

Intersections of judicial collective redress and corporate restructuring law: case studies of English mass tort restructurings

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Abstract

Two rapidly developing fields of private law – corporate restructuring law on the one hand and judicial collective redress on the other – may intersect. The two distinct legal spheres intersect when a financially distressed but economically viable corporate defendant initiates a restructuring procedure to resolve its mass tort liability with as much finality as possible. These so-called mass tort restructurings are already common in the US, a pioneer in both corporate restructuring law and collective redress. But mass tort restructurings are not limited to the US borders. This article provides an overview of mass tort restructurings in England and Wales based on presently documented case law. These English case studies provide a unique perspective on mass tort restructurings and may thereby contribute to a broader EU-wide policy debate on the appropriate rules for such restructurings in general.

1. Introduction

Within corporate insolvency law, there is a global trend toward more reorganization-friendly legal regimes. Rather than liquidating a financially distressed but economically viable company, the idea is that a better way of dealing with financial distress can be to save the debtor company as a continuing business by means of a restructuring procedure in which the rights of stakeholders are compromised. As part of this trend, the European Union adopted the Preventive Restructuring Directive in 2019, requiring all Member States to adopt restructuring procedures. Many of the procedural features are similar to those of Chapter 11 Bankruptcy Code, a restructuring procedure in the United States which has already been available since 1978. At the same time, England and Wales upgraded its own restructuring law. The Scheme of Arrangement under Part 26 of the Companies Act 2006 (“Scheme”) was its

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most powerful restructuring procedure for decades. The Restructuring Plan under Part 26A of the Companies Act 2006 (“Restructuring Plan”), introduced by the Corporate Insolvency and Governance Act 2020 (“CIGA”), adds new possibilities for overriding dissent by stakeholders.¹ It is sometimes referred to as the Super Scheme.

This paradigm shift in insolvency law may intersect with a second paradigm shift in private law. The second paradigm shift is the development of judicial collective redress as a special form of civil procedure for effectively and efficiently resolving mass tort claims.² Here the EU has also implemented a Directive: the Representative Actions Directive adopted in 2020. England and Wales already provided multiple procedures for bringing mass tort claims, including the representative action and group litigation. However, the use or impact of these collective actions has so far been limited in practice due to their procedural limitations. In 2015, the British government expanded its arsenal of collective redress significantly by adopting the Consumer Rights Act. This Act created a new opt-out class action for competition claims managed by the Competition Appeal Tribunal as specialist court.

The two paradigm shifts may intersect when a financially distressed but viable corporate defendant initiates a restructuring procedure to resolve its mass tort liability with as much finality as possible. In that event, the dynamics of mass tort resolution fundamentally change. The corporate defendant then shapeshifts into a distressed *debtor*. Mass tort claimants, in turn, morph into a large class of *creditors* amidst several other classes. Where the initiative in collective redress lies with mass tort claimants, the initiative in corporate restructurings lies with the debtor, aptly captured by the popular term of *Debtor-In-Possession*. These so-called mass tort restructurings are already prevalent in the United States. There, Chapter 11 Bankruptcy Code has been functioning as an alternative platform for mass tort resolution ever since asbestos claims overwhelmed court dockets across the nation in the 1980’s-1990’s. Two recent controversial mass tort cases that have yet to reach a final outcome – *Purdue Pharma* (opioids) and *Johnson & Johnson* (talc products) – are now capturing the headlines worldwide.

1 The company voluntary arrangement under the Insolvency Act 1986 is not discussed because the Scheme already provides a similar restructuring mechanism with an even broader reach. The Scheme can not only be imposed on a minority of unsecured creditors, but also on minorities in preferential and secured creditor classes. The background and functions of the Scheme and Restructuring Plan are further described in §3 below.

2 For the purpose of this article, mass tort liability broadly refers to mass damages claims arising from past wrongful conduct, whether in the context of personal injury, property damage, or any type of financial harm.

Mass tort restructurings are not a strictly American phenomenon. In principle, any jurisdiction with a mature market economy, developed private law system and sophisticated legal services market may witness mass tort restructurings. While such restructurings might not reach the same scale in the EU or England and Wales as in the US due to unique institutional features of the American litigation landscape, the legal processes are similar at their core. England and Wales offers a valuable perspective on how these two legal spheres may intersect in mass tort cases under conditions of financial distress. Various collective redress and restructuring procedures have been part of the English toolbox years before the two EU Directives on collective redress and preventive restructuring were adopted.

A notable feature of this English landscape is that the resolution of a mass tort case can occur in either of the two legal spheres. The English jurisdiction has already witnessed several corporate restructurings affecting thousands of tort claims, including mass asbestos claims in *Cape plc* (2006) and mass financial services claims in *Amigo Loans* (2019). At the same time, England and Wales has yet to reach a stage where corporate restructuring procedures constitute a full-blown and frequently used alternative to every collective redress procedure in all types of mass tort cases. Most of the presently documented mass tort restructurings arose in the financial (services) sector. Moreover, all these cases have been resolved under the Scheme; the Restructuring Plan has yet to enter the mass tort scene.

This article will provide an overview of England mass tort restructurings. It will not only examine the intersections between English collective redress procedures and corporate restructuring procedures that have already occurred but also identify significant intersections that may occur between the two fields of law in future mass tort cases. To set the relevant background, the article first provides separate outlines of English collective redress (§2) and English restructuring law (§3). Against that background, the article will delve into the possible intersections between these collective redress and restructuring procedures in a mass tort context (§4). In order to highlight the similarities and differences between the unique approaches of English collective redress and restructuring law to the resolution of mass tort claims, each section will address the same set of procedural and substantive questions:

- *The first question is as to the entry requirements: what conditions justify aggregating many claims in a single forum?*
- *The second question concerns the safeguards for representation: what procedural mechanisms are in place to ensure each claim is fairly represented in the collective process?*

- *The third question pertains to the substantive process of claim estimation: how can the value of the many claims be established cost-effectively without prejudicing parties' interests?*
- *The fourth question refers to the subsequent process of claim distribution: how can funds be distributed fairly among the many eligible claims?*
- *The fifth question concerns the scope of relief: to what extent may various third parties – such as shareholders, management and distributors – also obtain relief from their potentially massive liabilities?*
- *Finally, the sixth question pertains to the consideration of non-monetary interests: to what extent does the collective process leave room for interests other than monetary compensation, such as public accountability or the provision of forward-looking (injunctive) remedies?*

Each legal sphere will have to deal with these six questions. In that sense, the fields of collective redress and corporate restructuring are similar in nature. The backgrounds and fundamental objectives of these legal spheres, however, are very different. That is not only evidenced by the lack of comprehensive studies analyzing both legal spheres, but also by the significantly different ways in which their aggregate procedures address the six questions.

2. Mass tort resolution in representative actions, collective proceedings and group litigation

The modern English landscape of collective redress is fragmented. Instead of a generic class action statute, three collective actions exist alongside each other: the representative action, group litigation and collective proceedings. The representative action is a traditional class action that allows one class member to act on behalf of other class members with the same interest.³ By contrast, group litigation is a permissive joinder device that allows one court to manage all claims on a group register.⁴ Group litigation became available after amendment of the Civil Procedural Rules in 2000.⁵ Following the adoption of the Consumer Rights Act in 2015, collective proceedings were added to the toolbox for competition cases. This new regime introduced: (i) opt-out proceedings led by a class representative which may conclude in trial or settlement and (ii) opt-out proceedings wherein the class representative does

3 Currently in CPR 19.8

4 CPR 19.21

5 See Civil Procedure (Amendment) Rules 2000 (SI 2000/221 (L.1))

not one-sidedly apply for trial but jointly proposes a settlement with a would-be defendant.⁶

All three collective actions are managed by civil courts with a view to the objective enshrined in the Civil Procedure Rules: the just resolution of cases at proportionate cost.⁷ In the mass tort context, that objective translates to justly resolving collective action problems. All three collective actions strive to achieve that objective in different ways. This can be best illustrated in light of a seminal report written by Judge Lord Woolf which identified three pillars for access to justice when the English civil justice system was said to be in a state of crisis.⁸

The first pillar listed in the report is to provide access to justice for large numbers of persons who have been affected by wrongful conduct, but whose individual loss is so small that individual actions are economically infeasible. That objective is advanced by the representative action.⁹ The second pillar is to provide cost-proportionate methods of resolving cases where individual loss is large enough to justify individual action, but where the number of claimants mean that the cases cannot be managed satisfactorily in ordinary civil litigation. That objective is compatible with group litigation.¹⁰ Collective proceedings for competition claims lie somewhere in the middle. On the one hand, the intention of the government was to facilitate access to justice for those who would otherwise not be able to access legal redress.¹¹ On the other hand, collective proceedings are also meant to maximize efficiency, especially when a case involves many claims for which civil litigation would be feasible.¹²

The third pillar listed in the report is to strike a balance between the normal rights of claimants and defendants to pursue and defend cases individually, and the interests of a group of parties to litigate the action as a whole.¹³ All three English collec-

6 These two proceedings are formally known as respectively the collective proceeding order and collective settlement approval order. Because this article does not delve into some of the intricate differences between the two proceedings, it will simply refer to both variants as “collective proceedings”.

7 CPR 1.1 and Rule 4 CAT Rules 2015

8 Lord Harry Woolf, *Access to Justice: Final Report to the Lord Chancellor on the Civil Justice System in England and Wales*, HMSO 1996 (hereafter: “Woolf 1996”)

9 *Lloyd v. Google LLC* [2021] UKSC 50 [71]

10 See Civil Justice Council, *Improving Access to Justice through Collective Actions: Developing a More Efficient and Effective Procedure for Collective Actions: Final Report (A Series of Recommendations to the Lord Chancellor)*, December 2008 (hereafter: “Civil Justice Council 2008”), p. 86, noting that group litigation is not compatible with the first pillar.

11 *Le Patourel v BT Group PLC and another* [2022] EWCA Civ 593 [29]

12 *Le Patourel v BT Group PLC and another* [2022] EWCA Civ 593 [29]

13 Woolf (1996), p. 223

tive actions strike that balance in largely similar ways. First, all collective actions become available when claims share enough issues, but the standards vary (§2.1). Second, all collective actions follow a model of concentrated representation by specific actors, but subject to different criteria and exit-rights (§2.2). Third, all collective actions permit mass tort claims to be established via trial or settlement based on their distinct claim estimation methodologies (§2.3). Fourth, while all collective actions assume defendants' ability to pay mass tort claims in full, limited payment is common in practice (§2.4). Fifth, liabilities of third parties may be resolved in one settlement in all collective actions, but not without any litigation risk (§2.5). Sixth, all collective actions may contribute to various non-monetary interests through their operation as civil court proceedings (§2.6).

2.1 Varying commonality standards as central entry requirements

The most important entry requirement for bringing any of the three collective actions is that a group of mass tort claims share enough issues of fact and law to justify aggregation. The representative action requires all class members to have the same interest.¹⁴ Courts have historically strictly interpreted that criterion.¹⁵ As a result, representative actions are accessible for declaratory or injunctive relief, but difficult to bring for damages claims.¹⁶ The strict interpretation was upheld to some extent by the Supreme Court in *Lloyd v. Google*. In that case, a class representative brought claims against Google for loss of control of personal data on behalf of millions of Apple iPhone users. The Supreme Court stated that representative actions should be treated as a “flexible tool of convenience in the administration of justice” and “applied to the exigencies of modern life as occasion requires”.¹⁷ Yet the Supreme Court denied class certification in the case at hand, as liability to the class could not be established on a common basis without reference to the extent of unlawful processing in each case.¹⁸ It remains to be seen to what extent courts will more flexibly apply the same interest criterion in future representative action cases.¹⁹

In comparison to representative actions, the commonality standards in collective proceedings for competition claims are flexible. Claims can be included when they

¹⁴ CPR 19.8

¹⁵ See e.g., *Emerald Supplies v. British Airways* [2010] 2 W.L.R. 203 (CA); *Jalla & Anr v Shell International Trading & Anr* [2021] EWCA Civ 1389

¹⁶ See also Civil Justice Council (2008), p. 137-150, recommending a modern generic class action framework.

¹⁷ *Lloyd v. Google* [2021] UKSC 50 [68]-[72]

¹⁸ *Lloyd v. Google* [2021] UKSC 50 [87], [144]

¹⁹ Compare *Prismall v Google UK Ltd* [2024] EWCA Civ 1516, denying class certification, to *Commission Recovery Ltd v. Marks & Clerk LLP* [2024] EWCA Civ 9, upholding class certification.

are brought by an identifiable class, raise similar issues and are suitable for aggregation.²⁰ In relation to the suitability requirement, relevant factors are whether collective proceedings are an appropriate means for the fair and efficient resolution of the common issues; the costs and the benefits of continuing the proceedings; whether any separate proceedings making similar claims have already been commenced; the size and the nature of the class; whether the claims are suitable for an aggregate award of damages; and the availability of alternative dispute resolution and any other means of resolving the dispute.²¹

The most flexible commonality standard applies in group litigation. Where representative actions or collective proceedings are not evidently appropriate to resolve the dispute, the court may issue a group litigation order after considering the number of claims and the common issues involved.²² The court will then appoint a managing court responsible for the conduct of the group litigation.²³ Group litigation has been available in a wide variety of disputes, ranging from product liability to environmental disasters and data protection violations.²⁴

2.2 Adequate representation via representation criteria and exit rights

Arguably the most important procedural question in mass tort cases is how mass tort claimants can be fairly represented by another entity in a single legal proceeding without their explicit consent. While concentrated representation helps conserve judicial resources, mitigate litigation costs and prevent inconsistent trial outcomes, it also gives rise to conflict-of-interest problems due to the massive financial interests that mass tort cases entail in practice. All three English collective actions aim to ensure mass tort claimants are fairly represented via two main safeguards. First, the representative must adequately represent claimants' interests under court supervision (§2.2.1). Second, claimants have the right to vote with their feet by exercising opt-out or opt-in rights (§2.2.2).

2.2.1 Adequate representation via class representatives or lead counsel

All three collective actions provide adequate representation criteria for specific entities that act on behalf of claimants' interests. In representative actions, class

20 S.47(B)(5)(b), (6) CA 1998; Rule 79(1) CAT Rules 2015

21 Rule 79(2) CAT Rules 2015, CAT Guide 2015, par. 6.37

22 CPR 19.22

23 Practice Direction 19B (Group Litigation), par. 3, 8

24 See the long list of GLO-cases in <https://www.gov.uk/government/publications/list-of-group-litigation-orders>

representatives make all litigation decisions on behalf of class members. Beyond the same interest criterion, courts pay little regard to individual qualifications of the representative.²⁵ Courts often refer to the reality that modern litigation is generally “driven and funded by lawyers or commercial litigation funders with the representative party merely acting as a figurehead.”²⁶ The main route for dissatisfied class members is their general right to raise objections against the suitability of the representative.²⁷

Unlike representative actions, the statutory framework of collective proceedings regarding representation is elaborate. The Tribunal may authorise a class member as representative but may also authorise private bodies such as consumer organizations, trade associations, law firms, or special purpose vehicles.²⁸ In any case, appointment of a representative must be just and reasonable.²⁹ The representative must not have a material conflict of interest with class members and must be capable of fairly and adequately acting in their interests.³⁰ While there is no blanket prohibition against any type of class representative, individual class members or pre-existing institutions are met with less scrutiny than ad-hoc created special purpose vehicles backed by litigation funders.³¹

When multiple candidates compete for the position of representative, and each candidate could qualify, the Tribunal will ordinarily choose one representative expected to best serve those interests.³² The Tribunal may also appoint more than one representative if necessary to overcome an otherwise fundamental conflict of interest between subgroups of class members.³³ In that case, a separate representative is appointed for each sub-class.³⁴

In group litigation, the court does not appoint a class representative. Instead, the court appoints a lead solicitor, or multiple lead solicitors if the claimant group can be reasonably divided into subgroups.³⁵ Solicitors that represent a considerable number

25 CPR 19.8(2) only provides that “The court may direct that a person may not act as a representative.”

26 *Lloyd v. Google* [2021] UKSC 50 [72].

27 *Lloyd v. Google* [2021] UKSC 50 [77], referring to (current) CPR 19.8(3)

28 S.47B(8) CA 1998

29 S.47B(8) CA 1998; Rule 78, Rule 96 CAT Rules 2015

30 Rule 78(2) CAT Rules 2015

31 See Rule 78(3) CAT Rules; CAT Guidance 2015, 6.30

32 CAT Guidance 2015, 6.32; *Evans v Barclays Bank PLC & Ors* [2023] EWCA Civ 87 [10], [140]

33 *Evans v Barclays Bank PLC & Ors* [2023] EWCA Civ 87 [10], [139]

34 Rule 78(4) CAT Rules 2015, CAT Guidance 2015, par. 6.35.

35 *Hutson v. Tata Steel UK* [2017] EWHC 2647 [6]

of claimants may be favored, but the selection process is ultimately not an exercise in proportional representation.³⁶ Once appointed, lead solicitors are responsible for managing the group register, all discovery in respect of common liability issues and for the trial of any test cases ordered by the court.³⁷

2.2.2 *Opt-out or opt-in rights as exit safeguards*

In addition to representation criteria, all three collective actions aim to ensure fair representation by giving claimants the right to exit the collective process altogether by virtue of their opt-out or opt-in rights. In representative actions, the default rule is that the representative may lead the litigation without class members' approval.³⁸ Class members do not have a right to opt out, presumably because the strict same interest criterion is deemed to provide them enough protection against inadequate representation.³⁹ Nevertheless, it is open to the court to establish a simple procedure for opting out, or limit the class to those who have opted into the litigation.⁴⁰

Contrary to representative actions, collective proceedings must, by statute, commence as opt-in or opt-out proceedings.⁴¹ The Tribunal may specify the manner and the time by which class members must opt in or opt out.⁴² But the discretion of the Tribunal goes even further: it may also decide whether the proceedings are opt-in or opt-out, even where the representative only applied for one of the two.⁴³ Two particular factors to be considered by the Tribunal are (i) the strength of the claims; and (ii) whether opt-in proceedings are practicable.⁴⁴ In relation to the first factor, the strength of the claims must usually be more immediately perceptible in an opt-out case, because class members have not chosen to be part of the proceedings.⁴⁵ As regards the second factor, there is a general preference for opt-in where practicable. An opt-out class is usually only more practicable when it would be disproportionate

36 *Hutson v. Tata Steel UK* [2017] EWHC 2647 [21]

37 *Hutson v. Tata Steel UK* [2017] EWHC 2647 [6]

38 Tillema, I., *Entrepreneurial Mass Litigation: Balancing the Building Blocks* (diss. Rotterdam), 2019 (hereafter: "Tillema 2019") p. 189

39 Tillema (2019), p. 190

40 *Lloyd v Google LLC* [2021] UKSC 50 [77]. See also Civil Justice Council Report (2008), p. 81-82, noting that the various opt-out or opt-in rights based on whatever special circumstances arise, which may even be granted post-judgement, limit the finality of the litigation and economy of procedure.

41 S.47B(7)(c) CA 1998. Class members not domiciled in the UK can only be bound by opting in; S.47B(11) CA 1998; S.49A(6)-(10) CA 1998.

42 S.47B(10) CA 1998

43 *Evans v Barclays Bank PLC & Ors* [2023] EWCA Civ 87 [83]

44 Rule 79(3) CAT Rules 2015

45 CAT Guidance (2015), par. 6.39

for class members to commence individual proceedings given the small size of their claim.⁴⁶

In contrast to representative actions and collective proceedings, group litigation is, by definition, an opt-in mechanism. After publication of the group litigation order, present and future claimants who become aware of the litigation may enter the group register.⁴⁷ Courts generally set a cut-off date for joining the group register. But instead of a hard and fast approach, courts may decide to extend these cut-off dates.⁴⁸ Reversely, claimants on the group register may also request the court to exit the group litigation and pursue their own lawsuits separately.⁴⁹

2.3 Claim estimation based on various trial options or collective settlements

The framework of concentrated representation in all three collective actions not only creates conflict-of-interest problems but also causes tension with compensatory principles in tort law. Each collective action balances these principles with the goal of efficient compensation in different ways. Representative actions can lead to a class-wide trial based on a traditional compensatory principle (§2.3.1). By contrast, collective proceedings are guided by a modified compensatory principle for the classwide assessment of competition claims (§2.3.2). Group litigation stands wholly apart because classwide trial is not even an option there. Instead, trials of test cases are the main tool (§2.3.3). Given the risks of trial, all collective actions also offer collective settlement as alternative (§2.3.4).

2.3.1 *A traditional corrective justice approach via classwide trial in representative actions*

The compensatory principle underpinning representative actions requires damages awarded for a wrong to put each individual in the same position as if the wrong had not occurred, as best money as can do it.⁵⁰ All issues related to liability or quantum of damages must therefore be calculated on a basis common to all class members.⁵¹ That is often infeasible due to the presence of individual issues. But there are two notable alternatives to a full-blown classwide trial: (i) claim bifurcation and (ii) a common denominator. In a claim bifurcation, the class claim is solely brought for

46 Evans v Barclays Bank PLC & Ors [2023] EWCA Civ 87 [93], [123]-[124]

47 CPR 19.22

48 Weaver v. British Airways plc [2021] EWHC 217 (QB)

49 CPR 19.25

50 Lloyd v. Google LLC [2021] UKSC 50 [80]

51 Lloyd v Google LLC [2021] UKSC 50 [50]

common issues, leaving any issues which require individual determination to be dealt with in subsequent trials.⁵² Under the common denominator approach, the class claim is pursued for only part of the compensation that could be claimed by the whole class. The common denominator approach is suitable for simple cases.⁵³ In complex cases, this approach may only be permitted when class members would not be prejudiced by the limited compensation and often subject to the extra condition that class members are allowed to opt out.⁵⁴

2.3.2 A modified and flexible approach via classwide trial in collective proceedings

A modified compensatory principle applies in collective proceedings.⁵⁵ The Tribunal is not required to undertake an assessment of the damages recoverable in respect of each class member. The only requirement is that the distribution of the aggregate damages award is just.⁵⁶ In many cases, a just award will be one which is based on assessment of individual loss, or at least one which gives a larger share of the award to class members who can be shown to have suffered a greater loss.⁵⁷ However, in other cases, practical grounds may justify less standard remedies. Where the size of the class is large, but the damages are small on a per capita basis, for example, the Tribunal may also find an equal division of an aggregate damages sum among class members to be appropriate.⁵⁸

2.3.3 A decentralized approach via test trials in group litigation

Unlike representative actions and collective proceedings, classwide trial is not possible in group litigation. Instead, the court may use various case management tools, ranging from preliminary trials to test trials of individual claims on the group register.⁵⁹ Any judgement on common issues in test trials can also be made binding on other claims.⁶⁰

52 Lloyd v. Google LLC [2021] UKSC 50 [81]

53 Lloyd v. Google LLC [2021] UKSC 50 [82], giving as examples a wrongly charged fixed fee to all class members or a product with a defect that reduced its value by the same amount for all class members.

54 Lloyd v. Google LLC [2021] UKSC 50 [147]

55 S.47(C)(2) CA 1998. Merricks v. Mastercard [2020] UKSC 51 [97]

56 Merricks v. Mastercard [2020] UKSC 51 [76]-[77], [149]

57 Rule 92(1)-(2) CAT Rules 2015; CAT Guidance, par. 6.82

58 Merricks v. Mastercard [2020] UKSC 51 [149]. It should be noted that this seminal case ultimately ended in a class settlement, rather than class trial; see n. 66 below.

59 CPR 19.23-19.26

60 CPR 19.23(1)-(2)

The Civil Procedure Rules do not specify criteria for test cases. Usually, the parties will be directed by the court to reach an agreement on the selection process or to select an equal number of test cases. Lead solicitors have incentive to select the strongest claims, whereas defendants will seek to include weaker claims. Only careful sampling by both sides may generate trial outcomes which are representative of various issues common to claimants as a whole while also resolving individual issues that may affect particular subgroups of claimants.⁶¹ The outcome of test cases, or even the very threat of test trials, may also facilitate global settlement negotiations.⁶²

2.3.4 *Mass tort claim estimation via collective settlement*

The costs, duration and uncertainty of trial make collective settlement an attractive alternative in all three collective actions. In the framework of a settlement, mass tort claims can be 'scheduled' flexibly via formulas, matrices or any other agreed method. The level of substantive fairness review in relation to collective settlements strongly varies for each collective action. In group litigation, private out-of-court settlements, without any judicial review, are standard.⁶³ In representative actions, class settlements are possible. But since the modern use of the representative action is still in a nascent stage, no record of class settlements was found. By contrast, collective proceedings have an elaborate framework of judicial review for opt-out settlements. The settlement must be just and reasonable.⁶⁴ In particular, the Tribunal will consider (i) the amount and terms of the settlement, (ii) the likelihood of a higher aggregate award in trial, (iii) the likely duration and costs of trial, and (iv) the opinions of independent experts, legal representatives of settling parties, or objections by class members.⁶⁵

61 *Municipio De Mariana & Ors v. BHP Group* [2022] EWCA Civ 951 [140]-[141]

62 See e.g., *Motto v Trafigura Ltd* [2009] EWHC 1246 (QB), where 30.000 individuals brought claims for personal injuries and other losses arising out of the disposal of chemical waste by Trafigura in Côte d'Ivoire in 2006. All claims settled shortly before a scheduled 8-to-10-week trial of test cases would take place.

63 Tillema (2019), p. 195

64 S.49A(5) CA 1998

65 See Rule 94(9) and Rule 97(7) CAT Rules 2015 for opt-out settlements. One seminal case to follow in this regard is Mastercard (referred to above in n. 55). This case concluded in a £200 million class settlement. The settlement was approved by the Competition Appeal Tribunal despite opposition by the involved litigation funders; <https://mastercardconsumerclaim.co.uk/Home/SettlementUpdates>. The approval decision may still be appealed.

2.4 Claim distribution based on various litigation outcomes and litigation funding

In addition to the herculean task of estimating mass tort claims, all three collective actions also aim to ensure that funds are distributed equitably among these claims. Ensuring equitable *gross* distribution is straightforward in the event of trial, as defendants' ability to pay for mass tort claims is silently assumed by all three collective actions. Only collective proceedings contain some statutory rules to ensure an orderly distribution of an aggregate award.⁶⁶ Nevertheless, full payment is often limited in practice in two ways. First, collective settlements may create a situation where payment in full is not guaranteed (§2.4.1). Second, mass tort claims, whether established in trial or via settlement, are often subject to massive deductions of legal expenses owed to litigation funders (§2.4.2).

2.4.1 *Potentially limited distributions in collective settlements*

Collective settlements may freely specify how funds are to be distributed to mass tort claims in all three collective actions, ranging from a full distribution of uncapped funds to pro rata distribution of capped funds. The distribution plans are only subject to fairness review in opt-out collective proceedings. The Tribunal will then consider the amount and terms of a settlement also by reference to the estimated number of claimants likely to claim a share of the settlement and the provisions as to the disposition of undistributed funds.⁶⁷ In cases where the merits are evidently strong, but the number of claimants likely to receive a share of the settlement is low, letting the case go to trial may be deemed preferable. In trial, the defendant will be potentially required to pay a sum representing the full loss of the class while undistributed funds would go to charity, rather than back to the defendant.⁶⁸

2.4.2 *Net distribution based on the English rule and litigation funding*

The heavy dependence of all three collective actions on litigation funders not only creates potential downward pressures on the gross size of awards or settlements, but also possibly on claimants' net recovery if left unchecked.

The starting point is the English rule: the loser pays. This rule implies that the losing party must pay for its own legal costs *and* adverse costs of the prevailing party. The English rule is integrated differently in the three collective actions. In group litigation, claimants are severally liable for an equal proportion of the common costs

66 See Rule 93(1)-(2) and Rule 93(3)(a) CAT Rules 2015; S.47C(5)-(6) CA 1998.

67 Rule 94(9)(a)-(b), Rule 97(7)(a)-(b), Rule 94(g) CAT Rules 2015, CAT Guide 2015, par. 6.125

68 Gutmann v. SSWT [2024] CAT 32 [59]. See for details on the charity rule, S.47C(5) CA 1998.

and potential adverse costs.⁶⁹ By contrast, in representative actions and collective proceedings, where the class representative is the only formal party, class members are ordinarily not liable to pay common legal costs.⁷⁰

Against the background of the English Rule, litigation funding has emerged as an essential tool.⁷¹ Litigation funding arrangements usually entail a fixed success fee for invested capital alongside a contingency fee calculated by reference to a percentage of the recovered sum.⁷² Despite the growth of litigation funding in the past three decades, there are currently no ex-ante rules on permissible funding terms. The dominant model is that of self-regulation through voluntary codes of conduct and ad-hoc judicial oversight.⁷³ Only collective proceedings have explicit statutory rules which permit ad-hoc judicial monitoring of excessive funding terms. The Tribunal can control the recovery of the funder via its discretion to order the funder to be paid from unclaimed funds instead of claimed funds.⁷⁴ In the context of opt-out settlements, the Tribunal may also scrutinize whether any financial conflict of interest led to the settlement if legal costs constitute a significant proportion of the settlement fund.⁷⁵

The viability of litigation funding in all three collective actions has become less certain after a ruling of the Supreme Court in *PACCAR Inc v. CAT*.⁷⁶ In these collective proceedings, the Supreme Court ruled that litigation funding agreements which take the form of damages-based agreements must comply with restrictive regulations.⁷⁷ Damage-based agreements are defined in these regulations as a type of 'no cure, no pay' arrangement under which a representative providing advocacy services, litigation services or claims management services can recover an agreed percentage of a client's damages if the case is won, but will receive nothing if the case is lost. The ruling

69 CPR 46.6(3)-(4)

70 See for exceptions in collective proceedings, Rule 98(1)(b), Rule 88(2)(c) and Rule 98(2) CAT Rules 2015.

71 *Lloyd v. Google LLC* [2021] UKSC 50 [79]

72 See Tillema (2019), p. 154-162 and p. 176-181

73 See extensively Mulheron, R. (28 March 2024), A Review of Litigation Funding in England and Wales, A Legal Literature and Empirical Study, Report for submission to the Legal Services Board.

74 Section 47C(3)(b) CA; see also *Gutmann v Apple Inc* [2024] CAT 18 (13 Mar 2024) [14]-[20], [35]-[41].

75 CAT Guide 2015, par. 6.125

76 *PACCAR and ors v. Competition Appeal Tribunal and ors* [2023] UKSC 28

77 See Section 58AA of the Courts and Legal Services Act 1990, also known as DBA Regulations 2013. These regulations require damage-based agreements to specify the claims to which the agreement relates, the circumstances in which the lawyer's fees are payable and the reasons for setting the level of the percentage. But most importantly, the regulations also impose an ex-ante cap of 50% on the contingent recovery for general civil claims and 25% for personal injury claims; see Section 4 of DBA Regulations 2013.

particularly affected the competition law sector because damage-based agreements are entirely prohibited in opt-out collective proceedings.⁷⁸ Perhaps unsurprisingly then, the ruling quickly sparked legislative activity. The Ministry of Justice at the time submitted the Litigation Funding Agreements Bill, which would reverse the PACCAR-ruling by expressly permitting damages-based funding arrangements. However, the bill does not support a comprehensive reform by also including measures against excessive terms. The current government is waiting for a final report by the Civil Justice Council before deciding whether to push through the bill.⁷⁹

2.5 Resolution of third-party liabilities via collective settlements and barring provisions

In all three collective actions, the desire for an all-encompassing resolution may lead to a collective settlement which releases the potential mass tort liabilities of various third parties. The authority for the binding release of claims against third parties only requires court approval in collective proceedings, where the Tribunal will review proposed releases based on the parties' potential liabilities and the assets they contribute to the class settlement.⁸⁰

But it may be impossible to reach a global settlement in these collective actions because of two litigation risks. First, the participation of all or a substantial majority of claimants is usually required for a collective settlement to provide finality, but this cannot be guaranteed due to claimants' exit rights.⁸¹ Second, even with a substantial majority of participating claimants, a settling defendant may have to deal with non-settling defendants' efforts to shift their losses via claims for contribution if they are held liable. Defendants buy little peace through settlement unless they are assured that they will be protected against such cross claims. Only collective proceedings expressly include a mechanism to address this risk: barring provisions.⁸² In case of partial settlement, a provision may be incorporated to bar cross claims from non-settling defendants. But in exchange, the class representative will be limited to recover from the non-settling defendants only those damages for which they are proportionally liable.⁸³

78 S.47C(8) CA 1998

79 <https://www.pinsentmasons.com/out-law/news/litigation-funding-bill-delayed-summer-2025>.

80 See Rule 94(9) and Rule 97(7) CAT Rules 2015

81 See in this regard CAT Guide 2015, par. 6.125: "[a] settlement may incorporate a provision whereby either party has a right to cancel the settlement in the event that a specified opt-out threshold is exceeded."

82 CAT Guide 2015, par. 6.130-6.131. See also critically on the absence of a general legislatively prescribed framework, Civil Justice Council (2008), p. 387, nr. 47

83 See e.g., McLaren v. MOL Ltd & Ors [2023] CAT [75].

2.6 Varying consideration of non-monetary interests based on nature of the case and litigation outcomes

All three collective actions primarily focus on effectively and efficiently resolving compensation claims. Yet the legitimate interests implicated in mass tort cases range beyond the monetary. Defendants have possibly engaged in tortious conduct on a large scale. Individuals may want to pursue their own day in court, and there may be a public interest in transparency about alleged widespread misconduct and deterrence of harm. The degree to which collective actions contribute to such non-monetary interests ultimately depends on the nature, trajectory and outcome of the case, including the rate at which claimants re-enter the tort system to bring their own proceedings.

When a case ends in collective settlement, a unique feature that may counterbalance a lack of consideration for many non-monetary interests is the use of injunctive remedies which go above and beyond the settling defendant's potential legal obligations. It is already common in group litigation cases involving personal abuse to include injunctive remedies in opt-in settlements, like payments for (trauma) therapy, education grants, family tracing, health benefits, or letters of apology.⁸⁴ In theory, such injunctive remedies can also be incorporated in other cases. As the three collective actions continue to develop in practice, this may become an increasingly common feature.

3. Outline of English restructuring law: the Scheme and the Restructuring Plan

On the other side of the spectrum of aggregate proceedings lies English restructuring law. This field of law comes into view when the liabilities of a debtor grow too large. Insolvent and non-viable debtors typically cease to exist after all assets are sold and distributed among creditors in procedures like insolvency administration or liquidation.⁸⁵ But when financial distress has not yet spread enough to render the debtor non-viable, it may be in creditors' interests to accept partial payment, usually out of future cashflows generated by the debtor's continued business operations. The two most powerful restructuring procedures are the Scheme and the Restructuring Plan.

84 See e.g., regarding the two group settlements of sexual abuse claims against Manchester's children's homes, <https://www.localgovernmentlawyer.co.uk/-manchester-city-council-settles-second-set-of-historic-child-abuse>.

85 Paterson, S., Reflections on English Law Schemes of Arrangement in Distress and Proposals for Reform, ECFR 2018, 472–502 (hereafter: "Paterson 2018"), p. 474

The Scheme allows a corporate debtor to break deadlock negotiations if a majority of creditors support a restructuring and have reached an accommodation with the shareholders, but a minority of creditors in one or more class(es) oppose the financial restructuring.⁸⁶ The Scheme has been available to debtors since the nineteenth century under older versions of the Companies Act, but large corporate reorganizations were an almost entirely out-of-court affair.⁸⁷ After the financial crisis in 2008, the popularity of the Scheme increased dramatically.⁸⁸

The Restructuring Plan may go even further than the Scheme to break deadlock negotiations. Since the financial crisis in 2008, there was a growing consensus among scholars that the English jurisdiction missed an important tool in the corporate restructuring toolbox: a statutory cross class cramdown power that can break deadlock negotiations between *multiple stakeholder classes*.⁸⁹ In a 2016 consultation about corporate restructuring reforms, the Insolvency Service pointed out that increasingly complex capital structures made consensual restructuring agreements difficult to achieve.⁹⁰ This led the government to announce in 2018 that it was convinced of the need for a cross class cramdown. In 2020, amid the COVID-19 pandemic, the CIGA and its proposed Restructuring Plan with cross class cramdown provisions were rushed through Parliament without further consultation.⁹¹

Just like representative actions, group litigation, and collective proceedings, the Scheme and the Restructuring Plan are procedural devices capable of centralizing many claims against a debtor for resolution in one forum. But unlike the three collective actions, the just resolution of a mass tort case at proportionate cost is not the main objective of the two restructuring procedures. Rather, their central policy is maximizing the value of a viable debtor for the commercial benefit of stakeholders as a whole. And both restructuring procedures typically involve professional stakeholders who knowingly entered a relationship with the debtor, rather than mass tort claimants.⁹²

86 Paterson (2018), p. 473

87 Paterson, S., *Corporate Reorganization Law and Forces of Change*, Oxford University Press, 2020, 320 pp (hereafter: "Paterson 2020"), p. 2

88 Paterson (2018), p. 473

89 Paterson, S., *The Conceptual Foundation of Cross-Class Cramdown* (September 18, 2024). Available at SSRN: <https://ssrn.com/abstract=4959732> (hereafter: "Paterson 2024"), p. 10

90 Insolvency Service, 'A Review of the Corporate Insolvency Framework: A Consultation on Options for Reform' May 2016, par. 9.1

91 Paterson (2024), p. 11

92 English, *Scottish and Australian Chartered Bank* [1893] 3 Ch 385, p. 414

In order to shed light on the implications that arise when the two restructuring procedures intersect with the three collective actions (§4), this section first provides an outline of the Scheme and the Restructuring Plans in their ordinary context without mass tort elements. In that context, the central entry requirement is that a viable debtor faces some level of financial distress (§3.1). Adequate representation of stakeholders is ensured by their right to vote and by judicial oversight of the voting process (§3.2). Claim estimation takes an ancillary role, as the focus lies on a distribution among established claims (§3.3). In terms of distribution, the Scheme and Restructuring Plan are essentially a blank canvas as long as the voting process is fair, except when a cross class cramdown is engaged under the Restructuring Plan (§3.4). Resolution of third parties' contractual liabilities is common (§3.5). Finally, as the two restructuring procedures focus on monetary distribution, non-monetary interests take a back seat (§3.6).

3.1 Economic viability and varying levels of financial distress as central entry requirements

Scheme and Restructuring Plan proceedings typically commence with an application by the debtor to the court to convene one or more meetings of creditors and shareholders.⁹³ An implicit requirement is that the debtor's business should be viable if the plan is to continue trading.⁹⁴ Beyond that requirement, the two procedures contain different rules on the required level of financial distress. The Scheme can, in theory, also be proposed by entirely solvent companies.⁹⁵ However, when the scheme is used for restructuring debt, some level of financial distress is often required in practical terms. The statutory power for binding a dissenting minority of stakeholders to a compulsory rearrangement of their rights is meant to give viable but distressed debtors a prospect of survival.⁹⁶

The Restructuring Plan has a statutory pre-insolvency test as formal pre-insolvency procedure.⁹⁷ The procedure is available only for the debtor which "has encountered, or is likely to encounter, financial difficulties that are affecting, will affect or may affect their ability to carry on as a going concern".⁹⁸ The purpose of the compromise

93 S.896 (Scheme) and S.901C (Restructuring Plan) CA 2006. In both proceedings, applications can also be made by other parties like creditors, shareholders, or administrators in case of insolvency administration.

94 This follows from a feasibility test; see §3.2 and §3.4 below.

95 See e.g., *Equitable Life Assurance Society* [2019] EWHC 3336 (Ch)

96 *Sunbird Business Services Limited* [2020] EWHC 2493 [49]. See on vertical comparisons §3.4. below.

97 *Gategroup Guarantee Ltd* [2021] EWHC 304 (Ch) [85]-[137]

98 S.901A(2) CA 2006

of debt must be to “eliminate, reduce or prevent, or mitigate the effect of, any of the financial difficulties”.⁹⁹

3.2 Adequate representation via class voting and judicial review of voting procedure

A Scheme or Restructuring Plan proposed by the debtor can, if sanctioned by the court, significantly impair the claims and interests of many stakeholders without their consent.¹⁰⁰ Given that formidable compulsory power, both proceedings contain safeguards to ensure all affected stakeholders are adequately represented. These safeguards are spread out in a three-stage process: (i) a convening hearing; (ii) class meetings; and (iii) a sanction hearing.¹⁰¹

At the convening hearing, the court usually considers in advance the appropriate composition of stakeholder classes that are to vote on the proposal. In particular, the court may decide that more than one class of creditors is required if the creditors’ rights – either as existing against the debtor or as offered to them under the deal – are so dissimilar as to make it impossible for them to consult together with a view to their common interest.¹⁰²

At the class meetings, voting rights are the primary safeguard. A Scheme must be approved by a majority in number representing 75% in value and a simple majority

99 S.901A(3) CA 2006

100 An important caveat is appropriate here: competing proposals from creditors are possible, at least in theory, under both the Scheme and the Restructuring Plan. However, such proposals are extremely rare in practice. As to the Scheme, it follows from case law that consent by the debtor or, in certain cases, its (controlling) shareholders is required for a competing plan to be sanctioned; see *Savoy Hotel Ltd* [1981] 3 All ER 646. These rules have been held to also generally apply in case of a Restructuring Plan, despite the tension between such rules and the cross class cramdown provisions of the Restructuring Plan as formal (pre-)insolvency procedure; see *The Goodbox Co Labs Ltd* [2023] EWHC 274 (Ch) [57]. Remarkably, a competing plan was proposed recently by creditors in the high-profile restructuring of utility company Thames Water; see *Thames Water* [2025] EWHC 338 (Ch). A class of junior bondholders proposed a plan similar to the debtor’s plan, but which varied on certain key points; *Id* at [128]-[129]. The court sanctioned the plan of the debtor and dismissed the competing plan, based on factors such as the expected infeasibility of the competing plan without support from the senior creditor class backing the debtor’s plan and the out-of-the-money nature of the junior creditor class which sought approval of the competing plan; see *Id* at [164]-[172]. After appeal against the court’s sanctioning decision was rejected by the Court of Appeal, various parties are now considering to appeal to the Supreme Court; <https://www.standard.co.uk/business/thames-water-financial-restructuring-court-of-appeal-administration-b1217111.html>. Given these developments, it is still premature for this article to assess how rules on competing proposals could play out in the context of mass tort cases or how other rules might be more suitable in such cases.

101 *AGPS Bondco Plc* [2024] EWCA Civ 24 (Adler) [5]

102 *AGPS Bondco Plc* [2024] EWCA Civ 24 (Adler) [114]

in number in each affected class.¹⁰³ The rules differ for the Restructuring Plan. First, only a 75% majority in value is required for achieving the requisite majority in a class.¹⁰⁴ Second, courts may decide to exclude certain classes of creditors or shareholders from voting altogether if they do not have a 'genuine economic interest'.¹⁰⁵ A class only has a genuine economic interest if it is expected to receive full or partial payment in the relevant alternative ('in the money').¹⁰⁶ Third, the court may sanction a Restructuring Plan even when one of the classes does not achieve the statutory majority, as long as at least one in-the-money class votes for the plan (subject to the substantive requirements further discussed in §3.4).¹⁰⁷

At the sanction hearing, the court does not simply act as a 'rubber-stamp' for the wishes of voting majorities but exercises discretion in deciding whether to approve any Scheme or Restructuring Plan. The classic approach to the exercise of discretion is that the court will consider whether there has been (i) compliance with statutory requirements; (ii) fair representation of assenting classes; (iii) whether an intelligent and honest person might reasonably approve the plan in each assenting class; and finally (iv) whether there is some blot or defect in the proposal.¹⁰⁸ The latter two considerations relate primarily to distributional aspects (further discussed in §3.4). The first two considerations are discussed here, as they aim to ensure that a class is properly consulted and represented.

The first consideration boils down to whether a debtor made the necessary disclosures to properly constituted classes, including an explanatory statement which explains how the plan affects these classes.¹⁰⁹ The second consideration is meant to ensure that the statutory majority of those who attended the class meetings fairly represent the minority. The majority must be properly consulted and act in good faith without being influenced by collateral interests adverse to those of the class.¹¹⁰ In relation to both of these factors, courts often also consider the turn-out of the class meetings as a rough check. The turn-out figures are appreciated against the total number of creditors or shareholders who could attend the meetings and the total value of their claims or interests.¹¹¹

¹⁰³ S.899 CA 2006

¹⁰⁴ S.901F(1), S.901G(1) CA 2006

¹⁰⁵ S.901C(4) CA 2006

¹⁰⁶ *Fitness First* [2023] EWHC 1699 (Ch)

¹⁰⁷ S.901G CA 2006

¹⁰⁸ *KCA Deutag UK Finance plc* [2020] EWHC 2977

¹⁰⁹ *AGPS Bondco Plc* [2024] EWCA Civ 24 (Adler) [116]. See also S.897 (Scheme) and S.901D (Restructuring Plan) CA 2006.

¹¹⁰ JB Lindon (ed.), *Buckley on the Companies Acts* (13th edn, Butterworths 1957) 409

¹¹¹ *DeepOcean 1 UK Ltd* [2021] EWHC 138 (Ch) [54]

3.3 Claim estimation as ancillary process to claim distribution under Scheme and Restructuring Plan

Both the Scheme and the Restructuring Plan start with the general assumption that all claims against the debtor are undisputed or, if disputed, can be determined within a relatively short time window.¹¹² The point of the restructuring is simply to include claims, whenever and however determined, in a deal which limits the payout on those claims. To ensure an effective restructuring, both Scheme and Restructuring Plan proceedings use the word ‘claim’ in the widest sense to also include debts which have not yet become payable or contingent claims.¹¹³

3.4 Claim distribution based on judicial review of proposed distributions

Under both the Scheme and Restructuring Plan, a restructuring proposal which is supported by a fairly representative majority in each class and which does not have any defect making its implementation infeasible can be a blank canvas. Courts are guided by the democratic principle that stakeholders are the best judges of their own commercial interests and courts should not impose their own views of the merits.¹¹⁴ Nevertheless, the court retains the unfettered discretion to withhold sanction.¹¹⁵ The court will exercise that discretion if the proposal is not one which intelligent and honest stakeholders acting in respect of their own interests might reasonably approve.¹¹⁶ This rationality test does not require courts to decide whether the proposal is the only fair proposal or the best.¹¹⁷ But it does require a vertical comparison: the proposal must leave stakeholders better off than the most likely alternative scenario.¹¹⁸ The relevant comparator is usually insolvency administration or liquidation.¹¹⁹

Broader questions of fairness may have to be considered by the court if the debtor proposes a Restructuring Plan. Unlike the Scheme, which may only impose its terms on a dissenting minority whose interests are substantially similar to those of the

112 Of course, a Scheme or Restructuring Plan may also be used for settling large numbers of claims in specific types of cases outside of the mass tort context, such as run-off cases in the insurance industry; see e.g., *Hawk Insurance Co Ltd* [2001] EWCA Civ 241. Nevertheless, these cases form an exception to standard restructurings.

113 See as to contingent claims in a general context, *T&N Ltd & Ors* [2005] EWHC 2870 (Ch) [35]-[46]

114 *Virgin Atlantic Airways Limited* [2020] EWHC 2376 (Ch) at [45]-[46]

115 *Flybe Group Plc* [2019] EWHC 631 (Ch)

116 See *ALL Scheme Ltd* [2021] EWHC 1401 (Ch) [121]-[128]

117 *AGPS Bondco Plc* [2024] EWCA Civ 24 (Adler) [115]-[117]

118 *AGPS Bondco Plc* [2024] EWCA Civ 24 (Adler) [149]-[151]

119 *Colouroz Investment 2 LLC & Ors* [2020] EWHC 1864 (Ch) [79]

assenting majority in the same class, the Restructuring Plan may impose its terms on an entire dissenting class whose interests are substantially different to those of assenting classes.¹²⁰ The rationality test does not apply in that cross class cramdown scenario, because the court cannot simply defer to “the mere fact that one or more classes of creditors may have acted in their own separate interests in voting in favour of the plan.”¹²¹ Instead, two extra statutory requirements apply, supplemented by a judicial fairness review.

The two statutory requirements are very thin. First, the Restructuring Plan must receive the consent of at least one class with a genuine economic interest in the restructuring.¹²² That will often be easy to satisfy. Second, none of the members in the dissenting class must be worse off than in the most likely alternative absent the plan.¹²³ This inquiry is like the vertical comparison that courts make under the rationality test in relation to dissenting members in an assenting class. Here too, insolvent administration or liquidation are usually the relevant comparator.¹²⁴

Beyond the two statutory requirements, the most important distribution question is how the value sought to be generated by the Restructuring Plan, over and above the recovery expected in the relevant alternative, should be distributed between assenting classes and dissenting classes. No statutory provision specifies the methods for calculating restructuring value, nor whether its distribution should conform to the scheme of priority provided by insolvency law. Because consideration was given by the British government to including an absolute priority rule in the CIGA, its exclusion was a deliberate policy choice.¹²⁵ The parliamentary history only indicates that the court retains the unfettered discretion to assess whether the proposed distribution is ‘just and equitable’.¹²⁶ By refraining from a specific formulation of that criterion, the government appears to have relied on the courts to develop the law further.¹²⁷ English scholars are still divided as to how the law should

120 AGPS Bondco Plc [2024] EWCA Civ 24 (Adler) [140]

121 AGPS Bondco Plc [2024] EWCA Civ 24 (Adler) [133]

122 S.901G(5) CA 2006

123 S.901G(3)-(4) CA 2006

124 CB & I UK Ltd [2024] EWHC 398 (Ch) [94]-[112]

125 AGPS Bondco Plc [2024] EWCA Civ 24 (Adler) [158]

126 AGPS Bondco Plc [2024] EWCA Civ 24 (Adler) [155]-[159]

127 Van Zwieten, K., ‘Mid-Crisis Restructuring Law Reform in the United Kingdom’ (2023) 24 EBOR 287, 307.

be developed further, supporting proposals which range from relative priority rules to open-ended commercial reasonableness tests.¹²⁸

The current approach to a cross class cramdown developed in case law is as follows. When the dissenting class is in the money, some form of a horizontal comparison must be made between the recovery for the dissenting class and assenting classes.¹²⁹ A relevant reference point is whether the priority, as applicable among classes in the relevant alternative, is reflected in the distributions under the plan.¹³⁰ The court may freely permit a departure from the scheme of priority as long as there is a ‘good reason’ for such departure.¹³¹ A common example is that shareholders who provide some benefit to the restructuring, by for example injecting new money, can receive a proportionate share of the benefits.¹³² Another example is that essential trade creditors or employees may be paid in full to ensure the continued supply of goods or services.¹³³ But there is no exhaustive list of exceptions.¹³⁴

By contrast, when the dissenting class is out of the money in the relevant alternative, its views about the distributions under the plan “should not weigh heavily or at all in the decision of the court as to whether to exercise the power to sanction the plan and cram them down”.¹³⁵ The implication is that, in theory, a single in-the-money class may freely decide how to share the restructuring surplus with out-of-the-money classes.¹³⁶ Dissenting out-of-the-money classes are only entitled to some recovery to satisfy the jurisdictional requirement of ‘give and take’ between the company and its creditors.¹³⁷ The required consideration can be an extremely modest amount.¹³⁸

128 Compare the perspectives in Paterson (2024), p. 21-22 to Mokai, R., The ‘Too Much Unfair Value’ Approach to the UK Cramdown (October 20, 2024). Available at SSRN: <https://ssrn.com/abstract=4993883>.

129 AGPS Bondco Plc [2024] EWCA Civ 24 (Adler) [156]

130 AGPS Bondco Plc [2024] EWCA Civ 24 (Adler) [70], [158]

131 AGPS Bondco Plc [2024] EWCA Civ 24 (Adler) [166]

132 AGPS Bondco Plc [2024] EWCA Civ 24 (Adler) [167]-[168]

133 AGPS Bondco Plc [2024] EWCA Civ 24 (Adler) [170]

134 AGPS Bondco Plc [2024] EWCA Civ 24 (Adler) [167]

135 AGPS Bondco Plc [2024] EWCA Civ 24 (Adler) [251]-[252]

136 See e.g., Virgin Active Holdings Ltd [2021] EWHC 1246 (Ch) [249], approving a plan that permitted the shareholders to keep their shares based on the consent of secured creditors, who constituted the only in-the-money class, even though the claims of a dissenting intermediary class of landlords were impaired under the plan.

137 AGPS Bondco Plc [2024] EWCA Civ 24 (Adler) [275]-[278]

138 See e.g., CB & I UK Ltd, [2024] EWHC 398 (Ch) [58], [82]-[86], [116], considering that the release of a hard-fought arbitration award amounting to \$1.3 billion in exchange for a contingent value right amounting to merely 0.2% of the nominal value of that award could still meet the jurisdictional requirement of ‘give and take’.

3.5 Resolution of third-party liabilities via nonconsensual non-debtor releases

In principle, a corporate restructuring is a one-on-one affair between a debtor company and its creditors. However, the restructuring might fail if the plan does not satisfactorily address potential recourse claims from third parties who are liable for the same debts (“ricochet claims”). A debtor’s plan may address that problem via a provision that releases the liability of these third parties. These so-called non-debtor releases are especially common in group company contexts where group companies have guaranteed a distressed debtor’s debts. English courts routinely approve these releases vis-a-vis both assenting and dissenting creditors. The only requirement is that the alteration of creditors’ rights against the released non-debtors must be both ancillary to the arrangement between the debtor and its creditors as well as necessary to ensure its effectiveness.¹³⁹ Most English authorities that have approved nonconsensual non-debtor releases are first instance decisions.¹⁴⁰ But the rationale was also confirmed in the high-profile case on appeal of *Lehman Brothers International*.¹⁴¹ Since then, English courts’ power to approve nonconsensual non-debtor releases is often described as being subject to ‘Lehman necessity’ doctrine.

In the modern restructuring landscape, non-debtor releases are often integrated into a deed poll structure. In that structure, a special purpose vehicle is set up to unilaterally assume the liabilities of the actual business debtors in order to create a debtor-creditor relationship. That SPV subsequently proposes to the creditors a Scheme which contains a release of the business debtors’ liabilities based on an artificially created threat of ricochet claims.¹⁴²

3.6 No focus on non-monetary interests in the financial framework of English restructuring law

The normative framework of the Scheme and the Restructuring Plan is inspired by private law of contract theories which require restructuring procedures to reflect an optimal setting for resolving bargaining problems among creditors and shareholders under conditions of financial distress.¹⁴³ These bargaining theories are well adapted to commercial restructurings involving sophisticated creditors.¹⁴⁴ But the

139 See e.g., Gategroup [2021] EWHC 304 (Ch); Fitness First Clubs Ltd [2023] EWHC 1699 (Ch)

140 Montgomery, C., Whibley, K., & Young, R. (2024), Third Party Releases in Restructuring Processes: The English Perspective, INSOL World – Third Quarter, p. 17

141 Lehman Brothers International (Europe) (in administration) [2009] EWCA Civ 1161 [65]

142 See e.g., Gategroup Guarantee Ltd [2021] EWHC 304 (Ch)

143 Paterson (2024), p. 19-21

144 Paterson (2020), p. 217

theories are not designed for dealing with involuntary parties like (mass) tort claimants, nor non-monetary interests which mass tort cases often implicate.¹⁴⁵

4. Mass tort resolution under the Scheme and the Restructuring Plan: English mass tort restructurings

Mass tort claimants have the initial choice of where to bring their claims. Representative actions, collective proceedings and group litigation all provide routes to collective redress for different types of mass tort claims. But when corporate defendants encounter some level of financial distress, they may turn the tables by proposing a Scheme or Restructuring plan to comprehensively and finally resolve their mass tort liabilities on their own terms.

This section will discuss the mass tort resolution process under the Scheme and the Restructuring Plan by answering the same six questions, now tailored to the context of mass tort cases. First, as to the entry requirements, financial distress arising from mass litigation risk lies at the forefront (§4.1). Second, as to representation, mass tort claimants are absorbed into a web of mandatory classes that vote on restructuring proposals by the debtor (§4.2). All mass tort restructurings to date have been based on the Scheme, which requires a mass tort class to support the proposal with the requisite majority. However, if future cases are brought under the Restructuring Plan, that democratic safeguard is no longer guaranteed. Third, as to claim estimation, the Scheme and Restructuring Plan may take on the structure of a collective settlement but are subject to limited fairness review (§4.3). Fourth, as to distribution, proposed distributions under a Scheme or Restructuring Plan are subject to varying levels of fairness review that correspond to different voting outcomes (§4.4). Fifth, as to the resolution of third-party liabilities, mass liabilities of third parties may be flexibly resolved in restructuring procedures in multiple ways which are unavailable in English collective actions, including nonconsensual releases (§4.5). Sixth, as to the room for non-monetary interests, any restructuring proposal may, in theory, promote non-monetary interests just like English collective actions, but such interests have received little consideration thus far (§4.6).

Of course, in all large cases, many of the questions above will arise. Certain questions will lead to more of a legal battleground in one case than in the next. But before turning to the individual questions, this section will first provide a general

¹⁴⁵ See in a more general sense on non-adjusting creditors, Paterson (2020), p. 274.

introduction of the seminal mass tort restructuring cases so far, being *Cape plc* and *Amigo Loans*.

The first high-profile mass tort restructuring occurred in 2006 when Cape plc, one of the country's largest asbestos manufacturers, restructured its present and future mass asbestos liabilities as it continued trading.¹⁴⁶ At the time, practitioners recognized *Cape Plc* as an innovative restructuring with potentially wider applications for other sectors where there could be mass claims.¹⁴⁷ Given the rapid development of collective proceedings since 2015 and the billion-dollar claims that are routinely filed, one might have expected the competition law sector to follow. But remarkably, the next wave of mass restructurings occurred in the financial services sector, a sector for which the government did not deem a collective action framework necessary. The government had intended to introduce a class action regime for financial services claims with the draft Financial Services Bill in 2009, but the initiative was dropped from that bill after a general election in 2011.¹⁴⁸ Several years later, as Britain was experiencing a cost-of-living crisis fueled by the COVID-19 pandemic, various subprime loan lenders were confronted by mounting complaints that they provided unaffordable credit to consumers. The FCA issued a series of "Dear CEO" letters in 2022 and 2023, urging lenders to stop exploiting the crisis to promote their services in unsustainable ways.¹⁴⁹ But it was already too late for some of the country's largest subprime lenders, including *Amigo Loans*. Instead of going through the public complaints' procedure under the Financial Ombudsman Service or awaiting potential representative actions, Amigo Loans initiated a Scheme to resolve the mass unaffordability claims.

It is also important to preface the overview of English mass tort restructurings with the following observation: many cases have been initiated to achieve a controlled liquidation rather than a 'true' restructuring where the debtor continues trading. While such cases fall outside the focus of this Chapter, key considerations by courts in some of these cases bear relevance to the legal context of mass tort restructurings where the debtor continues trading as well. The most notable liquidation cases are (i) *T&N* (2005), involving mass asbestos claims; (ii) *Provident* (2021), involving mass consumer unaffordability claims; (iii) *Link Fund Solutions* (2023), involving financial mismanagement claims; and (iv) *People's Energy* (2024), involving mass data breach

146 Cape plc [2006] EWHC 1446 (Ch); Cape plc [2006] EWHC 1316 (Ch)

147 British Asbestos Newsletter, Tipping the Balance: Exit Strategies of UK Asbestos Defendants, Issue 64, Autumn 2006: <https://www.britishasbestosnewsletter.org/ban64.htm>

148 Tillema (2019), p. 32

149 See e.g. FCA (6 May 2022), Dear CEO Letter, p. 1-2; FCA (June 16 2022); FCA (29 September 2022)

and misrepresentation claims. Where relevant, these mass tort cases will also be discussed in the overview below.

4.1 Financial distress arising from mass litigation risk as central entry requirement in mass tort cases

Contrary to the three English collective actions, the Scheme and the Restructuring Plan can force all stakeholders who have a financial relationship with the debtor – beyond the class of mass tort claimants – to come to the table. The key question is whether the debtor faces enough financial distress to justify a restructuring. While the formal pre-insolvency requirement under the Restructuring Plan has not yet been tested in the mass tort context, presently documented cases under the Scheme provide an indication of the required levels of financial distress in practice.

Cape plc is illustrative. The Cape Group operated asbestos products factories in the UK and mining companies in South Africa. As the health risks associated with asbestos became widely known, Cape ceased all asbestos operations by the end of the 1980s.¹⁵⁰ Cape had diversified from asbestos manufacture to providing industrial support services in the energy sector, but potentially massive asbestos liabilities were hanging above its head. A storm of asbestos litigation headed towards the English shores in 1997 as South African victims applied for group litigation. After a series of appeals regarding jurisdictional issues, the House of Lords allowed the litigation to proceed. But it soon became apparent that the thousands of lawsuits might force Cape into a slow liquidation. Meanwhile, hundreds of victims had already passed away.¹⁵¹ Based on that reality, Cape and lead solicitors of South African claimants reached a tentative £21 million settlement in 2001. Yet Cape's banks did not agree to release the set amount of money.¹⁵² As a result, Cape did not meet the settlement terms, and the group litigation recommenced.¹⁵³ Cape subsequently reached two new settlements in 2003: a £7.5 million settlement with South African claimants and a £2.6 million settlement with UK shipyards in respect of their contribution claims.¹⁵⁴

The group settlements provided Cape some level of closure. However, most asbestos claimants were resident in the UK and not part of any collective settlement. These claimants included present and former employees, workers exposed to Cape's

150 Cape Scheme, Explanatory Statement, Part 2: Background to the Scheme

151 Meeran, R., *Cape Plc: South African Mineworkers' Quest for Justice*. *International Journal of Occupational and Environmental Health*, 9(3), 218–229, 2003 (hereafter: "Meeran 2003"), p. 224

152 Meeran (2003), p. 225

153 Meeran (2003), p. 225

154 Cape Scheme, Explanatory Statement, Part 2: Background to the Scheme, nr. 1

asbestos products in other businesses, as well as individuals who lived close to Cape factories.¹⁵⁵ Cape generated enough cashflows to meet claims in the short term, but asbestos claims could be made in the future over periods up to fifty years due to the long latency of asbestos-related conditions.¹⁵⁶ Actuarial estimates indicated that the discounted value of all unpaid UK asbestos claims, net of insurance recoveries, could be almost £120 million within a range of £70 million and £240 million.¹⁵⁷ Group litigation could therefore still lead to a liquidation. Furthermore, the uncertain number, value and timing of asbestos claims was already disrupting Cape's business operations. Cape faced difficulties in obtaining funding at commercially acceptable rates while important organizations in Cape's field of activity limited their dealings with the Cape group.¹⁵⁸ In response, Cape and twenty-four subsidiaries proposed a composite scheme to UK asbestos claimants in 2006.¹⁵⁹

Recent mass tort restructurings in the financial services sector have involved debtors further down the curve of financial distress. In *Amigo Loans*, the debtor company was already insolvent on a balance sheet basis as its total liabilities were estimated to be £597 million, including mass unaffordability claims of £347 million. Further, Amigo was at risk of becoming cashflow insolvent if it were not permitted to recommence lending by the FCA.¹⁶⁰

It is also possible that a corporate defendant becomes distressed for reasons other than exposure to mass tort liability. *People's Energy* is illustrative. The debtor, a retail energy supplier called People's Energy Supply Limited, as well as its parent company, restructured hundreds of thousands of potential data breach claims and misrepresentation claims in order to finalize a liquidation in insolvency administration.¹⁶¹ But the main reason the debtor initially filed for administration in 2021 was external: cash pressure caused by volatility in wholesale energy prices, lack of liquidity, increased price competition and the revocation of its supply licenses.¹⁶² Up to the date of the administration, only four data breach claims had been made.¹⁶³ But

155 Cape plc [2006] EWHC 1316 (Ch) [9]

156 Cape plc [2006] EWHC 1316 (Ch) [4]

157 Cape Scheme, Explanatory Statement, Part 2: Background to the Scheme, nr. 4

158 Cape plc [2006] EWHC 1316 (Ch) [4]

159 That scheme essentially consists of multiple interconditional schemes proposed by the Cape group members.

160 ALL Scheme Ltd [2022] EWHC 1318 (Ch) [5], [23]-[24]

161 People's Energy (Supply) Ltd [2024] EWHC 1367 (Ch) [3]-[4]

162 People's Energy (Supply) Ltd [2024] EWHC 1367 (Ch) [3]-[4]

163 People's Energy (Supply) Ltd [2024] EWHC 1367 (Ch) [7]

when the financial position of the debtor company improved considerably since the administration, a Scheme was used to resolve these claims.¹⁶⁴

Two possible intersections have not yet materialized in the present English landscape of mass tort restructurings. First, no record could be found of a restructuring of competition claims in lieu of collective proceedings. That might change in the future. Second, no record could be found of a mass tort restructuring preceded by completed mass tort litigation. It is possible, for example, that an aggregate damages award in a representative action or collective proceedings exceeds the debtor's value, or that the debtor fails to satisfy its funding obligations with respect to a collective settlement because of unexpected financial problems. As the English collective action landscape further develops, debtors may try to use the Scheme or Restructuring Plan in this 'post-liability phase' as well.

4.2 Adequate representation via class voting and judicial review of voting procedure in mass tort cases

The representation dynamics under the Scheme and the Restructuring Plan fundamentally differ from the three English collective actions because of the broad and mandatory nature of the two restructuring procedures. Where collective actions require individual claimants' consent at some stage, claimants have only a quasi-exit right in the two restructuring procedures, since their ability to veto the proposal depends on the consent of their class or, where a Restructuring Plan is engaged, the consent of *other* stakeholder classes.¹⁶⁵ Further, the Scheme and Restructuring Plan may also include future claims in the restructuring.¹⁶⁶ The only requirement is that the events giving rise to the relationship between the future claimant and the debtor must have taken place at the time of restructuring, such that it is not *inherently* impossible for future claimants to cast votes at the creditor meetings.¹⁶⁷

Aside from substantive questions (discussed in §4.3 – §4.6), these immense compulsory powers of the Scheme and the Restructuring Plan raise unique representation concerns. First, mass tort claimants may lack the means to properly negotiate a

164 People's Energy (Supply) Ltd [2024] EWHC 1367 (Ch) [9]

165 T&N Ltd & Ors [2005] EWHC 2870 (Ch) [40]. There are of course additional safeguards as part of courts' fairness review in such situations; see §4.4.3 below.

166 T&N Ltd & Ors [2005] EWHC 2870 (Ch) [60]-[67]

167 See Cape Scheme, Explanatory Statement, Part 8: Asbestos-related claims outside the Scheme, nr. 13, leaving unimpaired (i) potential contribution claims of third-party employers who employ asbestos claimants after the record date of the scheme and (ii) potential financial dependency claims of persons who become family members of asbestos claimants after the record date, as it would be inherently impossible for them to vote on the scheme.

deal with the debtor (§4.2.1). Second, mass tort claimants may be given insufficient time and information to consider a deal proposed by the debtor at the voting stage (§4.2.2). Third, the group vote of a mass tort class may be unreliable due to large conflicts of interest within the class (§4.2.3). Fourth, the Restructuring Plan with its cross class cramdown provisions might now render the voting power of a mass tort class illusory (§4.2.4). All these concerns are addressed in varying ways by English courts' discretionary fairness review.

4.2.1 *Dispersed representation and varying involvement of institutional actors in mass tort cases*

The democratic principle underpinning the Scheme and Restructuring Plan that creditors are the best judges of their own commercial interests continues to apply in a mass tort context. Debtors may take advantage of this fact by proposing opportunistic deals on a take-it-or-leave-it basis, given that mass tort claimants are usually a financially unsophisticated and vulnerable creditor group. No statutory framework mandates the participation of institutional actors like class representatives, creditor committees, or court trustees to increase mass tort claimants' bargaining power. But in practice, various institutional actors are actively involved in mass tort restructurings.

In many cases, claimants will be supported in the negotiation process by various private actors. In *Cape plc*, multiple solicitor firms specialized in asbestos cases negotiated the scheme with Cape. One of those firms acted as a coordinator for four other major claimant firms while also representing several asbestos support groups.¹⁶⁸ Cape also funded the firm's costs in dealing with the scheme.¹⁶⁹ Most cases in the financial services sector, involving large numbers of consumers with small unaffordability claims and often no legal representation, have followed a different input model. In many of these cases, the debtor itself appointed a customer advocate who reported on matters related to the plan and a committee of affected consumers led by an experienced accountant.¹⁷⁰

The level of institutional support increases substantially when regulatory agencies become involved. In the financial services sector, the flood of mass restructurings prompted the FCA to issue a formal guidance outlining its concern whenever firms propose less than full redress to consumers for mass liabilities caused by misconduct,

¹⁶⁸ *Cape plc* [2006] EWHC 1446 (Ch) [12], [29].

¹⁶⁹ *Cape plc* [2006] EWHC 1316 (Ch) [12]-[14].

¹⁷⁰ See e.g., *Everyday Lending Ltd* [2023] 2097 (Ch) [29]; *Morses Club Ltd* [2023] EWHC 1365 (Ch) [19].

especially when the firm continues trading.¹⁷¹ If the FCA decides to participate in the restructuring procedure, it will conduct its own fairness review, which is broader than that of the court given the FCA's consumer protection objective.¹⁷² The FCA will consider factors like the nature and scale of the debtor's misconduct, consumers' access to information and the level of compensation afforded to consumers relative to other stakeholder groups.¹⁷³

If regulatory agencies like the FCA conclude that the proposal is unfair, the court may weigh their objections in its sanctioning decision. *Amigo* is illustrative. A majority of almost 75.000 consumers representing 95% by number and 97% by value of the class voted in favor of Amigo's Scheme.¹⁷⁴ Yet the court refused to sanction the Scheme as it accepted the FCA's submission that the deal was unfair (further discussed in §4.2.2 – §4.4.3).¹⁷⁵

Regulatory agencies in other sectors may not be as involved due to different enforcement priorities. Given the unpredictable levels of institutional support, mass tort claimants' right to vote on proposals is the most important safeguard. However, as the next paragraphs explain (§4.2.2 – §4.2.4), voting rights may provide limited protection.

4.2.2 Non-representative voting in mass tort class due to lack of effective access to voting process

Contrary to commercial creditors, a majority vote by mass tort claimants may not be representative of the whole class because of two major obstacles. First, many claimants, especially those who are not legally represented, may have insufficient time and insufficient access to comprehensible information to cast informed votes on the restructuring proposal within the tight timetable set by the debtor. Second, future tort claimants in mass personal injury cases may be incapable of sensibly voting altogether due to the inherently uncertain nature of their claims.

Courts have addressed the first risk – non-participation due to insufficient engagement – in three ways. First, the debtor must properly notify claimants of the plan documents at the convening stage. Individual notice is required where possible, often

171 FCA, Finalised Guidance: FCA's approach to compromises for regulated firms, FG22/4 (July 2022) (hereafter: "FCA Guidance"), Chapter 1, nr. 11, Chapter 3, nrs. 25-27

172 FCA Guidance Chapter 3, nr. 26, nr. 38

173 FCA Guidance Chapter 3, nr. 29

174 ALL Scheme Ltd [2021] EWHC 1401 (Ch) [64]

175 ALL Scheme Ltd [2022] EWHC 1318 (Ch) [10]

along with public notice through various media channels.¹⁷⁶ Second, courts assess at the sanctioning stage whether claimants were also given an effective opportunity to comprehend these documents.¹⁷⁷ Third, the court will consider the turn-out rate at the meeting of the mass tort class as a rough check. But this check is relatively weak. Courts generally accept low turn-out figures because mass tort claimants tend to vote in far larger numbers than ordinary creditors while the potential total size of a mass tort class is usually uncertain.¹⁷⁸

If the court is not satisfied that the statutory majority fairly represents the interests of the whole mass tort class, the court will scrutinize the fairness of the distributions proposed in the plan to a far greater degree than it ordinarily would under the rationality test. That risk materialized in *Amigo* and will be further discussed in §4.4.3.

Despite the benefits of the approach above, it may fall short for future claimants. In *Cape plc*, an overwhelming majority of over 97% by number and value voted for the scheme.¹⁷⁹ The court noted there was a high turn-out rate of 25% in terms of value, based on a benchmark estimate of total asbestos liability at £120 million.¹⁸⁰ The court appreciated this turnout because it came from many future claimants, from whom a lower turnout was expected than present claimants.¹⁸¹ But the votes cast by future claimants are arguably unreliable as they lack the foresight to make reasoned decisions about their inherently uncertain position under the proposal. Moreover, many future claimants, such as persons who lived close to Cape factories, may have been unaware of their asbestos exposure.¹⁸²

4.2.3 *Unreliability of group vote in mass tort class due to intraclass conflicts of interest*

Even when a mass tort class has sufficient time and information to vote and does so in good faith, the majority vote may be unreliable because of two conflicts of interest. First, the applicable class composition standards under the Scheme and the

176 See e.g., *Cape plc* [2006] EWHC 1316 (Ch) [10]; *People's Energy (Supply) Ltd* [2024] EWHC 1367 (Ch) [34], nr. 6, where two rounds of additional advertisements were published in various newspapers after the emergence of potential misrepresentation claims to ensure maximum reach to all potential claimants. See further below §4.2.3.

177 See e.g., *Cape plc* [2006] EWHC 1446 (Ch) [21]-[27]

178 See e.g., *AI Scheme Limited* [2015] EWHC 2038 (Ch) [9]

179 *Cape plc* [2006] EWHC 1446 (Ch) [6]-[7]

180 *Cape plc* [2006] EWHC 1446 (Ch) [23]. The court could arrive at this turnout rate because the claims were valued for voting purposes; see §4.2.3 below.

181 *Cape plc* [2006] EWHC 1446 (Ch) [19], [26]

182 See also *Cape plc* [2006] EWHC 1316 (Ch) [9]

Restructuring Plan permit the debtor to pack together broad swaths of tort claims in a single class. Second, it may be inherently difficult for mass tort claimants to have a proportionate say within their class.

The first problem, related to class composition, arises because courts conduct their assessment whether mass tort claimants' rights are so dissimilar as to make it impossible for them to consult together with a view to their common interest strictly by reference to the legal nature of their rights, rather than significant practical differences.¹⁸³ *People's Energy* is illustrative. After a hearing at which directions were sought for convening the class meetings of data breach claimants, another species of mass claims emerged: misrepresentation claims.¹⁸⁴ Some customers asserted they were promised to receive shares in one of the group companies, while other customers claimed that they would receive a share of profits in certain circumstances.¹⁸⁵ The two completely different types of mass tort claims would have likely required two separate representative actions. Nevertheless, the court found a single class appropriate for both data breach and misrepresentation claimants because all these individuals held unsecured claims in the alternative of insolvency that would benefit from the same post-scheme right to submit those claims prior to a cut-off date and thereby enter a streamlined claims resolution process.¹⁸⁶

It is uncertain to what extent courts would extend the application of these broad class composition standards to mass competition cases, considering that the statutory rules governing collective proceedings expressly provide that separate (sub-)classes may be required in dealing with these types of claims. The Guide to Proceedings of the Competition Appeal Tribunal even gives as specific example that "in cartel damages claims, different categories of purchasers may have conflicting interests that require separate representation."¹⁸⁷ Would it be possible for a Scheme or Restructuring Plan to nevertheless lump together all categories of purchasers with cartel damages claims in a single class, on the basis that such claimants all have unsecured claims which they may submit under the terms of the restructuring proposal? That remains to be seen.

Ordinary class composition standards create a particular risk in the personal injury context: present and future claims can be lumped together in one class. In *Cape plc*,

183 *Cape plc* [2006] EWHC 1316 (Ch) [32]

184 *People's Energy (Supply) Ltd* [2024] EWHC 1367 (Ch) [13]

185 *People's Energy (Supply) Ltd* [2024] EWHC 1367 (Ch) [13]

186 *People's Energy (Supply) Ltd* [2024] EWHC 1367 (Ch) [38]. Aspects related to the claims resolution process are further discussed below in §4.3.

187 CAT Guide 2015, par. 6.35

the court identified four different types of asbestos victims.¹⁸⁸ Type 1 victims were individuals with established asbestos claims. Because these claimants would be paid in full immediately after the effective date of the scheme, they were excluded from voting.¹⁸⁹ Type 2 victims were individuals who have an actionable condition for which liability was admitted by Cape, but whose damages were unquantified. Type 3 victims were individuals with actionable conditions for whom liability was not yet established. Type 4 victims were all future claimants. Cape put all claims in one class.¹⁹⁰ The court found that separate classification was not necessary because the scheme strives to pay all claims in full.¹⁹¹ The fact that Type 4 victims run a greater risk of shortfall in payment over time did not lead the court to a different conclusion, because there is no certainty of full payment for Types 2 and 3 victims either, only a greater prospect.¹⁹² Moreover, the dividing line was blurred by the fact that many Type 2 and Type 3 claimants may be entitled to elect for provisional damages awards and thereby hold Type 4 claims for the yet undetermined part of their claims.¹⁹³

Ultimately, the court allowed the scheme to designate two asbestos classes: one for claimants who may have recourse against Cape companies' insurers and one for claimants who may not call on insurance, as only the difference in insurance rights made their positions *legally* different.¹⁹⁴ This approach is extreme. While it is true that many personal injuries follow a developing pattern in which the precise results cannot be foreseen, the fair conclusion is not necessarily that all present and future claims are therefore sufficiently similar. The dividing line could be sharpened by a further distinction between (i) claimants with final awards, (ii) claimants who may elect for provisional damages, and (iii) potential claimants may or may not develop any actionable condition at all.

The second problem, related to ensuring an actual majority in value in a mass tort class, has been addressed in a more proportionate manner. Instead of extensive evidentiary hearings that could unduly delay the restructuring, debtors make use of detailed voting forms to estimate the value of mass tort claims for the purpose of voting.¹⁹⁵ In some cases, the voting protocols are straightforward. In *Amigo*, claims

188 Cape plc [2006] EWHC 1316 (Ch) [28]

189 Cape plc [2006] EWHC 1316 (Ch) [28]

190 Cape plc [2006] EWHC 1316 (Ch) [32], [37]

191 Cape plc [2006] EWHC 1316 (Ch) [32]

192 Cape plc [2006] EWHC 1316 (Ch) [40], [45], [50]

193 Cape plc [2006] EWHC 1316 (Ch) [39]-[40], [44]

194 Cape plc [2006] EWHC 1446 (Ch) [5], [23]-[24]. See also further §4.4.1 below.

195 Cape plc [2006] EWHC 1316 (Ch) [52]

were approximated based on the value of allegedly excessive amounts paid, plus interest.¹⁹⁶ More detailed protocols have been used in more complex cases. In *Cape plc*, asbestos claims were estimated for voting purposes based on their status at the time of voting. All Type 2 and Type 3 claims fell within a range of claim values for pecuniary and non-pecuniary losses, with streamlined procedures for submitting the requisite evidence.¹⁹⁷ Type 4 claims, on the other hand, were simply attributed *average* values based on the individual's history of employment and the context of asbestos exposure.¹⁹⁸

4.2.4 *Illusory voting power of mass tort class in Restructuring Plan due to interclass conflict of interest*

Even when a mass tort class has sufficient time and information to vote and does so in good faith and in a reliable manner, their voting power may possibly prove to be illusory in future cases under a Restructuring Plan. In theory, debtors can use a Restructuring Plan to override the dissent of a mass tort class when at least one in-the-money (creditor) class supports the plan. Of course, from a practical perspective, debtors may strongly wish to prevent such a scenario in order to minimize opposition by dissenting claimants at the sanctioning stage and, perhaps more importantly, to avoid reputational costs. However, it may still be in debtors' interests to use a Restructuring Plan as a tool of last resort in certain cases, especially if their plan is overwhelmingly supported by other stakeholder classes and/or a reasonable majority in the mass tort class falling short of the statutory majority of 75% in value.

A case which came close to such a cross class cramdown scenario is *Amicus*. The debtor, Amicus Finance plc, initiated a Restructuring Plan to make a solvent exit from insolvency administration. The plan would pay compensation at a discounted rate to 418 consumers who had been misold financial products by Amicus. But the consumers had made the loans to the company via peer-to-peer lending platform Crowdstacker Ltd and an associated company which acted as a security trustee.¹⁹⁹ It was unclear whether the consumer lenders behind the Crowdstacker platform retained their proprietary rights and were the actual creditors in the case. The court took a pragmatic approach and permitted Crowdstacker to vote on behalf of

196 ALL Scheme Ltd [2022] EWHC 1318 (Ch) [29]

197 Cape Scheme, Explanatory Statement, Part 6: Claims Handling and how the Scheme will be Operated, nr. 5-6

198 Cape Scheme, Explanatory Statement, Part 6: Claims Handling and how the Scheme will be Operated, nr. 6

199 Amicus Finance [2021] EWHC 3036 (Ch) [5]

all consumer lenders, except those who decided to vote themselves.²⁰⁰ Ultimately, Crowdstacker represented 417 of the 418 consumer lenders, as only one lender decided to vote in respect of its claim.²⁰¹ Crowdstacker voted against the plan. Since Crowdstacker held 49.9% of the votes in its respective class of secured creditors, the plan could only be made binding if the court decided to approve a cross class cramdown. Ultimately, the court approved a cross class cramdown after all other stakeholder classes voted in favor of the plan.²⁰² The Amicus case thereby presents an example of a rather large class of consumer creditors being bound by a restructuring deal by means of a cross class cramdown. A similar outcome might be possible in cases where mass tort claimants are the actual creditors voting on the plan.

It should also be noted that a cross class cramdown scenario in mass tort cases would not necessarily be limited to the extreme situation that other commercial creditor classes support a plan which a single mass tort class rejects. It is also conceivable for a mass tort class to be crammed down when *another* (in-the-money) mass tort class supports the plan. If courts were to address the representation problems related to broad class composition standards (as discussed above in §4.2.3) by more often designating multiple mass tort classes in future cases, the possibility of this specific cramdown scenario increases. Ultimately, the voting power of a mass tort class likely depends on courts' review of the substantive terms of a restructuring proposal (further discussed below in §4.4.3).

4.3 Claim estimation via mandatory alternative dispute resolution or other methods in mass tort cases

In a mass tort context, the Scheme and the Restructuring Plan may channel all disputed mass tort claims into a variety of alternative-dispute-resolution processes set out in the debtor's plan documents. No provision in the Companies Act or other statute gives tort claimants the unfettered right to have their claims determined in separate civil court proceedings.²⁰³ Within that vacuum, mass tort claimants' rights at law have been effectively replaced by a newly created right to submit their claims for review under the restructuring deal itself in most cases so far.

Most of the cases have followed a model where decisionmakers appointed under a Scheme assess the validity and quantum of submitted claims.²⁰⁴ Claimants are only

200 Amicus Finance [2021] EWHC 3036 (Ch) [27]-[30]

201 Amicus Finance [2021] EWHC 3036 (Ch) [30], [33]

202 Amicus Finance plc [2022] Bus LR 86 [33], [78]-[79]

203 See also People's Energy (Supply) Ltd [2024] EWHC 1367 (Ch) [52]-[53], [78]

204 ALL Scheme Ltd [2022] EWHC 1318 (Ch) [12]; Morses Club Ltd [2023] EWHC 1365 (Ch) [15]-[17]

allowed to appeal to a so-called scheme adjudicator: usually a lawyer.²⁰⁵ In *People's Energy*, the court made a general observation about mandatory alternative dispute resolution: "An inquisitorial system will be put in place instead of the adversarial system which is the norm in English proceedings."²⁰⁶ The court further stated: "that is of course an incident of the Scheme and in fact one of its purposes in order to achieve a speedy resolution of creditor claims."²⁰⁷ Alternative dispute resolution may indeed in some cases provide a beneficial and less costly alternative to full-blown collective actions or individual litigation. On a general level, this has already been recognized in collective proceedings for competition claims.²⁰⁸

However, a mandatory alternative dispute resolution process also creates two risks. First, devised settlement procedures may, depending on the case, range from moderately flexible to prohibitive due to the lack of judicial oversight. In *People's Energy*, the joint administrators who proposed the scheme would assess submitted claims in the first instance.²⁰⁹ Dissatisfied claimants could appeal against those decisions to a panel of at least two legal experts, free of charge.²¹⁰ Far more restrictive conditions applied in *Amigo*. There, claimants dissatisfied with claim assessments by SchemeCo (i.e., the debtor itself) only had the right appeal to a single scheme adjudicator and could be required to pay the costs of the adjudicator if it rejects the appeal, at its own discretion.²¹¹

Second, claimants may be unable to establish the true value of their claims if they cannot pursue legal proceedings separate from the plan administration. That risk is especially large if the settlement terms under the plan are preceded by limited discovery in collective actions, leave little room for consideration of individualized evidence by independent and court-appointed experts, or impose flat maximum values on any claims established in trial.

In theory, English courts can ameliorate these concerns by using their discretion at the sanctioning stage to require additional safeguards. In a mass tort class consisting of small claims, the appointment of a class representative to negotiate the settlement

205 See e.g., *ALL Scheme Ltd* [2022] EWHC 1318 (Ch), New Business Scheme, §4.6; *Morses Club Ltd* [2023] EWHC 1365 (Ch), Explanatory Statement, Schedule 3: Determination of Scheme Claims – Simple Overview

206 *People's Energy (Supply) Ltd* [2024] EWHC 1367 (Ch) [18]

207 *People's Energy (Supply) Ltd* [2024] EWHC 1367 (Ch) [79]

208 See *supra* §2.1.

209 *People's Energy (Supply) Ltd* [2024] EWHC 1367 (Ch) [18]

210 *People's Energy (Supply) Ltd* [2024] EWHC 1367 (Ch) [18]

211 See e.g., *Amigo Loans*, New Business Scheme, Explanatory Statement, §6.23

terms and, if negotiations fail, pursue classwide trial for claim assessment purposes could potentially be beneficial in many cases. In a class consisting of large claims, it may be more efficient to give individuals the right to opt out for claim assessment purposes, and where appropriate join claims in group litigation, possibly under the condition that settlement procedures under the plan must first be exhausted. Of course, a major complication in relation to such additional protections is that the debtor will often have insufficient funds to pay for collective actions or individual litigation running parallel to the restructuring. But in many such cases that very problem is preordained by mass tort claimants' weak entitlement to the debtor's assets (further discussed in §4.4.3).

English courts are already likely to consider the potential unfairness of mandatory alternative dispute resolution in a subset of cases which involve large claims and a relatively solvent debtor.²¹² That possibly explains the approach in *Cape plc*. Instead of a mandatory dispute resolution process, the Cape Scheme provided that a newly formed subsidiary, Cape CCS, would pay for all asbestos claims as they fall due.²¹³ While an estimate of Cape's total asbestos liability prompted its decision to restructure, individual claimants retained the right to bring legal proceedings against Cape companies to determine whether they have a claim and, if so, of what amount.²¹⁴ The Cape Scheme may only cap the payout on those claims under the terms of the scheme (discussed further in §4.4).

4.4 Claim distribution based on judicial review of proposed distributions in mass tort cases

In a mass tort context, the Scheme and the Restructuring Plan may distribute limited funds among mass tort claimants, much like collective settlements in representative actions, collective proceedings or group litigation. But contrary to collective actions, settlement is now mandatory and subject to a distinct fairness review. This section will discuss the most important fairness considerations, whether statutory or non-statutory, in an order that corresponds to the level of distribution. The minimum requirement applicable at the individual level is that claimants must be no worse off than in the relevant alternative (§4.4.1). At the class level, there must be equitable distribution among claimants themselves (§4.4.2). At the inter-class level,

212 See also *People's Energy (Supply) Ltd* [2024] EWHC 1367 (Ch) [84], considering the claims adjudication process to be fair in the case at hand, in part because of the size of the claim amounts likely to be involved.

213 *Cape plc* [2006] EWHC 1446 (Ch) [3]

214 Cape Scheme, Explanatory Statement, Part 6: Claims Handling and how the Scheme will be Operated, nr. 4

the restructuring surplus must be fairly distributed between the mass tort class and other stakeholder classes (§4.4.3). On a general level, implementation of the proposal must be feasible (§4.4.4). Lastly, mass tort claims may be subject to certain net deductions (§4.4.5).

4.4.1 Vertical comparison analyses as minimum safeguard for mass tort claimants

The fundamental requirement that no creditor should be worse off under the restructuring proposal – reflected in both the rationality test and the criteria for a cross class cramdown under the Restructuring Plan – provides a minimum safeguard against undercompensation in the mass tort context.²¹⁵ In all these cases, courts must be satisfied that individual claimants receive no less than they would receive in the most likely alternative scenario.

When the debtor is already insolvent, a liquidation procedure is usually the correct comparator.²¹⁶ *Morses Club* offers an example. The proposed scheme would pay compensation at a discounted rate to consumers while Morses Club would continue operating.²¹⁷ The estimated recovery for claimants was 20%.²¹⁸ By contrast, the expected recovery in insolvency administration was 1 – 3%.²¹⁹ The FCA expressed concerns that claimants might be worse off if the scheme becomes effective but terminates before Morses Club receives the appropriate funding.²²⁰ The scheme was therefore amended to address that concern through the use of ‘early termination funding’: reserved funds equal to claimants’ minimum recovery if Morses Club went into an immediate administration.²²¹

When the debtor is solvent at the time of the restructuring, the relevant comparator is a continuation of the debtor as a going concern.²²² In *Cape plc*, it was expected that the Cape Group would continue trading and meet claims for as long as it can properly do so. Under the scheme, asbestos claimants could only enforce their claims against a ring-fenced fund administered by Cape CCS. The scheme sought to safeguard claimants’ position in two ways. First, the scheme created ongoing funding

215 See regarding the rationality test, *ALL Scheme Ltd* [2021] EWHC 1401 (Ch) [49].

216 *T&N Ltd & Ors* [2006] EWHC 1447 (Ch) [87]

217 *Morses Club Ltd* [2023] EWHC 1365 (Ch) [44]-[46]

218 *Morses Club Ltd* [2023] EWHC 1365 (Ch) [15]

219 *Morses Club Ltd* [2023] EWHC 1365 (Ch) [46]

220 *Morses Club Ltd* [2023] EWHC 1365 (Ch) [46]

221 *Morses Club Ltd* [2023] EWHC 1365 (Ch) [47]-[48]

222 *T&N Ltd & Ors* [2006] EWHC 1447 (Ch) [87]

obligations for Cape. An initial amount of £40 million would be injected into a scheme fund.²²³ If a three-yearly actuarial review, starting in 2008, would reveal a shortfall between the scheme fund and the funding required to pay all projected asbestos claims not covered by insurance over the following nine years, Cape is obligated to top up the funding.²²⁴ An important limitation is that Cape is not obligated to pay more than 70% of the Cape Group's consolidated adjusted operational cashflow each year.²²⁵ Some financial advisors of asbestos claimants voiced their concerns that the directors of Cape could manipulate this cashflow-based formula in order to limit Cape's top-up obligations.²²⁶ But the court reasoned that, while delay of payment was conceivable for a single year, delay would be very difficult to uphold for longer time periods if the business is consistently generating cashflows without a flagrant manipulation of working capital levels.²²⁷

Second, the scheme also included 'trigger-event' provisions to safeguard the position of the class of asbestos claimants who would be entitled to claim compensation directly from Cape's insurers if a Cape company were to become insolvent and liquidated. Where the payment percentage for each claim under the scheme falls below 100%, the scheme could prejudice this class of claimants by preventing them from forcing a Cape company to pay their claims or become insolvent.²²⁸ The scheme therefore automatically releases these claimants from their agreement not to enforce payment against a Cape company if the Cape company is insolvent while claimants may also decide to opt for such a release if the payment percentage falls below certain thresholds under the scheme.²²⁹

Beyond the group litigation context in *Cape plc*, the initiation or continuation of other collective actions such as representative actions or collective proceedings might also qualify as a relevant comparator in future cases. Such comparators will be realistic when the debtor is still solvent and *may* have enough liquidity to resolve all

223 Cape Scheme, Explanatory Statement, Part 1: Letter from the Chairman of Cape, nr. 7

224 Cape Scheme, Explanatory Statement, Part 3: Summary of the Proposals Envisaged by the Scheme, nrs. 4, 11.

225 Cape Scheme, Explanatory Statement, Part 3: Summary of the Proposals Envisaged by the Scheme, nrs. 4, 11.

226 Cape plc [2006] EWHC 1446 (Ch) [14]

227 Cape plc [2006] EWHC 1446 (Ch) [15]

228 Relevant background information here is that the Third Parties Act 1930 provides for the automatic transfer of a company's rights against its insurers to claimants upon certain insolvency events happening to the company.

229 Cape Scheme, Explanatory Statement, Part 5: Recourse Scheme Claims, nr. 1

anticipated mass tort claims in the short, medium or long term outside of a restructuring, via settlement or trial(s).

4.4.2 *Similar intraclass treatment of mass tort claimants as corollary requirement of rationality test*

The corollary requirement under the rationality test that value must be distributed equitably among creditors in the same class is difficult to ensure in a mass tort context. An important tool employed in many cases is a cut-off date for submitting eligible claims.²³⁰ In *Amigo*, claimants had to submit their claims within a six-month period after the effective scheme date or lose their right to compensation.²³¹ Settlements in collective actions usually adopt similar cut-off dates. But cut-off dates are designed with present claimants in mind, not future claimants.

In *Cape plc*, future claimants may be paid less than present claimants as a result of potential changes in the future, ranging from deterioration of Cape's trading performance to a continued increase in the number of asbestos claims or in the value of those claims. The scheme contains various provisions to properly deal with such developments.²³² Cape CCS would be supervised by an independent trustee, who must consent to transactions outside of normal business operations.²³³ Furthermore, the trustee had the right to appoint two directors to the board of Cape CCS to represent claimants' interests.²³⁴ Only the two scheme directors are entitled to vote on adjustment of the payment percentage for each asbestos claim or criteria on the basis of which the scheme fund will be invested for the benefit of all claimants.²³⁵ An important future development not contemplated by the scheme was the acquisition of Cape plc in 2017 by the French conglomerate Altrad for £332 million. Since the takeover by Altrad, Cape CCS has continued meeting claims while setting aside roughly £100 million for future claims. It is unclear whether these extra funds are insufficient or, conversely, more than necessary.²³⁶ Ultimately, it remains to be seen

230 People's Energy (Supply) Ltd [2024] EWHC 1367 (Ch) [16]

231 *Amigo*, New Business Scheme, §4.5 (Determination of Scheme Claims)

232 *Cape plc* [2006] EWHC 1446 (Ch) [31]-[32], [55]-[56], [73]

233 *Cape Scheme*, Explanatory Statement, Part 4, nr. 6.2(B)-(C)

234 *Cape Scheme*, Explanatory Statement, Part. 4, nr. 6.2(E)

235 *Cape Scheme*, Explanatory Statement, Part 1, nr. 7

236 See for more details, Secretariat, All-Party Parliamentary Group on Occupational Safety and Health Hearing Monday 24th March, Evidence provided by Peter Gartside (<https://www.appgosh.org/post/evidence-public-hearing-on-legacy-of-cape-asbestos>). Peter Gartside expressed his doubt as to whether Cape CCS will incur, as Altrad had stated, a further liability of £70 million under the Cape Scheme, noting that "the level of claims is now believed to be at its peak and many of the potential claimants are in the 60-80 plus age group"; see *Id* at par. 4.

whether the scheme will succeed in equitably paying all present and future asbestos claims.

4.4.3 *Distribution of restructuring surplus based on three possible levels of fairness review*

The protection provided to a mass tort class by vertical comparisons is the bare minimum. The most important question is how the debtor's upside value, over and above the relevant alternative, should be divided between a mass tort class and other stakeholder classes. In the controlled liquidation of UK-based manufacturer group T&N Ltd, the court not only had to decide how funds should be divided among present and future asbestos claims, but also how much money should go to a pension fund for the benefit of thousands of employees.²³⁷ Similar interclass competition may also arise in mass tort restructurings where the debtor continues trading. But in that context, claims of unsecured creditor classes like employees and trade creditors are usually left unimpaired to ensure continued business operations. Instead, the main priority dispute in practice is whether the class of shareholders, who would rank below mass tort claimants in insolvency, may retain interests in the debtor going forward. Present case law shows that courts may address such distribution questions based on three distinct levels of fairness review.

4.4.3.1 First level: flexible rationality test in case of a fair statutory majority in mass tort class

The first level of fairness review applies when a statutory majority being fairly representative of the mass tort class approves the proposal. The court will then only apply the rationality test.²³⁸ In that event, it is possible for shareholders to capture the lion's share of the restructuring surplus. In *Cape plc*, the scheme did not give asbestos claimants any of the equity in Cape. Nevertheless, the court considered Cape had two strong incentives to pay asbestos claims in full. First, Cape is only permitted to pay dividends when Cape CCS is funded in a sufficient amount to resolve anticipated claims over the following six years.²³⁹ Moreover, the payable dividends in any financial year may not, without the consent of a scheme trustee, exceed certain limits defined under the scheme.²⁴⁰

237 T&N Ltd & Ors [2005] EWHC 2870 (Ch) [22]

238 ALL Scheme Ltd [2022] EWHC 1318 (Ch) [51]-[52]

239 Cape plc [2006] EWHC 1316 (Ch) [16]-[20]

240 See for details, Cape plc [2006] EWHC 1316 (Ch) [20]

Notwithstanding the flexibility of the rationality test, courts may refuse to sanction proposals which offer an extremely limited return to a mass tort class. This became clear in *Provident*. In that case, Provident Personal Creditor and Greenwood Personal Credit proposed a scheme which would create a compensation fund of £50 million for a class comprising potentially millions of consumers with unaffordability claims.²⁴¹ The fund was based on a contribution by the parent company, Provident Finance plc, which sought to retain its stake in the debtors going forward. The FCA criticized the scheme because the total liability could potentially be £3.6 billion.²⁴² That made the return for the consumer class lie possibly as low as 1.38%, depending on how many consumers advance their claims.²⁴³ In the alternative of insolvency administration there would be less recovery, as preferential creditors' claims would swamp all the assets.²⁴⁴ Nevertheless, the court noted at the convening hearing that it perceived a potential "road block" in the way of scheme approval, as the consumer class may "suffer a headline reduction in their claims of some £3.5 billion" while shareholders would take the entire benefit of the debtors' ongoing profits.²⁴⁵ Ultimately, the debtors amended the scheme to provide for a controlled liquidation.²⁴⁶ The court approved the new scheme as shareholders no longer retained their interests at consumers' expense.²⁴⁷

4.4.3.2 Second level: judicial scrutiny in case of an unfairly achieved statutory majority in mass tort class

The second level of fairness review applies when the statutory majority is unfairly representative of the mass tort class. The court will then no longer conduct a rationality test.²⁴⁸ *Amigo* is illustrative. The initially proposed scheme would establish a compensation fund for consumers based on an initial amount of £15 million, a second amount up to £20 million as allowed claims were made, and finally an amount equal to 15% of Amigo's annual consolidated profits before tax for the subsequent four years.²⁴⁹ That translated to an expected return of 10%.²⁵⁰ The court did not defer to the majority vote because it found the class was improperly consulted. It stressed that the vast majority of creditors comprised financially vulnerable people with low

241 *Provident SPV* [2021] EWHC 1341 (Ch) [16]

242 *Provident SPV* [2021] EWHC 1341 (Ch) [44]-[46]

243 *Provident SPV* [2021] EWHC 1341 (Ch) [19]

244 *Provident SPV Ltd* [2021] EWHC 1341 (Ch) [12]-[13]

245 *Provident SPV Ltd* [2021] EWHC 1341 (Ch) [42]-[44]

246 *Provident SPV Ltd* [2021] EWHC 2217 (Ch) [5], [8]

247 *Provident SPV Ltd* [2021] EWHC 2217 (Ch) [35], [50]-[51]

248 *ALL Scheme Ltd* [2022] EWHC 1318 (Ch) [52]

249 *ALL Scheme Ltd* [2021] EWHC 1401 (Ch) [27]

250 *ALL Scheme Ltd* [2022] EWHC 1318 (Ch) [7]

levels of financial literacy who were provided deficient information about the alternatives open to them.²⁵¹ Instead of paying for lawyers, financial experts or committees to advise the consumers, Amigo presented the scheme on a take-it-or-leave-it basis as the only alternative to insolvency administration, where claimants would receive nothing.²⁵² In light of these concerns, the court also considered the turnout of less than 9% of the total potential class by number to be problematic.²⁵³

Because the rationality test did not apply under those circumstances, the court proceeded to scrutinise whether the scheme allocated the restructuring surplus fairly among the consumer class and the class of shareholders, who were allowed to retain their equity interests. Amigo contended that the allocation was reasonable, as the recovery for consumers would be nil in the alternative of insolvency administration. The court rejected that contention, ruling that Amigo had not justified why merely 15% of the future earnings over four years were to be paid to the fund.²⁵⁴ Crucially, the FCA had brought to the court's attention that shares in the parent company had increased in value by more than 250% since Amigo announced its intention to propose the scheme.²⁵⁵ The court agreed with the FCA that Amigo had reasonable time to come up with a new restructuring proposal on improved terms.²⁵⁶

After renewed negotiations, Amigo came back with two alternative schemes, one premised on Amigo continuing trading ("new business scheme") and the other on Amigo being liquidated ("wind-down scheme").²⁵⁷ This time, a customer committee was appointed to assist in the negotiation process.²⁵⁸ The new business scheme would dilute shareholders' equity from 100% to 5%, offering an expected return of 41% to claimants instead of 10%.²⁵⁹ Because the new scheme would be funded by a share issue to new investors, the upside value would largely go to them.²⁶⁰ The new proposal was approved by the customer committee, which prioritized certain and speedy distribution over an equity stake or profit share over a period of years.²⁶¹ The

251 ALL Scheme Ltd [2021] EWHC 1401 (Ch) [104]-[105]

252 ALL Scheme Ltd [2021] EWHC 1401 (Ch) [106]-[109], [134]

253 ALL Scheme Ltd [2021] EWHC 1401 (Ch) [113]-[117], [138]

254 ALL Scheme Ltd [2021] EWHC 1401 (Ch) [134]-[135]

255 ALL Scheme Ltd [2021] EWHC 1401 (Ch) [72]

256 ALL Scheme Ltd [2021] EWHC 1401 (Ch) [85]-[86], [90]-[92], [132], [143]

257 ALL Scheme Ltd [2022] EWHC 1318 (Ch). The new business scheme also included a "Fallback Solution" in case certain conditions were not met; this option is essentially the same as the wind-down scheme; *Id* at [37]-[38].

258 ALL Scheme Ltd [2022] EWHC 1318 (Ch) [64]

259 ALL Scheme Ltd [2022] EWHC 1318 (Ch) [12]-[13], [16]-[18]

260 ALL Scheme Ltd [2022] EWHC 1318 (Ch) [66]

261 ALL Scheme Ltd [2022] EWHC 1318 (Ch) [66]

turnout rate was 15%, higher than under the previous scheme.²⁶² Having regard to these improved terms, the court approved the new scheme.²⁶³

4.4.3.3 Third level: judicial scrutiny in case of a dissenting mass tort class under the Restructuring Plan

A third level of fairness review may be triggered in future cases under the Restructuring Plan when a mass tort class does not achieve a statutory majority in the first place. In theory, mass tort claimants could be forced to accept marginal amounts above their recovery in the relevant alternative, especially if they are deemed out of the money. There is no US-style statutory priority rule in place that protects mass tort claimants' entitlement to the restructuring surplus as a class of unsecured creditors. However, considering the judicial scrutiny applied in *Amigo* in the context of an unfairly achieved statutory majority, a similar approach would likely also apply if the court were to assess whether proposed distributions are 'just and equitable' in relation to a dissenting mass tort class.

It can also be inferred from *Amicus Finance* that courts would take a highly critical stance in a cross class cramdown scenario. In response to Crowdstacker's contention that the deal was unfair, the court noted it "previously expressed some sympathy with this view when considering schemes for the compromise of compensation claims against a company, where it is those who have been wronged by the company who sacrifice their redress to enable the wrongdoing company to be rescued for the benefit of its shareholders", referring to *Provident*.²⁶⁴ But the court reasoned the *Amicus* case was very different because of the commercial context.²⁶⁵ The court approved the plan based on various factors, including the statutory majorities achieved in other classes, the satisfaction of the rationality test in each of those classes and the fact that even in the dissenting class there was a simple majority in favor of the plan. But most notably, the court pointed to the acceptance of credit risk by Crowdstacker as professional lender and doubted whether the opposition by Crowdstacker was truly reflective of the wishes of consumers who had the real economic interest in the loans.²⁶⁶ By this reasoning, the level of judicial scrutiny increases substantially when a dissenting mass tort class actively opposes the restructuring by the debtor.

262 ALL Scheme Ltd [2022] EWHC 1318 (Ch) [50]

263 ALL Scheme Ltd [2022] EWHC 1318 (Ch) [67]

264 *Amicus Finance plc* [2022] Bus LR 86 [45]

265 *Amicus Finance plc* [2022] Bus LR 86 [45]

266 *Amicus Finance plc* [2022] Bus LR 86 [78]

But regardless of how courts precisely apply their fairness review, mass tort claimants' weak priority status as unsecured creditors in the relevant alternative sets an outer limit on the protection they stand to receive. First of all, higher-ranked creditors are generally paid before mass tort claimants. In *Amigo* and *Morses Club*, for example, the fact that secured bondholders were to be paid in full before any of the consumers was not in dispute. Furthermore, the current operation of the just and equitable rule makes it unlikely for courts to sanction plans which would allocate surplus value to a mass tort class at the expense of higher-ranked creditors (a 'cram up'). Unlike common grounds for priority departures – such as new value and critical employees or trade creditors – a departure in favor of mass tort claims will usually not yield some additional benefit to achieving a restructuring.

If one would like to provide more solid protection to mass tort claimants in restructurings, legislation is probably necessary to upgrade the priority status of tort claims. The basic idea behind an upgrade in priority would be that (mass) tort claimants should have some form of (super-)priority because they are involuntary *and* non-adjusting creditors. Of course, this policy approach raises questions as to whether further distinctions should be made within the very broad category of (mass) tort claimants itself. To give an example, should a class of SMEs with mass competition claims that were largely passed on to consumers receive the same priority status as a class of asbestos claimants suffering from mesothelioma? Instrumental fairness considerations are probably required to answer such policy questions. Beyond the nature of the damage, important factors to be considered in designing a multi-layered priority system for (mass) tort claims may include the nature and severity of the wrongful conduct by the debtor that gave rise to the tort claims and the financial vulnerability of the (mass) tort class in the case at hand.

An upgrade in priority for mass tort claimants could be achieved in two ways. The first and easiest way would be to give tort claimants a higher ranking in all liquidation and restructuring procedures.²⁶⁷ A second possible way is to provide (mass) tort claimants *de facto* priority in restructuring procedures by making their claims non-dischargeable in case of restructuring proposals or pre-packaged going concern sales. The legal route of giving *de facto* priority to certain types of creditors in restructurings through non-dischargeability rules was adopted in the seminal US Chapter 11

267 See e.g. in the context of Chapter 11 mass tort bankruptcies, Casey, A.J. & Macey, J.C., In Defense of Chapter 11 for Mass Torts, 90 U. CHI. L. REV. 973 (2023), p. 1011-1012, noting that “[a]n effort to make nonadjusting creditors better off could start by giving tort claimants priority over other claimants”, based on references to several notable proposals by US scholars in the past four decades.

case of *Apex Oil* as to public environmental claims.²⁶⁸ There is an increasing academic debate in the US and other jurisdictions about the policy question whether mass tort claims should (also) be non-dischargeable in corporate restructurings.²⁶⁹ But this debate is still in a very preliminary phase in the UK.²⁷⁰

4.4.4 *Feasibility test as uncertain final check in the mass tort context*

In a mass tort context, the inquiry whether there is some blot or defect in the Scheme or Restructuring Plan boils down to whether the debtor is capable of paying the mass claims in the manner that its crafted deal provides. In theory, that should be the case when the deal itself sets aside a capped amount for paying the claims. However, even a case in which the debtor caps its liability may spiral into insolvency. The most notable example is *Morses Club*. The approved scheme failed only a few months after

268 See Ohlrogge, M., Bankruptcy Claim Dischargeability and Public Externalities: Evidence from a Natural Experiment' in American Law and Economic Review, Available on https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3273486. See for details on facts of the case, Appendix C.2.

269 Non-dischargeability rules are more extreme than priority rules, as they do not leave room for a cram down in the mass tort class itself, let alone a cross class cramdown. While these rules operate like super-priority rules where the total value of mass tort claims is limited, these rules may jeopardize a restructuring altogether if mass tort claims exceed the expected value of a debtor. However, non-dischargeability also offers benefits relative to (super-)priority rules in mass tort cases, given the claim valuation uncertainties that plague these cases. See in this regard elaborately, Buccola, V.S.J. & Macey, J.C., Claim Durability and Bankruptcy's Tort Problem, 38 Yale J. REG 766 (2021), exploring the benefits and drawbacks of non-dischargeability in the context of Chapter 11 mass tort bankruptcies. See further, The Netherlands Association for Comparative and International Insolvency Law (NACIIL) Reports 2024, The 'Insolvent Polluter Still Pays' Principle?, Den Haag: Eleven International Publishing 2024 (hereafter: "NACIIL Reports 2024"), Ohlrogge, M., 'Environmental Claims in Bankruptcy: Dischargeability, Priority, and Other Policy Responses', §2.3, considering priority for environmental claims to be a preferable option to non-dischargeability. Finally, see in the context of Dutch restructuring law, NACIIL Reports 2024, Jonkers, A. and De Weijs, R. 'Preventing environmental bail outs: Environmental liabilities and (non)-inclusion and (non)-dischargeability under WHOA', §3.3, arguing that environmental claims and (mass) tort claims are not dischargeable and that, at any rate, such claims should not be bound by the application of a cross class cramdown.

270 See e.g., The Netherlands Association for Comparative and International Insolvency Law (NACIIL) Reports 2022, Third Party Releases by Means of Bankruptcy Law Guarantees and (Mass) Tort, Den Haag: Eleven International Publishing 2023, Mokai, R., 'Third-Party Releases in English Restructuring Law', p. 36-37, noting the protections afforded to mass tort claimants pursuant to Article 1 of the First Protocol to the European Convention on Human Rights in the context of nonconsensual third-party releases. That analysis is insightful, not least because other facets of mass tort restructurings must also satisfy (other) constitutional rules. For example, an unfair voting process or unreasonable mandatory claims resolution process imposed by the restructuring may violate the right to a fair trial under Article 6 of the European Convention on Human Rights. However, most mass tort restructuring cases in practice likely already provide mass tort claimants the minimum level of constitutional protection. Beyond the constitutional minimum, mass tort restructurings implicate many significant policy questions, including whether and the extent to which (mass) tort claims should have higher priority status.

implementation due to an unexpected increase in the number of unaffordability claims and the inability of *Morses Club* to refinance its debts.²⁷¹ *Morses Club* was forced to file for administration, where mass tort claimants were only able to share in the early termination funding. The anticipated distribution is not more than 0.9%, as the total expected claims are in excess of £130 million.²⁷²

Remarkably, debtors have been able to artificially satisfy the feasibility test in other cases by accounting for implementation failures through the simultaneous offering of a fallback liquidation plan. In *Amigo*, the fallback scheme was used after the group failed to secure the necessary investment for the new business scheme.²⁷³ An unexpected surge in claims made the expected recovery of 33% under the fallback scheme drop further to 17%.²⁷⁴

4.4.5 *Net claim distribution in Scheme and Restructuring Plan in the mass tort context*

Mass tort restructurings may entail considerable legal costs for many parties involved. First, the debtor may incur costs to hire professionals in initiating and implementing the restructuring. Second, the fees of involved solicitor firms or claims management companies will be deducted from the final claim amounts owed by the debtor to claimants. However, unlike English collective actions, the Scheme and Restructuring Plan normally do not create a large set-aside for litigation funders. In theory, the absence of third-party funding may facilitate higher net recoveries for claimants in mass tort restructurings. In *People's Energy*, the court noted that data breach and misrepresentation claimants had quick and cheap access to the scheme funds, as they did not need to engage solicitors, incur court fees, and were not at risk to pay potential adverse costs.²⁷⁵ Ultimately, it is difficult to assess whether the Scheme and Restructuring Plan generate higher or lower net recoveries for mass tort claims than English collective actions, since no empirical research has yet compared their distribution frameworks. It is also unlikely for such research to be feasible at this present stage. There is a very limited number of mass tort cases that have reached a distribution phase in class settlements or trials under English representative actions or collective proceedings, whilst the terms of most opt-in settlements reached in group litigation are not made public.

271 <https://www.ia-insolv.com/case+interpath+MNB15F4337.html>

272 <https://www.ia-insolv.com/case+interpath+MNB15F4337.html>

273 <https://www.independent.co.uk/business/lender-amigo-to-wind-down-after-failing-to-secure-cash->

274 Compare ALL Scheme Ltd [2022] EWHC 1318 (Ch) [16]-[18] to <https://www.amigoscheme.co.uk/>.

275 *People's Energy (Supply) Ltd* [2024] EWHC 1367 (Ch) [18], [49]

4.5 Resolution of third-party liabilities via nonconsensual releases and other methods in mass tort cases

The pressing need for a comprehensive resolution of mass tort claims does not disappear in a restructuring. Various third parties may be liable for claims that can be asserted against a restructuring debtor. In many cases, debtors have resolved such third-party liabilities by using nonconsensual non-debtor releases (§4.5.1). Through the lense of Lehman necessity doctrine, two types of mass liabilities are usually targeted: liabilities that give rise to ricochet claims and liabilities that cannot give rise to ricochet claims but in respect of which a release is nonetheless deemed necessary to make the arrangement between the debtor and creditors effective. However, releases are not the only way to resolve non-debtor liabilities which may give rise to ricochet claims. There are two lighter alternatives: a restructuring of ricochet claims (§4.5.2) and third-party litigation deed polls (§4.5.3).

4.5.1 Nonconsensual non-debtor tort releases based on Lehman necessity doctrine

The two variants of nonconsensual non-debtor releases in mass tort cases work differently. The first variant, involving a release of mass tort claims which may give rise to ricochet claims, can be directly applied or integrated in a deed poll structure. In *People's Energy*, the debtor's scheme directly released data breach and misrepresentation claims against both the debtor and its parent company.²⁷⁶ But most cases involve deed poll structures in which a special purpose vehicle assumes the mass tort liabilities of the actual business debtors.²⁷⁷ In *Amigo*, the scheme was proposed by an SPV called SchemeCo that assumed joint liability alongside Amigo Loans Limited, Amigo Holdings PLC, and other group entities. In exchange for the provided funding, the scheme released the mass unaffordability claims against these group entities, as well as their directors and employees.²⁷⁸

The second variant, related to claims which cannot give rise to ricochet claims, does not protect the restructuring itself but simply enhances the assets available for distribution. Insurance claims are the most important example to date. In *T&N*, the insurers of the T&N group contested their liability under the policies to asbestos claimants. The schemes proposed by the T&N group therefore included a lump sum settlement under which the insurers agreed to pay a substantial sum into trust in

276 *People's Energy (Supply) Ltd* [2024] EWHC 1367 (Ch) [17], [62]-[63]

277 *Morses Club Ltd* [2023] EWHC 1365 (Ch) [2], [13]-[14]

278 *ALL Scheme Ltd* [2022] EWHC 1318 (Ch) [69]; *Wind Down Scheme*, Schedule 2, §2.1

exchange for a release of their liabilities.²⁷⁹ Similarly, in *People's Energy*, the scheme not only released the debtor's parent company of joint liability, but also an insurer's liability under the policies in exchange for a lump sum payment.²⁸⁰ Courts approve these type of releases when they are necessary to give effect to the *proposed* restructuring deal rather than for a successful restructuring per se.²⁸¹

4.5.2 *Restructuring of ricochet claims in the Scheme or Restructuring Plan itself*

An important alternative to nonconsensual non-debtor releases in the context of claims which may give rise to ricochet claims is to simply include potential ricochet claims in the Scheme or Restructuring Plan. This strategy was deployed in *Cape plc*. The Cape Scheme targeted contribution claims from third-party employers (and their insurers) which may be successfully brought against the Cape companies in the future if those third parties had to pay for asbestos claims in excess of their own proportion of liability.²⁸² Vice versa, the scheme also preserved Cape's own right to assert contribution claims against other asbestos defendants, most notably T&N Ltd.²⁸³

4.5.3 *Third-party litigation deed poll as contribution reduction mechanism in a restructuring context*

A third-party litigation deed poll offers yet another approach. Instead of a nonconsensual release, which eliminates claims against non-debtors, or a restructuring of ricochet claims, which limits non-debtors' recourse, this structure reduces claims against non-debtors to the extent that the debtor would be liable to pay ricochet claims. This contribution reduction mechanism is similar in nature to the use of barring provisions in partial settlements under collective proceedings for competition claims. It was used in *Link Fund Solutions*. Link Fund Solutions Limited proposed a scheme resolving approximately 250.000 investor claims arising from its alleged failure in managing the LF Woodford Equity Income Fund, including over 20.000 pending group

279 T&N Limited and Others [2006] EWHC 1447 (Ch) [52]

280 *People's Energy (Supply) Ltd* [2024] EWHC 1367 (Ch) [62]-[63]. The insurance settlement was confidential.

281 See in this regard e.g., *T&N Limited and Others* [2006] EWHC 1447 (Ch) [38]

282 Cape Scheme, Explanatory Statement, Part 2: Background to the Scheme, nr. 2(c). The contribution claims are only left unaffected if the employee is exposed to asbestos wholly after the record date; see supra n. 217.

283 Cape Scheme, Explanatory Statement, Part 4: The Ancillary Agreements and the Scheme Shares, nr. 4; T&N [2006] EWHC 1447 (Ch) [24]

claims.²⁸⁴ The scheme provided all claimants a share in a lump sum settlement up to £230 million while allowing claimants to pursue litigation against unaffiliated third parties.²⁸⁵ However, as those third parties might bring contribution claims against the debtor, the scheme put in place a third-party litigation deed. The deed established a trust over successful claims which may result in contribution claims against the debtor. The proceeds of those claims were applied in accordance with a waterfall: first the escrow costs; second any amount owing under a litigation funding agreement; third, the debtor, up to the amount of any established contribution claim; and fourth, the balance, to the relevant claimants.²⁸⁶

4.6 Limited consideration of non-monetary interests in practice in mass tort cases

The focus in all mass tort restructurings to date has been on the speedy provision of compensation to mass tort claimants. There has been very little room for promoting non-monetary interests alongside compensatory relief.

Cape plc is illustrative. The scheme allowed Cape to maximize its value, which enhanced its ability to compensate asbestos victims. But the scheme did not provide transparency about Cape's conduct, nor injunctive remedies by way of compromise. When South African claimants sought group litigation before the House of Lords, the South African government intervened and submitted that Cape accepted the discriminatory health and safety laws of the old apartheid regime, which left South African workers unprotected, to increase its profits.²⁸⁷ When Cape initiated a scheme to resolve English asbestos claims a few years later, the UK government did not intervene. But in 2023, as Britain witnessed the world's highest rate of mesothelioma deaths with around 2,500 deaths per year, members of Parliament urged Cape, now part of the Altrad group, to make a £10 million donation towards mesothelioma research.²⁸⁸ In March 2025, a public hearing was held by the All-Party Parliamentary Group on Occupation Safety and Health, in which asbestos lawyers, medical experts, and the former director of Cape presented evidence on the asbestos legacy

284 Link Fund Solutions Limited [2024] EWHC 250 (Ch) [8]. Notably, a group litigation order was denied for the pending mass claims because general case management powers were deemed sufficient in the case at hand; *Edward Moon and Ors v. Link Fund Solutions* [2022] EWHC 3344 (Ch) [86]-[88].

285 Link Fund Solutions Limited [2024] EWHC 250 (Ch) [9]

286 Link Fund Solutions Scheme, Explanatory Statement, Part 5: How does the Scheme Work? Third-Party Litigation Deed, nrs. 52-54. There were various (potential) objections to the use of such a mechanism, but in the case at hand these were not significant; *Link Fund Solutions Limited* [2024] EWHC 250 (Ch) [79]-[82], [122].

287 Meeran (2003), p. 221

288 <https://www.theguardian.com/uk-asbestos-firm-owners-accused-whitewashing-reputation-altrad>

of the Cape Group and urged Altrad to make the £10 million donation towards mesothelioma research.²⁸⁹ Cape had become subject to much public scrutiny after court documents originating from past litigation brought against Cape on behalf of employers' insurers were disclosed. These documents indicated Cape deliberately withheld information on the risks of asbestos in the past while lobbying the British government to weaken protective regulations.²⁹⁰ The Asbestos Victims Support Groups Forum got access to the documents by pursuing legal proceedings all the way to the Supreme Court.²⁹¹ After Altrad received a £30 million public contract for asbestos removal in 2023, the Chair of the Forum summarized the Cape controversy succinctly: "A generation ago, Cape profited from asbestos. Today, Altrad is being given taxpayer money for asbestos removal."²⁹²

In *People's Energy*, the court explicitly considered the risk of corporate misconduct being swept under the rug through a restructuring. One objecting data breach claimant made the assertion that he was enrolled as a customer with the debtor and that his bank details were obtained to set up direct debit arrangements with his bank, without his consent or even his awareness.²⁹³ The court found the assertion to be unsettling and flagged the risk that debtors and related parties may have a key interest in turning a mass tort case into a private and non-adversarial matter of corporate restructuring.²⁹⁴ However, the court sanctioned the scheme as it was satisfied that the fiduciary duties of the joint administrators to the claimant and the claimant's right to complain about their conduct of the administration, without being bound to any non-disclosure arrangements as to reported potential criminal activity, offered enough protection.²⁹⁵ It remains to be seen to what extent courts will adopt more scrutiny in future mass tort restructuring cases where the debtor is in charge of the proceedings, outside of insolvency administration.

5. Conclusion

In England and Wales, collective redress procedures and corporate restructuring procedures are usually initiated and concluded in two separate worlds. However,

289 <https://www.leighday.co.uk/parliamentary-group-examines-legacy-of-cape-plc/>

290 <https://www.leighday.co.uk/asbestos-victims-support-forum-reveals-cape-knew-dangers-of-asbestolux/>

291 <https://www.leighday.co.uk/asbestos-victims-support-forum-reveals-cape-knew-dangers-of-asbestolux/>

292 Asbestos Victims Support Group Forum, Open Letter to Prime Minister, 21st July 2023

293 *People's Energy (Supply) Ltd* [2024] EWHC 1367 (Ch) [69]-[70]

294 *People's Energy (Supply) Ltd* [2024] EWHC 1367 (Ch) [69]-[70]

295 *People's Energy (Supply) Ltd* [2024] EWHC 1367 (Ch) [73]-[74], [80]-[82]

in some mass tort cases, the two fields of law may intersect. That intersection is, in essence, an intersection of the collective action problems that these laws are designed to address.

Representative actions, collective proceedings and group litigation aim to resolve at least one of the following two collective action problems: limited access to justice for persons with small claims on the one hand, and illusory access to justice for persons who may pursue large claims individually on the other. The presence of severe personal injury exacerbates the latter problem, since delay of compensation could cause mass tort claimants to incur irreversible injury at a rapid rate. The legal frameworks of representative actions, collective proceedings and group litigation are not without their flaws but ultimately aim to strike a balance between individualized and collective justice. It also remains to be seen how collective proceedings and representative actions will exactly strike this balance, as collective proceedings are still at a nascent stage while the modern representative action may possibly be applied more flexibly in future mass tort cases.

By contrast, the Scheme and the Restructuring Plan aim to resolve a specific collective action problem, namely hold-out behavior. The aim is to prevent a bargaining failure due to stakeholders' holding out from reasonable restructuring deals that maximize the value of a distressed debtor for stakeholders as a whole. Any of the three English collective actions may intersect with any of the two restructuring procedures when a financially distressed but viable corporate debtor aims to restructure its mass tort liability in order to address that bargaining problem.

All presently documented English mass tort restructurings involved the Scheme on the restructuring side and pending group litigation or potential representative actions on the collective redress side. And in each case, the restructuring targeted disputed mass tort liabilities prior to otherwise available collective redress procedures having been completed or initiated in the first place. But the possible intersections go beyond these scenarios. In particular, three major intersections may still occur in the future. First, the Scheme may also intersect with collective proceedings in competition cases. Second, the Restructuring Plan may be used in lieu of the Scheme because of its cross class cramdown provision in any future mass tort case. Third, both the Scheme and the Restructuring Plan are not only available when collective actions fail to timely resolve their 'own' collective action problems under conditions of financial distress. If representative actions or collective proceedings, for example, were to provide millions of consumers access to justice by vindicating a class claim, the defendant might still file for restructuring if the aggregate award of damages exceeds its going concern value. In this post-liability phase, there is no real

intersection of collective action problems. Rather, important questions regarding the fair distribution of the restructuring surplus between mass tort claimants and other stakeholders move to the forefront.

The use of a Scheme or Restructuring Plan to protect a debtor whose financial viability is actually threatened by mass tort liability may not only benefit other creditors and shareholders, but also mass tort claimants themselves, especially those who manifest injury in the future and risk having nowhere to turn for compensation. As corollary benefits, the restructuring may also preserve judicial resources, minimize litigation costs, and ensure expedited payment in severe personal injury cases. Furthermore, courts consistently exercise their discretion at the sanctioning stage in a way that facilitates a procedurally and substantively fair process for mass tort claimants. Notable procedural measures include (i) extensive notice that give mass tort claimants sufficient time and information to vote and (ii) the use of detailed voting forms to assess mass tort claims for voting purposes. Notable substantive measures include (i) some level of fairness review in relation to claim estimation methodologies included in a restructuring proposal, and more importantly, (ii) varying levels of fairness review in relation to proposed distributions which may protect mass tort claimants against many opportunistic take-it-or-leave-it deals.

But the current legal framework of English mass tort restructurings arguably falls short in other ways. Questionable procedural aspects include (i) the unpredictable involvement of regulatory agencies, (ii) due notice problems related to future claimants' voting rights and (iii) overly broad class composition standards. Questionable substantive aspects include (i) the use of mandatory alternative dispute resolution in the restructuring, (ii) the absence of class representatives in mass tort cases involving small claims, (iii) mass tort claimants' weak priority status as unsecured creditors despite being an involuntary and often vulnerable class, (iv) the expansive use of nonconsensual releases based on Lehman necessity doctrine despite lighter restructuring alternatives, and (v) limited consideration of various non-monetary interests which may be implicated in mass tort cases in practice.

The EU can draw many lessons from the English context of mass tort restructurings. Judicial collective redress and corporate restructuring law do not exist in separate legal vacuums. As long as mass tort claims are dischargeable creditor claims, corporate restructurings may play a role alongside collective redress in resolving such claims. But since the legal framework of corporate restructuring law is not designed to deal with an involuntary and vulnerable yet large group of creditors like mass tort claimants, considerable fine-tuning by the judiciary and the legislator may be necessary to ensure procedurally and substantively fair mass tort restructurings.