

Class/collective actions

Mayer Brown discusses the importance of businesses understanding their exposure

2024 is shaping up to be another significant year for the UK's burgeoning class/collective action regimes. New developments in several areas means that businesses need to have an understanding of their exposure across collective proceedings orders (CPOs) and umbrella proceedings orders in the Competition Appeal Tribunal (CAT), to group litigation orders (GLOs) and representative actions in the High Court.

Overview

2023 saw a continuation of trends from previous years – collective actions in the High Court are still primarily brought on an opt-in basis, either by multiple claims being brought together in a single action (eg, using a schedule of claimants); or the court making a GLO.

In terms of opt-out class actions, the CPO regime continues to be the most active for such claims since the Supreme Court's lowering of the class certification threshold in its 2020 judgment in *Merricks v Mastercard*¹, and this shows no sign of slowing down. There are now over 40 registered opt-out class actions, involving claimant classes in the millions and potential damages sums in the billions. Representative actions remain an option for opt-out claims in the High Court, but have not seen the same level of activity, following the Supreme Court's decision in *Lloyd v Google*² which raised the bar for the 'same interest' criteria that the claimant class must fulfil.

Recent developments

In the CAT

The increase in CPO claims has resulted in parties rigorously testing how various aspects of the regime are to be administered, as claims reach each procedural stage. In particular, we have seen the first settlement in a CPO claim, in the proceedings against the participants of the so called 'Ro-Ro' shipping cartel³, where the smallest defendant's (1.7%) share of the potential damages still amounted to £1.5m. Also arising from a CPO claim, the Supreme Court's July 2023 judgment in *PACCAR*⁴ cast serious doubts over the enforceability of certain litigation funding agreements (LFAs) where the funder takes a percentage of the overall damages awarded. Despite this, claimant firms and funders seem to have taken the judgment in their stride, amending LFA wording to comply with the post-*PACCAR* requirements. Two amended LFAs have been approved by the CAT to date, with these decisions remaining subject to appeal.

Another key development has been the first environmental disputes brought under the CPO regime. In 2023, six opt-out class actions were commenced against UK water companies, alleging that they abused their dominant positions in the market by under-reporting the number of sewage spills into the environment, and providing misleading information to their regulator. The claimants allege that the defendants benefited from this by charging higher prices than they would otherwise have been able to if they had provided accurate reporting.

In the High Court

Late 2023 and early 2024 saw a surge in activity in the GLO litigation against vehicle manufacturers relating to the alleged use of 'defeat devices' to cheat emissions tests. Ten GLOs, which are being collectively case managed, have now been granted (the '*NOx Group Litigation*'). The total claimant group includes over 1.2 million individuals who have brought the claim against the defendant manufacturers and authorised dealerships, with a total of 1,500 defendants. The claim value is yet to be determined, but based on a previous settlement in these proceedings, could be above £2.4bn.

As for representative actions, the January 2024 High Court decision in *Commission Recovery Ltd v Marks and Clerk LLP*⁵ demonstrated that despite the setback for claimants in *Lloyd v Google*, the English courts are amenable to permitting representative actions where the claims take a bifurcated approach. They may be appropriate to deal with issues in which the claimant class do have the 'same interest' on an opt-out basis (eg, establishing the defendant's breach), with individual issues (eg, liability to an individual claimant or quantum of damages) to be dealt with separately at a subsequent stage of proceedings.

What's next?

There are several noteworthy trials taking place in the coming 12 months in UK class actions.

The first full trial of a claim under the CPO regime in *Le Patourel v BT*⁶ commenced in January 2024 for eight weeks, and the certification hearings for many of the pending CPO applications have been listed this year. The first trial using the umbrella proceedings order mechanism will also take place this year in the *Merchant Interchange Fee Umbrella Proceedings*⁷, encompassing approximately 1,000 bundled claims by UK

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businesses alleging damages caused by the defendants' overcharging of multilateral interchange fees.

Environmental damages claims are expected to continue to grow in prominence in UK class actions, particularly those brought against UK parent companies for the alleged acts/omissions of their foreign subsidiaries. One of these claims, *Mariana v BHP*⁸, is listed for trial in October 2024 and is among the largest collective actions ever commenced in England and Wales. The eight-week trial will determine the claims of 700,000 Brazilian claimants who allege that an estimated £36bn in environmental damages arising from the Mariana dam disaster in 2015 was caused by the defendants.

The most progressed GLO in the *NOx Group Litigation* (against Mercedes) will go to trial in February 2025. It, along with two other GLOs (yet to be determined), will act as test cases, the result of which will bind the remainder.

Important case management decisions are also expected to continue to shape the regimes as they arise.

Outside the courts, there are two important proposed pieces of legislation that may have major impacts on UK class actions if they become law in 2024. The first is a new bill which would reverse the effect of the Supreme Court's decision in *PACCAR*, in relation to damages claims brought in the CAT.⁹ The second concerns amendments to the Digital Markets, Competition and Consumers Bill to expand the CPO regime to include consumer rights class actions.¹⁰ This is one for businesses to watch closely, as it would radically increase the risks of non-compliance with UK consumer protection laws for any companies with a UK customer base.

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1. *Mastercard Incorporated & Ors v Merricks* [2020] UKSC 51
2. *Lloyd v Google* [2021] UKSC 50
3. *Mark McLaren Class Representative Ltd v MOL (Europe Africa) Ltd & Ors* (Case no 1339/7/720)
4. *R (on the application of PACCAR Inc and others) v Competition Appeal Tribunal* [2023] UKSC 28
5. [2024] EWCA Civ 9
6. *Justin Le Patourel v BT Group PLC* (Claim No: 1381/7/7/21)
7. Claim no: 1517/11/7/22 (UM)
8. *Municipio de Mariana & Ors v BHP Group (UK) Ltd & Ors* (Claim No: HT-2022-000304)
9. bills.parliament.uk/publications/54762/documents/4592
10. publications.parliament.uk/pa/bills/cbill/58-04/0003/230003.pdf

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