Collective Actions in the United Kingdom and European Union, Three Years In: Opening and Closing Doors

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There has been a notable increase in momentum in collective actions in England and Wales in recent years. However, the collective redress landscape in England and Wales remains less developed than in other jurisdictions such as the United States, Canada and Australia. Pursuing group actions can still be challenging for some large claimant groups and can involve procedural uncertainty.

Those challenges can be seen from (and might be said to be caused by) the nature of the collective action regimes in England and Wales. Most of those regimes are "opt-in", which means that claimants must take affirmative steps to join an action. There are effectively only two "opt-out" regimes in England and Wales, where claimants will be considered part of an action unless they actively decline to participate.

The limited availability of "opt-out" routes for collective redress sets England and Wales apart from a number of other jurisdictions; in the United States, for example, an "opt-out" regime applies to most class actions (the primary exception being certain types of employment collective actions).

Of the two "opt-out" models available to litigants in England and Wales, the first (collective proceedings in the UK's Competition Appeals Tribunal (the "**CAT**")) is confined to claims for breaches of competition law. Accordingly, to pursue collective actions using an "opt-out" model in other contexts, litigants must deploy the second option: a representative action under Civil Procedural Rule ("**CPR**") 19.8 (formerly CPR 19.6).

As part of the increased interest in the pursuit of collective actions in England and Wales, the boundaries of the procedural mechanisms for pursuing collective actions are being continuously tested by litigants. There is no clearer illustration of this than the increasing number of attempts to deploy the CPR 19.8 representative-action mechanism in different contexts.

Over the last 12 months, prospective participants in collective actions in England and Wales have seen various procedural routes opened, closed and narrowed as this area of the law continues to move apace.

Representative Actions under CPR 19.8

Under CPR 19.8(1), claims can be brought by or against one or more persons (each a "representative") who have the same interest as those being represented (the "class members"). Representative actions are considered "opt-out" actions because the pursuit of a claim by or against the representative does not depend upon the consent of the class members.

Representative actions are rare. Historically, the "same interest" requirement has been the stumbling block for representatives seeking to bring claims. This difficulty was exemplified by the UK Supreme Court's 2021 decision in *Lloyd v Google LLC*, which prevented a claim under the Data Protection Act 1998 ("**DPA 1998**") in respect of alleged tracking of the internet activity of iPhone users from proceeding as a representative action under then-CPR 19.6 because:

- to satisfy the "same interest" requirement, the Court must not be required to undertake an individualised assessment in respect of each class member's claim to reach a judgment (whether of liability, damages, or any other element); and
- in *Google*, given that the alleged tracking was not uniform across all class members, the Court would need to carry out an individualised assessment of each person's claim to examine what unlawful processing had occurred.

Though not directly relevant to the claims before it, the Supreme Court in *Google* also made important observations about bringing claims for damages by way of representative actions, which, as examined below, remain of significant relevance to pursuing representative actions today (and continue to be considered by courts in this regard). It explained that:

- while damages claims do not preclude representative actions *per se*, damages are usually intended to restore each class member to a position as if the wrong had not occurred;
- accordingly, a representative action will typically not be suitable in damages claims because the Court must undertake an individualised assessment of damages in respect of each class member; and
- exceptions to this may include cases where it may be possible to calculate damages:
  - on a basis common to all class members (such as cases where all class members were wrongly charged a fixed fee); or
  - on a global basis (such as cases relating to loss under a particular insurance policy).

An Open Door – Secret Commissions?

A decision of the English High Court in February 2023 provided a timely reminder that representative actions may still be permitted in appropriate cases (and may be permitted more often than originally envisaged following *Google*).

The case in question was brought by an entity seeking to act as a representative of the current and former clients of a firm of patent and trademark lawyers in respect of an alleged failure to account for allegedly undisclosed commission payments.

In a judgment dated 24 February 2023, the High Court dismissed an application for an order that the proposed representative could not take on that role, which was made by the defendants on the basis that, amongst other things, the "same interest" requirement had not been satisfied.

In considering the application, Mr Justice Robin Knowles referred to important passages from the Supreme Court's judgment in *Google*. First, in considering what approach to take to the

application, the Judge referenced the Supreme Court's observations about the representative action regime to the effect that:

- the absence of a detailed legislative framework for representative actions does not mean that CPR 19.6 should be applied or interpreted restrictively;
- the "same interest" requirement should be interpreted "*purposively*" having regard to the Overriding Objective and the rationale underpinning CPR 19.6; and
- the premise of CPR 19.6 is that "*claims are capable of being brought by (or against) a number of people which raise a common issue (or issues): hence the potential and motivation for a judgment which binds them all*".

Second, the Judge considered his jurisdiction to permit the representative action – specifically, whether the "same interest" requirement was satisfied. Again, he considered the following comments of the Supreme Court about this:

- the rationale of the "same interest" requirement is to "*ensure that the representative can be relied on to conduct the litigation in a way which will effectively promote and protect the interests of all*" the class members.
- where "*advancing the case of class members affected by the issue would not prejudice the position of others, there is no reason in principle why all should not be represented by the same person*".
- historic concerns about whether representatives will "*pursue vigorously lines of argument not directly applicable to their individual case are misplaced in the modern context*" where collective redress proceedings are "*typically driven and funded by lawyers or commercial litigation funders*" and the representative acts "*as a figurehead*".

Having cited these observations, the Judge examined various arguments advanced by the defendants to suggest that the "same interest" requirement had not been met. Those arguments included the following contentions:

- The Nature of the Similarities: while the claims gave rise to common issues, they were not sufficiently similar because they (i) did not arise from the same events at the same time, and (ii) arose from separate contracts. For these reasons, the defendants contended that individualised assessments of various factual points would be required.
- Abuse of Process: some class members would (without their consent) be prevented from separately pursuing their claims that accrued before or after the relevant period being used for the representative action.
- Limitation: the position as to whether claims were statute-barred differed between class members, and an individualised assessment would be required for any class members seeking to rely on Section 32 of the Limitation Act 1980.
- Remedies: there were different remedies available to the class members and different methods for calculating the damages. The defendants pointed out that each class member's preferences on remedies may differ.

The Judge rejected these arguments, noting that the question before him was whether the "same interest" requirement was met. Accordingly, he determined that his task was to ascertain whether any of the defendants' arguments involved class members being affected by an issue in a way that prejudiced the position of others. He concluded that none had that impact, observing that the defendants' arguments:

"*include those that will require care but each is capable of resolution and none is fatal on jurisdiction. They will inform discretion, as will other material circumstances, but there is no absence of 'same interest'*".

Third, the Judge examined the exercise of his discretion and the need to give effect to the Overriding Objective. In that regard, he noted that the Supreme Court in *Google* had said:

"*Many of the considerations specifically included in that objective … are likely to militate in favour of allowing a claim, where practicable, to be continued as a representative action rather than leaving members of the class to pursue claims individually*".

Analysis – A Sign of Shifting Attitudes?

While the Judge was clear that "*each case turns on its own facts and circumstances*" and that "*the complexion could be different with different parties*", the Judge's decision could be a sign of shifting judicial attitudes in favour of representative actions under CPR 19.8.

Certainly the fact that a representative action was permitted in circumstances where there were clear differences amongst the class members is a significant development.

Moreover, the Judge's readiness to adopt and propose various case management solutions to preserve the underlying representative action is of note. This includes (as noted above) the potential for employing "*individual arrangements outside CPR 19.6*" to deal with limitation issues, and the use of tools from the common law and equity to deal with concerns about the payment of damages. Indeed, that apparent desire to safeguard the underlying representative action is supported by the Judge's references to the access to justice benefits, which included observations that:

- "*[I]f some can be assisted to access the court to establish whether the Defendants have their property or have not fulfilled their obligations to them then that is better than none*".
- "… I have reached the decision, in the exercise of my discretion, to allow the Claimant to represent the class, and to do so on the "opt out" basis proposed. If the choice is this or nothing, then better this".

In this respect, the decision arguably provides an indication that some courts appreciate the value of representative actions and will be prepared to adopt pragmatic case management solutions to preserve them insofar as possible and permissible. This may be of particular interest to parties seeking to encourage courts to permit the use of representative action under CPR 19.8 as part of a bifurcated process, the possibility of which was articulated by the Supreme Court in *Google*:

"*In cases where damages would require individual assessment, there may nevertheless be advantages in terms of justice and efficiency in adopting a bifurcated process … whereby common issues of law or fact are decided through a representative claim, leaving any issues which require individual determination – whether they relate to liability or the amount of damages – to be dealt with at a subsequent stage of the proceedings*".

Also likely to attract the attention is the judgment's endnote, which includes brief commentary from the Judge on:

- the rarity of actions brought under CPR 19.6, with the Judge noting that "*we are still perhaps in the foothills of [its] modern, flexible use … alongside the costs, costs risk and funding rules and practice of today and still to come*";
- the likely increase in the demand for means of collective redress in "*a complex world*"; and
- the roles of the courts and the legislature in addressing this demand, which included an observation that the "*case for further development through legislation may also be strong …*".

Uncertainties do remain with respect to the operation of CPR 19.8. For example, questions can be asked about the extent to which the courts will be prepared to examine individual issues as part of representative actions or require that such issues be dealt with in separate proceedings. It is also worth noting that the Judge expressly concluded that claims for undisclosed or secret commissions fall within the exceptions identified by the Supreme Court in *Google*. Accordingly, it might be argued that this aspect of the existing "same interest" jurisprudence remains undisturbed.

A Closed Door – CPR 19.8 and Data Protection?

Representative Actions in Data Privacy following Lloyd

While doors appear to have been opened (at least to some degree) for representative actions in the context of the secret commissions, the position is different as far as data protection claims are concerned. As examined below, although the door in this area has not been completely shut, there appears to be limited space for manoeuvre.

As noted above, the Supreme Court's decision in *Google* limited the potential for future representative actions that are based solely on contraventions of data protection legislation that do not result in damages or distress to the proposed class members. In that case, the Supreme Court unanimously confirmed that the loss of control of personal data would not be sufficient to support a claim under the DPA 1998 (and that loss of control will not itself usually amount to "distress" or "damage" without something more significant). The Supreme Court also held that determining the damage suffered by each class member would require an individualised assessment of loss that was not appropriate within the representative action framework.

That direction of travel has continued. In May 2023, in *Prismall v Google UK Limited & Anor*, the High Court summarily dismissed an attempt to pursue a representative action based on the tort of misuse of private information claim in which it was alleged that the class members had suffered damage in the form of loss of control over patient data.

In that case, Andrew Prismall had sought to pursue claims as the representative of approximately 1.6 million patients of the Royal Free London NHS Foundation Trust in respect of the transferring of medical records to and via an app owned by Google called DeepMind. In July 2017, the UK's Information Commissioner's Office ("**ICO**") concluded that this transfer did not fully comply with the DPA 1998 because patient consent had not been obtained.

Mr Prismall had initially brought a representative action in relation to the transfer that advanced claims based on breaches of data protection legislation. However, following the decision in *Lloyd v Google*, he discontinued this action.

Subsequently, Mr Prismall commenced a fresh action that advanced claims based on the tort of misuse of private information. As the Supreme Court expressed doubts in *Lloyd* regarding the viability of a representative action seeking damages for loss of control as a claim for breach of the DPA 1998, this new claim appeared to be an attempt to circumvent the Supreme Court's decision by advancing a fresh line of attack that was presumably based on the well-established principle that damages for this tort can be granted following the loss of control of personal data.

Mr Prismall argued that, at least to some degree, all of the class members had lost control over their private information when their data was shared with DeepMind without their explicit consent. He argued that compensation could (and should) be calculated by reference to this minimum harm without proving anything more, and that the same interest test was accordingly met.

The High Court rejected these arguments and the claim was struck out. As was the case in *Lloyd v Google,* the High Court concluded that an individualised assessment of each class member's damages would be required in a way that precluded a representative action. Further, it was held that the personal data involved was also non-sensitive in nature (despite it technically being health-related). It was therefore held that each class member did not have a realistic prospect of establishing a reasonable expectation of privacy in respect of this data or of crossing the *de minimis* threshold in relation to such an expectation.

The High Court's judgment in *Prismall* highlights the challenges for claimants seeking to bring representative actions, particularly where the arguments presented on behalf of the claimants are based on a "lowest common denominator" level of damages for each member of the claim.

In this respect, it is clear that litigants seeking to deploy representative actions in the context of privacy claims continue to face challenges – including, as an initial hurdle, identifying ways by which the same interest test can be satisfied, particularly against the background of the Supreme Court's decision in *Lloyd v Google.*

However, even against the background of the decisions in *Lloyd v Google* and *Prismall*, litigants (working together with interested funders and other stakeholders) are unlikely to give up trying to achieve a route for "opt-out" data privacy cases, given significant reduction in burden placed on claimants that this facilitates.

In this regard, there remains a faint glimmer of light for potential claimants.

First, it may be the case that *Prismall* is appealed, or that another group of litigants seek to distinguish its reasoning as part of a claim in relation to data that is particularly sensitive and/or interference that is particularly extreme.

Second, it is worth noting that *Lloyd v Google* was brought under the DPA 1998 and the Supreme Court explicitly left open the question as to whether the position would be different under the DPA 2018 (which implemented the GDPR). This point was highlighted in 2022 when the High Court decided that a representative action claim against TikTok entities was sufficiently arguable that claims forms could be served out of the jurisdiction. In *SMO v TikTok Inc. & Ors*, a representative sought to pursue a claim on behalf of a class of children in connection with allegations that TikTok had breached data protection legislation in its processing of personal data. Mr Justice Nicklin found (albeit with some caution) that the "serious issue to be tried" threshold had been met to allow him to grant the application because of – amongst other reasons – the alleged material difference between the remedy under Article 82(1) of the GDPR and the remedy under Section 13 of the DPA 1998, which has been the subject of *Lloyd v Google.*

Although this claim was withdrawn (for unknown reasons) by the prospective representative a few months later, and is therefore unlikely to move the needle in and of itself, it may act as inspiration for future such claims.

Third, some litigants have considered trying a different route altogether by pursing privacy collective actions in the CAT. The first collective proceedings order was granted by the CAT in 2021. Some claimants have since attempted to shoehorn privacy claims relating to data collection practices into this regime. It remains to be seen whether this approach constitutes a viable route for privacy collective actions in the United Kingdom.

Fourth, litigants may look to other jurisdictions to bring their claims, particularly in light of the EU's Representative Actions Directive which may open up new jurisdictions that have historically not seen much by way of collective actions activity. Of particular interest in the data privacy space is likely to be Ireland, in which a number of likely defendants (including some of the TikTok entities that were the subject of the claim in *SMO*) are domiciled.

In any event, depending on the claim (including where it is felt that there is a good, economically viable case), some litigants may elect to go for the traditional "opt-in" claims to avoid procedural difficulties. In this respect, other routes for the pursuit of collective actions in relation to data protection continue to be explored and, in keeping with developments in relation to representative actions, the scope of those procedural mechanisms continues to be tested and clarified.

This includes Group Litigation Orders ("**GLO**"), an "opt-in" procedure that has been historically used for data privacy

action. A high-profile example of this was the British Airways litigation commenced following a cyberattack identified in September 2018 against the airline which affected the personal data of around 500,000 customers. As recorded in a decision of Mr Justice Saini, following a period of bookbuilding and advertising, by February 2021 around 23,000 claimants had been signed up to a GLO made in October 2019.

However, there are signs of shifting attitudes as to the use of GLOs in the data privacy context. For example, in *Bennett & Ors v Equifax Limited,* over 1,000 claimants applied for a GLO in connection with a claim brought after the ICO had, in 2017, fined Equifax £500,000 for failing to take appropriate steps to protect individuals' personal data in connection with a cyber-attack. At the hearing of the application for a GLO in March 2022, the Court expressed concerns as to whether a GLO was the appropriate course. It eventually declined to make a GLO and recommended that further discussions take place between the parties, following which a Case Management Conference could be listed to determine whether it was preferable to proceed by way of a managed multi-party claim or a GLO. Potentially as a result of the hesitation expressed by the Court at the application hearing, it is understood that (following the Court's decision) the pursuit of a GLO has been abandoned and the parties are now seeking directions for the trial of a preliminary issue on the potential quantum of the claims, which could in turn increase settlement prospects.

Likewise, in *Beck & Ors v The Police Federation of England and Wales*, the claimants abandoned at the hearing an application for a GLO on behalf of 13,000 current and former members of the Police Federation seeking to bring claims following two cyber-incidents suffered by the organisation in March 2019. In a judgment from March 2023, the High Court ordered the Claimants to pay the Defendant's costs on the grounds that they ought to have recognised earlier that the proceedings may not necessarily be more proportionately managed by a GLO and should have engaged with the Defendant's proposal (i.e., a non-GLO lead claimant model) at an earlier stage.

Knocking at the Door – Where Next for CPR 19.8?

Securities Litigation

Our chapter for last year's *ICLG Class and Group Actions* guide observed that securities litigation has been on the rise in England and Wales. This unrelenting rise has continued, and more issuers have been the subject of such claims over the last 12 months, including Glencore plc, which is the subject of (at least) five actions brought by multiple groups of institutional investors, and Petrofac Limited. Other claims continue to make their way through the courts, as shown by an August 2023 decision on procedural topics issued by the High Court in claims brought by a group of institutional investors against Barclays plc.

Of particular interest is the fact that a number of these claims have been brought as representative actions under CPR 19.8. In those cases, the representatives are institutional investors seeking declarations on their own behalf and on behalf of other investors who dealt in securities of the defendants during the relevant period. Those declarations include allegations that: (i) the information issued to the market by the defendants was defective; and (ii) that "persons discharging managerial responsibility" within the defendants had the requisite state of mind in respect of that information.

It remains to be seen how the Court will assess the use of representative actions in this area, particularly in circumstances where – as examined in last year's chapter – recent decisions in claims against RSA Insurance Group Limited, G4S Limited and Serco Group plc looked potentially to have created something akin to a case management framework for their disposal. Of particular interest will be how the Court attempts to balance the interests of litigants in proceedings brought against defendants by different groups, where those groups have adopted different procedural routes for bringing their claims. This is illustrated by the recent collective actions against Glencore, where a majority of claimant groups issued more "standard" group litigation claims but at least one group has sought to deploy a representative action under CPR 19.8.

Insurance Recovery

As noted above, one of the more intriguing features of the observations made by the Supreme Court in *Lloyd v Google* was the indication (or if not, the signposting) as to the circumstances when representative actions seeking damages might be able to fall outside the scope of its decision. One such example was where it was possible to calculate damages on a global basis, such as in cases brought by claimants in relation to losses suffered under a particular insurance policy.

In recent years, a number of significant events have sown the seeds for groups of insured persons to explore that possibility. One such event is the COVID-19 pandemic, which has triggered various insurance-related disputes, including claims concerning Business Interruption policies. Following the decision in the Financial Conduct Authority's test case, in which the Supreme Court confirmed the circumstances under which businesses affected by pandemic restrictions could make claims on their Business Interruption policies, further claims have been issued by other policyholders.

A number of those cases, including a claim brought by 40 hospitality companies against Allianz Insurance PLC (including in respect of the operations of Newcastle Falcons rugby club), have been brought as representative actions under CPR 19.8.

Procedural Developments in Antitrust/ Competition

Class Actions in the CAT

The last 12 months have seen a surge in collective actions being brought before the CAT under Section 47B of the Competition Act 1998 for damages arising out of alleged breaches of competition law.

Following the Supreme Court's landmark 2020 judgment in *Mastercard Incorporated & Ores v Merricks*, and the CAT's subsequent granting of its first collective proceedings order certifying the proposed class in that case, it is evident that the floodgates have opened. Indeed, as of August 2023 there are over 20 ongoing collective actions issued in the CAT.

Those actions have been brought against a wide range of defendants, although the largest claims are being pursued against so-called "big tech" firms, and involve claimants seeking significant damages (in some cases exceeding £1 billion). Typically, the proposed representatives of the relevant class members are former regulators, academics or so-called consumer champions, similar to Walter Merricks (who was Chief Ombudsman of the Financial Ombudsman Service between 1999 and 2009).

One notable trend relates to the triggers (or lack thereof) for many of these actions. While it may have been expected that class actions pursued in the CAT would primarily be commenced after the issuing of infringement decisions by the UK's Competition and Markets Authority (the "**CMA**") and/or the European Commission (so-called follow action actions), this has proved not to be the case in practice. Many of the active actions are being brought on a stand-alone basis in relation to alleged practices (such as tying, self-preferencing and restrictions on

interoperability) that are being investigated in parallel by the CMA and/or other national or non-UK authorities.

This has potentially far-reaching consequences for wider competition practice, and for the following reason: while companies under investigation by the CMA and other authorities may be able to avoid the imposition of regulatory fines (or large fines) by, amongst other things, applying for and securing immunity or leniency, offering legally binding commitments to bring the impugned conduct to an end or settling in return for a reduced fine, taking those actions does not limit exposure to damages claims. On the contrary, in many cases those actions may lead to heightened litigation risk as these practices are often perceived by relevant stakeholders (including litigants considering pursuing actions) as a 'signal' of potential past wrongdoing.

One significant uncertainty remains. To date, the CAT has not awarded damages in a competition class action and it may be some time before it does. As such, it is not possible to draw firm conclusions on how the regime may frustrate the CMA's efforts to get companies to admit liability through settlement proceedings or to sign up to undertakings to bring conduct to an end. However, it is clear that the potential deterrent effect of class actions is becoming much more acute for businesses operating in the United Kingdom. In-depth due diligence for class action risk prior to M&A deals and ongoing compliance efforts are becoming more important than ever.

Trucks Judgment Puts the Brakes on Litigation Funding Arrangements

As the English courts have become an established destination for collective actions, a significant influx of litigation funding capital has followed. However, it remains to be seen whether – following the Supreme Court's July 2023 judgment in the *Trucks* litigation – the proliferation of competition class actions will continue at the same pace. Much will hang on how ongoing claims are resolved and how the CAT's process develops over the next 12 months.

In *R (PACCAR Inc & Ors) v Competition Appeal Tribunal*, the Supreme Court held that many commonly used forms of Litigation Funding Arrangements ("**LFAs**") constitute "*damages-based agreements*" ("**DBAs**"). By law, DBAs must satisfy certain conditions in order to be enforceable. Moreover, even where such conditions are met, Section 47C(8) of the Competition Act 1998 renders DBAs unenforceable in the context of "opt-out" collective proceedings.

The judgment arose from the *Trucks* litigation, which concerns follow-on damages claims arising out of the European Commission's 2016 decision fining several truck manufacturers for infringements of EU competition law. Claims have been brought by two proposed class representatives, UK Trucks Claims Ltd and the Road Haulage Association.

To obtain a Collective Proceedings Order from the CAT, proposed class representatives are required to prove, amongst other things, that they have adequate funding arrangements in place. In this case, the defendants challenged the LFAs that had been obtained on the grounds that they were DBAs within the meaning of Section 58AA(3) of the Courts and Legal Services Act 1990.

It was widely agreed that the LFAs in question did not comply with the Damages-Based Agreement Regulations 2013 (the "**DBA Regulations**"), which set out certain requirements that must be satisfied for a DBA to be enforceable. The central dispute was whether the LFAs were DBAs at all (in particular whether they involved an agreement to provide "*claims management services*"). In the context of the "opt-out" proceedings envisioned for the claim brought by UK Trucks Claims Ltd, the question was even more acute as DBAs are unenforceable in such proceedings in any event (even if they satisfy the requirements stipulated in the DBA Regulations).

The CAT and the Divisional Court on appeal both held that the funders were not, in this context, providing claims management services by way of the relevant LFAs. A 4-1 majority of the Supreme Court disagreed and upheld the defendants' appeals. The majority opinion focused on concepts of statutory interpretation, including the intention of Parliament at the time of the enactment of the relevant legislation (which supported the view that the term "*claims management services*" should not be limited to the active management of a claim but instead should be interpreted broadly to include LFAs). The majority rejected arguments to the effect that LFAs are commonplace and as such, their decision would render a significant number of agreements unlawful.

The Supreme Court's ruling rendered the LFAs in the *Trucks* litigation unenforceable. Questions have also been raised as to whether the ruling leaves the litigation funding industry and the competition class action regime more generally in circumstances where – as the CAT recognised in a 2021 ruling in *Gutmann v First MTR South Western Trains Limited* – "*third-party funding is a necessary feature of many collective proceedings*".

The Supreme Court observed that the implications of its judgment in *PACCAR* would be "*significant*" and would stretch beyond the *Trucks* litigation with "*the likely consequence in practice [being] that most third-party litigating funding agreements would … be unenforceable as the law currently stands*".

In the short term, there is likely to be a scramble to renegotiate existing LFAs and restructure new LFAs to either make them compliant with the requirements in the DBA Regulations or to decouple the funders' return from any final award of damages. In this regard, potential alternative ways of structuring funding arrangements include linking the return to a multiple of the funders' investment.

It also remains to be seen how the CAT will treat competition class actions that are already before it (including those which have already been through the certification stage) on the basis of LFAs that are likely to be unenforceable, in whole or in part, following *PACCAR*. This is particularly the case in the context of "opt-out" collective proceedings where any form of DBA is unenforceable.

Two industry bodies – The International Legal Finance Association and the Association of Litigation Funders of England and Wales – have issued a joint statement proclaiming that their members' "*willingness to finance meritorious claims*" is unaffected. Others have called on Parliament to intervene. The Supreme Court's judgment drew heavily on the legislative context of 2006, but most practitioners take the view that attitudes towards funding have shifted sufficiently such that it would be surprising if the same law were passed today if intended to have the same consequences.

Nevertheless, it seems likely that scrutiny of the merits of prospective competition class action claims (and, with it, the involvement of litigation funders in facilitating the pursuit of those actions) will increase going forward.

New Frontiers for Cases

Alongside the continued testing of the boundaries of the procedural rules for collective actions, there has been an expansion of the contexts in which collective actions are being pursued in England and Wales.

While it remains the case that collective actions in the financial services, product liability and antitrust contexts remain crucial pillars of the collective actions space, the areas examined in last year's article – such as securities litigation, environmental claims and employment claims – continue to grow. Indeed, these areas are candidates for further expansion. For example, a potential uptick in product liability claims could follow: (i) the introduction of legislation/regulation covering artificial intelligence devices, including medical devices, toys and vehicles (already

the subject of new legislation in the European Union); and (ii) increased scrutiny from the UK Government on perfluoroalkyl and polyfluoroalkyl substances (or PFAS), chemicals used in various consumer and industry products that have already been subject to class actions in the United States.

Moreover, new areas in which to pursue class actions continue to be explored by litigants. In addition to insurance-related claims (as examined above), the COVID-19 pandemic has set the stage for other collective actions. High-profile examples include claims brought by students against higher education institutions in respect of alleged disruption to their tuition as a result of the pandemic, claims of which type have already been brought by various groups of students in the United States (including against universities in Florida, Arizona and Pennsylvania).

In the United Kingdom, recent reports suggest that over 120,000 former and current students from across 18 different universities have sought to obtain a GLO in order to pursue their claims. Further, in July 2023, the High Court considered the appropriate procedural directions in the case of *Hamon & Ors v University College London*, a claim brought by a group of current and former students who allege that UCL breached tuition contracts after teaching went online during the pandemic with restricted access to facilities. At that hearing, Senior Master Fontaine: (i) issued a temporary stay with the aim of facilitating mediation or other alternative dispute resolution processes; but (ii) rejected an attempt by UCL to require students to complete the university's own internal complaints procedure and, if that failed, going through the Office of the Independent Adjudicator for Higher Education. The students' application for a GLO was adjourned.

Elsewhere, the potential for new actions are likely to arise in line with legislative and regulatory shifts, such as (i) the upcoming introduction of a new offence of a "*failure to prevent fraud*" by way of The Economic Crime and Corporate Transparency Bill 2022; (ii) the FCA's push to tackle greenwashing, evidenced by its recent enforcement action against HSBC; and (iii) the recent drive to make English courts the global hub for cryptocurrency disputes.

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