back to section

36 Opt-in collective actions can be settled without the CAT's approval. Back to section

37 Rule 94(8), Competition Appeal Tribunal Rules 2015. Back to section

38 See footnote 6; see order dated 6 December 2023. Back to section

39 Case No. 1381/7/7/21. Back to section

40 *Walter Hugh Merricks CBE v. Mastercard Inc and others* (Case No. 1266/7/7/16). Back to section

41 [2024] CAT 11. Back to section

42 [2023] CAT 73. Back to section

43 *Road Haulage Association Limited v. MAN SE and others* (Case No. 1289/7/7/18). Back to section

44 *UK Trucks Claim Limited v. Fiat Chrysler Automobiles NV and others* (Case No. 1282/7/7/18). Back to section

45 *Elizabeth Helen Coll v. Alphabet Inc and Ors* [2022] CAT 39. Back to section

46 *Município de Mariana and Ors v. BHP Group plc and Anor* [2020] EWHC 2930 (TCC). Back to section

47 See footnote 20. Back to section

48 A*CL Netherlands BV and Ors v. Lynch and Ors* [2022] EWHC 1178 (Ch). Back to section

49 In doing so, the Court endorsed the guidance provided in*Raiffeisen Zentralbank Osterreich AG v. The Royal Bank of Scotland plc* [2010] EWHC 1392 (Comm). Back to section

50 *Commission Recovery Ltd v. Marks and Clerk LLP* [2024] EWCA Civ 9. Back to section

51 *Wirral Council v. Indivior plc and Anor* [2023] EWHC 3114 (Comm). Back to section

52 [2023] EWHC 1169. Back to section

53 *Tongue and Ors v. Bayer Public Ltd Company and Ors* [2023] EWHC 1292 (KBD). Back to section

54 *Abbott and Ors v. Ministry of Defence* [2023] EWHC 2839 (KB). Back to section

55 CPR 19.6(4)(a). See too*Howells v. Dominion Insurance Co Ltd* [2005] EWHC 552 (Admin). Back to section

56 See*Independiente Ltd v. Music Trading On-Line (HK) Ltd* [2003] EWHC 470 (Ch), where the defendant's application for a direction under CPR 19.6(2) to prevent the claimant acting as a representative was dismissed in part on the grounds that a representative may act without the representee's authority as long as CPR 19.6(1) was fulfilled. Back to section

57 CPR 19.6(1). Back to section

58 *Emerald Supplies Ltd v. British Airways plc* [2010] EWCA Civ 1284: the claimants were unsuccessful in obtaining a representative action as the class was so wide that it was impossible to identify members before and possibly after the judgment, too. Back to section

59 *Emerald*, at 62, per Mummery LJ. Back to section

60 For instance, notice the strict approach taken to proving a common interest in*Jalla and Anor v. Shell International Trading and Anor* [2021] EWCA Civ 1389. This was upheld by the Court of Appeal on the basis that the common interest test had not been met, despite the claimants arguing that their case was materially indistinguishable from *Lloyd*. Back to section

61 CPR 19.6. Back to section

62 *John v. Rees and Ors* [1970] Ch. 345 at 370, per Megarry J. Back to section

63 CPR 1.1(2)(d). Back to section

64 CPR 19.11, PD 19B, Paragraph 6.1A. Back to section

65 *R v. The Number 8 Area Committee of the Legal Aid Board* [1994] P.I.Q.R. 476 at p. 480, per Popplewell J. Back to section

66 CPR 19.10. Back to section

67 CPR 19.11(1). Back to section

68 There is no guidance contained within CPR 19, nor the accompanying PDs, except for CPR 19.11(1), which states rather broadly that 'the court may make a GLO where there are or are likely to be a number of claims giving rise to the GLO issues'. Back to section

69 When considering the overriding objective, the court will pay 'particular regard to the other procedural means for achieving a similar or essentially similar result', in accordance with Paragraph 86 of Trower J's judgment in*Edward Moon and Ors v. Link Fund Solutions* [2022] EWHC 3344 (Ch). Back to section

70 *Lungowe v. Vedanta Resources Plc and Ors* [2020] EWHC 749 (TCC). Back to section

71 PD 19B, Paragraph 2.3(2). Back to section

72 This can be seen particularly in the recent actions brought under Section 90A of the FSMA. Back to section

73 The normal application procedure under CPR 23 should be used according to PD 19B, Paragraph 3.1. Back to section

74 The preliminary steps are detailed at PD 19B, Paragraph 2. Back to section

75 This information is contained at PD 19B, Paragraph 3.2. Back to section

76 CPR 19.12(1)(a). Back to section

77 Pursuant to CPR 19.12(1)(b). Back to section

78 CAT Practice Direction (Umbrella Proceedings) 2/2022. Back to section

79 Under CPRs 19.6 and 19.11. Back to section

80 Section 47B(6), CA. Back to section

81 Rule 79(2), CAT Rules 2015. Back to section

82 CPR 19.13(e) and PD 19B.13. Back to section

83 *Taylor v. Nugent Care Society* [2004] EWCA Civ 51. Back to section

84 Rule 79(2), CAT Rules. Rules 79(2)(a)–(g) give some guidance on the types of consideration that the CAT should have. Back to section

85 Rule 74(6), CAT Rules and Paragraph 6.37, CAT Guide. Back to section

86 Rules 80(1)(c) and 82, CAT Rules. Back to section

87 Rule 85(4), CAT Rules. Back to section

88 In relation to the timing of CPOs, the CRA implemented changes to the limitation period, extending it from two to six years so as to be on a par with the High Court. Back to section

89 In*Re RBS (Rights Issue Litigation) In Claims entered in the Group Register* (HC 2013 000484), the trial was delayed for four months until April 2017 owing to the complexity of the disclosure process. Significant settlements were also reached in December 2016, January 2017 and June 2017. Back to section

90 The introduction of the disclosure pilot scheme in the business and property courts may assist with mitigating the problem of lengthy disclosure periods. Back to section

91 Rule 63, CAT Rules. Competition claims are carved out of the Disclosure Pilot by CPR, PD 51U, Paragraph 1.4. Back to section

92 *BritNed Development Ltd v. ABB AB* [2018] EWHC 2616 (Ch). Back to section

93 BritNed was awarded only €11.7 million (plus interest) of the €180 million claimed. Back to section

94 *Greenwood and Ors v. Goodwin and Ors* [2014] EWHC 227 (Ch). Back to section

95 *Municipio De Mariana and Ors v. BHP Group PLC and Anor* [2021] EWHC 146 (TCC). Back to section

96 *Howells v. Dominion Insurance Company Ltd* [2005] EWHC 552 (Admin). Back to section

97 CPR 46.6(3). Common costs are the costs incurred in relation to GLO issues, or individual costs in relation to a test claim. The individual will be liable for all their other individual costs in the claim. Back to section

98 See footnote 78. Back to section

99 *Sharp and Ors v. Blank and Ors* [2020] EWHC 1870 (Ch). Back to section

100 *Chapelgate Credit Opportunity Master Fund Ltd v. Money and Ors* [2019] EWHC 997 (Ch); *Chapelgate Credit Opportunity Master Fund Ltd v. Money and Ors* [2020] EWCA Civ 246. Back to section

101 *Markt & Co Ltd v. Knight Steamship Co Ltd* [1910] 2 KB 1021. Back to section

102 *Independiente Ltd v. Music Trading On-Line (HK) Ltd* [2003] EWHC 470 (Ch). Back to section

103 With regard to the measure of damage for claims brought under Section 90A FSMA, a claimant is entitled to compensation for damage to cover loss suffered as a result of the misstatement or omission. FSMA, however, does not detail the measure of damage, nor is this subject to any direct authority. Back to section

104 Section 47C(1), CA. Back to section

105 Rule 93(1)(a), CAT Rules 2015. Back to section

106 Section 47C(6), CA. Back to section

107 Section 47C(5), CA. Back to section

108 [2024] EWHC 13 (Comm). Back to section

109 Section 49A, CA. Back to section

110 Section 49A(5), CA. Back to section

111 However, the likelihood that this covers all potential claimants is still limited. Back to section

112 *Morrison v. National Australia Bank* 561 U.S. 247 (2010). Back to section

113 'Foreign-cubed' claims, at issue in *Morrison*, were those made by non-US investors against non-US issuers to recover losses from purchases on non-US securities exchanges. Back to section

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