

# Class Actions 2021

Contributing editors  
Jonathan D Polkes and David J Lender



**Publisher**

Tom Barnes  
tom.barnes@lbresearch.com

**Subscriptions**

Claire Bagnall  
claire.bagnall@lbresearch.com

**Senior business development manager**

Adam Sargent  
adam.sargent@gettingthedealthrough.com

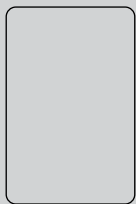
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# Class Actions 2021

**Contributing editors****Jonathan D Polkes and David J Lender****Weil Gotshal & Manges LLP**

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

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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 D Polkes and David J Lender of Weil Gotshal & Manges LLP, for their continued assistance with this volume.



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Weil Gotshal & Manges LLP

## 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 details 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 (the CAT Rules), and practical guidance is provided in the CAT's Guide to Proceedings (the 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 of the UK, who will be included in opt-out proceedings only if they have expressly opted in. There have, to date, been a handful of opt-out claims. The first opt-out application 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 on 27 March 2014 (Mobility Scooters: CE/9578-12), and 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).

The third was registered on 18 May 2018 by a special purpose vehicle, UK Trucks Claim Limited, as a follow-on action for damages arising from a decision of the European Commission on 19 July 2016 against a cartel of truck manufacturers (CASE AT.39824 – Trucks).

The fourth opt-out application was brought in February 2019 by Mr Justin Gutmann against London & South Eastern Railway Limited, First MTR South Western Trains Limited and Stagecoach South Western Trains Limited. This application involves claims against UK rail operators concerning the availability of certain rail fares. Unlike the other applications mentioned, this is not a follow-on action, meaning that the applicants will need to demonstrate that a breach of the underlying competition law has in fact taken place.

Finally, two competing applications were brought against a number of banks on 29 July 2019 by Michael O'Higgins FX Class Representative Limited, a special purpose vehicle, and on 11 December 2019 by Mr Phillip Evans, following two European Commission decisions made on 16 May 2019. The European Commission had found that various major banking groups participated in two cartels in the Spot Foreign Exchange market for the 11 G10 currencies. On 6 March 2020, the CAT refused to decide as a preliminary issue which of these applicants should represent the class and instead ruled that this issue should be heard at the same time as the substantive hearing on whether a collective proceedings order (CPO) should be granted at all in March 2021.

### 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 109 GLOs made, of which 34 were made prior to 2003. Furthermore, only three were made in 2018, only one was made in 2019 and only one has been made in 2020 (to date). 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 of under 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' 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 rehearing. 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 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 and the hearing for this concluded on 14 May 2020. Further clarification regarding the appropriate test to be applied can be expected in due course once the Supreme Court's decision is handed down.

A number of cases (as listed above) have been filed but adjourned by the CAT until the Supreme Court has handed down a judgment in the Mastercard appeal case.

## 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 109 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 and 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 causes 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 that 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 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, which 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: (1) 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; and (2) 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. While exact statistics are unavailable for High Court actions, they might take many years. For example, in October 2016, a number of claimants applied for a GLO 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 matter is not expected to be listed before 2021.

### 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: (1) the date on which the infringement of competition law that is the subject of a claim ceases; and (2) 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: (1) 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 (2) 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 arise 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 these 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 group litigation order (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 that has suffered loss) or a representative body, for example, a trade association. A collective proceedings order (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 Competition Act 1998 (the Act)).

Rule 78 of the Competition Appeal Tribunal (CAT) Rules of Procedure (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's Guide to Proceedings (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 needs to first 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 these 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 subclass, 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 the Civil Procedure Rules (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 the 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.

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 Civil Procedure Rules (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 group litigation order (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 Competition Appeal Tribunal (CAT) will include its requirements for providing any evidence it considers necessary for the determination of the application for a collective proceedings order (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 of Procedure (the 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), or both.

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 this 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 are 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 the 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 the 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, owing 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 handed down its judgment on 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 these agreements, and the advantages and disadvantages of the particular agreement will be fact-specific. It is highly likely that these 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 group litigation order (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 Civil Procedure Rule (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 Competition Appeal Tribunal (CAT) (CAT Rules of Procedure (the 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 collective proceedings order (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 granting 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 or defendants. 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 the 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 group litigation order (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 Civil Procedure Rules (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 collective proceedings order (CPO) has been made by the Competition Appeal Tribunal (CAT), the judgment will bind all represented persons unless specified otherwise (CAT Rules of Procedure, 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 this 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's Guide to Proceedings, 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 Competition Appeal Tribunal (CAT). Under the old section 47B of the Competition Act 1998 (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 Consumer Rights Act 2015, 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 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 these 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 Competition Act 1998 in breach of an arbitration clause.

The Competition Appeal Tribunal (CAT) may encourage and facilitate the use of alternative dispute resolution if deemed appropriate (CAT Rules of Procedure (the 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 these 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 a settlement of a claim conducted by a representative party under Civil Procedure Rule 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 Civil Procedure Rules (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 Competition Act 1998 (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 group litigation order (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 Competition Appeal Tribunal (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: (1) a standard basis, meaning that the costs are recoverable to

the extent that they are proportionate, reasonably incurred and reasonable in amount; or (2) (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 be dependent 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, these 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. Therefore, it would 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 Act and the CAT Rules of Procedure (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.

If 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.

## 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 heard the appeal in relation to whether the *Mastercard* case should be remitted to the Competition Appeal Tribunal for rehearing in May 2020, and judgment is expected to be handed down later this year. If MasterCard is unsuccessful in this appeal, it will be the first opt-out claim to proceed under the Consumer Rights Act 2015 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, including a number that are on hold pending the outcome of this case.

In respect of representative actions, the Supreme Court has granted Google permission to appeal against the Court of Appeal's decision in *Richard Lloyd v Google LLC* [2019] EWCA Civ 1599. In this case, the action was brought on behalf of an estimated 4.4 million iPhone users, involving the use of a feature that allowed Google to bypass certain blocking of third-party cookies and the sale of users' data to third parties without the users' knowledge or consent. In overturning the first instance judge, the Court of Appeal allowed the claimants to serve the claim on Google in the US. It also overturned the first instance decision in relation to the representative action by holding that the representative action could in fact be brought on the basis that, because damages were claimed on a per capita basis, all claimants had suffered the same loss (ie, loss of control over their data) and therefore shared the 'same interest' and could be identified. Finally, it held that the first instance judge was incorrect in exercising his discretion in ruling that the claim should not be permitted to proceed, as the class members were identifiable and did not need to individually authorise a representative claim. Moreover, it held that they would otherwise be left without an effective remedy. The Supreme Court will determine a number of contested issues including whether, in a representative action, uniform per capita damages can be awarded for data protection breaches (in this case without any proof of material damage) and whether it is necessary to identify the members of a class pursuant to the 'same interest' requirement.

## Coronavirus

35 | What emergency legislation, relief programmes and other initiatives specific to your practice area has your state implemented to address the pandemic? Have any existing government programmes, laws or regulations been amended to address these concerns? What best practices are advisable for clients?

New procedural rules have been introduced to address additional issues that parties may face arising out of the pandemic. These include amendments to Practice Direction 51Y, which took effect on 25 March 2020 and which clarified the manner in which the court may exercise its discretion to conduct hearings remotely in private and to ensure that access by the public to these remote hearings is made available by audio or video recordings. This will no longer apply following the date on which the Coronavirus Act 2020 ceases to have effect.

In addition, on 2 April 2020, Practice Direction 51ZA took effect to allow parties to agree extensions of time and to provide guidance to the court as to what to consider in respect of those applications during the covid-19 pandemic. The changes it effected include allowing parties to agree to extensions of up to 56 days (rather than 28 days) without formally notifying the court, provided it does not put a hearing date at risk. This Practice Direction will cease to have effect on 30 October 2020 unless an extension is put in place.

The English courts have adapted to the pandemic, including by allowing hearings to take place remotely. This includes in relation to class actions. For example, in the case of *Municipio De Mariana & Ors v BHP Group Plc* [2020] EWHC 928 (TCC), which arose out of the collapse of the Fundão Dam in Brazil in November 2015, the High Court ruled that a hearing related to one of the largest class actions could be delayed by six weeks, but was then to take place remotely in July 2020, following an application by two of the defendants to stay the proceedings. The judge also granted an extension of time for service of reply evidence, noting that the court must be conscious of the problems of remote working.

The potential for class actions to be initiated as a result of the consequences of business failures following the pandemic is also high. The areas where this might become prevalent might include, for example, employee claims, data protection claims and environmental, social and governance matters, where a number of individuals might all have the same interests. Another risk relates to securities class actions, which might arise if companies have been unable to meet their forecasts given the current market conditions.




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### Jamie Maples

jamie.maples@weil.com

### Hayley Lund

hayley.lund@weil.com

### Sarah Chaplin

sarah.chaplin@weil.com

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110 Fetter Lane  
London  
EC4A 1AY  
United Kingdom  
Tel: +44 20 7903 1000  
Fax: +44 20 7903 0990  
www.weil.com

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