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The Development of the Class Action in the United Kingdom

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I. INTRODUCTION

Class actions are not part of the U.K. legal landscape, at least not yet. In fact, commentary around the current passage of the Consumer Rights Bill through the U.K. Parliament has highlighted that class actions are viewed as something of a legal bogeyman. Concern has been expressed that the United Kingdom should avoid the introduction of a system of punitive damages combined with damages-based fee agreements and the wealthy/rapacious bar that would inevitably develop! Perish the thought!

On the other hand, effective consumer redress is on the legislative agenda at both the U.K. and European levels. It has been recognized that many meritorious claims are currently not being pursued and the Civil Justice Council (which oversees the modernization of the civil justice system) has recommended that the U.K. Government should facilitate new avenues for multi-party litigation. Consumers and small- and medium-sized businesses (“SMEs”) are least likely to have the resources required to bring an individual action and therefore may find the possibility of participating a scheme for collective redress most appealing. Therefore, the United Kingdom is taking a sectional rather than across-the-board approach to introducing the class or collective action, as and where need is demonstrated.

Private damages for breach of competition law will be in the vanguard introducing a wider mass consumer and business redress in the United Kingdom, although mass redress for consumers in the area of financial services is likely to be available first. The Consumer Rights Bill will introduce new forms of collective action in the United Kingdom where, in certain judicially supervised cases, claimants will have to opt-out, failing which their claim is included with the collective or class.

If class actions are to become reality in the United Kingdom, then funding for the action will be needed, whether from claimants, insurers, litigation funders, risk sharing with lawyers, or a mixture of all of these. Without funding or insurance, the liability to costs and defendants’ costs may be prohibitive.

Attempts to bring actions collectively under existing procedures have hit stumbling blocks so far. This article will consider the reasons why success has been elusive, and discuss the obstacles that might lie in the way of the implementation of an effective system of collective redress in the United Kingdom—in particular in the competition field—and how these might be overcome.

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II. THE COLLECTIVE REDRESS SYSTEM IN THE UNITED KINGDOM: THE CURRENT POSITION

At present, the forms of collective action available in the United Kingdom for redress, including breach of competition law, are limited.

Current competition law provides that certain “specified bodies,” the only such one being the Consumers’ Association, can bring collective consumer actions on behalf of two or more consumers before the specialist tribunal, the Competition Appeal Tribunal (the “CAT”). This has been used only once.

The 2007 claim by the Consumers’ Association against JJB Sports following the Office of Fair Trading² infringement decision in the *Replica Football Kits* case in 2003³ had potentially one million claimants entitled to compensation. However, the Association struggled to persuade as many as 140 consumers to opt-in; an expensive failure considering the degree of publicity invoked, the resources spent, and the level of external legal costs incurred.

As regards jurisdiction, the High Court has general jurisdiction whereas the CAT has specialist jurisdiction in relation only to damages actions that follow on from an infringement decision of the U.K. or the EU competition authorities. Insofar as part of a claim falls outside the infringement described in the decision, the CAT may not have jurisdiction. Where there is an infringement decision the claimant has to prove causation and loss as well as deal with other issues such as pass-on of overcharge. A claim before the CAT has to be brought within two years of the decision being final in respect of each party claimed against. Before the High Court the claim can be brought within six years of the cause of action accruing. The High Court can entertain claims not included in a decision.

The English courts have been a popular choice to pursue damages actions given their flexible approach to jurisdiction; for example, allowing jurisdiction to be found against U.K. companies who were not addressees of an infringement decision, but whose parents were addressees. In these cases, the subsidiaries allegedly had implemented or had knowledge of the cartel. This leads to the possibility of then finding jurisdiction against other non-U.K. addressees of the decision in respect of which jurisdiction in the United Kingdom would not otherwise have been available. Early and wide disclosure rules are an additional factor in attracting litigation to the United Kingdom.

The rules of the High Court of England & Wales allow a representative action to be brought by a claimant representing himself and other identified consumer or business claimants, thus avoiding the need for those persons to issue their own claim form. Representative proceedings can be brought where more than one person has the “same interest” in a claim. Interested persons must opt-in to the action to participate.

² The Office of Fair Trading was the predecessor to the CMA, which took over from the OFT on April 1, 2014, hereinafter referred to as the “OFT.”

³ *The Consumers Association v. JJB Sports PLC*, The Competition Appeal Tribunal, Case Number 1078/7/9/07 (England & Wales).

In practice, it is difficult to bring a representative action in the context of private antitrust litigation and the Court of Appeal has rejected attempts to use that as an “opt-in” style class action in a price-fixing case. In *Emerald Supplies Limited v British Airways plc*⁴ the claim was on behalf of flower importers comprising separate direct and indirect customers of British Airways’ airfreight services. They claimed damages for themselves, and others yet to be identified whom they purported to represent, for inflated air freight prices as a result of a price-fixing cartel to which BA and other airlines were party.

The action was struck out because, first, the class of direct and indirect purchasers was not capable of being identified until the outcome of the claim itself was determined;⁵ and, second, there was an obvious potential conflict between members of the class (direct and indirect purchasers) as to the damage suffered (i.e. those members of the class who did and those who did not “pass on” the inflated price to their customers). Therefore, it was difficult to argue they all had the same interest.

Group litigation orders (“GLOs”) are also available in the High Court. GLOs may be made by the court where one or more claims raise, or are likely to raise, “common or related issues,” to consolidate proceedings commenced by two or more claimants bringing separate actions. In practice, GLOs are seldom used, and there have been no GLOs made in the context of private antitrust litigation so far.

The Scottish court jurisdiction should not be overlooked. While it does not allow for any kind of representative action to be taken, an action may be brought by multiple pursuers, and pursuers may be added during the course of the action.

At present, where there are a number of claims dealing with similar or related issues, there is no formal collective procedure although the cases can be managed collectively on an *ad hoc* basis. For example, although cases have to be commenced as individual actions, they can become formally conjoined (or informally processed together) at a later stage (as occurred in litigation relating to the Piper Alpha and Lockerbie disasters).

To date, there have been relatively few damages claims in the Scottish Courts for breaches of competition law—most are commenced in the English courts but it should not be forgotten there are other potential jurisdictions to pursue a claim in the United Kingdom.⁶

Insofar as the U.K. court system currently provides for collective consumer action each mechanism is based on an opt-in rule. The consent of each represented individual is required to bring or continue a claim on his or her behalf. As the Consumers Association found out, this can be difficult to obtain, especially when each individual claim is for a small sum.

⁴ *Emerald Supplies Limited v British Airways plc* [2010] EWCA Civ.

⁵ I.e. when the claim was issued it was not possible to say whether the claimants were indeed purchasers of services at inflated prices, which was necessary for the purposes of Rule 19.6 of the Civil Procedure Rules that govern procedure in the High Court (the “CPR”) CPR 19.6

⁶ See, *Scottish Professional Football League Limited v Lisini Pub Management Co Limited* [2013] CSOH97, *Calor Gas Ltd v Express Fuels (Scotland) Ltd and Anor* [2008] CSOH 13, *Lothian Buses Ltd v Edinburgh Airport* [2011] (unreported), and *Millar & Bryce Ltd v Keeper of the Registers of Scotland* [1997] SCT 1000.

III. COLLECTIVE REDRESS IN THE UNITED KINGDOM: PROPOSALS FOR REFORM

Collective actions will be enabled by the provisions of the Consumer Rights Bill (the “CRB”). At the time of writing, the CRB has reached the final stages of Parliamentary procedure. If enacted, the changes are likely to come into effect in 2016. Alongside this, the European Union adopted a Directive at the end of 2014 on antitrust damages actions which aims to provide a stable and coherent backdrop for antitrust damages actions in the Member States addressing in general terms areas such as disclosure of evidence, passing-on defense, some protection for leniency documents, and joint and several liability.

The key innovation in the CRB is that claims will be available as either opt-in or opt-out proceedings. The possibility of bringing proceedings on an opt-out basis is in contrast to the position adopted by the European Commission in its 2013 Collective Redress Recommendation (the “Commission Recommendation”) that recommended that each Member State should designate a body to pursue damages for consumers collectively. The Commission Recommendation does not definitively rule out the use of an alternative opt-out collective proceedings model, and no requirements relating to the opt-in/opt-out nature of collective redress systems have been included in the EU’s Directive. Nevertheless, although the Recommendation is non-binding, the European Union is shepherding European jurisdictions to introduce collective actions.

IV. COLLECTIVE PROCEEDINGS

Under the proposed U.K. reforms, collective proceedings may be brought before the CAT, combining two or more claims which may be in respect of either stand-alone actions or actions following on from infringement decisions, or indeed a mixture of both.⁷

Collective proceedings must be commenced by a person who proposes to be the representative in those proceedings.⁸ The CAT will be able to authorize a person to act as the representative, whether or not that person is a class member (a person, business, or consumer whose claim is eligible for inclusion in the collective proceedings) but only if it considers that it is just and reasonable for that person to act as a representative in the proceedings.⁹

Criteria are likely to include whether: (i) that person would act fairly and adequately in the interests of the class member, (ii) has a material interest that is in conflict with the interests of class members, and (iii) would be able to pay the defendant’s recoverable costs if ordered to do so.¹⁰ In practice, single claimants are likely to be reluctant to take this costs risk. Representatives are likely to be bodies corporate.

The U.K. Government policy position is that these bodies corporate should be trade associations or consumer associations, but not law firms, third party funders, or special-purpose

⁷ New section 47B(1).

⁸ New section 47B(2).

⁹ New section 47B(8).

¹⁰ *Id.*, rule 6(2).

vehicles.¹¹ This remains to be determined. Bodies such as trade associations may not have deep pockets to fund upfront costs such as economists' reports and may also need to insure against defendants' costs. It is not possible to recover an insurance premium from the losing party so the cost of any premium would have to be met by the representative and recovered from the unclaimed residue of any damages award.

Collective proceedings, as such, will require judicial certification under a collective proceedings order ("CPO"). The CRB provides that the CAT may make a CPO only: (i) if it considers that the person who bought the proceedings is a person the CAT should authorize as above; and (ii) if the CAT considers that the claims raise the same, similar, or related issues of fact or law and are suitable to be brought in collective proceedings.¹² This test appears to be less of a hurdle to overcome than the "same interest" test required in representative proceedings in the High Court.¹³

Where the CAT orders proceedings to continue as opt-out collective proceedings, the proceedings can be brought on behalf of each class member except: (i) any class member who notifies the representative that they opt-out; or (ii) any class member not domiciled in the United Kingdom who does not opt-in, i.e. non-domiciled claimants cannot automatically be opted-in.¹⁴

Under the new procedure there would be no need to assess damages in respect of the claim of each represented person.¹⁵ Unlike the current position, where exemplary (i.e. punitive) damages are available in exceptional circumstances, the CAT would be expressly forbidden from awarding exemplary damages in collective proceedings.¹⁶ Damages-based agreements (agreements where the solicitor is remunerated by a share of the damages, such agreements have only recently been introduced in England & Wales) would be unavailable in relation to opt-out claims¹⁷ but the representative's legal costs or expenses would be allowed to be paid from the residue of the award of damages.¹⁸

V. CONCLUSION

Effective collective redress procedures are important in systems that want to ensure consumers and SMEs have access to redress where they have been overcharged for products they have purchased due to an infringement of competition law. At the moment, the procedures available in the United Kingdom are inflexible and there is paucity of case law on substantive issues.

We have been entertained by the ingenuity of claimants and defendants' lawyers in individual actions for damages establishing a number of important principles that should help to pave the way for aspects of collective actions. So far the majority of those affected by competition

¹¹ Private Actions in Competition Law: A consultation on options for reform - government response, Department for Business, Innovation & Skills, January 2013, page 26.

¹² New section 47B(5).

¹³ See *Emerald Supplies Limited v British Airways plc*, *supra* note 4.

¹⁴ New section 47B(11).

¹⁵ New section 47C(2).

¹⁶ New section 47C(1).

¹⁷ New section 47C(5).

¹⁸ New section 47C(6).

law infringements have not been able to obtain adequate redress. Those with deep pockets, or who can insure against adverse costs and have had lawyers willing to take fee risks, have fared better, with numerous settlements having been reached.

Of course, the permitted funding arrangements to allow lawyers to be paid for this entertainment are fairly crucial. It remains to be seen whether the reforms outlined above have the desired effects, but it is clear that efforts are being made both at EU and national levels to make the private enforcement arena more claimant-friendly, which will facilitate collection actions. Given the uncertainties, we shall have to do the usual—wait and see if these are sufficient to encourage more claims, especially on a collective basis. I suspect the combination of U.K. and EU determination and the fruits of successful actions will indeed breathe life into this area of legal activity.