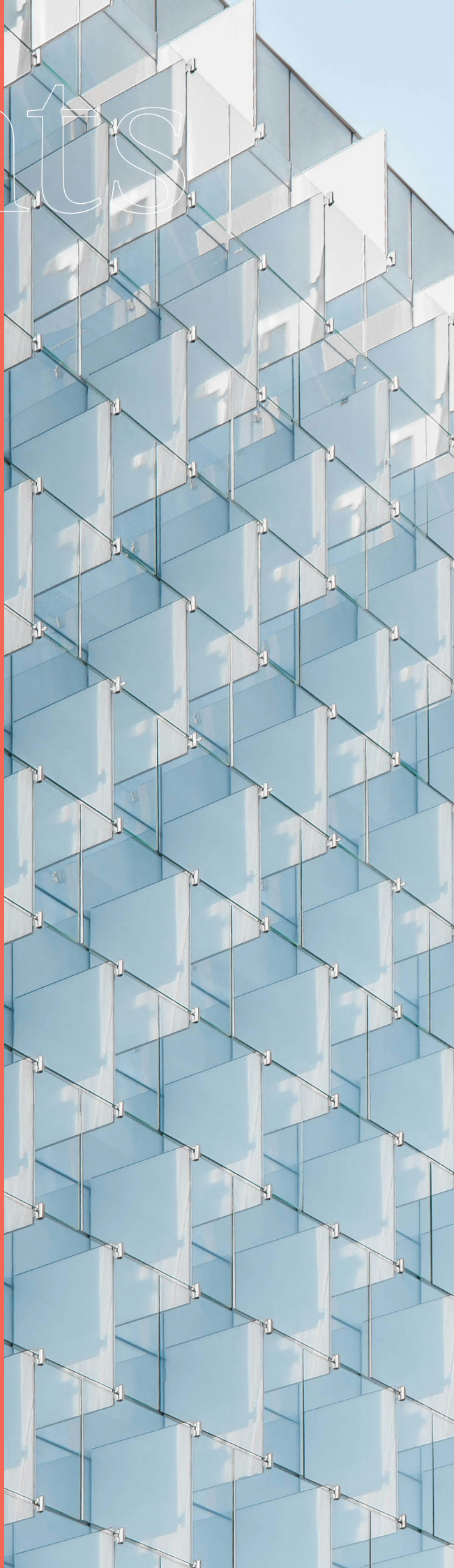
Ashurst

Group litigation and class actions in England and Wales

Ashurst Quickguide

Outpacing change

contents



What are class actions?

"Class actions" are legal proceedings where multiple claimants with claims sharing common characteristics seek a remedy against the same defendant or multiple defendants. They are also known as "collective proceedings" or "group litigation". The English courts have developed various types of procedures for bringing this type of litigation.

By way of example, class action proceedings could concern a group of claimants who claim to have suffered loss because they were exposed to the same event, such as a cyber-attack or environmental disaster. Or the class could comprise consumers who all bought a specific product and seek to bring proceedings regarding the price that was charged or the terms and conditions that applied.

An important distinction concerns the difference between opt-out class actions and opt-in class actions:

- Opt-out class actions are claims brought on behalf of a defined group or class without identifying all of the claimants or obtaining their authorisation. For example, the class might be defined as "all persons who subscribed for shares in reliance on the prospectus issued by ABC plc on 1 January" or "all persons who suffered loss as a consequence of the cyber-attack on ABC plc". The key point is that anyone who falls within the group is included in the claim unless they specifically opt out.
- Opt-in class actions are claims brought only by those who decide they want to participate in the claim and who specifically authorise the claim to be brought on their behalf.

Why has there been an increase in class actions?

The phrase "class actions" is often associated with the United States, where class action litigation is common and there is a long history of significant class action litigation. However, England, together with a number of other jurisdictions, has witnessed a significant growth in class actions in recent years. The reasons for this development include:

Growth in litigation funding and specialist claimant law firms

The significant growth in third-party funding of litigation coupled with the growing maturity of a specialist and dedicated group of claimant law firms has driven an increasing number of recent class actions, some of which have included a novel and creative approach to the relevant legal and procedural issues.

Increasing scrutiny of corporate behaviour

Customers, investors and activists are increasingly scrutinising corporate behaviour, particularly in relation to ESG, and are willing to pursue class actions in order to obtain recompense and/or to seek to hold corporates to account.

New legal procedures

The collective proceedings regime that is available for competition law infringements in the Competition Appeal Tribunal (CAT) has seen a surge in cases in recent years. This is discussed in more detail below.

Rapid technological change and regulation

This is giving rise to more regulation and increasingly stringent standards that corporates have to meet. Class action liability may follow if they fail to adhere to these standards.

Restriction of extra-territorial reach of US courts

For securities/shareholder class actions, one of the key triggers for growth in England has been a US Supreme Court decision which held that US courts must apply the presumption against extra-territorial application of US law where a US statute gives no clear indication of an extra-territorial application. Given the size of the London capital markets, it was perhaps inevitable that, in appropriate circumstances, potential classes of claimants would look instead to bring claims in the English courts, particularly in relation to London-listed issuers and their obligations to the markets.

What kind of claims are the subject of class actions?

Claimant law firms and litigation funders are increasingly innovative in terms of the issues that form the basis of class action claims.

The following types of claims have been a significant feature of class action litigation in recent years:

ESG and sustainability

Recent years have seen a focus on ESG and sustainability issues generally and including in relation to class actions.

The term ESG covers a broad and diverse spectrum of disputes according to the context in which it is used. For example, it has been used to encompass disputes relating to climate change and emissions, human rights abuses, waste disposal, employee relations and financial crime issues.

ESG class actions are usually seeking compensation for affected individuals. However, ESG related litigation can also be pursued with a broader agenda and that has been a feature in some class action claims, including to raise awareness of particular issues and seek to promote change, transparency and accountability.

There has been a significant increase in claims that seek to impose liability on an English parent company for the tortious actions or omissions of its subsidiaries in other jurisdictions, particularly in relation to environmental disasters. The key question in these cases is whether the parent company assumed a duty of care to those claimants affected by the allegedly wrongful acts. This has involved consideration of how far the parent company involved itself in the management of its subsidiaries' operations or held itself out as doing so. In general, these cases reflect a willingness of the courts to investigate alleged wrongdoing on the part of English based corporates.[1]

Supply chains are also subject to increasing focus in ESG litigation. Recent claims have sought to allege that a UK domiciled defendant owes a duty of care to foreign-domiciled claimants for the actions of a third-party operating in the defendant's supply chain. These claims are legally novel and the arguments have not been tested at trial.

"Greenwashing" (i.e. statements or actions by a company that misrepresent how environmentally friendly it is, or its products or services are), also represent a potential basis for ESG related class actions. It is not yet clear how greenwashing claims in and of themselves will succeed. The conventional view is that a claimant needs to demonstrate a direct connection, or causation, between the alleged greenwashing and the loss they have suffered in economic or financial terms. In many cases this will not be straightforward.

1 See for example, *Lungowe and Ors. v Vedanta Resources Plc and Konkola Copper Mines Plc* [2019] UKSC 20 and *Okpabi and others (Appellants) v Royal Dutch Shell Plc and another* [2021] UKSC 3

Data

There have been several well publicised cyber-attacks and data security incidents in recent years. A number of organisations have also made attempts to monetise the significant quantities of data that they hold. These developments reflect the growth of the digital economy and the recognition and importance of data as an asset in and of itself.

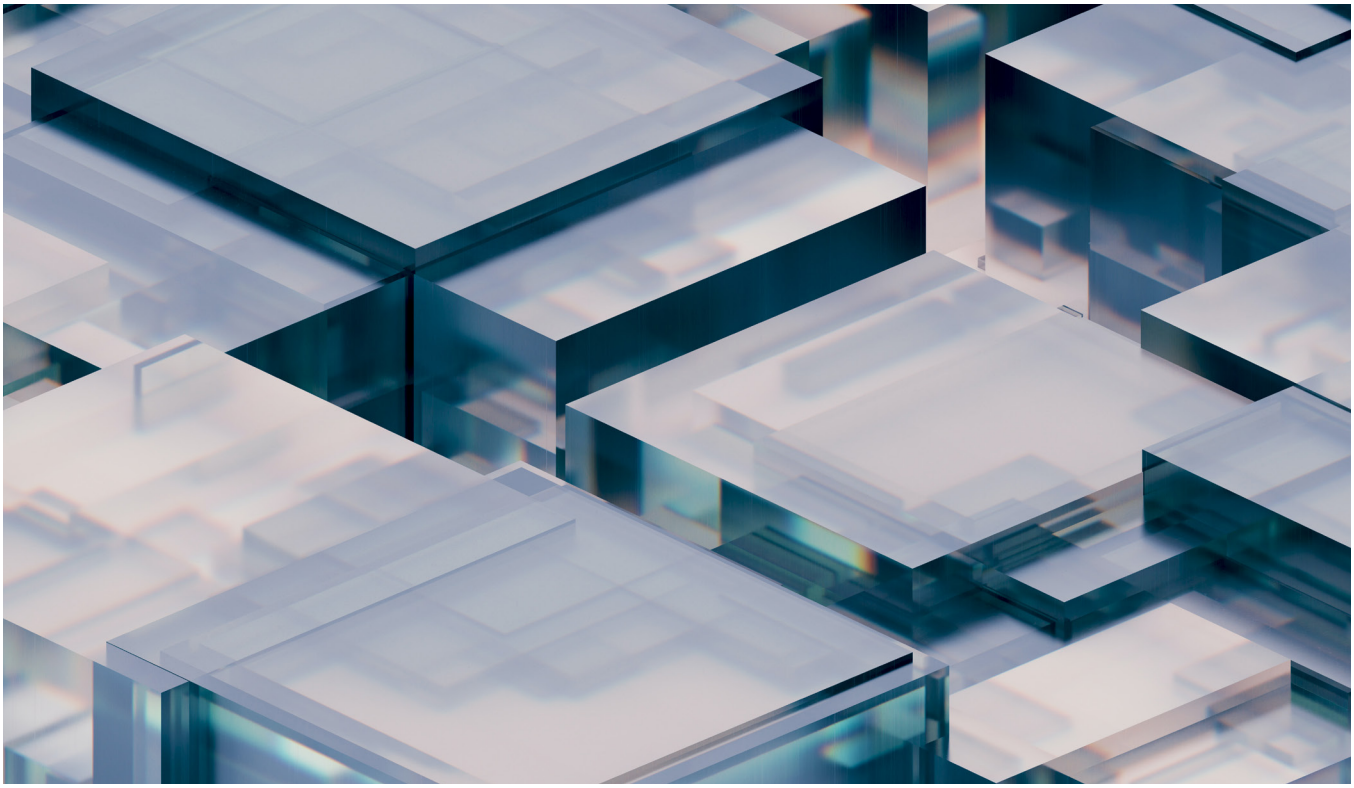
At the same time, there has been an increase in the protections available to individuals to protect their personal data and private information. This has occurred most significantly through the General Data Protection Regulation, as incorporated into English law by the European Union (Withdrawal) Act 2018, and the Data Protection Act 2018. There are also a number of other statutory and common law sources of rights available to protect personal data and information.

Against that background, there was a significant increase in class actions related to the exploitation and failure to protect individuals' data and information. British Airways, Ticketmaster, EasyJet and Marriott are all examples of well-publicised cyberattacks that have resulted in group litigation.

The Supreme Court decision in *Richard Lloyd v Google*[2] and the first instance decision in *Prismall v Google and Deepmind*[3], made it significantly harder to pursue data-based group actions on an opt-out basis.

However, claimant law firms continue to advertise for and investigate possible claims arising from cyber-attacks and data breach incidents and to explore mechanisms to bring opt-out class actions. The opt-in mechanisms discussed below are also available.

2 [2021] UKSC 50
3 [2023] EWHC 1169



Competition law infringements

The last decade has seen a notable increase in competition litigation activity across Europe, and particularly in England and Wales. In the last 3-4 years, this has included around 40 opt-in and opt-out class actions commenced in the CAT under the bespoke regime that caters for competition class actions in that forum (see further below). The quantum of these claims tends to be significant – in the hundreds of millions and often into the billions of pounds.

Competition class actions seek to recover damages for loss suffered by the affected class arising from an infringement of competition law – either abuse of a dominant position or anticompetitive agreements (i.e., cartel behaviour), or potentially both. Several of the claims filed in the CAT are presented as raising issues of competition law (in order to fall within the CAT's bespoke regime) but are perhaps more accurately characterised as consumer claims.

Competition class actions can be made on a "follow-on" or "standalone" basis.

- Follow-on claims are founded on a pre-existing infringement decision issued by the Competition and Markets Authority or by the European Commission (for investigations commenced before Brexit). Such regulatory decisions are binding on English courts and establish liability for the purposes of the follow-on claim. The litigation will therefore largely concern issues of causation and quantum, which are often complex and require extensive expert evidence.
- Standalone claims are based on allegations of anticompetitive behaviour, which need to be proven at trial in the usual way.

In practice, many so-called follow-on claims will be hybrid in nature and involve certain standalone elements that will need to be proven.

Historically, the competition litigation landscape in England & Wales has generally mirrored the competition regulators' sectors of focus. This remains broadly the case: for example, all of the Tech Giants (except Microsoft) currently face at least one large competition class action in the UK.

However, there is a growing trend of competition class actions being issued on a standalone basis, either before any regulatory intervention has occurred or before the investigations reach their conclusion. Claimants increasingly draw from regulatory activity in other jurisdictions (particularly the US) which is often but not always replicated in the UK. As a result, this trend is beginning to introduce a degree of divergence between the areas of regulatory focus and the areas of interest for potential claimants.

How do the courts manage class actions?

There are, broadly speaking, five procedures available to manage class actions.

Group Litigation Order (GLO)

A GLO is a court order which enables claims raising common or related issues to be managed together. This is intended to avoid duplication of costs and enable a single litigation process, rather than a multiplicity of proceedings advancing at different times and in different ways. Once a GLO is made, all existing claims concerning the GLO issues will be either automatically transferred into the group or stayed pending resolution of the group action.

The GLO is usually negotiated by the parties as a first step, with the court resolving any outstanding areas of disagreement. On the claimant-side, the proceedings will typically be managed by a lead solicitor, with other claimant firms contributing (typically behind the scenes) to the running of the litigation. A small committee of claimants will be appointed to steer the litigation on behalf of the wider group cohort.

Potential advantages for a defendant

- It introduces substantial efficiency and cost-saving. Rather than having to face multiple proceedings on the same issues at the same time, the defendant faces a single set of proceedings and generally has to deal only with one claimant firm.

Potential disadvantages for a defendant

- When a GLO is made it must be advertised, and the fact of the making of the GLO may be widely reported. This publicity can result in an increase in the number of claimants.
- It can cause claimants to act together in a more cooperative way because, at least to some extent, they have been ordered to do so, and thereby remove some of the potential to "divide and conquer" as between different firms.
- There can be substantial administrative costs involved in dealing with a group action, including costs referable to the verification of claimants as proper claimants and the management of the group claimant register.

Bespoke case management directions/test cases

Test cases can be tried as part of a GLO procedure, but a test case (or cases) can also be run on an informal basis, where there is no formal GLO. Instead, the parties agree and/or the court makes bespoke directions applying to a number of different cases or claimants. Often a few claimants are selected to act as a test case. The test cases are used to decide certain key issues which inform how the rest of the class are dealt with, even if the judgment in the test case will not bind the parties to the other claims.

Potential advantages for a defendant

- There is potentially less publicity compared with a GLO as it is not required to be formally advertised. However, claimant lawyers may still publicise the fact and details of the directions and/or test case.
- In theory at least, there could be lower legal costs because the court is concerned with a handful of cases, rather than managing a substantial group action (although see below).
- A helpful decision in the test case could provide a useful precedent to help resolve the other claims brought.

Potential disadvantages for a defendant

- In our experience, all firms will want to lead on the litigation and are likely to disagree about how it should be run. The disagreements between the claimant law firms can lead to substantially increased costs.
- Test cases are unlikely to lead to swift resolution. Complex case management means that proceedings often take many years.

Representative Actions

This is a procedure which allows a claim to be commenced or continued by (or against) one or more persons as representatives of any others who have the "same interest" in the claim.

The court's judgment binds everyone that the representative party purports to represent. A representative action therefore proceeds on an opt-out basis and the members of the class are not necessarily identified individually in or joined as parties to the claim. However, the court's permission is required to enforce a judgment or order by or against anyone who is not a party to the action.

Potential advantages for a defendant

- In some circumstances, the requirement for all members of the class to have the same interest might mean that claims are limited to the 'lowest common denominator' that applies to all members of the class.
- There are some important unanswered questions about the viability of funding representative actions in circumstances where none of the claimants (other than the representative claimant) will have agreed to the funding terms. This was an issue acknowledged by the Supreme Court in *Lloyd v Google* and may provide defendants with an avenue of challenge against the representative claimant and its funder.

Potential disadvantages for a defendant

- Instead of being liable only to those claimants who have brought claims, the defendant is in principle liable to pay damages to all members of the represented class, irrespective of whether or not they had shown any interest in the action. In effect, this is true class liability of the kind that is common in the US.

The interpretation of the 'same interest' requirement has given rise to a number of important decisions in recent years and the relevant issues are still not fully settled. Most recently:

- In *Lloyd v Google*, the Supreme Court recognised that the representative action procedure was a "*flexible tool of convenience in the administration of justice*" and said that there was no reason to interpret the regime restrictively. However, it also held that the use of the representative action procedure was not appropriate in situations where an individualised assessment of damages was required, as was the case in *Lloyd v Google* given the variability of personal data across the 4.4 million iPhone users that comprised the individual class members.
- A recent Court of Appeal decision in *Commission Recovery Limited v Marks and Clerk*[4] allowed a representative claim to proceed. This is the first Court of Appeal judgment on the representative action regime following *Lloyd v Google*. The existence of a narrow "common issue", which would not resolve all questions of liability or quantum in respect of all individual class members, was sufficient to engage the representative action jurisdiction. The Court of Appeal emphasised that a conflict of interest will only exist between class members where arguments on behalf of some class members could be prejudicial to others. Therefore, the availability of additional or alternative arguments to only some class members did not give rise to a conflict of interest unless those arguments prejudiced the position of other class members.
- An attempted representative claim failed in *Prismall v Google and Deepmind*. Given the decision in *Lloyd v Google*, the claimants accepted that it was necessary to examine their claim arising out of the sharing of their data by the Royal Free Hospital with the defendants on a "lowest common denominator" basis. However, applying that test, it was held that the information that was shared with the defendants was anodyne in nature and so would not have resulted in damages for everyone in the class. This decision is subject to appeal.

4 [2024] EWCA Civ 9

Collective Proceedings Order

The collective proceedings order (CPO) regime was introduced by the Consumer Rights Act 2015 which amended certain provisions of the Competition Act 1998. It applies only to private competition litigation in the CAT. It provides a procedure for bringing competition law claims on an opt-out or opt-in basis.

Potential advantages for a defendant

- It applies only to private competition litigation. However, recent years have seen a number of cases seeking to push the boundaries and reframe what are essentially issues of consumer and contract law as competition law issues.
- Rather than having to face multiple proceedings on the same issues at the same time, at least for opt-in collective actions, the defendant faces a single set of proceedings and generally has to deal only with one claimant firm. For opt-out claims, however, this advantage doesn't necessarily apply. This is because in the absence of the opt-out regime those claims are unlikely to be brought on an individual basis due to the disproportionate costs involved for.

Potential disadvantages for a defendant

- This is opt-out litigation akin to US style class action liability. Once the CPO is certified (see below), all members in the defined class become part of the action unless they opt out before the end of a designated period.
- The Supreme Court has made clear that the 'broad axe' principle applies to competition claims brought under the CPO regime. Essentially this means that that courts should not deprive claimants of a remedy because of difficult quantification issues and must do their best on the available evidence. The courts have also accepted that these claims need not be compensatory in nature, given the statutory regime underpinning them provides for an "aggregate" award of damages on a class-wide basis, not an individual assessment of each class member's loss.

A CPO requires certification in order to proceed. In *Walter Merricks v Mastercard Inc and others*[5], the Supreme Court provided guidance on the approach that should be adopted by the CAT in considering whether to certify a CPO application. The CAT must certify the collective proceeding, including determining whether or not the claims are to be "suitable" to be brought as collective proceedings and "suitable" for an aggregate award of damages. The Supreme Court held that "suitable" means suitable relative to individual proceedings and "suitable" for an award of aggregate damages as compared to individual damages. Further, the prospective class representative must establish that claims include "common issues" that are the same or similar across the defined class, being an identifiable group.

In light of this decision, subsequent years have seen a flurry of cases proceeding under the CPO regime, the majority of which have been certified or the prospective class representative has been invited to revise its claim, setting a low bar for certification. Many of these claims push the boundaries of what a "competition law" claim is, with the result that several claims that might more naturally be considered to be consumer, data protection or privacy cases are being shoehorned into the CPO regime in order to benefit from the advantages the regime offers to class representatives.

5 [2020] UKSC 51

Other informal procedures – multiple claimants on a claim form

CPR 19.1 provides that any number of claimants or defendants may be joined as parties to a claim. A single claim form can be used to start all claims which can be "conveniently" disposed of in the same proceedings[6]. There is no judicial guidance on what this means, rather the question is one of effective case management.

This mechanism was used in the recent group action against the Ministry of Defence where 3,450 claimants alleged injury following exposure to noise while in the military. All the claims were issued on one claim form. It was initially held at first instance that this was impermissible but the Divisional Court overturned that decision on appeal (*Abbott v Ministry of Defence*[7]).

6 CPR 7.3

7 [2023] EWHC 1475 (KB)

How are class actions funded?

The size and complexity of most class actions means that costs can be significant. As such, the question of how a class action will be funded is of crucial importance in determining its viability.

The principal sources of funding, which can be used individually or in combination, are as follows:

- **Conditional or contingent fee agreements**: such an agreement with the lawyers acting on the litigation will usually provide that the lawyer will charge the claimants only if they are successful (a "no win, no fee" agreement). How the lawyers' fees are calculated will depend on whether it is a conditional fee agreement (CFA) or a damages-based agreement (DBA).
- **ATE insurance**: After-the-Event policies typically provide cover for claimants' potential liability for adverse costs, as well as their own disbursements if the case is unsuccessful.
- **Third party funding**: the third party funding market has grown significantly in recent years and that growth is a major factor in the rise of class actions in this jurisdiction. A third party funder may finance some or all of the legal costs and disbursements in return for an agreed return out of the proceeds recovered in the litigation. This is typically calculated as a percentage share of damages or a multiple of the funding provided, or the higher of the two.

The question of funding is particularly important in competition class actions. These cases almost always require extensive expert evidence from an economist and, occasionally, from a forensic accountant. They are often cumbersome and take several years to reach trial. As a result, competition class actions tend to be particularly expensive to litigate, in effect making them cost-prohibitive for classes of consumers that do not have third party funding in place.

In competition claims, consumer classes are typically represented on an opt-out basis, for which DBAs are prohibited under English law. This issue has recently caused some concern to the funding industry following the Supreme Court decision in PACCAR[8] (an opt-out claim). The Supreme Court held that a litigation funding agreement providing for a return to the funder based on a percentage of damages recovered (a widely used funding model in class actions) amounted to a DBA and was therefore unenforceable. Litigation funders and litigants promptly began to renegotiate their funding agreements so as to adopt a compliant structure. This in turn gave rise to a temporary lull in litigation activity in this space while potential litigants and funders reassessed their positions.

The UK Government intended to intervene and introduced legislation which, if enacted, would have clarified that litigation funding agreements are not DBAs. In effect, this would have retrospectively validated all litigation funding agreements and reversed the decision in PACCAR. The bill did not pass before the dissolution of Parliament ahead of the general election on 4 July 2024. However, we expect that following the election, legislative change will be pursued at some stage by the new Government. The Civil Justice Council is also conducting a review of third-party funding in England and Wales considering access to justice, the effectiveness of funding and regulatory options. The full report is expected by the summer of 2025 and will make recommendations for change.

8 [2023] UKSC 28

What is the position regarding costs?

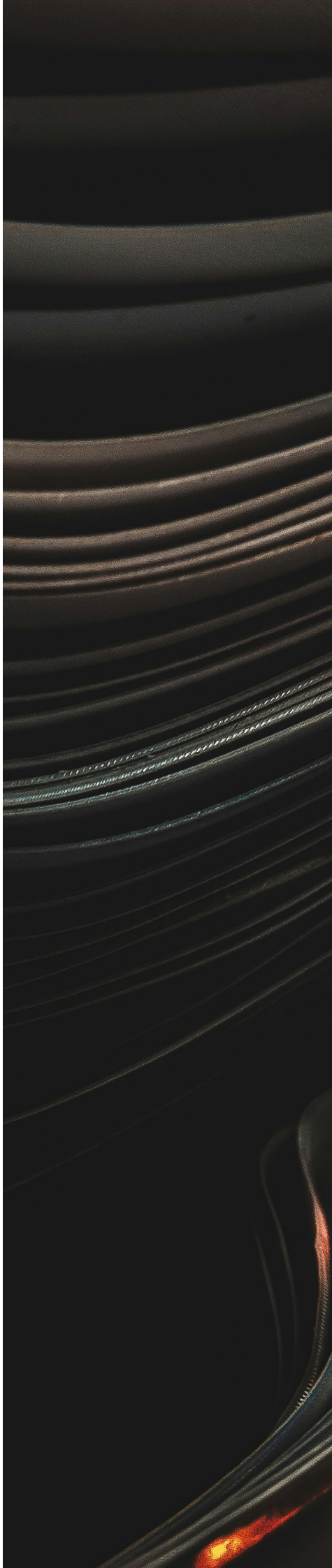
The usual rule that the loser pays the other side's costs applies equally to class actions; its retention was seen as important in preventing the development of a US style class action culture.

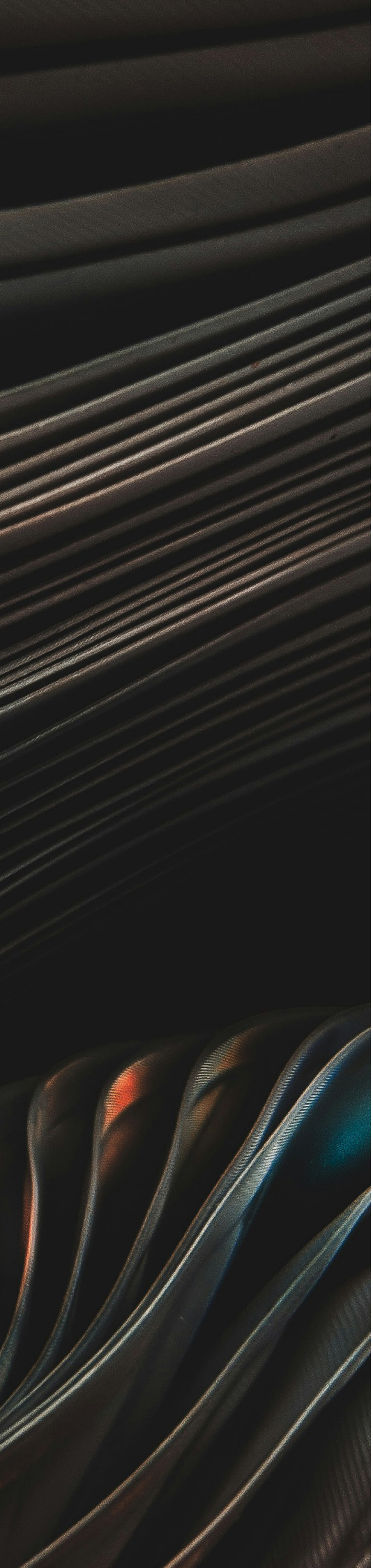
However, this is only a starting point and the court retains the ability to depart from the usual rule in appropriate circumstances, e.g. to make issue-based costs orders or to make orders that reflect the conduct of the parties in the course of the litigation.

There are also costs specific rules in relation to class actions:

- In the CAT, costs can be awarded to or ordered against the class representative, but not other represented persons unless: (i) the CAT has approved a sub-class of represented persons; (ii) there are costs associated with particular issues relating only to certain represented persons; or (iii) a class member has made an application (for example to be excluded from the class).
- In a GLO, costs are split into two categories of "individual costs" or "common costs". Common costs will include matters such as the resolution of the GLO issues, individual costs incurred if a case is a test claim or incurred by the lead solicitors' firm or legal representative. Individual costs in contrast are typically those costs incurred by a claim on the group register.

The CAT will consider the third party funding arrangements at the certification stage in a CPO application. Funding may also be relevant in the event of a carriage dispute where two or more class representatives (and their law firms) compete to decide which should lead the class action.





How can class actions be settled?

Settlement in group actions involves numerous parties and therefore can lead to particular challenges.

A number of factors are usually taken into account and there is often an interplay between prospects, quantum, costs and ability to pay. As group litigation involves multiple parties, practical issues can arise with authority to settle, confidentiality, costs and how any proceeds of settlement should be distributed. Opt-out class actions present particular challenges because of the difficulty in knowing how many people are seeking compensation, and so the amount of an appropriate settlement. In the Collective Proceedings regime in the CAT any settlement requires the approval of the Tribunal.

The CAT made its first collective settlement approval orders (CSAO) in February and April 2024. The first was made in *Mark McLaren Class Representative v MOL (Europe Africa) Ltd & Ors*, which was a follow-on opt-out claim arising from a European Commission decision in 2018 relating to cartel behaviour in relation to maritime shipping of new motor vehicles. The settlement was between the claimant class and one of the 12 defendants and concerned 1.7% of the claim value. The settlement was for £1.2 million in damages and £380,000 in costs.

The second CSAO was made in the Boundary Fares litigation – a standalone opt-out claim relating to fares charged by rail companies to customers who used a TfL travelcard for part of their journey. The settlement was between the claimant class and Stagecoach and amounts to £25 million in damages.

We expect a number of further decisions on this topic as the class actions regime in England and Wales continues to develop.

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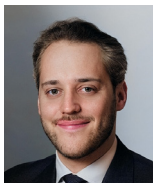

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