THE CLASS ACTIONS LAW REVIEW

SEVENTH EDITION

Editors
Camilla Sanger and Peter Wickham

THE LAWREVIEWS

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PREFACE

Class actions and major group litigation can be seismic events, not only for the parties involved but also for whole industries and parts of society. That potential impact means they are one of the few types of claim that have become truly global in both importance and scope, and this is reflected in this seventh edition of *The Class Actions Law Review*.

There are also a whole host of factors currently coalescing to increase the likelihood and magnitude of such actions. These factors include continuing geopolitical developments, particularly in Europe and North America, with moves towards protectionism and greater regulatory oversight. At the same time, further advances in (as well as greater recognition and experience of the limitations of) technology is giving rise to ever more stringent standards, with the potential for significant liability for those who fail to adhere to these protections. Finally, ever-growing consumer markets of increasing sophistication in Asia and Africa add to the expanding pool of potential claimants.

It should, therefore, come as no surprise that claimant law firms and third-party funders around the world are becoming ever more creative and active in promoting and pursuing class actions, and local laws are being updated to facilitate such actions before the courts.

As with previous editions of this *Law Review*, this updated publication aims to provide practitioners and clients with a single handbook to which they can turn for an overview of the key procedures, developments and factors in play in this area of law in a number of the world's most important jurisdictions.

Camilla Sanger and Peter Wickham
Slaughter and May
London
March 2023

Chapter 3

ENGLAND AND WALES

Camilla Sanger, Peter Wickham and James Lawrence[1]

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 and its subsequent application by the courts in other cases has firmly opened the door to these types of collective actions in the United Kingdom 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. For example, increased scrutiny of environmental, social and governance (ESG) issues in recent years is beginning to provide fertile ground for 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

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1 Camilla Sanger and Peter Wickham are partners and James Lawrence is an associate at Slaughter and May. The authors would like to thank Daniel Whitham for his assistance in producing this chapter.

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.

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.

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 111 GLOs[5] 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 *Port Talbot Steelworks Group Litigation*, the *Arkwright In Vessel Composting Site Group Litigation* and the *Nchanga Copper Mine Group Litigation*.[6] 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 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, with only one GLO being ordered in 2022,[7] 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.[8]

Representative actions have proven less popular since the Supreme Court's judgment in *Lloyd v. Google LLC* (*Lloyd*),[9] 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

5 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.

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

7 The *Arkwright In Vessel Composting Site Group Litigation*, which was ordered on 17 August 2022.

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

9 *Lloyd v. Google LLC* [2021] UKSC 50.

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 only been deployed 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 is difficult to see how certain types of claims are likely to progress as representative actions given 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.[10] 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.

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 Court of Appeal in *London & South Eastern Railway Limited v. Gutmann*[11] and *Justin Gutmann v. First MTR South Western Trains Limited and Another* (together, the *Trains Applications*) (discussed below).

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. More recently, in light of the decision in *Lloyd* and the restrictive impact this appears to have had on representative actions, there have 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.

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.[12] Although this inherent jurisdiction is not novel, the courts have recently shown an increasing willingness to use these

10 CRA, Schedule 8, Part 1.

11 *London & South Eastern Railway Limited v. Gutmann* [2022] E.C.C. 26.

12 CPR 3.1(g) and (h).

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.

Opt-out class action proceedings

This year has seen further growth in the number of claims brought under the opt-out class action procedure for competition cases. In particular, 13 new applications for a CPO were launched in 2022 (the most in a single year to date), taking the total number to 29.[13] Of the claims that have been issued, 11 have been certified to date, and the CAT has refused to certify only one claim.

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 stand-alone and follow-on basis.

Merricks

Filed on 8 September 2016 with the CAT,[14] *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)*).[15] 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.[16] 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

13 According to the CAT website: https://www.catribunal.org.uk/cases.

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

15 *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.

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

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. Almost six years on from the introduction of the CPO regime, the certification of *Merricks* – the first certified application for a CPO – is a significant milestone and Mastercard now faces the largest damages claim in the history of the English civil court.

A case management conference took place on 20 and 22 September 2022, and a hearing on limitation and exemptibility took place between 12 and 17 January 2023. The CAT issued its judgment on Merricks' application to amend his 're-amended reply' on 3 February 2023. The latest amendments set out factual allegations and matters that Merricks intends to rely on to show 'deliberate concealment',[17] as well as raising a legal argument on limitation based on a Court of Justice of the EU ruling in *Volvo AB v. RM*.[18] Mastercard argued that the proposed amendments would 'significantly disrupt the conduct of the trial'.[19] The unanimous judgment states that 'the balance of justice clearly favours granting permission to amend'.[20] The trial is scheduled to begin in July 2023.

Le Patourel v. BT Group plc[21] *(Le Patourel)*

Le Patourel arguably evidences the incentivising impact of the Supreme Court's judgment in *Merricks* on prospective claimants. The case stems from an investigation carried out by the regulator Ofcom in 2017, which found that BT Group plc (BT) had been overcharging its landline customers. Ofcom found that although the costs of providing landlines had been declining since 2009, BT continued to raise its prices. And while BT agreed to reduce the future bills of some of these customers, it did not compensate them for the previous overcharging.

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 for almost £600 million. Le Patourel, the claimant representative and founder of Collection Action on Land Lines, is seeking to obtain up to £500 each in compensation for as many as 2.3 million customers if the case is successful.

On 27 September 2021, the CAT granted a CPO. This was the first time a CPO in a stand-alone 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 the terms proposed by the proposed class representative (PCR).

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

17 *Walter Hugh Merricks CBE v. Mastercard Inc and others* [2023] CAT 5, §13.

18 Case C-267/20 Volvo AB v. RM, EU:C:2022:494.

19 *Walter Hugh Merricks CBE v. Mastercard Inc and others* [2023] CAT 5, §33.

20 *Walter Hugh Merricks CBE v. Mastercard Inc and others* [2023] CAT 5, §48.

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

customers, could be easily identified. On 6 May 2022, the Court of Appeal dismissed BT's appeal. Importantly, it held that there is no 'general presumption'[22] in favour of opt-in actions over opt-out. Rather, the legislation was drafted neutrally and so to presume a preference for opt-in claims (over opt-out), as BT argued, would run counter to the legislative intent. Additionally, the Court concluded that class members' involvement in the claim would be limited if an opt-in claim was mandated, and that the financial position of the parties (including a representative's ability to attract third-party funding) was a relevant consideration for the CAT in determining whether the claim should proceed on an opt-out basis.

The trial has been listed for January 2024.

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 stand-alone claims (i.e., claims that are not reliant on the findings of a regulatory authority) brought under the opt-out 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).

On 19 October 2021, the CAT ruled by unanimous judgment in favour of the PCR; therefore, enabling Mr Gutmann to act as the representative of a class estimated to comprise millions of individuals. In summary, the CAT rejected the summary judgment and strike-out applications advanced by the respondents, authorised the PCR to act as the class representative in the proceedings and 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 judgment of the majority in *Merricks*, who considered this provision to include proof of liability as well as quantification of loss. As

22 *Justin Le Patourel v. BT Group plc* [2022] EWCA Civ 593.

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.

All three respondent train operators appealed against the CAT's judgment. On 28 July 2022, the Court of Appeal dismissed these appeals.

One of the grounds of appeal raised the question of whether Section 47C(2) of the CA permits issues relating to liability (causation and proof of some loss) to be determined upon an aggregate top-down basis, or whether the position of each member of the class needs to be assessed individually. When considering the issue from the perspective of certification (rather than a view of the precise approach to follow at any substantive hearing), the Court of Appeal, upheld the CAT's judgment on this issue, concluding that the Supreme Court's judgments in *Merricks* and *Lloyd* were dispositive of this issue and, in any event, a purposive interpretation of Section 47CA(2) led to that conclusion. The Court of Appeal also endorsed the CAT's judgment that: (1) the existence of some no-loss claimants in a class was not an obstacle to certification; and (2) the interests of defendants could be taken into account at trial potentially via adjustments using estimations and assumptions. As a result, future defendants to collective proceedings may find it very difficult to object to certification by raising similar arguments.

The Court of Appeal also upheld the approach taken by the CAT in scrutinising and approving the methodology proposed by the class representative at the certification stage. The Court of Appeal found that the CAT had discharged its gatekeeper role at this stage in proceedings and exercised its discretion appropriately in satisfying itself as to the robustness of the class representative's methodology. It held that the train operators' criticisms of the methodology either did not raise an arguable issue of law or should be dealt with at trial (potentially by the CAT making use of its 'broad axe') rather than at the certification stage.

The CAT and Court of Appeal judgments in the *Trains Applications* are very significant in the development of the regime. 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, including from the CAT's decision in the present case (as upheld by the Court of Appeal), suggest that while the CAT will continue to play a 'gatekeeping role over the pursuit of collective proceedings'[23] (as proposed by Lord Briggs in *Merricks*), it may be relatively easy for proposed collective proceedings to pass through that gateway. However, it remains to be seen how the CAT will address the issues as the claims proceed through the substantive stages of litigation.

Road Haulage Association Limited v. MAN SE and others, and UK Trucks Claim Limited v. Fiat Chrysler Automobiles NV and others[24] *(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.

23 *Merricks v. Mastercard Inc* [2020] UKSC 51, §4.

24 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).

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, but the claim forms and expert reports of the two applicants take different approaches to defining the classes. Over 18,000 members have signed up to the *Road Haulage* proceedings.[25] 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 raised the possibility that both the *UK Trucks* and the *Road Haulage* applications could be certified as opt-in proceedings, potentially allowing claimants to choose between the two proceedings (although this would depend on how the class ended up being formulated).

The main hearing of the *Trucks Applications* was ultimately held in April 2021 following the Supreme Court's decision in *Merricks*. On 8 June 2022, the CAT handed down a landmark judgment approving the Road Haulage Association's (RHA's) application to bring collective proceedings on an opt-in basis. Meanwhile, on the same day, the CAT rejected the *UK Trucks* application. The CAT considered that both the *Road Haulage* and the *UK Trucks* applications were suitable but that it would be 'wholly inappropriate'[26] to approve both applications. It also considered there to be no legislative presumption in favour of opt-in or opt-out but that opt-in proceedings had the 'notable advantage of giving the expert economists access to a very significant source of data from the claimants to inform and support their quantification of estimated damages',[27] and that opt-in claims are practicable and the more reasonable and sensible way of proceeding.

On 28 October 2022, the CAT granted UK Trucks Claim Limited permission to appeal, while also granting 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 CAT issued a stay of the *Road Haulage* proceedings until determination of the appeals. On 7 February 2023, it was announced that the appeal will take place in May 2023.

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*[28] 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 United Kingdom. Consequently, the

25 According to a press release by Addleshaw Goddard, who represent the RHA.

26 *Road Haulage Association Limited v. MAN SE and others* [2022] CAT 25, §194.

27 *Road Haulage Association Limited v. MAN SE and others* [2022] CAT 25, §223.

28 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).

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 an early determination of this kind 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.

The CAT concluded that neither claim should be certified on an opt-out basis. The CAT reasoned that the claims as currently formulated were very weak, in particular in failing to articulate the basis on which the underlying conduct was said to have caused market-wide loss. Furthermore, it was considered that there was no practical reason why the proposed proceedings could not be brought on an opt-in basis, given that the claimants would, on the whole, be sophisticated corporate entities with high-value individual claims. The CAT did, however, refrain from striking out the *FX Applications* on the basis that the relevant area of law was uncertain, which made it inappropriate to do so without giving the applicants an opportunity to address the CAT's concerns. The CAT did grant the PCRs an opportunity to reformulate their applications on an opt-in basis. However, both PCRs previously indicated that it was very likely that it would not be possible to sign up sufficient claimants to make an opt-in claim viable. As a result of its refusal to certify either application, there was no formal need for the CAT to determine the carriage dispute. Nevertheless, the CAT indicated that, had it been required to, it would have marginally preferred *Evans* over *O'Higgins*. The judgment represents the first time since the Supreme Court's decision in *Merricks* that the CAT has refused to certify a CPO. It serves as a reminder to future class representatives that, despite the relatively low bar for certification set in *Merricks*, the CAT's gatekeeper function has not entirely dissipated. Both PCRs have since commenced appeals and parallel judicial review applications against the CAT's judgment, which are due to be heard in April 2023.

Other significant opt-out class actions

There have also been significant developments in the past year on a number of other CPO applications. As explained below, claimant law firms and funders appear to be targeting the largest global technology companies in particular – over half of the applications issued in the past two years have been against such companies.

In July 2022, the certification hearing took place in a case against Alphabet Inc and various other Google entities (together, Google).[29] The application alleges that Google has abused its dominant position in the market by engaging in various exclusionary practices in relation to the Google Play Store. The PCR alleges that as many as 19.5 million UK consumers overpaid for in-app content as a result of the company's Play Store restrictions.

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

The claim was certified on 31 August 2022.[30] On 16 December 2022, the CAT published an order giving directions on a number of points, including disclosure, factual witness evidence and expert evidence. The CAT also directed that the trial be listed from the first available date on or after 1 September 2025 with a time estimate of eight weeks.

A CPO application was issued on 14 February 2022 against (1) Meta Platforms, Inc and some of its subsidiaries (together, Meta) for loss and damage caused by alleged abuse of its dominant position, by imposing unfair terms, prices and other trading conditions on its users. 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. The certification hearing took place in January 2023 and judgment was handed down on 20 February 2023. The CAT found significant problems with the pleaded claims and the methodology proposed by the PCR. Specifically: (1) the CAT found that the proposed legal basis for assessing compensation owing to the class varies materially between the three alleged abuses, whereas the PCR's economic analysis sought to provide a singular response to Meta's alleged wrongdoing; and (2) the PCR's economic analysis failed to consider the two-sided nature of the relevant market, and risks incorrectly matching alleged 'excess profits' earned by Meta from advertisers with alleged losses suffered by users. However, instead of rejecting the CPO application entirely, the CAT ordered that the proceedings should be stayed for six months to allow the PCR to file additional evidence setting out 'a new and better blueprint leading to an effective trial of these proceedings'.

In addition, there is a claim against Apple Inc (Apple) related to the alleged loss suffered by British consumers and business entities as a result of its conduct in relation to concealing battery issues with certain iPhone models, and its decision to slow down the processors in approximately 44.2 million iPhones. Apple, which acknowledges the 'throttling' effect of the software update, maintains that this served to prevent the phones from shutting down unexpectedly. The company did not, however, offer users the option to disengage the setting and did not inform users that their phones were being slowed intentionally. Justin Gutmann, working with law firm Charles Lyndon, has filed a complaint with the CAT against Apple over its processors decision, claiming more than £750 million in damages. The application was made on 17 June 2022, and a case management conference took place on 22 November 2022.

There have also been several announcements in the media regarding a number of further potential proceedings against technology companies. For example, Google faces a further opt-out claim alleging that it engaged in anticompetitive conduct and the abuse of its dominant position in the advertising technology market in the United Kingdom and the Netherlands. The claim seeks to recover compensation for owners of websites carrying banner advertising, who claim that Google's market abuse reduced publisher advertising revenues by up to 40 per cent. It is estimated that UK publishers could be owed £13.6 billion in compensation.[31] A CPO application was issued on 30 November 2022.

In addition, 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 14 November 2016. The claim alleges that Amazon abuses its status as the dominant online

30 *Elizabeth Helen Coll v. Alphabet Inc and Others* [2022] CAT 39.

31 See, for example, the following Press Gazette article: https://pressgazette.co.uk/platforms/google-adtech-lawsuit-uk/.

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 it is the best deal.

As at the time of writing, the largest four global technology companies each, therefore, faces the prospect of defending very large CPO claims in 2023.

Clarification on certification standard and post-certification procedural innovations

As discussed above, the Court of Appeal's judgment in May 2022 in *La Patourel*[32] was significant in offering greater clarity on whether a claim can be pursued on an opt-in or opt-out basis. In addition, the Court of Appeal's decision in the *Trains Applications* considered whether issues relating to proof of liability, as opposed to quantum, could be determined on an aggregate basis (or whether the position of each class member needed to be assessed individually).

With so many CPOs having been granted over the past few years, the CAT was also forced in 2022 to confront a number of questions about how to approach the case management of opt-out claims post-certification in the form of rulings dealing with, for example, split trials and timetables for trial. In *Kent v. Apple*,[33] for example, Apple applied to split the proceedings in two, with the issues of market definition and dominance to be determined first, and the remaining issues of abuse, causation and quantum second. Dr Kent opposed the application on the basis that there was no 'clean split' between the issues and the CAT agreed, dismissing Apple's application at the hearing. Only a few weeks later, however, a separate panel of the CAT ordered that a trial for liability should be split off and heard before issues of causation and quantum in *Boyle v. Govia*,[34] on the basis that time and cost could be saved if Mr Boyle lost his case on liability. Notably, however, the parties had agreed to this split.

A key question for the development of the collective regime to date has been how collective claims will be managed where separate claims are also being brought by claimants elsewhere in the supply chain. This question was answered on 6 June 2022, when the CAT published its Practice Direction 2/2022: Umbrella Proceedings,[35] the effect of which is that the CAT can now group together different proceedings that 'may raise issues, concern matters, or have features that are not only particular to those proceedings but are also ubiquitous', which may then 'be hosted in different Proceedings ("Host Cases") when they arise out of a broadly similar economic and/or regulatory landscape'. In effect, this allows the CAT to take a unified approach to the inevitable overlap in issues between claims. By way of example, of the collective proceedings that relate to the subject matter of the Interchange

32 *Justin Le Patourel v. BT Group PLC* [2022] EWCA Civ 593.

33 *Dr. Rachael Kent v. Apple Inc and Apple Distribution International Ltd* [2022] CAT 45.

34 *David Courtney Boyle v. Govia Thameslink Railway Limited & Others* [2022] CAT 46.

35 CAT Practice Direction 2/2022, available online: https://www.catribunal.org.uk/sites/cat/files/2022-06/Practice%20Direction_Umbrella%20Proceedings_06%20June%202022_0.pdf.

Fee Umbrella Proceedings,[36] *Merricks*, although not part of these Umbrella Proceedings,[37] is being jointly case managed alongside them. In addition, a potential umbrella proceedings order is to be considered at the case management conference in *Volkswagen AG and others v. MOL (Europe Africa) and others*[38] (*VW*) in March 2023. *VW* concerns claims brought against some addressees of the European Commission's settlement decision dated 21 February 2018 regarding roll-on roll-off services.[39] The potential umbrella proceedings order would be with the CPO application brought by Mark McLaren Class Representative Limited,[40] which is a follow-on claim arising out of the same European Commission settlement decision.

The rise of 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.

The emergence of numerous large-scale environmental claims being brought by way of group litigation has raised interesting questions relating to the jurisdiction of the English courts and the implications for UK-domiciled entities of alleged wrongdoing by overseas parties.

Perhaps the most notable ongoing ESG case is *Município de Mariana and others v. BHP Group plc and another* (*BHP*), which illustrates the alternative routes by which UK-domiciled parent companies may resist claims brought against them for the activities of foreign subsidiaries.[41] 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 the High Court and the Court of Appeal's initial refusal to allow the claimants permission to appeal against the strike-out order, the Court of Appeal, on 27 July 2021, allowed the claimant's application under CPR 52.30 to reopen the decision and granted

36 Case No. 1517/11/7/22 (UM).

37 1266/7/7/16 *Walter Hugh Merricks CBE v. Mastercard Incorporated and Others*; and then the four proceedings brought simultaneously in 1443/7/7/22 *Commercial and Interregional Card Claims I Limited v. Visa Inc & Others*; 1444/7/7/22 *Commercial and Interregional Card Claims II Limited) v. Visa Inc & Others*; 1441/7/7/22 *Commercial and Interregional Card Claims I Limited v. Mastercard Incorporated & Others*; 1442/7/7/22 *Commercial and Interregional Card Claims II Limited v. Mastercard Incorporated & Others*. Note that the *Merricks* proceedings are stayed, pending the outcome of the Interchange Fee Umbrella Proceedings evidential hearing in May 2023.

38 Case No. 1528/5/7/22.

39 Case AT. 40009 – *Maritime Car Carriers.*

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

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

permission. It was noted in the judgment that this decision did not necessarily mean that the courts would be more willing to reopen a decision to refuse permission than was the case previously, as the combination of circumstances in this case was considered 'truly exceptional'.

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 relation to abuse of process, the judge had erred in concluding that the proceedings were irredeemably unmanageable and had wrongly relied on *forum non conveniens* factors as part of his analysis on abuse of process. As regards BHP Group (UK) Ltd's application under Article 34 of the Recast Brussels Regulation (Brussels Recast),[42] although the court should take a broad approach to whether actions in England and abroad are related, and to whether a judgment in the related Brazilian action was capable of recognition in this jurisdiction, a stay was not necessary for the administration of justice. In BHP Group Limited's *forum non conveniens* application, it had not been established that a single action in Brazil was a clearly and distinctly more appropriate forum in which the claims could more suitably be tried; further, the claimants had established that there was a real risk that they could not proceed together in a single action in Brazil.

The defendants were ordered to file a defence without prejudice to their application for permission to appeal to the UK Supreme Court (which remains pending at the time of writing). The defendants have 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. A first-stage liability trial will be held in April 2024.

Another major ESG case involves Tesco plc (Tesco). It is alleged that Burmese migrants were made to work up to 99 hours a week for unlawful wages and in forced labour conditions at a factory in Thailand making clothes for Tesco's F&F clothing range. The workers are seeking compensation from both Tesco and its auditing companies, Intertek Group plc and Intertek Testing Services (Thailand) Limited (together, Intertek), which inspected and certified the working conditions and practices. The F&F clothing business is worth £1.7 billion and it is claimed that a significant proportion of its profits are likely to be attributable to the low operating costs and use of cheap or free labour. The claimants assert that Tesco was aware, or ought reasonably to have been aware, of the unlawful housing conditions and factory working conditions and practices. They also allege that Intertek consistently conducted audits at the relevant factories between 2017 and 2020 and did not accurately identify or report what was happening. Tesco is accused of negligence for permitting, facilitating and failing to prevent the unlawful working and housing conditions that caused the workers injuries and losses. Tesco and Intertek are also accused of being unjustly enriched at the expense of the adult workers and are potentially liable to make restitution for that enrichment under Thai law.

Securities actions

On 17 May 2022, the High Court handed down its long-awaited judgment in *ACL Netherlands BV & Others v. Lynch & Others* (*Autonomy*).[43] The judgment followed a previously published summary of conclusions in which the High Court confirmed that the claimants had substantially succeeded in their claims against two former executives of Autonomy

42 Regulation (EU) No. 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast) (Brussels Recast).

43 *ACL Netherlands BV & Others v. Lynch & Others* [2022] EWHC 1178 (Ch).

Corporation Limited (ACL). The successful claims were brought under, among various other statutory and common law provisions, Section 90A of the Financial Services and Markets Act 2000 (FSMA). The judgment is significant, not only for its length and complexity but also because it is the first Section 90A FSMA case to come to trial in this jurisdiction.

Section 90A 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 (PDMR) 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 recent years, there has been a growing interest in securities litigation in the United Kingdom and there have been a number of claims brought under Section 90A or Schedule 10A FSMA. One of the key takeaways from the *Autonomy* judgment is that 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'.[44]

With regard to the subjective test, the Court clarified several key legal questions as to what will amount to 'guilty knowledge'. These questions related to the timing of the knowledge, recklessness, dishonesty and the impact of any advice given by professionals. The Court also confirmed that each of the statements in, for example, a company's annual report, must be taken in turn, with liability to be decided on a statement-by-statement basis.

In the *Autonomy* case, the alleged liability of ACL under Section 90A or Schedule 10A FSMA was used as a stepping stone to a claim against the defendants. ACL accepted full liability to its shareholders and sought to recover in turn from the defendants as PDMRs of ACL at the relevant time. The Court said that there was no conceptual impediment to this but that it was right to bear in mind that, in interpreting the provisions and conditions of liability, the relevant question was whether the issuer itself should be liable. This may open the door for future mergers and acquisitions disputes to be brought by way of a Section 90A or Schedule 10A FSMA claim by aggrieved purchasers against the target company in order, ultimately, to pursue a claim against former directors of the target company, based on breaches of their duties owed to the target company. Given the growing appetite for ESG-related litigation (detailed above), the clarity provided by this judgment is very likely to be put to use by shareholders considering bringing ESG claims against companies.

44 *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).

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.[45] 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[46] so long as the same-interest requirement is met.[47]

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.[48] 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 that sought to be represented, which was drawn so widely that it was described by the court as 'fatally flawed'.[49] 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.[50] 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

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

46 *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.

47 CPR 19.6(1).

48 *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.

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

50 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,[51] 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'.[52]

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 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',[53] 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.[54] 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',[55] 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'.[56] Nonetheless, the court has discretion in granting the order.[57] There is no guidance as to how this discretion is to be exercised,[58] though the overriding objective would still be applicable.[59] This was illustrated in the High Court judgment in *Lungowe v. Vedanta Resources Plc and others (Vedanta)*.[60] The

51 CPR 19.6.

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

53 CPR 1.1(2)(d).

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

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

56 CPR 19.10.

57 CPR 19.11(1).

58 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'.

59 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 other v. Link Fund Solutions* [2022] EWHC 3344 (Ch).

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

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,[61] 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.[62] This is in part because the standard of commonality is lower.

There are no special requirements for a GLO application,[63] although the applicant should both consider the preliminary steps[64] and ensure that his or her application contains the prescribed general information.[65] 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.[66] Nevertheless, the court may give directions[67] 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, 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 111 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.

61 PD 19B, Paragraph 2.3(2).

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

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

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

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

66 CPR 19.12(1)(a).

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

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 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 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, 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,[68] 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 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 only required 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.

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

68 Under CPRs 19.6 and 19.11.

a CPO. Principally, the CAT must determine that the claims 'raise the same, similar or related issues of fact or law'[69] and that a collective proceeding would be appropriate based upon a preliminary assessment of the merits and available alternative regimes.[70]

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 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.[71] However, failure to meet the deadline does not automatically mean that the claim cannot be added to the group.[72]

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'.[73] 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.[74] 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.[75] 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.[76]

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

69 Section 47B(6), CA.

70 Rule 79(2), CAT Rules 2015.

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

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

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

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

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

76 Rule 85(4), CAT Rules.

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.[77] 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 securities claims, some of which have already seen significant settlements,[78] 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.[79] 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.[80] 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.[81] In this October 2018 decision, the High Court ordered

77 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.

78 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.

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

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

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

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.[82] 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*[83] the wide costs discretion of the court was noted again and 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.[84] 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.[85] 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.[86] 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*,[87] 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

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

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

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

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

86 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.

87 See footnote 78.

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.[88] 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 judges, rather than as a binding rule.[89] 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, except 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 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 historic position was that the same-interest requirement excluded damages from being recoverable for the class.[90] However, there has been an incremental liberalisation such that it is established that damages can be claimed in a representative action.[91] The damages awarded, however, in proceedings governed

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

89 *Chapelgate Credit Opportunity Master Fund Ltd v. Money & Others* [2019] EWHC 997 (Ch); *Chapelgate Credit Opportunity Master Fund Ltd v. Money & Ors* [2020] EWCA Civ 246..

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

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

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).[92]

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.[93] 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.[94] 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'.[95] Any other remaining unpaid damages are to be paid to charity.[96]

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 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.

As previously noted, it is increasingly likely that third-party litigation funding will continue to grow in English class and group action litigation. The consequences of this could be significant in 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

92 With regard to the measure of damages for claims brought under Section 90A 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.

93 Section 47C(1), CA.

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

95 Section 47C(6), CA.

96 Section 47C(5), CA.

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 United States), 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.

In contrast, the CA contains provisions, implemented by the CRA, for a collective settlement scheme.[97] 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 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'.[98] 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.[99] 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 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.[100] 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.[101] 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.[102] It awaits to be seen, therefore, how the collective settlement scheme is adopted.

97 Section 49A, CA.

98 Section 49A(5), CA.

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

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

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

102 Section 47C(5), CA.

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 United States to pursue relief through class actions, the United States' Supreme Court's decision in *Morrison v. National Australia Bank*,[103] which effectively barred securities actions without a US nexus,[104] 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, is likely to continue to drive an increase in this kind of work in the English courts.

While the United Kingdom 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 disputes of this kind 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 United Kingdom 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 United Kingdom's accession. The European Commission formally blocked the United Kingdom'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 United Kingdom acceded to the Lugano Convention, this would have provided for a broadly similar regime as under Brussels Recast. In light of the United Kingdom's failure to accede to the Lugano Convention, the United Kingdom'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.[105] 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 United Kingdom's departure from the EU will remain an area to monitor.

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

104 '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.

105 Article 4, Brussels Recast.

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 United Kingdom's collective proceedings regime is still evolving following the Supreme Court's decision in *Merricks*, but the clear indication is that the CAT is applying the Supreme Court's test in a manner that quite readily allows for certification. A number of cases discussed above, including *Le Patourel* and the *Trains Applications*, all exhibit a similar liberal approach of this kind. 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. This creativity has manifested firstly in the emergence of a greater number of, traditionally more speculative, stand-alone claims, which can be seen in the increasing number of CPO applications being pursued, including those that have been issued in the past year against the largest global technology companies. Secondly, there is an element of creativity in the growing confidence among claimants to find novel ways to advance ESG-related collective proceedings in the CAT, which are stretching the boundaries of what is properly to be considered competition law.

The next few years, therefore, are expected to be very instructive regarding the operation of the regime. Now that a number of claims have achieved certification, how the CAT approaches the task of managing these very large claims will also be seen, particularly where related non-collective proceedings have been brought by other claimants. It remains to be seen exactly how the CAT will choose to exercise its new power to make umbrella proceedings orders to enable collective proceedings and other related proceedings to be dealt with together.

The year 2023 will be an interesting one 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.

Appendix 1

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