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Recent Developments In Antitrust Class Actions In The United Kingdom

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“The concept of the ‘class action’ as yet unknown to the English courts.”

Lord Donaldson MR in *Davies (Joseph Owen) v Eli Lilly & Co* [1987] 3 All ER 94 at 96

I. INTRODUCTION

Somewhat fitful attempts at promoting antitrust damages litigation have taken place in the EU in the last several years. These attempts have been stymied to a certain extent by a coalition of disparate, but cumulatively powerful, factors. For one thing, the EU Commission (and also, to an extent, certain national competition authorities) has sought to strike a delicate balance between competing considerations. A paramount consideration has been the jealous guarding of the Commission's leniency/amnesty policy in cartels—a policy that has been the major source of the very large majority of Commission cartel cases in the last 15 years. Fostering a private antitrust damages litigation culture is seen by some within the Commission as potentially undermining its leniency policy; in particular, if private litigation were to lead to a risk of discovery of corporate leniency statements by plaintiffs. Allied to this is a real fear on the part of many national legal systems of importing the perceived excesses of U.S. style class action lawsuits, coupled with (a somewhat surprising) resistance in many countries to EU harmonization of national civil procedure laws (perhaps reflecting the fact that the EU law has, with very, very limited exceptions, not sought to harmonize national legal procedural laws).

On the other hand, there is also recognition that administrative fines by the Commission do not, directly anyway,² benefit EU consumers, and that the political legitimacy of EU competition law could be significantly increased by consumer recovery of damages in civil litigation. At least some within the Commission also appear to accept that civil damages actions could be an important complement to public enforcement, particularly if the non-disclosure of corporate leniency statements could be guaranteed. The EU Courts, too, have recognized that there is a *substantive* individual right, under EU law, to compensation for damages caused by a breach of EU competition law (rather than merely a right that claims for damages under EU competition law should be effective and treated no differently, in *procedural* terms, to claims under national law).³

For plaintiffs' lawyers, at least, key to the success of an effective private damages action system is the need to cater for collective forms of redress. Because in many cases harm caused by, say, a cartel is atomized among a large group of purchasers and sub-purchasers whose individual

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² Commission fines go to the EU Budget, to which Member States contribute. So fines essentially lead to a *pro rata* reduction in national contributions to the EU Budget.

³ Case C-453/99, *Courage and Crehan*, [2001] ECR I-6297, and Joined Cases C-295- 298/04, *Manfredi*, [2006] ECR I-6619.

losses may not be huge, the incentives of any individual plaintiff to sue (usually large and well-resourced) defendants is sometimes limited. The same may be true of small- and medium-sized enterprises affected by anticompetitive behavior.⁴

As things currently stand, however, EU Commission reforms in this area appear to envisage a very limited form of collective action redress. In the draft of the EU Directive intended to legislate for a minimum level of common procedures for private damages actions, the Commission only provided for: (1) an opt-in collective redress procedure whereby two or more *named* plaintiffs could, in general, be joined in the same action, and (2) a representative action procedure, whereby certain nominated or “qualified” State bodies or not-for-profit entities would be able to pursue collective actions. While, in (2), the action could be brought on behalf of a group that did not involve individual named plaintiffs (*i.e.*, something more akin to an opt-out action), the reservation of such actions to essentially public bodies would seriously limit its practical effectiveness. Moreover, the fate of the draft Directive remains unclear following its withdrawal and the change in EU Competition Commissioner in February 2010.

Given the somewhat schizophrenic, and uncertain, approach of the EU authorities to private damages actions in the competition arena, it will likely, in the short- to medium-term anyway, be left to national legal systems in the EU to decide to what extent, if any, they wish to promote collective redress procedures in competition law cases. The United Kingdom has long been regarded as being at the vanguard of EU jurisdictions likely to be attractive, to plaintiffs at any rate, for private damages actions. Reasons for the U.K.’s attractiveness include the availability of full disclosure of documents as of right (unlike most civil law systems where specific (or, even, no) disclosure is the norm), the use of English as the lingua franca of competition law, and the generally high quality, probity, and speed of justice in the United Kingdom. Perhaps recognizing these attractions one of the leading U.S. class action law firms, Hausfeld LLP, established an office in London for the express purpose of bringing class action law suits.

This short article examines recent developments in multi-party litigation, including competition litigation, in the United Kingdom.⁵

⁴ A recent EU Green Paper notes as follows:

Consumers can always go to court to obtain individual redress. Mass claims could then in principle be resolved with a large number of individual claims. But there are barriers which de facto impede European consumers from obtaining effective redress. These are in particular high litigation costs and complex and lengthy procedures. One out of five European consumers will not go to court for less than EUR 1000. Half say they will not go to court for less than EUR 200. High costs and the risk of litigation make it uneconomic for a consumer to pay court, lawyer and experts fees that may exceed the compensation. Procedures are so complex and lengthy that consumers may find themselves entangled without any clear perception of when (or if) their case will be satisfactorily resolved. Only 30% of consumers think that it is easy to solve disputes through courts.

See Green Paper On Consumer Collective Redress (2008) COM(2008) 794 final, para 9. Interestingly, the European Economic and Social Committee, a consultative body of the European Union, in its “Opinion of the European Economic and Social Committee on the Green Paper favored “*granting individuals the right to opt-in to aggregate litigation proceedings rather than simply presuming them to be a party to it unless they opt out.*” See para. 5.2.3 at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2010:128:0097:0102:EN:PDF>.

⁵ This article does not examine alternative dispute mechanisms or arbitration. The former has been used with some success in at least one recent competition damages claim. In the Marine Hose cartel, one of the defendants, Parker ITR, has made available a fund, paid into an interest-bearing escrow account in London, representing 16% of specified sales of marine hose from 31 January 2002 to 2 May 2007. In return for giving up rights to litigate against Parker, purchasers can claim against the fund. An independent expert assisted by an independent economist will determine how much of the fund goes to each claimant but there is a presumption that direct Parker purchasers

II. THE CURRENT PROCEDURAL TOOLBOX

While the present short piece does not purport to be a piece on UK civil procedure rules, it is worth recalling the basics of how two or more plaintiffs can become multiple parties to the same litigation. In essence, there are four ways:⁶

1. ***Joinder as multiple claimants.*** The simplest form of multi-party litigation is where two or more persons are joined in the same action. Rule 19.1 of the Civil Procedure Rules (“CPR”) states that “*any number of claimants or defendants may be joined as parties to a claim.*” Of course it must, in law, be possible/necessary to join the additional party or parties. It is generally up to the plaintiff to decide how to constitute the litigation. At its most basic an action is properly constituted if there is a cause of action vested in a single plaintiff against a single defendant. Where rights are vested in persons jointly (but not severally) they must be joined as parties. In English law, an antitrust action is considered as an action for the tort of breach of statutory duty (the statutory duty being the duty not to infringe competition law). Defendants are jointly and severally liable for such torts so it is not a requirement for plaintiffs to join all possible defendants; in principle one would do (although in practice there may be various upsides to joining others). The plaintiffs must obviously not have a conflict of interest *inter se*.⁷
2. ***Group Litigation Orders.*** In the late 1990s, the U.K. courts developed the Group Litigation Order (“GLO”) procedure for mass tort litigation. This is now formalized in CPR Rule 19.10. The GLO procedure is not, however, a class action type system. Individual claims must still be joined. In essence what the GLO procedures do is to allow the Court, or the parties, to maintain a register of claims to which common and uniform rules of procedure can then be applied in the interests of efficiency. The GLO is therefore more akin to a centralized form of management of multiple claims. Since GLOs were introduced there have to date been around 70 orders, relating largely to product liability claims, holiday claims, and financial services claims.⁸

will be entitled to 16% of purchases during the settlement period unless they passed on the loss. Parker has also agreed to pay certain legal fees and the costs of notice and administration in addition to the settlement amount. For details of the settlement see http://www.hausfeldllp.com/content_documents/10/ParkerSummaryNotice.pdf. On alternative dispute mechanisms generally see COMPETITION LITIGATION: UK PRACTICE AND PROCEDURE, Brealey and Green ed, Oxford University Press (2010), Chapter 22.

⁶ It is also possible in English procedural law to have a “test case.” This is not a piece of multi-party litigation as such but a tool where, in circumstances where multiple individual actions have been commenced, one “typical” case is selected and that case is tried to establish the issue(s) common to the multiple claims. The other claims will usually be stayed pending the outcome of the test case. This possibility was used to good effect in recent litigation over the lawfulness of bank overdraft charges in the United Kingdom. See *Office of Fair Trading v Lloyds TSB Bank plc and others* [2007] UKHL 48.

⁷ Under CPR 19.4, the court’s permission is required to remove, add or substitute a party, unless the Claim Form has not been served (in which case the plaintiffs can add who they wish, subject to it being permissible under CPR 19 to do so). An application for permission may be made by (a) an existing party; or (b) a person who wishes to become a party. Nobody may be added or substituted as a plaintiff unless (a) he has given his consent in writing; and (b) that consent has been filed with the court.

⁸ These have included: (1) Dexion Deafness Group litigation (2005). Matters arising out of claims for personal injury (industrial deafness) arising out of employment at Defendant’s premises caused by excessive noise from 1963 to 2003; (2) Miners knee Group Litigation (2006). Common or related issues of fact or law in respect of the alleged liability of National Coal Board for chronic knee injury suffered as a result of underground work in mines between

3. **Consolidation of multiple (related) actions.** Where two or more actions commenced as separate actions are closely connected, the Court may (not must), under CPR 3.1(2)(g) order that they be consolidated into a single action. To similar practical effect, the Court may also order, under CPR 3.1(2)(h), that two or more claims are tried at the same time. While there are no hard and fast rules as to when the discretion to consolidate actions will be exercised, good reasons would usually include: (a) the claims raise common questions of law or fact; (b) the rights/relief arise in respect of or out of the same transaction(s); or (c) there is some other good reason for consolidation. Consolidation can be practically effective – in one case over 3,000 separate claims were consolidated.⁹
4. **Representative Actions.** An under-appreciated fact is that U.K. civil procedure rules have, for well over a century, included provisions that allow for at least a certain type of class action. The present avatar is CPR Rule 19.6.¹⁰ It, in essence, allows one named plaintiff to bring an action on behalf of himself and other, unnamed represented parties who have the “same interest” as the (named) representatives. The text of the rule provides that “(1) Where more than one person has the same interest in a claim, the claim may be begun; or the court may order that the claim be continued, by or against one or more of the persons who have the same interest as representatives of any other persons who have that interest.”¹¹ On the face of it, the rule is broad; there is, for example, no requirement that the represented persons should consent to the representative action said to be have been brought on their behalf. Nor does there appear to be any upper limit on the number of persons who can be represented, so long as they have the “same interest.” Nor is there any formal requirement that the representatives should be domiciled in the United Kingdom or otherwise subject to any jurisdictional requirement above and beyond the conditions for the application of the rule itself. Section III below focuses in more detail on CPR 19.6 since there is extant litigation in the UK on the extent to which it can be used to create a form of opt-out class action in competition law damages claims (*Emerald Supplies Limited & others v British Airways plc*).

1949 and 1994.2007; and (3) Atomic Veterans Group litigation (2007). Claims brought by veterans who participated in British program of testing nuclear weapons between 1952 and 1958. Various GLOs have been used to determine all of the issues in litigation, including quantification of damage. See, e.g., *Soviva Hotel Group Litigation* (2 November 2006); *Ryanair Agents Group Litigation* (17 January 2002); *Gerona Air Crash Group Litigation* (18 August 2001).

⁹ *Lubbe v Cape plc* [2000] 1 WLR 1545 (HL).

¹⁰ Indeed, it has been suggested that the common law pre-cursors to the current CPR 19.6 led to the development of the class action procedures in the United States.

¹¹ The Rule adds that:

2. The court may direct that a person may not act as a representative.
3. Any party may apply to the court for an order under paragraph (2).
4. Unless the court otherwise directs any judgment or order given in a claim in which a party is acting as a representative under this rule is binding on all persons represented in the claim; but may only be enforced by or against a person who is not a party to the claim with the permission of the court.

III. LOOKING AT REPRESENTATIVE ACTIONS IN MORE DETAIL

The precise limits of CPR 19.6 as a tool to allow class actions in competition law damages claims is currently being litigated before the UK courts in an action brought by Hausfeld LLP in the context of the investigation into price-fixing allegations in the air cargo sector—*Emerald Supplies Limited & others v British Airways plc*.

Before turning to the specifics of the *Emerald* case, however, it is worth pausing briefly to consider the antecedents to CPR 19.6 (and its predecessor rules, which were substantially similar), showing that it has had vitality in a range of diverse situations, including:

1. In *Duke of Bedford v Ellis* [1901] AC 1, Ellis and five other persons brought proceedings against the Duke of Bedford on behalf of themselves and all other “growers” of fruit, flowers, vegetables, roots, and herbs within the meaning of the Covent Garden Market Act 1828. They alleged that the Duke, as owner and manager of the market, did not comply with the provisions of the Act, and had exacted excessive tolls from the growers. The majority of the House of Lords agreed to grant declaratory relief to the claimants on behalf of themselves and all other growers within the meaning of the Act insofar as the declaration sought was merely limited to ordering that the Duke of Bedford give effect to the claimants’ statutory privileges.
2. In *Markt & Co., Limited v Knight Steamship Company Limited* [1910] 1021, the claimants shipped goods on a general ship of the defendants for a voyage from New York to Japan. Before arriving at its destination, the ship was sunk by a Russian cruiser on the ground that she was carrying contraband of war, and both ship and cargo was lost. The claimants, on behalf of themselves and forty-four other persons who had shipped goods on board the ship, brought proceedings against the owners of the ship for breach of contract and duty in the carriage of goods by sea. The Court of Appeal held that the claimants could not bring a representative action because *inter alia* of the existence of separate contracts, meaning that defenses might exist against some of the shippers which do not exist against the others (*e.g.*, estoppel, set-off etc.) and the defendants would have been prevented from establishing differing defenses in subsequent actions by members of the class (at 1040). The Court further held that a declaration that the defendants were liable to every member of the class in damages could not be ordered (at 1042).
3. In *Prudential Assurance Co. Ltd v Newman Industries Ltd. and others* [1981] Ch. 229, the claimants brought proceedings against the defendants, who included directors of Newman Industries and a further company Newman Industries was intending to acquire. The claimants alleged that the circular regarding Newman Industries’ acquisition that was sent to the shareholders was tricky and misleading, and contained statements that the defendant directors could not honestly have believed to be true. The claimants sought, on behalf of themselves and all other shareholders of Newman Industries who, like the named claimant, had suffered loss, a declaration that they were entitled to damages against the defendants for conspiracy. Vinelott J allowed the declarations to the effect that the circulars was tricky and misleading, that the individual defendants conspired to its circulation, and that in so doing they conspired to commit an unlawful act or induce a breach of contract, but did not allow the declaration as to damages.

4. In *Roche v Sherrington & others* [1982] 2 All ER 426, [1982] 1 WLR 599, the claimant was not allowed to bring a representative action to repay him certain sums that he had paid to the *Opus Dei* association during his period of membership against all members of the association worldwide. Slade J refused to allow the action to continue as a representative action on the grounds *inter alia* that: (1) there might be separate defenses open to members of *Opus Dei* who were not such members at the respective dates of the relevant payments claimed to have been made by the claimant which would not be open to persons who were members at such dates; (2) there might be separate defenses open to members of *Opus Dei* resident in certain countries of the world, which would not be open to persons resident in other countries. (The main focus of the claim was the United Kingdom, Ireland, Kenya, and Spain whereas all *Opus Dei* members worldwide were said to be the defendants.)

As noted, the first attempt to apply CPR 19.6 to a competition law damages claim is *Emerald Supplies Limited & others v British Airways plc*. The case is pending on appeal before the Court of Appeal and the author is counsel of record to one of the parties. The case will therefore be presented in largely neutral terms, taking into account information and findings that are a matter of public record.

The facts can be briefly stated. The named plaintiffs import cut flowers from, respectively, Columbia and Kenya. For that purpose they use the air freight services of British Airways (“BA”) and other international airlines. They claim that BA has been party to agreements and concerted practices with Lufthansa, Korean Airlines, Qantas, Japanese Airlines, Air France, Cathay Pacific, KLM, SAS, Martinair, and other undertakings directly or indirectly to fix the prices at which air freight services are supplied or to control or share the market for that supply.

Of note is that the EU Commission has not yet concluded its investigation into the air cargo sector. Notwithstanding this, in September 2008 the plaintiffs instituted proceedings against BA seeking damages for the alleged cartel infringements. The claim is extremely brief and laconic. The relevant parts are set out below, with the plaintiffs’ proposed amendments to their case (which have not yet been formally admitted) in underline and strikethrough:

8. The Claimants were direct or indirect purchasers or both of air freight services the prices for which were inflated by one or more of the agreements or concerted practices. As such they are representative of all other direct or indirect purchasers of air freight services the prices for which were so inflated.
9. By virtue of the inflated prices, the direct or indirect purchasers, including the Claimants, have suffered losses, including losses, under one or more of the following three heads:
 - the inflated element of the price, in so far as it was passed on to them, [and/or]
 - loss of sales volume in so far as the inflated price was passed on by them to their own buyers, and
 - loss of sales volumes of other products as a result of brand damage.
10. In the circumstances the Claimants claim on their own behalf and on behalf of all other direct or indirect purchasers of air freight services the prices for which were inflated by the agreements or concerted practices, a declaration that the Defendant is liable to pay damages are recoverable in principle from the Defendant by ~~to~~ those purchasers in respect of each of those three types of loss.

BA applied to strike out the claim, on the basis that it was not a proper representative action within the meaning of CPR 19.6. It succeeded at first instance in the High Court in doing so. The case is now on appeal to the Court of Appeal, with judgment pending. The key findings of the High Court (by Vice-Chancellor Morritt) were as follows:¹²

1. The pre-condition for the rule is, from its own opening words, that “where more than one person has the same interest in a claim the claim may be begun...”. The first pre-condition is that there should be more than one person who satisfies the remaining preconditions. There is no limit to the number of persons in the class to be represented. But the mere fact that in this case the relevant class is both numerous and geographically widely spread is not of itself an objection to a representative action. Nevertheless, he held, the more extensive the class the more clearly should the other pre-conditions be satisfied.
2. The second pre-condition is that those persons have the relevant interest *at the time the claim is begun*. It is not sufficient that the same identity of interest exists at the time that judgment is given must be rejected. While it is possible over time that membership of the class may fluctuate (and without leading to the disapplication of CPR 19.6), there was a difficulty with the posited class in that its composition depended on the outcome of the litigation. It was, to borrow a phrase used to refuse certification in U.S. class actions, a “fail safe” definition. The plaintiffs describe the class as “direct or indirect purchasers of air freight services the prices for which were inflated by the agreements or concerted practices.” But, the judge held, that formula describes the allegations made by the claimants against BA which they must prove in the action. By contrast, in previous decided cases under CPR 19.6, the class was either prescribed by the legislation at issue or otherwise ascertainable with a good degree of certainty (even if all members could not be listed), *e.g.*, members of a political party, those on the register of members of an association, or shareholders or copyright owners/licensees. Thus, the judge held, it is impossible to say of any given person that he was a member of the class at the time the claim form was issued. It is not that the class consists of a fluctuating body of persons but that the criteria for inclusion in the class cannot be satisfied at the time the action is brought because they depend on the action succeeding.”¹³
3. In addition, the judge objected to a class that comprised both direct and indirect purchasers. He held that, given the issue of pass-on of losses down the distribution chain, there was an “inevitable conflict between the claims of different members of the class.”¹⁴ This, presumably, because an indirect purchaser claim necessarily depended on a direct purchaser having passed on some or all of any loss to the indirect purchaser, such that the direct and indirect purchaser claims were potentially antagonistic, or at least did not have the “same interest” under CPR 19.6. Interestingly, in reaching this

¹² See *Emerald Supplies Limited & Another v British Airways plc* [2009] EWHC 741 (Ch).

¹³ *Id.*, ¶ 35.

¹⁴ *Id.*, ¶ 36.

conclusion, the judge rejected the argument that if the U.K. courts were to place a ban on raising the pass-on defense, as the U.S. Supreme Court did in *Hanover Shoe*, there would be no conflict between the plaintiffs. Rather surprisingly, he described *Hanover Shoe* as “a policy decision not open to the courts in England.” Nor did he consider that the fact that BA would be in a position to argue the issue of pass-on of losses by direct purchasers remove the lack of “same interest:” the objection was “because the opposing views in this case would arise between members of the class *inter se*, not by the parties in opposition to each other in the action itself.”¹⁵

The judgment, as noted, is on appeal and so could be wholly or partially reversed. But a number of comments are appropriate. In the first place, while the wording of CPR Rule 19.6 and the class action rules under Rule 23 of the U.S. Federal Rules of Procedure is clearly different, there is a good degree of similarity in the underlying analysis. Rule 23(a) states that:

One or more members of a class may sue or be sued as representative parties on behalf of all members only if: (1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class.

In the *Emerald* case, the judge considered that the plaintiffs and the other 178 companies it said the named plaintiffs would represent could be subject to joinder.¹⁶ He further held that, in so far as common questions of law/fact arose among the plaintiffs, such issues were more appropriately dealt with under the GLO procedure under CPR Rule 19.11. In this regard, the requirement of “same interest” under CPR 19.6 appears more demanding than the “common questions” requirement under Rule 23 of the Federal Rules of Procedure. By citing an “inevitable” conflict of interest between the representatives and represented (and the represented *inter se*), the judge also implicitly but clearly concluded that the representatives’ claims were not “typical” of the rest of the class (and that the claims within the represented class would also be different and not typical of even each other). Finally, while again not explicitly stated, the judge appears to have had in the back of his mind a concern that, where issues of pass-on would arise within the class, it was not appropriate for the representatives to act on behalf of the represented. They could not adequately protect the interests of all the class.¹⁷

Second, almost irrespective of the outcome of the appeal in the *Emerald* case, there appears to be no reason in principle why class actions would not be appropriate under CPR 19.6 in other cases. The gravamen of the *Emerald* case was the plaintiffs’ decision to include both direct and indirect purchaser claims within a single class action. It seems unlikely that the class

¹⁵ *Id.*, ¶ 37.

¹⁶ *Id.*, ¶ 38.

¹⁷ See to this effect Rule 23(b)(3):

the questions of law or fact common to class members [must] predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy. The matters pertinent to these findings include: (A) the class members’ interests in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already begun by or against class members; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and (D) the likely difficulties in managing a class action.

originally posited in the *Emerald* case would have been certified under Rule 23 of the Federal Rules of Procedure. Had the plaintiffs, for example, limited the representative action to direct or indirect purchasers or to certain sub-classes of direct or indirect purchasers, the “conflict of interest” due to pass on issues would either not have existed or could have been subject to appropriate case management directions.

Third, it has generally been assumed that no award for damages can be made in the representative action itself,¹⁸ i.e., that separate proceedings on loss and damage and quantum would be required. If this is correct, it is arguably an important practical disincentive to using CPR 19.6 in competition law damages claims. Thus, it is argued, victims of a price fixing cartel will not in a representative action be awarded compensation to reflect their own personal loss even if they could satisfy the condition of the “same interest” in a claim.¹⁹ But this is not self-evidently correct and is one of the issues before the Court of Appeal in *Emerald*. There is at least one reported case where the representatives and represented have been allowed by the UK courts to have a collective assessment of damages,²⁰ and, given the inherent powers of the courts, consistent with the overriding objectives of the CPR, to manage cases in the most effective manner, it should not be assumed that damages are automatically precluded in representation action cases.

Finally, the *Emerald* case does not answer—because the issue has not (yet?) arisen in the litigation—what basic evidential threshold, if any, the plaintiffs must overcome before a class action can be allowed to proceed. Unlike the United States, where a class must be certified by a judge, there is no “approval” process under CPR 19.6. Instead the action can proceed simply as issued *unless* the defendant (or another party/person) challenges the action as not being a proper representation action (usually by way of a strike out application). But what evidential standard the plaintiffs must satisfy will clearly also be an issue under CPR 19.6.

Recent class action developments in the United States and elsewhere have signaled a potentially significant change in class certification requirements, indicating a stricter test for plaintiffs. In particular, in *re Hydrogen Peroxide*,²¹ the Third Circuit made a significant, and pro-defendant, clarification to Rule 23, finding that the Court must (1) make findings that each Rule 23 requirement is met by a preponderance of the evidence (on which the plaintiffs bear the burden of proof), and not simply as a “threshold showing;” (2) resolve all factual and legal disputes relevant to class certification, even if they overlap with the merits of the cause of action: “an overlap between a class certification requirement and the merits of a claim is no reason to decline to resolve relevant disputes when necessary to determine whether a class certification

¹⁸ *Prudential Assurance Co Ltd v Newman Industries (No 1)* [1981] Ch 229 at 255-6.

¹⁹ See *COMPETITION LITIGATION: UK PRACTICE AND PROCEDURE*, Brealey and Green ed, Oxford University Press (2010), page 43.

²⁰ See *EMI Records v Riley* [1981] 1 WLR 923. The case does contain certain qualifications. The same damage had been suffered by all members of an ascertainable class and the members had consented to all pecuniary remedies being granted to the plaintiff on their behalf. Thus, and naturally enough, those who claim damages must at least be ascertainable at the time damage is awarded and must have consented to the award of damages in this way. This does not, therefore, envisage some form of abstract assessment of aggregate damages for a posited class, for the winners then to divvy up as they see fit. Moreover, the plaintiffs were all copyright holders in material whose rights were infringed by the defendant. As such they were a defined, contiguous, and fixed class (albeit that the copyrights could be assigned or sub-licensed to different persons over time). An unidentified class of direct or indirect purchasers may lack this specificity and contiguity.

²¹ *In re Hydrogen Peroxide Antitrust Litigation* 552 F. 3d 305 (3rd Cir 2008).

requirement is met;²² and (3) consider all relevant evidence, including, if presented, expert testimony in opposition to class certification.

The practical issue is what evidential or other requirements the U.K. courts will impose in respect of class actions under CPR 19.6. Will the plaintiff class be allowed to benefit from a presumption that price-fixing necessarily impacts on a purchasing class or can defendants put forward evidence showing that the class, or some part of it, could not have been adversely affected by price-fixing? In other words, what is the nature of the *prima facie* case that the plaintiff class must show? (In *re Hydrogen Peroxide* suggests the latter approach is now correct (at least in that Circuit), marking a departure from past case law.) Experience suggests that the U.K. courts would be open to striking out classes where the evidence for class-wide competition injury caused by the defendant's conduct is weak, while at the same time being mindful at the interlocutory stage of not conducting a "mini-trial."²³

IV. LOOKING FURTHER AHEAD

The practical lack of a developed class action tool in the United Kingdom has led various governmental and non-governmental agencies to propose legislative reform in this area. Each one of these initiatives would itself be worthy of a separate article. So only the main points are noted:

A. The Office of Fair Trading (OFT) Proposals

In 2007 the OFT published its conclusions and recommendations entitled *Private actions in competition law: effective redress for consumers and business - Office of Fair Trading* (2007).²⁴ This is specific to competition law only. The main conclusions have been summarized as follows:²⁵

[E]xisting procedures should be modified, or new procedures introduced, permitting representative bodies to bring not only follow-on but also standalone representative actions for damages and/or injunctions on behalf of consumers, whether for named consumers only (opt-in) or for consumers at

²² *Id.* at 316.

²³ *See, e.g.,* in *Arkin v Borchard Lines (No. 2)* [2001] All ER (D) 186:

[t]he fact is that there may exceptionally be cases of great factual complexity where, if the application to strike out the claim..., it may be essential for the judge before whom the application is made to conduct a careful investigation of the evidence to ascertain whether, in spite of the intrinsic complexity, there is obviously no substance in the claim. If that conclusion cannot be reached on the basis of the facts pleaded by the claimant and on any further facts which are indisputable either because they have been admitted or because they have gone unchallenged when there was a reasonable opportunity to challenge them or because they are the only realistic inference from other pleaded or admitted or unchallenged primary facts, the claim should be left to go to trial. However, as *Three Rivers District Council* shows, where the application in such complex cases relies on inferences of fact, the overriding objective may well require the claim to go to trial in the interests of a fair trial. That is because the relevant inference could not be safely drawn without further disclosure or oral evidence at the trial. It is thus necessary, where such inferences are relevant, to guard against the temptation of drawing them as a matter of probability, because the achievement of the overriding objective requires a much higher degree of certitude. Where, in a complex case, as may often be the situation, the frontier between what is merely improbable and what is clearly fanciful is blurred, the case or issue should be left to go to trial. (¶ 20)

²⁴ Private actions in competition law: effective redress for consumers and business Recommendations from the Office of Fair Trading, November 2007, available at http://www.offt.gov.uk/shared_offt/reports/comp_policy/oft916resp.pdf.

²⁵ *See* CIVIL JUSTICE COUNCIL REPORT, *Improving Access to Justice through Collective Actions, Developing a More Efficient and Effective Procedure for Collective Actions* (Final Report), page 57, available at http://www.civiljusticecouncil.gov.uk/files/Improving_Access_to_Justice_through_Collective_Actions.pdf.

large (opt-out). An identical recommendation was made in respect of representative actions on behalf of businesses (again on either an opt-in or opt-out basis, subject to further consultation). This is of interest in that it for the first time acknowledges that the range of potential claimants goes far beyond the more conventional consumers and similarly injured claimants. (emphasis in original)

B. The Civil Justice Council (CJC) Proposals and Government response.

In late 2008 the CJC published its final recommendations on *Improving Access to Justice through Collective Actions: Developing a More Efficient and Effective Procedure for Collective Actions*.²⁶ The long and detailed report cites a number of deficiencies in current collective redress mechanisms, including CPR 19.6, and sets out a detailed series of recommendations. Principal among them is the introduction and design of a generic collective action (for all civil claims affecting multiple claimants, not just those in the area of competition law) on either an opt-in or an opt-out basis, subject to a certification procedure and enhanced case management, with the possibility of damages being aggregated in appropriate cases. The CJC is of the view that implementation of an opt-out mechanism would probably require primary legislation, and that such a mechanism should be accompanied by new court powers to scrutinize and manage claims and costs. The Ministry of Justice's 2009 response to the CJC was tepid: "the Government does not support the introduction of a generic right of collective action. It believes that such rights should be considered, and where appropriate introduced, in respect of specific sectors." Undeterred, the CJC in 2010 prepared "a set of generic court rules of sufficient flexibility that they could be used for any different model of collective proceedings that primary legislation might permit."²⁷ With a change in Government in May 2010, what, if anything, will happen next is unclear.

The upshot of the above suggests that, if any collective redress reform is forthcoming in the United Kingdom, it will likely be rather limited. As things stand, representative follow-on actions in the specialist Competition Appeal Tribunal are permitted on behalf of consumers under section 47B of the Competition Act 1998. However, this legislation has been a bit of a damp squib, and the only approved representative body under this provision—Which?—has said that it does not intend to bring any further actions. The OFT proposals appear mainly to envisage simply extending the existing rights under Section 47B to potentially other bodies and to also allow them to bring a stand-alone action (and not merely a follow-on action from an administrative decision finding a violation). In so far as the Government appears even receptive to legislative reform in this area, it would appear to consider that the existing collective action regime under Section 47B of the Competition Act 1998 provides a good model for potential reforms along a similar line in *other* areas. In a rather prophetic way, the limited U.K. reforms proposed appear to echo the draft EU Directive on private enforcement which simply provided for a right of collective action vested in certain "qualified" State bodies or not-for-profit entities. Thus, even if the draft Directive is resurrected under the current Commissioner for Competition, it would appear to involve little if anything new in terms of U.K. civil procedural law.

V. CONCLUSION

After a promising start in 2002 (with the introduction, via the Enterprise Act 2002, of a collective right of action vested in certain nominated public interest bodies under Section 47B of the Competition Act 1998), collective redress mechanisms for recovery of damages for antitrust

²⁶ *Id.*

²⁷ See CJC, Draft Court Rules For Collective Proceedings (2010), available at http://www.civiljusticecouncil.gov.uk/files/CJC_Draft_Rules_for_Collective_Actions_Feb_2010.pdf.

infringements have hit the skids in recent years in the United Kingdom. There does not appear to be sufficient political will to adopt legislation giving a general right to bring opt-out class actions as exists under the U.S. federal (and, in some cases, state) rules.

Give this hiatus, the plaintiffs in *Emerald Supplies Limited & others v British Airways* are at least to be commended for their ingenuity in seeking to use a rather old and under-developed rule of civil procedure—the representative action under CPR 19.6—as a possible basis for enabling a class action right of sorts. Thus far, the *Emerald* plaintiffs have not been successful in this regard. But a Court of Appeal judgment remains pending and it may be that even an unsuccessful outcome for the plaintiffs would clarify what types of representative class actions would be permitted, *e.g.*, direct *or* indirect purchasers (but not both in the same action), or sub-classes of direct or indirect purchasers.

These developments may seem like dry matters of pure procedural law that are detached from the substantive development of antitrust law in the EU and at Member State level. But it can be argued with some force that the procedural context within which enforcement takes place has as important, if not more, an effect on the development of substantive principles of law as decisional practice and case law developments themselves. Probably the single great limiting factor in the development in the United States of the type of expansive or open-ended principles that sometimes characterize EU antitrust law (particularly for unilateral conduct) is the fear that such principles could wreak economic havoc in a plaintiff-friendly, treble damages enforcement procedural structure. By contrast, in an EU still driven largely by administrative enforcement, the risks from looser substantive principles are perceived to be less. Finally, it should also be recalled that the procedural framework within which victims of antitrust infringements are compensated will often be a much more powerful barometer of the political acceptability of the substantive principles that underpin antitrust law than the substantive principles themselves. In short, procedure matters.