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United Kingdom CLASS ACTIONS

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This country-specific Q&A provides an overview of class actions laws and regulations applicable in United Kingdom.

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UNITED KINGDOM CLASS ACTIONS



1. Do you have a class action or collective redress mechanism? If so, please describe the mechanism.

The key class action mechanisms available in England are as follows:

- Multiple joint claims commenced through the issue of a single claim form. The English Civil Procedure Rules ("**CPR**") allow multiple claims to be brought by one claim form where such claims "*can be conveniently disposed of in the same proceedings*". The Court will manage the claims using its general case management powers under the CPR. This procedure is normally used where the claimant group is represented by a single law firm.
- Claims brought pursuant to a Group Litigation Order ("**GLO**") pursuant to CPR 19.22. The Court will make a GLO where multiple claims give rise to "*common or related issues of fact or law*". This test is less stringent than "*same interest*" test used for representative actions (see below) and therefore GLOs are currently the most commonly used procedure for class actions in England, particularly where different groups of claimants represented by different law firms are involved.
- Representative actions pursuant to CPR 19.8, which are begun by one or more claimants as representatives of other persons with "*the same interest*" in the claim. Any judgment or order made in a representative action is binding on all persons represented (even if they are not party to the proceedings) but can only be enforced by or against non-parties with the permission of the Court.
- Collective proceedings brought under the Competition Act 1998 by a class representative before the Competition Appeals Tribunal ("**CAT**"). This mechanism is only available for claims relating to infringements of EU or UK competition law and must be certified by the CAT through the

grant of a Collective Proceedings Order ("**CPO**").

2. Who may bring class action or collective redress proceeding? (e.g. qualified entities, consumers etc)

Any natural or legal person may bring class action proceedings in England.

3. Which courts deal with class actions or collective redress proceedings?

Class actions are generally heard by the High Court's Chancery Division or Commercial Court, or (in the case of CPO proceedings) the CAT. The CAT is a specialist tribunal with the jurisdiction to hear actions relating to breaches of competition law. It is possible to transfer cases from the CAT to the High Court (and vice versa). The key difference between the two institutions is that cases before the CAT will be heard by a three-member tribunal (comprising one judge of the Chancery Division or senior lawyer and two lay members with specialist expertise) while cases before the High Court will be heard by a single judge.

4. What types of conduct and causes of action can be relied upon as the basis for a class action or collective redress mechanism?

Class actions are particularly common in relation to the following types of claims:

- Breaches of competition law
- Data privacy breaches
- Environmental damage
- Product liability and mis-selling
- Corporate misstatement
- Personal injury

5. Are there any limitations of types of claims that may be brought on a collective basis?

There are no limitations to the types of claims which may be brought on a collective basis, so long as the High Court or the CAT determines that it is appropriate for the claims to be managed and heard using one of the available class action mechanisms.

6. How frequently are class actions brought?

There have been significantly fewer class actions brought in England to date relative to other jurisdictions which are perceived as having more “claimant-friendly” class action regimes, such as the US, Canada and Australia. However, in recent years there has been an increase in class actions in England driven by a number of factors, principally significant investment by third-party litigation funders and increased importance being placed the English courts on access to justice, particularly in relation to consumer rights and environmental, social and governance (“**ESG**”) issues. This trend is likely to continue in light of recent decisions by the High Court and CAT which have facilitated the ease of bringing opt-out CPO claims and representative actions.

The English courts do not publish data on the number of group claims filed by a single claim form or by the representative action mechanism. However, a list of GLOs is maintained. This list shows that, as of 15 February 2023, 112 GLOs have been granted since November 2000.

As of February 2023, 31 CPO applications have been filed with the CAT and 10 have been granted.

7. What are the top three emerging business risks that are the focus of class action or collective redress litigation?

The following business risks have been the focus of recent class action proceedings:

- **ESG-related misconduct.** In recent years, the English courts have shown their willingness to take jurisdiction of mass tort claims relating to environmental pollution and human rights abuses, and in particular claims by overseas claimants relating to the alleged

misconduct of the foreign subsidiaries of UK-based parent companies (see question 20 below for further details). These recent decisions are likely to encourage further similar claims given the significant investment by litigation funders in the ESG space.

- **Corporate misstatement.** There have been a number of class action proceedings brought pursuant to section 90 and/or section 90A of the UK Financial Services and Markets Act (“**FSMA**”), which set out a regime where investors can claim statutory compensation for loss suffered in respect of misleading information published by UK issuers of publicly listed securities. Further to the Volkswagen “Dieselgate” scandal, there have also been group claims brought by UK vehicle owners against several vehicle manufacturers which involve allegations that the manufacturers misrepresented the affected vehicles’ compliance with applicable regulations. Given the increased attention being paid to corporate “greenwashing” by UK regulators and consumers, future litigation may relate to misleading claims made by companies regarding their environment credentials in public-facing documents or marketing material.
- **Cybersecurity and data privacy.** Cybersecurity and data privacy remains a key risk area for many UK businesses due to increased digitisation. The English courts have seen a number of cases where claimants have brought claims against big technology companies for breaches of data privacy law. Given the number of affected individuals, those cases were brought using the opt-out representative action mechanism.

The Supreme Court’s decision in the high-profile case of Lloyd v Google in November 2021 was regarded by many to have put the brakes on class action proceedings of this nature. The Court ruled that the representative action mechanism was not an appropriate procedure by

which large-scale data privacy claims could be brought, given the need to carry out individualised assessments of loss for each class member. However, the Court's ruling left the door open for bifurcated class action proceedings, where issues of liability could first be dealt with on a collective basis with a separate trial for individual issues of loss. A more recent High Court decision, Commission Recovery Limited v Marks & Clerk LLP, followed the approach taken in Lloyd v Google and allowed a representative action to proceed on the basis that issues requiring individual determination could be isolated from the common issues and decided at a subsequent stage of the proceedings.

8. Is your jurisdiction an "opt in" or "opt out" jurisdiction?

Of the key class actions mechanisms available in England (see question 1):

- Multiple joint claims and GLO claims operate on a "opt in" basis.
- Representative actions operate on an "opt out" basis, though enforcing any judgment or order made in the proceedings against or by a non-party requires the Court's permission.
- Collective actions brought under the Competition Act can proceed on either an "opt in" or "opt out" basis.

9. What is required (i.e. procedural formalities) in order to start a class action or collective redress claim?

The procedural steps required to start a claim depend on the class action mechanism which is used.

- **Multiple joint claims:** The claim is commenced by the claimants filing a claim form at Court.
- **GLO claims:** The claim is commenced by the claimants filing a claim form at Court. The claimants will then make an application to the Court for a GLO. This application is typically prepared by the intended "lead solicitors" with input from the solicitors of other claimant groups. The application notice must contain the information specified in CPR Practice Direction 19B 3.2, including the number of claims already issued which are proposed to be subject to the GLO and the

"common issues of fact or law" that are likely to arise across all those claims. If the Court approves the GLO, the claim will be added to the GLO register and there will be a specified period of time for further claimants to "opt-in" to the proceedings.

- **Representative actions:** The claim is commenced by the claimant(s) filing a claim form at Court. The representative capacity of the claimant(s) and the details of the represented class must be made clear on the claim form. Unlike GLO claims, the representative claimant(s) do not need to obtain a Court order to allow the claim to continue as a representative action, although the defendant may apply to the Court for an order that the claimant may not act as a representative.
- **Collective proceedings before the CAT:** The proposed class representative must file a collective proceedings claim form with the CAT registrar. The claim form must contain certain information specified by Rule 75 of the CAT Rules, including:
 - that the representative applying for a CPO and whether the application relates to proposed opt-in or opt-out proceedings;
 - a description of the proposed class, its estimated size and any possible sub-class; and
 - a summary of the basis on which the representation seeks to be authorised.

The claim form initiates proceedings and also serves as the application for a CPO. The proceedings can only be continued if the CAT makes a CPO authorising the class representative and certifying the claims as eligible for inclusion in collective proceedings.

10. What remedies are available to claimants in class action or collective

redress proceedings?

All remedies available to claimants in regular proceedings are also available in class action proceedings. The most common remedy claimed by claimants in class action proceedings is damages, which will be quantified by the trial judge / tribunal taking into account party submissions and expert evidence. Claimants are entitled to claim interest on damages from the date the alleged loss is suffered. Claimants may also seek non-pecuniary remedies such as specific performance, declaratory relief and injunctions.

11. Are punitive or exemplary damages available for class actions or collective redress proceedings?

Punitive / exemplary damages are available for class actions in principle. However, in practice awards of punitive damages are uncommon. As a general rule, the English courts do not award exemplary damages in civil proceedings as the purpose of the civil law is to compensate claimants for their loss and not to punish defendants.

The Court may choose to exercise its discretion to award punitive damages where (i) there had been oppressive, arbitrary or unconstitutional conduct by government servants; (ii) a defendant has engaged in conduct to make a profit which exceeds the compensation payable to the claimant; and (iii) provided by statute. Examples of the types of cases in which punitive damages have been awarded include tort cases involving wilful misconduct, such as deceit, intimidation, defamation or sexual / racial discrimination. Punitive damages are generally not available in cases involving breach of contract or breaches of competition law.

12. Are class actions or collective redress proceedings subject to juries? If so, what is the role of juries?

There are no civil jury trials in England.

13. What is the measure of damages for class actions or collective redress proceedings?

Damages are generally calculated on a compensatory basis with the aim of putting the claimant back into the position he / she would have been had the tortious act or breach which is the subject of proceedings not been committed.

In the case of CPO proceedings, the CAT is permitted to make an aggregate award of damages without undertaking an assessment of the amount of damages recoverable in respect of each class member. The Supreme Court has ruled that the CAT is not required to ensure that the distribution of damages across individual class members is compensatory; the only requirement is that the distribution is "*fair and reasonable*".

14. Are there any jurisdictional obstacles to class actions or collective redress proceedings?

There are no jurisdictional obstacles specific to class actions. When determining whether to take jurisdiction of a class action, the English courts will apply the same rules as in regular proceedings. Different jurisdictional regimes apply depending on where the parties are domiciled, the date on which proceedings were commenced, the type of claim commenced and where the alleged damage was suffered. The main sources of law used by the English courts in determining jurisdiction are international jurisdictional conventions and regulations, UK statutes, the CPR and English common law principles.

15. Are there any limits on the nationality or domicile of claimants in class actions or collective redress proceedings?

In respect of class actions commenced in the High Court and opt-in CPO proceedings in the CAT, there are no nationality or domicile restrictions to who may be a claimant provided that the Court or the CAT takes jurisdiction. However, as regards opt-out CPO proceedings, any class member not domiciled in the UK must opt in by a specified time to ensure that proceedings are brought on its behalf.

16. Do any international laws (e.g. EU Representative Actions Directive) impact the conduct of class actions or collective redress proceedings? If so, how?

There are currently no international laws which impact the procedural conduct of English class action proceedings. The available class action mechanisms are governed by the CPR or the CAT Rules and applicable English case law.

Claimants are attempting to import international law, or so-called 'soft law' standards (e.g. UN Principles on Business and Human Rights) to assert alleged breaches

of standards of care in tort cases, especially in the human rights or environmental contexts.

17. Is there any mechanism for the collective settlement of class actions or collective redress proceedings?

There are no specific rules for the settlement of claims brought under the opt-in mechanisms or the representative action mechanism. Claims can be settled without the approval of the Court or the CAT, although they must be notified and proceedings must be discontinued once settlement has been achieved.

As regards opt-out CPO proceedings, settlements must be approved by the CAT. The class representative and the defendant(s) must make an application to the CAT for a collective settlement approval order. The CAT may make the order where *"it is satisfied that the terms of the collective settlement are just and reasonable"* (Rule 94(8) of the CAT Rules).

18. Is there any judicial oversight for settlements of class actions or collective redress mechanisms?

Please see the response to question 17.

19. How do class actions or collective redress proceedings typically interact with regulatory enforcement findings? e.g. competition or financial regulators?

Claimants in class action proceedings typically seek to rely on regulatory enforcement findings in establishing the defendant's liability. This is because class actions are usually funded by litigation funders, whose main aim is to reduce the costs of conducting the claim while increasing the probability of a settlement with the defendant or judgment in favour of the claimants. Litigation funders therefore seek to fund claims where allegations of the defendant's liability are already supported in whole or in part by regulatory enforcement findings. Moreover, in most class action proceedings, there exists a stark information asymmetry between the claimants and the defendant in that the vast majority of relevant evidence will be in the possession of the defendant. The claimants therefore do not know whether they have a reasonable basis for bringing their claims until regulatory enforcement findings are publicised.

Section 47A(2) of the Competition Act specifically contemplates claims brought in the CAT in respect of an

existing "infringement decision". Such claims are commonly known as "follow-on" claims and are based on a decision by a UK or EU regulator that a relevant competition law prohibition has been infringement. Sections 58 and 58A of the Competition Act provide that the CAT is bound by (i) findings of fact made by the Competition and Markets Authority ("**CMA**") in the course of an investigation into an alleged competition law infringement; and (ii) an eligible infringement decision once it becomes final.

20. Are class actions or collective redress proceedings being brought for 'ESG' matters? If so, how are those claims being framed?

To date, class actions relating to ESG matters have been few in number. However, their frequency is expected to rise, driven by the growing prominence of the climate agenda, the increasing ESG compliance and disclosure obligations on companies and significant investment in the ESG space by litigation funders.

There are currently two claims in the English courts against UK-based mining / energy companies and their overseas subsidiaries: a claim by Zambian citizens against Vedanta Resources plc and its Zambian subsidiary, and a claim by Nigerian citizens against Royal Dutch Shell Plc and its Nigerian subsidiary. The claimants are citizens of the country in which the relevant subsidiary is based and seek to recover damages from the UK parent company for its subsidiary's actions, namely alleged environmental damage and alleged violations of human rights. The claims against the UK parent company are framed as claims in negligence. The claimants allege that the parent company's control over its subsidiary's operations means that they owe the claimants a duty of care. The English courts have allowed such cases to proceed based on concerns around the claimants' access to justice in the relevant jurisdictions.

Similar claims have also been brought in the English courts by Brazilian citizens against BHP Group entities, although those claims are being advanced under Brazilian law. The case was again allowed to proceed based on access to justice concerns.

There is a proposed opt-out CPO claim awaiting certification by the CAT against water and waste management companies in the United Kingdom. The claim relates to alleged unlawful discharges of untreated sewage and wastewater. The proposed claim is brought by an individual (a professor in water resource management) on behalf of UK bill-payers, and litigation

funding has been secured for the claim. The proposed claim is based on an alleged abuse of the water and waste management companies' dominant position in the market. Should it be allowed by the CAT to proceed, it may encourage similar claims by activist individuals seeking to hold companies to account.

21. Is litigation funding for class actions or collective redress proceedings permitted?

Litigation funding is available for all class action mechanisms in England.

22. Are contingency fee arrangements permissible for the funding of class actions or collective redress proceedings?

Contingency fee arrangements are permissible for all class action mechanisms in England, save that damages-based agreements are not enforceable for "opt-out" collective proceedings before the CAT (section 47C(8) of the Competition Act). Damages-based agreements are a form of contingency fee arrangement where, if a claimant is successful in its claim, the legal representative is paid a percentage of the damages recovered.

23. Can a court make an 'adverse costs' order against the unsuccessful party in class actions or collective redress proceedings?

As a general rule, the English courts will order the unsuccessful party in proceedings to pay a large proportion (c. 70%) of the successful party's costs. The courts have a high degree of discretion in awarding adverse costs under the CPR and may choose to depart from the general rule where they deem appropriate.

Where multiple joint claims are commenced by a single claim form, all claimants are jointly and severally liable for adverse costs.

Where claims are brought pursuant to a GLO, claimants are severally liable for "common costs" (i.e., costs incurred in relation to common issues of law and fact) and are also liable for "individual costs" (i.e., the costs incurred exclusively in relation to their individual claims).

In representative actions, the representative claimant is usually the only class member liable for adverse costs. However, in exceptional circumstances, one or more other class members may be ordered to pay or contribute to adverse costs.

The CAT similarly has a high degree of discretion in making costs awards under the CAT Rules and may take into account the extent to which a party has succeeded on its case. In collective actions before the CAT, the class representative is usually the only class member liable for adverse costs. However, where issues specific to a sub-class or individual are determined, costs can be awarded against the relevant sub-class or individual.

In practice, claimants in class actions do not typically pay adverse costs out of pocket. Most class actions are funded by a commercial litigation funder, who (as part of the funding arrangements with claimants) will have obtained "after the event" insurance to cover the claimants' liability to pay adverse costs.

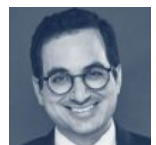
24. Are there any proposals for the reform of class actions or collective redress proceedings? If so, what are those proposals?

There are currently no publicly known proposals for the reform of class actions or collective redress proceedings.

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