



FROM HOMOGENEOUSNESS TO THE DISCRETE: CRITERIA FOR SUCCESSFUL CLASS ACTION SETTLEMENTS

Authored by: Claire Van der Zant (Director of Strategic Partnerships) - Shieldpay

From defining the uniformity of a Class to servicing the complexities of tens or hundreds of thousands claimant settlements, we showcase here the journey solicitors and class representatives need to take to cross the chasm from one end of the spectrum to the other in delivering highly successful class action settlements.

We look at the journey from defining a class, navigating the complexities of the litigation process, through to recognising the individual needs when it comes to settling a case, whether settlement occurs in or out of court.

Determination of “homogeneousness” in UK class actions

There are several different tests which need to be satisfied to certify a mass tort case and determine whether it can proceed on an opt-in or an opt-out basis.

- **Opt-in:** For a group litigation order (GLO), the test is straightforward: there needs to be more than one claimant who have a common or related issue and those claimants need to opt-in to the case.

- **Opt-out:** For a collective action proceeding (CPO) to be certified by the CAT, however, it's imperative that the class's legal representatives successfully argue that all claimants constitute a “homogenous” group. To achieve this, the team must prove that the claimants have been affected by the same wrongdoing and are seeking compensation on the same grounds. In this way, the claim is brought on behalf of all those eligible, and it requires an individual to actively declare that they do not want to be involved to leave the class.

The concept of “homogeneousness” for CPO class action claims is a significant consideration for a case to be certified.

Lawyers need to contend with a few opposing interests:



1. The fight for justice

For many lawyers, class actions are a mechanism to represent everyone who has been adversely affected by a large institution – it's a David vs Goliath battle to secure compensation.

Legal teams need to be able to extrapolate information from the class representative and a sample of individuals to consider the issue from a universal standpoint. The legal argument has to be sound for hundreds, thousands or even millions of people.



2. Building a strong legal argument

Although there is a personal (and commercial) drive to represent as many

people as possible, there must be limitations to who is considered part of the class. Lawyers must be steadfast in their decision-making on the criteria for eligibility for compensation, drawing clear boundaries with a strong argument as to why individuals are or are not involved in the claim.



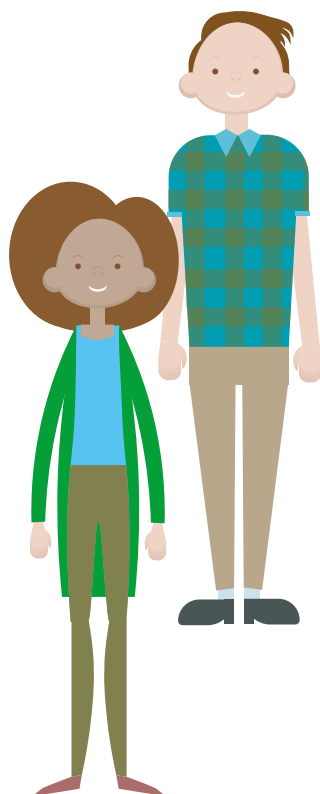
3. The commerciality of the case

Before even filing the case, lawyers must prove themselves to litigation funders to receive sufficient financial backing to carry out the work. To determine whether a case should go forward, funders need to know the potential size of the class and value of the compensation. Lawyers need to be calculated in their proposals to not over-estimate and promise more than what they believe they can achieve.

Law firms must actively consider how best to satisfy these opposing interests in the case in order to successfully navigate the fast-evolving class actions market. Here are a few considerations and suggestions for how to overcome this challenge and successfully apply the concept of “homogeneousness”.

The complexities for legal proceedings

Alongside the complexity of the litigation itself, there are additional factors to consider as proceedings progress towards trial.



1. A competitive market

There is no doubt that the class actions market can be highly lucrative, and that the opportunity is growing.

The value of class actions taking place in the UK courts surged six-fold in 2022, increasing from £4bn in 2021 to £26bn.

This has also been reflected in the assets held by litigation funders which hit a record of £2.2bn last year, a 10-fold increase over the course of a decade.

With increasing financial opportunity comes increasing competition.

In more uncompromising situations, law firms have gone against one another and filed claims in relation to the same subject matter. This issue of ‘carriage disputes’ was first seen in the UK last year with the FX cartel case last year. The two rival applicants were both refused certification in the CAT due to their unsuitability to proceed as opt-out claims.

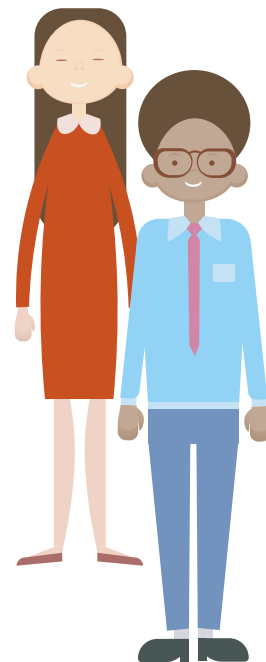
It is inevitable that we will see a rise in the number of carriage disputes over the coming year, and we will soon gain a better understanding of the CAT’s stance on carriage disputes. However, we can assume that they will not entertain them. Carriage disputes go against the ethos of the collective action regime; they do not make bringing litigation claims more efficient in the judiciary system.



2. Determining the tiering of damages and the question of subclasses

Although there is the overarching rule of “homogeneousness”, there may be subsets of the class that have been affected by the wrongdoing slightly differently. The cause of damage must be homogeneous but the extent to which it occurred can vary. For example, in a data breach there could be some who had more of their personal data stolen than others, or it could be to do with the length of time that a price increase affected someone, such as in the BT landline case. In this way, the class could be divided to award different proportions of the compensation.

Much of this work will be determined by the economists and other expert financial modelling work carried out to support the



case. Legal teams must understand the workings of the calculations inside and out and support the rationale behind the class structure.

Considerations for tailoring the claimant journey

While a group is legally considered to be “homogenous”, it is also important to remember that each member of the class will have greatly differing personal circumstances which need to be recognised and acknowledged in the claimant journey.



1. The process for opting out

In June 2022, there were an estimated 171 million UK class action members involved in a CAT procedure. However, there will be individuals who do not wish to participate, and it is a legal requirement to give individuals sufficient opportunity to remove themselves as class members. For this reason, amongst others, law firms are mandated to use a claims administrator when it comes to class actions.

What to look for in a claims administrator:

The ideal claims administrator has demonstrable experience in organising and managing high volumes of claimants. A strong recommendation is that they are technology-driven to ensure seamless case management, be adaptable to different claimant needs and have a robust data function to keep records on every activity.



2. Modes of communication

A developing piece of work for laws firms is how they reach out to claimants and inform them of any developments or changes to their case. The communications must demonstrate empathy and transparency to gain the trust of their clients. To do this, they must understand their class and their communication preferences – how to deliver the right message, to the right people, at the right time.

Bolster your marketing and communications function:

Legal services marketing functions are beginning to mirror consumer facing industries. They are implementing technology such as CRM systems to better track and manage the client journey and identify when they need to provide support or reassurance throughout the claim process. There needs to be strong leadership in this area to help establish direct lines of communication and alignment across the law firm, a more transparent internal framework will enable more transparent external communications.



3. Payments

The individual members of a class action are likely to have diverse needs and expectations when it comes to the distribution of compensation funds. Within a single class action, there might be an older demographic that is not particularly comfortable with digital payments, while the younger generation

who relies on online banking and expects instant bank transfers. There may also be others who do not have the means or perhaps have chosen to be unbanked, as well as claimants overseas in other jurisdictions, as a few examples.

Navigating these challenges in distributing funds to the class can be extremely difficult and time consuming for law firms. Not only is there a substantial operational burden to manage cash flow and offer support for claimants, but there are the added complexities of regulatory compliance and the increasing threats of cybersecurity and financial crime.

Partner with a trusted and regulated payments provider:

As the market continues to expand and develop, class sizes will grow and the total compensation value for each case will increase, the risks associated with processing payments will intensify. Law firms need to partner with specialist payments providers who can directly solve for these challenges, enabling greater internal efficiencies and improved claimant experiences.

Expert Knowledge

For law firms to ensure that their case is not only certified but is ultimately settled, they must uphold the rule of homogeneity. While legal teams need to consider who to bring in to help establish their legal argument, such as economists, they must also recognise the nuances within the extensive population of the class and seek support to best manage the needs of the individuals.

Every class action is a formidable undertaking and law firms need to build robust internal functions as well as recognise areas that need support, where they can bring in expert advice and solutions to ensure seamless management of the case.

Technology providers are essential to the development of the class actions market in the UK. They are working hand in hand with law firms to build solutions that can not only scale quickly but can adapt as the regime continues to evolve.

