CRN | Class Representatives Network

Scottish Civil Justice Council

Group Procedure: call for evidence

Beverley Robertson

Legal and Policy Officer, Class Representatives Network

23 January 2026

Introduction and Summary

The Class Representatives Network is a community interest company (CIC) and non-profit organisation dedicated to supporting and representing class representatives leading collective actions. The CRN fulfils its aims by providing practical support to class representatives and conducting research on their experiences to inform legal and policy discussions.

This submission is the product of the CIC entity of the CRN. While it aims to represent the views of class representatives, it is not an agreed 'consensus position' of everyone involved with the network. Any opinions expressed are those of Beverley Robertson (Legal and Policy Officer) and the Class Representatives Network CIC.

In summary:

- the CRN supports the extension of the Scottish group procedure to include opt-out claims. Such a move has the potential to improve access to justice for Scottish consumers and businesses. It would also deter law-breaking and prevent companies from being unjustly enriched by their own wrongdoing;
- many objections to the introduction of an opt-out group procedure are not evidence-based and confuse different types of mass litigation. We understand that the group procedure already protects group members from any personal liability, in the same way that class members are protected in UK collective proceedings. Defenders, on the other hand, are protected from unmeritorious or speculative claims by safeguards such as certification, expense-shifting and pursuer liability for adverse expenses;
- as group members might not be aware of any opt-out proceedings, however, we suggest that it would nevertheless be appropriate to introduce certain additional safeguards to protect their interests. These could mirror the safeguards which already exist in the UK collective proceedings regime.

Question 1: What are your views on the introduction of opt-out group proceedings in accordance with Part 4 of the Act

The importance of Group Proceedings

1.1 It is well documented that group litigation makes access to justice feasible in circumstances where group members have suffered losses which may be individually small, but large in aggregate. This submission refers to two ways in which consumers and businesses in Scotland can potentially join such litigation, both of which were introduced with the aim of providing access to justice in these circumstances:

- first, collective proceedings in the Competition Appeal Tribunal (CAT) can be brought on behalf consumers and businesses across the UK under the Competition Act 1998. These can be brought on either an opt-in or an opt-out basis. We refer to these as "UK Collective Proceedings" and to the person bringing them as the "class representative";
- secondly, other civil claims can be brought using the group procedure under Chapter 26A of the Rules of the Court of Session ("RCS"), introduced under the Civil Litigation (Expenses and Group Proceedings) (Scotland) Act 2018 ("the 2018 Act"). These can currently only be brought on an opt-in basis. We refer to this as "Scottish Group Procedure" and the person bringing the proceedings as the "representative party".

1.2 "Opt-in" group litigation requires members of the relevant group to take some measure actively to join the litigation[1]. This means that they must be made aware of the proceedings in the first place and that they must then notify the person bringing the proceedings that they consent for their claim to be brought.[2]

1.3 On the other hand, "opt-out" proceedings provide that everyone who meets the relevant criteria is automatically included in the claim unless they opt out. Group members do not need to take any active steps to join the claim.[3]

Limitations of opt-in proceedings and the access to justice gap

1.4 The most important limitation of opt-in proceedings is that there will inevitably be large proportions of the class who do not opt in, even though it might be in their best interests to do so.

1.5 For some, this may be because the amount of time and effort it would take to understand the issue and complete the paperwork is not justified by the amount they stand to gain if the claim is successful. For others, it may simply be down to apathy, a lack of awareness, or a lack of understanding. This is a very significant problem where the class comprises end consumers, as illustrated by the 2007 case brought by the Consumers' Association, against JJB Sports plc in relation to the price fixing of replica football kit. Although the class in that case was thought to comprise up to 1.5 million people, only 130 individual consumers opted in to the proceedings.[4] It is also likely that those who opt-in are disproportionately drawn from the best informed and best resourced groups within society, with low information and vulnerable class members more likely to be excluded.

---

[1] 2018 Act, s 20(8)(a) "'opt-in proceedings' are group proceedings which are brought with the express consent of each member of the group on whose behalf they are brought".
[2] RCS 26A.14(1).
[3] 2018 Act, s 20(8)(b)"'opt-out proceedings' are group proceedings which are brought on behalf of a group, each member of which has a claim which is of a description specified by the Court as being eligible to be brought in the Scotland and (i) is domiciled in Scotland and has not given notice that the member does not consent to the claim being brought in the proceedings, or (ii) is not domiciled in Scotland and has given exress consent to the claim being brought in the proceedings".
[4] See the Notice of a claim for damages of 12.3.2007 Case No: 1078/7/9/07

1.6 This has two important negative effects:

- first, and most importantly, it means that very large numbers of people (including a disproportionate number of those in more vulnerable groups) are left without redress, and the defender is able to benefit from its wrongdoing with regard to them. This is sometimes described as an "access to justice gap";
- secondly, it makes it more difficult to achieve the scale necessary to obtain third party funding. This ultimately makes access to justice for all class members more difficult to achieve.

1.7 For this reason, we support the extension of the Scottish Group Procedure to allow for opt-out claims to be brought. Such a reform could potentially enable Scottish consumers and businesses to obtain redress for breaches of consumer protection laws, data protection breaches, environmental breaches, or breaches of the Digital Markets regime and other torts in a way which has not previously been possible.

Objections to opt-out class actions

1.8 We are aware of extensive campaigning by interest groups which seek to limit collective litigation throughout the UK, and we note that Fair Civil Justice (FCJ) expressed concerns about the introduction of opt-out group proceedings in Scotland in a press release of 13 November 2025.[5]

1.9 We understand that FCJ also made a submission to the UK Department of Business and Trade (DBT) on these issues in response to its call for evidence on opt-out collective proceedings (although they do not appear to have published those submissions),[6] and we expect that they will also make submissions to the SCJC in response to the current consultation.

1.10 The CRN also made a detailed submission to the DBT, which is publicly available.[7] We would draw the SCJC's attention in particular to Annex 1 of that document which highlights the many ways in which the research commissioned and frequently cited by opponents of collective proceedings is often erroneous, unsubstantiated and misleading.

1.11 Although FCJ present themselves as concerned about the "*many risks facing consumers in the current litigation landscape*", it might be suggested their primary concern is protecting defenders from the threat of class actions.[8] In any event, the concerns expressed in the FCJ press release are summarised and addressed below.

---

[5] Scottish Civil Justice Council Consultation on Group Proceedings: proposed changes, concerns, and how to get involved | Fair Civil Justice

[6] DBT Consultation Open Letter - 29 October 2025 | Fair Civil Justice

[7] Class-Representatives-Network-DBT-Consultation-Response-2025.pdf

[8] *Lee Bridgehouse v Bayerische Motoren Werke Aktiengesellschaft* [2024] CSOH 2 at [16], citing Perrell J of the Ontario Superior Court of Justice in *Sondhi v Deloitte Management Service LP* ONSC 271 at [43] "defendants

Classes are too large

1.12 The FCJ press release states that "*class actions encompassing more than 540 million class members have been brought in the UK, with most of the growth in the last three years*", implying (we assume) that the number of people who are class members is too high and may increase if this reform is implemented.

1.13 The number of class members for some opt-out collective proceedings is indeed large. In the CRN's view, however, it is precisely *because* the classes affected by unlawful conduct are sometimes so large that the opt-out procedure is needed. Dr Rachael Kent's recent successful claim against Apple,[9] was brought on behalf of a class of approximately 36 million members. Had opt-out proceedings not been available, there would have been no realistic prospect of redress for these class members.

"Evidence internationally suggests that there will be an exponential rise in the number of speculative claims"

1.14 The CRN is not aware of any evidence that there is a problem with speculative claims under the UK Collective Proceedings regime. Defendants are protected from unmeritorious claims by the requirement that claims must first be certified in the CAT, by the high cost of bringing proceedings (which are not recoverable if the claim fails), by the claimant's liability for adverse costs if the claim fails, and by the CAT's jurisdiction over collective settlements in opt-out proceedings which requires that any settlement must be "*just and reasonable*".

We note that the Scottish legislation similarly requires the permission of the Court for proceedings to be brought,[10] which may be refused if, inter alia,

- it has not been demonstrated that there is a prima facie case, or
- it has not been demonstrated that the proposed proceedings have any real prospects of success.[11]

1.16 There are also similar financial disincentives to bringing speculative claims in Scotland.

1.17 It is therefore difficult to see why anyone would fund a claim which did not have a good prospect of success. As noted above, the CAT has very recently found in favour of Dr Rachael Kent in her claim against Apple on behalf of 36 million class members.[12] This claim

---

are not genuinely interested in ensuring that class members are adequately represented; rather, defendants are genuinely interested in ensuring that there is no class action".

[9] *Dr Rachael Kent v Apple Inc* [2025] CAT 67. A separate hearing has been scheduled before the CAT to address quantum.

[10] 2018 Act, s 20(5).

[11] RCS 26A.11(5).

[12] *Dr Rachael Kent v Apple Inc* [2025] CAT 67.

was clearly not speculative and could not have been brought without the availability of the opt-out procedure.

Claims will be funded by "unregulated speculators" and "the lack of regulation of third party litigation funders has resulted in a system that significantly rewards funders…"

1.18 The CRN strongly disagrees with this characterisation of either UK Collective Proceedings or Scottish Group Proceedings. The treatment of returns to funders under both systems is discussed at 4.22 to 4.24 below.

Financial redress for consumers will be "hard to identify"

1.19 FCJ suggest that group proceedings would not deliver financial redress to consumers, citing the *Boundary Fares*[13] case, in which take up of compensation by the class was low.

1.20 We agree that it is important for public confidence in the regime that any settlement or damages awarded at the conclusion of an opt-out group claim is, as far as possible, effectively distributed to the group members. The *Boundary Fares* case was one in which this was particularly challenging, largely because the class members (people who had bought the relevant train tickets during the relevant period) were difficult to identify and contact and were unlikely to have retained their physical train tickets. Distribution in other cases can be expected to be more successful. In many cases, the defenders are likely to have records of the customers to whom compensation may be due, making the group much easier to reach.

1.21 It is also important to note that the undistributed sums in *Boundary Fares* have not enriched funders or lawyers. Rather, they resulted in a significant donation (of £3.8 million) to the Access to Justice Foundation. This will be used for the benefit of some of the most vulnerable in society.[14]

"[T]here are many risks facing consumers in the current litigation landscape [such as] homeowners caught up in the cavity wall insulation scandal who are promised a 'no win, no fee' legal representation, only to find themselves saddled with legal bills they couldn't afford because their claim was unsuccessful"

[13] *Gutmann v First MTR Judgment (Stakeholder Entitlement)* [2025] CAT 72

[14] Access to Justice Foundation sets out its plans for spending collective action millions | Law Gazette
"AtJF have announced that an open grants round will open early next year to distribute the funds, focussing on making grants in three core areas: Access to legal advice for individuals … Activity to support policy changes … Mass reach through citizen engagement to raise awareness of legal rights - including consumer redress."

1.22 The CRN agrees that group members must not be at risk of liability for unexpected (or indeed any) expenses as a result of an unsuccessful claim. One of the strengths of UK Collective Proceedings is that it is the class representative who is liable to pay the defendant's costs if the claim fails and class members are protected from any risk. We understand that this is also the case under the Scottish Group Procedure, but this is further discussed below.

Question 2: Are there any areas of litigation which should be exempted from opt-out group proceedings, in your view?

2.1 The CRN generally supports making opt-out group proceedings as widely available as possible, subject to suitable safeguards for group members, discussed below.

Question 3: Should group procedure (whether opt-in or opt-out apply to judicial reviews in Scotland?

3.1 The CRN does not have any experience in this area.

Question 4: How should court procedures for opt-out proceedings differ from those which already apply to opt-in actions?

4.1 We have identified the following areas where there may be different considerations for opt-out proceedings, compared to opt-in. Most of these stem from the need to provide greater protection for group members in opt-out proceedings since they have no direct control over the conduct of the case or any settlement, but will be bound by the outcome:

- suitability of the representative party;
- communication with group members;
- monitoring of representative party and defender's expenses;
- defender protection for adverse expenses;
- requirement to provide a litigation plan;
- liability of group members for expenses;
- aggregate damages;
- oversight of settlement agreements;
- funder share of any damages award; and
- unclaimed damages.

Suitability of the representative party

4.2 In both opt-in and opt-out proceedings it is important that that the person representing the group can act in the best interests of the group. In UK Collective Proceedings, the CAT must be satisfied that it is "*just and reasonable*" for the applicant to act,[15] and in Scottish Group Proceedings, the Court of Session must be satisfied that the applicant is a "*suitable person*" to act as a representative party.[16] These appear to be similar tests, and the CAT Rules do not differentiate between opt-in and opt-out proceedings for these purposes. We note, however, that the CAT Guide to Proceedings state that the suitability of the person is particularly important in opt-out proceedings, where the representative party and its lawyers will not be in contact with many members of the class or be subject to their instructions, but must act in the interests of the class as a whole.[17]

> "*the Tribunal will consider whether the proposed class representative is competent to manage what is likely to be a large and complex piece of litigation, while also adequately representing the class members' interests. Recognising the inevitable complexity of collective proceedings, the Tribunal is also likely to consider the suitability of the proposed class representative's lawyers. The proposed class representative would usually be expected to have the ability to provide proper instructions to its lawyers and be capable of exerting sufficient control over the legal work conducted and costs incurred. Indeed, the Tribunal may require the proposed class representative to demonstrate at least a basic understanding of the facts relevant to the claim, and the nature of the claims themselves, so as to satisfy the Tribunal that it is capable of instructing its lawyers"*

4.3 The SCJC may want to consider whether similar considerations might apply when the Court is deciding whether to authorise a representative party in opt-out group proceedings as, first, the proceedings will potentially be larger in size and complexity than opt-in cases; and secondly, unknown class members are being represented, who cannot be assumed to have satisfied themselves of the competence of the representative and its legal advisers.

4.4 However, we also consider that the bar for appointment of a representative party should not be set at a level which constitutes an impediment to justice, and that the Court should be sceptical of defenders' self-serving attempts to challenge the suitability of representative parties at certification stage.[18]

Communication with group members

[15] Competition Appeal Tribunal Rules 2015, r 78.
[16] RCS 26A.7(2).
[17] Competition Appeal Tribunal Guide to Proceedings paras 6.29 – 6.30.
[18] *Bridgehouse v BMW* [2024] CSOH 2, [16] "The court should be skeptical because the defendant's crocodile tears argument about the adequacy of the representative plaintiff is made out of a desire to devour the class action and have the certification motion dismissed"

4.5 Where proceedings are opt-in, it is clearly important that members of the group in question are made aware of their right to join the claim. Thus, the Court of Session may only grant permission to bring group proceedings if it is satisfied that the representative party has "*made all reasonable efforts to identify and notify potential members of the group about the proceedings*". When permission is granted, the Lord Ordinary must also make an order requiring advertisement of the permission to bring group proceedings.[19]

4.6 For opt-out proceedings, it is also important that class members are made aware of the claim so that they can opt out if they so choose.[20] However, notification of class members is possibly even more important if and when a settlement is reached or damages are awarded, as group members need to be made aware of their entitlement to compensation.

4.7 Thus, in UK Collective Proceedings, CAT Rule 78 requires the class representative to have a litigation plan which includes, amongst other things, a method for notifying the represented persons of the progress of the proceedings.[21] The CAT Rules also make provisions for class members to be notified at certain key stages in the procedure (for example, when the distribution of damages is to be considered at a hearing[22] and when the Tribunal has made a collective settlement order).[23]

4.8 The SCJC may want to consider whether similar provisions would be necessary following any amendment to the Scottish Group Procedure.

Monitoring of Representative Party and Defender's expenses

4.9 In order to ensure that the regime works in the best interests of the group it is important that the representative party does not incur excessive expenses. This is particularly important in opt-out proceedings as the representative party will not be able to take instructions from group members. For this reason, the CAT has taken a close interest in class representatives' costs in collective proceedings.[24]

4.10 The CRN understands the importance of cost management, although it has argued that the Tribunal should also scrutinise defendants' costs to promote equality of arms and prevent defendants from engaging in aggressive strategies, aimed at running down the class representative's budget. [25]

---

[19] RCS 26A.12(h).
[20] Although where consumer claims are concerned it is unlikely that it will be in a class member's interests to do this.
[21] CAT Rules 2015, r 78(3)(c)(i).
[22] CAT Rules 2015, r 92(3).
[23] CAT Rules 2015, r 96(15).
[24] See for example, *Spottiswoode v Airwave and Motorola Ruling (CPO Costs)* [2025] CAT 76 in which the Tribunal reduced some of the lawyers' costs by 40-50% and disallowed the costs of one law firm which the Tribunal considered to have been instructed unnecessarily.
[25] CRN response to the Department of Business and Trade Opt-out collective actions regime review: call for evidence, paras 6.5-6.20

4.11 For the same reasons, the SCJC may want to consider the extent to which the Court of Session should review the parties' expenses during the conduct of any opt-out claims under the Scottish Group Procedure.

Defender protection for adverse expenses

4.12 UK Collective Proceedings and Scottish Group Proceedings both require that the party bringing proceedings must be able to meet the other side's expenses if the claim fails.

4.13 CAT Rule 78(2)(d) provides that when determining whether it is just and reasonable for the applicant to act as the class representative the Tribunal must consider, inter alia, whether that person "*will be able to pay the defendant's recoverable costs if ordered to do so*". The Tribunal's Guide to Proceedings indicates that in considering this question the Tribunal "*will have regard to the proposed class representative's financial resources, including any relevant fee arrangements with its lawyers, third party funders or insurers. The costs budget appended to the collective proceedings plan … is likely to assist the Tribunal's assessment in this regard*"[26]. In practice, most claims rely on 'after the event' (ATE) insurance to cover adverse costs, the adequacy of which will be scrutinised by the Tribunal.

4.14 In Scottish Group Proceedings, we understand that this requirement is covered by the applicant's need to demonstrate "*sufficient competence to litigate the claims properly, including financial resources to meet an expenses award*" but that "*the details of the funding arrangements do not require to be disclosed*".[27] Instead, it is sufficient for the Court of Session to understand the nature of the representative party's financial resources, potentially combined with an undertaking from a litigation funder with evidence of substantial assets. Thus, in *Bridgehouse v BMW*, it was stated that:

> "*The Applicant and group members are being funded by Quantum Claims. Quantum Claims is a Scottish funder with many years of experience in funding Scottish litigation. Different considerations apply in funding Scottish litigation from funding litigation in England. For example an "After The Event" insurance policy is not acceptable as security for adverse expenses… Quantum Claims has given an undertaking to the court that it will indemnify the Applicant and group members in respect of expenses awards made against them in the course of these group proceeding. The latest available statutory accounts for Quantum Claims show net assets of over £8 million. In light of the indemnity, and the underlying strength of Quantum Claims' balance sheet, I am satisfied that the Applicant has sufficient financial resources to meet any expense awards. If the financial position of the Applicant or Quantum Claims changes during the course of the litigation, then it will of course be open to the Defenders to seek caution for expenses"*.[28]

[26] CAT Guide to Proceedings para 6.33.
[27] RCS 26A.7(2)(f)
[28] *Bridgehouse v BMW* [2024] CSOH 2, [47].

4.15 The CRN does not take a view on the relative merits of the different approaches, beyond noting that it is clearly important that the representative party can meet any liability to the defender for its recoverable expenses, and that no liability is borne by group members.

Litigation Plan

4.16 There is no provision in Scottish Group Procedure which is equivalent to the requirement in CAT Rule 78 that, in determining at the certification stage whether the class representative would act fairly and adequately in the interests of class members, the CAT must take into account:

"(c) *whether the proposed class representative has prepared a plan for the collective proceedings that satisfactorily includes –*

(i) a method for bringing the proceedings on behalf of represented persons and for notifying represented persons of the progress of the proceedings; and

(ii) a procedure for governance and consultation which takes into account the size and nature of the class; and

(iii) any estimate of and details of arrangements as to costs, fees or disbursements which the Tribunal orders that the proposed class representative shall provide"

4.17 We understand that this is because Scottish Group Proceedings are currently opt-in only and so do not need to protect unknown class members.[29] If they are extended to include opt-out proceedings then the SCJC may want to consider introducing similar protections.

Liability of group members for expenses

4.18 Under the UK Collective Proceedings regime, costs may be awarded against the class representative, but not against class members.[30]

4.19 We understand that, similarly, Scottish Group Procedure allows for awards of expenses to be made for or against the representative party and the defenders, but not against individual group members. Thus, in *Bridgehouse v BMW*, Lord Ericht stated that:

> "*Awards in respect of expenses are made for or against the parties to the action i.e. the representative party and the Defenders: they are not made for or against the individual persons …. there is only one action and only one firm of solicitors conducting it …*" [31]

[29] *Bridgehouse v BMW* [2024] CSOH 2, [24].
[30] CAT Rules 2015, r 79.
[31] *Bridgehouse v BMW* [2024] CSOH 2, [9].

4.20 This contrasts with, and represents an improvement on, the situation in some GLO litigation (such as the cavity wall litigation referred to by FCJ above), where individuals may find they have incurred unwelcome and unexpected liabilities as a result of their participation in the litigation.[32]

4.21 We note, in passing, Lord Ericht's observation in *Milligan v Land Rover* that:

> "*[if] there is a dominus litis, then the expenses of an action can be recovered from the dominus litis. So if, for example, due to changes in circumstances neither the applicant nor Quantum Claims has in the end of the day the financial resources to meet an award of expenses, then it may be that if there is indeed a dominus litis, then expenses may be recoverable from that dominus litis instead*".[33]

4.22 It is difficult to envisage a situation where group members in an opt-out claim could meet the criteria for being considered *dominus litis*. If there remains any ambiguity on this question, however, then we would suggest that group members' immunity from liability should be clarified.

Aggregate damages

4.23 Section 47C(2) Competition Act 1998 makes specific provision for the award of aggregate damages in UK Collective Proceedings,[34] meaning that the Tribunal is not required to make an assessment of the amount of damages recoverable in respect of each class member. As far as we are aware, there is no similar provision in the Scottish legislation. Given the potential size of opt-out groups, and the potentially small value of individual claims, the SCJC may consider that opt-out proceedings would be considerably more economical and practicable if provision were made for damages to be assessed on an aggregate basis.

Oversight of settlement agreements

4.24 Rule 26A.30 of the rules of the Court of Session provides that "*[t]he representative party must consult with the group members on the terms of any proposed settlement before any damages in connection with the proceedings may be distributed*."

4.25 This will not be possible in opt-out proceedings, and so the SCJC may want to consider making provision instead for the Court to oversee settlements to ensure that the settlement is just and reasonable in the interests of the group. This is the approach taken by

[32] Indeed, Lord Ericht explicitly contrasts Scottish Group Procedure with the English GLO procedure in *Bridgehouse v BMW*, [20-22].
[33] *Steven Blair Milligan v Jaguar Land Rover Automotive plc and others* [2024] CSOH 96, [28]
[34] Competition Act 1998, s 47C(2) "The Tribunal may make an award of damages in collective proceedings without undertaking an assessment of the amount of damages recoverable in respect of the claim of each represented person."

the CAT, which will take into account the factors set out in CAT Rule 94(9). The Tribunal has noted, in this regard, that:

> "*A settlement of collective proceedings requires the approval of the Tribunal only when those proceedings are conducted on an opt-out basis: s. 49A(1) CA. That reflects the fact that for opt-in proceedings, the CR can obtain instructions from the CMs [class members] whether or not to agree to a proposed settlement, whereas this course is self-evidently not possible for opt-out proceedings. In opt-out proceedings, therefore, the Tribunal has a particular responsibility to protect the interests of the absent CMs*"[35]
>
> "*It is because the CMs are not actually involved in the proceedings, and neither the CR nor the CR's lawyers can take instructions from them, that the Tribunal has to scrutinise a proposed settlement, by which every CM will be bound (unless he or she expressly opts out) and the settlement will not be effective without the Tribunal's approval. The situation is not dissimilar to the case of a settlement of a case brought on behalf of a child, where the settlement requires the approval of the court: CPR 21.10. Indeed, this is why it is only settlement of opt-out collective proceedings which require such approval. There is no such control over settlement of opt-in collective proceedings, although they of course may also be subject to third-party funding.*"[36]

4.26 Thought should also be given to the fact that the approval of a collective settlement will often involve the Court being shown material which it would not be appropriate for the Court deciding on the merits to see, should the case proceed to trial.[37] It may therefore be necessary to ensure that the Courts in question are differently constituted.

Funder share of any damages award

4.27 Litigation funding plays a crucial role in allowing proceedings to be brought and funders need to be able to make adequate returns if they are to continue to invest. Such claims are high risk compared to other types of investment, so funders need to be able to make relatively high returns on successful cases in order to counterbalance lower or negative returns in unsuccessful ones. If funders were to withdraw from the market, such

[35] *Merricks v Mastercard CSAO Application* [2025] CAT 28, [7].
[36] *Merricks v Mastercard CSAO Application* [2025] CAT 28, [81].
[37] See for example the CAT Guide to Proceedings at 6.7 "an application for approval of a collective settlement will often involve a Tribunal being shown material which, in the event that the settlement is not approved and the case continues to trial, should not be placed before a Tribunal hearing the trial and deciding the merits. Accordingly, if the proceedings are certified as opt-out collective proceedings, the panel conducting the case management (the "case management tribunal") will at an appropriate stage prior to the trial determine that the proceedings should thereafter be heard by a separate panel (the "trial tribunal"). If at any stage (including after the commencement of the trial) the parties come to terms and seek approval of a settlement, the application for a collective settlement order will be determined by the case management tribunal".

cases would not be able to proceed at all, and group members would be deprived of their only opportunity to seek redress.

4.28 However, it is also important for public trust in any regime that settlement or damages awards are distributed in a way which is fair to group members (as well as other risk takers such as lawyers on conditional fee arrangements). For this reason, funders should not take disproportionately large amounts from any damages or settlement.

4.29 In UK Collective Proceedings, the CAT scrutinises funding at both the beginning of proceedings (when deciding whether to grant a collective proceedings order) and at the end (when deciding whether to approve a settlement and deciding stakeholder entitlement). Any concerns (of either the CAT or the defendants) about the appropriateness of those arrangements can therefore be addressed in full, and the CAT can ensure that returns to all stakeholders are fair and reasonable in all the circumstances.[38]

4.30 As noted above, under Scottish Group Procedure the representative party must demonstrate to the Court that it has financial resources to meet any expenses but "*details of funding arrangements do not require to be disclosed*"[39] - presumably because proceedings are opt-in only and so brought with the express consent of each member of the group. If the SCJC decides to extend the regime to cover opt-out proceedings it may want to consider whether greater transparency of funding agreements is necessary to ensure that whoever is funding the litigation does not make an unreasonable return.

Unclaimed damages

4.31 It will be important in any opt-out proceedings to ensure that the representative party has a plan for distributing any settlement or damages award to the group it is representing. There is always a risk, however, that sums will remain unclaimed at the end of this process. It is therefore necessary to consider how these should be distributed.

4.32 The main options for dealing with undistributed damages are reversion to the defender or payment to the funder; further distribution to group members who did claim; and distribution to charity.

4.33 One significant problem with reversion to the defender is that it allows the defender to avoid the consequences of its wrongdoing and provides a disincentive to maximise distribution. This could be a particular problem where the representative party is dependent upon the cooperation of the defender to identify and contact group members. Similarly, if unclaimed funds revert to the funder, this may give rise to a conflict of interest between the

[38] In *Justin Gutmann v Apple Inc and others* [2024] CAT 18, [28] the Tribunal stated: "… the Tribunal has a supervisory role in determining how proceeds are to be distributed at the end of proceedings. This means the Tribunal can, at the end of proceedings, revisit whether it is prepared to endorse the payment of the agreed sums to the Funder. At this stage it may have better visibility as to the proportionality of the Funder's fee in relation to the damages awarded and the complexity of the proceedings and can, if necessary, require further evidence to be presented in relation to the appropriateness of the Funder's fee".

[39] RCS 26A.7(2)(f).

representative party (who wants to maximise returns to the group) and the funder (which stands to profit from any unclaimed sums).

4.34 For this reason, CRN members generally prefer further distribution to the group and/or payment to charity. In UK Collective Proceedings, the charity prescribed under section 47C(5) of the Competition Act 1998 to receive unclaimed damages is the Access to Justice Foundation. In *Merricks* the Tribunal noted that "*Since the justification of the collective proceedings is that the CMs could not in practice bring these claims otherwise, a charity which has as its object the provision of assistance to a very wide range of bodies across the UK to help the disadvantaged pursue or protect their legal rights seems to us an appropriate recipient of residue funds in these proceedings*".[40] Such an approach also reduces the risk of lobbying and satellite litigation disputing the choice of charity.[41] As has been noted, in *Gutmann v First MTR,*[42] nearly £4 million has been awarded to the Access to Justice Foundation from the unclaimed settlement sum.

Question 5: How do you think the certification process for opt-out group proceedings should operate

5.1 Many of the issues discussed in the response to Question 4 above are relevant to the certification process. We would draw the SCJC's attention, in particular to issues concerning the suitability of the representative party (4.2 to 4.3), defender protection from adverse expenses (4.12 to 4.15), litigation plans (4.16 to 4.17) and funder shares of any damages award (4.27 to 4.30).

Question 6: What procedural steps are required to protect the rights of the group members in opt-out group proceedings (many of whom may not know that they are part of group proceedings)?

6.1 Some of the measures required to protect group members in opt-out proceedings include ensuring that the representative party is suitable (4.2 to 4.4), ensuring that group members are made aware of the proceedings and their ability to claim (4.5 to 4.8); monitoring expenses (4.9 to 4.11); ensuring that group members incur no liability for adverse expenses (4.18 to 4.22); ensuring that any settlement is fair and reasonable (4.24 to 4.26) and ensuring that other stakeholders such as funders do not take a disproportionate share of any damages award (4.27 to 4.30).

---

[40] *Merricks v Mastercard Judgment (CSAO Application)* [2025] CAT 28, [202].
[41] *Merricks v Mastercard Judgment (CSAO Application)* [2025] CAT 28, [203].
[42] *Gutmann v First MTR Judgment (Stakeholder Entitlement)* [2025] CAT 72.

Question 7: Are there any particular measures that should apply to opt-out group procedure for the protection of defenders or respondents, in your view (e.g. in relation to the ability of a group representative to meet adverse awards of expenses)

7.1 We consider that defenders or respondents should have assurance that the representative party will be able to meet any adverse award of expenses. This is discussed at 4.12 to 4.15.

Question 8: Should pre-action protocols be a requirement in group proceedings in Scotland (opt-in or opt-out). If so, should these be voluntary or compulsory, and what should happen if they are not complied with?

8.1 The CRN does not comment on this question.

Question 9: If the case is resolved by a decision of the court, what role should the court have in approving the distribution of the award?

9.1 The CRN considers that the court should have a role in approving the distribution of both damages awards and settlement agreements in the interests of group members. The approval of collective settlement agreements is discussed at 4.24 to 4.26 above.

Question 10: If the case is resolved by a settlement what role should the court have in approving the settlement amount and its distribution?

10.1 This is discussed at 4.24 to 4.26 above.

Question 11: Do you have any views on how unclaimed damages awards or settlement sums should be distributed?

11.1 This is discussed at 4.31 to 4.34 above.

Question 12: What do you regard as being the main issues for the funding of group proceedings in Scotland (whether opt-in or opt-out)?

12. The CRN does not have any experience of funding in the context of the Scottish Group Procedure. Our members' experiences of funding UK Collective Proceedings are discussed in the CRN's response to Question 1 of the DBT's call for evidence on opt-out collective actions.[43]

Question 13: How do you think that opt-out group proceedings should be funded and what protection measures should be put in place for group members regarding those funding arrangements, in your view?

13.1 The CRN supports any funding arrangements which increase access to justice. The most important protection for group members is that they should not incur any liability as a result of the litigation, for example for adverse expenses if the claim fails. As discussed at 4.18 to 4.22, it is our understanding that group members do not incur any such liability under Scottish Group Procedure.

13.2 In addition to the above, group members should be protected from the risk of their representatives failing to act in their best interests. Measures to protect group members from this include:

- ensuring that the representative party is suitable and able to act in the best interests of the group (4.2 to 4.4);
- ensuring that the representative party does not run up excessive expenses (4.9 to 4.11);
- ensuring that any settlement, and the distribution of any sums awarded is fair and reasonable (4.24 to 4.26); and

[43] Class-Representatives-Network-DBT-Consultation-Response-2025.pdf

- ensuring that the funder does not take a disproportionate share of any sums recovered (4.27 to 4.30).

Question 14: What are your views on disclosure of funding arrangements and confidentiality around funding documents which are lodged with the court (whether opt-out or opt-in)?

14.1 In UK Collective Proceedings the class representative will often publish a non-confidential version of the funding agreements on their claim website, and the CAT has indicated that this should be standard practice for all opt-out collective proceedings.[44]

14.2 For the purposes of its response to the Department of Business and Trade's review of the opt-out collective actions regime, the CRN asked class representatives about their views on the confidentiality provisions in funding agreements.[45] Class representatives expressed a range of views on whether disclosure of the funder's level of return would be helpful, and on whether it was desirable for the funder's source of funding to be disclosed.

14.3 Many class representatives were of the view that - as class members are protected from liabilities in UK Collective Proceedings and their interests are protected by the class representative and the CAT - they are unlikely to pay much attention to the details of funding agreements, or to benefit from seeing them. In terms of communication with class members, a more pressing concern for class representatives is that of making class members aware of the proceedings so that they can make a claim from any settlement sum or damages.

Question 15: Do you have any views on whether there should be changes to the Taxation of Judicial Expenses Rules 2019 for group proceedings (opt-in or opt-out)?

15.1 The CRN does not comment on this question.

[44] *Stephan and Hammond v Amazon* [2025] CAT 42, [41].
[45] Class-Representatives-Network-DBT-Consultation-Response-2025.pdf at para 5.8 to 5.13.

Question 16: Are there any aspects of substantive law which could be a barrier to group proceedings working effectively?

16.1 The CRN does not comment on this question.

Question 17: Are there any other points which you feel are relevant to the procedures relating to the current opt-in regime; or which may inform and shape a potential opt-out regime in Scotland?

17.1 The CRN has no further points to add.