**Law Reform Essay Competition 2024: Highly commended award**

**An 'Opt-Out' Class Action Regime for Environmental Claims by Benn Sheridan**

John Evelyn's description of London during the Great Frost of 1684 is marked by contrast. Despite the cold, its enterprising citizens built a "Citty" on the Thames' frozen waters – the frost fair – whose "Horse and Coach races, pupet-plays" drew crowds. Fires were lit, leaving the

> "aire ... so filld with the fuliginous steame of the Sea-Coale, that hardly could one see crosse the streete, and this filling the lungs with its grosse particles exceedingly obstructed the breast, so as one could scarce breath ... ".[1]

The tension Evelyn explores between London's natural and industrialising environments, and the cost of industrialisation for its citizens' health, is universal. Today's residents, for whom a frozen Thames is, because of climate change, impossible to contemplate, might still recognise his account of a congested city. To communities surrounding the Niger Delta,[2] or living in conurbations in Zambia's Chingola District,[3] however, the image of pollutants spoiling the natural environment, and causing serious injury, may have a literal resonance.

The aim of this essay is to reduce, via incremental reform, this tension. It proposes to tilt the balance incrementally in favour of individual and environment by a change to the English collective redress regime, enabling opt-out, cross-border class actions against defendants alleged to have committed environmental mass torts or 'greenwashing' by making unsubstantiated statements about environmental credentials.[4] This change may be introduced by two amendments to the class action, "**Competition Regime**":[5] (1) to s47A of the Competition Act 1998,[6] extending the opt-out regime to encompass claims with an environmental nexus; (2) to s47B(11)(b),

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[1] John Evelyn's account of the Great Frost of 1684 in Carey, J. (ed.) *The Faber Book of Reportage* (Faber, 1987), p. 192.

[2] *Okpabi v Royal Dutch Shell* [2021] UKSC 3

[3] *Vedanta Resources Plc v Lungowe* [2019] UKSC 20

[4] Potential causes of action include s90-90A of the FSMA, unfair prejudice petitions, derivative actions under the Companies Act 2006, and misrepresentation.

[5] Comprising the Competition Act 1998; Enterprise Act 2002; Enterprise and Regulatory Reform Act 2013; Consumer Rights Act 2015; Digital Markets, Competition and Consumers Act 2024.

[6] S47A was introduced by the Consumer Rights Act 2015.

enabling opt-out environmental class actions for all class members, regardless of domicile.

This additional regime (the "Environmental Regime") would enable victims of mass torts[7] or shareholders to obtain redress at proportionate cost, in a specialised tribunal, the CAT,[8] without the inefficiencies of case-management-heavy group litigation[9] or the uncertainty of the representative action.[10]

I

The limitations of the current collective redress regimes may be illustrated with an example.[11]A sailing club (the "Club"), an unincorporated association, owns Barsetshire reservoir (the "Reservoir"),[12] fed by a spring. The Club permits swimming in the Reservoir on the weekend.

The spring is owned by Jupiter Water Plc ("Jupiter"). Jupiter bottles spring water at a "Factory" on its land, neighbouring the Reservoir. Jupiter's website calls the Factory a 'toxin-free zone'. One Friday, a toxin leaks from the Factory into the Reservoir (the "Incident"). The Club must pay to clean the Reservoir; the swimmers come out in a rash; nine in ten bottles of Jupiter's Friday batch are contaminated; Jupiter's share-price plunges.

Jupiter is potentially liable: (i) to the Club in nuisance for carrying out an activity that interferes with its neighbour's property rights, causing loss;[13](ii) to the swimmers in negligence or breach of statutory duty;[14] (iii) to nine-in-ten consumers of Friday's batch of bottled water in contract, negligence, or statute[15] for (at least) the value of their

[7] Like the claimants in *Jalla v Shell* [2023] UKSC 16. Representative and group actions failed: the *Jalla* claimants had different interests; the nuisance was time-barred.
[8] The Competition Appeals Tribunal. It is anticipated that the CAT may be renamed to reflect its expanded role.
[9] CPR 19.21-26.
[10] CPR 19.8.
[11] Fictional.
[12] Under a joint tenancy of all members.
[13] Cf. *The Manchester Ship Canal Company Ltd v United Utilities Water Ltd No 2* [2024] UKSC 22
[14] The Environmental Protection Act 1990 s.73(6).

[15] The Consumer Protection Act 1987.

purchase, or more if they suffer injury. Jupiter's directors are potentially liable (iv) to shareholders in the UK and abroad who suffer financial loss.[16]

The Incident, widely publicised in the UK, is noticed by Warden Funding Ltd ("Warden"), who wishes to fund a claim on behalf of those affected in return for a success fee. There are, broadly,[17] two options available: group litigation under CPR 19.21-26 and representative action under CPR 19.8.

Under CPR 19.21-26, claims giving rise to "common or related issues" of law or fact may be case managed under a Group Litigation Order ("GLO"). The Court establishes a group register for managing procedural steps collectively (CPR 19.22) and deals with generic issues via test claims (CPR 19.26). Common determinations bind all relevant claimants.[18] It is potentially suitable for Club members; Jupiter shareholders; the consumers; the swimmers.

However, the GLO creates an opt-in regime. Multiple claimants must participate for it to be cost-effective. Not all will do so. Jupiter's overseas shareholders may not participate because they do not know about the existence of the proposed litigation. Many consumers' ceiling on damages is too low (the purchase price) to make joining worthwhile. The swimmers and Club members may not participate out of apathy or reluctance.

A GLO also creates practical obstacles: the facts necessary to formulate a complete cause of action must be set out for each claimant (e.g. in a schedule).[19] Participation is not "a matter of subscription";[20] it requires ongoing involvement.

Finally, managing a large group litigation is burdensome on judges and expensive. In a case management judgment in the "*Diesel*" litigation,[21] Cockerill J commented that "the present indication is that there will be well over 1 million claimants and over 1500 defendants. The scale of the litigation is unprecedented". Cost estimates for the *Diesel* trial have been estimated at £1.2 billion, with trial in 2026 at the earliest.[22] This is because the regime only enables individual claimants to satisfy procedural

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[16] Cf. *ClientEarth v Shell* [2023] EWHC 1137 (Ch). Lord Carnwath described this case as a *"missed opportunity"*: https://www.lse.ac.uk/granthaminstitute/publication/clientearth-v-shell-what-future-for-derivative-claims/ [accessed September 2024].

[17] This essay does not consider the derivative action procedure at CPR 19.14-20.

[18] The White Book (vol. 1) 2024, Editorial note on Pt 19 at 19.21.1.

[19] *Alame v Royal Dutch Shell Plc* [2022] EWHC 989 (TCC).

[20] *Manning & Napier v Tesco plc* [2017] EWHC 3296 (Ch)

[21] *Various Claimants v Mercedes-Benz Group AG* [2023] EWHC 3173 (KB).

[22] 'High Court Slashes Staggering Costs Budget', *Global Legal Post*, July 2024 https://www.globallegalpost.com/news/high-court-slashes-staggering-ps343m-claimants-costs-budget-in-dieselgate-litigation-1807621734 [accessed September 2024].

requirements collectively, reducing duplication. It does not change their substance. The result, Adrian Zuckermann says, is that GLOs have "not proved useful where many people are affected by some wrongdoing or legal issue, but not to a sufficient extent that any of them are motivated to litigate".[23]

The growth of litigation funding has alleviated this issue, but the problem remains – working to commercial funders' advantage and claimants' disadvantage. Without Warden's deep pockets to front-load legal costs or risk appetite, a Barsetshire group litigation would be practically impossible. This was implicitly recognised by Sales JSC in *PACCAR*, who noted that commercial funding is "widely acknowledged to play a valuable role in furthering access to justice".[24] The price of this access is bargaining power: Warden can command from the Barsetshire claimants the lion's share of damages as a success fee.[25] The Post Office Group Litigation is the best-known illustration:[26] the 555 claimant sub-postmasters were awarded £57.75million, but £46million went to the funder and legal team. The sub-postmasters were left with £20,000 each[27] – a shortfall only remedied by public inquiry and two government schemes.[28]

The GLO regime fails to achieve the objectives (access to justice, proportionality, balancing party interests) to the extent that Lord Woolf, its instigator, hoped.[29] It fails to provide access because many claimants are unable or unwilling to opt-in; it is neither expeditious, because large group litigations require the Court to list trial years in advance, nor proportionate – the cost of liaising with all parties, even where issues are generic, is substantial; finally, the balance of interests tips in favour of a non-party, the funder.

This poses problems for environmental claimants. Their claims commonly have international components;[30] claimants may not be able to participate easily in English

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[23] See the analysis in Zuckermann, A. Zuckermann on Civil Procedure: Principles of Civil Practice (Sweet & Maxwell, 2021) at paragraph 13.52.

[24] *R (on the application of PACCAR Inc and others) v Competition Appeal Tribunal and others* [2023] UKSC 28 at [11].

[25] Provided certain formality conditions are complied with: *PACCAR*.

[26] *Alan Bates and Ors v Post Office Ltd* [2019] EWHC 3408 (QB)

[27] 'Post Office and Horizon Compensation: interim report' (Hansard, 17 February 2022) at https://publications.parliament.uk/pa/cm5802/cmselect/cmbeis/1129/report.html (accessed 13 September 2024)

[28] 'Transparency data: Post Office Horizon financial redress data' (Department for Business & Trade, 4 September 2024): https://www.gov.uk/government/publications/post-office-horizon-compensation-data-for-2024/post-office-horizon-compensation-data-april-2024 [accessed 13 September 2024].

[29] Lord Woolf, Access to Justice: Final Report to the Lord Chancellor (1995), Chapter 17: https://webarchive.nationalarchives.gov.uk/ukgwa/20060214041406/http://www.dca.gov.uk/civil/final/sec4c.htm#c17 [accessed 13 September 2024].

[30] *Okpabi v Royal Dutch Shell* [2021] UKSC 3.

proceedings; the funder remains gatekeeper to redress, commanding a large success fee.

Warden's second option is a representative action under CPR 19.8: a representative claimant may claim on behalf of a claimant class provided class members have the "same interest". This procedure was considered in *Lloyd v Google*,[31] when the representative claimant, Mr Lloyd, acting on behalf of four million iPhone users, sought to repurpose CPR 19.8 as an opt-out class action regime.

Leggatt JSC, overturning Vos C's appellate judgment (which awarded the iPhone users damages for Google's data misuse), held that the procedure could be used to determine common class issues, such as liability, even where the cause of action between them differed, (a more flexible interpretation than the previous leading case),[32] but could not be used by Mr Lloyd to obtain monetary damages for the class. The *"same interest"* requirement left damages subordinate to the compensatory principle,[33] which "necessitate[s] an individualised assessment".[34]

That principle deprives the swimmers of a representative claim: their differing injuries require individualised assessment. What of the consumers? In *Prismall v Google*,[35] Heather Williams J struck out a claim under CPR 19.8 holding that, if individualised assessment were required at all, an award of damages is precluded. The representative claimant's contention that the class was entitled to a sum representing their "irreducible minimum" loss was rejected. An appeal is outstanding.[36] Its outcome will affect the bottled water consumers, whose claim for damages for injury would require an individualised assessment, but who might each be thought entitled to an irreducible minimum: the bottle purchase price.

Even if Prismall's appeal succeeds, the consumers face a further issue: class definition. To define the class with reference to their alleged loss – e.g. 'purchasers of contaminated bottled water' – renders the claim bound to fail because the description depends on a finding of liability. If this representative claim failed, the 'class' would have only one member.[37]

The class must be defined without reference to Jupiter's wrongdoing – like 'all purchasers of bottled water produced on the Friday'. Yet this gives rise to a further

[31] [2021] UKSC 50

[32] Markt & Co v Knight Steamship Co [1910] 2 KB 1021 (CA).

[33] The principle that a claimant is entitled to more, or less, than the sum that would put them in the position had the wrongdoing (such as a tort or contract breach) never occurred.

[34] *Lloyd* at [58]. Leggatt JSC called this the 'bifurcated procedure'.

[35] [2024] 1 W.L.R. 879.

[36] At time of writing.

[37] *Emerald Supplies Ltd v British Airways Plc* [2009] EWHC 741 (Ch).

issue: the ten percent who purchased uncontaminated bottled water do not have the same interest as the rest; under this class definition, the representative action also fails.

A group that could benefit from CPR 19.8 is Jupiter's shareholders, who belong to an identifiable class and have the same interest: losses resulting from the share price collapse. The percentage fall in price is the same; no individualised assessment is required.[38] A representative action might be fertile ground.

This analysis was doubted by Green J in *Wirral v Invidior Plc*.[39] Green J struck out an FSMA claim brought as a representative action because it fettered the judge's case management discretion to manage a multi-party claim.[40] Wirral's appeal is listed for December this year.[41] The appellate court should carefully consider whether the principles applying to multi-party claims (where multiple claimants bring individual claims collectively) apply to the representative regime (where one claimant brings a single claim to determine the liability of or to a class). For now, however, *Wirral* suggests the Jupiter shareholders' representative action will fail.

The group for whom CPR 19.8 appears appropriate is the Club members. They share the same interest: a joint tenancy in the Reservoir. They have suffered a single loss, to the same extent. But they face a practical obstacle: funding. If, as in a group litigation, Warden will bear the risk of up-front legal fees and (potentially) adverse costs, then a success fee, deducted from the Club's damages, is required.

Without Warden's involvement, the Club's claim is only possible in theory. In articles written before[42] and after[43] *Lloyd*, Rachael Mulheron notes that there is no obvious legal basis entitling a funder to share in damages where a representative action proceeds on an opt-out basis. Unlike a group litigation, where claimants agree to a success fee, representative action damages are payable to anyone fitting the class description – Warden does not. Funding a representative action without a basis for obtaining a success fee is uncommercial.

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[38] It is suggested that a percentage-based quantification reflects the 'top-down' approach approved by Briggs JSC in *Merricks v Mastercard* [UKSC] 51 at [71].

[39] [2023] EWHC 3114 (Comm).

[40] *Wirral* at [48].

[41] At time of writing.

[42] Mulheron, R. 'Creating, and Distributing, Common Funds Under the English Representative Rule'. King's Law Journal, (2021) 32(3), 381–413.

[43] Mulheron, R. 'Further impetus for a statutory class action, *post-Lloyd v Google*' C.J.Q. 2023, 42(1), 10-31.

II

Parliament should introduce an opt-out class action regime to rectify the inadequacies in, and overcome the limits of, the collective redress regimes identified above. The Environmental Regime is a balanced, incremental solution, because it: (a) draws on and complements the existing Competition Regime; (b) is international in scope; (c) has fewer disadvantages than US or Australian generic regimes; (d) supports urgent environmental policy goals.

(A)

The principal source of the Competition Regime's procedure is s47 of the 1998 Act.[44] This is supplemented by the CAT rules (the "Rules").[45] These provide that any person may bring a claim before the CAT as class representative, provided the CAT considers it "just and reasonable" to appoint them (s47B), applying class authorisation and claim certification criteria at r78-79. The Tribunal may order class representatives to notify all known class members of proceedings (r81), to the extent possible (r90). The CAT is empowered by s47A(2) to consider whether a party has committed a breach. It can decide to run the claim on an opt-in or opt-out basis (s47B(10)-(11), r82). It may award aggregate damages instead of assessing individual loss (s47C(2)). A funder's involvement is contemplated: where damages remain unclaimed, a proportion of the remainder (at a level controlled by the Court) may be paid either to charity (s47C(5)) or to a (funder-backed) representative to cover expenses (s47C(6)), despite there being no funding agreement.[46] Finally, the bench comprises judges and lay ordinary members with sector expertise, allowing it to approach technical cases adeptly.[47]

In short, the Competition Regime provides a sophisticated opt-in/opt-out class action procedure which remedies the inadequacies of the GLO and representative regimes by altering substantive law to give the CAT discretion to: (i) certify an opt-out class action; (ii) appoint a representative (who need not be a class member); and (iii) award aggregate damages, resolving the problem with the compensatory principle highlighted in *Lloyd*. The Competition Regime's core limitation is it is sector-based: s47A confines it to competition infringements. It may be amended to create a class action, Environmental Regime:

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[44] As amended by the Consumer Rights Act 2015.

[45] Available at https://www.catribunal.org.uk/sites/cat/files/2017-11/The_Competition_Appeal_Tribunal_Rules_2015.pdf [accessed 14 September 2024].

[46] The Competition Act 1998; cf. discussion in Zuckermann on Costs, Chpt. 13.

[47] See: https://www.catribunal.org.uk/about. [accessed September 2024].

"This section applies to a claim of a kind specified in subsection (3) which a person who has suffered loss or damage may make in civil proceedings brought in any part of the United Kingdom in respect of

**[(1)]** an infringement decision or an alleged infringement of—

(a) the Chapter I prohibition, or

(b) the Chapter II prohibition,... [or]

**[(2) a breach of**

**(a) tortious or statutory duties alleged to result in environmental harm, or**

**( ) tortious or statutory duties arising from corporate statements or environmental policies]**"[48]

The creation of an Environmental Regime is a suitable expansion of the CAT's remit. The purpose of the Competition Regime is to ensure the UK economy is free from market distortion. The CAT would be complemented by an effective Environmental Regime because environmental wrongdoing distorts the proper functioning of markets, too: the OECD estimates that global GDP per capita could be 37% higher today had there been no global warming after 1960.[49] An Environmental Regime allows those contributing to, and profiting from, environmental distortion to be held accountable to those who lose out.

Further, enabling technical, environmental claims to decided by the CAT, which may be constituted with (for example) climate scientists or chemists as ordinary members, makes this tribunal particularly well-suited to tackling the difficult questions that such claims often raise.[50]

(B)

The second modification is to s47B(11)(b), which makes opting-out available to class members "except any class member who is not domiciled in the United Kingdom..." – foreign-domiciled members must opt-in. This is inadequate for international environmental claims: environmental harm does not respect jurisdictional

[48] Alterations to the statutory wording are in bold and [square brackets].

[49] OECD (2024), OECD Employment Outlook 2024: The Net-Zero Transition and the Labour Market, OECD Publishing, Paris, https://doi.org/10.1787/ac8b3538-en.

[50] For an environmental group claim that turns on technical evidence, see The Corby Group Litigation [2009] EWHC 1944 (TCC).

boundaries. A further sub-section should provide that "(c) section (b), above, shall not apply to claims brought under s47A(2)".[51] This allows foreign domiciled claimants to benefit from the opt-out procedure under the Environmental Regime – subject to the common law jurisdiction test being met.[52] The potential benefits of an international collective redress regime are illustrated by *Sanda v PTTEP*.[53] Indonesian-domiciled seaweed farmers claimed against an Australian company (albeit on an opt-in basis), establishing their entitlement to damages arising from an oil spill.

(C)

International models for generic opt-out regimes should not be emulated entirely, however. Introducing a US-style regime[54] might create an excessively litigious class action landscape – a financial drag on businesses and a catalyst for frivolous claims. This was the government's objection[55] to 2013's UK generic regime proposal.[56]

If Australia were emulated, under which (as in the UK) financial risk is borne by litigation funders for a success fee, then the core objection is that English courts neither can nor should be permitted to make – on a generic basis – the common fund orders by which funders in Australian opt-out class actions are paid. These provide for success fees whether or not class members consent. It is submitted that only two situations justify a success fee being paid: (i) the class members agree to the fee by joining proceedings on an opt-in basis, or (ii) collective monetary redress (via an opt-out procedure) is urgently required, and this outweighs the need for agreement.

It is only very rarely that the second criterion will be met – a fact that Australian courts now appear to recognise: since *Money Max*[57] established the judicial discretion to make common fund orders in 2016, the initial swell of opt-out, funder-backed class

[51] Section 47A(2) being the subsection introduced by the proposed amendment, above.
[52] *Spiliada Maritime Corporation v Cansulex Ltd* [1987] 1 AC.
[53] *Sanda v PTTEP Australasia (Ashmore Cartier) Pty Ltd (No 7)* [2021] FCA 237.
[54] Under which class actions have low barriers to entry because the adverse costs risk is low.
[55] Private Actions in Competition Law: A Consultation on Options for Reform—Government *Response* (2013), para 5.33
[56] A generic regime was favoured by the Civil Justice Council and contributors including Mulheron in their recommendations to the government: https://www.judiciary.uk/wp-content/uploads/2022/06/FINAL-Improving-Access-to-Justice-through-Collective-Actions.pdf [accessed 25 September 2024].
[57] *Money Max Int Pty Ltd v QBE Insurance Group Ltd* [2016] FCAFC 148.

actions has ebbed.[58] *Sanda*, for example, was certified as an opt-in claim.[59] That case also illustrates a practical problem with the Australian regime: introducing a **generic** opt-out regime may be insufficiently targeted to have practical effect.

(D)

The appropriate solution is the Environmental Regime. This incremental expansion provides a mechanism for vindicating individual rights that have been seriously compromised. The cases that inspire this proposal[60] do not concern millions of claimants reluctantly bringing low-value claims. They concern communities whose need for an adequate collective redress procedure arises because it is practically the only means for these communities to obtain compensation: *Vedanta*.[61] The severity of their individual loss is magnitudes higher than claimants in *Lloyd* and *Prismall*.[62] This loss demands the protection of an accessible opt-out regime.

The proposal is also necessary because when the Court vindicates a class's rights to redress for environmental harm or greenwashing, it adds to the arsenal on which states rely to discourage (or reverse) environmental destruction. Following settlement in *Sanda*, 15,000 seaweed farmers each received approximately AUD 34,000.[63] This sum supports a social good: seaweed farming supports marine biodiversity, CO2 sequestration, and reduces reliance on methane-producing livestock.[64] In *Lloyd* the core issue was singularly the individual's right to data protection. The decision in *Sanda* and other environmental class actions have the potential for deeper impact.

Finally, the Environmental Regime is practical: it does no more than give teeth to **existing** environmental norms, redirecting companies to the reality of a changing

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[58] For a summary of Australia's approach to opt-out class actions see: https://www.corrs.com.au/insights/the-30-year-evolution-of-class-actions-in-australia [accessed 25 September 2024].

[59] Hodgson, C. 'The money behind the coming wave of climate litigation' *Financial Times*, June 2023: https://www.ft.com/content/055ef9f4-5fb7-4746-bebd-7bfa00b20c82#:~:text=For%20investors%20looking%20for%20an%20asset [accessed September 2024].

[60] including *Okpabi*, *Vedanta*, *Jalla*, and *Manchester Ship Canal*.

[61] *Vedanta* at [66] onwards.

[62] In *Okpabi*, for example, the claimants alleged that they had suffered chronic health problems and loss of the livestock on whom they depended for a living.

[63] Or USD 115,000,000 in total accounting for the funder's success fee.

[64] 'Seaweed Farming: Assessment on the Potential of Sustainable Upscaling for Climate, Communities and the Planet' *UN Environmental Programme* (2023) at https://www.unep.org/resources/report/seaweed-farming-assessment-sustainable-upscaling [accessed September 2024].

climate by raising the litigation risk of non-compliance with minimum standards they are already obliged to uphold.

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Evelyn recognised that successful society demands compromise: the need to survive the frost trumped his distaste for "grosse particles" that "obstructed the breath". Unlike Evelyn, however, today's law-makers not only appreciate the pernicious effect "grosse particles" have on individual's bodily autonomy in the short-term – they must also recognise that it hinders long-term, sustainable progress. The Environmental Regime is necessary because it satisfies this dual function, vindicating collective individual rights and protecting society when corporate actors fail to meet common law, or publicly assumed, environmental obligations.