THE CLASS ACTIONS LAW REVIEW

FIFTH EDITION

Editor
Camilla Sanger

THE LAWREVIEWS

THE CLASS ACTIONS LAW REVIEW

FIFTH EDITION

Reproduced with permission from Law Business Research Ltd
This article was first published in April 2021
For further information please contact Nick.Barette@thelawreviews.co.uk

Editor
Camilla Sanger

THE LAWREVIEWS

PUBLISHER
Tom Barnes

SENIOR BUSINESS DEVELOPMENT MANAGER
Nick Barette

BUSINESS DEVELOPMENT MANAGER
Joel Woods

SENIOR ACCOUNT MANAGERS
Pere Aspinall, Jack Bagnall

ACCOUNT MANAGERS
Olivia Budd, Katie Hodgetts, Reece Whelan

PRODUCT MARKETING EXECUTIVE
Rebecca Mogridge

RESEARCH LEAD
Kieran Hansen

EDITORIAL COORDINATOR
Gracie Ford

PRODUCTION AND OPERATIONS DIRECTOR
Adam Myers

PRODUCTION EDITOR
Martin Roach

SUBEDITOR
Anne Borthwick

CHIEF EXECUTIVE OFFICER
Nick Brailey

Published in the United Kingdom
by Law Business Research Ltd, London
Meridian House, 34–35 Farringdon Street, London, EC4A 4HL, UK

www.TheLawReviews.co.uk

ISBN 978-1-83862-764-5

Printed in Great Britain by
Encompass Print Solutions, Derbyshire
Tel: 0844 2480 112

ACKNOWLEDGEMENTS

The publisher acknowledges and thanks the following for their assistance throughout the preparation of this book:

ARENDT & MEDERNACH

ARNTZEN DE BESCHE

CMS CAMERON MCKENNA NABARRO OLSWANG LLP

CRAVATH, SWAINE & MOORE LLP

GORRISSEN FEDERSPIEL

HENGELER MUELLER

JOHNSON WINTER & SLATTERY

KACHWAHA & PARTNERS

KENNEDYS

LOYENS & LOEFF

NAGASHIMA OHNO & TSUNEMATSU

PINHEIRO NETO ADVOGADOS

RONEN ADINI & CO

SIM CHONG LLC

SLAUGHTER AND MAY

TAMAYO JARAMILLO & ASOCIADOS

URÍA MENÉNDEZ

CONTENTS

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, as reflected in this fifth 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 technology, as well as greater recognition and experience of its limitations, is giving rise to ever more stringent standards, offering 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 sophisticated and active in promoting and pursuing such claims, and local laws are being updated to facilitate such actions before the courts.

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

Camilla Sanger
Slaughter and May
London
March 2021

Chapter 6

ENGLAND AND WALES

Camilla Sanger, Peter Wickham and James Lawrence[1]

I INTRODUCTION TO THE CLASS ACTIONS FRAMEWORK

Group litigation 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 past six years in particular have seen the group litigation sector undergo rapid development and expansion. One of the catalysts for this growth was the introduction of true opt-out class actions, as lawyers from the United States (US) would recognise them, in the context of certain competition law claims. 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, has meant that collective actions and group claims have now become an attractive and feasible means of redress across a variety of sectors. The Supreme Court's recent landmark decision in *Mastercard Incorporated and others v. Walter Hugh Merricks CBE* (*Merricks*)[4] has opened the door to collective actions in the UK and this, together with other recent developments in the sphere of group claims, means that England is now one of the most attractive jurisdictions in which to commence group litigation.

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

---

1 Camilla Sanger is a partner and Peter Wickham and James Lawrence are associates at Slaughter and May. The authors would like to thank Chaya Kupperman for her 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.

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).[5] 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 over 100 GLOs made across a wide variety of cases, including environmental claims, product liability claims, tax disputes, claims relating to financial investments, claims relating to data breaches, and shareholder claims.[6] Both the amounts in dispute and the number of claimants have varied. GLOs are fairly popular among claimants, compared to representative actions (considered further below) because of the simpler procedure and lower standard of commonality required between class members.

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. However, the court's permission is needed to enforce a judgment or order 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 not been widely used, in large part because of the restrictive manner in which the same-interest requirement has been interpreted by the courts. Nonetheless, in October 2019, the Court of Appeal allowed a claim to proceed under CPR 19.6 in *Lloyd v. Google LLC* (*Lloyd* – discussed further below). While the decision has been appealed to the Supreme Court, the Court of Appeal's judgment may indicate a change in the courts' attitude towards the representative action regime.

The other opt-out mechanism available to litigants in England is the collective proceedings regime. The collective proceedings regime is relatively new, having only been introduced by the Consumer Rights Act 2015 (CRA), by way of amendment to the Competition Act 1998 (CA). The CRA establishes a US-style class action regime in English law for the first time, although currently only for private competition litigation.[7] Under a private competition action, a CPO is sought from the Competition Appeal Tribunal (CAT), which, if granted, then determines the scope of the class that will be bound by any subsequent judgment.

Prior to the CRA, there had been a specific opt-in procedure for private competition law claims, although this was deemed to have been too restrictive in scope. Given the nature of competition law claims, namely where the loss to the individual is small but the potential class is wide, this opt-out regime seeks to provide the collective redress that is considered imperative for effective remediation. Efforts have been made to introduce similar

5 CPR 19.10. English civil procedure is governed by the CPR and supplementary practice directions (PDs). These can be found, with commentaries and interim updates, in *The White Book* published by Sweet & Maxwell.

6 See https://www.gov.uk/guidance/group-litigation-orders.

7 Consumer Rights Act 2015, Schedule 8, Part 1.

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. Only one attempt to extend the opt-out regime beyond the competition sphere in this way has since been suggested – an amendment to the Data Protection Bill sought to apply the opt-out class action regime to data breaches. However, this was rejected during the passage of the Bill and is not contained in the enacted statute, the Data Protection Act 2018 (DPA 2018).

Despite its limited current application, and the lack of headway made in extending the scope of the regime, 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. The implications of the Supreme Court's decision in *Merricks* (discussed below) are likely to be integral to the perceived success of the CRA regime, and consequently the likelihood of the regime being expanded beyond the competition sphere.

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

II THE YEAR IN REVIEW

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

i Opt-out class action proceedings

The English courts have continued to deal with issues arising from cases where the opt-out class action procedure for competition cases has been used.

Merricks

Filed on 8 September 2016 with the CAT,[9] *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*)).[10] The claim followed on from the

8 CPR 3.1(2).

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

10 *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

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 on the basis that expert evidence adduced at the certification stage failed to demonstrate a commonality of interest owing to the fact it could not be determined how much of the loss had been passed through to each proposed claimant. Upon Mr Merricks' appeal, the Court of Appeal considered for the first time whether it had jurisdiction to hear an appeal against the CAT's refusal to grant a CPO, finding that it did have such jurisdiction provided a point of law was raised.

In April 2019, the Court of Appeal reversed the CAT's decision.[11] It found that: (1) the proper standard for evidence for the proposed class representative (PCR) is no higher than a 'real prospect of success', so the methodology proposed by the PCR for establishing loss was sufficient for the CPO stage in the proceedings; (2) aggregate damages need not be proposed to be distributed on a compensatory basis (as had been envisaged by the CAT); and (3) loss does not need to be established through calculating individual loss. The Court of Appeal also held that refusal to grant the CPO would be likely to mean that no follow-on proceedings would succeed, given that the small sums involved for each individual would make individual litigation impractical, so there were strong policy reasons for granting the CPO.

On 11 December 2020, in the most important decision for the collective proceedings regime to date, the Supreme Court dismissed Mastercard's appeal and largely upheld the Court of Appeal's decision (albeit on slightly different grounds). The Supreme Court acknowledged that the CAT has an important 'gatekeeping role' and a wide discretion to decide whether a CPO should be certified. However, the majority decision of the Supreme Court identified five errors of law in the CAT's decision.

First, the CAT failed to recognise that the pass-on of multilateral interchange fees was a common issue, and this should have been an important factor in favour of certification. For the majority, the CAT's consideration of certification never recovered from this flawed starting point.

Second, the CAT placed too much weight on its decision that the case was not suitable for aggregate damages. While this is a relevant factor when considering the eligibility of claims for collective proceedings, it is not a condition to certification.

Third, the CAT should have applied a test of 'relative suitability'. In considering whether claims are suitable for collective proceedings, the correct approach was to ask whether collective proceedings were suitable relative to the alternative of bringing individual claims. If forensic difficulties would have been insufficient to deny a trial to an individual claimant, they should not, of themselves, have been sufficient to deny certification.

Fourth, and most serious of the CAT's errors in the majority's estimation, the CAT was wrong to decide that difficulties with incomplete data are a good reason to refuse certification. A court must do its best on the evidence available to quantify a claimant's loss, even if that task is complex and difficult.

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.

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

Finally, the CAT was wrong to require that the proposed method for distribution of damages take account of the loss suffered by each individual member of the class. A central purpose of the power to award aggregate damages in collective proceedings is to avoid the need for individual assessment of loss, and the application of the compensatory principle is not essential in relation to the distribution of aggregate damages.

The Supreme Court's landmark judgment marks an important step for the future of England's nascent class action regime. The decision provides long-awaited guidance on the approach to certification of collective proceedings in the CAT. Nonetheless, while the Supreme Court's judgment represents a significant development, the longer-term impact remains to be seen. Other opt-out class actions that were stayed pending the outcome in *Merricks* (discussed below) are now expected to progress to certification hearings, in turn generating further developments as they are determined by the CAT. With collective proceedings ultimately being products of their own specific facts, it is not yet certain how the CAT will conduct its 'value judgment' about the suitability of CPO applications in light of the Supreme Court's judgment. The CAT's re-hearing of *Merricks*, listed for 25 March 2021, will no doubt be closely watched given its potential impact on a vast class of claimants.

Other CPO claims

Other opt-out class actions that were stayed pending *Merricks* (discussed below) will now progress to certification hearings with the benefit of authoritative guidance. While it remains to be seen whether the cautionary note sounded by the dissenting judges – that the approach to 'suitability' set out by the majority has the potential to 'very significantly diminish the role and utility of the certification safeguard' – it is likely that the Supreme Court's decision will pave the way for more collective proceedings to be commenced in England. In this respect, it is notable that on 15 January 2021, just over a month after the *Merricks* decision was handed down, an opt-out collective action was launched in the CAT against BT Group plc (BT) for almost £600 million, on behalf of approximately 2.3 million landline customers, for alleged historic overcharging.[12]

Justin Gutmann v. First MTR South Western Trains Limited and another, and Justin Gutmann v. London & South Eastern Railway Limited (together, the Trains Applications)

The first stand-alone claims brought under the opt-out collective proceedings regime were the *Trains Applications*.[13]

These applications, brought in February 2019, involve claims against UK rail operators concerning the availability of certain rail fares and involve proposed classes in the millions. As with the *Trucks Applications* (discussed below), the CAT decided to stay the CPO application, pending the *Merricks* decision. Unlike the other claims mentioned below, the *Trains Applications* will need not only to overcome the hurdles detailed above to obtain a CPO, but also to demonstrate a breach of the underlying competition law. Save for the claim recently brought against BT (which arose out of a review, conducted by Ofcom in 2017, of the market for standalone landline telephone services), the other CPO applications that

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

13 Respectively *Justin Gutmann v. London & South Eastern Railway Limited* (case No. 1305/7/7/19) and *Justin Gutmann v. First MTR South Western Trains Limited and Another* (case No. 1304/7/7/18).

have been brought to date are follow-on actions, meaning that a breach of competition law has already been established and the claims follow on from the infringement decision. The success or otherwise of this case may well, therefore, have a significant impact on whether further stand-alone claims are brought in the future. The case is also of particular interest as it is the first CPO application due to be heard by the CAT following the Supreme Court's judgment in *Merricks*, with the certification hearing relisted for 9 March 2021.

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

The *Road Haulage Association Limited v. MAN SE and others* (*Road Haulage*)[14] 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*)[15] CPO application has been brought as opt-out collective proceedings at first instance, but opt-in in the alternative.

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

Broadly, the proposed class across the *Trucks Applications* encompasses those who purchased or leased new or pre-owned medium or heavy trucks during the relevant period, but the claim forms and expert reports of the two applicants take different approaches to defining the classes. To date, over 10,000 members have signed up to the *Road Haulage* proceedings,[16] although this number is expected to increase if the CAT grants the CPO. At a case management conference held in December 2018, the CAT directed that both claims should be heard together, and also suggested that there was nothing under the collective proceedings regime that prevented two opt-in proceedings being certified for the same infringement. This raises the possibility that both the *UK Trucks* and *Road Haulage* applications could be certified as opt-in proceedings, potentially allowing claimants to choose between the two proceedings (although this will depend on how the class is formulated).

Following the decision in *Merricks,* the certification hearings have been listed for April 2021. It is unclear, however, how the courts will manage the different claims, as proceedings brought by individual claimants have now made significantly more progress than the *Trucks Applications.*

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

The *FX Applications*[17] 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.

14 *Road Haulage Association Limited v. Man SE and others* (case No. 1289/7/7/18).

15 *UK Trucks Claim Limited v. Fiat Chrysler Automobiles N.V. and others* (case No. 1282/7/7/18).

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

17 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).

The unique point in the *FX Applications* is that this is the first time that competing opt-out collective proceedings have been filed in the UK. Consequently, the claims raise novel questions as to how competing applications should be managed efficiently and fairly, and the considerations that the CAT should take into account when deciding which claim is the most suitable. In a judgment handed down on 6 March 2020, the CAT concluded that the question of which class representative is the most suitable (termed a 'carriage dispute') should not be dealt with as a preliminary issue because the carriage dispute 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, which has since been scheduled for 12 July 2021.

ii Significant environmental actions

Further significant developments are being seen in respect of large-scale environmental claims, which are raising interesting questions relating to the jurisdiction of the English courts and the implications of alleged wrongdoing by overseas parties on UK-domiciled entities.

On 12 February 2021, the Supreme Court handed down its judgment in *Okpabi and others v. Royal Dutch Shell Plc and another* (*Okpabi*) on a jurisdiction appeal, providing important clarification on the approach to jurisdictional challenges and the potential liability of parent companies for the activities of their foreign subsidiaries.[18] The proceedings are brought by approximately 42,500 Nigerian farmers and fishermen against Royal Dutch Shell plc (RDS), a UK-domiciled company, and its Nigerian subsidiary, Shell Petroleum Development Company of Nigeria Ltd (SPDC), over environmental pollution from pipelines operated by SPDC. Applying the guidance given by the Supreme Court two years earlier in *Vedanta Resources Plc and another v. Lungowe and others* (*Vedanta*),[19] a landmark judgment concerning alleged toxic emissions from the Nchanga copper mine in Zambia, the Supreme Court unanimously ruled that there is a good arguable case that RDS owes a duty of care to those allegedly harmed by the acts of its foreign subsidiary and that the claim must, therefore, proceed to full trial in the English courts. Two key principles arise from the Supreme Court's judgment. First, in assessing whether a claim against an anchor defendant raises a real issue to be tried (which *Vedanta* illustrates is a requirement for the English court's jurisdiction), the court should avoid conducting a mini-trial on the basis of the evidence and instead focus its analysis on the particulars of claim and whether, on the basis that the facts alleged are true, the cause of action has a real prospect of success. The practical effect of this is that it will be hard for a defendant to succeed on an argument that a claim has no real prospect of success unless it can be shown that the facts relied upon by the claimant are demonstrably untrue. Second, in line with *Vedanta*, there is no special or separate parent company duty of care test; whether such a duty arises will be determined on the application of the ordinary principles of tort law. In *Okpabi*, the Supreme Court found that the vertical corporate structure of the Shell group, and the control it allegedly afforded Shell over SPDC, was at least capable of giving rise to a duty of care. *Okpabi* will now return to the High Court, where the defendants

18 *Okpabi and others v. Royal Dutch Shell Plc and another* [2021] UKSC 3.

19 *Vedanta Resources PLC and another v. Lungowe and others* [2019] UKSC 20.

may pursue further challenges to the English court's jurisdiction, including arguing, on the basis of another aspect of the decision in *Vedanta,* that England is not the appropriate forum for a claim whose focus is Nigeria.

Município de Mariana and others v. BHP Group plc and another (*BHP*) illustrates that there are alternative routes by which UK-domiciled parent companies may resist claims brought against them for the activities of foreign subsidiaries.[20] The proceedings were brought against BHP Group Plc and BHP Limited, respectively English and Australian companies that sit at the head of the BHP group, over the Samarco dam failure. The dam was owned and operated by a Brazilian-incorporated joint venture between Vale SA and a Brazilian subsidiary of BHP Group Plc. The claimed amount of approximately £5 billion, brought on behalf of over 200,000 claimants, makes it one of the largest claims in English legal history. However, in November 2020, the High Court struck out the claim as an abuse of process in light of concurrent proceedings concerning the same matters in Brazil. The High Court held that allowing the English claim to proceed in parallel would result in wasted time, cost and duplication of effort. There was also an acute risk of irreconcilable judgments. Were the case not to have been struck out on that basis, the judge noted that he would have stayed the claim against one or more of: (1) both defendants for abuse of process; (2) the English entity, BHP Group Plc, pursuant to 'related action' provisions contained in the Recast Brussels Regulation (Brussels Recast); (3) the Australian entity, BHP Limited, on *forum non conveniens* grounds; and (4) both defendants on case management grounds.[21] Following the High Court's refusal to allow the claimants permission to appeal, the claimants have applied to the Court of Appeal for permission.

This decision may provide some comfort to multinationals, demonstrating that the English courts will not lightly permit claims against UK-domiciled parent companies where there are parallel proceedings in another jurisdiction. Nonetheless, particularly in light of the subsequent Supreme Court judgment in *Okpabi*, the judgment should not be interpreted as the judiciary moving away from the trend towards actions against UK-domiciled parent companies in respect of alleged misconduct by overseas subsidiaries. The particular facts of the case were central to the High Court's decision: there were numerous proceedings concerning the same subject matter well underway in Brazil, the claimants had access to multiple existing routes of substantive redress in Brazil and over 150,000 of the claimants in the English proceedings had already received compensation.

iii Significant data breach actions

The past couple of years have also seen an increase in activity in the data sector, regarding potential breaches of the DPA 2018 and the associated EU General Data Protection Regulation 2018 (EU GDPR).[22]

In *WM Morrisons Supermarkets plc v. Various Claimants*,[23] a GLO was brought against Morrisons by approximately 9,000 employees for a deliberate data breach by a disgruntled employee who unlawfully disclosed payroll data pertaining to over 100,000 colleagues. In

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

21 ibid., at 265, *per* Turner J.

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

23 *WM Morrisons Supermarkets plc v. Various Claimants* [2020] UKSC 12.

April 2020, the Supreme Court held that, on the facts, the employee's wrongful conduct was not sufficiently connected with the acts that he was authorised to do in his employment so as to find Morrisons vicariously liable.

Furthermore, in *Lloyd,* one of the most significant cases to date for class actions in England, the Court of Appeal granted the claimant permission to serve Google out of jurisdiction in a claim that could involve over four million iPhone users. The claim relates to the 'Safari workaround', which allowed Google to determine the date visited and time spent by users on websites, as well as pages visited and advertisements viewed. Although there was no pecuniary loss or distress, the Court of Appeal found that damages could be awarded under Section 13 of the Data Protection Act 1998 (DPA 1998) for breach of Section 4(4) of the same Act. This is because the information collected by the workaround did hold economic value, and so loss of this data was a loss to the claimant group. Significantly, the Court of Appeal allowed the use of the representative action procedure under CPR 19.6(1) to pursue an opt-out-style claim. Although 'unusual',[24] there was a commonality of interest, as required by CPR 19.6(1), since all claimants had browser-generated information taken without their consent over the same period and in the same circumstances. The Court also noted that it was appropriate to use its discretion under CPR 19.6(2) to allow the class representative to act given the alleged scale of the wrongdoing by Google, especially where there might otherwise be no other remedy. The alleged wrongdoing also distinguishes this case from *Morrisons*. In *Morrisons*, the data controllers were themselves victims of wrongdoing; on the other hand, in *Lloyd*, the controller allegedly sought to gain from the data breach. The Supreme Court is set to hear the appeal in April 2021. If the Supreme Court upholds the Court of Appeal's decision in *Lloyd*, it will allow claimants to more easily bring representative actions for data breach claims, on the basis that all the claimants have lost control of their data and, therefore, meet the 'same interest' test.

Separately, following the Information Commissioner's Office issuing its maximum penalty fine of £500,000 to Facebook for processing the personal data of users unfairly by allowing app developers access to their information without sufficiently clear and informed consent, a consumer representative action has been brought on behalf of affected users. The claim, launched in February 2021, seeks damages from Facebook under the DPA 1998. It is estimated that at least a million UK users were affected.

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.

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

ii Commencing proceedings

Representative actions

As noted above, not only can representative actions be utilised for any type of claim, there are also no requirements pertaining to the number of representees, be they claimants or defendants. The principal requirements for a representative action are:

a the representative is a party to the proceedings; and

b 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.[25] 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[26] so long as the same-interest requirement is met.[27]

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.[28] 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 sought to be represented, which was drawn so widely that it was described by the court as 'fatally flawed'.[29] 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. Furthermore, the overriding objective is important too in shaping its application. Concepts similar to proportionality can be distilled from the case law. Although the CPR appears to require an identical interest,[30] 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'.[31]

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

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

26 *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.

27 CPR 19.6(1).

28 *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.

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

30 CPR 19.6.

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

(such as breaches regarding special category data), making it possible to find a same interest across the whole class. The Supreme Court's judgment in *Lloyd* is expected to provide further guidance on the approach to this test.

In light of the requirements for the courts to consider the overriding objective, particularly that the dispute is dealt with 'expeditiously and fairly',[32] 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.[33] They are similarly premised on the notion that where there are similar facts and issues to be resolved, it is more efficient that these are dealt with collectively. Given the costs inherent in litigation, such efficiencies have enabled claimants to recover losses previously unobtainable. It is important to distinguish, however, between instances where the determination of a single issue is common to all the claims, and instances where a defendant is liable to numerous claimants but each is separate as to liability and quantum. Where there are no generic issues, 'nor generic issues of such materiality as to save costs in their determination',[34] 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'.[35] Nonetheless, the court has discretion in granting the order.[36] There is no guidance as to how this discretion is to be exercised,[37] though the overriding objective would still be applicable. This was illustrated in the recent High Court judgment in *Lungowe v. Vedanta Resources Plc and others*.[38] The first defendant sought a GLO in respect of three separate sets of proceedings, two represented by one firm and the third by another. The two claimant firms submitted that, if a GLO were made, the High Court should keep the two 'strands' separate. The judge, however, noted that the claims shared common facts and issues and were, therefore, ideally suited to the making of a GLO. He observed that the submissions were underpinned by the commercial advantage to the two firms in keeping the proceedings separate. This was not deemed a good reason and was contrary to the ethos of group litigation and the parties' express duty to assist the court in furthering the overriding objective. Similarly, consideration must also be given to whether a representative action would be more appropriate,[39] 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.[40] This is in part because the standard of commonality is lower.

32 CPR 1.1(2)(d).

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

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

35 CPR 19.10.

36 CPR 19.11(1).

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

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

39 PD 19B, Paragraph 2.3(2).

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

There are no special requirements for a GLO application,[41] although the applicant should both consider the preliminary steps[42] and ensure that his or her application contains the prescribed general information.[43] 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.[44] Nevertheless, the court may give directions[45] 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 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 point of contact for the court and the other parties and whose relationship with the other firms must be carefully defined in writing. In addition, claimants are only entitled to instruct one counsel team.

Once a GLO is granted, a deadline is set by which time the other claimants must have been added to the group register. While there have been some notable GLOs granted recently, in particular in respect of the mass data breach claim against Morrisons and the unsuccessful claim brought by 5,800 shareholders against Lloyds Banking Group and its former directors concerning alleged breaches of duty in acquiring HBOS in 2008, it is notable that, since the introduction of the GLO procedure in 2000, there have only been 109 GLOs ordered to date.[46] Whether the increased availability of funding for these types of claims will lead to an increase in GLO applications remains to be seen.

Joint case management

The courts are able to use ordinary case management powers under the CPRs to manage claims brought by multiple claimants. CPR 3.1(2)(g) and (h) allow courts to consolidate or jointly try claims. These powers afford judges significant control and flexibility over the management of the claim, and the decision to use this mechanism in *Okpabi* and *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 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,

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

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

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

44 CPR 19.12(1)(a).

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

46 See https://www.gov.uk/guidance/group-litigation-orders.

sharing certain characteristics (i.e., a class action as ordinarily understood). While collective proceedings are limited solely to competition actions before the CAT, it 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,[47] 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 authority such as the Office of Fair Trading or the European Commission. With 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 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 proceedings. Section 47B CA and Rule 79 of the CAT Rules detail the requirements that must be met for the CAT to make a CPO. Principally, the CAT must determine that the claims 'raise the same, similar or related issues of fact or law'[48] and that a collective proceeding would be appropriate based upon a preliminary assessment of the merits and available alternative regimes.[49] How the CAT applies the 'relative suitability' test articulated by the Supreme Court in *Merricks* will be fundamental to the collective proceedings' operation, reach and success.

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

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,

47 Under CPRs 19.6 and 19.11.

48 Section 47B(6), CA.

49 Rule 79(2), CAT Rules 2015.

the court may give directions stipulating the date by which further claims cannot be added to the group register without the court's permission.[50] However, failure to meet the deadline does not automatically mean that the claim cannot be added to the group.[51]

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'.[52] 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.[53] In certifying a claim as eligible for inclusion in collective proceedings, the CPO must describe the class and any sub-classes along with the provisions for opting in and out of the proceedings.[54] 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.[55]

Process

Given the breadth of the class or group action mechanisms in England, generalities regarding the process of such actions are difficult to discern. For example, liability and quantum may be split depending on the type of claim that is brought, though in other instances, such as in follow-on claims, breach need not even be assessed. The same can be said for assessing the speed at which class actions progress. As regards collective proceedings, it is impossible at present to determine the rate at which these are to progress given how recently they have become available and the preliminary stages that cases under the new CRA regime have reached.[56] 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,[57] they may not provide a good benchmark from which to assess the speed and potential efficiencies of such a group action mechanism.

Disclosure

The disclosure provisions do, however, 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

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

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

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

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

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

55 Rule 85(4), CAT Rules.

56 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.

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

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.[58]

iv Damages and costs

Costs

The general rules on costs are detailed at CPR 44. This provides 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 in class actions, given their size and complexity.

However, as demonstrated by *BritNed Developments Ltd v. ABB AB*,[59] 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. In this decision (in October 2018), the High Court ordered both parties to pay their own multimillion-pound costs, in light of the fact that the claimant was awarded damages significantly lower than that claimed.[60] 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 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, 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.[61] 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. 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.[62] 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.[63]

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

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

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

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

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

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

In *RBS*, however, the court decided at a case management conference in December 2013 that adverse costs should be shared on a several basis in proportion to the size of the individual's subscription cost in the rights issue relative to the total subscription cost for all the claimants on the group register. More recently, following the dismissal of the shareholder claim against Lloyds, the High Court ruled that the claimants' third party litigation funder was jointly and severally liable for the defendants' costs, rejecting the funder's submission that it should be liable only to the extent that the claimants did not satisfy the adverse costs order.[64] 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.[65] 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 is adequate that the PCR has a level of adverse costs cover sufficient for at least a significant part of the proceedings.

Damages

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

With regard to damages for representative actions, the historic position was that the same-interest requirement excluded damages from being recoverable for the class.[66] However, there has been an incremental liberalisation such that it is established that damages can be claimed in a representative action.[67] The damages awarded, however, in proceedings governed

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

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

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

67 *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, though under English law, damages are generally compensatory (e.g., breach of contract, tort).[68]

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.[69] Punitive damages may still be sought in relation to a competition law breach; however, to seek them, the individual would need to opt out from the collective proceedings action and bring an individual claim. The CAT will calculate damages aggregately for the class or sub-class and will not undertake an assessment as to the amount of damages recoverable by each represented person. The Supreme Court's decision in *Merricks* suggests that aggregate damages need not necessarily be distributed on a truly compensatory basis, given that the CAT does not calculate loss for each individual. 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.[70] 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'.[71] Any other remaining unpaid damages are to be paid to charity.[72]

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, there is often a significant and mutual impetus for claimants and defendants to settle class actions out of court. In some instances, such as in securities litigation under Section 90 FSMA, where the cause of action has not been frequently litigated, the absence of clear precedent may encourage the parties to settle to avoid

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

69 Section 47C(1), CA.

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

71 Section 47C(6), CA. Criticisms have been levied at such a system that does not require all victims to exercise their rights to ensure the funder's effective repayment: A Higgins and A Zuckerman, 'Class actions come to England – more access to justice and more of a compensation culture, but they are superior to the alternatives' [2016] CJQ 1. In turn, questions have been raised regarding the potential for conflict between funders and representatives on the one hand, and claimants on the other. The government was concerned about this and initially considered not allowing law firms or third parties to act as representatives. While this provision was removed from the final draft, the CAT Guide, Paragraph 6.30 states that 'conflict between the interests of a law firm or third-party funder and the interests of the class member may mean that such a body is unsuitable to act as a class representative'. Given the potential conflict of interest in a conceivably large proportion of claims, it awaits to be seen what influence this guidance has on the CAT's determinations in certification hearings.

72 Section 47C(5), CA.

uncertainty. With regard specifically to follow-on actions, since breach will have already been determined, the dispute will likely focus on the issues of causation and quantum. Given that the determination of causation and quantum can still be a complex and expensive process, defendants may consider it more economical to settle out of court.

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

In contrast, the CA contains provisions, implemented by the CRA, for a collective settlement scheme.[73] Once a CPO has been made and proceedings are authorised to continue on an opt-out basis, claims may only be settled by way of a collective settlement approved by the CAT. The proposed settlement must be presented to the CAT by the representative and the defendant of the collective proceedings. The settlement need not apply to all of the defendants in the proceedings, merely those who intend to be bound by it. The CAT, however, may only make an order approving the settlement where it deems the terms to be 'just and reasonable'.[74] If the time frame specified in the collective settlement approval order given by the CAT has expired, the collective settlement will be binding upon all those domiciled in the UK who fell within the CPO's defined class and did not opt out, and those domiciled outside the UK who otherwise fell within the defined class and opted in.[75] Opt-in collective proceedings are not subject to such requirements, although they cannot be settled without the CAT's permission before the expiry of the time given in the collective proceedings for a class member to opt in to the proceedings.

The potential success of the collective settlement scheme will, however, be closely tied to a claimant's ability to use the collective action scheme. If the opt-out certification process proves to be unduly restrictive, the defendant will no longer be induced to settle. The residency provisions in the CRA may also present issues to the success of the collective settlement scheme.[76] 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.[77] Nonetheless,

73 Section 49A, CA.

74 Section 49A(5), CA.

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

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

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

certain other provisions may further promote settlement, for instance that any remaining unpaid damages are to be paid to charity.[78] It, therefore, awaits to be seen how the collective settlement scheme is adopted.

IV CROSS-BORDER ISSUES

England is a popular forum for the resolution of disputes, both domestic and international. The reasons for this include the sophistication and probity of English judges, the availability of lawyers and specialists in a range of fields, and perhaps above all, the pre-eminent place of English law in international commercial relations. While many claimants have traditionally (although unnecessarily) looked to the US to pursue relief through class actions, the United States' Supreme Court's decision in *Morrison v. National Australia Bank*,[79] which effectively barred securities actions without a US nexus,[80] 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 UK, and the increasing availability of third-party litigation funding, in combination with the pre-existing attractions of England as a forum, is likely to continue to drive an increase in this kind of work in the English courts.

While the UK formally left the EU on 31 January 2020, and the transition period ended on 31 December 2020, the avowed aim is for continuity and stability, and it may be a number of years before any change in this area materialises. By way of practical example, key tenets of the EU competition regime remain in effect because they are contained within the CA, a free-standing UK statute. Breaches of EU competition law in remaining EU Member States remain actionable in England where an English court is willing to accept jurisdiction over a defendant. The law applicable to such disputes would be determined either according to rules analogous to the current regime or by reference to the formerly applicable, and substantively similar, UK rules. Moreover, unless and until the UK re-accedes to the Lugano Convention,[81] the UK's departure from the EU may also 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.[82] 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 trend in England's class action market is expected to continue, though the implications of the UK's departure from the EU will remain an area to monitor.

78 Section 47C(5), CA.

79 561 U.S. 247 (2010).

80 '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.

81 The UK has applied to re-accede to the Lugano Convention in its own right but at the time of writing, the EU has yet to consent. If the UK accedes to the Lugano Convention, this would provide for a broadly similar regime as under Brussels Recast.

82 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 introduction of opt-out proceedings, combined with decisions in cases such as *Merricks*, *Okpabi* and *Lloyd*, demonstrate the determination of both the legislature and the courts to develop this area, in particular as a key means for individuals to seek redress across a variety of sectors. The year 2021 is likely to be a pivotal one in determining whether this upward trend continues, for a number of reasons.

First, the Supreme Court's decision in *Merricks* has provided long-awaited guidance on the approach to the certification of collective proceedings in the CAT, and the decision will likely embolden claimants' law firms and litigation funders given the approach adopted as to how 'suitability' should be assessed. However, the judgment's longer-term impact on the future of the UK's collective proceedings regime is not yet clear. The regime remains in its infancy, with at least eight CPO applications expected to progress in 2021. Although the threshold for a CPO to be granted has been markedly lowered, it remains to be seen how the CAT will conduct its 'value judgment' about suitability of CPO applications. Moreover, the *Merricks* judgment does not consider how carriage disputes should be addressed, and it will be interesting to see what approach the CAT adopts towards assessing competing opt-out CPO applications in the *FX Applications.*

Second, the obvious consequence of the *Merricks* judgment is that there are likely to be more collective actions. However, the decision may also lead to an increase in English class actions more generally. If Lord Briggs' observation – that a key principle underpinning the decision is practical access to justice – is a symbol of the Supreme Court's broader desire to ensure that businesses and consumers have access to effective redress, we may well see the Supreme Court uphold the Court of Appeal's decision in *Lloyd,* which would be a major event in the development of the representative action regime.

The Supreme Court's ruling in *Lloyd* is likely to be crucial to the future of mass data claims, as well as the development of the English class action regime more generally. From a data breach perspective, if the Supreme Court upholds the Court of Appeal's judgment, the increase in the number of data protection class actions is likely to continue. With a number of other mass data breach claims already listed in the English courts, including against Facebook, Marriot, British Airways, EasyJet and Google Ireland, the Supreme Court's decision will undoubtedly be closely watched. These high-profile claims are also expected to further test the boundaries of and provide guidance in an area of litigation that is still being developed by the English courts. Moreover, *Lloyd* is of wider interest because, if the Court of Appeal's judgment is upheld, this may represent a change of judicial approach to the interpretation of the same interest requirement under CPR 19.6, which could in turn see an increase in the use of representative actions.

Finally, the Supreme Court's decision in *Okpabi* demonstrates that the courts are embracing the landmark judgment in *Vedanta* in relation to the English court's jurisdiction and the circumstances in which a parent company owes a duty of care to those allegedly harmed by the acts of a foreign subsidiary. *Okpabi* may well result in an increase in the number of overseas claimants seeking redress before the English courts from a parent company in respect of alleged loss occasioned by the acts or omissions of its foreign subsidiary. The Supreme Court's warning to the lower courts against conducting mini-trials (including considering extensive factual evidence) at the jurisdictional stage should be expected to have the practical effect of making it easier for claimants to meet the necessary threshold, as it may be difficult for defendants to demonstrate that the facts in the pleadings are untrue or unsupportable. It

seems inevitable that *Okpabi* will reinforce the perception of England as an attractive forum for bringing claims against multinationals and that the decisions in *Okpabi* and *Vedanta* provide fertile ground for the future growth of class actions.

Ultimately, 2021 is shaping up to be an important year for the future of the class action market, with a number of key issues to be addressed.

Appendix 1

ABOUT THE AUTHORS

CAMILLA SANGER

Slaughter and May

Camilla Sanger is a partner in Slaughter and May's disputes and investigations group, and she advises on a wide range of complex and substantial disputes. Her practice spans commercial, competition and banking litigation, and contentious regulatory investigations.

PETER WICKHAM

Slaughter and May

Peter Wickham is an associate in Slaughter and May's disputes and investigations group. He has a broad-ranging international arbitration and litigation practice with a particular focus on the energy and natural resources sector and group litigation.

JAMES LAWRENCE

Slaughter and May

James Lawrence is an associate in Slaughter and May's disputes and investigations group. His practice focuses on competition and commercial litigation.

SLAUGHTER AND MAY

One Bunhill Row
London EC1Y 8YY
United Kingdom
Tel: +44 20 7090 4000
camilla.sanger@slaughterandmay.com
peter.wickham@slaughterandmay.com
james.lawrence@slaughterandmay.com
www.slaughterandmay.com

an LBR business

ISBN 978-1-83862-764-5