UK COLLECTIVE REDRESS 2023 YEAR IN REVIEW

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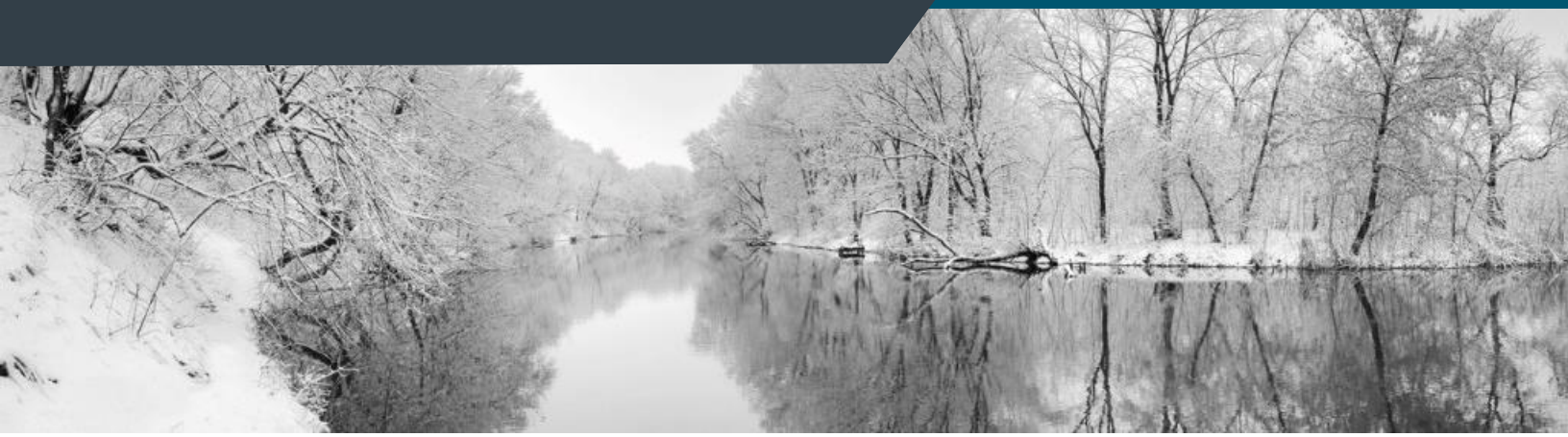
FOR THE CHALLENGE



2023 represented another year of exponential growth for the UK's still relatively young collective actions regime. The last 12 months have, at the time of writing, seen seven new collective claims filed, the long-awaited announcement of the first proposed collective settlement, a Tribunal-sanctioned consolidation of two collective proceedings brought on behalf of the same class, the emergence of the concept of "triability" and the progress of many existing claims towards trial. The year also saw the Supreme Court's judgment in *PACCAR*[1] concerning the nature of litigation funding in Competition Appeal Tribunal cases, the consequences of which are still being felt. In this retrospective, the authors look back at 2023 and pick out a few key themes and trends amongst all the action.

The new claims on the block

The seven new claims filed in 2023 continued the trend of standalone claims against Big Tech: two claims a piece were filed against each of Apple[2], Amazon[3] and Google[4], with further claims brought against (i) Santander and other motor finance providers[5] and (ii) Severn Trent Water[6]. Further claims have also been announced against other UK water companies as well as against video game developer Valve Corporation, although we understand at the time of writing that they have yet to be filed.

2023 continued the trend of claims seeking significant damages, with the largest claim in *Stopford*, seeking approximately £7 billion in redress on behalf of tens of millions of UK consumers in respect of Google's abuse of its dominant position in the UK search market.

[1] *R (on the application of PACCAR Inc and others) v Competition Appeal Tribunal and others* [2023] UKSC 28.
[2] *Dr. Sean Ennis v Apple Inc. & Others* (Case no. 1601/7/7/23) and *Christine Riefa Class Representative Limited v Apple Inc. & Others* (Case no. 1602/7/7/23).
[3] *Robert Hammond v Amazon.com, Inc. & Others* (Case no. 1595/7/7/23) and *Christine Riefa Class Representative Limited v Apple Inc. & Others* (Case no. 1602/7/7/23).
[4] *Charles Arthur v Alphabet Inc. & Others* (Case no. 1582/7/7/23) and *Nikki Stopford v Alphabet Inc. & Others* (Case no. 1606/7/7/23).
[5] *Doug Taylor v Santander UK plc & Others* (case not yet available on the Tribunal website).
[6] *Carolyn Roberts v Severn Trent Water plc* (case not yet available on the Tribunal website).

Consolidation of competing actions: a new way forward?

One of the above-referenced claims against Google, that of *Arthur*, could have resulted in a dispute as to carriage with *Pollack* – however, this was avoided by a consolidation of the proposed class representatives' (PCRs) claims.

Previously, where competing actions seeking damages on behalf of the same class had been filed, PCRs had engaged in a so-called carriage dispute which saw the Tribunal determine which case could proceed (see *FX*[7] and *Trucks*[8]). In both *FX* and *Trucks*, the Tribunal had determined the issue of carriage at the same time as certification in a "rolled up" hearing.

The Tribunal opted to take a different approach in *Arthur* and *Pollack*. At the first CMC in *Pollack*, the Tribunal held that the question of carriage was to be determined first, in advance of the question of certification, and that "*although each case will have to be considered on its merits – that that will be the position in the case of most carriage disputes*."[9] The Tribunal also noted that, during a carriage dispute, proposed defendants "*will not, unless they chose to do so, have to participate in the carriage dispute at all*"[10] (emphasis in the original) - a clear indication of their role at this procedural stage going forward.

Having determined that the question of carriage was to be considered first, the Tribunal then provided directions which allowed the two PCRs sufficient time to consider combining their claims before the Tribunal determined the carriage dispute. The PCRs resolved to combine their efforts and jointly applied to consolidate their actions. The Tribunal then converted the hearing listed for the carriage dispute into a hearing for the consolidation application. At this hearing, for the first time in the UK's collective proceedings regime, the Tribunal ordered that the two actions be consolidated and proceed to the certification hearing as a single case.[11]

The Tribunal's decision to hear the carriage disputes before certification and to allow competing PCRs to combine their applications will be welcomed as a useful precedent by many, given the potential for significant time and costs savings. Whether future carriage disputes will be resolved by consolidation remains to be seen, but a model approach has been identified.

The Tribunal will hear its first carriage dispute following the consolidation of *Arthur* and *Pollack* in *Hunter*[12] and *Hammond* before the end of this year. The Tribunal adopted the same approach to resolving the carriage dispute as established in *Arthur* and *Pollack* and this will provide for an opportunity to consider the Tribunal's refreshed approach to this issue.

Certification standard and regime boundaries

Alongside this notable 'first', the Tribunal and the Court of Appeal has continued to provide welcome clarification of the standard for certification and the boundaries of the regime.

In *FX*[13], an important judgment from the Court of Appeal in November provided guidance as to how the collective proceedings regime will address: (i) the distinction between opt-in and opt-out proceedings; (ii) classes comprising mostly businesses; and (iii) carriage.

As to the first of those, the Court of Appeal confirmed that there is no legislative predisposition in favour of opt-in or opt-out proceedings.[14]

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[7] *Phillip Evans v Barclays Bank PLC & Others*; *Michael O'Higgins FX Class Representative Limited v Barclays Bank PLC & Others* [2022] CAT 16.
[8] *UK Trucks Claim Limited v Stellantis N.V. & Others; Road Haulage Association Limited v Man SE & Others* [2022] CAT 25.
[9] *Claudio Pollack v Alphabet Inc. & Others* [2023] CAT 34 at [17].
[10] *Ibid* at [25(1)].
[11] *Ad Tech Collective Action LLP v Alphabet Inc. & Others* [2023] CAT 65.
[12] *Julie Hunter v Amazon.com, Inc. & Others* (Case no. 1568/7/7/22).
[13] *Philip Evans v Barclays Bank PLC & Others* [2023] EWCA Civ 876.
[14] The Court of Appeal first noted this in *Justin Le Patourel v BT Group plc* [2022] EWCA Civ 593, at [68]. The decision of the Tribunal in *FX* was made before the *Le Patourel* judgment was handed down, and therefore did not have the benefit of its guidance.

Rather, the assessment is guided by the legislative intention behind the collective action regime: enabling access to justice,[15] including allowing for the vindication of claimants' rights (which will incentivize compliance with the law) and promoting judicial efficiency. Importantly, the assessment is not to be guided by consideration as to whether the defendants would be unfairly burdened or oppressed by the prospect of an opt-out action.[16]

As we have explored in prior publications, the *FX* collective action is one of the first opt-out applications to have a proposed class that is not primarily comprised of consumers. In its split decision (discussed in our Perspectives), the Tribunal considered that the size and sophistication of class members weighed in favour of opt-in (and against opt-out) proceedings. However, on appeal, the Court of Appeal rejected this limitation on the regime.[17] The Court of Appeal also provided further guidance on factors relevant to determination of a carriage dispute, ruling that:

- There is no principle that the first PCR to file their claim should be preferred.
- A broader claim is not necessarily preferable to a narrower claim.
- When examining funding packages, the Tribunal will consider the ability and preparedness of a PCR and its funders to increase its funding over time, rather than compare a snapshot of available funding at the certification stage.

The Court of Appeal considered that, in this case, each PCR should bear its own costs of the carriage dispute before the Tribunal because "*the costs incurred might be viewed as an investment decision by a funder and proposed lawyers*", albeit that the Court anticipated that in future cases, the costs should be more constrained.

Beyond *FX*, the Tribunal's judgments in *David Boyle v Govia Thameslink Railway Limited & Others*[18] and *Justin Gutmann v Apple Inc. & Others*[19] developed the jurisprudence going to the certification threshold (set down authoritatively by the Supreme Court in *Merricks*). Both rulings emphasised the focus on the proposed expert methodology as the determinant of a PCR's identification of a suitable way of case managing proceedings to trial.

In *Boyle*, the Tribunal stated that if collective proceedings are: (i) arguable and (ii) "triable", they should proceed to trial. "Arguability" is a concept with which practitioners are already familiar and refers to a real, as opposed to fanciful, prospect of success. This is intended to be a relatively low threshold. As to the identification of "triability", the Tribunal stated that "*no case should be untriable, if it is arguable*"[20] and went on to set out both what "triability" means and the relationship between this concept and the *Pro-Sys* test.

The Tribunal stated that:

- It will only be in the most extreme case, where a PCR fails after repeated efforts to demonstrate a claim's triability, that the Tribunal may strike out a claim.[21]
- The Tribunal will afford a great margin of appreciation for the amount of detail required for the PCR's methodology for the purposes of certification.[22]
- *"[T]oo much encouragement has been given to overloading what is intended as a straightforward test of triability, turning the Microsoft Pro-Sys test into something coming close to a mini-trial*".[23]
- The *Pro-Sys* test is not a "once-and-for-all" test, and the Tribunal will play an active role in managing cases through to trial.[24]

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[15] *Philip Evans v Barclays Bank PLC & Others* [2023] EWCA Civ 876 at at [87]-[88].
[16] *Ibid* at [89].
[17] *Ibid* at [122].
[18] *David Boyle v Govia Thameslink Railway Limited & Others* [2023] CAT 63.
[19] *Justin Gutmann v Apple Inc. & Others* [2023] CAT 67.
[20] *David Boyle v Govia Thameslink Railway Limited & Others* [2023] CAT 63 at [7].
[21] *Ibid* at [8(1)].
[22] *Ibid* at [8(2)].
[23] *Ibid* at [8(3)].
[24] *Ibid* at [8(4)].

- Where the *Pro-Sys* test is failed and the issue is one readily capable of being fixed, the class representative will be permitted to fix the problem[25] and
- The *Pro-Sys* test is a "*low order test for a blueprint to trial; no more and no less*".[26]

The Tribunal emphasised the key role that expert economists have in establishing the blueprint to trial and that therefore the Tribunal "*will pay close attention to what the expert says they need, and what is the most efficient and proportionate way to proceed to trial.*" The Tribunal doubted whether traditional disclosure exercises were an efficient or proportionate manner of providing the expert with what they required in order to complete their economic analysis. Instead, the Tribunal indicated that the class representative's expert should articulate its requirement for data or information and that material should be produced (in schedule form) by the defendant's expert.[27]

In *Gutmann*, the Tribunal had previously adjourned the question of certification, inviting the PCR to make an application for pre-certification disclosure in order to plead his case with more particularity.[28] Following the making of an order for preliminary disclosure, the PCR filed an amended claim with the Tribunal. At the second certification hearing, the Tribunal considered a counterfactual which the proposed defendants described as "highly speculative and not supported by evidence".[29] However, the Tribunal considered that this was an attack on the nature of the abuse and the correct counterfactual rather than the economic methodology and that, prior to disclosure, the methodology is necessarily provisional.[30] The Tribunal accepted that methodologies may require refinement in light of facts as they emerge, which is a matter the Tribunal will have regard to as a matter of case management.[31]

Post-certification case management

Reflecting the progression of cases since the inception of the regime, the Tribunal is now being asked to exercise its case management powers in a variety of different circumstances following the certification of 11 cases to date.

With *Coll v Google*[32] and *Kent v Apple*[33] progressing towards trial in 2025, the Tribunal has provided guidance on how it intends to approach case management of standalone opt-out claims during the pre-evidence / discovery phase.

In *Coll v Google*, the class representative requested further disclosure of financial documents and for more information about how Google had conducted its disclosure to date. Google opposed both applications on the basis that sufficient information had been provided to date and that the requests were disproportionate. This notwithstanding, the Tribunal agreed with the class representative that further data and information was needed and ordered a timetable for this to be provided swiftly.[34] While the Tribunal has, and does, encourage parties to resolve much of the dispute themselves, the Tribunal's considered ruling demonstrates that it is prepared to step in and resolve issues when necessary.

In *Kent v Apple*, the Tribunal ordered (amongst other things) that Apple disclose a significant number of documents that had already been produced in relevant investigations and related claims in other jurisdictions.[35] Alongside disclosure, the Tribunal ordered a process for the parties to agree the issues each of their experts would be opining on, to avoid the parties' experts addressing different points. The Tribunal's consideration that these two workstreams of disclosure and expert issues identification should develop in tandem shows that a key focus of the Tribunal has become ensuring that the disclosure provided or anticipated supports the analysis that will need to be undertaken by the experts, a point emphasised by the Tribunal in *Boyle*. This is likely to be a significant focus on the Tribunal's approach to

[25] *Ibid* at [8(5)].
[26] *Ibid* at [9(6)].
[27] *Ibid* at [9(7)].
[28] *Justin Gutmann v Apple Inc. & Others* [2023] CAT 35.
[29] *Justin Gutmann v Apple Inc. & Others* [2023] CAT 67 at [59].
[30] *Ibid* at [60].
[31] *Ibid* at [63].
[32] *Elizabeth Helen Coll v Alphabet Inc. and Others* (Case no. 1408/7/7/21).
[33] *Dr Rachael Kent v Apple Inc. & Apple Distribution International Ltd* (Case no. 1403/7/7/21).
[34] *Elizabeth Helen Coll v Alphabet Inc. and Others* [2023] CAT 72.
[35] *Dr Rachael Kent v Apple Inc. & Apple Distribution International Ltd* [2023] CAT 20.

many of the opt-out claims, which, although factually complex, will likely also turn on expert analysis due to their predominately being standalone claims.

The Tribunal continued to use its relatively recent case management tool, the Umbrella Proceeding Order, in the ongoing management of the *Merchant Interchange Fee Umbrella*[36] proceedings this year. The Tribunal held hearings at which various Umbrella Proceeding Claimants, the class representative in *Merricks* and the defendants were all heard on issues regarding: (i) the implications of the CJEU's decision in *Volvo*[37] and (ii) evidential issues relating to pass-on.

On the *Volvo* issue, the Tribunal was asked to interpret the CJEU's judgment in *Volvo*, which was given following the UK's exit from the EU and determine whether they were bound by it. The Tribunal held that the *Volvo* judgment was not authority that, as a matter of EU law, limitation periods for competition law infringements only start to run when the infringement of competition law has ceased, and in any event the Tribunal would not have followed it following the UK's exit from the EU.[38] This judgment is being appealed to the Court of Appeal, the decision of which will be closely watched given its potential to assist claimants in extending limitation periods for their claims.

On the pass-on issue, the Tribunal was asked to consider for a third time the manner in which evidential issues relating to retailer pass-on would be dealt with for the purposes of "Trial 2", which is listed for late 2024 in order to address issues relating to pass-on. The parties proposed three methods of dealing with such issues, all of which were rejected by the Tribunal on the basis that they would not lead to an effective Trial 2. The Tribunal had some sympathy for the parties' positions, noting that it had limited room for manoeuvre in evidential terms compared to previous proceedings concerning pass-on due to the range of facts that could be said to be relevant being "*so vast as to preclude effective trial*". In light of the limited time before Trial 2 and the difficulty in making progress to date, the Tribunal set out a strict procedural pathway forward which left the Tribunal firmly in control of the process[39] – the next hearing on the issue is due to take place on 10 and 11 January 2023.

The Tribunal has also taken a similar approach in respect of Trial 1 in the *Merchant Interchange Fee Umbrella* proceedings, which is listed for February 2024 to determine certain Article 101 TFEU liability issues. At a CMC in September, the Tribunal implemented fortnightly procedural hearings up to trial which counsel (and in some instances, experts) are required to attend in order to resolve any issues and ensure that the listing window is not lost.

The Tribunal's approach is a signpost to parties that, in circumstances where the parties are unable to progress matters on their own, the Tribunal will step in and ensure that cases are managed in an effective manner. This approach may be more pronounced in the context of Umbrella Proceedings, which necessarily involve a more substantial evidential matrix and more represented parties than would be found in ordinary proceedings.

Finally, the Court of Appeal has confirmed the ability of defendants to communicate with class members where the communication concerns the relevant collective proceedings in the *RoRo*[40] proceedings (*RoRo*).[41] Previously, a number of defendants had written to certain corporate class members and indicated that disclosure could be sought from them, an act the Tribunal considered to be prohibited by the Tribunal Rules (discussed in our Perspectives series).[42] However, this judgment was overturned on appeal, with the Court of Appeal concluding that, among other reasons, there is no general rule to prevent a defendant from communicating directly with a represented party and there is nothing in the context of collective competition proceedings which necessitates having any such restriction.

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[36] *Merchant Interchange Fee Umbrella Proceedings* (Case no. 1517/11/7/22 (UM)).
[37] Case C-267/20 *Volvo AB and DAF Trucks NV v RM*, EU:C:2022:494.
[38] *Merchant Interchange Fee Umbrella Proceedings* [2023] CAT 49.
[39] *Merchant Interchange Fee Umbrella Proceedings* [2023] CAT [60].
[40] *Mark McLaren Class Representative Limited v MOL (Europe Africa) Ltd and Others* (Case No. 1339/7/7/20).
[41] *Mark McLaren Class Representative Limited v MOL (Europe Africa) Ltd and Others* [2023] EWCA Civ 1471
[42] *Mark McLaren Class Representative Limited v MOL (Europe Africa) Ltd and Others* [2022] CAT 53.

Beginning of the end: the first proposed collective settlement

Another important 'first' for the collective proceedings regime in 2023 was the announcement of the first proposed collective settlement in *RoRo*. It was announced in October 2023 that the class representative has reached a settlement with one of the defendants, reportedly for £1.5m (of which £1.12m is damages), and the Tribunal will consider whether to approve the collective settlement order later this year. This will be the first time the Tribunal has the opportunity to provide a view on settlement terms, including as to any proposed return for the funder, and the outcome of the hearing will be closely watched.

Funding under renewed scrutiny

The Tribunal has generally taken a pragmatic approach to issues with PCRs' funding arrangements and allowed them to modify their arrangements where issues arose. As a consequence, there have been limited challenges by defendants at the certification stage in collective actions filed in the last few years. However, the recent Supreme Court judgment in *PACCAR* has reopened the potential for funding issues to be raised. In *PACCAR*, the majority held that litigation funding falls within the definition of "claim management services" in the relevant legislation[43] and that accordingly a litigation funding agreement that provides for a funder's return calculable by reference to the amount of damages ultimately recovered is a damages-based agreement ("**DBA**"). By virtue of the legislation which brought about the collective regime, DBAs are not enforceable where entered into for the purpose of funding opt-out collective proceedings.[44]

Following the Supreme Court's judgment, a large number of PCRs and class representatives have updated their funding arrangements to remove language that provides for a funder's return calculable in these terms. The Tribunal recently heard the first challenge to one example of new arrangements entered into in *Alex Neill Class Representative Limited v Sony Interactive Entertainment Europe Limited & Others*[45], in which the defendants argued that a provision provided for calculating the funder's fee as a percentage of damages "*only to the extent enforceable and permitted by applicable law*" was nevertheless a DBA. The Tribunal disagreed with all of the defendant's submissions in relation to the PCR's funding arrangements, holding, among other things, that the relevant clauses operate with a contingency, such that they have no legal effect until the contingency (legislation by Parliament to reverse the effect of *PACCAR*) eventuates and that the fact of the funder being due to receive a multiple on its investment did not render the litigation funding agreement a DBA.[46]

One of the amendments made to the Digital Markets, Competition and Consumers Bill at third reading in the House of Commons attempts to remedy certain of the potential consequences of *PACCAR* and it is possible that the Bill may be amended further in the Lords later this year. In the meantime and subject to any proposed legislation coming into force, we may see further related issues play out before the courts in existing cases.

Looking forward to 2024

It is likely that in 2024 we will see the Tribunal offers its views for the first time on a collective settlement following the hearing in *RoRo* on 6 December. This will present a significant milestone for the regime. We may then of course see further collective settlements announced - and the extent to which this is the case may depend to some degree on *RoRo*.

Settlements aside, practitioners will no doubt pay close attention both to judicial and legislative developments regarding litigation funding, and there will also be close interest in the Tribunal's handling of the carriage dispute in *Hunter* and *Hammond*, scheduled to be heard on 20 December 2023.

[43] Within the meaning of section 58AA(3) of the Courts and Legal Services Act 1990.
[44] Pursuant to section 47C(8) of the Competition Act 1998.
[45] *Alex Neill Class Representative Limited v Sony Interactive Entertainment Europe Limited & Others* (Case no. 1527/7/7/22).
[46] *Alex Neill Class Representative Limited v Sony Interactive Entertainment Europe Limited & Others* [2023] CAT 73 at [148].
[47] *Justin Le Patourel v BT Group plc* (Case no. 1381/7/7/21).

We expect the announcement of new collective claims to continue, while the progress of existing claims will be closely monitored. We can also expect the first trial under the regime in *Le Patourel*[47] to take place over the period of January to March 2024.

In short, we predict 2024 to be as eventful as 2023 and we look forward to reviewing the events of next year in due course.

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