

Class Actions 2020

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Class Actions 2020

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Lexology Getting The Deal Through is delighted to publish the fifth edition of *Class Actions*, which is available in print and online at www.lexology.com/gtdt.

Lexology Getting The Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique Lexology Getting The Deal Through format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes new chapters on Israel and South Africa.

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Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Lexology Getting The Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editors, Jonathan Polkes and David Lender of Weil, Gotshal & Manges LLP for their continued assistance with this volume.



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OVERVIEW

Court system

1 | Outline the organisation of your court system as it relates to collective or representative actions (class actions). In which courts may class actions be brought?

In England and Wales, there is no direct equivalent to US class actions. However, there are a number of procedures by which collective or representative actions can be brought before the English court.

The main legal and regulatory source for collective actions is the Civil Procedure Rules (CPR), supplemented by practice directions that provide practical detail on the operation and interpretation of the CPR.

The court can consolidate claims by multiple claimants by virtue of its discretionary and general case management powers under Part 3 of the CPR. The CPR also allows for multiparty litigation to be brought by issuing a claim in which more than one claimant or defendant is named.

Alternatively, Part 19 of the CPR outlines two specific procedures for collective actions, allowing the court to join multiple claims together by way of Group Litigation Orders (GLOs) if more than one claimant has a cause of action raising common or related issues of fact or law. This is done on an opt-in rather than an opt-out basis. The second route under Part 19 allows a representative to bring or defend an action on behalf of others who have the same interest in the claim by way of representative claims. To qualify, the parties must have a common grievance throughout the proceedings and the relief sought must be beneficial to all. Additional claimants or defendants can be added to a claim that has already been issued, but must first issue an individual claim themselves.

Certain other statutes and rules provide for specific procedures to be used when issuing claims in specialist tribunals, such as the Competition Act 1998 (the Act) and the Consumer Rights Act 2015 (CRA), which specify that certain competition law damages claims are to be brought before the Competition Appeal Tribunal (CAT). The CAT is governed by its own Rules of Procedure (CAT Rules) and practical guidance is provided in the CAT's Guide to Proceedings (CAT Guide). Collective actions in the CAT can either be brought by multiple claimants or by a specified body on behalf of consumers; or through being the subject of a collective proceedings order.

Historically, collective actions in the CAT were allowed only by way of opting in. However, the Act was amended in October 2015 and, among other matters, these amendments allowed for collective actions to be brought in the CAT on an opt-out basis. Therefore claims can now be brought on behalf of a defined set of claimants (excluding those claimants that formally opt out). An exception to this is those domiciled outside the UK, who will be included in opt-out proceedings only if they have expressly opted in. There have, to date, been three opt-out claims. The first opt-out was registered on 25 May 2016 with the CAT as a follow-on action for damages arising from a decision of the Office of Fair Trading of 27 March 2014 (*Mobility Scooters*:

CE/9578-12); the second was registered with the CAT on 8 September 2016 as a follow-on action for damages arising from a decision of the European Commission of 19 December 2007 (COMP/34.579 *MasterCard*, COMP/36.518 *EuroCommerce* and COMP/38.580 *Commercial Cards*); and the third was registered on 18 May 2018 as a follow-on action for damages arising from a decision of the European Commission of 19 July 2016 (CASE AT.39824 – *Trucks*).

Frequency of class actions

2 | How common are class actions in your jurisdiction? What has been the recent attitude of lawmakers and the judiciary to class actions?

GLOs were introduced in 2000 in response to Lord Woolf's recommendations and objectives in his Final Report on Access to Justice, showing some inclination to overcome some of the shortcomings of the existing methods of multiparty litigation. However, unlike collective actions in the CAT, there are still no mechanisms for large-scale opt-out class actions in general civil litigation claims.

Since 2000, GLOs have been used relatively infrequently, with only 105 GLOs made, of which 34 were prior to 2003. Furthermore, only five were made in 2017, only three were made in 2018, and none have been made in 2019 (at the time of writing). Therefore their use does not appear to be increasing.

There is no formal record of how many representative claims have been made, but case law suggests that these have also not been used frequently since 2000.

The introduction of opt-out collective action proceedings before the CAT acknowledges that the prior framework was not fully succeeding and that a new approach was needed in this sector. The first opt-out collective case to be brought under the new regime was brought by Dorothy Gibson, in her capacity as the General Secretary of the National Pensioners Convention, against Pride Mobility Products Limited (Pride) on behalf of purchasers of Pride-branded mobility scooters (estimated to comprise 27,000 to 32,000 consumers who had each purchased a new Pride scooter in the UK within the relevant claim period) (*Mobility Scooters*: CE/9578-12). This action followed on from a 2014 decision from the Office of Fair Trading (now the Competition and Markets Authority) concerning anticompetitive agreements in place between Pride and eight retailers selling Pride's mobility scooters. Pursuant to these arrangements, the retailers would not advertise certain models of Pride scooters online at prices below the recommended retail price. However, the proceedings were dismissed on 31 March 2017 on the basis that Ms Gibson's case did not differentiate between the prices of scooters sold by the eight retailers noted in the Office of Fair Trading's decision (ie, the subject matter of the infringement) and the prices of scooters sold by all other Pride retailers. Consumers of the latter category could not form part of the class. The CAT granted Ms Gibson permission to serve an amended claim form and reformulate the claim by providing further

economic evidence, but she later withdrew her claim, as the eligible class would have comprised fewer than 1,000 members.

The second opt-out claim was brought by Walter Merricks, a former Chief Financial Services Ombudsman, as the proposed class representative, against MasterCard on behalf of approximately 46.2 million UK consumers, following on from the European Commission's 2007 decision as to MasterCard's unlawfully high interchange fees. The damages claimed were approximately £14 billion, making it the largest claim ever filed in England and Wales. However, once again, on 21 July 2017, the CAT dismissed Mr Merricks's application, owing to the challenges of estimating individual losses and because it also deemed an aggregate award of damages to be unsuitable. The CAT did not offer Mr Merricks a chance to amend and reformulate the claim. Permission to appeal the decision was refused by the CAT on 28 September 2017 on the basis that the legislation provides no route of appeal from the refusal to certify the class. The CAT was of the view that this reflected a deliberate policy to confine the right of appeal to decisions on the substantive claims in order to prevent prolonged litigation. The CAT also went on to comment that it would have refused permission in any case, as Mr Merrick had not been able to propose a method of distribution of the aggregate award of damages that, even on an approximate basis, would lead to payments on a compensatory (rather than a punitive) basis. However, in a decision handed down on 16 April 2019, the Court of Appeal overturned this and remitted the application to the CAT for re-hearing. It held that the CAT had applied the wrong legal test in making its decision and that it was premature for the CAT to refuse the application, given that distribution is a matter for the trial judge once an award has been made. Instead of assessing the difficulties in distributing any eventual award, the test that should have been applied was whether the claims had a 'real prospect of success'. Subsequently, the Supreme Court confirmed on 25 July 2019 that Mastercard had leave to appeal the Court of Appeal's decision, so further clarification regarding the appropriate test to be applied can be expected in due course.

Additionally, a further application has been filed following the ruling by the European Commission published on 19 July 2016 against a cartel of truck manufacturers (MAN, Volvo/Renault, Daimler, Iveco and DAF). UK Trucks Claim Limited, a special-purpose vehicle formed for the purposes of the claim, filed its application for an opt-out claim on 18 May 2018. The trade body, the Road Haulage Association, has subsequently also filed an opt-in application for a Collective Proceedings Order (CPO) (17 July 2018). The applications were due to be heard in June 2019. However, in light of Mastercard's appeal to the Supreme Court, the CAT has adjourned the case until the Supreme Court has heard the appeal and handed down a judgment.

Legal basis

3 | What is the legal basis for class actions? Is it derived from statute or case law?

Group litigation orders and representative claims

The basis for representative claims and GLOs is derived from Part 19 of the CPR and its related practice direction, as supplemented by case law.

Competition Act 1998

The basis for collective actions is derived from statute, specifically section 47(B) of the Act. The CRA amended the Act to permit opt-out collective proceedings before the CAT, having previously permitted only opt-in collective proceedings.

Types of claims

4 | What types of claims may be filed as class actions?

Group litigation orders and representative claims

All types of claims can be filed as collective actions. The 105 GLOs that have been made by the courts of England and Wales since 2000 have covered a broad range of claims, including product liability, medical negligence, environmental issues or abuse and mistreatment in schools and children's homes, and no types of claims have been specifically excluded.

Competition Act 1998

The Act permits collective actions to be brought in respect of two types of damages claims. First, it allows for follow-on damages claims (where the infringement and liability of the defendant has already been established by a decision of the relevant regulator or European Commission). Second, it also allows for independent damages claims (where the infringement has yet to be proven).

Relief

5 | What relief may be sought in class proceedings?

Group litigation orders and representative claims

In theory, there is no limit to the types of relief available for these claims apart from those under English law generally. Therefore, both damages (including restitutionary damages) and declaratory relief can be sought. Punitive and exemplary damages are allowed in principle in respect of certain courses of action, but are exceptionally rare under English law.

Competition Act 1998

Section 47A(3) of the Act allows both for money damages and for injunctive relief. Notably, an injunction granted by the CAT now takes effect and is enforceable as if it were granted by the High Court (section 47D(1) of the Act). The actions which have been decided by the CAT to date have concerned claims for compensatory damages, but theoretically claims for disgorgement and restitution should also be possible under the Act if it can be proven that compensatory damages are an inadequate remedy. Exemplary damages are not permitted (section 47C(1) of the Act) and the CAT does not have the jurisdiction to grant declaratory relief.

Initiating a class action and timing

6 | How is a class action initiated? What is the limitation period for bringing a class action? Can the time limit for bringing a class action be paused? How long do class actions typically take from filing to a final decision?

Group litigation orders

The court can grant a GLO on its own initiative or following an application by a claimant or defendant. The practice direction to Part 19 of the CPR provides for certain preliminary steps that should be taken. For example, the solicitor acting for the proposed applicant must consult the Law Society's Multi-Party Action Information Service to obtain information about other cases giving rise to issues to be covered by the proposed GLO.

The practice direction to Part 19 of the CPR also recommends that the solicitors for the prospective claimants form a solicitors' group, from which one solicitor is chosen to take the lead in making the application and act on behalf of all of those on the register throughout the duration of the case. The application can be made by one solicitor and the court may direct that the GLO claimants serve group particulars of claim, setting out the various claims of all the claimants on the group register. However, each claimant seeking to have its claim included in the GLO will first need to issue its own claim using its own claim form.

The application for the GLO may be made at any time before or after any relevant claims have been issued, and should be made using the general procedure under Part 23 of the CPR. The application should include (among other things) the number and nature of claims already issued, the number of parties likely to be involved and the common issues of fact or law that are likely to arise in the litigation.

The GLO will specify the common or related issues of fact or law that it covers so as to identify the existing and (potentially) future claims to be managed as a group under the order. The individual claims will be listed on the group register. The court normally directs that new claims issued after the GLO is made, that raise any number of the issues under the GLO, should be included on its register of claims. There is no maximum number of claimants that can be added to the register.

The GLO effectively means that all claims currently or subsequently listed on the register for that GLO will be managed collectively by the court. Often, the court will order that one or more of the claims on the register proceed as test claims (to address a specific issue of law or fact), with the outcome to then be applied to the remaining claims.

There are no special limitation periods for bringing a collective action. The Limitation Act 1980 sets out the periods for High Court claims generally and the periods vary depending on the type of action. For example, there is a limitation period of six years from the date on which the cause of action arises for most breaches of contract and tort claims. Subject to certain exceptions, English law does not permit the running of time to be suspended.

Representative claims

Where a party wishes to act as a representative for other people who have the same interest in a claim, it can indicate this in its claim form.

It is not necessary for those represented to be named as parties to the proceedings, nor is it necessary for the person purporting to act as a representative to have the authority of those it represents, provided the 'same interest' test is met. Under this test, at all stages of the proceedings, it must be possible to say of any particular person whether or not they qualify for membership of the represented class by virtue of having the same interest. The parties must have the same interest in the proceedings, they must have a common grievance and the relief sought must be beneficial to all. Notably, membership of the group does not need to remain constant throughout the proceedings.

Subject to certain exceptions, the permission of the court is not required for a claim to be pursued by a representative party (CPR 19.6). However, the court determines whether the would-be claimants or defendants have the 'same interest', and can also determine that a particular person cannot act as a representative (either using its discretion or following an application by another party to the claim). A court can also order that existing claims continue under a representative party or that a GLO is adopted instead.

The minimum number of persons required to have the 'same interest' is two. There is, in principle, no maximum number of parties that can potentially be represented.

The representative party will undertake the day-to-day management and decisions on the running of the proceedings. Unlike a GLO, it is possible for persons who are represented to take no active part in the litigation where they are not named parties to the claim. A represented person who is not a party to the claim and plays no active role is unlikely to be subject to disclosure obligations or costs risks.

As with GLOs, the Limitation Act 1980 applies when considering limitation periods.

The likely duration of civil cases is highly dependent on the complexity of the case and its value. Although exact statistics are unavailable for High Court actions, they might take many years. For example, the *Volkswagen* case discussed in question 34 is not expected to be listed before late 2020, despite the GLO having been applied for in October 2016.

Competition Act 1998

The party wishing to begin collective proceedings must send a specific claim form to the CAT-appointed registrar. The claim form should include, among other things, a description of the proposed class, an estimate of the number of class members and a concise statement of the relevant facts and law relied upon and the relief sought (CAT Rules, rule 75).

The CAT will then hold a case management conference to give directions for the conduct of the application for a CPO and ultimately determine the application having heard the parties (CAT Rules, rules 76 and 77). The CAT will decide whether claims are eligible for collective proceedings, on the basis of whether claims are brought on behalf of an identifiable class, raise common issues and are suitable (CAT Rules, rule 79(1)). In determining suitability, the CAT will consider (among other matters), the size and nature of the class, whether the claims are suitable for an aggregate award of damages and the availability of alternative means of resolving the dispute. Both the *Pride* and *MasterCard* cases failed to proceed beyond this stage. If the CAT considers a CPO appropriate, the CPO will authorise the class representative to act as such. Among other things, the CPO will identify the class and the claims certified for inclusion, and specify whether they are opt-in or opt-out proceedings.

Limitation periods are prescribed under the Act to be six years from the later of:

- the date on which the infringement of competition law that is the subject of a claim ceases; and
- the date on which the claimant knows, or could reasonably be expected to know, of such infringement.

Under the Act, the limitation period is suspended for:

- the duration of any investigation by the competition authority (and starts running again from either one year after the decision of the competition authority or one year after the investigation is closed); and
- any period of time where the parties to the dispute are engaging in a consensual dispute resolution process.

Additionally, the limitation period is suspended for individual proceedings that arose on or after 1 October 2015 and that were originally made as part of collective proceedings, such that these claims are not time-barred if the collective proceedings cease or the claims in question do not form part of such proceedings.

CLASS FORMATION

Standing

7 | What are the standing requirements for a class action?

Group litigation orders and representative claims

The usual route for bringing legal action applies to claims subject to a GLO or representative claims. The claimant must therefore show that it has a cause of action.

To be added to the register of claims for a specific GLO an issued claim must give rise to the 'common or related issues of fact and law' specific to that GLO. New claimants must issue a claim form before their claim can be entered on the group register.

The test for a claim to proceed by a representative party is that those represented must have the 'same interest' in a claim. The court may add a person as a claimant in proceedings either on its own initiative or following an application, which must be accompanied by evidence. Any order must be served on all parties and anyone else affected.

Competition Act 1998

A representative may be a claimant (an individual or a business who has suffered loss) or a representative body (for example, a trade association). A CPO must include authorisations for the person bringing the proceedings to act as a representative, a description of the class of persons, and whether the proceedings will be opt-in or opt-out (section 47B(7) of the Act).

Rule 78 of the CAT Rules provides a list of the relevant factors for authorising a class representative. Those factors include whether the representative would 'fairly and adequately act in the interests of the class members', whether the representative has a 'material interest that is in conflict with the interests of the class members', whether the representative would be able 'to pay the defendant's recoverable costs if ordered to do so' and, if the proposed representative is not a class member, whether it is a pre-existing body. Paragraph 6.30 of the CAT Guide provides further practical guidance and suggests that the CAT will consider whether the proposed class representative is competent to manage what is likely to be a large and complex piece of litigation.

Participation

8 | Do members of a class have to opt in or opt out of the action? Are class members notified that an action has been commenced on their behalf and, if so, how?

Group litigation orders

For a claimant to have its claim managed under a potential or existing GLO, it first needs to issue its own claim form for its individual claim. Therefore, GLOs provide an opt-in regime, as each individual claimant must consciously take steps to bring a claim to court, and individuals will be bound only if they choose to be.

The court can also direct particular claims to be managed under a GLO using its discretionary powers. However, if a party disagrees, it can make an application for such claims to be removed.

Representative claims

It is not necessary for those represented to be named as parties to the proceedings, nor is it necessary for the representative party to have the authority of those it represents to act as their representative.

Competition Act 1998

Since 2015, the CAT has the power to state whether any collective proceedings will be opt-in or opt-out (section 47B(7)(c) of the Act). To determine this, the CAT will consider the strength of the claims and whether it is practical for the proceedings to be opt-in, including the estimated amount of damages that individual class members may recover. The class representative must give notice of the CPO to class members in a form and manner approved by the CAT (CAT Rules, rule 81). The notice must set out in straightforward terms how class members opt in or opt out of proceedings (CAT Guide, paragraph 6.59).

The CPO will specify a time by which class members must opt in or opt out of the collective proceedings. After that date, the permission of the CAT will be required (CAT Rules, rule 82). The class representative must maintain a register of class members who have opted in or out of the proceedings and this must be available on request to the CAT, any defendant and such other person as the CAT may direct (CAT Rules, rule 83).

Certification requirements

9 | What are the requirements for a case to be filed as a class action?

Group litigation orders

There is no minimum number of claims or persons required for a GLO to be made.

Before joining the register for the GLO, individual claimants must issue their own claim form. The court may give directions about the form of pleadings for claims covered by the GLO. For example, the court may direct that the claimants serve group particulars of claim. The group particulars of claim is in addition to the individual claim forms, and must include information setting out the claims of all of the claimants on the register for that GLO. Group particulars of claim will usually contain general allegations relating to all of the claims and a schedule specifying which of the general allegations are relied on by, and any specific facts relevant to, each claimant.

Often, the specific facts relating to each claimant on the group register will be obtained using a questionnaire that has been approved by the court managing the GLO.

Representative claims

There is a minimum number of two claimants for a representative action. For a claim to proceed as a representative claim, the persons to be represented must have the same interest in the claim and the representative only needs to note on the claim form that they are acting as representative.

Competition Act 1998

There is no minimum number of class members for collective proceedings in the CAT, but the class must be identifiable. Collective proceedings may be brought by combining two or more claims (section 47B of the Act). Collective proceedings may be commenced by a person who proposes to be a representative, but may only be continued if the CAT makes a CPO (section 47B(4) of the Act).

There is no requirement that all of the claims should be against all of the defendants in collective proceedings (section 47B(3)(b) of the Act).

The proposed class representative must send a collective proceedings claim form to the CAT's registrar containing specified information (CAT Rules, rule 75(1)), including (among other matters) whether the application relates to a proposed opt-in or opt-out procedure, a description of the proposed class, its estimated size and any possible sub-class, and a summary of the basis on which the representative seeks to be authorised.

10 | How does a court determine whether the case qualifies for a class action?

Group litigation orders

The court will usually deal with any application for a GLO at an oral hearing and may exercise its discretion as to whether to order a GLO or to add a particular claim to an existing GLO.

Whether the court allows a GLO on its own initiative or following an application, it may not be made without the consent of the relevant head of the particular court division in which it would be made (the President of the Queen's Bench Division in the case of claims proceeding in the Queen's Bench Division or the Chancellor of the High Court in the case of claims proceeding in the Chancery Division). To obtain this consent, the judge considering a GLO must, either before or after hearing the application, provide the relevant documentation, together with a written statement as to why a GLO is desirable.

Representative claims

Pursuant to CPR 19.7, there are certain categories of claims for which the court's permission is expressly required, including where the claim concerns the estate of a deceased person, property subject to trust, or the meaning of a document, and the people whom the representative is to represent have not been born, cannot be found or cannot easily be ascertained. Other than these, a party can commence a representative claim without the permission of the court by indicating on the claim form that it is acting as a representative.

However, the court can intervene and reject the person acting as a representative, either at its own discretion or following an application from another party. The test to be satisfied for a claim to proceed by a representative party is that the parties to be represented must have the same interest in the claim. In general terms the test is strict and is considered more difficult to satisfy than that for a GLO.

Competition Act 1998

The CAT may make a CPO if it considers the proposed class representative is capable of acting in that capacity. The representative does not need to be a class member, but the CAT must conclude that it is 'just and reasonable'. It must also consider that the claims raise the same, similar or related issues of fact or law and are suitable to be brought in collective proceedings (section 47B(5) of the Act; CAT Rules, rule 77).

The CAT will also determine whether the collective proceedings should be opt-in or opt-out. In doing so, it will assess, among other things, the 'strength of the claims' (CAT Rules, rule 79(3)(a)). However, this does not amount to a full 'merits assessment' (CAT Guide, paragraph 6.39).

The decision on whether to make a CPO will ordinarily be made after an oral hearing. The CAT rejected the MasterCard CPO application on the basis of insufficient quantification of consumer losses. In the *MasterCard* case, the CAT followed its own decision in *Pride* in endorsing the test for whether the class representative had proposed an appropriate method for calculation of damages.

Consolidation

11 | Is there a process for consolidating multiple class action filings?

Group litigation orders

A list of all GLOs is maintained and published by the court (www.gov.uk/guidance/group-litigation-orders#list-of-all-group-litigation-orders).

Individual GLOs may expressly provide for how they are to be publicised and often state a 'cut-off date' before which claims proceeding under the GLO should be made (failing which they are likely to be stayed).

Once a GLO has been made, a group register is established on which details are recorded of the cases that are to be subject to the GLO, and any judgment on one GLO issue will be binding in relation to all other claims on the group register, unless otherwise ordered by the court. The court may direct that, from a specified date, all new claims that also raise any of the GLO issues already in consideration must be started in that same court. However, the relevant practice direction expressly provides that if a claim starts in the wrong court it will not be automatically terminated, but instead should be transferred to the correct court.

The courts also have general powers under CPR 3.1 to consolidate proceedings or to try multiple claims together.

Competition Act 1998

There is no formal record of claims in the CAT.

PROCEDURE

Discovery

12 | How does discovery work in class actions?

Group litigation orders and representative claims

As with usual civil litigation, the courts have significant flexibility in how disclosure (discovery) is to be managed. Amendments to the CPR in April 2013 changed the default position from 'standard disclosure' (pursuant to which each party must conduct a reasonable search for documents on which it relies, documents that harm its own case and documents that assist the other party's case) to disclosure orders that are more closely customised to the needs of the particular case. The court can choose from a variety of options, including issue-based disclosure.

This flexibility is particularly suited to multiparty litigation, given the practical difficulties associated with disclosure from multiple parties.

In litigation under a GLO, unless the court orders otherwise, disclosure of any document relating to the issues covered by the GLO by a party to a claim on the register of a GLO is considered to be disclosure of that document to all parties to current and future claims on that GLO register.

In litigation brought or defended by a representative party, only those who are named parties to the claim (as opposed to those who are represented but are not named parties) will be treated as parties for the purposes of providing disclosure.

Competition Act 1998

The CAT will include its requirements for providing any evidence it considers necessary for the determination of the application for a CPO as part of its directions for the conduct of such an application. However, the possible scope of disclosure in respect of the main claim is not specifically a relevant factor to be considered by the CAT when making a CPO.

The CAT has powers to order, on any terms it thinks fit, that disclosure be given by any party to the collective proceedings to any other party, by the class representative to any or all represented persons and by any represented person to any other represented person, the class representative or the defendant (CAT Rules, rule 89).

Privilege and confidentiality

13 | What rules and standards govern non-disclosure of documents on the grounds of professional privilege, litigation privilege or other confidentiality considerations?

Group litigation orders and representative claims

No special rules of privilege apply in GLOs or representative claims. Documents may only be withheld if they are subject to legal advice privilege (applying to confidential communications between a lawyer and their client for the purpose of giving or receiving legal advice) or litigation privilege (applying to confidential documents created for the dominant purpose of litigation where litigation is in reasonable contemplation).

Common interest and joint privilege may also be particularly relevant, where parties who either share the same interest or who have engaged the same solicitor (respectively) can disclose an otherwise privileged document to one another without losing privilege in that document as against third parties.

Competition Act 1998

Although the same legal principles regarding privilege apply, given the confidential nature of many documents that will be required to be disclosed in cases concerning competition, the CAT has power to put in place a 'confidentiality ring' (CAT Rules, rule 101). These allow only legal advisers full access to confidential documents and restrict how those documents can be used and shared. A request for such confidential

treatment may be made in writing by any party during the course of proceedings.

Testimony

- 14 | What rules apply to submission of factual and expert witness testimony? In what circumstances will the court order witness-examination?

Group litigation orders and representative claims

Evidence for pretrial applications is typically filed with the court when making the application for a GLO.

Subsequently, the usual procedure regarding testimony will apply to GLOs and representative claims. Under Part 32 of CPR, the court has discretion to set directions for the filing of factual and expert witness evidence at a case management conference and can direct that specific issues require evidence. The court will generally order parties to exchange written statements containing the factual witness evidence on which they intend to rely and, if deemed necessary, make orders relating to separate or joint experts producing a written report. At trial, both factual and expert witnesses are generally cross-examined, but the court has discretion to dispense with this as it sees fit.

Competition Act 1998

Similarly, applicants submit evidence relied on in support of their applications to the CAT. The CAT also has discretion to give directions regarding factual and expert evidence (CAT Rules, rule 21), which are generally given at a case management conference. In addition to the applicant and the defendants, class members may apply to the CAT to make submissions either in writing or orally at the hearing.

Pursuant to this rule, the CAT may also limit cross-examination of witnesses to any extent or in any manner it considers appropriate. In both the *Pride* and *MasterCard* cases, the applicants' experts gave oral evidence at the request of the CAT (and, in the *MasterCard* case, were cross-examined by the defendants' counsel).

DEFENCE

Defence strategy

- 15 | What mechanisms and strategies are available to class-action defendants?

Group litigation orders and representative actions

In addition to defending the claim generally and other common strategies available when defending a claim, such as seeking strike-out or summary judgment, or pursuing an order for security for costs, defendants can resist the application for a collective action in the first instance. For example, they might make an argument that the issues are not sufficiently common between the applicants.

Competition Act 1998

Similarly, defendants are likely to argue that an application is inappropriate (for example, due to claimants not forming part of a class or that a distribution of damages would not be possible). Further guidance will likely follow once the Supreme Court has heard the *MasterCard* appeal.

Joint defence agreements

- 16 | What rules and standards govern joint defence agreements? Are they discoverable? What are the advantages and disadvantages of these agreements?

If there are multiple defendants to a claim who have a common interest, they might enter into a joint defence agreement to express that common interest privilege applies and agree on cost-saving measures, such as

instructing a joint expert. There are no rules or standards that govern such agreements, and the advantages and disadvantages of the particular agreement will be fact-specific. It is highly likely that such agreements would be protected by legal professional privilege and would not be discoverable.

SETTLEMENT

Approval of settlements

- 17 | Describe the process and requirements for approval of a class-action settlement.

Group litigation orders and representative claims

Subject to certain specific exceptions, parties do not require approval from the court of any settlement that may be reached, although steps must be taken to inform the court of the settlement so that the litigation can be brought to an end. Where the claim to be settled is a test claim under a GLO, the court's approval is still not required. However, another claim on the register for that GLO will generally be substituted to proceed as the test claim.

The court's approval is required for a settlement of a claim conducted by a representative party under CPR 19.7. The court will approve a settlement where it is satisfied that the settlement is for the benefit of all the represented persons.

Competition Act 1998

In respect of opt-in proceedings, the class representative cannot settle those proceedings before the time specified as the time by which a class member may opt in to those proceedings without the permission of the CAT (CAT Rules, rule 95).

In respect of opt-out proceedings, the class representative and any parties wishing to be bound by the proposed settlement must make an application to the CAT for a collective settlement approval order. The CAT will make a collective settlement approval order only where it is satisfied that the terms of the collective settlement are just and reasonable, taking into account various factors, including the likelihood of the claimants being awarded more than the settlement at trial and the likely cost and duration of proceedings. If one or more represented persons or class members are to be omitted from the collective settlement, the CAT may permit the proceedings to continue as to one or more claims between different parties (CAT Rules, rule 94).

Objections to settlement

- 18 | May class members object to a settlement? How?

Group litigation orders

There is no requirement that all class members enter into a settlement. In the Royal Bank of Scotland (RBS) rights litigation (which was the subject of a GLO made on 17 September 2013 and which focused on sections 90 and 90A of the Financial Services and Markets Act 2000), RBS settled with the bulk of the claimant shareholders. Those with greater risk appetite refused settlement to continue with the litigation, before ultimately settling at a later stage.

Representative claims

For representative claims under CPR 19.7, protection is provided by the need for the court's approval of the settlement. There is otherwise no mechanism to object.

Competition Act 1998

Where the CAT has granted a CPO, there is no way of challenging a settlement order once made, but parties may choose to opt out of any settlement, provided they do so by a date specified by the CAT. A

settlement will not be binding upon parties domiciled outside the UK unless they specifically opt in.

Where a collective settlement approval order is made before the grant of a CPO, the CAT may vary or revoke the collective settlement approval order on its own initiative or on the application of a class member or party (CAT Rules, rule 96(17)).

Separate settlements

19 | How are separate class action settlements handled?

Group litigation orders and representative actions

During the course of GLO proceedings, individuals may enter into settlement agreements with the defendant(s). If the claim being settled is a test claim, the court will generally make an order that this is substituted with another claim on the group register. In some cases, the GLO may contain provisions restricting settlement of a test claim without first gaining permission of the court.

Competition Act 1998

Individual settlements before the CAT are possible in opt-in cases on the basis that all represented persons and the CAT are notified.

JUDGMENT AND APPEAL

Preclusive effect

20 | What is the preclusive effect of a final judgment in a class action?

Group litigation orders

Any judgment made on a GLO issue is binding on all the parties to the other claims that are on the register at the time of the judgment, unless the court orders otherwise. The court may also direct the extent to which any judgment binds parties to any claim that is subsequently added to the register for the GLO.

Representative claims

A judgment given in a representative action under CPR 19.6 or CPR 19.7 is binding on all persons represented in the claim, unless the court orders otherwise. This is so even if persons are unaware of the proceedings. However, to prevent injustice, the court's permission is required for the judgment to be enforced by or against a person who is not a formal party to the claim.

Competition Act 1998

Where a CPO has been made by the CAT, the judgment will bind all represented persons unless specified otherwise (CAT Rules, rules 81(2) (d) and 91(1)). A judgment in opt-out proceedings will be binding on potential class members domiciled outside the UK only where they have specifically opted in.

Appeals

21 | What type of appellate review is available with respect to class-action decisions?

Group litigation orders and representative claims

An appeal against a judgment in GLO proceedings may be made only with the permission of the court. Permission may be sought from the judge that gave the judgment being appealed or directly from the Court of Appeal.

Where a party was entered on the register for the GLO after a judgment or order was made, it cannot apply for such judgment or order to be set aside, varied or stayed and cannot appeal. It can, however, apply to the court for an order that the judgment or order is not binding on it.

Competition Act 1998

An application for permission to appeal on a point of law can be made either to the CAT or directly to the Court of Appeal, and the application will ordinarily be dealt with on paper. Permission to appeal will be given only where the court considers that the appeal would have a real prospect of success, or there is some other compelling reason.

There is no statutory provision for appeals against the CAT's decision on an application for a CPO; this would have to be done by way of judicial review (CAT Guide, paragraph 6.92).

REGULATORY ACTION

Regulators

22 | What role do regulators play in connection with class actions?

Competition Act 1998

Regulators have not previously brought collective actions in the CAT. Under the old section 47B of the Act, only a 'specified body' had the right to bring opt-in collective proceedings in the CAT and only where an infringement had already been established. The Consumers' Association, Which?, was the only organisation to obtain the status enabling it to bring opt-in proceedings under the Specified Body (Consumer Claims) Order 2005 (SI 2005/2365).

Following amendments introduced by the CRA, the Act now permits anyone (rather than just a specified body) to bring collective proceedings, provided that person is a suitable class representative. No regulators have yet become involved in collective actions following the amendments.

Private enforcement

23 | Describe any incentives the civil or criminal systems provide to facilitate follow-on actions.

Competition Act 1998

In relation to the Act, there are some helpful provisions in relation to the admissibility of evidence in competition proceedings. For example, the decisions of competition authorities of EU member states are considered prima facie evidence of an infringement of competition law (paragraph 35 of schedule 8A of the Act). Other types of documents are fact-dependent: for example, leniency statements (whether or not those statements have been withdrawn), settlement submissions (which have not been withdrawn) and investigation materials are only admissible if they were obtained lawfully by a party to the proceedings and otherwise than from a competition authority's file.

ALTERNATIVE DISPUTE RESOLUTION

Arbitration and ADR

24 | What role do arbitration and other forms of alternative dispute resolution play in class actions? Can arbitration clauses lawfully contain class-action waivers?

Group litigation orders and representative claims

If a party participates in a collective action in breach of an arbitration clause, the court will almost certainly enforce the arbitration clause. Arbitral tribunals have limited powers to consolidate proceedings in the absence of the consent of the parties. Accordingly, to the extent that collective actions are permitted within arbitration at all, it is on an opt-in basis.

Other forms of alternative dispute resolution are strongly encouraged in all types of litigation, and parties will have to confirm whether they have considered such types of resolution and what steps have been taken in relation to these.

Competition Act 1998

It is difficult to see how a claim could be brought under the Act in breach of an arbitration clause.

The CAT may encourage and facilitate the use of alternative dispute resolution if deemed appropriate (CAT Rules, rule 4(6)(a)). Applicants will also need to confirm in the claim form what alternative dispute resolution procedures have been used, and the availability of such measures will be taken into consideration in whether the claim is eligible for forming a collective proceeding.

Court-ordered mediation

25 | Do courts order pretrial mediation in class actions? Does the appointment of a mediator make it more likely that the court will approve a settlement?

Group litigation orders and representative claims

The court will not force parties to undergo mediation. However, alternative dispute resolution generally (including mediation) is strongly recommended throughout the life of proceedings and the court will have the discretion to facilitate this by allowing stays of proceedings or penalising parties for unreasonably failing to engage in such methods. Parties do not generally require approval from the court of any settlement that may be reached.

The court's approval is required for settlement of a claim conducted by a representative party under CPR 19.7. The court will approve a settlement where it is satisfied that the settlement is for the benefit of all the represented persons. This will be highly fact-specific and evidence that a mediator has overseen an agreement will be conducive to proving this.

Competition Act 1998

The CAT may encourage and facilitate the use of alternative dispute resolution (which can include mediation) if deemed appropriate (CAT Rules, rule 4(6)(a)). The CAT will make a collective settlement approval order only where it is satisfied that the terms of the collective settlement are just and reasonable, taking into account various factors, including the likelihood of the claimants being awarded more than the settlement at trial and the likely cost and duration of proceedings. This will be highly dependent on context, but the use of a mediator will be helpful.

FEES, COSTS AND FUNDING

Contingency fees

26 | What are the rules regarding contingency fee agreements for plaintiffs' lawyers in a class action?

Group litigation orders and representative claims

Part 19 of the CPR does not contain any specific rules or restrictions in relation to contingency fee agreements in collective actions. Accordingly, the general position is that claimants' lawyers are permitted to work on a contingency fee basis, but subject to relatively strict limitations.

English law also allows (again, subject to certain limitations) the use of 'conditional fee arrangements' where a lawyer will receive a specified uplift on fees depending on the outcome of the case.

Competition Act 1998

Lawyers cannot operate on a contingency fee basis for opt-out collective proceedings. However, contingency fee arrangements can be used for opt-in collective proceedings (section 47C(8) of the Act).

Conditional fee arrangements appear to be allowed both for opt-in and for opt-out collective proceedings.

Cost burden

27 | What are the rules regarding a losing party's obligation to pay the prevailing party's attorneys' fees and litigation costs in a class action?

Group litigation orders and representative claims

The court has discretion to order that one party pays some or all of another party's litigation costs. The court applies the general rule that the losing party pays the costs of the successful party (in addition to their own costs).

In cases that proceed pursuant to a GLO, there will be individual costs (costs specific to a particular claim) and common costs (costs incurred in dealing with the GLO issues, including the costs of a claim proceeding as a test claim and the costs of the lead solicitor). Generally, an order for costs against group litigants imposes several liability on members for an equal proportion of the common costs. Group litigants will be liable for any individual costs of their claims, in addition to their share of the common costs.

Competition Act 1998

The CAT also has discretion to make any order it thinks fit regarding costs allocation, but will generally follow the 'loser pays' principle. In allocating costs between the parties, the CAT will consider a number of factors, including the conduct of all parties in relation to the proceedings and whether costs were proportionately and reasonably incurred.

In considering the recovery of costs in the *MasterCard* proceedings, the CAT held that MasterCard was entitled to recover only £250,000 of the total £2 million claimed in counsels' fees. It is clear, therefore, that in applying the 'loser pays' principle, the CAT will not allow successful parties to recover costs that it deems disproportionate.

Calculation

28 | How are costs calculated? What costs are typically recovered? Does cost calculation differ in the litigation and settlement contexts?

Costs in a litigation context (whether in court or the CAT) may be awarded on either:

- a standard basis, meaning that the costs are recoverable to the extent that they are proportionate, reasonably incurred and reasonable in amount; or
- (more unusually) an indemnity basis, which will compensate the receiving party for wrongful conduct of the paying party.

The calculation of costs paid pursuant to a settlement will depend on the particular agreement between the parties.

Third-party funding

29 | Is third-party funding of class actions permitted?

Group litigation orders and representative claims

Yes, third-party litigation funding is permitted. The size of collective claims allows litigation funding to be viable.

Competition Act 1998

Yes, third-party litigation funding is permitted for collective proceedings (opt-in and opt-out) before the CAT.

The claim brought against MasterCard was initially funded by Gerchen Keller Capital LLC, which is reported to have provided up to £43 million to finance the claim. The funding arrangement in place meant that class members did not need to pay anything to be part of the claim. The CAT confirmed that the funder's fees were 'costs incurred' by the class representative and, accordingly, such costs were to be

paid from unpaid damages. The CAT noted that, given the restrictions on contingency fees, the collective actions regime was likely to rely on third-party funding to be effective. Innsworth Litigation Funding is reported to be providing funding going forwards.

Public funding

30 | Is legal aid or other public funding available for class actions?

Public funding, including legal aid, is limited to a very narrow category of classes and the bar to qualify for its provision is high. It would therefore be unusual for it to be available for collective actions.

Insurance

31 | Are adverse costs, adverse litigation judgment or after-the-event insurance available?

After-the-event insurance is available for all types of collective actions and is often used by claimants in group litigation as it assists in showing that they can pay the defendant's costs if the action fails.

Claimants might also consider entering into conditional or contingent fee arrangements with their legal advisers.

Transfer of claims

32 | Can plaintiffs sell their claim to another party?

Group litigation orders and representative claims

Part 19 of the CPR does not contain any specific prohibitions. Accordingly, claims may be assigned in accordance with the provisions of English law relevant to assignments of rights of action.

Competition Act 1998

The amended Competition Act and the CAT Rules also do not restrict the sale of claims.

Distributing compensation

33 | If distribution of compensation to class members is problematic, what happens to the award?

Group litigation orders and representative claims

As GLOs are opt-in (rather than opt-out), all of the claimants are identifiable and have knowledge of the proceedings. Representative claims also require the class of represented parties to be clearly ascertainable. It is therefore unlikely that a scenario would arise in which there are undistributed damages, as the award will be reflective of the harm done to the specific number of individuals who opted in to the proceedings.

In the event that there are ever unclaimed damages, these are paid to the Access to Justice Foundation.

Competition Act 1998

Where the CAT makes an award of damages in collective proceedings, it may specify the date by which represented persons must claim their entitlement to a share of the award. Where damages are unclaimed by the specified date, the CAT can order that all or part of any unclaimed damages be paid to the class representative in respect of all or part of the costs or expenses it incurred in connection with the proceedings (section 47C(6) of the Act; CAT Rules, rule 93.4). In addition, the CAT may order that a portion of unclaimed damages be donated to charity.



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UPDATE AND TRENDS

Legal and regulatory developments

34 | What legislative, regulatory or judicial developments related to class actions are on the horizon?

The Supreme Court has given MasterCard leave to appeal the Court of Appeal's decision for the case against it to be remitted to the CAT for re-hearing. This case has not yet been listed but, if MasterCard is unsuccessful in this appeal, it will be the first opt-out claim to proceed under the CRA and might incentivise others to pursue claims. Either way, a judgment from the Supreme Court will provide useful guidance on the correct legal tests to be applied, which in turn will have implications for the prospects of future cases.

Separately, in May 2018, a GLO was granted allowing legal action brought on behalf more than 60,000 claimants against Volkswagen in connection with allegations that Volkswagen had installed software enabling their vehicles to cheat on emissions tests and misrepresented the environmental benefits of its diesel vehicles to buyers. This represents the largest consumer group action to come before the English court and is thought to be the largest GLO ever made by number of claimants. The legal funding group Therium Capital Management is providing third-party financing.

The proceedings have already raised interesting case management issues, given the number of law firms involved. In addition to the court ordering indemnity costs in Volkswagen's favour in light of the behaviour of one of the law firms previously involved, it also handed down judgment that a covenant in a non-disclosure agreement between two of the law firms (ie, to prevent one of the firms from representing other claimants for a period of six years) was unenforceable, as being an unreasonable restraint of trade.

The first substantive case management conference was held on 5-6 March 2019, in which it was held that:

- there is no reason in principle not to order trial of a preliminary issue in the case of a GLO (and indeed, such an order was made); and
- an application to retrospectively extend the cut-off date for the issue and service of claim forms would be allowed as it would not cause any real disruption.

Trial is not expected to take place before the end of 2020. It will be interesting to see how the court continues to exercise its case management powers in respect of such a large group.

Finally, WM Morrisons has also been granted leave by the Supreme Court to appeal against a judgment granted by the Court of Appeal relating to approximately 5,500 of its current and former employees, which found that it was vicariously liable for a data breach after a disgruntled employee leaked payroll information online. The appeal is listed for 6–7 November 2019 and, if unsuccessful, might encourage similar collective actions by employees.

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