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2024: An Important Year for UK Collective Actions

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There has been significant growth in U.K. class actions (often referred to in the U.K. as "collective actions") in recent years. As has been the case in the U.S.—where class actions have been a mainstay of litigation for decades—that growth in claims has been fuelled by claimant-side law firms and associated third party funders.

With those increased claimant-led efforts and litigation funding arrangements has come a mixture of treatment by the U.K. courts, as the courts establish parameters on the funding, "carriage" (i.e. which claimants' law firm has lead responsibility in a case) and case management in this relatively new area of law.

This update highlights key U.K. collective action developments to look out for in 2024.

A keenly-anticipated judgment is that of the Competition Appeal Tribunal (CAT) in Justin Le Patourel v BT Group plc (CAT Case No 1381/7/7/21) ("Le Patourel"), which was the first full trial of an "opt-out" collective action in the CAT. The trial took place in January 2024 and the judgment has not yet been handed down. One key issue of broader interest will be the CAT's decision on the treatment of undistributed damages (i.e. after payment of any final amounts to claimants, the leftover amounts which have not been paid over to claimants due to lack of engagement by claimants otherwise entitled to damages). While the amount of undistributed damages is unknown until a later stage of any collective action, it has the potential to be a very significant amount.

The CAT Rules provide either that the CAT can direct undistributed damages to be transferred to the class representative in respect of any costs, fees or disbursements incurred by the class representative in the proceedings, or as a default that the Tribunal shall order that such undistributed damages are paid to charity (CAT Rules 2015, Rules 93(4) and (6)). Therefore the CAT's ruling in Le Patourel on the treatment of undistributed damages and allocation of amounts for payment to litigation funders will be closely monitored and may impact funding arrangements in the future.

Perhaps the most important development for collective actions in the U.K. is the pending reversal of the Supreme Court's decision in R (PACCAR)v Competition Appeal Tribunal [2023] UKSC 28 ("PACCAR") that litigation funding agreements with a reward-based return were "damages-based agreements" and were unenforceable. Given that it is

generally understood that most opt-out actions in the U.K. are funded by such agreements, this judgment is highly significant to collective actions.

On 4 March 2024, the Ministry of Justice announced plans to introduce legislation to reverse PACCAR to "help people pursuing claims against big businesses secure funding to take their cases to court". The Litigation Funding Agreements (Enforceability) Bill (the "LFA Bill") was subsequently published on 19 March 2024. Section 1(2) of the LFA Bill reverses PACCAR by altering the definition of damages-based agreements, whereby: "an agreement is not a damages-based agreement if or to the extent that it is a litigation funding agreement."

The LFA Bill remains with the House of Lords as it makes its way through the drafting and approval process for the passing of new legislation. Given the apparent strong political support for the LFA Bill, it currently appears that the LFA Bill and the provision contained currently at section 1(2) will be passed into law—however it remains to be seen how the LFA Bill develops in the coming months, including following the upcoming UK general election on 4 July 2024.

The U.K. government's focus on facilitating third party funding coincides with one of the largest opt-in collective actions (by class-size) ever brought before the English High Court: Municipio de Mariana & Ors v BHP Group (UK) Limited & Anor (High Court Case No HT-2022-000304) (the "Fundão Dam").

Following the collapse of the Fundão Dam in Brazil, claimants affected by the tragedy first asserted claims in the Brazilian courts against the relevant company which had built the dam, before then asserting claims in the English High Court in 2018 against what the claimants assert are the relevant U.K.-based parent companies of the BHP mining group. This case is one of several active and recent cases in which claimants from outside of the U.K. have brought actions against U.K.-based parent companies – and in which the English courts have confirmed that they have jurisdiction over such claims.

This claimants to this collective action consist of more than 700,000 individuals, 1,600 businesses, 75 religious institutions, 46 municipalities, seven utility companies, and 9,500 members from indigenous communities. The claimants' solicitors estimate the value of the claims as £36 billion.

The trial is set for October 2024, and will be watched closely as to how the High Court manages a collective proceeding trial of this magnitude. A series of case management decisions in 2023 and 2024 already demonstrate a flexibility and willingness of the Court to allow late amendments to pleadings and further disclosure applications where appropriate.

In summary, 2024 is set to be an important year for collective actions in England and Wales. The judgment in Le Patourel should provide clarity as to how returns for funders will operate in practice. This will be crucial in shaping the future of collective actions in the U.K. given the importance of third-party funding to bringing such claims. The U.K. government's plan to introduce legislation reversing the PACCAR decision will have a significant impact on how litigation funders approach collective actions in England & Wales. Should this draft legislation be passed into law, collective action activity in England & Wales is likely to increase.

Finally, the Fundão Dam case will demonstrate the exposure of U.K.-based parent companies to collective actions for incidents occurring abroad, and the potential for very large groups of claimants to be assembled for proceedings before the English High Court. As the trial approaches, the developments in this case will continue to show how the High Court manages large-scale opt-in proceedings.
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