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GCR INSIGHT

THE SETTLEMENTS GUIDE

Editor

Mark H Hamer

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Publisher's Note

For many clients, a quick and easy settlement is infinitely preferable to a protracted and rambunctious legal battle, but settlements gain little time in the spotlight within the world of competition enforcement. Equally, while there may be common themes across some jurisdictions, there are also enough significant local variations in settlement processes and procedures to trip up a global antitrust matter.

For these reasons, *Global Competition Review* is delighted to bring this, the newest addition to its stable of resources designed to help practitioners through the complex world of competition law, to our community. *The Settlements Guide* draws on the wisdom and expertise of distinguished practitioners globally, and brings together unparalleled proficiency in the field. GCR thanks our editor, Mark H Hamer, and his distinguished panel in helping us provide such essential guidance for all competition professionals.

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PART III

SETTLING PRIVATE DAMAGES ACTIONS

UK: Settling Collective Actions

Lucy Rigby, Eleanor Powell and Luke Grimes¹

Introduction

The prevalence of collective actions in England and Wales (E&W) has increased over recent years. This trend has been driven by a number of factors, including the introduction of the opt-out regime for competition law claims under the Consumer Rights Act (CRA) in 2015, the increase in the availability of litigation funding required to bring collective claims and the growth of firms specialised in this area. It follows that there is likely to be a greater interest among practitioners, claimants and defendants alike in the mechanisms and strategies involved in settling collective disputes.

In this chapter, we cover the unique substantive and procedural issues relevant to settling group litigation orders (GLOs), English Civil Procedure Rules (CPR) Rule 19.6 representative actions and opt-out collective actions in the UK Competition Appeal Tribunal (CAT). In doing so, we consider the degree of approvals required from the court, alongside the strategic considerations claimants and defendants encounter when settling such claims.

Background: types of collective claims in E&W

It is helpful to first briefly examine the types of collective actions that may be brought in E&W. The oldest of these is the 'representative action', now incorporated in Section II of Part 19 of the CPR at Rule 19.6. Representative actions have long permitted individuals to bring actions on behalf of other parties with a 'same interest', albeit without those other parties' consent: claims are thus brought on behalf of a class of persons on an 'opt-out' basis. While the circumstances in which this procedural mechanism might be used have historically been restricted by the

¹ Lucy Rigby is a counsel, Eleanor Powell is a senior associate and Luke Grimes is an associate at Hausfeld. The authors thank Joseph Pridmore for his assistance. The law as stated is the law of England and Wales. References to 'English' throughout also capture the courts of Wales.

English courts,² it is viewed as having been reinvigorated by the judgment of the Court of Appeal in *Richard Lloyd v. Google LLC*.³ The Court of Appeal's judgment indicates that representative actions may be utilised for the purposes of consumer claims based on loss of control of personal data, as each claimant's loss of control of their data was considered by the Court of Appeal to constitute the 'same interest' for the purposes of CPR Rule 19.6.⁴

The CPR also permit individual claims to be brought together by way of GLOs on an opt-in basis.⁵ GLOs are governed by CPR Rules 19.10 to 19.15 and a GLO is essentially a process ordered by the court to promote the efficient management of the litigation. Although the procedure is not without fault, it remains the most frequently used procedure for the determination of a large number of claims (amounting to 109 as at June 2020).⁶ Claims issued by individual claimants are entered on to a group register by a given date and it is for the court to decide whether there are, or are likely to be, a number of claims giving rise to the common GLO issues.⁷ If that requirement is satisfied, then the court may exercise its discretion to grant a GLO. In considering whether to do so, the court must seek to give effect to the overriding objective of the CPR, which is to enable the court to deal with cases justly and at a proportionate cost. There is no separate class representative required for a GLO, and a party joining the group register will be bound by any judgment or order made by the court insofar as it relates to the GLO issues (unless the court orders otherwise).

As above, a key driver contributing to the increase in collective litigation in E&W in recent years is the coming into force of the CRA. The competition-specific collective actions regime in the CAT is governed by Section 47B of the Competition Act 1998 (the CA 98) and the CAT Rules 2015 (the CAT Rules).⁸ The CA 98, as reformed by the CRA, now permits claims to be brought on an opt-out, as well as an opt-in, basis and provides for a CAT-sanctioned mechanism by which both opt-out and opt-in collective claims are capable of being settled, as is explored in more detail below. Opt-out claims can be brought on a 'follow-on' basis (that is where the infringement and liability of a defendant has already been established by a regulator) as well as for 'stand-alone' damages claims (that is where the infringement and a defendant's liability for the same is to be established by the class representative). In both follow-on and stand-alone damages claims, causation and quantum will need to be established by the class representative.

For completeness, we note that courts are also able to consolidate claims brought by various claimants or case manage claims concurrently. This is often the approach where it is felt that it would be convenient to do so, simply by using ordinary case management powers pursuant

2 *Duke of Bedford v. Ellis* [1901] AC 1, 8; *Markt & Co Ltd v. Knight Steamship Co Ltd* [1910] 2 KB 1021; *Emerald Supplies Ltd v. British Airways Plc* [2010] EWCA Civ 1284.

3 [2019] EWCA Civ 1599.

4 We note that this judgment is, at the time of writing, subject to appeal to the UK Supreme Court and is not expected to be heard until April 2021 at the earliest.

5 See Section III of Part 19.

6 A full list of all GLOs is available at www.gov.uk/guidance/group-litigation-orders (at the time of writing, the list was last updated on 23 June 2020).

7 i.e., the common or related issues of fact or law that are the subject matter of the GLO. The court has the discretion to refuse registration if it is not satisfied that a claim can be managed conveniently alongside the other claims on the group register, or if including a claim would adversely affect the case management of the other claims (Practice Direction 19B – Group Litigation, 6.4).

8 Part 5, Rules 73–98, CAT Rules 2015.

to CPR Rule 3.1(2). This ability has long existed in the CPR, but the courts have recently demonstrated an increasing willingness to use this inherent jurisdiction to manage multiple cases, such as in relation to the UK *Interchange* litigation during the appeal proceedings.⁹

The legal framework associated with settling collective actions

The key difference between the various types of collective claims noted above, particularly when it comes to the framework of legal approvals required for settlements, is that the CAT's collective regime requires prior court approval, whereas claims brought pursuant to CPR Part 19 (a GLO or an opt-out action using CPR Rule 19.6), on the face of the CPR at least, do not.

GLOs

In seeking to resolve a case in which a GLO is in place, the parties are, in general (other than in limited circumstances, such as if the proceedings are brought on behalf of minors), free to agree and settle as they see fit. The High Court's duty to actively manage cases and to encourage parties to use alternative dispute resolution (ADR) to settle in whole or in part exists in relation to a GLO in the same way it does to a claim brought under CPR Rule 19.6 (see below). It is possible for the court to impose costs sanctions on parties that unreasonably fail to engage in ADR.

It is not necessary to obtain the court's approval of any settlement in a GLO, and often parties settle outside of court with the terms of any agreement remaining confidential (while the fact of the settlement itself may be documented in an order indefinitely staying the proceedings). The role of the court in any settlement reached in a GLO is merely to finalise and approve the conclusion of proceedings. If, however, a settlement is agreed between only some of the parties on the group register, the court may adopt a greater degree of oversight to ensure that the settlement does not prejudice the conduct of the action (i.e., by facilitating an orderly handover from settling and non-settling groups).

CPR Rule 19.6 representative claims

Representative claims are brought on behalf of a class of persons on an opt-out basis, with the representative claimant pursuing an action on both his or her behalf and on behalf of a class. The High Court, however, has a duty pursuant to the CPR (including the relevant pre-action conduct practice direction), to actively manage cases and to encourage parties to use ADR to settle in whole or in part.¹⁰ The court may impose costs sanctions on parties that unreasonably fail to engage in ADR. Otherwise, the parties may agree to settle the action without the approval of the court, other than in limited circumstances (for example, if the claim is brought on behalf of minors).¹¹ It is not yet clear, however, what a framework for settlement may look like in practice given that the English courts' approval for the use of this procedure for damages claims in appropriate circumstances has not been exercised.

It may be thought most likely that any settlement would, in some respects, mirror one reached in an opt-out collective case in the CAT (in relation to which, see below) and that the court may wish to exercise a degree of scrutiny over settlement terms on behalf of the class.

⁹ *Sainsbury's Supermarkets Ltd & Ors v. Mastercard Incorporated & Ors* [2018] EWCA 1536 (Civ).

¹⁰ CPR Rule 1.4(2)(e).

¹¹ See CPR Rule 21.20.

One aspect of the CAT regime that would presumably need to be emulated, potentially via CPR Rule 19.6(4)(b), which entitles non-parties to enforce a judgment with the court's permission, is in relation to the notification of the class as to the settlement in order to allow class members to come forward and claim their share of the damages. In this respect, it would not be possible for the settlement, or the fact of it at least, to remain confidential.

CAT collective claims

As provided by the CA 98 (as amended by the CRA) and the CAT Rules, a collective settlement of opt-out collective proceedings will only be binding if it is approved by the CAT. Similarly, this is the key differentiating factor as between the types of collective actions. The CAT has the power to approve a settlement in collective proceedings before or after a collective proceedings order (CPO) has been made.¹²

Where a CPO has been made, the claims to which the CPO applies cannot be settled other than via the grant of a collective settlement approval order (CSAO).¹³ An application for CSAO must be made by the class representative and the defendant or defendants wishing to be bound by the settlement.¹⁴ An application for a CSAO will set out the details of the claims that it is proposed will be settled, as well as the terms of the proposed settlement, including the payment of costs.¹⁵ Importantly, a CSAO application must also contain a statement that the applicants 'believe the terms of the proposed settlement are just and reasonable supported by evidence which may include any report by an independent expert or any opinion of the applicants' legal representatives as to the merits of the collective settlement'¹⁶ and specify how a settlement amount will be distributed.¹⁷ The CAT will make a CSAO only if it is satisfied that the terms are 'just and reasonable'.¹⁸ The factors that the CAT will take into account in such an assessment include, but are not limited to: (1) the value of the settlement, including provisions as to costs; (2) experts' and legal advisers' views; and (3) any provisions of the settlement that go to any unclaimed balance. Notably, the reversion of unclaimed settlement sums to defendants shall not, in and of itself, be considered unreasonable.¹⁹

Where a CPO has not been made, the proposed representative and the defendant can apply jointly to the CAT for a collective settlement order (CSO). A CSO effectively replaces the CPO aspect of the process in that it incorporates an assessment by the CAT as to the underlying claims in accordance with the criteria for the grant of a CPO. It is therefore perfectly possible for parties to commence settlement negotiations at a very early stage.²⁰ An application to the CAT for a CSO must satisfy the requirements set out in CAT Rule 96; in particular, it must provide, among other things: (1) a summary of the basis upon which it would be just and reasonable for the proposed settlement representative to act as such; (2) a description of the proposed settlement class and an estimate of the number of class members (including the basis for that

12 Competition Act 1998, Sections 49B and 49A.

13 CAT Rule 94(1).

14 CAT Rule 94(3).

15 CAT Rule 94(4)(b).

16 CAT Rule 94(4)(c).

17 CAT Rule 94(4)(d).

18 Competition Act 1998, Section 49A(5).

19 CAT Rule 94(9).

20 Competition Act 1998, Section 49B(a) and (b); CAT Rule 96(1).

estimate); (3) details of the claims to be settled; and (4) a summary of the basis upon which the claims, if they had been made in collective proceedings, would satisfy the requirements of Rule 79.²¹

Once the CAT has granted a CSO, the parties may apply for a CSAO²² – the criteria for the grant of which are set out above. If the CAT approves a collective settlement before expiry of the period for class members to opt out, then the CSAO binds all class members, except for those who opted out of the settlement or class members not domiciled in the UK.

The effect of CAT Rule 96 is such as to mean that the requirements of CAT Rules 78 and 79, which apply for the purposes of the grant of a CPO, must also be met for the purposes of the grant of a CSO. However, the CAT Guide to Proceedings (Guide)²³ notes that ‘there will inevitably be less concern about the suitability of the collective handling of common issues when the parties are coming to the Tribunal only for the purposes of approving a settlement and not in order to pursue legal proceedings.’²⁴

As to the standard of scrutiny that the CAT will apply to applications for CSAOs, the Guide offers some insight at Paragraph 6.124:

Unless a class member objects to the settlement, the Tribunal will not have the benefit of adversarial argument in considering whether to approve the terms proposed. However, an application for a CSAO is markedly different from the presentation to the Tribunal or a court of a consent order in ordinary civil proceedings. If approved, the settlement will bind all members of the defined class who do not opt out and bring to an end the (or preclude the commencement of) proceedings brought on behalf of the class, although many class members will not have given instructions to the class representative (or settlement representative) agreeing to the settlement. In these circumstances, the Tribunal will closely scrutinise the proposed collective settlement. However, the Tribunal will not require the settlement to be perfect and there is likely to be a range of reasonable settlements which could be approved by the Tribunal.

Where a CPO has been made in opt-in proceedings, the class representative may not, without the permission of the CAT, settle those proceedings before the expiry date by which a class member may opt in (without the CAT’s permission) to those proceedings.

We note that no collective settlement has, as yet, been approved by the CAT and, as at the time of writing, the CAT has not publicised any applications associated with the same.

21 CAT Rule 96.

22 CAT Rule 97(1).

23 CAT Guide to Proceedings 2015.

24 Paragraph 6.108 of the Guide.

Strategic considerations

As in any complex litigation, the factors that may be considered by claimants and defendants in the context of collective actions are multifarious. They will naturally be likely to include the value to a business of the point or principle at stake and relative assessments as to the strength of the opposing party's case. Several factors, however, are more specific to collective actions and it is these that we focus on here.

The costs of ongoing collective litigation

In a collective action, as in any other, one or both parties' preference may be to reach a settlement, assuming reasonable terms can be agreed, to manage risk and avoid further costs. Broadly speaking, the motivation of the claimant(s) when considering settlement is to secure what they consider to be a reasonable sum by way of redress for the cited wrong. For the defendant(s), motivation is often twofold: first, to ensure that any settlement sum parted with is as appropriately limited as possible; and, second, to secure the certainty associated with no further exposure.

The costs of pursuing any collective action to full trial can be expected to play heavily into the settlement dynamic, particularly at pivotal milestones in the course of litigation, such as obtaining a CPO or following disclosure. We note here that in jurisdictions with 'older' class action regimes than that of E&W, certification is a key driver of collective settlements. This is because the court has assessed the merits of the case to some degree and decided to allow the claim to proceed. This point is thus a natural one for defendants to take a view on the costs and benefits of settlement.

In a GLO context, a defendant may consider settlement at the point at which the group register closes – on the basis that a defendant has more certainty as to its exposure once potential class members have foregone the opportunity to be added to the group register. This said, it is emphasised that the grant of a GLO is not directly comparable to the grant of a CPO following a certification, as the latter entails a far greater degree of scrutiny of (among other things) the underlying legal and economic case, appropriateness of the class representative and adequacy of any funding.

The ability to make settlement offers under the relevant procedural rules illustrates an important point of difference between the forms of collective actions contemplated in this chapter. As a GLO is operated under the CPR, Part 36 affords both parties the mechanism to make 'without prejudice' settlement offers in exchange for certain costs incentives, depending upon the nature of the offer and outcome. Such offers are often made at pivotal junctures in proceedings and are timed to encourage parties to settle. For example, an effective CPR Part 36 offer may be made at the very outset of a case (even during pre-action) or following disclosure that strongly supports a party's case, which, if successful, will confer severe costs consequences. In the collective proceedings context, however, the CAT's equivalent of Part 36²⁵ does not apply, which is largely due to the settlement procedure already enshrined within the CAT Rules and the collective regime. Regardless of the rules governing settlement offers, parties remain free to exchange settlement offers in 'without prejudice' correspondence, which may carry their own costs incentives albeit often not as stark as those afforded by the procedural rules.

25 CAT Rule 45; CAT Guidance at Paragraph 5.110.

Whereas the above explores the costs consequences in a monetary sense, there are further costs consequences that may not be quantifiable but nevertheless detrimental. Defendants may in this respect consider the reputational costs of continuing to litigate collective claims. Litigation naturally exposes the parties in the public domain, in particular the purported wrongdoing by the defendant, and this factor is heightened in the context of collective proceedings where 'noticing' of the class necessarily entails wide-spanning publicity for the case. Such exposure may further harm a defendant's reputation, potentially resulting in negative consequences such as decreased consumer confidence in a brand. Large corporate defendants, in particular, will therefore need to bear in mind the interests of shareholders when weighing up the reputational risks presented by large-scale litigation played out in a very public arena. This said, there may be value for a sagacious defendant in utilising the opportunity of a settlement to spin any publicity surrounding the settlement in a positive light, in the sense of their choosing 'voluntarily' to do the right thing or make amends for past conduct.

Partial settlements and limiting further exposure

As above, as part and parcel of settling a claim, defendants will usually seek to minimise or eliminate the possibility of further exposure by closing-out all current, and potentially future, liabilities. In all types of collective settlement, therefore, the scope of the settlement class is likely to be something to which defendants pay a good deal of attention. In the context of the CAT, where settlements must be approved by the Tribunal, the CAT may also be expected to pay attention to the number and scope of claims caught by a settlement.

Relatedly, it is possible in all types of collective claim for settlements to be reached with some claimants and not with others. Indeed, in the CAT context, class members can choose to opt out of a collective settlement and so may potentially leave the defendant with some residual exposure, albeit this would very likely be small in the context of a large class. With regard to GLO claims, this point is neatly illustrated by the Royal Bank of Scotland's (RBS) rights litigation, which was the subject of a GLO made on 17 September 2013.²⁶ The claims related to the RBS' £12 billion rights issue in April 2008, before the bank failed and was required to be bailed out by the UK government to the sum of £45.5 billion. The claimants were shareholders who alleged that they suffered loss as a consequence of the prospectus containing false and misleading statements and wrongful omissions in relation to the financial state of RBS. Numerous settlements were reached by subgroups in this matter before trial, but other groups refused settlement and proceeded with the litigation before settling at a later stage.

Lastly, in the competition litigation arena, corporate defendants that have informed regulators of cartels often benefit from a partial or full reduction of any regulatory fine. Such 'leniency applicants' have recently been afforded with certain safeguards pursuant to the EU Damages Directive,²⁷ including that they are only liable for damages on a joint and several basis in the event that the claimant is unable to recover losses from non-leniency applicants in the cartel.²⁸ However, while a certain financial incentive is potentially afforded to the defendant, leniency applicants may still remain an initial target for claimants for settlement, given the possibility of leveraging the settlement to gain further insight and knowledge into the cartel

26 *Re RBS (Rights Issue Litigation) in Claims entered in the Group Register* (HC 2013 000484) (RBS).

27 Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014.

28 *id.*, Article 11(4).

(thus increasing the claimant's potential success against the other cartelists). This remains an important consideration for all forms of proceedings, including in the collective context in the CAT where collective proceedings may be brought on a 'follow-on' basis pursuant to a regulatory decision.

Specific incentives to settle

In addition to the deterrents against continuing to litigate noted above, it is important to note that the CAT's settlement regime specifically incentivises collective settlements by providing the potential for reversions. Specifically, the CAT Rules state that a settlement term allowing for the residue of any settlement sums unclaimed by eligible class members to go back to a settling defendant shall not be considered unreasonable. This prospect of clawing back any settlement proceeds is particularly attractive for a defendant as it has the effect of reducing - potentially significantly - the net total amount of its damages and costs payout.

Conclusions

As noted above, parties to collective actions will consider a myriad of different, and often interrelated, factors when attempting to resolve proceedings out of court. There is, as it stands, a shortage of precedent in relation to settlement of CAT opt-out claims and CPR Rule 19.6 actions. However, due to the number of collective actions afoot in E&W, this may not be the case for long.

Appendix 1

About the Authors

Lucy Rigby Hausfeld

Lucy Rigby specialises in competition litigation and has particular expertise in large-scale collective redress. She has worked on numerous pieces of highly complex, multi-jurisdictional litigation across a variety of sectors. At Hausfeld, her expertise has proven invaluable in its filing of two opt-out collective actions under the UK's class actions regime introduced by the Consumer Rights Act 2015. Lucy has extensive experience of conducting litigation before the Competition Appeal Tribunal, the High Court, the Court of Appeal and the Supreme Court. She has also worked on European and domestic antitrust investigations, both in private practice and on behalf of the regulator, and has advised clients on several high-profile merger transactions. Prior to joining Hausfeld, Lucy worked for Which?, the OFT (now CMA) and Slaughter and May.

Eleanor Powell Hausfeld

Eleanor Powell is a skilled litigator with experience acting for a diverse client base across a variety of disputes. She has particular experience dealing with issues arising under UK and EU competition law and, more recently, those surrounding privacy and data rights. Eleanor has achieved significant results in the High Court and the Competition Appeal Tribunal, including securing strategic settlements totalling tens of millions of euros for clients. She has, however, also acted on an unprecedented constitutional challenge in the Supreme Court concerning the Judicial Review of the Prorogation of Parliament, in addition to developing her expertise in group opt-in and representative and collective opt-out actions. Eleanor has developed excellent relationships with litigation funders, economists and counsel.

Luke Grimes

Hausfeld

Luke Grimes's practice focuses on competition damages litigation. Luke has been a pivotal part of the legal teams dealing with the most renowned competition damages actions in recent years, such as the *Interchange Fee Litigation*. He is currently advising a UK energy company on its follow-on damages claim relating to the *Power Cables* cartel.

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Whether, where, why, when and how to settle global antitrust matters is fundamental to the successful counselling of a client facing competition enforcement issues, and yet surprisingly little practical guidance exists to help lawyers understand the process and how to best protect the company's interests in navigating it. *The Settlements Guide* brings together expert practitioners from 17 leading institutions around the world to fill that gap and debate the key issues in negotiating a successful settlement in antitrust matters.