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Private Litigation in England and Wales

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I. INTRODUCTION

The United Kingdom has been at the forefront of developments of private enforcement of competition law. However, as I discussed in a previous article co-authored with Ali Nikpay,² this jurisdiction has also often adopted a cautious approach to measures aimed at facilitating litigation in this field, for fear of fostering spurious claims and a litigation culture that would be socially harmful and unfair to defendants. This article updates that article as to the current status of private litigation in England and Wales.

There is no doubt that England and Wales is well placed to be a forum for effective resolution of competition law disputes. First, English courts have adopted an expansive approach to territorial jurisdiction. In *Provimi Ltd v Aventis Animal Nutrition SA*, the court dismissed applications for striking out and summary judgment in actions brought by a German company against English defendants where the claimant had had no contractual dealings whatsoever with the English companies. However, the English companies were part of the same corporate group and formed the same “undertaking” as the German companies, from which the claimant had purchased goods at the allegedly higher cartel price.³ Higher prices in Germany would not have been tenable if the cartel had not been implemented on a supra-national scale. Therefore, the conduct of the English defendants had contributed to causing a loss to the claimant.

Second, almost uniquely in Europe, English law recognizes the principle that, in order to do justice between the parties, all relevant evidence must be placed before the court. Therefore, the parties are under a continuing duty to disclose all documents which are or have been in their possession and that either support their case, or support the other party’s case, or undermine the disclosing party’s case. Disclosure is essential in competition litigation. In civil law countries, the opposite general principle applies: A party does not have a duty to disclose evidence that supports the other party’s case or undermines his own case. This principle has, of course, exceptions, particularly where the other party is able to identify a document with sufficient precision and applies to the court for specific disclosure of that document.

Third, competition cases in England and Wales must be issued in or transferred to the Chancery division of the High Court, where a small number of senior judges will be able to build significant experience in competition cases. The same judges can also sit as chairman of the Competition Appeal Tribunal (“CAT”), which, among other things, hears appeals against the decisions of the Office of Fair Trading (“OFT”) or the regulators as to whether the national or European competition rules have been infringed. Furthermore, the CAT has jurisdiction to hear claims for damages or other sum of money when the infringement has already been established

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² R. Nazzini & A. Nikpay, *Private Actions in EC Competition Law*, 4(2) COMPETITION POL’Y INT’L, 107 (2008).

³ *Provimi Ltd v Aventis Animal Nutrition SA* [2003] 2 All ER (Comm) 683, §§ 25 – 40.

in a decision by the OFT, a regulator, or the European Commission (so-called “follow-on claims”).

There are two main features of the English system that, however, are liable to constitute a significant obstacle to effective redress in competition cases: costs and the lack of a clearly established and effective procedure for collective claims.

II. FUNDING AND COSTS

Funding may be an acute problem in a competition case, particularly in stand-alone cases. These cases may require significant upfront investigations. Furthermore, economic evidence is almost certainly needed to assess the viability of a claim. Follow-on cases may be less expensive to fund, as the claimant will be able to rely on a decision of the OFT, a regulator, the CAT, or the European Commission. However, issues of causation and quantum, including the issue of passing-on, may still prove expensive to litigate.

In any civil case, a litigant needs to fund the legal fees of the solicitors conducting the litigation, as well as the barrister’s fees. In a competition case, there are usually economic expert’s fees. Other disbursements include “out-of-pocket expenses”, such as court fees, sums incurred on couriers, telephone and fax, and expenses incurred on witnesses. If the case is lost, a litigant is usually liable for the other party’s reasonable and proportionate costs.

Contingency fees are prohibited in England and Wales in contentious matters. However, a lawyer may agree to act on a conditional fee basis whereby the lawyer is paid only in specified circumstances (generally, if the case is won). To compensate for the risk undertaken by the lawyer, the costs, when payable, may be increased up to a maximum cap set in secondary legislation, currently 100 percent.

To ameliorate these problems, in 2007 the OFT made the following recommendations to Her Majesty’s Government:

- Introducing conditional fee agreements in representative actions that allow for an increase of greater than 100 percent on lawyers’ fees.
- Codifying courts’ discretion to cap parties’ costs liabilities and to provide for the courts’ discretion to give the claimant cost protection in appropriate cases.
- Establishing a merits-based litigation fund.

The former Government did not formally respond to these recommendations and it is unclear whether the current Government will do so. This is probably due to the circumstance that the issues raised by the OFT are being more widely and generally debated in relation to civil costs. After the publication of the OFT’s recommendations, Sir Rupert Jackson, a Lord Justice of Appeal, was asked to carry out a comprehensive review of civil costs in England and Wales. His final report, published in November 2009, recommends that, subject to appropriate regulation, both solicitors and counsel be allowed to enter into contingency fee agreements with costs being recoverable from the other party based on the ordinary principles. Further recommendations include:

- At the judge’s discretion, making third party funders liable for the full amount of adverse costs. Currently, third party funders are only liable to the extent of the funding provided.
- Giving the court the power to provide at the certification stage that there be one-way cost

shifting in collective actions. One-way cost shifting would protect the collective claimant against the liability for adverse costs.

- Undertaking financial modeling to ascertain the viability of one or more Contingency Legal Aid Funds (“CLAFs”)⁴ or a Supplementary Legal Aid Scheme (“SLAS”).⁵

Whether any of the recommendations in the Jackson report will be implemented is at this time unclear. Clearly, however, contingency fees and one-way cost shifting in collective actions will go some way to ameliorate the position of claimants in competition cases.

III. COLLECTIVE ACTIONS

In 2007, the OFT recommended to the Government that representative bodies should be allowed to bring stand-alone and follow-on representative actions for damages and applications for injunctions for breaches of competition law on behalf of consumers and businesses on an opt-in and on an opt-out basis. As with costs, the issue is now being considered on a wider basis. In 2008, the Civil Justice Council⁶ recommended that a generic collective action should be introduced. The Council also noted that individual and discrete collective actions could also properly be introduced in the wider civil context i.e., before the CAT, to complement the generic civil collective action.

In 2009 the Ministry of Justice published *The Government’s Response to the Civil Justice Council’s Report: ‘Improving Access to Justice through Collective Actions’*. The Government made it clear that it did not support the Council’s proposal for a generic collective action procedure. The Government believed that a sector-specific approach to the introduction of collective actions would be preferable. The Government emphasized that ADR should be explored before the parties resort to litigation. When a sector-specific collective action was appropriate, the model favored by the Government was that a representative body should be authorized to bring collective actions on behalf of the individuals affected as opposed to a member of a class of similarly affected individuals being allowed to bring a claim on behalf of the class. The Government believed that a strict certification procedure for collective actions would be needed and that the costs shifting rule should be maintained in collective actions, in order to deter unmeritorious claims.

Notwithstanding the Government’s concession that a sector-specific approach to collective actions should be adopted, these proposals continue to be controversial. One example will suffice. The Financial Services Bill 2009 enabled the court to permit collective proceedings to be brought in respect of financial services claims either on an opt-in or on an opt-out basis. However, the relevant clauses were removed during the parliamentary process and the Financial Services Act 2009 makes no provision on collective actions.

⁴ Defined as “a fund which grants funding to chosen applicants, where the receipt of funding is conditional on the applicant agreeing to pay a percentage of any amount awarded (e.g. as damages) back into the fund. CLAFs attempt to be self-financing and operate on a not-for profit basis.”

⁵ Defined as follows: “Similar to a CLAF, in that it is a legal fund which aims to be self-funding, and the granting of funding is conditional upon the applicant agreeing to pay a percentage of any amounts recovered back into the fund. A SLAS is different from a CLAF in that it is usually operated by a legal aid body, and is intended to provide funding to persons who are not of sufficient means to afford legal representation for their case.”

⁶ The Civil Justice Council is an advisory public body established under the Civil Procedure Act 1997 with responsibility for overseeing and co-ordinating the modernization of the civil justice system.

Given that no reform is forthcoming in the foreseeable future, the only option for claimants is to try and make the best use of the current procedures. Interestingly, the availability of an opt-out collective action is currently being litigated under the existing law and, in particular, under rule 19.6 of the Civil Procedure Rules.

Under CPR r 19.6 representative claims are brought by one or more persons as representatives of any other persons who have the same interest. A person who is not a party to the claim, but is represented as a member of the class, is not primarily liable in costs and is not subject to disclosure.⁷ Unless the court otherwise directs, any judgment or order given in a claim in which a party is acting as a representative is binding on all persons represented in the claim but, as a safeguard, may only be enforced by or against a person who is not a party to the claim with the permission of the court. This allows the person against whom the judgment is sought to dispute liability on grounds of his own special circumstances.

By way of example, representative proceedings have been allowed under CPR, r 19.6 and its predecessors in a case in which “growers,” so defined by the applicable legislation, sought to enforce certain statutory rights against the owner of the market⁸ in a case concerning the validity of a meeting of the local Labour party⁹ and also in a case in which one Lloyd's syndicate who subscribed to a particular policy was allowed to represent all the other syndicates who so subscribed in relation to a claim under the policy.¹⁰ However, representative claims have not been allowed when the members of the class do not have “a common interest” and a “common grievance,” and when the relief is not in its nature beneficial to all.¹¹

For instance, in *Aberconway v Whetnall*,¹² the court struck out a representative claim in which the plaintiffs sought to recover, on behalf of themselves and all other subscribers to a fund for the benefit of the defendant, the amounts they had collectively subscribed on the grounds that they were induced to do so by misrepresentation. Eve J considered that the representative claim could not be maintained because it could not be said that “...the donors to the fund have a common interest and a common grievance when the very existence of the grievance depends on facts that may differ in each individual case.”

In *Emerald Supplies Ltd v British Airways Plc*,¹³ the claimants used the air freight services of the defendant to import flowers. They claimed that the defendant's prices were inflated by a cartel. They issued proceedings on their own behalf and on behalf of all other direct or indirect purchasers of air freight services who were charged inflated prices by the same cartel. It is important to note that the claim was for a declaration that the defendant was liable to pay damages to the members of the class. It is well established that claims for damages cannot be brought as representative claims because the interests of the claimants are, by definition, different.

The Chancellor of the High Court struck out the representative element of the claim because the criteria for inclusion in the class (that the members paid inflated prices) could only be

⁷ *Ventouris v Mountain* [1990] 1 WLR 170.

⁸ *Duke of Bedford v Ellis* [1901] AC 1.

⁹ *John v Rees* [1970] Ch 345.

¹⁰ *National Bank of Greece v RM Outhwaite* [2001] All ER (D) 59.

¹¹ This is the test laid out by Lord Macnaghten in the *Duke of Bedford* case and applied by the Chancellor of the High Court in *Emerald Supplies Ltd v British Airways Plc* [2009] EWHC 741 (Ch), § 33.

¹² (1918) 87 L.J.Ch 524.

¹³ *Emerald Supplies Ltd v British Airways Plc* [2009] EWHC 741 (Ch).

satisfied after elements of the claim had been proven,¹⁴ and the relief sought in the action was not equally beneficial for all members of the class. An indirect purchaser may have suffered no loss if the inflated price was completely absorbed by a direct purchaser. His Lordship also noted that the allocation of losses between direct and indirect purchasers created an inevitable conflict between the claims of different members of the class.¹⁵ The court found that the policy to avoid multiple actions could be achieved by a Group Litigation Order under CPR, r 19.11.¹⁶ The case is under appeal. The hearing before the Court of Appeal has already taken place but, at the time of writing, the judgment has not been handed down yet.

IV. LOOKING AHEAD

England and Wales remains an attractive jurisdiction to litigate competition claims, particularly between businesses. However, high costs and the unavailability of an opt-out collective action represent significant obstacles to claims by consumers or small businesses. The 2007 OFT's recommendations to Her Majesty's Government have been overtaken by events. Wide-ranging recommendations on costs have been made in the Jackson Report, currently under consideration. The Government rejected the Civil Justice Council's recommendation for a generic collective-action procedure and, while not excluding a sector-specific approach, gave no signal to be inclined to introduce collective actions.

Generally, it seems that a significant number of cases settle before being brought or before trial while those cases which are pursued to the trial are unlikely to be successful. It also appears that consumers and small businesses are being deterred from bringing court cases. If this is true, then ADR could play a significant role in ensuring access to justice in competition law disputes in a more structured way than has happened so far. There are several options that could be considered but some could be easily implemented within the existing legal framework.

For instance, courts could encourage parties to mediate competition disputes. One example may suffice. In a number of recent damages actions under section 47A CA 1998,¹⁷ the CAT has demonstrated its commitment to the spirit of swift and cost-efficient dispute resolution. Pursuant to Rule 44(3)(a) of the Competition Appeal Tribunal Rules 2003, the CAT "may in particular [...] encourage and facilitate the use of an alternative dispute resolution procedures if the Tribunal considers that appropriate [...]"¹⁸ The Tribunal "cannot force mediation" and

¹⁴ *Id.*, §§ 30 – 35.

¹⁵ *Id.*, §§ 36 – 37.

¹⁶ *Id.*, § 38.

¹⁷ Case No. 1028/5/7/04 - BCL Old Co Limited and others v Aventis SA and others; Order of 11 February 2005 in Case no. 1028/5/7/04; Order of 17 December 2004 in Case no. 1028/5/7/04; Order of 11 February 2005 in Case no. 1029/5/7/04; Transcript of the Case Management Conference of 17 December 2004 in Cases no. 1028/5/7/04 and 1029/5/7/04, p. 4; Case No. 1029/5/7/04 - Deans Foods Limited v Roche Products Limited and others; Order of 25 January 2005 in Case no. 1029/5/7/04; Order of 17 December 2004 in Case no. 1029/5/7/04; Case No. 1088/3/7/07 - M E Burgess, J J Burgess and S J Burgess (trading as J J Burgess and Sons) v. (1) W. Austin and Sons (Stevenage) Limited and (2) Harwood Park Crematorium Limited; for a commentary, Blanke & Nazzini, 1(1) GCLR (2008), R-23 - R-24; Transcript of the Case Management Conference of 20 November 2007 in Case no. 1088/3/7/07, p. 1; Order of 20 November 2007 in Case no. 1088/5/7/07; Order of 18 February 2008 in Case no. 1088/5/7/07; Case no. 1077/5/7/07 – Emerson Electric SA and others v. Morgan Crucible and others; Transcript of the Case management Conference of 13 December 2007 in Case no. 1077/5/7/07, p. 12.

¹⁸ Note that the CAT Rules 2003 are similar to the followed the CPR in its wording on a preliminary recourse to ADR.

there is “no sanction” for not following through with the mediation.¹⁹To facilitate mediation, the CAT has ordered²⁰ the stay of proceedings while settlement negotiations were pending,²¹ and the Tribunal has also ordered further disclosure and the service of expert reports to provide sufficient information for the mediation.²²While the mediation is pending, the Tribunal’s role is supportive and facilitative, and to the extent that the mediator cannot deal with a certain issue, the parties are allowed to make an application to the Tribunal for assistance.²³ This trend should be encouraged and may, in the end, provide more effective redress to businesses and consumers than full-blown, expensive litigation.

¹⁹ Transcript of the Case Management Conference of 13 December 2007 in Case no. 1077/5/7/07, pp. 12 and 37. Compared to the practice of the English Commercial Court, this is somewhat untypical: The Commercial Court will not hesitate to draw cost consequences should a party unreasonably refuse to try mediation before resorting to court proceedings.

²⁰ Order of 11 February 2005 in Case no. 1028/5/7/04 and Order of 11 February 2005 in Case no. 1029/5/7/04.

²¹ Order of 25 January 2005 in Case no. 1029/5/7/04.

²² Order of 17 December 2004 in Case no. 1028/5/7/04 and Order of 17 December 2004 in Case no. 1029/5/7/04.

²³ Blanke & Nazzini, 1(1) GCLR (2008), p. R-23.