



“Improving Access to Justice through Collective Actions”

**Developing a More Efficient and Effective Procedure
for Collective Actions**

FINAL REPORT

A Series of Recommendations to the Lord Chancellor

November 2008

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RECOMMENDATION 2 – Collective claims should be capable of being brought by a wide range of representative parties: individual representative claimants or defendants, designated bodies, and ad hoc bodies.

RECOMMENDATION 3 – Collective claims may be brought on an opt-in or opt-out basis, subject to court certification (see Recommendation 4). Where an action is brought on an opt-out or opt-in basis the limitation period for class members should be suspended pending a defined change of circumstance.

RECOMMENDATION 4 – No collective claim should be permitted to proceed unless it is certified by the court as being suitable to proceed as such. Certification should be subject to a strict certification procedure.

RECOMMENDATION 5 - Appeals from either positive certification or a refusal to certify a claim should be subject to the current rules on permission to appeal from case management decisions. Equally, all other appeals brought within collective action proceedings should be subject to the normal appeal rules. Class members may seek to appeal final judgments and settlement approvals.

RECOMMENDATION 6 – Collective claims should be subject to an enhanced form of case management by specialist judges. Such enhanced case management should be based on the recommendations of Mr Justice Aikens’ Working Party which led to the Complex Case Management Pilot currently in the Commercial Court

RECOMMENDATION 7 - Where a case is brought on an opt-out or opt-in basis, the court should have the power to aggregate damages in an appropriate case. The Civil Justice Council recommends that the Lord Chancellor conduct a wider policy consultation into such a reform given that it affects both substantive and procedural law.

RECOMMENDATION 8 – To protect the interests of the represented class of claimants any settlement agreed by the representative claimant and the defendant(s) must be approved by the court within a ‘Fairness Hearing’ before it can bind the represented class of claimants. In approving a settlement or giving judgment on a collective claim the court should take account of a number of issues in order to ensure that the represented class are given adequate opportunity claim their share of the settlement or judgment.

RECOMMENDATION 9 - There should be full costs shifting.

RECOMMENDATION 10 - Unallocated damages from an aggregate award should be distributed by a trustee of the award according to general trust law principles. In appropriate cases such a *cy-près* distribution could be made to a Foundation or Trust.

RECOMMENDATION 11 – While most elements of a new collective action could be introduced by the Civil Procedure Rule Committee, it is desirable that any new action be introduced by primary legislation.

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FOREWORD

This report was published initially in July 2008 as an interim draft. It was published in order to enable various stakeholders and other interested parties to assess the nature of the proposals that would ultimately be made.

It was also published in draft form in order to enable the authors to produce, at the request of a number of interested parties, a set of draft Civil Procedure Rules and a draft Collective Action Act. The aim of both is to stimulate debate and to provide concrete, albeit indicative, examples of the form such rules and statutory provisions could take consistently with the substantive recommendations made. Further research has also been carried out on the present Group Litigation Order in order to assess if, and how, it might be improved in a reformed landscape.

Additionally, given the importance which the Civil Justice Council places on the indivisibility of the right of effective access to justice for claimants and defendants, further work had been carried out to assess how best to ensure that any proposed reform is one which is consistent with equality of arms.

Finally, I would like to thank all those who have contributed to the drafting of this report.

John Sorabji
November 2008

“Improving Access to Justice through Collective Actions”

Developing a More Efficient and Effective Procedure for Collective Actions

INTRODUCTION

1. This paper is published as **formal advice to the Lord Chancellor**.
2. The paper makes a series of recommendations that aim to improve, through the proposed civil procedure reforms, access to justice for citizens through collective actions.¹ The recommendations do not seek to change, introduce, or remove citizens’ substantive legal rights.
3. The Civil Justice Council has consulted extensively on the findings and recommendations through a series of stakeholder events held throughout 2006-2008. A list of organisations who have contributed appears at **Appendix B**. The authors have also engaged in a considerable number of other consumer events and consultations, a number of which are listed at **Appendix C**. The recommendations it makes are supported by an overwhelming majority view of stakeholders consulted, unless otherwise indicated.
4. The authors have reviewed a substantial volume of research material from a considerable number of common law and civilian jurisdictions. A non-exhaustive list of material reviewed appears at **Appendix D**. It should be noted that the views expressed in this report are not necessarily the individual views of the authors, whose contributions reflected their own areas of expertise.

¹ See Glossary for definition.

5. This report should be read in conjunction with “The Future Funding of Litigation -Alternative Funding Structures” published in June 2007, which makes specific recommendations for the funding of collective or multi-party claims (Executive Summary at **Appendix E**). It should also be read in conjunction with “Improved Access to Justice – Funding Options and Proportionate Costs, published in August 2005 (Executive Summary at **Appendix F**).

6. The Civil Justice Council remains committed to the overriding principles published in previous reports.² These principles state that the delivery of access to justice is dependent upon
 - (i) a meritorious case; the participants having at the outset access to means of funding their case;
 - (ii) the lawyers on each side having at the outset access to reasonable remuneration;
 - (iii) the cost of (ii) and (iii) being proportionate to what is at stake; and
 - (iv) the availability of an efficient and properly resourced civil justice system.

7. The Civil Justice Council intends that the reforms proposed in this report are not only consistent with these principles, but in being so are equally consistent with the principles Lord Woolf identified as basic and necessary features of a civil justice system capable of delivering effective access to justice for all, claimant and defendant alike. Those principles can be summarised as follows. A civil justice system:
 1. should be just in the results it and they deliver;
 2. should be fair and be seen to be fair;
 3. should ensure litigants have an equal opportunity, regardless of their

² E.g., *The Future of Litigation Funding – Alternative Funding Structures*, (CJC) (June 2007) at 7.

resources, to assert or defend their legal rights;

4. should ensure that every litigant has an adequate opportunity to state his or her own case and answer their opponent's;
 5. should treat like cases alike (and conversely treat different cases differently);
 6. should deal with cases efficiently and economically, in a way which is comprehensible to those using the civil justice system and which provides litigants with as much certainty as the litigation permits; and do so within a system best organised to realise these principles.³
8. It is these principles, which reflect Lord Woolf's commitment to procedural justice now being as important as substantive justice, which guide the Civil Justice Council in making its recommendations.
9. The Civil Justice Council **invites the Lord Chancellor to provide a formal response.**

³ Lord Woolf MR, *Access to Justice: Interim Report to the Lord Chancellor on the Civil Justice System in England and Wales* (HMSO) (1995), Chapter 1.3.



PART 1

EXECUTIVE SUMMARY

KEY ASSUMPTIONS, FINDINGS and RECOMMENDATIONS

KEY ASSUMPTIONS

Key Assumption 1 -

It is unrealistic to expect the Government will provide the funds to enable a new method of resolving collective claims outside the civil process.

Key Assumption 2 -

Ombudsman or Regulatory Systems are not primarily suited to resolve the very wide range of detriment that can give rise to the need for large scale remedial action.

Key Assumption 3 -

Private enforcement is to be preferred to state funded regulatory intervention due to the differing primary aims of private enforcement and regulation.

Key Assumption 4 –

Collective action reform is consistent with the Government's policy statements supportive of collective private action and is in addition desirable in the light of European policy which is focused on improving collective redress for consumers.⁴

⁴ E.g., Her Majesty's Treasury, Budget 2007, (HC 342) at 3.45 – 3.48.





KEY FINDINGS

KEY FINDING 1 –

Existing procedure does not provide sufficient or effective access to justice for a wide range of citizens, particularly but not exclusively consumers, small businesses, employees wishing to bring collective or multi-party claims.

KEY FINDING 2 –

Existing collective actions are **effective in part**, but **could be improved** considerably to **promote better enforcement of citizens' rights**, whilst protecting defendants from non-meritorious litigation.

KEY FINDING 3 -

There is **overwhelming evidence** that meritorious claims, which could be brought are currently not being pursued.

KEY FINDING 4 -

There are meritorious claims that could fairly be brought with **greater efficiency and effectiveness** on a collective rather than unitary basis.

KEY FINDING 5 -

Effective collective actions **promote competition and market efficiency**, consistent with the Government's economic principles and objectives, benefiting individual citizens, businesses and society as a whole. Equally they are effective mechanisms through which individual rights can be upheld.

KEY FINDING 6 -

Collective claims can **benefit defendants** in resolving disputes more economically and efficiently, with greater conclusive certainty than can arise through unitary claims.

KEY FINDING 7 -

The Court is the most appropriate body to ensure that any new collective procedure is **fairly balanced as between claimants and defendants**, the latter of which should be properly protected from unmeritorious, vexatious or spurious claims as well as from so-called blackmail claims.

KEY FINDING 8 -

The proposed new collective procedure should **apply to all civil claims** which affect multiple claimants.

KEY FINDING 9 -

There should be **no presumption** as to whether collective claims should be brought on an opt-in or opt-out basis. The Court should decide, according to new rules, practice directions and/or guidelines, which mechanism is the most appropriate for any particular claim taking into account all the relevant circumstances. In assessing whether opt-in or opt-out is most appropriate the court should be particularly mindful of the need to ensure that neither claimants' nor defendants' substantive legal rights should be subverted by the

choice of procedure.

KEY FINDING 10 -

The majority of the proposed procedural reforms could be introduced by **Rules of Court** (the CPR), developing existing procedure and principles laid down in case law. Primary legislation may be considered a more complete option to introduce a modern collective action and will be necessary, given the jurisdictional basis of the civil courts and other civil fora, if discrete reform is introduced in such fora as the CAT or the ET.



SUMMARY OF RECOMMENDATIONS

RECOMMENDATION 1

A generic collective action should be introduced. Individual and discrete collective actions could also properly be introduced in the wider civil context i.e., before the CAT or the Employment Tribunal to complement the generic civil collective action.

RECOMMENDATION 2

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approvals.⁵

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RECOMMENDATION 9

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⁵ CPR 52.

RECOMMENDATION 11

While most elements of a new collective action could be introduced by the Civil Procedure Rule Committee, it is desirable that any new action be introduced by primary legislation.



PART 2

EXISTING LAW AND PROCEDURE

Summary

This chapter sets out the current mechanisms for managing claims which involve multi-parties, either claimant or defendant.

INTRODUCTION

1. There are at present a number of different procedural mechanisms which can be used to manage multi-party litigation in the civil justice system of England and Wales (England).⁶ They are: the test case; consolidation and single trial of multiple actions; the Group Litigation Order; and the representative action.

Test Cases

2. The simplest way in which the court can manage efficiently a multiplicity of individual claims is via the use of the test case. Unlike other jurisdictions, such as Austria or Germany,⁷ England does not have a statutory or a formal test case procedure.⁸ English civil procedure has traditionally provided the court with the necessary power to manage litigation so that where a large number of individual claims, each raising a common, or perhaps several common, factual or legal issues all but one or a small number of actions which raise those common issues

⁶ England and English should be read as a reference to England and Wales or English and Welsh.

⁷ See Stuyck et al, *An analysis and evaluation of alternative means of consumer redress other than redress through ordinary judicial proceedings*, (Leuven University) (2007) at 262.

⁸ Although see GLOs below.

are prosecuted to final determination.⁹ Selection of those actions to go forward is usually a matter for the parties, rather than the court. In order to facilitate the prosecution of the selected actions, the court possesses the power to stay the remainder either on its own initiative or with the parties' consent. The power to stay arose originally under the court's inherent jurisdiction to control its own process. It is now given statutory form by CPR 3.1(2)(f).

3. Determinations arrived at in test cases have precedential effect in respect of those stayed or any future actions. They do not however in and of themselves finally determine those actions. Recent instances where test cases have been selected as a means to effectively manage a large body of claims arising out of the same issues of law or fact are: the credit-hire litigation,¹⁰ and the bank charges litigation.¹¹

Consolidation of Proceedings and the Single Trial of Multiple Actions

4. The prosecution of test cases involves the selection and prosecution of an individual claim or claims which give rise to representative issues i.e., ones common to other actions. In addition to this the CPR provides two mechanisms through which large numbers of individual claims can be prosecuted simultaneously.
5. In the first instance the court can consolidate any number of individual actions into one single set of proceedings.¹² In *Lubbe v Cape plc*, for instance, over 3000 claims were consolidated in this way.¹³ Once consolidated the claims are treated as if they were and are in fact one single action with multiple parties joined to it.¹⁴
6. The consolidation power serves to ensure that parties to litigation, primarily defendants, are not vexed with the cost and delay of having to defend a number of

⁹ A similar process is evident in the Employment Tribunals, where test cases can be selected and prosecuted to final determination.

¹⁰ *Dimond v Lovell* [2002] 1 AC 384.

¹¹ *The Office of Fair Trading v Abbey National Plc & Others* [2008] EWHC 875 (Comm).

¹² CPR 3.1(2)(g).

¹³ [2000] 1 WLR 1545 (HL).

¹⁴ *Civil Procedure 2008*, Vol. 1 (Sweet & Maxwell) (2008) (Waller LJ, ed) (The White Book 2008) at 3.1.10.

- separate claims which could have been brought in a single action. It thus seeks to ensure the efficient and economic prosecution of actions in order to give rise to finality of litigation. This was reflected in the original use of the power to facilitate the effective joinder of claims that could and ought properly to have been brought within a single set of proceedings by a claimant or claimants against the same defendant.¹⁵ It can however be exercised more widely than this as it can be used to consolidate proceedings which although commenced as separate claims, could have been joined within a single claim. In this it is not limited to claims where there are common claimants and defendants.¹⁶
7. The power to consolidate proceedings is a discretionary one. The discretion is a flexible one. The current provision, CPR 3.1(2)(g), unlike its statutory predecessors, is unfettered by any specific guidance.¹⁷ The power to consolidate under the Rules of the Supreme Court (RSC) and the County Court Rules (CCR) could only be exercised where the various proceedings gave rise to: i) a common question of law or fact; or ii) that the rights to relief claimed in the proceedings arose in respect of or out of the same transaction or series of transactions; or iii) that it was desirable for some other reason to join the claims. As a new procedural code the CPR is not bound by the guidance developed under its statutory predecessors. However, it is likely that because the consolidation power, as with all provisions within the CPR, is subject to the overriding objective, the previous guidance will remain of importance to a court assessing whether to exercise its discretion.¹⁸
8. The second management power provided by the CPR is one which enables the court to direct that two or more claims can be tried on the same occasion.¹⁹ This power, unlike the power to consolidate, does not result in the claims being joined in a single action. It is therefore a power used to co-ordinate the effective and

¹⁵ *Martin v Martin* [1897] 1 QB 429 (CA).

¹⁶ *Payne v British Time Recorder Co. Ltd* [1921] 2 KB 1 (CA).

¹⁷ RSC Ord. 4 r. 9 (1) and CCR Ord. 13 r. 9 (1).

¹⁸ White Book 2008 at 3.1.10.

¹⁹ CPR 3.1(2)(h).

efficient prosecution of individual claims, which continue to exist as separate claims. The fundamental purpose of this power is, as it is for consolidation, to save litigation time and cost.

Group Litigation Orders (GLOs)

9. The final mechanism whereby English civil procedure enables the court to effectively and efficiently manage a multiplicity of individual claims, which remain as such, is the Group Litigation Order or GLO.²⁰ The GLO is a relatively recent innovation. It was introduced into the CPR in May 2000 as a consequence of recommendations made by Lord Woolf within his Final Access to Justice Report.²¹ It was introduced in recognition of the fact that the existing procedural mechanisms (the test case, consolidation and representative actions) were not sufficient to enable the court properly and effectively to manage large numbers of claims which shared a common legal or factual basis. They were inadequate because they had not been designed specifically to deal with the problems to which large scale multi-party litigation gave rise.²² This inadequacy was felt particularly sharply during the 1980s and 1990s as the courts were required to deal with a series of multiparty litigation arising from a sequence of transport and product liability disasters; insurance claims; and environmental claims.²³ During the course of the actions arising out of one defective pharmaceutical product, Purchas LJ indicated that in the absence of the introduction of a new form of procedure the court could not adequately deal with such cases under the then procedural regime. He put it this way:

“There may well be a strong case for legislative action to provide a jurisdictional structure for the collation and resolution of mass product liability claims, particularly in the pharmaceutical field, but this court cannot devise such rules.

²⁰ For a detailed introduction see: *Andrews, English Civil Procedure: Fundamentals of the New Civil Justice System*, (Andrews (2003)) (OUP) (2003) at 974ff.

²¹ *Civil Procedure (Amendment) Rules 2000* (SI 221 of 2000). They were introduced by way of statutory instrument as it had previously been recognised that the court could not itself fashion ad hoc case by case rules to govern group litigation: see *Nash v Eli Lilly & Co* [1993] 4 ALL ER 383 at 409; Woolf, *Access to Justice: Final Report to the Lord Chancellor on the Civil Justice System in England and Wales* (HMSO, London) (1996), Chapter 17.

²² Woolf (1996) at Chapter 17.7 – 17.13.

²³ Andrews (2003) at 975.

In this sense we echo the remarks made by Lord Donaldson MR in Davies (Joseph Owen) v Eli Lilly & Co [1987] 3 All ER 94 at 96, [1987] 1 WLR 1136 at 1139 under the heading 'The concept of the "class action" as yet unknown to the English courts'."

The then existing mechanisms were inadequate because they had not been designed specifically to deal with the problems to which this type of litigation gave rise.²⁴ Since GLOs were introduced 62 such orders have been made, largely relating to product liability claims, physical and sexual abuse claims, holiday claims, and financial services claims.²⁵

10. The GLO regime is set out at CPR 19.10 – 19.15, which states:

“Definition

19.10 A Group Litigation Order (‘GLO’) means an order made under rule 19.11 to provide for the case management of claims which give rise to common or related issues of fact or law (the ‘GLO issues’).

Group Litigation Order

19.11

(1) The court may make a GLO where there are or are likely to be a number of claims giving rise to the GLO issues.

(The practice direction provides the procedure for applying for a GLO)

(2) A GLO must –

- (a) contain directions about the establishment of a register (the ‘group register’) on which the claims managed under the GLO will be entered;*
- (b) specify the GLO issues which will identify the claims to be managed as a group under the GLO; and*
- (c) specify the court (the ‘management court’) which will manage the claims on the group register.*

(3) A GLO may –

- (a) in relation to claims which raise one or more of the GLO issues –*

²⁴ Woolf (1996) at Chapter 17.7 – 17.13.

²⁵ For a complete list of such orders see, (<http://www.hmcourts-service.gov.uk/cms/150.htm>). The chapter, entitled “Evidence of Need”, deals with reported problems and difficulties of the GLO.

- (i) direct their transfer to the management court;
 - (ii) order their stay (GL) until further order; and
 - (iii) direct their entry on the group register;
- (b) direct that from a specified date claims which raise one or more of the GLO issues should be started in the management court and entered on the group register; and
- (c) give directions for publicising the GLO.

Effect of the GLO

19.12

(1) Where a judgment or order is given or made in a claim on the group register in relation to one or more GLO issues –

- (a) that judgment or order is binding on the parties to all other claims that are on the group register at the time the judgment is given or the order is made unless the court orders otherwise; and
- (b) the court may give directions as to the extent to which that judgment or order is binding on the parties to any claim which is subsequently entered on the group register.

(2) Unless paragraph (3) applies, any party who is adversely affected by a judgment or order which is binding on him may seek permission to appeal the order.

(3) A party to a claim which was entered on the group register after a judgment or order which is binding on him was given or made may not –

- (a) apply for the judgment or order to be set aside (GL) , varied or stayed (GL) ; or
- (b) appeal the judgment or order;

but may apply to the court for an order that the judgment or order is not binding on him.

(4) Unless the court orders otherwise, disclosure of any document relating to the GLO issues by a party to a claim on the group register is disclosure of that document to all parties to claims –

- (a) on the group register; and
- (b) which are subsequently entered on the group register.

Case management

19.13 Directions given by the management court may include directions –

- (a) varying the GLO issues;

- (b) providing for one or more claims on the group register to proceed as test claims;*
- (c) appointing the solicitor of one or more parties to be the lead solicitor for the claimants or defendants;*
- (d) specifying the details to be included in a statement of case in order to show that the criteria for entry of the claim on the group register have been met;*
- (e) specifying a date after which no claim may be added to the group register unless the court gives permission; and*
- (f) for the entry of any particular claim which meets one or more of the GLO issues on the group register.*

(Part 3 contains general provisions about the case management powers of the court)

Removal from the register

19.14

- (1) A party to a claim entered on the group register may apply to the management court for the claim to be removed from the register.*
- (2) If the management court orders the claim to be removed from the register it may give directions about the future management of the claim.*

Test claims

19.15

- (1) Where a direction has been given for a claim on the group register to proceed as a test claim and that claim is settled, the management court may order that another claim on the group register be substituted as the test claim.*
- (2) Where an order is made under paragraph (1), any order made in the test claim before the date of substitution is binding on the substituted claim unless the court orders otherwise.²⁶*

11. It is evident from the foregoing that the GLO regime is a case management regime designed to manage effectively a large number of individual claims, which raise common or related issues of law or fact. A GLO is not a form of representative action. Representative claimants or defendants are not identified or selected under a GLO. On the contrary individual claims are brought within an overarching managerial framework; a framework which, in common with the rest of the CPR, must operate according to the overriding objective (CPR 1.1) so as to

²⁶ CPR PD 19 – Group Litigation Orders, supplements the rules.

promote judicial and party efficiency and economy.²⁷ That being said the GLO regime does accommodate the possibility that an individual claim can be selected to go forward as a test case within the GLO framework. Where a claim goes forward as a test case any determination will bind the other claims subject to the GLO and can, if the court directs, bind any claims which are subsequently entered onto the group register.²⁸

The Representative Rule

12. It is a feature of English procedure that any number of parties can be joined to a single set of proceedings.²⁹ This capability underpins the court's power to consolidate a large number of claims into a single set of proceedings; wherein all the parties to each individual claim so consolidated becomes a party to the new, single action. Multiplicity of parties within a single claim can however lead to practical difficulties. It can, as Zuckerman notes, lead to '*duplication and confusion*.'³⁰ It can lead to unnecessary cost and delay. It can therefore undermine the proper and efficient administration of justice. This problem has long been recognised by the English courts and resulted in the High Court of Chancery developing the representative action.³¹
13. Representative actions brought under the representative rule (CPR 19.6) permit one named claimant or defendant prosecuting or defending an action on both his behalf and on behalf of a class of individuals (the represented class).³² The representative party in this way acts not only for others (the represented class) who have an interest in the litigation but does so on the basis that they, the representative party, has the same interest in the litigation as the represented class.

²⁷ On the cost-saving motivation which lies behind the GLO see: *Boake Allen Ltd v Revenue & Customs Commissioners* [2007] 1 WLR 1386 at 1394 per Lord Woolf.

²⁸ CPR 19.12.

²⁹ CPR 19.1.

³⁰ Zuckerman, *Zuckerman on Civil Procedure, Principles of Practice*, (2006) (2nd Ed) (Sweet & Maxwell) at 508.

³¹ See *Markt & Co Ltd v Knight Steamship Co Ltd* [1910] 2 KB 1021 (CA) (*Markt*) for a discussion.

³² The representative party must itself be capable of joinder as a proper claimant or defendant in non-representative proceedings: see CPR 19.6(1).

14. The represented class, unlike where a number of claims are consolidated, are not joined to the action. They are not therefore automatically subject to disclosure or costs obligations.³³ They are however bound by the court's determination of the claim.³⁴
15. The choice of representative claimant or representative defendant enables the court to proceed expeditiously and economically to judgment; it thus facilitates the proper administration of justice. A representative action can take one of three forms: i) active, where a claimant acts as the representative party; ii) passive, where a defendant acts as the representative party; or iii) active and passive which combines both of the former two types of representative action.³⁵
16. The current rule as to representative actions is set out in CPR 19.6, which states that:

“19.6

- (1) Where more than one person has the same interest in a claim –*
- a) the claim may be begun; or*
- b) 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.*
- (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 –*
- (a) is binding on all persons represented in the claim; but*
- (b) may only be enforced by or against a person who is not a party to the claim with the permission of the court³⁶.*
- (5) This rule does not apply to a claim to which rule 19.7 applies.”³⁷*

³³ Andrews, *English Civil Procedure, Fundamental of the New Civil Justice System*, (2003) (Oxford) at 989.

³⁴ CPR 19.6(4).

³⁵ Andrews, *English Civil Procedure, Fundamental of the New Civil Justice System*, (2003) (Oxford) at 987

³⁶ See, *Howells v Dominion Insurance Company Ltd* [2005] EWHC 552.

³⁷ This provision is the statutory successor to RSC Ord. 15 r. 12 and CCR Ord. 5 r. 5. The court's power to

17. The present rule, as did its statutory predecessors, imposes two preconditions upon taking representative proceedings. First, there needs to be more than one potential claimant or defendant. There must be a class of individuals to be represented, even if the class is as small as two. Secondly, the represented class must have the ‘*same interest*.’ Same interest is given a very narrow definition in the authorities; although in recent years the stringency of this test has been somewhat relaxed. In strict terms, as defined by Lord Mcnaughton in *Bedford v Ellis*³⁸ and explained by the Court of Appeal in *Markt & Co Ltd v Knight Steamship Co Ltd*,³⁹ ‘*same interest*’ means:

- i) a common interest arising, for instance, under a common document;
- ii) a common grievance; and
- iii) a remedy beneficial to all, but not damages.

18. The strict interpretation of the commonality test and the inability to obtain damages has resulted in the representative rule being underused within the framework of English civil procedure.⁴⁰ This underuse has continued despite a number of decisions that have attempted to render it of greater utility. *Prudential Assurance Co Ltd v Newman Industries Ltd* [1981] Ch. 229 at 246 – 247, which held that the action could be used in claims arising from tort as well as contract and that a declaration could be made that the represented class were entitled to damages, which could then be pursued on an individual basis. *EMI Records Ltd v Riley* [1981] 1 WLR 923 established that damages were recoverable in a representative action where the global quantum to the entire class was ascertainable. It is thus arguable that but for the *Markt* requirement that there be a common document the Bank Charges litigation could have proceeded under the

direct proceedings to continue as representative proceedings originated from the practice of the High Court of Chancery. CPR 19.7 governs representative proceedings brought where the representative prosecutes or defends the proceedings on behalf of interested persons who cannot be ascertained.

³⁸ [1901] AC 1 (HL) at 7 – 12.

³⁹[1910] 2 KB 1021 (CA); esp. see Fletcher Moulton LJ at 1035. Also see Buckley LJ’s dissenting judgment which arguably properly followed the Court of Appeal in Chancery’s decision in *Warrick v The Queen’s College, Oxford* (1870) LR 6 Ch. App. 716 at 726.

⁴⁰ Andrews (2003), *ibid*.

- representative rule following *EMI Records* given that the global quantum to the entire class of bank account holders is ascertainable.
19. Following from these two decisions the Court of Appeal in *The Irish Rowan* explained that it had erred in *Markt* when it, held that the rule had to be interpreted without reference to pre-1873 Chancery practice.⁴¹ It went on to outline how: i) the rule as then drafted had safeguards, consistent with the old practice, for class members who wished to disassociate themselves from the class; that the rule permitted class members to opt-out of the class; that as the class members entered into identical contracts there was sufficient commonality. Relying on *EMI Records* amongst others, it went on to affirm that damages claims were not to be automatically excluded from representative actions.⁴²
 20. Most recently Morritt VC in *Independiente Ltd v Music Trading On-Line (HK) Ltd* examined the scope of the rule in its CPR guise: CPR 19.6.⁴³ He noted that the principles governing the rule were the same post-CPR as they were pre-CPR, albeit the rule had to be interpreted and applied consistently with the overriding objective.⁴⁴ In particular the definition of ‘same interest’ in the rule had to be interpreted flexibly and in conformity with the overriding objective. The test to establish whether the rule was appropriate for the case was that laid down by *Ellis*: common interest, common grievance and relief beneficial to all. There was, contrary to *Markt*, a common interest despite the presence of different defences. Damages were available where they were beneficial to all.
 21. Despite these developments the representative rule remains underused in English civil litigation, despite its self-evident and acknowledged similarities to the US class action, of which it is simply one form.⁴⁵

⁴¹ [1990] 2 QB 206 at 237 – 239.

⁴² [1990] 2 QB 206 at 227 – 241.

⁴³ [2003] EWHC 470 (Ch).

⁴⁴ [2003] EWHC 470 (Ch) at [21] & [23].

⁴⁵ *Class Actions in the United States of America: An Overview of the Process and the Empirical Literature*, (RAND Institute for Civil Justice, Santa Monica, California, USA (2007) (Pace (2007)) at 7.



PART 3

COMPARATIVE LAW – COLLECTIVE REDRESS IN OTHER JURISDICTIONS

Summary

This chapter examines the range of collective action regimes introduced in a number of common law and civilian jurisdictions.

United States’ Federal regime

1. The best-known collective action is the class action, which is operative in the federal jurisdiction of the United States (the US class action). Rule 23 of the US Federal Rules of Civil Procedure (FRCP) has operated in its present form since 1966. A class action procedure had previously been implemented when, in 1938, the US Federal Rules of Civil Procedure were adopted, although it dates back further than this and shares a common origin in Anglo-American equity proceedings.⁴⁶ However, the previous incarnation of Rule 23, which subdivided classes into ‘true’, ‘spurious’ or ‘hybrid’ actions, was generally considered to be confusing and obfuscatory, and so the rule was redrafted by the Rules Advisory Committee in 1964, and adopted in 1966.
2. Essentially, FRCP 23 has two parts. Rule 23(a) (entitled, ‘Prerequisites to a class action’) outlines the four requirements that all class actions must meet (numerosity, commonality, typicality, and adequacy of representation), and in addition to this, the

⁴⁶ Notes to Rule 23 of the FRCP.

(http://www.federalcivilprocedure.com/FED_RULES_OF_CIV_PRO_E_ARTICLE_04_Rule_23.0_Class_Actions_NOTES.htm).

class action must fall within one of the Rule 23(b)(1) or (b)(2) or (b)(3) categories. The first two of these aforementioned categories generally endorse compulsory class membership (although, rarely, some courts have contemplated a discretionary power to allow opt-outs in these categories), and apply where the class members are not principally pursuing damages, but are, instead, bringing their action against a limited fund, or for injunctive or declaratory relief. In comparison to its (b)(1) and (b)(2) counterparts, the purpose of the rule 23(b)(3) class action is to enable class members to recover *damages*, subject to a right to opt-out of the proceedings (which right must be adequately notified to the class members), and thereafter, all class members who have not opted out will be bound by any decision rendered on the common issues.

3. The four requirements of Rule 23(a) have to be coupled with two further requirements which the Rules Advisory Committee considered to be necessary and appropriate for (b)(3) class actions: that the common issues predominate over the individual issues; and that a class action is superior to other available methods for the fair and efficient adjudication of the dispute.
4. The FRCP was the subject of considerable review over the years, but was not actually amended until 1998, when a new Rule 23(f) was added, effective 1 December 1998, establishing a system for permissive interlocutory appeals from orders granting or denying class certification. Further amendments were introduced on 1 December 2003, relevant to: the timing of certification decision and notice; judicial oversights of settlements; attorney appointment; and attorney compensation. Other statutes have also sought to reform US class actions jurisprudence. In 1995, the Private Securities Litigation Reform Act of 1995 was passed, in order to deal with difficulties which had arisen with the commencement and conduct of securities fraud class actions; and in 2005, the Class Action Fairness Act of 2005 was passed, primarily in order to redress some difficulties with class action settlements (such as coupon settlements, which have received much negative comment from some members of the judiciary and academics) and to expand the jurisdiction of federal courts over class actions.
5. The actual and perceived excesses of the United States' class action model have

attracted much adverse comment in England. However, as law reform and academic commentary have equally observed, the differences between the two jurisdictions are both numerous and significant:

- (i) Although some costs-shifting does occur in US litigation, particularly under certain statutes, the normal US costs rule is that each party bears their own legal costs; in England, costs-shifting is however the norm. Thus, litigants in England who fear an adverse costs award, should they lose, face a significant disincentive to litigation in comparison with their US counterparts. As a necessary corollary of the absence of cost-shifting, security for costs applications are not a feature of the US class action;
- (ii) In the US the disclosure process operates as much as a means to define the nature of the cause of action as it does to secure evidence relevant to the cause of action. It does so not just through documentary disclosure but also through the widespread use of oral interrogatories (depositions). The disclosure obligation is, in addition to this, much wider than it is in England. This use of disclosure is one of the fundamental causes of the high litigation costs associated with the US class action and one of the central bases for the pressure to settle that stems from unmeritorious, so-called, blackmail suits. There is no suggestion that the fundamental role and nature of disclosure in England will, or even ought to, change to broaden it beyond standard or specific disclosure or that the use of oral interrogatories would have to increase if a collective action were introduced. The US system of discovery, particularly its role in framing the nature of the claim, is a feature of its civil justice system *per se* and is not simply a feature of the US class action. It is not a feature of the English civil justice system nor should it be;
- (iii) In the US, jury trials (constitutionally enshrined in the US Constitution's Seventh Amendment in respect of federal trials) are more common than they are in England where they are confined to, e.g., deceit, defamation

actions, actions for malicious prosecution and false imprisonment.⁴⁷ The ancillary uncertainties of how a jury would view the merits of a class action and assess damages are significant factors in US class actions litigation which do not apply to or arise in English civil trials;⁴⁸

- (iv) Case management is very much a part of the post-Woolf reforms, and explicit endorsement of case management is to be found in both the CPR and in recent judicial task forces (such as the *Report and Recommendations of the Commercial Long Trials Working Party (December 2007)*). By comparison, some US judges prefer a system whereby courts respond to parties' requests for judicial hearings but do not otherwise involve themselves in the litigation, thereby adopting a less active approach to the case's progress;
- (v) At the present time, percentage-based contingency fee agreements are not available for contentious business in England i.e., for actions brought before courts, whereas they are a common feature of US litigation. Even if contingency fees were to become permissible in England in future, as with the US, it is presumed that they would be subject to court scrutiny. The prospect of large contingency fee awards becoming a feature of English litigation seems remote: they are not an essentially feature of any collective action;
- (vi) The availability of punitive damages is restricted in England under the *Rookes v Barnard* principle. This is in stark contrast to the US, where punitive and treble damages are available more frequently in cases which are brought as class actions.⁴⁹ Furthermore the rationale for this wider availability of punitive or treble damages in the US is absent from England: it exists in the US as a consequence of the more widespread use

⁴⁷ County Courts Act 1984 s66; Supreme Court Act 1981 s 69.

⁴⁸ Jury trials remain a possibility in England in respect of, for instance, defamation proceedings. This is however atypical.

⁴⁹ *Rookes v Barnard* [1964] AC 1129.

of the civil justice system as a means of private regulation rather than, as in England more straightforwardly, a means of enforcing substantive law rights via the provision of compensatory damages. The nature of the English regulatory system, bolstered by the Macrory reforms and the enactment of the Regulatory Enforcement and Sanctions Act 2008 militates against the need to utilise the civil justice system in a way similar to US approach. It is thus the case that there is little similarity between the US and English approaches to punitive or treble damages at present; nor are the conditions likely to prevail in the future which could arguably justify adopting the US approach. In any event, if such conditions were to change in future they would do so not as a consequence of the reform of collective actions but of a change in substantive social and public policy outwith the remit of the present study;

- (vii) One of the most strident criticisms of the US class actions regime has been the judicial approval of what are perceived to be unfair settlement agreements and some of these deficiencies and problems were the subject of reform in the Class Actions Fairness Act of 2005.⁵⁰ By contrast, one would expect English judges to exercise the greatest caution toward, and scrutiny of, any settlement agreement reached between the parties, given the strong case management functions which are already exercised in English litigation, whether under the Group Litigation Order or in complex litigation generally;
6. On a separate note, the Irish Law Reform Commission noted, as one difference between the multitude of class actions in the US and what might be expected, should an opt-out action be introduced into Irish law, that ‘*a strong pro bono tradition among lawyers in the United States has facilitated many class actions, particularly in the field of civil rights*’;⁵¹

⁵⁰ Epitomised most eloquently perhaps by the title given to one US article on the subject: Koniak, *Feasting while the Widow Weeps*, (1995) 80 Cornell L Rev 1045.

⁵¹ Irish Law Commission, *Multi-Party Litigation*, (2003) (LR CP 25-2003), at 2.05.

7. There is some suggestion that the levels of compensatory damages, especially for non-pecuniary heads of damages such as pain and suffering, tend to be higher in the US than in England, thus increasing the incentive to commence class actions in the US (especially when coupled with the greater availability of punitive damages). This again would tend to reflect the nature of jury damages awards, which would not be replicated in England given that such awards are made by the court;
8. There are also some substantive law differences between English and US law, for example, the implementation of the fraud-on-the-market theory in the US, per *Basic Inc v Levinson* 485 US 224 (1988), whereby a shareholder class can seek to rely on a rebuttable presumption of reliance that the market for the shares in question was efficient, and that the class members traded in reliance on the integrity of the market price for those shares, in order to overcome individual causation problems in shareholder disputes. Such substantive law differences could be expected to have some effect on which actions were certified in the respective jurisdictions.⁵²

Canada's provincial regimes

9. The first jurisdiction to enact collective (class) action legislation in Canada was the civil law jurisdiction of Quebec. It did so through the Act Respecting the Class Action 1978 (see **Appendix O**). This legislation differs in some respects from the common law provincial regimes which were enacted subsequently (a defendant's appellate rights, and certification criteria such as numerosity, being just two examples). The first of the common law provinces to introduce a class action was Ontario, through the Class Proceedings Act, SO 1992 (commenced 1 January 1993). At that time, the Williston Committee, which was engaged in reforming the Ontario Rules of Civil Procedure, stated that '*we are convinced that the present procedure concerning class actions is in a very serious state of disarray*'⁵³; that assessment was affirmed by the Canadian Supreme Court in *Naken v General Motors of Canada Ltd* (1983) 144 DLR

⁵² For a discussion see Mulheron, *Some Difficulties with Group Litigation Orders—and Why a Class Action is Superior* 24 Civil Justice Quarterly (2005) 40, 62–65.

⁵³ Cited by the Manitoba Law Reform Commission, *Class Proceedings* (2003) 7.

(3d) 385; (SCC) 410, which held that the standard representative rule (based on the statutory predecessor to CPR 19.6 and construed consistently with *Markt*) which at that time applied in Ontario was ‘*totally inadequate*’ to cope with modern, complex claims involving goods and services consumed on a widespread scale that could give rise to multiple grievances.

10. Other common law provinces gradually followed Ontario’s lead, with legislation which is similar, but not necessarily identical to, that of Ontario’s. The British Columbia Class Proceedings Act, RSBC 1996⁵⁴ is notable, as the Alberta Law Reform Institute has since pointed out, for the fact that its legislature more closely adhered to the Ontario Law Reform Commission’s extensive recommendations and draft legislation (contained in Report on Class Actions (1982)) than did the Ontario legislature in several key features (e.g., in respect of some certification features, and funding recommendations). Other provinces have since enacted the following class action statutes: Saskatchewan’s Class Actions Act, SS 2001;⁵⁵ Newfoundland and Labrador’s Class Actions Act, SNL 2001;⁵⁶ Manitoba’s Class Proceedings Act, CCSM 2003;⁵⁷ Alberta’s Class Proceedings Act, SA 2003;⁵⁸ and New Brunswick’s Class Proceedings Act, SNB 2006.⁵⁹ The Federal Court of Canada also has a class action procedure in place for those limited matters which fall within its jurisdiction (Federal Courts Rules, S.O.R./98-106, Pt 5.1).
11. The Canadian regimes eschewed the categorisation approach adopted under FRCP 23(b); endorse detailed certification procedures; and are drafted in a fairly detailed manner, in respect of both the commencement and conduct of class actions thereunder.

⁵⁴ Commenced 1 August 1995

⁵⁵ Commenced 1 January 2002.

⁵⁶ Commenced 1 April 2002.

⁵⁷ Commenced 1 January 2003.

⁵⁸ Commenced 1 April 2004.

⁵⁹ Commenced 30 June 2007.

Australia

12. Pt IVA of the Federal Court of Australia Act 1976 applies only to claimants whose causes of action arise under Federal jurisdiction: the Australian Federal jurisdiction is very wide and far wider than, for instance, the Canadian Federal jurisdiction. As a consequence its class action regime has been quite extensively used.⁶⁰ Although Part IVA refers to a '*representative proceeding*', the Australian model is an opt-out class action. The only State in Australia to have implemented an opt-out class action is that of Victoria.⁶¹
13. Pt IVA does not follow precisely the recommendations of the Australian Law Reform Commission report which preceded it. For example, the Australian legislature did not accept the Commission's proposals for contingency fees or a public assistance fund for litigants. Nor did it adopt the Commission's '*grouped proceedings*' approach whereby each group member was to be the equivalent of a party to the proceedings before the court (devised for what the ALRC perceived was a constitutional requirement). Instead, class members are not, in the context of Pt IVA, parties to the proceeding for the purposes of costs or otherwise.
14. As with the Canadian legislatures, the Australian legislature expressly chose not to follow the categorisation approach of FRCP 23. However, in contrast to all North America opt-out class actions, the Australian legislature did not enact a formal certification requirement within Pt IVA. Instead, there are certain '*threshold requirements*', i.e., certification criteria dealing with commonality and numerosity, which must be satisfied under s 33C, failing which the defendant may challenge the proceedings as being improperly constituted as representative proceedings. There are further powers vested in the court to discontinue representative proceedings at least in class actions form under any of ss 33L, 33M or 33N, where the scenarios stipulated in those sections are met. A survey of several decisions on Pt IVA illustrates that defendants have frequently sought to challenge the procedural legality of representative proceedings by mounting twin attacks, based on the arguments that the

⁶⁰ This commenced operation on 3 March 1992.

⁶¹ See Part 4A of the Supreme Court Act 1986, which commenced operation in 2000.

s 33C criteria have not been met, and/or that the proceedings should be discontinued under, say, one the grounds in s 33N. As some Australian commentators have since noted, it is ironic that the Australian legislature's determination to avoid certification has been rebuffed by litigants' interlocutory challenges that have assumed the role of *de facto* certification hearings in any event.

15. Most recently, the Victorian Law Reform Commission, in its Civil Justice Review, has recommended reform of its class action procedure. Its proposals were that: i) it should be clarified that there is no legal requirement that each member of the represented class have a cause of action against all defendants to the class action provided that all class members have a legal claim against at least one defendant; ii) that class actions can be brought 'on behalf of some of those with the same, similar or related claims even if the class comprises only those who have consented to the conduct of proceedings on their behalf'; and iii) conferring on the Supreme Court a power to make *cy-près* type remedies in appropriate circumstances.⁶²

Europe

16. The European landscape is a mixed bag of differing collective redress mechanisms. There is the opt-in collective action model, as illustrated, for example, by Sweden's Group Proceedings Act 2002.⁶³ The legislation was originally contemplated as an opt-out procedure, but this was changed in the final enactment, such that group members must apply to the court to be included within the group. A further opt-in model of note is the newly-enacted Italian *Azione collettiva risarcitoria*, included as Article 140 of the Codice del Consumo, which came into force on 30 June 2008.
17. There is, on the other hand, the opt-out model, as illustrated by Spain's Law of Civil Judgment 1/2000, which commenced on 1 January 2001, and Portugal's Right of Proceeding, Participation and Popular Action, No 83/95 of 31 August 1995, both of which permit actions on behalf of unidentified group members.

⁶² Victorian Law Reform Commission, *Civil Justice Review*, (March 2008) (Report No 14) at 12 and 521 – 561

⁶³ Commenced on 1 January 2003.

18. There are also the recent bi-model class action regimes of Denmark, set out in the Administration of Justice Act, Pt 23, Act No 181/2007 and Norway, under its Civil Procedure Code; both of which have only been in force since 1 January 2008. Both regimes stipulate opt-in to be the main model. They both however permit the use of an opt-out collective action where the court is satisfied that certain conditions arise. In Denmark's case, for example, the prerequisites are that the individual claims of group members are low value, and the opt-in model is considered to be an inappropriate method of dispute resolution. In other words opt-out is permitted in order to increase access to justice according to the first of the three principles identified by Lord Woolf (cited *infra*).
19. On a different note again, the Netherlands' model is one which deals is based on collective settlement agreements arising out of mass torts, such as '*mass disaster accidents*',⁶⁴ whereas the German system is one which provides an example of a situation-specific regime, e.g., its Kapitalanleger-Musterverfahrensgesetz (The Act on the Initiation of Model Case Proceedings in Respect of Investors), introduced due to the inability of the then state of the German civil justice system with 17,000 claims brought by investors against Deutsche Telekom AG.⁶⁵
20. There are also European jurisdictions which have no generic collective action specifically for damages thus far, such as Ireland. Although the Irish Law Commission recommended the introduction of a GLO regime in 2005.⁶⁶

⁶⁴ The Act on Collective Settlement of Mass Damages, which commenced on 27 July 2005.

⁶⁵ Commenced on 1 November 2005. For a discussion see, Sturmer, *Model case proceedings in the capital markets - tentative steps towards group litigation in Germany*, 26 Civil Justice Quarterly (2007) 250.

⁶⁶ Irish Law Commission, Multi-Party Litigation, (LRC 76-2005) at 69ff. Its original recommendation was for the introduction of a new class action procedure: see Irish Law Commission (LRC CP 25-2003) at 59. For a jurisdiction-by-jurisdiction survey of Europe see: BEUC, *Private Group Actions: Taking Europe Forward* (8 October 2007, X/049/2007 also see Stuyck (2007). For further details on the Australian, Canadian and American class action regimes, see: Mulheron, *The Class Action in Common Law Legal Systems: A Comparative Perspective* (Hart, Oxford, 2004).



PART 4
THE IMPETUS FOR REFORM
- The Policy Context & Political Impetus

Summary

This chapter examines a range of policy proposals on collective and representative claims from both UK and EU policymakers. The ongoing activity detailed here is indicative of the consensus around the case for taking action to improve collective redress mechanisms beyond those currently available to consumers, employees, small businesses, trade associations and other potential claimants. There is also a consensus that any mechanisms that emerge must be balanced and proportionate.

Introduction

*“There may well be a strong case for legislative action to provide a jurisdictional structure for the collation and resolution of mass ... claims”.*⁶⁷

1. The question of how most effectively to deal with multiple claims of a similar nature has been raised and considered by Government and other policymakers on many occasions over the last decade or so.⁶⁸ The terminology used over this period by different agencies ranges from group litigation, multi-party actions, representative claims and collective consumer redress. Although the terminology may differ, the essential thrust of the various papers and proposals has been towards establishing an

⁶⁷ *Nash v Eli Lilly & Co* 1993 4 All E R 383, at 409 per Purchas LJ.

⁶⁸ See, for instance: *Davies v Eli Lilly* [1987] 1 WLR 1136 at 139; Report of the Review Body of Civil Justice (Cmd 394) at 274 – 276.

efficient and balanced procedure for the resolution of multiple or collective claims which raise similar or common issues of either law or fact.

2. This central question surrounding any collective mechanism was succinctly framed by the National Consumer Council in a submission to Lord Woolf's "Access to Justice" inquiry in the mid 1990s, quoted below, in a passage which predates the implementation of CPR's the group litigation provisions.

*"As we become an increasingly mass producing and mass consuming society, one product or service with a flaw has the potential to injure or cause other loss to more and more people. Yet our civil justice system has not adapted to mass legal actions. We still largely treat them as a collection of individual cases, with the findings in one case having only limited relevance in law to all of the others."*⁶⁹

3. This passage is instructive not only in setting the debate about collective claims firmly in the consumer context but also in alluding to the process and inefficiencies that arise from dealing with such claims as if they were unitary pieces of litigation.
4. This chapter briefly outlines the last decade's consultations, inquiries and consultations which relate to collective redress in the civil justice system. It concludes that the sustained level of political activity in this area indicates the continuing will among policymakers to work towards establishing an efficient, balanced procedure for the collective resolution of like claims.

United Kingdom (England and Wales)

Policy activity – a brief chronology

5. This section sets out relevant policy initiatives on collective redress which have been developed by agencies other than the Civil Justice Council. It does not deal with the CJC's previous reports and recommendations on collective action [which are noted in the introduction to this paper and included in full at **Appendix E and F** below]. Nor does it deal with procedural or policy activity before Lord Woolf's "Access to

⁶⁹ Woolf (1996) Chapter 17.1.

Justice” reports.⁷⁰ Hence it takes the implementation of the GLO) mechanism in the Civil Procedure Rules (CPR) as the starting point from which to examine developments.

Lord Woolf's Access to Justice Reports

6. Lord Woolf’s starting point was that there was in English procedure no specific rules of court dealing with multi-party actions; albeit this was more a reflection upon the inadequacy of the representative rule as an effective procedural mechanism than an absolute criticism. He noted the difficulties which English procedure had had during the 1990s in dealing with product liability litigation, which gave rise to large numbers of claimants whose claims each arose from the same legal or factual base.⁷¹

7. Lord Woolf’s conclusions were that:

“(1) Where proceedings will or may require collective treatment, parties or the Legal Aid Board should apply for a multi-party situation (MPS) to be established. This would suspend the operation of the Limitation Act. The court may also initiate an application. Within the MPS, part of the proceedings could be common to some or all of the claimants, and other parts could be limited to individual claimants.

(2) Individual claimants would be able to join the MPS at the application stage and subsequently by entering their names on an initial register.

(3) The court should certify an MPS if it is satisfied that the group or groups will be sufficiently large and homogeneous, and that the cases within the MPS will be more viable if there is a collective approach than if they are handled individually.

(4) Lower value or local cases should be dealt with locally at appropriate courts by either a High Court or Circuit judge.

(5) A managing judge should be appointed at or as soon as possible following certification and should handle the action throughout.

(6) In appropriate cases additional support may be provided by the appointment of a deputy Master or deputy district judge from those practitioners who already have considerable experience of multi-party

⁷⁰ Woolf (1995) and (1996).

⁷¹ Andrews, *English Civil Procedure*, (Oxford) (2003) at 975 sets out a detailed summary of the many areas where multi-party claims arose during this period; also see Hodges, *Multi-Party Actions*, (Oxford) (2001).

litigation.

(7) The court should have a residual power to approve the lead lawyer if a difficulty arises in appointing one.

(8) The court should usually aim to treat as a priority the determination of the generic issues while establishing economic methods of handling the individual cases.

(9) The court should have power to progress the MPS on an 'opt-out' or 'opt-in' basis, whichever contributes best to the effective and efficient disposition of the case.

(10) In reaching a decision on notice of the action to potential claimants, the court must take into account the cost of such notice and its usefulness.

(11) The court should be responsible for determining whether the action has merit and should proceed and the criteria which must be met by those wishing to join the action.

(12) The court should determine the arrangements for costs and cost sharing at the outset. The costs of action groups should be recoverable on taxation.

(13) The Lord Chancellor's Department and Legal Aid Board should consider the possibility of extending the upper limits of financial eligibility on the basis of increased contributions. In appropriate cases, with tight judicial management and control on costs it may be possible for assisted persons' liability to be assessed and fixed in advance.

(14) The possibility of a contingency legal aid fund should be reconsidered in the context of these proposals.

(15) The court has a duty to protect the interests of claimants, especially those unidentified or unborn.

(16) In appropriate cases the court should appoint a trustee.

(17) Multi-party settlements should be approved by the court especially where the defendant offers a lump sum settlement.

(18) The court should require an identified and finite group of claimants to have in place from the outset a constitution including provisions relating to acceptance of settlement.”⁷²

8. These recommendations, and the GLO which they produced, were not simply aimed at introducing a new procedure for disputes involving multiple parties, albeit one

⁷² Woolf (1996) at Chapter 17, Recommendations.

which built on common law developments, they were intended to achieve three ends. Those ends were identified by Lord Woolf as requiring any new or reformed procedure to:

- *provide access to justice where large numbers of people have been affected by another's conduct, but individual loss is so small that it makes an individual action economically unviable;*
- *provide expeditious, effective and proportionate methods of resolving cases, where individual damages are large enough to justify individual action but where the number of claimants and the nature of the issues involved mean that the cases cannot be managed satisfactorily in accordance with normal procedure;*
- *achieve a balance between the normal rights of claimants and defendants, to pursue and defend cases individually, and the interests of a group of parties to litigate the action as a whole in an effective manner.*⁷³

9. These three themes – access to justice, proportionality & efficiency, fairness – remain valid benchmarks to be applied when considering the various consultations and approaches to collective action since Lord Woolf.⁷⁴ One of the fundamental drawbacks of the GLO regime which has been identified since its introduction is that it fails to facilitate effective access to justice for individuals whose claims fall within the first of the three goals. Because the GLO, like the opt-in follow-on action in competition claims, requires individual citizens to take positive steps to commence litigation or join the claim register there has been little take up or use of it where claims are individually small even though the totality of the claim when aggregated is extremely large.

10. The fact that the GLO may not have been the ideal solution to the problems of multi-party litigation was itself acknowledged by Lord Woolf, who rightly stated that:

“In this area of litigation more than any other my examination of the problems

⁷³ Woolf (1996) at chapter 17.2.

⁷⁴ For a recent discussion see: Gibbons, *Group Litigation, Class Actions and Lord Woolf's Three Objectives – A Critical Analysis*, CJK Vol. 27 (2008) 208.

does not pretend to present the final answer but merely to try to be the next step forward in a lively debate within which parties and judges are hammering out better ways of managing the unmanageable.”⁷⁵

Representative Claims – Lord Chancellor’s Department (LCD) (2001)

11. Lord Woolf’s comments proved prescient. In early 2001 the LCD issued a consultation paper “Representative Claims: Proposed New Procedures”.⁷⁶ This defined representative claims as:

“... claims made by, or defended by, a representative or representative organisation on behalf of a group of individuals who may, or may not be individually named in a situation where an individual would have a direct cause of action.”⁷⁷

12. The proposals in the paper would, if implemented, have introduced a generic representative action procedure for all civil claims. Pre-action conduct would have been governed by a protocol, after which issue of the representative action would be subject to the court’s permission. The person(s) applying to conduct the matter would have had to satisfy the court that it would be an appropriate person to act as the group’s representative (by satisfying indicative criteria which could be set out in rules of court or a practice direction) and that the representative claim would be an appropriate way to proceed. The proposals would have allowed both existing designated bodies (for example recognised consumer organisations) and looser, *ad hoc* bodies or groups to apply to be representatives. It would thus have gone beyond either the GLO or the representative rule in CPR 19.6 because it would have enabled claims to be brought on behalf of a represented class by a body or organisation which did not itself have a direct interest in the action i.e., which did not itself have the same or in fact any cause of action against the defendant.

13. As controversially as this proposal at the time, particularly among business and defendant communities, the paper appeared to advocate an “opt out” approach to identifying members of the group; albeit this approach had previously been

⁷⁵ Woolf (1996) at Chapter 17.6.

⁷⁶ <http://www.dca.gov.uk/consult/general/repclaims.htm>

⁷⁷ LCD, *Representative Claims: Proposed New Procedures*, (February 2001) at [13].

recommended by Lord Woolf.⁷⁸ Finally the paper alluded to the possibility of costs protection for the representative body if the case was brought in the public interest.

14. Following consultation, the LCD's proposals were not taken forward, with particular comment being made by the senior judiciary, for instance, as to the necessity for primary legislation if representative bodies with no direct interest in the litigation were to be introduced.⁷⁹ Even so, some of the themes of the present debate around collective redress, examined in further detail in this report at Part 9 may be discerned from the previous thinking, most notably in:

- the need for the court to control an initial permission or “gate-keeper“ stage;
- the test of appropriateness (alternatively superiority) of the group or representative mechanism;
- the “opt out” approach to the group; and
- the possibility of some form of costs protection for the group

Representative Actions in Consumer Protection Legislation – Department for Trade and Industry (2006)

15. Although the LCD's general proposals were not taken forward at the time, limited proposals for representative actions, which built on the proposal that claims could be brought by representative bodies, were enacted in the narrower context of competition law.

16. Section 47B of the Competition Act (inserted by the Enterprise Act 2002) provides for representative actions in competition cases.⁸⁰ The section provides for follow on

⁷⁸ Woolf (1996) at Chapter 17.42 & 17.46.

⁷⁹ See, LCD, *Representative Claims: Proposed New Procedures*: Consultation Response (April 2002).

⁸⁰ Only bodies designated by the Secretary of State under the Special Body (Consumer Claims) Order 2005 (SI 2005/2365) may bring this type of representative action. Which (formerly the Consumers' Association)

claims only (i.e. after an adverse finding by the regulator), on behalf of named consumers only (i.e., an opt-in mechanism).

17. After the LCD paper, the matter of representative actions more generally was examined again in the then DTI's consumer strategy published in June 2005.⁸¹ This may well indicate the re-setting of the debate on representative actions and collective redress within the broader overall consumer protection context. The strategy document included an unequivocal commitment on representative actions:

We Will

- ***Introduce representative actions for consumers.*** *Sometimes going to court is the only way for consumers to get justice, but some consumers may not feel capable of doing so. We intend to introduce representative actions for consumers. We will consult further on how this might be done, in particular to avoid inadvertently creating a compensation culture and to avoid businesses facing spurious claims. We expect that only certain organisations would be allowed to bring a representative action and it might be necessary, for example, for pre-approval to be obtained from a court before proceeding.*

18. The consultation paper on representative actions referred to here was subsequently issued in July 2006.⁸² The key question it raised was whether representative actions should be permitted on behalf of named consumers only (an opt in mechanism, and the DTI's preferred approach) or on behalf of consumers at large (an opt out mechanism)?

19. The paper set out several further secondary questions, which further developed the themes of the debate identified above in the LCD paper. These were:

is the only body to have been so designated to date. It has brought one such action, against JJB Sports, to recover compensation for consumers who purchased replica football shirts at inflated prices.

⁸¹ "A Fair Deal For All Extending Competitive Markets: Empowered Consumers, Successful Business" <http://www.berr.gov.uk/files/file23787.pdf>

⁸² The DTI paper refers to the earlier LCD consultation at its paragraph 11: "*The LCD consultation received a range of responses and there was general support for the greater access to justice that provisions of this kind would provide. It was decided that provisions of this sort should be introduced only where there is a clear need for them and through primary legislation. This was partly because this would allow greater flexibility and fuller consultation than simply making amendments to the court rules by secondary legislation. In light of these findings we are now setting out proposals to introduce representative actions for consumer protection legislation.*"

- whether only designated bodies should bring representative actions?

(the DTI's preferred approach) and

- whether a permission stage before the court should be required?

20. Other matters relating to defining the scope of the consumer actions to be covered, dealing with multiple small claims and to assessing what types of similar claims might be suited to the representative action were also raised. Whilst there were no express proposals as to funding and costs, the paper did not envisage public funds being available to support representative claims:

“We do not intend to fund such cases directly from the public purse but see a role for consumer bodies or other similarly interested groups leading this activity.”

21. The response to the consultation was published in March 2008, by the renamed Department for Business Enterprise & Regulatory Reform (BERR).⁸³ This reported that business representatives were generally opposed to the proposals with consumer organisations and the Office of Fair Trading supporting them and arguing they should apply to consumers at large.

22. BERR's response also alluded to the European Commission's recent activity in respect of collective redress for consumers, which is detailed below. It concluded that:

Building on the responses to the consultation and these policy developments, we consider that further work is needed to examine the evidence base ... In particular we are keen to further examine with enforcement authorities what sort of case studies would suit representative actions, and to what extent could some of these cases be resolved through a restorative justice approach.

⁸³ <http://www.berr.gov.uk/files/file45051.pdf>

23. These points are further examined in this paper in Part 4 (Evidence of Need for Reform) and Part 5 (Public Enforcement and the Role of Regulators).

Private actions in competition law: effective redress for consumers and business - Office of Fair Trading (April & November 2007)

24. In contrast to the previous initiatives, which deal with redress for general civil wrongs, the consultation (April) and response (November) issued by the OFT deal with redress for breaches of competition law only.

25. The difference is noteworthy insofar as the competition authorities are empowered to investigate alleged breaches of competition law and to make adverse findings as to the liability of the market participants and to impose fines for anti-competitive behaviour. The prospect of this initial, regulatory, finding of liability should facilitate redress claims – known as follow-on actions – from those who have suffered losses due to the infringements. The general link between regulatory enforcement and civil redress is further explored in Part 5.

26. The OFT consultation paper consulted on proposals grouped around six principles, quoted below. Whilst certain of these are specific to competition law, the more general elements (points 4 – 6) clearly echo the three benchmarks - access to justice, proportionality & efficiency, fairness – set out by Lord Woolf in 1996:

1. *consumers and businesses suffering losses as a result of breaches of competition law should be able to recover compensation, both as claims for damages on a standalone basis as well as in follow-on cases brought after public enforcement action*
2. *responsible bodies which are representative of consumers and businesses should be allowed to bring private actions on behalf of those persons*
3. *private competition law actions should exist alongside, and in harmony with, public enforcement*

4. *any changes must be aimed at providing access to redress for those harmed by anti-competitive behaviour, whilst at the same time guarding against the development of a 'litigation culture', in particular the costs, diversion of management time and chilling effects that can arise from actual or threatened ill-founded litigation*
5. *processes and systems should be available to facilitate effective ways of resolving private competition law actions, and to encourage settlement of cases without going to court or trial wherever possible, and*
6. *the right balance should be struck between requiring defendants and others to disclose relevant materials to claimants, and ensuring that this process is not abused.*

27. Following consultation, the OFT made a series of recommendations to Government.

Once again, these pick up the themes of the collective action debate identified earlier in this chapter. Its main recommendation was that existing 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 large (opt-out).

28. 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. It is a range which the evidence of need study has demonstrated through its comparative study of other jurisdictions that goes far beyond consumer interests and encompasses a broad range of actions, from human rights cases to employment disputes. The latter point is already demonstrated within England through the availability of a collective action mechanism in respect of redundancy or Transfers of Undertakings and the proposal that trade associations be given a right to commence representative actions through implementation of

Directive 2004/48 EC.⁸⁴

29. As regards costs, the OFT recommended permitting, in conditional fee cases a success fee uplift greater than 100%, in these cases and recommended costs protection in appropriate cases. It went on to recommend the establishment of a merits-based litigation fund, which appears in marked contrast to the BERR view that public funds should not generally be available to pursue representative claims.

The Budget 2007⁸⁵

30. Perhaps the most authoritative statement in terms of support for private actions in competition claims from Government came in the Chancellor of the Exchequer's (then the Right Honourable Gordon Brown MP) budget report 2007:

“Private Actions

3.45. Private actions are an important aspect of a well-functioning competition regime. An effective regime would allow those affected by anti-competitive behaviour to receive redress for harm suffered and broaden the scope of cases that can be investigated, promoting a greater awareness of competition law and reinforcing deterrence, without encouraging ill-founded litigation.”

Discrimination Law Review 2005 – 2008

31. In 2005 the Government launched its Discrimination Law Review, the aim of which was to create a *“clearer and more streamlined equality legislation framework which produces better outcomes for those who experience disadvantage while reflecting better regulation principles.”*⁸⁶ Within its terms of reference the Review indicated that one of its key areas of work would be *‘an investigation of different approaches to enforcing discrimination law so that a spectrum of enforcement options [could] be*

⁸⁴ See, for instance, section 189 of the Trade Union and Labour Relations (Consolidation) Act 1992 and regulation 13 – 15 of the Transfer of Undertakings (Protection of Employment) Regulations 2006 (SI 2006/246); The Patent Office, *Consultation Paper: Representative Actions for the Enforcement of Intellectual Property Rights*, (2006).

⁸⁵ Her Majesty's Treasury, Budget 2007, (HC 342) at 3.45 – 3.48.

⁸⁶ For a summary see: *The Equality Bill – Government Response to the Consultation* (July 2008) (CM 7454) at 11 (http://www.equalities.gov.uk/publications/Government_Response_to_the_consultation.pdf).

considered'.⁸⁷ In its 2008 response to the Discrimination Law Review consultation, the Government indicated that it would consider, in light of the present report, whether there is a case for introducing representative actions in discrimination cases, and that it would consult on any proposals for reform.⁸⁸ While it is not covered in the Civil Justice Council's evidence of need study, it is apparent that there is a strong case for concluding that there is an unmet need for a collective action mechanism to enable the effective prosecution of claims arising out of discriminatory conduct e.g., equal pay, by employers and service providers, and a clear need for such a mechanism to be introduced. In respect of employment, while 24% of BME (black and minority ethnic) individuals report that they believe they have been refused a job during the last five years because of their race or colour (in contrast to just 3% of white job applicants),⁸⁹ and 62% of over 50s report that they have been refused employment on grounds of their age (in contrast to just 5.5% of those aged 30 – 39),⁹⁰ relatively few such claims are prosecuted. 83% of businesses report that they do not believe they will face any formal investigation of their employment practises or ever be taken to court as a consequence of those practises.

32. In the non-employment field, research has revealed that almost half of all disabled customers are unhappy with the facilities offered by the hospitality trade, with accessibility topping the list of complaints.⁹¹ At the same time, research commissioned by the former DfES to assess the impact of the Disability Discrimination Act 1995 found that many (potential) claimants view the court system and its procedures as daunting, intimidating and complex, and that this could be a disincentive to pursue cases. The researchers concluded that this complexity reinforced the need for expert advice and representation.⁹²

⁸⁷ http://www.equalities.gov.uk/dlr/terms_of_ref.htm

⁸⁸ *The Equality Bill – Government Response to the Consultation* (July 2008) (CM 7454) at 6, 11, 70 and 81 – 82.

⁸⁹ Department for Communities and Local Government, *Citizenship Survey, April-June 2007, England & Wales*, (October 2007) (<http://www.communities.gov.uk/documents/corporate/pdf/citizenshipsurveyaprjun2007.pdf>).

⁹⁰ Department for Communities and Local Government, *Citizenship Survey, 2005, Cross-Cutting Themes* (June 2006).

⁹¹ *Caterer and Hotelkeeper Magazine*, (6 October 2005).

⁹² Institute for Employment Studies, *Monitoring the Disability Discrimination Act (DDA) 1995*, (1999).

33. It is therefore clear that there is an access to justice gap for those suffering unlawful discrimination. This gap is not only preventing individuals from enforcing their rights but also helps to explain why 42% of businesses are unable to articulate reasons why they should take steps to ensure that discrimination does not take place and conversely that equality is promoted.⁹³ Effective collective action is needed in this area, just as it is needed in other areas such as consumer protection, competition law, contractual disputes and mass torts, to ensure that substantive rights, which may at present be unenforceable due to the lack of effective collective action mechanisms, are rendered enforceable. Moreover it is evident, as was recognised by the Irish Law Commission, in its 2003 Consultation Paper on Multi-Party Actions that collective actions have an important role to play in the effective prosecution of mass claims arising out of discriminatory behaviour in the employment field in order to ‘*vindicate civil rights*.’⁹⁴ That they do so is evident, again as noted by the Irish Law Commission, by the US Supreme Court in its decisions in *East Texas Motor Freight v Rodriguez* 431 US 395 (1977) and *General Tel Co v Falcon* 457 US 147 (1982).

Europe

Collective Consumer Redress - European Commission (2005 onwards)

34. EU policy makers have identified meaningful and accessible consumer redress mechanisms (i.e., collective actions for consumers) as being at the heart of the single market across the 27 Member States. Collective redress forms part of the Commission’s Consumer Policy Strategy for 2007 – 2013, published in March 2007.⁹⁵ The strategy notes that:

If consumers are to have sufficient confidence in shopping outside their own Member State and take advantage of the internal market, they need assurance that if things go wrong they have effective mechanisms to seek redress. Consumer disputes require tailored mechanisms that do not impose costs and delays disproportionate to the value at stake.

It [the Commission] will also consider action on collective redress mechanisms for

⁹³ National Employment Panel, *The Business Commission on Race Equality in the Workplace*, (October 2007) at 13, paragraph 31.

⁹⁴ Irish Law Commission (LRC CP 25-2003) at 36.

⁹⁵ *EU Consumer Policy strategy 2007 – 2013* (Com (2007) 99).

consumers both for infringements of consumer protection rules and for breaches of EU anti-trust rules in line with its 2005 Green Paper on private damages actions.

35. The European Commission's activity is being led, in tandem, by the Competition Directorate General (DG COMP) and the Health and Consumer Protection Affairs Directorate General (DG SANCO).

Anti-trust claims

36. The policy articulated by the European Commission in respect of competition law is arguably the more developed, with a Commission White Paper having been published in April 2008, following the December 2005 Green Paper (noted above).⁹⁶ The recent White Paper finds that⁹⁷

With respect to collective redress, the Commission considers that there is a clear need for mechanisms allowing aggregation of the individual claims of victims of antitrust infringements.

37. In order to meet this need, the Commission suggests the introduction of representative actions on behalf of consumers and businesses, and further suggests that these be complemented by collective actions (on an opt-in basis) in competition matters.⁹⁸
38. The White Paper also deals briefly with the matter of costs, alluding to the potential need for some form of costs protection or relaxation in relevant cases. Although no specific recommendations are made, the Paper finds that the “loser pays” or costs shifting principle has a dual role – playing an important function in filtering out unmeritorious but equally acting to discourage victims with meritorious claims. The text skirts round this controversial area in suggesting that national courts may need to be empowered to derogate from the principle “*in certain justified circumstances*”: see the White Paper.

⁹⁶ Kroes, *The Green Paper on antitrust damages actions: empowering European citizens to enforce their rights*, (Brussels) (06 June 2006) (Opening speech at the European Parliament workshop on damages actions for breach of the EC Antitrust rules) at 6.

⁹⁷ White Paper on Damages actions for breach of the EC antitrust rules, COM(2008) 165 final, at section 2.1.

⁹⁸ The text of the White Paper uses “suggests” here, rather than any other formulation such as recommends or advises.

Collective Consumer Redress

39. As regards collective consumer redress more widely cast, in late 2005 DG SANCO commissioned Leuven University to research alternative means of consumer redress across the EU, other than conventional proceedings. Some two years later, the completed Leuven research preceded a significant conference on collective redress in Lisbon in November 2007, addressed by both the Competition and Consumer Protection Commissioners.⁹⁹ In their speeches both went to some length to reassure delegates that the Commission is aware of the widespread antipathy across the EU towards an aggressive US style class action litigation culture.¹⁰⁰

40. At the Lisbon conference, Commissioner Kuneva announced a consultation on benchmarks that should feature in effective and efficient redress systems. Formal consultation on the Commission's ten benchmarks (included at **Appendix G**) ran until the end of March 2008.

41. More recently, DG SANCO is in the process of conducting and producing a new study focusing specifically on collective redress in the EU. This seeks to evaluate the effectiveness and efficiency of existing mechanisms and to assess whether consumers suffer detriment in Member States where collective redress mechanisms are not available. At the same time, the Commission launched a further study aimed at providing more information on the key problems faced by consumers in obtaining redress for mass claims.

42. The Commission has stated that it will use the results of these consultations and

⁹⁹ Stuyck et al, *An analysis and evaluation of alternative means of consumer redress other than redress through ordinary judicial proceedings*, (Leuven University) (2007) at 262.

¹⁰⁰ "I am well aware of the concerns about importing a system which, in combination with other features, have led to excesses in non-European jurisdictions. Let me repeat today that that it is not what the European Commission has in mind. We have learned from these foreign experiences, their strengths and their weaknesses. But we are not in favour of introducing wholesale a system which would be alien to our European traditions and cultures, or which would encourage unmerited claims." (Commissioner Kroes - Lisbon, 9 November 2007) and "To those who have come all the way to Lisbon to hear the words 'class action', let me be clear from the start: there will not be any. Not in Europe, not under my watch." (Commissioner Kuneva - Lisbon, 10 November 2007).

further studies, together with other information provided by stakeholders and interested parties, to decide whether, and if so, to what extent, an initiative on collective consumer redress is required at EU level. It will also need to decide what form any such initiative might take.

43. As regards timing, the expectation is that the Commission will publish the results of the two studies and a further consultation on collective consumer redress in December 2008.

European Economic and Social Committee (EESC) (2007 – 2008)

44. In February 2007 the EESC on its own initiative decided to examine and issue an opinion on ‘*[d]efining the collective actions system and its role in the context of consumer law.*’¹⁰¹ In doing so it examined the role and arrangements ‘*for a form of collective group action, harmonised at Community level, in particular in the area of consumer law and competition law, at least at an initial stage.*’¹⁰² It did so with the aim of promoting further discussion and analysis of the issues.

45. The EESC in its Opinion arrived at a number of conclusions, which were, *inter alia*, that:

- (1) Appropriate procedures both at EU level and at member state level should be available to uphold substantive (material) rights (at 4.1);
- (2) All EU member states, whether through their own constitutions or incorporation of the European Convention of Human Rights and Fundamental Freedoms affirm the right to fair trial, which includes the right of meaningful and effective access to the courts (at 4.2);
- (3) Existing legal mechanisms do not always provide such practical and

¹⁰¹ The Opinion is reprinted in full, with the kind permission of the EESC, at **Appendix Q**.

¹⁰² European Economic and Social Committee, *Opinion on Defining the collective actions system and its role in the context of Community Consumer Law*, at 1.1.

(<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2008:162:0001:0019:EN:PDF>)

meaningful access to justice (at 4.3);

- (4) The creation of a European collective action would secure effective access to justice to all consumers. It would also be of benefit to commercial operators through procedural cost savings and through providing legal certainty. It would also lead to a single European jurisprudence in this area. It would benefit the development of private international law within the EU and strengthen consumer law through making it possible for consumers to obtain fair compensation (at 4.4 – 4.6);
- (5) The development of collective actions is not necessarily to be limited to consumer or competition law (at 5.5);
- (6) A new collective action should not be introduced on the basis that it can only be pursued on behalf of consumers by a representative body such as a consumer body or Ombudsman. Such mechanisms are primarily regulatory and are not generally able to obtain effective redress for consumers (at 7.1);
- (7) A new collective action should not take the form of a US class action i.e., it should not incorporate those aspects of a collective action which give rise to negative aspects of the US system, such as: punitive damages; contingency fees; forum shopping across State jurisdictions (at 7.1.2);
- (8) The merits and drawbacks of opt-in and opt-out were canvassed. In particular it was noted that there were significant disadvantages to an opt-in system i.e., procedural delay, low take-up right etc. It was also noted that concerns that arose as to whether an opt-out system was compatible with the right to fair trial could be met (at 7.2);
- (9) A certification stage, carried out by the court, is necessary as is court approval of any settlement. Proper procedures should be put in place to allow for evidential disclosure. Such actions should only be brought before designated

courts. (at 7.3);

- (10) Compensation for all forms of damage (pecuniary and non-pecuniary) must be available under a collective action. Proper mechanisms should be put in place to calculate damages and distribution of damages to class members, either directly or if necessary indirectly (at 7.4);
- (11) An effective and expeditious appeal procedure should be in place, available to both claimants and defendants (at 7.5);
- (12) Any new action must be self-financing, although a support fund should be established for those litigants who cannot afford, at the outset of proceedings to fund an action. Such a support fund could be funded on a polluter-pays principle (at 7.6)

Conclusion

- 46. The widespread developments outlined in this chapter demonstrate that the need to provide proper, efficient and effective access to justice where large numbers of individual citizens have collectively suffered similar losses has been a key concern of a wide range of policy makers over a considerable period of time. Coupled with this has been the explicit recognition that any measures to improve access to justice through reform in this area must be both balanced and proportionate.
- 47. These two factors – access to justice, delivered via a balanced and proportionate mechanism – remain the touchstones by which proposals to improve the mechanisms through which collective action can be effectively and fairly pursued (including those made in this report) will be measured.
- 48. The recent policy debate on collective action has been active on two levels, both in England and in the EU. First - and generally the more advanced – relates to competition law, in which a limited representative mechanism already exists in England and Wales and in which proposals have been put forward both the OFT and

BERR and, at the European level, by the Commission. The second level covers civil claims generally and consumer claims in particular. Prior to this report, detailed practical proposals for a generic collective action in England have not been put forward, although the issue had been examined on several occasions by various agencies.



PART 5
PUBLIC ENFORCEMENT and the ROLE OF REGULATORS

Summary

This chapter considers the present position in respect of non-court based regulatory methods of redress.

1. There are at the present time a number of public enforcement mechanisms, which are able to facilitate the provision of consumer redress. Public enforcement can arise in a number of ways and through a number of vehicles. The following is intended to be an indicative rather than exhaustive study.

Ombudsman

2. Ombudsman schemes have been a feature of the regulatory landscape since the early 1960s when the Parliamentary Ombudsman was created.¹⁰³ As Seneviratne put it ombudsmen are “*complaint-handlers, [who provide] ‘an impartial, accessible, informal, speedy and cheap means of resolving complaints’*”¹⁰⁴ There are a wide variety of such schemes at present, some of which are the product of legislation whereas others have been established by private industry, for example, the

¹⁰³ See Justice, *The Citizen and the Administration: the Redress of Grievances* (Stevens, 1961). For a detailed account see, Seneviratne, *Professorial Inaugural lecture* (17 April 2000, Nottingham Law School) (<http://www.bioa.org.uk/otherinfo/Ombudsmen-2000-Mary%20Seneviratne.pdf>).

¹⁰⁴ Seneviratne (2000) at 16, citing: Giddings, *The ombudsman in a changing world* (1998) 8 (6) Consumer Policy Review 202 at 203.

Parliamentary and Health Service Ombudsman, the Financial Ombudsman Service, the Legal Services Ombudsman, the Pensions Ombudsman, the Ombudsman for Estate Agents,¹⁰⁵ the Removals Industry Ombudsman Scheme, and the Telecommunications Ombudsman.¹⁰⁶ In addition to these formal Ombudsman schemes there are similar bodies which fulfil the same role e.g., the Police Complaints Authority or the Broadcasting Standards Commission.¹⁰⁷

3. Ombudsman schemes, unlike their counterparts in, for instance, Denmark, do not initiate or fund litigation before the civil courts.¹⁰⁸ Rather they tend to complement the civil justice system by providing an informal, inquisitorial forum for resolving a variety of complaints both economically and efficiently.
4. Ombudsman schemes have available to them a range of remedies where they find a complaint to have been made out. They can require the subject of the complaint to provide an apology, to change their behaviour or to provide the complainant with compensation, although such compensation will not be an equivalent level to that which would be available in legal proceedings if the matter were justiciable.¹⁰⁹

Regulators

5. In addition to Ombudsman schemes a large number of industry sectors are subject to regulation. Regulators exist, for instance, in respect of competition law (the Competition Commission, the Office of Fair Trading¹¹⁰), the pensions industry (the

¹⁰⁵ The Estate Agents' Ombudsman is now capable of requiring payment of consumer compensation as a consequence of the Consumer Estate Agents and Redress Act 2007.

¹⁰⁶ For an exhaustive list see: http://www.ombudsman.org.uk/contact_us/if_we_cannot_help.html or the British and Irish Ombudsman Association: <http://www.bioa.org.uk/index.php>

¹⁰⁷ Seneviratne (200) at 15.

¹⁰⁸ <http://www.forbrug.dk/english/dco/>. This is despite the suggestion, by, for instance, the CAB that a universal Consumer Ombudsman ought to be introduced to provide a more effective means via which consumers could be provided with compensation. Such a body if introduced would provide a means of providing effective redress for multiple consumer claims which would complement well any new mechanism introduced into the English civil justice system. It would do so as it would facilitate compensation consistently with the proper emphasis on alternative dispute resolution: see Citizens' Advice Bureau, *Representative Actions in Consumer Protection Legislation: Consultation Response to the DTI*. (October 2006) at 2.

¹⁰⁹ http://www.adrnow.org.uk/go/SubSection_15.html;jsessionid=aDU3QMbUnMV5

¹¹⁰ See, for instance the various powers under Part 8 of the Enterprise Act 2002, such as the implementation of the Injunctions Directive (Directive 98/27/EC) which established a '*common procedure to allow*

Pensions Regulator), financial services (the FSA),¹¹¹ health and safety (the Health and Safety Executive) and the railways (the Office of Rail Regulation). A non-exhaustive list of regulators is given in Schedule 5 of the Regulatory Sanctions and Enforcement Act 2008.¹¹²

6. Regulatory regimes exist as a means to ensure that certain specific industries or business sectors operate consistently with substantive law. For instance, the Office of Fair Trading seeks to ensure that businesses do not abuse their market position or operate concerted practices to the detriment of market efficiency or consumer welfare. Equally, the Office of Rail Regulation regulates the rail industry in order to ensure, for instance, that train operators do not abuse their monopolistic position and comply with health and safety law.¹¹³

7. Regulatory regimes exist where, as Macrory put it “. . . *Government cannot be confident that the whole of the sector covered will voluntarily comply with the standards or achieve desired outcomes.*”¹¹⁴ Regulators are, in the first instance then, compliance mechanisms. But where compliance with standards is not achieved consumers will often suffer detriment. Regulators will thus, as a corollary of their primary aim, ensure that consumer detriment is kept to a minimum by ensuring proper compliance with relevant standards. Regulatory schemes, in this way, as Macrory saw it rightly, had a number of features. The paramount aim was to ensure that businesses in the regulated sector were punished effectively where they failed to

consumer bodies to stop unlawful practices [detrimental] to the collective interest of consumers anywhere in the EU.’ The Directive is implemented into English law through section 217 of the Enterprise Act 2002.

¹¹¹ See section 382 – 383 of the Financial Services and Markets Act 2000.

¹¹² The listed regulators are: British Hallmarking Council, Charity Commission for England and Wales, Coal Authority, Competition Commission, Countryside Council for Wales, Environment Agency, Financial Services Authority, Food Standards Agency, Football Licensing Authority, Forestry Commissioners, Gambling Commission, Gangmasters Licensing Authority, Health and Safety Executive, Hearing Aid Council, Historic Buildings and Monuments Commission for England (“English Heritage”), Housing Corporation, Human Fertilisation and Embryology Authority, Human Tissue Authority, Information Commissioner, Local fisheries committees, Natural England, Office of Communications, Office of Fair Trading, Office of Rail Regulation, Pensions Regulator, Security Industry Authority, Statistics Board. Other regulators not included within the ambit of the Regulatory Sanctions and Enforcement Act 2008 are, for instance, Ofwat (water industry), Ofcom (television, radio and related media), Ofgem (energy industry), Postcomm (postal services industry).

¹¹³ <http://www.rail-reg.gov.uk/>

¹¹⁴ Macrory, *Regulatory Justice: Making Sanctions Effective*, (Final Report) (November 2006) at 15.

comply with regulatory requirements. Punitive measures were to be combined however, where pertinent, with other measures aimed to induce behavioural modification so as to deter future non-compliance. Finally, they existed to ensure that redress was given to those who suffered a detriment as a consequence of established non-compliance.¹¹⁵ There are however a number of problems with the use of regulatory mechanisms and regulators as the means to provide effective consumer collective redress.

8. First, not all industries or businesses, for instance, operate within a regulated sector, nor is there, as in the case of Denmark, a single body that can initiate proceedings against any business which has caused consumer detriment. There is no omnicompetent regulator nor does there appear to be any suggestion that one either should or might be introduced. Equally, not all regulators have or are likely to be given the power to require compensatory awards to be paid to consumers. Postcomm, for instance, is constitutionally unable to respond to individual complaints and, *a fortiori*, it is unable to provide either individual or collective redress. While it is anticipated that the absence of such compensatory delivery mechanisms is to be rectified to a degree by the Regulatory Sanctions and Enforcement Act 2008, a number of regulators will not to be given the power to require the payment of compensation to individuals, but only it seems where the regulator is certain beyond a reasonable doubt that a relevant offence has been committed.¹¹⁶ Equally, there always remains the possibility, as the CAB pointed out in their consultation response to the DTI, that a regulator may be disbanded at some future point in time.¹¹⁷ Taken either singularly or together these points strongly suggest that there will thus be an access to justice gap for those individuals, singly or collectively, who suffer injury as a consequence of action by an actor within a regulated industry where the regulator does not have the power to require compensation payments to be made. Equally, even where the power to award compensation does exist it will only exist to the criminal standard of proof rather than to the civil standard of proof; thus institutionalising an

¹¹⁵ Macrory (2006) at 35.

¹¹⁶ See section 42 (2) of the Regulatory Sanctions and Enforcement Act 2008

¹¹⁷ Citizens' Advice Bureau, *Representative Actions in Consumer Protection Legislation: Consultation Response to the DTI*. (October 2006) at 8.

access to justice gap for those citizens who could, if an effective and efficient civil procedural mechanism existed to enforce their rights, have enforced them as other citizens can by satisfying the court to the lower civil standard.

9. A second difficulty arises however in respect of those regulators who are or will be able to facilitate the provision of compensatory awards to consumers. That difficulty arises from the nature of regulatory regimes, which unlike the civil justice system are not designed to provide full compensatory redress to consumers either singularly or collectively. The primary function of regulatory regimes, is as Macrory makes clear, to ensure compliance with statutory and other regulatory norms. Regulatory sanctions exist and the means to facilitate compliance either through deterrence or punitive sanction.¹¹⁸ While they may be able to require compensation to be paid such awards may well be a secondary consideration for any regulatory regime. Where such redress conflicts with the regulator's primary role it might well be anticipated that the primary role will take precedence. It would be anticipated that a regulator, in order to ensure future compliance or encourage industry whistle blowing, may well enter into leniency agreements with individual businesses which might give rise to the regulator either taking no action against that business or require it to pay less than full compensation to those consumers who had been adversely affected by its actions. As EC Competition Commissioner Kroes argues, "[u]nlike courts, which address and enforce the rights of individuals, the authorities act in the general interest."¹¹⁹ She further explains that:

"...no matter how closely public intervention mirrors the concerns of consumers, no matter how effectively the fines that we impose punish and deter unlawful behaviour, the victims of illegal behaviour will still not be compensated for their losses. Public enforcement is simply not there to serve this goal. It is there to punish and deter

¹¹⁸ As evident in Macrory's six penalties principles, *Macrory* (2006) at 10: "A sanction should: 1. Aim to change the behaviour of the offender; 2. Aim to eliminate any financial gain or benefit from non-compliance; 3. Be responsive and consider what is appropriate for the particular offender and regulatory issue, which can include punishment and the public stigma that should be associated with a criminal conviction; 4. Be proportionate to the nature of the offence and the harm caused; 5. Aim to restore the harm caused by regulatory non-compliance, where appropriate; and 6. Aim to deter future non-compliance."

¹¹⁹ Speech: *Enhancing Actions for Damages for Breach of Competition Rules in Europe* (22 September 2005) at 2, accessible online at: <http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/05/533&format=HTML&aged=0&language=EN&guiLanguage=en>.

illegal behaviour. It cannot make amends for the damage and suffering caused to consumers. Therefore, consumers should be empowered to enforce their rights themselves."¹²⁰

10. Thirdly, even in those areas where regulators wish to ensure full compensation is paid to adversely affected consumers, doubts must arise as to whether regulatory action is the most efficient and economic means by which this can be provided. To begin, it is doubtful whether public bodies would be able to act upon every single case of infringement, as Commissioner Kroes states, "*even the best competition authority cannot know at first hand every problem in every sector of the market.*"¹²¹ Furthermore it can be argued that regulators are not themselves in the best position to assess certain types of damage which involve difficult factual questions e.g., non-economic loss such as general damages for pain and suffering, as they may well be required to do following enactment of the Regulatory Enforcement and Sanctions Act 2008. Equally, it is doubtful that regulators are able, absent legal action before for instance a tribunal such as the Competition Appeal Tribunal, to economically and efficiently ensure that compensation is paid where a business contests liability or contends that they have not breached any relevant regulatory norm. Regulatory action taken by the OFT, for instance, arising out of bank charges in 2008 required resort to formal litigation, and only then after a concerted media campaign and large scale individual action before the courts. Not only was regulatory action here essentially reactive but due to the robust defensive stance taken by the relevant businesses it required resort to the civil justice system in any event.
11. Moreover any compensatory award which might be made following the changes effected by the Regulatory Sanctions and Enforcement Act 2008 are unlikely to form an effective means of providing effective access to justice in the context of civil justice given that it requires that compensation should only be awarded where the

¹²⁰Speech: *Making consumers' right to damages a reality: the case for collective redress mechanisms in antitrust claims* (9 November 2007) at 3, accessible online at <<http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/07/698&format=HTML&aged=0&language=EN&guiLanguage=en>>.

¹²¹Speech: *Regulating for Competition and Growth* (17 February 2005), accessible online at: <http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/05/98&format=HTML&aged=0&language=EN&guiLanguage=en>.

regulator is satisfied to the criminal rather than the civil standard of proof.¹²² This places claimants at a distinct disadvantage and one not envisaged by Macrory, who recommended a civil standard of proof.¹²³ Absent acceptance of a civil standard of proof, which was specifically rejected by the government in respect of Macrory's recommendations, regulation cannot as argued by some, provide an effective means of ensuring collective civil redress.

12. Equally, it can be questioned whether the proposed new compensatory mechanism envisaged by the 2008 Act may well not prove successful given the lack of use of similar powers by the FSA which exist under sections 382 and 383 of the Financial Services and Markets Act 2002. Equally, as Hodges points out similar powers to award compensation which have existed within the wider context of criminal procedure have since their introduction in 1973 '*not been widely used.*'¹²⁴ History suggests that the same lack of use may well arise post-enactment of the 2008 Act; even if it were accepted that the access to justice gap which exists in the civil justice fora is properly met through the use of either regulators or the criminal courts applying the criminal standard of proof.

13. Furthermore, regulatory bodies are not equipped with the resources to enable them to fulfil their public enforcement role, nor are they likely to have the resources available to pursue every meritorious compensatory action. The question thus arises as to why certain individuals should be denied effective access to justice because a regulator does not have the resources to pursue an action on their behalf. As OFT Chairman, Philip Collins explained, "*What is clear is that competition authorities cannot, and should not, take on every case. Our work has to be prioritised, limited taxpayers' resources allocated accordingly and the progress of cases speeded up.*"¹²⁵ Where a regulator cannot for legitimate reasons take on a case, absent an effective procedural mechanism for citizens to utilise the access to justice gap will remain. Taking these

¹²² Section 42 (2) of the Regulatory Enforcement and Sanctions Act 2008.

¹²³ Macrory (2006) at 46ff.

¹²⁴ Hodges, *Global Class Actions Project Country Report: England and Wales*, (2007) at 4 (<http://globalclassactions.stanford.edu/reports.html#england>).

¹²⁵ *Public and private enforcement challenges and opportunities* (6 June 2006), at 15: <http://www.of.gov.uk/shared_of/speeches/0306.pdf>

factors into account, the argument, as put by Commissioner Kroes that “[a]nyone harmed by unlawful action should not have to wait for a public body to intervene”¹²⁶ becomes more persuasive. Both Philip Collins and Commissioner Kroes point towards the necessity of their being an available, effective and efficient civil mechanism which at the very least would complement regulatory compensatory action and would do so where it was shown to be a superior compensatory mechanism in the circumstances (i.e., it would be a question for the superiority question at the proposed certification stage).

14. Regulatory mechanisms for collective consumer redress like Ombudsman schemes, are not without problems. They are not all encompassing: they are not just limited to the consumer field but they are not all-encompassing even in that field. Not all regulators are constitutionally able to require compensation payments to be made. It is not necessarily the case that regulatory action is either more efficient or economical than action via the civil justice system. Most significantly however, reliance on regulators as the vehicle for providing compensation is based on a fundamental flaw. Regulators exist to regulate not to ensure the provision of compensation. They are the converse of justice systems, which exist to give proper effect to substantive law and, as a necessary corollary, ensure compensation is paid to those whose substantive rights have been infringed. The co-option of regulators as deliverers of redress is as flawed as the co-option of the civil justice system as a primary means of regulation. The fear must be that a regulator will where necessary to further effective future compliance with regulatory norms sacrifice the requirement that proper compensation is paid to consumers both individually and collectively. The regulatory imperative will inevitably take precedence.

15. In the circumstances while Ombudsman schemes and regulatory mechanisms may provide in certain circumstances more effective and efficient means through which collective action and compensation could be pursued the limits inherent in such

¹²⁶ *More private antitrust enforcement through better access to damages: an invitation for an open debate* (9 March 2006) at 3: <http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/06/158&format=HTML&aged=0&language=EN&guiLanguage=en>.

schemes are such as to lead to the conclusion that even where they to be effective within their spheres of operation they would not be able to meet the full extent of the access to justice gap to which the present lack of an effective collective action gives rise.



PART 6

Private Enforcement: The Case for a Generic Opt Out Collective Action

Summary

This chapter considers the weaknesses in the present procedural mechanisms available to prosecute collective actions. It proposes that those weaknesses can only be overcome through introduction of a new generic collective action.

Introduction

1. The recognition that individual citizens have almost no chance of bringing actions against powerful companies has led authorities to explore avenues for shifting the balance of litigation risk in favour of the individual citizen, either as consumer, employee or otherwise, and the small business. To do this effectively a broad international consensus has developed that a collective action procedure is the most efficient and effective means of providing genuine access to justice in the 21st Century world of the global market, the mass production of goods and services, and sale through such media as the internet as well as more traditional market places.
2. While a number of mechanisms exist in England to facilitate the effective prosecution and management of a large number of claims which give rise to substantially the same or similar legal or factual issues (joinder, test cases or GLOs) there remains an access to justice gap. The denial of effective access to justice, as demonstrated by, for

instance, Professor Mulheron's evidence of need study,¹²⁷ by the failure of the follow-on Competition law regime to produce more than one action which left, as a consequence of the barriers to entry created by its opt-in nature, vast numbers of those who had suffered actionable detriment uncompensated, and evidence that large numbers of employment (discrimination) claims are unprosecuted, provides strong support for the conclusion that citizens in England are not being fairly served through the provision of sufficient or effective access to justice by the present procedural mechanisms. Access to justice is, despite the present procedural mechanisms, still disproportionately weighted against claimants whether they are groups of consumers, small businesses, employees, or victims of mass torts. This has resulted in few claims being brought, and significantly, demonstrates that a number of meritorious claims simply have not seen the light of day. Where claims have been brought, they have been brought in a manner which is either manifestly inefficient, e.g., the Bank charges litigation, or at procedural disadvantage to the claimants i.e., the Football shirts litigation.

3. The existing CPR mechanisms which could theoretically be deployed to bring consumer and small business claims have been covered earlier. This section summarises the generic weakness in the current mechanisms, including the new consumer vehicle in the competition field, discussing briefly how they may be rendered properly effective and more routinely utilised.

Private enforcement – Definition

4. Private enforcement is a term often used interchangeably to describe a mixed function. In this context the primary function is that giving proper effect and enforcement to the substantive rights of those individual citizens who had suffered actionable detriment as a consequence of, for instance, anti-competitive conduct, consumer-related infringements, product liability issues, contractual disputes, mass-

¹²⁷ Mulheron, *Reform of Collective Redress in England and Wales: A Perspective of Need*, (CJC Research Paper, 2007) esp., 16, 23, 25, 32, 48, 66, 72, Parts V and VI.

torts, employment and discrimination issues. Effective enforcement would involve compensatory damage awards, which were appropriate according to established substantive law principles disgorgement of profits. It is as a consequence of its primarily compensatory function that effective private enforcement arises, through which it provides a real deterrent effect that such actions are said to have on unlawful conduct. In this context both the OFT and the European Commission have publicly stated that they see private actions by victims in competition law as a necessary complement to their own public enforcement efforts, which are intended to be regulatory and where necessary punitive.¹²⁸ Consistently with the conclusions drawn in the previous chapter on public enforcement, the OFT, in this context, has emphasised that its role in respect of Competition Act investigations is one of enforcement and deterrence rather than the achievement of compensation for those citizens who have suffered loss as a consequence of anti-competitive behaviour.¹²⁹ Aside from the deterrent aspects there appear to be two reasons for this: first, that both private and public enforcement seek to promote economic efficiency by improving the functioning of the market; and secondly that the resources available to private parties can be used as a complement to the (necessarily finite) resources available to the public authorities to pursue infringers and maintain market competitiveness. Greater private enforcement should, then, give public enforcers greater freedom to prioritise their activity where they think it will do most good.

¹²⁸ European Commission, Report on Public/Private Enforcement (2004) (The Ashurst Report): “The EU must move forward from the ‘state of total underdevelopment’ of private claims for damages”; *Van Gend en Loos v Nederlandse Administratie der Belastingen* [1963] ECR 1: “*The vigilance of individuals concerned to protect their rights amounts to an effective supervision in addition to the supervision entrusted . . . to the diligence of the Commission and of the Member States*”; as recognised in the Annex to Green Paper on Damages (Com (2005) 672 Final) at 8. See speech of Phillip Collins, OFT Chairman at: <http://www.biicl.org>.

¹²⁹ http://oft.gov.uk/advice_and_resources/resource_base/ca98

Defects in the Present Collective Mechanisms

Representative actions under the CPR

5. Until the CPR's introduction, the representative rule procedure under RSC Ord. 15 r. 12 was the only truly available collective action mechanism and was, as Uff noted, akin to the US class action contained in Rule 23 of the Federal Court Rules.¹³⁰ As noted earlier this is now contained in CPR 19.6. Practitioner experience of this rule is that despite attempts to increase its flexibility through a number of cases, it remains no more effective than the old RSC procedure. It does not for a number of reasons, each of which can be explored by reference to the recent Bank charges litigation. It is useful to do by reference to this litigation, which saw an extremely large number of individual claims being issued on the small claims track against a number of defendant banks. Each claim raised a common issue or issues relating to whether unauthorised overdraft charges were either penalty charges, and therefore unenforceable, or unfair contract terms if otherwise lawful. It is axiomatic that if, the first of Lord Woolf's three principles (see *supra*) was capable of being met by existing procedure these claims ought properly to have been capable of prosecution by one of the extant forms of collective or multi-party action presently available. The question is in the present context, why they were not capable of effective prosecution under the representative rule?

6. The primary reason why these claims could not go forward under the representative rule is that, just as its predecessor under the RSC was, it is still bound by a very stringent interpretation of same interest/commonality.¹³¹ Litigants are required to have the same interest in one cause of action. That same interest requires there to be one index accident, if a tort, or as in the Bank charges litigation a single contract to which all the claimants (claimant class) were party. That the claimants had all entered into similar contracts, or even identical contracts, is not sufficient to satisfy the same

¹³⁰ Uff, *Class, Representative and Shareholders' Derivative Actions in English Law*, Civil Justice Quarterly (1986) 50 at 56.

¹³¹ *Markt & Co Ltd v Knight Steamship Co Ltd* [1910] 2 KB 1021.

interest requirement. Moreover for a same interest to exist any benefit from the litigation must be common to all. Different defences available as between the defendants and individual members of the claimant class would defeat this as would any difference in the nature of the remedy available to the members of the claimant class. In the bank charges case both of these two points could arguable have been met in the majority of cases as the defences available would have been common to all and the damages could have been assessed globally applying the principle set out in *EMI Records Ltd v Riley* [1981] 1 WLR 923. The class claimants could not however in the Bank charges case, and this is the case more generally, get beyond the same interest requirement re., the basis of the cause of action and this is despite the Court of Appeal's decision in *The Irish Rowan*,¹³² which held that there was no necessity for class claimants to all be parties to the same, single contract.¹³³

7. On a more general level, while the damages issue arising from the definition of same interest was arguably capable of resolution in the Bank charges litigation the EMI Records approach has not apparently been followed in other litigation. Equally, attempts to ameliorate the strict approach adopted by *Markt* to damages in cases such as *Prudential Assurance Co Ltd v Newman Industries Ltd*¹³⁴ have not been widely followed. Difficulties and continuing uncertainties as to damage awards under the representative rule continue to blight its usefulness.
8. In addition to these problems, which militate against the commencement of actions under the representative rule, a further difficulty arises in respect to its application following judgment. Joinder, reflective of its basis as a means to arrive at declaratory or injunctive relief, is mandatory. It therefore suggests that insofar as finality of litigation is concerned for both claimant class members and defendants it is wholly certain as to the effect of its judgment. In order for a judgment under the representative rule to be enforced by or against a party who is only before the court

¹³² [1991] 2 QB 206 at 222-23.

¹³³ See, Sorabji, *Class Actions: Reinventing the Wheel (Appendix M)*; Andrews (2003) at 991ff; Stratford, *Class Actions*, (Brick Court Chambers, 2007) (Seminar Materials) at 85.

¹³⁴ [1981] Ch 229.

by way of representation the court's permission is however required (CPR 19.6(4)). This creates a form, albeit a limited one, of opt-out post-judgment. Whether permission for enforcement will be granted is something which must be assessed on the basis of whatever special circumstances arise.¹³⁵ Even if a claim succeeds under the representative rule its application in respect of represented class members remains at the present time therefore to a degree uncertain, undermining to a degree any real benefits which might otherwise arise regarding: certainty; finality of litigation; efficiency and economy of procedure.

9. As it is, the representative rule as presently interpreted ensures that claims which could otherwise be fairly and effectively pursued through it, like the Bank charges litigation, must go forward as unitary claims. From a practical perspective, in that litigation, with so many banks implicated, few major law firms were without some conflict of interest, whilst others were unwilling to test out the important legal principles involved against such powerful adversaries, especially given the likely costs involved, economies of scale, and procedural requirements under the representative rule. While many bank customers did receive payments because the banks took a commercial view to pay, bank customers, like others with individual claims in a class of claimants, were left to the dangers associated with numerous individual suits i.e., the risk of inconsistent judgments; disproportionate litigation delay; disproportionate and likely exorbitant cost to the litigants and the court system as a whole; and adverse publicity for the defendants over a long period of time.¹³⁶

Test Cases, Joinder and Consolidation

10. These three traditional mechanisms are inadequate means through which to effectively and efficiently prosecute large numbers of individual claims which arise from a common cause or give rise to common or similar issues of law or fact. Joinder and consolidation, while offering the ability to manage several individual claims within one action become unwieldy when truly large numbers of parties are involved,

¹³⁵ *Howells & Another v Dominion Insurance Company Ltd* [2005] EWHC 552 (QB).

¹³⁶ For a fuller discussion, see Mulheron, *op cit*, Unitary Actions.

which limits their efficacy and the court's ability to adequately and properly resolve the claims and issues arising within them on their substantive merits. That there were and are inadequate to the task is to a degree well-established given the need in the 1990s to develop at common law what would be codified post-Woolf into the GLO in cases such as *Davies (Joseph Owen) v Eli Lilly & Co* [1987] 3 All ER 94 at 96, [1987] 1 WLR 1136 and *Nash v Eli Lilly & Co* [1993] 4 ALL ER 383 at 409.

11. The use of the, or a, test case has a number of advantages in terms of efficiency and efficacy. The selection of a test case, with other similar claims being stayed pending its outcome has clear benefits in these terms. Equally, it enables a judgment to be given, which while it does not bind the stayed by way of *res judicata*, it does operate insofar as relevant according to the doctrine of precedent. In essence this was the approach taken by the OFT when it initiated proceedings in the Bank charges litigation at the request of seven banks under the '*wider implications process*' (WIP) which provides that, '*where in the respondent's opinion there is an issue raising novel questions of law with significant consequences*' the regulator may consider bringing a test case.¹³⁷ Under the costs arrangements agreed at the outset of the case between the OFT and the respondents, each party is to pay its own cost of the action.¹³⁸ Consumer associations had asked the OFT to take the case prior to the banks' intervention, but this could not be progressed because of the express limitation that only respondents can make such a request. Given there were/are many thousands of consumers affected and their claims put immense pressure on the court system, this limitation may need to be revisited so that the request may come from other quarters for example the Treasury, or consumer associations with contingent test case budgetary arrangements made accordingly, to ensure the test case mechanism is fair, effective and efficient. In other, and more general cases, selection of test cases is a matter for the court's case management powers. While the effect of the doctrine of precedent only goes so far, it would be anticipated that the individual bank charges claims would settle as a

¹³⁷ See DISP, chapter 3, for further details of the '*wider implications process*', at: <http://www.fsahandbook.inf/>

¹³⁸ See the OFT's statement at: www.of.gov.uk. For a further explanation of shared responsibilities between regulators and the '*wider implications process*', see, www.ombudsmanandfsa.org.uk

consequence of the ultimate result of the OFT test case.

12. Use of the test case, either in civil proceedings or proceedings before the Employment Tribunal, does however bring with it a number of disadvantages. First, which it has in common with joinder and consolidation, it keeps in place a potential barrier to entry to the justice system through requiring individual claimants to issue proceedings. It is predicated on a large number of claims being issued. This is the case not simply before a test case can be or is generally selected but equally is the case post-judgment in the test case. Given the limitations of a test case judgment, see below, individual claims will generally still need to be litigated or at the least issued. The barrier to entry thus remains. Such extant or future claims may however settle, in the latter case following receipt of a letter before claim rather than issue, but they may do so on an unfairly disadvantageous basis given that there may well be significant individual inequality of arms between them and any defendant.
13. Secondly, due to the unitary nature of any claim selected as a test claim it will be determined according to its substantive merits. It will not therefore be able to take account of other, wider issues, which arise in those other cases which are stayed pending its resolution nor will other members of a class of claimants be in a position to influence the conduct of the case, through, for instance, ensuring or at the very least suggesting that certain points be taken or that certain issues be considered. It may therefore be the case that its determination will not provide proper guidance through the doctrine of precedent to large numbers of those other claims, which will then either have to be resolved individually or via further test cases. Equally, it may result in a judgment which prejudices unfairly those parties subject to the stay as they were unable to deploy their own, and possibly, highly pertinent arguments prior to resolution of the point at issue. Moreover the use of a test case may not be suitable due to the nature of the cause of action. While it might be suitable where claims give rise to a common question, as they did in the Bank charges litigation, of contractual interpretation. It will not equally or necessarily be as capable of fairly and efficiently

resolving mass tort claims, where individual damages and causation issues may well predominate.

14. Further problems arise through the use of test cases. The test case may, for instance, settle before judgment. This will leave the issue undetermined. It will result in a new claim being selected and prosecuted with the attendant additional cost and delay, both to the individual litigants and the justice system as a whole, that the replacement of one claim for another *ab initio* brings with it. Equally, undue pressure may be brought to bear against individual litigants by a defendant with, in economic terms, greater market power. Such pressure could result in undue pressure being brought on individual claimants to settle claims for disproportionately low amounts. Moreover the inequality of arms between individual consumers, employees or small businesses may give rise to valid claims not being initiated or continued or being settled at an unjust level as a consequence of realistic fears of repercussions and/or damage to individual or business reputations through proceeding with individual test litigation.

GLOs

15. The GLO was introduced as a means to provide effective case management for unitary and individual claims, where there were such large numbers of them that they could not be effectively managed using either joinder and consolidation. The GLO is however flexible enough to combine what is in effective a sophisticated form of joinder or consolidation with the use of the test case within its own procedural framework. The rationale for the GLO's introduction has twice been explained judicially by Lord Woolf. In *Taylor v Nugent Care Society*, he emphasised that the GLO was introduced in order to provide an effective case management system for large numbers of individual claims:

“The provisions which are contained in the Civil Procedure Rules dealing with group litigation were an innovation which was introduced by an amendment to the rules made in 2000. It was the experience of the courts that if litigation involving a substantial number of claimants was to be managed in the appropriate way, it was

essential that there should be some procedure which provided the courts with very wide powers to manage the proceedings. It was in the court's interest for the proper dispatch of other litigation that the court should have those powers. It was also in the interests of litigants that the courts should have those powers because it would enable the court to deal with this sort of litigation in a more efficient and economic manner than would otherwise be possible. It would enable the court to provide more expeditious justice."¹³⁹

In *Boake Allen Ltd v Revenue & Customs Commissioners* he emphasised that a fundamental rationale of the GLO was that it provide a cost-effective means of prosecuting individual claims.

All litigants are entitled to be protected from incurring unnecessary costs. This is the objective of the GLO regime."¹⁴⁰

16. In both cases the emphasis was on the effective and efficient prosecution of viable individual claims; viable because they could otherwise be prosecuted independently of each other i.e., as unitary claims. The rationale did not extend to enabling individual small claims to be effectively prosecuted where previously such claims could not be prosecuted at all as individual claims. Implicitly there appears to be an acknowledgement that the GLO cannot meet the first of the three principles underpinning collective action reform Lord Woolf identified in his Final Report.
17. Technically consumer and small business representatives could bring actions in England under the existing GLO procedure. GLOs could, and can, provide a useful and flexible tool for managing multi-party claims consistently with their rationale as explained by Lord Woolf. They are not, however, ideal vehicles for the prosecution of collective claims. Claimants must opt-in through issue of a claim form, rather than opt-out. Barriers to entry, to access to justice, remain therefore a part of the GLO regime, which cannot provide effective access to justice for those individuals whose claims are of limited individual quantum and where the litigation (cost) risk far outweighs the potential value of a successful judgment. Moreover simply being party

¹³⁹ [2004] 1 WLR 1129 at [9].

¹⁴⁰ [2007] 1 WLR at 1394.

to a GLO remains in itself a relatively expensive exercise for individual litigants in any event, not least because, as an opt-in mechanism, it still requires, as was evident from *Taylor v Nugent* significant front-loading of litigation cost. The GLO does not therefore mitigate, but on the contrary, institutionalises the inability of those litigants, with relatively small claims that give rise to common issues, to prosecute them effectively. The GLO does nothing to satisfy the first of Lord Woolf's three principles which collective actions are required to meet.

18. These problems are further compounded by: the use of cut-off dates which preclude claimants joining the opt-in register but which does not, nor could it, preclude them from prosecuting their claim as an individual claim; the lack of provision to aggregate damages; and the lack of a mechanism whereby the court can scrutinise and approve any proposed settlement. Each of these factors reduce the utility of the mechanism as a means to reduce the number of separate actions which may be commenced arising out of a common cause of action. Where, for instance, as in *Taylor v Nugent*, and individual misses the cut-off date they will still be able to prosecute their action individually. Such an action may be stayed pending the outcome of the group litigation, but it will nevertheless be prosecuted; thus undermining the efficiency and economy benefits of the GLO. Equally, the inability to aggregate damages means that damages will necessarily have to be dealt with on an individual basis, further undermining efficiency and economy savings.
19. Such problems might be ameliorated to some extent by reforming the GLO so that it operated as an opt-out mechanism or permitted claimants to opt-in at judgment or on settlement. Such a reform would in effective turn to the GLO into an opt-out collective action; whereas it is more appropriate for the court to have at its disposal the widest range of procedural mechanisms to manage claims effectively, whether that be on an opt-in basis or an opt-out basis.

The new consumer mechanism

20. The most recent addition to the panoply of procedural devices available to manage collective actions is the consumer redress mechanism in the field of competition law. This was introduced through section 19 of the Enterprise Act 2002, which inserted a new section 47B into the Competition Act 1998. It provides that bodies specified by the Secretary of State can bring ‘*consumer actions*’ in the Competition Appeals Tribunal (CAT) on behalf of those who have suffered as a result of an established infringement on a ‘relevant prohibition’. The relevant prohibitions are Chapter I and Chapter II of the 1998 Act, Articles 81 and 82 EC and the corresponding provisions the ECSC Treaty. It is what is known as a ‘*follow on*’ action because it can only be used when an infringement has already been established by the OFT or Commission and any appeals have been finally determined.
21. The only body to apply and be designated to date is *Which?* Shortly following on from a decision of the House of Lords to refuse JJB Sports permission to lodge an appeal, *Which?* pioneered the new provision by issuing proceedings in the CAT on behalf of named claimants who had been victims of ten members of a sports cartel convicted in 2003 for the price fixing of replica football shirts.¹⁴¹ Both the mechanism and a number of the substantive law issues for example, levels of evidence to be accepted, quantification of damages, distribution of the damages were new areas to be decided by the CAT.
22. The single biggest difficulty in bringing the case so long after the event was gathering claimants, a factor the defendants knew would militate against the representative body and was easily exploited.¹⁴² Even while the numbers affected were significant, around 1.2 – 1.5 million, very few claimants were named on the claim form at the end of the opt-in exercise. Had the s47B mechanism been an opt out system *Which?* could simply have had the damages either settled or decided once disclosure had taken

¹⁴¹ *Consumer Association v JJB Sports PLC* : case/n 1078/7/9/07.

¹⁴² See Gubbay, ‘*Private Action in Competition Law: effective redress for consumers and business*’ (April 2007), *Which?*’s response to the OFT discussion paper for more detail.

place, without the burden and strategic vulnerability associated with the opt-in process and, crucially, without the rights being enforced of those who had not opted-in, but who if a more effective and efficient procedural mechanism existed would have taken the opportunity afforded by that mechanism to enforce their rights. Insofar as the rights of those who did not wish to litigate are concerned, such rights are protected within an opt-out regime through effective notice of the action and an effective opportunity to elect not to take part in the litigation. Equally, an opt-out regime would have enabled *Which?* to ensure that any surplus funds, i.e., unclaimed at the end of the expiration period, would have been subject to negotiation with the defendant.

Suggested reforms

23. Despite its current limitations the s47B vehicle is superior to its CPR 19.6 equivalent. Its primary advantage is the lack of limitation which arises in respect of CPR 19.6 through its same interest test. Equally, the s47B vehicle is superior to its CPR 19.10 equivalent i.e., the GLO as it enables a large number of claims to be brought on a unitary basis rather than via a managed system of individual claims. There are however, fundamental weaknesses common to both the s47B and GLO procedural mechanisms, which act as serious disincentives to bringing private claims. The barriers common to both mechanisms flow from the fact that they are opt-in mechanisms.¹⁴³ The effects of this are multi-faceted as opt-in mechanisms are:
- a. **Resource intensive:** gathering the claimant cohort takes up considerable cost and time. These pre-litigation costs are not recoverable under the normal cost rules;
 - b. **Involve front loading of costs:** entry of each of the claimant's names and details onto a group register usually at the time the claim form is lodged, the

¹⁴³ In brief, an opt-in system is one where all members of the group must be gathered and named at the time the claim is issued. An opt-out system is where an action is brought on behalf of an unidentified group who opt in later in the process, at the point of claiming their damages.

CAT rules however do allow for the joining and substitution of names post-issue of the claim form;

- c. **Require funding:** gathering claimants to satisfy third party funders, and ATE requirements so that there are enough claimants to cover the high cost of bringing the action. Under an opt-out regime funders undertake a risk analysis based on potential numbers in the group, value of the claims and the potential take up rate by other representative bodies; and
 - d. **Have cost implications:** In low value collective consumer claims there are real disincentives for lawyers who may assist bodies bringing the claims. Under normal CFA rules the agreement provides that the firm reserves the right to recover those costs from the client where they are unable to recover from the defendants. In these cases the client is unlikely to be in a position to meet those costs and therefore the work would need to be undertaken on a CFA-Lite basis. A CFA-Lite agreement means lawyers they would not seek to recover costs from their clients but would agree to only take what they could recover from the defendants which could put them considerably out of pocket. Accordingly some cost protections¹⁴⁴ should be made available in line with the working party's report on litigating public interest litigation.
24. In addition to these generic problems the s47B procedure requires that a body is designated and approved by the Lord Chancellor. In order to do so the Lord Chancellor must be satisfied that the body is: a recognized representative of the group; has integrity and reputation; gives rise to no potential conflicts of interest; has adequate financial means; and has the expertise to bring the action. The application is subject to a three month consultation period where objections may be raised. There then follows final approval with a statutory instrument drafted and laid before Parliament. Having survived this rigorous process, there is a view that a designated body should not be subject to the costs and delays of class certification and

¹⁴⁴ For a fuller discussion of costs protection, see: Liberty, *Litigating the Public Interest: report of the working group on facilitating public interest litigation*, (July 2006) (www.liberty-human-rights.org.uk).

permission stage hearings that *ad hoc* representative parties may require. This process, while it protects the public interest is both time-consuming and potentially burdensome for a variety of body's who might otherwise seek designation. This is especially the case where a body, such as an unincorporated association, trade association or trade union, or an individual claimant may only wish or need to act as a representative in a single instance.

25. The introduction of the follow on s47B action in a specialized court was seen as a great step forward and, if reformed so as to become an opt-out action, may still become an ideal procedural mechanism in the CAT. In fact, a procedure based on such a revised s47B action applicable generically and on a standalone rather than simply a follow-on basis could widen the scope of what is currently permissible in the High Court and other civil fora. Equally, its utility could properly be increased through the introduction a court-based approval of ad hoc bodies as representatives (see below) in addition to pre-authorised bodies.

26. The introduction of an opt-out system however, could warrant any action being subject to more checks and balances including close court management, which would include judicial discretion to conduct certification and permission hearings with regards to designated bodies. However, given the cost risks involved and the potential need for third party funders to be satisfied on the case prospects, and the reputational risks, it is highly unlikely that designated or indeed *ad hoc* bodies will bring unmeritorious actions, especially given robust case management, certification and the possibility of the imposition of security for costs.

27. In the US the opt-out regime governed by Rule 23 of the Federal Court Rules class actions are closely managed and, including class certification and permission stages; court approved settlements and fairness hearings so that those who wish to opt out may do so. Lawyers' fees are also court approved. Absent any of the procedural features in England which led to past class actions excesses in the US it may be

advisable to adopt aspects of this process where it is efficient and expedient to do so to satisfy defendants and the court, the actions have merit and good prospects. While it is clear that collective actions bring benefits insofar as access to justice is concerned, in that they, as Andrews has pointed out, enable do not require an ‘*alleged victim of a legal wrong*’ to take positive steps to bring an action, ‘*enable rights to be vindicated that cannot readily be enforced by individual action . . . [and redress] procedural inequality between small claimants and large defendants.*’¹⁴⁵

28. In order to ensure, in the interests of the claimant class, defendants and the court that a collective action is the most appropriate procedural mechanism in terms of efficiency, economy, fairness and access to justice before such an action should be permitted to proceed it should be subject to positive certification by the court. In carrying out the certification process at the initial case management stage the court should assess the proposed collective action according to a number of criteria. Such criteria have been set in a number of jurisdictions with some variations.¹⁴⁶ Broadly they could include:

- a. Numerosity: minimum size of the class;
- b. Preliminary merits of the claim;
- c. Commonality: a nexus between factual and legal issues between the group members bringing the claim;
- d. Superiority: whether the collective procedure is superior to other means of resolving the dispute between group members and the defendant; and

¹⁴⁵ Andrews, *Multi-Party Proceedings in England: Representative and Group Actions*, Duke Journal of Comparative and International Law (Vol. 11) (2001) 249 at 263.

¹⁴⁶ Mulheron: *The Class Action in Common Law Legal Systems: A Comparative Perspective*, (Hart Publishing) (2004), Part 11.

- e. Adequate representation: for the reason that collective actions will bind all group members, Assessment would include whether there is any conflict with interests of group members.
29. Of particular importance in the certification exercise will be the assessment of the preliminary merits. This is of importance as a means to protect defendant interests. While a collective action provides an effective means to increase claimant access to justice it must be remembered that the right of effective access to justice guaranteed both under the common law and Article 6(1) ECHR is an indivisible right. A defendant's right to procedural justice must be equally protected. This is of particular importance in respect of collective actions as they give rise to the risk of the development of what are known in the US and other jurisdictions as *blackmail suits* i.e., generally unmeritorious actions commenced purely as a means to extract a settlement from a defendant.¹⁴⁷ Equally, care must be taken to avoid the risk of a collective action being used as a means to further either the impression that there is a growth in what is termed 'compensation culture' or the existence of such a phenomenon. In order to protect defendant's access to justice rights the court should conduct a robust assessment of the preliminary merits of a proposed collective action prior to and as a precondition to certification.
30. As noted above designation of representative parties could be widened properly and consistently with the recommendations made by the OFT to include representative groups in the human rights (e.g., the Equal Opportunity and Human Rights Commission, which would be able to build on its existing role to launch formal investigations where it suspects that a company may be in breach of discrimination law), trade associations and bodies (e.g., the Federation Against Software Theft) and small business fields, rather than simply consumer groups.¹⁴⁸ There is thus no reason

¹⁴⁷ Miller, *Of Frankenstein Monsters and Shining Knights: Myth, Reality, and the 'Class Action Problem'*, (92) Harvard Law Review 664 (1979).

¹⁴⁸ Trevor Phillips, the Chair of the Equal Opportunity and Human Rights Commission (EHRC), presented powerful arguments for the EHRC to take cases on behalf of individuals, Bevan Foundation lecture, 23 October 2007. Trade unionists at UNITE have also called for a widening of designation for employee disputes such as the equal pay claims currently being brought.

in principle why an opt-out redress mechanism could not have wide application. Equally, there is no reason why it could not, in principle be limited to specific, designated areas. There is also no reason why, as is the case in other jurisdictions, that it could not be used as an effective means of prosecuting employment claims, in for instance the civil courts or the Employment Tribunals. The introduction of such a mechanism in other fora, such as the CAT or the Employment Tribunals (on the model which exists at present in the employment field of representative actions brought by Trade Unions in respect of alleged TUPE breaches) could complement any civil justice reforms or go forward in the absence of civil justice reform. In either case such reform in other fora would bridge the access to justice gap in respect of such claims within those fora and would militate against the necessity of claims having to be brought in the civil justice system.

31. Following the JJB Sports case *Which?* announced publicly it did not intend to bring more actions.¹⁴⁹ Unlike the private profession and regulators who specialize in litigation, cash strapped not-for profit organisations and charities, often have different priorities such as lobbying and campaigning as their core work. Designated bodies may be more likely to participate in the enforcement community if there were an opt out model and some cost protection. Equally and again as noted earlier, court approval of ad hoc representative parties on a case by case basis would improve the utility of an opt-out action as it would enable a much wider pool of potential representatives to prosecute claims; such court approval could only properly occur after it was satisfied that the putative representative was a proper body or individual to prosecute the claim.

32. In order to protect all parties if funding arrangements are entered into as a means to fund the costs of any new collective action it ought to be permissible for the court to assess those arrangements in order to ascertain whether they are fair and just. Factors

¹⁴⁹ British Institute of International and Comparative Law, 8th Annual Trans-Atlantic Antitrust Dialogue, London (15 May 2008).

that could guide such an assessment could include:¹⁵⁰

- a. The client demonstrated an interest in suing on its own behalf;
 - b. The funder does not have the capacity to monopolise the litigation;
 - c. No conflict in interest between the funder and the client;
 - d. The funder has fully informed the client about the effects of the funding arrangement;
 - e. The funder has sufficient resources to meet its commitments to the claimants;
 - f. The funder must be willing and able to meet any adverse costs order that may be rendered against the claimants or the funder should the action fail. The funder will not corrupt the legal process; and
 - g. The funder has not negotiated an inordinately high fee.
33. These details could be provided by way of a short written statement, verified by a statement of truth, at the certification hearing.
34. Finally, if a new collective action is introduced it is advisable in the light of experience in other jurisdictions for it to be reviewed within a fixed time period i.e., 3 – 5 years in order to assess the following, and if necessary effect further remedial reform:
- a. whether the legal risks associated with private enforcement litigation have been reduced;

¹⁵⁰ Mulheron, *Third Party Funding; A Changing Landscape*, 28 Civil Justice Quarterly (2008) 312 at [36].

- b. whether availability of funding has increased; and
 - c. the impacts of private enforcement actions on designated bodies, courts and business.
35. These could be measured in part by recording and analysing the numbers and nature of private claims and settlements to assess the overall effectiveness.



Part 7

THE EVIDENCE OF NEED FOR REFORM

EXTRACTED FROM:

R Mulheron, *Reform of Collective Redress in England and Wales: A Perspective of Need* (2008), pp 157– 61.

Commencement of extract:

Overall conclusion

1. Research has demonstrably evidenced an ‘unmet need’ for reform of collective redress mechanisms in English civil procedure. Whether this is to be achieved by the introduction of a new collective redress mechanism or by the supplementation of an existing procedure, ‘something more’ is required to facilitate the litigation and testing of widespread grievances, in circumstances where, presently, these grievances are not being addressed nor compensated. ... An opt-out collective redress regime would provide much utility in the present procedural landscape. A number of scenarios discussed in this Research Paper appear to be eminently suited to such a regime.

...

Substantiating reasons for this conclusion

2. Since the GLO was introduced in 2000, there have been notably fewer group actions than the number of collective actions which have been commenced in Australia. Similarly, the number of class proceedings in Ontario (where certification is required at the outset, on criteria which are somewhat more discerning than the GLO’s

certification requirements) far exceeds equivalent litigation over the same time period under the GLO regime.

3. However, it is not just a question of numbers. The *types* of collective actions are also far wider under the opt-out regimes of Australia and Ontario than the types of group claims brought so far under the GLO regime — in circumstances where, feasibly, the same or similar grievance could exist among UK citizens too. Indeed, several categories of grievance brought in Australia/Ontario have no equivalent under the GLO regime (for example, the very small over-charge cases, or real estate disputes involving, say, a dispute between the landlord of a shopping centre and the tenants). Notably, several of the claims in Australia/Ontario were, individually, non-recoverable claims, in which case individual litigation was extremely unlikely — however, the opt-out systems of these jurisdictions have also been used for collective actions in which large-value individual claims have been encompassed by the suit.

4. There is, in reasonable proximity to England, the long-standing Portuguese opt-out regime, entitled the *Right of Proceeding, Participation and Popular Action*. It has been in operation since 1995, and the consumer organisation DECO has obtained valuable experience in bringing actions under it. DECO's view is that the regime has worked well, although the limited number of collective actions for damages is a direct result of the limited resources which DECO has available to it to prosecute such actions. As always, when turning one's attention to the second of the trio of issues which were outlined in the 'Background' earlier (at p 2) — need, design and costs/funding — the lessons to be learnt from other jurisdictions' legislative design and experiences thereunder are of paramount importance. In that respect, the refinements and improvements proposed by DECO are most interesting for English law reformers. Other opt-out regimes have recently been introduced in Europe (Spain, Denmark, Norway, the Netherlands), each of which has different features and pre-conditions for use.

5. Where English claimants have sought to 'add on' to class actions instituted in the United States (under rule 23 of the Federal Rules of Civil Procedure), problems have

sometimes ensued, that have resulted in the English claimants being ‘dumped out’ of the action or treated unfavourably by comparison. Although some of these actions had a ‘connection’ with the English jurisdiction that would have permitted an action to be brought in England, nevertheless, claimants sought to be joined to a US opt-out action, in the absence of any opt-out regime in England under which the action could have been commenced. This has not always ended happily for the English claimants, as both judicial decisions under rule 23, and the practical experience of UK law firms attest.

6. Since March 2006 (when *Which?* launched a direct campaign of consumer awareness), the English county court system has been increasingly overwhelmed by a multitude of bank charges claims being filed by bank customers. The bank charges litigation has also raised other dangers associated with numerous individual suits. For all litigants, there are the risks of inconsistent judgments and delays in outcome. For the defendant, there is the added risk of embarrassing and adverse publicity if it overlooks the need to enter a defence to one or more of these unitary actions.
7. Other contexts in which ‘unmet need’ is evident are: compensation for loss or damage incurred where unfair terms are identified as standard terms being improperly used by businesses in consumer contracts; where infringing behaviour has been identified and punished by way of fines/penalties in respect of anti-competitive conduct, but where neither ‘follow-on’ actions nor stand-alone (liability + quantum) claims have been brought by injured parties; and in the employment context, where the numbers of individual claims filed for equal pay, sex discrimination and working time directives, have ‘exploded’ in the past 1–2 years. In each of these contexts, a collective opt-out regime would provide better access to justice and judicial efficiency. Furthermore, calls for better private enforcement procedures have been made by public bodies or publicly-funded bodies in each of these categories — in some instances, by entities that could feasibly act as an ideological claimant in collective actions.
8. Having regard to these particular contexts, it is not suggested that different collective action frameworks should be implemented in each context — these contexts are

merely provided by way of example, to show an ‘unmet need’. A *generic, statutory*, ‘build the field and they will come’-type regime, which covers all types of scenarios potentially giving rise to collective actions, is preferable, in this author’s view.

9. A Questionnaire distributed to Respondents who have had experience in conducting opt-in group litigation in England produced some interesting insights. The experience in English group litigation indicates that, under an opt-in regime, the opt-in rates vary considerably, from very low percentages (<1%) to almost all (90%), or all, of group members opting to participate in the litigation. In several instances, however, the percentages of opting-in could not be determined because early cut-off dates were established, and the total number in the group was never able to be ascertained before the litigation was finalised. Respondents indicated that the vast majority of the Relevant Actions sustained *some* procedural difficulties because they were conducted under an opt-in regime — and the tasks of identifying and communicating with large classes, together with pleadings requirements at the outset, were especially difficult.
10. Furthermore, the experience derived from English group litigation indicates (per Table 5) that there are almost twenty reasons why group members may not opt in to litigation — reasons that are as diverse as human nature. While some of these reasons will preclude these claimants *ever* choosing to litigate their grievances, many of the reasons for not opting-in that emerged in the study are particularly pertinent when the litigation is in its ‘infancy’, prior to any determination or settlement of the common issues, and when the litigation inevitably retains such an ‘individualised’ hue.
11. The exercise of ‘crunching the numbers’ on opt-in versus opt-out confirms the anecdotal evidence that opt-out ‘*catches more litigants in the fishing net*’. Where modern empirical data exists, the median opt-out rates have been as low as 0.1%, and no higher than 13%. Where widespread empirical data does not exist as yet, judicial summations of opt-out rates indicate a range of opt-outs between 40% (which is rare, on the cases surveyed) and 0%, with a tendency for the rates of participation under opt-out regimes to be high (that does not, however, guarantee that all class members will come forward to claim their individual entitlements following the resolution of

the common issues. On the other hand, whilst the experience in English group litigation indicates that, under its opt-in regime, the opt-in rates vary considerably, from very low percentages (<1%) to almost all group members opting to participate in the litigation, European experience sometimes indicates a *very* low rate of participation (less than 1%) where resort to opt-in was necessary in consumer claims and where the class sizes were very large. In the United States too, a much lower participation rate has been evident under opt-in than under opt-out. In that respect, the dual pillars — access to justice and judicial efficiency in disposing of the dispute once and for all — are enhanced by an opt-out regime.

Concluding remarks

12. The various ‘building blocks’ which were the subject of research point toward the incontrovertible conclusion that, in England, there is an ‘unmet need’ for better redress of common grievances which have allegedly given rise to monetary loss and damage to a class of claimants. This is *not* a ‘solution in search of a problem’. The need for progressive procedural reform exists, and a more effective method of pursuing collective action in England is urgently required to address it.



Part 8

Substantive Law or Rules of Court?

Conclusions of the Civil Justice Council’s Comparative Law Committee Collective Redress Working Party on the Question of whether the implementation of an Opt-Out Collective Action Regime requires the enactment of Substantive Legislation or may be achieved by changes to the Civil Procedure Rules¹⁵¹

Summary

This chapter sets out the Comparative Law Committee of the Civil Justice Council’s view on the question of whether the implementation of an opt-out collective action regime requires the enactment of substantive legislation or may be achieved by changes to the Civil Procedure Rules in the light of a divergence of opinions expressed by members of the Working Party.

BACKGROUND

1. The working party’s terms of reference were that it was limited to answering the question: “*What changes are necessary to the substantive law of England and Wales in order to introduce an opt-out collective action?*” Whether or not an opt-out model *should* be introduced was agreed to be outside the terms of reference of

¹⁵¹ The Collective Redress Working Party first met on 13th November 2007. Its membership is as follows: Seamus Andrew, Senior Partner of Simmons Cooper Andrew, Solicitors; Michael Black QC, Two Temple Gardens (Chair); Ms Ingrid Gubbay, Consultant in the London office of Cohen, Milstein, Hausfeld & Toll LLP; His Honour Judge Graham Jones, Chairman of the CJC Comparative Law Committee; Professor Rachael Mulheron, Professor of Law, Queen Mary University of London; Robert Musgrove, Chief Executive of the Civil Justice Council; John Sorabji, Legal Secretary to the Master of the Rolls; Nick Thomas, Senior Partner of Kennedys, Solicitors.

the Working Party. Further, the question addressed presupposes that changes to the substantive law of England and Wales *are* necessary to introduce an opt-out model.¹⁵²

2. On 29th November 2007, Rachael Mulheron produced a short paper at the Civil Justice Council Collective Consumer Redress Event at Theobalds Park, setting out 10 bullet points describing changes to the substantive law that *may* be brought about by a modern opt-out collective action procedure.

- **Limitation periods** – suspending the limitation periods for all group members upon the representative claimant filing his pleadings, until a defined event occurs (such as the group member opting out of the class).
- **Appeal rights** - requiring ‘absent class members’ (those defined as falling within the class description but who take no active part in the litigation and are only before the court by representation) to forfeit or limit their appeal rights in some circumstances.
- **Modifying *res judicata* for absent class members** - permitting any determination of the common issues argued in the class action to bind the absent class members, hence a modification in the principle of *res judicata*.
- **Aggregate damages assessment** - permitting aggregate (class-wide) assessment of damages, which may also represent a change in the rules governing quantification of damages.
- **Evidence given by another** - permitting the evidence of an absent class member to be given by a representative and not by the class member himself.

¹⁵² The terms of reference were agreed at its initial meeting on 13 November 2007.

- **Simplified means of proof** - permitting, by specific evidentiary rules, that evidence on individual issues can be given by expeditious means, including by virtue of amending the rules of evidence or means of proof.
 - **Abrogating the *Henderson* rule**¹⁵³ - amending the *Henderson* rule so that the class is not required to bring forth its whole case and the defendant will not be judged to be prejudiced by the failure of the class to do so.
 - **Standing** - permitting a representative claimant to assert a cause of action against a defendant against whom the claimant has no direct cause of action (the cause of action is against a co-defendant, such that, against each defendant named in the originating proceedings, there is a representative claimant who asserts a cause of action against him).
 - **Statistical evidence** - permitting statistical evidence to be used as a means of both establishing liability (for example, as a means of establishing loss), and the quantum of damages.
 - ***Cy-près* distributions** - with respect to the related question of damages distribution, permitting a *cy-près* distribution of damages to parties other than the injured or damaged class members.
3. On 8th February 2008, a substantial Civil Justice Council Research Paper entitled “*Reform of Collective Redress in England and Wales*” authored by Rachael Mulheron was launched. Greeting its publication, the Master of Rolls said:

I welcome this research as an important contribution to the debate on whether our existing mechanisms for collective consumer redress provide effective access to justice. As the report makes plain, it is clearly not desirable to import a US style class action system, nor would it be practical to do so. However it is right to consider whether civil procedure can or should be improved whilst ensuring proper protection against unmeritorious claims. The Civil Justice Council will consider these matters further and will provide advice to Government.

4. In her conclusions Rachael Mulheron stated:

¹⁵³ (1843) 3 Hare 100.

The various ‘building blocks’ which have been the subject of examination in this Research Paper point toward the incontrovertible conclusion that, in England and Wales, there is an ‘unmet need’ for better redress of common grievances which have allegedly given rise to monetary loss and damage to a class of claimants. This is not a ‘solution in search of a problem’. The need for progressive procedural reform exists, and a more effective method of collective redress in England and Wales is urgently required to address it.

5. On 9th March 2008, Rachael Mulheron circulated amongst the Working Party a paper entitled, *“Implementing an Opt-Out Collective Action in England and Wales: Legislation versus Court Rules”*. She concluded that a legislative form of implementation will be required, otherwise, any *ultra vires* application brought by a defendant, alleging that a rules-based “opt-out” collective regime under which it is being sued is beyond the powers of the Civil Procedure Rule Committee, is likely to be successful.

6. Members of the Working Party made a number of comments:
 - Ingrid Gubbay asked whether the need for primary legislation might be avoided by amending the Limitation Act by way of a regulatory reform order to give the court discretion in collective actions to suspend the time limit for absentee claimants.

 - Rachael Mulheron replied (in summary):
 - It seems that Legislative and Regulatory Reform Act 2006 provides quite limited scope for Ministers to make regulatory reform orders that could amend the Limitation Act;

 - Amendment of the Civil Procedure Act 1997 to confer on the CPR Committee the power to make rules amending the substantive law would be unlikely;

 - The problem with putting *cy-près*, aggregate assessment of damages, etc in subordinate legislation is that some people will certainly argue

that they do not amend the substantive law, and others will take the view that they certainly do -- it will be impossible to get a consensus on that, without either an appellate judicial ruling (when defendants inevitably take the point that they are being sued under an invalid regime) or legislation;

- There has been plenty of precedent that defendants could point to in order to argue that legislation has been enacted precisely to get around all the potential *ultra vires* problems that judges could be concerned about. The only way would be to put the collective action in place by some form of subordinate legislation (e.g., the CPR), and then hope for an authoritative appellate ruling that said that both the regime was fine and unimpeachable and that these various orders of aggregate assessment, *cy-près*, suspending the limitation period, etc, were indeed permissible;
 - The question also arises as to whether by the insertion of more detailed provisions, the existing representative rule in CPR 19.6 could be refashioned in to a fully-operational “opt-out” class action.
- John Sorabji was of the view:
 - It is very doubtful that amending the Limitation Act 1980 would fall within the ambit of the Legislative and Regulatory Reform Act 2006;
 - It was doubtful that the Civil Procedure Act could be amended by Statutory Instrument or that from the perspective of proper legislative scrutiny it would be appropriate;
 - The representative rule is one which creates compulsory joinder pre-judgment, but which gives the court the power effectively to allow an absent party to opt out of the judgment post judgment (CPR 19 (4) (a) and (b)). It is thus in effect an “opt-out” class action;

- (Tentatively) that CPR 19 (4) can be used as the vehicle by which a modern class action could be fashioned without resort to primary legislation.
 - Nick Thomas expressed the opinion that, based on his experience representing insurers, that, absent primary legislation, any organised and well funded defendant would inevitably seek to argue that an “opt-out” collective regime implemented solely by amendments to the CPR was *ultra vires* because such defendants would be concerned to take all steps possible to stop such a regime in its tracks out of the concern at the “creep” towards issues which are perfectly capable of being addressed by the current regime being henceforth progressed by “class action”. He believed that insurers’ position would be that, if there were primary legislation, they could raise their concerns about the “creep” issue in consultation with a view to achieving legislation which provided for the acknowledged needs for a collective regime but which at the same time built in safeguards against the feared “creep”.
7. Rachael Mulheron’s paper was presented at the Civil Justice Council Collective Consumer Redress Event at Beaumont House, on 26th-27th March 2008. At the same event John Sorabji presented a paper entitled, “*Class Actions: Reinventing The Wheel*” in which he argued that except for issues of limitation and *cy prè*s (which are not essential features of a modern class action) the representative rule can be used, in the absence of a specific class action statute, by the court under its inherent jurisdiction to fashion a modern class action.
 8. At the meeting of the Comparative Law Committee meeting on 2nd May 2008, Graham Jones asked the Working Party to consider the divergent views of Rachael Mulheron and John Sorabji and advise the Committee.
 9. There was further discussion at the meeting of the Comparative Law Committee meeting on 16th June 2008.

SUMMARY OF RACHAEL MULHERON'S VIEWS

10. Rachael Mulheron's views may be summarised as follows:

- Powers of the Civil Procedure Rule Committee -
 - The Civil Procedure Act 1997 empowers the Civil Procedure Rule Committee to make rules of practice and procedure. Under Sch 1, r 4, the Committee is authorised to make rules to '*modify the rules of evidence as they apply to proceedings in any court within the scope of the rules*'. Otherwise, there is no provision in either the principal sections or in Schedule 1 of the Act that permits the Rule Committee to amend the substantive law;
 - In contrast, the Civil Rules Committee in Ontario has much wider powers, pursuant to s.66 of the Courts of Justice Act (RSO 1990, c C.43). It is permitted to make rules for Ontario's Court of Appeal and the Superior Court of Justice in relation to the practice and procedure of those courts in all civil proceedings, even though such rules may alter the substantive law. Notwithstanding, Ontario's opt-out class action regime was statutorily implemented, on the recommendation of the Ontario Law Reform Commission. In addition to the view that substantive law was affected by an "opt-out" regime, the Commission also recommended the legislative route because the implementation of such an important piece of reform (important to the public, the litigants and the court) '*deserved to be debated fully in the Legislative Assembly, rather than passed by way of regulation pursuant to the Judicature Act*';¹⁵⁴
 - Thus, if an opt-out regime amends the substantive law by its provisions (which it does), then either the Rule Committee cannot make rules introducing such a regime, and to do so would be *ultra vires*, or the terms of the Civil Procedure Act 1997 will have to be

¹⁵⁴ OLRC, *Report on Class Actions*, 306.

statutorily changed to allow substantive law to be dealt with by the Committee (similarly to Ontario's provisions) to permit the Committee to introduce an opt-out collective redress regime by amendment to the Civil Procedure Rules. As matters presently stand, either expanding the present wording of the representative rule in CPR 19.6 or inserting a new regime in CPR Part 19 (which presently also contains the Group Litigation Order in CPR 19.III) are not safe options.

- How an opt-out collective action regime alters the substantive law by its drafting –
 - The class action is a procedural vehicle, it neither modifies nor creates substantive rights;¹⁵⁵
 - In reality the regime may amend the substantive law in two ways: first, by the way in which it is drafted; and secondly, by the way in which it is judicially permitted to interact with the substantive law. The former is of immediate relevance and there are, at least, five key areas in which experience in other jurisdictions shows that implementation of an opt-out regime *does* affect the substantive law,
 1. **Limitation** - An opt-out collective action regime will contain a provision which suspends the limitation periods for all Absent Claimants¹⁵⁶ on the representative claimant filing his pleadings, until a defined event occurs (such as the Absent Claimant opting out of the class, or the collective action being decertified). [*It is common ground that suspension of limitation periods will require implementation by primary legislation*]

¹⁵⁵ *Bisaillon v Concordia University* [2006] SCC 19, [2006] 1 SCR 666.

¹⁵⁶ A person who falls within the class description, who has not opted out, and who is represented by the representative claimant until the determination of the common issues, but who takes no active part in the litigation until or unless required to prove the individual issue/s pertaining to that person.

2. **Res judicata and Absent Claimants** - An opt-out regime will provide that determination of the common issues argued in the collective action will bind the Absent Claimants and will bar them from re-litigating those issues. Lord Philips has expressed the view that this would be a novel concept under English law and was likely to require primary legislation. Sir Andrew Morritt agreed with him.¹⁵⁷ The issue did arise in the courts of Victoria but was superseded by legislation before an appellate decision could be delivered. Law reform commissions in Alberta and Manitoba have expressed the view that to provide that any finding on the common issues binds the Absent Claimants is an amendment to the substantive law requiring legislation. The other aspect of *res judicata* that may be affected is the rule in *Henderson v Henderson*.¹⁵⁸ In Canada the issue has arisen in relation to claimants' claims that fall outside the scope of the common issues. Can a representative claimant tailor the claims proposed for certification for tactical reasons, or does the rule in *Henderson* require the claimant to bring forward the totality the claims that are capable of being dealt with as common issues?
3. **Aggregate Assessment of Damages** - An opt-out collective action regime typically permits a court to 'award damages

¹⁵⁷ See, LCD, *Representative Claims: Proposed New Procedures*: Consultation Response (April 2002).

¹⁵⁸ Per Sir James Wigram V-C in *Henderson v Henderson* 3 Hare 100, 114-115: "In trying this question, I believe I state the rule of the court correctly, when I say, that where a given matter becomes the subject of litigation in, and of adjudication by, a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of *res judicata* applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time."

in an aggregate amount’, as a class-wide assessment, without reference to the individual class members’ losses. Lord Justice May has commented that *‘[i]f the causes of action and remedies were to go beyond those presently available, they need to be defined and then would probably require legislation’*. The Association of District Judges has also noted that a new representative claim *‘might well involve fundamental law reform, for example, of the way in which damages are calculated, and the basis upon which compensation may be awarded for a breach of duty.’* Such issues *‘can only be resolved by primary legislation’*.¹⁵⁹ Law reform commissions in Alberta, Manitoba and Ontario have also opined that aggregate assessment of damages brings about a change to the substantive law of damages assessment, and would require implementation by legislation,

4. **Cy-Près Distribution of Damages** - where distribution of damages to all or some of the class members is impossible or impracticable, most “opt-out” collective action regimes permit the court to distribute the undistributed balance to people who are not class members (via either a price-rollback order, or by a distribution to an organisation which has purposes similar to the underlying purposes of the litigation). [*It is common ground that the cy-près distribution of damages will require implementation by primary legislation*],

¹⁵⁹ See, LCD, *Representative Claims: Proposed New Procedures*: Consultation Response (April 2002).

5. **Multiple Defendants** – it will represent a change in the substantive law of standing if a collective regime permits a representative claimant to assert a cause of action against a defendant against whom the claimant has no direct cause of action (instead, the cause of action is against a co-defendant), because, in unitary litigation, that representative claimant could not possibly sue that defendant. Some class action “opt-out” regimes permit that, as against each defendant named in the originating proceedings, there is *a* representative claimant who asserts a cause of action against it, but that it is not necessary that *every* representative claimant (and class member) can assert a pleadable cause of action against *every* defendant. There is a divergence of views between jurisdictions as to whether this is permissible – Ontario has accepted that it is whereas Australia has not.

- How other jurisdictions have dealt with the issue –
 - There are only two opt-out collective action regimes embodied in rules of civil procedure – the US federal regime and the regime contained in the Federal Court Rules 1998 (Canada). South Australia has a representative action procedure that allows class actions but does not contain opt-out provisions;
 - Ireland and Scotland have proposed implementation of collective redress regimes by procedural rules, but for opt-in rather than opt-out systems;
 - The regimes of Australia (Federal), Victoria (sSate) and Provincial opt-out regimes in Canada have all been implemented by statute;

- In Victoria, there was a recommendation for the implementation of an opt-out regime by statute. This was not done and it was, instead, introduced by court rules. The first defendant brought an *ultra vires* challenge. The case was referred to the Victoria Court of Appeal which held (3:2) that the rules were *intra vires*. There was then a further appeal to the High Court of Australia, but before the case reached the High Court the Victoria Parliament hastily introduced legislation to remove any doubts about the legality of the scheme.

SUMMARY OF JOHN SORABJI'S VIEWS

11. John Sorabji's paper starts with a quotation from the notes to RSC O.16, r.9 appearing in the 1904 White Book:

Intervention by persons and parties – If a person not a party to a class action desires to intervene in any way he should apply to be made a party, Watson v Cave (1881) LR 17 ChD 19 [CA].¹⁶⁰

12. He asks that if there was reference to class actions in 1904, does the fact that we are now discussing how best to introduce a collective redress action mean that we have abolished the class action between 1904 and 2008? Alternatively, does it still exist, dormant and unused?
13. He traces the evolution of representative proceedings in equity from the complete joinder rule, through the representative rule to the Bill of Peace and begins his analysis of the modern position in 1899/1900 with *Ellis v Duke of Bedford*.¹⁶¹
14. In that case the House of Lords (by a majority) upheld the majority of the Court of Appeal (Vaughan Williams LJ dissenting). Lord Mcnaghten gave the leading speech. John Sorabji summarises it as follows:
 - Representative actions are available where the class has a common interest, a common grievance and the relief sought was in its nature beneficial to all;

¹⁶⁰ The expression "class action" is not actually used in *Watson v Cave*.

¹⁶¹ [1901] AC 1.

- The basis of the common interest and grievance did not have to be the same for each class member;
 - That other factors, such as distinct rights between the class members, that may serve to differentiate the class members, are irrelevant. The basis of a representative action is what the class has in common ‘*not what differentiates the cases of individual members*’;
 - It did not matter that the represented class was ‘*fluctuating and indefinite*’, the description of the class was sufficient properly to define it.
15. He suggests that Vaughan Williams LJ restricted the application of *Ellis* in the subsequent case of *Markt & Co Ltd v Knight Steamship*¹⁶² and “*set back the development and application of the representative action throughout the 20th Century and did much ... to abolish the class action in England*”.
16. The claim was brought by cargo owners on behalf of themselves and the other owners against ship-owners for breach of contract for the carriage of goods by sea. Each of the cargo owners had a different contract with the ship-owners. John Sorabji summarises Vaughan Williams LJ’s judgment as follows:
- There was nothing on the writ to show that the bills of lading and the exceptions within them were identical or that the goods shipped were of the same class or kind;
 - There was no common purpose or connection amongst the cargo owners to justify a representative action either under the old Chancery practice or under Rule 16 Order 9. The only bond between the class members was that they all had goods on the ship;
 - While the cargo owners suffered a common wrong in that their goods were all lost, they had no common right or common purpose and as each class

¹⁶² [1910] 2 KB 1021.

member's claim could be defeated by facts and matters unique to them it could not be said that they had the same rights as required per *Ellis*;

- Whether or not (and the implication was not) Lord Macnaghten was right in his summary of the pre-1873 Chancery practice, the court had now to construe the rule consistently insofar as the common law and chancery was concerned '*notwithstanding any prior practice in the Court of Chancery*;

and that of Fletcher Moulton LJ:

- The class had not properly been defined. Simply listing the class members did not define the class;
- Whatever the practice had been in equity, that was now immaterial as the court was now governed by the language of Order 16 Rule 9. That rule was definitive of the court's practice and it was irrelevant whether the rule narrowed or expanded the pre-1873 practice;
- The rule required as an essential condition '*that the persons who are to be represented have the same interest as the plaintiff in one and the same cause of action or matter.*' This was what Lord Macnaghten meant in *Ellis* when he adverted to common interest;
- The same interest could not arise where different defences could be raised against the class members;
- The same interest could not arise where the class members entered into separate contracts with the defendant, even if the contracts were identical, as this would be an impermissible infringement of privity of contract;
- Damages were not an available remedy to representative actions, nor could a declaratory judgment be given declaring a right to damages.

17. In John Sorabji's opinion after *Markt* the representative rule's utility was severely restricted as the combination of the judgments meant that in order to fall within the scope of the rule a representative plaintiff had to show: i) a common interest arising under a common document; ii) a common grievance; and iii) a remedy beneficial to all, but not damages.
18. Against that background he considers the present position:
- In *Prudential Assurance Co Ltd v Newman Industries Ltd*¹⁶³ Vinelott J held that representative actions available for claims in tort. Insofar as damages were concerned, Vinelott J held that while individual damages claims could not be pursued by a representative plaintiff, a declaration that class members were entitled to damages could be granted, which individual class members would then be entitled to rely on in future individual damages claims;
 - In *EMI Records Ltd v Riley* Dillon J held that damages were recoverable in a representative action.¹⁶⁴ They were recoverable because the global quantum of damage to the entire class was ascertainable;
 - In *Moon v Atherton* Denning MR, affirmed that only the representative plaintiff was liable for costs and that the represented parties would be bound by the decision. He went on to hold that as limitation continued to run for represented parties the court had sufficient power to substitute one of them for the representative, if the representative wished to discontinue or settle the claim.¹⁶⁵ In an *obiter dictum* he stated that the action, for negligence, could properly be brought as a representative action;
 - Then in *The Irish Rowan* the Court of Appeal (Purchas LJ) explained that it had erred in *Markt* when it, that is Vaughan Williams LJ (and Fletcher

¹⁶³ [1981] Ch. 229.

¹⁶⁴ [1981] 1 WLR 923.

¹⁶⁵ [1972] 2 QB 435.

Moulton although he was not referred to), held that the rule had to be interpreted without reference to pre-1873 Chancery practice.¹⁶⁶ It went on to outline how: the rule as then drafted had safeguards, consistent with the old practice, for class members who wished to disassociate themselves from the class; that the rule permitted class members to opt out of the class; that as the class members entered into identical contracts there was sufficient commonality. Relying on *EMI Records* and *Moon v Atherton*, amongst others, it went on to affirm that damages claims were not to be automatically excluded from representative actions. In essence, it held that the representative action had to be applied, ‘*within the spirit of flexibility*’ which imbued the 19th Century case law.¹⁶⁷ A flexibility available in 1790, reaffirmed in 1990 and *quaere* still available then in 2008.

- Most recently Morritt VC in *Independiente Ltd v Music Trading On-Line (HK) Ltd* examined the scope of the rule in its CPR guise: CPR 19.6.¹⁶⁸ He noted that the principles governing the rule were the same post-CPR as they were pre-CPR, albeit the rule had to be interpreted and applied consistently with the overriding objective. In particular the definition of ‘same interest’ in the rule had to be interpreted flexibly and in conformity with the overriding objective. The test to establish whether the rule was appropriate for the case was that laid down by *Ellis*: common interest, common grievance and relief beneficial to all. There was a common interest despite the presence of different defences (contrary to *Markt*). Pecuniary relief was available as it was beneficial to all.

19. John Sorabji expresses the view that it is arguable that the representative rule as explained in the jurisprudence could be transformed into a modern class action, with two exceptions. As it stands at the present time the jurisdiction does not accommodate *cy-près* distributions nor does it operate to suspend limitation

¹⁶⁶ [1990] 2 QB 206.

¹⁶⁷ Andrews, “*Principles of Civil Procedure*”, (1994) (1st Edition) (Sweet & Maxwell) at 148.

¹⁶⁸ [2003] EWHC 470 (Ch).

periods for the represented class. Such reforms would have to be the product of primary legislation and a public policy debate properly carried out by Parliament.

20. He suggests that the English representative rule is equivalent to Rule 23 of the US Federal Rules of Civil Procedure. Having accepted that global damages awards are available and that the basis of the representative action is flexible, not limited to past precedent, John Sorabji asks whether it is reasonable to conclude that the English jurisdiction could well accommodate damage aggregation, through perhaps treating the class as a single entity which has suffered damage and then leave it for the class members to ascertain their rights *inter se*.¹⁶⁹
21. He then turns to the questions of opt-out and mandatory classes. In his opinion it is both a mandatory action and in some circumstances an opt-out action, under the representative rule, where the court has the power to permit an opt-out under CPR 19.6 (4) *cf. The Irish Rowan*. Given the introduction of Article 6 ECHR, CPR 19.6 (4)¹⁷⁰ could not but, in his view, be interpreted now as providing an opt-out power per the interpretative approach exemplified by *Cachia and Others v Faluyi*¹⁷¹ and *Goode v Martin*.¹⁷² Such an Article 6 compliant interpretation of

¹⁶⁹ Since delivering his paper, John Sorabji has drawn the Working Party's attention to an article by Dr Susan M. C. Gibbons, *Group Litigation, Class Actions and Lord Woolf's Three Objectives — A Critical Analysis*" (2008) 27(2) Civil Justice Quarterly 208-243 who points out that: "Secondly, many leading class action jurisdictions permit courts to make aggregate damages awards. These require a more flexible view of damages than that traditionally accepted in England--one that enables damages to be awarded simply on evidence of injury to the group, without precise evidence that each putative victim has suffered loss and how much. Under CPR Pt 19.III, GLO claims remain separate actions that ultimately must be resolved individually--for example, through individual quantum trials once generic liability and causation have been established. However, in *EMI Records Ltd v Riley*, a representative party action under CPR Pt 19.II (which procedure is more akin to the class action device than is the GLO), Dillon J. authorised an inquiry as to damages suffered by all members of the represented class on an aggregate basis, to avoid the inconvenience of multiple separate proceedings. Importantly, he could see no objection to aggregate damages awards in principle, so long as the evidence is reliable and a reasonable degree of accuracy can be achieved in determining the total damage suffered by the group as a whole. The Scottish Law Commission favoured precisely the same approach for multi-party actions. The Law Society, too, could see "no very strong argument for banning" lump sum global settlement offers--despite noting the potential for conflicts of interest between claimants--based on the public interest in securing the swiftest, most cost-efficient resolution."

¹⁷⁰ 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 –

- (a) is binding on all persons represented in the claim; but
- (b) may only be enforced by or against a person who is not a party to the claim with the permission of the court.

¹⁷¹ [2001] 1 WLR 1966.

the jurisdiction could not but require the court to operate a sufficient notice requirement prior to certification here as in the US.

22. He questions the proposition that the introduction of an opt-out class action would be *ultra vires* the rule-making power: there has been a power since 1873 and beyond to create a mandatory class, the *a fortiori* case. Given the power to create the *a fortiori* case surely it follows by necessary implication that there is a power to create the lesser case, the opt-out class action?
23. He accepts that insofar as settlement is concerned there appears to be no present basis in the jurisprudence for court-approval of settlements so as to bind the class. That is not to say that the court's power to approve settlements in cases where parties are represented by others e.g., CPR 21.10 (children and patients) could not be extended to cover represented parties. The rationale for approval is the same in both types of case; the parties to be bound are not before the court except by representative. Again the rule could be drafted so as to provide for adequate opt-out notice.
24. As to disclosure: it was held in 1990 that there was no general power to require disclosure from represented parties as they were not for this purpose parties to the action, but he asks whether this is really a genuine difficulty now. CPR 19 (1) (2) (a) and (b) provide the jurisdiction to add parties to proceedings so that the court can resolve matters or issues in dispute in the proceedings. If there were a necessity to obtain relevant evidence from a represented party he cannot see why the party could not, in principle, be joined as a representative party, in order to obtain the evidence to enable the court to deal with the common issue. Equally, the court may simply utilise its existing powers to obtain evidence from non-parties (CPR 31.17).
25. John Sorabji accepts he differs with Rachael Mulheron on costs, but suggests "*that is perhaps an issue for the brave new world of third party funding*".

¹⁷² [2002] 1 WLR 1828.

26. As for appeals - equity used to permit non-parties, who could and should have been joined to actions, to appeal against judgments where their interests were affected by the judgment. The represented class members would have been able to take advantage of this rule, which required them to be granted permission to appeal. He suggests that there is no reason why this rule (which the Court of Appeal has just approved as continuing to exist under the CPR¹⁷³) should not apply to represented parties.
27. Finally, he turns to the *vires point*: if the CPR were to be amended so as to codify the representative rule would a *vires* challenge succeed, the argument being that such a change would be beyond the rule-making power under the Civil Procedure Act 1997? In his view this does not arise on the above analysis. It is to misunderstand the rule-making power. The rule-making power here would be exercised to give shape to an extant jurisdiction; it would not be, as Buxton LJ recently noted in another context, impermissibly creating jurisdiction.¹⁷⁴ It would be codifying a jurisdiction which has been in existence since, at least, the 18th Century and which has been exercised and affirmed by the House of Lords twice. The *vires* point would only arise if the Rule Committee went beyond the ambit of that jurisdiction. The real question then is to identify, as he tried to do, the bounds of the extant jurisdiction.
28. John Sorabji considers that except for issues of limitation and *cy-près* (which are not essential features of a modern class action) it need not have to go beyond that jurisdiction. Indeed as the Canadian Supreme Court has held in *West Canadian Shopping Centres Inc v Dutton*¹⁷⁵, the representative rule can be used, in the absence of a specific class action statute, by the court under its inherent jurisdiction to fashion a modern class action. The procedural rule in question in that case was based on the old RSC rule, it was operating in a judicial system that evolved out of the English judicial system and is therefore as much a product of the common law and equity as the English courts. He concludes that, absent

¹⁷³ *MA Holdings Ltd v George Wimpey UK Ltd* [2008] EWCA Civ 12.

¹⁷⁴ *Jaffray v The Society of Lloyds* [2007] EWCA Civ 586, citing *British South Africa Co v Companhia de Mocambique* [1893] AC 602 at 628.

¹⁷⁵ [2001] 2 SCR 534.

statutory intervention, there is on the face of it no reason why the English courts cannot, in this field, follow the path trodden by the Canadian Supreme Court and utilise the existing jurisdiction.

DISCUSSION

29. This paper proceeds on the assumption that it is the recommendation of the Civil Justice Council that an opt-out model of collective redress procedure should be adopted. This is only as an assumption as it is apparent from the remarks of the Master of the Rolls set out at paragraph 3 above that the final decision as to the nature of the Council's advice to Government has yet to be taken.
30. It is however worth reminding ourselves of the recommendations of Lord Woolf in his Final Access to Justice Report. In Chapter 17 he addressed Multi-Party Actions:

46. The court should have powers to progress the MPS¹⁷⁶ on either an 'opt-out' or an 'opt-in' basis, whichever is most appropriate to the particular circumstances and whichever contributes best to the overall disposition of the case. In some circumstances it will be appropriate to commence an MPS on an 'opt-out' basis and to establish an 'opt-in' register at a later stage.

....

77. The Inquiry has heard how action groups can take on the role of an informed client, with formal constitutions established at the outset to provide for later problems, particularly in relation to settlement. Such groups can take account of their members' interests and ensure that these are reflected in the instructions to their legal representatives. Where there is no formal group representing the interests of the claimants, or where it is considered that the litigants' interests require separate representation, a trustee should be appointed by the court. There may also be a need for a trustee in cases where there are both privately paying and legally aided litigants, to ensure that the interests of both are taken into account. The trustee would be publicly funded, in some cases by the Legal Aid Board, on the basis that he or she would be fulfilling a role that would otherwise be met by an assisted person's own solicitors, or by arrangements under an 'all work' contract, which would require the lead firm to make arrangements for looking after individual clients as well as fulfilling a wider role.

78. The role of trustee would be flexible but the main elements might be:

¹⁷⁶ i.e., a Multi-Party Situation.

(a) to identify the objectives and priorities of the parties (by meeting them at an early stage to determine their needs), and to assist with devising a plan to meet those objectives;

(b) to maintain a watching brief on the public interest elements of the action to ensure that opportunities to instigate change are not missed;

(c) where necessary, to look after the interests of unidentified or unborn claimants and to act as protection against defendants picking out lead cases for settlement;

(d) if appropriate, to assist in the formation of an informal support group, if one does not come into being spontaneously (this could be done by advertising and holding regional meetings to inform people of the impending action and put them in touch with one another).[emphasis added]

31. It is also undoubtedly the case that, were it ultimately decided as a matter of policy that an opt-out model of collective redress procedure should be adopted, the implementation of the procedure would be achieved more quickly by amendment to the Civil Procedure Rules than by primary legislation. Indeed if primary legislation were adopted, that legislation would still necessitate amendment to the Civil Procedure Rules. Some of the timing deficit could be recovered by the preparation of draft rules in parallel to legislative draughtsmanship.
32. A further fundamental matter that the Working Party cannot ignore is that even if the Government were to accept advice from the Civil Justice Council to introduce an “opt-out” model of collective redress, Parliament remains sovereign. The same view may therefore be taken as the Ontario Law Reform Commission as noted in Rachael Mulheron’s paper (see paragraph 10 above) that such an important reform, ‘*deserved to be debated fully in the Legislative Assembly, rather than passed by way of regulation pursuant to the Judicature Act*’.¹⁷⁷

¹⁷⁷ In her book, “*The Class Action in Common Law Legal Systems, A Comparative Perspective*” (2004), Rachael Mulheron records at page 8 (original footnote references to views and quotations sourced to law reform commissions, judicial opinion, and academic commentators are omitted in this extract):

Ontario’s Class Proceedings Act 1992 was enacted after lengthy consideration, which commenced in 1976 when the Attorney-General requested the Ontario Law Reform Commission (OLRC) to conduct a detailed study of class actions. At the time, the Williston Committee stated that “we are convinced that the present procedure concerning class actions is in a very serious state of disarray”. That damning verdict was reiterated by the Canadian Supreme Court’s view in 1983 that Ontario’s representative rule was “totally inadequate” to cope with “complex and uncertain” claims involving numerous parties similarly situated. The OLRC study, a three-volume analysis published in 1982, is still regarded as “a seminal work on [the]

33. This would seem to conflict with the decision of the Canadian Supreme Court in the *West Canadian Shopping Centres* case cited by John Sorabji (see paragraph 28 above). In fact it does not; on the contrary, the case supports the proposition that legislation is desirable. At paragraph 1, the Chief Justice stated:

While the class action has existed in one form or another for hundreds of years, its importance has increased of late. Particularly in complicated cases implicating the interests of many people, the class action may provide the best means of fair and efficient resolution. Yet absent legislative direction, there remains considerable uncertainty as to the conditions under which a court should permit a class action to be maintained.

34. After tracing the judicial history of class actions set out in John Sorabji's paper and noting the reduction in their use following *Markt*, the Supreme Court went on to consider the *Alberta Rules of Court* which substantially embody the English representative rule, and at paragraphs 32 and 33 of the Chief Justice continued:

Clearly, it would be advantageous if there existed a legislative framework addressing these issues. The absence of comprehensive legislation means that courts are forced to rely heavily on individual case management to structure class proceedings. This taxes judicial resources and denies the parties ex ante certainty as to their procedural rights. One of the main weaknesses of the current Alberta regime is the absence of a threshold "certification" provision. In British Columbia, Ontario, and Quebec, a class action may proceed only after the court certifies that the class and representative meet certain requirements. In Alberta, by contrast, courts effectively certify ex post, only after the opposing party files a motion to strike. It would be preferable if the appropriateness of the class action could be determined at the outset by certification.

Absent comprehensive legislation, the courts must fill the void under their inherent power to settle the rules of practice and procedure as to disputes brought before them ... However desirable comprehensive legislation on class action practice may be, if such legislation has not been enacted, the courts must determine the availability of the class action and the mechanics of class action

topic." The government of the day did not implement the OLRC's proposals, but again in 1989, following further impetus for the introduction of a class action procedure, the Attorney General of Ontario formed an Advisory Committee on Class Action Reform. The report of this Committee, tabled in the legislature in 1990, prompted the enactment of the statute in 1992. The eleven-year lapse between when the OLRC presented its work, and the eventual implementation of the class actions regime, was aptly referred to by one commentator as "an elephantine gestation period", although it is evident that Australia's legislature took equally as long to ruminate about the introduction of a class action regime. Judicially, it has been observed that the Ontario studies are a useful background when considering the intent of the legislation, but they are not binding.

practice.

35. It is thus clear that the Supreme Court of Canada in fact strongly favours the introduction of “*comprehensive legislation*”. The Supreme Court is perhaps uniquely placed to form such a view as it entertains appeals from Provinces that have adopted such legislation (e.g. British Columbia and Ontario¹⁷⁸) and those that have not (e.g. Alberta).

36. It may be argued that in *West Canadian Shopping Centres*, the Supreme Court was considering an unamended representative rule, not whether a class action regime could be introduced by subordinate legislation in the form of court rules as opposed to primary legislation. Assuming that it is not alleged that the Chief Justice was imprecise in her language, it is noteworthy that each of the jurisdictions to which she referred, namely British Columbia and Ontario, has adopted primary legislation (in Ontario’s case, for the reason set out at paragraph 34). There can thus be no doubt that by “legislation” the Chief Justice meant primary legislation.

37. Indeed it is common ground that *some* primary legislative intervention will, in any event, be necessary in order:
 - To allow suspension of limitation periods for all Absent Claimants on the representative claimant filing his pleadings, until a defined event occurs (such as the Absent Claimant opting out of the class, or the collective action being decertified); and
 - Where distribution of damages to all or some of the class members is impossible or impracticable, to permit the court to distribute the undistributed balance to people who are not class members (via either a price-rollback order, or by a distribution to an organisation which has purposes similar to the underlying purposes of the litigation) (i.e. *cy-près* distribution).

¹⁷⁸ Being a civil law jurisdiction, Quebec is not directly comparable.

38. *Cy-près* distribution of unclaimed residual damages is not an essential element of an “opt-out” collective redress regime. It has not been adopted in Australia. It is permitted by statute in Ontario where such distribution has been approved in circumstances where, because of the large size of the class, the small damages per member, and the costs associated with distribution, the parties agreed to distribute the aggregate amount of the settlement by way of a *cy-près* distribution to selected recipient organisations, which would be likely to serve the interests of the class members and where there are significant problems in identifying possible plaintiffs. In the USA *cy-près* distributions under the *Federal Rules of Procedure* have received a mixed reception: it has been approved in some federal districts but remains “*controversial and unsettled*”.¹⁷⁹ In the circumstances, it would seem to be inappropriate to regard the necessity for primary legislation to introduce *cy-près* distribution of unclaimed residual damages as a determinative factor in considering whether an “opt-out” regime, as a whole, should be introduced by primary legislation.
39. On the other hand, the suspension of limitation periods *does* appear to be a common feature in established “opt-out” collective redress regimes, albeit that there are disparities in the various ways in which it has been implemented.¹⁸⁰ In Lord Woolf’s “*Access to Justice – Final Report*”, he stated:¹⁸¹

*In some circumstances defendants and the Legal Aid Board may be well aware that there are large numbers of people who might be affected by the product in question. In those circumstances the claim may be more manageable if the initial certification puts any further individual applications for legal aid on hold and provides for deemed inclusion of unidentified potential claimants on an ‘opt-out’ basis until definitive criteria can be established to provide for the effective filtering of potential claims before they are entered on the register. **There is, however, a need for action to be taken in relation to the limitation period and this can only be effective if there are provisions to suspend or freeze the running of the limitation period on certification of the MPS, as in many other jurisdictions, so that further claimants whose claims were not being considered***

¹⁷⁹ Mulheron, *op. cit.*, pp. 428-430, citing (at p 429): A Conte and HB Newberg, *Newberg on Class Actions* (4th edn, Thomson West Group, 2002) vol 4, para 11.20 page 28. Also described in: Mulheron, *The Modern Cy-près Doctrine: Applications and Implications* (Routledge, London, 2006), chh 7, 8.

¹⁸⁰ Mulheron, *op. cit.*, pp. 381 – 388.

¹⁸¹ Woolf (1996) at Chapter 17.45.

in detail at this stage were not disadvantaged. This will require primary legislation. In the absence of such legislation I have no doubt that courts will continue to exercise their discretion to admit latecomers since the existence of the MPS ensures that defendants are already aware of the potential claims against them.[emphasis added]

In the circumstances, the Working Party *does* consider that any opt-out collective redress regime will require amendments to be made to the Limitation Act by primary legislation and that this is a matter to be taken into account in considering whether the whole regime should be implemented by primary legislation.

40. Reverting to the other eight bullet points referred to at paragraph 2, namely:

- 1) Requiring Absent Claimants to forfeit or limit their appeal rights in some circumstances.
- 2) Permitting any determination of the common issues argued in the class action to bind Absent Claimants, hence a modification in the principles of *res judicata*.
- 3) Permitting aggregate (class-wide) assessment of damages.
- 4) Permitting the evidence of an Absent Claimant to be given by a representative and not by the class member himself.
- 5) Permitting, by specific evidentiary rules, that evidence on individual issues can be given by expeditious means, including by virtue of amending the rules of evidence or means of proof.
- 6) Amending the *Henderson* rule so that the class is not required to bring forth its whole case and the defendant will not be judged to be prejudiced by the failure of the class to do so.
- 7) Permitting a representative claimant to assert a cause of action against a defendant against whom the claimant has no direct cause of action.

- 8) Permitting statistical evidence to be used as a means of both establishing liability (for example, as a means of establishing loss), and the quantum of damages.
- **Item 1** – rights of appeal may be regulated by rules of court¹⁸², the Rule Committee may in particular specify the classes of case in which a right of appeal may be exercised only with permission, the court or courts which may give permission for the purposes of this section, any considerations to be taken into account in deciding whether permission should be given, and any requirements to be satisfied before permission may be given, and may make different provision for different circumstances. It follows that any modification of rights of appeal for Absent Claimants will *not* require primary legislation.
 - **Item 2 and 6** – it appears to be the view of the Lord Chief Justice and Vice Chancellor, as he then was, that to prescribe that the determination of the common issues argued in the collective action will bind Absent Claimants and will bar them from relitigating those issues, will require primary legislation. It is however worth noting that the current representative rule provides that unless the court otherwise directs any judgment or order given in a claim in which a party is acting as a representative under the rule is binding on all persons represented in the claim.¹⁸³

There does not appear to be any evidence of concluded views on the *Henderson* issue in terms of court rules versus legislation. Indeed the application of the *Henderson* rule has developed in recent years from a mechanistic application to one based on abuse of process. Lord Bingham said in *Johnson v Gore Wood & Co.*¹⁸⁴

It is, however, wrong to hold that because a matter could have

¹⁸² Section 54 Access to Justice Act 1999.

¹⁸³ Rule 19.6(4)(a).

¹⁸⁴ [2002] 2 AC 1, 31.

been raised in earlier proceedings it should have been, so as to render the raising of it in later proceedings necessarily abusive. That is to adopt too dogmatic an approach to what should in my opinion be a broad, merits-based judgment which takes account of the public and private interests involved and also takes account of all the facts of the case, focusing attention on the crucial question whether, in all the circumstances, a party is misusing or abusing the process of the court by seeking to raise before it the issue which could have been raised before. As one cannot comprehensively list all possible forms of abuse, so one cannot formulate any hard and fast rule to determine whether, on given facts, abuse is to be found or not.

It may therefore be argued that the *Henderson* rule is unlikely in the future to have a significant impact on collective actions unless the actions have some element of abuse.

- **Item 3** – it has been suggested (see footnote 14) that *EMI Records Ltd v Riley*,¹⁸⁵ provides a precedent for the award of aggregated damages because Dillon J. authorised an inquiry as to damages suffered by all members of the represented class on an aggregate basis, to avoid the inconvenience of multiple separate proceedings and he could see no objection to aggregate damages awards in principle, so long as the evidence is reliable and a reasonable degree of accuracy can be achieved in determining the total damage suffered by the group as a whole. The case was in fact a hearing for judgment on admissions and the defendant appeared in person. She was a market trader accused of selling pirated recordings. The members of the class (being the members of the British Phonographic Industry Ltd) had consented to all pecuniary remedies granted in respect of actions for *inter alia* infringement of copyright in sound recordings and selling counterfeit records and all sums paid in settlement of such actions being actions conducted by the solicitors to the B.P.I. to be paid to the B.P.I. in order to defray the expenses of detecting and suppressing the pirate and counterfeit record and like trades. The defendant said that she had no comment on that, which the judge took to

¹⁸⁵ [1981] 1 WLR 923.

mean that she did not dispute it. She also said that she did not want the action complicated and extended by massive inquiries. On the question of whether an inquiry as to damages would be held, the judge said,

I think that the fundamental factor is the special position in this particular trade of the B.P.I. This is not a case of a small number of manufacturers getting together as a self-constituted association where there would be a serious likelihood that other pirate cassettes which the defendant may have sold would have nothing to do with the members of the association, because she herself has admitted that nearly all records in this country, and "record" includes discs or tapes or similar contrivances for reproducing sound, are produced, made or distributed by the members of the B.P.I. The matter of substance that underlies this is that if the plaintiffs can only recover damages in respect of tapes in which they individually own the copyright they will have considerable difficulty in establishing which pirate E.M.I. tapes were sold by the defendant among the 2,980 tapes which she admits having sold or among whatever higher number it is found she had sold, but given the admission that nearly all records including tapes are produced, made or distributed by members of the B.P.I., on an inquiry as to damages suffered by all members of the B.P.I. the task will be much simpler since it will be clear and seems to be admitted that nearly all the tapes which the defendant had sold were tapes the copyright in which belongs to members of the B.P.I.

In the circumstances of the B.P.I. and the pleaded allegations, including paragraph 7 of the statement of claim, and I have already referred to the defence to these, it seems to me that it is appropriate that damages should be recoverable by the plaintiffs in the representative capacity in which they are entitled to sue for an injunction, and it would be a wholly unnecessary complication of our procedure if the court were to insist that for the purposes of the inquiry as to damages all members of the B.P.I. must be joined as co-plaintiffs, or alternatively, all members except for E.M.I. Records Ltd. must issue separate writs and apply for them to be consolidated with the claim for damages of E.M.I. Records Ltd.

Therefore, in my judgment, it is appropriate that the inquiry as to damages should be in the form set out in the draft minutes of order, but it must be clear that there is to be no duplication of damage in so far as there are claims outstanding as against other defendants.

Thus this was an unusual case where no individual class member was claiming damages for itself. Nor was the point fully argued. The Working Party regards this as an unsafe basis on which to advise that the concept of

aggregate damages in representative actions already forms part of English law, especially when Dillon J specifically distinguished the facts of the case from *Prudential Assurance Co Ltd v Newman Industries Ltd* in which Vinelott J had said in terms:

The court cannot in a representative action make an order for damages, though, of course, the plaintiff in its own non-representative capacity will be entitled to pursue its claim for damages.

- **Items 4, 5 and 8** – these matters may even be within the powers of a trial judge under the present rules. Even if they were not, under Sch 1, r 4 of the Civil Procedure Act 1997, the Civil Procedure Rule Committee is empowered to make rules to ‘*modify the rules of evidence as they apply to proceedings in any court within the scope of the rules*’. Consequently the Working Party does not consider that it would be necessary to pass primary legislation to deal with these issues.
- **Item 7** – it seems to the Working Party that it would represent a significant change to the substantive law to allow a representative claimant to assert a cause of action against a defendant against whom the claimant has no cause of action. If a representative claimant did not have a cause of action against a particular defendant (e.g. the representative claimant being a smoker but not of one the brands joined as defendants) it is difficult to see how he could satisfy the current “interest” requirement as derived from English case law. The matter could only be put beyond doubt by primary legislation.

CONCLUSIONS

41. The Working Party has not considered the *replacement* of the current opt-in system, but rather the *addition* of an opt-out alternative to be used in appropriate cases as originally contemplated by Lord Woolf.
42. The ultimate position is that there is clearly an arguable case that *some* elements of an opt-out collective action could be introduced by way of amendment to the CPR and that the inevitable¹⁸⁶ *ultra vires* challenge in respect of those elements *may* fail. Is it however neither attractive nor desirable:
- To condemn the first litigants under the new regime to protracted litigation that is likely to take them to the House of Lords, or
 - That a procedure introduced to meet the needs of access to justice in the 21st century has to be justified by a painstaking examination of jurisprudence dating back to the 18th.
43. Other elements would have to be implemented by primary legislation in any event. It would be desirable to produce a single coherent and integrated regime rather than to deal with matters piecemeal. Even if the initial draughtsmanship of both the rules and the statutory changes were consistent, the different consultation and approval processes applicable to rule changes and primary legislation respectively could give rise to inconsistencies.
44. It is accepted that the process of implementation by primary legislation may take longer than that of rule change, especially given the fact that rule change will be necessary to give effect to the provisions of the primary legislation. The delay may however be ameliorated by twin-tracking the legislative and rule draughtsmanship. Further, it is hoped that if a series of appeals can be avoided, litigants will have access to defined and predictable procedures earlier than would otherwise have been the case. It is also hoped that the wider consultation process involved in promulgation by primary legislation may provide all stakeholders

¹⁸⁶ See Nick Thomas' view above.

with a greater opportunity for input and may thereby, possibly at least, avoid some satellite litigation.

45. An alternative approach might be initially to introduce as much of an opt-out system as possible by rule change whilst at the same time initiating the process necessary to introduce primary legislation, not just in relation to amendment of the Limitation Act (and *possibly* in relation to *cy-près* distribution of unclaimed damages), but to establish a comprehensive opt-out system.
46. There are some attractions in this approach: not least the fact that, on the assumption that there is currently an unmet need for access to justice, that need will be met more quickly than would be the case if the opt-out collective action were to be introduced first by legislation and then by court rules reflecting that legislation. Further, the experience derived from the first claims under a rule-based system would inform the debate over the form of the legislation.
47. The alternative would still leave the first claimants with the unenviable burden of pioneering the jurisdiction through the appellate courts. It is possible that the unsatisfactory state of the common law as described by John Sorabji in his paper may mean that the “leap-frog” procedure can be used to accelerate appeals from courts of first instance to the House of Lords. It may also be that primary legislation can be introduced in time to forestall at least some appeals.
48. The Working Party respectfully adopts the reasoning of the Chief Justice of the Supreme Court of Canada in the *West Canadian Shopping Centres* case as set out at paragraph 34 – a comprehensive legislative regime is highly desirable, trying to craft a remedy using existing rules will lead to protracted litigation that will constrain the courts to develop the jurisdiction on a case by case piecemeal basis. Clearly second best option would be to introduce as comprehensive as possible a system by court rules within the constraints of the limitations placed on the powers of the Rule Committee by the terms of the Civil Procedure Act 1997.

49. In all the circumstances it is the recommendation of the Working Party that if there is to be an opt-out collective action regime it should be implemented by primary legislation. Alternatively, a shorter time-frame for the provision of access to an opt-out collective action to litigants may be achieved by the initial introduction of the regime through amendments to the CPR, followed by legislation.

POSTSCRIPT

50. The Working Party was subsequently asked to consider whether there is any evidence that:

- Representative parties were treated as trustees for the representative class in situations other than shareholder or partnership actions pre-1873; and
- They were treated this way in any actions giving rise to financial awards before 1873 and most likely post-1858, when damages became an available remedy in equity?

51. Given the conclusions reached above, the Working Party has not felt it necessary to consider these two interesting questions. It is however noted that Lord Woolf did recommend the introduction of a concept of trusteeship for the protection of class-members in his final report (albeit in the context of a somewhat different costs regime than that which currently obtains).

52. The Working Party would therefore recommend that as part of the drafting process of either rules or legislation to implement an opt-out collective action regime consideration is also given to the implementation of Lord Woolf's recommendation. Consideration may also be given to the possibility that aggregate damages form a fund which is administered by a trustee. This may enable:

- The damages to be available in part for funding arrangements while the interests of the beneficiaries of the fund are protected by the trustee;

- Proper supervision of the distribution of damages to claimants who have at that stage opted-in while protecting the fund for the benefit of those who remain under a disability; and
- The use of the *cy-près* doctrine as an incident of general trust law.



PART 9
RECOMMENDATIONS

An Improved Collective Procedure

Summary

This chapter sets out the Civil Justice Council's 11 Recommendations for collective action reform.

RECOMMENDATION 1

A generic collective action should be introduced. Individual and discrete collective actions could also properly be introduced in the wider civil context i.e., before the CAT or the Employment Tribunal to complement the generic civil collective action.¹⁸⁷

The Civil Justice Council in light of its examination of other jurisdictions and following extensive stakeholder consultation **recommends that a generic collective action be introduced generally**. The introduction of such procedural reform will introduce a more effective, efficient, economical and fair means of increasing access to justice for all, claimant and defendant alike whilst benefiting, through the economies and efficiency gains it brings, the proper administration of justice. **The introduction of a generic**

¹⁸⁷ In the context of the present paper a collective action refers to an action brought by a representative party for and on behalf of itself, or simply by the representative body on behalf of, a represented class of claimants or defendants seeking the vindication of substantive law rights, where a nature of the cause of action gives rise to a commonality of interest between the members of the represented class.

collective action of general application need not nor ought it preclude the development of further reform in other areas both within the civil courts and in other civil and regulatory jurisdictions. It should not, for instance, preclude consideration of or further reform to the GLO, the further development of regulatory compensatory mechanisms, or the development of specific no-fault schemes in certain product liability areas as has happened in other jurisdictions.

A new collective action mechanism, while it is intended to increase access to justice, to better enable individual citizens vindicate their substantive law rights is not intended to either be an action of first resort or exclusive. In the first instance, consistently with the spirit of the Woolf Reforms, it is understood and accepted that litigation of any sort is an option of last resort. Moreover, the fact that, as is made clear in **Recommendation 4**, in order to bring a collective action the court has to be satisfied that there is no better means of right-vindication (through the superiority criterion) such actions will not be permitted to proceed where, for instance, a regulatory mechanism provides a more effective means of securing the vindication of those rights: see **Recommendation 3**.

While the primary recommendation is that a generic procedure be introduced within the civil courts, that recommendation is made subject to two further sub-recommendations.

The first sub-recommendation is that in order to increase effective access to civil justice individual and discrete collective action regimes could properly be introduced in other civil fora in order to complement the generic civil collective action. Discrete collective actions could, for instance, beneficially be introduced into the CAT or the ET in order to facilitate effective access to civil justice in civil claims, which ought properly be brought before these specialist civil tribunals. Such claims, in the CAT, might be brought on either a follow-on basis, as at present, or on a stand-alone basis. If that were the case, such claims could be prosecuted properly and efficiently before a specialist tribunal to the benefit of claimants and defendants. This would also facilitate the proper and effective administration of justice both in the civil courts, as claims would not have to be brought before those courts thus giving rise to resource savings, whilst enabling them to be prosecuted efficiently within the appropriate specialist tribunal.

The second sub-recommendation is that there is merit in introducing for a short period of time a discrete, rather than generic, collective action within the civil courts ahead of the scheduled introduction of the generic action. An obvious example of how this could be achieved would be through the introduction of a discrete, stand-alone collective action for claims arising out of competition law breaches which have caused harm to individual consumers. A stand-alone action introduced on this basis would have the advantage over the introduction of a trial follow-on action as the latter would presuppose an extent adverse finding against a defendant in regulatory proceedings. It would therefore be a claim with obvious merit and be more likely to be certified and, possibly to succeed. It would thus not prove a useful forerunner of wider reform. It would not because the advantage of introducing a discrete action ahead of wider reform would be to provide an initial assessment of the utility of the form of action, to assess any practical weaknesses and advantages. A true picture of utility would not therefore arise. The advantage of introducing what the Master of the Rolls has acknowledged to be radical reform on a trial basis ahead of generic reform would be to gather the evidence of experience in England of such an action in actual use. Such evidence could then, as Andrews suggests, be used to assess the true utility of the action, where it works and where and how it does not work.¹⁸⁸ Such evidence gathered over a reasonable period of time could then usefully inform the structure of wider reform before the Civil Procedure Rule Committee (CPRC) brings the wider generic action into force.

It is **not** being suggested however that a generic form of action only be introduced if a trial of a discrete form of action is successful. Studies from other jurisdictions demonstrate the undoubted utility of a generic action and that generic actions do not pose any more difficulties than a procedure restricted either initially, or at all, to follow-on or stand-alone actions. Equally it was the clear view of a majority of stakeholders consulted that any reform should be generic rather than limited with the possibility of future roll-out. The purpose of the initial trial would be to enable the CPRC to assess how the generic action should be implemented and **not** to assess whether it should be implemented. There a clear timetable for implementation of: i) any initial discrete action;

¹⁸⁸ Andrews (2001) at 265ff.

and ii) of the generic action should be set out within the legislative programme that introduces the new action: see **Recommendation 11** as to the means to introduce the new action.

RECOMMENDATION 2

Collective claims should be brought by a wide range of representative parties: individual representative claimants or defendants, designated bodies, and ad hoc bodies.

The fundamental premise of a collective action is that there is a class of individuals who are not before the court other than by representation. A collective action, whether opt-in or opt-out, is one where the claim is prosecuted or defended by a single party who represents the represented class and the result of which action binds the represented class members as if they were actual parties to the action even though only the representative party is actually before the court. This position differs from that which arises under a GLO, where each of the class who opted-into the action are parties before the court: they are because the GLO is no more than a sophisticated device for managing multiple singular claims.

Given that the class are not before the court it will be necessary for the court to be satisfied as to the nature and suitability of a representative party to act on their behalf and represent their interests.

Such an assurance is already provided in the context of competition law, where only bodies designated under the Special Body (Consumer Claims) Order 2005 can act as representative parties in follow-on actions brought under s47B of the Competition Act 1998 e.g., *Which?*.¹⁸⁹ At the present time only one claim has been brought by a designated consumer body, *Which?*, on behalf of consumers, This has proved to be a considerable drain on consumer organisation's resources, and of limited success in terms of the number of consumers compensated. Equally, it has stated that it will not in future bring such proceedings.

The CJC concludes that such a practice of designation would if adopted generally so as to

¹⁸⁹ Also see: Article 4 of the Enforcement Directive (2004/48)
(http://eur-lex.europa.eu/pri/en/oj/dat/2004/l_195/l_19520040602en00160025.pdf)

apply to any new collective procedure properly protect the public interest and the interests of represented parties. It would protect the public interest as it would continue to ensure that only proper representative bodies, who it should be remembered do not have a direct interest in the litigation *per se* albeit they may have a wider indirect interest in it, would be able to act on behalf of a represented class. It would, through widening the scope of bodies who could be designated enable bodies with greater resources and a public interest remit to seek and obtain designation.

In addition to the 2005 Order procedure such an assurance is also already provided under the present representative rule in civil proceedings brought under CPR 19.6. In order to act as a representative party an individual with a direct interest in the subject matter of the claim must satisfy the court that it sufficiently, properly and fairly represents the interests of the represented class.¹⁹⁰ The Court approves such designation in each case under this rule, in contrast to pre-approval on a general basis by the Lord Chancellor under the 2005 Order.

The Civil Justice Council recommends that the present approach under the 2005 Order and CPR 19.6 be incorporated into any new collective action. In order to facilitate the prosecution, and where pertinent the defence of claims, by representative parties it is recommended that the principle contained within CPR 19.6 is extended so as to enable the following to act as representative parties under a new collective action: i) individual litigants who have a direct interest in the dispute; ii) socially responsible collective bodies, such as, charities, Trade Unions, trade associations, consumer and other public interest bodies, such as the CAB, National Consumer Council, or the Equality and Human Rights Commission, which could be designated as such by the Lord Chancellor on the same basis as the 2005 Order power currently provides for consumer designation; iii) ad hoc bodies, such as, for instance, unincorporated associations,¹⁹¹ consumer, industry or public interest bodies who while they have not sought or been granted designation under ii) the court is satisfied are capable of acting in the best interests of the

¹⁹⁰ *Adair v New River Company* 11 Ves. 429 at 433.

¹⁹¹ For the benefits of the use of unincorporated associations in respect of opt-in collective actions in mass tort situations, see Roche, *A Litigation Association Model to Aggregate Mass Tort Claims for Adjudication*, *Virginia Law Review* (Vol. 91) (2005) 1463.

individual claimants as a representative party.

The recommendation as to the use of ad hoc bodies is made having accepted that the present 2005 Order designation system acts as a disproportionate disincentive to bodies who may only wish to or be in a position to act as a representative party in a single action. Formal designation by the Lord Chancellor would thus be reserved to bodies who would be in a sense ‘repeat players’ and who have necessary resources to bring such actions; whereas court approval of ad hoc bodies would, through application of the same or similar criteria as applied by the Lord Chancellor, ensure greater flexibility within the system whilst maintaining the public interest that only proper bodies are permitted to act as representative bodies

Court approval should take place during the certification process: see **Recommendation 4** (below). Court approval should not simply be limited however to approving ad hoc bodies. The court should retain the discretion to approve, as part of the certification process, bodies already authorised to bring collective proceedings. In such cases, court-approval will serve the purpose of ensuring that the authorised body is acting within the ambit of its authorisation and is the most suitable body to act as the representative party in the immediate proceedings. It might, for instance, be the case that another individual, ad hoc body or authorised body is a more suitable body to act as representative party in the immediate circumstances of any particular case.

One caveat must be made at this stage. During the consultation process concerns were raised that any collective action mechanism might tend to give rise to lawyer-fuelled litigation; a feature of the US class action system. To obviate the prospect of that occurring as a consequence of these recommendations it would be anticipated that law firms, especially alternative business structures, would not be suitable bodies for authorisation or ad hoc certification. Equally, both the court and the professional regulators would need to be particularly mindful of ensuring, through appropriate professional conduct rules and robust enforcement, that law firms and other regulated bodies did not engage in lawyer-led litigation and the attendant abuses to which it can give rise.

RECOMMENDATION 3

Collective claims may be brought on an opt-in or opt-out basis, subject to court certification (see Recommendation 4). Where an action is brought on an opt-out or opt-in basis the limitation period for class members should be suspended pending a defined change of circumstance.

It is noteworthy that Lord Woolf recommended that the court be given ‘*the power to progress [a] Multi-Party Situation on an “opt-out” or “opt-in” basis, whichever contributes best to the effective and efficient disposition of the case*’.¹⁹² This approach and recommendation is consistent with the Civil Justice Council’s findings, from an assessment of comparative approaches in other jurisdictions, that there is a good deal of merit in both opt-in and opt-out approaches to collective actions. This assessment has demonstrated that there is a good deal of evidence to support the proposition that some types of claim are better suited to resolution via an opt-in action whereas others are better suited to resolution through an opt-out action.

For instance, a large number of small claims arising out of a common contractual dispute, holiday claims etc., or a common tortious dispute may be better suited to resolution via an opt-out collective action. If however a consumer claim appears to be inherently suited to individualised litigation that is case managed as a collective action of unitary actions (because, say, the size of the class is very small, and each class member has indicated a wish to sue individually and would probably opt-out to do so, were the proceedings to be brought under an opt-out model), then the certification court could appropriately order that the action be certified as a GLO or, if more advantageous an opt-in collective action. However, if the class of consumers, the nature of their grievances, and the levels of compensation being sought, are such that the progress of the action by a representative claimant on behalf of a described class would be preferable as a means of resolving the parties’ disputes, then certification of the action as an opt-out collective action could appropriately be ordered. Opt-in collective proceedings might well be more advantageous in circumstances where a trade association wishes to bring an action on behalf of its

¹⁹² Woolf (1996) at Chapter 17.42 , 17.46 and recommendation 9.

members. The trade association would in such circumstances be able to act as representative party, with its members electing to opt-into the proceedings. The court's decision upon the appropriate multi-party procedural vehicle for the dispute will always depend upon the circumstances of the particular case.

The use of opt-out might equally be properly and fairly utilised in actions that seek to vindicate civil or other general rights i.e., equal pay claims; anti-discrimination claims; employment claims, environmental claims, pension claims, competition claims (i.e., private actions arising out of breaches of competition law). Opt-out may be more suitable to such claims given their nature and the general preponderance of common issues of law or fact.

On the contrary, mass tort claims may, depending on the issues which they raise, be in some cases better suited to resolution via either an opt-in or an opt-out action.¹⁹³ Where, for instance, a mass tort gives rise a large number of claims which are factually complex and raise considerable differing issues of causation it might be better for those claims to proceed not on an opt-out basis, which might tend to reduce the court's ability to properly assess represented parties' and the defendant's substantive rights, it might be better for the claim to proceed as either a number of discrete opt-in actions, where claims are grouped together in light of their similarities, or to proceed in the first instance as an opt-out action on common issues with decertification to follow and to lead to the claims to then proceed as individual actions, opt-in actions or on a GLO basis.

It should therefore be for the court to determine the most appropriate action certification in any particular proceeding. In doing so it should have regard to: the nature and type of action; fairness to the parties (which would include an assessment as to whether its ability to properly decide the substantive issues which arise in the action can be properly adjudicated); efficiency of disposal; and the public interest. Mixed-certification should also be made where appropriate i.e., opt-out on issues common to all the represented

¹⁹³ As Roche (2005) notes US Rule 23 was not designed to deal with mass tort actions; also see Moller, *Controlling Unconstitutional Class Actions: A Blueprint for Future Lawsuit Reform*, (2005) Cato Institute Policy Analysis (No 546).

class i.e., where there are common issues as to liability and/or causation, decertification of the opt-out when those issues are resolved with the action continuing either as individual claims or, where appropriate, on an opt-in basis, in order to properly and fairly resolve remaining issues which demonstrate too great a dissimilarity to justify the claim continuing on an opt-out basis. In such circumstances the combination of opt-out on some issues with opt-in on other discrete issues provides an advantage over opt-out being combined with a GLO process. It does so because the use of the GLO would require individual represented class members (represented under the initial opt-out) to bring individual claims on the discrete issues, whereas the use of opt-in would simply require the certification of a representative party for the discrete issue with relevant class members straightforwardly giving notice that they opt-in. Such a process offers a more efficient and effective mechanism to prosecute a mixed-certification claim both from the perspective of litigants and the court.

This approach is one that does **not** therefore recommend the introduction of any form of presumption as to whether a collective action should operate on an opt-in or opt-out basis. It is an approach which places the responsibility for designation with the court at the certification stage. It is notable that all the opt-out regimes in North America include, within their certification criteria, a requirement that the opt-out action be judicially compared with other available procedures (pursuant to a so-called ‘superiority criterion’). Hence, a discretion on the part of the court to refuse the opt-out action from going forth is already built into a sophisticated opt-out model—and, most importantly, has been the subject of a close analysis and developed jurisprudence. Hence, it is not the case, anywhere in the world, that an opt-out model is invoked with nary a consideration of other procedural mechanisms and how well-suited those other mechanisms are to the resolution of the dispute.

In conducting its certification exercise under any new collective action procedure such a superiority test should be carried out. In carrying it out though the court should not be limited as to an assessment of whether opt-in or opt-out are the bases on which the action should continue. In assessing superiority the court should equally have regard to the full range of procedural mechanisms available to it i.e., GLO, action under the extant and to

be retained representative rule, the test or lead case approach, and joinder and consolidation. It should also have regard to any submissions as to whether proceedings in a different fora might be a more appropriate, fair and just means of resolving the dispute i.e., compensation via regulatory enforcement; action by an Ombudsman; action in a different legal fora i.e., before the CAT or in the Employment Tribunal.

It is noted that some commentators have raised concerns as to whether an opt-out collective action might breach the right to fair trial guaranteed by the common law and Article 6(1) ECHR. It is also noted that the position is taken in some European jurisdictions, e.g., Italy, that an opt-out action would be unconstitutional given constitutional guarantees of the right to fair trial.¹⁹⁴ It should be noted however that a comparative examination of collective action mechanisms demonstrates that opt-out actions are well-established in countries, which have strong constitutional commitments to the right to fair trial i.e., the due process commitments guaranteed within the US Constitution are not seen as raising concerns about the constitutionality of Rule 23 of the Federal Court Rules.¹⁹⁵ Ultimately however the question as to whether an opt-out action might breach the right to fair trial as guaranteed in UK law cannot be answered solely by reference to a comparative study of the views of other States. They might act as a guide but their approaches cannot be definitive.

The Civil Justice Council takes the view that the introduction of an opt-out collective does not pose any real Article 6(1) ECHR problem. It does not for a number of reasons.

First, an opt-out collective action aims to create effective access to justice for citizens who would not otherwise have any or any effective access to justice. This is particularly the case where small individual claims are concerned or where litigants who are denied

¹⁹⁴ Cf Article 24(1) of the Italian Constitution: “Everyone may bring cases before a court of law in order to protect their rights under civil and administrative law.” For a general discussion, see: Cappalli & Consolo, *Class Actions for Continental Europe? A Preliminary Inquiry*, 6 *Temple International and Comparative Law Journal* (1992) 217. In order not to breach the right of access guaranteed by its Constitution the Italian Parliament introduced a new collective consumer action in 2008, under its Finance Bill 2008, which enables collective actions to be brought by authorised consumer bodies on an opt-in basis: see report in *The Lawyer* (21 April 2008): <http://www.thelawyer.com/cgi-bin/item.cgi?id=132330&d=415&h=417&f=416> and see the discussion of other jurisdictions above.

¹⁹⁵ See V and IV Amendment of the US Constitution.

effective access to justice through reasons of individual impecuniosity are concerned. A mechanism which increases effective access to justice to a class of citizens who would previously had none, albeit through a mechanism which eschews the traditional method of requiring the individuals concerned to take active steps to assert their right to effective access to justice, cannot legitimately be said to breach Article 6(1) ECHR. Moreover, it is concluded, the introduction of an opt-out collective action is a proportionate means of ensuring effective access to justice for all.

Secondly, it is wrong to suggest that an opt-out action remains an optional form of action. Unlike the present representative rule which creates a form of mandatory joinder, an opt-out action is one of voluntary joinder. Given that any opt-out collective action must involve as part of its certification process a requirement that proper and effective notice is given to all members of the represented class in order to enable them to opt-out of the action it is clear that any individual who wishes to take no part in the proceedings has an adequate and proper opportunity to exercise their right of party autonomy by giving notice to the representative party or the court. Equally, the court could be given a discretion, similar to that in CPR 19.6(4), to enable a represented party to opt-out of a judgment if, for instance, it could demonstrate that exceptional circumstances arose to justify the taking of such a course of action. Equally, party autonomy rights are protected insofar as settlement is concerned in a sophisticated opt-out action where the represented class are given the opportunity to opt-out of any settlement.

It is of course the case that insofar as the represented class is concerned party autonomy is to a degree denuded in an opt-out collective action, insofar as the represented class members do not have active carriage of the action. They would not for instance have their own legal representatives, who would run the litigation on their behalf. This is however true of opt-in actions, actions brought under the representative rule, actions brought within a GLO where conduct of the litigation is often carried out by a single law firm, and of follow-on actions under section 47B of the Competition Act 1998. In principle therefore there is no difference between loss of party autonomy in this sense under an opt-out action than there is in other forms of extant collective action. In all these cases, opt-in and opt-out, the loss of party autonomy in this sense is an inevitable and

reasonable consequence of the nature of collective actions and the benefits they provide to litigants who would not otherwise be able to prosecute their claims and seek to vindicate their rights either at all or in such an effective and efficient a manner as provided by the collective action, whether opt-in or opt-out.

In the circumstances the Civil Justice Council concludes that given effective and adequate notice so that represented class members can truly opt-out of a collective action and due to the benefits which arise through the prosecution of claims through such a device this type of collective action would actually promote citizen's Article 6(1) ECHR rights rather than frustrate them.

Finally, it is recommended that the introduction of an opt-out mechanism will need, as Lord Woolf noted in his Final Access to Justice Report the introduction of a power to suspend the running of limitation.¹⁹⁶ It is recommended that limitation should be suspended when a putative representative party issues a claim which seeks certification as an opt-out collective action. At that point all the members of the represented class are potentially before the court by way of representation and have therefore potentially issued a claim by representation. The suspension of limitation should be lifted and time should start running for the class members where certification is refused or they opt-out of the action. Equally, the suspension should be lifted if the claim once certified is then at a future stage decertified or if on certification the court draws the boundaries of the class on a narrower basis than the representative party had originally drawn them in the claim as issued or the class member for some other reason ceases to be part of the class.

¹⁹⁶ Woolf (1996) at 17.45.

RECOMMENDATION 4

No collective claim should be permitted to proceed unless it is certified by the court as being suitable to proceed as such. Certification should be subject to a strict certification procedure, which is to include provision for the imposition of security for costs.

It is apparent from a comparative analysis that a certification stage is an essential element of any mature collective action mechanism. Certification ensures that the court, consistently with the requirement to manage actively cases consistently with the overriding objective, is able to assess and decide on the most appropriate mechanism through which a claim should progress i.e., as an opt-in collective action, opt-out collective action, traditional unitary action, or through a GLO..

By way of example it is anticipated that for single or simple mass torts, e.g., rail or air accidents, industrial accidents or holiday claims and certain clinical negligence claims opt-in certification may well prove superior. In such cases claims are likely to be relatively high value. In addition, in such cases the number of claimant class members should be readily ascertainable and readily identifiable from, for instance, travel booking forms, passenger manifests and purchase ledgers. It is the case however that where class numbers reach a certain level it will become sufficiently large that it would neither be efficient nor effective to classify the collective action as opt-in, or for that matter on as a GLO. In such circumstances, which could only be ascertained on a case-by-case basis, opt-out certification would prove superior.

It is anticipated that opt-out certification would be the most effective and efficient means of prosecuting a claim akin to the Bank Charges litigation i.e., where there are an extremely large number of individual claimants each with a relatively small value claim. Such claims have not proved capable of adequate management through the present GLO. Equally, the use of test cases to resolve that litigation was unable to ensure that large number of small claims were not issued at disproportionate cost to both claimants, defendants and the civil justice system as a whole.

Finally, it is anticipated that opt-out certification would be appropriate in cases where there were large numbers of individual claimant class members and where it was impractical or impossible at the outset of litigation to identify each of those class members. Product liability, consumer and competition claims would provide the most likely source of such claims in the ambit of the civil justice system (including the CAT). Equal pay and discrimination claims would provide the most likely source of such claims in the Employment Tribunals.

The central issue though is that it will be for the court on a case-by-case basis to assess which procedural mechanism is the most appropriate.

Certification serves another and wider purpose. It is not simply aimed at ensuring that the most appropriate form of civil procedure is adopted in the prosecution of any claim. It is also aimed at ensuring that the use of civil process is in and of itself the most appropriate, the superior, means of prosecuting any claim and achieving effective redress. Certification will also therefore require an assessment of non-court based redress mechanisms, such as, where available, Ombudsman and regulatory action. In this way certification provides the mechanism whereby the court can ensure that the use of collective action through the court process forms a complementary aspect of an overarching system of effective redress. It is not proposed that collective actions be the only means of ensuring effective redress, but that their introduction and control through certification, will enable the civil justice system to effectively and efficiently play its proper role in enabling individuals, employees and businesses to enforce their substantive rights. It is anticipated that where more effective non-court based redress mechanisms e.g., regulatory mechanisms or Ombudsman schemes, exist certification would be refused.

Certification also enables the court to ensure that any claim progresses in a fashion which best facilitates effective use of court resources and best facilitates effective access to justice for both claimants and defendants alike. It is not just therefore a mechanism aimed at protecting the public interest in the proper administration of justice *qua* effective court

management but equally through ensuring that all parties to litigation are treated fairly. Absent an express certification process the risk will arise, as was the experience in Australia, that a *de facto* certification process will develop through defendants issuing large numbers of interim applications challenging the legitimacy of any individual claim proceeding on a collective basis. The possibility of such large scale procedural skirmishing must be avoided in any reformed process.

Certification is thus seen by the Civil Justice Council as an absolutely mandatory element of any collective action introduced in England. Certification, consistently with the general approach to case management, should be both available on application by individual litigants and should be capable of order by the court on its own initiative, subject to challenge by the parties as is ordinarily the case in respect of orders made by the court of its own initiative. In this way the court will be best able to maintain strict control of any collective action process and in so doing act as a diligent gatekeeper at the outset of any such action per CPR 1.1 and 3.1. It is noteworthy that this approach is already taken in respect of the GLO. In essence therefore the present position as to certification would be expanded to encompass any collective action.

The Civil Justice Council therefore recommends that any new collective action mechanism should incorporate a certification process, which should take place as early as possible in the litigation and which should be applied rigorously by the court. Rigorous application will require the representative party to satisfy the court of the following:

- the claim can be brought in a way that furthers the overriding objective (CPR 1.1);
- the representative party has the standing and ability to represent the interests of the class of consumer claimants both properly and adequately;¹⁹⁷
- the claim is not merely justiciable (discloses a genuine cause of action) but has legal merit i.e., certification requires the court to conduct a preliminary merits-test;

¹⁹⁷ Although note this requirement will practically be modified or automatically made out if a party is a designated body: see **Recommendation 2** (above).

- there is a minimum number of identifiable claimants;
- there is sufficient commonality of interest and remedy;
- there is a reasonable expectation that the claimants will recover an acceptable proportion of their claim, if the claim is successful;
- the collective claim is the most appropriate legal vehicle to resolve the consumer issues i.e., it is a superior redress mechanism than, for instance, either pursuing the claim on a traditional, unitary, basis through the civil courts or a specialist tribunal or alternatively, through pursuit of a compensatory remedy via regulatory action where that is available and where it is able to deliver effective access to justice;
- the parties have reasonably considered alternative forms of resolution; and
- any funding arrangement is fair as between the parties.

The following table outlines a potential schema of certification criteria (drawn from the experience garnered under opt-out regimes elsewhere):

Certification Criteria¹⁹⁸

| Broad area of consideration | Questions to be asked | In particular ... |
|-----------------------------|---|---|
| Minimum numerosity | How many consumers should be necessary in order for the class action to be warranted? | Is a minimum specified number to be selected? Or simply two or more consumers? Or by stating that wherever their joinder or consolidation is impracticable? |
| Preliminary merits | What, if any, preliminary merits filter should be satisfied (apart from the usual requirement that the pleadings disclose a cause of action)? | Should it be necessary to show that the class action has a 'high probability of success', to warrant the fact that it will be consumptive of judicial resources? Is a minimum financial threshold per consumer warranted? Should a cost-benefit analysis be required in the class action's favour? |
| Commonality of issues | How is the degree of commonality to be worded? | How significant must the common issues be? Predominant? Important in moving the litigation forward? Merely a 'triable issue'? How significant are the individual issues to be, before the class action fails certification? |
| Superiority | Must the class action be the superior means of resolving the common issues, or the entire dispute? | What factors will make up that superiority matrix? Costs comparisons between unitary and class litigation? Look at the characteristics of the consumers? Look at whether there is any 'need' for the class action? Should it matter if the defendant is to be adversely affected by the class action? What effect does the institution of separate proceedings have upon superiority? |
| The representative | Should an absence of conflict of interest, adequacy, and typicality, all be required for the representative to pass certification? | How is conflict to be assessed? What factors matter to adequacy, and which are to be considered irrelevant? Is there any place for typicality? If so, does it mean that there has to be an interest in the litigation on the part of the consumers? |

Depending on the answers to these questions the court will be able to certify, or not, any particular action and may do so by reference to the whole range of alternative mechanisms available e.g., opt-in, opt-out, mixed-certification i.e., where a claim is certified as opt-out in respect of liability and then recertified as opt-in in respect of damages where, for instance, that is the most efficient and fair way to progress the claim to final determination, GLO, test case, joinder, consolidation, stay pending action in a

¹⁹⁸ Mulheron, *Justice Enhanced: Framing an Opt-Out Class Action for England*, (2007) *Modern Law Review* 550 at 569.

regulatory forum or before another tribunal or no certification at all.

It is readily apparent that one of the most significant concerns regarding collective actions is the possibility that so-called blackmail suits may proliferate. Such actions are typically unmeritorious and are prosecuted with a view to procuring a settlement from a defendant. Settlement is procured due to the possible large-scale cost consequences that might be incurred in the proceedings combined with the prospect that such costs, from a successful defendant's perspective, would be in practice irrecoverable. Such suits are reported to be commonplace in the US for instance, and may well also be apparent in other jurisdictions e.g., Canada. What evidence there is in respect of jurisdictions outside the US is however anecdotal. The Civil Justice Council in framing its proposals has been particularly mindful of the possibility that such blackmail suits may arise where opt-out collective action regimes exist. Its recommendations as a whole seek to limit the scope for such actions to occur in England and Wales.

The central basis on which blackmail suits occur in the US are two features of the US civil justice system that do not pertain in England and Wales. First, the absence of cost shifting in the US, in contrast to England and Wales, allows blackmail suits to occur. The incidence of costs incurred by a defendant defending such a claim are always irrecoverable in the US. Secondly, the nature of US pre-trial discovery and the use of deposition evidence to frame cases stands in stark contrast to the English approach to disclosure. Pre-trial discovery and deposition, particularly pre-certification, gives rise to particularly large defendant costs in the US; costs which as noted are irrecoverable. The incidence of such costs and their irrecoverability provides a very strong incentive for defendants to take an economic approach to settlement even in unmeritorious cases.¹⁹⁹ That this is the case provides an equally strong incentive to bring such blackmail suits in the first instance. It should be noted that the anecdotal evidence arising in respect of Canada is likely to stem from the fact that in a number of its jurisdictions (British Columbia, Manitoba and Newfoundland) there is no cost-shifting; in Quebec there is only a low degree of cost shifting, whereas whilst Ontario retains cost shifting in such cases

¹⁹⁹ See Kritzer, *Seven dogged myths concerning contingency fees*, Washington University Law Quarterly (Vol. 80) (2002) 739.

there are exceptions for test cases, novel points or public interest cases. Only one province, Alberta, retains full cost shifting. The evidence from Canada must therefore be viewed as demonstrating the need to retain full cost-shifting as a means to limit the incidence or possibility of blackmail suits.

The Civil Justice Council notes that these two features of the US system are absent from the English civil justice system, and it is not proposed that they be incorporated into any proposed English collective action. In such circumstances, it is thought to be unlikely that blackmail suits would arise in England. However mindful of the possibility that there might remain the prospect that such actions might arise, the issue was raised by the Master of the Rolls as to whether further protection could be afforded to defendants to militate against the prospect that this form of potential abuse of any collective action system might arise.

In order to provide that further protection for defendants whilst not stifling genuine claims a further aspect ought to be built into the certification process: security for costs. It is noted elsewhere in this report that security for costs ought to be a feature of any collective action (see, for instance, **Recommendation 9**). During the certification stage of any collective action the certification court, it is recommended, ought to consider the imposition of a security for costs order against a representative party. This will ensure that representative parties, and their funders, will have to focus their attention on the fact that not only will they, if unsuccessful in the prosecution of their claim, face a costs bill but also that from the certification stage they will be required to provide security for those potential costs. In the circumstances, it is thought unlikely that abusive claims will be pursued as such claimants will not be permitted to prosecute their claim as a collective action absent the ability to provide security for costs. When this is combined with early certification and the English approach to disclosure, it becomes increasingly unlikely that the necessary conditions in which blackmail suits can be pursued will exist under any reformed English procedure.²⁰⁰ In this way adequate protection for defendants from

²⁰⁰ If an opt-out collective action is also to be introduced in the Employment Tribunals cost-shifting and security for costs will have to become part of its procedure for such cases in order to preclude the potential proliferation of blackmail suits.

abusive claims can be incorporated into the certification process without overly burdening genuine claimants.

RECOMMENDATION 5

Appeals from either positive certification or a refusal to certify a claim should be subject to the current rules on permission to appeal from case management decisions. Equally, all other appeals brought within collective action proceedings should be subject to the normal appeal rules. Class members may seek to appeal final judgments and settlement approvals.

It is apparent from extensive analysis of other jurisdictions, particularly the United States, Canada and Australia, that the certification stage of any collective action can produce extensive tactical appellate challenges. The main problem with appeals on certification is their automatic use, in particular by defendants to delay proceedings and unnecessarily increase costs in order to try to apply pressure on claimants, leading to withdrawal of claim or forced settlement. Extensive appeals, especially where they are prosecuted for tactical reasons, are therefore to be deprecated, not least because they subvert the aim of the litigation process away from the determination of cases according to their substantive merits.

There is a case for proposing that the appeal rights be altered in collective actions, such that for instance there be no right of appeal from a positive certification, although appeals are permitted from refusals to certify. This is the position in Quebec. While this approach is superficially attractive, as there is a strong likelihood that if replicated in England it would tend to reduce the prospect of tactical appeals its introduction cannot be recommended. It cannot be recommended as the Civil Justice Council considers that such an approach would be in direct conflict with the requirement under both Article 6(1) of the European Convention of Human Rights and CPR 1.1 to ensure equality of arms for both claimant and defendant. An approach which permitted one party to access the appellate process whilst denying access to it to the other party in litigation is, it is considered, unjust.

The Civil Justice Council therefore recommends that any appeals that arise within the context of a collective action, whether case management, or other interim decision,

certification decision, decertification decision or final judgment should be subject to the general rules which govern appeals set out in CPR 52. It recommends that certification and other interim decisions as they are case management decisions ought to be treated as such by the court whilst dealing with permission to appeal applications and that it should do so to ensure that the permission stage of the process operates as an effective filter system in the context of collective actions. Moreover, where permission to appeal is sought for what are patently tactical reasons the court should, as appropriate, utilise the power to make a ‘Totally Devoid of Merit’ order under CPR 52.10(6).

Class members are not parties to a collective action other than by representation. Their interests are finally determined by any judgment (whether on the merits or by summary judgment or strike out) however and they will be bound by any such judgment or approved settlement. In order to protect their rights they should have the right to seek permission to appeal such a decision if the representative party does not do so *pace* the right of non-party’s appeal under the principle affirmed in *MA Holdings Ltd v George Wimpey UK Ltd* [2008] EWCA Civ 12. In order to ensure that a defendant is treated fairly the right of non-parties to seek permission to appeal should be subject to the same time limits as apply to other permission applications and such an application should only go forward if the representative party chooses not to appeal. If the representative party chooses not to seek permission to appeal it ought to be treated as having accepted the judgment. Furthermore the court should then treat the non-party as having become the representative party for the class.

RECOMMENDATION 6

Collective claims should be subject to an enhanced form of case management by specialist judges. Such enhanced case management should be based on the recommendations of Mr Justice Aikens' Working Party which led to the Complex Case Management Pilot currently in the Commercial Court.

Collective actions are by their very nature complex and tend to take up a considerable amount of court time. That being said through concentrating a multitude of individual actions within a single set of proceedings they are nevertheless a more efficient and economic way of resolving such claims.

To ensure that collective actions are properly and robustly case managed under the existing case management powers set out in CPR 3.1, applied consistently with the overriding objective. A copy of the court's existing case management powers under CPR 3.1 appears at **Appendix J**.

It has been recognised recently that highly complex, lengthy and (by definition) expensive litigation needs a more specialised form of judicial control. Both the BCCI and Equitable Life cases brought to light the considerable difficulties in case managing huge and highly complex pieces of litigation, and the judgment in that case led to well publicised criticism of the procedures for managing such litigation. There are many similarities in the skills required of the case managing judge in complex commercial cases that can be compared to the need for rigorous case management of collective claims given the complex nature of such cases. In July 2007, a working party of judges and Commercial Court Users, chaired by Mr Justice Aikens, examined the court's approach to the case management of complex cases. Within its report, entitled the "*Report and Recommendations of the Commercial Court Long Trials Working Party*",²⁰¹ it recognised that existing case management powers were sufficient for managing complex cases. It did however make a number of recommendations to provide specific further guidance to judges and parties to ensure that those powers were used more effectively and that such

²⁰¹ http://www.judiciary.gov.uk/docs/rep_comm_wrkg_party_long_trials.pdf

cases were managed equally effectively and efficiently.

Given the similarities in nature between collective actions and complex commercial claims it is recommended that they be managed consistently with the recommendations set out in the Aikens J Working Party's report. This recommendation is made because the Civil Justice Council concludes that it is absolutely essential for the court to exercise such rigorous case management at all stages of a collective action to ensure that the efficiency and economy benefits which arise from such actions are not lost.

The recommendations included enhanced guidance on the management of;

- Pre-action protocols;
- ADR
- Statements of Case and List of Issues;
- Disclosure;
- Witness Statements;
- Expert Evidence;
- Summary Judgment and striking Out;
- Judicial Indications on Merits of the Case or Preliminary Issues;
- the Use of Technology;
- Costs;
- the Pre-Trial Timetable and Trial;
- Client Responsibility for the Litigation; and
- Judicial Resource management;

A copy of the Executive Summary and Recommendation appears at **Appendix K**.

This form of enhanced judicial case management is currently subject to a pilot exercise in the Commercial Court, and by accounts operating effectively.

The guidance following the Working Group's recommendations should however be amended to take account of factors specific to collective actions (for example the

certification procedure, fairness hearings, distribution of damages), and may form the basis for guidance to judges who may be responsible for case managing collective claims.

It should however be particularly emphasised that the Civil Justice Council recognises the central importance of ADR in its many forms. It is particularly important in the context of collective actions, especially those which progress on an opt-out basis as comparative experience shows that a significant proportion of such claims result in settlement rather than dispositive judgment. The court should as part of its active case management should ensure that the parties to a collective action had actively taken steps to engage in ADR as per Lord Woolf's emphasis in his two Access to Justice Reports on the centrality of ADR to the civil justice system and that litigation should be a course of last resort.

Given the nature of collective actions it might well be impractical, especially in those cases which give rise to small value individual claims, for individual class members to have engaged in some form of ADR pre-certification. Individual class members should, of course, seek to arrive at a consensual settlement prior to certification, but it is recognised that in cases where individual damages are likely to be small then this may be impractical. However to ensure that ADR is afforded its proper importance, post-certification it should form a routine part of the case management of a collective action, consistently with the Master of the Rolls' proposals as set out in *The Future of Civil Mediation*, esp., at [17] – [18].²⁰²

²⁰² http://www.judiciary.gov.uk/docs/speeches/mr_mediation_conference_may08.pdf

RECOMMENDATION 7

Where a case is brought on an opt-out or opt-in basis, the court should have the power to aggregate damages in an appropriate case. The Civil Justice Council recommends that the Lord Chancellor conduct a wider policy consultation into such a reform given that it effects both substantive and procedural law.

The introduction of a new collective action mechanism in general and an opt-out collective action in particular is not intended to affect the substantive law of damages. The introduction of such new forms of procedure is intended to render access to justice through the vindication of existing substantive law more effective. For the avoidance of doubt therefore the Civil Justice Council makes **no** recommendation that the substantive law of damages should be reformed to, for instance, render exemplary or punitive damages or restitutionary damages remedies available through the prosecution of a collective action. Damages should continue to be awarded on established principles of the substantive law and should depend upon the nature of the substantive cause of action, whether that arise in the law of tort, contract or restitution.²⁰³

The Civil Justice Council notes however that one of the reasons identified as to why the present representative rule has remained ‘*a procedural backwater rather than a flourishing style of multi-party litigation*’ is the absence of a general power to aggregate damages.²⁰⁴ The general rule in English law is that each individual claimant should prove their own particular loss according to established principles.

Opt-out regimes however typically permit (either explicitly, or as in the case of the US federal class action rule, by judicial determination where the rule is silent on the issue) an aggregate assessment of damages. Equally, there is no reason why an opt-in collective action could not proceed to assess damages on an aggregate basis in an appropriate case.

²⁰³ As defined in DCA, *The Law of Damages*, (CP 9/07) at [195], exemplary damages “*aim to punish the wrongdoer*”, whereas restitutionary damages “*aim to strip away some or all of the gains by a defendant arising from a civil wrong*”.

²⁰⁴ Andrews (2001) at 253.

Strictly speaking, aggregate assessment or damage aggregation means a computation of damages that does not depend upon the summation of the class members' actual loss and damage. It is a means of quantifying and proving loss not by reference to an individual claimant but by treating the entire class as a unitary entity and assessing the global damage suffered by the entire class. In that respect, an aggregate assessment can practically occur by either a global or lump sum awarded against the defendant, or it may be achieved by a formula applied on a class-wide basis that determines individual class members' entitlements. Once the aggregate award is made then it is either for the court to assess individual class members' entitlement to a share of the global sum or it is for the individual class members to prove their entitlement to a share.

Under opt-out regimes elsewhere, the power to make an aggregate award of damages has been widely endorsed as a means of avoiding costly, time-consuming and inefficient individual damages determinations. It is said that this has a twin-pronged benefit to both class members and to defendants, and that it also constitutes an important factor in the certification process (ie, if aggregate assessment is feasible, then the court may be more inclined to find that an opt-out class action is the superior means of resolving the dispute).

There is already a limited acceptance of damage aggregation under the representative rule: see *Morrison Steamship Co v The Owners of Cargo lately laden on SS Greystoke Castle* [1947] 1 ALL ER 696 (HL) and more recently *EMI Records*. Both those decisions arose out of circumstances where individual loss could be calculated however and the court could have either made several individual awards or one global award to the representative party, who would then distribute it to the represented class. In other words damage aggregation as it stands at the present time is one based on damage summation and not damage aggregation as it is known in opt-out collective regimes in other countries. Notwithstanding this difference it is recommended that that consideration be given to extending this principle to permit damage aggregation in wider circumstances and through the use other techniques to aggregate damages such as by awarded a global lump sum award to the class by treated them as a unitary claimant for the assessment purposes or through the application of an appropriate assessment formula.

As this recommendation goes strictly beyond the field of procedural reform, it is a reform which would facilitate greater access to justice within the framework of an opt-out, as well as an opt-in, collective action. The question as to whether aggregate assessment provisions authorise a departure from the substantive principles governing damages assessment has arisen elsewhere (an issue which is pertinent to the legislation-versus-court-rules debate). Furthermore the measure of accuracy required for an aggregate assessment computation has also been the subject of some debate. Another controversy that has arisen elsewhere is whether provisions permitting an aggregate assessment of monetary relief can apply only when liability has been established, or whether such provisions can be relied upon to prove the fact of the damage so as to establish liability. Given its interrelation with substantive law the Civil Justice Council is constrained to recommend that the Lord Chancellor conduct a wider policy debate as to whether such a reform should be introduced.

The Civil Justice Council would note however that it takes the view, endorsed by Andrews and others, that damage aggregation plays a beneficial and essential role in the development of a mature and successful collective action mechanism. While care must be taken in the use of such a method of damage assessment to protect defendant's procedural and substantive rights, such awards bring with them if properly implemented a number of benefits. Damage aggregation, for instance, ensures that the defendant has certainty and finality in terms of their liability to all claimants who have suffered detriment (with the court adopting the principle of *res judicata*), especially where class members who have not yet joined the beneficiaries have an opportunity to opt-in to the award or court approved settlement; the award ensures that each claimant will fair compensation predicated on the totality of harm caused both by the defendant *per se* and to each claimant on an individual basis; it thus serves to ensure that claimants are properly compensated and that defendants are not left in possession of any financial benefit derived from their unjust conduct; it thus through its primarily compensatory basis serves to assist and complement public regulatory action.

RECOMMENDATION 8

To protect the interests of the represented class of claimants any settlement agreed by the representative claimant and the defendant(s) must be approved by the court within a ‘Fairness Hearing’ before it can bind the represented class of claimants. In approving a settlement or giving judgment on a collective claim the court should take account of a number of issues in order to ensure that the represented class are given adequate opportunity claim their share of the settlement or judgment.

As noted in Recommendation 6 both Lord Woolf’s Access to Justice Reports and the CPR emphasise the fundamental importance of the principle that litigation should be a course of last resort. While it will often be the case with collective actions that a consensual settlement of individual claims will not be possible prior to certification, such consensual settlement, through the various forms of ADR, remains a distinct possibility post-certification and in some types of opt-out action a likely outcome.

Where a settlement is proposed and achieved, and experience in other jurisdictions strongly supports the conclusion it is recommended that such a settlement should not be valid and binding unless it is approved by the court following a ‘fairness hearing’. The court’s approval is necessary in order to protect the interests of the absent claimants, who will be bound by the settlement just as it is necessary in more traditional cases where a party is only before the court by way of representative cf., CPR 21. This is the case whether the claim is pursued on either an opt-in or opt-out basis, as in either case the represented class are not directly before the court. Essentially, the court must be satisfied that the settlement agreement is fair, just and reasonable in light of the circumstances of the case, any objections to the settlement by the represented class, which ought to be given adequate opportunity to submit its views to the court on the settlement.

The fairness hearing should not simply review the terms of the settlement for fairness but also determine how absent claimants should opt-in to the settlement, what reasonable steps should be taken to advertise for absent claimants to notify them of the settlement,, what evidence is required to claim a share of the settlement, what the limitation period

should be set to claim a share and to determine who should administer the judgment (and at what cost). The court should take account of the same considerations and determine the same questions, *mutatis mutandis*, when determining a collective claim by way of final judgment.

In the light of a study of comparative experience it is clear that a fairness hearing has four benefits. First, it allows the court to ensure that the interests of absent class members (who, in many cases, are unlikely to have the benefit of legal advice) have been adequately served by the settlement. Secondly, it also seeks to prevent ‘sweetheart deals’, by which representative claimants use the class action to improve their own bargaining position to settle their individual claims on terms more favourable than for the other class members. Thirdly, a fairness hearing seeks to ensure that the legal representative’s funding arrangements do not compromise the best interests of the class members, and that there is no collusion between class lawyers and the defendant. Finally, a fairness hearing is a means for the court to monitor extortionate settlements to prevent profiteering from vulnerable defendants *i.e.*, so-called blackmail suits. As such, it has been judicially noted under opt-out regimes elsewhere that a fairness hearing forms part of a court’s protective jurisdiction; not just for the represented class but also for defendants as it protects their right to effective access to justice, especially to procedural justice.

It is therefore recommended that a fairness hearing should be an essential part of any new collective action procedure. Such a hearing it is recommended should require the court to take account of a number of settlement criteria. A clear example of such criteria, which could properly be adopted here can be taken from US experience, where in order to determine whether a settlement is fair, just and reasonable the court is required to take account of the following:

1. the complexity, expense and likely duration of the litigation;
2. the reaction of the class to the settlement;
3. the stage of the proceedings and the amount of discovery completed;
4. the risks of establishing liability;

5. the risks of establishing damages;
6. the risks of maintaining the class action through the trial;
7. the ability of the defendants to withstand a greater judgment;
8. the range of reasonableness of the settlement fund in light of the best possible recovery; and
9. the range of reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of litigation.²⁰⁵

²⁰⁵ See, *Wal-Mart Stores Inc v Visa USA Inc*, 396 F 3d 96, 117 (2d Cir 2005), citing, *City of Detroit v Grinnell Corp*, 495 F 2d 448, 454 (2d Cir 1974).

RECOMMENDATION 9

There should be full costs shifting

While the court should utilise in appropriate cases the full range of costs measures, such as security for costs, protective costs orders or cost capping orders, the English rule as to costs should be maintained. It should be maintained not least as disincentive to the issue of purely speculative unmeritorious, vexatious or otherwise spurious claims.

The CJC notes however that in other fora, if discrete collective actions were to be introduced, different costs considerations would arise. Collective actions before the CAT would for instance arguably permit contingency fees, which would give rise to distinct issues as to the control of fees from the perspective of both the claimant class and defendants.²⁰⁶ Actions before the Employment Tribunal on the other hand operate according to the US costs rule i.e., inter partes costs are as a general rule not recoverable. Differences such as these would require further consideration to protect both claimants and defendants and in particular would require the introduction of further safeguards to act as a break on unmeritorious litigation.

The combined issues of funding, and the prospective liability for the other sides costs should a claim fail, were estimated to be the principal reason why over 80% of potential collective consumer actions brought to lawyers did not proceed to a claim.²⁰⁷

Funding Claims

The Civil Justice Council has addressed the issues of funding in its paper “The Future Funding of Litigation – Alternative Funding Structures” where the Council recommends the establishment of a Supplemental Legal Aid Scheme, the acceptance of properly regulated thirds party funding as a mainstream funding option, and in the absence of other effective funding mechanisms, contingency fees. Further work continues on

²⁰⁶ See the combined effect of section 12 of the Enterprise Act 2002 and the definition of non-contentious business in the Solicitors Act 1974.

²⁰⁷ As stated at the CJC first Collective Consumer Redress Event, October 2006.

developing a form of “soft touch” regulation for third party funders, and the funding of collective consumer claims is not addressed further in this paper.

Liability for Adverse Costs

England and Wales continues in the main to operate the “loser pays” principle in contentious litigation²⁰⁸. The rule is one of general application, although the court has a wide discretion to award full reasonable costs, limited costs, or no costs at all.

When legal aid was more widely available for funding collective consumer claims, the provision of legal aid in itself provided protection for the claimants from exposure to adverse costs awards in most circumstances.²⁰⁹ With the considerable reduction in collective consumer claims being funded over the past decade (see Mulheron, Evidence of Need, Extracted at Part 7, prospective claimants have needed to seek private forms of funding, which exposes them to full liability for adverse costs. Although lawyers appear to have been willing to take on claims under Conditional Fee Agreements, until very recently there has been no evidence that Insurers have been willing to write After the Event Insurance policies to protect from adverse costs²¹⁰.

There is no doubt that costs shifting is a sanction against non-meritorious litigation. This is recognised in the European Union's consideration of developing more effective consumer redress mechanisms, and further afield in the jurisdictions of Australia and Canada.

The United States is generally regarded as operating a non costs shifting regime, although this is only true in part as there is some degree of cost shifting in nearly all elements, in particular in shifting disbursements and costs awards for bad behaviour. The Civil Justice Council will publish a report on the operation of contingency fees and costs shifting in its next paper.

²⁰⁸ CPR 44.3.2(a).

²⁰⁹ Access to Justice Act 2000 as amended by the Community Legal Service (Scope) Regulations 2000. S.11. Community legal Service (Costs Protection) Regulations 2000 as amended.

²¹⁰ There is emerging anecdotal evidence that ATE insurers may now be considering ATE cover for collective consumer claims, following the emergence of a commercial funding market.

There are many critics of the United States system that claim non (or very limited) cost shifting encourages weak cases and so-called blackmail litigation. Supporters argue that it places the responsibility for the clear assessment of the risks and merits of the case onto the reputations of the lawyers bringing them.²¹¹

In Canada, liability for costs varies by province (in terms of class actions). British Columbia, Manitoba and Newfoundland have no cost shifting. Ontario has full costs shifting (with cost saving provisions for test cases, novel points, or public interest cases). Alberta has full cost shifting. Quebec has costs shifting although recoverable costs are low (low individual value class action claims may be brought under small claims procedure and costs)

In Australia there is cost shifting against class representatives, although non representative class members are protected.

Costs Protection and Protective Costs Orders

In England and Wales, the consideration of cost protection for claimants bringing claims that are determined to be in the public interest, has been led by the Courts in terms of conditions where they would make a full or partial costs protection order for claimants. **Appendix I** provides a detailed consideration of leading case law (in particular *R v Lord Chancellor ex p CPAG*, and more recently *Re Cornerhouse Research*).

Following *Cornerhouse*, a working group, chaired by Lord Justice Maurice Kay, was established to consider whether the courts should grant cost protection orders in cases of meritorious public interest claims. Lord Justice Maurice Kay wrote:

“...it remains the case that there are public interest cases which merit litigation but which are excluded from the courts for reasons of costs. There are limits to the level of funding available from the Legal Services Commission and, in the area of judicial review, it is difficult to find insurers who will back conditional fee agreements for an affordable

²¹¹ See Kritzer, *Seven dogged myths concerning contingency fees*, Washington University Law Quarterly (Vol. 80) (2002) 739.

premium.....there is still a significant amount of potential public interest litigation which is deterred by the operation of our traditional approach to litigation costs.”

The report made the following recommendations:

1. The courts should be prepared to grant PCOs *in public interest cases*;
2. A public interest case for this purpose is one where:
 - (i) the issues raised are ones of general public importance, and
 - (ii) the public interest requires that those issues should be resolved.
3. It should not be a condition for obtaining a PCO that the person or body applying for it have no private interest in the outcome of the case;
4. Nonetheless, the nature and extent of an applicant’s private interest was a factor relevant to the decision whether to grant a PCO;
5. Three types of PCO could be identified:
 - (i) an arrangement where the party benefiting from the PCO will not be liable for their opponent’s costs if they lose but will be entitled to recover their costs if successful (a Type 1 PCO);
 - (ii) an arrangement where neither side will be liable for the other’s costs (a Type 2 PCO); and
 - (iii) an arrangement where the benefiting party’s liability for their opponent’s costs if they lose is capped in advance (a Type 3 PCO);
6. All three types of order were orders that the circumstances of a particular case might justify and should therefore be options available to the courts;
7. Agreement could not be reached on whether a cap should be placed on the costs incurred by the party benefiting from a Type 1 or Type 3 PCO;

8. In deciding whether to grant a PCO the courts should place little emphasis on the fact that the lawyers for the applicant are acting or are prepared to act pro bono;
9. It should not be a condition for obtaining a PCO that the person or body applying for it would not proceed with the substantive proceedings if not granted one – this was, however, an issue that a court could properly take into account;
10. The public interest in a case and the disparity of resources between the parties might justify granting a PCO even though the person or body seeking one might still be able to pursue the case without one;
11. There was no reason in principle why a PCO should not be granted for an appeal; and
12. (With some dissent) There should be a presumption on an application for a PCO that there should be no order as to costs, this rule only to be departed from where a party acts unreasonably.

Costs Capping and Budgeting

Again the Courts have taken the lead in developing more sophisticated costs control tools.

The Civil Justice Council's previous report, *The Future Funding of Litigation – Alternative Funding Structures*, provides a summary of case law up to August 2007. Subsequently the Court of Appeal considered the subject in *Willis v Nicholson*,²¹² although declined to make specific guidelines on where and how a budget or cap should be imposed. The matter has now been referred to the Civil Procedure Rule Committee to prepare a report.

There is clearly jurisdiction for the Court to impose costs budgets or caps, but their effectiveness is limited to the control of recoverable, or between the parties, costs and so

²¹² *Willis v Nicholson* [2007] EWCA Civ 199.

are unlikely to be fully effective against a deep pocketed defendant who is prepared to invest large sums of money defending a claim in the full knowledge that they are unlikely to recover. This inevitably tips the fair playing field, a major concern expressed by Lord Woolf at the time of the Access to Justice Reports. Again this emphasises the responsibility of the case managing judge to exercise his or her case management powers effectively.

Impecunious Claimants

From studies of other jurisdictions, it is clear that there is some scope for claims to be brought by groups of claimants who for reasons of impecuniosity are effectively immune from costs shifting. If you have nothing, you can pay nothing. Defendant businesses and their lawyers make a very clear claim of so-called blackmail suits where lawyers generate litigation with impecunious claimants, who effectively blackmail a settlement from defendant businesses, under threat of racking up huge legal costs that will never be recovered.

Cost shifting will only offer protection to a limited degree, although the existing mechanism to award security for costs could be developed so as to apply to representative parties, just as at the present time it is available in cases brought under CPR 19.6 (see above).

As part of the certification procedure, it should be the responsibility of the court to ensure that any claim where a Costs Protection Order is not granted, is either sufficiently insured, backed by properly capitalised funders, or that the claimants themselves have sufficient means to pay any adverse costs. This may be achieved by either an effective After the Event Policy (although these are only just emerging on the market), perhaps a grouping of Before the Event policies (in a similar way to recent developments in Austria), a form of Stop Loss insurance, or in the case of a commercially funded claim, the demonstration that the funder has ready access to monies to pay adverse costs.

Conclusion

Cost shifting is a deterrent against speculative or so-called blackmail litigation, unless the claimants are impecunious, in which case the courts existing powers to award security for cost should provide protection for defendants against such blackmail claims.

As part of the certification procedure, parties may be at liberty to apply to the court under existing procedure for a Protective Costs Order, and/or a costs budget or cap, to limit the exposure of claimants to adverse where they can convince the court the claim meets public interest criteria (currently being developed by a Working Group of the Civil Justice Council).

Where the Court determines that there should be full or substantial part cost shifting, parties will need to demonstrate to the court that they are good for the money, or are adequately insured.

RECOMMENDATION 10

Unallocated damages from an aggregate award should be distributed by a trustee of the award according to general trust law principles. In appropriate cases such a *cy-près* distribution could be made to a Foundation or Trust.

Where collective actions are pursued on an opt-out basis experience shows that there is the likelihood that there will remain an unclaimed residue of the judgment damages award, especially where damage aggregation occurs, or the settlement award. Some jurisdictions, albeit not the US system insofar as judgment awards are concerned, have specifically provided the court with a *cy-près* power so that such a residue can be distributed either for a purpose that will benefit the class generally or benefit, for instance, a charity related to the issue which gave rise to the collective action.

It appears however that experience in those jurisdictions whose systems incorporate such a power can lead to the court being placed in a difficult position as interested groups seek to lobby it in order to secure an award in their favour.

The Civil Justice Council recognises the utility of any residue being applied consistently with the proper use of a *cy-près* power. It however recognises the possibility that giving the court a power to exercise that power itself may lead to difficulties and may tend to undermine the court's perceived independence. It therefore recommends, consistently with Lord Woolf's original recommendation from the Final Access to Justice Report, that a trustee be appointed to administer any judgment or settlement award or alternatively that the representative party hold such a sum as trustee for the class, and that where after a proper period of time with proper and proportionate notice given to the class an unclaimed residue remains that residue be applied by the trustee according to general trust law principles. In appropriate cases, this unclaimed residue could on this basis be distributed to a Foundation or Trust.²¹³

²¹³ An appropriate body to which an unclaimed residue could be distributed would be the Access to Justice Foundation established under section 194 of the Legal Services Act 2007.

RECOMMENDATION 11

While most elements of a new collective action could be introduced by the Civil Procedure Rule Committee, it is desirable that any new action be introduced by primary legislation.

While there is considerable scope for reform of CPR 19.6, the Civil Justice Council recommends that it is preferable that reform be taken forward by primary legislation. This will enable those elements of reform which effective substantive law to be debated fully and implemented in a way that would preclude *vires* challenges. Reform through primary legislation is also believed to be the most efficient mechanism to ensure a consistent approach to reform across the spectrum of civil fora.



PART 10

DRAFT CIVIL PROCEEDINGS ACT AND RULES OF COURT

Summary

This chapter sets out a draft Collective Proceedings Act and draft Rules of Court.²¹⁴ The draft Act is intended to be indicative only. It simply sets out those areas that any future Act will have to cover if the recommendations in this report are to be implemented. The draft Rules of Court have been drafted so as to approximate as near as possible the Civil Procedure Rules. It may well be the case that matters set out within the draft rules ought more properly be placed in primary legislation. Both the draft Act and the draft Rules are a starting point and are not intended to be taken as a final destination.

It should be noted that this report notes that any collective action could operate on the basis that there can be both representative claimants and representative defendants. The draft Act reflects this. The draft rules, for reasons of simplicity of drafting only encompass representative claimants.

Both the draft Act and draft rules incorporate provision for both opt-out and opt-in collective proceedings consistently with the main recommendations in this report. If introduced into the CPR it is anticipated that the draft rules would supplement the existing GLO regime, which would remain as a case management tool for dealing with numerous individual claims.

²¹⁴ The drafts were prepared by a Working Party constituted of: Michael Black QC, Rachael Mulheron and John Sorabji.

Draft Collective Proceedings Act

An Act to amend the law about civil procedure in England and Wales; and for connected purposes.

Be it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

ARRANGEMENT OF SECTIONS

1. Collective proceedings may be pursued or defended in the County Courts of England and Wales and the Senior Courts of England and Wales and the Supreme Court of the United Kingdom.
2. For the purposes of section 1, collective proceedings are civil proceedings, as defined in the Civil Procedure Act 1997 made, continued or defended by a party (a representative party) on behalf of a class comprising at least two claimants or defendants where the nature of the cause of action gives rise to common or related issues of fact or law between the members of the class.
3. A representative party may issue, continue or defend proceedings on behalf of a class of claimants or defendants where they are:
 - (1) authorised to do so on an ad hoc basis under the Civil Procedure Rules; or
 - (2) authorised to act as such and on such terms as specified by order of the Lord Chancellor, in accordance with criteria to be published by the Lord Chancellor for the purposes of this section.
 - (a) An application by a body to be authorised under section 3(2) is to be made in a form approved by the Lord Chancellor for the

purpose.

- (b) Before issuing criteria under section 3(2) the Lord Chancellor shall consult the Lord Chief Justice.
 - (c) Before authorising a body under section 3(2) the Lord Chancellor shall consult the Lord Chief Justice;
 - (d) The Lord Chief Justice may nominate a judicial office holder to carry out the functions under section sections 3(2)(b) and (c);
 - (e) “judicial office holder” has the same meaning as in section 109(4) of the Constitutional Reform Act 2005;
- (3) A representative party shall not be required to have an interest in the proceedings.

4. Civil Procedure Rules may make provision for:

- (1) the definition, nature and type of common to class members;
- (2) the suspension of any applicable limitation period relating to members of a represented class;
- (3) the payment of aggregate or proportional damages;
- (4) the payment of damages to the representative party or another individual or body as trustee for the class members; and
- (5) any other matter relating or incidental to the proper management and conduct of the collective proceedings.

5. Civil Procedure Rules are those rules made under section 1 of the Civil Procedure Act 1997.

6. For the purpose of section 4(3) aggregate or proportional damages are damages assessed without the proof of individual loss suffered by each member of the represented class.

7. Collective proceedings may be issued, continued or defended on behalf of the

- represented class either:
- (1) with the express prior consent of each class member (opt-in proceedings);
or
 - (2) without the express prior consent of any of the class members (opt-out proceedings).
8. Where opt-out proceedings are issued, continued or defended Civil Procedure Rules shall make provision for:
- (1) fair, reasonable and adequate notice to be given to the class members of the collective proceedings; and thereafter
 - (2) a fair, reasonable and adequate period of time in which class members can elect to opt-out of the represented class for the purposes of the collective proceedings.
9. Proceedings may not continue as collective proceedings unless certified by a court in accordance with rules set out in the Civil Procedure Rules.
10. For the purposes of section 9 Civil Procedure Rules shall make provision for:
- (1) when certification is to take place;
 - (2) the criteria applicable for certification;
 - (3) which courts may certify proceedings as collective proceedings.

Draft Civil Procedure Rules²¹⁵

CPR 19

Application and Definitions

19.16 (1) This Section of this Part applies to proceedings to which [section 1 of the Collective Proceedings Act 200X] applies.

(2) In this Section of this Part unless the context otherwise requires:

(a) ‘authorised body’ means an incorporated or unincorporated body whose objects include the pursuit of collective proceedings as a representative claimant and which is a body specified under section 47B Competition Act 1998 [or section 3(2) of the draft Collective Proceedings Act 200X];²¹⁶

(b) ‘certified body’ means an incorporated or unincorporated body whose objects include the pursuit of collective proceedings as a representative claimant and which issues or continues collective proceedings and is certified by the court as a suitable body to act as a representative claimant;

(c) ‘certification application’ means an application for the certification of a claim as collective proceedings and appointing a representative claimant in accordance with this Section of this Part;

(d) ‘certification order’ means an order certifying a claim as collective proceedings and appointing a representative claimant in accordance with this Section of this Part;

²¹⁵ If the recommendation is adopted that collective proceedings be introduced in other civil fora these rules could be adapted *mutatis mutandis*. Draft civil procedure rules have been prepared as the primary focus of this study is the civil justice system.

²¹⁶ Or any other body authorised under a comparable provision.

(e) ‘class member’ means a member of a class of persons on whose behalf collective proceedings have been commenced and which may be certified as either opt-in or opt-out proceedings;

(a) ‘collective proceedings’ means a claim certified under rule 19.19;

(b) ‘common issues’ means common or related issues of fact or law;

(f) ‘non-resident class member’ means a member of a class of persons on whose behalf collective proceedings have been commenced and who is not resident in England and Wales;

(g) ‘opt-in’ means a form of collective proceedings that are brought by a representative claimant on behalf of class members and which upon certification are only continued on behalf of those class members that consent to the representative claimant continuing the claim on their behalf;

(h) ‘opt-out’ means a form of collective proceedings that are brought by a representative claimant on behalf of class members who upon certification are presumed to have consented, unless the contrary is shown, to the representative claimant continuing the claim on their behalf;

(i) ‘representative claimant’ means a claimant appointed under rule 19.20;

(j) ‘sub-class’ means a class whose members have claims that raise common issues not shared by all the class members;

(k) ‘sub-class representative claimant’ means a claimant appointed under rule 19.20.

Commencing collective proceedings

19.17 (1) Any person, certified or authorised body commencing a claim intended to be collective proceedings must at the same time make a certification application.

(2) Any person, certified or authorised body seeking certification of an existing claim as collective proceedings must make a certification application as soon as practicable.

(3) The court will hold a case management conference in accordance with the relevant practice direction.

Applying for certification

19.18 (1) An application for certification under rule 19.19 must be made in accordance with Part 23.

(2) A defendant may make a certification application at any time.

(3) A certification application must be supported by written evidence.

(4) The application and written evidence must be filed and served on all parties at least [10] days before the date of hearing of the application unless the court orders otherwise.

(5) The written evidence referred to in paragraph (3) must—

(a) set out the material facts on which the applicant intends to rely at the hearing of the application; and

(b) provide an estimate of the number of proposed class members.

(6) Any written evidence in response to the application referred to in paragraph (3) must be filed and served no later than [5] days before the date of hearing of the application unless the court orders otherwise.²¹⁷

Certification of the collective proceedings

19.19 (1) Subject to rules 19.19(3) and (4) the court may certify a claim as collective proceedings if—

- (a) there is an identifiable class of 2 or more persons;
- (b) the claims of the class members raise common issues;
- (c) collective proceedings are the most appropriate means for the fair and efficient resolution of the common issues; and
- (d) there is a person, certified or authorised body suitable for appointment as representative claimant.
- (e) the collective proceeding has a real prospect of success.

(2) The court may certify the proceedings on an opt-in (“opt-in proceedings”) or an opt-out (“opt-out proceedings”) basis.

(3) The court will not refuse to certify a claim as collective proceedings on the grounds that:

²¹⁷ All time limits in square brackets are indicative. It is likely that consultation would reveal that longer time limits are necessary to deal properly with collective proceedings.

- (a) the remedy claimed includes a claim for damages that would require individual assessment after determination of the common issues;
 - (b) the remedy claimed relates to separate contracts involving different class members;
 - (c) different remedies are sought for different class members;
 - (d) the number of class members or the identity of each class member is not known;
 - (e) the class includes a sub-class whose members have claims that raise common issues not shared by all class members; or
 - (f) the collective proceedings involve separate acts or omissions of the defendant done or omitted to be done in relation to individual class members.²¹⁸
- (4) Where the court finds that the certification criteria specified in rule 19.19(1) have been satisfied, it may nevertheless refuse to certify the claim as collective proceedings if the remedy claimed is or includes payment of money to class members (otherwise than in respect of costs), and the court concludes that it is likely that, if judgment were to be given in favour of the representative claimant, the cost to the defendant of identifying the class members and distributing to them the amounts ordered to be paid to them would be disproportionate, having regard to the likely total of those amounts.

²¹⁸ CPR 19.19(3) is explicitly included in the rules in order to ensure that the strict approach taken by the Court in the *Markt* case is not replicated in any new collective proceeding rule.

- (5) If a class includes a sub-class whose members have claims that raise common issues not shared by all the class members so that the protection of the interests of the sub-class members requires that they be separately represented, the court may refuse to certify the claim as collective proceedings unless there is a person or authorised body suitable for appointment as representative claimant for the sub-class.
- (6) A class that comprises persons resident in England and Wales and persons not resident in England and Wales must be divided into sub-classes comprising respectively those persons resident in England and Wales and those who are not.
- (7) Where the court certifies the claim as collective it shall certify it as either:
 - (a) opt-in proceedings; or
 - (b) opt-out proceedings.

Standing and suitability of representative claimant

- 19.20 (1) The representative of a class or sub-class, ('the representative claimant')—
- (a) shall be either—
 - (i) a member of the class of persons who is resident in England and Wales and who would otherwise be entitled to commence proceedings on his own behalf against the defendant; or
 - (ii) a certified or authorised body provided that—

(1) the interests of the class members are linked to the objects of the certified or authorised body; and

(2) in the case of a certified body, its appointment the representative claimant is considered by the court to be in the interests of justice;

(b) shall have prepared a plan for the collective proceedings that sets out a method to the satisfaction of the court for bringing the proceedings on behalf of the class and for notifying class members of the fact and progress of the proceedings; and

(c) shall have provided a summary of any agreements relating to fees and disbursements.

(2) A person, certified or authorised body will be suitable to act as a representative claimant and approved as such during the certification hearing if that person or body—

(a) would fairly and adequately represent the interests of the class or sub-class,²¹⁹ and

(b) does not have, on the common issues, an interest that is in conflict with the interests of the class members.

(3) If, on the application of a class member or party, it appears to the court that a representative claimant is not able adequately to

²¹⁹ The requirement that authorised bodies are subject to this aspect of the certification may on the face of it appear superfluous as they have already been authorised to act as representative claimants. This sub-rule is relevant insofar as authorised bodies are concerned as it provides the basis on which the court can assess whether the authorised body is in the circumstances of any specific claim the most suitable body to act as the representative claimant in those individual proceedings. It might be the case, for instance, that another authorised body or an ad hoc (i.e., to be court-certified) body or individual could, in the circumstances, of an individual claim be a more suitable representative claimant than the authorised body.

represent the interests of the class members, the court may—

- (a) substitute another class member, certified or authorised body as representative claimant; and
 - (b) make any other order it considers appropriate.
- (4) A representative claimant may only withdraw as a party to collective proceedings if the court—
- (a) gives permission for the representative claimant to withdraw; and
 - (b) is satisfied that another person, certified or authorised body meets the requirements of this rule and may fairly be substituted as representative claimant.
- (5) Where a person, certified or authorised body referred to in paragraph (1) has commenced collective proceedings, the person or body retains a sufficient interest—
- (a) to continue the proceedings; and
 - (b) to bring an appeal from a judgment in the proceedings;

even where the person or body has no or ceases to have a claim against the defendant.

Opting Out

19.21

- (1) Where the collective proceedings have been certified as opt-out proceedings the court will fix a date before which a class member may opt out of the collective proceedings ('the opt-out date').
- (2) A class member may, in the manner and within the time specified in the certification order opt out of opt-out proceedings.
- (3) A class member who fails to opt out by the opt-out date may not do so after that date, except with permission of the court.
- (4) The court may grant permission under paragraph (3) if it is satisfied that—
 - (a) the delay was not caused by any fault of the class member; and
 - (b) the defendant would not suffer substantial prejudice if permission were granted.
- (5) The court may, on the application of a class member or party, extend the period during which class members may opt-out of opt-out proceedings.
- (6) Except with the permission of the court, the hearing of collective proceedings must not commence earlier than the opt-out date.
- (7) A class member will be excluded from the class if he does

not, before the opt-out date, discontinue or apply to stay any claim brought by him that raises the common issues set out in the certification order.

- (8) This rule does not apply to non-resident class members.

Opting In

19.22

- (1) Where the collective proceedings have been certified as opt-in proceedings the court will fix a date before which a class member may opt into the collective proceedings ('the opt-in date').
- (2) A class member may, in the manner and within the time specified in the certification order opt into opt-in proceedings.
- (3) A class member who fails to opt in by the opt-in date may not do so after that date, except with permission of the court.
- (4) The court may grant permission under paragraph (3) if it is satisfied that—
- (a) the delay was not caused by any fault of the class member; and
 - (b) the defendant would not suffer substantial prejudice if permission were granted.
- (5) The court may, on the application of a class member or party, extend the period during which class members may opt-into opt-in proceedings.

- (6) Except with the permission of the court, the hearing of collective proceedings must not commence earlier than the opt-in date.
- (7) A class member will be excluded from the class if he does not, before the opt-in date, discontinue or apply to stay any claim brought by him that raises the common issues set out in the certification order.
- (8) This rule does not apply to non-resident class members.

Opting in – Non-Resident Class Members

- 19.23
- (1) A non-resident class member may, in the manner and within the time specified in the certification order, opt-into collective proceedings.
 - (2) The court will fix a date before which a non-resident class member may opt-into the collective proceedings ('the non-resident opt-in date').
 - (3) A non-resident class member referred to in paragraph (1) who opts-into the proceedings is, from that time, a member of the class involved in the proceedings for every purpose of this Section of this Rule.
 - (4) A non-resident class member may not opt-into proceedings under paragraph (1) unless—
 - (a) the certification order specifies that the class shall divide into sub-classes; and
 - (b) the sub-class of which the person is to become a member has or will have, at the time the person becomes a member, a representative claimant who satisfies the requirements of rule

19.20.

- (5) The court, on the application of a non-resident class member or party, may extend the non-resident opt-in date.
- (6) A non-resident class member who fails to opt-in by the non-resident opt-in date may not opt-in after that date, except with the permission of the court.
- (7) A non-resident class member who has failed to discontinue or apply to stay any claim brought by him in England and Wales before the non-resident opt-in date may apply to opt-into the collective proceedings at any time before the determination of the common issues with the permission of the court.
- (8) The court may grant permission under paragraphs (6) and (7) if it is satisfied that—
 - (a) the delay was not caused by any fault of the class member; and
 - (b) the defendant would not suffer substantial prejudice if permission were granted.
- (9) Except with the permission of the court, the hearing of collective proceedings must not commence earlier than the non-resident opt-in date.

Consent to class membership²²⁰

19.24 (1) The consent of a person to be a class member in opt-out collective proceedings is not required unless the person is a non-resident class member to whom rule 19.23 applies.

Persons under disability

19.25 (1) It is not necessary for a person under a disability to have a next friend merely in order to be a class member.

(2) A class member who is under a disability may only take a step in the collective proceedings, or conduct part of the collective proceedings, by his next friend.

Contents of certification order

19.26 (1) In this rule any reference to class includes any sub-classes.

(2) A certification order shall—

- (a) specify whether the collective proceedings are opt-in or opt-out proceedings;
- (b) describe or otherwise identify the class;
- (c) state the name of the representative claimant(s) appointed by the court for the class;
- (d) state the nature of the claim(s) made on behalf of the class;
- (e) state the remedy sought by the class;

²²⁰ We believe that this is a matter of substantive law and should be underpinned by a provision in the enabling statute.

- (f) specify the common issues for the class;
 - (g) state the opt-out date and the manner and the time within which class members may voluntarily opt out of the collective proceedings;
 - (h) state the opt-in date and the manner and the time within which any class member or non-resident class member may opt into the collective proceedings;
 - (i) order the publication of a notice to the class members pursuant to rule 19.33; and
 - (j) include any other provisions the court considers appropriate.
- (3) In describing or otherwise identifying class members for the purposes of paragraph (2)(b), it is not necessary to name or specify the number of the class members.

Post-certification amendments

- 19.27
- (1) The court may amend the certification order on the application of a class member or party.
 - (2) If a court amends the certification order so as to alter the class description, it may also make any other orders it considers appropriate, including an order relating to the giving of notice to persons who, as a result of the amendment, will be included in the class and the date before which such persons may either opt into or out of the proceedings if resident in England and Wales and may opt into the proceedings if non-resident in England and Wales.

- (3) If, at any time after a certification order is made, the conditions for certification are no longer satisfied with respect to the collective proceedings, the court will decertify the claim.

Continuance of litigation

19.28 (1) If the court refuses to certify a claim as collective proceedings under rule 19.19, or decertifies the claim as collective proceedings under rule 19.27(3), the court may permit the proceedings to continue as one or more claims between different parties and, for that purpose, the court may—

- (a) order the addition, removal or substitution of parties;
- (b) order the amendment of the claim form; or
- (c) make any other order that it considers appropriate.

Stages of collective proceedings

19.29 (1) Unless the court otherwise orders, in collective proceedings—

- (a) common issues for a class must be determined together;
 - (b) common issues for a sub-class must be determined together; and
 - (c) issues that require the participation of individual class members must be determined in accordance with rule 19.37.
- (2) The court may give judgment in respect of the common issues and separate judgments in respect of any other issue.

Participation of class members

19.30 The court may, at any time in collective proceedings, permit one or more class members to participate in the proceedings on such terms as it considers appropriate.

Disclosure

- 19.31
- (1) Subject to this rule Part 31 applies to collective proceedings.
 - (2) A party to collective proceedings may obtain disclosure of documents in the possession of class members other than the representative claimant with the permission of the court.
 - (3) In deciding whether to grant a defendant permission under paragraph (2), the court will consider in particular—
 - (a) the stage of the collective proceedings and the issues to be determined at that stage;
 - (b) the presence of sub-classes; and
 - (c) the approximate monetary value of individual claims, if any.
 - (4) A class member is subject to the same sanctions under Part 31.21 as a party for failure to disclose or to permit inspection.

Notices generally

19.32 The non-receipt of or failure to respond to a notice by a class member does not affect a step taken, or an order made, or a judgment given, in collective proceedings.

Notice of certification

- 19.33 (1) Notice that a claim has been certified as collective proceedings must be given by the representative claimant to the class members in accordance with this rule and the relevant practice direction.
- (2) Unless the court orders otherwise, notice under this rule shall—
- (a) describe the proceedings, including the name and address of the representative claimant and the remedy sought;
 - (b) state the opt-out date for class members where the proceedings are certified as opt-out proceedings;
 - (c) state the opt-in date for class members where the proceedings are certified as opt-in proceedings;
 - (d) state the opt-in date for non-resident class members;
 - (e) describe the possible financial consequences of the proceedings to class members;
 - (f) summarise any agreements relating to fees and disbursements;
 - (g) describe any counterclaim being made against the class or any sub-class, including the remedy sought in the counterclaim;
 - (h) state that the judgment on the common issues for the class or the sub-class, whether favourable or not, will bind—
 - (i) class members who do not opt-out of the

proceedings; and

- (ii) class members who opt-into the proceedings;
- (i) describe the rights, if any, of class members to participate in the proceedings;
- (j) give an address to which class members may direct inquiries about the proceedings; and
- (k) give any other information the court considers appropriate.

Judgment of the court

19.34 (1) The court may, in determining a matter in collective proceedings, do any one or more of the following:

- (a) determine one or more of the common issues of law or fact;
- (b) determine individual issues, or otherwise order their determination in accordance with the provisions of rule 19.37;
- (c) give judgment in a specified sum payable to class members or sub-class members in such manner as it considers appropriate;
- (d) give judgment in an aggregate sum in respect of all or any part of a defendant's liability to class members, without specifying amounts awarded in respect of individual class members;
- (e) make such other order as the court considers appropriate.

Judgment on the common issues

- 19.35 (1) A judgment on the common issues ('the common issues judgment') shall—
- (a) set out the common issues specified in the certification order;
 - (b) name or describe the class or sub-class members who are affected by it;
 - (c) state the nature of the claims made on behalf of the class or sub-class described in the certification order; and
 - (d) specify the remedy granted.
- (2) The common issues judgment—
- (a) binds every member of the class or sub-class, who has not opted out of, or been excluded from, the collective proceedings;
 - (b) binds every class member who has opted into the collective proceedings; and
 - (c) does not bind a party to the collective proceedings in any subsequent proceedings between that party and a person who opted out of, or had been excluded from, the collective proceedings.

Notice of determination of common issues

- 19.36 (1) When in collective proceedings common issues are determined, the representative claimant must give notice to the class members in accordance with this rule and the relevant practice direction.
- (2) Unless the court orders otherwise, notice under this rule shall—
- (a) state that common issues have been determined;
 - (b) identify the common issues that have been determined and explain the determinations made;
 - (c) if common issues have been determined in favour of the class members,
 - (i) state that class members may be entitled to individual remedies;
 - (ii) describe the steps that must be taken to establish an individual claim; and
 - (iii) state that failure on the part of a class member to take those steps will result in the member not being entitled to bring an individual claim except with the permission of the court;
 - (d) give an address to which class members may direct inquiries about the proceedings; and
 - (e) give any other information that the court considers appropriate.

Determination of individual issues

- 19.37
- (1) When the court determines common issues in favour of a class or sub-class and determines that there are issues that are applicable only to certain individual members of the class or sub-class, the court may order that the individual questions be determined in further hearings.
 - (2) The court may give any necessary directions relating to the procedures that must be followed in conducting hearings under paragraph (1).
 - (3) The court shall set a time within which individual members of the class or sub-class may make claims in respect of the individual issues.
 - (4) A member of the class or sub-class who fails to make a claim within the time set under paragraph (3) may not later make a claim under this rule in respect of the issues applicable only to that member, except with the permission of the court.
 - (5) The court may grant permission under paragraph (4) if it is satisfied that—
 - (a) the delay was not caused by any fault of that person; and
 - (b) the defendant would not suffer substantial prejudice if permission were granted.
 - (6) The individual class member, and not the representative claimant, may be liable for the costs of the determination of the individual issues.

Aggregate awards²²¹

19.38 (1) The court may give judgment in an aggregate sum in accordance with this rule if—

- (a) some or all class members make monetary claims; and
 - (b) the aggregate or a part of the defendant's liability to some or all class members can be determined by a reasonably accurate assessment and without proof by individual class members.
- (2) Before making an order under paragraph (1), the court must provide the defendant with an opportunity to make submissions to the court in respect of any matter relating to a proposed aggregate award, including the following—
- (a) contesting the merits or amount of an aggregate award; and
 - (b) that individual proof of monetary claims is required due to the individual nature of the claims.

Average or proportional share of aggregate awards

19.39 (1) If the court makes an order under rule 19.38, the court may further order that all or a part of the aggregate award be applied so that some or all individual class or sub-class members share in the award on an average or proportional basis if—

- (a) it would be impractical or inefficient to—
 - (i) identify the class or sub-class members entitled to

²²¹ This and the two rules that follow raise matters of substantive law that should be underpinned by provisions in the enabling statute.

share in the award; or

- (ii) determine the exact shares that should be allocated to individual class or sub-class members; and
 - (b) failure to make an order under this paragraph would deny recovery to a substantial number of class or sub-class members.
- (2) If an order is made under paragraph (1), any member of the class or sub-class in respect of whom the order was made may, within the time specified in the order, apply to the court to be excluded from the proposed distribution and be given the opportunity to prove that member's claim on an individual basis.
- (3) In deciding whether to exclude a class or sub-class member from an average or proportional distribution, the court will consider—
- (a) the extent to which the class or sub-class member's individual claim varies from the average for the class or sub-class;
 - (b) the number of class or sub-class members seeking to be excluded from the average distribution; and
 - (c) whether excluding the class or sub-class members referred to in paragraph (b) would unreasonably deplete the amount to be distributed on the average basis.
- (4) Any amount recovered by a class or sub-class member who proves that member's claim on an individual basis must be deducted from the amount to be distributed on the average basis before the

distribution.

Individual share of aggregate award

- 19.40
- (1) If the court makes an order under rule 19.38, the court may further order that all or a part of the aggregate award be divided among class or sub-class members on an individual basis.
 - (2) If the court determines that individual claims are to be made by class or sub-class members in order to establish entitlement to part of the aggregate award under paragraph (1), the court will specify the procedures for determining the claims.
 - (3) When specifying the procedures under paragraph (2), the court will set a time within which class or sub-class members may make claims under this rule.
 - (4) A class or sub-class member who fails to make a claim within the time set under paragraph (3) may not later make a claim under this rule, except with the permission of the court.
 - (5) The court may grant permission under paragraph (4) if it is satisfied that—
 - (a) the delay was not caused by any fault of that person; and
 - (b) the defendant would not suffer substantial prejudice if permission were granted.

Distribution

19.41 (1) The court may direct any means of distribution of any sum awarded that it considers appropriate, including any one or more of the following orders—

- (a) that the defendant distribute directly to the class or sub-class members the amount to which each class or sub-class member is entitled by any means authorised by the court; or
- (b) that the defendant pay into court the total amount of the defendant's liability to the class or sub-class members until further order of the court.

(2) The court may—

- (a) order that the costs of distributing sums under this rule, including the costs of any notice associated with the distribution and the fees payable to a person administering the distribution, be paid out of the proceeds of the judgment; and
- (b) make any further or other order it considers appropriate.

Undistributed award²²²

19.42 (1) The court may order that all or any part of an award of any sum that is due to class or sub-class members and that has not been distributed within a time set by the court ('the undistributed residue') be paid to a Trustee to be applied in any manner that may reasonably be expected to benefit class or sub-class members.

²²² This is a matter of substantive law and should be underpinned by a provision in the enabling statute. This rule reflects Recommendation 10 at page 165 of the report of July 2008 which itself reflected the recommendations of Lord Woolf in his final report.

- (2) In deciding whether to make an order under paragraph (1), the court may consider—
 - (a) whether the distribution of the undistributed residue would result in unreasonable benefits to persons who are not members of the class or sub-class; and
 - (b) any other matter the court considers relevant.
- (3) The court may make an order under paragraph (1) even if the order would benefit—
 - (a) persons who are not class or sub-class members; or
 - (b) persons who may otherwise receive any judgment sum as a result of the collective proceedings.
- (4) If any part of any judgment sum which is to be divided among individual class or sub-class members remains unclaimed or otherwise undistributed after a time set by the court, the court may order that that part of the award—
 - (a) be applied against the cost of the collective proceedings;
 - (b) be forfeited to the Crown; or
 - (c) be returned to the defendant.

Notice of settlement

- 19.43 (1) Notice that an offer to settle has been made shall be given by the representative claimant to the members of the class or sub-class in accordance with this rule and the relevant practice direction.
- (2) Unless the court orders otherwise, notice under this rule shall—
- (a) provide a brief account of the conduct of the proceedings;
 - (b) describe any plan for distributing settlement funds; and
 - (c) give notice of the fairness hearing to be held in accordance with rule 19.44.

Settlement and discontinuance

- 19.44 (1) Settlement of collective proceedings will not take effect unless—
- (a) the court conducts a hearing (‘the fairness hearing’) attended by the following persons—
 - (i) the parties to the collective proceedings;
 - (ii) any objectors under paragraph (3) below; and
 - (iii) other persons (including, but not limited to, expert witnesses) as the court thinks appropriate;
 - (b) the representative claimant has given notice of the fairness hearing to the class members in accordance with rule 19.43; and
 - (c) the court approves the content of the settlement agreement

on terms which it considers to be appropriate.

- (2) Any class member may object to a settlement proposal.
- (3) The court may refuse to approve a settlement unless it affords a further opportunity to request exclusion from the settlement to individual class members who had an earlier opportunity to request exclusion but did not do so.
- (4) If the settlement is approved, the representative claimant must give notice of the approval to all class members in accordance with the relevant practice direction.
- (5) The court may order that all or any class members be given a further opportunity to opt out and that the notice given in accordance with paragraph (6) describes that entitlement and the manner in which it may be exercised.
- (6) When approved, the settlement—
 - (a) binds every class member who has not opted out of or been excluded from the collective proceedings;
 - (b) binds every class member who has opted into the proceedings; and
 - (c) does not bind a party to the collective proceedings in any subsequent proceeding between the party and a person who opted out of, had been excluded from or who failed to opt into collective proceedings.

Settlement of individual claim of representative claimant

- 19.45 (1) A representative claimant may, with the permission of the court, settle his individual claim in whole or in part at any stage of the collective proceedings.
- (2) A representative claimant who is seeking permission to settle, or who has settled, his individual claim—
- (a) may nevertheless continue to represent the class; or alternatively,
 - (b) may, with the permission of the court, withdraw as representative claimant.
- (3) Where a person has sought permission to withdraw as representative claimant under paragraph (2)(a), the court—
- (a) must be satisfied that notice of the application has been given to class members in accordance with these rules and the relevant practice direction, and in sufficient time for them to apply to have another person substituted as the representative claimant;
 - (b) may, on the application of a class member, make an order for the substitution of another class member or authorised body as representative claimant; and
 - (c) may make such other orders as it considers appropriate.

Appeals

19.46 (1) If a representative claimant does not appeal any of the following judgments or orders, or appeals and later discontinues the appeal, namely—

- (a) an order certifying or refusing to certify proceedings as collective proceedings;
- (b) an order decertifying the collective proceedings;
- (c) a common issues judgment; or
- (d) an order with respect to an aggregate sum.

Any member of the class for which the representative claimant has been appointed may apply for permission to exercise the right of appeal of the representative claimant within 30 days after—

- (i) the expiry of the appeal period available to the representative claimant if the representative claimant does not appeal; or
 - (ii) the day the notice of discontinuance was filed, if the representative claimant appeals but files a notice of discontinuance of the appeal.
- (2) A class member may appeal any order determining or dismissing the member's claim in respect of one or more individual issues.

Liability of class members for costs

- 19.47 (1) Class members, other than the representative claimant, are not liable for costs except with respect to the determination of their own individual claims.
- (2) Where the court appoints a sub-class representative claimant, that person, and not the representative claimant, is liable for costs associated with the determination of the issues common to the sub-class.
- (3) Where the court substitutes a representative claimant pursuant to rule 19.20(3)(a), he is not liable for the costs of the collective proceedings incurred before the substitution, unless the court otherwise orders.

Fees and disbursements

- 19.48 (1) An agreement in relation to the fees and disbursements payable by the representative claimant must be in writing and must—
- (a) state the terms under which fees and disbursements are to be paid;
- (b) give an estimate of the expected fee and state whether or not that fee is conditional on success in the collective proceedings; and
- (c) state the method by which payment is to be made, whether by lump sum or otherwise.
- (2) An agreement in respect of fees and disbursements is not enforceable unless approved by the court.

- (3) If an agreement is not approved by the court, or if the amount due under an approved agreement is in dispute, the court may—
- (a) determine the amount in respect of fees and disbursements;
or
 - (b) make any other or further order it considers appropriate.

Limitation periods²²³

- 19.49 (1) Subject to paragraph (3), any limitation period applicable to a claim in collective proceedings will be suspended in favour of a class member on the commencement of the proceedings, and resumes running against the class member when any of the following occurs:
- (a) the class member opts out of opt-out proceedings;
 - (b) an amendment is made to the certification order that has the effect of excluding the class member from the collective proceedings;
 - (c) a decertification order is made under rule 19.27(3);
 - (d) the collective proceedings are dismissed without an adjudication on the merits;
 - (e) the collective proceedings are discontinued with the approval of the court; or
 - (f) the collective proceedings are settled with the approval of the court, unless the settlement agreement provides otherwise.

²²³ This is a matter of substantive law and should be underpinned by a provision in the enabling statute.

- (2) Subject to paragraph (3) any limitation period applicable to a claim in opt-in proceedings will be suspended in favour of a class member on the date on which the class member opts into the proceedings, and resumes running against the class member when any of the following occurs:
- (a) an amendment is made to the certification order that has the effect of excluding the class member from the collective proceedings;
 - (b) an order is made under rule 19.27(3);
 - (c) the collective proceedings are dismissed without an adjudication on the merits;
 - (d) the collective proceedings are discontinued with the approval of the court; or
 - (e) the collective proceedings are settled with the approval of the court, unless the settlement agreement provides otherwise.
- (3) If there is a right of appeal in respect of an event described in paragraph (1)(a) to (f) and paragraph 2 (a) to (e), the limitation period resumes running as soon as the time for appeal has expired without an appeal being commenced or as soon as any appeal has been finally determined.

Application of this Section

- 19.50 (1) This Section of this Part does not apply to—
- (a) any proceedings that may be brought in a representative capacity under a statute; and
 - (b) any proceedings required by law to be brought in a representative capacity.

Registration of applications for certification

19.51 The Central Office at the Royal Courts of Justice shall maintain a register of applications for certification brought under rule 19.18 that shall be available for public inspection in accordance with Part 5.

PRACTICE DIRECTION

Case Management

1. If proceedings are intended to be collective proceedings, the claimant must apply for a case management conference at the same time as issuing a certification application.
2. Any party may, at a time earlier than that provided in paragraph 1, apply in writing to the court to fix a case management conference.
3. The court may fix a case management conference at any time on its own initiative.
4. At the case management conference the court will consider the directions necessary for the proper conduct of the certification hearing.
5. A judge ('the managing judge') will be appointed for the purpose of the collective proceedings as soon as possible. He will assume overall responsibility for the management of the claim.
6. A Master or a District Judge may be appointed to deal with procedural matters, which he will do in accordance with any directions given by the managing judge.
7. A costs judge may be appointed and may be invited to attend case management hearings.

Notice

8. Notice must be given to class members of the following matters in relation to collective proceedings:
 - (a) an application by a defendant for the stay or dismissal of the collective proceedings; and

- (b) an application by a representative claimant under rule 19.20(4) seeking permission to withdraw as representative claimant.
- 9. At any other time, the court may order any party to give notice to the persons that the court considers necessary to protect the interests of any class member or party or to ensure the fair conduct of the proceedings.
- 10. Any notice which must be given by a representative claimant of a judgment or order must state whether the representative claimant intends to appeal the judgment or order in whole or in part and must state the date by which it is necessary to file an application for permission to appeal if none has been filed.
- 11. If the representative claimant appeals a judgment or order but later discontinues his appeal, he must give notice of discontinuance to all class members in such manner as the court considers appropriate.
- 12. The court may order that notice be given by—
 - (a) personal delivery;
 - (b) post;
 - (c) publishing or leafletting;
 - (d) press advertisement, radio or television broadcast;
 - (e) individually notifying a sample group within the class; or
 - (f) any other means or combination of means that the court considers appropriate.

13. The court will order when and by what means notice is to be given, having regard to—
- (a) the cost of giving notice;
 - (b) the nature of the remedy sought;
 - (c) the size of the individual claims of the class members;
 - (d) the number of class members;
 - (e) the presence of sub-classes;
 - (f) the number of non-resident class members;
 - (g) whether some or all of the class members may opt out, or have opted out, of the collective proceedings;
 - (h) the places of residence of class members;
 - (i) any other relevant matter.
14. The court will not order that notice be given personally to each class member unless it is satisfied that it is reasonably practicable, and not unduly expensive, to do so.
15. A court may order that notice—
- (a) be given to different class members by different means;
 - (b) be given by any party; or

(c) be dispensed with if, having regard to the factors set out in paragraph 13, the court considers it appropriate to do so.

16. Notices referred to in rules 19.32, 19.36, 19.43 shall not be given unless they have been approved by a court.
17. The court may determine the amount and allocation of expenses in respect of notices and who is to pay those expenses.
18. Notices shall be written in plain language that will be easily understood by the persons to whom they are addressed.

Not for addition in the draft Part IV or the draft PD.

Security for Costs (by way of amendment to CPR 25.13(2)(f))

25.13(2)(f) the claimant is acting as a nominal or representative claimant under Part 19.16 and there is reason to believe that he will be unable to pay the defendant's costs if ordered to do so.



APPENDIX A

STAKEHOLDER CONSULTATION

1. A series of four major stakeholder events have debated in considerable detail whether there is a need for reform of collective redress procedures for consumers or small businesses seeking compensation in collective actions, and if so what shape that reform should take.
2. Detailed minutes of these events (redacted to accord with Chatham House principles at **Appendix H**).
3. The first event invited stakeholders to consider whether there was a deficiency in access to justice for consumers, and whether there should be reform, either in process or in funding.
4. The second considered whether there was evidence of need in support of the consensus for reform, and if so what were the parameters for reform.
5. This third event considered the legal and legislative changes that may be required to achieve the parameters identified in the second event, in particular where some of the principles identified may affect substantive law. The event started to develop a framework for a more effective process, in particular the need for rigorous certification on merits, the need for firm judicial case management, and developing effective protection for defendants against what is seen as “lawyer

driven” litigation.

6. A series of formal papers were prepared for the events, mostly prepared by Professor Rachael Mulheron (Queen Mary University of London), and John Sorabji (a barrister, and Legal Secretary to the Master of the Rolls). Copies of the main papers appear at **Appendices L, M and N**.

First Event, October 2006

1. At the first event, held in October 2006, the CJC presented the following propositions:

- There is currently no effective way of protecting consumers who have suffered modest but real losses
- Class actions have no place in this jurisdiction
- The current cost regime prevents many meritorious group actions from proceeding
- Consumer claims and those by businesses are distinct and discreet from each other and should be treated differently in law, costs and procedure
- Public enforcers need active and effective private enforcement to meet policy requirements

2. The general responses of the consultees were:

- There is a lack of access to justice in consumer redress. Group and representative procedures should be developed further to promote better access to justice.
- The funding of claims was perceived to be the biggest barrier to access to

justice.

- The court should take on a bigger role in controlling multi party proceedings
- procedures in England and Wales could be developed to avoid the perceived excesses
- Reform was inevitable
- There was notable support for opt-out actions for consumer claims, mainly on the grounds of that consumers were “ill-informed”, “incapable of running claims”, and “completely frightened of conventional court processes”. The role of private enforcement as a deterrent was recognised..

Second Event, November 2007

3. At the second event the CJC posed the following questions:

- What should be the delineation between the state function the role of recognised consumer bodies, and that of private enforcers?
- Would a court controlled opt-out procedure improve access justice in some consumer clams (especially in the case of vulnerable consumers?)
- What should be the role of the court in controlling or regulating claims (in terms of only allowing meritorious clams to proceed, controlling evidence and process, funding, ensuring settlements are in the interest of the consumer)?
- Would the power to award restitutional, aggregate or Cy-près damages be in the best interest of; the consumer; state commitment to the open market;

and provide an effective element of deterrence?

4. In his opening speech the Master of the Rolls expanded these into 13 key questions for consideration:

1. What types of complaint are we discussing and against whom?
2. What is the nature of the alleged liability? Is it contractual, tortious, quasi-criminal, regulatory or is it a mixture of those? If it is a mixture, how should they be mixed together?
3. Is the claimant seeking compensation or what?
4. What is the real purpose of the claim? Is it:
 - i. compensation?
 - ii. or is it regurgitation of unlawful profits, and if so to whom should such profits be paid?

Should it be to:

- a. the claimant? Even though the claimant's loss may be different than the amount of unlawful profits that have been made.
 - b. a consumer organisation through the operation of *Cy-près* or something like it (where the individual damages are small)?
 - c. the state?
 - d. a bit of each?
5. Insofar as the claim is intended to punish the defendant, is this really

the role of private litigation or should that be the role of the state?

6. If not why not?

CRITICALLY

7. By whom should the litigation be funded?
- a. The claimant? This is obviously a possibility, but not one that many claimants, especially consumers, could take up.
 - b. The claimant's lawyers?
 - c. The state?
 - d. If otherwise, how?
8. Is the whole thing worth the candle?
9. Should the claimant give the defendant security for costs as they do in some parts of Australia? If not, why not?
10. How should the claims be advanced?
- a. By test case?
 - b. By representative action?
 - c. By group action?
 - d. By some form of class action if that is different?
11. How should the claim be funded?

- a. Out of the claimant's own pocket?
 - b. CFA? If by CFA, should uplift of more than 100% be permitted? Is there any limit to the uplift that could be allowed? How should we decide what the uplift should be? Are there any principles which should inform the answer to that question?
 - c. Contingency fees?
 - d. Third party funding?
 - e. Legal aid contingency fund method? SLAS or something like it?
 - f. State?
12. If the claimant fails and the defendant succeeds, should the defendant recover his costs from the claimant, or the group he represents, or those who opted in or those who have not yet opted in? If the defendant should not recover his costs why not? Should there be a cap on the amount of costs that the defendant can recover?
5. In response to the day's debate, His Honour Judge Graham Jones summarised as follows:
1. Some additional procedure is needed to enable collective redress to be achieved in appropriate cases..
 2. We should not shrink from calling it a class action because that is what it is
 3. We can learn from the American system and experiences about what we must take care to exclude.

4. Any additional procedure should be generic.
5. We may be able to achieve the additional procedure by modifying and extending the existing CPR provisions in relation to representative actions.
6. The balance of evidence is weighted in favour of opt-out rather than opt-in.
7. If there is to be such a system, it must be closely controlled by the court.
8. There must be proper costs protection for defendants.
9. Currently the system must be compensatory. Punishment and disgorgement of excess profit are matters for the state. The *Cy-près* doctrine may be considered to be deterrent or punitive in nature. If that view is taken, an opt-out system should have some sort of *Cy-près* application of unclaimed damages.
10. There was an inevitable need to change the substantive law and to suspend the limitation period.

Third Event, March 2008

12. The purpose of the third event held by the CJC was to discuss how reform of our system of collective redress could be brought about, whether through legislation, rules of court, or a combination of the two.
13. Delegates received an address from Professor Mulheron, who argued that some primary legislation would be needed to implement substantive changes in the law required to enact an opt-out collective action regime. Professor Mulheron's presentation touched upon five areas of the proposed opt-out regime which have been

considered by judges and law reform commissions to require a substantive change in the law. These five areas were:

- Limitation periods
- *Res judicata*
- Aggregate assessment of damages
- *Cy-près* distribution of damages
- Standing against multiple defendants

14. The delegation next heard a presentation by John Sorabji (Legal Secretary to the Master of the Rolls) who submitted that the legal basis for a system of collective action was already in place. As such, he argued that although some features of a proposed opt-out regime would require the implementation of substantive changes in the law (e.g. as with the issue of limitation), more reliance could be placed on rules of court as a vehicle for reform.

15. Delegates split off into focus groups to consider the sixty features of a proposed opt-out collective action regime, as provided by Professor Mulheron, and considered how these individual features could be enacted. The feeling expressed by many was that the enactment of such a regime would not need to be underpinned by a comprehensive legislative framework and could instead be introduced through more extensive use of rules of court.

Fourth Event, 26 June 2008

The purpose of this event was to discuss the first draft version of the present report and recommendations. That discussion and its conclusions was to form the basis of further refinement and inform the basis of the finalised report.



APPENDIX B

Organisations who have contributed to stakeholder events

Allianz

Amicus

Berrymans Lace Mawer Solicitors

Citizens Advice

Civic Consulting

Clifford Chance

Cohen, Milstein, Hausfeld & Toll PLLC

Confederation of British Industry

Covington & Burling LLP

Davies Arnold Cooper

Department for Business, Enterprise & Regulatory Reform (BERR)

Edwin Coe LLP

Equality and Human Rights Commission

Expedite Resolution

Financial Ombudsman Service

Fulbright & Jaworski LLP

Government Equalities Office

HM Court Service

HM Treasury

Hugh James Solicitors

Irwin Mitchell

Law Society (London & Brussels offices)

Legal Services Commission (LSC)

Leigh Day & Co Solicitors
Litigation Protection Ltd
Lovells
Ministry of Justice (MoJ)
National Consumer Council
Northern Ireland Legal Services Commission
Norwich Union
Office of Fair Trading (OFT)
Russell Jones & Walker
Thompsons Solicitors
Tilburg University
Two Temple Gardens
University of London
University of Oxford
Weightmans Solicitors
Which?
3-4 South Square

The Master of the Rolls
Senior Master Whitaker
His Honour Judge Graham Jones
Mr Justice Ross Cranston
District Judge Trent
His Honour Judge Stephen Stewart
Senior Costs Judge Hurst
District Judge Suzanne Burn
His Honour Judge MacDuff
Senior Master Turner



APPENDIX C

CJC attendance at other consumer events

The following list details a number of the events attended by members of the CJC concerning collective redress and collective actions.

- European Union, Portuguese Presidency, Conference on Collective Redress, (Lisbon, 9 – 10 November 2007)
- British Institute of International and Comparative Law, Collective Redress in Europe: where now?, (London, 15 November 2007)
- Oxford University & Stanford University, The Globalisation of Class Actions Conference (Oxford, 13 – 14 December 2007)
- British Institute of International and Comparative Law, The Reform of Group Actions under English Law, (London, 16 April 2008)
- Osgoode Hall Law School, 5th Annual Symposium on Class Actions, (Toronto, 10 – 11 April 2008)
- BERR, Making the EU Work for Consumers (London, 08 May 2008)
- DG SANCO, Stakeholder Workshop on Collective Redress (Brussels, 06 June 2008)



APPENDIX D

Material reviewed in the study

Set out below is a non-exhaustive list of material reviewed and which informed the present report.

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Andrews, *English Civil Procedure: Fundamentals of the New Civil Justice System*, (Andrews (2003)) (OUP) (2003)

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BEUC, *Private Group Actions: Taking Europe Forward* (8 October 2007, X/049/2007)

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Caterer and Hotelkeeper Magazine, (6 October 2005)

Citizens' Advice Bureau, *Representative Actions in Consumer Protection Legislation: Consultation Response to the DTI*. (October 2006)

Civil Justice Council, *The Future of Litigation Funding – Alternative Funding Structures* (June 2007)

Civil Procedure 2008, Vol. 1 (Sweet & Maxwell) (2008) (Waller LJ, ed) (The White Book 2008) at 3.1.10.

Coffee, *Class Wars: The Dilemma of the Mass Tort Class Action*, (1995) 95 Colorado

Law Review 1343

Cramton, *Individualised Justice, Mass Torts, and 'Settlement Class Actions: An Introduction*, (1995) 80 Cornell Law Rev 811

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Department for Communities and Local Government, *Citizenship Survey, April-June 2007, England & Wales*, (October 2007)

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European Commission, Report on Public/Private Enforcement (2004) (The Ashurst Report)

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Giddings, *The ombudsman in a changing world* (1998) 8 (6) Consumer Policy Review 202

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Gubbay, *Private Action in Competition Law: effective redress for consumers and business* (April 2007)

²²⁴ http://ec.europa.eu/consumers/redress_cons/collective_redress_en.htm

²²⁵ (<http://ec.europa.eu/comm/competition/antitrust/actionsdamages/documents.html>)

Her Majesty's Treasury, Budget 2007, (HC 342)

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Hodges, *Global Class Actions Project Country Report: England and Wales*, (2007) (<http://globalclassactions.stanford.edu/reports.html#england>)

Institute for Employment Studies, *Monitoring the Disability Discrimination Act (DDA) 1995*, (1999)

Irish Law Commission, *Multi-Party Litigation*, (2003) (LR CP 25-2003)

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Justice, *The Citizen and the Administration: the Redress of Grievances* (Stevens, 1961)

Koniak, *Feasting while the Widow Weeps*, (1995) 80 Cornell L Rev 1045

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Mulheron, *Justice Enhanced: Framing an Opt-Out Class Action for England*, (2007) *Modern Law Review* 550

Mulheron & Cashman, *Third Party Funding; A Changing Landscape*, 28 *Civil Justice Quarterly* (2008) 312

National Employment Panel, *The Business Commission on Race Equality in the Workplace*, (October 2007)

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APPENDIX E

“Improved Access to Justice – Funding Options & Proportionate Costs”

The Future Funding of Litigation - Alternative Funding Structures²²⁶

EXECUTIVE SUMMARY

KEY ASSUMPTIONS, FINDINGS and RECOMMENDATIONS

KEY ASSUMPTIONS

Key Assumption 1 -

There will be no new Government money to fund the Recommendations

14. This paper is written on the assumption that the Government will not provide any additional public money either to increase legal aid coverage in civil, or to provide any seed corn funding to “pump prime” a Contingency Legal Aid Fund or Supplemental Legal Aid Scheme.

Key Assumption 2 –

The concept of “No Win, No Fee” is now ingrained in the funding system

15. This paper accepts that it is current Government policy to continue to support the

²²⁶ Civil Justice Council (June 2007)

funding mechanism of Conditional Fee Agreements in their current form, and is written on the assumption that Government has no immediate plans to change this policy.

16. In the absence of Legal Aid for much of civil process, no win, no fee agreements do provide access to justice. However, the current operation of Conditional Fee Agreements, backed by after the event insurance (ATE) is dependent on the sustainability of an insurance market that is perceived as fragile, and is beset with complexity causing additional cost and uncertainty. (For recent case law see Appendix 7).

KEY FINDINGS

Key Finding 1 –

None of the alternative funding schemes that have been studied in other jurisdictions would operate effectively in England and Wales.

17. Most schemes operate at very low volumes (no more than 100-120 cases per year, some significantly less), and the majority of their business is in lower value, low risk litigation. Most do not offer any significant form of cost protection.

Key Finding 2 –

None of the studied schemes would be immune from the problem of adverse selection against other funding mechanisms in England and Wales.²²⁷

18. The majority of schemes operate effectively because of a lack of alternative options. Where alternatives have emerged, the effectiveness of the schemes studied is diminished

²²⁷ Schemes studied: Hong Kong CLAF, SLAS and CLAF schemes in all Australian states, Ontario Class Action Fund, general funding of multi party consumer actions in Vancouver, Quebec Fonds Collectifs.

RECOMMENDATIONS

Recommendation 1

A Contingency Legal Aid Fund (CLAF) should not be established under the current cost regime of England and Wales.

19. Although there is considerable merit in the concept of a CLAF, there is insufficient evidence from other jurisdictions that a CLAF style scheme could be transported to this jurisdiction. CLAF's can be successful, but suffer variously from insufficient seed funding, adverse selection, and (even where successful) expansion into higher risk (losing) cases that reduce income and threaten the scheme. It is unlikely that a CLAF would be successful in England and Wales due to adverse selection in a system where conditional fee agreements are operating successfully.

Recommendation 2

A Supplementary Legal Aid Scheme (SLAS) should be established and operated by the Legal Services Commission.

20. A SLAS would expand access to justice by increasing legal aid coverage and good value for money by (i) creating additional funds and (ii) reducing the net cost of the scheme. The SLAS would introduce a form of self-funding mechanism into the legal aid scheme whereby, if a case was won, costs would be recovered and an additional sum would be payable to the fund by means of a levy to be paid as a percentage of damages recovered, or out of recovered costs. The SLAS would offer protection to parties from adverse costs if a case is lost. Positive recovery via the levy could be used to expand public funding for the civil legal aid budget. Also, the SLAS scheme could be engineered to link with Conditional Fee Agreements as a complementary method of funding via a levy on costs/damages recovered.

Recommendation 3

Properly regulated Third Party Funding should be recognised as an acceptable option for mainstream litigation. Rules of Court should also be developed to ensure effective controls over the conduct of litigation where third parties provide the funding.

21. Third party funding is already established in England and Wales. The case of *Arkin* laid down principles for third parties to fund cases and defined to what extent third party funders may be liable for costs in cases that are lost.

22. The decision of the High Court in the case of *Fostif* in Australia (where Third Party Funding has been established for more than a decade) undertook a modern review of the notions of champerty and maintenance. The Court provided guidelines on the role and limits of third party funder influence on the conduct of litigation and the relationships between third party funders, lawyers and their clients.

23. Third party funding has the potential to increase access to justice in areas of consumer rights and multi party action. However it must be effectively regulated and rigorously controlled by the courts.

Recommendation 4

In multi party cases where no other form of funding is available, regulated contingency fees should be permitted to provide access to justice. The Ministry of Justice should conduct thorough research to ascertain whether contingency fees can improve access to justice in the resolution of civil disputes generally.

24. Contingency fees, subject to proper court control may now be an essential method of funding multi party cases where legal aid and/or no other form of funding is available.

25. However, this paper does not recommend the blanket introduction of contingency

fees in contentious business.



APPENDIX F

“Improved Access to Justice – Funding Options & Proportionate Costs”

Report & Recommendations²²⁸

RECOMMENDATIONS 1 – 20

Recommendation 1

Small Claims Limit for Personal Injury Cases

The starting point for recovery of costs in personal injury claims below £5,000 should remain at £1,000.

Recommendation 2

Fast Track Limit for Personal Injury Cases

The Fast Track Limit for personal injury cases should be increased to £25,000. There should be an opt-in option for cases up to £50,000 in value.

Recommendation 3

²²⁸ Civil Justice Council (August 2005)

Personal Injury Cases in the Fast Track

The Predictable Costs Scheme (CPR Part 45 Section II), currently restricted to RTA cases below £10,000, should be extended to include all personal injury cases in the [increased level] fast track and should include fixed costs from the pre-action protocol stage through the post issue process & including trial with an escape route for exceptional cases. Fixed success fees, fixed/guideline ATE premiums and fixed/guideline disbursements should also be part of the scheme.

Recommendation 4

RTA Claims below £10,000

The vast majority of RTA claims fall below the £10,000 value threshold. The CJC recommends that in the vast majority of such claims where liability is not an issue speedy and prompt resolution would be assisted by a less resource intensive pre action protocol that would reduce unnecessary transactional costs. This should include:

- (i) the presumption that the claimant's lawyer will obtain a medical report from an appropriate medical practitioner, at a fixed fee, to be paid promptly by the third party insurer.
- (ii) the development of a "tariff" database for the valuation of general damages
- (iii) in cases where a police report is necessary, the agreement of a national standardised format, fixed fee & target timescale for delivery.
- (iv) a priority objective that all professionals involved in the claim should have regard to rehabilitation of the injured claimant in accordance with the APIL/ABI Rehabilitation Code.

Recommendation 5

In addition to personal injury cases, referred to in Recommendations 1 and 2 it would also be desirable to include housing cases within Recommendation 1, and non personal injury cases within Recommendation 2.

Recommendation 6

Section 6 of the Costs Practice Direction should be reviewed when the amendments to the Practice Direction, approved in July 2005, have come into effect, to ensure that the giving of an estimate carries a sanction if the estimate is departed from significantly.

Recommendation 7

In multi track cases where the value exceeds £1 million, in all group actions and in other complex proceedings there should be a rebuttable presumption requiring the parties to present budgets, supervised by the Court at appropriate stages to ensure compliance with the proportionality provisions of the overriding objective of the CPR.

Recommendation 8

Where the parties have agreed or the court has approved an estimate or budget and/or cap, both the receiving party and the paying party should be entitled to apply for detailed assessment but only at a costs risk if a significant increase/reduction in the amount claimed is not achieved.

Recommendation 9**Benchmark Costs**

In all multi track cases benchmark costs should be provided for pre-action protocol work.

Recommendation 10

With a view to increasing access to justice and providing funding options in cases where ATE insurance is unavailable, the Legal Services Commission should give further consideration to the Conditional Legal Aid scheme (CLAS) previously proposed by the Law Society, the contingency Legal Aid Fund (CLAF) previously proposed by the Bar Council and JUSTICE, and the Supplementary Legal Aid System (SLAS) operating in Hong Kong.

Recommendation 11

In contentious business cases where contingency fees are currently disallowed, American style contingency fees requiring abolition of the fee shifting rule should not be introduced. However, consideration should be given to the introduction of contingency fees on a regulated basis along similar lines to those permitted in Ontario by the Solicitors' Act 2002 particularly to assist access to justice in group actions and other complex cases where no other method of funding is available.

Recommendation 12

Building on the Protective Costs Order as explained in *R (Corner House Research) v Secretary of State for Trade and Industry* [2005] EWCA Civ 192, to permit access to justice in public law cases, further consideration should be given to the wider import of the judgment.

Recommendation 13

Building on the judgment of the Court of Appeal in “*Arkin*” further consideration should be given to the use of third party funding as a last resort means of providing access to justice.

Recommendation 14

Encouragement should be given to the further expansion and public awareness of Before the Event Insurance to provide wider affordable access to justice funding complemented where necessary by a strong After the Event Insurance market.

Recommendation 15

The particular problems of funding group actions should be taken into account when considering Recommendations 10-13.

Recommendation 16

In addition to the presumption relating to the provision of medical reports in RTA cases below £10,000 (Recommendation 4) further work should be conducted by the CJC to develop an industry based agreement for fixed/guidelines fees for medical experts in all personal injury cases in a revised fast track of £25,000 (**Recommendation 2**).

Recommendation 17

Between the parties costs should be payable on the basis of costs and disbursements reasonably and proportionately incurred and should be assessed at hourly rates determined from time to time by the Costs Council (Recommendation 19) without prejudice to the ability of solicitors (and barristers) to agree other rates on a solicitor/client basis.

Recommendation 18

The CJC endorses the proposed legislation announced by the Government to regulate Claims Management Companies and urges that this be introduced with as much speed and rigour as possible so as to protect consumers and reduce if not remove opportunities for “technical” costs litigation that have bedevilled the Courts at all levels.

Recommendation 19

Successful litigants in person should be entitled to a simple flat rate (or fixed fee in a scale scheme) whether or not they have sustained financial loss.

Recommendation 20

A Costs Council should be established to oversee the introduction, implementation and monitoring of the reforms we recommend and in particular to establish and review annually the recoverable fixed fees in the fast track and guideline hourly rates between the parties in the multi-track. Membership of the Costs Council should include representatives of the leading stakeholder organisations involved in the funding and payment of costs and should be chaired by a member of the judiciary.

Recommendation 21

That the DCA and the professional bodies (Law Society and Bar Council) should work together with the Attorney General's pro bono co-coordinating committee to introduce a pro bono CFA.



APPENDIX G

European Union – Ten Consumer Benchmarks

The European Commission identified ten benchmarks for the effective and efficient collective redress mechanisms, the aim of which is to give rise to satisfactory consumer redress. Those benchmarks are:²²⁹

1. The mechanism should enable consumers to obtain satisfactory redress in cases which they could not otherwise adequately pursue on an individual basis.
2. It should be possible to finance the actions in a way that allows either the consumers themselves to proceed with a collective action, or to be effectively represented by a third party. Plaintiffs' costs for bringing an action should not be disproportionate to the amount in dispute.
3. The costs of proceedings for defendants should not be disproportionate to the amount in dispute. On the one hand, this would ensure that defendants will not be unreasonably burdened. On the other hand, defendants should not for instance artificially and unreasonably increase their legal costs. Consumers would therefore not be deterred from bringing an action in Member States which apply the "loser-pays" principle.
4. The compensation to be provided by traders/service providers against whom actions have been successfully brought should be at least equal to the harm caused by the incriminated conduct, but should not be excessive as for instance to amount to punitive damages.

²²⁹ http://ec.europa.eu/consumers/redress_cons/collective_redress_en.htm

5. One outcome should be the reduction of future harm to all consumers. Therefore a preventive effect for potential future wrongful conduct by traders or service providers concerned is desirable – for instance by skimming off the profit gained from the incriminated conduct.
6. The introduction of unmeritorious claims should be discouraged.
7. Sufficient opportunity for adequate out-of-court settlement should be foreseen.
8. The information networking preparing and managing possible collective redress actions should allow for effective "bundling" of individual actions.
9. The length of proceedings leading to the solution of the problem in question should be reasonable for the parties.
10. Collective redress actions should aim at distributing the proceeds in an appropriate manner amongst plaintiffs, their representatives and possibly other related entities.



APPENDIX H

Minutes of the Four Collective Redress Events

First Collective Redress Event: Minutes

October 2006

There was a strong feeling held by the considerable majority of attendees, that there was a lack of access to justice in consumer redress. There was strong support for the group and representative procedures to be developed further to promote better access to justice.

The **funding** of claims dominated discussions, as this is perceived as the **biggest barrier** to access to justice.

There was a similarly feeling that the **court should take on a bigger role** in controlling multi party proceedings (subject to funding reform allowing meritorious cases to get off the ground in the first place).

There was discussion surrounding the perception of the US class action system, but unanimous acceptance that our procedures could be developed to avoid their perceived excesses (Australia has been running group and class actions for years without the problems of the US).

There was common feeling that reform was inevitable (particularly in the face of anticipated EU reforms), and that it was essential to plan properly for this, to ensure our

systems were effective. Lawyers from both sides would rather a controlled English system that was “fair”, “balanced”, and “controlled by the courts”, than the potential exposure to US or other EU court systems.

There was notable support for opt-out actions for consumer claims, mainly on the grounds of that consumers were “ill-informed”, “incapable of running claims”, and “completely frightened of conventional court processes”. The role of private enforcement in as a deterrent was recognised.

One argument in support for opt-out in consumer claims was the opportunity to start a claim much earlier, which could stop the damage to further (ie a greater number of) consumers.

There was unanimity that an English system could be designed that was fair, promoted access justice, but was tougher than other systems (and less punitive). There was considerable support for the cy pres doctrine which could create funds that could potentially be distributed to disadvantaged citizens with unmet legal need, such as advice, rights education, and debt management

There was no great concern over fuelling the perception of a compensation culture, save for the need to avoid adopting a US approach which may open the floodgates. Access to justice was considered to prevail over perception concerns. This was supported by confidence that the judiciary were capable of controlling any possible excesses, and would be able to curb lawyer or funder driven litigation.

In discussion of potential improvements to the court process, there was support for:

- A Minimum number of clearly identified claimants before an action was commenced.
- No need for "designated" consumer bodies only to bring claims.
- Judges to certify a case before it was allowed to proceed (including a representativeness test on the claimant group or class)

- Judges having the power to say that a case, however meritorious, cannot proceed (on grounds of proportionality, or that it simply isn't justiciable in a reasonable amount of time and cost)
- Judicial control over case management (judges to get better specialist training)
- Judicial control on what legal argument will be accepted (ie limitation on running a "death by paperwork" case)
- Judicial control over disclosure (effecting strong limitations, and avoiding "fishing")
- Judiciary imposed costs budgeting, capping, and monitoring (limiting the amount either side can spend on the case)
- Development of costs protection orders as appropriate (public interest test - *Cornerhouse* refers)
- Judiciary to approve all settlements, and means of advertising and distribution (particularly salient if opt-out to prevent "low-balling" by lawyers anxious to get their costs).
- *Cy pres* doctrine (if opt-out), if a judge considers appropriate (deterrent measures).

In discussion of potential improvements to funding, there was support for:

- An acceptance that any funding system would take a percentage of damages
- Green light for a Supplemental Legal Aid Scheme (maybe on a shared basis with lawyers taking cases over on a CFA, the legal aid fund takes a percentage of damages)
- Third party funding to move into the mainstream, but controlled strictly by rules of court and regulation.

The Civil Justice Council will prepare a supplementary paper as advice and recommendations to the Lord Chancellor on reform of court processes to improve access to justice in multi party consumer redress claims.

Second Collective Redress Event: Minutes

November 2007

Keynote speech by the Master of the Rolls, the Rt Hon Sir Anthony Clarke

The Master of the Rolls explained that part of the role of the CJC is to facilitate discussion in relation to aspects of the civil justice system. He noted that by holding events such as these in the past, the CJC has succeeded in bringing diverse interests together and finding common ground between them.

The Master of the Rolls touched upon a recent competition judgement of Mr Justice Lewison which contained the following pertinent quotation from *The Wealth of Nations* by Adam Smith:

“People of the same trade seldom meet together, even for merriment and diversion, but when they do, the conversation ends in a conspiracy against the public, or in some contrivance to raise prices”.

The Master of the Rolls expressed his wish to discuss the following set of questions:

1. What types of complaint are we discussing and against whom?
2. What is the nature of the alleged liability? Is it contractual, tortious, quasi-criminal, regulatory or is it a mixture of those? If it is a mixture, how should they be mixed together?
3. Is the claimant seeking compensation or what?
4. What is the real purpose of the claim?
5. Is it:
 - i. compensation?
 - ii. or is it regurgitation of unlawful profits, and if so to whom should such

profits be paid?

Should it be to:

- a. the claimant? Even though the claimant's loss may be different than the amount of unlawful profits that have been made.
 - b. a consumer organisation through the operation of *cy pres* or something like it (where the individual damages are small)?
 - c. the state?
 - d. a bit of each?
6. Insofar as the claim is intended to punish the defendant, is this really the role of private litigation or should that be the role of the state?
 7. If not why not?

CRITICALLY

8. By whom should the litigation be funded?
 - a. The claimant? This is obviously a possibility, but not one that many claimants, especially consumers, could take up.
 - b. The claimant's lawyers?
 - c. The state?
 - d. If otherwise, how?
9. Is the whole thing worth the candle?
10. Should the claimant give the defendant security for costs as they do in some parts of Australia? If not, why not?
11. How should the claims be advanced?
 - a. By test case?
 - b. By representative action?
 - c. By group action?
 - d. By some form of class action if that is different?
12. How should the claim be funded?
 - a. Out of the claimant's own pocket?

- b. CFA? If by CFA, should uplift of more than 100% be permitted? Is there any limit to the uplift that could be allowed? How should we decide what the uplift should be? Are there any principles which should inform the answer to that question?
 - c. Contingency fees?
 - d. Third party funding? The Master of the Rolls mentioned a Times article on hedge funds going into third party funding.²³⁰ Should third party funders be regulated? If so, by whom and how?
 - e. Legal aid contingency fund method? SLAS or something like it?
 - f. State?
13. If the claimant fails and the defendant succeeds, should the defendant recover his costs from the claimant, or the group he represents, or those who opted in or those who have not yet opted in? If the defendant should not recover his costs why not? Should there be a cap on the amount of costs that the defendant can recover?

There is already a sophisticated system of compensation in such areas as competition law. Using the Devenish case as his point of reference, the Master of the Rolls outlined the European system of competition law enforcement and follow-on actions. He touched upon the issue of damages which was considered by Mr Justice Lewison and noted that the case raised important issues of substantive law, procedure and principle as well as matters of political and social policy.

Opening remarks by Michael Napier QC

Michael Napier extended a warm welcome to delegates. He summarised the genealogy of CJC involvement in collective redress, an issue encapsulated by the conference document, “Introduction to the Event” by Robert Musgrove, Chief Executive to the Civil Justice Council.

²³⁰ Michael Herman, “Former litigator hired to invest \$100m in court cases for UK hedge fund”, *The Times* (28 November 2007), online: Times Online <http://business.timesonline.co.uk/tol/business/industry_sectors/banking_and_finance/article2957156.ece>.

Michael Napier explained that CJC involvement in collective redress emerged as a corollary of its work on funding and access to justice. In August 2005, the CJC produced a report on access to justice in relation to funding, an issue that has driven a lot of the work the CJC has done. Although this report did not address consumer and collective redress, it considered the problem of funding group actions. A second report in June 2007, examined funding and proportionate costs, and looked at alternative structures. At a CJC event in October 2006, the Council began to probe in a preliminary way at this area. The conclusion of that event gave the platform for coming here to look much more closely at this area.

The CJC's June 2007 report stated that, "As further development on consumer redress takes place in the EU and Government, the Civil Justice Council will prepare a supplementary paper of advice and recommendation to the Lord Chancellor on any reform necessary to the CPR to improve access to justice in this area of group consumer litigation."²³¹ This reference to the CPR is important because any reform, whether it is a group litigation order with tweaks or an opt-out system with brakes, will at most require change to primary legislation and at least amendment to the CPR.

Quoting Robert Musgrove's paper, Michael Napier explained that the event provided the opportunity to consider evidence on whether there is genuine need for reform, or whether that need is merely perceived. Napier asked whether the collective redress debate equated to finding a solution to a problem. He also questioned whether there is a real access to justice gap.

Napier outlined the agenda and introduced the first speaker, John Sorabji, Legal Secretary to the Master of the Rolls and member of the CJC's Collective Redress Committee.

²³¹ Civil Justice Council, *Improved Access to Justice – Funding Options & Proportionate Costs: The Future Funding of Litigation - Alternative Funding Structures*, Paragraph 168 at 71, online: Civil Justice Council <http://www.civiljusticecouncil.gov.uk/files/future_funding_litigation_paper_v117_final.pdf>.

Discussion following John Sorabji's speech**Michael Napier QC:**

Michael Napier commended John Sorabji on his comprehensive review of collective redress. He highlighted the importance of learning from the U.S. experience of class actions. Napier explained that there was a balanced representation of claimant and defendant interests at the event. He queried whether the sole purpose of group litigation orders was to save costs. Napier added that the advent of group litigation orders finally brought into the CPR a regime under which practitioners could work.

Master of the Rolls:

The Master of the Rolls asked John Sorabji what restrictions made to the role of the representation order in the 1910 case could be relaxed under the CPR.

John Sorabji:

The primary restriction is the three-part test of what constitutes the same interest. This restriction could be relaxed by ending the restriction as to the common interest giving rise to the cause of action and the type of damages claimed.

Judge 1:

The judge declared his firm belief that representative actions are the answer, as they are a very good way of getting a swift liability decision. He cast doubt on the severity of the aforementioned restrictions and stated that these problems could fit within 90.6 as it stands now. Judge 1 then alluded to the question of funding.

Defendant lawyer 1:

Defendant lawyer 1 asserted his belief that, in practice, representative action procedure

cannot be used sensibly as currently drafted. It would be worth looking at representative procedures in other jurisdictions, such as the U.S., where more discretion is allowed to make orders which would enable cases to be tried more effectively and cheaply.

Claimant lawyer 1:

Claimant lawyer 1 remarked that group litigation orders potentially increase costs. He said that the attraction of them is the costs regime. Claimant lawyer 1 added that we might as well use ordinary procedure for large numbers of claims.

Claimant lawyer 2:

Claimant lawyer 2 voiced his support of group litigation orders, calling them a fantastic tool. He argued that there are much bigger problems with why cases are not coming forward. Claimant lawyer 2 stated that the two issues which really need to be addressed are:

1. How to get more third party funding in: this has to be developed as public funding is not an option.
2. Causation: the evidential hurdle is too high, allowing defendants such as drugs companies to get away with far too much.

Master of the Rolls:

The Master of the Rolls said that this would involve changing the substantive law relating to causation.

Claimant lawyer 3:

The City is not desperate to fund lots of individual pharmaceutical cases. After all, the basic criteria is that aggregate damages need to be in excess of £10 million. The representative rule may provide a partial solution if it has the effect of aggregating damages. In the absence of this solution, hedge funds will not go anywhere near group

litigation orders.

Master of the Rolls:

The Master of the Rolls asked Claimant lawyer 3 to what extent such a funder would be willing to fund the underlying investigation required to identify the underlying liability.

Claimant lawyer 3:

Claimant lawyer 3 replied that the possibility of funding would be increased if the return, expected aggregate damages and chances of success are good enough and the timescale short enough. He added that a procedure which has the ability to aggregate damages and provide a quick answer would mean that more funding might be available.

Judge 2:

Judge 2 made the following points:

1. Funding is the basic problem. Sweden has recently brought in a form of class action but there has been very little take up. Sweden does not have provision for contingency fees. The problem therefore is funding. We are driven to contingency fees or some other form of funding.
2. We shouldn't refuse to look at the U.S. class actions system because of its unattractive features. The problems with jury trials, punitive damages and uncontrolled contingency fees are not shared by our system. If we can control funding in some way then there is much in the U.S. system that we can benefit from but whatever you call it, it is a form of class action.

Michael Napier:

Michael Napier said that it was tempting to agree with the proposition that the big problem is funding. However, he noted that the purpose of the event was not aimed at the

question of funding, rather its purpose is to examine the procedural side of problem. He informed the delegation that the last time the CJC met, it made the following five conclusions:

1. Funding is the greatest barrier to bringing legitimate multiparty consumer redress claim
2. Alternative funding systems for multiparty claims would take a percentage of damages
3. The current group litigation procedure works reasonably well but could be improved
4. An opt-out procedure would be appropriate in some consumer claims
5. The judiciary should play a more proactive role in controlling and managing multi-party litigation

Michael Napier encouraged the delegation to look at these last three points rather than funding.

Discussion following the presentation of Steven Altham, OFT

Michael Napier:

Michael Napier asked the delegation how it viewed the recommendations made by the OFT.

Claimant lawyer 3:

Claimant lawyer 3 welcomed the OFT recommendations. He articulated the concern that the recommendations focus on a discrete area and yet raise issues that have a much wider impact. He commented that if these reforms were simply focused on the competition arena, they would be open to abuse by litigants pleading competition issues in

commercial disputes to take advantage of a playing field tipped in favour of the claimant, or lawyers seeking success fees of over 100%. He suggested that one answer to that might be that we have a specialist tribunal in UK which may give more scope to be more expansive in terms of rule changes that might be under consideration without having an impact across the CPR for all other claims.

Steven Altham:

Steven Altham asked Claimant lawyer 3 how realistic his vision of the potential consequences of the recommendations was.

Claimant lawyer 3:

Claimant lawyer 3 responded that in the commercial context, it is a real possibility. He stated that it was seen as the nuclear option in contractual disputes. He questioned how achievable it is to limit reforms to one particular area.

Consumer representative 1:

Consumer representative 1 congratulated the OFT on its report, stating that it dealt well with the key issues. Her organisation regards an opt-out scheme as essential as it would be incredibly difficult to run a case on an opt-in basis. Although it would prefer a general opt-out scheme, Consumer representative 1 understood the desire for a mechanism to control it. As the need for opt-out comes up very rarely, to automatically shut down the barriers would be extremely unjust to consumers. Consumer representative 1 considered the expansion of representative bodies a good idea. She expressed her support for special designation in respect of a particular issue rather than simply for life.

Consumer representative 2:

Consumer representative 2 echoed the comments made by Consumer representative 1. He concluded that OFT would deal with high profile cases and that consumer organisations

would deal with low risk small cases. Accordingly, he wondered who would deal with the medium level “in-between” cases.

Claimant lawyer 2:

Claimant lawyer 2 acknowledged the importance of Consumer representative 2’s point. Private enforcement in the cases envisaged by the OFT would pose a massive step for law firms.

Judge 2:

Judge 2 questioned the desirability of restricting class actions to particular types of cases.

Defendant lawyer 2:

Defendant lawyer 2 similarly expressed opposition to a multi-layered regime. He envisaged that the debate would only move on after various aspects of the U.S. class actions system were handled.

Master of the Rolls:

The Master of the Rolls asked whether defendants would be protected at all against claim that fail. Is the defendant to have any protection against costs? If so, whom is it going to be against? He noted that the whole package needs consideration.

Steven Altham:

Steve Altham explained that this aspect of the proposals is a work in progress.

Master of the Rolls:

The Master of the Rolls stated the need to decide in what classes of case the defendant is to be protected; in what classes of case he is not; in what classes of case the defendant will be made to pay 300% over the base cost if he loses but not give him anything if he wins. The Master of the Rolls noted the complexity of these sorts of issues.

Claimant lawyer 1:

Claimant lawyer 1 remarked that resolving the issue of adverse costs is absolutely vital in taking the debate forward. While claimants have some control over their own costs they have absolutely no control over adverse costs, particularly in cartel cases. In such cases, large companies can throw huge resources into the defence over which claimants have no control.

John Sorabji:

John Sorabji said that although this discussion is predicated on having a costs regime where the loser pays, in the U.S. and other jurisdictions parties cover their own costs whether they win or lose. He added that if we are to consider costs and funding, we ought to consider whether that might be something we have to move towards.

Michael Napier:

Michael Napier moved the discussion onto the OFT's treatment of opt-out.

Steven Altham:

Steven Altham explained that the OFT takes an incremental approach and believes in having different instruments available rather than a one-size-fits-all style. Whether an opt-out scheme should be applied ought to be for the individual judge to decide.

Michael Napier:

Michael Napier confirmed that this would predicate the power of the judge to implement a rule that allows opt out.

Claimant lawyer 2:

Claimant lawyer 2 stated that opt-in schemes would not work in consumer cases. Though he appreciated why the OFT paper sat on the fence, he explained that continued absence of change to the legal architecture combined with judges who have traditionally been involved in opt-in cases, means that opt-out schemes would be little used.

Claimant lawyer 1:

Claimant lawyer 1 spoke of the financial risks attached to making unsuccessful opt-out applications to the judge.

Defendant lawyer 1:

[Unclear]

Michael Napier:

Michael Napier confirmed that there is a benefit for defendants in knowing exactly the scale of the problem.

Defendant lawyer 1:

Defendant lawyer 1 stated that there are advantages to the defendant in having an opt-out system.

John Sorabji:

John Sorabji explained that defendants would favour an opt-out system because of the finality of litigation.

Defendant lawyer 3:

Defendant lawyer 3 argued that while opt-in schemes could work for competition and consumer issues, they would not be successful in complex product liability and pharmaceutical cases.

Steven Altham:

Steven Altham used this argument as support for having a specific collective action for competition law. He added that it would be a shame not to have a collective redress system at all.

Defendant lawyer 3:

Defendant lawyer 3 advised that a measure of flexibility would be required.

Michael Napier:

Michael Napier referred to the desirability of a generic procedure for all types of claim.

Steven Altham:

Steven Altham said that this would be fine as long as there is a procedure that works.

John Sorabji:

John Sorabji argued that having a generic flexible procedure would probably be better

than a subject specific approach. He cautioned that any new procedure would have to be consistent with the Woolf reforms.

Discussion following Academic 1's presentation

Master of the Rolls:

The Master of the Rolls asked Academic 1 what the essential ingredients of the opt-out system are.

Academic 1:

Academic 1 explained that opt-out systems are characterised by three key features:

1. Certification criteria at the outset
2. Due process notice requirements
3. *Res judicata* on the common issues

Master of the Rolls:

The Master of the Rolls asked Academic 1 what the effects of opt-out systems are.

Academic 1:

Academic 1 responded that opt-out schemes enable individuals to proceed alone or opt out of litigation altogether.

Master of the Rolls:

The Master of the Rolls asked Academic 1 to what extent cost protection exists for defendants in Australia and Canada.

Academic 1:

Academic 1 summarised the system of costs protection in Australia.

Master of the Rolls:

The Master of the Rolls asked Academic 1 how the claimant funds the security.

Academic 1:

Academic 1 explained that funds could be lodged in court or the claimant could make guarantees as a precondition of bringing the action further.

Master of the Rolls:

The Master of the Rolls asked Academic 1 whether this has worked in the examples listed in her paper.

Academic 1:

Academic 1 stated that very few have had security for costs applications brought.

Master of the Rolls:

The Master of the Rolls questioned why the defendant is not routinely asked for security for costs.

Academic 1:

Academic 1 remarked that courts make this requirement if the public interest demands it. She said she was not aware whether the Australian courts asked for security for costs as a matter of course.

Master of the Rolls:

The Master of the Rolls asked whether this meant, in reality, that defendants do not recover their costs in opt-out cases.

Robert Musgrove:

Robert Musgrove informed the Master of the Rolls, in Quebec, costs protection is provided by the state, which effectively insures cases and takes a percentage of the damages if the case is successful.

Academic 1:

As many cases settle, there is a lack of knowledge regarding how defendants' costs are dealt with.

Judge 1:

Judge 1 sought clarification from Academic 1 as to the difference between opt-out and the mandatory class.

Academic 1:

Academic 1 expressed her view that the problem with a mandatory class is that it prevents people from opting out with respect to their entitlement to get compensation.

Judge 1:

Judge 1 shared his worry about the possibility that those who opt out may still bring their own liability claims.

Academic 1:

Academic 1 assured Judge 1 that, in reality, very few opt out. In the U.S., over 99% of litigants remain in the class. In Australia, claims made by those who have opted out are stayed pending the result of the collective action.

Judge 1:

Judge 1 expressed an interest in learning how many group litigation order applications are refused and why.

Academic 1:

Academic 1 agreed that it would be interesting to discover on what basis group litigation orders are refused e.g. on the grounds of commonality or superiority. The transparency of the Canadian certification process means that this can be found out with considerable ease.

Claimant lawyer 2:

Claimant lawyer 2 complimented Academic 1 on her paper and asked whether it presumed the establishment of an opt-out system.

Academic 1:

Academic 1 confirmed that under her proposals there would be a presumption of opt-out but with superiority criteria built in. The final decision on the system to be used must always rest with the individual judge.

Claimant lawyer 2:

Claimant lawyer 2 voiced his support for the presumption of opt-out in cases of all types.

Defendant lawyer 4:

Defendant lawyer 4 questioned Academic 1 on her proposal that at some stage in the opt-out process there has got to be opt-in. He did not understand how that would work and he asked whether there has been any empirical evidence of that sort in any other jurisdiction.

Academic 1:

Academic 1 explained that this exists in the U.S., adding that the opt-in rate at the end can be as low as 10%, or as high as 100%. She stated that opt-out converts to opt-in at some point. Academic 1 questioned whether judges or law firms could make a particular claim opt-in at the outset by, for example, defining a class by the damage it has suffered and whether it has a retainer with a particular law firm. One Australian judge deemed that to be an abuse of opt-out regime, holding that an opt-out system is only meant to describe and pull in the class. A later ruling held that it constituted a legitimate way of making a claim opt-in. This decision has been appealed and the case is to be heard shortly.

Defendant lawyer 4:

Defendant lawyer 4 stated that if you have opt-out but with opt-in later, effectively it is the same thing as opt-in.

Academic 1:

One feature of the opt-out system is aggregate damages. Opt-out pulls people into the class description at the outset, while with opt-in people have to make a proactive decision to join the class. As regards the legal effect, in opt-out cases the class is bound on judgment, which can be for the benefit or disadvantage of the entire class. However, with

opt-in cases, the finality of litigation is not there.

Judge 2:

Judge 2 confirmed that when people opt in to a class, all their action means is “I want my money!”. He argued that it is misleading to say that opt-out cases become opt-in because they only become opt-in in the sense that members claim their due compensation.

Master of the Rolls:

The Master of the Rolls raised the costs implications for the defendant who successfully opposes an opt-out case.

Robert Musgrove:

Robert Musgrove suggested that third party funding or legal insurance could handle these situations.

Professional representative 1:

Professional representative 1 contended that it was highly appropriate to have the opportunity to pursue class action, adding that he did not see why claims should be run on an exclusively opt-in basis. Using equal pay cases as an example, Professional representative 1 said that claims can be made on different grounds and at different times. With a class action, the court could define the issues to be dealt with and avoid this problem, which wastes a great deal of time and effort. On a related point, Professional representative 1 stated that in the bank charges case only one decision is needed as regards the contractual relationship between the parties.

Academic 2:

Academic 2 congratulated Academic 1 on her paper and then made the following points:

1. Would it be a good idea to consider the possibility of public enforcement as part of the superiority test? A system of checks and balances system could be incorporated into this so that if public enforcement failed, the private sector could take over.
2. Dutch experience:
 - a. A small but significant percentage opted out of the Dexia settlement. Academic 2 touched upon the dubious role of claim management agencies in this matter, who effectively stimulated those opting out.
 - b. Academic 2 cast doubt on the argument made against opt-out that everyone is entitled to their day in court so they can obtain a tailor made solution to their problem. She argued that it was important to consider ways of encouraging litigants not to opt out.

Academic 1:

In response to the points made by Academic 2, Academic 1 stated that public enforcement is part of the superiority matrix in Canada. On whether the right to opt out should be limited, Academic 1 explained that other jurisdictions have considered whether it should be the judge's role to decide whether an opt-out becomes a mandatory class because of the need for finality. She added that this has not been implemented in anywhere but there are many reasons why this idea makes sense.

Consumer representative 1:

Consumer representative 1 asked whether we have closely analysed which types of claims would be suitable for collective action. She said that she has been struggling to come up with scenarios where her organisation would bring actions if its powers were not just limited to competition actions. The variety of cases and level of competition mean that it would be incredibly difficult to classify things in a way that you could run them either on a group basis or on a test case basis.

Academic 1:

Table 2 shows the range of grievances which have been brought in opt-out systems elsewhere. This shows the potential cases which would be suitable for class action here but experience sometimes brings different and unexpected results as the Canadian experience shows us.

Government representative 1:

Government representative 1 touched upon the motivations for using the court system.

Academic 3:

Academic 3 explored the division between consumer groups in relation to collective redress. While all feel that there are uses for collective action, some would not have the resources to take advantage of such a system.

Academic 1:

Academic 1 said that funding was the key issue here. Unless funding and costs protection is secured, collective redress will be underutilised.

Academic 4:

Academic 4 congratulated Academic 1 on her research. He asserted the belief that it is dangerous to examine civil justice systems to the exclusion of other solutions such as regulatory and ADR mechanisms. Academic 4 questioned why £3 billion is being wasted on individual cases in relation to the bank charges matter when only one test case is needed to deal with the case and the FSA has said that if the banks lose it will use its regulatory powers to order them to make compensation orders. Academic 4 directed his questions to the government. Firstly, what is the simplest, cheapest, quickest, most cost efficient and cost proportionate methods of solving these problems. Secondly, how do

you balance the different opportunities presented by different systems?

Michael Napier:

Michael Napier indicated that it would be more appropriate to deal with these questions in the next session.

Professional representative 2:

Professional representative 2 asked Academic 1 to what extent she had come across evidence of need at the European level.

Academic 1:

The Consumer Strategy and the existence of add on actions in some European countries demonstrate evidence of need for a collective redress mechanism in Europe. However, constitutional issues make this problematical. Academic 1 added that she could not comment on this particular area with any expertise.

Presentation by Judge 2

Judge 2 explained that he was originally billed to deal with substantive law issues. With that in mind, the Civil Justice Council set up a committee to deal with those issues under the chairmanship of Michael Black QC. Judge 2 then congratulated fellow committee member, Academic 1, on her research.

He offered the following thoughts by way of summary for what he hoped would be a discussion to see whether a consensus could be reached to take matters forward:

1. Some additional procedure is needed to enable collective redress to be achieved in appropriate cases. There is a deficiency in our current procedures with Europe it would be desirable to have such procedure.
2. We should not shrink from calling it a class action because that is what it is.
3. We can learn from the American system and experiences about what we must take care to exclude. In undertaking such an exercise we are aided by the fact that our system does not contain the features which make the U.S. class actions system unattractive to us (e.g. jury trials and punitive damages). The issue of contingency fees might be one area of difficulty. Although there seems to be a consensus against the introduction of contingency fees, is collective redress viable without them?
4. Any additional procedure should be generic. It should not be limited to certain areas such as consumer redress or competition. It must be able to deal with collective redress across the whole spectrum.
5. We may be able to achieve the additional procedure by modifying and extending the existing CPR provisions in relation to representative actions. Reference was made to a contractual case limitation as an example of something that could be easily altered using the CPR.
6. Judge 2 stated that in his opinion, the balance of evidence is weighted in favour of opt-out rather than opt-in. It seems from the evidence that opt-in mechanisms do not enable class actions to get off the ground. Although some defendants instinctively react to opt-out, other defendants (and representatives of defendants) support the quantification of liability and finality that an opt-out system brings.
7. If there is to be such a system, it must be closely controlled by the court. The court will need to certify that the procedure is appropriate in the particular circumstances. If contingency fees are permitted the court has to exercise very close control over the arrangements of those fees and the amount of recovery. Unbridled contingency fees would lead us at least part of the way down the American road.
8. Judge 2 asserted the view that there must be proper costs protection for defendants. The protection given in the Canadian and Australian systems is more illusory than real. In Ontario, there is some state guarantee or state support for the

successful defendant. But given our legal aid history, the story may well be different over here. The playing field would not be level if there was not proper protection for defendants' costs.

9. The system must be compensatory. Punishment and disgorgement of excess profit are matters for the state. The *cy pres* doctrine may be considered to be deterrent or punitive in nature. If that view is taken, an opt-out system should have some sort of *cy pres* application of unclaimed damages.
10. Judge 2 sees an inevitable need to change the substantive law and to suspend the limitation period.

Discussion following the presentation of Judge 2

Professional representative 1:

Professional representative 1 indicated his agreement with Judge 2's points. Modification of the CPR would be a step in the right direction, but change to the substantive law would be needed. He suggested that the *cy pres* surplus could be used to pay the defendants' costs in successful cases.

Judge 1:

Judge 1 said that he was not averse to the one-size-fits-all idea in relation to representative actions. However, he added that he would not want to see this as a cross border procedure that replaces the group litigation order. Judge 1 also touched upon contingency fees.

Michael Napier:

Michael Napier informed the delegation that the most recent Civil Justice Council report on funding looked at contingency fees quite carefully. It concluded in favour of the

Ontarian system of court-supervised contingency fees. Whilst the abolition of the fee shifting rule was not contemplated, it was agreed that if the only way to fund group actions was through a form of contingency fees then this rule would have to be revisited. Though an attempt has been made to confine today's debate to procedural matters, it is clear that funding is an essential part of the debate. The eventual conclusions of the Civil Justice Council will combine past work on funding together with procedural issues.

Judge 1:

Judge 1 argued that disgorgement of profit is a better method of ensuring the effectiveness of contingency fees.

Judge 2:

Judge 2 explained that the proposed procedure would be supplementary and that the system of group litigation orders would be retained.

Academic 4:

Academic 4 advocated the need for a holistic approach to the problem rather than an exclusive focus on the civil justice system. He also spoke of the reluctance of regulatory bodies to get involved in issues relating to compensation.

Michael Napier:

Michael Napier asked Academic 4 what system he would be in favour of.

Academic 4:

Academic 4 replied that he would favour a public law solution in which investigators would have the ability to institute a compensation order. This is the only such system that would satisfy the criteria which Meglena Kuneva has put forward of speed, efficiency,

effectiveness and absence of abuse.

Michael Napier:

Michael Napier asked how compensation would be delivered to individuals under such a system.

Academic 4:

Academic 4 explained that the threat of an investigation, fine, court action and compensation order would encourage infringing companies to compensate individuals and secure leniency as a result. Where the details of individuals harmed are known, compensation could be in monetary or other form.

Claimant lawyer 1:

Claimant lawyer 1 said that such a proposal would deal only with follow-on situations, and would not cover stand-alone cases.

Academic 4:

Academic 4 said that public pressure could be used to pressure infringing companies into paying compensation without going through the court system first. This is a cheap and quick solution. Liberalisation of the class action mechanism would on the other hand herald abuse as can be seen through the examples of the U.S. and Australia.

Claimant lawyer 1:

Claimant lawyer 1 argued that liberalisation is required to bring about efficiency.

Academic 4:

Academic 4 stated that the system is integrated and needs to be effective as a whole.

Government representative 2:

Government representative 2 said that while she saw the merits of the system outline by Academic 4 she was not convinced that there are public bodies which cover the very wide range of cases which could be litigated or the organisational capacity to pick up on all infringements. She ended her remarks by stating that it seemed ambitious that regulation could be as perfect as Academic 4 had described.

Claimant lawyer 4:

Claimant lawyer 4 argued that the system proposed by Academic 4 was not an “effective quick big stick”. He supported this point by reference to a pharmaceutical case in which an investigation into whether a drugs company should be prosecuted took four years. Claimant lawyer 4 then spoke of the fallacy of public pressure, stating that infringing companies often pay large sums to victims in the U.S. but not in Britain regardless of the press they get here. Using environment nuisance as his point of reference, Claimant lawyer 4 also questioned whether regulatory authorities would be capable of investigating the individual effects caused by one infringement.

Defendant lawyer 1:

Defendant lawyer 1 referred to Academic 4’s plan as “the Holy Grail”. He said that a lot of work would need to be done before the plan could be put into action. He raised the concern that alternative methods of resolving the problem would have to sit on the backburner in the meantime. Defendant lawyer 1 added that the proposed change would not make any difference to the two parallel processes currently operated in our system.

Claimant lawyer 2:

Claimant lawyer 2 questioned whether regulatory authorities can always know what the problems are and always be able to do what is right. He asserted his belief that it is important for individuals to have the power to group together and bring a claim.

Consumer representative 1:

Consumer representative 1 remarked that the regulatory route is attractive because of the issues of independence and public trust. Although Academic 4's idea may not be a good practical solution given the resource and structural constraints, it was still a good solution which should inform future work on this issue.

Academic 1:

Academic 1 agreed that Academic 4's proposal was the ideal but noted that it was not supported by the current realities. She spoke of the gap for private law remedies when public authorities are involved and referred to the disadvantages suffered by systems which lack a certification process.

Academic 4:

Academic 4 explained that the regulatory framework in the UK is well developed but that it is sometimes difficult to identify because of its sectoral nature. He said that a sectoral compensation scheme, as operated by Nordic states and New Zealand, could deal with the pharmaceuticals problem raised by Claimant lawyer 4. Academic 4 informed the delegation that the Nordic systems work extraordinarily well according to the criteria of speed, low cost and absence of abuse etc. He added his personal belief that the pharmaceutical industry could be persuaded to distribute compensation if they were promised that they would not be hit by a great deal of class action litigation.

Michael Napier:

Michael Napier stated that pharmaceutical companies have been asked for a long time to produce their own compensation schemes.

Claimant lawyer 1:

Claimant lawyer 1 wondered whether it would be better to pilot the OFT's restricted version rather than trying to introduce sweeping change at once.

Professional representative 2:

Professional representative 2 stated that the regulatory debate is a very interesting one but that it was not the focus of this event which is to discuss whether we should have collective redress or not. He remarked that an effective route to private law remedies is needed to deal with multiple private law breaches. He noted that reform is essential and declared support for the propositions advanced by Judge 2. Professional representative 2 then raised his concern about claimants funding costs protection for defendants.

Judge 2:

Judge 2 said that this was a good point: costs protection could kill the whole thing.

Claimant lawyer 3:

Claimant lawyer 3 spoke of the connection between opt-out, certification, costs capping and security for costs. If you're looking at opt-out, this also links into certification and consideration of costs capping.

Academic 1:

Academic 1 suggested that if we had a collective opt-out mechanism, 1-2% of each judgment or settlement could be retained for a fund to provide costs protection for defendants and support future claimant actions which would then remove the requirement for a percentage of contingency fees.

Claimant lawyer 4:

Claimant lawyer 4 discussed funding and the opt-out system.

Claimant lawyer 2:

Claimant lawyer 2 asked how a case is settled in an opt-out system when there is no real sense of how many individuals have been affected.

Michael Napier:

Michael Napier referred to this as a fundamental point. He confirmed Academic 1's view that when a defendant wishes to settle, members of the opt-out class would have to opt in to take the benefit of that settlement so some mechanism would be necessary to quantify who is opting in.

Academic 1:

Academic 1 said that in practice it appears that the settlement pressure has come from the assessment of what the class wide damage is, which has been agreed between the parties. Another mechanism is where the court insists on opting in prior to the determination of common issues.

Claimant lawyer 2:

Claimant lawyer 2 asked about the timing of notice to the class on opting in for settlement.

Academic 1:

Academic 1 explained that the court would determine when the class is closed as part of their case management judicial decision. Notice of opt-in to settlement would be directed at the class in the same way that the opt-out notice originally was distributed.

Government representative 3:

Government representative 3 asked what happens to the rights of people who neither opt in nor specifically opt out?

Academic 1:

Academic 1 said that if there is an opt-out arrangement and members of the class do not come forward for their claim then *res judicata* applies and they are bound by the judgment of the court.

Government representative 3:

Government representative 3 questioned whether this applied to class members who do not receive the notice.

Academic 1:

Academic 1 replied in the affirmative, adding that this is why the due process requirements on distributing the notice are extremely important.

Claimant lawyer 3:

Claimant lawyer 3 stated that a case could be settled in relation to a review mechanism where applications are made and defendants settle on the basis of an agreed formula, as opposed to settling a case for a fixed amount. He explained that claimants opt in by putting themselves through the formula. Claimant lawyer 3 said he was not sure why the decision to opt in should be taken before the judgment as to liability.

Michael Napier:

There has to be flexibility on the timing for opt-in because every case is different.

Claimant lawyer 1:

Claimant lawyer 1 asked whether it would be possible to opt out of settlement and continue with proceedings.

Academic 1:

Academic 1 said that this has certainly been the case in the United States.

Concluding remarks**Michael Napier:**

Michael Napier explained that this event had taken on a different format to those held in the past. He remarked that today had been much more of a consultative meeting with key stakeholders. He thanked the delegation for their contributions which would inform the final draft of Academic 1's paper. Michael Napier observed that there seemed to be consensus on the need for reform of collective redress mechanisms and noted that there

were no substantive objections to the points made by Judge 2. He added that what shape that should take remains to be seen. He recognised the need for balance to ensure a level playing field for claimants and defendants. In relation to substantive law, Michael Napier stated that there would be many hurdles to overcome if primary legislation were to be introduced. He noted that funding is a key issue and suggested that in the finalisation of the report the Civil Justice Council might take a more holistic approach and examine both procedural and funding issues. He thanked Academic 4 for his contribution, remarking that is obviously an area that needs to be given full consideration. Michael Napier concluded that the final document will be ready in spring and that it would go before the Council for approval before recommendations would be made to government.

Robert Musgrove:

Robert Musgrove indicated that this subject would be revisited with another consultative event in February 2008.

Third Collective Redress Event: Substantive Law and Process Framework: Minutes**27 March 2008****Opening remarks by Mike Napier QC**

Mike Napier welcomed delegates to the conference and explained that the event would be held according to the Chatham House Rules. He noted the broad constituency of the conference delegation and related it to the representative nature of the Civil Justice Council (CJC) itself. He then described the advisory role of the CJC and explained its interest in access to justice – an issue which permeates the topic of collective redress.

Mike Napier referred to Bob Musgrove's introductory paper as an effective channel for delegates' thoughts and a useful background to the involvement of the CJC in collective redress. He elaborated on the history of CJC work in this field, pointing out that it became involved in collective redress through its work on litigation funding.

Mike Napier touched upon the two fora hosted by the CJC on collective redress and the study it commissioned on evidence of need, completed by Academic 1 earlier this year. He also mentioned that the CJC had been actively engaged with European institutions and stakeholders, where much political and academic work is being undertaken in the field of collective redress.

Mike Napier remarked that the purpose of the conference was to discuss how reform in the area of collective redress should be brought about and he drew attention to the papers which would assist delegates in this regard. Mike Napier concluded his address with an explanation of the format that the event would take.

Substantive Law Issues

“Legislation versus Rules of Court” – Academic 1

Introduction

Academic 1 explained at the outset that the binary tension contained in the title of her presentation and accompanying document was not intended to dictate the course of ensuing discussions. Her view was that some primary legislation would be needed to implement substantive changes in the law required for the enactment of an opt-out collective action regime. However, she added that other options ought to be taken into account. Academic 1 declared her intention to explain why some change in the substantive law is required and to consider whether this need may be circumvented in any way.

To begin, Academic 1 explained the process of making court rules. She informed delegates that the Civil Procedure Rules Committee (hereinafter “Rules Committee”) has responsibility for creating court rules. Academic 1 argued that the Rules Committee is only permitted to make rules governing practice and procedure (Section 1(1) of the Civil Procedure Act) and modifying the rules of evidence (Schedule 1 Rule 4 of the Civil Procedure Act).

Academic 1 stated her belief that the proposed opt-out regime does not fall within those strict parameters. She questioned whether a slight amendment of Section 1(1) of the Civil Procedure Act to extend the powers of the Rules Committee could be enacted to change practice and procedure even where it amends the substantive law. Academic 1 noted that there is a precedent for this elsewhere in the Commonwealth (i.e. Ontario) but added that she was unsure as to how realistic such a course of action would be in England and Wales.

Academic 1 itemised five areas of the proposed opt-out regime which have been considered by judges, reform commissions etc to require a substantive change in the law.

1. *Limitation periods*

Academic 1 articulated her view that a substantive change in the law would be required to create an opt-out regime whereby the representative claimant files the pleadings initially then the limitation period is suspended for all represented parties thereby allowing them to bring individual proceedings to prove its individual issues down the track without ever having filed its own proceedings in the first place.

Academic 1 supported her argument by reference to the Woolf Report in which it was acknowledged by Lord Woolf himself that a change to the substantive law would be brought about by affecting the limitation period for multiparty litigation.

2. *Res judicata*

Academic 1 expressed her opinion that modification of the *res judicata* for absent class members would require a substantive change in the law. However, she remained open as to whether the Rules Committee could still tackle this area through the creation of rules of court.

Academic 1 explained that there are two ways in which the *res judicata* issue comes alive in collective actions:

- a. Under the Representative Rule (CPR 19.6), the representative claimant has the common legal issues determined for the described amorphous class. Under this rule, there are no notification requirements. As confirmed by the courts, an express mandate to be represented is not required from all class members either. Absent class members are already capable of being bound by the determination in a representative action even though they themselves do not file proceedings but are represented.

The problem is that the Representative Rule has not been judicially considered

to be suitable for solely monetary relief because of the way in which the same interest has been defined in that rule. A representative claimant has the same interest as all the members that he is representing if he is bringing declaratory, injunctive or ancillary relief or an action for money that is going into a common fund. However there is judicial concern with respect to the same interest for individual monetary compensation, as evidenced by the case of *Fostiff* where the Australian High Court ruled (5-2) that the representative action was invalidly constituted. Given that monetary relief is a key feature of the opt-out collective action, it is debatable whether *res judicata* falls within the rule-making capacity of the Rules Committee.

- b. Academic 1 informed the delegation that the second way in which the *res judicata* issue comes alive in collective actions is in extended *res judicata*. She suggested that it could be implemented judicially rather than legislatively. However, in Canada, the extended principle of *res judicata* in the *Henderson rule* (requiring parties to bring before the court everything which should be raised in those proceedings preventing defendants from facing further onslaughts of litigation) was overruled by the Class Proceedings Act which allows the class to bring further actions on common issues. Academic 1 spoke of English precedent in *Barrow v Banks*, where the Court of Appeal held that special circumstances may justify exception to the Henderson Rule.

3. *Aggregate assessment of damages*

Academic 1 reported that the question of whether aggregate assessment of damages constitutes a substantive change in the law was considered by the Victorian Court of Appeal in the *Academy* case. Three judges ruled that it was not, while two argued it was. The judges who ruled that it was not, maintained that aggregate assessment of damages for the class as a whole fell within the parameters of judicial discretion given that the law of damages is an inexact science at best with general damages being, to some extent at least, an approximation.

The minority strongly disagreed contending that it is one thing to say that damages are an inexact science and quite another to argue that damages awarded need not have a commensurate link with the people who have been damaged; the individual members of the class.

The High Court of Australia gave leave to appeal on this very point. However, before it had the chance to give its verdict, the Victorian Parliament decided that the aggregate assessment of damages should be legislated upon and the appeal was vacated.

Academic 1 considered aggregate assessment of damages from the domestic angle, explaining that three judicial responses to the 2001 consultation by the Lord Chancellor's Department on representative claims, considered that aggregate assessment of damages was a substantive change in the law and would require primary legislation.

4. *Cy-près distribution of damage*

Academic 1 outlined the concept of *cy-près* distribution of damages and its use in overseas jurisdictions. She voiced her belief that it would require a substantive change in the law as it would potentially involve awarding damages to those who have not been harmed by the defendant(s).

In support of her argument, Academic 1 said that the Australian Law Reform Commission refused to countenance *cy-près* distribution because it was punitive rather than compensatory in nature, and as a result, was not introduced by the legislature. Furthermore, U.S. judges have suggested that the *cy-près* distribution of damages constitutes a substantive change in the law.

5. *Standing against multiple defendants*

Academic 1 questioned whether it was possible for rules of court to enable multiple defendants to be sued by class members where some will not have a cause of action

against some of those defendants. She maintained that this formed a major change to the standing rules as it involves a defendant being sued by people who have no cause of action against it at all.

Academic 1 referred to the experience in Canada where standing against multiple defendants is permitted. She informed delegates that the second action brought under the opt-out regime in Ontario in 1993 tested whether defendants could be sued by people who had no cause of action against them. It was held that they could because there was legislative provision for such situations.

Academic 1 added that in Australia, there has been a major tension between the *Philip Morris* interpretation which holds that each defendant must have a party who is suing it and if there are any defendants and class members who do not have corresponding causes of action then it is not a properly constituted collective action.

Conclusion

Academic 1 concluded that of all five areas, she found it difficult to see how limitation, *cy-près*, and standing could be introduced through amendment to the CPR. Although there is precedent of rules in the other areas, she noted that in most cases legislation has been introduced to prevent *ultra vires* claims.

Academic 1 told the delegation that law reform commissions in Ireland and Scotland had considered collective redress and deemed rules of courts to be sufficient. However, she added that each considered opt-in as opposed to opt-out systems and did not examine the issues of limitation, *cy-près* and standing.

Academic 1 recognised that the Representative Rule is an interesting collective device. However, there are several aspects of a sophisticated opt-out regime which the Representative Rule does not cover. Furthermore it presents difficulties with bringing monetary claims, the interpretation of same interest, and the fact that other jurisdictions have introduced opt-out actions after grappling with the Representative Rule which later

proved to be completely inadequate is also instructive in this regard.

Academic 1 commented that the conundrum about legislation versus court rules has to be considered in its wider context. She remarked that there is over 100 years of combined opt-out jurisprudence in America, Australia and Canada. On this basis, Academic 1 advocated the introduction of a third generation statute building on the experience of these other jurisdictions and legislating with certainty on matters which have already taken up an inordinate amount of judicial consideration thus minimising satellite litigation, giving flexibility to the claimant and protection to the defendant, as well as setting the parameters of collective redress internationally.

Mike Napier:

Mike Napier thanked Academic 1 for her excellent presentation and asked what a sophisticated opt-out system would encompass.

Academic 1:

Academic 1 explained that a sophisticated opt-out system would encompass aggregate assessment of damages, *cy-près* distribution and standing against multiple defendants. She remarked that it would be possible to have an opt-out mechanism in place without these features but added that it would be difficult for it to operate with utility in their absence.

Mike Napier:

Mike Napier asked whether any views have been expressed in this jurisdiction on the legislation versus rules conundrum.

Academic 1:

Academic 1 stated that she was not aware of any.

Consumer Representative 1:

Consumer Representative 1 asked why an opt-out collective regime suspends the limitation period for absent members and questioned whether it was needed. She asked how *cy-près* distribution became a common practice in the U.S. given that it is not enshrined in rules.

Academic 1:

Academic 1 replied that if the limitation period was not suspended for absent class members and the representative claimant won on the common issues, they may then be statute-barred from proving their individual issues because their cause of action would not be complete until proven. They could issue their own proceedings if there was time but the reality is that the limitation period would have long passed.

Academic 1 explained that *cy-près* distribution has been invoked in settlements rather than in judgments, having been proposed by inventive and innovative counsel in the 1970s as an alternative to going to trial.

Claimant Lawyer 1:

Claimant Lawyer 1 asked why certification does not stop the limitation period.

John Sorabji, Legal Secretary to the Master of the Rolls:

John Sorabji explained this is a historical practice founded on the notion that the mandatory class is not considered as a full party and therefore bringing the representative action does not stop limitation for anyone except the representative claimant.

Claimant Lawyer 1:

Claimant Lawyer 1 asked whether there is any statutory requirement in relation to costs or whether it would fall within the court's discretion.

Academic 1:

Academic 1 answered that only Australia has incorporated immunity from costs in its class action statute for absent class members.

Claimant Lawyer 1:

Claimant Lawyer 1 questioned whether there was a need for statutory change in light of this.

Academic 1

Academic 1 wondered whether judges already had the power to do this using their discretion or any powers conferred by the CPR.

Regulator 1:

Regulator 1 asked why primary legislation would be needed to allow standing against multiple defendants when it only entailed consolidation.

Academic 1:

Academic 1 explained that some legislation would be required because it is not a consolidation *per se* and she noted the difficulties of later consolidation using the Australian experience as an example.

Academic 1:

Academic 1 led the delegation through her diagrams and explained the question of standing.

Claimant Lawyer 2:

Claimant Lawyer 2 questioned whether consolidation would require legislation a representative claimant for each defendant existed.

Claimant Lawyer 3:

Claimant Lawyer 3 asked whether courts have struggled to exercise the power of *cy-près* distribution.

Academic 1:

Academic 1 replied that North American courts have sought to accommodate *cy-près* distributions where they could, and sometimes even where the overlap between the underlying purpose and class is tenuous.

Bob Musgrove, Chief Executive of the Civil Justice Council:

Bob Musgrove supported Academic 1's observations and added that from his experience with Quebec, courts have taken great care in considering how *cy-près* distributions should be made.

Judge 1:

Judge 1 stated that regulators at state level have begun to use this technique.

Claimant Lawyer 4:

Claimant Lawyer 4 asked Academic 1 whether she had encountered a model elsewhere that adopts that sort of procedure other than in an insolvency situation.

Academic 1:

Academic 1 said that she had only encountered this model where the representative rule has been used for monetary recovery where it is ancillary to injunctive or declaratory relief.

John Sorabji:

John Sorabji explained that the representative rule in the insolvency jurisdiction shares the same common law origin.

“Class Actions – Reinventing the wheel” – a speech by John Sorabji

See Appendix 1

Judge 1:

Judge 1 stated that John Sorabji’s presentation rightly identified the potential in the rules. He noted that despite Academic 1’s excellent case, there are potential political problems with third generation legislation as it is very difficult to compete for legislative time.

Claimant Lawyer 2:

Claimant Lawyer 2 asked why the limitation period issue is considered to be insuperable and as requiring legislation.

John Sorabji:

John Sorabji replied that the limitation period issue requires legislation because there is no provision for it in the Limitation Act as it currently stands. He noted that the fact that the represented class are not parties before the court in the full extent and can at any time take active steps to intervene in the class action means that they cannot be deemed by the court in any way to have brought the action as far as limitation is concerned.

Trade Union Representative 1:

Trade Union Representative 1 reminded John Sorabji of previous comments he had made in respect of collective redress.

John Sorabji:

John Sorabji stood by his previous comments and maintained his belief that, although the process is a difficult one, some form of collective redress action will be introduced as the political will is present. He suggested that all routes – legislative and non-legislative – are explored to this end, and argued that a collective redress mechanism is key to ensuring access to justice.

Claimant Lawyer 1:

Claimant Lawyer 1 asked whether the U.K. would be compelled, in any event, to enact legislation regarding a collective redress mechanism given European activity in this field.

John Sorabji:

John Sorabji replied that European initiatives will be complementary to national collective redress systems.

Mike Napier:

Mike Napier recapped the points of consensus and contention emerging from the two presentations.

He reminded the delegation of the questions to be considered by syndicate groups:

1. Limitation periods
2. Modifying *res judicata* for absent claimants
3. Aggregate assessment of damages
4. *Cy-près* distribution of damages
5. Standing against multiple defendants

Assuming a mechanism is required for reform, he asked the delegation to consider the following options:

- a. There might be legislation that only goes as far as enabling legislation and then the rest is left to the Rule Committee
- b. Statute might provide detailed legislative setting of rules so that it would be taken away from the Rule Committee or completely left to legislation
- c. There is no legislation and it's all left to the Rule Committee
- d. Europe: if we don't do anything it may be that a European directive would force our government to go down the reform route

Report Back to Plenary Session**Group A: Claimant Lawyer 5**

Group A first considered and then agreed upon the need for a collective opt-out process. It viewed opt-out group actions as part of the broader regulatory and enforcement picture, and as such, not mutually exclusive. In light of this, it asserted the need to consider other consumer redress methods.

Group A felt there was a need for primary legislation in respect of limitation, perhaps by discrete amendment of the Limitation Act. It talked of a secondary limitation period which would run not from the wrongful act but the date of the decision in respect of competition cases. It asked Academic 1 the position on limitation in respect of the GLO regime.

In respect of *res judicata*, Group A felt there was a strong case for improving the notice provisions as well as access to information about collective claims at the start of the process. It considered that a rules-based approach would be the most appropriate way of dealing with some of the *res judicata* issues at the back end of disputes. Group A suggested different notice provisions within different rules for different types of procedure.

On aggregate assessment of damages, Group A considered it to be a key element of an opt-out regime. On a practical level, it noted that the availability of aggregate damages would make the procedure attractive to third party funders and render it a better-used process than the current multiparty system.

Group A considered that *cy-près* was controversial and would likely hold up the development of the collective redress system itself. It was felt that *cy-près* does not necessarily need to be a feature of an opt-out regime and in fact there could be a mechanism whereby any residual amount could revert to the defendant.

Although Group A acknowledged the problems surrounding standing it did not reach a conclusion on the issue.

As a side note, Group A suggested that opting out should be possible right up to judgment rather than just a limited period at the start of proceedings.

Group A thought that European activity in the field of collective redress was moving far too slowly to force the UK's hand in this respect. That being the case, it felt that the UK

ought to lead by example and create an exemplary system of collective redress to be developed throughout other member states.

Group A considered the legislative route and discussed whether the creation of a collective action mechanism could be incorporated through amendment to existing legislation.

Group B: Claimant Lawyer 3

Group B expressed appreciation to Academic 1 and John Sorabji for their thorough and comprehensive presentations and began by distilling the following points of principle:

1. Any solution has to meet the yardsticks of certainty and predictability.
2. Legislation in some areas is inevitable and should take the form of enabling or framework legislation, rather than detailed prescription.
3. Time presents a serious challenge because:
 - a. We are already positively exporting group litigation to the US and perhaps in time to individual European jurisdictions
 - b. If we wait for an EU directive it might not be suitable or desirable for our purposes.
3. Group B argued that the UK ought to lead by example and move as effectively and rapidly as possible.

Recognising that legislation produces a tension with time, Group B explored whether some interim rules-based solution might be adopted but constantly hit upon the problem of uncertainty and the risk of satellite litigation risk which would flow from that.

Group B considered that if a collective redress mechanism were to use representative bodies as well as claimants that would create a sixth component that would arguably need legislation.

Group B was not convinced that legislation was essential in relation to limitation and

multiple defendants and thought that those areas needed closer study in relation to existing law and procedure and predicting how the various components might play out in practice.

Group B considered that legislation was required with respect to *res judicata*, aggregate assessment and *cy-près: res judicata* because it lies at the root of the opt-out structure; aggregate assessment because it was felt to have a political dimension to it; and *cy-près* because it seemed to be a difficult problem and one that if left alone might produce a struggle. In relation to *cy-près*, Group B suggested offering Parliament a candidate destination (i.e. the Access to Justice Foundation, section 194 Legal Services Act) to ease its passage into law.

Whilst Group B was mindful of the political realities underlying the legislative debate, it remained conscious that as the law is one of the UK's greatest exports and that as our procedure runs alongside it, if the UK lags behind in delivering to the world a procedure that works in the area of collective redress then it is not maximising what it has to offer.

Group C: Claimant Lawyer 4

Although Group C recognised that the remit of the CJC was restricted to matters litigated in the civil courts, it concluded that collective redress would need broader consideration in relation to different fora and subject matters.

Group C discussed whether light touch enabling legislation with the Rules Committee filling in the gaps would be the way forward. It felt that the government would be reluctant to cede much power to the Rules Committee and that major constitutional issues relating to the separation of power and rule of law would arise were the Rules Committee permitted to amend substantive law.

Group C examined the possibility of instituting a third generation act with detailed rules, and felt that legislation would provide stronger directive than a rules-based option thus avoiding the risk of satellite litigation. Group C recognised the practicalities of legislating

in a piecemeal fashion rather than enacting a coherent code. It considered the question of riding a lighter form of legislation on the back of another law but it was felt that that would still require consensus across government.

Group C considered not legislating at all, but it was pointed out that there is no provision for an opt-out system in existing legislation.

Group C discussed the issue of limitation and how it would work in relation to an opt-out system, but it did not come to a conclusion on the question of the indivisibility of actions. It felt that this is an issue that requires further study.

Group C felt that it was undesirable to wait for Europe as the collective redress debate has already been going on for several years and there are many different agenda in Europe. In any event, it was acknowledged that it might only recommend an opt-in system more suitable to civil law systems rather than common law systems.

Group C also discussed *cy-près* and the possible use of trust law.

Mike Napier:

Mike Napier summarised the points emanating from the group reports. He noted the consensus that the UK should not wait for Europe before implementing its own collective redress mechanism and that the subject of limitation required further study. While Group B considered that legislation in some areas was inevitable, Group C went further leaning more towards the third generation option than a light-touch rules-based solution, and in contrast, Group A appeared to roll back a little. Mike Napier commented on the slight divergence of view on *cy-près* with Group A viewing it as controversial and likely to hold up the procedure and Group B arguing that it should be kept very simple.

Judge 1:

Judge 1 agreed with Group B on the need for certainty and the importance of starting from principle, including the principle of access to justice.

Mike Napier:

Mike Napier declared that certainty and predictability have always been important to CJC because of the risk of satellite litigation.

Academic 1:

In response to the question from Group A, Academic 1 explained that in group litigation orders, limitation stops running from the date that the claim is filed.

Judge 1:

Judge 1 asked whether the Limitation Act is applied by rules or a practice direction.

John Sorabji:

John Sorabji replied that the system works because in a group litigation order an individual claimant has to issue their entire claim and it is a sophisticated form of joinder.

Mike Napier:

Mike Napier added that claimants have to issue their claims within whatever limitation period applies to the claim and that the courts cannot toll the Limitation Act. He concluded that all class actions have the problem of limitation, and that as such, this issue has to be tackled.

Advice Services Representative 1:

Advice Services Representative 1 stated that developments with respect to the way that consumer bodies are organising themselves in order to act as representatives is a matter that needs to be taken into account.

Mike Napier:

Mike Napier welcomed Advice Services Representative 1's comment and invited contributions from consumer body representatives.

Developing a Framework for Plenary Reform – Academic 1

Academic 1 took the delegation through her sixty design points for an opt-out collective action regime (see Appendix 2).

Mike Napier:

Mike Napier asked Academic 1 whether the Uniform Class Proceedings Act from Canada is provincial or federal.

Academic 1:

Academic 1 replied that it was prompted by the common law provinces rather than the civil law jurisdiction.

Bob Musgrove:

Bob Musgrove suggested that the Act seemed to be a legislative hybrid of British Columbia, Ontario and Quebec designed to cover all three provinces.

Mike Napier:

Mike Napier explained that he was bringing this Act to the attention of the delegation as it is a piece of legislation which encapsulates the design features identified by Academic 1.

Academic 1:

Academic 1 stated that both Canada and Australia share second generation statutes which seek to be more prescriptive over areas which the US left open for judicial examination.

Claimant Lawyer 3:

Claimant Lawyer 3 questioned whether the fairness hearing would be heard by the judge running the collective action or a separate judge.

Academic 1:

Academic 1 said that her understanding was that in Canada, fairness hearings are dealt with by the judge who has the conduct of the action.

Professional Representative 1:

Professional Representative 1 wondered to what extent ECHR compliance had been considered.

Academic 1:

Academic 1 answered that this matter was important and open for discussion.

Group A: Claimant Lawyer 5

Of the sixty design points for an opt-out collective action regime, Group A was given points 1-31 to consider.

1. *In accordance with the usual requirements of CPR 3.4(2)(b) and (c), no frivolous, vexatious or abusive claims will be permitted to be brought as collective actions.*
2. *In accordance with the usual requirements of CPR 3.4(2)(a), the collective action must disclose a reasonable grounds for bringing the claim.*
3. *In addition to CPR 3.4, the statement of case must also comply with any specific pleadings requirements of a collective action regime (eg, which require the pleadings to specify the common issues of fact or law, or which require the pleadings to define the class, or which require the pleadings to specify the causes of action and the remedies sought), with sufficient particularity.*

Group A agreed with points 1-3.

4. *As a further brake/moderation on the ability to start a collective action, the claimant class should be required to satisfy legislatively-prescribed preliminary merits test/s.*

Group A expressed concern at what a preliminary merits test might look like and whether it would be costly and onerous. It was initially considered to be unnecessary because defendants would simply apply to strike the process out at that stage and it would not go forward. However, having talked it through, Group A felt that there would be some court scrutiny at the initial stage in any event. Given that the business lobby would be pressing for something that it could see at that stage that would protect its interests it was felt there should be some form of preliminary look at the process although that it ought not be a terribly high bar.

Group A felt that there should be two elements of the preliminary merits test

- a. Touching upon the superiority point: is collective mechanism the right vehicle for the dispute?
 - b. The second element of the test would be to give court the opportunity to have an early look at merits. Group A thought that this should fundamentally be a court-led process rather than one that would necessarily involve costs transfer between the parties and attendant costs risks.
5. *A 'pre-certification protocol' may be preferable, requiring certain 'Woolf-motivated up-front disclosures' (eg, in the context of a collective action, information about the size of class, or information about the likely common and individual issues, or facts that to go prove why a collective action would be superior to other means of resolving the dispute), prior to the certification hearing.*

Group A talked about the possibility of pre-action disclosure applications as part of this protocol process particularly to assist those representing the putative class to work out what the size of the class might be in order to give some boundaries at an early stage. There followed a discussion about how this would work in practice and the group considered whether or not as part of that pre-certification process a defendant ought to disclose whether it had other similar approaches in respect of the same matters. Particularly in respect of consumer matters, Group A felt that the details of the individual class members might well come out at the post-certification stage but that it would be too onerous and unnecessary for them to emerge at this initial preliminary pre-action protocol stage.

6. *A collective action must be the superior form of resolving the class members' disputes. If another procedural regime, available to claimants, is more efficient and less burdensome, the collective action should not run.*
7. *The type of monetary remedy that may be sought and awarded in a collective action (eg, damages, disgorgement, restitution, exemplary damages, financial penalties) needs to be carefully considered, and the legislation appropriately*

drafted to either cover or restrict the field of remedies.

In respect of point 7, Group A thought that the general law should be allowed to take its course. Its whole discussion was dominated by the principle that we should keep the new features of this process to a bare minimum and borrow as much as possible from what exists elsewhere.

8. *A collective action must be manageable, from the court's point of view (and the court must be satisfied of that at the outset, subject to one possible exception in point 11 below).*

Group A agreed on this point.

9. *Whether any type of legal issue should be excluded from the scope of the collective action regime needs to be legislatively prescribed.*

Group A was fairly relaxed about this generic process applying to all sorts of disputes. Although this would lead to collective mechanisms being pursued in specialist tribunals with limited resources, Group A felt that the collective action regime should extend there in any event.

10. *Appeals from certification orders (eg, who has the right to appeal, whether an appeal is as of right or only with leave) should be legislatively prescribed.*

In respect of appeals, Group A thought that the ordinary rules ought to apply.

16. *Whether the class definition can 'tie' class membership to an external party (rather than to the series of events out of which the dispute arose), eg, to a law firm representing the class or to a third party litigation funder, needs to be judicially or legislatively prescribed.*

In considering point 16 on lawyer tie-in, Group A turned to the issues of costs and

funding. Group A felt that the tie-in might look unpalatable but was actually needed owing to funding considerations.

27. *The status of ideological claimants (eg, the criteria permitting their appointment as representative, whether they should act as sole or supplementary / preferred or secondary representative claimants) must be carefully articulated.*

Group A felt that the point regarding ideological claimants was a worthwhile idea and would act as filter on speculative claims. However, it had grave concerns about the resources available for consumer bodies to do this and felt that specially formed *ad hoc* action groups ought to be allowed to act as these sorts of claimants.

Group B: Claimant Lawyer 3

Of the sixty design points for an opt-out collective action regime, Group B was given points 32-43 to consider.

Group B felt that the following four areas needed to be addressed before points 32-43 could be considered:

1. How costs are going to be dealt with, from security to questions of capping to exchanges of estimates.
2. The whole question of funding: from third party funding to direct funding etc.
3. The need for an early stage of permission/filter/certification
4. The need for some form of codification of the whole process.

32. *The class members must be adequately informed about their opt-out rights under the collective action, giving them a realistic opportunity to opt-out. The manner of giving notice (eg, when and how often the notice should be given, whether it is mandatory or discretionary to do so, whether group or individual notice should be permitted, what appropriate use can be made of the internet and websites for disseminating opt-out notice) should be legislatively or judicially prescribed.*

33. *Who pays for the opt-out notice needs to be considered, if not articulated.*
34. *The content of the opt-out notice, the appropriate length of the opt-out period (eg, whether any minimum or maximum opt-out periods should be set), and how to opt out, need to be legislatively or judicially prescribed.*
37. *When, and how, is the class to be closed? At some point (and with very limited exception), the class must convert from opt-out to opt-in. In most scenarios, the class members will have to ‘put their feet on the sticky paper’ at some point, thereby giving rise to the ‘take-up rate’ of the action. The parameters of this conversion from opt-out to opt-in must be legislatively or judicially prescribed.*

Group C first considered paragraphs 32-34 and 37. It concluded that the most important was at what was last point was opt-out required. Group B recognised that judicial discretion would be needed to deal with matters on a case by case basis.

35. *Close judicial case-management of the collective action (in accordance with recently-discussed management practices for complex litigation) would be mandatory.*
36. *In accordance with the wide-ranging case-management provision of CPR 3.1, the court must have freedom to exercise broad powers (to enable it to narrow/widen the common issues, amend the definition of the class, or to direct amendments to the pleadings, etc), in order to permit the collective action to dispose of the dispute as expeditiously and proportionately as possible, in accordance with CPR 1.1's overriding objective.*

Group C considered the following features as essential in relation to court control, case management and exercise of court powers:

- judicial specialisation;
- allocation to the judge;

- training in handling this type of procedure over and above any training or experience in the substantive law in question;
- definition by the judge of the issues and the common ground;
- a close eye on the tactical attempts that would be there to force issues into or out of the bracket of common issues; and
- a preparedness by the appellate courts to respect as far as possible the case management decisions by the judge charged to run the litigation at first instance.

38. *The circumstances in which communications can be made by the representative claimant (or the claimant law firm) to the absent class members (as either formal notice which requires court approval, or as general correspondence which does not) will need to be judicially considered, if not legislatively prescribed.*

Group B favoured relative freedom and thought that the control mechanism should be founded on ethics rather than based on court rule.

39. *The extent (if any) to which a defendant may contact absent class members directly after the collective action is certified (with a view to individually settling with those absent class members) will need to be judicially prescribed, in order to set the parameters of acceptable litigious conduct and to prevent claims of inappropriate or abusive process.*

Group B found this point very tricky and opinions on it diverged greatly. On the one hand, a libertarian outlook was taken towards this issue and on the other, concern was expressed about the abuses that could happen under an unregulated system.

40. *The person/s (eg, the representative claimant, absent class members) against whom disclosure can be sought with or without leave, should be legislatively prescribed.*

Group B regarded the existing jurisdiction as perfectly adequate and one which would

probably need little addition.

41. *The circumstances in which the collective action may be de-certified should be prescribed.*

Group B agreed with this point.

42. *The limitation period will stop running for both representative claimant and absent class members, either when the representative claimant files the collective action, or when (or if) the action is certified. The precise circumstances for when the limitation period stops running must be legislatively prescribed.*

Group B felt that the limitation period should stop running at the point of certification.

43. *The limitation period will start running again upon certain events happening; these triggers must be legislatively prescribed.*

In conclusion, Group B saw a place for a combined legislative and rules-based solution rather than a full legislative code.

Group C: Claimant Lawyer 4

Of the sixty design points for an opt-out collective action regime, Group C was given points 44-60 to consider.

44. *Settlement agreements must be subject to a fairness hearing. This is, essentially, to preserve fairness for absent class members and for the defendant.*

Group C agreed that settlement agreements should be subject to a fairness hearing. It was also suggested that there should be a presumption of fairness in relation to a settlement negotiated by an ideological claimant particularly where under competition law the

claimant had already satisfied the concept of designation and that it was fair for the ideological claimant to represent the class. That led on to the idea that it was beneficial to a representative body to have a fairness hearing. Indeed there was some concern that otherwise the representative body may be vulnerable to allegations of low settlement etc and it was important both to have a look at procedural and substantive fairness in relation to any settlement negotiated and also the concept of fairness should apply whether one has an opt-in or opt-out proceeding.

45. *Adequate notice of the settlement hearing, and further adequate notice about the verdict reached at the settlement hearing, will need to be judicially or legislatively prescribed. In all instances, the timing and content of the notices will likely be required to be judicially approved.*

Group C felt that this point was subsumed in the issue of procedural and substantive fairness and that it was important that absent members of the class should have the opportunity to attend any such hearing.

46. *The 'fairness criteria' against which the court must subject a settlement agreement should be either judicially or legislatively prescribed. Whether evidence from representative claimants, absent class members, defendant representatives, legal counsel from each side, and experts, would be helpful to the fairness hearing, needs to be considered.*

Group C considered the notion of catch-all criteria and the idea that there should be an element of judicial discretion. It saw that so far as consumers were concerned it was very helpful for them to have a list of criteria by which they could examine any settlement to see whether it satisfied the test of fairness. However, Group C also considered that it might tie down issues and work against innovative and expedient settlements.

47. *The potential impact of any 'bar orders' (whereby a settling defendant seeks to obtain an order that it is not open to any claims for indemnity and contribution from a non-settling defendant, in the event that the non-settling defendant loses at*

trial), needs to be considered, if not legislatively prescribed.

Group C considered this a matter for legislation. However, it thought there should be mechanism to approve a settlement and make a bar order but that it should not be compulsory. Group C felt that the concept of bar orders certainly had place in the class actions structure.

48. *The procedures by which absent class members can (a) object to a settlement, or (b) opt out of a settlement (if a second opt-out stage is to be permitted at all), need to be judicially or legislatively prescribed.*

This point prompted quite a lot of discussion about the concept of opting out of a settlement and whether by taking such action, a party would be continuing with the action. Group C considered that perhaps a simple answer to the problem opting-out should be prohibited after the fairness hearing to ensure finality and certainty.

49. *The procedure (if any) by which absent class members can opt back into a class for the purposes of settlement need to be judicially or legislatively prescribed.*

Group C supported the right to opt back into a class for the purposes of settlement on the basis that it would help defendants assess the levels of settlement and provide a measure of finality.

50. *Damages assessment may be individual, or a class-wide aggregate assessment, depending upon the circumstances. The pre-requisites for aggregate assessment need to be legislatively and judicially prescribed with the utmost clarity.*

Group C agreed with this point.

51. *Compensation distribution should be permitted to be made to class members directly, or via a cy-pres order.*

Group C agreed with this point.

52. *A direct distribution to class members may be permitted, not by an individual assessment of each class member's entitlement, but on the basis of an average or pro rata assessment for class members identified at the point at which the assessment is being made.*

Group C agreed with this point.

53. *Cy-pres distributions (and the pre-requisites governing them) will need to be mandated legislatively, if permitted.*

Group C felt that the basis upon which *cy-près* damages were distributed would need to be made explicit and there would have to be guidance. However there were disparate views on this question and not enough time to come to any consensus.

54. *Whether coupon recovery should ever be permitted (compensation 'in like', rather than in monetary terms), needs to be legislatively or judicially articulated.*

Group C was divided on this point and ultimately felt it to be a fairness issue to be assessed at a fairness hearing.

John Sorabji:

John Sorabji noted that in respect of point 59 on appeal rights, the Court of Appeal had before Christmas held that non-parties can appeal decisions but that they would need to seek permission to appeal.

Mike Napier:

Mike Napier thanked delegates for their hard work and valuable contributions. He stated that delegates' contributions would be fed into a paper formulating some draft

recommendations on funding and procedure. Mike Napier remarked that the paper would be consulted on by a larger group of stakeholders at another forum, sent for approval to the CJC for signing off and would then be directed to the Ministry of Justice and Lord Chancellor.

Fourth Collective Redress Event: Draft Recommendations to Government: Minutes**Minutes – 26 June 2008****Opening remarks by Sir Anthony Clarke, Master of the Rolls**

The Master of the Rolls welcomed delegates to the conference. He recorded his satisfaction that the concerns of defendants had been addressed in the main conference paper, *“Improving Access to Justice for Consumers”*: *Developing Better Redress Procedures for Collective Consumer Claims* (hereinafter “main conference paper”). He then noted the issues of complexity and comprehension surrounding the jargon of collective redress.

The Master of the Rolls informed delegates that the remit of the Civil Justice Council (hereinafter “CJC”) is concerned with access to justice and procedure as opposed to substantive law. In this vein, he explained that while the damages debate, the passing on and determination of loss are important and interesting matters, they are not related to matters of procedure but rather of social policy and, accordingly, for Parliament to determine.

The Master of the Rolls touched upon the questions he asked of delegates at the Collective Redress II Conference in November 2007. He stated that the most critical of these questions related to the funding of collective actions and the protection for defendants in such cases.

The Master of the Rolls then turned his attention to two features of the main conference paper. First, in this paper, it is erroneously suggested that only unsuccessful claimants are able to appeal an unsuccessful costs ruling. However, this recommendation was supposed to apply to unsuccessful defendants as well.

The second feature of the paper considered by the Master of the Rolls related to its suggestions regarding the power of the Civil Procedure Rules Committee (hereinafter “CPRC”) in relation to costs at the post-certification stage. Although the paper envisages the use of a protected costs order, the Master of the Rolls articulated his view that the CPRC would take a conservative approach to this. He then looked at the paper’s suggestion regarding costs capping.

The Master of the Rolls concluded his address in describing the proposals for reform as “radical change”. He supported the view that a comprehensive legislative regime would be required to underpin reform to the collective redress system. Though he felt that the system could be improved through rule change, the Master of the Rolls warned that more extensive reform in the absence of primary legislation would lead to endless satellite litigation which “would be a wonderful jamboree for lawyers” but spell misery for everyone else.

Key issues – Michael Napier CBE QC

Michael Napier presented the genealogy of the collective redress debate, taking delegates through the relevant conferences and papers that preceded and accompanied the day’s event. He touched upon the paper referred to by the Master of the Rolls, explaining that it comprised, *inter alia*, a set of recommendations on the improvement of collective redress in England and Wales which – after refinement by delegates and further editing – would be submitted to the Council for its approval before being sent to the Minister of Justice.

Michael Napier guided attendees through a report by the CJC Collective Redress Working Party, which examines the question of whether the implementation of an opt-out collective action regime requires the enactment of substantive legislation or may be achieved through amendment to the Civil Procedure Rules (hereinafter “CPR”). He then drew the attention of delegates to another paper accompanying the conference entitled *Collective Redress – A Business View*, and explained that it would be accompanied by an oral presentation by its author, Business Representative 1, during the course of the day.

After pointing out key elements of the findings and recommendations of the main conference paper, Michael Napier touched upon the importance of refining the language of collective redress; the respective roles of the civil justice system and public bodies in compensating harm/loss; the importance of private actions to the economy and society as a whole; the role of court control in balancing the relationship between claimants and defendants; the need of each party for certainty; the question whether improvements should apply to all types of claim; the opt-in/opt-out conundrum, and the issue of *cy-près*.

Assumptions, findings and recommendations – Academic 1

Academic 1 began her presentation by informing delegates that its purpose was to set the context of the day's event and explain key terminology, especially the opt-in versus opt-out debate. She explained that much of the report distributed to attendees on the day, together with the recommendations, were authored by the Civil Justice Council itself, and hence, the report's key points and recommendations would be presented to the conference by a CJC member later in the day. She then proceeded to deliver her presentation in four main segments with the use of an accompanying handout.

1. The square

Academic 1 first talked about developments in the field of collective redress in the Commonwealth, European Union, United States and England & Wales. She referred to bold nature of the EU Green Paper on *Damages Actions for Breach of the EC Antitrust Rules* (2006) and the bland White Paper that followed it. According to Academic 1, the fact that the Commonwealth is grappling with aspects of class actions jurisprudence at the highest appellate level means that a perfect system does not exist. In similar vein, it is important to remember that the excesses of the US class actions regime that attract publicity are not applicable in England & Wales as our legal systems and cultures differ. Academic 1 concluded this segment of her presentation by articulating the importance of learning from other jurisdictions in creating a collective redress mechanism and she advised delegates of the need to listen to the voices of claimants and defendants in this process.

2. *The line*

Academic 1 outlined the collective redress process describing the opt-out debate; jurisprudence relating to the timing of opt-out; the limited circumstances in which opt-out does not transform into opt-in; the absence of a presumption in favour of an opt-out class action; and the issue of surplus funds.

3. *The angle*

Academic 1 turned her attention to the evidence of need for an improved collective redress mechanism. She argued that this evidence was borne out by the greater breadth and number of collective actions in jurisdictions with established class actions systems, as well as the absence of collective actions in England & Wales following proven cases of group harm/loss. Academic 1 stated that in the absence of an improved system of collective redress, claimants who would otherwise have sued in England may seek to join actions abroad whose subsequent judgments may not be recognised here. US federal courts seem to be becoming increasingly unwilling to allow 'foreign claimants' to form part of classes in rule 23 actions.

4. *The design aspect*

In the fourth and final segment of her presentation, Academic 1 suggested ways in which an opt-out scheme of collective redress could ensure fair treatment of both claimants and defendants. Such safeguards would include, for example, a tough certification process and cost-benefit analysis, and clear principles of *res judicata* that will give a defendant 'global peace'. Problems encountered by other jurisdictions (e.g. the claimant who reserves part of his case for a second bite of the cherry where their initial claim fails, and where the Henderson rule is interpreted such that the claimant is allowed to do this) should, she argued, be overcome through third generation legislation rather than used as a justification for not developing collective actions here.

Michael Napier QC:

Michael Napier asked the meaning of third generation legislation and how this compared to first and second generation legislation.

Academic 1:

Academic 1 replied that first generation legislation refers to the light-handed approach taken in the US with Rule 23. The problems encountered in this jurisdiction encouraged the formulation, in Australian and Canada, of more extensive provisions relating to class actions when they developed their own systems (these are the ‘second generation’ statutes referred to). Academic 1 explained that a third generation statute would take into account the issues grappled with by all of these (and other) jurisdictions in the development of a collective redress mechanism while not being heavily prescriptive on all matters.

Collective Redress: A Business View – Business Representative 1:

At the invitation of Michael Napier, Business Representative 1 spoke to his paper on the perspective of business on collective redress. He talked about the importance of this subject to his organisation which has been interacting closely with domestic and international institutions such as the OFT, DG Comp and DG Sanco.

Business Representative 1 remarked that while collective redress is a particularly sensitive topic for global firms that have defended class actions in the US, business would in general subscribe to more effective collective actions. In this regard, he commented on the detrimental effect of cartels on business and the wider economy. Business Representative 1 then considered areas of coincidence with the views expressed by the main conference paper (e.g. the need for a generic private action and balanced solution as well as the importance of funding).

Business Representative 1 explored the broader definition of redress as incorporating ADR and then highlighted the concerns of business. On the subject of funding, he

cautioned against amendment to the loser pays rule, expressed support for the development of third party funding, voiced concern about the funding of speculative claims, and conveyed the opposition of business to the introduction of contingency fee agreements. Business Representative 1 articulated his support for an increased role for public bodies and quickly fielded the idea of establishing an Office of Public Advocate to take up claims that would not otherwise be funded. He warned against the development of an opt-out system of collective redress and the introduction of *cy-près* as a punitive measure.

Judge 1:

Judge 1 observed that the following questions seemed to be of particular importance and asked delegates for their views on them:

- 1) Should collective redress extend beyond litigation and purely consumer claims?
- 2) In contrast to the impression that may be given by the main conference paper, an opt-out action – and not a new form of opt-in – is being proposed.
- 3) Is an opt-out action desirable or would it be preferable to have, for example, modification of existing opt-in procedures, compulsory mediation and/or an increased role for public authorities and regulators?
- 4) What is your opinion on the nature of damages that an opt-out system would entail? Are they to be compensatory or aggregation and a *cy-près* application? Is an opt-out system possible with only compensatory damages? Is *cy-près* appropriate as a means of applying surplus funds?
- 5) What would happen in cross-border cases? To what extent would *res judicata* apply? Would “forum shopping” emerge as an inevitable consequence?

Michael Napier QC:

Michael Napier opened the floor for debate on these questions.

Judge 2:

Judge 2 emphasised the importance of exploring the role of public authorities and regulators and its connection to the opt-in/opt-out debate. He expressed his agreement with Academic 1's argument that in the field of collective redress England & Wales have lagged behind other jurisdictions that they once led and that there now exists the responsibility to catch up with them.

Lawyer 1:

Lawyer 1 advised that the proposals for an improved system for collective redress are at an early stage of progress and he recommended that delegates remain conscious of the cross-border issue and respectful of developments in Europe.

Master of the Rolls:

The Master of the Rolls counselled that any implementing legislation would need to take into account the accompanying need to alter the Brussels regulation.

Mediator 1:

Mediator 1 gave his support to a wider interpretation of redress as embracing out-of-court based solutions.

Trade Union Representative 1:

Trade Union Representative 1 touched upon the conservatism and fear pervading the

debate on defendants and their security for costs and he questioned whether surplus funds could in fact be used to cover the costs of a successful defendant.

Lawyer 2:

Lawyer 2 made the following three points:

1. A future system of collective redress will need to be attractive to funders in order to be workable.
2. *Res judicata* is the key settlement question for defendants and will accordingly need to be addressed.
3. Momentum for an improved regime ought not be slowed down by fears of the costs involved in distributing damages as this is already managed effectively by professional IT providers.

Judge 3:

Judge 3 raised the issue of limitation in collective actions in respect of those under a legal disability.

Lawyer 3:

Lawyer 3 asked for an update on the two CJC papers on funding. He opined that third party funding is not a panacea but a private solution which does not advance the interests of justice.

Robert Musgrove, Chief Executive of the Civil Justice Council:

Robert Musgrove reported that the funding papers touched upon a range of options including third party funding, contingency fees and SLASS. CJC recommendations in respect of SLASS are now with the Legal Services Commission, which is currently preoccupied with its wider reform agenda. As regards contingency fee agreements,

Senior Costs Judge Peter Hurst and Professor Richard Moorhead have undertaken a study on this matter which is currently in draft. Robert Musgrove informed delegates that the area of third party funding is very active and the CJC has interacted with the Financial Services Authority (hereinafter “FSA”), Law Society and Ministry of Justice in this regard. A proposed code of conduct for the regulation of third party funders is currently being devised and this, he added, will be considered at an event to be hosted by the CJC next month.

Master of the Rolls:

The Master of the Rolls asked Academic 1 what systems Canada and Australia deal with the costs of a successful defendant, and if so, how?

Academic 1:

Academic 1 said that in Australia, if a third party funder funds the class action, then the third party funder typically covers adverse costs if a representative claimant loses, and she added that this may be enforced by the defendant. In Ontario, in class actions litigation, a CLAS fund operates deducting 10% from every monetary judgment or settlement. However, this fund has received fewer applications than was originally envisaged, and some successful defendants effectively factor in their legal costs as a cost of doing business.

Judge 1:

Judge 1 declared that the Ontarian system does not work.

Academic 1:

Academic 1 stated that the Ontarian system is regarded as problematical because of the 10% levy which discourages applications to it, and because the levy only applies to those actions which were supported by the fund, not to *all* class actions which proceed to

judgment or to settlement.

Master of the Rolls:

The Master of the Rolls contended that any proposed opt-out scheme would have to make representative claimant personally liable to the defendant for the costs right up to the end of the trial period, and as such, the representative would need to have access to funding.

Lawyer 4:

Lawyer 4 stated that it might be useful to consider the criticism levelled against the evidence of need argument.

Advice Services Representative 1:

Advice Services Representative 1 suggested the insertion in the main conference paper of a reference to the Consumer Redress Act 2007 which deals with representative bodies in collective actions.

Robert Musgrove:

Robert Musgrove stated that it had already been inserted.

Michael Napier QC:

Michael Napier asked the four syndicate groups to consider the following questions:

1. Does collective redress extend beyond litigation?
2. Do you favour compulsory mediation?
3. Should collective actions extend beyond consumer cases?

4. Are you in favour of Academic 1's model of collective redress?
5. What are your views on damages and how they might be applied?
6. What do you think of the cross-border issue?
7. What is your view on Academic 1's grid chart relating to certification procedures?

Master of the Rolls:

The Master of the Rolls added a further question:

8. Should defendants be fully protected for costs throughout? If not, why not? If so, to what extent?

Judge 1:

Judge 1 acknowledged the limits applied to contingency fees in practice. He added that the proposal regarding their introduction here envisages court approval of the percentage rate on a case-by-case basis.

Group A: Lawyer 5

1. Group A felt that collective redress extended beyond litigation.
2. However, it expressed its opposition to compulsory mediation, feeling that it would send out the wrong message and lead to unacceptable behaviour by the parties.
3. Group A preferred the generic application of collective redress.

4. Group A was in favour of a sophisticated third generation legislative mechanism with checks and balances.
5. The question of damages was considered by Group A to be one of the most challenging issues. It was felt that the rationale of an opt-out mechanism would be lost if aggregation of damages did not follow. Group A concluded that the question of compensatory and punitive damages was one of policy and thus for consideration elsewhere.
6. Group A touched upon the *Italian Torpedo* case. There was the feeling that Europe would impose its own solution on England & Wales as regards the cross-border issue.
8. On the subject of costs protection, Group A thought that a clear opt-out procedure with aggregate damages would encourage funders who would provide costs protection for defendants.

Group B: Trade Union Representative 1

Group B came to similar conclusions as Group A.

1. Group B felt that collective redress extended beyond litigation.
2. Group B considered that ADR methods extended beyond mediation and that in any event its use ought to be encouraged rather than made compulsory.
3. Group B favoured the use of the term collective redress over consumer redress.
4. Group B favoured the introduction of an opt-out collective redress system with two provisos:

- a. The need to avoid the potential problems already identified in other jurisdictions
- b. Wide court discretion to deal with any problems which may arise

5/8. Group B considered questions 5 and 8 together. It explored the issues of certainty and timing and felt that the approach to damages, protection for defendants and funding would all have to be taken into account. In the context of damages, there was a wide range of views as to what compensation meant and it decided that this was a substantive issue for further consideration.

Group B looked at what might happen with surplus funds. It raised the issue of trust funds which already exist and anticipated the use of *cy-près*. Some members expressed their support for the Access to Justice fund and the possibility of directing any surplus to worthwhile projects. The idea of returning any surplus to the Exchequer and defendants was also touched upon.

6. In relation to the cross-border issue, Group B touched upon the *Italian torpedo* case and the Brussels regulations but did not reach any specific conclusions on this matter.
7. Group B did not have the time to consider Academic 1's grid chart relating to certification procedures.

Group C: Academic 1

1. Group C believed that litigation should be of last resort. Although it was noted that the ombudsman scheme had recently been extended it was recognised that the role of redress is not one envisaged by the OFT though this may change in the future. Group C concluded that litigation is merely part of a bigger picture.
2. Some members of Group C argued in favour of a presumption of a requirement to mediate which could be opted-out of. Others said this should be a matter for

- judicial discretion. Group C considered the attendant costs of a compulsory requirement to mediate.
3. Group C unanimously concluded that collective redress should extend beyond consumers and consumer cases. It noted that the OFT's proposals regarding subject-specific opt-out representative actions could be broadened in practice if introduced. Group C also noted that SMEs (small and medium enterprises) could comprise members of classes in representative actions, and that these were an often-overlooked, but important, group who could suffer loss and damage from certain types of wrongdoing.
 4. It was suggested that a costs analysis comparing cases conducted on an opt-in basis and those conducted on an opt-out basis could be an important and interesting exercise. Group C unanimously agreed that a new opt-out regime was required and felt that, in addition to in-built protections in the regime itself, such a system would guard against unmeritorious claims through the use of three filters: lawyers, funders and representative organisations.
 5. Group C viewed aggregate assessment of damages as an integral part of an opt-out collective action. It felt that *cy-près* was a controversial political decision for Parliament to take.
 6. Group C did not have the time to consider question 6.
 7. It was considered whether the rules should be fairly prescriptive about which ought to be applied or whether the judge should be granted discretion. One member argued that judicial discretion could give rise to satellite litigation.
 8. Group C expressed the view that a public fund could be a useful tool but that it would have to be thought out and set up carefully. The general view espoused by Group C was that costs shifting should be retained and abandoned only in very limited circumstances.

Group D: Judge 3

1. Group D felt that collective redress should extend beyond litigation.
2. Group D opposed the compulsory use of mediation. It felt that other ADR methods could be employed and on a more flexible basis with, for example, a pre-action protocol to encourage its use.
3. Group D believed that collective redress should be generic in nature rather than based solely on consumer claims.
4. Group D felt that the question of an opt-out system could not be separated from the issue of costs. It identified problems relating to *res judicata* closure for defendants; the identification of claimants; and the identification of those liable for costs.

There was a strong feeling that conditional fee agreements and the after-the-event (hereinafter “ATE”) insurance market could not support an opt-out scheme of collective redress. Group D explored the possibility of no costs shifting and no defendant’s costs on the one hand, and contingency fee agreements on the other. It concluded that the latter was the preferred option.

Group D felt that Europe would take the initiative in this field but that it would look to England & Wales for a lead. As such, it was concluded that any future model should be sufficiently flexible to be adapted elsewhere and that it should also fit in with the European benchmarks.

5. Group D expressed the view that damages should be purely compensatory in nature as a general principle and that surplus funds should revert to defendants. However, where the defendants have sought to, or would, profit from wrongdoing the surplus should be distributed amongst claimants or dealt with through the use

of *cy-près*.

6. Group D did not have the time to deal with *res judicata*. It took the view that England & Wales should devise a collective redress model first and then work with Europe on cross-border issues.
7. On the subject of certification, Group D was acutely aware of the need for specialist judges. It questioned the level such judges would need to be at and the way in which they ought to be trained. Group D also felt that the issues relating to terms of certification were very important.

Judge 1:

Judge 1 asked delegates for their views on costs shifting and the way in which principle should apply in practice.

Judge 4:

Judge 4 stated that Group A considered certification as generally quite straightforward. It would be easy to recognise vexatious cases and certification would only become important in the grey areas in between. Group A felt that once there was certification, funding would follow with built-in protection for defendants. However, the real issue concerned where funding would come from for pre-certification where there is going to be satellite litigation over certification. One group member suggested a dual test comprising a prima facie certification process with a later opportunity for the defendant to vary or set aside the certification order.

Lawyer 1:

Lawyer 1 informed delegates that Group D was particularly concerned about costs shifting. Given that ATE insurance or contingency fees are unlikely to be available, he asked who would pick up the costs of such cases.

Michael Napier QC:

Michael Napier stated that the absence of funding would mean that cases could not be progressed and he asked whether ATE insurers are showing more interest in funding group actions.

Insurer 1:

Insurer 1 confirmed that although ATE insurers are indeed showing more interest in funding group actions, they lack the certainty offered by group litigation orders (hereinafter “GLOs”) and test cases. He added that, in contrast to ATE insurers, third party funders would be concerned about the punitive *vs.* compensatory damages debate. He then stated the need for substantive legal underpinning of any future collective redress regime.

Lawyer 2:

Lawyer 2 remarked that cases are sometimes funded through a combination of insurance and third party funding. He stated that insurers only work on cases prior to certification where there are sufficient aggregate claims. This may suggest that some form of costs limitation at certification with adequate control on both sides could help secure funding.

Lawyer 1:

In response to a question by Judge 1, Lawyer 1 explained how contingency fees and costs shifting could operate independently.

Civil Servant 1:

Civil Servant 1 confirmed that legal aid immunity for costs meant that the costs shifting

rule did not apply and successful defendants could not recover their costs. He cautioned against treating recoverability for costs by successful defendants as a sacred cow and vital part of any new collective redress system. He stated that the uncertainty surrounding opt-out actions meant that it was difficult to see how costs shifting would work. Civil Servant 1 spoke of the importance of balancing the interests of the parties and the possibility of removing costs shifting in some circumstances.

Legislation and Procedure – Lawyer 4

Lawyer 4 guided delegates through a paper drafted by the CJC Collective Redress Working Party. This explored the question of whether implementation of an opt-out collective action regime would require the enactment of substantive legislation or could alternatively be achieved by amendment of the CPR.

Lawyer 4 explained that the impetus for the paper arose from a divergence of opinions expressed by members of the working party. He then summarised these divergent views represented by Academic 1 on the one hand, and John Sorabji (Legal Secretary to the Master of the Rolls) on the other. The former argued that five components of a sophisticated collective redress mechanism – namely limitation, *res judicata*, aggregate assessment of damages, *cy-près* distribution of damages and standing against multiple defendants – would require legislative underpinning. Conversely, John Sorabji traced the evolution of the representative rule in equity and common law, concluding that it could be transformed into a modern class action that could rely on rule change except in the areas of *cy-près* and limitation (where primary legislation would be required).

Lawyer 4 described how the key elements of a sophisticated opt-out collective redress system could be enacted. The working party concluded in favour of Academic 1's position stating that the proposed reform programme is extensive and as such requires the sanction of the legislature. He argued that it was not an attractive prospect to revert to 18th and 19th century authorities to justify reform through amendment to the CPR. Lawyer 4 added that such a move would inevitably lead to an *ultra vires* challenge causing spiralling satellite litigation going all the way to the House of Lords. He also suggested

the possibility of attempting rule change while waiting for a slot in the legislative timetable.

Lawyer 5:

Lawyer 5 commented that the draft Civil Law Reform Bill might amend the Limitation Act according to Law Commission recommendations, and he suggested that this could be used to introduce a discrete area of the proposed reforms.

Group A: Lawyer 2

Group A expressed the view that a comprehensive legislative solution was the best model and that it should codify the procedures in one place. There was a strong feeling that a parallel rules-based exercise could undermine political will for legislative reform. Group A voiced its belief that political support for an improved collective redress mechanism was required and that future debate should proceed on the basis of draft rules rather than abstract principles.

Group B: Lawyer 4

On the one hand, Group B felt it desirable that the reform process be kick started with new rules. However, it also realised that any political decisions on the future of a scheme could not be anticipated. Group B agreed that matters of policy would require substantive legal change, the timing of which would be uncertain given the present political climate. It was concluded that a “Camp David” method was required, by which Group B meant that a set of rules should be drafted ready for debate.

Group C: Civil Servant 1

Group C favoured a comprehensive legislative solution but accepted that this may be difficult to implement given the longer timescales involved and the current political

climate. Group C considered piggy-backing reform on other pieces of legislation and looked at the European Mediation Directive in this regard. Group C worried that reliance on rule change and/or unclear drafting could lead to satellite litigation.

Group D: Lawyer 1

Group D suggested that it would not be good to attempt to lead the rest of Europe in the field of collective redress with rules which might very well end up being challenged. Group D considered European directives and enabling legislation as a vehicle for reform. It questioned whether trusts could be established in every major case and was troubled by the concept of an access to justice trust being used to pay the costs of successful defendants as it could encourage unmeritorious claims. Group D felt that the any residual monies should be given to late claimants and ultimately returned to defendants.

Master of the Rolls:

The Master of the Rolls stated that the CPRC would be reluctant to look at reform on a piecemeal basis in the absence of detailed public consultation. He argued that it would be beneficial for the whole scheme to be drafted in order to facilitate future debate.

Judge 1:

Judge 1 distilled the key elements of the morning debate:

1. Some form of collective redress in addition to existing mechanisms is necessary:
 - a. England & Wales lags behind other jurisdictions where it once led the way
 - b. There is an access to justice problem caused by the inadequacies of the system as it currently stands

2. Collective redress is preferred to the term class or collective action so as to include alternative methods of dispute resolution as well as recourse to the civil courts

3. The apt title is collective redress not consumer redress.
4. The procedure should be generic and not limited to consumer claims however existing procedures such as the OFT's schemes should be maintained and developed in parallel to this
5. Though other forms of dispute resolution are to be encouraged, those other forms should not be compulsory
6. Regulatory and other like bodies they have part to play but there must be recourse to the civil courts in the event of breaches of the civil law
7. There is general support that court-based redress should be an opt-out system but subject to stringent control and safeguards. There would be no new opt-in procedure; existing procedures considered to be adequate.
8. There would be close control by the court with certification in accordance with the agreed provision laid down in the rules.
9. There must be proper protection for defendants. There are some existing controls that weed out frivolous claims.
10. There was a divergence of view on the difficult area of damages. There was a preponderance of opinion that damages should be compensatory. But then this leads to the question of what this means given that there was also general support for aggregation of damages. These are matters of social and public policy. Should there be disgorgement of profit? Is it appropriate to provide access to civil court for a large number of people with small claims if there is no public mechanism of deterrence? What should happen to surplus?
11. Funding is obviously the key as any new system will simply not get off the

ground unless there is proper funding for it. There is some support for contingency fees plus costs shifting. It also appears that ATE insurers may be interested in providing funding. The CJC is hosting a TPF event next month which may be an appropriate occasion to consider this further.

12. Funding is important not only as a means of getting the action off the ground but also because it provides the further safeguards needed for defendants. This must be retained throughout the whole of the procedure.
13. The difficulties of the cross-border situation are recognised but it is suggested that we get on with our own action

Judge 1 then summarised the afternoon debate:

1. There is general agreement that there should be a legislative approach
2. Draft rules might be formulated so that further discussion can focus on something in print.
3. There was disillusionment in some quarters with the perceived lack of political will
4. However, some suggested that a European directive requiring member states to provide access to justice in this area view may mean that our current system is deemed inadequate and others suggested that a reform programme could be pushed along by enabling legislation

Judge 2:

Judge 2 said that legislation cannot be bolted on to directives as they are enacted by regulation under the European Communities Act.

Civil Servant 1:

Civil Servant 1 referred to the importance of regulatory systems and advocated the need to take a holistic approach to the problem.

Michael Napier QC:

Although the main conference paper deals with this point, Michael Napier obtained agreement from Robert Musgrove that it would be given more in-depth treatment.

Trade Union Representative 1:

Trade Union Representative 1 stated that the litigation process effectively underpins the ADR argument.

Judge 2:

Judge 2 voiced his support for the development of draft model rules.

Lawyer 1:

Lawyer 1 suggested the improvement of existing representative actions and GLOs as part of the reform package.

Advice Services Representative 1:

Advice Services Representative 1 referred to the presentational benefit of pushing forward the reform agenda from the perspective of consumers.

Lawyer 4:

Lawyer 4 volunteered the services of the Collective Redress Working Party in drafting

the rules.

Judge 1:

Judge 1 ran through responses made to the recommendations of the main conference paper.

- | | |
|--------------------|--|
| Recommendation 1: | Nothing to say |
| Recommendation 2: | Reflects what was discussed |
| Recommendation 3: | Perhaps too prescriptive and needs to be made more general |
| Recommendation 4: | Substantial change is needed with costs shifting available throughout the process |
| Recommendation 5: | Needs to be altered through deletion of the first sentence |
| Recommendation 6: | Generally supported |
| Recommendation 7: | Yes except there is reference to disgorgement of profits illegally obtained and there is question that leg would certainly be needed in relation to that |
| Recommendation 8: | Supported |
| Recommendation 9: | Not entirely supported. Divergence of view as to what should happen to such funds. The general sense of the meeting would be reflected by that being put on a broader basis rather than restricted to the Legal Services Act |
| Recommendation 10: | Generally supported ²³² |

²³² NB: the recommendations at this stage were: RECOMMENDATION 1: A wider range of Representative Bodies should be able to bring claims on behalf of consumers; RECOMMENDATION 2: Collective consumer claims may be brought on an opt-in or opt-out basis; RECOMMENDATION 3: Collective consumer claims should meet strict certification procedure by the Court; RECOMMENDATION 4: There should be full costs shifting prior to the point of certification,; thereafter the Court will determine the costs liability of the parties; RECOMMENDATION 5: There should be no right of appeal against positive certification. Appeal against a refusal to certify a claim should be subject to extant rules²³² on permission to appeal; RECOMMENDATION 6: The case managing judge should exercise an enhanced form of active case management, along the lines of the recommendations of Mr Justice Aiken's Working Party; RECOMMENDATION 7: Where a case is brought on an opt-out basis, the court should have the power to award aggregate damages; RECOMMENDATION 8: Where a case is settled on an opt-out basis, the court should conduct a "Fairness Hearing" to ensure that the interests of the consumer claimants are properly and fairly served; RECOMMENDATION 9: Unallocated damages from an aggregate award should be

Academic 1:

Academic 1 asked whether Recommendation 1 (*'A wider range of Representative Bodies should be able to bring claims on behalf of consumers'*) was intended to preclude those members of the class with a direct action from acting as representative claimants – the way that it was presently worded, it could be taken to mean that only 'representative bodies' could bring the claims. Judge 1 responded that the present intention was to allow either representative body or a directly-affected class member to bring the claims on behalf of others, and that the recommendation should be reworded to reflect that.

Lawyer 1:

Lawyer 1 suggested that the consensus for a Euro-sensitive approach be reflected in the main conference paper.

Master of the Rolls:

The Master of the Rolls thanked Michael Napier for facilitating the event and he thanked all the delegates for attending. He noted the consensus that had been reached on many aspects of the debate and expressed his hope that the discussions may be taken forward.



APPENDIX I

Protective Costs Orders – Summary of Case Law

CASE LAW - PROTECTIVE COSTS ORDERS

1. The Court of Appeal has reviewed the law relating to protective or pre-emptive costs orders where costs are to be paid out of a fund.²³³

2. In a case where trustees of a charity applied to the court for directions in relation to an appeal against an order appointing a receiver and manager of the charity, and whether they might be indemnified out of the charity's property in respect of the costs incurred by them in prosecuting the appeal, the court allowed the Attorney-General to be heard and to submit evidence on the application. The court held that the practice in pre-emptive costs applications was that they should be between the parties.²³⁴ Justice required that a party had a right to be heard before an order was made that the party would bear the whole costs of substantial litigation whether it won or lost. The Attorney-General was, for the purpose of the application, regarded as being in the same position as a beneficiary. There was strong public interest in the Attorney-General being present on an application which, if successful, would involve the expenditure of a large proportion of the charity's funds.²³⁵ A policyholder objecting to a proposed scheme of re-organisation of an insurance company was entitled to a pre-emptive costs order in his favour because his position was closely analogous to that of

²³³ *McDonald v Horne* (1995) 1 All E.R. 961

²³⁴ CPR 19.9 (derivative claims).

²³⁵ *Weth & Ors v HM Attorney-General & Ors*, November 21, 1997, Mr L. Collins Q.C. (Deputy High Court Judge) (unreported).

a shareholder bringing a derivative action against the controllers of a company on behalf of the company as a whole, in that he had given consideration in exchange for his interest. The application also enabled the proposed reorganisation to be fully tested by the court.²³⁶

Statutory Costs Jurisdiction

3. The Court's jurisdiction to deal with litigation costs is based upon section 51 of the Supreme Court Act 1981; this discretion must be exercised in accordance with the Rules of Court and established principles.

The General Principles

4. Costs follow the event (subject to CPR, r.44.3).

The Special Principle — Costs Out of a Fund

- (a) Costs of trustees and other fiduciaries: In the case of a fund held on trust the trustee is entitled to his costs out of the fund on the indemnity basis provided only that he has not acted unreasonably or “in substance for his own benefit rather than that of the fund”.²³⁷
5. Trustees are able to protect themselves against the possibility that they may be held to have acted unreasonably or in their own interest by applying at an early stage for directions as to whether to bring or defend proceedings.²³⁸
 - (b) Extensions of special principle to beneficiaries: The Chancery Courts have been willing in certain circumstances to extend to other parties to trust litigation an entitlement to costs in any event by analogy with that accorded to trustees.²³⁹ Kekewich J. said that trust

²³⁶ *Re Axa Sun Life Plc* [2000] EW Ch.D., November 1, Evans-Lombe J.

²³⁷ CPR, r.48.4.

²³⁸ See *Re Beddoe* [1893] 1 Ch. 547, at 557.

²³⁹ See *Re Buckton* [1907] 2 Ch. 406, Kekewich J.

litigation could be divided into three categories:

- (i) proceedings brought by trustees to have the guidance of the court as to the construction of the trust instrument or some question arising in the course of the administration: in such cases the costs of all parties are usually treated as necessarily incurred for the benefit of the estate and ordered to be paid out of the fund:
- (ii) cases in which the application is made by someone other than the trustees that raise the same kind of point as in (i) and would have justified an application by the trustees: this trust is treated in the same way as the first:
- (iii) cases in which a beneficiary is making a hostile claim against the trustees or another beneficiary. This is treated in the same way as ordinary common law litigation and costs usually follow the event. The court may sometimes feel sufficiently confident that the case is within (i) or (ii) to be able to make a prospective order that parties other than the trustees are to have their costs in any event.²⁴⁰

- (c) Extension of principle to derivative action: In *Wallersteiner v Moir*,²⁴¹ the Court of Appeal said that a minority shareholder bringing a derivative action on behalf of a company could obtain the authority of the court to sue as if he were a trustee suing on behalf of a fund with the same entitlement to be indemnified out of the assets against his costs and any costs he may be ordered to pay to the other party. The Court said that the minority shareholder could make a

²⁴⁰ See *Re Exchange Securities Ltd (No.2)* (1985) B.C.L.C. 392, 395.

²⁴¹ [1975] Q.B. 373.

Beddoe application in the same way as the trustee.

- (d) Extension of Wallersteiner to Pension Funds: There is a compelling analogy between a minority shareholder's action for damages on behalf of a company and an action by a member of a pension fund to compel trustees or others to account to the fund. In both cases a person with a limited interest in a fund, whether the company's assets or a pension fund, is alleging injury to the fund as a whole and seeking restitution on behalf of the fund. What distinguishes the shareholder and pension fund member on the one hand from the ordinary trust beneficiary on the other is that the former have both given consideration for their interests, they are not just recipients of the settler's bounty. The relationship between the parties is a commercial one and the pension fund members are entitled to be satisfied that the fund is being properly administered. Even in a long contributory scheme the employer's payments are not bounty, they are part of the consideration for the services of the employee.

6. Pension funds are a special form of trust and the analogy between them and companies with shareholders is so much stronger than in the case of ordinary trusts that in a judgment of the court it would do no violence to established authority if the court were to apply to them the Wallersteiner procedure.²⁴²

Practice: The power to make a Wallersteiner v Moir order in a pension fund should be exercised with considerable care.²⁴³

7. The question is whether the claimants have shown a sufficient case for further investigation. Once the judge is satisfied that there are matters which need to be

²⁴² The attention of the court was drawn to a decision of the House of Lords in *Chapman v Chapman* [1954] A.C. 429 but it was held that the jurisdiction has to be found in s.51 of the Supreme Court Act 1981 which is subject only to rules of court and established principles. The court was not persuaded that any such rule or principle would be violated.

²⁴³ See *Smith v Croft* [1986] 1 W.L.R. 580, Walton J.

investigated, caution should take the form of choosing the most economical form of investigation. This will not necessarily involve authorising a full trial or even full pleadings and discovery. The court should not authorise any legal process until it has explored the possibility of independent investigation by a person or persons acceptable to both parties.

8. Even if further investigation is required it need not necessarily take the form of a full-scale trial, the court might in the first instance authorise only discovery (preferably limited) or appoint judicial trustees with power to take possession of the documents and investigate for themselves. The court may also think that if the action is to be pursued beyond the stage of investigation and discovery it should be put into the hands of independent judicial trustees in which case the pre-emptive costs order will expire when the handover has been completed.
9. In general the court should try to secure the fairest and most economical judicial or extra judicial resolution of the dispute.²⁴⁴
10. The application for a pre-emptive costs order should be heard by a judge of first instance in the Chancery Division, even if the case was to be heard by the Court of Appeal.²⁴⁵
11. Under the CPR the court may take a more robust view about costs to be paid out of the trust fund. Where trustees are able and willing to bring proceedings themselves a successful claimant who is a beneficiary will not necessarily be awarded costs out of the fund.²⁴⁶
12. The court should avoid the temptation to be swayed by a comparison between the costs of a potential appeal and the funds in a scheme so as to be generous with the money of another. Trusts did not exist to fund litigation by a minority group of

²⁴⁴ per Hoffman L.J., *McDonald v Horn* [1995] 1 All E.R. 961, CA. 287

²⁴⁵ *Machin v National Power plc (No.1)*, May 18, 1998, Laddie J. (unreported). See also *Machin v National Power plc (No.2)*, July 31, 1998, Carnwath J. (unreported).

²⁴⁶ *D'Abo v Paget (No.2)*, The Times, August 10, 2000, Lawrence Collins Q.C.

members at the expense of its members as a whole but to use its assets for the benefit of all those members in accordance with the rules that defined its existence and purpose.²⁴⁷

PROTECTIVE COSTS ORDERS IN PUBLIC LAW CASES

13. In *The Queen (on the application of Corner House Research) v Secretary of State for Trade and Industry* [2005] EWCA Civ 192 the Court of Appeal considered, in depth, the question of Protective Costs Orders (PCOs) in public law cases. The Court stated that the general purpose of a PCO is to allow a claimant of limited means, access to the court in order to advance his case without the fear of an order for substantial costs being made against him. A fear which could dis-inhibit him from continuing the case at all. The Court identified the leading authority on the topic as the judgment of Dyson J in *R v Lord Chancellor ex p. CPAG* [1999] 1 WLR 347.

14. The Court traced the history of the “English Rule” that costs follow the event, from the end of the 13th century. The Chancery Division tempered the effect of the English Rule principle in cases where there was a “private fund” available. This fund might be the assets of a trust²⁴⁸; the assets of a company in a minority shareholders action²⁴⁹; the action of a pension scheme²⁵⁰; or, the assets involved in the reorganisation of a life insurance business.²⁵¹ The starting point for Judges was the proposition that they must do nothing to inhibit the exercise of discretion as to costs, which would be vested in the Judge conducting the substantive hearing.

15. In relation to costs in public law litigation, the Court pointed out that official bodies would often appear or intervene in public law proceedings, on the basis that they were present to assist the court in an amicus curiae role, even if they were respondents in the proceedings, and in that capacity, in a court which traditionally ordered only one

²⁴⁷ *Chessels v British Telecommunications Plc* [2001] EWHC, Ch. D., December 20: [2002] PENS L.R. 141, Laddie J. (pre-emptive costs order refused).

²⁴⁸ *In Re: Beddoe: Downes v Cotton* [1893] 1 Ch 547

²⁴⁹ *Wallersteiner v Moir (No.2)* [1975] QB 373

²⁵⁰ *McDonald v Horn* [1995] ICR 685

²⁵¹ *In Re Axa Equity and Law Life Assurance Plc (No.1)* [2001] 2 BCLC 447

set of costs, it would neither apply for costs, nor expect an order for costs to be made against it, even if its submissions favoured one side more than the other.²⁵² From time to time leave to appeal to the House of Lords is given to a public body, on terms that it would pay both sides costs in the House of Lords and not seek to disturb the orders for costs made in the court below.

16. The decision in *Corner House Research* is concerned with the incidence of costs in a judicial review application at first instance. The Court indicated that there was a growing feeling that access to justice is sometimes unjustly impeded if there is slavish adherence to the normal private law costs regime.

17. In *R v Lord Chancellor ex p. CPAG* Dyson J heard two applications for PCOs at the same time. One to enable the Child Poverty Action Group to continue judicial review proceedings, for the purpose of requiring the Lord Chancellor to reconsider the way he exercised his power in relation to the extension of legal aid cover before Social Security Tribunals and Commissioners; and second, in relation to a legal challenge by Amnesty International UK to a decision made by the Director of Public Prosecutions not to prosecute two individuals for possession of an electro-shock baton without the requisite licence. Although the respondents conceded that the court possessed jurisdiction to make a PCO. There was no agreement as to the correct principle. Dyson J said that it was only in the most exceptional circumstances that the discretion to make a PCO should be exercised, in a case involving a public interest challenge. He went on to lay down certain guidelines which were further reviewed by the Court of Appeal in *Corner House*.

18. Having reviewed the historical setting of PCOs the Court went on to consider recent developments in Ireland, Canada and Australia. The Court then set out the governing principles and gave some practical guidance. The basic governing principles are set out in Section 51 of the Supreme Court Act 1981 and CPR Parts 43 to 48. CPR 44.3 is of particular importance. The Court expressed itself satisfied that

²⁵² See *R (Davis) v Birmingham Deputy Coroner* [2004] EWCA Civ 207 the Court cited Justices, Tribunals, Coroners and The Central Arbitration Committee as examples.

there are features of public law litigation which distinguish it from private law and family litigation. There is a public interest in the elucidation of public law by the higher courts, in addition to the interests of the individual parties. One should not therefore necessarily expect identical principles to govern the incidence of costs in public law cases.

19. The Court was in broad agreement with the guidelines laid down by Dyson J but decided to reformulate them with greater precision:

“1. A PCO may be made at any stage of the proceedings, on such conditions as the court thinks fit, provided that the court is satisfied that:

- (i) the issues raised are of general public importance;
- (ii) the public interest requires that those issues should be resolved;
- (iii) the applicant has no private interest in the outcome of the case;
- (iv) having regard to the financial resources of the applicant and the respondent(s) and to the amount of costs that are likely to be involved it is fair and just to make the order;
- (v) if the order is not made the applicant will probably discontinue the proceedings and will be acting reasonably in so doing.

2. If those acting for the applicant are doing so pro bono, this will be likely to enhance the merits of the application for a PCO.

3. It is for the court, in its discretion, to decide whether it is fair and just to make the order in the light of the considerations set out above.”

20. There is room for considerable variation in the form of order to be used, depending on what is appropriate and fair in each of the cases in which the question may arise. It is likely that a costs capping order for the claimant’s costs will be required in all cases, other than one where the claimant’s lawyers are acting pro bono, and the effect of the PCO is to prescribe in advance that there would be no order as to costs in the substantive proceedings, whatever the outcome. The court gave further guidance as follows:

- “(i) When making any PCO where the applicant is seeking an order for costs in its favour, if it wins, the court should prescribe, by way of a capping order, a total amount of the recoverable costs which will be inclusive, so far as a CFA funded party is concerned, of any additional liability;
- (ii) the purpose of the PCO will be to limit or extinguish the liability of the applicant if it loses, and, as a balancing factor, the liability of the defendant for the applicant’s costs, if the defendant loses, will thus be restricted to a reasonably modest amount. The applicant should expect the capping order to restrict it to solicitors’ fees and a fee for a single advocate of junior counsel status that are no more than modest;
- (iii) the overriding purpose of exercising this jurisdiction is to enable the applicant to present its case to the court with a reasonably competent advocate, without being exposed to such serious financial risks that would deter it from advancing a case of general public importance at all, where the court considers that it is in the public interest that an order should be made. The beneficiary of a PCO must not expect the capping order that will accompany the PCO to permit anything other than modest representation, and must arrange its legal representation (when its lawyers are not willing to act pro bono) accordingly.”

21. The Court did not think that it had any power to make an order that the defendants should finance the claimant’s costs at first instance as the litigation proceeded. The Court went on to set out a suggested procedure and gave an indication of the modest

level of costs it would expect to see (generally not exceeding £5,000 in a multi party case).

22. Certain conditions have to be fulfilled to warrant the making of a protective costs order, one of these being that the applicant should have no private interest in the outcome of the case. Where the applicant was seeking compensation as part of the relief sought, that amounted to a private interest in the outcome, and the application was refused²⁵³. When making an application for a protective costs order for the first time at the appeal stage, there is no reason why different considerations from those set out in *R (Cornerhouse Research) v Secretary of State for Trade & Industry* above, should be applied²⁵⁴.
23. In *R (Ministry of Defence) v Wiltshire and Swindon Coroner* [2005] EWHC 889 (admin); [2006] 1 WLR 134; [2005] 4 All ER 40, Collins, J, the Judge expressed the view that protective costs orders had until then been made only in favour of claimants in judicial review cases. The purpose behind such orders is to ensure that, in appropriate cases, a litigant will not be precluded from bring a valid claim because the costs of so doing are likely to be prohibitive, and, more importantly, because the risk, if he loses, of having to pay the other side's costs are such as would inhibit him from bringing that claim. That is particularly the case where it is considered to be in the public interest that someone challenge a particular matter which has a wide effect, or may have a wide effect and there is, for example, a pressure group or individuals who have an interest in so doing, but who do not have the means to risk an adverse order for costs.
24. The Judge however thought that the principle was a deeper one and a wider one, in that the court's general discretion in relation to costs, and more importantly in ensuring that there is proper access to justice, and if the needs of justice require, appropriate orders can be made. Collins J could see no reason in principle why a

²⁵³ *Weir & Ors v Secretary of State for Transport* [2005] EWHC 24 April (Ch) Lindsay J.

²⁵⁴ *Goodson v HM Coroner for Bedfordshire & Luton* [2005] EWCA Civ 1172..

protective costs order should not, in an appropriate case, extend to protect the position of a defendant. It was unlikely in public law cases that a defendant, being a public body, would be in a position where a protective costs order was necessary in the interests of justice but the Judge did not rule out the possibility that that could arise in a given set of circumstances, particularly perhaps where an individual had a public law role and had to make a decision in that role and there was, for whatever reason, no protection given to him in relation to costs by any other body or person.

25. Collins J accepted the circumstances where that could arise would be unusual, and no doubt exceedingly rare, but the possibility was there and the principles relating to protective costs orders could readily be adapted to fit the relevant circumstances.

OTHER ORDERS FOR THE COSTS OF TRUSTEES

26. Whilst it is normal practice on an application to the court for directions by trustees for the costs to be paid out of the trust funds, the court has a discretion to diverge from that practice where appropriate. Such a course was held to be appropriate where the trustees had decided to adopt a partisan role, where they had argued positively for a specific outcome in the interests of one class of beneficiary against the interests of another class. In those circumstances the court held that the role adopted by the trustees was not neutral and the trustees had to accept that they might be subject to costs consequences. The existence of an exoneration clause within the trustees' terms of office was no protection against a court order, nor was it a factor which inclined the court to exercise its discretion in the trustees favour.²⁵⁵

27. Where the Charity Commission appointed a receiver and manager of the charity, and subsequently on his advice appointed new trustees and removed the former chairman of trustees, under section 18 of the Charities Act 1993, the former trustee appealed against the appointment of the receiver and applied for an order indemnifying him out of the charity's property in respect of the costs of the appeal. The trustees' application was dismissed and permission to appeal refused by the Court of Appeal on the basis that the trustee had not been acting for the benefit of the charity (by refusing to

²⁵⁵ *Breadner v Granville and Grossman* [2000] EWHC, Ch. D., July 16, Park J.

compromise an earlier action) and was therefore liable to pay the costs.²⁵⁶

28. Where the trustees of a pension scheme brought proceedings, and the beneficiary representative of the active members of the scheme was a defendant, the defendant's application for a pre-emptive costs order was granted taking into account the size of the fund and the fact that the trustees had named the particular beneficiary as a defendant. Even if it could be said that it had not been absolutely necessary for the beneficiary to be joined, the fact that he had been would normally entitle such a party to their costs.²⁵⁷

29. In a case where a company went into administration after a shareholder had brought a petition under section 459 of the Companies Act 1985 the administrator sought directions from the court in relation to possible appeals from orders made relating to the petition. The court gave directions relating to the appeals and made pre-emptive costs order in relation to those proceedings in favour of the administrators to the effect that the costs were to be paid out of the estate of the company, in any event in priority to the claims of the other creditors. On appeal it was held that the pre-emptive costs order should not have been made in circumstances where the litigation was hostile. The court was required to be particularly cautious in making a pre-emptive costs order. To make such an order the court needed complete confidence that the administrators would win and that all the costs would be properly incurred. A pre-emptive costs order could be made only on the strongest possible grounds once it was established that there was a more than negligible chance that the administrators might fail. It was potentially unjust to make a pre-emptive costs order.²⁵⁸

²⁵⁶ *Weth v H M. Attorney General* [2001] EWHC, Ch. D., February 23.

²⁵⁷ *Stevens v Bell (Costs)* [2001] OP L.R. 123, Park J.

²⁵⁸ *Ciro Citterio Menswear Plc* [2002] EWHC, Ch, May 3, Pumfrey J.



APPENDIX J

CPR 3.1 – The Court's Case Management Powers

CPR 3.1:

3.1

(1) The list of powers in this rule is in addition to any powers given to the court by any other rule or practice direction or by any other enactment or any powers it may otherwise have.

(2) Except where these Rules provide otherwise, the court may –

- (a) extend or shorten the time for compliance with any rule, practice direction or court order (even if an application for extension is made after the time for compliance has expired);
- (b) adjourn or bring forward a hearing;
- (c) require a party or a party's legal representative to attend the court;
- (d) hold a hearing and receive evidence by telephone or by using any other method of direct oral communication;
- (e) direct that part of any proceedings (such as a counterclaim) be dealt with as separate proceedings;
- (f) stay (GL) the whole or part of any proceedings or judgment either generally or until a specified date or event;
- (g) consolidate proceedings;
- (h) try two or more claims on the same occasion;
- (i) direct a separate trial of any issue;
- (j) decide the order in which issues are to be tried;

- (k) exclude an issue from consideration;
 - (l) dismiss or give judgment on a claim after a decision on a preliminary issue;
 - (ll) order any party to file and serve an estimate of costs;
 - (m) take any other step or make any other order for the purpose of managing the case and furthering the overriding objective.
- (3) When the court makes an order, it may –
- (a) make it subject to conditions, including a condition to pay a sum of money into court; and
 - (b) specify the consequence of failure to comply with the order or a condition.
- (4) Where the court gives directions it may take into account whether or not a party has complied with any relevant pre-action protocol (GL).
- (5) The court may order a party to pay a sum of money into court if that party has, without good reason, failed to comply with a rule, practice direction or a relevant pre-action protocol.
- (6) When exercising its power under paragraph (5) the court must have regard to –
- (a) the amount in dispute; and
 - (b) the costs which the parties have incurred or which they may incur.
- (6A) Where a party pays money into court following an order under paragraph (3) or (5), the money shall be security for any sum payable by that party to any other party in the proceedings.
- (7) A power of the court under these Rules to make an order includes a power to vary or revoke the order.



APPENDIX K

Executive Summary – Report and Recommendations of the Commercial Court Long Trials Working Party

A. Executive Summary of Recommendations of the Working Party²⁵⁹

A1. General (see Section B)

1. The Commercial Court Long Trials Working Party (“WP”) was set up under the auspices of the Commercial Court Users Committee in January 2007. The WP gave itself wide terms of reference enabling it to consider all aspects concerning the management of heavy and complex litigation in the Commercial Court.

2. It concluded that the existing procedural code, under the CPR, contained sufficient powers to enable proposals for the more efficient conduct of these cases to be implemented. The WP concluded that there are further ways in which the procedural code can and should be supplemented and so more effectively used to achieve that greater efficiency, in the interests of the business community served by the Commercial Court. The WP identified a number of respects in which the Admiralty and Commercial Courts Guide (“the Guide”) can be used to achieve this. Many of the arrangements recommended by the WP can be applied to, and should benefit, all Commercial Court cases and not simply the most heavy and complex. The areas in which the Guide will need change have been analysed.

²⁵⁹ Report and Recommendations of the Commercial Court Long Trials Working Party (December 2007) (Judiciary of England and Wales) at 6 – 13.

3. The WP reviewed each of the stages of litigation. It noted that a problem in one stage could lead to problems in other stages. For example long and complex statements of case could lead to problems with disclosure, witness statements, client accountability and length of trial. To take another example, some forms of judicial control of complex litigation could occur too late in the litigation to have a sufficiently useful effect.

A2. Pre-Action Protocols (see Section C)

4. The WP concluded that litigants should continue to comply with the general protocols. However, consistently with the need to ensure that cases are developed with the benefit of greater definition and judicial involvement (in particular through the List of Issues: see paragraph 5 below) the WP concluded that, particularly in large cases, the time and burden of pre-action procedure should be kept within limits. Accordingly, it recommended that:

- a. The parties should comply with the minimum expectations of the existing pre-action protocol regimes.
- b. The Guide should be amended to provide that in such cases the pre-action letter of claim should be concise and do no more than explain the proposed claim sufficiently to enable it to be understood by the potential defendant. Similarly, the potential defendant need only provide a concise response.
- c. Generally, there would be no need for the parties at this stage to appoint experts before writing a letter of claim, or responding to one.
- d. Compliance with pre-action protocol regimes should not be required in cases where delays in starting proceedings might prompt forum shopping in other jurisdictions.

A3. Statements of Case and Lists of Issues (see Section D)

5. The WP noted a tendency of parties (through their lawyers) failing to plead only material facts and, instead, setting out detailed background facts and evidence, as well as law and argument. The WP considered that a client must be able readily to identify the

key aspects of his case and the basis on which his opponent takes issue with them. The WP recommended that:

- a. Statements of case should not exceed 25 pages in length without permission of the court and should (except in the case of very brief statements of case) include a short summary.
- b. The court should regulate whether further information on a party's statement of case is required.
- c. At the first Case Management Conference (“CMC”) the court will settle judicially the list of key issues from an initial draft provided by the parties (“the List of Issues”). That list will thereafter become, effectively, a court document. The statements of case will thereafter increasingly have only secondary importance. A draft Model List of Issues is appended to this Report at Appendix 2.
- d. “Pleading points” will be actively discouraged by the court.
- e. The List of Issues would be used to regulate subsequent disclosure, witness statements and expert reports, all of which must be framed by reference to the issues within the List.

A4. Disclosure (see Section E)

6. The WP recognised the importance of disclosure but proposed the following steps to deal with the widely expressed concerns that, particularly in large scale litigation, the administrative burden and therefore cost of disclosure has grown disproportionately to its benefits:

- a. Automatic disclosure should not take place until after the CMC scheduled to deal with disclosure.
- b. In advance of that CMC the parties should prepare a schedule identifying the

disclosure required by reference to the issues listed in the List of Issues, setting out (with brief reasons) whether "standard disclosure", or less or more, and when, was said to be required on each particular issue.

c. The aim will be to control disclosure on each issue by reference to classes of document, and periods of time, and level of disclosure, that are proportionate to the costs involved and the likelihood of the disclosure assisting the court in determining the issue.

A5. Witness Statements (see Section F)

7. The WP concluded that, in general, witness statements are often too long and insufficiently focused on the real issues that the witness can deal with. Accordingly it recommended that:

a. In appropriate cases the court should impose a limit on the length of witness statements.

b. The parties should, by headings in the witness statements themselves, identify which paragraphs of the statements relate to which of the issues in the List of Issues.

c. In appropriate cases, on appropriate issues, the court should dispense with witness statements, order statements of the "gist" of evidence to be served, and/or allow limited examination in chief to be given at trial.

A6. Expert Evidence (see Section G)

8. The WP concluded that expert reports in large-scale litigation are often too long and over elaborate. The principal reason for this is the failure of the parties and the court to define with sufficient precision the relevant expert disciplines and issues before the experts write their reports. Accordingly, the WP recommended that:

a. The List of Issues should identify the expert issues, either when it is first produced or subsequently when they have been properly identified.

- b. Expert reports should be framed by reference to those issues.
- c. Expert reports should normally be exchanged sequentially.
- d. The court should delay settling the List of Issues, to the extent that it relates to expert issues, if more time is needed before doing so.
- e. The court should always consider limiting the length of expert reports.

A7. Summary judgment/ Striking out/ Submissions of No Case to Answer (see Section H)

9. The WP concluded that it would be inappropriate if not impossible to have, for different types or size of case, different standards by which the court should judge whether to grant summary judgment or to strike out a claim or defence. However, it recommended that:

- a. The court should recognise that a more flexible approach to the range of costs orders available where applications for summary judgment or to strike out a claim or defence had failed might encourage parties to explore the use of these powers more.
- b. The List of Issues should be used by judges to promote a consideration of whether particular issues were appropriate for summary judgment or strike out applications.
- c. In large cases which look likely to generate a large number of interim appeals (which often include summary judgment/strike out applications) a Lord Justice of Appeal with Commercial Court experience should be identified at an early stage in the case to be a member of every appeal panel, and arrangements should be made for appeals to be taken as promptly as possible.

10. The WP does not recommended that there be any change to the present rules and practice regarding a submission of “no case to answer” at the end of a claimant’s case. However there may be cases where the judge can isolate one or more important issues and hear all the evidence and submissions on them and then rule on them.

A8. Indications from Judges as to the Merits of a Case/ Preliminary Issues (see Section H)

11. The WP noted the various occasions when a judge might give an indication of provisional views on the merits of a case. Overall the WP was in favour of this, provided it was done openly, with the parties’ consent and the judge made it clear that the view was provisional. The WP recommended that:

- a. Judges should be encouraged to give provisional views on the merits of particular issues identified in the List of Issues if it seemed appropriate to do so: eg at a CMC, as well as giving rulings at strike out/summary judgment applications.
- b. The parties could agree that views could be given at suitable points in the trial.
- c. The court should raise awareness of the existing early neutral evaluation (“ENE”) facility referred to in the Guide.
- d. More use should be made of preliminary issues, using the new List of Issues as the guide to identifying them.

A9. Use of Technology – Scope for “paperless” Litigation (see Section I)

12. The WP recognised that at this stage any proposals for paperless trials must be limited. Nonetheless, the WP recommended that:

- a. The Guide should contain a specific provision that the parties and the court must consider at an early stage in a case the scope for using IT, particularly at the trial and particularly in long and complex cases.

b. This consideration should include the production in hard copy of only those bundles likely to be referred to reasonably frequently at trial, with electronic copies of the remaining documents available in court.

c. A specialist working party should be set up, consisting of clients and practitioners who will be in and will use the new courts in the new building under construction in Fetter Lane. This group should develop specific proposals on how future trials can, where appropriate, become paperless.

A10. Costs (see Section J)

13. The WP considered that many of the existing powers of the court in relation to costs are among the advantages that litigation in the Commercial Court offers over litigation in many other jurisdictions.

14. The WP felt strongly that the introduction of daily Court fees would put the court, and thus the use and development of English commercial law, at a significant disadvantage.

15. The WP further recommended that:

a. The court should be prepared to make a summary assessment of costs where the total costs claimed was £250,000 or less.

b. More use should be made of payments on account of costs where a higher sum for costs than that is claimed.

c. The court should make more use of its power to award costs to discourage parties from behaving unreasonably.

A11. Management of the Pre-Trial Timetable and the Trial (see Section K)

16. The WP considered that, by having the List of Issues and then focusing disclosure, witness statements and expert evidence on the issues identified in that list, there should be a narrower and more focused engagement of the parties at trial than has sometimes

been the case in large and complex cases. Its recommendations for trials therefore include the following:

- a. No two-party trial, however complex, should ordinarily be listed for more than 13 weeks (3 months).
- b. The pre-trial and trial timetable should be organised around careful estimates for each piece of work, with an appropriate contingency built in.
- c. At the Pre-Trial Review provisional time limits should be set for every component of the trial, ie. openings, the examination-in-chief (if any), cross-examination of all witnesses and closing speeches. The timetable for preparation of the chronology, and the type required, should always be discussed.
- d. The court should make more use of its existing powers to decide the order in which issues are taken at trial and to take certain issues to the point of decision before moving onto other issues.
- e. The parties must agree a list of matters of common ground (within the List of Issues) and this should be updated so as to ensure that the trial remains focused on the key areas of difference between the parties.
- f. Outline opening arguments should be concise, not normally exceed 50 pages, and be structured in accordance with the List of Issues.
- g. No opening speech should ever ordinarily be estimated to exceed two days, even in the heaviest case.
- h. Time limits should be set for the examination of witnesses (either individually or collectively) wherever appropriate.
- i. Consideration should be given, on a case-by-case basis, to a change in court

sitting hours during trial to meet the needs of those involved and to achieve the objective of efficiency.

j. The court should impose a page limit on the length of written closing arguments, and the oral closing argument by a party should not exceed two days.

A12. Client Accountability and Responsibility for Litigation (see Section L)

17. The WP concluded that there were respects in which it was possible to increase client involvement in the litigation, in the interests of ensuring that appropriate senior management responsibility continued to be taken for the litigation, and thus that there was greater client accountability.

18. The WP has proposed the following:

- a. Senior client representatives should be required to sign a fresh statement of truth shortly before trial verifying statements of case.
- b. At appropriate stages those representatives should also be required to sign a statement to the court indicating whether ADR has been considered internally within the client organisation.
- c. The power of the judge to require such representatives to be present in court (by video link if necessary), if the judge considers that doing so will assist in case management or resolution of the dispute, should be emphasised. At the same time care must be taken not to deter foreign clients from litigating in London by requiring their attendance when not really necessary.

A13. Judicial Resource Management for Heavy and Complex Cases (see Section M)

19. The WP recognised that its recommendations will require more judicial resources if long and complex cases are to be prepared and managed efficiently before and at the trial. It appreciated that Commercial Judges are called upon to undertake duties away from the Commercial Court.

Accordingly, the WP recommended that:

- a. The "two judge team" system should continue to be used where appropriate. It should be the duty of the parties to ask for a two judge team at an early stage, if they think that the case is sufficiently heavy/complex.

- b. Steps should be taken to ensure that at all times one or other of the two judges nominated for a heavy and complex case will be available to sit in the Commercial Court to deal with CMCs/interim matters in that case and/or the trial.

- c. Arrangements should be put in place to enable the parties in a heavy and complex case to contact one or other of the two judge team informally (ie by telephone or email, via the clerk or the Listing Office), so as to deal with urgent matters or to seek guidance on procedural points.



APPENDIX L

‘Sixty (60) Design Issues for an Opt-out Collective Action Regime’²⁶⁰

**CIVIL JUSTICE COUNCIL
COLLECTIVE CONSUMER REDRESS EVENT**

Old Windsor, Berkshire

26–27 March 2008

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Preamble:

- There are three parts to any collective action regime: need, design and funding. The ‘need’ aspect has been previously addressed (*Reform of Collective Redress in England and Wales: A Perspective of Need* (available at: www.civiljusticecouncil.gov.uk, ‘Publications’, 8 February 2008)).
- This note sketches some points about the ‘design framework’ of such a regime. The note intentionally does not deal with the treatment of costs and funding (the subject of a separate study).

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- The purpose of this note is to *canvass for wide discussion* the various design conundrums that arise in the procedural aspects of an opt-out collective action—throughout its beginning, its middle, and its end.
- Procedural aspects ‘at the beginning’ dominate the framework, for this is the ‘engine room’ which fires up or extinguishes the collective action at the very outset. It is a moot point whether the ‘beginning procedures’ are overly stated/prescriptive, but at least in Commonwealth jurisdictions, it seems to reflect an attitude of the law reform commissioners and legislatures to ensure, and demonstrably so, that their collective frameworks are not merely transplants of the US opt-out class action regime.
- Not all of these ‘design issues’ will necessarily require legislative articulation. Some would probably be dealt with sufficiently by establishing judicial precedent. A few *may* be possible to deal with by consideration and negotiation between litigants during the litigious process rather than by legislative prescription or judicial precedent being set down. All, however, have arisen in class actions jurisprudence elsewhere, and for each one of them, *different* solutions are possible. Hence, that is why their consideration within the design of any supplementary opt-out regime implemented for England and Wales (as a ‘third generation statute’), and a fulsome debate by stakeholders about the different solutions, are crucial.

AT THE BEGINNING ...

Pleadings matters

1. In accordance with the usual requirements of CPR 3.4(2)(b) and (c), *no frivolous, vexatious or abusive claims* will be permitted to be brought as collective actions.
2. In accordance with the usual requirements of CPR 3.4(2)(a), the collective action *must disclose a reasonable grounds* for bringing the claim.
3. In addition to CPR 3.4, the statement of case must also comply with any *specific pleadings requirements of a collective action regime* (eg, which require the pleadings to

specify the common issues of fact or law, or which require the pleadings to define the class, or which require the pleadings to specify the causes of action and the remedies sought), with sufficient particularity.

The procedural peculiarities of the collective action

4. As a further brake/moderation on the ability to start a collective action, the claimant class should be

required to satisfy legislatively-prescribed *preliminary merits test/s*.

5. A *'pre-certification protocol'* may be preferable, requiring certain 'Woolf-motivated up-front disclosures' (eg, in the context of a collective action, information about the size of class, or information about the likely common and individual issues, or facts that to go prove why a collective action would be superior to other means of resolving the dispute), prior to the certification hearing.

6. A collective action must be *the superior form of resolving the class members' disputes*. If another procedural regime, available to claimants, is more efficient and less burdensome, the collective action should not run.

7. The *type of monetary remedy* that may be sought and awarded in a collective action (eg, damages, disgorgement, restitution, exemplary damages, financial penalties) needs to be carefully considered, and the legislation appropriately drafted to either cover or restrict the field of remedies.

8. A collective action must be *manageable*, from the court's point of view (and the court must be satisfied of that at the outset, subject to one possible exception in point 11 below).

9. Whether any *type of legal issue should be excluded* from the scope of the collective action regime needs to be legislatively prescribed.

10. *Appeals from certification orders* (eg, who has the right to appeal, whether an appeal

is as of right or only with leave) should be legislatively prescribed.

11. The circumstances in which a collective action can be certified for the purposes of *creating a settlement class by consent* (and which certification criteria can be ‘overlooked’ for that purpose) will need to be carefully considered.

A spotlight on the class

12. A *sufficient minimum number* of class members must exist to form a class.

13. The class members’ claims must be *sufficiently common* to be heard in the one collective action (‘commonality’ requiring consideration of whether there has to be a common ‘cause of action’ in play, whether a common issue of fact or law is sufficient, whether some sort of ‘predominance’ of common issues is necessary or not, etc). Only if the collective action has sufficient commonality will the action run.

14. The collective action must proceed *without any conflict of interests* between representative claimant and absent class members. Otherwise, the collective action should not run.

15. The *class has to be defined (described)* in a way that is fair to both claimants and defendants.

16. Whether the class definition can *‘tie’ class membership to an external party* (rather than to the series of events out of which the dispute arose), eg, to a law firm representing the class or to a third party litigation funder, needs to be judicially or legislatively prescribed.

17. A permission to allow the *formation of sub-classes* should be legislatively prescribed.

18. The *status of the absent class members* (eg, their right to give evidence at certification or at trial, disclosure against them, the scope of the legal duty of care owed to them by the claimant law firm) needs to be carefully considered.

19. Whether *worldwide classes* can be the subject of a class definition is most unlikely. How foreign class members should thus interact with an English collective action regime should be explicitly stated.

20. Whether any *type of entity/person should be excluded from being a class member* under the collective action (or only permitted to be a class member upon certain prerequisites being satisfied) needs to be legislatively prescribed.

A spotlight on the defendant/s being sued

21. Proper *standing requirements* should apply, where *multiple defendants* are being sued in the collective action. Whether that requires that every class member have a pleadable cause of action against every defendant named in the action, or whether it is sufficient that, as against each defendant, there is a class member (and representative claimant) who can plead a cause of action, needs to be legislatively or judicially prescribed.

22. A collective action must be *fair to the defendant*.

23. Whether any particular *types of defendants should be excluded* from the scope of the collective action regime needs to be legislatively prescribed.

A spotlight on those prosecuting the collective action

24. The *representative claimant must be adequate* to represent the absent class members. Otherwise, the collective action should not run (and furthermore, during conduct, the circumstances in which a substitution can occur must be legislatively prescribed).

25. The *representative claimant must have the financial means* to conduct the collective action (including the capacity to meet any *security for costs* order).

26. The *legal representation* must be adequate to represent the absent class members. Otherwise, the collective action should not run (and furthermore, during conduct,

substitution must be permissible if judicially deemed necessary).

27. The *status of ideological claimants* (eg, the criteria permitting their appointment as representative, whether they should act as sole or supplementary / preferred or secondary representative claimants) must be carefully articulated.

Potential abuse of process issues

28. The extent (if any) to which a *defendant may contact absent class members directly before the collective action is certified* (with a view to individually settling with those absent class members) will need to be judicially prescribed, in order to set the parameters of acceptable litigious conduct and to prevent claims of inappropriate or abusive process.

29. The extent to which *the Henderson rule* applies to collective actions must be articulated. The operation of this rule has an impact upon the degree of finality of a collective action for a defendant.

30. How *multiple collective actions on the same subject-matter against the same defendant/s* should be handled and resolved, needs to be carefully considered.

31. How *concurrent class members' individual actions* (whether instituted prior to certification of the collective action, or instituted by opt-out class members) should be handled and resolved, needs to be carefully considered.

DURING THE ACTION

The opting-out process

32. The *class members must be adequately informed* about their opt-out rights under the collective action, giving them a realistic opportunity to opt-out. The *manner of giving notice* (eg, when and how often the notice should be given, whether it is mandatory or discretionary to do so, whether group or individual notice should be permitted, what appropriate use can be made of the internet and websites for disseminating opt-out notice) should be legislatively or judicially prescribed.

33. *Who pays for the opt-out notice* needs to be considered, if not articulated.

34. The *content of the opt-out notice*, the appropriate length of the *opt-out period* (eg, whether any minimum or maximum opt-out periods should be set), and *how to opt out*, need to be legislatively or judicially prescribed.

Court control

35. *Close judicial case-management* of the collective action (in accordance with recently-discussed management practices for complex litigation) would be mandatory.

36. In accordance with the wide-ranging case-management provision of CPR 3.1, the *court must have freedom to exercise broad powers* (to enable it to narrow/widen the common issues, amend the definition of the class, or to direct amendments to the pleadings, etc), in order to permit the collective action to dispose of the dispute as expeditiously and proportionately as possible, in accordance with CPR 1.1's overriding objective.

Conducting the collective action

37. *When, and how, is the class to be closed?* At some point (and with very limited exception), the class must convert from opt-out to opt-in. In most scenarios, the class members will have to 'put their feet on the sticky paper' at some point, thereby giving rise to the 'take-up rate' of the action. The parameters of this conversion from opt-out to opt-in must be legislatively or judicially prescribed.

38. The circumstances in which *communications can be made by the representative claimant (or the claimant law firm) to the absent class members* (as either formal notice which requires court approval, or as general correspondence which does not) will need to be judicially considered, if not legislatively prescribed.

39. The extent (if any) to which *a defendant may contact absent class members directly after the collective action is certified* (with a view to individually settling with those

absent class members) will need to be judicially prescribed, in order to set the parameters of acceptable litigious conduct and to prevent claims of inappropriate or abusive process.

40. The person/s (eg, the representative claimant, absent class members) against whom *disclosure* can be sought with or without leave, should be legislatively prescribed.

41. The circumstances in which the *collective action may be de-certified* should be prescribed.

Limitation periods

42. The *limitation period will stop running* for both representative claimant and absent class members, either when the representative claimant files the collective action, or when (or if) the action is certified. The precise circumstances for when the limitation period stops running must be legislatively prescribed.

43. The *limitation period will start running again* upon certain events happening; these triggers must be legislatively prescribed.

AT THE END ...

Settlement of the collective action

44. *Settlement agreements must be subject to a fairness hearing.* This is, essentially, to preserve fairness for absent class members and for the defendant.

45. *Adequate notice of the settlement hearing*, and further adequate notice about the *verdict* reached at the settlement hearing, will need to be judicially or legislatively prescribed. In all instances, the timing and content of the notices will likely be required to be judicially approved.

46. The *'fairness criteria'* against which the court must subject a settlement agreement should be either judicially or legislatively prescribed. Whether evidence from representative claimants, absent class members, defendant representatives, legal counsel

from each side, and experts, would be helpful to the fairness hearing, needs to be considered.

47. The potential impact of any '*bar orders*' (whereby a settling defendant seeks to obtain an order that it is not open to any claims for indemnity and contribution from a non-settling defendant, in the event that the non-settling defendant loses at trial), needs to be considered, if not legislatively prescribed.

48. The procedures by which absent class members can (a) *object* to a settlement, or (b) *opt out* of a settlement (if a second opt-out stage is to be permitted at all), need to be judicially or legislatively prescribed.

49. The procedure (if any) by which absent class members *can opt back into a class* for the purposes of settlement need to be judicially or legislatively prescribed.

Assessing and distributing the money

50. *Damages assessment* may be individual, or a class-wide aggregate assessment, depending upon the circumstances. The pre-requisites for aggregate assessment need to be legislatively and judicially prescribed with the utmost clarity.

51. *Compensation distribution* should be permitted to be made to class members directly, or via a *cy-pres* order.

52. A direct distribution to class members may be permitted, not by an individual assessment of each class member's entitlement, but on the basis of an *average or pro rata assessment* for class members identified at the point at which the assessment is being made.

53. *Cy-pres distributions* (and the pre-requisites governing them) will need to be mandated legislatively, if permitted.

54. Whether *coupon recovery* should ever be permitted (compensation 'in like', rather than in monetary terms), needs to be legislatively or judicially articulated.

55. Whether any *reversionary distribution* should be countenanced should be legislatively prescribed.

56. The *representative claimant* may seek to make a *claim for compensation* for the time and effort expended to represent the absent class members; whether such claims should be permissible will need to be considered, if not articulated.

Treating the class members individually at the end

57. The means of determining *the individual issues* (if any) remaining after the determination of the common issues (whether by judgment or pursuant to a settlement agreement) must be clear and explicit.

58. Whether class members *have the right to insist upon individual assessment and direct distribution*, or whether, in the interests of proportionality, the managing judge may approve an average distribution or a *cy-pres* distribution, regardless of individual class members' indications to the contrary, needs to be carefully articulated.

Rights of appeal

59. *Appeal rights* regarding the *judgment of the common issues* (who, when, with or without leave), and appeal rights regarding *judgment on individual issues* (who, when, thresholds, with or without leave) must be explicitly stated.

60. *Appeal rights* (if any) from a judicially-approved *settlement agreement* need to be considered, if not judicially or legislatively prescribed.²⁶¹

²⁶¹ (Please note: a 'best practice' collective action regime, based upon a comparative analysis of the Australian, Canadian and United States' regimes, has been proposed in: R Mulheron, *The Class Action in Common Law Legal Systems: A Comparative Perspective* (Hart Publishing, Oxford, 2004) and *The Modern Cy-Pres Doctrine: Applications and Implications* (Routledge Cavendish, London, 2006). Almost all of the features mentioned herein are canvassed in much further detail, with comparative treatment and with 'best practice' recommendations, in those books.)



APPENDIX M

CLASS ACTIONS: REINVENTING THE WHEEL

CIVIL JUSTICE COUNCIL COLLECTIVE ADDRESS EVENT

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Introduction

1. Imagine you've hitched a ride with David Tennant (something which might appeal more to some than others) and he's taken you back to 1904. He could take you anywhere, to see anyone, but you have the misfortune to land in the chambers of Thomas Snow, in the Inner Temple. Because, like Churchill's optimist, you see the opportunity in any difficulty, no matter how it might appear to a pessimist to lack promise, and because you're fervently committed to expanding your knowledge of civil procedure you decide to ask Mr Snow the odd question or two. (You know of course that Thomas Snow was the Jack Jacob of his day – the first and founder editor of what is now the White Book). You get on like a house on fire and he's as interested to hear what's going on in 2008 as you were in finding out what was going on in 1904. The conversation turns to collective redress (which you explain is

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the ungainly term for what are sometimes called representative or class actions); and you tell him about the latest developments and the arguments for and against its introduction in England and Wales. This puzzles him and he pulls down from his bookshelf the latest edition of the White Book.

2. He turns to page 162, looks more puzzled and then asks you when were they abolished? It's your turn to look puzzled and you ask him to explain. He refers you to the notes to RSC Order 16 rule 9, and reads the following:

“Intervention by persons and parties – If a person not a party to a class action desires to intervene in any way he should apply to be made a party, Watson v Cave (1881) LR 17 ChD 19 [CA].”

3. So when did you abolish the class action he asks again? You might well look confused at this point – I certainly would. We must have abolished it, otherwise why are we discussing how best to introduce a collective redress action.
4. Must we have abolished it though? Maybe it's still there, but we've just lost sight of it. That we've lost sight of it and it has lain unused, underused or unappreciated for what it really is does not mean the jurisdiction has ceased to exist. As was submitted in the ultimately unsuccessful attempt to breathe new life into the old equity bill of review in *Cinpres Gas Injection Ltd v Melea Ltd* [2008] EWCA Civ 9 (at 95)

“. . . even if . . . jurisdiction has not been exercised for a 100 years that does not matter: once there is jurisdiction there is always jurisdiction. Jurisdiction does not fade with time.”

That attempt to breathe life into an old jurisdiction failed not because that submission was rejected but because the common law procedure had overtaken the old equity procedure in that case.

5. Where does this leave us for today's purposes? Well I know where it leaves me; in the unenviable position of presenting what might be taken as the minority report to Rachael's many, exhaustive and authoritative reports. It leaves me looking at whether what Snow referred to as a class action is available to us today as a means through which to introduce – or reintroduce – an effective collective redress mechanism via procedural reform of the representative action in England and Wales.
6. In order to consider the modern-day utility of the representative action it is perhaps instructive to give an overview of the jurisdiction.

Past

7. The traditional conception of the purpose of English civil proceedings is, in Lord Brougham's often repeated words, is '*to do justice between man and man.*'²⁶³ To do justice between individuals. This is undoubtedly right and is often used as an explanation or justification for the reticence with which English civil procedure has treated the class action. It is however only a partial picture as it only articulates the common law's approach to litigation. Equity, English civil justice's other parent took a diametrically opposite approach. Equity's aim was in the words of Talbot LC

²⁶³ *Speeches of Henry Brougham* (1838) Vol. 2 at 324

in *Knigh v Knigh* to do ‘*complete justice and not by halves*.’²⁶⁴ What did he mean by this?

8. Talbot LC was adverting here to the practice in equity of ensuring that finality of litigation was reached within one set of proceedings by requiring the joinder of all interested parties. Equity did not simply do justice between man and man but between all those who had an interest in the litigation. As Eldon LC explained the rule in *Cockburn v Thompson*:

*“The strict rule is, that all persons materially interested in the suit, however numerous, ought to be parties: that there be a complete Decree between all parties, having material interests.”*²⁶⁵

9. Through this equity could adjudicate as to the rights of all within one set of proceedings having examined each and every relevant issue; thereby obviating the need for any future or further proceedings. This requirement, known as the complete joinder rule, brought with it a number of procedural disadvantages however. It often resulted in the joinder of large numbers of essentially passive parties, which increased litigation time and expense unnecessarily. This was especially problematic when a party died and proceedings had to be stayed pending joinder of the deceased’s heir or heirs. It was equally problematic where an individual who ought to have been joined was, for whatever reason, not joined to the proceedings as they could appeal by way of rehearing at any time after judgment.

²⁶⁴ 3 P. WMS. 331 at 334

²⁶⁵ 16 Ves. Jun. 321 at 325 – 326.

10. To obviate the procedural disadvantages of the rule while maintaining its advantages equity developed the representative rule. By this mechanism the complete joinder rule was relaxed so that a single party, for instance the plaintiff, was deemed to represent all other potential plaintiffs, who would thereby be bound by the decision. The basis on which this relaxation of the joinder rule was made was explained in 1722 in *Chancey v May* as arising where

*“it would be impracticable to make them all parties by name, and there would be continual abatements by death and otherwise, and no coming to justice if all were to be made parties.”*²⁶⁶

11. The complete joinder rule gave way when it would be inconvenient if it was strictly applied.²⁶⁷ It could be relaxed so that there were either representative plaintiffs²⁶⁸ or defendants, who properly represented the class.²⁶⁹ It did so because as Cottenham LC put it in *Wallworth v Holt*:

*“. . . it is the duty of this Court to adapt its practice and course of proceedings to the existing state of society, and not by too strict an adherence to forms and rules, established under different circumstances, to decline to administer justice, and to enforce rights for which there is no other remedy.”*²⁷⁰

12. There was however a second procedural basis for the representative rule, again consistent with equity’s aim of achieving complete justice albeit more obviously contrary to the common law’s aim of doing justice between man and man. US

²⁶⁶ Prec. Ch. 592; and see *City of London v Richmond* (1701) 2 Vern. 421.

²⁶⁷ *Adair v The New River Company* 11 Ves. 429.

²⁶⁸ *Cockburn v Thompson* 16 Ves. Jun. 321

²⁶⁹ *Mayor of York v Pilkington & Others* 1 Atk. 282

²⁷⁰ (1841) 4 My. & Cr. 619 at 635.

Supreme Court Associate Justice Story described it in this way in his magisterial guide to equity proceedings in England and the US:

“The general doctrine of public policy which in some form or other may be found in the jurisprudence of every civilized country is, that an end ought to be put to litigation, and above all to fruitless litigation . . . If suits might be perpetually brought to litigate the same questions between the same parties or their privies as often as either should choose, it is obvious that remedial justice would soon become a mere mockery; for the termination of one suit would become the signal for the institution of a new one, and the expenses might become ruinous to all parties. The obvious ground of the jurisdiction of Courts of Equity in cases of this sort is to suppress useless litigation and to prevent multiplicity of suits.

One class of cases to which this remedial process [by way of a bill of peace] is properly applied is where there is one general right to established against a great number of persons. And it may be resorted to where one person claims or defends a right against many or where many claim or defend a right against one. In such cases Courts of Equity interpose in order to prevent multiplicity of suits; for as each separate party may sue or be sued in a separate action at law [that is to say in a common law action between man and man], and each suit would only decide the particular right in question between the plaintiff and the defendant in that action, litigation might be interminable. Courts of Equity therefore, having a power to bring all the parties before them, will at once proceed to the ascertainment of the general right; and if necessary, they will ascertain it by an action of issue at law, and then make a decree finally binding upon all the parties.”²⁷¹

13. All the parties did not need to be before the court however. Complete joinder could again be relaxed under the bill of peace as long as ‘*there was a right claimed that affects many persons, and that a suitable number of parties in interest are brought before the court . . .*’²⁷²

14. We can already begin to see the contours of the early class action. It was a procedural mechanism aimed at efficiently and economically dealing with disputes

²⁷¹ Story, *Commentaries on Equity Jurisprudence as Administered in England and America*, (Little Brown & Co) (1886) (4th Edition) (Story (1886)) at Vol. II at 853 – 854.

²⁷² Story (1886) Vol. II at 857.

involving large numbers of parties all of whom had a common dispute. It obviated as Plumer MR put it in *Meux v Maltby* the ‘*great inconvenience*’ of bringing all the parties before the court.²⁷³ But for the mechanism those claims would either not be litigated at all or would be litigated individually at great cost and expense for the common party and the court. Absent such a procedure there would be, again in Plumer MR’s words, ‘*an absolute failure of justice.*’²⁷⁴ Rather than allow either of those eventualities to occur the court permitted a single representative plaintiff or defendant to bring or defend proceedings on behalf of those others.

15. What other features did it have? First of all, the representative party prosecutes the claim at his own expense.²⁷⁵ He ran the costs risk. He also ran the risk of an order of security for costs.²⁷⁶ The court would require sufficient representative parties to ensure that the disputed issue was justly and fairly tried.²⁷⁷ It lay to the court to assess whether the representative could properly and fairly represent the represented class.²⁷⁸ The represented class could be as wide as the whole world.²⁷⁹ The decision would bind all the rights of those represented i.e., it would operate as a *res judicata* in respect of the matter decided i.e., the common issue.²⁸⁰ But only in respect of the matter decided.²⁸¹ Where a represented party wished to assert that he did not have an interest in common with the representative and the represented class he could

²⁷³ (1818) 2 Swans. 277 at 281.

²⁷⁴ (1818) 2 Swans. 277 at 283.

²⁷⁵ *Handforth v Storie* (1825) 2 Sim & St. 196 at 198.

²⁷⁶ *De Hart v Stevenson & Others* (1875) LR 1 QBD 313 (Div Court)

²⁷⁷ *Adair v New River Company* 11 Ves. 429 at 433.

²⁷⁸ *Commissioners of Sewers of the City of London v Gellatly* (1876) LR 3 ChD 610 at 615 per Jessel MR.

²⁷⁹ (1818) 2 Swans. 277 at 283.

²⁸⁰ (1818) 2 Swans. 277 at 285; thus answering the view expressed by Lord Phillips MR in his response to the 2001 LCD Consultation on Representative Actions.

²⁸¹ *Commissioners of Sewers of the City of London v Gellatly* (1876) LR 3 ChD 610 at 616 per Jessel MR.

and should apply to be joined as a defendant to the action.²⁸² In order to bring such proceedings the representative party must seek a remedy that was ‘*in its nature beneficial to all those whom he [undertook] to represent.*’²⁸³ To be beneficial to all, the representative and the represented parties had to have a ‘*common interest*’ or ‘*general right*’²⁸⁴ i.e., one common to all. As Lord Hatherley LC put it in *Warrick v The Queen’s College, Oxford*, a decision of the Court of Appeal in Chancery:

“*I take it that the view of this Court is, that all persons having a common right, which is invaded by a common enemy, although they may have different rights inter se, are entitled to join in attacking the common enemy in respect of that common right . . . although after the common right is established they may have a considerable litigation among themselves as to who are the persons entitled to the gains obtained through that suit.*”²⁸⁵

16. Hatherley LC also makes it clear that the common rights did not need to arise through the same document. All that the represented class need demonstrate was that their rights ‘*all depend(ed) upon the same question*’.²⁸⁶ Where however the representative action was brought by bill of peace the common rights did have to arise out of a single document.

17. So matters stood at the turn of the 20th Century, when consideration of the representative action came before Lindley MR, Rigby and Vaughan Williams LLJs in the Court of Appeal in *Ellis v Duke of Bedford*. The question before the Court was whether a group of fruit and vegetable growers could maintain an action both

²⁸² *Watson v Cave (No 1)* (1881) LR 17 ChD 19 (CA); *Fraser v Cooper, Hall & Co* (1882) LR 21 ChD 718.

²⁸³ *Gray v Chaplin* (1825) 2 Sim & St. 267 at 272.

²⁸⁴ *Commissioner of Sewers of the City of London v Glasse* (1871) LR 7 Ch. App. 456 at 646 per James LJ

²⁸⁵ (1870) LR 6 Ch. App. 716 at 726.

²⁸⁶ The question was whether a representative action could be brought to determine the validity of numerous identical certificates individually held by the claimants: *Sheffield Waterworks v Yeomans* (1866) LR 2 Ch. App. 8 at 11.

on their own behalf and on behalf of other such growers against the Duke of Bedford in respect of rights to stalls at Covent Garden Market. Lindley MR, who was in all likelihood the leading authority on the use of the representative action, and Rigby LJ held that they could bring the action in a representative capacity. They could do so because despite the fact that there were differences between the represented parties inter se they had a common claim against a common defendant.

18. While Vaughan Williams LJ agreed on the principles, he dissented as to the application of those principles holding that as the plaintiffs had no individual property rights they could have no rights in common. In essence he based his judgment on an earlier decision of the Court of Appeal in *Temperton v Russell* (albeit he did so without reference to it) in which Lindley LJ giving the judgment of the court appeared to hold that representative actions could only be brought where the class held beneficial property rights.²⁸⁷ That decision had already been explained by Wills J in *Wood v McCarthy & Another* as not going that far but as simply holding that following the Judicature Act reforms this aspect of Chancery procedure was available in all Divisions of the High Court but only on the same basis as it had been in the Court of Chancery. As Wills J put it *Temperton* simply held that as representative actions could not be used in actions for tort prior to the Judicature Act reforms they could not be used to prosecute such actions post-1873.²⁸⁸ I gloss over the fact that Lindley, by then MR, felt no need to advert to his previous decision when giving his judgment in *Ellis*.

²⁸⁷ [1893] 1 QB 435.

²⁸⁸ [1893] 1 QB 775 at 778.

19. The Court of Appeal's decision was upheld by a majority of the Lords in *Duke of Bedford v Ellis & Others*, in which Lord Macnaghten gave the leading judgment.²⁸⁹

In doing so he provides the most authoritative discussion of the representative rule.

Within that discussion he held that:

- 1) Representative actions are available where the class has a common interest, a common grievance and the relief sought was in its nature beneficial to all;
- 2) The basis of the common interest and grievance did not have to be the same for each class member;
- 3) That other factors, such as distinct rights between the class members, may serve to differentiate the class members was irrelevant. The basis of a representative action is what the class has in common '*not what differentiates the cases of individual members*';
- 4) If *Temperton* held that representative actions were only available where a beneficial property right was in issue it was wrongly decided; the rule was not so limited;
- 5) It did not matter that the represented class was '*fluctuating and indefinite*', the description of the class was sufficient to properly define it.²⁹⁰

20. Lords Morris and Shand delivered concurring judgments. All three emphasised how Vaughan Williams LJ erred in placing any weight on the principle said to be established in *Temperton*. A principle which both Macnaghten and Shand pointed out was contrary to precedent that would have been as binding upon the court in

²⁸⁹ [1901] AC 1.

²⁹⁰ [1901] AC 1 at 7 – 12.

Temperton as it was on the Court of Appeal in *Ellis* (i.e., *Warrick v Queen's College*; a decision of the Court of Appeal in Chancery).

21. Lindley, by then Lord Lindley, would expressly disavow *Temperton* shortly after the Lords' decision in *Ellis* when giving judgment in the Lords in *The Taff Vale Railway Company v The Amalgamated Society of Railway Servants* where he held that:

*“The principle on which the rule is based forbids its restriction to cases for which an exact precedent can be found in the reports. The principle is as applicable to new cases as to old, and ought to be applied to the exigencies of modern life as occasion requires. The rule itself has been embodied and made applicable to the various Divisions of the High Court by the Judicature Act, 1873, ss 16 and 23 – 25 . . . and the unfortunate observations made on that rule in Temperton . . . have been happily corrected in this House in . . . Ellis.”*²⁹¹

22. Vaughan Williams LJ was to have his revenge though. In *Markt & Co Ltd v Knight Steamship* he gave the lead judgment, with which Fletcher Moulton LJ agreed (Buckley LJ dissenting) which explained the House of Lord's decision in *Ellis* in as restrictive a fashion as possible.²⁹² This judgment set back the development and application of the representative action throughout the 20th Century and did much, in answer to the question our hypothetical Thomas Snow posed earlier, to abolish the class action in England. The claim arose out of the wreck of a steamship. The representative action was brought by various shippers and was an action for breach of contract and duty in and about the carriage of goods by sea. The contracts were the respective bills of lading. Vaughan Williams LJ held as follows:

²⁹¹ [1901]AC 426 at 443.

²⁹² [1910] 2 KB 1021 (CA)

- 1) There was nothing on the writ to show that the bills of lading and the exceptions within them were identical or that the goods shipped were of the same class or kind;
 - 2) There was no common purpose or connection amongst the shippers to justify a representative action either under the old chancery practice or under Rule 16 Order 9. The only bond between the class members was that they all had goods on the ship;
 - 3) While the shippers suffered a common wrong in that their goods were all lost, they had no common right or common purpose and as each class members claim could be defeated by facts and matters unique to them it could not be said that they had the same rights as required per *Ellis*
 - 4) Whether or not, and the implication was not, Macnaghten was right in his summary of the pre-1873 Chancery practice the court had now to construe the rule consistently insofar as the common law and chancery was concerned '*notwithstanding any prior practice in the Court of Chancery.*'
23. Fletcher Moulton LJ held that the claim was not properly brought as a representative action as:
- 1) The class had not properly been defined. Simply listing the class members did not define the class;
 - 2) Whatever the practice had been in equity, that was now immaterial as the Court was now governed by the language of Order 16 Rule 9. That rule is now

definitive of the court's practice and it is irrelevant whether the rule narrows or expands the pre-1873 practice. The rule is the rule;

- 3) The rule requires as an essential condition '*that the persons who are to be represented have the same interest as the plaintiff in one and the same cause of action or matter.*' This is what Macnaghten meant in *Ellis* when he adverted to common interest;
- 4) The same interest could not arise where different defences could be raised against the class members;
- 5) The same interest could not arise where the class members entered into separate contracts with the defendant, even if the contracts were identical, as this would be an impermissible infringement of privity of contract²⁹³;
- 6) Damages were not an available remedy to representative actions, nor could a declaratory judgment be given declaring a right to damages.

24. Buckley LJ dissented and his judgment reads like the judgment of the single equity lawyer in a three judge Court of Appeal. He held that:

- 1) Order 16 Rule 9 was intended to apply the equity, which was more flexible than the rigid common law approach to all Divisions (per Macnaghten);
- 2) It is no objection to a representative action that the rights between the parties arise under separate contracts;
- 3) A representative plaintiff must be in a position to claim a benefit common to all the class, but he can also claim a benefit personal to himself;

²⁹³ A point reiterated by Evershed MR in *Smith v Cardiff Corporation* [1954] 1 QB 210 at 226.

- 4) The class can have the same interest against a defendant notwithstanding the fact that it can result in different measures of relief to its members;
 - 5) The shippers had a common right against a common enemy (as per *Warrick* and *Ellis*) i.e., that the ship owner should consign their goods to a ship not also carrying contraband, as such they could seek a declaration that the ship owner was in breach of contract. Once liability was established in the class action, further proceedings could be brought by the individual class members for damages, in which proceedings individual defences could be run by the ship owner as to why that particular plaintiff ought not to recover (applying *Warrick*; *Gellatly*).
25. Vaughan Williams and Fletcher Moulton LJJs, who I assume (perhaps unfairly and inaccurately) were common lawyers, won the day and effectively put an end to the utility of the representative action. This is said by many commentators to mark the high point of the court's narrow interpretation of the jurisdiction. A more accurate summation would be that it marked the high point of the common law's attempt to improperly emasculate an equitable jurisdiction. But it's wrong to indulge in *ad hominem* comment.
26. After *Markt* the representative rule's utility was severely restricted as the combination of their judgments meant that in order to fall within the scope of the rule a representative plaintiff had to show: i) a common interest arising under a common document; ii) a common grievance; and iii) a remedy beneficial to all, but

not damages.²⁹⁴ On its own merits though the decision in *Markt* doesn't stand up to much scrutiny. Both judges ignored binding precedent to the effect that: i) the rule could be used when there were separate contracts, the basis of the common interest need not be the same for all (*Warrick; Ellis*); ii) the differences which existed between the representatives and the defendant were irrelevant, the key issue was the common element (*Warrick; Ellis*;) unless the action was brought by Bill of Peace (long since abolished); iii) the rule had to be interpreted consistently with the old equity practice, the RSC was not to be interpreted on its face alone (*Temperton; Ellis; Taff Vale*).

Present

27. The representative rule suffered due to the *Markt* decision until the early 1970s and then again in the 1990s when a number of decisions tried to breathe new life into it. Vinelott J in *Prudential Assurance Co Ltd v Newman Industries Ltd* held that the effect of *Ellis* and *Taff Vale* was to make representative actions available for claims in tort: *Temperton* simply showed that the non-representative plaintiffs had been chosen, if proper representatives had been chosen the action in tort would have proceeded.²⁹⁵ Insofar as damages were concerned, Vinelott J held that while individual damages claims could not be pursued by a representative plaintiff, a declaration that class members were entitled to damages could be granted, which individual class members would then be entitled to rely on in future individual damages claims [at 257]. In other words he adopted Buckley LJ's approach from *Markt* that the representative action would give a *prima facie* right to damages or

²⁹⁴ Andrews (2003)

²⁹⁵ [1981] Ch. 229 at 246 – 247.

might operate as an issue estoppel on the common issue, which could be defeated in secondary proceedings where and if there were any special circumstances, defences etc.

28. In *EMI Records Ltd v Riley* Dillon J held that damages were recoverable in a representative action.²⁹⁶ They were recoverable because the global quantum to the entire class was ascertainable. Without reference to it Dillon J applied Lord Hatherley's point from *Warrick*, that once a common right was established there might well be considerable litigation between the class members to ascertain their individual right to a share of the common gain.
29. In *Moon v Atherton* Denning MR, affirmed that only the representative plaintiff was liable for costs and that the represented parties would be bound by the decision. He went on to hold that as limitation continued to run for represented parties the court had sufficient power to substitute one of them for the representative, if the representative wished to discontinue or settle the claim.²⁹⁷ In an *obiter dictum* he stated that the action, for negligence, could properly be brought as a representative action. He thus affirmed, without reference to it, Vinelott J's conclusion, that *contra Markt, Ellis and Taff Vale* established that the representative action was available for tortious claims.
30. Then in *The Irish Rowan* the Court of Appeal (Purchas LJ) explained that it had erred in *Markt* when it, that is Vaughan Williams LJ (and Fletcher Moulton although

²⁹⁶ [1981] 1 WLR 923.

²⁹⁷ [1972] 2 QB 435 (CA) at 442

he was not referred to), held that the rule had to be interpreted without reference to pre-1873 Chancery practice.²⁹⁸ It went on to outline how: i) the rule as then drafted had safeguards, consistent with the old practice, for class members who wished to disassociate themselves from the class (at 239); that the rule permitted class members to opt-out of the class (at 241 per Order 15 rule 12 (1)); that as the class members entered into identical contracts there was sufficient commonality. Relying on *EMI Records* and *Moon v Atherton*, amongst others, it went on to affirm that damages claims were not to be automatically excluded from representative actions (at 227). In essence, it held that the representative action had to be applied, as Andrews put it, ‘*within the spirit of flexibility*’ which imbued the 19th Century case law.²⁹⁹ A flexibility available in 1790, reaffirmed in 1990 and still available then in 2008(?).

31. Most recently Morritt VC in *Independiente Ltd v Music Trading On-Line (HK) Ltd* examined the scope of the rule in its CPR guise: CPR 19.6.³⁰⁰ He noted that the principles governing the rule were the same post-CPR as they were pre-CPR, albeit the rule had to be interpreted and applied consistently with the overriding objective.³⁰¹ In particular the definition of ‘same interest’ in the rule had to be interpreted flexibly and in conformity with the overriding objective. The test to establish whether the rule was appropriate for the case was that laid down by *Ellis*: common interest, common grievance and relief beneficial to all. There was a common interest despite the presence of different defences (contrary to *Markt* but

²⁹⁸ [1990] 2 QB 206 at 237 – 239.

²⁹⁹ Andrews, *Principles of Civil Procedure*, (1994) (1st Edition) (Sweet & Maxwell) at 148.

³⁰⁰ [2003] EWHC 470 (Ch).

³⁰¹ [2003] EWHC 470 (Ch) at [21] & [23].

fully in line with *Temperton; Ellis; Taff Vale*). Pecuniary relief was available as it was beneficial to all.

Future

32. Where does all this leave us now and for the future? It is arguable that the representative rule as explained in the jurisprudence could be transformed into a modern class action, with two exceptions. As it stands at the present time the jurisdiction does not accommodate *cy pres* distributions nor does it operate to suspend limitation periods for the represented class. Such reforms would need to be the product of primary legislation and a public policy debate properly carried out by Parliament; within which, for instance, government might consider whether any unclaimed damages could or should be applied to the Legal Aid Fund or a SLAS. Such a use, would arguably, be in keeping with the aim of furthering access to justice for the many. That's the negative, so what's the positive?
33. We can see that by contrasting the rule with Rule 23 of the US Federal Rules of Civil Procedure, which shapes the US class action. Rule 23 (a) sets out 4 conditions which have to be satisfied in order to certify an action as a class action: i) numerosity i.e., that there are so many class members that joinder of them all is impracticable; ii) commonality i.e., there must be a common question of law or fact; iii) typicality; the claims or defences of the representative parties are typical of the class i.e., that the representative's complaint is typical of the classes complaint, in other words that the representative is a member of the represented class; and iv) the representative parties fairly and adequately protect the interests of the class.

34. The English representative rule, as I have hopefully shown, contains: a minimum numerosity requirement (*Chancey v May*); a commonality requirement, to which *Markt* was an improper attempt to sidestep binding authority as to the nature of common interest and grievance (*Warrick, Ellis*); a typicality requirement (*Adair v New River Company*); and a requirement that the representative must properly and adequately represent the interests of the represented class (*Gellatly*). Equally its justification and the basis of its jurisdiction is the same as that of class actions throughout the world: to increase access to justice, to enable claims that it would not otherwise be possible to litigate to come before the courts and to prosecute others with greater procedural efficiency and economy than would otherwise be possible.
35. Rule 23 (b), following the 1966 reforms, introduced into the US the damages class action (Rule 23 (b) (3)). When introduced additional procedural safeguards were also introduced. In order to bring such an action it must be superior to other forms of procedure. The representative rule incorporates the same requirement (*Meux*). Equally, the damages class action must satisfy a common benefit requirement (Rule 23 (b) (3)). This is already a pre-requisite under the representative rule (*Warrick, Glasse, Ellis*). Further commonalities between the US class action and the representative action are: that the class has to be capable of proper definition (Rule 23 (c) and *Ellis*); they bind the represented class in respect of the common issue (Rule 23 (c) and (*Meux* and others)).³⁰² While damages are available under both

³⁰² Pace, *Class Actions in the United States of America: An Overview of the Process and the Empirical Literature*, (RAND Institute for Civil Justice, Santa Monica, California, USA (2007) (Pace (2007)) at 7

systems, there is a greater practical acceptance and application of aggregate damages claims in the US in contrast to the arguably theoretical basis upon which the English action might embrace them through further developments akin to those acknowledged by Purchas LJ in *The Irish Rowan*.³⁰³

36. Having accepted that global damages awards are available and that the basis of the representative action is a flexible one not limited to past precedent (in Lindley's words a flexible action which '*ought to be applied to the exigencies of modern life as occasion requires*'), is it *or perhaps* it is reasonable, to conclude that the English jurisdiction could well accommodate damage aggregation, through perhaps treating the class as a single entity which has suffered damage and then leave it for the class members to ascertain their rights *inter se* as per *Warrick*.
37. What about opt-in, opt-out and mandatory classes? Professor Mulheron has on occasion noted the difficulty in characterising the representative rule. Is it a mandatory class or not? The answer to that question is yes and no? And the same issue and answer arises in respect of the Rule 23 class action. In the US Rule 23 is a mandatory class action. It's mandatory, with no notice of certification requirement, where injunctive or declaratory relief is sought. Why? Because the relief sought is indivisible for all class members. There is however a power to order notice.³⁰⁴ Insofar as Rule 23 (b) (3) damages class actions are concerned the class action opt-out operates. The same is true, both as to it being a mandatory action and in some circumstances an opt-out action, under the representative rule, where the court has

³⁰³ Pace (2007) at 11ff.

³⁰⁴ Pace (2007) at 10.

the power to permit an opt-out under CPR 19.6 (4) *cf. The Irish Rowan*. Given the introduction of Article 6 ECHR, CPR 19.6 (4) could not but, in my view, be interpreted now as providing an opt-out power per the interpretative approach exemplified by *Cachia and Others v Faluyi* [2001] 1 WLR 1966 and *Goode v Martin* [2002] 1 WLR 1828. Such an Article 6 compliant interpretation of the jurisdiction could not but require the court to operate a sufficient notice requirement prior to certification here as in the US. (I gloss over Cappalli's and Consolo's suggestion that there may well be a positive duty to introduce class actions so as to give proper effect to constitutional guarantees of access to justice.³⁰⁵)

38. It is sometimes argued that the introduction of an opt-out class action would be *ultra vires* the rule-making power. I wonder if this is right. There has been a power since 1873 and beyond to create a mandatory class, the *a fortiori* case. Given the power to create the *a fortiori* case surely it follows by necessary implication that there is a power to create the lesser case, the opt-out class action?
39. We should perhaps not be surprised at the similarity between Rule 23 and the representative rule, as the Rand Institute for Civil Justice acknowledged last year, Rule 23 is based on rules which had existed since the 19th Century in the US; rules which I have no doubt were based on the English representative rule.³⁰⁶

³⁰⁵ Cappalli & Consolo, *Class Actions for Continental Europe? A Preliminary Inquiry*, 6 Temp. International and Comparative Law Journal (1992) 261. Their suggestion relates to the guarantee of access to justice contained within Article 24 of the Italian Constitution; it is equally applicable however to Article 6 ECHR.

³⁰⁶ Pace (2007) at 2.

40. Insofar as settlement is concerned there appears to be no present basis in the jurisprudence for court-approval of settlements so as to bind the class. That is not to say that the court's power to approve settlements in cases where parties are represented by others e.g., CPR 21.10 (children and patients) could not be so extended to cover represented parties. The rationale for approval is the same in both types of case; the parties to be bound are not before the court except by representative. Again the rule could be drafted so as to provide for adequate opt-out notice.
41. And as for disclosure? It was held in 1990 that there was no general power to require disclosure from represented parties as they were not for this purpose parties to the action.³⁰⁷ I wonder whether this is really a genuine difficulty now. CPR 19 (1) (2) (a) and (b) provide the jurisdiction to add parties to proceedings so that the court can resolve matters or issues in dispute in the proceedings. If there was a necessity to obtain relevant evidence from a represented party I cannot see why they could not, in principle, be joined as representative parties, in order to obtain that evidence to enable the court to deal with the common issue. Equally, I wonder why the court could not simply utilise its existing powers to obtain evidence from non-parties here (CPR 31.17).
42. We of course differ on costs, but that is perhaps an issue for the brave new world of third party funding. And as for appeals. Equity used to permit non-parties, who could of and should have been joined to actions, to appeal against judgments where

³⁰⁷ *Ventouris v Mountain* [1990] 1 WLR 1370.

there interests were effected by the judgment. The represented class members are non-parties are would have been able to take advantage of this rule, which required them to be granted permission to appeal. There is no reason why this rule, which the Court of Appeal has just approved as continuing to exist under the CPR (*MA Holdings Ltd v George Wimpey UK Ltd* [2008] EWCA Civ 12) should not apply to represented parties.

43. There is however the *vires* point. If the CPR were to be amended so as to codify the representative rule would a *vires* challenge succeed; the argument being that such a change would be beyond the rule-making power under the Civil Procedure Act 1997. In my view this does not arise on the above analysis. It is to misunderstand the rule-making power. The rule-making power here would be exercised to give shape to an extant jurisdiction; it would not be, as Buxton LJ recently noted in another context, impermissibly creating jurisdiction: see *Jaffray v The Society of Lloyds* [2007] EWCA Civ 586, citing *British South Africa Co v Companhia de Mocambique* [1893] AC 602 at 628. It would be codifying a jurisdiction which has been in existence since the 18th Century and which has been exercised and affirmed by the House of Lords twice. The *vires* point would only arise if the Rule Committee went beyond the ambit of that jurisdiction. The real question then is to identify, as I have tried to do, the bounds of the extant jurisdiction.
44. Except for issues of limitation and *cy pres* (which are not essential features of a modern class action) it need not have to go beyond that jurisdiction. Indeed as the Canadian Supreme Court has held in *West Canadian Shopping Centres Inc v Dutton*

[2001] 2 SCR 534, the representative rule can be used, in the absence of a specific class action statute, by the court under its inherent jurisdiction to fashion a modern class action. The procedural rule in question in that case was based on the old RSC rule, it was operating in a judicial system that evolved out of the English judicial system and is therefore as much a product of the common law and equity as the English courts. Absent statutory intervention, there is on the face of it no reason why the English courts cannot, in this field, follow the path trodden by the Canadian Supreme Court and utilise the existing jurisdiction.



APPENDIX N

IMPLEMENTING AN OPT-OUT COLLECTIVE ACTION

in

ENGLAND AND WALES:

LEGISLATION versus COURT RULES

A Report

to the

Civil Justice Council of England and Wales

Collective Redress Working Party

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LIST OF ABBREVIATIONS

| | |
|---------------------------------------|---|
| <i>Alberta Report</i> | Alberta Law Reform Institute, <i>Class Actions</i> (Rep No 85, 2000) |
| <i>Australian Report</i> | Australian Law Reform Commission, <i>Grouped Proceedings in the Federal Court</i> (Report No 46, 1988) |
| <i>Federal Court of Canada Report</i> | Federal Court of Canada Rules Committee, <i>Class Proceedings in the Federal Court of Canada</i> (DP 2000) |
| <i>Irish Report</i> | Law Commission of Ireland, <i>Multi-Party Litigation</i> (Rep No 76, 2005) |
| <i>Manitoba Report</i> | Manitoba Law Reform Commission, <i>Class Proceedings</i> (Rep No 100, 1999) |
| <i>Ontario Report</i> | Ontario Law Reform Commission, <i>Report on Class Actions</i> (1982) |
| <i>Scottish Report</i> | Scottish Law Commission, <i>Multi-Party Actions</i> (1996) |
| <i>South Australian Report</i> | Law Reform Committee of South Australia, <i>Relating to Class Actions</i> (1977) |
| <i>Wolf Report</i> | Lord Woolf, <i>Access to Justice: Final Report to the Lord Chancellor on the Civil Justice System in England and Wales</i> (1996) |

DEFINITIONS

- 'Absent Claimant'* a person who falls within the class description and who has not opted-out, and who is represented by the representative claimant until the determination of the common issues, but who takes no active part in the litigation until or unless required to prove the individual issue/s pertaining to that class member
- 'CJC Working Party'* the Working Party is comprised of:
- Mr Seamus Andrew, Partner, Simmons Cooper Andrew
 - Mr Michael Black QC, Two Temple Gardens (Chair)
 - Ms Ingrid Gubbay, Legal Consultant
 - His Honour Judge Graham Jones, Cardiff Civil Trial Centre
 - Prof Rachael Mulheron, Queen Mary University of London
 - Mr Robert Musgrove, Chief Executive, Civil Justice Council
 - Mr John Sorabji, Legal Secretary to the Master of the Rolls
 - Mr Nick Thomas, Partner, Kennedys Lawyers
- 'the CPR'* the Civil Procedure Rules, promulgated pursuant to s 1 of the Civil Procedure Act 1997, c 12.

I. INTRODUCTION

The question posed in this Report is whether an opt-out collective regime could be implemented in England and Wales via the Civil Procedure Rules, or whether it could *only* be implemented by means of legislative enactment.

The conclusion postulated in this Report is that *legislative* form of implementation will be required. Otherwise, any *ultra vires* application brought by a defendant, alleging that a rules-based opt-out collective regime under which it is being sued is beyond the powers of the Civil Procedure Rule Committee, is likely to be successful.

This conclusion is substantiated by dividing the analysis into the following three sections:

- II. Revisiting the powers of the Civil Procedure Rule Committee.
- III. Analysing how an opt-out collective redress regime alters the substantive law by its wording.
- IV. Examining how other jurisdictions have dealt with the rules-versus-legislation issue.

II. REVISITING THE POWERS OF THE CIVIL PROCEDURE RULE COMMITTEE

(a) Limited powers

The Civil Procedure Rule Committee ('the Committee') was established by s 2 of the Civil Procedure Act 1997, c 12. Its powers are circumscribed, in that it only has power to make rules of 'practice and procedure':

s 1 (1) There are to be rules of court (to be called 'Civil Procedure Rules') governing the practice and procedure to be followed in:

- (a) the civil division of the Court of Appeal,
- (b) the High Court, and
- (c) county courts.

(2) Schedule 1 (which makes further provision about the extent of the power to make Civil Procedure Rules) is to have effect.

(3) The power to make Civil Procedure Rules is to be exercised with a view to securing that the civil justice system is accessible, fair and efficient.

Under Sch 1, r 4, the Committee is authorised to make rules to 'modify the rules of evidence as they apply to proceedings in any court within the scope of the rules'.

Otherwise, there is no provision in either the principal sections or in Schedule 1 of the Act that permits the CPR Committee to amend the substantive law.

(b) Wider powers could be expressly authorised

The CPR Committee's powers are to be contrasted with the rules-making power that is sometimes vested in other civil procedure rules committees.

For example, as observed in *Mazzuca v Silvercreek Pharmacy Ltd* (2001), 56 OR (3d) 768, 207 DLR (4th) 492 (Ont CA), para 44, the Civil Rules Committee in Ontario has much wider powers, pursuant to s 66 of the Courts of Justice Act (RSO 1990, c C.43). That Committee is permitted to make rules for Ontario's Court of Appeal and the

Superior Court of Justice in relation to the practice and procedure of those courts in all civil proceedings, even though such rules may alter the substantive law. Section 66(2) specifically allows the Committee to make rules, ‘even though they alter or conform to the substantive law’.

Despite this, however, Ontario’s opt-out class action regime was statutorily implemented, on the recommendation of the Ontario Law Reform Commission. In addition to the view that substantive law was affected by an opt-out regime, that Commission also recommended the legislative route because the implementation of such an important piece of reform (important to the public, the litigants and the court) ‘deserved to be debated fully in the Legislative Assembly, rather than passed by way of regulation pursuant to the Judicature Act’: *Ontario Report*, 306.

(c) Two options

Thus, if an opt-out regime amends the substantive law by its provisions (which it does: see Section 2), then *either* the CPR Committee cannot make rules introducing such a regime, and to do so would be *ultra vires*, *or* the terms of the Civil Procedure Act 1997 will have to be statutorily changed to allow substantive law to be dealt with by the Committee (similarly to Ontario’s provisions) to permit the Committee to introduce an opt-out collective redress regime by amendment to the Civil Procedure Rules.

As matters presently stand, either expanding the present wording of the representative rule in CPR 19.6 or inserting a new regime in CPR Pt 19 (which presently also contained the Group Litigation Order in CPR 19.III) are not safe options.

III. HOW AN OPT-OUT COLLECTIVE ACTION REGIME ALTERS THE SUBSTANTIVE LAW BY ITS DRAFTING

Fundamentally, the class action is a procedural vehicle only. The Supreme Court of Canada expressed the position in this way (per *Bisailon v Concordia University* [2006] SCC 19, [2006] 1 SCR 666, LeBel J, at paras 16–19, 22):

The class action has a social dimension. Its purpose is to facilitate access to justice for citizens who share common problems and would otherwise have little incentive to apply to the courts on an individual basis to assert their rights. ... The class action is nevertheless a procedural vehicle whose use neither modifies nor creates substantive rights. ... It cannot serve as a basis for legal proceedings if the various claims it covers, taken individually, would not do so ... Thus, unless otherwise provided, the substantive law continues to apply as it would in a traditional individual proceeding [internal citations omitted].

See too, for similar comments: *Reid v Ford Motor Company* [2006] BCSC 712, para 26, citing: *Ontario New Home Warranty Program v Chevron Chemical Co* (1999), 46 OR (3d) 130 (SCJ), para 50; and *Serhan Estate v Johnson & Johnson* (2006), 269 DLR (4th) 279, para 252 (Ont CA); *L (T) v Alberta (Director of Child Welfare)* [2006] ABQB 104, 58 Alta LR (4th) 23 (Alta QB), para 102.

However, in reality, an opt-out regime may seek to amend the substantive law in two ways:

- (A) by the way in which it is explicitly drafted by law-makers, or
- (B) by the way in which the class action is judicially permitted to interact with other substantive law (despite the cautionary note adopted in the passage above).

This Report only pertains to the first-mentioned of these categories. In this section, **five** key changes are highlighted. These may not be exhaustive of the way in which an opt-out collective action could bring about a substantive change in the law (with regard to the causes of action available to the parties, and the remedies for which they may claim), but

these five areas all have judicial and law reform commission opinion to support the proposition that some change in the law *does* occur as a result of these five features. It should be noted that, to the extent that a sophisticated opt-out collective action regime may bring about other changes to the substantive law (eg, some simplified means of giving evidence), some of these will be within the power of the Civil Procedure Rule Committee to implement (especially via Sch 1, r 4). The five features discussed herein are discussed precisely because they would seem to fall *outside* the scope of the Rule Committee's powers.

(1) *LIMITATION PERIODS*

- (a) What the provision entails.** An opt-out collective action regime will contain a provision which tolls (suspends) the limitation periods for all Absent Claimants upon the representative claimant filing his pleadings, until a defined event occurs (such as the Absent Claimant opting out of the class, or the collective action being decertified).

An example of such a provision is s 33ZE of Australia's federal opt-out regime, contained in the Federal Court of Australia Act 1976:

Suspension of limitation periods

(1) Upon the commencement of a representative proceeding, the running of any limitation period that applies to the claim of a group member to which the proceeding relates is suspended.

(2) The limitation period does not begin to run again unless either the member opts out of the proceeding under section 33J or the proceeding, and any appeals arising from the proceeding, are determined without finally disposing of the group member's claim.

- (b) Judicial opinion.** There is both English and overseas judicial opinion which states that this provision changes the substantive law governing an individual's

entitlement to bring proceedings. For example, see Lord Woolf, in the *Woolf Report*, ch 17, para 45;

There is, however, a need for action to be taken in relation to the limitation period and this can only be effective if there are provisions to suspend or freeze the running of the limitation period on certification of the Multi-Party Situation, as in many other jurisdictions, so that further claimants whose claims were not being considered in detail at this stage were not disadvantaged. This will require primary legislation.

In addition, in *Pauli v ACE INA Insurance* [2002] ABQB 715, 322 AR 126, 12 Alta LR (4th) 332, para 36, Rooke J accepted that limitation periods being suspended by a class action regime would effect the sort of change to substantive law that would lie outside the scope of power of the Alberta Rules of Court Committee (of which he was a member):

The only limitation to such case management rules or more formal rules by the Alberta Rules of Court Committee would appear to be substantive provisions relevant to limitations and the like.

- (c) **Law commission opinion.** Some law reform commissions have expressed the view that the tolling of limitation periods is a matter of substantive law, requiring legislation and not rules of court: *Alberta Report*, para 484; *South Australian Report*, p 10–11; *Manitoba Report*, p 38. The *South Australian Report* (authored by a number of justices of the South Australian Supreme Court) put their opinion in this fashion:

Class actions require some modification of the rules regarding limitation of actions. The ordinary limitation provisions must be made subject to the right of individual members of a class to establish their claims after the common questions have been determined, notwithstanding that the time for instituting proceedings has expired. Some provision must also be made for members of the class who may have delayed their remedy as the result of the class action but who are disappointed in that expectation, as where an order to proceed as a class action is refused or having been granted, is subsequently rescinded.

(2) ***MODIFYING RES JUDICATA FOR ABSENT CLAIMANTS***

- (a) **What the provision entails.** The central tenet of an opt-out regime is that it will permit any determination of the common issues argued in the collective action to bind the Absent Claimants who have not filed individual proceedings themselves, yet who will be barred from re-litigating those issues again. Hence, this tenet represents a modification of the principles of *res judicata*.

A typical provision is provided by s 27(1) of Alberta's Class Proceedings Act, SA 2003, c C-16.5:

Judgment on common issues is binding

Subject to subsection (2), a judgment

(a) on common issues of a class binds every class member, and

(b) on common issues of a subclass binds every subclass member,

but only to the extent that the judgment determines common issues that

(c) are set out in the certification order,

(d) relate to claims described in the certification order, and

(e) relate to relief sought by the class or subclass as stated in the certification order.

- (b) **Judicial opinion.** It was seemingly on this basis that the then-Master of the Rolls, Lord Phillips, responding to the Lord Chancellor's Department (LCD) Consultation, *Representative Claims: Proposed New Procedures* (2001) (by response dated 1 May 2001, reproduced in the later document published by the LCD, *Representative Claims: Proposed New Procedures: Consultation Response* (2002)), remarked:

To permit representative claims on behalf of unnamed individuals would be to introduce a new concept into English law. I share the view ... that they are likely to require primary legislation.

Primary legislation was also advocated by the Vice-Chancellor, Sir Andrew Morritt, when responding to the same Consultation (response dated 20 April 2001).

In similar vein, in *Schutt Flying Academy (Australia) Pty Ltd v Mobil Oil Australia Ltd (Attorney-General for the State of Victoria intervening)* [2000] VSCA 103, the defendant argued that an opt-out collective action regime that purported to permit a judgment on the common issues to bind Absent Claimants was beyond the scope of the rule-making powers vested in the judges of the Supreme Court of Victoria by s 25(1) of the Supreme Court Act 1986 (especially s 25(1)(f)(i), which gave the judges the power to make Rules of Court ‘for or with respect to ... any matter relating to the practice and procedure of the Court’). The only member of the Victorian Court of Appeal to expressly deal with this argument — Ormiston JA, at paras 38–40 — stated that ‘one may concede that the binding effect of judgments and the principles of ... *res judicata* and issue estoppel are substantive.’ However, in the end, his Honour formed one of the 3:2 majority which held that the collective action regime *was* within the rule-making power vested by s 25(1). The precedential value of that conclusion may be somewhat diminished, however, by the fact that special leave on the issue was granted to the High Court of Australia, and in order to be certain of its validity, the Victorian Parliament eventually acted to legislate the collective regime (as Pt 4A of the Supreme Court Act) before the appeal was heard. Thus, the issue was never determined by the High Court.

The other aspect of *res judicata* that may be amended by a collective action regime is that the *Henderson* rule may be abrogated. It has been considered, in Canada, to be ‘necessary to modify the doctrine of *res judicata* in class actions in cases where a plaintiff or plaintiffs have other claims which fall outside the scope of the common issues in the class action’, such that the regime’s wording ‘clearly limits the binding effect of the judgment on the common issues to the common issues described in the certification order’: per Keenan J in *Allan v CIBC Trust Corp* (1998), 39 OR (3d) 675 (SCJ), paras 23–24. Hence, in that case (per 25):

[t]he present Plaintiffs’ claims are based on the liability of CIBC Trust

and the other defendants for breaches of their obligations and negligence prior to and unrelated to the application for appointment for Receiver. The order dismissing the Class action does not address those issues and does not impede the present Plaintiffs from going forward with the present actions. They are not the same cause of action.

Indeed, if the representative claimant can keep parts of his case back, and narrow the common issues in order to obtain a better chance of certification and/or a more favourable prospect of a decision in his favour on the common issues, then this means that either a collective regime is a ‘special circumstance’ under the *Henderson* rule, or that the *Henderson* rule does truly only require the claimant to bring forth what should have been *dealt with* as common issues (at least as the representative claimant sees it) in the earlier proceedings, and not what should have been *raised* in the earlier proceedings.

For further discussion of this important point, see: R Mulheron, ‘Justice Enhanced: Framing an Opt-Out Class Action for England and Wales’ (2007) 70 *Modern Law Review* 550, 572–575.

- (c) **Law commission opinion.** Some law reform commissions have also remarked that any finding on the common issues that binds Absent Claimants is an amendment to the substantive law, and hence, that implementation of that feature would require legislation: *Alberta Report*, para 484; *Manitoba Report*, 38.

(3) **AGGREGATE ASSESSMENT OF DAMAGES**

- (a) **What the provision entails.** An opt-out collective action regime typically permits a court to ‘award damages in an aggregate amount’, as a class-wide assessment, without reference to the individual class members’ losses. The provisions governing aggregate assessment commonly depend upon certain pre-conditions which must be satisfied to allow for such an assessment (eg, the degree of accuracy required, whether liability must have been established in toto, and whether some form of monetary relief must be claimed by the entire class or only

part of the class).

A typical aggregate assessment provision is contained in s 24 of Ontario's Class Proceedings Act, SO 1992, c 6:

Aggregate assessment of monetary relief

(1) The court may determine the aggregate or a part of a defendant's liability to class members and give judgment accordingly where,

(a) monetary relief is claimed on behalf of some or all class members;

(b) no questions of fact or law other than those relating to the assessment of monetary relief remain to be determined in order to establish the amount of the defendant's monetary liability; and

(c) the aggregate or a part of the defendant's liability to some or all class members can reasonably be determined without proof by individual class members.

- (b) **Judicial opinion.** In the previously-mentioned case of *Schutt Flying Academy (Australia) Pty Ltd v Mobil Oil Australia Ltd (Attorney-General for the State of Victoria intervening)* [2000] VSCA 103, the Victorian Court of Appeal were divided as to whether aggregate assessment provisions effected a substantive change to the law. The minority of the court thought that they did, per Winneke P (at para 5):

the authorization given to the Court by rule 25(1)(f) to 'award damages in an aggregate amount', subject to the limitation not to do so 'unless a reasonably accurate assessment can be made of the total amount to which group members will be entitled under the judgment', cannot be equated with a power to assess reasonable damages, according to law, in respect of actual losses suffered by individual group members. Indeed, it is difficult to see how it could be so when the 'opt-out' procedures prescribed by the Rules envisage that, at the time when judgment for an award of damages in an aggregate amount is given, the number of group members and the amount of their individual losses will, or may, not be accurately known. It seems to me, as it does to Brooking JA, that rules which authorize the Court to assess damages which are incommensurate with the actual loss suffered by individual group members are rules which go beyond the boundaries of permissible rule-making and intrude into the field of rule-making with respect to the substantive rights of litigants.

See too, Brooking JA's judgment at paras 15–29.

The majority of the Court of Appeal (Ormiston, Phillips and Charles JJA), on the other hand, did not consider that aggregate assessment provisions brought about a substantive change in the law. As mentioned, special leave to appeal to the High Court was granted, but was eventually vacated when the Victorian Parliament decided to remove the collective action from rules of court (as Order 18A of the General Rules of Civil Procedure) and implement it (including the aggregate assessment provisions) as legislation (as Pt 4A of the Supreme Court Act 1986).

In response to the Lord Chancellor Department's Consultation, *Representative Claims: Proposed New Procedures* (2001), Lord Justice May recommended primary legislation, so that '[i]f the causes of action and remedies were to go beyond those presently available, they need to be defined and then would probably require legislation' (response dated 24 April 2001).

Similarly, in their response to the same Consultation, the Association of District Judges noted that a new representative claim 'might well involve fundamental law reform, for example, of the way in which damages are calculated, and the basis upon which compensation may be awarded for a breach of duty.' Such issues 'can only be resolved by primary legislation' (response dated 24 April 2001).

- (c) **Law commission opinion.** Some law reform commissions have also opined that aggregate assessment of damages also brings about a change to the substantive law of damages assessment, and would require implementation by legislation: *Alberta Report*, para 484; *Manitoba Report*, p 38; *Ontario Report*, 306.

(4) ***CY-PRÈS DISTRIBUTIONS OF DAMAGES***

- (a) **What the provision entails.** Where distribution of damages to class members is

impossible or impracticable, then most opt-out collective action regimes permit the court to distribute the unclaimed sum to people who are not class members (via either a price-rollback order, or by a distribution to an organisation which has purposes similar to the underlying purposes of the litigation).

A typical provision is contained in s 34 of Manitoba's Class Proceedings Act, CCSM c C130:

Undistributed award

34(1) The court may order that all or any part of an award under this Division that has not been distributed within a time set by the court be applied in any manner that may reasonably be expected to benefit class or subclass members, even if the order does not provide for monetary relief to individual class or subclass members.

34(2) In deciding whether to make an order under subsection (1), the court must consider

- (a) whether the distribution would result in unreasonable benefits to persons who are not members of the class or subclass; and
- (b) any other matter the court considers relevant.

34(3) The court may make an order under subsection (1) whether or not all the class or subclass members can be identified or all their shares can be exactly determined.

34(4) The court may make an order under subsection (1) even if the order would benefit

- (a) persons who are not class or subclass members; or
- (b) persons who may otherwise receive monetary relief as a result of the class proceeding.

- (b) **Judicial opinion.** In the United States, the Ninth Circuit has stated, in *In re Telephone Charges*, 500 F 2d 89, 90 (9th Cir 1974) that *cy-près* distributions significantly alter substantive law, and was 'clearly prohibited' by the Rules Enabling Act promulgating the Federal Rules of Civil Procedure, given that such rules were not permitted to 'abridge, enlarge or modify any substantive right' (Rules Enabling Act, 28 USC, s 2072 (1976)). In addition, the Second Circuit

held, in *Eisen v Carlisle and Jacquelin*, 479 F 2d 1005, 1018 (2nd Cir 1973), that *cy-près* distributions were ‘illegal, [and] inadmissible as a solution’ to damages distribution.

Although *cy-près* distributions constitute a significant component of many judicially-approved *settlements* in American class actions jurisprudence, the status of *cy-près* distributions, in respect of *judgments*, remains unclear and unsettled.

Along the same lines of reasoning, in Canada, one court has described the notion of a *cy-près* distribution as ‘novel’: *Smith v Canadian Tire Acceptance Ltd* (1995), 22 OR (3d) 433 (Gen Div), para 41.

- (c) **Law commission opinion.** Perhaps the most strident statement of how *cy-près* distributions are perceived to change the substantive law is contained in the *Australian Report*, paras 237–39, where that Commission refused to countenance such distributions. Three principal reasons were given. First, class actions were supposed to achieve compensation for class members, whereas *cy-près* distributions did not achieve that, but instead promoted deterrence. Secondly, any damages award payable by the defendant should be closely matched to the class members’ entitlement to damages, and a *cy-près* distribution to some persons who were not class members removed the prospects of a ‘close match’. Thirdly, a windfall to non-class members who were not themselves injured would not be permitted under unitary litigation, nor should it under collective action regimes.

Ultimately, the Australian legislature did not enact *cy-près* provisions, on this recommendation against by the *Australian Report*. However, Canadian opt-out collective action regimes have favoured *cy-près* provisions, but as the reasoning above shows, they require a policy decision and, where implemented, represent a change in the substantive law of damages distribution.

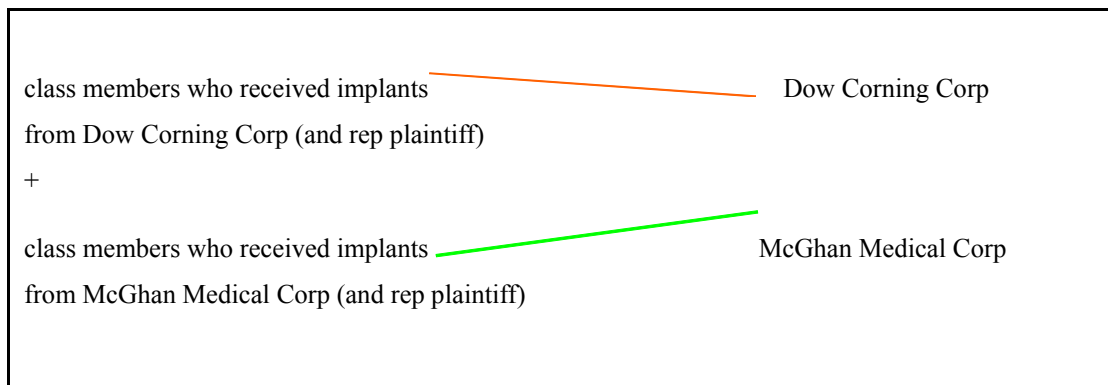
Notably, the *Ontario Report*, at 306, also noted that its recommendations as to distribution of damages (which included *cy-près* distributions) arguably involved

some changes to the substantive law.

(5) ***STANDING AGAINST MULTIPLE DEFENDANTS***

If a collective regime permits a representative claimant to assert a cause of action against a defendant against whom the claimant has no direct cause of action (instead, the cause of action is against a co-defendant), then that represents a change to the substantive law of standing — because, in unitary litigation, that representative claimant could not possibly sue that defendant. Some class action opt-out regimes permit that, as against each defendant named in the originating proceedings, there is *a* representative claimant who asserts a cause of action against it, but that it is not necessary that every representative claimant (and class member) can assert a pleadable cause of action against every defendant.

For example, as the litigation in *Bendall v McGhan Medical Corporation* (1994), 106 DLR (4th) 339, 14 OR (3d) 734 (Gen Div) demonstrates, this is acceptable under Ontario's regime, for no class member in this case had received breast implants from both breast implant manufacturers sued in the class action:



Thus, in Ontario, this is the position, with respect to standing against multiple defendants:

[In original version of paper, a diagram was inserted here which was reproduced from: R Mulheron, *The Class Action in Common Law Legal Systems: A*

Comparative Perspective (Hart Publishing, Oxford, 2004), p 149.]

However, some Australian judges have not taken nearly as liberal a view on this issue. In *Symington v Hoechst Schering Agrevo Pty Ltd* (1997) 78 FCR 164, 167, Wilcox J held that the representative:

must himself or herself have standing to sue the particular respondent and, where there is more than one respondent, each of them. It is not enough that the applicant has standing to sue one respondent and other people have claims against some other respondent which arise out of similar or related circumstances and give rise to a substantial common issue of law or fact.

This was later endorsed, and became known as the ‘*Philip Morris*’ interpretation (arising out of the tobacco litigation in Australia, whereby many of the class members had only smoked the brand of one defendant manufacturer and not the brands of all defendants sued in the action; the action was incompetently instituted, held the Full Federal Court): *Philip Morris (Australia) Ltd v Nixon* (2000) 170 ALR 487, paras 126–27. The Australian construction of what constitutes valid standing, however, was relaxed somewhat by a differently-constituted Full Federal Court in: *Bray v Hoffmann-La Roche Ltd* [2003] FCAFC 153, [248].

The issue is a very important one, upon which English law-makers would need to adopt a position. As Sackville J noted in *Hunter Valley Community Investments Pty Ltd v Bell* (2001)37 ACSR 326 (FCA), para 57, collective actions against multiple defendants (where conspiracy among them cannot be alleged) is a relatively common phenomenon, and Spender J stated in the *Philip Morris* case that the issue of multiple defendants ‘seriously compound the difficulties [of standing]’ for collective regimes.

IV. HOW OTHER JURISDICTIONS HAVE DEALT WITH THE ISSUE

So far as the author is aware, only two opt-out collective action regimes are contained within rules of civil procedure:

- the United States federal regime, contained in r 23 of the Federal Rules of Civil Procedure; and
- the opt-out regime contained within the Federal Court Rules 1998 (Canada), as r 334.1–334.40 (unlike the US regime, this particular Canadian rules-based regime includes explicit provisions governing aggregate assessment of damages, per r 334.334.28, and appears also to contemplate *cy-près* distributions, per r 334.28.)

The South Australian ‘representative action’ is also embodied in court rules — as rule 34 of the Supreme Court Rules 1987 — but, whilst it permits an action on behalf of a described class (per r 34.04(a)), there are no opting-out provisions of the type witnessed in the classic collective action regimes mentioned above.

Closer to home, some nearby jurisdictions — Ireland and Scotland — have recommended the implementation of collective access regimes via rules rather than by legislation. However, notably, both regimes ultimately recommended opt-in rather than opt-out, thereby reducing (although not entirely eliminating) some of the substantive changes itemised in the previous section of the Report:

- in Ireland – ‘the use of Rules of Court rather than primary legislation is consistent with the principles set out in the Government of Ireland’s White Paper, *Better Regulation*’: *Irish Report* (2005), para 1.45 — however, no rules of court have yet been enacted;
- in Scotland – rules of court were considered appropriate in Scotland, given the status of Acts of Sederunt made by the Court of Session itself, hence the

recommendation that ‘as far as possible, any class action procedure should be regulated by Act of Sederunt rather than by Act of Parliament’: *Scottish Report*, para 4.10.

Otherwise, the regimes of Australia (federal), Victoria (state), and all the presently-existing provincial opt-out regimes in Canada, have been implemented by statute.

In Victoria, the history of the present opt-out regime, contained within Pt 4A of the Supreme Court Act 1986, is instructive. Notwithstanding a comprehensive and carefully-considered law reform report recommending an opt-out collective action regime for the Victorian jurisdiction (see Victorian Attorney-General’s Law Reform Advisory Council (by V Morabito and J Epstein), *Class Actions in Victoria—Time for a New Approach* (1997)), Parliament did not introduce any legislation. Thereafter, law-makers in that jurisdiction ran the gamut of implementing an opt-out regime via court rules (via Order 18A of the Supreme Court (General Civil Procedure) Rules), followed by an *ultra vires* challenge by the first defendant sued thereunder, a special request by the judge in charge of the Trial Division of the Victorian Supreme Court (Hedigan J) that the Victorian Court of Appeal consider the question, ‘Is Order 18A of the General Rules of Civil Procedure valid?’ (per *Schutt’s* case, above), a narrow finding of 3:2 in *Schutt* that it *was* valid, a further appeal to the High Court of Australia on that question, the hasty introduction of legislation by the Victorian Parliament to remove any doubt about the legality of the regime, and the ultimate vacation of the High Court appeal on that particular issue (eventually, a challenge to the validity of the Pt 4A regime upon constitutional grounds also failed, on 26 June 2002: *Mobil Oil Australia Pty Ltd v Victoria* (2002) 211 CLR 1 (HCA)).

This is surely not a precedent which law-makers in this jurisdiction would wish to follow!

[Further analysis of many of the topics discussed in this Report is contained in: R Mulheron, *The Class Action in Common Law Legal Systems: A Comparative Perspective* (Hart Publishing, Oxford, 2004) and *The Modern Cy-près Doctrine: Applications and Implications* (Routledge Cavendish, London, 2006).



APPENDIX O

An Act respecting the Class Action: Quebec

R.S.Q., chapter R-2.1

TITLE I

CLASS ACTION

1. (Amendment integrated into c. C-25, a. 34).

1978, c. 8, s. 1.

2. (Amendment integrated into c. C-25, a. 954).

1978, c. 8, s. 2.

3. (Amendment integrated into c. C-25, aa. 999-1051).

1978, c. 8, s. 3.

4. (Amendment integrated into c. C-25, Book X).

1978, c. 8, s. 4.

TITLE II

ASSISTANCE TO CLASS ACTIONS

CHAPTER I

DEFINITIONS

Interpretation:

5. In this title, unless the context indicates a different meaning,

“assistance”;

(a) “assistance” means the assistance granted under Chapter III of this title;

“recipient”;

(b) “recipient” means the person who receives assistance;

“Fonds”;

(c) “Fonds” means the Fonds d'aide aux recours collectifs established by section 6;

“representative”;

(d) “representative” means the person who is ascribed the status of representative for the bringing of a class action, in accordance with article 1003 of the Code of Civil Procedure;

“applicant”.

(e) “applicant” means a person who applies for assistance.

1978, c. 8, s. 5.

CHAPTER II

THE FONDS

Name.

6. An agency is established under the name of “Fonds d'aide aux recours collectifs”.

Legal person.

The Fonds is a legal person established in the public interest.

1978, c. 8, s. 6; 1999, c. 40, s. 242.

Object.

7. The object of the Fonds is to ensure the financing of class actions in the manner provided for by this title and to disseminate information respecting the exercise of such actions.

1978, c. 8, s. 7; 1984, c. 46, s. 31.

Administration.

8. The Fonds shall be administered by three persons including a president, appointed for not more than three years by the Government, after consultation with the Barreau du Québec and the Commission des services juridiques.

Salary, fees.

The Government shall fix, where necessary, the salary, additional salary or fees that may be paid to each of the administrators, and their allowances or indemnities.

1978, c. 8, s. 8.

Administrator to remain in office.

9. An administrator shall remain in office on the expiry of his term until he is reappointed or replaced.

1978, c. 8, s. 9.

Absence or unable to act.

10. If an administrator is absent or unable to act, the Government may appoint a person to replace him temporarily.

1978, c. 8, s. 10; 1999, c. 40, s. 242.

Head office.

11. The Fonds shall have its head office at the place determined by the Government; a notice of the location or of any change of location of the head office shall be published in the Gazette officielle du Québec.

Sittings.

The Fonds may hold its sittings anywhere in Québec.

1978, c. 8, s. 11.

Quorum.

12. Two members constitute a quorum of the Fonds. In the case of a tie-vote, the president has a casting vote.

Personal interest.

An administrator having a personal interest related to an application for assistance must declare his interest and must abstain from participating in the decision, under pain of forfeiture of office.

Participation in decision.

However, if such an interest results solely from the fact that the administrator is a member of the group on behalf of which an application for assistance is made to the Fonds, the administrator shall participate in the decision but must declare his interest.

1978, c. 8, s. 12.

Appointment.

13. The secretary and the other officers of the Fonds are appointed in accordance with the Public Service Act (chapter F-3.1.1).

1978, c. 8, s. 13; 1986, c. 61, s. 37; 2000, c. 8, s. 242.

Minutes, copies and extracts.

14. Minutes of the sittings of the Fonds approved by the administrators are authentic; the same applies to copies or extracts certified by the president or the secretary.

1978, c. 8, s. 14.

Fiscal year.

15. The fiscal year of the Fonds ends on 31 March each year.

1978, c. 8, s. 15.

Budget.

16. Not later than 1 September each year, the Fonds shall send its budget to the Minister of Justice for the ensuing fiscal year. Such budget shall be without effect so long as it has not been approved by the Minister.

Administrator dismissed.

The Government may dismiss any administrator of the Fonds who acquiesces to an expenditure not provided for by the budget of the Fonds, except an expenditure not exceeding the revenues of the Fonds not provided for in the budget.

1978, c. 8, s. 16.

Annual report.

17. The Fonds shall send to the Minister of Justice, not later than 30 June each year, a report of its activities for the previous fiscal year.

Tabling.

The Minister shall table such report before the National Assembly if it is in session, or, if it is not in session, within thirty days from the opening of the next session or resumption, as the case may be.

1978, c. 8, s. 17.

Information and report.

18. The Fonds shall at any time give to the Minister of Justice any information or report he requires on its activities.

1978, c. 8, s. 18.

Audit of books and accounts.

19. The Auditor General shall, each year and, in addition, whenever the Government so orders, audit the books and accounts of the Fonds.

1978, c. 8, s. 19.

CHAPTER III

ASSISTANCE

DIVISION I

GRANTING ASSISTANCE

Application in writing.

20. Every representative and every person intending to be ascribed such status may apply in writing for assistance from the Fonds.

1978, c. 8, s. 20.

Content.

21. The applicant shall set forth in his application the basis of his claim and the essential facts determining its exercise, and shall describe the group on behalf of which he intends to bring or is bringing the class action.

Content.

He shall also state his financial condition and that of the members of the group who have made themselves known; he shall indicate the purposes for which the assistance is intended to be used, the amount required, and any other revenue or service available to him.

1978, c. 8, s. 21.

Affidavit.

22. The applicant shall certify in his application that the information supplied by him is accurate, and he shall authorize the Fonds to verify the accuracy thereof.

Vouchers and other information.

He shall furnish the vouchers and other information the Fonds requires.

1978, c. 8, s. 22.

Power of the Fonds.

23. The Fonds shall study the applicant's application and it may, for that purpose, meet with the applicant or his attorney and allow him to present observations.

Criteria for granting assistance.

In order to determine whether to grant assistance, the Fonds shall assess whether the class action may be brought or continued without such assistance; in addition, if the status of representative has not yet been ascribed to the applicant, the Fonds shall consider the probable existence of the right he intends to assert and the probability that the class action will be brought.

Appeal.

Where the representative or a member requesting to be substituted for him intends to appeal the judgment which decides the questions of law or fact dealt with collectively, the Fonds, in order to determine whether to grant or terminate assistance, shall assess whether the action may be continued without such assistance and whether the appeal is likely to succeed if brought.

Decision.

The Fonds may defer the study of a part of the application, refuse assistance or grant it, in whole or in part; in all cases, it shall render its decision within one month following receipt of the application.

1978, c. 8, s. 23; 1991, c. 19, s. 1; 1997, c. 43, s. 555.

Written notification.

24. If the Fonds defers the study of a part of the application or if it refuses to grant assistance, it shall notify the applicant in writing of its decision and indicate the reasons therefor.

1978, c. 8, s. 24.

Agreement between Fonds and recipient.

25. If assistance is granted, the Fonds shall agree upon the conditions with the applicant or his attorney.

The agreement between the Fonds and the recipient shall, in particular, provide for:

- (a) the amount and use of the assistance;
- (b) the advances that may be paid to the recipient;
- (c) the terms and conditions of producing accounts and expenditures;
- (d) the reports the recipient or his attorney must supply to the Fonds;
- (e) the cases where assistance may be suspended or diminished;
- (f) the terms and conditions of reimbursing the advances received or of assistance, if such is the case;
- (g) the subrogation of the Fonds in the rights of the recipient or his attorney up to the amounts paid to them.

1978, c. 8, s. 25.

Temporary assistance.

26. An administrator of the Fonds may grant the applicant temporary assistance, which shall not exceed the amount prescribed by regulation of the Fonds, if he considers that immediate assistance is necessary to avoid the loss or non-exercise of the applicant's right and if the Fonds cannot meet in time to decide the applicant's application. The decision of the administrator must be substantiated.

Reimbursement.

The applicant must reimburse the amounts so received if the Fonds thereafter refuses to grant assistance.

1978, c. 8, s. 26.

DIVISION II

RIGHTS AND OBLIGATIONS OF THE FONDS AND OF THE RECIPIENT

Right of recipient.

27. The recipient is entitled to the payment by the Fonds of the expenses expedient for the preparation or bringing of the class action in the manner provided for in the agreement contemplated in section 25.

1978, c. 8, s. 27.

Obligations of recipient.

28. The recipient must notify the Fonds of any fact changing the information supplied in accordance with sections 21 and 22.

Obligations of recipient.

He must also send to the Fonds a copy of the judgment of the court authorizing the bringing of the class action or terminating it, ordering the publication of a notice or of such a nature as to amend the agreement.

1978, c. 8, s. 28.

Obligations of the Fonds.

29. The Fonds shall pay for the recipient in the manner provided for in the agreement contemplated in section 25, up to the amount of the assistance:

- (a) the fees of the recipient's attorney;
- (b) the fees and costs of experts and advocates-counsel acting for the recipient;
- (c) the costs and other court expenditures including costs of notification, if they are at the expense of the recipient;
- (d) the other expenses expedient to the preparation or the bringing of the class action.

1978, c. 8, s. 29.

Reimbursement.

30. The recipient or, if such is the case, his attorney shall reimburse to the Fonds the amounts paid by it up to the amounts they receive from a third party as fees, costs or expenses.

1978, c. 8, s. 30.

Subrogation.

31. In the cases where the representative was granted assistance, if the defendant in whose favour the final judgment has been rendered shows to the satisfaction of the Fonds that it is impossible for him to obtain the full payment of the judicial costs on the property of the representative, the Fonds, after examining the financial condition of the defendant, may pay these judicial costs in the name of the representative. The Fonds then becomes subrogated in the rights of the defendant up to the amount paid to him.

1978, c. 8, s. 31.

Filing.

32. The Fonds shall file at the office of the Superior Court of the district in which the class action is brought, the conclusions of the decision granting assistance.

Obligation of the court.

The court must hear the Fonds before deciding the payment of costs, determining the fees of the representative's attorney, or approving a transaction on costs or fees.

1978, c. 8, s. 32.

Loss of assistance.

33. A recipient who fails to bring the class action or who is not authorized to bring it, or who loses his status of representative or waives it, is no longer entitled to assistance.

Obligation of recipient.

He must then notify the Fonds, report to it, and reimburse to it the advances received and not yet spent.

1978, c. 8, s. 33.

Assistance to cease pleno jure.

34. Assistance ceases pleno jure if the recipient uses it for purposes other than those agreed upon; in such case, he shall reimburse the amount of assistance received and not used for the purposes of the class action.

1978, c. 8, s. 34.

DIVISION III

PROCEEDING BEFORE THE ADMINISTRATIVE TRIBUNAL OF QUÉBEC

Contestation.

35. Any applicant whose application for assistance is denied may, within 30 days of notification of the decision of the Fonds, contest the decision before the Administrative Tribunal of Québec.

1978, c. 8, s. 35; 1988, c. 21, s. 66; 1997, c. 43, s. 558.

36. (Repealed).

1978, c. 8, s. 36; 1997, c. 43, s. 559.

Decision.

37. If the Tribunal decides that the applicant is entitled to assistance, it shall order the Fonds to proceed with the granting of the assistance after agreement with the applicant or his attorney in conformity with section 25.

1978, c. 8, s. 37; 1997, c. 43, s. 560.

CHAPTER III.1

ASSISTANCE FOR PROCEEDINGS BEFORE THE FEDERAL COURT OF CANADA

Financial assistance.

37.1. The Fonds may grant financial assistance for the institution of a proceeding of the nature of a class action before the Federal Court of Canada, provided that

1) the applicant proves that substantial grounds exist to warrant the institution of the proceeding before the Federal Court, rather than before the Superior Court;

2) the applicant and at least 50% of the members of the group are Québec residents ;

3) the subject-matter of the proceeding is one in respect of which the Federal Court - Trial Division and the Superior Court have concurrent jurisdiction.

Members.

The number of members of the group and the proportion of the members who are Québec residents may be established on the basis of existing statistics or available data.

1999, c. 70, s. 1.

Assistance.

37.2. Assistance shall be granted subject to the other provisions of this Act, except the provisions of sections 32 and 42.

Assistance.

However, before granting assistance, the Fonds shall, in all cases, determine whether or not the proceeding can be instituted or continued without the assistance and consider the probable existence of the right the applicant intends to assert as well as the probability that the proceeding will be instituted.

1999, c. 70, s. 1.

CHAPTER IV

REGULATIONS

Regulations of the Government.

38. The Government may, by regulation:

(a) fix, for the application of section 42, the percentage withheld by the Fonds from the balance or from a liquidated claim;

(b) determine the cases where assistance may be granted to persons who do not reside in Québec and establish criteria and standards in that regard;

(c) determine the cases where assistance may be granted to a resident of Québec who intends to institute a proceeding of the nature of a class action outside Québec.

1978, c. 8, s. 38.

Regulations of the Fonds.

39. The Fonds may, by regulation subject to the approval of the Government:

(a) determine the form and content of the applications and of the reports to be filed with the Fonds;

(b) determine the amount that an administrator may commit pursuant to section 26;

(c) determine the percentage of the assistance that may be remitted to a recipient as an advance payment;

(d) (paragraph repealed);

(e) prescribe rules necessary for its internal management and the conduct of its business.

1978, c. 8, s. 39; 1986, c. 61, s. 38.

Notice in Gazette officielle du Québec.

40. No regulation dealing with the matters contemplated in section 38 or in paragraph a, b, c or e of section 39 shall be made except after a notice of 30 days published in the Gazette officielle du Québec, setting forth the text thereof.

1978, c. 8, s. 40.

Coming into force.

41. Every regulation made under sections 38 and 39 comes into force on the date of its publication in the Gazette officielle du Québec or on any later date fixed therein.

1978, c. 8, s. 41.

CHAPTER V

FINANCIAL PROVISIONS

Percentage withheld by the Fonds.

42. In the case of a collective recovery of the claims, the Fonds shall withhold a percentage fixed by regulation of the Government on the balance established under article 1033 or 1034 of the Code of Civil Procedure; in other cases, the Fonds shall withhold a percentage fixed by regulation of the Government on every liquidated claim.

1978, c. 8, s. 42.

Powers of the Fonds.

43. The Fonds may, with respect to the assistance it grants,

(a) spend the sums placed at its disposal for that purpose by the Minister of Justice and those which have been withheld in accordance with section 42;

(b) also make, annually, financial commitments other than a loan for an amount up to the amount determined by the Minister of Justice at the time of approval of the budget of the Fonds.

1978, c. 8, s. 43; 1982, c. 37, s. 25.

Loans.

44. In addition to its powers under section 43, the Fonds may, with the prior authorization of the Minister of Justice, contract a loan in respect of the assistance it grants or in order to carry on its operations.

1978, c. 8, s. 44; 1982, c. 37, s. 25.

Powers of the Government.

44.1. The Government, on such conditions as it determines, may

(a) undertake to supply the liquidity fund required by the Fonds so as to enable it to repay the capital and interest of a loan contracted by the Fonds, when due;

(b) guarantee the payment, in capital and interest, of any loan or other financial commitment contracted or made by the Fonds.

Required sums.

The sums required for the purposes of this section are taken out of the consolidated revenue fund.

1982, c. 37, s. 25.

Sums required.

45. The sums required for the application of this title shall be taken, for the years 1978/1979 and 1979/1980, out of the consolidated revenue fund and for the subsequent years out of the moneys granted each year for that purpose by Parliament.

1978, c. 8, s. 45.

TITLE III

MISCELLANEOUS PROVISIONS

46. (Omitted).

1978, c. 8, s. 46.

47. (Omitted).

1978, c. 8, s. 47.

48. (Omitted).

1978, c. 8, s. 48.

49. (Omitted).

1978, c. 8, s. 49.

50. (Omitted).

1978, c. 8, s. 50.

51. (Omitted).

1978, c. 8, s. 51.

52. (Amendment integrated into c. A-14, s. 63).

1978, c. 8, s. 52.

53. (Amendment integrated into c. A-14, s. 80).

1978, c. 8, s. 53.

54. (Amendment integrated into c. A-14, s. 87.1).

1978, c. 8, s. 54.

Minister responsible.

55. The Minister of Justice is responsible for the application of this act.

1978, c. 8, s. 55.

56. (Omitted).

1978, c. 8, s. 56.

57. (This section ceased to have effect on 17 April 1987).

1982, c. 21, s. 1; U. K., 1982, c. 11, Sch. B, Part I, s. 33.

REPEAL SCHEDULE

In accordance with section 17 of the Act respecting the consolidation of the statutes and regulations (chapter R-3), chapter 8 of the statutes of 1978, in force on 1 June 1979, is repealed, except sections 46 to 51, effective from the coming into force of chapter R-2.1 of the Revised Statutes.



APPENDIX P

Glossary of terms

Aggregate Damages: a means of assessing damages which does not require the proof of individual loss suffered by each member of the represented class. Damages are assessed either on the basis that the represented class is a single entity i.e., a global damage award is made or via the use of statistical evidence.

Class Action: a synonym for representative or collective action, most commonly associated and used to describe the collective/representative action mechanism available in the United States.

Collective Action: a synonym for representative action, albeit without the connotation of a connection with the extent representative action under CPR 19.6. The term is in some contexts used to describe follow-on actions brought under the Competition Act 1998, especially in the context of the term 'collective consumer redress'. **In the context of the present paper** a collective action refers to an action brought by a representative party for and on behalf of itself, or simply by the representative body on behalf of, a represented class of claimants or defendants seeking the vindication of substantive law rights, where a nature of the cause of action gives rise to a commonality of interest between the members of the represented class.

Cy-près Distribution: a traditional means of distributing assets held in trust where the terms of the trust can no longer be fulfilled and which has been used analogously in some jurisdictions as a means to distribute unclaimed damages or unclaimed settlement awards in representative proceedings.

Follow-on Action: a form of collective/representative action brought, at present, under section 47B of the Competition Act 1998, and which is brought after an adverse finding in regulatory proceedings against a defendant who has been found to have breached the provisions of the 1998 Act.

Group litigation order (GLO): a sophisticated case management order which permits multiple joinder of parties whose legal actions have a common interest. Each action managed in this way remains a traditional unitary action.

Opt-in: the requirement in a collective action that individual litigants actively elect to take part in the litigation as members of the represented class.

Opt-out: the requirement that individual litigants, who fall within the definition of the represented class, actively elect not to take part in the collective action. Failure to actively elect not to be a member of the class automatically entails class membership. Opt-out thus describes presumptive class membership.

Representative action: an action which provides for legal persons to be represented in civil proceedings by another or other legal persons. It enables multiple individual actions to be pursued as one single individual action, albeit one which binds the represented class members. This term is generally used to refer to an action brought under CPR 19.6.

Representative party: the legal person or persons who is authorised to conduct representative or collective proceedings on behalf of a defined or definable class of legal persons. The representative party can act as either a representative claimant or a representative defendant.

Represented class: the defined or definable class of legal persons who have a cause of action against a common or common defendant(s) that give rise to the same or common issues and whose actions are pursued in a representative action by a representative claimant or claimants.

Stand-alone action: a representative or collective action that is neither predicated upon nor arises out of prior regulatory action against a legal person.



APPENDIX Q

European Economic and Social Committee,

*Opinion on Defining the collective actions system and its role in the context of
Community Consumer Law*³⁰⁸



European Economic and Social Committee

**INT/348
Collective actions system
and its role in Community
consumer law**

Brussels, 14 February 2008

OPINION
of the
European Economic and Social Committee
on
Defining the collective actions system and its role in the context of Community consumer law
Own-initiative opinion

³⁰⁸ Official Journal 25.06.2008 (C 162/1), reprinted with the very kind permission of the European Economic and Social Committee.

On 16 February 2007, the European Economic and Social Committee acting under Rule 29(2) of the its Rules of Procedure, decided to draw up an own-initiative opinion on:

Defining the collective actions system and its role in the context of Community consumer law.

The Section for the Single Market, Production and Consumption, which was responsible for preparing the Committee's work on the subject, adopted its opinion on 31 January 2008. The rapporteur was Mr Pegado Liz.

At its 442nd plenary session, held on 13 and 14 February 2008 (meeting of 14 February), the European Economic and Social Committee adopted the following opinion by 134 votes to 94 with 6 abstentions.

*

* *

Conclusions and recommendations

- ①▢ The EESC has decided to reopen the debate on the need for an in-depth appraisal – and the advisability of carrying out such an appraisal – of the role of and legal arrangements for a form of collective group action, harmonised at Community level, in particular in the area of consumer law and competition law, at least at an initial stage.
- ②②▢ The EESC has always advocated the definition at Community level of a collective action designed to secure effective compensation in the event of the infringement of collective or diffuse rights. Such a measure would usefully complement the protection already afforded by both legal remedies and alternative remedies, a notable example of the former remedy being actions for injunction, as defined by Directive 98/27/EC of 19 May 1998.
- ③③③▢ The EESC has, on a number of occasions, advocated the need for the EU to take action in this field since, in its view, such action:

- may make a decisive contribution towards removing obstacles hampering the operation of the internal market which are brought about by the divergences in the various national legal systems; action by the EU would thus give consumers a renewed confidence in the benefits of the single market and also provide the requisite conditions for genuine, fair competition between enterprises (Articles 3(1) (c) and (g) of the EC Treaty);
- would make it possible to step up consumer protection, thus making it easier for consumers to more effectively invoke their rights to institute legal proceedings, whilst also ensuring that EU laws are implemented more effectively (Article 3(1)(t) of the EC Treaty);
- would comply with the basic principle of ensuring the right to an effective remedy and a fair hearing by an impartial tribunal, a right which is guaranteed under the Charter of Fundamental Rights of the European Union (Article 47).

①②☐ The fact that several EU Member States have, over the last few years, adopted disparate judicial systems for representing the collective interests of consumers, whereas other Member States have yet to introduce provisions in this field, leads to inequalities as regards access to justice and has a detrimental effect on the achievement of the internal market. The EESC deplores this state of affairs, all the more since public satisfaction and confidence represent one of the widely publicised objectives of the achievement of the internal market in the twenty-first century. The EESC is all too aware of the effects that any possible steps might have on the competitiveness of European companies and the knock-on effect that disproportionate costs would eventually have on workers and consumers.

②☐ The EESC therefore intends to make its contribution to this appraisal by putting forward concrete proposals in respect of the legal arrangements for such collective actions, taking account not just of the national systems applicable in European states but also of the experience gained by other states which have developed such measures. The Committee takes particular account of the principles set out in Recommendation C(2007) 74 of the Council of Ministers of the OECD on Consumer Dispute Resolution and Redress, of 12 July 2007.

②①☐ In defining the proposed parameters for an EU legislative initiative, the EESC has taken account of the common legal tradition of European judicial institutions and the common principles underlying civil procedure in the EU Member States; the EESC has therefore rejected the features of US-style "class actions", which are incompatible with the abovementioned traditions and principles. The EESC considers particularly harmful any practice of giving a substantial share of sums

won as compensation or punitive damages from cases championing consumer interests to third party investors or lawyers, mirroring American class actions.

- In the light of the aims and purposes of such an instrument, the EESC has analysed the main possible options as regards: the legal arrangements to be introduced (advantages and disadvantages of an opt-in, opt-out or combined scheme); the role of the court; the question of compensation; appeals and the financing of the measures.
- The legal basis for such an initiative and the legal instrument to be employed are further key issues which have also been analysed and in respect of which proposals have been put forward.
- The EESC would also point out that this appraisal of the establishment of machinery for collective actions is in no way at variance with the existence and development of alternative dispute resolution (ADR) methods, indeed the opposite is the case. The EESC was one of the first bodies to express the need to set up effective instruments to enable consumers to invoke their rights - both individual and collective rights - without involving the courts. In this respect, the EESC would state the case for improved alignment of ombudsman and related systems in the various sectors of consumer society, particularly in places where cross-border trade is most developed or most likely to develop.
- There is a whole range of collective remedies for consumers who have suffered loss, from individual, voluntary and consensual actions to collective and legal remedies. Each of these levels of dispute settlement must work optimally, facilitating compensation for loss suffered at the level which is the most accessible for victims.
- The EESC welcomes the European Commission's declared intention to continue to study this issue. The EESC does, however, underline the need for this intention to be matched by a real political will, leading to the introduction of appropriate legislative measures.
- Voicing the wishes of the representatives of organised civil society, the EESC also calls upon the European Parliament, the Council and the Member States to ensure that this appraisal is carried out taking into consideration the interests of the various parties and complying with the principles of proportionality and subsidiarity and is followed by the vital political decisions which have to be taken

in order to enable an initiative along the recommended lines to be adopted as soon as possible

Introduction

- ④③③③③ The purpose of this own-initiative opinion is to promote a broad-based discussion on the role and legal arrangements for collective action³⁰⁹ at Community level, in particular in the area of consumer law and competition law, at least at an initial stage³¹⁰. Its ultimate aim is to encourage civil society and the competent institutions of the European Union to study the need for and the impact of such an initiative, to think about the definition of its legal nature and the terms and conditions of its implementation, in the framework of a European legal area.
- ④③② The methodology used is based on a prior analysis of needs in the single market and the conformity of the initiative with Community law. Its capacity to resolve cross-border disputes, particularly those involving the economic interests of consumers, effectively and rapidly, is then studied.

The single market and the collective interests of consumers

- ④③ The development of "mass" commercial transactions following the development of mass production from the second half of the last century brought about major changes in methods of entering into contracts and obtaining agreements for the sale and provision of services.

The advent of the information society and the opportunities thus created for distance selling and electronic commerce have brought new benefits to consumers, but they are now potentially subject to new forms of pressure and new risks when entering into contracts.

- ④③③ Where they have become established, public offers, standard contracts, more and more aggressive forms of advertising and marketing, unsuitable pre-contractual information, widespread unfair practices and anti-competitive practices may cause

³⁰⁹ In the sense of civil procedure, having the aim of defending collective or diffuse interests either for prevention (injunction) or for redress (claims for damages). Another meaning of the expression "collective action" can be found in British and US legal literature to denote the sociological roots of associability (see *Collective action in the European Union; interests and the new politics of associability*, Justin Greenwood and Mark Aspinwall, Routledge, London, 1998), which is particularly informative about the sociological origins and social needs leading to collective actions in the strict procedural sense.

³¹⁰ The possibility, which already exists in several national legal systems, of enlarging the scope of collective actions to include all collective or diffuse interests in areas such as the environment, the cultural heritage, spatial planning etc should not be excluded, irrespective of whether such actions are brought against private-law or public-law bodies, including administrations or public authorities.

harm to key groups of consumers who are most often not identified and may be difficult to identify.

④②①① In the legal systems based on traditional procedural law, derived from Roman law, homogeneous individual interests, the collective interests of groups and the diffuse interests of the public are not always served by suitable forms of judicial action which may be described as easy, rapid, inexpensive and effective³¹¹.

④②①① Almost everywhere in the world, particularly in the EU Member States, legal systems provide judicial remedies to protect collective or diffuse interests.

a) However these systems are rather disparate and give rise to clear differences in the protection of these interests. These disparities are the cause of distortions in the operation of the internal market.

④①④ Because of a lack of harmonisation at EU level, national judicial systems have, in the recent past, developed along very different lines. These differences cannot be attributed so much to divergences in basic principles but rather to different traditions as regards procedural law. The tables appended to this document illustrate the key differences at national level³¹².

³¹¹ It is rare to find such a concise form of words in the legal literature as that used by an eminent lawyer and Portuguese member of Parliament, during a parliamentary debate, to support the introduction of collective actions in Portugal.

Referring to the new second and third-generation forms of law: labour law, consumer law, environmental law, spatial planning law, law for the protection of the cultural heritage, "*universal forms of law which belong to many if not all*", Mr Almeida Santos said:

"These forms of law belong to everyone, or at least to a large number of people. Is it therefore right that the protection of these rights should be so parsimonious, with plaintiffs forced to wait for their case to come to court, a case which might be identical to that of their colleague or neighbour, sometimes winning their case only when the result no longer has any meaning, when the compensation awarded has already been eroded by inflation, or when the restoration of their honour comes too late to prevent divorce or irreparable damage to their financial standing, or when the final arrival at their destination at the end of a long procedural calvary perfectly sums up the ineffectiveness and futility of the legal process? Should we accept this Kafkaesque judicial purgatory as the status quo?"

"Suddenly we realise that exclusively individual legal protection is no longer enough; that there are 'meta-individual' rights and interests, mid-way between individual rights and collective interests; that the right of those directly or indirectly harmed to go to court is insufficient; that the individualistic concept of law and justice is approaching its end, that the dawn of a new pluralism and a new law is on the horizon" (in D.A.R. Series I, No. 46, 21/2/1990, p. 1617).

³¹² The study of the Centre for Consumer Law of the Catholic University of Leuven prepared for the Commission (DG Sanco) is an excellent summary which illustrates the consequences of the different national approaches to the settlement of cross-border disputes, particularly where consumers from several Member States are affected by the same unfair cross-border commercial practices, by defects in the same products or by contracts negotiated at a distance including the same unfair general contractual clauses.

④④▢ A number of parties, in particular organisations representing consumer interests but also many legal practitioners and professors of Community law, lost no time in denouncing the disadvantages to which this situation gives rise, in terms of creating inequality amongst European citizens as regards access to law and justice³¹³.

④④①▢ Within the EU Institutions, it was only in 1985, however, following a seminar held in Ghent in 1982 under the auspices of the Commission, that the memorandum on *Consumer access to justice*³¹⁴ was published, in which the Commission for the first time looked, inter alia, at systems for the legal defence of collective interests.

④④①①▢ However, it was only in its Supplementary Communication of 7 May 1987 that the Commission, following a Resolution of the European Parliament of 13 March 1987³¹⁵, actually announced its intention of looking at the possibility of a framework directive introducing a general right for associations to defend their collective interests before the courts and calling on the Council to recognise the prominent role of consumer organisations, both as intermediaries and as direct agents in relation to consumer access to justice.

④④①①①▢ In its Resolution of 25 June 1987, exclusively devoted to consumer access to justice, the Council stressed the important role which consumer organisations were required to play, calling on the Commission to consider whether a Community-level initiative in that area might be appropriate³¹⁶.

④④①②▢ Finally, in 1989, when preparing its *Future priorities for a relaunch of consumer protection policy*, the Commission expressed the view in its Three Year

³¹³ When examining the literature on this subject, mention must be made of the pioneering work by Jacques van Compernelle entitled *Le droit d'action en justice des groupements*, Larcier, Brussels 1972 and the collaborative work entitled *L'aide juridique au consommateur* by T. Bourgoignie, Guy Delvax, Françoise Domont-Naert and C. Panier, CDC Bruylant, Brussels, 1981.

³¹⁴ Sent to the Council on 4 January 1985 and supplemented on 7 May 1987 by a *Supplementary Communication on consumer access to justice*. Moreover, in the Commission Communication of 4 June 1985 entitled *A new impetus for consumer protection policy* (COM(85) 314 final), the outlines of which were approved by the Council on 23 June 1986 (OJ C 167, 5.6.1986), it was stressed that traditional legal procedures were slow and often expensive compared with the amounts at stake in consumer cases and that appropriate means of consultation and redress were needed to ensure that consumer rights were duly protected.

³¹⁵ The rapporteur was the Dutch MEP Ms Boot. One of the aspects of the text which should be stressed, following the amendments tabled by MEPs Squarcialupi and Pegado Liz, was the appeal to the Commission to propose a directive harmonising the laws of the Member States so as to safeguard the defence of the collective interests of consumers, by giving consumer associations the opportunity to bring legal action in the interests of the category they represented and of individual consumers (A2-152/86 of 21 November 1986 (EP 104.304).

³¹⁶ Resolution 87/C, OJ C 176, 4.7.1987.

Programme (1990-1992)³¹⁷ that the arrangements for access to justice and compensation were inadequate in a large number of Member States because of their cost, complexity and the time involved, and that there were problems linked to cross-border transactions. It announced that it would be carrying out studies on measures to be adopted, with particular attention for the possibility of collective actions for compensation for losses sustained by consumers³¹⁸.

- ④④②□ It was, however, only in 1993 that the Commission relaunched a public debate on this issue with the publication of the significant *Green Paper on access of consumers to justice and the settlement of consumer disputes in the single market*³¹⁹.

³¹⁷ Approved by the Council on 9 March 1989 (OJ C 99, 13.4.1989).

³¹⁸ COM(90) 98 final of 3 May 1990. This was the first reference to collective actions in an official Commission document.

³¹⁹ COM(93) 576 final of 16 November 1993. In order to understand this document, it is important to recall that, between 1991 and 1992, there were a number of initiatives in the debate on questions connected with access to law and justice, including the Conference on consumer compensation mechanisms held by the *Office of Fair Trading* in London in January 1991, the third Conference on consumer access to justice held in Lisbon on 21-23 May 1992 under the auspices of the Commission and the *Instituto do Consumidor*, as well as the seminar on the *Protection of the cross-border Consumer* held in Luxembourg in October 1993 by the Ministry of the Economy, and that on the Family and solidarity supported by the Commission, which resulted in reports which are still of great relevance today. During the same period a number of leading academics and legal experts set down their views on the issue (see, *inter alia*, *Group Actions and Consumer Protection*, Thierry Bourgoignie (Ed.), Col. Droit et Consommation, Vol XXVIII, 1992; *Group Actions and the Defence of the Consumer Interest in the European Community*, Anne Morin, INC, France, 1990).

It was on this occasion that the question of the establishment of a uniform system for actions for injunctions was examined in detail for the first time. Many people thought at the time that this would serve as a basis for a true system of collective action in defence of consumer interests³²⁰.

④④②①□ In its Resolution of 22 April 1994³²¹, the European Parliament concluded that it would be appropriate to carry out a degree of harmonisation of the procedural rules of the Member States, making provision for the right, in cases involving amounts below a certain threshold, to launch Community proceedings which would permit the rapid resolution of cross-border disputes. The Parliament also indicated that it would be appropriate to harmonise, to a certain extent, the conditions applicable to bringing actions for injunctions against illegal commercial practices.

³²⁰ It should, however, be pointed out that the Green Paper is based on several earlier decisions and documents, which underpin it and give it the necessary basis of political support. In March 1992 the Commission had entrusted to a group of independent experts, led by Peter Sutherland, the task of drawing up a report on the operation of the internal market in order to assess the impact of the implementation of the White Paper on the Internal Market.

The report, published on 26 October 1992, looked in particular at the question of access to justice. It stated that there was no certainty as to the effectiveness of the protection of consumer rights and drew attention to concerns about the ineffectiveness of the Brussels Convention of 1968 on mutual recognition of court judgments and the resulting difficulty of obtaining the enforcement in a Member State of a judgment delivered by a court in another Member State. It recommended (Recommendation No 22) that the Community look into the question as a matter of urgency. This recommendation gave rise to the Communication from the Commission to the Council and the European Parliament: *The Operation of the Community's Internal Market after 1992: Follow up to the Sutherland Report* (SEC(92) 2277 final). The *Working Document of the Commission on a Strategic Programme on the Internal Market*, submitted by the Commission in June 1993, recognised the need for a coherent operational framework for access to justice which would need to include a number of measures regarding the dissemination, transparency and application of Community law (COM(93) 256 final). Moreover, the Commission Communication to the Council of 22 December 1993 drew attention to the fact that completion of the internal market could lead to an increase in the number of cases where residents of one Member State were asking for their rights to be respected in another Member State (COM(93) 632 final).

As the Commission argued that it was not up to the Community to seek a harmonisation which would have abolished the specific characteristics of different national legal systems, the Commission expressed its intention of focusing on the provision of information and training on Community law, transparency, effectiveness and rigour in the application of that law, and on coordination and cooperation in judicial matters between Member States and the Commission, facilitated by the entry into force of the Maastricht Treaty, and in particular of its "third pillar". These efforts resulted in the publication of the Green Paper and in the large-scale consultation which was launched in its wake. At its meeting of 27 September 1993 (686th internal market session), the Council had already concluded that it was essential to develop the debate on access to justice, in particular on the basis of a Green Paper announced by the Commission for the end of the year which would look at the question of procedural means and, if appropriate, that of increased transparency of sanctions. It was at this time that a major study was drawn up for the Commission by E. Balate, C. Nerry, J. Bigot, R. Techel, M.A. Munge, L. Dorr and P. Pawlas, with the assistance of A.M. Pettovich, on the subject of *A right to group actions for consumer associations throughout the Community* (Contract B5-1000/91/012369), which remains a standard work in this field.

³²¹ PE 207.674 of 9 March; rapporteur: Mr Medina Ortega.

Similarly, the EESC, in an opinion adopted unanimously at the plenary session of 1 June 1994³²², referred, *inter alia*, to the principle of: "general recognition of the active legal right of consumer associations to represent collective and diffuse interests, before any judicial or out-of-court authority in any Member State, irrespective of the nationality of the interested parties and the associations themselves, or of the place where the dispute arises". It expressly called on the Commission to establish a uniform procedure for collective actions and joint representation, not only to put a stop to illegal practices but also for actions for damages³²³.

For her part Commissioner Emma Bonino, from the moment she set out her priorities, focused on the establishment of a Community procedure for the rapid resolution of cross-border disputes and the harmonisation of conditions for bringing actions for injunctions against illegal commercial practices, together with the mutual recognition of the right of consumer organisations to bring legal action³²⁴.

³²² CES 742/94; rapporteur: Mr Ataíde Ferreira (OJ C 295, 22.10.1994). The ESC's interest in the subject was not new. In other documents, for example two own-initiative opinions on the completion of the internal market and consumer protection drawn up by Mr Ataíde Ferreira and adopted respectively on 26 September 1992 (CES 1115/91, OJ C 339, 31.12.1991) and 24 November 1992 (CES 878/92, OJ C 19, 25.1.1993), the Commission's attention had already been drawn to the need to identify opportunities for action in relation to the regulation of cross-border disputes and to recognise the powers of representation of consumer organisations in both national and transfrontier disputes (CES 115/91, point 5.4.2; CES 878/92, point 4.12, and section 4 of the interesting study appended to it, carried out jointly by Eric Balate, Pierre Dejemepe and Monique Goyens and published by the ESC, pp. 103 et seq.).

³²³ This subject was subsequently taken up by the EESC in several of its opinions, the most significant of which were the own-initiative opinion on the *Single market and consumer protection: opportunities and obstacles* (rapporteur: Mr Ceballo Herrero), adopted at the session of 22 November 1995, which noted that at that date there had been no follow-up to the suggestions and proposals put forward by the ESC in its previous opinion on the Green Paper (CES 1309/95); the opinion on the *Single Market in 1994 - Report from the Commission to the European Parliament and the Council* (COM(95) 238 final) (rapporteur: Mr Vever), which pointed to delays in the effective implementation of the internal market, particularly regarding consumer legislation, and in particular for cross-border relations (CES 1310/95, OJ C 39, 12.2.1996); the opinion on the *Communication from the Commission: Priorities for Consumer Policy (1996-1998)* (rapporteur: Mr Koopman), in which the Committee, while welcoming the proposal for a directive on actions for injunctions and the action plan presented by the Commission on consumer access to justice, said that it awaited with interest developments in the area, that, in that area, the single market was far from complete and that a "conscious adherence to consumer rights" was a basic condition for gaining that confidence from the consumer (CES 889/96, OJ C 295, 7.10.1996). The same kind of concern was also expressed in the ESC's opinion on the *Communication from the Commission to the European Parliament and the Council on the impact and effectiveness of the single market* (COM(96) 520 final of 23 April 1997) (rapporteur: Mr Pasolli, CES 467/97 - OJ C 206, 7.7.1997).

³²⁴ In her first public statement, at a European Parliament hearing on 10 January 1995, the new Commissioner for consumer affairs recognised that consumer policy was a matter of the first importance for the construction of a Citizens' Europe and made a personal commitment to follow-up the consultations already carried out in connection with the Green Paper on Access to Justice.

In reply to specific questions about the situation with regard to access to justice, the Commissioner acknowledged that consumer access to justice was far from satisfactory and that the time taken for court

④④④④ Subsequently a Proposal for a European Parliament and Council Directive on injunctions for the protection of consumers' interests was published on 25 January 1996³²⁵. With this directive the Commission took up the recommendation of the Sutherland Report and responded to the suggestion, which enjoyed widespread support, contained in the Green Paper^{326,327}.

④④④ The directive undeniably a revolutionised Community law, as for the first time the Community was legislating in a general way on a matter relating to civil procedural law³²⁸.

The suggestion that the scope of application be extended to include damages was not however followed up.

proceedings in certain Member States was likely to compromise seriously the effectiveness of consumer law.

³²⁵ COM(95) 712 final.

³²⁶ Taking as a basis Article 100a of the Treaty on European Union, and having regard to the principles of subsidiarity and proportionality, the Commission made provision for the harmonisation of the procedural rules of the various Member States relating to certain forms of legal redress, with the following objectives:

- the cessation or prohibition of any act infringing consumer interests protected by the various directives listed in an annex;
- measures necessary to correct the effects of the infringement, including publication of the decision; and
- the imposition of a financial penalty on the losing party to the dispute in the event of non-compliance with the decision by the deadline set.

The same proposal provided that any body representing the interests of consumers in a Member State, when the interests it represented were affected by an infringement originating in another Member State, could apply to the court or competent authority of that Member State to enforce the rights it represented.

³²⁷ The final text of the directive was adopted at the Consumer Council held in Luxembourg on 23 April 1998, by a qualified majority with Germany voting against, and its final version, which includes most of the suggestions and criticisms made, was published on 11 June 1998.

³²⁸ Directive 98/27/EC of 19 May 1998, OJ L 166, 11.6.1998. It should be remembered that the European Parliament was very critical of the scope and limitations of the proposal and made various changes to the initial text, including:

- extending the scope of a directive to cover all future directives concerning the protection of consumer interests;
- including among the recognised bodies organisations and federations representing consumers or firms acting at European and not exclusively national level.

In an opinion drawn up by Mr Ramaekers, the EESC criticised the legal basis of the proposal, considering that it should have been Article 129a rather than Article 100a of the Treaty, as well as its limited scope and the requirement for prior application to a national body in the country where the proceedings had to be brought, which would significantly and unnecessarily delay the proceedings (CES 1095/96 - OJ C 30, 30.1.1997).

④④④④④ In parallel, the Commission drew up an *Action plan on consumer access to justice and the settlement of consumer disputes in the internal market*, presented on 14 February 1996, in which, having defined and described the problem of consumer disputes and studied the various solutions available at national level in the Member States, it listed a number of initiatives which it planned to launch. These included studying the possibility of consumers suffering loss at the hands of the same commercial operator to instruct consumer organisations to group their complaints *ex ante* in order to pool homogeneous individual cases with a view to submitting them simultaneously to the same court³²⁹.

④④④④④ In this context, the European Parliament, in its Resolution of 14 November 1996, expressed the view that access to justice was a fundamental human right and a precondition for guaranteeing legal certainty, either at national or Community level. It recognised the importance of out-of-court procedures for settling consumer disputes but drew attention to the need for the consumer, having exhausted all the out-of-court conciliation procedures, to be able to resort to ordinary court procedures in accordance with the principles of legal effectiveness and certainty. Consequently, it called on the Commission to draw up other proposals to improve the access of non-resident European citizens to national judicial procedures, and encouraged the Member States to promote the involvement of consumer associations as the authorised representatives of persons empowered to bring claims before the courts and to recognise these associations as being entitled to bring collective actions in response to certain illegal commercial practices³³⁰.

④④④④④ Since then the question would appear to have been effectively left in abeyance by the European Commission³³¹.

At the EESC, however, the question has been taken up on several occasions, with a view to demonstrating the need for a Community-level civil procedural instrument for the legal defence of diffuse, collective or homogeneous individual interests³³².

³²⁹ COM(96) 13 final.

³³⁰ A-0355/96 (PE 253.833).

³³¹ Certain directives nonetheless contain references to collective actions as a suitable and effective way of guaranteeing compliance with their provisions. This is true, for example of Directive 97/7/EC of 20.5.1997 (distance contracts), Article 11 or Directive 2002/65/EC of 23.9.2002 (distance marketing of consumer financial services), Article 13.

³³² Reference should be made here to the following EESC opinions:

- Own-initiative opinion CESE 141/2005 – OJ C 221, 8.9.2005 on Consumer policy post-enlargement (point 11.6).

④④④②②☐ Only recently the Commission reopened the question in its *Green Paper on Damages actions for breach of the EC antitrust rules*³³³ in terms which are worth quoting:

"It will be very unlikely for practical reasons, if not impossible, that consumers and purchasers with small claims will bring an action for damages for breach of antitrust law. Consideration should therefore be given to ways in which these interests can be better protected by collective actions. Beyond the specific protection of consumer interests, collective actions can serve to consolidate a large number of smaller claims into one action, thereby saving time and money."

④④④②☐ In its opinion of 26 October 2006, the EESC expressed its support for this Commission initiative and confirmed the need for collective actions where they *"provide a perfect example of some key objectives: i) effective compensation for damages, facilitating claims for damages by organisations on behalf of the consumers affected, thus helping to provide real access to justice; ii) the prevention and deterrence of antitrust behaviour, given the greater social impact of this type of action"*³³⁴.

④④④②②☐ The Commission entrusted to the Consumer Law Studies Centre of the Catholic University of Leuven the task of drawing up a major study, recently published, on alternative dispute resolution (ADR) methods. A not inconsiderable part of the study, which runs to 400 pages, is devoted to a description of 28 national systems of collective legal means for the defence of consumer interests, those of the 25 Member States plus those of the USA, Canada and Australia³³⁵.

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- Opinion CESE 230/2006 – OJ C 88, 11.4.2006, on the Programme of Community action in the field of health and consumer protection 2007-2013, point 3.2.2.2.1.
 - Opinion CESE 594/2006 – OJ C 185, 8.8.2006 on a Legal framework for consumer policy.

³³³ COM(2005) 672 final of 19.12.2005.

³³⁴ Opinion CESE 1349/2006 – OJ C 324, 30.12.2006 (rapporteur: Mr Sánchez Miguel). This subject was also tackled in the Committee's own-initiative opinion on *Regulating competition and consumer protection* (CESE 949/2006 – OJ C 309, 16.12.2006).

³³⁵ The study was referred to in footnote 4. Although very comprehensive, this comparative study does not cover the situation in Bulgaria or Romania, nor does it take account of the most recent development in Finland, or of the highly advanced systems in Brazil, Israel and New Zealand, or of the proposals being debated in France and Italy. For an account of the Australian system, see the collaborative work *Consumer Protection Law*, by J. Goldring, L.W. Maher, J. McKeough and G. Pearson, The Federation of Press, Sydney, 1998; on the New Zealand system, see *Consumer Law in New Zealand*, by Kate Tokeley, Butterworth, Wellington, 2000; for an account of developments in Asia, and in particular India, the Philippines, Hong Kong, Bangladesh, Thailand and Indonesia, see *Developing Consumer Law in Asia*, record of the IACL/IOCU seminar, Kuala Lumpur, Faculty of Law, University of Malaya, 1994.

It appears that the Commission has recently launched another study on Evaluating the effectiveness and efficiency of collective redress mechanisms in the EU (2007/S 55-067230, 20.3.2007).

④④④②②②② The new European Commissioner with responsibility for consumer affairs, Meglena Kuneva, has announced in several declarations that this issue was one of the priorities of her term of office. This issue is also addressed in the recent communication on the *EU Consumer policy strategy 2007/2013*³³⁶. The issue was further reaffirmed by both Commissioner Neelie Kroes and Commissioner Meglena Kuneva at a recent conference in Lisbon organised at the initiative of the Portuguese presidency of the European Council³³⁷.

④④④②②②② The Council of Ministers of the OECD has also recently adopted a Recommendation on Consumer Dispute Resolution and Redress [C(2007) 74 of 12 July 2007], which acknowledges that most existing frameworks for consumer dispute resolution and redress in the Member States were developed to address domestic cases and are not always adequate to provide remedies for consumers from another Member State.

Why should collective actions be introduced at Community level?

④④④②②②② If the interests of consumers are to be taken into account from a legal standpoint in the EU Member States and at EU level, it is essential not only that material rights be recognised but also that appropriate procedures are available for upholding these rights.

It should also be pointed out that the increase in the volume of cross-border trade has brought about an expansion of consumer litigation at EU level.

In many cases, it is recognised that the settlement of litigation on an individual basis is an inadequate measure. The cost and the slowness of such settlements are major contributory factors in rendering consumer rights ineffective, particularly in cases where a multitude of consumers (i.e. several thousand or even several million) suffer injury as a result of one and the same practice and in cases where the amounts represented by the individual damages are relatively small. The gradual development of the "European company" also gives rise to problems

³³⁶ COM(2007) 99 final of 13.3.2007, point 5.3; the EESC has just published an opinion on this document – Rapporteur: Ms Darmanin.

³³⁷ "Conference on Collective Redress: Towards European Collective Redress for Consumers?" (9/10 November 2007) during which Commissioner Kroes made the following observation: "*Consumers not only have rights, but should also be able to effectively enforce them, if necessary through court action. And when court action can only be taken by each consumer individually, no consumer will ever make it to the court room: collective redress mechanisms are therefore an absolute must! It is only then that (consumers) will be able to fully benefit from the Single Market.*" Commissioner Kuneva, for her part, rightly stressed that: "*Consumers will not be able to enjoy the full benefits of the Single Market unless effective systems are in place to address their complaints and to give them the means for adequate redress. Collective redress could be an effective means to strengthen the redress framework that we have already set up for European consumers, through the encouragement of ADR mechanisms and the establishment of a cross-border small claims procedure*".

when it comes to determining which law is applicable; EU citizens should be able to invoke their rights in a uniform way. As things stand at present, improper practices which occur under identical circumstances and cause identical damage in several Member States may give rise to compensation only in those few Member States which have introduced a system of collective actions.

- ④③①▢ Furthermore, the constitutions of all the EU Member States and the European Convention for the Protection of Human Rights and Fundamental Freedoms affirm the right to a fair trial. This right includes, inter alia, the right to have meaningful and effective access to the courts.
- ④③①①▢ Under the existing legal systems, citizens cannot always contest, in concrete, practical terms, certain practices which are injurious to them and initiate court proceedings.

Over a period of several decades, a number of Member States have introduced two types of response to address this problem.

Initially, they recognised the right to protect the collective interests of consumers by bringing actions before administrative bodies or before courts and tribunals. A further appropriate response has also taken the form of recognition of a procedure under which individual actions are lumped together. These actions mainly seek to bring about procedural savings by lumping together all of the actions and synthesising them into a single procedure.

- ④③①①①▢ The creation of a European collective action would make it possible to provide access to justice to all consumers, irrespective of their nationality and financial situation and the amount of individual damage which they have suffered. It would also be beneficial to commercial operators in view of the procedural savings which could be achieved. The costs of such an action would be lower than the costs liable to be incurred as a result of a multitude of individual actions. This procedure would also have the advantage of providing legal certainty by virtue of the fact that an extremely large number of similar complaints would be resolved under a single ruling³³⁸. Finally, such a measure would avoid contradictions in jurisprudence between courts in the different EU Member States called upon to settle similar cases.

³³⁸ Patrick von Braunmühl rightly pointed out at the "Leuven Brainstorming Event on Collective Redress", organised by the Commission on 29 June 2007, that "*collective actions could reduce the number of individual cases resulting from a specific incident. Especially in an opt out system a company can settle a large number of consumers claims in one proceeding. It can negotiate with a group representative of all consumers concerned and it can concentrate its resources on one court case rather than on several different cases. Even if a voluntary settlement is not possible and the court has to decide there is more legal certainty if the decision covers all cases related to the same incident or breach of law*".

The introduction of a common system for all European countries would therefore make it possible to provide consumers with improved protection, whilst enhancing the confidence of the business world and, as a result, boosting trade within the EU.

④③②①② The introduction of a European collective action, as defined above, would have a beneficial effect in respect of private international law in view of the difficulties in interpreting and applying the standards for resolving contractual and extra-contractual disputes (Rome I and Rome II). Such an action would also make it possible to set out precise definitions of the rules governing jurisdiction and the recognition and enforcement of judgements in civil and commercial matters (Regulation 44/2001)³³⁹.

④③②② The consumer law would therefore be strengthened by increased initiation of legal proceedings which make it possible to provide consumers with fair compensation and to give effective protection to the "weak party", which is a fundamental principle of EU law. This would apply, in particular, to the recent Unfair Commercial Practices Directive. Such practices are often used simultaneously in several Member States, causing harm to many consumers but giving them no opportunity to seek collective redress. Group action is a complementary procedure vital to the effective implementation of this directive.

All of the currently known directives in the field of consumer protection, as transposed into national law by the Member States, would therefore be made more effective by the recognition of collective actions in the fields covered by these directives.

It would be desirable for small and medium-sized enterprises (SMEs) also to benefit from the application of the provisions in question as they, too, find themselves in a similar situation.

④③②② It goes without saying that the bringing of collective actions at EU level, as a final means of seeking to resolve disputes, in no way precludes recourse to systems of out-of-court settlement of consumer disputes. The latter measures have received the unqualified support of the EESC and their potential should be further explored in detail and further developed.

Terminology

³³⁹ This point was explained in detail at the seminar on Rome I and Rome II, held in Lisbon on 12 and 13 November 2007 and organised by the Portuguese presidency, in conjunction with the German and Slovenian presidencies, and the Academy of European Law (Europäische Rechtsakademie – ERA).

④③②①☐ In order to be able to properly identify the subject of the proposal, agreement must be reached on the type of legal action in question.

As the survey of the different systems adopted in the various Member States demonstrates, the designation and contents of the various types of action vary considerably. Distinctions must therefore be drawn between "representative actions", "public interest actions" and "collective actions".

④③②①☐ Representative actions can be brought only by consumer associations or administrative bodies (the Ombudsman and similar bodies), with a view to securing the cessation of acts which infringe the rights of the consumer and even, in the case of some countries, securing the abolition of unfair or unlawful terms in consumer contracts.

④③②①☐ "Public interest actions" provide consumer associations with the opportunity to decide whether or not to bring an action before a court in cases where the public, general interest of consumers is damaged by the infringement of either a specific provision of substantive law or a general standard of behaviour. "Public interest" does not represent the sum of the individual interests of consumers but is similar to "general interests".

④③①④☐ "Collective actions" are legal actions which enable a large number of persons to have their rights recognised and to obtain compensation. From a technical standpoint, "collective actions" therefore represent a collective procedural application of individual rights.

③☐ Recourse to collective actions is not necessarily limited to just the fields of consumer protection and competition.

However, in the case of this opinion, the use of the term "collective action" is confined to the material field, as recognised under Community law.

③①☐ It is therefore proposed that the term "collective action" be used in this opinion³⁴⁰.

Legal basis

³⁴⁰ A comparative analysis of the different terms used in several EU Member States and what they mean in the respective languages is set out in an article entitled *Class System* by Louis Degos and Geoffrey V. Morson, published in the Los Angeles Lawyer Magazine, edition of November 2006, pages 32 et seq. The terms used in certain countries are as follows: Ireland – *multi-party litigation* (MPL); the UK – *group litigation order* (GLO) or simply *group action*; in Germany – *Gruppenklage*; in Sweden – *grupptalan* or *collective lawsuit*; in Portugal – *popular lawsuit*; and in Hungary – *combined lawsuit*.

③④④▢ The legal basis for the policy of defending the interests of consumers is to be found in Title XIV of the EC Treaty, which is entitled "Consumer protection".

Article 153 clearly provides important points for consideration.

③④④④▢ As things stand at present, even though consumer law has mainly come into being on the basis of the benchmark Article 95 of the EC Treaty, consumer protection policy, as envisaged here, clearly represents a measure designed to promote the economic interests of consumers.

③④④▢ There is no doubt that collective actions will provide a high level of protection and will enable consumer organisations to organise themselves with a view to protecting the interests of consumers, i.e. to provide them with fair compensation in the event of the infringement of rights accorded to them under all Community law, including competition law.

③④▢ The introduction of collective actions at EU level will also help to improve the operation of the internal market for the benefit of consumers, which is one of the goals of the "internal market review". This will, in turn, give consumers greater confidence in respect of the expansion of cross-border trade³⁴¹.

³⁴¹ Cf. Communication from the Commission on a Single market for 21st century Europe (COM(2007) 724 final of 20 November 2007).

③②① It could also be argued that, as we are dealing here with a purely legal instrument, Articles 65 and 67 could possibly be selected as an appropriate legal basis. It was on the basis of these articles that, from 1996 onwards, the Commission proposed and the European Parliament adopted a whole series of legal instruments in the field of civil procedural law at EU level³⁴².

³⁴²

These legal instruments include the following:

- Green Paper on access of consumers to justice and the settlement of consumer disputes in the Single Market (COM(93) 576 final);
- Recommendation of the Commission of 12 May 1995 on payment periods in commercial transactions and the associated Commission Communication – OJ L 127, 10.6.1995 and OJ C 144, 10.6.1995 respectively;
- Communication from the Commission on the Action Plan on Consumer Access to Justice and the Settlement of Consumer Disputes in the Internal Market - COM(96) 13 final, 14 February 1996;
- Communication from the Commission to the Council and the European Parliament entitled: "Towards greater efficiency in obtaining and enforcing judgments in the European Union" - COM(97) 609 final - OJ C 33, 31.1.1998;
- Directive 98/27/EC of 19 May 1998 on injunctions for the protection of consumers' interests - OJ L 166, 11.6.1998;
- Council Regulation (EC) 1346/2000 on insolvency proceedings - OJ L 160, 30.6.2000. The rapporteur of the EESC opinion on this subject was Mr G. Ravoet (CESE 79/2001 of 26 January 2000 – OJ C 75, 15.3.2000);
- Council Regulation (EC) No 1347/2000 of 29 May 2000 on jurisdiction and the recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility for children of both spouses - *idem*. The rapporteur for the EESC opinion on the matter was Mr Braghin (CES 940/1999 of 20 October 1999- OJ C 368, 20.12.1999),
- Council Regulation (EC) No 1348/2000 of 29 May 2000 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters - *idem*. The rapporteur for the EESC opinion on the matter was Mr Hernandez Bataller (CES 947/1999 of 21 October 1999 - OJ C 368, 20.12.1999);
- Directive 2000/35/EC of 29 June 2000 on combating late payment in commercial transactions - OJ L 200, 8.8.2000;
- Programme of measures to implement the principle of mutual recognition of decisions in civil and commercial matters – OJ C 12, 15.5.2001;
- Council Decision of 28 May 2001 establishing a European Judicial Network in Civil and Commercial Matters – OJ L 174, 27.6.2001. The rapporteur for the EESC opinion on the subject was Mr Retureau (CESE 227/2001 of 28 February 2001 - OJ C 139, 11.5.2001);
- Council Regulation (EC) 1206/2001 of 28 May 2001 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters - OJ L 174, 27.6.2001. The rapporteur for the EESC opinion on this subject was Mr Hernandez Bataller (CESE 228/2001 of 28 February 2001) – OJ C 139, 11.5.2001;
- Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, (Brussels I). OJ L

This solution could be considered since collective actions could be used in the case of both cross-border disputes and national litigation and in fields other than that of consumer law.

③②①①▢ The collective action should, at all events, respect the principles of subsidiarity and proportionality; it should never go beyond the bounds of what is required to meet the objectives set out in the Treaty, insofar as such objectives cannot be adequately achieved by the Member States and are thus better realised by taking action at Community level.

③②①①①▢ The collective action should also follow the principles and mechanisms highlighted in the Recommendation of the Council of Ministers of the OECD (Rec. C(2007) 74 of 12 July 2007), which are presented as common principles despite the diversity of legal cultures that exist in the Member States.

The parameters of collective actions at Community level

③①④▢ Collective actions must not take the following forms:

a) Collective actions must not take the form of representative actions:

Representative actions are open only to a number of specially authorised bodies (consumer associations and the Ombudsman). Under this procedure consumers are generally not able to obtain redress for damage suffered by individuals.

12, 16.1.2001. The rapporteur for the EESC's opinion on this subject was Mr Malosse (CESE 233/2000 of 1 March 2000 – OJ C 117, 26.4.2000);

- Green Paper on Alternative Dispute Resolution in civil and commercial Law - COM(2002) 196 final, 19 April 2002;
- Regulation (EC) No 805/2004 of 21 April 2004 creating a European Enforcement Order for uncontested claims – OJ L 143 of 30 April 2004. The rapporteur for the EESC's opinion on this subject was Mr G. Ravoet (CESE 1348/2002 of 11 December 2002 - OJ C 85, 8.4.2003);
- Proposal for a Regulation establishing a European Small Claims Procedure (COM(2005) 87 final of 15.3.2005). The rapporteur for the EESC opinion on this subject was Mr Pegado Liz (CESE 243/2006 of 14.2.2006);
- Green Paper on improving the efficiency of the enforcement of judgments in the European Union: the attachment of bank accounts, COM(2006) 618 final. The rapporteur for the EESC opinion on the subject was Mr Pegado Liz (CESE 1237/2007 of 26 September 2007);
- Regulation 1896/2006/EC of 12 December 2006 (OJ L 399, 30.12.2006) creating a European order for payment procedure (COM(2004) 173 final of 19 March 2004). The rapporteur for the EESC opinion on the matter was Mr Pegado Liz (CESE 133/2005 of 22 February 2005).

The main aim of these procedures is to secure the cessation of acts which infringe consumer rights and even, in some countries, to secure the abolition of unfair or unlawful terms in consumer contracts in respect of which the courts are unable to make provision for any compensation.

Certain countries have made adjustments to these mechanisms in order to make it possible to compensate consumers. Such compensation is not, however, paid to individual consumers but retained by the representative bodies or paid to the State to be used for social purposes.

Representative actions are thus, in practice, not to be equated with real collective actions, in which all consumers are compensated in a single legal proceeding.

b) **Collective actions must not take the form of the "class actions" employed in the USA:**

The introduction of a European collective action must not result in the establishment in Europe of US style class actions. The US judicial system is very different from the judicial systems of the EU Member States. The weaknesses of "class actions", which are accused of giving rise to excessive settlements, are peculiar to this judicial system and could not occur in Europe.

In the USA, court decisions are delivered by people's juries and elected judges. The special make-up of the US system, which differs from that of the majority of the EU Member States (which have professional judges), very frequently leads to certain State courts authorising fanciful actions and handing down decisions which are excessively favourable to the plaintiff; this, in turn, results in consumers submitting their claims to particular courts, rather than other courts which have the reputation of adopting a less favourable approach ("forum shopping").

European "collective actions", on the other hand, would serve as a bastion which would halt forum shopping in its tracks since a single type of legal procedure would be created and set up in each EU Member State, as a result of which, irrespective of the court or the State selected by the claimants, the legal action would proceed in the same way and the court rulings would be of a similar nature.

In the USA, the compensatory damages awarded may be accompanied by punitive damages. These damages, which are set by the juries and elected judges, frequently attain astronomical proportions. Punitive damages are not applied in most EU Member States.

Lawyers in the USA are remunerated by means of a generally applicable system of *contingency fees*. This system constitutes a sort of "champerty", under which lawyers, who may themselves be the claimants, have an interest in the outcome of the claim. This system is prohibited – either by law or under lawyers' codes of professional conduct – in the majority of EU Member States.

③●📄 **The basic choice: "opt-in" or "opt-out"**

In the light of an examination of the collective action procedures adopted in the Member States, these procedures may be classified into two categories, depending on the main mechanism which underpins the initiation of the action and the intervention of the consumer in the procedure. If the consumer has to make deliberate representations in order to be a party to the procedure, an "opt-in" system is adopted. If, on the other hand, the initiation of the action automatically involves the participation of the consumer in the procedure, without it being necessary for him or her to make themselves known, an "opt-out" system is adopted. In the latter case, the consumer always retains the right to choose not to be covered by the procedure. The drawing-up of a European collective action thus inevitably involves selecting the mechanism which is to underpin such an action.

a) **"Opt-in" and test cases**

Under the *opt-in* system the persons concerned have to make known their desire to be party to the procedure. The persons concerned must therefore make themselves known and expressly ask to be part of the action before the decision is delivered.

Alongside the opt-in system, the mechanism known as "test cases" or which is based on an initial declaratory ruling has also come into being. These procedures are similar to collective actions based on the opt-in principle since, in the case of test cases too, the persons concerned must make themselves known in order to be able to be party to the procedure and to lodge individual claims. The distinctive feature of the test case mechanism does, however, lie in the fact that the judge selects one of the individual claims and gives a ruling on that claim alone. The ruling given under the test case procedure will then be applicable to all the other individual claims lodged with the court.

Advantages of these mechanisms

Each member of the group in question has to make himself or herself known in order to be party to the procedure; the way in which this is done is generally by signing a register. It is therefore a question of making known an express desire to participate; this enables the procedure to be in line with the principle of freedom

to take legal proceedings. The plaintiff only takes action on behalf of the persons concerned once they have given their formal agreement.

Under the opt-in method, the foreseeable extent of the damages at stake may be determined ex ante. This is important for the defendants who are directly concerned by the claim for compensation, generally, and it enables them to take out insurance policies to cover part of the potential damages. Sufficient funds will therefore be held in reserve to meet legitimate compensation claims.

With regard to the test case procedure, a single individual case is submitted to the judge in order to enable him/her to make an assessment of the problem; this represents a saving of time and a more effective approach for the judge since he/she will be able to take a decision on the liability of the commercial operator concerned on the basis of one case only.

Drawbacks of these mechanisms

These mechanisms are difficult to administer and are expensive: the persons concerned have to make themselves known in order to be party to the procedure and to draw up an individual file. The management of the individual files becomes a complex matter once a large number of persons is involved.

This leads to very long procedural delays since the court has to organise and deal with each of the individual dossiers. In the case of mass litigation, from which most collective actions derive, the damages suffered by individuals are relatively homogenous and frequently do not need to be examined on an individual basis.

Turning to the test case procedure, the judge does not always lay down the amount of compensation due and sometimes transfers cases to individual procedures. This gives rise to administrative problems and extends the time limits of the procedure.

Furthermore, an analysis of collective actions under the opt-in procedure and the test cases instigated in those states which provide for such a mechanism shows that a large proportion of consumers do not lodge a claim before the courts because they do not have proper information on the existence of the procedures in question. A large proportion of the persons concerned also refuse to initiate legal proceedings because of the material, financial and psychological obstacles thrown up by legal proceedings (demands as regards time and money and the fact that the whole matter is extremely complex).

There is therefore a sizeable drop-out rate between the number of persons who really do take action and the potential number of persons concerned. The compensation for damages awarded to consumers is therefore incomplete and any profit unlawfully acquired by commercial operators as a result of the practice in question may, in large, part be retained by them. The deterrent goal of the procedure is not achieved.

These procedures also give rise to a problem with regard to the relative effect of the judgement delivered. The decision delivered in connection with a collective action will be applicable only to those persons who were party to the action. Consumers who had not made themselves known will therefore be fully at liberty to initiate individual actions which could give rise to decisions which are in contradiction with those secured in the case of the collective action.

b) Opt-out

Traditional collective actions are based on a system known as "opt-out", under which all the persons who are the victims of a particular conduct are included in the action by default; the only persons excluded are those who have expressly made known their desire to be excluded.

A number of European States have drawn up a sui generis procedure in respect of collective actions based on the abovementioned system.

Advantages of this mechanism

An analysis of national systems based on the opt-out principle shows that this procedure is simpler to administer and more effective than the other procedures adopted by some Member States.

The system in question ensures that the persons concerned have real access to justice and, consequently, goes so far as to provide fair and effective compensation to all consumers who are the victims of particular practices.

This procedure also avoids administrative difficulties for both the plaintiff and the courts (the members of the group covered by the collective action make themselves known only at the end of the procedure and not in advance of the procedure).

The procedure also has a real deterrent effect on the liable party, since the latter is obliged to compensate all the persons who have been victims of a given practice and may have to refund the unlawful profit derived from the practice in question.

Account should also be taken of the advantages which this type of procedure offers to the commercial operator against whom the case is brought. Having recourse to collective actions makes it possible to achieve savings in human resources and financial savings with regard to the defence of the commercial operator involved and to organise the defence in a much more effective way. Rather than having to manage, simultaneously a vast number of similar cases being tried by a whole range of different courts, the party in question prepares his or her defence before a single court.

Drawbacks of this mechanism

This mechanism could be regarded as being at variance with the constitutional principles of a number of states and with the European Convention on Human Rights and, in particular, with the principle of the freedom to take legal proceedings, insofar as persons are deemed to be automatically part of the group covered by a collective action without having given their express agreement to be so included. If the persons concerned do not ask to be excluded, they could be bound by the decision that is delivered.

It is, however, perfectly possible to preserve this individual freedom. This could be achieved in one of two ways: either by forwarding to the persons concerned information addressed to them by name, which would make it possible to regard those persons who subsequently do not ask to be excluded as having given their tacit authorisation for the action. The other way in which this goal could be achieved is by giving members of the group concerned the right to ask to be excluded from the procedure at any time, even after the decision has been delivered and, if the decision taken is not favourable to them, to enable them to initiate individual actions.

The rights of the defence, such as the principle of an adversarial process and the principle of equality of arms would also be safeguarded: the commercial operator involved must be able to invoke individual means of defence against one of the victims who is a member of the group covered by the collective action. This principle is linked to that of having a "fair trial" (Article 6 of the European Convention of Human Rights). Under the opt-out system it is indeed the case that all the persons concerned would perhaps not be designated by name and would not be known to the commercial operator against whom the action has been

brought. The latter party could therefore find it impossible to invoke individual means of defence.

However, in the context of a collective action, the individual situations are inevitably homogeneous and the judge is the guarantor that this shall be the case. Litigation linked to consumer rights and competition mainly derives from contracts and the situation of the interested parties is therefore virtually identical. The legal issue (*causa petendi*) is one and the same. It is therefore difficult to see how the commercial operator could invoke a specific means of defence in respect of a single consumer.

Throughout the procedure the judge may have the possibility of throwing out an action in cases where he establishes that the situations of the claimants are characterised by considerable differences of law and fact.

Finally, when it comes to setting compensation, the judge has the possibility of establishing sub-groups in order to adjust, for example, the amount of compensation in the light of individual situations and therefore also in the light of possible reductions in liability.

c) *Opt-out and opt-in according to the type of litigation*

The system recently selected by both Denmark and Norway makes provision for both *opt-in* and *opt-out* procedures. The judge may decide to have recourse to an *opt-out* system if the litigation in question involves small amounts, if the claims are similar and if it would be difficult to pursue an *opt-in* procedure. There are many cases of consumer litigation in which consumers are unable to obtain an effective individual remedy because of the large number of individuals concerned and the small financial sums involved. Use of the *opt-out* procedure makes it possible to take account of all the persons concerned and to secure a penalty which is on a par with the level of unlawful profit which may have been made. In the case of litigation involving high levels of individual damage, the *opt-in* system is selected, making it necessary for each consumer to make themselves known in order to be party to the procedure.

Advantages of this procedure

The administration of the procedure is rendered easier in the case of mass litigation. The goal of providing redress is achieved if effective publicity is provided. The goal of serving as a deterrent is likewise achieved.

Any possible infringements of constitutional principles or the European Human Rights Convention are offset by the effectiveness of the process in respect of providing redress and serving as a deterrent.

Drawbacks of the mechanism

Attention should be drawn first of all to the difficulty in defining the boundary between the two procedures of opt-in and opt-out. The two states which have adopted these procedures have done so only recently and no concrete cases are yet available. The relevant laws refer only to: "mass litigation in respect of small sums in the case of which the use of individual procedures should not be expected".

This problem of the lack of a clearly-defined boundary could give rise to very long debates during the procedure and to appeals which would extend the length of the procedure.

③●① The role of the judge

- a) In this particular type of procedure, which pits a large number of claimants against each other, the powers that are vested in the judge are of crucial importance.
- b) In the majority of the procedures involving the *opt-out* principle, an initial phase of the procedure involves an examination carried out by the judge to determine whether the action is admissible. This same aim is served by the examination of the individual file in respect of *test cases*.

The importance of the stage involving verification of whether or not a case is admissible lies in the fact that this stage makes it possible to halt, at the beginning of the procedure, any claims which are manifestly unjustified or of a fanciful nature and which could unlawfully damage the image of the opposing party; this objective is achieved by preventing abusive or inappropriate procedures from being taken further.

It is the judge who guarantees that this stage of verifying whether a procedure is admissible is properly carried out. In concrete terms, he has the task of verifying whether the conditions set out in law for undertaking collective actions are respected.

In particular, the judge has to check whether:

- there are indeed grounds for a legal dispute (the proceedings initiated by the claimant must not be barred);
 - the composition of the group makes it impracticable to engage in a joint procedure or a procedure involving a mandate;
 - there are matters of law or of fact which are common to the members of the group (the same *causa petendi*);
 - the claim against the commercial operator is consistent from the point of view of the alleged facts (the criterion of the probability of the alleged claim – "*fumus boni iuris*");
 - the plaintiff is able to adequately represent and protect the interests of the members of the group.
- c) At a later stage, it is also important that the judge is able to validate any proposed transaction or reject it if, in his estimation, it is not in the interests of the members of the group. To be in a position to do this, he must have greater powers than simply those of approving transactions, which are the powers usually vested in judges by law under the majority of judicial systems which apply in the EU Member States.
- d) Given the particular nature of this procedure, there is also a need to make provision for appropriate procedures for the production of evidence. The judge must be able to use powers of injunction with regard to the opposing party or third party in order to secure the production of documents or he must be able to order measures of inquiry with a view to establishing new evidence. The legislation establishing collective actions must expressly stipulate that the judge may not refuse to take the abovementioned action once it has been requested by the claimants.
- e) In order to enable judges to take on these powers in the most effective way possible, it would appear to be necessary to stipulate that only particular courts, designated by name, will have jurisdiction for collective actions. The judicial structures of the Member States should therefore be adapted accordingly and provision also needs to be made for judges sitting in the courts in question to receive special training.

- a) Collective actions must enable claims to be made for compensation for material damage (financial damage), physical damage and compensation for pain and suffering and other forms of non-pecuniary loss. Since the aim of the action is both to compensate consumers and to provide a deterrent, it seems necessary to make provision for compensation of all forms of damage if this goal is to be achieved. It should also be possible to provide courts with simple, inexpensive and transparent evaluation methods, without abandoning the principle of compensation for damages.
- b) Claimants involved in collective actions must also be able to secure several forms of damage from the court. In addition to stipulating the cessation of particular behaviour or the invalidity of an act which can still be carried out, compensation of damages must be able to take a direct or indirect form. Provision must also be made for compensation to be backed up by other forms of remedy, such as advertising the publication of the court's findings, public notices etc.
- c) Direct, individual compensation must not be the only form of compensation envisaged, as under certain hypotheses, it would be difficult - if not impossible - to bring about, either because the members of the group concerned cannot be identified under the *opt-out* mechanism or because there are too many such persons, or yet again, because the amount represented by their individual damages is too low. The key requirements are that the persons involved should always be compensated - even indirectly - and that the deterrent effect should be achieved.

Appropriate machinery should be devised to address the following cases: the judge is able to calculate the amount of compensation to be paid to identified or identifiable members of the group (under the *opt-in* scheme, test cases or even under *opt-out* arrangements, in cases where the commercial operator has provided a list of the customers concerned, for example). Appropriate machinery should likewise be devised to address cases where distribution of payments to individuals proves to be too expensive in view of the small amounts of individual damages involved.

In the same way, if the sums are not all distributed, priority should be given to a measure of indirect compensation in respect of the residue of the compensation. In his decision the judge should set out in detail the action to be funded by the residue and he should adopt the procedures for monitoring this operation; responsibility for implementing these procedures may be delegated to a third party.

Should even this measure of indirect compensation prove to be impossible, the total amount of the residue determined by the judge shall be paid into a fund for supporting collective action in order to enable it to finance new actions.

If the judge is unable to calculate the amount to be paid to each individual by way of compensation in cases in which it is not possible to identify all the members of the group (this applies solely in the case of the *opt-out* mechanism), he must be able to establish an assessment grid for the different categories of damages. Responsibility for distributing the compensation sums may be delegated to the court registry, the lawyer representing the group or a third party (insurance agent, account, etc.); such arrangements have the advantage of relieving the court of responsibility for this long and complex stage of analysing individual claims.

In the case of the second hypothesis, the judge must be able to make provision for individual compensation for members of the group who have made themselves known following the publication of information on the judgement; the residue of the compensation is to be allocated to actions providing indirect compensation for the damage suffered by the group.

If no indirect measure is possible, the residue must be paid to the support fund.

③●①①①▢ **Appeals**

- a) Collective actions must recognise the rights of either party to lodge an appeal.
- b) Bearing in mind the importance of (a) the need to ensure that victims are compensated without delay and (b) making certain that the rights of each of the parties have been properly appreciated, there is a need to reconcile each party's right to lodge an appeal against the decision with the abovementioned overriding needs.
- c) The recognition of this right of appeal should therefore oblige the Member States to establish a rapid appeal procedure in order to avoid the application of a purely stalling mechanism.
- d) Furthermore, having the certainty that proper provision has been made in the accounts of the liable party for the compensation which it has been ordered to pay also provides a guarantee for the victims in the event of an appeal.

③●①①▢ **Financing the system**

- a) The collective action system must ultimately be self financing.
- b) Given that it is not desirable, or even possible, to introduce a blanket system of US-style *contingency fees*, since such a system runs counter to the European legal system, it is essential to make provision for a form of financing which would enable claimants who do not have the requisite funds to instigate a collective action to obtain an advance in respect of their legal costs (lawyer's fees, cost of expert opinion in connection with the inquiry measures undertaken by the judge, etc.).
- c) One of the ways of funding this system would be by establishing a "support fund for collective action", provisioned by the sum of the "unlawful profits" made by enterprises which have been convicted; these profits, as defined by the judge in the course of the procedure, could be so used insofar as they are not claimed by identified persons who have suffered direct injury³⁴³.
- d) The support fund may also (a) have the role of centralising all the information relating to ongoing collective actions and (b) be instructed to pass on information relating to the steps to be taken by the persons concerned with a view to making themselves known, excluding themselves from a collective action or securing compensation.

③●●□ Additional procedural rules

From a detailed point of view, there will be a vast range of procedural rules which will have to be laid down but they will be listed only as a "token entry".

Such procedural rules will have to be drawn up in the case of:

- the arrangements in respect of notifying interested parties;
- legal expenses and legal aid;
- cooperation between judicial and administrative authorities in the Member States;
- deadlines in respect of the instigation of legal proceedings and prescribed periods;
- the use of the internet (eJustice).

³⁴³ A good example in this context is the "support fund for collective action" set up in Quebec; this fund is regarded as playing a vital role in the development of collective actions. It is provisioned by the reimbursement of sums advanced to claimants who win their collective actions and from the residue of compensation payments not claimed by members of groups involved in collective actions. Claimants who instigate collective actions are able to secure from the judge the reimbursement of expenditure incurred in instigating the action only on condition that they provide supporting documents.

Legal instrument to be employed: a regulation or a directive?

③④②①①☐ Provision could be made for the introduction of collective actions at EU level by having recourse to either a directive or a regulation; it is considered that a mere recommendation would, by definition, fall short of what is required for creating the conditions for effective, uniform action which are necessary to enable such a measure to be adopted in a harmonised way in 27 Member States.

③④②①①☐ Provided that the content envisaged is extended to cover other matters and not only consumers' rights, and provided that Articles 65 and 67 of the EC Treaty are selected as the legal basis, the adoption of a regulation could be considered, on a par with, for example, the regulations on: insolvency procedures; the European enforcement order; the European order for payment procedure; the European small claims procedure; and the attachment of bank accounts.

③④②①①☐ If, however, it is decided to restrict – at least for an initial period – the field of application of this initiative to that of consumer rights, the most appropriate way of making provision for collective actions at EU level would appear to be by means of a directive; such a directive would follow up the directive on actions for injunction.

③④①④☐ Considerable differences as regards procedural rules continue to exist between the Member States. The basic principles underlying collective actions should therefore be set out in general terms since the Member States would apply the directive having due regard to their usual procedural principles.

It is indeed not certain that, for example, harmonisation will be possible since the courts given jurisdiction to hear these actions would themselves depend on the rules applicable in each Member State as regards the administration of justice.

The methods of referral must be in line with the specific provisions of the Member States. The use of a regulation would therefore not be appropriate.

③④④☐ It would also appear to be self-evident that, in this case, the proposed directive must provide for full harmonisation in order to prevent Member States from making the system more binding to the detriment of enterprises which have their head office in the said Member States.

Brussels, 14 February 2008.

The President

The Secretary-General

of the
European Economic and Social Committee

of the
European Economic and Social Committee

Dimitris Dimitriadis

Patrick Venturini

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N.B.: Appendix overleaf.PPENDIX

to the
OPINION
of the European Economic and Social Committee

The following amendments, which were supported by at least a quarter of the votes cast, were rejected in the debate:

1. Point 7.2.2.2.4

"The procedure also has a real deterrent effect on the liable party, since the latter is obliged to compensate all the persons who have been victims of a given practice and may have to refund the unlawful profit derived from the practice in question."

Reason

See point 7.6.3.

Result of the vote

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| Votes in favour: | 104 |
| Votes against: | 114 |
| Abstentions: | 13 |

2. Point 7.6.1.

Delete:

~~"The collective action system must ultimately be self-financing."~~

Reason

Access to justice is the responsibility of the public authorities and must not depend on the success of previous actions which are unconnected with subsequent cases (see also reason for amendment to point 7.6.3).

Result of the vote

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| Votes in favour: | 107 |
| Votes against: | 116 |
| Abstentions: | 10 |

3. Point 7.6.3

~~"One of the ways of funding this system would be by establishing a 'support fund for collective action', provisioned by the sum of the "unlawful profits" made by enterprises which have been convicted; these profits, as defined by the judge in the course of the procedure, could be so used insofar as they are not claimed by identified persons who have suffered direct injury. It is up to the public authorities to guarantee access to justice, for example by assigning revenue from fines for contraventions of consumer law to financing collective actions."~~

Reason

The form of recourse envisaged aims to provide compensation for damage suffered by consumers, but excluding "punitive damages". This concept borrowed from US practice inappropriately combines civil interests and criminal law. The mere fact of fully compensating consumers for their loss constitutes an effective deterrent for the liable party.

The question of whether a profit has been made as a result of contravention of the law or fraud is a matter for sanctions imposed by the public authorities. They may assign revenue from fines levied to facilitate access to collective actions. Responsibility for ensuring access to justice lies with government, which is subject to democratic scrutiny, rather than with private law individuals and organisations.

As the damages due will have been paid to the consumers who suffered the loss, it would be inappropriate to create an artificial link between the surplus from one action and actions in subsequent cases, particularly where the objective was no longer to obtain fair reparation for the consumers who had suffered loss in the case in question.

Result of the vote

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| Votes in favour: | 104 |
| Votes against: | 106 |
| Abstentions: | 18 |



European Economic and Social Committee
Section for the Single Market, Production and Consumption

APPENDIX

to the

WORKING DOCUMENT

of the

Section for the Single Market, Production and Consumption

on

"Defining the collective actions system and its role in the context of Community consumer law"

(Own-initiative Opinion)

Comparative tables of collective redress in consumer law litigation, by country

(prepared by Mrs Gaëlle Patetta)

Representative action in the EU Member States (I)

| | <i>Austria</i> | <i>Belgium</i> | <i>Denmark</i> | <i>France</i> | <i>Finland</i> | <i>Luxembourg</i> |
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| Description | <p>The Austrian Code of Civil Procedure (<i>Zivilprozessordnung/ZPO</i>) does not provide for a special proceeding for collective actions. However, in recent years, consumer organisations have found a way around this gap in legislation (Article 227 of the Code of civil procedure - <i>Austrian style collective action</i>). Injunction proceedings are provided for under Articles 28 to 30 of the Consumer protection law.</p> | <p>In Belgium, an individual or legal person must have a current, immediate and personal interest in order to take action. This has traditionally prevented a person or group from instituting proceedings in the name or on behalf of a group of persons. However, in recent years a degree of collective action has been introduced in a limited number of areas (legislation on trade practices and consumer credit and on environmental and human rights organisations). Article 95 of the Law of 14 July 1991 on trade practices, consumer information and protection provides for injunction proceedings.</p> <p>- A proposal for reform was tabled in 2003 but came to nothing. It did not give specific details of relations between the association and the group, and did not specify how the compensation should be divided between the members of the group.</p> <p>- A new reform proposal was tabled on 11 July 2006, aimed at amending</p> | <p>Articles 20 and 27 of the <i>Marketing Practices Act</i> (No 1389/2005) provide for injunction proceedings.</p> | <p>Approved consumer associations have the right to take legal action. Four types of action are possible (Article L 421-1 et seq. of the Consumer Code). Article L 462-1 of the Trade Code also allows consumer associations to bring injunction proceedings before the Competition Council against anti-competitive practices. A compensation claim cannot be lodged with the Council. Consumer associations may also bring an action before the administrative courts against the abuse of power by administrative authorities or to make the administration liable.</p> | <p>The Ombudsman may bring administrative proceedings against abusive trade practices or clauses (Article 9 of the Consumer Agency Act, and Article 3(3)(2) of the Consumer Protection Act, etc.). The Ombudsman, or, where the Ombudsman refuses to take the action, a legally-empowered consumer organisation, may also bring proceedings before the Market court, on the basis of a petition. Finally, a law introduced on 12 January 2007, which entered into force in March 2007, provides for proceedings fairly similar to that which pertains in Sweden, allowing the Ombudsman to bring consumer collective actions before the Finnish Consumer Complaints Board.</p> | <p>The law of 19 December 2003 enables organisations authorised by the Minister for Consumer Affairs to call for the cessation of activities that are in breach of certain laws (laws on consumer protection, credit, e-commerce, etc.). The law of 25 August 1983 on the legal protection of consumers and the law of 30 July 2002 regulating certain trade practices enables organisations authorised by the Minister to initiate criminal proceedings (file a civil action) where these two laws are infringed.</p> |

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| | | the judicial code, with a view to granting associations the right to institute collective actions. It proposes to allow associations with legal standing to bring an action to protect a collective interest pertaining to its statutory objective. The bill is still before the Chamber of Deputies. | | | | |
| Scope | Consumer law | Consumer and investor protection | Consumer law | Consumer law | Consumer law | Consumer law |
| 1 - Institution of the proceedings | In the case of Austrian-style collective actions the district court has jurisdiction for actions up to EUR 10 000 and the regional court for actions above EUR 10 000. The regional court has jurisdiction for injunction proceedings. | The president of the Commercial court has jurisdiction. | The Maritime and Commercial Court in Copenhagen has jurisdiction. | Criminal courts (local court, police court or criminal court) or civil courts (local court, magistrates' court or county court). | Office of the Ombudsman, Market court or Finnish Consumer Complaints Board | |
| 1-1 Preconditions to taking a representative action | | | | | | |
| 1-1-a the representative | -Austrian-style collective action: Actions may be taken by the Consumer protection association (VKI) and the Federal chamber of workers and salaried employees. - Injunction proceedings: Several professional representative bodies, such | Any person with a personal and direct interest (consumer or business); the Minister for the Economy; professional, inter-branch, or consumer organisations. | Any representative body that demonstrates a sufficient and personal interest may take an action. The Ombudsman may also institute proceedings. Since 1994, he may also, if he so | Duly-declared associations whose statutory object specifies the protection of consumer interests may, if they are approved for this purpose, exercise the rights conferred upon civil parties in | Ombudsman or representative organisations. In Finland, two organisations represent the interests of consumers at national level: - Suomen Kuluttajaliitto (The Consumer association of Finland) | Only one organisation – the ULC [Luxembourg Consumer Union] – has been recognised by the Minister and is authorised to initiate injunction proceedings. |

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| | <p>as the Federal economic chamber and the Chamber of agriculture, as well as the VKI, may bring injunction proceedings.</p> | | <p>requests, pool consumers' claims for compensation, where these are identical.</p> | <p>respect of events directly, or indirectly, prejudicing the collective interest of consumers. (Article L421-1 and R411-1 of the Consumer Code). Authorisation is granted to associations that: 1. can prove on the date of request that they have been in existence for one year, from the date of declaration; 2. during this period of existence, can provide evidence of effective and public activity with a view to the protection of consumer interests, evaluated, in particular, in line with the circulation of publications relating to the holding of regular information meetings; 3. bring together, on the date of the application for approval, a number of individually paid-up members: a) at least 10 000 for national associations; this condition not being required for associations dedicated to research and analysis</p> | <p>- Kuluttajat – Konsumenternary (local consumer associations) <i>The Consumer association of Finland</i> is a national coordination body representing 60 dulydeclared local associations. It also accepts individual members. In addition, seven national organisations including Finnish salaried employees, patients and retired people are members of the association. The <i>local consumer associations</i> (Kuluttajat-Konsumenternary) are a separate organisation with approximately 750 members and seven memberorganisations</p> | |
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| | | | | <p>of a scientific nature; b) an adequate number, in consideration of the territorial framework of their activity, for local, departmental or regional associations. Where the association has a federal or confederal structure, the total number of paid-up members of all the component associations is taken into consideration.</p> | | |
| <p><i>1-1-b grounds for admissibility</i></p> | <p>- Austrian-style collective actions: Consumer associations are taking more and more actions on behalf of hundreds of consumers. These actions involve transferring to one single entity (the consumer association) all the individual actions against the same defendant. The appointed proxy then brings one single action before the courts in his own name. This system greatly reduces the cost of proceedings. The consumer department of the Ministry of Justice may come to an agreement with the association to cover the costs</p> | <p>The consumer association taking the action must be a member of the Consumer Council, to which 14 consumer associations are currently affiliated.</p> | <p>The purpose of such actions is to compensate associations where damage has been incurred. But it is also possible for a consumer to join an action brought by a representative organisation in order to obtain compensation for his own damages.</p> | <p>- Actions taken in the collective interest of consumers: a) action to stop illegal actions or to remove illegal or abusive clauses: consumer associations may ask the civil court, ruling on civil actions, or the criminal court, ruling on civil actions, to order the counsel for the defence or the defendant, where appropriate subject to penalty, for any measure intended to stop illegal actions or to remove illegal clauses from the contract or the standard contract offered to consumers</p> | <p>- In the case of administrative proceedings brought by the Ombudsman, an initial proposal must be made to the business to make a written commitment to cease the practices in question or its use of abusive clauses. Only where such an attempt to find an amicable settlement fails can the proceedings be initiated. - In the case of proceedings brought before the Market court, the business is requested, during a preparatory phase, to give a</p> | |

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| | <p>of the case. The VKI may also turn to of a German financial company which covers all costs in the event of the action failing or, where it is successful, receives 30% of the compensation as a contingency fee.</p> <p>This type of proceedings also allows matters of law and of fact that are common to several actions to be settled once and for all, in the context of a model case.</p> <p>The Austrian Supreme Court has deemed that such proceedings are legal, provided that the grounds for all of the individual actions are the same.</p> <p>- Injunction proceedings : Associations may take an action to have abusive clauses removed, where EU legislation has been breached, or in the case of conduct contrary to competition law (e.g., unethical or misleading advertising). Before referring the matter to the court, the plaintiffs must call</p> | | | <p>(Article L421-2 of the Consumer Code). The associations mentioned in Article L. 421-1 and organisations able to provide proof of their inclusion on the list published in the Official Journal of the European Communities in application of Article 4 of Directive 98/27/EC of the European Parliament and of the Council on injunctions for the protection of consumers' interests may bring an action before a civil court to stop or prohibit any illegal action in respect of the provisions transposing the Directives mentioned in Article 1 of the aforementioned Directive. The judge may order, on these grounds, where appropriate subject to a fine, the deletion of an illegal or abusive clause in any contract or standard contract offered to, or intended for, the consumer. (Article L421-6 of the Consumer</p> | <p>written response to the petition; only after this may the judgment phase begin.</p> | |
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| | <p>on the company to cease its illegal activities.</p> | | | <p>Code). Such action is possible notwithstanding the existence of any established individual or collective damage. Abusive clauses must be in force at the time the writ is issued (preventive/deterrent aspect of action) b) Intervention in civil actions: The associations mentioned in Article L. 421-1 may institute proceedings in civil courts and, in particular, request the application of the measures provided for in Article L. 421-2, where the initial application aims to repair damage suffered by one or more consumers due to events not constituting a criminal offence. (Article L. 421-7 of the Consumer Code). - Representative actions: Where several consumers, identified as natural persons, have suffered individual damages caused by the same business act and which have a common origin, any</p> | | |
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| | | | | <p>approved association recognised as being representative on a national level in application of the provisions of Part I may, if it has been duly authorised by at least two of the consumers concerned, institute legal proceedings to obtain reparation before any court on behalf of these consumers.</p> <p>The mandate may not be solicited by a public appeal on radio or television, nor by posting of information, by tract or personalised letter. Authorisation must be given in writing by each consumer. Any consumer who has agreed, in accordance with the conditions provided for in Article L. 422-1, to the institution of proceedings before a criminal court is, in this event, deemed to be exercising the rights conferred upon a civil party in application of the French code of criminal procedure.</p> <p>Notifications or</p> | | |
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| | | | | <p>notices concerning the consumer are, however, addressed to the association (Article L 422-1 et seq. of the Consumer Code). This type of action has been used on only 5 occasions since its inception as it has proved very complicated to handle and very costly for consumer associations.</p> | | |
| 2- Judgments | <p>- Austrian style collective action: The court awards compensation for damages.</p> <p>- Injunction proceedings: The judge penalises conduct contrary to EU or Austrian legislation, but does not award compensation for damages.</p> | <p>The sole purpose of such actions is to secure the cessation of illegal practices; under no circumstances may they be taken for compensation purposes. Furthermore, the associations must bear the cost and the risk that the action entails.</p> | <p>The court compensates the damage incurred by the association (if any) and by the consumers who were allowed to join the action</p> | <p>- Actions taken in the collective interest of consumers: a) action to stop illegal actions or to remove illegal or abusive clauses: such actions enable the effective application of consumer law. Public announcements, which are often ordered by judges, enable the greatest number of consumers to be informed of their rights. Compensation awarded for the infringement of consumers' collective interest is paid to the association and not to individual consumers. Furthermore, decisions issued benefit only the parties to</p> | <p>- In the case of administrative proceedings, the ombudsman can only order the cessation of the activities or the removal of the abusive clause. - In the case of proceedings before the Consumer Complaints Board, the Board may order the defendant to implement the necessary recommendations to settle all actions by consumers that are affected by the same problem.</p> | <p>In the case of criminal proceedings, compensation may be sought as well as publication. The organisation must quantify the damage and prove the causal link between the damage and the fault of the defendant.</p> |

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| | | | | <p>the proceedings (The principle of relative jurisdiction of the matter judged).</p> <p>b) Intervention in civil actions: the association may obtain compensation for damage caused to the collective interest of consumers but an initial request must be lodged by a consumer.</p> <p>- Representative actions: damages obtained in a ruling against a business by a court referred to by the mandated association are awarded to the consumers who gave the association its mandate.</p> | | |
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Representative action in the EU Member States (II)

| | Greece | Italy | Netherlands | Poland | Slovakia | Czech Republic |
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| Definition | Article 10 of law 251/1994 on consumer protection, provides for action aimed at preventing infringements of consumers' rights. It involves an injunction procedure against any infringement of consumer protection legislation. | Group action does not yet exist in Italy (see the section on reform plans). Provision is only made for representative action. The aim of such action is to stop (injunction) infringements of consumer rights or cause unfair clauses to be eliminated (Articles 37, 139 and 140 of the Italian Consumer Code). | There is provision for general group action under Article 3:305a of the Dutch civil code. Action to eliminate unfair clauses is provided for in Article 6:240 of the civil code. | Action to eliminate unfair clauses in consumer contracts is provided for in Articles 47936 – 47945 of the civil procedure code (k.p.c.) Action for cessation in the case of anti-competitive practices is also provided for in Articles 17 and 18 of the Act on combating anti-competitive practices of 16 April 1993 (Dz.U. 2003, Nos. 153 - 1503). The aim is to protect the interests of both consumers and investors. | Article 26 of Law No 634/1992 on consumer protection and the civil procedure code provide for the possibility of requesting the prohibition or cessation of an illegal act or practice. This procedure has only been available since 2004. | Consumers and consumer associations may institute a cessation procedure (injunction) on the basis of consumer protection Law No 634/1992 or the Commercial Code for protection against unfair competition. |
| Scope | Consumer law | Protection of consumers' interests and action against unfair terms in consumer contracts | Remedy of general application. | Protection of consumers and investors | All cases where consumer rights provided for under Law 634/1994 have been infringed. | The procedure can be introduced to bring an end to illegal practices detrimental to consumers. |
| I. Competent jurisdiction | The court of first instance is the competent jurisdiction. | The court with jurisdiction for actions for cessation (injunctions) is the civil court of first instance. | | The "Sad Ochrony Konkurencji I Konsumentów", the court for consumer protection and competition, has jurisdiction for the action to eliminate unfair clauses. | The courts with jurisdiction for civil cases or trade disputes | |

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| | | | | For the cessation procedure, the ordinary rules of jurisdiction apply. | | |
| 1-1 Prior conditions for representative action | | | | | | |
| 1-1-a the representative | Only specific consumer associations which meet criteria determined by the law or specific trade or business chambers may bring an action. | <ul style="list-style-type: none"> - Action against unfair clauses: under Article 37 of the Italian Consumer Code, associations representing consumers and businesses, and chambers of commerce, industry, handicrafts and agriculture may institute proceedings against a business or association which uses or acknowledges use of unfair clauses and may ask the court to prohibit these clauses. - Action to protect consumers' interests: under Articles 139 and 149 of the Italian Consumer Code, associations may prevent acts and behaviours infringing consumers' interests. | A representative body may act to protect the interests of third parties, if the objective of the said body, as defined in its statute, is to act to defend such interests. | <ul style="list-style-type: none"> - Action to eliminate clauses: All consumers to whom the contract was proposed, consumers' associations, the Ombudsman and the President of the Office for Competition and Consumer Protection (UOKIK). - Action in cessation: Only the President of the UOKIK. | A consumer or consumer protection organisation may initiate the procedure. | The procedure can be initiated by a consumer whose rights have been infringed or by consumer organisations. |
| 1-1-b admissibility criteria | The consumer association must: | | The various interests must be | | | |

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| | <ul style="list-style-type: none"> - have at least 500 members - be registered with the Consumers Union. - act to protect the general interest of all consumers, with no distinction between members and non-members. | | <p>sufficiently similar to be included in a single action, and the application must contain common matters of law and fact. The representative body acts in its own name; the parties it is representing are not litigants. Before taking action, the body must endeavour to reach a settlement with the defendant.</p> | | | |
| 2-the judgment | <p>The court orders the acts to cease and compensates for nonmaterial injury to the general consumer interest. There is no compensation for individual damages.</p> | <ul style="list-style-type: none"> - Action against unfair clauses: the judge may eliminate unfair terms in contracts concluded between consumers and businesses. - Action to protect consumer interests: the judge may put an end to the acts and behaviours that infringe consumer interests. | <p>Requests for compensation are not possible in this action. The sole objective of the request is to ensure compliance with or termination of a contract or order publication of specific information concerning the defendant's products or services.</p> | <ul style="list-style-type: none"> - Action to eliminate clauses : The clauses are eliminated. No damages may be claimed. - Action in cessation: The court orders interruption of the activity. The decision may be made public. The judge may also order a sum of money to be paid for social purposes or as compensation for the anticompetitive practice. | <p>The court may only deliver a judgment on the cessation of the act or practice.</p> | <p>The decision links all the persons affected by the practices (res judicata). The decision may be published at the expense of the losing party. In actions against unfair competition practices, consumers may apply individually for damages. Collective reparation is not possible.</p> |

Representative actions in the EU Member States (III)

| | Hungary | Sweden | Cyprus | Lithuania | Slovenia | Ireland | Spain |
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| Definition | Several representative actions are possible in the event of the infringement of consumer rights. Collective action is provided for under section 92 of the Competition Act and under section 39 of the Consumer Protection Act. Its objective is to protect the rights of consumers even if they are not identified. There is also an action to remove unfair terms, provided for under Article 209/B of the civil code Act IV of 1959 (hereinafter HCC). | In Sweden there is a "special joint complaint" action, which may be brought before the Swedish Consumer Complaint Board (see Finland for a similar action). | Following the transposition of EU Directive 98/27, the consumer protection laws provide for an injunction. This action has yet to be used. | The Code of Civil Procedure provides for an injunction and an action to remove unfair terms. Collective action is in theory provided for under Article 49 of the Code of Civil Procedure. This article states that a group may bring a claim with the intention of protecting the public interest. However, there are no other provisions setting out this action for damages, which means that it is not enforceable in practice. | Slovenia has two injunction actions. - Articles 75 and 76 of the Consumer Protection Act authorise consumer organisations to request the voidance of contracts. - Article 133 of the Code of Obligations also provides for the possibility of requesting the cessation of activities involving risk. | The law on the regulation of unfair terms in consumer contracts of 1995, amended in 2000, gives consumer organisations the possibility of requesting the high court to prohibit the use of unfair terms. This action is not used by associations through lack of financial resources. | An injunction is provided for under Article 11(4) of the law of 7 January 2000. |
| Scope of application | Consumer law | Consumer and social law. | This action can be lodged in the event of any violation of consumer protection laws (unfair terms, timeshare, distance selling, sale and | | - The action provided for under the Consumer Protection Act can be used only in disputes between consumers and professionals (actions which violate the law or | Unfair terms in consumer contracts. | This action may be lodged in the event of noncompliance with several sector-specific laws. |

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| | | | guarantee of consumer goods etc.). | | professional usage). - The Code of Obligations Procedure is used to protect against activities involving risk. | | |
| 1- Instituting judicial proceedings | The civil court has jurisdiction for these two actions. | | | | | | |
| 1-1 Prerequisites for representative action | | | | | | | |
| 1-1-a the representative | The representatives can be: - section 92 of the Competition Act : consumer associations, the Competition Council - section 39 of the Consumer Protection Act: the Inspectorate General for Consumer Protection, the public prosecutor's office, the National Audit Office, consumer associations - action to remove unfair terms: the public prosecutor, the minister, the chamber of commerce, professional chambers or | Only the Ombudsman has the authority to refer a matter to the Swedish Consumer Complaint Board. But if it declines to lodge the action, consumer and employee organisations may do so. Individual consumers cannot lodge this action. | The action can be lodged by the Department for Competition and Consumer Protection of the Ministry for Trade, Industry and Tourism or any organisation able to demonstrate a legitimate and sufficient interest in protecting the collective interests of consumers in general (the Cypriot Consumers Association and the Union for Cypriot Consumers and Quality of Life). | The action may be lodged by consumer organisations and the National Office for the Protection of Consumer Rights. | - Only a consumer rights organisation which has been in existence for over a year or an association of consumer rights organisations may lodge an action under the Consumer Protection Act. - The Code of Obligations Procedure may be instituted by any individual or group of individuals who wish to do so. | The action may be lodged by consumer rights organisations or by the Consumer Affairs Officer. | The National Consumers' Institute and its regional equivalents, consumer associations and the public prosecutor may lodge this action. |

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| | <p>professional associations as well as consumer organisations.</p> | | | | | | |
| <p>1-1-b conditions of admissibility</p> | <p>- section 92 of the Competition Act : consumer associations and the Competition Council may bring before a court consumer complaints against a single defendant who has caused injury to a large number of consumers or wherever consumers cannot be identified in the event of significant injury resulting from an illegal act. - section 39 of the Consumer Protection Act: a consumer association, the Inspectorate-General for Consumer Protection, the public prosecutor's office and the National Audit Office may take action against an individual whose illegal activities cause injury to a large number of</p> | | | | | | |

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| | consumers or cause significant damage to consumer interests. It is not necessary for the consumers to be identified. | | | | | | |
| 2- the ruling | <p>- section 92 of the Competition Act: the court may order the defendant to reduce or modify the price, to repair or replace the product. It may also order the ruling to be published in a national journal with the costs to be covered by the losing party.</p> <p>- section 39 of the Consumer Protection Act: the court may order the cessation of the injurious situation and may also order the ruling to be published in a national journal with the costs to be covered by the losing party.</p> <p>- action to remove unfair terms: The contract is declared</p> | <p>If it deems the action to be justified, the Consumer Complaint Board may order the defendant to implement the necessary recommendations to settle all disputes involving consumers who have been victims of the same problem even if they have not acted individually.</p> | <p>The action makes it possible to obtain a temporary or permanent injunction. In certain cases, the competent authority may also order the enterprise to pay an administrative penalty.</p> | <p>Only an injunction may be obtained from the court. Compensation in the form of damages is not possible.</p> | <p>Under these two actions, the court orders cessation. In the action provided for under the Consumer Protection Act, it may also make provision for information and publicity measures with the costs to be covered by the defendant. The court may also rule that a contract or part of a contract be annulled.</p> | <p>The aim of the action is to prohibit or put an end to an illegal practice. In certain cases, plaintiffs may also claim compensation for damages incurred.</p> | |

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| | invalid and the judge may order the ruling to be published in a national journal or on the Internet. | | | | | | |
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Collective action in EU Member States (I)

| | England | Germany | Sweden | Spain |
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| Definition | <p>The 2000 amendment to the 1998 Civil Procedure Rules improves and develops collective actions known as multi-party actions (Part 19 III and 48). This procedure enables a certain number of claimants (natural or legal persons or other entities), with a common interest (de facto or de jure) to bring action as a group against one or more defendants. This is a test case procedure. It should be noted that Article S. 47 B of the 1998 Competition Act allows certain authorised organisations to bring a compensation suit before the Competition Appeal Tribunal on behalf of a group of two or more individual consumers subsequent to some form of abuse of dominant position. However, the action must follow on from a decision noting the antitrust practice.</p> | <p>Germany has adopted a procedure intended to facilitate the commencement of actions by individual investors for false information, misleading or inadequate information or public information concerning capital markets – law of 1 November 2005, the Act on Model Case Proceedings in Disputes Under Capital Markets Law. The test phase for this law continues until 2010. If successful, it will be extended to other areas. This is a test case procedure. Germany also has the Sammel ou Muster klage procedure, under 1(3) No. 8 of the RBerG (German Law Governing Legal Advice). Consumer associations or centres for consumer protection may bring cases on behalf of consumers who have transferred their disputes to them</p> | <p>A model for group action was established in 1973, originally limited to cases where the National Board of Consumer Claim (NBC) had already examined the matter and recommended that the consumers be awarded compensation. The consumers' ombudsman then became competent for cases which had not previously been examined by the NBC. The law of 30 May 2002 established a new procedure for group action, the grupprättegång, which entered into force on 1 January 2003. The action is brought by a plaintiff (private person, legal entity, non-profit making association or governmental authority) representing a large group of people. According to the type of plaintiff, the group action is qualified as private group action, action by an organisation or public group action. This procedure has been used six times since it was set up.</p> | <p>The law of 7 January 2000 established collective action to facilitate compensation for damages suffered by consumers and users. Provision is made for this under articles 11.2 and 11.3 of the law.</p> |
| Scope | Group action may be used for all types of dispute, | The scope is very limited, concerning only disputes | Group action may apply to all cases brought before | Civil liability action may be criminal or |

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| | <p>but in practice is primarily used in cases of physical injury caused by a sudden accident, industrial disease or the harmful effects of pharmaceutical products; physical injury and/or financial damage caused by the use of defective products, the sale of financial products at a loss or further to the publication of misleading information; material damage caused by, inter alia, a faulty repair; against the government for financial damage caused by the failure to implement European law.</p> | <p>regarding financial market law, e.g. an application for compensation owing to false information, misleading information or omitted public information concerning the financial markets; or an application for the fulfilment of a contract, which is based on an offer under the Securities Acquisition and Takeover Act.</p> | <p>the ordinary courts of first instance, with the exception of action by an organisation, which is restricted to consumer and environmental law. Nevertheless, group action is essentially intended for environmental law, labour law, consumer law and the main laws on consumer protection: the law on marketing, the law on the contractual conditions of consumers, the law on product safety, the law on consumer sales, the law on consumer credit, the law on consumer insurance, the law on price information and the law on distance and door-to-door sales.</p> | <p>contractual in nature and allows compensation for damages arising from unfair clauses, unfair competition or unlawful publicity. These actions may be brought for all types of pecuniary or personal damage, including non-material damage.</p> |
| 1 – Presentation of the body | | | | |
| 1-1 Prior conditions for collective action | | | | |
| 1-1-a the group | <p>This may be a group of claimants or a group of defendants. In principle, the members of the group, who must have suffered damages, must be mentioned by name in the application for a summons. Failing that, group actions may be brought without the names and addresses of the members being known in advance, provided however that they are readily identifiable.</p> | <p>The law on model procedures in financial law disputes allows similar disputes to be grouped together (minimum of ten). The disputes must concern the same issue in the field of stock market disputes.</p> | <p>The group is made up of persons on whose behalf the plaintiff is bringing the action. It must be identified in detail and must include a large number of people. The group may be extended during the action provided that this does not result in any additional excessive delays in the procedure. The members of the group must have suffered damages and must be mentioned by</p> | <p>The group must be made up of the majority of the injured parties, i.e. of those injured parties who have decided or may easily be persuaded to decide (the burden of proof rests on the group). Nevertheless, owing to their legitimacy, associations are not required to bring together the majority of the injured parties.</p> |

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| | <p>The court must have a reliable assessment of the number of potential plaintiffs. It may also set criteria for joining the group, often based on factual circumstances. During the action, the judge may authorise the plaintiff to extend the group provided that this does not result in any additional excessive delays in the procedure.</p> | | <p>name in the application for a summons. Group action may however be brought without the names and addresses of the members being known in advance, if they are readily identifiable.</p> | |
| <p>1-1-b definition of the group</p> | <p>Opt-in</p> <p>This system requires explicit agreement to be included in the action brought. The action is based on a specific mandate and silence is interpreted as refusal. The plaintiffs may join the group at any time but the court may set a deadline, after which no further complaint may be added to the register. Parties wishing to be included in the action after this date must apply to the court for authorisation, stating the reasons why they were unable to register before the deadline. If a potential plaintiff does not join the action before the deadline, he may still bring an individual action, but he will not benefit from public funding or insurance. A claimant may withdraw from the group at any moment, subject to payment of the</p> | <p>Opt-in</p> <p>This is a unique system since plaintiffs who have brought similar individual procedures will be bound by the outcome of the model procedure, irrespective of whether they have taken an active part in this. However, the other injured parties who have not taken legal action may not benefit from the decision.</p> | <p>Opt-in</p> <p>This system requires explicit agreement to be included in the action brought. The action is based on a specific mandate and silence is interpreted as refusal. Only those bodies or persons who, having received service of process from the judge of their intention to form part of the group, have clearly expressed the wish to do so. Once they have opted for the procedure, the group members are forbidden from acting on an individual basis and only the group may appeal against the judge's decision. The members of the group covered by the procedure are mentioned by name in the judge's decision</p> | <p>Opt-in</p> <p>This system requires explicit agreement to be included in the action brought. The action is based on a specific mandate and silence is interpreted as refusal. The consumer may take part in the class procedure.</p> |

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| | expenses incurred until withdrawal. If a test claimant wishes to withdraw from the dispute, a new test claimant must be appointed. | | | |
| 1-1-c the test claimant | The test claimant is appointed by the authorisation order. | The Higher Court appoints a test claimant; the test claimant and the defendants are the only parties. The other plaintiffs are authorised to follow the procedure as third parties. | There are three possible types of action: - private group action: brought by a physical person who has suffered damages. - Action by an organisation: an organisation may bring group action if its aim is to protect consumers or employees in connection with the goods or services offered by the defendant or if it establishes that there is a significant advantage to the litigation being dealt with via group action. This action is open to all non-profit making organisations pursuing these objectives provided that they have the financial means needed and that the court considers that they are an appropriate representative for the group. - public group action: brought by an authority appointed by the government, in light of the nature of the litigation and the capacity of the authority to represent the members of the group. | The action may be brought by an individual consumer, a consumer association, a specific group (afectados) or the public authorities. The protected interests of the consumers may be collective or generalised. - The interest is collective (intereses colectivos) when the injured party is readily identifiable. The burden of proof rests on the group. The action may therefore be brought by both a consumer association and a group of consumers if the group includes the majority of the injured parties. - The interest is generalised (intereses difusos) when the injured parties are difficult to identify. Under these circumstances, certain consumer associations are authorised to bring a collective action. |
| 1-1-d the solicitor | The solicitor is appointed either by one or more plaintiffs, or by one or more defendants: his duties are to coordinate the action on behalf | | The presence of a lawyer is not required for public group action or when one of the group members is able to plead the case. Private group | |

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| | <p>of the plaintiffs or defendants, take action on their behalf and manage the register. These duties are generally allocated by the court to the principal solicitor who is appointed by the parties. If no agreement can be reached among the parties, the court may appoint a solicitor.</p> | | <p>action and action by an organisation must be conducted by a lawyer who is a member of the Bar to ensure that the interests of all parties are protected.</p> | |
| 1-2 legal costs and legal aid | | | | |
| 1-2-a legal costs | <p>The legal costs are borne by the losing party. They are advanced by the test claimant but the court may decide otherwise.</p> <p>There are two types of costs:</p> <ul style="list-style-type: none"> - individual costs: subject to the discretion of the court. A plaintiff who has lost may be required to bear the costs incurred by the defendant in answering his complaint, even if the other plaintiffs win. Should the plaintiffs win, the defendant will bear all the costs incurred. - common costs: the principal court may decide how the costs incurred with a view to resolving common questions or test claim costs should be distributed among the plaintiffs. The group members are normally responsible as a group for the costs of the common action. Conditional fee arrangements are allowed, i.e., if | <p>In principle, the legal costs are borne by the losing party.</p> | <p>The legal expenses are borne by the losing party. They are advanced by the test claimant, and the judge may compel other members to bear certain expenses.</p> <p>The conditional fee system is preferred. Under this system, a claimant and a lawyer may conclude a risk acceptance agreement, under which the lawyer's fees will be set on the basis of the outcome of the dispute. Remuneration as a percentage of the compensation obtained is excluded. Agreements of this nature (risk agreements) may only be argued to group members if they have been approved by the court.</p> | <p>Contingency fees are not authorised. However, it is possible to come to an agreement concerning minimum fees to be paid to the lawyer regardless of the outcome of the trial and which may be increased according to the damages awarded.</p> |

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| | the solicitor loses, he receives no fees, and if he wins, he receives the fees plus a bonus. | | | |
| 1-2-b legal aid | The claimants may take up an insurance policy (Legal Expenses Insurance) and/or receive funding from the Legal Services Commission. | Legal protection insurance does not apply to group actions. Legal aid is possible under certain conditions and is authorised by the court. | The legal expenses are borne by the losing party. In the case of a group, they are advanced by the test claimant. The judge may compel other members to pay certain expenses. The test claimant may benefit from legal aid to cover the legal expenses and the fees of the lawyer or consultant, and to compensate for his work in connection with the group action, the time spent on the procedure and the advances. | Legal protection insurance is allowed. Legal aid also exists. People eligible to benefit from this must have a salary of less than double the minimum income set each year by the government. |
| 2 – Committal | | | | |
| 2-1 the competent court | The ordinary judge is competent, but when the procedure is brought, a principal court is appointed. | The Higher Regional Court is competent once ten applications concerning stock market disputes have been submitted, concerning the same subject. | Group action falls in principle within the remit, in the first instance, of the 68 district courts (Tingsrätten), in particular that of the defendant or of the district in which the damages occurred. By way of an exception, actions falling under environmental law are heard before five courts specialising in environmental law. | The civil judge is competent. |
| 2-2 submission of application for collective action | Each plaintiff must submit an individual detailed complaint (particulars of claim), which must include: a precise statement of the facts on which the plaintiffs are basing their action, | During a financial market procedure, in the first instance, the plaintiffs and defendants may enter an application to bring a model procedure before the court. | A group action is brought in accordance with the general rules of civil procedure. The statement of claim must identify: -the group, -the facts, common or similar, of the complaints | |

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| | <p>their interest in the matter, the compensation requested and the grounds for the complaint.</p> <p>When a person wants his complaint to be examined in the context of a group action, he must submit an application to this effect. The plaintiff must send a copy of his application to the manager of the register with a request to be added to the register. The principal court has the power to order plaintiffs to provide Group Particulars of claim as well, summarising all of the individual complaints. The court may reject a complaint if it considers that the procedure is unfair and unjust and that the cost/benefit ratio does not justify the action. Pre-action discovery is not intended for multiparty action. However, the plaintiffs must comply with pre-action protocol before submitting their complaints. Failure to comply with the rules for the commencement of proceedings may be sanctioned (fine).</p> | <p>The aim of the application may be:</p> <ul style="list-style-type: none"> - to establish the (non-) existence of certain conditions justifying or ruling out committal, - or for the Higher Regional Court to clarify certain legal questions (Oberlandesgericht). | <p>of the group members, the facts known to the plaintiff which may be important for the examination of certain complaints, -the other facts which are important for establishing whether the individual complaints should be treated as a group action. The plaintiff will also set out in the application the names and addresses of all the group members and the facts to be served to the group members.</p> <p>It may appear, during the examination of another individual procedure, that a group action is more appropriate, and the plaintiff may then, in writing, ask the court to convert his action into a group action, provided that the defendant agrees and it is clear that the advantages of group action outweigh the disadvantages to the defendant of such a procedure.</p> | |
| 3 – Admissibility of the action and the authorisation procedure | | | | |
| 3-1 Conditions for admissibility | A certain number of complaints must raise | If at least ten applications on identical questions have | The complaints of the group members must be | The aim of the action is the payment of |

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| | <p>common or connected de jure or de facto questions. There must be a major advantage for the court and the parties in having these cases examined collectively.</p> | <p>been entered within four months, the first court must defer judgment on the questions common to these applications and forward the matter to the Higher Regional Court so that it may decide on the model procedure.</p> | <p>identical or of a similar nature as regards the damages suffered. The number of legal bases for the complaints of the group members must not be so large as to render the procedure unmanageable. Group action must offer an advantage compared to other judicial procedures and the group must be identified appropriately. Moreover, the entity or plaintiff who brings the action on behalf of the group must be an appropriate representative for the group, must possess the necessary financial resources for the proceedings, and must not have any interests which run counter to the group's interests.</p> | <p>compensation or the fulfilment of a specific obligation on the part of the defendant. It may also seek to have the defendant's conduct declared unlawful. The collective action should be advertised in advance so that the injured parties may assert their rights or their individual interest. The publication expenses come under the assessed costs.</p> |
| 3-2 The authorisation Order | | | | |
| 3-2-a Request for authorisation | <p>The procedure usually begins with the examination by the judge of a request for an authorisation order, called a Group Litigation Order (GLO), submitted by a solicitor, on the grounds that there are or there might be a certain number of applications concerning common or connected de facto or de jure questions. The request for a GLO may be made by a plaintiff or a defendant, or even the court, at any time,</p> | | <p>There is no specific rule concerning authorisation or the decision to bring the procedure.</p> | <p>The admissibility of the request is assessed when the judge delivers his decision.</p> |

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| | <p>provided however that the Lord Chief Justice or the Vice-Chancellor have consented. The request for a GLO must contain: a summary of the nature of the dispute, the number and type of the complaints already submitted, the number of parties liable to be involved, the de facto or de jure questions which might be put during the dispute and whether there are questions distinguishing smaller groups from the complaints of the overall group.</p> | | | |
| <p>3-2-b Discovery</p> | <p>The parties and the court must establish together the extent and deadlines for communicating evidence very early in proceedings and in light of the circumstances of the case. Both plaintiffs and defendants are required to provide appropriate information. So as to facilitate an amicable settlement. Unless the court decides otherwise, any communication, by a plaintiff included on the register, of evidence concerning the questions relating to the GLO must be forwarded to all the plaintiffs included or to be included on the register. Experts' opinions are limited to what is reasonably required to settle the dispute.</p> | | <p>No discovery</p> | <p>The forms of proof are governed by the traditional rules: each party must provide proof and the court may sometimes ask that certain specific evidence be brought to the discussion.</p> |

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| <p>3-2-c Content of the order</p> | <p>The GLO will specify which court will examine the complaints included on the group register. The GLO will order that a register be kept in which all the complaints will be registered, will set out a list of connected de facto and/or de jure questions for the resolution of the dispute, will confirm the choice of one or more cases (or will choose them itself) which will be examined as test cases (the decision on these will constitute case law), may appoint the solicitor of one or more parties to be principal solicitor for the group of plaintiffs or the group of defendants, may order that the complaints be transferred to a principal court, may order that judgment be deferred on all the other connected complaints until a decision is delivered on a test case, will order that future connected complaints be added to the action and may set a date after which no further plaintiffs may be added to the register.</p> | <p>The applications judged admissible will be announced publicly by the court which will then include them in a register of complaints drawn up by the Electronic Federal Gazette and available via internet (www.ebundesanzeiger.de).</p> | | |
| <p>3-2-d Publication of the order</p> | <p>The GLO will set the conditions for publication. Service of process is not sent directly to all the persons potentially concerned by the GLO. When</p> | | | |

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| | <p>the court draws up an order on its own initiative, without hearing the parties or giving them the opportunity to be represented, a concerned party may request that the order be disregarded, amended or suspended. When a hearing has been held or when certain parties have had the opportunity to be represented but one party has not received service of process or has not had the opportunity to be represented, the latter has the right to contest the adoption of the order, requesting that it be disregarded, amended or suspended. He must contest this before a deadline set by the court or within seven days following the date on which he became aware of the order.</p> | | | |
| <p>3-2-d Procedure subsequent to the order</p> | <p>Once the GLO has been drawn up and unless the principal court decides otherwise, every complaint already included on the register of the group will automatically be included in the multi-party action. Hearing dates already set, external to the group's dispute, are cancelled. Complaints already pending will be transferred to the court and included on the register. If the court decides not to draw up a GLO, each</p> | | | |

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| | complaint will be examined individually. An appeal is possible, subject to authorisation by the judge. | | | |
| 4 – Trial | | | | |
| 4-1 Decisions and Steps | | | | |
| 4-1-a Extension of the action | | | The court may permit the plaintiff to extend a group action to include other complaints or new members, if this does not result in any major delay or disadvantage to the defendant. The request to extend the group must be made in writing and contain the same information as the statement of claim. | |
| 4-1 b Abandoning or withdrawing the action | Should the principal court decide that a complaint cannot easily be examined together with the other complaints included on the group's register, or if it considers that including a complaint on the register would have an adverse effect upon the examination of the others, it may order that the complaint in question not be included on the group's register, or that it be withdrawn. If the court considers that a particular complaint does not fulfil the registration criteria, it may order that | | The test claimant may abandon the group action within the deadline set for sending the agreement, and the procedure will then be abandoned. He may also abandon part of the questions connected to one member's complaint, and that complaint will be abandoned. In that case, the relevant group member may submit to the court, before a specified deadline, a written notice stating that he wishes to be a party and bring an action in defence of his rights. The test claimant's action will then be separate, and may be | |

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| | <p>it be withdrawn from the provisions of the GLO. In case of withdrawal, the complaint may still be examined individually, unless a subsequent decision decrees that it be abandoned, rejected, suspended or settled.</p> | | <p>transferred to another competent court.</p> | |
| <p>4-1- c substitution of the test claimant</p> | | <p>The parties involved in the model procedure may accept an agreement, as well as the third parties who have entered applications.</p> | <p>If the plaintiff can no longer be considered an appropriate test claimant for the group members, or if he is involved in an appeal, the court appoints another person as test claimant, who has the right to bring a group action. If no new test claimant can be appointed, the action will be abandoned.</p> | |
| <p>4-2 Amicable settlement</p> | <p>The English system does not allow confirmation, in so far as the settlement is not mandatory for all the parties to the action and does not prevent the action being pursued. However it is urged by the judge. If the defendants agree to a settlement entailing a global offer, the plaintiffs must decide how this sum will be distributed. However, the court may set an amount and impose a distribution mechanism. If a test claim is settled amicably, the court may order that another complaint be</p> | | <p>The test claimant is authorised to negotiate an amicable settlement with the defendant on the group's behalf. In order to be valid, this settlement must be approved by decision of the judge. It must not discriminate against certain members nor be clearly unfair. It then applies to all group members without discrimination. However, it will only be binding upon group members after service of process and a court injunction.</p> | |

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| | substituted as test claim. In this case, all decisions taken prior to the substitution apply to the new test claim. | | | |
| 4-3 Decision | | | | |
| 4-3-a The judge will usually deliver his decision first on the common questions and then on the individual questions. | Concerns one or more test cases. The judge first sets out the principles. | At its discretion, the court will appoint the model case and the model plaintiff. The decision is delivered via model decree. | The court may deliver a decision which, for certain members, is a final decision on fundamental questions and for other members, signifies that discussion on one particular question has been adjourned. The court will then order each group member whose case has not received a final decision to request, before a set deadline, that the question pending be examined. If a group member does not submit such a request, his action will be rejected, unless the defendant has not consented to the request or there are clear grounds for the action. | There are specific rules concerning content and fulfilment in the case of actions brought by consumer associations. If the defendant is sentenced to fulfil certain obligations, the judge must identify the consumers who will benefit from this fulfilment. The judge's decision must at least set down the criteria for benefiting from this fulfilment. If the decision declares the defendant's conduct to be unlawful, it must decide whether the sentence affects injured parties who are not involved in the trial. If consumers take part in the action, the decision must give a ruling on their specific requests. |
| 4-3-b Sentence | The judge may order collective or individual collection. Should the court order individual collection, each member must enter his individual complaint in the year following the publication of the notice. The court has the discretionary power | The model decree is mandatory. The first court will then give a ruling based on the decision of the Higher Court regarding the individual questions, in particular the amount of compensation. It is possible to appeal to the German Supreme Court (Bundesgerichtshof) against the | | A decision awarding compensation to a consumer constitutes a writ of execution. There is a specific procedure should the decision not establish individual damages, and simply identify the criteria and conditions necessary for obtaining |

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| | <p>to decide how the balance will be allocated. Either each party is attributed the amount of compensation, or the judge attributes a lump sum to be distributed by the group. A third party is appointed to assess the complaints individually or distribute an amount to each of the members, under the supervision of the court.</p> | <p>decision of the Higher Court.</p> | | <p>compensation. Third parties who are not involved in the trial may benefit from the decision on the collective action provided they fulfil the conditions identified in the decision.</p> |
| <p>4-3-c Scope of the decision</p> | <p>The decision or order is binding upon all the complaints which were included on the group's register at the time when the decision was delivered or the order drawn up. The court may decide that the decision or order is also binding upon complaints subsequently added to the group's register. The resolution of a collective action does not necessarily result in the resolution of each complaint. The appeal against the decision or order may be collective as well as individual. Any party to whom the judgment or order is unfavourable may request authorisation to appeal. A party whose complaint was added to the register after the decision was delivered or the order drawn up may not request that the decision or order be disregarded, amended or</p> | | <p>The group members are not bound by the decision unless they have previously submitted to the court in writing their agreement to take part in the group and to benefit from the procedure. In this case, the decision will have authority over all the members as if they had acted on their own account. An appeal against the decision may be lodged only by the group.</p> | |

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| | suspended, nor may he appeal; he may however request that the decision or order not be binding upon him. | | | |
| 4-3-d Service of the decision | | | The court must serve the decision or final decision, as well as the settlement which is subject to a request for confirmation, to the group members. | |

Collective actions in EU Member States (II)

| | Netherlands | Denmark | Portugal | Finland |
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| Definition | <p>27 July 2005 saw the adoption of an Act on collective settlement of mass damages (Wet collectieve afwikkeling massaschade), which facilitated the collective settlement of such damages (articles 7:907 CC and 1013 CPC). This procedure was created for accidents in which a large number of parties suffered the same injury at the same time. It can only be used where victims, represented by an association, have reached an amicable settlement.</p> | <p>A class action proceeding has been created by Act 181 of 28 February 2007, which will enter into force on 1 January 2008. Class action is presented as a distinct form of procedure intended to enable a – possibly large – number of similar claims to be treated in one and the same suit. The procedure is different for small-claims (opt-out) and for larger claims (opt-in). In addition, only the Ombudsman may conduct the opt-out proceeding.</p> | <p>Portugal has created a class action procedure whose principle has been enshrined in the Constitution since 1989 and which provides for a "right of popular action" (Acção Popular) for the prevention, cessation or pursuit in law of some infractions – Art. 13 of Act 24/96 "Estabelece o regime legal aplicável a defesa dos consumidores". Portugal also has a suspensory proceeding – Art. 21 of Act 24/96 and Arts. 1(2) and 4 (1) of Decree 234/99 – which can be brought by the Institute of Consumers (Instituto do Consumidor) in regard of goods and services that constitute a risk to the health, safety or economic interests of consumers. Only the cessation, suspension or interruption of the sale of these goods can be sought.</p> | <p>Since 1995, several committees have been tasked with looking into the creation of a class action in Finland. The last report dates from March 2006. Following this report, a law establishing class action, "Ryhmäkannelaki", was passed on 13 April 2007 and will come into force on 1 October 2007. This law has been presented as reinforcing the procedure created in January 2007 which enabled the Ombudsman to initiate an action before the Finnish Consumer Complaint Board. Were the recommendations of the Board not to be followed, the Ombudsman could initiate this class action (see the chart Representative action in the EU Member States (I)).</p> |
| Field of application | The procedure is of general application. | | The law establishes the scope of the "popular action" as follows: public health, the environment, quality of life, protection for the consumption of goods and services, the cultural heritage and public property. | A class action can only be initiated for collective litigation in the fields of consumer protection (defective goods, contractual clauses, investment and insurance products). Cases involving stock market investments are excluded. |
| 1 – Filing the claim | | | | |
| 1-1 Prerequisites for the class | | | | |

| Action | | | | |
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| <p>1-1-a The class</p> | <p>A group of plaintiffs cannot itself act. They must be represented by a representative body whose articles cover consumer protection.</p> | <p>In the opt-in proceeding, the action can be brought by a consumer, an association, a private institution or other grouping, providing the action falls within its remit, or by the consumers' Ombudsman or other legally competent public authorities.</p> <p>In the case of a class action with opt-out, only a legally empowered public authority (such as the Ombudsman) may initiate the proceeding.</p> <p>In the opt-in procedure: the tribunal sets a deadline for written notice of participation in the class action. The tribunal determines the address to which such notification should be sent. Where justified by special circumstances, the tribunal can allow the adhesion to be made after the deadline.</p> <p>In the opt-out procedure, the tribunal can set a deadline for exclusion from the class action by written notification. The tribunal decides the address to which this notification must be sent.</p> <p>Where justified by special circumstances, the tribunal can allow the renunciation to be made after the deadline.</p> <p>The tribunal can decide that notification shall</p> | <p>Any citizen, as well as associations or foundations representing interests protected by the law within the field of application of the class action, can act if necessary, without mandate, on behalf of all the members concerned</p> <p>The group does not have to be already constituted when the petition is lodged and can be created in the course of the proceeding and even when the damages are being recovered. Those involved do not need to be precisely identified.</p> | <p>Only the Ombudsman can initiate the proceeding.</p> <p>The tribunal can rule that for some issues the claims of some class members be treated separately in sub-classes</p> |

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| | | be made entirely or partially by means of public announcement. It can enjoin the group's representative to perform the notification. The costs of this notification are paid provisionally by the group's representative. | | |
| 1-1-b Defining the class | <p>Opt-out</p> <p>Any party not wishing to be bound by the settlement has three months after its approval to make this known.</p> | <p>Opt-out and Opt-in</p> <p>- Opt-out for small claims collective actions where there is no likelihood of individual proceedings being initiated. At the request of the group's representative, the tribunal decides that the class action will cover class members who do not abstain from the proceedings. All parties are automatically party to the proceedings. Only the Ombudsman can initiate this proceeding with opt-out.</p> <p>- Opt-in for all other disputes.</p> | <p>Opt-out</p> <p>Once the petition has been lodged, the tribunal notifies identified parties individually and unidentified parties through newspapers or public notices.</p> | <p>Opt-in:</p> <p>Anyone wishing to take part in the proceeding must come forward and explicitly join. Victims can adhere to the action by filling in an online form.</p> |
| 1-1-c Representative | The representative body. | <p>- In the action with opt-out: the tribunal can designate the consumers' ombudsman or other legally competent public authorities as representative.</p> <p>- In the action with opt-in: the tribunal can designate associations, private institutions or other groupings as representative if the proceeding falls within the purpose of this association (for example, the</p> | The right to conduct a "popular action" is accorded to any citizen exercising his civil and political rights, to associations and foundations that defend interests protected by the law, and to local authorities. | Only the Ombudsman can act as representative |

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| | | consumers' council in a case regarding consumers), or the consumers' ombudsman or other legally competent public authorities. | | |
| 1-2 Court costs and legal aid | | | | |
| 1-2-a Court costs | | Usually, only the parties are obliged to pay the costs of the proceeding. The tribunal can, however, elect to impose some of the costs on the class members. The group's representative can be required to deposit a guarantee for the court costs and to indemnify the other party. Furthermore, the members of an opt-in class action group can be required to deposit a guarantee as a condition for joining the class action. An individual member of the group can be required to pay the court costs corresponding to this guarantee plus the amount, where appropriate, he would stand to gain by participating in the group. In the case of an opt-out class action, a guarantee cannot be required from the group members. | In the civil courts, the presence of a lawyer is obligatory if the economic value of the protected interest exceeds the maximum authorised by the judicial body dealing with the case. If the case results in – even partial – victory, no legal costs whatsoever are paid. If the case fails completely, the judge can set an amount for the action pursued of between 1/10 and 1/2 of the normal costs. Lawyers are paid by the parties according to the normal law. There are no contingency fees. | Only the parties to the proceeding are required to pay the costs. Class members are not deemed parties to the procedure. |
| 1-2-b Legal aid | | If the court costs imposed on a member of the group are not covered by liability insurance or other form of insurance, they will be | Those of limited means can have their lawyers' fees and sometimes the court costs paid through a legal aid mechanism | |

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| | | paid by the Treasury if the class action meets the conditions for a free suit. | | |
| 2 – Referral to the tribunal | | | | |
| 2-1 Competent tribunal | The Amsterdam Court of Appeal is competent to approve the settlement. | | There is no dedicated judicial forum. | Jurisdiction lies with the tribunals of first instance (Turku, Vaasa, Kuopio, Helsinki, Lahti and Oulu). |
| 2-2 Filing the class action application | | The class action is initiated by the filing of a claim before the tribunal. The claim can be lodged by anyone eligible to be designated as representative of the group. The claim must include a description of the class, information about how the class members can be identified and informed of the action, and a statement by the representative of the class that he is ready to assume this role. | A class action is filed under the general rules for civil procedure. The claim must specify: the class, the common or similar facts underlying the claims of the class members, the known facts about the applicant that could be important for examining some claims, other facts important for determining whether the individual claims should be the subject of a class action. The applicant will also set out in the petition the names and addresses of all the class members and the facts to be notified to the class members. It may emerge in the course of an individual action that a class action would be more appropriate. The plaintiff can then ask the court in writing for his action to be converted into a class action if the defendant consents and if it is clear that the benefits of the | The claim must indicate: <ul style="list-style-type: none"> - the class concerned in the action, - known claims, - the facts on which these claims are based, - reasons why the matter can be addressed in a class action, - circumstances known to the plaintiff that are particularly important for examining the claims of some of the class members, - insofar as possible, the evidence the plaintiff intends to present in support of his action and the purpose served by each piece of evidence, - an application for reimbursement of court costs if the applicant considers this appropriate, and - the reason why the tribunal has jurisdiction. |

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| | | | class action outweigh the disadvantages that such a procedure would entail for the defendant. | |
| 3 – Eligibility of the action and authorisation procedure | | | | |
| 3-1 Eligibility conditions | This class action is possible if the litigation involves: - shared rights and obligations or the same factual and legal bases - claims or obligations of the same kind based on the same factual and legal bases. | The essential conditions for initiating a class action are as follows: - there must be a claim of the same nature involving several parties, - a class action must be the best way of addressing these claims, - it must be possible to effectively identify the class members – i.e., the parties affected – and inform them of the proceeding, – it must be possible to designate a representative. | The initial plaintiff does not need to be correctly represented. It is enough that the parties are entitled to act, that the petition is not manifestly unfounded and that the interests concerned are ones protected by law. | The proceeding is possible if: - several parties have the same claim based on common or similar circumstances against the same defendant, - a class action proceeding is appropriate given the size of the class, the nature of the claims and the nature of the evidence adduced, - the class is sufficiently well defined. |
| 3-2 Authorisation order | | | | |
| 3-2-a Application for authorisation | Entities entitled to act can initiate a case for damages incurred in their name and in the interests of those concerned | The tribunal must affirm that the nature of the claim makes a class action appropriate. | A preliminary ruling on eligibility is issued. | |
| 3-2-b Discovery | | | No discovery | |
| 3-2-c Substance of the order | | The tribunal determines the framework of the class action. If a class action is annulled or dismissed, the class members must be informed, unless this is patently unnecessary. If the class action is annulled or dismissed, each member | | |

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| | | <p>of the group affected by it can, by written notification to the tribunal within four weeks, intervene regarding his claim and pursue his case with an individual proceeding. The same holds if the tribunal decides that an action cannot not be addressed through a class action</p> | | |
| 3-2-d Publication of the order | | | <p>The tribunal proceeds to inform interested parties either personally or by public announcement in the press (non-identified interests). The notice calls on interested parties to declare whether they wish to exclude themselves from the action. The judge also proceeds to summon the defendants.</p> | <p>The tribunal must inform the parties promptly by post or email that a class action proceeding has been launched and name the presiding judge. The tribunal must set a deadline for participation in the class. The applicant (Ombudsman) must, by post or email, inform the class members whose identity he knows that the case is pending. If the notice cannot be sent in this way, it must be published in one or more newspapers or in some other appropriate manner.</p> |
| 3-2-d Procedure following the order | | | | <p>The applicant (Ombudsman) drafts a petition setting out the names of the members, their addresses, professions and, if necessary, the reasons for the action. The petition for a hearing must be lodged with the tribunal within a month of the deadline for participation in the group. The</p> |

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| | | | | tribunal may extend the deadline if special reasons so merit. Following receipt of the petition for a hearing, the tribunal issues a summons enjoining the defendant to reply in writing. |
| 4 – Legal proceedings | | | | |
| 4-1 Decisions and measures | | | | |
| 4-1-a Extension of the action | | | | |
| 4-1 b Renunciation or withdrawal from the action | | | | |
| 4-1-c Substitution of the representative | | The tribunal can designate a new representative if this proves necessary. In collective actions with opt-in, the tribunal can designate a new group representative if this is requested by at least half of the group members who have associated themselves and if the request is accompanied by a statement by the new representative of his readiness to assume the role. | | |
| 4-2 Amicable settlement | In the case of a class action, damages and interest can only be secured if there is an amicable settlement. The settlement must involve: -an agreement between one or several parties who undertake to pay compensation and an entity which represents the interests of a group | The compromises struck by the group representative in a class action case are only valid when approved by the tribunal. The tribunal approves the compromise unless this involves an unacceptable discrimination of some class members or is, for other reasons, | Settlement is possible at any time. It must be approved by the judge and communicated in the same way as the notification of interested parties. | |

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| | <p>(class) of parties (victims) as set out in its articles</p> <ul style="list-style-type: none"> -a definition of the group(s) of parties in whose interest the settlement is made - the number of parties in the group(s) - the amount of the indemnity going to the group(s) - the conditions that must be met for parties to receive the indemnity - how the indemnity is calculated - names and addresses of those who must be informed of the right to opt out - the indemnity must be established objectively and it must be set out in the agreement - if a third party is designated to arrange the indemnity, this party must be a party to the agreement. | <p>manifestly unreasonable. The tribunal can decide that notice must be made.</p> | | |
| 4-3 The judgement | | | | |
| 4-3-a In most cases, the judge will rule first on common and then on individual issues. | <p>In the case of an amicable settlement, one or several parties agree to pay damages and interest to all the victims. The damages and interest are assessed using an indemnity scale for collective actions. The settlement is between the association and the parties who will pay the indemnity.</p> | | <p>Identified claimants are compensated in proportion with their losses as determined by the judge. Sums awarded to non-identified claimants are sent to the Ministry of Justice, which retains them until the right lapses (3 years). Thereafter, they will be used to finance access to law and the legal system in other "popular actions". There is no punitive interest or damages.</p> | <p>The class members are not considered as parties to the proceeding and do not have a right to be heard.</p> |
| 4-3-b The judgement | <p>Those who have not asked to be excluded are</p> | | <p>General application of civil procedure rules.</p> | <p>An application may be made for a practice to be</p> |

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| | compensated at a time specified in the settlement (one year at the latest). Those who do not claim their compensation in time forfeit their rights. | | | halted or for an injunction to prevent it. Financial reparation may also be requested, as may compensation for physical injury. |
| 4-3-c Scope of the judgement | All the parties named in the settlement are bound by the judgement, which is enforceable. They can only exclude themselves by making a written declaration. | Tribunal judgements made in a class action are legally binding on the class members concerned by the proceeding. If the group representative does not submit an appeal, an appeal can be submitted by anyone who may be designated representative of the group. If the group's opposing party lodges an appeal against a class action judgement, the appeal is dealt with according to the rules governing collective actions. | The judgement applies indiscriminately to all claimants, save those who have expressly excluded themselves. Under the general rules on civil proceedings an appeal against this ruling can go as far as the Supreme Court. The appeal can be collective or individual. The judge can decide that the appeal will not have suspensory effect. | Parties may exclude themselves from the proceeding before the judgement is given; thereafter, all the class members are bound by the decision. |
| 4-3-d Notification of the judgement | | | Judgements are notified to the identified parties and if they win the case, must be published – at the cost of the unsuccessful party – in two newspapers chosen by the judge. | |

Collective redress in non-EU States

| | United States | Quebec | Brazil |
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| Definition | Article 23 of US federal rules of civil procedure, amended by the Fairness Act of February 2005, created "collective actions". One or more individuals or an organisation representing a group can file a lawsuit on behalf of group members, without the latter being individually identified. | Several Canadian provinces (Quebec, Ontario, etc....) have legislation on collective actions. Such lawsuits can also be brought to the Federal Court. The Quebec model known as "recours collectifs" entered into force in 1979 and was amended in 2002 (Articles 999-1052 of the Code of Civil Procedure); this procedure enables one member | The right to collective actions has been enshrined in the Brazilian Constitution since 1988. The Public Civil Action law adopted in 1985 and the Consumer Code (Article 81) created the "Ação coletiva". This procedure is instigated by a plaintiff representing a group with a view to its protection in judicial proceedings. The judgment which is |

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| | | to file a lawsuit without authorisation on behalf of all members. Defence actions do not exist (article 900 of the Code of Civil Procedure). | passed on this occasion applies to the group as a whole. |
| Scope | Collective actions were generalised in 1966 to all fields: civil rights, consumer law, environment law, labour law, etc. | Collective actions are of general application. | <p>There are several types of collective actions:</p> <ul style="list-style-type: none"> - popular actions against acts which are damaging to public heritage - Public civil action against moral damage and damage to national heritage concerning the environment, consumers, property and rights of artistic, aesthetic, historical or touristic value, etc. - Consumer Code group action against acts which infringe diffuse, collective or homogeneous individual rights of consumers. - rights are diffuse when it is difficult to identify which consumers are victims (e.g. misleading advertising). Diffuse rights are transindividual and indivisible; they belong to a group of nonidentifiable individuals who are only united by factual circumstances (such as buying the same products or watching the same TV programme). - rights are collective when consumer victims are easily identifiable. <p>The burden of proof rests on the group. Actions can be brought both by a consumer association and a group of consumers if the group comprises a majority of the victims. Collective rights are also transindividual and indivisible but, unlike diffuse rights, there is a legal link between them or with the defendant (e.g. a bank, a credit company or a school infringe collective rights by imposing excessive prices or illegal charges on their customers. There is a contractual link between the members of the</p> |

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| | | | <p>group and the defendant).</p> <ul style="list-style-type: none"> – individual and homogenous rights: in this case a class action is to remedy individual damages. It concerns subjective rights with a common origin, and relates to common questions of law or fact. – Collective injunction warrant: damage caused by the illegal act of a public authority. |
| 1 -Instigation of the Proceedings | | | |
| 1-1 Preliminary conditions for a class action | | | |
| 1-1-a The group | <p>The group can be constituted during proceedings or when financial penalties are applied. It must be constituted from a number of persons, who can be precisely identified upon allocation and who are at least easily identifiable (the group must be sufficient in number, and its members' interests must be sufficiently similar and welldefined).</p> | The group is only defined at the authorisation stage. | <p>Group-action to compensate individual damages (individual and homogenous rights): only after judgment has been passed on responsibility do consumers come forward and constitute a group. In other types of group action, the group is an abstract entity.</p> |
| 1-1-b defining the group | <p style="text-align: center;">The opt-out</p> <p>This goes back to the origins of the American system. The group automatically includes all potential victims of a particular conduct with the exception of those who have explicitly declared their wish to opt out from the group thus constituted.</p> | <p style="text-align: center;">The opt-out</p> <p>An individual who finds out that a class action lawsuit has been filed can decide to opt out. In that case he should inform the clerk of the Superior Court by registered post of his wish to opt out before the expiry of the opt out period set by the judge and announced by a notice published in the newspapers.</p> | <p>The system varies depending on the type of Consumer Code classaction:</p> <ul style="list-style-type: none"> – Infringements of diffuse rights: protection of diffuse rights does not involve protecting the individual rights of group members. Judgement generally involves a certain degree of restitution in kind. In the rare cases where financial compensation is ordered, the money is paid into a government funds and not to group members. If they have suffered individual loss, they must apply for compensation by filing an individual lawsuit or |

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| | | | <p>a class-action lawsuit for the defence of individual homogenous rights.</p> <ul style="list-style-type: none"> – The same applies to infringement of collective rights. In general, a lawsuit is initiated to bring about cessation of an activity by the defendant. – Infringement of individual homogenous rights: opt-in <p>The system requires explicit agreement to become a party to the instigated action. The lawsuit requires explicit authorisation, and silence amounts to opting out.</p> <p>The outcome of the case does not benefit initiators of individual lawsuits unless they request suspension of their individual proceedings within 30 days from filing the class action lawsuit.</p> |
| <p>1-1-c the representative</p> | <p>The representative is a person who acts on behalf of the group members in view of the fact that his legal situation is representative of the members. However, no legal definition exists, and a mandate is not required. In addition, a member of the group can also be heard during the inquiry.</p> | <p>The representative is a member of the group empowered by the court to represent the other members. He leads the action as a whole. The representative can be a legal person under private law, a company or an association. No mandate is required. However the court has discretionary powers to hear a member of the group if it considers that it may be useful.</p> | <p>Lawsuits may be initiated:</p> <ul style="list-style-type: none"> – by any citizen in the case of popular action – by the Public Prosecutor's Office, the federal government, federal states, municipalities, independent administrations, public companies, foundations, semi-public companies and associations in the case of public civil actions. – by the Public Prosecutor's Office, the federal government, federal states, municipalities, and public administrative entities or bodies in the case of Consumer Code class action; also by associations and consumer groups in the case of class action to compensate individual damages. – by political parties represented in the National Congress, trade union organisations, organisations representing groups, and associations which have been properly constituted and operating for at least a year, to defend members or associates |

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| | | | in the case of the collective injunction warrant. |
| 1-1-d Legal counsel | Legal counsel is officially designated by the certification order | | |
| 1-2 procedural costs and legal aid | | | Collective actions are seen as helping to make the law more democratic. For this reason, legislative authorities have exempted such lawsuits from payment of procedural costs (Article 87 CDC). However, if the plaintiff has acted in bad faith, financial penalties may be applied. |
| 1-2-a procedural costs | "Contingency fees" system whereby the plaintiffs' lawyer pays an advance on procedural costs and is remunerated on the basis of a percentage of compensation paid out to the group. | The representative of the group bears sole responsibility for costs and expenses in the case of an unsuccessful lawsuit. Lawyers' fees are fixed by the court. The law provides for judicial supervision of the agreement. The principle of "contingency fees" applies. | |
| 1-2-b Legal aid | No legal aid | An assistance fund for class action suits which is a public law legal entity has been set up. The fund can advance the procedural costs. The assistance is refundable if the lawsuit is successful. Besides financing lawsuits, the fund also provides information on collective actions. The fund is financed partly by subsidies from the Ministry of Justice and partly self-financed by refunds on advances and a percentage levied on undistributed awards (sums awarded as compensation and not claimed by victims). The fund is managed by a body independent of the government. | |
| 2 – Submission of a case to the court | | | |
| 2-1 the court having | Since the Fairness Act (2005), collective | The Superior Court has sole jurisdiction in the first | The court with jurisdiction over the action is the |

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| <p>jurisdiction</p> | <p>actions in principle fall within the jurisdiction of federal courts, whereas state courts have special jurisdiction. Federal courts have "original jurisdiction" over collective actions for sums of over \$5 million involving the residents of several federal states or residents of one state and a foreign state. The law therefore provides for "removal", i.e. transfer to a federal court by the defendant of a class action lawsuit which fulfils these conditions and which was originally brought to a state court. The aim is to remedy abusive "forum shopping" practices with plaintiffs' lawyers bringing cases to state courts which are deemed to be favourable to plaintiffs ("magnet jurisdictions").</p> <p>There are two exceptions to the jurisdiction exercised in principle by federal courts over such cases:</p> <ul style="list-style-type: none"> - a court can refuse to rule on a class action lawsuits if twothirds of the group members and the main defendants are residents of the state in which the lawsuit was originally initiated. The law sets out six criteria for the court to take into consideration: - the claims asserted involve matters of national or interstate interest - the claims asserted are governed by laws of the state in which the action was originally filed or by the laws of other states - the class action has been pleaded in a manner that seeks to avoid federal jurisdiction | <p>instance.</p> | <p>court which has jurisdiction over the location where the damages were incurred, or the court of any municipality if the damages extend to three regions, of one of the state capitals if the damages extend to more than three municipalities, or of the federal district for damages extending to more than three states or of national importance.</p> |
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| | <ul style="list-style-type: none"> - the action was brought in a forum unconnected with the class members, the alleged harm, or the defendants - the number of citizens of the state in which the action was originally filed is substantially larger than the number of citizens of another state - during the three-year period preceding filing, one or more other collective actions asserting the same or similar claims were filed on behalf of the same persons - the federal court must decline to rule on a class action for which: <ul style="list-style-type: none"> - more than two-thirds of the group are residents - at least one defendant whose conduct forms the main basis for the claims asserted is a resident of the state where the action was originally filed - the principal injuries were incurred in that state, and during the three-year period preceding the filing of that class action, no other class action has been filed asserting the same or similar allegations against any of the defendants by the same or other persons; or two-thirds or more of the group members and the primary defendants are residents of the state in which the action was originally filed. | | |
| <p>2-2 filing a motion for class action</p> | <p>the parties must file a motion with the court which has jurisdiction. The motion must include the following:</p> <ul style="list-style-type: none"> - substantiation of territorial jurisdiction - an assertion of the impracticability of a | <p>The action is filed by a member of the group. The defendant is notified and both parties are heard.</p> | <p>Filing of a collective procedure is subject to ordinary civil procedure rules. The damage in question must fall within the scope of the law governing one of the types of collective action.</p> |

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| | <p>joinder of proceedings</p> <ul style="list-style-type: none"> - a confirmation of the link which enables the group to be constituted - an assertion that the claims and defence put forward by the representative of the group and its members are typical - a presentation of the reasons for which approval is requested - a summary of the claims for compensation - an oath taken by the parties and their legal counsel(s) to protect the interest of absent members honestly, fairly and adequately - a decision on whether or not to request the presence of a jury. <p>After the motion has been filed, the "primary discovery" or discussion phase begins. The complaint is served on the defendant, who has 30 days to respond or "dismiss" it. This period can be extended on request. At the end of this phase, the judge passes judgment. The motion is filed at the same time as the request for authorisation. Defendants invariably call for dismissal of the lawsuit. If the lawsuit is admitted, the defendant may request a "summary judgment" enabling him to win the case without the need for a trial. If the defendant fails at this stage, and in the absence of an out-of-court settlement, the next stage is certification of the group as requested by the plaintiff</p> | | <p>The initiator of an individual lawsuit can ask for his hearing to be suspended if there is a collective procedure asserting the same legal claims and with the same purpose, until judgment has been passed on the collective procedure.</p> |
| <p>3 – Admissibility of</p> | | | |

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| <p>the lawsuit and the authorisation procedure</p> | | | |
| <p>3-1 Conditions for admissibility</p> | <p>There are specific and general admissibility conditions. The general conditions ("prerequisites to a class action" are as follows: – numerosity: the class must be so numerous that individual joinder of all members is impracticable – commonality: there must exist questions of law or fact common to the class – typicality: the claims or defences of the representative party must be typical of the claims or defences of the persons concerned – adequacy of representation: the representative party must be able to protect the interests of the class fairly and honestly Specific conditions ("collective actions maintainable": the prosecution of separate actions would create a risk of inconsistent rulings; rulings with respect to individual members of the class would harm the interests of other members, or impair their ability to protect their own interests; the opposing party has acted or refused to act on grounds generally applicable to the class; questions of law or fact common to the members of the class predominate over any questions affecting only individual members ("predominance"); a class action is superior to other available methods for the fair and efficient adjudication of the controversy ("superiority").</p> | <p>For the action to be admissible, the following cumulative conditions must be met: – the actions of the members raise identical, similar or related questions of law or fact; – the facts alleged seem to justify the conclusions sought, i.e. the cause is serious ("colour of right" of the lawsuit), without needing to prove the legal validity of conclusions concerning the alleged facts; the purpose of this condition is to prevent frivolous lawsuits; – the composition of the group makes the application of another lawsuit difficult or impracticable – the member to whom the court intends to ascribe the status of representative is in a position to represent the members adequately.</p> | <p>Depending on the nature of the damage, the judge will examine whether the procedural means used (the type of lawsuit) are appropriate and whether the plaintiff has a legitimate cause for action. Current Brazilian law establishes legitimacy of the plaintiff on the basis of one criterion: the plaintiff must be one of the persons stipulated by the law.</p> |

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| | <p>Other factors are taken into consideration, for example the effective existence of a category or group, the interest of members of the class in individually controlling the prosecution or defence of separate actions, the extent and nature of any litigation already commenced and involving members of the class, and the difficulties likely to be encountered in the management of a class action.</p> | | |
| 3-2 The certification Order | | | |
| 3-2-a The request for certification | <p>The petitioner initiating a group action must submit a request for certification (the term used in US law to refer to authorisation). This request also designates an attorney to represent the group. If certification is refused, proceedings continue between individual parties and no longer with the group as a whole.</p> | <p>A preliminary request for authorisation of the lawsuit is submitted. This request ("motion") states the facts of the case and the nature of the lawsuit, and it describes the group; it must be served on the defendant. A central register of motions is kept in the office of the Superior Court.</p> | |
| 3-2-b Discovery | <p>After the request for certification, the "discovery period" begins. This procedure enables the plaintiff to obtain disclosure by the defendant of any documents in the possession of the latter which the plaintiff deems necessary to support his action. In principle Federal Rule 34 does not stipulate any limit on the number of documents whose disclosure may be requested. At the end of the procedure, a hearing (order) is held, during which the parties present their evidence. At the end of this hearing, the court takes a decision on certification. If</p> | <p>Since 1 January 2003, the discovery procedure at the stage of admissibility has been changed. The defendants are no longer allowed to put questions to plaintiffs, nor to request the court to contest the truth of the alleged facts in writing; only oral contestation is possible. They no longer have the right to adduce evidence at the authorisation hearing, nor can they present the facts orally. However, the judge may authorise presentation of appropriate evidence.</p> | |

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| | <p>certification is refused, only the individual plaintiffs can continue the procedure, and not the group as a whole. If certification is granted, in the case of a suit for damages, all the members of the group who can reasonably be identified must be served notice of the certification decision, and be given a chance to opt out from the procedure.</p> | | |
| <p>3-2-c Content of the order</p> | <p>A certification order defines the class and the class claims, issues, or defences, and must appoint class counsel. The court also has the power to decertify the group.</p> | <p>The judgment granting the motion describes the group whose members will be bound by any judgment, identifies the principal questions to be dealt with collectively and the related conclusions sought, orders the publication of a notice to the members, and appoints the member representing the group. The judgment granting the motion may be revised at any time at the request of one of the parties if the court deems that the lawsuit no longer fulfils the conditions for admissibility (amendment or annulment of the judgment).</p> | |
| <p>3-2-d Publication of the order</p> | <p>In the case of a claim for damages, if certification is granted the judge makes existence of the action public by notifying the certification decision to all members of the group who can be reasonably identified, or by means of the press if there are unidentified victims.</p> | <p>The judgment orders publication of a notice to the members of the group. This includes: the description of the group, the right of a member to intervene in the class action, the principal questions to be dealt with collectively and the related conclusions sought, the right of a member to request his exclusion from the group, the formalities to be followed and the time limit for requesting his exclusion; the fact that a member who is not a representative or an intervener cannot be called upon to pay the costs of the class</p> | <p>Once the original request has been received, the judge orders a writ to be served on the accused and publishes an order in the Official Gazette declaring initiation of the action and enabling other victims to join the proceedings. The law also provides for notification of the procedure by means of consumer protection organisations.</p> |

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| | | action; and any other information the court deems it useful to include in the notice. | |
| 3-2-d Procedure after the order | If certification is refused, only individual plaintiffs can continue the procedure, and not the group as a whole. An appeal can be lodged within 10 days of the court's decision. | The representative brings his request in accordance with the ordinary rules within three months of the authorisation. Failing this, the judge may declare it perempted. If the judgment authorising a collective action is annulled, proceedings are pursued between individual parties, in accordance with the ordinary rules. Members have the option to opt out of the group at this stage. The judgment granting the motion and authorising the exercise of the recourse is without appeal. The judgment dismissing the motion is subject to appeal. | |
| 4 – The trial | | | |
| 4-1 Decisions and Measures | | | |
| 4-1-a Extension of the action | | | |
| 4-1 b Voluntary dismissal of the action or withdrawal | Any voluntary dismissal of the action must be approved by the court after a hearing to establish whether it is fair, reasonable, and adequate. With regard to withdrawal from the action, the court must make it clear from the beginning of the procedure that it will exclude any member of the group who so requests and will explain how they can do so. | A member may request his exclusion from the group by notifying the clerk of his decision, by registered mail, before the expiry of the time limit for exclusion. In this case he is not bound by any judgment on the demand of the representative. In the course of the collective action, the law provides for protection of group members by the court. Hence, any discontinuation or out-of-court settlement can only take effect if approved by the court. | |
| 4-1- c substitution of the representative | | A member may, by motion, apply to the court to have himself or another member substituted for the representative. The court may substitute the applicant or another | |

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| | | <p>member consenting thereto for the representative if it is of opinion that the latter is no longer in a position to represent the members adequately.</p> <p>The substituted representative accepts the trial at the stage it has then reached; he may, with the authorisation of the court, refuse to ratify the proceedings already had if they have caused an irreparable prejudice to the members. He cannot be bound to pay the costs and other expenses for proceedings prior to the substitution, unless the court orders otherwise</p> | |
| <p>4-2 Out-of-court settlement</p> | <p>The action may be closed by a settlement or compromise at any stage of the procedure, even after certification. Settlements must be approved by the judge, who must issue an opinion.</p> <p>The 2005 reform, which was intended to prevent certain abuses of the law, strengthened judicial supervision of settlements, particularly in consumer law (the Consumer Class Action Bill of Rights). A federal court may not approve:</p> <ul style="list-style-type: none"> – any proposed out-of-court settlement unless it is deemed to be fair, reasonable and adequate; – a proposed settlement under which any class member is obligated to pay sums to class counsel that would result in a net loss to the class member unless the court finds that non-monetary benefits to the class member substantially outweigh the monetary loss – a proposed settlement that provides for the payment of greater sums to some class members than to others solely on the basis of their closer geographic proximity to the court. | <p>Settlement "transaction" is possible during proceedings, and must be approved by the court, provided that a notice has already been given to members containing certain information specified by the Code of Civil Procedure. Members disputing a settlement may present their arguments to the court.</p> | <p>The parties can sign an agreement or compromise known as an "an agreement to amend conduct" (TAC) Once ratified by the judge, this agreement has the same affect as a judicial decision. By means of this document, the Public Prosecutor's Office or any other public entity or body authorised to file an action signs an agreement with party accused of irregular conduct, thereby obliging them to amend their conduct. In the case of non-compliance with the agreement, the party which is at fault may execute it directly without the need for new proceedings or for prior proof of the facts.</p> |

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| | Not later than 10 days after a proposed settlement of a class action is filed in court, the defendant must notify the appropriate federal or state authorities (the Attorney General or regulatory body if the defendant is a bank or insurance company); failing this, the settlement is ineffective against the plaintiffs. Final approval of a proposed settlement may not be issued earlier than 90 days after notification. | | |
| 4-3 The judgment | | | |
| 4-3-a Usually the judge rules firstly on questions which are common to the group and then on individual questions. | A special feature of collective actions in the US is that juries may be asked to find on a class action if the representative so requests. | The ordinary rules of first instance hearings apply. Judgment is first passed on general questions, and then if necessary on individual responsibility or individual evaluation of the damage suffered by a member. The final judgment describes the group, determines the responsibility or otherwise of the defendant, and orders the defendant to pay damages or to reimburse a certain amount of money. There is no jury. The lawsuit as a whole is conducted by the representative | In the case of group actions to protect individual and homogeneous rights, the judge first decides in principle on finding against the defendant for the damages which he has caused. After the passing of this judgment, the second, "liquid and executory judgment" orders compensation after the victims have declared themselves. |
| 4-3-b Award of damages | It is the jury which determines total damages and interest by combining individual claims. If any undistributed sums are left over, the court may order them to be awarded to a work of public interest. In addition, the jury may decide to condemn the defendant to punitive damages to punish him for his conduct. These damages may only be awarded if the defendant's conduct meets certain criteria. Defendants have the option of requesting the judge for a remittitur (reduction of the | The judge may order a professional to pay "exemplary" damages, equivalent to punitive damages, or to reimbursement of a sum of money. The judge may order collective or individual recovery. – The court orders collective recovery if the judgment enables the establishment with sufficient accuracy of the total amount of the claims of the members, even if the identity of each of the members or the exact amount of their claims is not established. The money is deposited in the office of the | Class action lawsuits to protect diffuse or collective rights: generally, compensation involves restitution together with a penalty. In the case of misleading advertising, the judge usually orders counter-advertising at the expense of the defendant and compensation for damage to consumers' general interests. In the rare situations where financial compensation is ordered, it is paid into a government fund supervised by the Ministry of Justice. The money in the fund must then be used to restore the rights which have been violated or to |

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| | <p>award) if the amount of punitive damages is excessive. In principle, the award is made in favour of the representative, who is then responsible for distributing the award among the victims.</p> | <p>court or with a financial institution. It is then distributed to the members of the group as per the arrangements decided on by the court. The court may also designate a third person to liquidate claims; this person has a similar role to that of the magistrate appointed in French collective proceedings to liquidate claims ("mandataire liquidateur").</p> <p>– If it is not possible to establish the claims with sufficient accuracy, the court orders individual recovery. Each of the members must file his individual claim during the year following publication of the notice. The court has discretionary powers to dispose of the undistributed award.</p> <p>In general, the balance is distributed among non-profit organisations operating in fields which are directly or indirectly related to the issues of the action.</p> <p>With regard to distribution, either each party is awarded a sum of damages, or the judge awards a sum of money to be distributed by the group. A third party is designated to liquidate individual claims or to distribute awards among individual members, under the supervision of the court.</p> | <p>protect rights which are similar to those concerned by the lawsuit (financing research and education projects).</p> <p>Group action to protect individual homogeneous rights: the judge only rules on the responsibility of the defendant. Consumers who are victims must then lodge their individual claims with the court to establish that they are members of the group and to prove the causal link and the damage suffered by them.</p> <p>If only a few consumers come forward during the year following the judgment (as often happens in mass litigation with only small individual damages), the law authorises representative entities to have the decision executed. These then need to prove the total amount of damages suffered by the group. The total amount is paid into the government fund.</p> |
| 4-3-c Scope of the judgment | <p>The judgment has the force of res judicata for all the persons in the group unless they are officially excluded. The Court of Appeals may permit an appeal from an order granting or denying class action certification if application is made within ten days after entry of the order.</p> | | <p>The effects of the judgment depend on the type of rights:</p> <ul style="list-style-type: none"> – in the case of diffuse rights, the decision has erga omnes effects – in the case of collective rights, the decision is effective for all group members – in the case of individual homogeneous rights, the decision, if favourable, is effective for all victims, and if unfavourable, it has no effect on them. |
| 4-3-d Notification of the judgment | <p>The court may require the representative to notify victims.</p> | <p>When the final judgment acquires the authority of res judicata, the</p> | |

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| | Notice may be served at any time to ensure the fair conduct of the lawsuit, including notice of decisions on collective questions. | court orders the publication of a notice containing a description of the group and indicating the tenor of the judgment. | |
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Collective redress in non-EU States (II)

| | Norway | Chile | Israel | Australia |
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| Definition | <p>The new law on civil proceedings (Tvisteloven) adopted in 2007 includes a chapter on collective actions (chapter 32). It will enter into force on 1 January 2008.</p> <p>The new law provides different mechanisms for small claims litigation (opt-out) and cases involving larger claims (opt-in).</p> <p>A collective action can be lodged by a group or against a group.</p> | <p>Law of 14 July 2004 allows certain specified representatives to initiate an individual action, the outcome of which applies to all victims.</p> | <p>A law introduced in Israel in 1988 opened up the financial investment sector to collective action.</p> <p>In 1995, this procedure was extended to infringements of consumer protection law, as well as banking and insurance law.</p> <p>An amending law was passed on 12 March 2006 which allows individuals and organisations to take action against companies or public authorities on behalf of a group of victims.</p> <p>A fund has been created by the new law to support collective action, where the general interest is at stake.</p> | <p>The Federal Court Act was amended in 1992 in order to create a collective action.</p> <p>A representative party may lodge a collective action against the same defendant relating to disputes involving federal law and mutual questions of fact or of law.</p> |
| Scope | | Consumer law | The scope is very broad (all infringements of consumers' interests, discrimination, social rights, protection of handicapped persons, action against the government and public authorities). | All cases come under federal law. |
| 1 – Launching judicial proceedings | | | | |
| 1-1 Prerequisites for collective action | | | | |
| 1-1-a Group | <p>The two types of action can be lodged by a consumer, a representative organisation, an association, or the Ombudsman.</p> <p>The court can decide to establish sub-groups if</p> | <p>The action can be lodged by</p> <ul style="list-style-type: none"> - SERNAC (national consumer's service) - a group of consumers involving at least 50 persons - consumers' associations | <p>An action can be lodged by an individual or an organisation.</p> | <p>The action may be lodged by an individual with a sufficient interest in taking legal action against another individual on his or her own behalf or on behalf of other persons.</p> |

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| | questions of law or fact concern only some members of the group. | | | Seven or more persons must be the victims of the same individual and have cases involving mutual questions of fact and of law. |
| 1-1-b Group size | Opt-out and Opt-in: Opt-out for small claims cases involving a large number of claimants where it is clear that no individual action would be taken: All persons concerned are automatically party to proceedings. Opt-in for other cases. | | | Opt-out : All victims form part of the group unless they decide to opt-out from the group. If they do not opt out, they are automatically bound by the decision. |
| 1-1-c Representative | Is appointed by the court. This person could well be the original claimant, if he/she agrees. The court has the power to appoint a new representative when proceedings are underway. | | | There are no financial circumstances or conflicts of interest which preclude the possibility of being the group representative. The ACCC (Australian Competition and Consumer Commission) may also represent the group. |
| 1-1-d Lawyer | | | | |
| 1-2 Cost of proceedings and legal aid | | | | |
| 1-2-a Cost of proceedings | In most cases the parties involved in proceedings are themselves responsible for the costs entailed. The court can, however, decide to charge members of the group part of these costs in the case of proceedings with an opt-in. It is usually obligatory to have a lawyer. He/she, as well as the representative, have a right to be remunerated for the work carried out | | The court approves the amount of lawyers' fees on the basis of the following criteria: the expected benefit of the action for members of the group, the complexity and difficulty of the case, the benefits for whoever lodged the action, the way in which the lawyer assumed responsibility for the action, the amounts of compensation actually awarded compared to initial | Members of the group are not party to the action and are therefore not responsible for the costs of the action. Only the representative is required to pay the defendant's expenses should the case be lost. Contingency fees are banned in Australia. |

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| | by them. The amount is set by the court. | | requests. | |
| 1-2-b Legal aid | | | | |
| 2 – Submission to the court | | | | |
| 2-1 Court Responsible | Municipal court. | | | The competent court is the federal court. |
| 2-2 Lodging of collective action | | Once the action has been lodged, and the general conditions set out in law have been met, the judge orders that the defendant and SERNAC, if it is not at the origin of the action, be notified. The defendant has 10 days to comment on the action. | | The action must: - provide details of the group or identify the members without necessarily naming them all, - indicate the nature of the actions being brought by members of the group, - indicate the questions of fact or of law common to members of the group. |
| 3 – Admissibility of the action and granting of leave | | | | There is no admissibility stage but members are informed of the start of the collective action and of their right to opt out from it. |
| 3-1 Requirements for admissibility | Proceedings are only initiated if the following criteria have been fulfilled: - several persons must have a claim or be subject to an obligation on a similar legal and factual basis. - collective action is the most appropriate procedure for dealing with claims. | Whether leave is granted or not depends on the following criteria: - the action has been brought by SERNAC, or a group of at least 50 consumers, or a consumers' association. - the practice which is being called into question impacts on the collective and diffuse interests of consumers - the action sets out the factual points which affect the above interests - the potential number of victims justifies, in terms of cost and benefits, recourse to this special procedure. | An admissibility action exists. However, the judge has considerable discretion as regards the admissibility of an action. For example, if the collective action claim involves essential goods and services for consumers and if this action will have an adverse impact on the defendant far greater than the benefits received by members of the group or undertaking, the judge may reject the claim. | |
| 3-2 Granting of leave | | | | |
| 3-2-a Request for the | The collective action is initiated by | The judge must rule on the admissibility of | | |

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| granting of leave | serving a writ of summons which demonstrates that the criteria for granting leave have been fulfilled, and which sets out what kind of action is involved. (opt-out or opt-in) | the action within five days of having received the defendant's comments. If the defendant fails to comment, the judge will rule within the same deadline. | | |
| 3-2-b Discovery | | | | |
| 3-2-c Granting of leave | The court must indicate as soon as possible after the writ has been served whether it will grant leave or not. In granting leave, the court must set out what kind of claims can be considered in the proceedings, the mechanism chosen (opt-in or opt-out), the deadline for registering members of the group (opt-in), determine what proportion of costs will be charged to the members of the group (proceedings with opt-in may include a covering of costs), appoint the representative. | | | |
| 3-2-d Publication of leave granted | The Court must ensure that persons who may wish to join proceedings (opt-in), or who are automatically part of them (opt-out) are notified of the action by means of a letter, announcement, or any other method it sees fit. The possible implications which proceedings may have, as well as the conditions for participating in them must also be detailed. | Once leave has been granted, two notifications are published in national newspapers, informing potential victims that they can join the proceedings. Following such notification, it is no longer possible for an individual action to be lodged against the same defendant on the same issue. | | |

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| 3-2-d Procedure following the granting of leave | | The defendant can appeal against the decision to grant leave. Proceedings are suspended until the Court of Appeal has reached its decision. | | |
| 4 – Proceedings | | | | |
| 4-1 Decisions and Measures | | | | |
| 4-1-a Extension of the action | | | | |
| 4-1 b Withdrawal of action | | | | The judge has the option of separating the claims in individual actions if there are fewer than seven persons involved. The judge may do the same if the cost of identifying group members or distributing the compensation awarded is excessive compared to the total amount of compensation, or if individual actions would be more effective. |
| 4-1- c Replacement of the representative | | | | |
| 4-2 Amicable settlements | The settlement must be ratified by the court in the case of proceedings with an opt-out | The judge can suggest mediation or a settlement as and when he/she deems necessary. | The proposed settlement must be forwarded to members of the group, who are entitled to exclude themselves from the settlement. It must also be submitted to an expert competent in the field who must attest to the reasonable nature of the proposed settlement. The judgment endorsing the settlement must make clear reference to the expert opinion. | |
| 4-3 Ruling | | | | |
| 4-3-a Usually, the | | | | |

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| <p>judge first issues the ruling concerning questions of common interest, followed by those of individual interest.</p> | | | | |
| <p>4-3-b Sentencing</p> | | <p>The ruling must indicate:</p> <ul style="list-style-type: none"> - in what way the facts are relevant to the collective and diffuse interests of consumers - the responsibility, if any, of the defendant, and the penalty incurred - compensation procedure - reimbursement of overpayments. | <p>The judge is free to set the amount of compensation owed to members of the group. The judge may reduce the amount of compensation, or stipulate that it will be awarded over a period of time if he/she believes that the overall amount of compensation due constitutes an excessive cost for the defendant. It might also be the case that the compensation will not be awarded to members of the group but to another, more appropriate beneficiary.</p> | <p>The ruling determines responsibility and sets the amount of compensation for members of the group (punitive damages are possible) either on a collective or individual basis.</p> |
| <p>4-3-c Scope of the ruling</p> | | <p>The defendant can appeal against the ruling. This suspends execution.</p> | | |
| <p>4-3-d Notification of the ruling</p> | | <p>Once executed, the sentence applies erga omnes. The ruling is published at least twice in local, regional and national daily newspapers which are determined by the judge.</p> <p>Interested parties must come forward and present themselves to the same court which issued the ruling within 90 days following the last notice to validate their rights.</p> | | |

Planned reforms for introducing collective actions in Europe

| | Austria | France | Italy |
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| Government and other bills | Recently the Austrian Parliament unanimously requested the Austrian minister of justice to examine the possibility of introducing group (class) action into legislation. | A government bill "in favour of consumers" was presented to the Council of Ministers on 8 November 2006 but withdrawn from the parliamentary timetable at the conference of group presidents in January 2007. | The Italian government tabled a bill on 27 July 2006 (No1495) aimed at introducing collective action by the addition of an article to the Italian consumer code. Four other bills (Nos 1289, 1662, 679 and 1883) proposed a system similar or very close to that in the government bill. Four other bills (Nos 1330, 1443, 1834 and 1882) were also tabled which proposed a very detailed scheme open to any private person wishing to represent consumers. These bills contain a novel feature: the <i>curatore amministrativo</i> ("administrator/representative"), whose task it is to manage the procedure. Nearly all of these bills are currently being examined by the Justice Committee of the Italian Chamber of Deputies. |
| Details of the procedure | With the aid of an expert group, the minister of justice began drafting new legislation in September 2005. The procedure is still in progress. | Articles 12 to 14 of the bill "in favour of consumers" made provision for group (class) action. -Scope of collective action: only concerned consumer law. Only losses resulting from non-performance or improper performance of contractual obligations by the same supplier, involving the same type of contract relating to the sale of products or provision of services could lead to a collective action. Moreover, only material damage suffered by consumers who were natural persons was covered. Finally, a ceiling of EUR 2,000 was set on compensation claimed by a consumer and only Tribunaux de Grande Instance (Regional Courts) authorised by decree would have heard such actions. - Only approved representative consumer associations at national level could have initiated this procedure. | -Government bill (No1495) and bill No 1883: creation of a new article 140(a) in the consumer code providing for a procedure which is only open to some consumer associations, chambers of commerce, industry, crafts and agriculture, and professional associations. They will be able to ask a court to order the defendant to pay damages and interest and reimburse sums due to consumers, on grounds of illegal acts in the performance of a contract, noncontractual illicit acts and anti-competitive behaviour giving rise to multiple damages. The procedure is divided into two stages: |

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| | | <p>The bill provided for a mechanism of representation without mandate for bringing legal action. Consumer groups could have acted directly on behalf of potential victims.</p> <p>- The proposed procedure was divided into two stages:</p> <p>1st stage: the court dealing with the case would only have given a ruling on the responsibility of the supplier concerned.</p> <p>2nd stage: this stage would only have been initiated in the event of a declaratory judgement of responsibility. The court would have ordered the judgement to be published and have fixed a period during which consumers could have claimed compensation from the supplier.</p> <p>Each victim would have then had to make himself known and amicably request compensation from the supplier.</p> <p>In the event of no response or disagreement over the amount proposed by the supplier, the consumer would then have had to individually refer the matter back to the court which had made the first judgement in order to fix the amount of compensation.</p> | <p>- 1st stage – only consumer associations, professional associations and chambers of commerce, industry, crafts and agriculture can bring an action to obtain a judgement that would give a ruling on the existence of damage and determine the minimum amount to be paid to each of the consumers who are victims of unlawful practices. .</p> <p>- 2nd stage - consumer associations, professional associations and chambers of commerce, industry, crafts and agriculture or the supplier refer the matter to the conciliation section of a court or another conciliation body, which fixes the amount of compensation for each consumer.</p> <p>- 3rd stage – if conciliation fails, each consumer brings an individual action in order to obtain compensation.</p> <p>- Other bills similar to the government bill (Nos 1289, 679 and 1662):</p> <p>The procedure is only open to the consumer associations and similar entities listed in Article 139 of decree No 206 of 6 September 2005.</p> <p>However, the scope is more restricted than that of the government bill since it would only be possible to bring action for damages arising from illegal acts committed in the performance of the contracts provided for in Article 1342 of the Civil Code (consumer credit contracts, bank contracts, insurance contracts, etc.) One of these bills (No 1289) even excludes collective action being brought in areas where an arbitration or conciliation mechanism exists in an</p> |
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| | | | <p>independent administrative authority. The procedure is divided into several stages: In bills Nos 1662 and 679, collective action can only be initiated after a preliminary attempt at conciliation. In bill No 1289, this conciliation stage is mandatory following the judgement establishing the existence of damage and defining the criteria for evaluation and compensation. If the preliminary attempt at conciliation fails, each consumer must bring an individual action. - Other bills (Nos 1330, 1443, 1834 and 1882): Anyone who has an interest may apply to the court of the place of residence of the person or one of the persons (public or private) causing the damage for compensation or restitution of money in respect of a harmful act. The associations representing the interests of the group are authorised to bring a collective action on condition that they do it jointly with at least one person who has a legal interest to bring an action. Moreover, any person who potentially belongs to the group but who does not wish to take part in a collective action may bring an "individual" action. The procedure may be undertaken for any "act giving rise to collective damage": unlawful act, omission, culpable breach of contract or tort which interests a plurality of people in similar circumstances. The group is a body of identifiable individuals who have suffered damage, comply with the definition of the group determined by the</p> |
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| | | | <p>court and are included on the register maintained by the "administrator/representative" (opt-in). An "administrator/representative" is appointed by the court. It is his task to collect registrations for the group register and to distribute any compensation awarded as a result of the collective action.</p> <p>The institution of a collective action is not a case of lis alibi pendens within the meaning of Article 39 of the code of civil procedure for persons who, at the time an individual action is instituted, have not expressly opted for a collective action.</p> <p>Provision is made for an admissibility stage:</p> <p>The admissibility petition in respect of the collective action must contain the particulars laid down in Article 63 of the code of civil procedure:</p> <ul style="list-style-type: none">a- details of the competent courtb- the family name, first name, place of residence, date and place of birth of the "group promoter". <p>The family name, first name and place of residence of the person causing the damage.</p> <p>If the representative or the person causing the damage is a legal entity, the petition must contain the name and registered office of the entity together with details of the body with the power of representation in legal proceedings.</p> <ul style="list-style-type: none">c-the fax number or e-mail address at which the lawyer states he wishes to receive communications and notifications during the proceedings.d-the proposed definition of the "group" containing the criteria for |
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| | | | <p>identifying precisely the persons belonging to the group and to whom the legal and factual submissions refer.</p> <p>e- the claim for a specific amount of compensation for damage or for the restitution of a sum of money together with the criteria for its distribution between the participants in the action.</p> <p>f- the legal and factual submissions.</p> <p>g- the list of persons belonging to the group who ask to be represented by the "group promoter", with details of the family name, first name, place of residence, place and date of birth, and an estimate of the damage.</p> <p>h- for each person, evidence must be produced providing proof of damage.</p> <p>An extract of the writ containing a brief account of the evidence and the facts, the claims and the court dealing with the case, must be published in an official gazette within 10 days of serving notice to the person who has caused the damage.</p> <p>The person causing the damage can lodge an objection to the collective action within two months of being served notification, inter alia by disputing the grounds for the admissibility of the action.</p> <p>If the parties reach a compromise settlement, it will not be valid until it has been approved by a majority of the participants in the action in a vote organised by the "administrator/representative".</p> <p>The first vote is only valid if at least 1/3 of the participants take part in the vote. Failing this, a second vote is held without the necessary quorum.</p> |
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| | | | <p>Once the agreement has been adopted, the "administrator/representative" forwards it to the reporting judge for definitive approval. The reporting judge then forwards it to the court, which gives a decision on the agreement (judicial confirmation).</p> <p>The "administrator/representative" sends a notification to all the participants in the action containing details of the agreement concluded.</p> <p>The judgement is delivered by the full court.</p> <p>The "administrator/representative" must take all the necessary steps to enforce the judgement and act quickly to distribute the sums due to the participants in the order in which they were registered (based on evidence of damage for each participant).</p> <p>Lawyers are not permitted to organise collective actions (directly or indirectly). The fees of lawyers working for the "group promoter" can be freely determined, but they must not exceed 10% of the sums obtained. Fees are fixed according to the complexity of the case and the result obtained.</p> |
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