Chapter 3

ENGLAND AND WALES

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I INTRODUCTION TO THE CLASS ACTIONS FRAMEWORK

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 several 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] in 2020 has firmly opened the door to these types of collective actions in the UK and this, together with other recent developments in the sphere of group claims, means that England is now one of the most attractive jurisdictions in which to commence group litigation.

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. England has become one of the most attractive jurisdictions in which to commence group litigation.

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

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.

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

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, there have been 109 GLOs 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. Recent GLOs include: the *Nchanga Copper Mine Group Litigation*, the *British Airways Data Event Group Litigation* and the *Omega Proteins Group Litigation*.[5] Both the amounts in dispute and the number of claimants have varied across the GLOs to date. GLOs are comparatively popular among claimants, as compared to representative actions (considered further below), not least because of the simpler procedure and lower standard of commonality required between class members. Nonetheless, their number has remained relatively modest, which may well be attributed to the fact that they are opt-in, potentially limiting their attractiveness to prospective claimants and litigation funders.

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.[6]

At this stage, it is unclear what impact the Supreme Court's recent judgment in *Lloyd v. Google LLC* (*Lloyd*), which is discussed further below, is likely to have on the popularity of representative actions. Although the court refused to allow Mr Lloyd's claim (which was brought on behalf of 4.4 million iPhone users) to proceed under CPR 19.6, it was broadly encouraging of the use of representative actions in appropriate cases. The court held 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. The court was keen to point out that the representative action model could have worked if it had only been deployed to establish liability for the infringements of data protection law. It therefore did not rule out split actions, in which a representative is used to establish liability, before

5 See https://www.gov.uk/guidance/group-litigation-orders for a complete list of all GLOs made since the regime was introduced.

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

an opt-in GLO is used to address quantum of damages. However, in light of the judgment, it is difficult to see how certain types of claims are likely to progress as representative actions because of the requirement for uniform damages.

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.[7] Under a private competition action, a CPO is sought from the Competition Appeal Tribunal (CAT) which, if granted, then determines the scope of the class that will be bound by any subsequent judgment.

Prior to the CRA, there had been a specific opt-in procedure for private competition law claims, although this was deemed to have been too restrictive in scope. Given the nature of competition law claims, namely where the loss to the individual is small but the potential class is wide, this opt-out regime seeks to provide the collective redress that is considered imperative for effective remediation. Efforts have been made to introduce similar collective redress mechanisms in other sectors. In November 2008, the Civil Justice Council recommended that the reforms that led to the collective action regime under the CRA should lead to a generic collective action available for all civil claims on an opt-in or opt-out basis. However, this suggestion was rejected by the government in favour of sector-by-sector reform where required.

Despite its apparent limited application, the new CRA procedure remains of particular interest as it may possibly be a harbinger of future broader, or sector-specific, class actions in England, following the decisions of the Supreme Court in *Merricks* and the CAT in *Justin Gutmann v. London & South Eastern Railways Limited*[8] (together, the *Trains Applications*) (discussed below).

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.[9] Although this inherent jurisdiction is not novel, the courts have recently shown an increasing willingness to use these powers to manage large and complex cases. As detailed further below, the courts have used case management powers to manage significant group action claims against entities in the BHP group, Vedanta Resources plc and Royal Dutch Shell plc.

II THE 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.

7 CRA, Schedule 8, Part 1.

8 Respectively *Justin Gutmann v. First MTR South Western Trains Limited and another* (case No. 1304/7/7/19) and *Justin Gutmann v. London & South Eastern Railways Limited* (case No. 1305/7/7/19).

9 CPR 3.1(g) and (h).

Opt-out class action proceedings

The English courts have continued to deal with issues arising from cases where the opt-out class action procedure for competition cases has been used and some of the first collective claims have now been certified. The claims commenced to date demonstrate that the collective proceedings mechanism is being used across a broad spectrum of cases, involving both businesses and consumers, and relating to a wide range of competition law infringements including those pursued on both a standalone and follow-on basis.

Merricks

Filed on 8 September 2016 with the CAT,[10] *Merricks* was the second follow-on claim brought under the new opt-out collective proceedings regime (the first being in relation to *Dorothy Gibson v. Pride Mobility Products Limited (Pride Mobility)*).[11] The claim followed on from the finding of the European Commission that Mastercard had infringed EU competition law as a result of interchange fees on transactions between 1992 and 2007. The case was brought by the former Chief Ombudsman of the Financial Ombudsman Service and was valued by the claimants' lawyers at £14 billion, making it the largest claim heard in England to date.

In 2017, the CAT refused to grant a CPO, but in April 2019, the Court of Appeal reversed the CAT's decision.[12] On 11 December 2020, in a vital decision for the collective proceedings regime, the Supreme Court dismissed Mastercard's appeal, providing long-awaited guidance on the approach to the certification of collective proceedings in the CAT, which has enabled other CPO applications (discussed below) to progress with the benefit of authoritative guidance. In particular, the Supreme Court held that, when assessing the eligibility condition for certification, the CAT should have regard to certain criteria, including whether the claims are 'suitable' to be brought in collective proceedings. *Merricks* provided guidance that a claim may be suitable in circumstances where traditional, individual proceedings would be unsuitable for obtaining redress at the individual consumer level.

Following the Supreme Court's decision, *Merricks* was remitted to the CAT for it to reconsider certification. Given that Mastercard no longer opposed certification, the CAT only had to consider ancillary issues at the certification hearing, such as whether Mr Merricks could amend his application to extend the class to include individuals who had died before the claim was issued and whether the collective proceedings could include a claim for compound interest. On the former issue, the CAT rejected the proposed amendment on the basis that it was not possible simply to include deceased persons in the class and the amendment application was out of time; however, the Tribunal held it was in principle possible to have a

10 *Walter Hugh Merricks CBE v. Mastercard Inc and others* (case No. 1266/7/7/16).

11 *Dorothy Gibson v. Pride Mobility Products Limited* (case No. 1257/7/7/16). Pride Mobility is a distributor of mobility scooters that was found by the Office of Fair Trading (OFT) to have infringed the CA, following an agreement between several retailers that they would not advertise particular scooters online at a price below Pride Mobility's recommended retail price. The OFT's decision did not impose a penalty on Pride Mobility. A follow-on claim was brought by the National Pensioners' Convention on behalf of a class of approximately 30,000 people and was England's first opt-out collective action. At the end of 2017, the CAT determined that proceedings should be adjourned on the grounds that the proposed class could only comprise those directly affected by the scope of the OFT's original decision. The claimants declined to attempt to reformulate the proposed class, which would have been insufficiently large for the costs incurred to be met by the potential damages to be awarded, let alone compensate the class members, and the claim was withdrawn.

12 *Merricks v. Mastercard Incorporated & Anor* [2019] EWCA Civ 674.

class definition which includes the estates of deceased persons. On the latter issue, the CAT refused to allow the inclusion of the claim for compound interest because Mr Merricks had failed to put forward a viable methodology for estimating what loss by way of compound interest was suffered on an aggregate basis. Almost six years on from the introduction of the CPO regime, the certification of Merricks – being the first certified application for a CPO – is a significant milestone. Mastercard now faces the largest damages claim in the history of the English civil court, although a trial date has not yet been set.

The Trains Applications

The *Trains Applications*, brought in February 2019, involve claims against UK rail operators on the basis of alleged abuse of dominance concerning the availability of certain rail fares. They were the first standalone claims (i.e., claims that are not reliant on the findings of a regulatory authority) brought under the opt-out collective proceedings regime. Standalone claims 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).

On 19 October 2021, the CAT ruled by unanimous judgment in favour of the proposed class representative (PCR), therefore enabling Mr Gutmann to act as the representative of a class estimated to comprise millions of individuals. In summary, the CAT:

a rejected the summary judgment and strike-out applications advanced by the respondents;
b authorised the PCR to act as the class representative in the proceedings; and
c found that the claims raised common issues and were suitable to be brought in collective proceedings.

In rejecting the respondents' summary judgment and strike-out applications, the CAT found that the PCR's case on abuse of dominance was reasonably arguable and not 'a dramatic extension of the existing law'. In particular, the CAT noted that the categories of abuse are not closed and that it was not extraordinary or fanciful to say that where a dominant company operates an unfair selling system (e.g., where the availability of cheaper alternative prices for the same service is not transparent or adequately communicated to customers) this may also constitute an abuse. Importantly for future cases, the CAT found that establishing abusive conduct does not require the identification of a counterfactual in specific detail. The PCR was not in a position to specify the precise manner in which the respondents should have organised their businesses to achieve a different outcome, although the claim forms referred to the examples of better training and amended sales procedures.

Of particular note is the CAT's analysis in relation to causation and quantum and its interpretation of Section 47C(2) of the CA (which provides that damages may be awarded in collective proceedings without undertaking an assessment of the amount of damages recoverable in respect of the claim of each represented person). In interpreting Section 47C(2), the CAT applied obiter comments from the majority's judgment in *Merricks*, who considered this provision to include 'proof of liability as well as quantification of loss'. As a result, it concluded that issues of liability and causation can be tried on a common basis, provided that there is sufficient commonality to those issues and a realistic and plausible way to calculate aggregate damages. Future defendants to collective proceedings may therefore be limited in their ability to test individual features of the claims made, with little or no substantive requirement on the part of individual claimants to show proof of loss.

The CAT's decision in the *Trains Applications* is potentially very significant. At the time of the Supreme Court's judgment in *Merricks*, it was unclear how the CAT would apply the test articulated by the Supreme Court; however, early indications, in particular the CAT's decision in the present case, suggest that while the CAT will continue to play a 'gatekeeping role over the pursuit of collective proceedings' (as proposed by Lord Briggs in *Merricks*) it may be much easier for proposed collective proceedings to pass through that gateway.

Moreover, the perception (arising initially from *Merricks*, and now reinforced by the decision in the *Trains Applications*) that that the bar for certification has been lowered appears to have encouraged prospective claimants, as there has been an increase in the number of CPO applications made in the last year. In addition, initial signs suggest that claimant law firms and litigation funders have been emboldened to bring more creative claims using the CPO regime, such as standalone claims (as in the *Trains Applications*).

The respondents have appealed the CAT's decision and permission to appeal was granted on 4 February 2022.

Le Patourel v. BT Group plc[13] *(Le Patourel)*

Le Patourel arguably evidences the incentivising impact of the Supreme Court's judgment in *Merricks* on prospective claimants. On 15 January 2021, just over a month after the decision in *Merricks* was handed down, an opt-out collective action was launched in the CAT against BT Group plc (BT) for almost £600 million, on behalf of approximately 2.3 million landline customers, for alleged historic overcharging. On 27 September 2021, the CAT granted a CPO. This was the first time a CPO in a standalone opt-out claim, and so one not based on a regulatory decision, had been granted. It was also the first time that a CPO was granted on all of the terms proposed by the PCR.

The CAT denied BT permission to appeal against the granting of the CPO, but BT went on to successfully seek such permission from the Court of Appeal in November 2021. BT's appeal seeks to argue that the claim against it does not enjoy a real prospect of success, and further that the case is not suitable to be brought on an opt-out basis as the class of claimants, all being BT customers, could be easily identified.

Road Haulage Association Limited v. MAN SE and others, and UK Trucks Claim Limited v. Fiat Chrysler Automobiles NV and others[14] *(together, the Trucks Applications)*

The Road Haulage Association Limited v. MAN SE and others (Road Haulage) CPO application has been brought under the opt-in collective proceedings regime, while the *UK Trucks Claim Limited v. Fiat Chrysler Automobiles NV and others (UK Trucks)* CPO application has been brought as opt-out collective proceedings at first instance, but opt-in in the alternative.

Both applications, brought in July 2018 and May 2018 respectively, followed the European Commission's finding in July 2016 that certain European truck manufacturers had engaged in collusive arrangements on pricing. In light of the similar issues involved, the *Trucks Applications* are being heard together.

Broadly, the proposed class across the *Trucks Applications* encompasses those who purchased or leased new or pre-owned medium or heavy trucks during the relevant period,

13 *Justin Le Patourel v. BT Group plc* (case No. 1381/7/7/21).

14 *Respectively Road Haulage Association Limited v. MAN SE and others* (case No. 1289/7/7/18) and *UK Trucks Claim Limited v. Fiat Chrysler Automobiles NV and others* (case No. 1282/7/7/18).

but the claim forms and expert reports of the two applicants take different approaches to defining the classes. To date, over 10,000 members have signed up to the *Road Haulage* proceedings, although this number is expected to increase if the CAT grants the CPO.[15] At a case management conference held in December 2018, the CAT directed that both claims should be heard together, and also suggested that there was nothing under the collective proceedings regime that prevented two opt-in proceedings being certified for the same infringement. This raises the possibility that both the *UK Trucks* and *Road Haulage* applications could be certified as opt-in proceedings, potentially allowing claimants to choose between the two proceedings (although this will depend on how the class is formulated).

The main hearing of the *Trucks Applications* was ultimately held in April 2021 following the Supreme Court's decision in *Merricks*. The CAT's judgment for that hearing is still pending and it therefore remains unclear how the CAT will manage the different claims flowing from the European Commission's decision, as proceedings brought against the proposed defendants by individual claimants have now made significantly more progress than the *Trucks Applications*.

Michael O'Higgins FX Class Representative Ltd v. Barclays Bank PLC & Others, and Phillip Evans v. Barclays Bank Plc & Ors (together, the FX Applications)

The *FX Applications*[16] are opt-out follow-on damages claims arising out of the European Commission's decisions adopted on 16 May 2019, which found that six banks had engaged in two cartels in the spot foreign exchange market for 11 currencies. The *Michael O'Higgins FX Class Representative Ltd v. Barclays Bank PLC & Others (O'Higgins)* and *Phillip Evans v. Barclays Bank Plc & Ors (Evans)* applications were filed on 29 July 2019 and 11 December 2019 respectively.

The unique point in the *FX Applications* is that this is the first time that competing opt-out collective proceedings have been filed in the UK. Consequently, the claims raise novel questions as to how competing applications should be managed efficiently and fairly, and the considerations that the CAT should take into account when deciding which claim is the most suitable to be certified. It is common in other jurisdictions with established class action regimes, such as Canada, for 'carriage disputes' (which deal with the question of which class representative is the most suitable) to be heard at an early stage; the two contenders in this case also argued for such an early determination to be made. However, in a judgment handed down on 6 March 2020, the CAT concluded that the carriage dispute should not be dealt with as a preliminary issue because it is not necessarily a discrete matter capable of being determined in advance of certification, as the question of who may be appropriately authorised to bring a collective action cannot always be disassociated from the question of whether a claim should be certified. As a result, the CAT held that the issues of whether a CPO should be made at all and, if so, which application should succeed, should be heard together at a single hearing. The certification and carriage hearing took place on 12–16 July 2021, and the judgment is pending.

15 http://bfff.co.uk/record-numbers-join-rha-truck-cartel-claim.

16 Respectively *Michael O'Higgins FX Class Representative Ltd v. Barclays Banks PLC & Others* (case No. 1329/7/7/19) and *Phillip Evans v. Barclays Bank Plc & Ors* (case No. 1336/7/7/19).

Other significant opt-out class actions

There have also been developments in various other CPO proceedings over the last year, including a number of new applications that have been issued. For example, two opt-out mass lawsuits have been filed in the CAT claiming damages from major digital platforms for alleged breaches of competition law. Alphabet Inc (the parent company of Google) and various other Google entities (together, Google) are facing a claim launched in July 2021 on behalf of 19.5 million UK consumers that the PCR alleges overpaid for in-app content as a result of the company's application store restrictions.[17] Similarly, an application to commence collective proceedings was made against Apple Inc and Apple Distribution International (together, Apple) in May 2021.[18] Dr Rachael Kent, the PCR, is seeking up to £1.5 billion from Apple on behalf of 19.6 consumers that allegedly overpaid for iPhone applications due to Apple's App Store rules and the commission it charges.

Moreover, there have been announcements in the media[19] that Facebook's parent company, Meta, has received a letter before action regarding a £2.3 billion opt-out class action brought on behalf of an estimated 44 million UK consumers for allegedly abusing its dominance by illegally exploiting the personal data of its users. If the lawsuit is filed, it will be the first class action against Facebook in the UK.

Outside of the technology sector, the certification hearing in *Mark McLaren Class Representative Limited v. MOL (Europe Africa) Ltd and Others (McLaren)* took place in November 2021.[20] The CPO application, which was launched in February 2020, seeks damages for consumers arising from an infringement decision of the European Commission adopted on 21 February 2018 (Case AT.40009 – Maritime Car Carriers), which found that there was a cartel in the market for deep sea carriage services on routes to and from the EEA, involving all of the respondents, which operated between 18 October 2006 and 6 September 2021. The proposed class includes all persons (other than certain excluded persons) who purchased or financed new cars or light-medium weight commercial vehicles in the UK between 18 October 2006 and 6 September 2015. The CAT's decision is pending.

ii Significant environmental actions

The rise of ESG discourse in the investor community and more widely has meant that there are an increasing number of large-scale environmental claims being brought by way of group litigation. These actions have raised interesting questions relating to the jurisdiction of the English courts and the implications of alleged wrongdoing by overseas parties on UK-domiciled entities.

Município de Mariana and others v. BHP Group plc and another (BHP) illustrates that there are alternative routes by which UK-domiciled parent companies may resist claims brought against them for the activities of foreign subsidiaries.[21] The proceedings were brought against BHP Group plc and BHP Limited, respectively English and Australian companies that sit at the head of the BHP group, over the Samarco dam failure. The dam was owned

17 *Elizabeth Helen Coll v. Alphabet Inc. and Others* (case No. 1408/7/7/21).

18 *Dr Rachael Kent v. Apple Inc. and Apple Distribution International Ltd* (case No. 1403/7/21).

19 https://www.legal-brief.co.uk/news/chambers/class-action-launched-against-meta-on-behalf-of-uk-consumers/.

20 *Mark McLaren Class Representative Limited v. MOL (Europe Africa) Ltd and Others* (case No. 1339/7/7/20).

21 *Município de Mariana and others v. BHP Group plc and another* [2020] EWHC 2930 (TCC).

and operated by a Brazilian-incorporated joint venture between Vale SA and a Brazilian subsidiary of BHP Group plc. The claimed amount of approximately £5 billion, brought on behalf of over 200,000 claimants, makes it one of the largest claims in English legal history.

However, in November 2020, the High Court struck out the claim as an abuse of process in light of concurrent proceedings concerning the same matters in Brazil. The High Court held that allowing the English claim to proceed in parallel would result in wasted time and costs and duplication of effort. There was also an acute risk of irreconcilable judgments. Were the case not to have been struck out on that basis, the judge noted that he would have stayed the claim against one or more of: (1) both defendants for abuse of process; (2) the English entity, BHP Group plc, pursuant to 'related action' provisions contained in the Recast Brussels Regulation (Brussels Recast); (3) the Australian entity, BHP Limited, on *forum non conveniens* grounds; and (4) both defendants on case management grounds.[22]

Following the High Court and the Court of Appeal's refusal to allow the claimants permission to appeal against the strike-out order, on 27 July 2021 the Court of Appeal reopened the decision, allowing the claimants permission to appeal on the condition that they pay the full amount of the costs ordered by the High Court in January 2021. This permission was granted on the basis that the court considered that the first instance judge had failed to address essential points which went to the heart of the claimants' challenge to the High Court's findings on abuse of process, critically undermining the integrity of the process for granting permission to appeal. Nonetheless, it was noted in the judgment that this decision did not necessarily mean that the courts would be any more willing than before to reopen a decision to refuse permission, as the combination of circumstances in this case was 'truly exceptional'. This decision has, however, undoubtedly called into question the approach to case management in large group claims in relation to alleged wrongdoing by overseas parties adopted by the High Court at first instance.

Looking towards the future, it is possible that we will see a rise in ESG litigation, although specific climate change litigation is not yet something that has developed in the civil law sector, as opposed to existing (albeit still challenging and developing) public law options relating to such issues.

Significant data breach actions

The past couple of years have also seen an increase in activity in the data sector, with various group litigation regarding potential breaches of the DPA 2018 and the associated EU General Data Protection Regulation 2018 (EU GDPR).[23] Prominent representative actions which attacked corporate data policies included *Lloyd*, cases against Oracle and Salesforce, two competing sets of litigation against Facebook, and a challenge to Google, DeepMind and a London hospital.[24]

In *Lloyd*, one of the most significant cases to date for class actions in England, the Court of Appeal granted the claimant permission to serve Google out of jurisdiction in a claim that potentially involved over 4 million iPhone users. The claim related to the 'Safari

22 ibid., at 265, per Turner J.

23 Following the UK's departure from the EU on 31 January 2020, the EU GDPR no longer applies to the UK. However, the EU GDPR has been incorporated into UK data protection law as the UK GDPR and therefore the data protection provisions contained in the EU GDPR continue to apply in practice.

24 https://ct.moreover.com/?a=46747929968&p=14e&v=1&x=ywhZfRat8AFXWZLRBqBV_g&u1=ND&u2=up-urn:user:PA185263411.

workaround', which allowed Google to determine the date visited and time spent by users on websites, as well as pages visited and advertisements viewed. Although there was no pecuniary loss or distress, the Court of Appeal found that damages could be awarded under Section 13 of the Data Protection Act 1998 (DPA 1998) for breach of Section 4(4) of the same Act. This is because the information collected by the workaround did hold economic value, and so loss of this data was a loss to the claimant group. Significantly, the Court of Appeal allowed the use of the representative action procedure under CPR 19.6(1) to pursue an opt-out-style claim. Although 'unusual',[25] there was a commonality of interest, as required by CPR 19.6(1), since all claimants had browser-generated information taken without their consent over the same period and in the same circumstances. The court also noted that it was appropriate to use its discretion under CPR 19.6(2) to allow the class representative to act given the alleged scale of the wrongdoing by Google, especially where there might otherwise be no other remedy.

Nonetheless, in November 2021 the Supreme Court comprehensively dismissed Mr Lloyd's representative action, in a major blow to the development of this sort of claim in the future. The Supreme Court found that a pure 'loss of control' claim could not be founded under the DPA 1998 in the absence of any evidence of damage or distress. The court found that in this situation an individualised assessment of damages was required. The Supreme Court further noted the proposal to bring claims on a 'lowest common denominator' basis, and found that the facts which Mr Lloyd aimed to prove in each individual case were insufficient to meet any threshold of seriousness.

This result, along with similar recent strike-out decisions concerning *de minimis* data breaches in *Warren v. DSG Retail Ltd26 (Warren)* and *Rolfe v. Veale Wasbrough Vizards (Rolfe)* has meant that some of the potential momentum building around representative actions regarding data privacy is likely to be tempered.[27] For instance, in *Warren* it was made clear that a failure to secure data without use of the data by the defendant does not constitute sufficient basis for a data breach claim. Likewise, *Rolfe* found that no remedy was available for a data breach in the absence of evidence of real, credible harm; and that a single data breach involving a limited amount of non-sensitive personal data was unlikely to cause sufficient harm to form the basis for a claim in ordinary circumstances.

However, it is also worth noting that in *Lloyd*, the Supreme Court remained open in principle to the suitability of representative actions to provide declaratory relief going to questions of liability. The court in *Lloyd* also notably confined itself to commenting on the position under the DPA 1998 and refused to be drawn into discussions of the UK GDPR, leaving the position there unclear and so potentially open to future data breach claims. Likewise, claimant law firms will be considering carefully how they may revise class definitions to achieve an actual and uniform effect in any future potential data breach claims. It is, however, clear that it will be very difficult, if not impossible, to bring these sorts of claims going forwards. In any event, there are likely to be other types of claims which can be successfully brought using representative actions, even if data breach claims cannot.

25 *Lloyd*, at 7, per Sir Geoffrey Vos C.

26 *Warren v. DSG Retail Ltd* [2021] EWHC 2168.

27 *Rolfe v. Veale Wasbrough Vizards* [2021] EWHC 2809.

III 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 there are also 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.[28] However, it may only be enforced by or against a non-party with the court's permission. Importantly, though, the representee need not authorise being represented[29] so long as the same-interest requirement is met.[30]

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.[31] 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, so 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 which sought to be represented, which was drawn so widely that it was described by the court as 'fatally flawed'.[32] 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.[33] 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

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

29 *Independiente Ltd v. Music Trading On-Line (HK) Ltd* [2003] EWHC 470 (Ch): 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.

30 CPR 19.6(1).

31 *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.

32 *Emerald*, at 62, per Mummery LJ.

33 For instance, notice the strict approach taken to proving a common interest in *Jalla and another v. Shell International Trading and another* [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*.

be distilled from the case law. Although the CPR appears to require an identical interest,[34] 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'.[35]

This decision can be contrasted with the decision in *Lloyd*, described above, in which the Court of Appeal found that roughly four 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 which 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',[36] 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 his or her own claim first to be entered upon the group register.[37] 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, such 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',[38] 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'.[39] Nonetheless, the court has discretion in granting the order.[40] There is no guidance as to how this discretion is to be exercised,[41] though the overriding objective would still be applicable. This was illustrated in the High Court judgment in *Lungowe v. Vedanta Resources Plc and others (Vedanta)*.[42] 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

34 CPR 19.6.

35 *John v. Rees and others* [1970] Ch. 345 at 370, per Megarry J.

36 CPR 1.1(2)(d).

37 CPR 19.11, PD 19B, Paragraph 6.1A.

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

39 CPR 19.10.

40 CPR 19.11(1).

41 There is no guidance contained within CPR 19, nor the accompanying PDs.

42 *Lungowe v. Vedanta Resources Plc and others* [2020] EWHC 749 (TCC).

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,[43] 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.[44] This is in part because the standard of commonality is lower.

There are no special requirements for a GLO application,[45] although the applicant should both consider the preliminary steps[46] and ensure that his or her application contains the prescribed general information.[47] 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.[48] Nevertheless, the court may give directions[49] 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 only entitled to instruct 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 recently, 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, there have only been 109 GLOs 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

43 PD 19B, Paragraph 2.3(2).

44 This can be seen particularly in the recent actions brought under Section 90 of the Financial Services and Markets Act 2000 (FSMA).

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

46 The preliminary steps are detailed at PD 19B, Paragraph 2.

47 This information is contained at PD 19B, Paragraph 3.2.

48 CPR 19.12(1)(a).

49 Pursuant to CPR 19.12(1)(b).

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 to utilise these powers to manage such large cases is another indicator of growing judicial enthusiasm for facilitating class actions.

CPOs

The most significant recent change to the English class action regime resulted from the CRA, which came into effect 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, and 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,[50] 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: these are the 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 standalone. 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 only required to show that the breach caused them loss. In contrast, a standalone 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.

Similarly 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, 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'[51] and that a collective proceeding would be appropriate based upon a preliminary assessment of the merits and available alternative regimes.[52]

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 only apply automatically to members domiciled within the UK. 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.

50 Under CPRs 19.6 and 19.11.

51 Section 47B(6), CA.

52 Rule 79(2), CAT Rules 2015.

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.[53] However, failure to meet the deadline does not automatically mean that the claim cannot be added to the group.[54]

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'.[55] 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.[56] In certifying a claim as eligible for inclusion in collective proceedings, the CPO must describe the class and any sub-classes along with the provisions for opting in and out of the proceedings.[57] 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.[58]

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, it is impossible at present to determine the rate at which these are to progress given how recently they have become available and the preliminary stages that cases under the new CRA regime have reached.[59] Nonetheless, it is notable that *Le Patrouel* 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

53 CPR 19.13(e) and PD 19B.13.

54 *Taylor v. Nugent Care Society* [2004] EWCA Civ 51.

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

56 Rule 74(6), CAT Rules and Paragraph 6.37, CAT Guide.

57 Rules 80(1)(c) and 82, CAT Rules.

58 Rule 85(4), CAT Rules.

59 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.

securities claims, some of which have already seen significant settlements,[60] 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, due to the existence of a large volume of parties, issues and documents. The considerable time often required for disclosure is one of the reasons why a trial of GLO issues may not take place for a long period of time after the GLO order is made.[61] 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 only meet 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.[62] 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.[63] 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.[64] 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 others v. Goodwin and others*[65] the wide costs discretion of the court was noted again and

60 *In Re RBS (Rights Issue Litigation) In Claims entered in the Group Register* (HC 2013 000484) (RBS), 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.

61 The introduction of the Disclosure Pilot Scheme in the Business and Property Courts may assist with mitigating the problem of lengthy disclosure periods.

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

63 *Britned Development Ltd v. ABB AB* [2018] EWHC 2616 (Ch).

64 BritNed was awarded only €11.7 million (plus interest) of the €180 million claimed.

65 *Greenwood and others v. Goodwin and others* [2014] EWHC 227 (Ch).

it was asserted 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.[66] 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.[67] 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.[68] 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 *RBS*, 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.[69] 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 & Others*, which had clarified that the *Arkin* cap is intended as guidance for

66 *Municipio De Mariana & Ors v. BHP Group PLC & Anor* [2021] EWHC 146 (TCC).

67 *Howells v. Dominion Insurance Company* Ltd [2005] EWHC 552 (Admin).

68 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 of their other individual costs in the claim.

69 *Sharp & Ors v. Blank & Ors* [2020] EWHC 1870 (Ch).

judges, rather than as a binding rule.[70, 71] 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 respect of opt-out collective proceedings, however, given that (unlike proceedings governed by GLOs or representative actions) damages-based agreements are prohibited, it is likely that these will depend on third-party funding in order to be commenced. In the *Trucks Applications*, the CAT considered the PCR's third-party litigation funding arrangements. In a judgment published on 28 October 2019, the CAT held that the funding arrangements entered into by the applicants in both applications did not provide grounds for refusing to authorise the PCR. Crucially, the CAT found that the funding arrangements, pursuant to which the funder is paid by reference to the amount of damages recovered, were not damages-based agreements and so not subject to the Damages-Based Agreements Regulations 2013, and, therefore, were not unlawful. The CAT also rejected the respondents' concerns regarding the level of adverse costs cover, finding that it was adequate that the PCR had a level of adverse costs cover sufficient for at least a significant part of the proceedings.

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, save for deductions for costs that had been incurred in any event and additional issues 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 US, 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 US.

With regard to damages for representative actions, the historic position was that the same-interest requirement excluded damages from being recoverable for the class.[72] However, there has been an incremental liberalisation such that it is established that damages can be claimed in a representative action.[73] 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, tort).[74]

The provisions for damages in collective proceedings claims are, however, more detailed. Damages are ordinarily compensatory; exemplary (i.e., punitive) damages for

70 *Chapelgate Credit Opportunity Master Fund Ltd v. Money & Others* [2019] EWHC 997 (Ch).

71 *Chapelgate Credit Opportunity Master Fund Ltd v. Money & Ors* [2020] EWCA Civ 246.

72 *Markt & Co Ltd v. Knight Steamship Co Ltd* [1910] 2 KB 1021.

73 *Independiente Ltd v. Music Trading On-Line (HK) Ltd* [2003] EWHC 470 (Ch).

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

collective proceedings have been statutorily excluded.[75] 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 sub-class 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.[76] 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'.[77] Any other remaining unpaid damages are to be paid to charity.[78]

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.

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 90 FSMA, 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 will likely 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.

As noted, it is increasingly likely that third-party litigation funding will take a larger role in English class and group action litigation. The consequences could be significant, opening up new claimants, types and scales of litigation to class and group actions not previously seen before. Third-party litigation funding also introduces a new dynamic when considering and negotiating settlement: although professional funders are legally prohibited from exercising control over the litigation they fund, the manner in which many funding packages are structured (with the cost of funds effectively increasing the longer a case progresses) may incentivise claimants to give fuller consideration to settling actions before trial. Unlike in some other jurisdictions (notably the US), settlements in GLO and representative actions do not require court approval, though admissible settlement attempts may still have an impact upon the court's allocation of costs as between the parties if a settlement is not reached. The CPRs do not, however, contain any explicit guidance on how any settlement negotiations or agreements are to be managed.

75 Section 47C(1), CA.

76 Rule 93(1)(a), CAT Rules 2015.

77 Section 47C(6), CA.

78 Section 47C(5), CA.

In contrast, the CA contains provisions, implemented by the CRA, for a collective settlement scheme.[79] Once a CPO has been made and proceedings are authorised to continue on an opt-out basis, claims may only be settled 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 settlement need not apply to all of the defendants in the proceedings, merely those who intend to be bound by it. The CAT, however, may only make an order approving the settlement where it deems the terms to be 'just and reasonable'.[80] 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 UK who fall within the CPO's defined class and did not opt out, and those domiciled outside the UK who otherwise fell within the defined class and opted in.[81] Opt-in collective proceedings are not subject to such 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 potential success of the collective settlement scheme will, however, be closely tied to a claimant's ability to use the collective action scheme. If the opt-out certification process proves to be unduly restrictive, the defendant will no longer be induced to settle. The residency provisions in the CRA may also present issues to the success of the collective settlement scheme.[82] Defendants could be reluctant to pursue a collective settlement scheme since it does not automatically provide the global settlement that they might be seeking, given non-UK-domiciled individuals will need to opt in to any settlement.[83] It should also be remembered that unless the settlement is on a universal basis and will comprise the entirety of the contested issues then aspects of the litigation will continue regardless. Nonetheless, certain other provisions may further promote settlement, for instance that any remaining unpaid damages are to be paid to charity.[84] It, therefore, awaits to be seen how the collective settlement scheme is adopted.

IV 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 US to pursue relief through class actions, the United States' Supreme Court's decision in *Morrison v. National Australia Bank*,[85] which effectively barred securities actions without a US nexus,[86] has caused potential claimants, including institutional investors, to reappraise the situation. The advent of opt-out actions under the

79 Section 49A, CA.

80 Section 49A(5), CA.

81 However, the likelihood that this covers all potential claimants is still limited.

82 Lawne, 'Private enforcement and collective redress: a claimant perspective on the proposed BIS reforms' [2013] Comp. Law 171.

83 Section 49A(10)(b), CA.

84 Section 47C(5), CA.

85 *Morrison v. National Australia Bank* 561 U.S. 247 (2010).

86 '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.

CA, which are open to claimants domiciled outside the UK, and the increasing availability of third-party litigation funding, in combination with the pre-existing attractions of England as a forum, is likely to continue to drive an increase in this kind of work in the English courts.

While the UK formally left the EU 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. By way of practical example, key tenets of the EU competition regime remain in effect because they are contained within the CA, a free-standing UK statute. Breaches of EU competition law in remaining EU Member States remain actionable in England where an English court is willing to accept jurisdiction over a defendant. The law applicable to such disputes would be determined either according to rules analogous to the current regime or by reference to the formerly applicable, and substantively similar, UK rules. The UK applied to join the Lugano Convention in April 2020; however, this required unanimous consent from all EU Member States and on 4 May 2021 the EU Commission announced in a communication to the European Parliament and Council that it was opposed to the UK's accession. The European Commission formally blocked the UK's accession on 28 June 2021, and this refusal was announced on 1 July by the Federal Department of Foreign Affairs of Switzerland. Had the UK acceded to the Lugano Convention, this would have provided for a broadly similar regime as under Brussels Recast. In light of the UK's failure to accede to the Lugano Convention, the UK's departure from the EU may provide defendants with greater options for mounting jurisdictional arguments to defeat proceedings in future, particularly in respect of mass tort claims, as the general principle under Brussels Recast that prevented English courts from declining jurisdiction simply because another country's court might be a more appropriate forum no longer applies.[87] This may in part explain the timing of certain cases that were issued in the run up to 31 December 2020, as claimants relied on the provisions of Brussels Recast to commence claims against UK-domiciled defendants and then anchor overseas defendants to the proceedings in the English courts. Thus, the implications of the UK's departure from the EU will remain an area to monitor.

V 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. The UK's collective proceedings regime is still evolving following the Supreme Court's decision in *Merricks*, but recent indications, in particular the judgment in the *Trains Applications*, suggest that the CAT is applying the Supreme Court's test in a manner that more readily allows for certification as opposed to prior to *Merricks*. Further, recent cases appear to have given prospective claimants, claimant law firms and litigation funders confidence, which has encouraged them to bring new and more creative claims, including traditionally more speculative standalone claims. This can be seen from the increasing number of CPO applications being pursued, including three claims that have been issued in the last year against tech companies (namely Google, Apple and Meta). It is generally expected that more claims will be certified, but greater clarity on this should be provided shortly when the CAT

87 Article 4, Brussels Recast.

hands down its judgments in the *Trucks Applications*, *FX Applications* and *McLaren*, and the outcomes of the appeals against the CAT's certification decisions in the *Trains Applications* and *Le Patourel* are known.

However, there have been signs of the momentum around certain types of group litigation, such as data breach claims, starting to become tempered with legal reality. The Supreme Court's dismissal of Lloyd in November 2021 was a significant blow for group data breach claims. Successful strike-out applications regarding *de minimis* claims for data breaches in *Warren* and *Rolfe* have also shown that the English courts are taking a cautious approach to opening the floodgates in this area. More generally, *Lloyd* also failed to herald a more generous judicial approach to the interpretation of the same interest requirement for a representative action under CPR 19.6 as prospective claimants were hoping. Nonetheless, it is still somewhat unclear what impact *Lloyd* will have, especially as some encouragement for representative actions was nevertheless offered by the Supreme Court. Although data breach claims are unlikely to be able to be brought through representative actions, other types of claims will still be capable of being brought through this regime.

Moreover, there are various new types of group litigation which are likely to become more widespread. It is envisioned that class and group actions may provide a crucial framework for individuals to obtain legal redress in ways that have not been possible before. Shifting international discourse in areas such as data protection, the environment, and human rights render these areas fertile ground for precedent setting group litigation in the years ahead.

2022 will be an interesting year for group litigation as claimants, claimant law firms, and litigation funders continue to test the boundaries of this area of litigation which is still very much being developed by the English courts.

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