HARBOUR
LITIGATION FUNDING

Harbour View

Access to justice

Summer 2017
Featuring topical articles by guest authors and the Harbour team.

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Access to justice
Breaking down the barriers

Lucy Pert, Director of Litigation Funding.

In the words of the UN, access to justice is a basic principle of the rule of law. In the absence of access to justice, people are unable to have their voice heard, exercise their rights, challenge discrimination or hold decision-makers accountable.

The question posed by Hausfeld herein is pertinent; *what use is the law to any of us – individuals or businesses - if it is not enforceable?*

It is indisputable that the cost of litigation is high and rising. Lord Jackson's succinct foreword to his 2009 Review of Civil Litigation Costs posited that *"in some areas of civil litigation costs are disproportionate and impede access to justice"*.

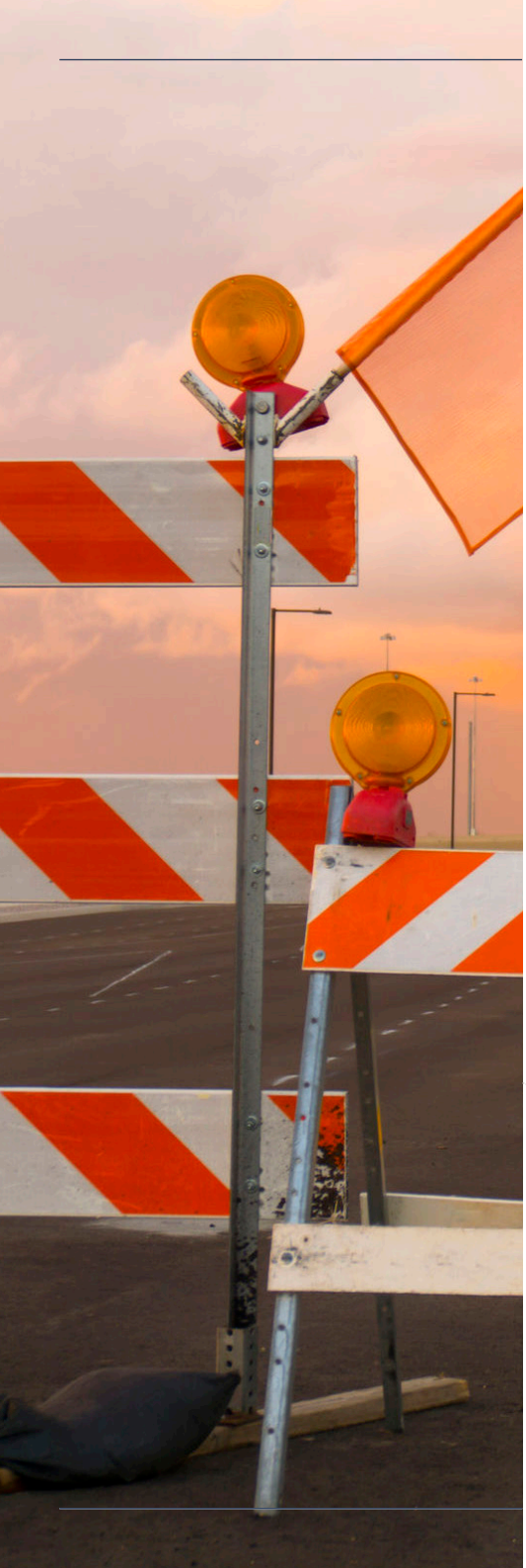
Andrea Coomber of Justice, an all-party law reform and human rights organisation working to strengthen the justice system and supported in their efforts in part by Harbour, addresses what can be done to improve access to justice when funding for legal aid is at an all-time low.

Widely accepted as one of the tools at the disposal of claimants, third party funding can assist with the high costs of commercial litigation and arbitration. The Jackson review expressly approved litigation funding as promoting access to justice. As mentioned by my colleague Stephen O'Dowd in his article, this principle was recently affirmed in the case of *Excalibur Ventures*.

Third party funding can provide access to justice to the truly indigent and Ben Slade from Maurice Blackburn offers outstanding examples of how class actions have allowed access to justice for the socially and economically disadvantaged in Australia. Harbour has funded such group actions, a recent example being our backing of over 15,000 Indonesian seaweed farmers whose seaweed crop was destroyed by an oil spill, and will continue to do so.

Further, Ellen Soerjatin sets out how the Dutch are leading the way in Europe when it comes to collective redress.

"Third party funding's ability to provide access to justice should not exclusively be seen through this narrow prism."



With the cost of litigation so high, even wealthy individuals, small to medium or large businesses can be deterred from pursuing meritorious claims. Defendants with deep pockets can rely on this inequality of arms to garner an unfair advantage over less well-heeled claimants.

It has been said that third party funding has fuelled an increase in litigation against large corporations. Litigation funders, however, only fund meritorious claims that have been through a rigorous due diligence process. Consequently, it would be more accurate to say that corporations can no longer act with impunity and rely on the inordinate cost of litigation to ensure that there can be no civil remedy for those affected. Harbour funds many businesses that, absent the ability to use third party funding, would not have pursued their meritorious claims.

And as pointed out by James Clanchy, there is nothing new in this concept: P&I and Defence Clubs have been breaking down barriers to access to justice in the shipping world for over 150 years.

Enjoy the edition!

Access to justice in the 21st century
A reality check

Andrea Coomber, Director, JUSTICE.

Our conception of access to justice is changing, and needs to change. When legal aid was introduced as a pillar of the welfare state in 1947, roughly 80% of the population was eligible for support. The justice system was 'democratised' and most people were either able to afford a lawyer or eligible to have one provided for them. Our adversarial court system thrived, as did the legal professions.

The last 30 years

But over the last thirty years, state funding for legal advice, assistance and representation has contracted. Thresholds for eligibility have risen and scope for legal aid has shrunk. Most dramatic was the coalition government's 2012 Legal Aid, Sentencing and Punishment of Offenders Act (LASPO) – which saw most social welfare and family cases excluded from the scope of legal aid. A lot has been written about the devastating effects of LASPO – on the decimation of crucial 'early advice', on the creation of 'advice deserts' and on rising numbers of people fending for themselves in courtrooms across the country – which I won't rehearse.

While some political parties suggest that LASPO should be reviewed, none suggest that legal aid will ever be returned to the near-universal provision of the past. One aspect LASPO highlighted is that our adversarial system – predicated on everyone being represented – was no longer fit for purpose.

While LASPO has acted as the final straw, the reality is that as legal aid has decreased over the last thirty years, the majority of the population has been excluded from our courts. For years now, most ordinary people wouldn't qualify for legal aid and realistically would never be able to afford a lawyer, nor be able to expose themselves to the costs risks associated with civil litigation. With twenty years of working for NGOs under my belt, I count myself among this group. For someone faced with a possible civil claim, the options become to represent themselves (most likely, poorly) or to give up on the courts altogether.

> **"Though there is much talk about our courts being clogged up with litigants in person, the truth is that most people just stay away."**

A few years ago the Chief Justice of the Australian Family Court wrote that when a system is faced with large numbers of litigants in person, there are three possible solutions: make people lawyers (through public legal education); give people lawyers (through legal aid) or change the system. The law reform charity that I head, JUSTICE, is very much in the system change business.

Shaping reform

In 2014, a working party of our members, chaired by Sir Stanley Burnton, started work on how the civil courts and tribunals might operate differently. Our work revealed that much of judges' time is taken up doing work that could easily and better be done by someone more junior, through an investigative rather than adversarial system. Most matters going to court aren't legally complicated, or even factually complicated; in many cases people just want to know if there is 'anything in it'. With a lack of free legal advice, they end up in court before a judge, who is often the first lawyer they've spoken to. This is a difficult and unedifying process for everyone, and obviously not the best use of expensive judicial time.

To provide more meaningful help to litigants, our *Delivering Justice in an Age of Austerity Report* of April 2015 proposes the use of what we called Registrars, picked up and now termed Case Officers, to engage in early triage with parties – engaging in Early Neutral Evaluation or mediation with parties, discussing the implications of the litigation and referring complicated matters to a judge. We proposed much greater support for users of the system, through telephone and online advice, with much more generally being done online. In the internet age, our court system's absolute reliance on paper and in-person proceedings seems out of step. A similar approach was recommended by the parallel report of the Civil Justice Council's Advisory Group on Online Dispute Resolution, chaired by Professor Richard Susskind (who also served on our group).

I am delighted that our work has been picked up by the powers that be, and is now shaping the Reform Programme, which is seeing an unprecedented £1bn investment from the Treasury in the modernisation of the courts. In the middle of last year, the final report of Lord Justice Briggs on the civil courts structure (which he discussed at length in the previous **Harbour View**) proposed the adoption of a system very much in line with that suggested by JUSTICE for claims of up to £25,000, through an Online Solutions Court.

And it's not just civil justice. Last October, the Lord Chief Justice, the Senior President of Tribunals and Lord Chancellor agreed a vision of the courts of the future, in *Transforming our Justice System*. This paper envisages a more accessible justice system, with more done on 'papers' or online, with less recourse to attendance in court. It proposes that court users be engaged directly to solve their problems and to make better use of IT.

True access to justice

JUSTICE welcomes all of this as strengthening access to justice, but we have two key reservations.

First, we are keen that our online justice system genuinely embraces innovation, not just automation. We can't just digitise processes that are already inefficient or nonsensical (of which there are a good number) and instead need to use this as an opportunity to streamline processes and to be smart about the use of technology with the interests of ordinary court users at heart.

Second, and most importantly, we need to ensure that the new system does not exclude people without access to the internet or without the language, IT or other skills and support to operate in an online environment. This is a red

line for the judiciary and for JUSTICE, and we will soon establish a new working party of our members to consider how to assist the digitally deprived in this new era.

At the same time, there is no point pretending that these people are properly served by the existing system; they're not. Most are denied access to justice, along with very many people of modest means. While an online court may pose challenges for access, those who oppose it don't seem to be proposing a realistic alternative which is more inclusive.

While our justice system is among the best in the world, it risks being a system of two parts. The all-singing-all-dancing service for big business and wealthy individuals able to pay for outstanding lawyers to represent them in court; and at the other end, a system struggling under the weight of people who are fending for themselves in the face of antiquated processes which are too expensive, too complicated and largely unintelligible. The innovations proposed by JUSTICE and being explored by government go some way to start redressing this imbalance in experience. The justice system has always evolved; this latest stage offers the possibility of putting the needs of ordinary people at the heart of reform.

To find out more about Justice's work, please visit **www.justice.org.uk**, *or call 020 7329 5100 if you would like to discuss ways of cooperating.*

Mutual friends
Navigating access to justice

James Clanchy, FCIArb, Arbitrator draws parallels with the shipping industry's century old funding solutions.

Third party funding is often talked about as if it were a new phenomenon. In the international arbitration community, it is said to raise ethical issues never before encountered and so important that entire books and conferences have been devoted to the subject.

However, assisting commercial parties with the costs of bringing and defending claims is a very old practice. Access to justice in the commercial world can be provided in different ways. One of the most successful and well established methods is through mutual insurance associations. For more than 150 years, the shipping industry has relied on support from its 'clubs' when owners and operators have faced disputes with parties from other industries.

Mutual funding: an old solution to an old problem

Ships don't collide with each other as much as they used to. In the mid-19th century, when navigation technology was not as advanced and both international trade and emigration were booming, collisions at sea were not unusual. Insurance available at Lloyds did not cover the ship-owner's full amount of liability. To meet this shortfall and to provide mutual insurance for other risks not covered by commercial underwriters, ship-owners formed 'protection and indemnity' ('P&I') associations (clubs), first in London and followed by others in Liverpool, Newcastle, Scandinavia, Japan and the USA.

By the 1880s, the clubs recognised the demand from their members, not only for liability insurance but also for assistance with the costs of bringing contractual claims. Some of the international trading houses had become immensely prosperous and powerful and individual ship-owners could find themselves vulnerable. The costs of taking out proceedings against charterers and other parties could be burdensome. The clubs devised a new product, 'freight, demurrage and defence' cover ('FD&D' or 'defence' for short).

Defence cover quickly proved popular. The access to justice which it provided, allowed members to assert claims previously abandoned for lack of resources. The clubs' growth at the end of the 19th century can be compared to the current growth of modern third party funding increasingly used in other commercial sectors.

The clubs' managers were experienced in handling disputes in various jurisdictions, particularly in London arbitration. They worked closely with external lawyers but also built up in-house expertise.

So successful was defence cover that some clubs emerged, offering that type of legal expenses

insurance on its own, no longer attached to a P&I club. An example is Nordisk, founded in 1889, based in Oslo and with an office in Singapore. According to its 2016 report, 2,679 vessels were entered with the club and 2,156 new cases were registered last year. It employs more than 20 in-house lawyers, including English solicitors and barristers, who deal with a wide range of commercial disputes, including London arbitrations, sometimes involving claims of tens, even hundreds, of millions of dollars.

Old and new funders provide access to justice

The recent downturn in the offshore oil industry has led to a spike in disputes. Some claims will be covered by clubs. Other players in the industry, without 'before the event' insurance of this sort, have been turning to the new third party funders instead.

In many important respects, the clubs and third party funders have a similar business approach. For example, defence cover is discretionary. A member must satisfy the club's managers or its board that it will be worthwhile to support a particular case. The assessment of the merits of a claim, litigation risks, timelines and budgets are basically the same as those carried out by the new funders.

Calibrated risk assessments of the kind produced by funders are nothing new. Club directors have expected them for many years and shipping lawyers are used to providing them.

Likewise, club claim handlers monitor proceedings in the hands of external lawyers. Club rules require members to share information and their lawyers to be prepared to take instructions direct from the club. Non-professional funders who failed to take 'rigorous steps short of champerty' were criticised by the courts in the *Excalibur* litigation. Such steps are part of the routine of a club claim handler. English Commercial Court judges often know about these practices and the benefits an extra pair of eyes brings to bear on a claim by an insurer-funder, from their own past careers as barristers.

Those members of the international arbitration community who would seek to introduce 'regulation' for the new funders could learn some useful lessons from the ways clubs have dealt with cases during the last century and more.

For example, in deciding whether to support a claim, it is a principle enshrined in FD&D rules that the club will take into account the reasonableness of a member's conduct measured by reference to what a notional uninsured owner or charterer would have done in the same position. Likewise, the club will consider the cost-effectiveness of the measures which the member proposes to take. If security for costs is justified, a club can provide it quickly and straightforwardly by way of a letter of undertaking.

Arbitral institutions and other bodies, which have prospered through the thousands of shipping related arbitrations which they have handled over the years, have never found it necessary to introduce specific 'regulation' for cases involving funding by clubs. Disclosure of club support has never been made obligatory in international arbitration and there has been no clamour for it.

The contribution the clubs have made, not only to the development of international arbitration, but also to its ethical standards, should not be underestimated. The access to justice which they provide to individual claimants has assisted their own industry and the wider world of commercial arbitration too.

Third party funding has not brought a brave new world. It has joined the clubs and other long established insurer-funders, friends in the venerable old business of supporting parties in commercial disputes.

Litigation Funding and Access to Justice
Friend or foe?

Stephen O'Dowd, Senior Director Funding Litigation and Harbour's specialist in class actions.

It is a measure of how far the industry has come that the potential of litigation funding to facilitate access to justice is now broadly accepted by the litigation community in the UK.

As far back as 2007, the UK's Civil Justice Council report, entitled "Improved Access to Justice – Funding Options & Proportionate Costs", championed the potential of litigation funding to increase access to justice by providing claimants, at the outset, with the means to fund their case; and providing lawyers, at the outcome, with access to reasonable remuneration.

As recently as November 2016, the UK Court of Appeal's judgment in the case of *Excalibur Ventures LLC v Texas Keystone Inc and others* reaffirmed litigation funding as "an accepted and judicially sanctioned activity perceived to be in the public interest". Tomlinson LJ.

Funding can help access to justice…

Looking at litigation funding in practice, there are clear examples of its ability to provide access to justice, especially in the context of class actions. Ben Slade, in his article on page 13, highlights a number of Australian class actions which demonstrate a very positive social utility.

Another example is an Australian class action that Harbour is funding and that Ben is managing. In that case, thousands of Indonesian seaweed farmers claim that one of Australia's worst oil disasters had a devastating impact on their seaweed crops, virtually destroying their livelihoods. Seaweed farming had lifted the claimants out of their previous subsistence existence, and without funding, they lacked the means to seek justice against the oil company.

Cases like this illustrate that funding allows claimants to meet well-resourced opponents on a level playing field, and underlines the ability of our industry to act as a force for good. And that is a cause for celebration.

… but is it the answer?

Although litigation funding provides some welcome assistance in increasing access to justice, it cannot solve the social justice problem by itself.

There are several reasons for this. The litigation funding industry, although fast-growing, is still relatively small. And most funders will only back high-value cases, where damages claimed are in the millions of pounds.

The latter reason, relating to claim size, ties in with the key point made in Ben Slade's article.

"Funding allows claimants to meet well-resourced opponents on a level playing field…"

Most funders understand that litigation should only be commenced for the benefit of the claimant, but they also have a duty to deliver a return to their investors. Funders, therefore, look for a large enough gap between the costs of the litigation and the damages claimed. This allows them to proceed with greater confidence that the chief beneficiary of success in the litigation will be the claimant.

Which brings me to what, in my view, is the biggest single obstacle in the path of access to justice for claimants with good claims – litigation cost.

Litigation is expensive and the cost of litigation in the UK was recognised as a major issue when Lord Justice Jackson delivered his reforms in 2013. The reforms included the introduction of mandatory costs budgeting for all litigation, with certain exceptions.

Without doubt, the results of the costs budgeting regime have been mixed. The cultural impact was significant – it went against the grain of most lawyers to think about costs at the outset of litigation rather than at its conclusion. And training for the judiciary was inadequate, leading to huge inconsistencies between judges in their approach to budgets.

Nevertheless, four years have passed since Jackson LJ's reforms and it seems clear that costs budgeting is here to stay in the UK. And – I tentatively suggest – lawyers and judges are getting to grips with it.

With better costs management and certainty, more funders are bound to back smaller cases.

Most importantly, more claimants will have access to justice.

Australia
25 Years of class actions and social utility

Ben Slade, Maurice Blackburn's head of the firm's New South Wales class actions department looks back on 25 years of class actions in Australia and explains the need for some reforms going forward.

The Chief Justice of the Federal Court of Australia recently made the following statement about class actions in his court:

"The case for social utility of the class action regime in operation has to be sufficiently demonstrable so that no honest person can misunderstand it, and no dishonest one successfully misrepresent it".

Most plaintiff lawyers who conduct class actions understand this sentiment. That is, that a class action should only be commenced for the benefit of the class and should be an action that, if successful, will produce a real benefit for all members of the class. These actions have a positive social utility.

Australia and access to justice

There are now, after 25 years of a facilitated opt-out class actions regime in Australia, some very good examples of actions offering access to justice. Especially those conducted for the benefit of vulnerable persons such as refugees, the intellectually disabled, children, aboriginal people, older people, those who have suffered personal injury or the socially and economically disadvantaged. I hereby think of the following cases.

- Recently, a class action was conducted on behalf of 50 intellectually disabled and psychiatrically impaired residents of a licenced residential care facility. The residents claimed that over a 10-year period they were assaulted, falsely imprisoned, drugged and financially exploited by the licenced manager. When the government authority was notified of their treatment, it failed to respond. The case was hard fought but after three years of interlocutory disputation and document destruction, the residents were able to participate in a A$4.05 million fund *(McAlister v State of New South Wales (No.2) [2017] FCA 93)*.

- Intellectually disabled workers recently settled their action for over A$100 million. The funds will be distributed to 1,500 Australians who it was claimed were discriminated against by the Commonwealth Government when underpaid in sweatshops. *(Duval-Comrie v Commonwealth of Australia* [2011] NSWSC 582).

- The residents of Palm Island, just off Australia's north east coast, were set upon by the police in 2004 after a riot broke out in response to a death in custody of a young Aboriginal man. An emergency was declared and the "Special Emergency Response Team" turned out in force. In *Wotton v State of Queensland* ((No. 5) [2016] FCA 1457) Mr Wotton, his partner

and mother won declarations and damages that will benefit all of Palm Island's residents. After a long and difficult hearing the judge, amongst other things, found:

"… the emergency declaration was part of facilitating an excessive and disproportionate policing response …" (at [10(c)]) and *"Despite the entire population of Palm Island… being less than 2000, between 88 and 111 police officers … were on the island … I have not accepted evidence suggesting the people to be arrested were reasonably suspected of having any weapons nor that there were any acts or threats of violence after the fires subsided …. Yet, during the SERT operations, armed, masked SERT officers broke into the houses of 18 families on Palm Island, …undertaken as a show of force against local people who had protested about the conduct of police."* (at [10(d)]).

- Almost 30,000 borrowers of dubious payday loans were refunded A$20 million after their Federal Court class claim was settled in 2015. The claim alleged that the lender used an impermissible mechanism to get around the maximum allowable annual percentage rate (*Gray v Cash Converters International Ltd* (2014) 100 ACSR 29).

- In 2015, a settlement of class action in the NSW Supreme Court provided 56 young people A$2.2 million plus costs. They complained that the police were falsely arresting and detaining them in reliance on out-of-date bail information (*Konneh v State of NSW (No. 3)* (2013) 235 A Crim R 191).

- In 2014, the NSW Supreme Court approved the settlement of a claim by 200 UK orphans who were routinely abused in the 1960s at a school in country NSW, Australia. Those class members are sharing in a A$24 million fund (*Giles v Commonwealth of Australia (No.2)* [2014] NSW SC 1531).

- 2000 people who were injured by hip implants that were alleged to be defective are currently sharing in a A$250 million settlement *(Stanford v DePuy International Limited (No.6)* [2016] FCA 1452).

And so the list goes on. The references above exemplify the benefits that a well-functioning class actions regime can offer society. I am not suggesting that class actions taken for less vulnerable class members do not have a positive social utility. Many do.

Legislators, judges, lawyers, litigation funders and their clients might do well to recognise the benefits that properly brought and well conducted class actions bring society. The regulatory burden of prosecuting wrongdoers is shared by the private sector, those who cause mass losses are brought to account and the victims are compensated for the wrong done to them.

Need for reform

But class actions are not easy. They can be factually and legally complex. A lot is at stake. They can be hard fought. They can take many years and consume substantial resources. In Australia, the class representative, a funder, law firm or insurer must also accept the risk of adverse costs. These who fund such cases and indemnify the costs risk should be properly rewarded for doing so on success.

Our regime does not, sadly, give much comfort to lawyers and funders that meritorious claims will result in a positive reward. Cumbersome judicial procedures must be avoided and the claims are actively judicially case managed.

Regulators need to consider a range of available options to remove or reduce the impact of these barriers.

A possible reform may be one that encourages litigation funders to support socially just actions by giving them the right to apply at the outset for a common fund order. That is, an order made at the outset that a funder of an open class claim can expect to recover a reasonable percentage of the collective damages award.

Another reform may be to lift the ban on contingency fees and to introduce a regime that works in practice.

A third is to amend the provisions regarding proportionality and costs to recognise that a defendant's conduct may be responsible for excessive costs and if such, the plaintiff's right to recover costs should not be thereby constrained.

To ask lawyers and funders to take extraordinary risks for the benefit of society without adequate reward is too much to expect, and failure to act will mean that the sorts of cases detailed above will become few and far between.

Collective redress in the UK
Testing the water

Hausfeld lawyers Anthony Maton, Scott Campbell and Lucy Rigby take stock of the current private enforcement landscape.

What use is the law to any of us – individuals or businesses – if it is not enforceable? This is a valid question in the competition law sphere, just as in any other, where access to justice is not only a matter of fairness but also vital for the healthy functioning of the economy.

The Consumer Rights Act in 2015 introduced reforms to the regime for the private enforcement of competition law i.e. damage claims brought by those who have suffered from competition law infringement, and heralded a significant step forward for access to justice for UK claimants. The establishing of a regime for opt-out collective actions – that is actions brought by a representative on behalf of a group where the group is bound unless they individually drop out - was a welcome acknowledgement that the existing private actions regime was not working as it should.

As we approach the second anniversary of the Consumer Rights Act 2015 coming into force, it is appropriate to take stock of the private enforcement landscape from a claimant's perspective. The picture – as we shall see – is a mixed one.

A step in the right direction

The case for an opt-out collective regime was (and is) an incredibly strong one. Competition law infringements invariably harm large numbers of individuals and businesses, but often the individual level of loss doesn't make an individual claim for redress, with all the associated cost and risk, a viable one.

Group claims already exist, said those who opposed reform which was true of course. It is possible for claims to be brought together by representative proceedings under CPR 19.6 or with the use of a group litigation order. But such mechanisms can, in many cases, make claims impractical and unwieldy. Opt-in actions whereby class members must actively agree to join the class, have been available for some time but Which?'s experience of their claim for consumers' losses relating to replica football shirts was evidence enough that opt-in actions are not an appropriate mechanism to deliver redress at scale. Despite widespread publicity about Which?'s action, only 0.1% of those affected by JJB Sport's anti-competitive activity opted in to the claim.

By contrast, opt-out actions allow claimants far greater opportunity to access justice and to obtain redress. An action is brought by a proposed class representative. It is brought on either a follow-on, following a public enforcement decision, or a standalone bass, i.e. without such a decision. If the Competition Appeal Tribunal ("CAT") – the specialised tribunal that deals with competition claims - is content that the proposed claims raise the same, similar or related issues of fact or law and are suitable to be brought in collective proceedings, it may allow the claims to progress to trial and, in turn, make an aggregate award of damages.

The introduction of this regime was a very positive step, and enhanced the UK's reputation as leading the pack in terms of collective redress, relative to our European neighbours. To date the European Commission has lacked the political will to legislate for opt-out actions at pan-European level and has instead only 'recommended' the use of opt-in models. It is worth noting, however, that the Netherlands looks set to introduce a regime for opt-out actions soon (see pages 19 to 21).

Testing the water

So far, so positive. But theory is one thing, practice is another. There are several features of the reforms, and indeed practical experience of the reforms in action, which indicate that there may be some way to go in making the UK a truly collective friendly jurisdiction.

For example, the rules governing limitation are unnecessarily restrictive. The CAT Rules introduced in 2015 contain transitional limitation provisions which preserve the 2003 CAT Rules, thus rendering in one fell swoop, a swathe of potential claims obsolete. From the claimant perspective, this was and is frustrating and deeply illogical in the context of a supposed widening of claimants' access to justice.

The new regime also specifically rules out damages based agreements – contingency fee type arrangements - and applies strict rules governing the financial incentives for those supporting the bringing of claims. The clear intention was to reassure those who feared the move towards US-style class actions by placing stringent restrictions on the fledgling regime.

The experience of collective claims which have been filed to date certainly indicates the CAT is likely to take an approach which errs on the conservative side. In *Dorothy Gibson v Pride Mobility Products Limited [2017] CAT 9*, the first case to be brought under the new regime, Mr. Justice Roth made clear in his judgment that the CAT will take a very rigorous approach to the certification of claims. Having decided that the bulk of the claims were not eligible to be included in the proceedings, he offered the claimants – represented by Dorothy Gibson, the general secretary of the National Pensioners Convention – the opportunity to replead their claim. The claimants declined to do so and withdrew. Whilst there were some positive implications to be taken from the CAT's approach in this case, it is nevertheless clear that the CAT intends to set the bar for certification of class claims high.

Pride is not the only collective case to have been heard by the CAT to date – the other is the *MasterCard consumer claim, Walter Hugh Merricks CBE v MasterCard Incorporated and Others* (Case No. 1266/7/7/16).

The MasterCard claim is considerably larger, both in terms of damages claimed (£14 billion) and the size of the class (46 million individuals). Judgment in this case is expected soon and it will be interesting to see how the CAT deals with the requirement that the claims need to be 'sufficiently similar' and indeed the funding arrangements, both of which were subject to challenge by MasterCard at the January 2017 hearing.

Conclusion

The UK remains the leader in Europe when it comes to collective redress for claimants in competition law cases and there are good reasons to be positive about the future of the landscape. As ever, it's the practical reality of being able to obtain redress which counts, and it remains to be seen whether the UK structure will bear the intended fruit.

> **"…there may be some way to go in making the UK a truly collective friendly jurisdiction."**

The global reach of the Dutch regime sets it apart from similar regimes in the UK and elsewhere.

Collective redress
Should we be going Dutch?

Commercial litigator and corporate governance specialist, Ellen Soerjatin, sets out how the Dutch are leading the way in Europe when it comes to collective redress.

Based on criteria such as cost-effectiveness, efficiency, impartiality and independence the World Justice Project ranked the civil legal system of the Netherlands the highest of all civil justice systems in the world. Consequently, it is worth reflecting upon the progress the Dutch courts are making in promoting access to justice through developments on collective redress.

Besides the successful introduction of the Dutch Collective Settlement of Mass Claims Act in 2005, the Dutch legislator recently proposed new legislation to introduce the ability to claim monetary compensation by way of a representative action.

Collective settlement of mass claims

In 2005 Dutch law introduced the Collective Settlement of Mass Claims Act. Pursuant to this Act the parties to a settlement agreement may ask the Amsterdam Court of Appeal to declare the settlement agreement binding on all entities having incurred damage as a result of a certain act of a liable party. Such settlement agreements must have been entered into between one or more of the defendants and one or more organisations (usually a "claim foundation" incorporated in accordance with Dutch law) representing the interests of the claimants. The court may declare the settlement binding on an entire group of interested entities. An opt out system is applied.

A settlement will not be declared binding if, among other things, the amount of the settlement relief provided for in the settlement agreement is not reasonable, or if the claim foundation is not sufficiently representative of the interests of the entire group whose interests it claims to represent.

The Act was originally intended for personal injury but any damage caused by an event or a series of similar events can be subject to a settlement under the Act. In practice, the Act is mainly used for securities damages and damages resulting from mis-sold financial products.

The success of this litigation tool has encouraged the institution of numerous Dutch interest groups, especially in the event of mass damages in the financial, oil and automotive sectors. This has led to the development of a Dutch claim code which addresses issues of governance, transparency and financing.

Consequently, the position of the Netherlands as an attractive alternative for settling international mass claims - irrespective whether any litigation has taken place in the Netherlands - and as a forum for non-US securities holders is further strengthened.

The global reach of this regime sets it apart from similar regimes in the UK and elsewhere.

Collective action

Under Dutch law, a representative organisation can file a representative action before a Dutch court under the Dutch Civil Code. Until recently, such action was limited to a *declaratory* judgment relating to the civil liability of the entity for the damages incurred by a specific group of injured entities.

The Dutch legislator recently proposed new legislation to introduce the possibility to claim *monetary* compensation by way of a representative action. Consequently, the Dutch will have a tool which is in some ways similar to the US class action. Unlike the collective regime for the collective enforcement of competition law in the UK, this legislation would apply to all types of civil claims.

If this new legislation is adopted, a jurisdiction clause designating the Dutch court or the fact that the representative organisation is incorporated and residing in the Netherlands would not be sufficient for the Dutch courts to assume jurisdiction in a representative action. Instead, any collective action (aiming at monetary compensation or a declaratory judgment) must have a sufficiently close connection with the Dutch legal sphere. That is the case if (i) the majority of the injured persons represented by the representative organisation reside in the Netherlands, or (ii) the party liable for the damages resides in the Netherlands, or (iii) the event(s) which form(s) the basis for the collective claim took place in the Netherlands.

The collective claim can only be brought before the Amsterdam District Court. Although Dutch law does not have the principle of certification of a representative organisation similar to the US class action, the court may appoint one single representative organisation as the exclusive representative of all injured parties, similar to the role of the Lead Plaintiff in the US class action. The final judgment is binding on all injured parties not having opted out.

The requirements for standing of the representative organisation have been strengthened by including the requirements of the aforementioned claim code i.e. on governance, financing, financial position and communication of the representative organisation.

The nature of the damages which are the basis for the collective claim can widely vary, and no distinction is made as to the legal basis for the collective claim, for instance contractual default, act of tort or breach of law.

The Dutch courts and legislature have embraced the notion of collective redress. To promote access to justice for large groups of aggrieved claimants, going Dutch might be just the thing.

Harbour news

On 23rd May, the Supreme Court of Ireland delivered its decision in the much-publicised appeal by Persona Digital Telephony and Sigma Wireless Networks Ltd – the first case to come before the Supreme Court concerning the potential use of professional third party funding to support a party in legal proceedings. The judges dismissed the appeal on the basis that third party funding, save in limited circumstances, is unlawful because of the rules in Ireland regarding champerty. The decision goes against the recent trend of positive developments regarding third party funding, in Singapore, Hong Kong, Dubai and Paris.

On 21st June, Lord Clarke of Stone-cum-Ebony addressed the packed Gray's Inn Hall at the 5th Annual Harbour Lecture. To mark our 10th anniversary year, we couldn't think of anyone better placed to reflect on *The 'delights' of dispute resolution in London: the past, present and future*. Details of his speech are accessible through the **Harbour website**.

The Harbour team continues to travel, meet contacts worldwide and speak about third party funding globally.

If you wish to find out more about the information in the materials published, please contact **Silvia Van den Bruel** on +44 (0)20 3829 9336.

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