Applying the brakes

Ed Coulson and **Andrew Leitch** examine what lies behind a slowdown in CAT action funding

The competition collective actions regime in the Competition Appeal Tribunal (CAT) has now been in place for more than 10 years. However, it endured a slow start, as the initial cases were denied certification and were either subsequently discontinued (as happened in the first case *Gibson v Pride Mobility Products* [2017] CAT 9) or appealed up to the senior courts (as in *Merricks v Mastercard* below).

It was not until the Supreme Court handed down its judgment in *Merricks* (UKSC 2019/0118) in 2020, which significantly lowered the bar for certification of claims, that the regime really got going in earnest. What followed was a significant ramping up of collective actions being filed; during the years 2022 to 2024, collective actions were being filed at a rate of around one every month. There is little doubt that the lower bar to certification spurred this wave of claims being filed, given the inevitable resulting settlement pressure that comes with a certified case, even if the merits of the claim may be poor. This significantly increased the attractiveness of collective actions to litigation funders. Indeed, this concern – of a low certification standard giving rise to settlements of unmeritorious claims – featured in the parliamentary debates when the Consumer Rights Bill was making its way through parliament.

However, what followed in the years 2025 and 2026 (to date) has been a significant slowdown in new collective actions being filed, with the rate of new claims more than halving from the peak years.

Litigation funders are an essential component in the collective actions ecosystem; without them, claims simply would not be brought as class representatives invariably have neither the resources nor the commercial incentive to self-fund such actions. The main factor driving the slowdown in collective action filings has therefore been the reduced availability of litigation funding for such claims. We discuss below what has caused this reduction in funder appetite, and what developments may lie ahead in 2027 and beyond.

THE CAUSE OF THE POST-2024 SLOWDOWN

The conventional wisdom has been that the Supreme Court's judgment in *PACCAR* [2023] UKSC 28, delivered in July 2023, caused a drop in funder appetite to fund new collective actions. The *PACCAR* judgment held that litigation funders fell within the definition of 'claims management services', such that litigation funding agreements under which the funder's return was calculated as a percentage of the damages recovered constituted a damages-based agreement (DBA). That was a seismic ruling within the collective actions regime, as almost all litigation funding agreements were structured as a percentage return of damages recovered, and DBAs are prohibited in the collective actions regime.

The *PACCAR* ruling undoubtedly created major upheaval for litigation funders and all claimant-side stakeholders in the collective actions regime. Litigation funding agreements needed to be renegotiated, mid-litigation, across the board and significant legal costs were incurred in doing so. However, the agreements were in due course amended and the collective actions that were afoot when the *PACCAR* judgment landed did continue under renegotiated agreements. Further, although collective actions are typically months (or longer) in gestation, the year following the *PACCAR* judgment (2024) was another peak year of collective action filings.

Indeed, there have been a number of other developments under the regime which contributed to the reduced funder appetite for collective actions, perhaps to a greater extent.

First, from 2025 the CAT ruled against certification in a number of claims. Up to the end of 2024, with the exception of the *Evans* collective action (in which the CAT, in *Evans v Barclays Bank Plc and others* [2022] CAT 16, refused certification on an opt-out basis but stayed the claim for three months to allow a revised application for certification on an opt-in basis), the CAT certified every post-Supreme Court in *Merricks* collective action. However, in January 2025 the CAT fully refused certification for the first time in *Riefa v Apple* [2025] CAT 5, on account of the class representative being unsuitable to represent the class, as she did not have a sufficient grasp of the claim's litigation funding arrangements. Less than two months later, in March 2025, the CAT refused the certification in *Roberts v Seven Trent Water and others* [2025] CAT 17, on the technical legal basis that the claims were precluded by the operation of the Water Industry Act 1991. Then, in August 2025, the CAT refused certification of the *Rowntree v Performing Right Society* [2025] CAT 49 collective action on the basis that, among other things, the claim was unsuitable to be brought as a collective action as the individual class members did not necessarily have individual claims against the defendant.

Second, the ultimate outcomes of some of the collective actions that sailed through certification prior to 2025 have disappointed, from a litigation funder perspective. In December 2024, in the first collective actions trial judgment, the CAT found in favour of the defendants in the *Justin Le Patourel v BT Group Plc* [2024] CAT 76 collective action, leaving the litigation funder in that case with a multi-million pound loss. Then, in October 2025, the CAT found in favour of the defendants following a liability trial in *Gutmann v First MTR South Western Trains Limited* [2025] CAT 64, again leaving the litigation funder with a heavy loss.

Third, the lack of certainty of the funder's commercial return is a key reason for reduced litigation funder appetite for collective actions. While a litigation funder will have a contractual agreement with the class representative which specifies its return, the amount actually awarded to it is a matter for the CAT's discretion.

This can be seen in practice in a number of cases which have settled ahead of trial, which have involved litigation funders taking a haircut on their anticipated contractual returns. In *Gutmann*, in a settlement reached prior to the liability trial taking place, the distribution of the settlement sums to consumers was extremely disappointing, with less than 1% of the settlement funds claimed. In light of that disappointing distribution, the CAT reduced the funder's return and granted a significant payment to charity from the unclaimed sums. In *Merricks*, the +£16bn claim eventually settled for £200m, against the funder's wishes. The funder sought to recover £179m of the settlement pot; however, the CAT limited the funder's return to £68m. The settlement resulted in a fall-out among the claimant-side stakeholders, which has resulted in the litigation funder bringing arbitration proceedings against the class representative in that case.

Fourth, the time taken for cases to proceed through to trial is inconsistent but can often be slow. For example, the *Merricks* claim ran for more than eight years prior to settlement, with trial not imminent at the point of settlement. The *Trucks* collective action ([2024] CAT 51) has been running for eight years without resolution, again with no trial imminent. This is often due to pre-trial decisions and appeals. For litigation funders, the amount of time that funds are deployed is a key metric in determining whether the case has been profitable, as the funds deployed typically come with a high cost of capital given the inherent risks in funding litigation. Funders also privately admit that they are at maximum capital commitment to the collective actions regime, until they begin to see some significant commercial returns.

While litigation funders may be encouraged by the c.£1.5bn awarded in the *Kent v Apple Inc* [2025] CAT 67 collective action, that case is subject to appeal and, if the award survives the appeal process, it is likely to be a number of years before the funder receives any return.

WHERE NEXT?

Litigation funding is still available in the market for collective actions, which is evidenced by the announcement of the *Motorway Services* and *Housebuilders* collective actions within the last few months. However, litigation funders are increasingly cautious and their due diligence has increased markedly, such that fewer collective actions are being filed. This is perhaps the market correction that was needed after the post-*Merricks* Supreme Court decision, which led to a deluge of claims which appear to have undergone considerably less due diligence, and in our view contain among them a significant number of cases with questionable merits. It seems highly likely that there are some further heavy funder losses in the pipeline, when those cases fall for determination by the CAT.

Looking ahead, the collective actions regime – and litigation funders' appetite to participate in it – are likely to be significantly impacted by any legislative changes arising out of the Civil Justice Council's Review of Litigation Funding Final Report, which recommended significant changes to the law on litigation funding of collective actions. While some proposed reforms, such as the reversal of the Supreme Court's *PACCAR* judgment, appear positive for litigation funders, others appear more challenging. For example, the report recommends legislating to prevent litigation funders or claimant law firms approaching class representatives to initiate collective actions.

Similarly, legislation may follow the Department for Business and Trade's (DBT) call for evidence on the opt-out regime. On 17 July 2026, the DBT published a consultation which builds on last year's call for evidence. While some of the major reforms mooted in the call for evidence have not made their way into the consultation (such as an expansion of the collective actions regime to other areas of law outside of competition litigation) there are a couple of key reforms that are likely to significantly impact litigation funding in the opt-out regime. Litigation funders will be encouraged by proposals for increased certainty as to their commercial return, by requiring the CAT to give an indication as to the reasonableness of the funder's proposed return at the certification stage, and a presumption that funders will receive their return at the point of damages being ordered, or settlement being approved, rather than awaiting the outcome of distribution. However, the consultation also considers permitting law firms to undertake opt-out claims on DBAs, without the involvement of litigation funders. The DBT points to evidence from Victoria, Australia, where such reforms have led to lower funding costs and higher returns for consumers. While such reform would present new competition for litigation funders in funding opt-out claims, it remains to be seen whether claimant law firms will have the capital and risk appetite to shoulder the often +£20m budgets that opt-out claims require.

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