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CLASS AND COLLECTIVE ACTIONS

Class/collective actions in the UK (England and Wales): overview

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OVERVIEW OF CLASS/COLLECTIVE ACTIONS AND CURRENT TRENDS

1. What is the definition of class/collective actions in your jurisdiction? Are they popular and what are the current trends?

Definition of class/collective actions

The type of collective action addressed in this chapter involves a class of claimants, sharing certain characteristics, bringing a claim against one or more defendants. In England and Wales, there are numerous avenues for multi-party litigation, that is, litigation involving multiple claimants and/or defendants. These include:

- Claims by multiple claimants managed together by the court using its case management powers.
- Group litigation orders (GLOs).
- Claims by representative claimants.

All of these are examined in this Q&A.

Use of class/collective actions

Historically, various claims have been brought using collective action mechanisms, including:

- Competition law claims (for example, "follow-on" claims arising out of decisions of the European Commission finding cartel infringements or "standalone" actions alleging breaches of competition law).
- Personal injury claims.
- Pensions disputes.

Current trends

2015 saw a major reform of collective action procedures with the introduction of an "opt-out" collective redress procedure for competition law claims in the Competition Appeal Tribunal (CAT). This came into effect on 1 October 2015. The collective action procedures have been tested by a number of cases before the CAT including *Gibson v Pride Mobility Products Ltd (Case No. 1257/7/7/16)* and in *Merricks v MasterCard Incorporated and others (Case No. 1266/7/7/16)*. These cases offer guidance on the collective actions procedures before the CAT.

Further, the *Trucks Cartel Litigation (Case Nos. 1282/7/7/18 and 1289/7/7/18)*, which is currently going through the CAT, provides insight as to the possibility for "opt-in" and "opt-out" collective redress procedures to be brought in tandem by different groups of claimants against the same defendant(s) in respect of the same anti-competitive behaviour(s). The CAT allowed an "opt-in" claim and an "opt-out" claim brought by two separate groups of claimants to proceed in parallel. The CAT noted that there is nothing as a matter of law that would prevent both claims proceeding if they can be "managed effectively and efficiently in a way that avoids unnecessary duplication and to seek to achieve consistent results".

Since 24 July 2015, the government has published a list detailing all ongoing GLOs being heard by the English courts (*www.gov.uk/guidance/group-litigation-orders*). This list suggests that we should expect an increase in the number of collective actions arising from regulatory breaches by financial institutions (for example, the *RBS Rights Issue Litigation (17 September 2013)*, which was the subject of a GLO, the *Lloyds/HBOS Litigation (6 August 2014)* and the *Berkeley Burke SIPP Litigation (23 January 2018)*). This is despite the fact that these types of claims may give rise to difficult issues of causation, apportionment and damage quantification. See also *Question 24, National developments.*

REGULATORY FRAMEWORK

2. What are the principal sources of law and regulations relating to class/collective actions? What are the different mechanisms for bringing a class/collective action?

Principal sources of law

The principal legal and regulatory sources for collective actions are the Civil Procedure Rules and Practice Directions, as supplemented by statute (including the Senior Courts Act 1981). Also, the Competition Act 1998 and the Consumer Rights Act 2015 provide for certain competition law damages claims to be brought before the CAT, for which the Competition Appeal Tribunal Rules 2015 (*SI 2015/1648*) (CAT Rules) provide the requisite procedure.

In addition, the statutory instrument for implementing Directive 2014/104/EU on actions for damages under national law for infringements of competition law provisions of the member states (Anti-trust Damages Directive) came into force on 9 March 2017 (the Claims in respect of Loss or Damage arising from Competition Infringements (Competition Act 1998 and Other Enactments (Amendment) Regulations 2017). The Regulations introduce a suite of changes to competition law including in relation to limitation (*see Question 4*), disclosure (*see Question 15*) and evidence (*see Question 17*), among other matters detailed below. The substantive provisions of the Regulations only apply to claims where loss or damage as a result of an infringement of competition law takes place on or after the date they come into force (*see Part 10, Schedule 8A, Competition Act 1998*). For completeness, the procedural provisions concerning disclosure and evidence in the Regulations apply to proceedings in a competition claim in which the "first proceedings" before a court or the CAT took place on or after the date they come into force (*see also Part 10, Schedule 8A, Competition Act 1998*).

Principal institutions

High Court collective actions are generally heard by either the Chancery Division or the Commercial Court. If the claim involves competition law, it is generally heard by the Chancery Division (*Civil Procedure Rule (CPR) 30.8*), and if it is a "commercial claim" (*CPR 58.1(2)*) (any claim relating to a business document or contract, the

export or import of goods, banking and financial services), it is heard by the Commercial Court. There is a separate mechanism for bringing competition law claims in the CAT.

It is also possible to transfer cases within the divisions of the High Court, and from the CAT to the High Court (*rules 71 and 72, CAT Rules*). This may be needed to resolve the issue of multiple claims brought in different English courts at multiple levels of the supply chain by having them case-managed together in the same court. However, there may be a conflict between CPR 30.5 and rules 71 and 72 of the CAT Rules, as they seem to require that applications for transfer between the High Court and the CAT need to be made to both forums.

While there used to be significant differences between the CAT and the High Court, the Consumer Rights Act 2015 has narrowed the gap. The CAT is now able to deal with both standalone as well as "follow-on" claims and may also order injunctive relief. Further, the limitation period in respect of claims brought before the CAT now mirrors that applied to claims brought in the High Court. Some differences remain: the CAT benefits from a tribunal comprised of three members (one judge of the Chancery Division or senior lawyer and two lay members). The lay members often have specialist expertise (for example, in economics), which can be particularly useful in cases concerning complex overcharge calculations. On the other hand, the Chancery Division is more experienced in dealing with key issues such as quantum.

Different mechanisms

In the High Court, the options for bringing collective actions are:

- Claims which can be "conveniently" disposed of in the same proceedings can either be brought jointly or consolidated, with the court exercising overall case management using its ordinary procedural rules.
- GLOs which provide for several claims where more than one claimant has a cause of action raising common or related issues of fact or law to be grouped together and managed using specific procedural rules.
- Representative actions.

In the CAT, the relevant options are:

- Collective actions which can be brought by multiple claimants or by a specified body on behalf of consumers.
- Collective actions which can be the subject of a collective proceedings order, and can proceed on either an opt-in or opt-out basis.

As set out in this Q&A, these options have procedural differences, and the nature of the claimants and the quantum of their claims determine which is preferable. For example, multiple claimants bringing significant follow-on claims may prefer case management under the ordinary procedural rules of the High Court, where they can benefit from retaining greater control over the litigation and from the High Court's flexibility and experience in dealing with quantum and contribution issues. On the other hand, representatives of consumers in competition law claims may want to make use of the CAT's collective redress provisions as their claims would otherwise be too small to bring in any other way. Finally, GLOs have tended to be used in personal injury and product liability claims where the formal GLO procedural rules, though more complex and rigid than the ordinary case management powers of the High Court, can assist in bringing what are in practice complex standalone claims involving often disparate groups of claimants.

3. Are class/collective actions permitted/used in all areas of law, or only in specific areas?

Principal areas for collective actions

Collective actions arise in all areas. However, they are commonly seen in:

- Personal injury, negligence and competition claims.
- Product liability disputes.
- Environmental disputes.
- Pensions disputes.
- Financial services/consumer redress.

Consumer protection and rights

There has been recent reform in consumer protection and rights, which impact on collective actions (*see Question 2*).

LIMITATION

4. What are the key limitation periods for class/collective actions?

Limitation periods for High Court claims

The Limitation Act 1980 sets limitation periods for High Court claims. Periods vary depending on the nature of the action, but most are six years from the date on which the cause of action accrued, subject to fraudulent concealment, when time only starts to run once the claimant discovers the concealment or could with reasonable diligence have discovered it (*sections 2, 5 and 32, Limitation Act 1980*).

The nature of the action is relevant to when a cause of action accrues. For example:

- For breach of contract time runs from the date of breach.
- In tort (including most competition claims), time runs from the date damage was suffered.

Limitation periods for CAT claims

Claims in respect of Loss or Damage arising from Competition Infringements (Competition Act 1998 and Other Enactments (Amendment)) Regulations 2017 have amended the Competition Act 1998 by introducing a number of reforms in relation to limitation periods for competition actions where the relevant infringement commenced on, or after, the date they come into force including:

- Limitation stops running for the duration of the investigation by the competition authority into the competition law infringement in question (*paragraph 21, Schedule 8A, Competition Act 1998*). Limitation starts running again one year after the decision of the competition authority or one year after the investigation is closed.
- Limitation stops running where the parties to the dispute engage in a "consensual dispute resolution process" such as mediation or arbitration (*paragraph 22, Schedule 8A, Competition Act 1998*). Once this consensual process ends, the limitation period resumes running.
- The Regulations also provide some protection in relation to incipient collective proceedings. For example, where collective proceedings are brought under section 47B of the Competition Act 1998 but the court does not make a collective proceedings order, limitation is suspended during this period (*paragraph 23, Schedule 8A, Competition Act 1998*). This means that claimants are then positioned to bring individual claims under section 47A

of the Competition Act 1998 with the same limitation period remaining at the commencement of the collective proceedings.

- The Regulations also reform the rules around the start of the limitation period which is the later of the day on which the infringement of competition law ceases, or the claimant's day of knowledge (that is, the first day on which the claimants know, or could reasonably be expected to know, of the infringer's behaviour; that the behaviour constitutes an infringement of competition law; that the claimant has suffered loss or damage arising from that infringement, and the identity of the infringer (*paragraph 19, Schedule 8A, Competition Act 1998*). Once the limitation period starts to run, the claimant has six years to bring the action (*paragraph 18, Schedule 8A, Competition Act 1998*).

STANDING AND PROCEDURAL FRAMEWORK FOR BRINGING AN ACTION

Standing

5. What are the rules for bringing a claim in a class/collective action?

Definition of class

High Court. A representative action can be brought where more than one person has the same interest in a claim and the claim is brought by or against one or more of those persons. "The same interest" was considered by the Court of Appeal in *Emerald Supplies Ltd v British Airways plc [2010] EWCA Civ 1284*, which held that "[a]t all stages of the proceedings, and not just at the date of judgment at the end":

- It must be possible to say of any particular person whether or not they qualify for membership of the represented class of persons by virtue of having "the same interest".
- The parties must have the same interest in the proceedings, they must have a common grievance, and the relief sought must be beneficial to all.
- This does not mean that the membership of the group must remain constant and closed throughout. It may indeed fluctuate. It does not have to be possible to compile a complete list when the litigation begins as to who is in the class or group represented.

This test makes the bringing of representative actions in competition law claims very difficult. In contrast, the test for a GLO is much easier to satisfy as it may be made where more than one claimant has a cause of action raising common or related issues of fact or law (*CPR 19.10*).

CAT. Class members must have claims as a result of a competition law infringement that "raise common issues" (that is, "the same, similar or related issues of fact or law") (*rule 79(1)(b) and 73(2), CAT Rules*).

Potential claimant

The claimant must fall within the class of persons intended to be protected by the statute in respect of which breach is alleged.

Claims before the CAT can be brought by a single claimant, or by a representative. The representative need not be directly affected, but if not, the CAT must consider it just and reasonable for that entity to act as a representative, in which regard various criteria are considered (*section 47B(8), Competition Act 1998; rule 78(1), 78(2), (3) and (4), CAT Rules*).

Claimants outside the jurisdiction

When determining jurisdiction, the court has a number of potential sources of law to consider, including common law principles and the English Civil Procedure Code, bilateral jurisdiction conventions and multilateral jurisdiction conventions and regulations. These include:

- The Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (as amended by various Accession Conventions) (Brussels Convention).
- EFTA Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters 1988, as amended by the Convention of 30 October 2007 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (Lugano Convention).
- Regulation (EC) No 44/2001 of 22 December 2000 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (Original Brussels Regulation), as recast by Regulation (EU) No 1215/2012 of 12 December 2012 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial matters (Recast Brussels Regulation).

The applicable law depends on the location of the parties.

Where parties are domiciled in the EU, jurisdiction is most likely to be governed by the Recast Brussels Regulation. Generally, in circumstances where there is no express choice of court clause, a person domiciled in a member state must be sued in that member state, although exceptions provide for additional jurisdictions, such as the place of the performance of the contract, or, in tort, where the harmful act occurred.

Where the defendant is outside the EEA, and no bilateral jurisdiction conventions apply, the English Civil Procedure Rules, and common law, set out the criteria for determining jurisdiction. The doctrine of *forum non conveniens* is a discretionary power allowing the court to refuse jurisdiction where the courts of England and Wales are not the appropriate forum.

Courts may also refuse jurisdiction for an English domiciled defendant if damage is suffered outside the EEA (*Allen v Depuy International Ltd [2014] EWHC 753 (QB)*). In one case, consumers suffering damage outside the EEA could not bring a product liability claim against a manufacturer domiciled in England, as the Consumer Protection Act 1987 did not have territorial effect outside the EEA.

Representative actions in the English courts can be brought on behalf of claimants residing outside the jurisdiction. *Emerald Supplies* confirms that the location of the members of the represented class will not preclude a representative action (*Emerald Supplies [2009] EWHC 741 (Ch), at paragraph 30*). Unless the court directs otherwise, any judgment or order in a claim in which a party is acting as a representative is binding on all persons represented (*CPR 19.6(4)*).

GLOs and multiple claimant joint proceedings allow the court to consider related claims together for ease of case management. Before a claim can be entered on the GLO group register or joined to a proceeding it must be issued as an individual claim (*Practice Direction 19B, paragraphs 2.1 and 6.1A*). These claimants can bring a claim in England and Wales subject to usual conflicts of laws rules.

As regards claims in the CAT, for opt-out collective proceedings, any class member who is not domiciled in the UK at a time specified must opt in to ensure that the proceedings are brought on its behalf (*section 47B(11), Competition Act 1998*).

Professional claimants

Commercial funders increasingly fund claims in return for a share of proceeds. The claimant remains the claimant, that is, the funder does not "step into the shoes" of the claimant. The Association of Litigation Funders' Code of Conduct sets out its best practice for third party funders (although it should be noted that not all litigation funders have signed up to that Code of Conduct).

Qualification, joinder and test cases

6. What are the key procedural elements for maintaining a case as a class action?

Certification/qualification

High Court claims. The court can consolidate different proceedings and try multiple claims together under general case management powers (*CPR 3.1(2)*). The judge therefore retains considerable flexibility and discretion in whether and how to manage multiple individual claims together so that they become part of a *de facto* collective action.

In representative actions, the court determines whether the would-be claimants or defendants have the "same interest"; even when the *Emerald Supplies* criteria are satisfied (*see Question 5, Definition of class: High Court*), the court has discretion to disallow a representative action, and adopt a GLO. Any judgment or order in a representative action will be binding on "all persons represented" (*CPR 19.6(4)*). Represented persons do not need to be party and an order or judgment will be equally binding on a non-party, although it is only enforceable with permission.

Parties can apply for a GLO, or the court may make an order of its own initiative (*CPR 19.11 and Practice Direction 19B, paragraphs 3.1 and 4*). Before applying, the applicant's solicitors must consult the Law Society's Multi Party Action Information Service for information about other cases with the same proposed GLO issues (*Practice Direction 19B, paragraph 2.1*). A GLO application can be made at any time before or after relevant claims have been issued (*Practice Direction 19B, paragraph 3.1*).

CAT. The CAT may certify claims as eligible for collective proceedings, where it is satisfied that the claims are brought on behalf of an identifiable class, raise common issues and are suitable (*rule 79(1), CAT Rules*). In determining suitability, the CAT will consider:

- Whether collective proceedings are an appropriate means for the fair and efficient resolution of the common issues.
- The costs and benefits of the collective proceedings.
- Whether any separate proceedings making claims of the same or a similar nature have already been commenced by members of the class.
- The size and nature of the class.
- Whether it is possible to determine for any person whether he is or is not a member of the class.
- Whether the claims are suitable for an aggregate award of damages.
- The availability of alternative dispute resolution and any other means of resolving the dispute.

(*rule 79(2), CAT Rules.*)

For the US perspective on the CAT class certification rules, see *Country Q&A, Class/collective actions in Europe: overview of applicable EU law principles.*

If the CAT considers a collective proceedings order appropriate, the order will authorise the class representative to act as such. Among other things, the order will identify the class and any sub-classes, and the claims certified for inclusion, and specify whether they are opt-in or opt-out proceedings and the manner in which members may opt-in or opt-out (*rule 79(1), CAT Rules*).

Minimum/maximum number of claimants

High Court claims. There is no maximum number of claimants for joint proceedings or a representative action, and a minimum number of two (*CPR 19.1 and CPR 19.6(1)*). Similarly, there is no threshold for a GLO save a requirement for a "number of claims" (*note to CPR 19.11*). Additionally, any judgment or order in a claim on the group register in respect of one or more of the GLO issues will be binding on the parties to all other claims on the register, unless otherwise ordered. A court may decide not to make a GLO if there are insufficient claimants who seriously intend to proceed (*Austin v Miller Argent (South Wales) Ltd [2011] EWCA Civ 928*).

CAT. There is no maximum number of class members for collective proceedings in the CAT, albeit there must be an identifiable class (*rule 79(1)(a), CAT Rules*). The CAT will consider the size of the class in determining whether the claims are suitable for collective proceedings (*CAT Rules, rule 79(2)(d)*).

Joining other claimants

High Court claims. In representative actions, the court may add a person as a claimant in proceedings either on its own initiative or on application (*CPR 19.4(1)*). The application must be accompanied by evidence and may be determined without a hearing where all parties agree. Any order must be served on all parties and anyone else affected (*CPR 19.4(5)*).

The court will consider whether either:

- It is desirable to add the new party so that the court can resolve all the matters in dispute.
- There is an issue involving the new party and an existing party which is connected to the matters in dispute, and it is desirable to add the new party so that issue can be resolved.

(*CPR 19.2(2).*)

For GLOs, putative new claimants must issue a claim form before their claim can be entered on the group register (*paragraph 6.1A, Practice Direction 19B*). The court may refuse to add claims to the group register, or order their removal (*paragraph 6.4, Practice Direction 19B*). The court may also specify a deadline after which no claim may be added to the Group Register without permission (*paragraph 13, Practice Direction 19B*).

The court will typically require parties to make public the existence of the GLO to manage all relevant claims. Usually, parties will advertise the GLO; the court can determine the content of the advertisement if the parties are unable to agree.

Claims before the CAT. While High Court actions are all opt-in, meaning claimants must choose to join the action to be a member of the class; the CAT operates both opt-in and opt-out regimes. At certification stage the CAT specifies whether proceedings are opt-in or opt-out. 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 (*rule 79.3, CAT Rules*).

In addition, after the expiry of a limitation period, the CAT may add or substitute a party only if that limitation period was current when the proceedings were started, and addition or substitution is necessary. This applies where:

- The new party is substituted for a party named by mistake.
- The claim cannot properly proceed unless the new party is added or substituted.
- The original party has died or had a bankruptcy order and his interest or liability has passed to the new party.

(*rule 38.7, CAT Rules.*)

The CAT Rules also restrict when amendments can be made to claim forms after the limitation period has expired (*rule 32.2, CAT Rules*).

Test cases

The High Court can exercise its case management powers by selecting one or more claims from the group register as test claims, to address specific issues of law or fact. The CPR does not specify

rules regarding selection of test claimants and it is therefore open to the parties to agree. Test claims are likely to be selected on the basis that they represent common characteristics of the other claims on the group register. For example, each test claim may cover a specific industry, size and/or type of claimant, specific time periods and/or heads of loss.

As regards test claims in GLOs, any judgment or order made in a test claim in respect of GLO issues will be binding on the parties to all other claims on the group register, unless otherwise ordered.

Timetabling

7. What is the usual procedural timetable for a case?

Average length of proceedings

Length of proceedings before the High Court or the CAT will depend on many factors including volume of evidence (which will likely increase with the number of parties) and complexity of the issues. On average, first instance High Court proceedings take two to three years, whereas the average length of proceedings in the CAT tends to be shorter, as the process is more streamlined.

Acceleration

It is possible to obtain an expedited hearing or apply for a "speedy trial" order. Such orders would only be granted in circumstances of real urgency. The CAT also operates a "Fast Track Procedure" (FTP) which is available at the discretion of the CAT who will have regard to various factors (such as the size and complexity of the case (*see CAT Rules, rule 58*)) in deciding whether to make proceedings subject to the FTP. The FTP allows claims for damages that are brought under section 47A of the Competition Act 1998 to be heard as soon as possible, and in any event within six months. The FTP is intended to enable less complex claims brought by individuals and SMEs to be dealt with quickly and at reasonable cost. The first case to proceed under the CAT's fast-track procedure was *Socrates Training Ltd v The Law Society of England and Wales [2017] CAT 10*. The claim completed within seven months from its initiation to judgment, including a four-day hearing.

Summary disposal of claims

Both the High Court and the CAT have the power to strike out cases or grant default or summary judgment (*CPR 3, CPR 12 and CPR 24; rules 41, 42 and 43, CAT Rules*).

Effect of the area of law on the procedural system

8. Does the applicable procedural system vary depending on the relevant area of law in which the class/collective action is brought?

The collective actions regime in the High Court applies to all areas, but is most common in personal injury, negligence and competition law matters. There is also a growing tendency for the collective actions regime to apply to financial services cases. Actions in CAT, including collective actions, are confined to claims arising out of breaches of competition law.

FUNDING AND COSTS

Funding

9. What are the rules governing lawyers' fees in class/collective actions?

Two types of "contingency" fee arrangement are permitted in England and Wales: conditional fee arrangements (CFAs) and damages-based agreements (DBAs) (*sections 44 and 45, Legal Aid, Sentencing and Punishment of Offenders Act 2012*).

CFAs

A CFA is defined as "... an agreement with a person providing litigation or advocacy services which provides for his fees and expenses, or any part of them, to be payable only in specified circumstances" (*section 58(2)(a), Courts and Legal Services Act 1990*). CFAs can be entered into by both barristers and solicitors, and must be in writing, but cannot relate to criminal or family proceedings.

If the claimant succeeds, the CFA may provide that the legal representative will be paid a "success" fee in addition to base costs. Rules regarding recoverability of success fees differ depending on whether the CFA was entered into before or after 1 April 2013 (*section 44, Legal Aid, Sentencing and Punishment of Offenders Act 2012*). Success fees are not recoverable from opponents under CFAs after 1 April 2013, subject to certain exceptions (*section 58A(6), Courts and Legal Services Act 1990*).

For CFAs before 1 April 2013, the recoverability of the success fee from the losing party depends on whether, having regard to facts and circumstances as they reasonably appeared at the time of the arrangement, the fee was reasonable, in light of:

- The risk that the circumstances in which the costs, fees or expenses would be payable might or might not occur.
- The legal representative's liability for any disbursements.
- What other methods of financing the costs were available to the receiving party.

(*paragraphs 11.7 and 11.8, pre-1 April 2013 Costs Practice Direction 44.*)

The success fee must be expressed as a percentage uplift on the amount that would be payable if there were no CFA, up to 100% (*Article 3, Conditional Fee Agreements Order 2013 (SI 2013/689)*). The percentage uplift must be stated in the CFA (*section 58(4), Courts and Legal Services Act 1990*). Further limitations apply to success fees in personal injury claims.

DBAs

DBAs are a form of "no-win, no fee" arrangement. If the claimant wins then the legal representative is paid a percentage of the damages recovered. If the claimant is unsuccessful, then no payment of fees is required. A DBA must be in writing and generally must not require payment by the client of anything other than the contingency fee and any expenses, net of amounts recoverable from another party. The contingency fee in a DBA must not exceed 50% of the sums ultimately recovered by the client at first instance (there are no such limits in respect of subsequent proceedings).

DBAs are unenforceable in opt-out collective proceedings in respect of infringements of competition law, but can be used in opt-in collective proceedings (*section 47C (8), Competition Act 1998*).

10. Is third party funding of class/collective actions permitted?

Both CFAs and DBAs entail some third party funding, in that the relevant law firm bears some or all of the costs of the litigation unless the client wins. In addition, it is also permissible in England and Wales for a third party to fund litigation (which is becoming increasingly common in England and Wales, with an increasing number of funders), including in return for a share of the proceeds (if any), subject to certain restrictions.

The restrictions on third party funding arise from the common law rules prohibiting "maintenance", the funding by an unconnected third party of litigation, and "champerty", doing so for gain. These rules have been substantially eroded but may still apply in certain circumstances. Among the factors a court assessing whether third party funding may breach the rules against champerty and

maintenance will consider are the extent to which the funder controls the litigation, and the financial impact of the arrangements, including on the likely quantum of damages.

If a funding agreement breaches the rules against champerty and maintenance, it is void and unenforceable (*Re Trepca Mines Ltd (No 2) [1963] Ch 199*). The funder will not be able to recover its costs from the funded party, and they will not be recoverable from the other side. In addition, if the funded side has lost in the litigation, the funder may be liable to pay some or all of the costs of the litigation (*Arkin v Borchard Lines Ltd and others [2005] EWCA Civ 655*) (*see Question 13*).

In relation to opt-out collective proceedings in the CAT, 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), Competition Act 1998; rule 93.4, CAT Rules*). The appropriate recovery of legal costs was considered by the CAT in *Merricks v MasterCard Incorporated and others [2017] CAT 27*. At paragraph 29 of its Ruling (Costs), the CAT applied Leggatt J's Judgment in *Kazakhstan Kagazy plc v Zhunus [2015] EWHC 404 (Comm), at [13]*, which held that the reasonable and proportionate amount of legal costs that a winning party to a litigation should be able to recover is "... the lowest amount which it could reasonably have been expected to spend in order to have its case conducted and presented proficiently, having regard to all the relevant circumstances". The CAT agreed with Leggatt J that "[e]xpenditure over and above this level should be for a party's own account and not recoverable from the other party".

Applying the reasoning of Leggatt J in *Kazakhstan Kagazy plc v Zhunus* to the *Merricks* case, the CAT held that MasterCard was only entitled to recover GBP250,000 in counsels' fees, against the GBP2 million claimed. This suggests that while the CAT is willing to uphold the well-established 'loser pays' principle in CPO proceedings, it is unwilling to permit defendants to recover costs that lack proportionality.

The CAT denied MasterCard's claim for interest on its costs on the basis that the CAT Rules did not allow for such costs to be awarded.

Finally, there is no blanket ban on certain types of organisations such as law firms, third party funders or special purpose vehicles becoming class representatives. However, the CAT will consider whether the relevant organisation is a pre-existing body and the nature and function of that body (*rule 78(3)(b), CAT Rules*). As with class members seeking to act as a class representative, the CAT will also consider the organisation's ability to manage proceedings, instruct its lawyers and the suitability of its lawyers (*paragraph 6.30, 2015 Guide to Proceedings*).

11. Is financial support available from any government or other public body for class/collective action litigation?

Public funding in the form of civil legal aid is limited to a narrow category of cases in the UK and is subject to strict qualification requirements. It is unlikely to be available for commercial collective actions.

12. Are other funding options available to claimants in class/collective actions?

After the event insurance is a permissible means of funding litigation in England and Wales. However, for policies issued on or after 1 April 2013, the insurance premium will not be recoverable from the other party, save in the "excepted cases" (*section 46, Legal Aid, Sentencing and Punishment of Offenders Act 2012*). The "excepted cases" are:

- Insolvency proceedings provided the policy was entered into before 6 April 2016.
- Publication and privacy-related proceedings.
- Claims for damages in respect of a medical condition called "diffuse mesothelioma".

(*CPR 48.1 and 48.2 and Costs Practice Direction 48.*)

There is no requirement to notify the court or the other side of the presence of an after the event insurance policy issued on or after 1 April 2013. For policies entered into before 1 April 2013, notification of the funding arrangement must be filed and served on all parties, identifying the insurer and the policy number and stating whether premium payments are staged (*paragraph 19.4(3), pre-1 April 2013 Costs Practice Direction 44*).

In recent years, there has also been an increased interest in litigation funding (that is, third party funding) to finance collective actions. Litigation funding has been acknowledged by the High Court and the CAT as a legitimate means to fund collective actions, as evidenced in *Essar Oilfields Services Ltd v Norscott Rig Management [2016] EWHC 2361 (Comm)* where the High Court upheld an arbitrator's decision to allow the winning party to recover its third party funding costs from the losing party, and *Merricks v MasterCard and others [2017] CAT 16*, in which the CAT stated that it would have approved litigation funding in that case.

Costs

13. What are the key rules for costs/fees in class/collective action litigation?

The High Court has discretion to award a party its costs, typically on the "loser pays" principle.

Costs may be awarded on a standard or an indemnity basis. On the standard basis, costs are recoverable only insofar as they are proportionate, and reasonably incurred and reasonable in amount. On the indemnity basis, there is a presumption that costs are proportionate, and costs will be recoverable insofar as they are reasonably incurred and reasonable in amount. The standard basis is common and an award on an indemnity basis is generally made to compensate the receiving party for wrongful conduct of the paying party. However, in each case, the party recovering costs can never recover more than actually spent.

If a claim is under a GLO, then common costs are usually divided among the group, and members will be severally (but not jointly) liable for them.

In the CAT, there is discretion as to costs. In making a costs order, the CAT may consider:

- The conduct of all parties.
- Any schedule of incurred or estimated costs.
- Whether a party has succeeded on part of its case, even if not wholly successful.
- Any admissible settlement offer.
- Whether costs were proportionately and reasonably incurred, and whether costs are proportionate and reasonable in amount.

(*CAT Rules, rule 104.*)

Fees associated with third party funding agreements can potentially be recoverable. In *Merricks v MasterCard*, the CAT held that such fees constitute "costs incurred" in connection with the proceedings if:

- The agreement obliges the class representative to pay the funder's fee if the claim succeeds.

- The agreement allows for the fee to be reduced in the event that the CAT orders a lower amount to be paid to the class representative.

Only if each of these conditions are satisfied will the CAT consider fees associated with third party funding arrangements recoverable as costs incurred in connection with the proceedings.

To put the above in context, in *Merricks v MasterCard* in return for a funding commitment of up to GBP35million, the funder was to receive the greater of GBP135 million or 30% of the undistributed proceeds of the action up to GBP1 billion, plus 20% of the undistributed proceeds in excess of GBP1 billion. The CAT said: "section 47C(6) CA is not an *inter partes* costs rule and it is not dependent on a strict application of the indemnity principle as that applies to recovery of costs. As we have already observed, this is a specific rule designed for a new and discrete procedural regime. The question is whether the statutory reference to a cost or expense being 'incurred' is broad enough to cover a conditional liability. In our judgment, it is". It added: "The government in promoting the legislation therefore clearly envisaged that many collective actions would be dependent on third party funding, and it is self-evident that this could not be achieved unless the class representative incurred a conditional liability for the funder's costs, which could be discharged through recovery out of the unclaimed damages". The CAT further noted that funding agreements were needed for an effective operation of the collective proceedings regime. This judgment is likely to give funders comfort that they can recover their "funder's fees" which is in turn likely to mean that they will be prepared to fund further claims.

Key effects of the costs/funding regime

14. What are the key effects of the current costs/funding regime?

The increased availability of third party funding is designed to improve access to justice. This development is particularly relevant in light of recent legal aid reforms, which significantly reduced the categories of cases for which legal aid is available, as well as introducing more restrictive conditions for availability.

The limits imposed on the recoverability of "success" fees are intended to promote fairness to the losing party, and to avoid "inflammation" of damages. Similar considerations prompted the change to non-recovery of payments made for after the event insurance premiums.

DISCLOSURE AND PRIVILEGE

15. What is the procedure for disclosure of documents in a class/collective action?

A "document" is broadly defined as "anything in which information of any description is recorded", including electronic documents (*CPR 31.4; rule 2(1), CAT Rules*). The definition extends to documents that are not easily accessible, that is, on servers and back-up systems, and metadata (information stored and associated with electronic documents) (*paragraph 2A.1, Practice Direction 31A*).

Before litigation

The High Court and the CAT can order pre-action disclosure where the applicant can show that both they and the respondent are likely parties to subsequent proceedings and that the documents would fall within the definition of standard disclosure had proceedings started (*CPR 31.16 and rule 62, CAT Rules*). The applicant must show that pre-action disclosure is necessary to:

- Fairly dispose of the anticipated proceedings.
- Assist in resolving the dispute without commencing proceedings.
- Save costs.

The application itself must specify the documents sought and require the respondent to specify those that are either no longer within his possession, power or control, or those he has a right to withhold (for example, privileged documents).

During litigation

Disclosure between the parties. In proceedings before the High Court, the parties are required to disclose all documents which are or have been in their control at any point during proceedings. The court may make an order for either standard or specific disclosure (*CPR 31.10 and 31.12*). Particular issues in respect of disclosure have arisen in the context of competition litigation cases and "leniency" material where EU law principles have to be balanced with the principle of procedural autonomy under national law. For example, in *National Grid Electricity Transmission v ABB and others [2012] EWHC 869 (Ch)*, it was held that a court could order limited disclosure of such documents into a confidentiality ring. Article 6(a) of the Anti-trust Damages Directive on certain rules governing actions for damages under national law for infringements of the competition law provisions of the member states and the European Union prohibits the disclosure of leniency statements. For a detailed discussion of the Anti-trust Damages Directive, see *Country Q&A, Class/collective actions in Europe: overview of applicable EU law principles*.

In proceedings before the CAT, the CAT will decide at the first case management conference whether and when the disclosure report and Electronic Documents Questionnaire should be filed, and then decides subsequently what disclosure orders to make. The CAT may at any point give directions as to disclosure, including what searches are to be undertaken, bearing in mind the need to limit disclosure to that which is necessary to deal with the case justly (*rule 60(2) and (3), CAT Rules*).

The Disclosure Pilot. From 1 January 2019, a two-year Disclosure Pilot governs the disclosure process for the majority of new and existing claims brought in the Business and Property Courts. Introduced with the intention of bringing a "wholesale cultural change" to disclosure in English litigation, the Disclosure Pilot's rules (set out in Practice Direction 51U) move English law away from Standard Disclosure by introducing new "Disclosure Duties" and providing for a new two-stage disclosure process.

The Initial Disclosure stage requires each party to provide both:

- The key documents on which they have relied to support the arguments in their statements of case.
- The key documents that are necessary to enable the other parties to understand the claim or defence they have to meet.

This initial stage can be dispensed with by agreement, by court order, or where it would require a party to provide the larger of more than 1,000 pages or 200 documents (which is likely to impact major or complex commercial disputes).

Parties who then wish to proceed with further disclosure must seek an order for Extended Disclosure from the court, choosing from five disclosure models that range from simple to complex:

- Model A: no further disclosure.
- Model B: limited disclosure, similar in scope to Initial Disclosure but without page/document limits.
- Model C: request-led search-based disclosure of documents or narrow classes of documents relating to a particular issue.
- Model D: search-based disclosure of documents (not including "narrative documents" that are relevant only to the background or context of the material facts or events) that are likely to support or adversely affect either party's claim or defence in relation to one or more issues (closest to Standard Disclosure under CPR 31).

- Model E: wide search-based disclosure of documents falling within Model D, as well as narrative documents and documents which may lead to a train of inquiry that may result in the identification of other documents for disclosure.

Disclosure by third parties. In both the High Court and the CAT, parties may apply for disclosure of documents by a third party, supported by evidence that the documents sought are likely to support the applicant's case or adversely affect the opposing party's case, and that disclosure is necessary to fairly dispose of the case and save costs (*CPR 31.17; rule 63, CAT Rules*). The application must specify the documents sought and require the respondent to identify those that are no longer under his/her control or in respect of which he/she has a right to withhold.

In addition, the Claims in respect of Loss or Damage arising from Competition Infringements (Competition Act 1998 and Other Enactments (Amendment) Regulations 2017 prevent a court from making disclosure orders in respect of:

- A settlement submission which has not been withdrawn.
- A cartel leniency statement (whether or not it has been withdrawn).
- A competition authority's investigation materials before the investigation is closed or ordering a competition authority to disclose its file.

(*paragraphs 28 to 30, Schedule 8A, Competition Act 1998.*)

Practice Direction 31C, Disclosure and Inspection in relation to Competition Claims, assists with the implementation of the Anti-trust Damages Directive under national law for infringements of competition law provisions of the member states (Anti-trust Damages Directive) and sets out particular rules and procedures for disclosure and inspection in respect of competition claims.

16. Are there special considerations for privilege in relation to class/collective actions?

The concept of privilege confers a right to withhold documents. There are a number of types of privilege. However, in the context of collective actions, the following forms arise:

- **Legal advice privilege.** This involves confidential communications between a client and his/her lawyer which came into existence for the purpose of giving or receiving legal advice.
- **Litigation privilege.** This involves confidential communications between either a client or his/her lawyer and a third party, or to documents created by or on behalf of a client or his/her lawyer. The communications/documents must have been created for the dominant purpose of litigation, which must be pending or contemplated.
- **Joint privilege.** This is where two or more parties engage the same solicitor to advise them under a joint retainer, for example in the context of a representative action. It also applies where two or more parties share a joint interest in the subject matter of a privileged communication, for example, parent companies and subsidiaries.
- **Common interest privilege.** This allows a party to disclose a privileged document to a co-party or a third party without losing privilege in that document. The other party must share the same interest as the originating party.

EVIDENCE

17. What is the procedure for filing factual and expert witness evidence in class/collective actions?

Evidence in the High Court

Any fact which needs to be proved by the evidence of witnesses is to be provided at trial by their oral evidence in public, or at any other hearing by written evidence (*CPR 32.2*). There may be cases in which it is appropriate to establish a confidentiality ring, which allows, through protective orders or undertakings, limited disclosure of documents or witness evidence.

Expert evidence will characteristically involve evidence from subject matter specialists. The overriding duty of an expert, regardless of whether instructed by a particular party, is to the court.

The court will ordinarily set directions for the filing of factual and expert witness evidence early, usually at the first case management conference. Directions about factual evidence generally require service of signed witness statements. The court can direct specific issues on which it requires evidence, the nature of the evidence required to decide those issues, and the way the evidence is to be provided (*CPR 32.1*). In practice, this power is rarely used for factual witness evidence. In contrast, parties can only use expert witness evidence with permission, and directions will specify the expert disciplines and, if possible, parties will specify the identity of each expert.

Parties generally call their own experts; rarely, the court will order a single joint expert.

Parties exchange written expert reports and often supplemental reports. Sequential exchange is encouraged. Experts typically participate in meetings of experts, at which lawyers are not generally present, following which the experts file a joint report indicating areas of agreement and disagreement.

At trial, both factual and expert witnesses are generally cross-examined, although the court has the power to dispense with cross-examination. At trial, experts can either give evidence consecutively, or follow a practice known as "hot-tubbing", where experts are cross-examined concurrently.

Evidence before the CAT

The CAT can give directions about evidence, including for the provision of statements of agreed matters and limits on the number of witnesses, and for the appointment and instruction of experts, whether by the CAT or by the parties, and the manner in which evidence is to be placed before the CAT (*rule 21, CAT Rules*). Directions are generally given at a case management conference (*rules 19 and 20, CAT Rules*). Unless the CAT otherwise directs, no factual or expert witnesses are heard unless the witness statement or expert report has been submitted in advance of the hearing and in accordance with directions (*rule 21(3), CAT Rules*). The CAT also has the power to put in place a confidentiality ring (*rule 101(3), CAT Rules*).

In *Merricks v MasterCard and others [2017] CAT 16,* the CAT considered that the appropriate test to apply in respect of assessing expert evidence was that set out by the Supreme Court of Canada in *Pro-Sys Consultants Ltd v Microsoft Corporation [2013] 3 SCC 57, [2013] 3 S.C.R. 477.* The test applied was to provide that the expert methodology must be sufficiently credible or plausible to establish some basis in fact for the commonality requirement, "and that means the methodology must offer a realistic prospect of establishing loss on a class-wide basis". Applying the findings of the Supreme Court of Canada, the CAT held that it was not sufficient for expert methodology to be theoretical or hypothetical, but rather that it must be grounded on the facts of the case and there must be some evidence on the data available against which the methodology is applied.

The Court of Appeal overturned the CAT's judgment refusing to grant a Collective Proceedings Order (CPO), on 16 April 2019 (*[2019] EWCA Civ 674*) and, subject to MasterCard's application for permission to appeal to the Supreme Court of the United Kingdom, has remitted the plaintiffs' application for a CPO back to the CAT for a re-hearing. In its judgment, the Court of Appeal considered the appropriate legal test for an application for a CPO in the UK. It found that:

- Canadian case law provides guidance on the proper approach for assessing claims for aggregate damages, but it is not binding.
- The CAT placed too great an onus on the proposed class representative at the CPO stage, particularly in respect of the availability of data.
- The CAT was wrong to have conducted a "mini-trial" by carrying out a detailed economic analysis of the plaintiffs' claim at the certification stage and instead should only have asked whether the proceedings had a real prospect of success.
- The CAT was wrong to consider that an aggregated damages award had to be distributed on a compensatory basis to reflect in some way the loss suffered by individual class members.
- It is inappropriate for any consideration to be given to the appropriate distribution of any aggregated damages award until after the conclusion of trial.

It is unknown whether MasterCard's application for permission to appeal the Court of Appeal's judgment will be successful. However, assuming that the Supreme Court does give MasterCard leave to appeal, it is likely that the proper basis for the assessment of expert evidence and its application to the facts will continue to be a contentious issue in this case.

Regulations

The Claims in respect of Loss or Damage arising from Competition Infringements (Competition Act 1998 and Other Enactments (Amendment)) Regulations 2017 reverse the burden of proof in a number of respects, including, for example:

- A rebuttable presumption that cartels cause harm (*paragraph 13, Schedule 8A, Competition Act 1998*).
- Where a claim is made by an indirect purchaser (that is, a party who purchased the goods or services sold by the cartel further down the supply chain), there is a rebuttable presumption that the indirect purchaser suffered loss if they prove that the direct purchaser paid an overcharge for the goods or services (*paragraph 9, Schedule 8A, Competition Act 1998*).
- The burden of proof is expressly on the defendant in showing that there is any pass on of an overcharge or underpayment (*paragraph 11, Schedule 8A, Competition Act 1998*).

In addition, the Regulations introduce various reforms in relation to the admissibility of evidence in competition proceedings. For instance, the decisions of competition authorities of other EU member states are considered to be prima facie evidence of an infringement of competition law (*paragraph 35, Schedule 8A, Competition Act 1998*). Leniency statements, whether or not those statements have been withdrawn, and settlement submissions which have not been withdrawn, will not be admissible in evidence, unless they were obtained lawfully by a party to the proceedings and otherwise than from a competition authority's file (*paragraph 32, Schedule 8A, Competition Act 1998*). Investigation materials of a competition authority are not admissible before the investigation has closed unless they were obtained lawfully by a party to the proceedings and otherwise than from a competition authority's file (*paragraph 33, Schedule 8A, Competition Act 1998*). The admissibility of evidence obtained from a competition authority's file is also restricted under paragraph 34 of Schedule 8A to the Competition Act 1998.

DEFENCE

18. Can one defendant apply to join other possible defendants in a class/collective action?

Joining other defendants

The court can add a person as a defendant in proceedings either on its own initiative or following an application (*CPR 19.4.1*) (*see Question 5*).

Rights of multiple defendants

Joint defence agreements. Multiple defendants often enter "joint defence agreements" where they have a common interest. It is important to draft the agreement, to ensure privilege is not waived.

"Common interest privilege" operates to allow a party to disclose privileged documents (whether subject to legal advice privilege or litigation privilege) to others, for example, co-defendants, without losing privilege. The parties must have a common interest in the subject matter of the privileged document.

Joint experts. It may be efficient for multiple defendants to appoint a joint expert (and in some instances the instruction of joint experts may be actively encouraged by the courts). The joint engagement letter with the expert should contain express wording that any documents provided to the expert and communications between the expert and the client and/or legal advisers are privileged. The parties may also wish to include a provision in the engagement letter prohibiting the expert from disclosing each defendant's documents to its co-defendants without consent.

Joint retainers. It is common for multiple claimants in the same action to be represented by the same solicitor using a joint retainer. For example, in *Emerald Supplies*, over 500 claimants were represented by one law firm (*Emerald Supplies Ltd and others and British Airways plc (Claim No: HC-2008-000002 CMC)*). While this approach avoids the time and cost implications of co-ordination between multiple law firms, it also raises practical difficulties in respect of obtaining client instructions and co-ordinating key parts of the litigation process such as disclosure.

DAMAGES AND RELIEF

19. What is the measure of damages under national law in the field of class/collective actions?

Damages

For tortious claims, the standard measure puts the injured party into the position he or she would have been in had the tortious act not been committed, and there are well established common law rules for quantifying such damages. Quantification is conducted by the trial judge, with regard to expert evidence and party submissions. In *2 Travel Group plc*, the CAT held that exemplary damages could exceptionally be awarded in competition cases where the infringing entity both:

- Had not been fined or granted immunity from fines by a competition authority.
- Was aware that its conduct was probably or clearly unlawful.

(*2 Travel Group plc (in liquidation) v Cardiff City Transport Services Ltd [2012] CAT 19.*)

Under the Regulations, exemplary damages are no longer available to claimants in competition proceedings to which they apply (*paragraph 36, Schedule 8A, Competition Act 1998*).

There is no cap on damages that can be recovered from either a single defendant, or overall, and the basic rule is of joint and several liability. That is, each defendant is jointly and severally liable for the

damage suffered, unless the judge orders specific apportionment. In competition law cases, the issue of whether the damage may have been passed on to a downstream level of the supply chain for example, from a direct purchaser to an indirect purchaser may be relevant. For a more detailed discussion, see *Country Q&A, Class/collective actions in Europe: overview of applicable EU law principles*.

Recovering damages

It is common in collective actions for a defendant to bring a separate action against other defendants under CPR Part 20, also known as a contribution claim. A Part 20 contribution claim may be brought against a third party for contribution or an indemnity in respect of damages awarded, or some other remedy. The Part 20 contribution claim will be separate from the main action (although both claims may be managed together).

The time limit for bringing a Part 20 contribution claim is two years from the date on which the party claiming contribution settled the main action or was held liable in damages (*section 10, Limitation Act 1980*).

Under the Regulations, contribution claims in competition proceedings will be quantified in accordance with the defendant's relative responsibility for the whole of the loss or damage caused by the infringement (*paragraph 38, Schedule 8A, Competition Act 1998*).

Interest on damages

In the High Court, interest is awarded from the date of the breach or infringement to the date of the judgment, at a rate set by the court. Post-judgment interest will be awarded at the judgment rate, which is currently set at 8% per annum. The CAT has the power to award interest on all or any damages for all or any part of the period between the accrual of the cause of action and either the date of payment (if the payment is made before the CAT's decision) or the date of the decision (*rule 105(3), CAT Rules,*). Unless otherwise directed, the rate of interest cannot exceed the judgment rate.

Declaratory relief and interim awards

20. What rules apply to declaratory relief and interim relief in class/collective actions?

Declaratory relief

Declaratory relief is available in collective actions in the High Court, and can be sought at any stage of proceedings. Declarations can be made on issues of fact and law, including, for example, the interpretation and/or effect of contractual clauses. It is a discretionary remedy, and the court will consider the interests of justice and whether there are any other reasons whether or not to grant the relief sought. Courts are unlikely to grant relief that is academic or hypothetical.

In the normal course, the relief sought, including any applications for declaratory relief, will be adjudicated upon at the end of the proceedings, but it is possible to seek interim declaratory relief if necessary, or indeed for preliminary issues to be determined ahead of the full substantive hearing if the judge considers there is some utility, such as a cost saving, to so doing.

The CAT does not have the jurisdiction to grant declaratory relief.

Interim awards

In both the High Court and the CAT, applications for an interim payment can be made at any stage of the proceedings.

Interim payments are payments on account of any damage, debt (in the High Court) or other sum (excluding costs) which that party may ultimately be held liable for (*section 32(1), Senior Courts Act 1981; rule 66, CAT Rules*). An order for an interim payment will only be made where:

- The defendant has admitted liability.
- Judgment has been obtained against the defendant.
- The court is satisfied that the claimant would obtain judgment for a substantial sum of money if the case went to trial.

The amount ordered would only be a reasonable proportion of the probable final judgment. This kind of order can be made against two or more defendants in respect of the same liability.

SETTLEMENT

21. What rules apply to settlement of class/collective actions?

Settlement rules

In the High Court, cases can, as a general principle, be settled out of court without court authorisation. A settlement is a form of contract and so the usual rules as to validity of contract apply.

If proceedings have been commenced, then the court must be informed if a settlement has been reached. The claim may be discontinued or stayed, with the consent of the court. If the proceedings are stayed, then settlement can be enforced as part of the same proceedings.

In the CAT, if an opt-in collective proceedings order has been made, 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 (*rule 95, CAT Rules*).

If the proceedings were opt-out collective proceedings, the class representative, and such of the defendants as wish to be bound by the proposed settlement must make an application to the CAT for a collective settlement approval order. This application must, among other things:

- Provide details of the claims to be settled.
- Set out the settlement terms, including provisions as to payment of costs, fees and disbursements.
- Include a statement that the applicants believe that the terms are just and reasonable, supported by evidence which may include a report of an independent expert or an opinion of the applicants' legal representatives.

The CAT can require further evidence on the merits or order confidential treatment of any part of the application. At the hearing, the CAT may make a collective settlement approval order where it is satisfied that the terms of the collective settlement are just and reasonable, taking into account various factors. 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 (*rule 94(14), CAT Rules*).

In addition, an application for a collective settlement order can be made to the CAT, where no collective proceedings order has previously been made, for approval of a settlement between persons who would have been claimants and defendants in collective proceedings if they had been brought (*rule 96, CAT Rules*).

Separate settlements

A defendant who settles the entire claim may be entitled to a contribution from others (*section 1(1), Civil Liability (Contribution) Act 1978*). Others may challenge the settlement as unreasonable.

Where one of multiple defendants settles the claim against it, the settling defendant may still be required under the Civil Liability (Contribution) Act 1978 to contribute to the damages for which the other defendants are liable.

APPEALS

22. Do parties have a right to appeal decisions relating to class actions, such as a decision granting or denying certification of a class action?

There is a right of appeal against case management decisions. Such appeals against High Court case management decisions, while possible, rarely succeed, as the presiding judge is accorded a wide discretion. In particular, the decision as to whether to make a GLO is an exercise in case management discretion and will not be lightly interfered with (*Austin v Miller Argent (South Wales) Ltd [2011] EWCA Civ 928*). The position is even starker in relation to appeals against CAT case management decisions, where appeals are appropriate only in the most extreme cases (*Hutchison 3G UK Ltd v OFCOM (unreported)*).

An application for permission to appeal can be made to the High Court or the CAT, which made the decision, and/or to the Court of Appeal within 21 days of the order containing the directions in the High Court (*CPR 52.12(b)*), and within three weeks of a decision of the CAT (*CAT Rules, rule 107(1)*). The Court of Appeal will generally determine the application on paper, but has the power to direct oral submissions. Permission to appeal will only be given where the court considers that the appeal would have a real prospect of success, or there is some other compelling reason.

In *Merricks v MasterCard and others [2017] CAT 16*, the CAT denied the Applicant's application for permission to appeal the CAT's judgment dated 21 July 2017 (*[2017] CAT 16*) on the basis that, because the CAT had not certified the claim, it had not made any "decision" capable of being appealed and therefore there was no jurisdiction to grant permission to appeal under section 49(1A) of the Competition Act 1998 or the CAT Rules 2015. On 27 October 2017, the applicant filed an application for judicial review in the Administrative Court and an application in the Court of Appeal for permission to appeal the CAT's decision to refuse to allow the collective action against MasterCard's alleged illegal card fees to continue. On 19 January 2018, Hickinbottom LJ ordered that the Administrative Court and the Court of Appeal, constituted by the same Lord Justices of Appeal sitting concurrently in both courts, should hear the applicant's oral argument on its applications to bring a judicial review and for permission to appeal. Subsequently, on 13 November 2018, the Court of Appeal granted the applicant permission to appeal, and the judicial review claim therefore fell away.

ALTERNATIVE DISPUTE RESOLUTION

23. Is alternative dispute resolution (ADR) available in class/collective actions?

Alternative dispute resolution (ADR) is strongly encouraged in all manner of civil litigation in England and Wales. Further, throughout the proceedings, parties have to confirm whether they have considered ADR, and what ADR steps have been taken. Similarly, the governing principles of the CAT Rules provide that the CAT may encourage and facilitate the use of ADR (*rule 4, CAT Rules*).

ADR generally takes the form of mediation, which is a negotiation between the parties facilitated by an independent neutral third party. A negotiated resolution can take any form, and provides more flexibility to the parties than the High Court/the CAT.

PROPOSALS FOR REFORM

24. Are there any proposals for reform concerning class/collective actions?

National developments

The Consumer Rights Act 2015 came into force on 1 October 2015. The CAT Rules also came into force at that time. Consequently, significant reform of the collective actions rules has already been undertaken in England and Wales, which will no doubt be further developed in the coming months and years.

Impact of EU Commission's recommendations for reform

On 11 April 2018, the European Commission published a proposal for a new EU law which would introduce the first European-wide approach to consumer class actions. The proposed new law, coined a New Deal for Consumers, seeks to enhance the protection afforded to EU consumers by enabling qualifying entities to launch representative actions on behalf of consumers and introduce stronger sanctioning powers for consumer authorities in the member states. The New Deal for Consumers goes significantly further than Directive 2009/22/EC on injunctions for the protection of consumers' interests in terms of preventing violations of certain EU consumer protection laws. The law is expected to progress through Parliament in 2019.

The Anti-trust Damages Directive entered into force on 26 December 2014, and was required to be implemented by member states by 27 December 2016. The Anti-trust Damages Directive stipulates various wide-ranging changes that are likely to affect collective actions in this jurisdiction. This was complemented by the Commission Recommendation of 11 June 2013 on common principles for injunctive and compensatory collective redress mechanisms in the member states concerning violations of rights granted under Union Law (Recommendation). The Consumer Rights Act 2015 was intended to implement the Recommendation and indeed goes further than the Recommendation in several respects. The UK government published its response to a public consultation on implementing the Draft Directive on 20 December 2016: "Having considered the responses received, we have decided to take a light-touch approach to implementation. Wherever possible we will rely on existing legislation, case law or Court Rules. Where necessary we will legislate to ensure that we fully implement the directive".

For a more detailed discussion of the Anti-trust Damages Directive and the Recommendation, see *Country Q&A, Class/collective actions in Europe: overview of applicable EU law principles.*

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Recent activities

- Several global corporations in major international cartel investigations in the airline, steel, life sciences, automotive, and maritime sectors.
- General Cable Corporation in an action for damages brought against members of an alleged power cables cartel in the High Court in England
- Singapore Airlines and Singapore Airlines Cargo in multiple civil claims in the English High Court for damages arising out of the Commission's infringement decision imposing EUR799 million on air cargo carriers for a global price-fixing cartel on fuel surcharges.
- Harvard International PLC in an anti-trust defence and counter-claim to a patent infringement action brought in the High Court in England by nine members of the MPEG-2 patent pool.
- A major transport company on its successful application for judicial review in the High Court against a decision by Her Majesty's Revenue and Customs to impose significant value-added tax liability on the company.
- The London Metal Exchange (LME) before the High Court and Court of Appeal in its successful defence against Rusal in judicial review proceedings relating to changes in the LME's warehousing rules. The case proceeded to the Supreme Court, which refused Rusal permission to appeal LME's victory in the Court of Appeal.

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Recent activities

- Represented clients in group and collective actions in the UK in sectors ranging from the financial to the public sector and claims involving issues such as investments, tax efficient products, restitution and anti-competitive behaviour.
- Represented financial institutions in Europe, the US, and Asia in disputes and regulatory investigations arising from issues such as collateralised debt obligations, LIBOR, FX, and other high-profile matters.
- Represented clients in a wide range of matters arising from Financial Conduct Authority (FCA) activities including enforcement work, Section 166 appointments, and the production of independent reports for consideration of the FCA (and the Bank of England).
- Conducted multijurisdictional corporate investigations and managing government investigations involving a wide range of issues, such as foreign corrupt practices, bribery, export control and sanctions violations, payments to third parties, whistleblowing, improper trading, and accountancy issues.
- Experience over many years in representing international clients facing US class action and other litigation.
- Handled litigation in the Commercial Court, Chancery Division and Queens Bench Division, for UK and international clients over many years.
- Conducted internal investigations for a range of companies concerning alleged bribery and sanctions breaches and working on post-investigation remediation and compliance programmes.

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Non-professional qualifications. LPC, College of Law, England, 2010; LLB (Hons) Law, University of East Anglia, England, 2008.

Recent activities

- Advising investors in relation to the ongoing claim against Tesco plc under section 90A of the Financial Services and Markets Act 2000.
- Acting for a Luxembourg bank in a claim against a Russian borrower and various domiciled guarantors under a USD75 million facility agreement.
- Acted for an airline leasing company in the successful repossession of its aircraft following a default by the lessee.
- Acted for a Dutch bank in a successful arbitration against defaulting Russian borrowers and guarantors under a USD100 million facility agreement.
- Advised a property development company in relation to a claim against a bank regarding a breach of contractual duty. The quantum of the claim was in excess of GBP10 million.
- Advised on a GBP3.75 million claim against a leading firm of solicitors. The case arose out of alleged negligent drafting of partnership agreement. The case settled on successful terms for our client shortly after mediation.
- Advised in an ongoing professional negligence claim against one of the world's leading firms of valuers. The quantum of the claim was in excess of GBP150 million.

Professional qualifications. Solicitor, England and Wales.

Areas of practice. EU and UK Competition law and anti-trust.

Non-professional qualifications. LLB Law, University of Hong Kong, 2012; LLB Law, Warwick University, 2013; LPC, BPP Law School, 2015.

Recent activities

- Acting for Concordia in relation to an ongoing investigation by the Competition and Markets Authority into alleged excessive pricing.
- Acting for Concordia in relation to a Statement of Objections by the Competition and Markets Authority in relation to an alleged pay-for-delay arrangement.
- Acting for Concordia in connection with challenges to CMA Search Warrants at the High Court and the Court of Appeal.
- Acting for a Fortune 500 company in an ongoing investigation into alleged market-sharing and price-fixing.
- Acting for Sainsbury's Supermarkets Ltd in connection with a claim for damages against Visa in the interchange fee litigation at the High Court, the Court of Appeal and the Supreme Court of the United Kingdom. In a landmark judgment in July 2018, the Court of Appeal upheld Sainsbury's claim that the UK MIF was an unlawful restriction of competition under UK and EU law.