CLEARY GOTTLIEB

ALERT MEMORANDUM

Developments in UK Disputes: Implications for 2025 and Beyond

February 28, 2025

2025 looks set to see the continuation of several trends in UK disputes, including in relation to class and collective actions, litigation funding and ESG disputes. Both the Competition Appeal Tribunal and the English High Court have continued to scrutinise representatives in collective action proceedings and representative proceedings respectively, emphasising the importance of proper representation of the class. Meanwhile, litigation funding remains poised for reform. At the same time, we expect to see more ESG-related claims, with regulatory scrutiny contributing to an evolving litigation landscape.

There have also been new developments over the last year which are likely to have a lasting impact in the courts going forward. In respect of legal privilege, the courts have provided some clarity on aspects of privilege (like waiver), and muddled others (like the Shareholder Rule). A Court of Appeal decision on "secret" commissions in the motor industry will shortly be considered by the UK Supreme Court, which will impact transparency obligations in financial transactions involving intermediaries generally.

Several legal developments are also underway this year, with the Arbitration Bill having recently received royal assent and the Hague Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters 2019 due to enter into force in July. The latter will enhance the recognition and enforcement of UK judgments in contracting states (including the EU).

Finally, certain trends and developments featured in last year's update are still very much in flux, for example, in relation to both AI and digital assets, as the UK government and related agencies continue to consult on these new technologies and how best to regulate them. Meanwhile, the courts are continuing to grapple with new legal questions in this space, such as the applicability of copyright protections to AI-generated content and the proprietary nature of crypto assets, a trend we anticipate will continue alongside future regulatory change.

1

Continued Growth and Development of Class and Collective Actions and Securities Litigation

Class actions continue to be a developing area of law in England and Wales. Class actions currently exist in a variety of forms, including, in the High Court, where multiple claimants use the same claim form, where claims are managed together under a group litigation order ("GLO"), and representative proceedings under Civil Procedure Rule ("CPR") 19.8 where the claimant representative and the represented class have the "same interest". However, the majority of class actions take place before the Competition Appeal Tribunal ("CAT"), where an authorised representative acts on behalf of the class in collective proceedings. As predicted for 2024, we anticipate that the number and value of class actions before both the CAT and the High Court will continue to increase in 2025 and beyond.

2024 saw a large increase in the number of GLOs made, with 11 GLOs granted in 2024 compared to two in 2023.[1] Nine of the 11 GLOs granted in 2024 relate to the NOx Emissions cases (as to which, see below). However, this may herald an expansion of the use of GLOs in the coming year, as claimants and those representing them seek opportunities for class actions beyond the competition sphere.

A total of 10 Collective Proceedings Orders ("CPOs") were granted by the CAT in 2024, doubling the number of CPOs to have been granted which prior to 2024 was only nine. 2025 has already seen a further two CPOs granted in *Ad Tech v Alphabet*[2] and *Gutmann v Apple* (which are part of a number of collective actions being pursued against tech companies).[3] This brings the total number of CPOs to have been granted to 21.[4] We anticipate that this number will continue to increase in 2025 since three further applications for CPOs were made in Q4 2024.[5] Of the proceedings filed in 2024, 11 were opt-out proceedings,[6] continuing the upward trend in opt-out proceedings in the UK since the landmark decision in *Merricks*.[7] Nevertheless, the CAT is exercising scrutiny over proposed class representatives, as demonstrated in its recent refusal to grant a CPO in a class action against Apple and Amazon.[8] The CAT took the view that the proposed class representative had failed to satisfy the authorisation conditions as she had "*not demonstrated sufficient independence or robustness so as to act fairly and adequately in the interest of the class*".[9] This evidences the CAT's efforts to ensure that proceedings protect the interests of the proposed class and not merely the stakeholders.[10]

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[1] The UK government records that as at 12 February 2025, 11 GLOs had been made in 2024, while only two were made in 2023: https://www.gov.uk/government/publications/group-litigation-orders/list-of-group-litigation-orders#port-talbot-steelworks-group-litigation.

[2] *Ad Tech Collective Action LLP v Alphabet Inc. and Others* (1572/7/7/22 and 1582/7/7/23).

[3] *Justin Gutmann v Apple Inc.*(1468/7/7/22).

[4] Data taken from the CAT website: https://www.catribunal.org.uk/cases.

[5] *Consumers' Association ("Which?") v Apple Inc* (1689/7/7/24); *Dr Maria Luisa Stasi v Microsoft Corporation* (1696/7/7/24); and *Clare Mary Joan Spottiswoode CBE v Airwave Solutions* Limited (1698/7/7/24).

[6] Data taken from the CAT website: https://www.catribunal.org.uk/cases.

[7] *Mastercard Incorporated & Others v Walter Hugh Merricks CBE* [2020] UKSC 51. See also Cleary Gottlieb, Mastercard Incorporated and Others (Appellants) V Walter Hugh Merricks CBE (Respondent) (11 December 2020), https://www.clearyantitrustwatch.com/2020/12/mastercard-incorporated-and-others-appellants-v-walter-hugh-merricks-cbe-respondent/.

[8] *Christine Riefa Class Representative Limited v Apple Inc. & Others* [2025] CAT 5.

[9] *Christine Riefa Class Representative Limited v Apple Inc. & Others* [2025] CAT 5 at [115].

[10] See further Cleary Gottlieb, CAT Refuses to Certify Collective Proceedings Against Apple and Amazon (15 January 2025), https://www.clearygottlieb.com/news-and-insights/publication-listing/cat-refuses-to-certify-collective-proceedings-against-apple-and-amazon.

The CAT also approved three further collective settlement applications in 2024, in *Gutmann v First MTR South Western Trains*[11] and *Mark McLaren Class Representative Limited v MOL and ors*.[12] These settlements have both included separate portions for (i) damages for class members, (ii) costs and expenses (of funders and insurers), and (iii) distribution costs. This demonstrates the CAT's focus on ensuring that class members are compensated but also that it accepts the reality that a large number of professionals are involved in such claims (including litigation funders) and some recovery is required for those professionals in order for class actions to exist. The competing interests between the various stakeholders in class actions were recently put to the test in the contested settlement in *Merricks* (see further below).

The CAT also handed down judgment in the first class action to proceed to trial in the UK in *Le Patourel v BT Group PLC*.[13] The claimants brought claims against BT for abuse of dominance by imposing unfair excessive prices. After scrutinising the claim, the CAT found that BT's prices were excessive but not unfair and therefore that there had been no abuse of dominant position. This judgment may impact ongoing collective actions by sending a signal that certification of a class and the granting of a CPO is just the first step and certified claims will still be strongly tested at trial. The CAT's decision further highlights the risk of bringing substantial standalone class actions which are not supported by binding findings of infringement.

A number of hotly anticipated class actions are already in trial or set to proceed to trial in 2025, including, in the CAT, four major opt-out cases: *Rachel Kent v Apple*,[14] where Apple faces claims in relation to commissions charged for applications downloaded from the Apple App Store; *McLaren v MOL*,[15] a follow-on damages claim stemming from a 2018 European Commission finding of a cartel in the maritime shipping industry; *Coll v Google*,[16] where Google faces similar claims to those against Apple in relation to commissions charged on Google Play Store downloads; and *Consumers' Association v Qualcomm*.[17] The first two trials began on 13 January 2025 and together represent only the second and third class actions to make it to a full trial in the UK. In the High Court, the Pan-NOx Emissions Group Litigation will reach a 10-week trial starting in October 2025.

A particular area of class actions that remains relatively undeveloped in England and Wales as compared to other common law jurisdictions such as the US, Canada and Australia, is securities litigation. Such claims are pursued in England and Wales, often by shareholders, under sections 90 and 90A and schedule 10A of the Financial Services and Markets Act 2000 ("FSMA"). This provides for compensation to be paid for misleading statements or dishonest omissions in a company's prospectus and other published information. Such claims have historically been difficult to bring due to the challenge in establishing that a false or misleading statement led to a loss, such as a reduction in the value of the security. While claims in the ESG sphere have been on the rise (see further the *Boohoo* case below), in a blow to the development of section 90/90A FSMA claims being brought as representative actions, the Court of Appeal has recently handed down its judgment in *Wirral*

[11] *Gutmann v First MTR South Western Trains Limited & Ors.* [2024] CAT 32.

[12] *Mark McLaren Class Representative Limited v MOL (Europe Africa) Ltd and others* [2025] CAT 4.

[13] *Le Patourel v BT Group PLC* [2024] CAT 76.

[14] *Dr. Racheal Kent v Apple Inc. and Apple Distribution International Ltd* (1403/7/7/21).

[15] *Mark McLaren Class Representative Limited v MOL (Europe Africa) Ltd and Others* (1339/7/7/20).

[16] *Elizabeth Helen Coll v Alphabet Inc. and Others* (1408/7/7/21).

[17] *Consumers' Association v Qualcomm Incorporated* (1382/7/7/21).

Council v Indivior PLC,[18] in which it dismissed an appeal against the High Court's decision refusing to allow representative actions (where the claimants have the "same interest") to proceed, instead finding that the matter should proceed as ordinary multi-party proceedings with each investor being a claimant.[19] The Court had regard to the structural difficulties of a claim brought by a representative claimant, which were also discussed last year in *Smith v British Airways*,[20] where the Court was conscious of potential conflicts within the class, such as the problems of a claimant's lack of authority to receive others' money and waive elements of others' claims.[21]

This Court of Appeal judgment in *Wirral* followed a 2024 judgment of the High Court in *Allianz Funds Multi-Strategy Trust and Others v Barclays Plc*[22] in which it provided guidance on the reliance requirement for shareholder actions, making clear that investors wishing to make claims for statements made by a company in its published information under section 90A FSMA must show reliance by proving that they had read or heard the representation, that they had understood it in the sense which they alleged was false and that it had caused them to act in a way which had caused them loss. Passive investors could not therefore bring such claims.

Meanwhile, new listing rules from the UK's Financial Conduct Authority ("FCA") came into force on 29 July 2024.[23] The new listing rules are intended to be more flexible than the previous rules in order to attract business and grow the UK economy. However, with flexibility comes greater scope for misstatements, and despite the difficulties in such claims faced in *Allianz v Barclays* and *Wirral Council*, claimants may find new avenues to bring increased securities litigation claims under FSMA.

[18] *Wirral Council v Indivior PLC* [2025] EWCA Civ 40

[19] *Wirral Council v Indivior PLC* [2023] EWHC 3114 (Comm).

[20] *Smith v British Airways* [2024] EWHC 2173 (KB).

[21] *Smith v British Airways* [2024] EWHC 2173 (KB) at [45].

[22] *Allianz Funds Multi-Strategy Trust & ors v Barclays Plc* [2024] EWHC 2710 (Ch).

[23] *FCA Press Release of 11 July 2024*, https://www.fca.org.uk/news/press-releases/fca-overhauls-listing-rules-boost-growth-and-innovation-uk-stock-markets.

2

Reform of Litigation Funding

The coming year is likely to see important developments in relation to litigation funding, including potential proposals for regulation.

The third party funding ("TPF") industry has been in a state of limbo since July 2023 when the Supreme Court handed down its landmark decision in *PACCAR*.[24] *PACCAR* held that TPF agreements under which the funder is entitled to recover a percentage of any damages awarded were in fact damages-based agreements ("DBAs") and therefore unenforceable in the CAT in relation to opt-out proceedings,[25] and in any event they did not comply with the DBA Regulations 2013.[26] Until this point, the commonly-held view had been that TPF agreements were not

[24] *R (on the application of PACCAR and others) v Competition Appeal Tribunal and others* [2023] UKSC 28

[25] Section 47C(8) of the Competition Act 1998 states that "*A damages-based agreement is unenforceable if it relates to opt-out collective proceedings.*"

[26] https://www.clearyantitrustwatch.com/2023/08/supreme-court-rules-most-litigation-funding-agreements-are-unlawful/#_ftn2

DBAs and the upshot of the Supreme Court's decision was that the majority of TPF agreements in place in the UK were, overnight, rendered unenforceable.

In early 2024, following remarks made by the former sub-postmaster Alan Bates in support of the role played by litigation funding in the Post Office proceedings (which were conducted pursuant to a GLO rather than a collective action before the CAT), the former Conservative Government announced its intention to reverse the effects of *PACCAR* through legislation.[27] In March 2024 the then-Government introduced the Litigation Funding Agreements (Enforceability) Bill into Parliament. The Bill sought to restore the pre-*PACCAR* position by amending the definition of DBA in 58AA(3)(a) of the Courts and Legal Service Act 1990[28] and was widely expected to become law. The Bill had attracted broad cross-party support and was making its way through the House of Lords when its progress was brought to a halt by the dissolution of Parliament on 30 May 2024[29] following the announcement of a UK general election.

Following the election, the newly-elected Labour Government indicated that it did not intend to reintroduce the Bill or to legislate to address *PACCAR* pending the conclusion of the Civil Justice Council's ("CJC") review into litigation funding.[30] The CJC review, which began in spring 2024, aims to (i) set out the current position of TPF, (ii) consider access to justice, effectiveness and regulatory options, and (iii) make recommendations for reform, if necessary.[31]

The CJC's interim report and consultation were published in late October 2024 and it is expected to publish its final report, including its recommendations, in summer 2025. In accordance with the CJC's terms of reference, the interim report considers the development of TPF in England and Wales, approaches to regulation in other jurisdictions, the relationship between TPF and the costs of litigation, and alternatives to TPF.[32]

The interim report does not make any recommendations at this stage and the consultation phase (which has been extended to run until 3 March 2025) will likely shape the proposals ultimately contained in the CJC's final report. This said, the interim report does give some early indications that the CJC may be leaning in favour of some form of regulatory reform. Among other things, the interim report highlights the following:

— England and Wales is the only jurisdiction where TPF is self-regulated. All other jurisdictions either do not regulate TPF at all (more typically the case in jurisdictions which never adopted prohibitions on maintenance and champerty) or subject TPF to statutory regulation.[33]

— The self-regulatory voluntary Code currently in force in England and Wales[34] was introduced in 2011 in response to the recommendations of the Jackson Costs Review. The Jackson Review's support for self-regulation was predicated on (i) all funders signing up to the voluntary Code, and (ii) concerns about the Code's approach to funders' capital adequacy being addressed.[35]

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[27] Financial Times, UK Government vows to protect litigation funding that helped sub-postmasters (15 January 2024), https://www.ft.com/content/3d089314-eb97-4e21-9101-962876c7d480 ; Written Ministerial Statement by the Lord Chancellor and Secretary of State for Justice, Alex Chalk MP KC (4 March 2024), https://questions-statements.parliament.uk/written-statements/detail/2024-03-04/hcws306

[28] Explanatory notes to the Litigation Funding Agreements (Enforceability) Bill (19 March 2024), https://bills.parliament.uk/publications/54764/documents/4594

[29] Proclamation for the Dissolution of Parliament (30 May 2024) https://www.thegazette.co.uk/notice/4631913

[30] Response by Ministry of Justice to written question (1 August 2024) https://questions-statements.parliament.uk/written-questions/detail/2024-07-29/hl449

[31] Terms of Reference for CJC Review of Litigation Funding (20 April 2024) https://www.judiciary.uk/wp-content/uploads/2024/04/20240422-CJC-TPF-Review-TOR.pdf

[32] CJC Review of Litigation Funding, Interim Report and Consultation (31 October 2024) https://www.judiciary.uk/wp-content/uploads/2024/10/CJC-Review-of-Litigation-Funding-Interim-Report.pdf

[33] CJC Interim report (*supra*), paragraph 3.2

[34] The Association of Litigation Funders of England & Wales – Code of Conduct (January 2018): https://associationoflitigationfunders.com/wp-content/uploads/2018/03/Code-Of-Conduct-for-Litigation-Funders-at-Jan-2018-FINAL.pdf

[35] CJC Interim report (*supra*), paragraph 3.5

While (ii) was achieved, (i) has not been achieved. Of the approximately 44 funders operating in England and Wales, only 16 are signed up to the Code.[36]

— Self-regulation was introduced when the TPF market was in its infancy. Both the Jackson Review and the 2010 CJC consultation that followed it concluded that the question of full statutory regulation should be revisited if the market expanded.[37] The TPF market in England and Wales has increased at least ten-fold since the Jackson Review and is now the second largest such market in the world.[38]

Despite these indications, we will of course have to wait until at least summer 2025 before the full extent of the CJC's recommendations are known and even if reform is recommended, there is likely to be a lengthy implementation period meaning that any firm changes recommended by the CJC will be unlikely to come into effect before 2026.

In the meantime, the Courts will continue to deal with the ramifications of the *PACCAR* judgment: in *Alex Neill Class Representative Ltd v Sony Interactive Entertainment Europe Ltd*[39] for example, the CAT held that a TPF agreement that had been amended to provide that the litigation funder would be paid the greater of (1) a multiple of its overall funding contribution, or (2) a percentage of proceeds recovered, but "*only to the extent enforceable and permitted by applicable law*" was enforceable. Since the funders' return was based on a percentage of the funds committed and not a percentage of damages, it was not a DBA. The CAT further held that the "*only to the extent enforceable or permitted by applicable law*" language included in the amended TPF agreement was sufficient to allow the funder's return to be expressed as a percentage of damages because the legal effect of that clause was contingent on a change in the law permitting such agreements. A number of first instance decisions have subsequently taken the same approach, holding that TPF agreements are not DBAs where the funder's fee is based on a multiple of the funds committed.[40] The Court of Appeal is expected to hear appeals in a number of these cases before the summer.

More recently, the role of litigation funders, and their ability to seek to influence and control litigation, has been brought into sharp focus by the proposed settlement of the multi-billion pound claim in the *Merricks v Mastercard* collective action. In December 2024, after almost nine years of litigation, an in-principle settlement for £200 million was reached between the parties, but this has been opposed by the funder, Innsworth Capital, who has described the settlement (said to have been "*struck without* [its] *agreement*") as "*too low and premature*". As an opt-out collective action, the settlement must be approved by the CAT and Innsworth. On 23 January 2025, the CAT granted Innsworth permission to intervene and oppose the settlement on the basis that it had sufficient interest in the outcome of the settlement. Following a three day settlement hearing which concluded on 21 February 2025, the CAT approved the settlement in spite of the funder's opposition, finding that the agreed settlement amount was just and reasonable. This decision took into account the developments in the case since the claim was brought, which had drastically reduced the likely quantum of the claim. No doubt the CJC will be watching these developments closely as it considers its recommendations regarding the future of litigation funding in the UK.

[36] CJC Interim report (*supra*), paragraph 3.1

[37] CJC Interim report (*supra*), paragraphs 3.4 - 3.6.

[38] CJC Interim report (*supra*), paragraph 3.8.

[39] [2023] CAT 73

[40] *Commercial and Interregional Card Claims I Ltd v Mastercard Inc* [2024] CAT 3 (and this was the case even where the funder's fee was expressly capped by reference to the damages recovered); *Mark McLaren Class Representative Limited v MOL (Europe Africa) Ltd and others* [2024] CAT 10.

3

Legal Privilege: a paradigm shift?

In 2024, the English courts handed down a number of significant decisions relating to the law of privilege.

Key amongst these was the High Court's decision in *Aabar Holdings v Glencore Plc & Others* ("*Aabar*"),[41] which overturned the longstanding rule that a company is not entitled to assert legal privilege against its shareholders, save in relation to documents produced for the dominant purpose of litigation between the company and that shareholder (the "Shareholder Rule").

Having conducted a detailed analysis of the relevant authorities, Picken J held that the Shareholder Rule – which had been a feature of English law since the late 19th century – is "*unjustifiable and should no longer be applied*". If, however, he was wrong about the existence of the Shareholder Rule, Picken J held (obiter) that:

(i) The Shareholder Rule does not apply to without prejudice privilege: its remit is therefore limited to legal advice and litigation privilege.

(ii) The Shareholder Rule could extend beyond registered shareholders to beneficial owners of shares. While Picken J's decision in this regard is consistent with the decision of the Bermudian Court of Appeal in *Oasis Investments v Jardine Strategic Holdings*,[42] it is at odds with recent English decisions on the topic, including the decision in *Various Claimants v G4S Plc*[43] where Michael Green J held, in keeping with the older English authorities, that the Shareholder Rule applies only to the registered shareholders of a company.

(iii) The Shareholder Rule could be invoked by former shareholders in relation to communications made during the period in which they were a shareholder.

(iv) The Shareholder Rule could extend to the documents of a subsidiary company in circumstances where the holding company (in which the shareholder held shares) and the subsidiary had a joint interest in the communication.

The result of *Aabar* is therefore a patchwork of conflicting first instance decisions regarding both the existence and scope of the Shareholder Rule, which gives rise to much uncertainty for shareholders and their advisors. It was with a view to resolving this uncertainty that Glencore sought permission for a leapfrog appeal of the *Aabar* decision. However, permission has been refused by the Supreme Court. Nevertheless, some clarity may be found following the Privy Council's hearing of the appeal of *Oasis Investments v Jardine Strategic Holdings*[44] in March 2025.

If *Aabar* is followed, this could limit the ability of claimant shareholders to obtain disclosure of key documents in fields of litigation where the Shareholder Rule has been regularly applied, such as in climate change litigation and securities litigation, which we discuss separately in this update. Even if *Aabar* is subsequently overturned by the courts, it will remain to be seen whether Picken J's obiter comments on the extent to which the Shareholder Rule is to be applied will be upheld.

[41] *Aabar Holdings SARL v Glencore Plc* [2024] EWHC 3046 (Comm).

[42] *Oasis Investments II Master Fund Ltd and Others v Jardine Strategic Holdings Limited* [2024] CA (Bda) 7 Civ.

[43] *Various Claimants v G4S Plc* [2023] EWHC 2863 (Ch)

[44] *Oasis Investments II Master Fund Ltd and Others v Jardine Strategic Holdings Limited* [2024] CA (Bda) 7 Civ.

The English courts also considered aspects of the law of privilege in a number of decisions in 2024:

— In *Al Sadeq v Dechert*,[45] the Court of Appeal clarified a number of important points about the scope of legal professional privilege (both litigation privilege and legal advice privilege), including providing guidance as to the boundaries of the "iniquity exception" from privilege (where documents have been produced as part of criminal or unlawful conduct), where it found that iniquity must be shown on the balance of probabilities. The Court of Appeal also confirmed that litigation privilege could extend to non-parties to proceedings, provided the relevant communications had been made for the sole or dominant purpose of the litigation. The Court also commented that non-legal work undertaken by lawyers in the context of an investigation could still be subject to the protection of legal privilege.

— In *Pentagon Food Group v B Cadman Ltd*,[46] the court rejected the idea that "mediation privilege" exists as a privilege distinct from "without prejudice privilege" on the basis of current authorities, although acknowledged that future consideration of the issue by either the legislature or the courts may be required.

— In *Gorbachev v Guriev*[47] the Commercial Court provided a useful reminder of the potential pitfalls of pursuing a tactical waiver of privilege. The Court found that, where privilege was waived over a document, in order to avoid an incomplete or unfair picture, it was necessary to disclose all of the material relevant to the issue in respect of which privilege has been waived, which included in *Gorbachev* all instructions from the Claimant to his counsel that were relevant to the dispute.

We can expect further clarity on the law of privilege in 2025 as principles handed down in those judgments will be reconsidered and as other cases examining different aspects of privilege are heard.

[45] *Al Sadeq v Dechert* [2024] EWCA Civ 28.

[46] *Pentagon Food Group Ltd and others v B Cadman Ltd* [2024] EWHC 2513 (Comm).

[47] *Gorbachev v Guriev* [2024] EWHC 622 (Comm).

4

Regulatory, Statutory and Treaty Developments on the Horizon

Arbitration Bill finally receives royal assent

Last year, we predicted that the Arbitration Bill – which sought to amend the Arbitration Act 1996 in a number of important ways – would pass swiftly through Parliament in 2024. However, the UK snap election and change of government over summer 2024 delayed those statutory changes.

A new Arbitration Bill was re-introduced to Parliament in July 2024, in substantially the same form as the previous draft, with notable changes to the existing Arbitration Act 1996 including: (i) the express ability for arbitrators to summarily dispose of issues where there is no real prospect of success, (ii) the introduction of a statutory duty on arbitrators to disclose circumstances which may give rise to doubts about their impartiality,

and (iii) a new provision that the law governing an arbitration agreement will be the law of the seat chosen for arbitration unless parties expressly agree otherwise.

Following its second and third reading in the House of Lords, additional amendments were proposed (including provisions which would impose an explicit duty on arbitrators to safeguard against corruption in the arbitration process), but ultimately rejected. The Arbitration Bill received royal assent on 24 February 2025, with reforms to be introduced as soon as possible.

Regulation of AI and Digital Asset Claims Continues to Develop

We highlighted a number of areas at the intersection of law and technology in last year's update which continue to evolve, as both UK policymakers and the courts grapple with technological developments and the legal disputes involving them.

In the AI space, the *Stability AI* case continues to progress through the English Courts. This dispute concerns allegations of copyright infringement against open-source AI company Stability AI by Getty Images and other claimants (the latter bringing their claim as a representative action under CPR 19.8). Last year we reported that in December 2023, the High Court refused to grant reverse summary judgment against the various Getty claimants.

In January 2025, the High Court handed down a further judgment as against the sixth Claimant, Thomas M. Barwick Inc, a representative of a class of about 50,000 copyright owners who licensed their work to Getty Imagines and who were advancing similar claims to Getty. The representative's claim is that Stability "scraped" copyrighted images from Getty's website, used those images to train its AI tool, and reproduced new, synthetic material using substantial parts those copyrighted images. Stability challenged the class representative's claim on the basis that each copyright owner within the class had different licensing agreements with Getty and that these differences necessitated separate legal actions. Each of the class members therefore had "different interests" in the claim and the claims could not therefore be brought together under CPR 19.8.

The High Court agreed with Stability AI and refused to permit the representative claim to continue on the basis that the class had not put forward a definitive list of the copyright images which had been used and therefore which of the copyright owners properly belonged in the class, and in any event that certifying the class would not bring any real efficiencies in a trial as careful examination would still need to be carried out on a case-by-case basis as to both liability and quantum.[48]

Trial of the claims advanced by the Getty claimants is currently set for June 2025.

In response to this and other disputes involving complex questions about representative actions against AI companies, in December 2024 the UK Government launched a consultation on Copyright and AI which closed on 25 February 2025.[49] In this Consultation, the government sought industry participants' proposals for how to balance rights and opportunities for both creative and technology industries. This includes proposals for transparency by AI platforms on the content they have used for AI training, as well as proposals for the protection of "exclusively computer generated works" which are currently not protected by UK statute.

While it is too soon to predict the outcome of any future legislation made in reliance on the

[48] [2025] EWHC 38 (Ch).

[49] https://www.gov.uk/government/consultations/copyright-and-artificial-intelligence.

consultation, or how that legislation is then implemented in the courts, what is clear is that commercial parties, the courts and government are equally invested and it is expected this is an area of ongoing development.

In the realm of digital assets like crypto currencies and NFTs, last year we referred to the breadth of cases emerging in the courts which are grappling with complex questions about property and liability, as well as fraud and jurisdictional issues in relation to digital assets. A further development which is expected to impact at least some of those claims is the Property (Digital Assets etc) Bill ("Digital Assets Bill"), which was introduced to Parliament in September 2024. The Digital Assets Bill seeks to clarify that certain digital assets such as crypto tokens can constitute property under English law.

At the time of writing, the Digital Assets Bill is in report stage and has yet to enter its third reading in the House of Lords.[50] As such it remains to be seen whether it progresses through Parliament and if it indeed becomes law (and if so in what form). While it is too soon to say whether such law will have far-reaching consequences for the cases currently progressing through the courts, in its present form the Digital Assets Bill indicates at least a strong willingness by the UK government and stakeholders to clarify and possibly expand the scope of proprietary rights in this domain.

Post-Brexit Recognition and Enforcement of Judgments

A further treaty development that has finally come to fruition is the UK's ratification of the Hague Convention of 2019 on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters ("Hague Convention 2019"), which is set to come into force in the UK on 1 July 2025.

The Hague Convention 2019 is designed to provide a global framework of common rules to facilitate the recognition and enforcement of judgments between states which are a party to it. In an expansion on the existing 2005 Hague Convention on Choice of Court Agreements ("Hague Convention 2005"), the Hague Convention 2019 also recognises non-exclusive choice of court agreements. The UK has been a signatory in its own right to the Hague Convention 2005 since 2019 and it has been key for the UK in a post-Brexit world: while judgments from the UK used to benefit from automatic recognition and enforcement in the EU through the Brussels Regulation regime, the UK has since had to adapt its relationship with the EU (as well as and other non-EU countries) on cross-jurisdiction issues including the mutual treatment of foreign judgments.

The Hague Convention 2019 will provide a further route for the enforcement of civil and commercial judgments. However, while an important step, the Hague Convention 2019 does not provide a regime to address substantive jurisdictional issues (as the Brussels Regulation did) and focuses solely on recognition and enforcement of final judgments. English courts will therefore continue to apply piecemeal bilateral treaties and the common law to jurisdictional questions.

The Hague Convention 2019 will apply as between the UK and other signatories to it (which at the time of writing includes the EU) to judgments handed down in claims commenced after the Hague Convention 2019 comes into force in both the UK and EU. As such, while the Hague Convention 2019 is expected to provide a much more streamlined process for recognition and enforcement of UK judgments, those advantages will not be seen for some time as cases make their way through the courts.

[50] https://bills.parliament.uk/bills/3766.

5

Reconsideration of "secret" commissions

The past few years have seen a significant rise in cases in the County Courts regarding "secret" commissions (i.e., commissions paid in secret by one party to another for the introduction of business). The lack of binding authority regarding the central issues in such cases and differing first instance judgments at the County Court level have led to a lack of clarity as to what duties are owed by a broker and what degree of disclosure will negate the 'secrecy' of a commission.

Such confusion is likely to be resolved imminently, with three cases making their way together to the Supreme Court for determination in a three day hearing from 1-3 April 2025: *Johnson v FirstRand Bank*; *Wrench v FirstRand Bank*; and *Hopcraft v Close Brothers*.[51]

While the cases themselves concern commissions in the context of the motor finance industry, it is widely accepted that the decisions could have broader implications for other financial services markets regulated by the FCA involving intermediary arrangements. Indeed, on 2 December 2024, the FCA wrote to the Supreme Court to encourage expedition in determining the appeal to ensure "*certainty and stability in the market*" and resolve the persisting legal uncertainties.[52]

This issue is of particular significance because secret commissions are treated akin to bribery and, as a consequence, the same remedies will be available, including recission of the transaction in connection with which the commission was paid.

At a high level, each of the three claims involved similar facts, which are helpful to note in order to understand the nuances of the Court of Appeal's decisions. The claimants had each approached a car dealership to purchase a vehicle under a hire-purchase agreement. The dealerships then contacted lenders with whom they worked and communicated a single financial proposal back to the claimants. In each case, the dealerships provided sales documentation which set out the possibility of a commission payment from the lender to the dealership to a different degree:

— In *Hopcraft*, the sales documentation did not include reference to the payment of commission by the lender to the dealership. Indeed, a witness for the lender accepted in cross-examination that the disclosure of any commission was not required as part of their standard practice. There was therefore no real dispute that the commission was secret.

— In *Wrench*, there was a dispute as to whether the standard terms and conditions were incorporated, but it was not disputed that those terms included a statement to the effect that commission "*may be payable*" by the lender to the dealership who introduced the transaction. The terms required the customer to sign a declaration to say that their attention had been drawn to those terms. In this case, the declaration was unsigned and the claimant's position is that neither the terms nor the commission were drawn to his attention.

— In *Johnson*, the sales documentation did make reference to the possible payment of a commission, but the Court of Appeal held that there were a number of "*materially untruthful and misleading statements*" in the document regarding

[51] CA-2023-001453; CA-2024-00353; CA-2024-00482. A hearing has not yet been listed, but is expected to take place during Hilary Term (i.e., between now and April 2025).

[52] Letter from the FCA to the Supreme Court dated 2 December 2024.

the exercise of the dealership's judgment in selecting an appropriate finance provider.

The Court of Appeal held that there was no doubt that the dealerships were credit brokers for the claimants; they were operating in dual capacity as sellers of the vehicles and also as credit brokers to obtain financing on behalf of the claimants. Similarly, the court made clear that the hire-purchase agreements were credit agreements. To the extent that the brokers owed duties to the claimants, the claimants argued that making payment of commission rendered the lenders liable as accessories.

The central questions in the appeal were as follows:

1. **Did the dealerships/brokers owe a disinterested duty?** The court held that the dealers did owe a "disinterested duty". In their role as credit broker, their responsibility was to search for and offer the customer a finance deal from lenders that was competitive and suitable for the customer's needs. The Court made it expressly clear that the first instance court in *Hopcraft* was wrong to find otherwise. The dealers owed the claimants a duty to provide information, advice, or recommendations on an "*impartial or disinterested basis*". This meant that they were under an obligation to fully disclose the existence of the commission, its amount, and how it was calculated.

2. **Did the dealership/brokers owe a fiduciary duty?** The Court held that the dealerships also owed a parallel fiduciary duty and that, in all three cases, there was a conflict of interest and no informed consent in relation to the commission. The Court made a number of interesting points in relation to this question, specifically that:

    a. it was not necessary for the dealership/broker to be an agent for the customer in the strict legal sense;

    b. it was relevant that the dealerships were not carrying out a purely "*ministerial function*";

    c. the vulnerability of the customers was part of what gave rise to a reasonable expectation that the dealership would act in their best interests; and

    d. the absence of payment of a fee to the dealership did not negate any fiduciary duty (a fee was not an "*essential ingredient*" to find such a duty existed) and the first instance courts were wrong to find otherwise.

The main consideration of the Court was whether the broker was acting on behalf of the customer in a capacity where there was an obligation of loyalty and trust of confidence in relation to their role.

3. **Were the commissions sufficiently disclosed to negate secrecy?** The Court held that the question as to whether a commission was sufficiently disclosed will depend on the facts of the case, including the steps taken to bring the matter to the customer's attention. In cases of a potential conflict of interest, the customer must provide informed consent to the fiduciary's relevant acts. In considering this aspect of the case, the Court gave particular weight in *Wrench* to the fact that the statement about commission was "*hidden in plain sight*" and "*tucked away in a sub-clause*". The Court considered that there was a negligible prospect the customer would have read those terms and that the lender could not have had a "*real expectation*" they would do so.

4. **If so, is there accessorial liability of the lender?** The fact that there was a conflict of interest and no informed consent was not sufficient, in itself, to mean that the lender was a primary wrongdoer. Instead, the Court found that, in order to give rise to a primary

liability on the part of the lender, the first requirement was that the commission must be "*secret*". If there was partial disclosure which negated secrecy, but no informed consent from the customer, the lender could only be liable as an accessory to the dealer's breach of fiduciary duty, as was the ultimate decision in *Johnson*.

While this judgment does a great deal to clarify the inconsistent case law in the County Courts, to the extent the Court's judgment has wider application beyond the motor finance industry, these clarifications could have a significant impact on the position of lenders in such intermediary arrangements and their duties to a principal.

The lenders in each case appealed the judgment of the Court of Appeal and the Supreme Court will hear the cases together in early April 2025. This will be an area to watch closely, given the FCA has also indicated that further regulatory intervention may need to be considered, depending on the outcome of the appeal.

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ESG and Climate Litigation

Our previous update identified greenwashing as an area to watch going forward. As anticipated, the UK regulatory framework in relation to greenwashing has developed at pace over the past year.

In May 2024, the FCA introduced its anti-greenwashing rule which requires FCA-authorised firms to ensure all sustainability-related claims about their products and services are fair, clear and not misleading.[53] In line with other FCA Rules and Principles, the anti-greenwashing rule allows the FCA to bring enforcement action against firms in breach. It also provides a new line of attack for potential claimants by enabling private persons who have suffered loss as a result of breach to bring a claim under section 138D of the FSMA.[54]

The voluntary carbon market and the growing adoption of voluntary carbon credits ("VCRs") presents a heightened risk of greenwashing litigation in 2025 and beyond. Many companies are seeking to offset their emissions by purchasing VCRs, which represent investments in projects intended to result in the reduction or removal of one metric tonne of greenhouse gases.[55] However, the lack of any standardised governmental or regulatory oversight or scrutiny make VCRs fertile ground for claims if the levels of emissions reduction anticipated are not realised. Claims may be pursued by VCR purchasers against project developers for breaches of contract, misrepresentation or fraud if there is a later diminution in value of the VCRs. Purchasers of VCRs may also be vulnerable to claims from shareholders and investors, if they fail to disclose that their environmental credentials have been achieved through offsets rather than by greenhouse gas emission reductions at source. Litigation commenced in the United States – although in the context of a mandatory, rather than voluntary, carbon market – and in the

[53] 4.3.1R of the Environmental, Social and Governance (ESG) Sourcebook in the FCA Handbook.

[54] Financial Services and Markets Act 2000.

[55] https://interactive.carbonbrief.org/carbon-offsets-2023/companies.html.

Netherlands have demonstrated that these claims are not simply hypothetical risks.[56]

It is likely that climate litigation in group contexts will be pursued with renewed momentum, buoyed the Court of Appeal's sympathy for the claimants in *Alame v Shell*.[57] The Court of Appeal determined that the claimants – who brought claims in respect of damage resulting from oil spills – should not be forced to advance their claim under the cover of a "*global claim*" and should instead be free to pursue their case as they saw fit. "*Global claims*" have been used in construction litigation contexts to circumvent the difficulty distinguishing between the various events that led to a claimant's loss by allowing a claimant to plead a collection of events that are all attributable to the defendant and have collectively led to loss. However, such claims would have been immediately defeated if it could be proven that an event for which the Defendant was not liable contributed significantly to the damage, the Court's decision raised the threshold required for the Defendants to defeat the claim. Noting a "*substantial inequality of arms*" between the information possessed by the claimants and the defendants, the Court also found that disclosure should not be limited only to the specific facts that the Claimants have already been able to plead. This serves as another reminder that the Courts are willing to exercise far-reaching case management powers to rectify the perceived asymmetry between the parties in a group litigation context.[58]

In the social rather than environmental context, a group of institutional investors brought a claim in 2024 under sections 90 and 90A FSMA against the online fast fashion retailed Boohoo Group plc ("Boohoo") following reports that one of Boohoo's supplier's factories in Leicester paid workers significantly less than minimum wage in the UK.[59] The claimants are seeking compensation for reduction in share prices as a result of these revelations, on the grounds that Boohoo's disclosure was untrue or misleading as to the wages paid by its suppliers. The claim is currently proceeding through the English High Court.

As discussed last year, international developments (including those outside the realm of private enforcement) can have significant implications for the UK and this continues to be the case as we move into 2025. The landscape of ESG commitments has been rapidly changing.

In 2025, we expect to see a clearer indication of what effect this may have on ESG- and climate-related litigation in the UK. In the absence of adequate regulation, consumers and local governments may feel that the responsibility of encouraging behavioural change from companies now lies with them, and might therefore advance claims using public nuisance and consumer protection theories. The beginnings of this movement can already be seen in the United States, where claims have been brought across the plastic supply chain and against petrochemical and consumer companies.[60] We anticipate that such international developments may also have an impact in the UK.

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Cleary Gottlieb

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[56] See *FossielVrij NL v. KLM* and *Global Carbon Opportunity (Cayman) Ltd and others v CME Group Inc and New York Mercantile Exchange Inc.*

[57] *Alame and others v (1) Shell plc; (2) The Shell Petroleum Development Company of Nigeria Ltd* [2024] EWCA Civ 1500.

[58] See also *Municipio de Mariana and others v BHP Group (UK) Ltd (formerly BHP Group PLC) and BHP Group Ltd* [2022] EWCA Civ 951.

[59] *California State Teachers' Retirement System and another v. Boohoo Group PLC* (Claim No. FL-2024-000017).

[60] *See The People of the State of California, ex rel. Rob Bonta, Attorney General of California v Exxon Mobil Corporation* where California Attorney General Rob Bonta filed a claim against ExxonMobil, alleging that it had misled consumers about recyclability to encourage the purchase of single-use plastic products. *See also The People of the State of California v PepsiCo* in which claims were brought against PepsiCo and Coca-Cola in relation to their involvement in plastic pollution due to their single use plastic bottles.

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