

The International Comparative Legal Guide to: **Class & Group Actions 2011**

A practical cross-border insight
into class and group actions work

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1 Class/Group Actions

1.1 Do you have a specific procedure for handling a series or group of related claims? If so, please outline this.

Yes. Where claims give rise to common or related issues of fact or law the court has power to make a group litigation order (“GLO”) enabling it to manage the claims covered by the Order in a co-ordinated way. Before granting a GLO the court must be satisfied that it is the most proportionate means of resolving the claims, and that no other order is more appropriate. A GLO must establish:

- a group register on which details of the claims to be managed under the GLO must be entered;
- the GLO issues, which will identify the claims to be managed under the GLO; and
- the “management court” responsible for managing the claims.

Claims can also be pursued in a representative action where one representative claimant or defendant acts on behalf of a class of individuals. However, the procedure is rarely used as it is only available where the class of litigants have the same interest in one cause of action. It is not available where members of the class have different defences or different remedies. The procedure is therefore most commonly used where the claims arise out of one accident or tort or the breach of one contract. This restrictive approach to bringing a representative action has been confirmed in *Emerald Supplies Ltd and Others v British Airways plc* [2009] EWHC 741 (Ch) which concerned a claim by importers of cut flowers who alleged that BA had entered into concerted practices with other airlines to inflate air freight prices. Emerald brought proceedings itself and as representatives of all other direct and indirect purchasers of air freight services affected by the alleged concerted practices. The representative element of the claim was struck out as it was not possible to say at the time the action was begun who was a member of the class and the relief sought was not equally beneficial to all members of the class. The court rejected the Claimants’ attempts to widen the representative action procedure to encompass elements of a ‘class action’, finding that the GLO procedure provided a mechanism for avoiding multiple actions and that it was not in the interests of justice for actions to be pursued on behalf of persons “who cannot be identified before the judgment in the action”.

The court also has general powers to consolidate a number of individual proceedings into one action and can order that 2 or more claims be tried together.

1.2 Do these rules apply to all areas of law or to certain sectors only e.g. competition law, security/financial services? Please outline any rules relating to specific areas of law.

The group action rules apply to all areas of law. Separate rules apply to claims for compensation in respect of certain infringements of competition law and these are outlined in section 2 below.

1.3 Does the procedure provide for the management of claims by means of class action (whether determination of one claim leads to the determination of the class) or by means of a group action where related claims are managed together, but the decision in one claim does not automatically create a binding precedent for the others in the group?

Management is by means of a group action. The claims that make up the group litigation remain individual actions which are managed collectively. The outcome of any one case (including any “lead action” or “test case”) does not automatically determine liability in the remaining claims in the cohort. Lead actions establish findings of law and fact that may, in practice, allow the parties to compromise or simplify resolution of the remainder of the litigation by focusing further proceedings on clarifying any remaining points of principle.

However, consistent with the principles of estoppel, the court rules provide that where a judgment is made on one of the GLO issues that judgment is binding on the parties to all of the other claims that are on the group register at the time the judgment was given, unless the court orders otherwise.

1.4 Is the procedure “opt-in” or “opt-out”?

The GLO procedure is ‘opt-in’. It provides a mechanism by which claims which are being pursued individually may be managed together.

There is currently no ‘opt-out’ class action procedure in England and Wales. The scope of the present rules on collective actions and whether an ‘opt-out’ procedure should be introduced has been considered by the UK Government. It does not presently support the introduction of a generic right to a collective action, but considers that a collective action procedure may be introduced on a sector-specific basis if there is evidence of need and following an assessment of the available options, in particular regulatory options (such as giving regulators the power to order the payment of compensation). There is sector-specific legislation in the competition field and legislation may shortly be introduced in the

area of consumer protection law (see the answer to question 2.1 below).

1.5 Is there a minimum threshold/number of claims that can be managed under the procedure?

No, but it is generally accepted that there must be at least 5 claims to justify coordination in a GLO. In deciding whether to make a GLO the court will take account of the number of claims threatened as well as the number of actions commenced.

1.6 How similar must the claims be? For example, in what circumstances will a class action be certified or a group litigation order made?

The claims must give rise to common or related issues of fact or law. In *Hobson & Others v Ashton Morton Slack Solicitors and Others* [2006] EWHC 1134 (QB) the court refused to grant a GLO in respect of claims brought by a group of miners and ex-miners regarding the enforceability of agreements made between the Claimants and their trade unions under which the Claimants agreed to pay to the trade union a proportion of the compensation awarded to them in separate litigation, as no group litigation issue had been sufficiently or precisely identified: the only unifying feature in the litigation was that all of the Claimants were miners or ex-miners. The individual agreements between the Claimants and the trade union were different and the assessment of liability depended on the facts of each case. The Court also found that a GLO was not an appropriate means of resolving the dispute, as the cost of pursuing this grossly exceeded the amount of damages claimed. Consolidation of the actions or the trial of selected cases were a more appropriate and cost effective means of resolving the claims.

1.7 Who can bring the class/group proceedings e.g. individuals, group(s) and/or representative bodies?

Group actions can be brought by any person or legal entity that has a claim. Certain approved representative bodies can bring proceedings on behalf of consumers seeking compensation for losses caused by infringements of competition law (see the answer to question 2.1 below).

1.8 Where a class/group action is initiated/approved by the court must potential claimants be informed of the action? If so, how are they notified? Is advertising of the class/group action permitted or required? Are there any restrictions on such advertising?

Where a GLO is approved the court will commonly order the parties to publicise the existence of the GLO so that all relevant claims can be managed within it. This usually takes the form of an advertisement, which will be approved by the court if the parties are unable to agree the wording.

Solicitors also advertise their involvement in potential group claims and seek to gather additional claimants, for example through postings on a firm's website. Such publicity must meet certain standards laid down in the Solicitors Code of Conduct 2007 and, in particular, it must not be misleading or inaccurate. Solicitors cannot make unsolicited visits or telephone calls to members of the public.

1.9 How many group/class actions are commonly brought each year and in what areas of law e.g. have group/class action procedures been used in the fields of: Product liability; Securities/financial services/shareholder claims; Competition; Consumer fraud; Mass tort claims, e.g. disaster litigation; Environmental; Intellectual property; or Employment law?

There are currently about 74 GLOs that are being managed by the English courts. The claims cover a range of different areas of law and include claims relating to personal injuries, defective products and medicines, cases of industrial disease, claims arising from accidents or disasters, cases of physical or mental abuse, shareholder claims, claims relating to the provision of financial advice and environmental claims. Less than 10 GLOs have been commenced in each of the last 5 years.

1.10 What remedies are available where such claims are brought e.g. monetary compensation and/or injunctive/declaratory relief?

The full range of remedies is available, including monetary compensation and injunctive or declaratory relief.

2 Actions by Representative Bodies

2.1 Do you have a procedure permitting collective actions by representative bodies e.g. consumer organisations or interest groups?

Under section 47B of the Competition Act 1998 certain representative bodies may bring proceedings on behalf of individual consumers who have suffered losses as a result of specified infringements of competition law. These are 'follow on' damages actions which can only be brought where it has been established by the relevant competition authorities that a breach of competition law has taken place.

To date only one such action has been brought. In 2008 an action brought by Which? (formerly The Consumers Association) against JJB Sports PLC in respect of the overcharging of consumers who purchased replica football shirts was settled. The damages claim was brought after JJB had been found guilty of participating in a price fixing cartel between 2000 and 2001 involving 7 other companies.

At present there is no other procedure by which representative bodies can bring collective damages actions on behalf of a group of claimants. However the Government indicated in its report 'Improving Access to Justice through Collective Actions' (see question 9.2) that representative bodies in sectors other than competition law could be authorised to bring collective actions if there is a need. Indeed, it has announced that it will shortly appoint a "Consumer Advocate" to champion consumer rights. It is believed that the role will involve powers similar to those proposed in a recent Government consultation, which included the power to bring representative proceedings on behalf of consumers in cases where there has been a breach of consumer protection legislation. The proposal envisaged that this might be through a "follow on" action permitted where a breach of the law has been established in separate public enforcement proceedings. The extent to which a collective action brought by the Consumer Advocate would be 'opt-in' or 'opt-out' is not yet settled.

2.2 Who is permitted to bring such claims e.g. public authorities, state appointed ombudsmen or consumer associations? Must the organisation be approved by the state?

Group consumer claims under the Competition Act may only be brought by specified bodies approved by the Secretary of State. Such bodies must meet certain criteria, including demonstrating that they represent or protect the interests of consumers and that they can be expected to act independently, impartially and with integrity. Currently only Which? has been approved to bring such claims.

2.3 In what circumstances may representative actions be brought? Is the procedure only available in respect of certain areas of law e.g. consumer disputes?

Group consumer actions may be brought on behalf of groups of 2 or more named individuals in respect of goods and services which they received (or should have received) as consumers, and must relate to the same breach of competition law. The representative action procedure is not available to businesses who suffer losses as a result of breaches of competition law, although they may bring claims for compensation through the court system in the usual way. The procedure is 'opt-in'. Each consumer must consent to his or her claim being brought by the specified body. Any damages that are awarded are paid directly to the represented consumers individually.

2.4 What remedies are available where such claims are brought e.g. injunctive/declaratory relief and/or monetary compensation?

The Competition Act procedure applies to claims for monetary compensation.

3 Court Procedures

3.1 Is the trial by a judge or a jury?

Trials are by a judge.

3.2 How are the proceedings managed e.g. are they dealt with by specialist courts/judges? Is a specialist judge appointed to manage the procedural aspects and/or hear the case?

Once a GLO has been made a managing judge will be appointed with responsibility for case management of the litigation. He will commonly also hear the trial of the case. He may be assisted by a Master or another judge appointed to deal with certain procedural matters.

3.3 How is the group or class of claims defined e.g. by certification of a class? Can the court impose a 'cut-off date by which claimants must join the litigation?

There is no certification procedure in group litigation. The court will often impose a "cut-off date" by which claims must join the GLO. This is a case management measure and does not affect the law on limitation. Subject to possible arguments on abuse of process, it does not prevent a Claimant from seeking permission to apply to join the GLO at a later date, nor does it prevent Claimants from issuing their own proceedings and pursuing these separately.

It is not uncommon for there to be different groups of claims managed under one GLO; for example, if a group of claims are unable to join the GLO by the cut-off date they may be managed as a separate group "B". Such claims will commonly be stayed by the court pending the outcome of the first group of claims.

3.4 Do the courts commonly select 'test' or 'model' cases and try all issues of law and fact in those cases, or do they determine generic or preliminary issues of law or fact, or are both approaches available? If the court can order preliminary issues do such issues relate only to matters of law or can they relate to issues of fact as well, and if there is trial by jury, by whom are preliminary issues decided?

Both approaches are available and may be combined in appropriate cases. The English courts will usually order that one or more actions that are representative of the cohort of claims are tried as lead actions. Any generic issues of law or fact will be addressed in the trial of those lead actions.

In accordance with his general case management powers, the judge can also order the trial of generic preliminary issues of law and fact in separate proceedings prior to the main trial, and can decide the order in which issues are to be tried in the main trial.

3.5 Are any other case management procedures typically used in the context of class/group litigation?

Judges have an extremely wide discretion to manage the litigation as they see fit and may make directions including:

- the transfer of claims to a different court that will manage the litigation;
- appointing lead solicitors to act on behalf of the Claimants and Defendants;
- specifying the details to be included in the pleadings - it is common for the courts to order that lead cases should be pleaded in full, but they may only require limited information to be provided for the remaining claims, by means of a schedule of information or questionnaire; and
- as to recoverable costs and other measures (see section 6 below).

3.6 Does the court appoint experts to assist it in considering technical issues and, if not, may the parties present expert evidence? Are there any restrictions on the nature or extent of that evidence?

Experts are generally appointed by the parties rather than by the courts. No expert may give evidence, whether written or oral, without the court's permission and the court may, in appropriate cases, dispense with expert evidence or require that evidence on a particular issue be given by a single joint expert. (The court will select a joint expert from a list prepared by the parties if they cannot agree who should be instructed.) The extent of the expert evidence that is permitted will depend on the complexity and value of the claim.

Experts can only give evidence on matters of opinion falling within their expertise. Their evidence should be independent and comprehensive. An expert owes an overriding duty to the court to assist it on relevant matters and this duty overrides any obligation to the party instructing the expert.

3.7 Are factual or expert witnesses required to present themselves for pre-trial deposition and are witness statements/expert reports exchanged prior to trial?

Witnesses are not generally required to present themselves for pre-trial deposition. However, the court may order evidence to be given by deposition if the witness is unable to attend the trial. The increased use of video conferencing facilities has reduced the use of depositions. Evidence can be taken by video if the witness is abroad or too ill to attend court.

The factual and expert evidence that the parties intend to rely upon at trial must be provided in the form of witness statements and expert reports that are disclosed by the parties prior to the trial. Evidence is usually exchanged, but the court may direct that it is served sequentially. Factual and expert witnesses are required to give oral evidence at the trial unless the court orders otherwise. However, the witness can only amplify the evidence given with the court's permission.

3.8 What obligations to disclose documentary evidence arise either before court proceedings are commenced or as part of the pre-trial procedures?

A party to an action is required to disclose the documents (including paper records, drawings, microfilms, information held on tape, video, CD or DVD, and electronic documents) in his control on which he relies or which adversely affect his own case or support another party's case. A document is in a party's control if he has, or had, physical possession of it, a right to possession of it, or a right to inspect and take copies of it. The parties are required to conduct a reasonable and proportionate search for disclosable documents.

Disclosure usually takes place after pleadings have been served setting out the parties' cases. However, the court also has power to order pre-action disclosure in appropriate cases in order to dispose fairly of the proceedings. Such disclosure may only be ordered in respect of specific documents or classes of documents that would have to be disclosed in any event once the proceedings are underway. A party may also seek an order for disclosure of specific documents or classes of documents.

Disclosable documents are identified in a List of Documents served on the opposing party. All disclosed documents can be inspected save for those which are privileged from inspection.

The obligation to give disclosure continues until the action is at an end and applies to documents created while the proceedings are underway. A party may not rely upon any documents that it does not disclose. Moreover, if a party withholds documentation that should have been disclosed, the court may impose cost penalties or draw an adverse inference.

3.9 How long does it normally take to get to trial?

This depends on the complexity of the case and the value of the claim. According to the 2009 Judicial Statistics published by the Ministry of Justice, unitary actions proceeding in the County Court (excluding certain small claims which are fast tracked), on average, took 48 weeks from the issue of proceedings until trial. Equivalent statistics are not available for High Court actions, but these cases are generally more complicated and therefore take longer to come to trial (in 2004 the average was 20-32 months).

Complex group actions may take many years to come to trial. For example, in the third generation oral contraceptives litigation it took approximately 6½ years from the issue of the first proceedings until judgment.

3.10 What appeal options are available?

An appeal may only be made with the permission of the court (either the appeal court or the lower court that made the decision subject to appeal) and such permission will only be granted if the appeal appears to have a real prospect of success or there are other compelling reasons why it should be heard.

The appeal will usually be limited to a review of the lower court's decision, but the court retains the power to order a re-hearing in the interests of justice. An appeal will be allowed where the decision of the lower court was wrong (because the court made an error of law, or of fact, or in the exercise of its discretion) or was unjust because of a serious procedural or other irregularity. In practice, the courts will rarely disturb findings of fact made by the trial judge who had the benefit of hearing first hand the witness and expert evidence.

The appeal court may affirm, vary or set aside any order or judgment made by the lower court, order a new trial or hearing or make any other appropriate order.

4 Time Limits

4.1 Are there any time limits on bringing or issuing court proceedings?

Yes. Under the Limitation Act 1980 the basic limitation period for tortious actions (including negligence claims) and for breach of contract is 6 years from the date on which the cause of action accrued. Special requirements apply in the case of latent damage caused by negligence.

Where product liability proceedings are brought under the Consumer Protection Act ("CPA") there is also a general long-stop provision. A right of action under the CPA is extinguished ten years after the defective product was put into circulation and this applies irrespective of the other provisions of the Limitation Act.

4.2 If so, please explain what these are. Does the age or condition of the claimant affect the calculation of any time limits and does the court have a discretion to disapply time limits?

Special rules apply to persons under a disability, during such period as they are a minor or of unsound mind. In general, time only begins to run for limitation purposes when such Claimant dies or ceases to be under a disability. However, the 10-year long-stop for CPA claims still applies.

Separate rules also apply to personal injury claims for damages in respect of negligence, nuisance or breach of duty. In such cases, the claim must be brought within 3 years from the date on which the cause of action accrued (i.e. the date of injury or death) or the date of knowledge by the Claimant of certain facts. The date of knowledge is when the Claimant is aware of the identity of the Defendant, that the injury was significant, and that it was attributable in whole or part to the alleged negligence, nuisance or breach of duty. The court has a discretionary power to disapply this time limit where it would be equitable to do so.

4.3 To what extent, if at all, do issues of concealment or fraud affect the running of any time limit?

Where an action is based on the Defendant's fraud, or the Defendant has deliberately concealed any fact relevant to the Claimant's right

of action, the relevant limitation period does not begin to run until the Claimant has, or could with reasonable diligence have, discovered the fraud or concealment.

5 Remedies

5.1 What types of damage are recoverable e.g. bodily injury, mental damage, damage to property, economic loss?

In contract, damages are intended to put the injured party into the position he would have been in if the contract was performed. Damages are usually awarded for monetary loss (for example, in respect of damage to property), but they can include non-pecuniary losses, such as damages for death or personal injury (including mental injury) where this was within the parties' contemplation as not unlikely to arise from the breach of contract. Economic losses, such as loss of profits, are recoverable if these are a foreseeable consequence of the breach.

In negligence, damages are awarded to put the injured party into the position he would have been in if the negligent act had not occurred. Damages can be recovered for death or personal injury (including mental injury) and damage to property. Pure economic losses which are not consequent on physical damage are not generally recoverable in negligence, save in some cases of negligent advice.

In the case of product liability claims pursued under the CPA, damage includes death or personal injury (including mental injury) or loss of, or damage to, property for private use and consumption (provided the damages recoverable in respect of property loss exceed the minimum threshold of £275). Damages are not recoverable in respect of damage to the defective product itself.

Additional restrictions apply to the recovery of damages for mental injury. The English courts only permit recovery for recognised psychiatric injuries. Mere anxiety or distress are not actionable and are not, on their own, sufficient to ground a claim for damages (see *AB and Others v Tameside & Glossop Health Authority and Others* [1997] 8 Med LR 91).

Compensation claims may also be made under specific statutes, (e.g. employment legislation) which may impose restrictions on the types of damage recoverable.

5.2 Can damages be recovered in respect of the cost of medical monitoring (e.g. covering the cost of investigations or tests) in circumstances where a product has not yet malfunctioned and caused injury, but it may do so in future?

English law does not generally permit recovery of the cost of tests or investigations unless the product has actually malfunctioned and caused physical or psychiatric injury or damage. Such medical monitoring costs are recoverable only as medical expenses consequential upon the main injury.

The English courts will not generally allow a Claimant to recover damages where he/she sustains a recognised, but unforeseeable, psychiatric illness as a result of becoming aware that he/she is at risk of sustaining a disease/illness, or to recover the costs of future medical monitoring to determine if that disease/injury has arisen. In the case of *Johnston v NEI International Combustion Limited and Others* [2007] UKHL 39 a Claimant was diagnosed with depression as a result of his knowledge that he was at risk of sustaining an asbestos related disease. The Court found that there was insufficient evidence to allow it to conclude that an ordinary person would have sustained a psychiatric injury in these

circumstances and concluded that the injury was not reasonably foreseeable and therefore dismissed the claim.

5.3 Are punitive damages recoverable? If so, are there any restrictions?

Punitive or exemplary damages are rarely, if ever, awarded. They are not generally available in respect of claims for breach of contract. Although they are available in tort claims (see *Kuddus (AP) v Chief Constable of Leicester Constabulary* [2001] 2 WLR 1789), exemplary damages will only be awarded in certain limited circumstances, including where the Defendant's conduct was calculated to make a profit that exceeds the compensation recoverable by the Claimant or where there has been oppressive, arbitrary and unconstitutional conduct by Government servants (see *Rowlands v Chief Constable of Merseyside* [2006] All ER (D) 298 (Dec)). Exemplary damages are not generally recoverable in circumstances where a Defendant has already been fined in respect of his conduct (see *Devenish Nutrition Limited v Sanofi-Aventis SA and Others* [2007] EWHC 2394 (Ch)).

5.4 Is there a maximum limit on the damages recoverable from one defendant e.g. for a series of claims arising from one product/incident or accident?

No there is no maximum limit.

5.5 How are damages quantified? Are they divided amongst the members of the class/group and, if so, on what basis?

Damages are awarded to individual claimants based on the damage/losses that they have personally sustained.

5.6 Do special rules apply to the settlement of claims/proceedings e.g. is court approval required?

The Court's permission is required to discontinue proceedings after a Defence has been served. Court approval is also usually sought where there is a settlement or compromise of a claim made by, or on behalf of, or against, a child (aged under 18) or an adult who is incapable of managing their own property and affairs, as such a compromise is not enforceable without the approval of the court. There is no requirement to seek court approval in other circumstances, for example, on the settlement of the claims comprising a group action.

6 Costs

6.1 Can the successful party recover: (a) court fees or other incidental expenses; (b) their own legal costs of bringing the proceedings, from the losing party? Does the 'loser pays' rule apply?

The assessment of costs is a matter for the court's discretion. The general rule is that the unsuccessful party pays the costs of the successful party (so-called "costs shifting"), including both court fees and legal costs (including expert fees and incidental expenses). However, the court can make such orders as it considers appropriate reflecting matters such as the parties' success or failure on particular issues in the proceedings (issue-based cost orders) and the parties' conduct. If the amount of costs cannot be agreed between the parties they will be assessed by the court to determine

if the sums claimed are reasonable; costs are commonly discounted (sometimes by up to one third) on assessment. Where a party makes an offer to settle which meets certain procedural requirements (a “Part 36 offer”) and this is not accepted by the other party in satisfaction of the claim, unless that other party achieves a better result at trial, he may become liable for all costs incurred after the offer was refused.

Where Claimants are publicly funded through legal aid, costs will only be enforced against them in exceptional circumstances, as a Claimant will only be ordered to pay such amount as is reasonable taking account of all the circumstances, including the parties’ resources. Although costs are generally awarded against a legally-aided party they cannot be enforced without the court’s permission and, in practice, this will not be granted unless the Claimant’s financial position improves significantly. In effect, this means that Defendants are unlikely to recover their costs of successfully defending proceedings brought by legally aided Claimants.

A Court of Appeal Judge, Lord Justice Jackson, has conducted a wide-ranging review of the costs of litigation in England and Wales, and published his final report in January 2010 (the “Jackson Report”). As part of his proposals to increase access to justice, he has proposed that qualified one-way costs shifting should be introduced for certain types of claims including personal injury, clinical negligence, judicial review and defamation claims. Under the proposal the Claimant will not be required to pay the Defendant’s costs if the claim fails, but the Defendant will be required to pay the Claimant’s costs if the claim succeeds. One-way costs shifting could significantly increase the ability of Claimants’ lawyers to mount product liability claims, including group actions. If Claimants and their lawyers know they are protected against the risk of having to pay the Defendant’s costs if they lose, they may be prepared to pursue litigation in a way that was previously only realistic with the benefit of legal aid funding.

The status of the Jackson Report and the likelihood of it leading to any changes in the costs regime is unclear. The Government has announced that it will consult later this year on some of the recommendations of the Jackson Report, in particular those relating to Conditional Fee Arrangements (see question 7.3 below). It is unclear whether that consultation will address the rules on costs.

6.2 How are the costs of litigation shared amongst the members of the group/class? How are the costs common to all claims involved in the action (‘common costs’) and the costs attributable to each individual claim (individual costs’) allocated?

The Court Rules provide a framework for sharing costs between the Claimants whose claims are entered on the GLO group register. Each litigant has responsibility for the individual costs of his/her claim together with his/her share of the common costs. Unless the court makes a different order, any order for costs against group litigants imposes several (as opposed to “joint”) liability for common or generic costs. Each Claimant may be ordered to pay a share of any common costs incurred before he/she joined the group action, but not after he/she has concluded or compromised the claim and left the action.

6.3 What are the costs consequences, if any, where a member of the group/class discontinues their claim before the conclusion of the group/class action?

Where a Claimant discontinues his/her claim, in the absence of any other Order, he/she will be responsible for paying the Defendant’s costs. Although liability for individual costs crystallises at the time

of the discontinuance, the court will not determine liability for common costs until after the trial of generic issues in the main action (*Sayers v Smithkline Beecham Plc*; *XYZ v Schering Health Care Limited*; *Afrika v Cape PLC* [2002] 1 WLR 2274, C.A.). In some circumstances the individual costs of bringing lead actions may be treated as generic costs because the actions illustrate issues common to many claims.

6.4 Do the courts manage the costs incurred by the parties e.g. by limiting the amount of costs recoverable or by imposing a ‘cap’ on costs? Are costs assessed by the court during and/or at the end of the proceedings?

Costs orders will be made in relation to procedural matters arising during the litigation and at the end of the case. Costs will usually be assessed and enforced at the end of the proceedings. However, the court can also make summary assessments of costs (for example, relating to matters addressed during procedural hearings), although such powers are less frequently exercised in the context of complex group actions. Where summary assessment takes place, the costs ordered to be paid may be enforced immediately, before the conclusion of the case.

The court also has power to manage the costs incurred during the course of the litigation. For example, it can impose a cap on future recoverable costs to be incurred by the parties where such an order is in the interests of justice, there is a substantial risk that without such an order the costs incurred will be disproportionate to the amount in issue and the costs cannot be adequately controlled through the usual case management procedures. Such orders have been imposed in group litigation (see, for example *AB and Others v Leeds Teaching Hospitals NHS Trust* and in the matter of the *Nationwide Organ Group Litigation* [2003] *Lloyds Law Reports* 355 and *Multiple Claimants v Corby Borough Council* [2008] EWHC 619 (TCC)) and can be made against any party and at any stage of the proceedings and may relate to the litigation as a whole or to specific issues. These orders do not prevent parties from exceeding the cap, but merely bar recovery of costs above the cap from the unsuccessful other party. The court can also order the parties to provide an estimate of the costs that they would seek to recover if they were successful in the case.

In *Boake Allen Limited v Revenue and Customs Commissioners* [2007] UKHL 25 Lord Woolf stated that costs implications should be considered in making any procedural Order in the context of a GLO as such Orders can cumulatively add to the total costs of the litigation, making them disproportionate. He concluded that it was important to ensure that such procedural steps generate the least possible costs.

7 Funding

7.1 Is public funding e.g. legal aid, available?

Yes. Public funding is available in England and Wales.

7.2 If so, are there any restrictions on the availability of public funding?

Civil legal aid is only available to fund advice on certain types of issues including family law, immigration and asylum, social welfare, mental health, disputes with public authorities such as the police, claims for clinical negligence, and cases involving a ‘wider significant public interest’. It is not generally available to fund general contractual or tortious claims, including personal injury

claims. Legal aid will also be refused if alternative funding is available, for example if the view is taken that the claimant's case can be pursued under a Conditional Fee Agreement (CFA).

If the type of work is eligible, full funding will only be granted if the following requirements are met:

- means test – the applicant meets certain financial eligibility criteria; and
- cost-benefit test – the likely benefit of the proceedings to the applicant and others justifies the likely costs, having regard to the prospects of success.

Additional criteria apply to the funding of 'high cost' cases and group litigation. Legal aid funding will be refused for low value claims (where the damages are likely to be £5,000 or less) pursued as part of a group action unless they relate to certain allegations of serious wrongdoing by public authorities (such as abuse of children or vulnerable adults) or are selected as test cases or lead claims. In these circumstances the other low value claims which are part of the overall cohort of group claims must be funded by other means, usually under a CFA.

Funding may also be refused in the light of the resources available; a high cost case will have to compete against other cases which also meet the basic funding criteria and which are seeking funding. The Legal Services Commission (LSC) sets funding priorities which may change from time to time and have regard to the overall resources available in the Central Budget. An annual affordability review is carried out which takes account of factors including the prospects of success, the likely costs, the importance of the case to the claimants and the public interest. Guidance issued by the LSC makes clear that legal aid will not generally be granted to conduct scientific research and that actions against manufacturers of products that are subject to a sophisticated regulatory regime (such as medicines) will generally be considered a lower funding priority.

The effect of these rules is that public funding is only available to pursue group actions in strictly defined circumstances. Suggestions that this inhibits proper access to justice prompted the Civil Justice Council (CJC, which advises Government on possible changes to civil justice procedures) to recommend in its March 2009 report "Improved Access to Justice - Funding Options and Proportionate Costs" that a range of additional options should be considered to fund group actions and other high value claims including regulated contingency fees and setting up a supplementary or contingency legal aid fund that could, for example, be funded by a levy paid from costs/damages awarded in successful legally aided cases. The Jackson Report supported the setting up of such an additional fund if it could be made financially viable. It is unclear whether this proposal will be pursued.

7.3 Is funding allowed through conditional or contingency fees and, if so, on what conditions?

Yes, through CFAs. There are broadly 2 types of CFA: "no win no fee" agreements; and "less (or nothing) if you lose" agreements. The precise terms of the CFA are strictly regulated and agreements that fall outside the legal requirements are unenforceable. A feature is that the costs recoverable against the unsuccessful party are increased in return for accepting no, or a reduced fee if the claim/defence is unsuccessful. But in order to protect the unsuccessful party against an award of costs in favour of the other party it is usual to combine a CFA with either insurance or membership of an organisation, such as a trade union, that will bring proceedings on behalf of its members and pay the costs of an unsuccessful action. A range of "after the event" insurance

products are available and in some cases insurers may agree to defer the payment of premiums in return for an increased premium. The success fee and any premium paid to obtain legal expenses insurance will be recoverable in addition to legal costs, where a party with the benefit of a CFA successfully pursues or defends an action.

Contingency fees are not permitted. However, the CJC proposed in its March 2009 report "Improved Access to Justice - Funding Options and Proportionate Costs" that court regulated contingency fees should be permitted to fund multi-party cases where no other form of funding is available. It is uncertain whether this proposal will be adopted. The introduction of regulated contingency fees is also supported by the Jackson Report (see section 6 above) but on the basis that costs would be recoverable on the usual basis and not by reference to the contingency fee. In addition, the Report proposed that:

- (1) The success fee under a CFA should not be recoverable from the unsuccessful opponent. It should be capped at 25% and paid by the Claimants, who should be compensated by a 10% uplift in general damages in personal injury and certain other tort claims.
- (2) The ATE insurance premium should no longer be recoverable from the unsuccessful opponent.

The Government will consult later this year on the recommendations of the Jackson Report relating to funding arrangements, including the proposals relating to CFAs and contingency fees

7.4 Is third party funding of claims permitted and, if so, on what basis may funding be provided?

Yes, in certain circumstances. In *Arkin v Borchard Lines* [2005] 1 WLR 2055 the Court of Appeal made it clear that, in principle, third party funding may be an acceptable means of funding litigation. However, certain third party funding arrangements may be unenforceable. In *R (Factortame Ltd) v Transport Secretary (No.8)* [2002] EWCA Civ 932 the court held that in deciding whether a funding agreement is objectionable (champertous) the courts will take into account whether the funder controls the proceedings, whether the agreed recovery rate is fair and whether the agreement facilitates access to justice. If the funder controls the proceedings, the agreement will be usually be champertous and unenforceable. In addition, as he will generally be treated as if he was a party to the proceedings, he will be exposed to costs liability.

Arkin concerned the award of costs against a third party funder. The Court of Appeal held that in the case of an objectionable agreement the funder will be liable to pay his opponent's costs without limit if the claim fails; in the case of an acceptable agreement the funder's cost liability is limited to the amount of the funding he provided.

In addition, the Solicitors Code of Conduct provides that there can be no third-party funding in cases involving personal injury or death. The Jackson Report proposed that this restriction be lifted. It also recommended abolition of the indemnity principle under which a party to litigation can only recover costs which he is himself required to pay, e.g. to his own lawyers.

The CJC is currently consulting on a 'Code of Conduct for the Funding by Third Parties of Litigation in England and Wales' which would introduce a voluntary code setting out best practice for litigation funders.

8 Other Mechanisms

8.1 Can consumers' claims be assigned to a consumer association or representative body and brought by that body? If so, please outline the procedure.

In general, no. Specific rules apply to claims for compensation arising from infringements of competition law which are outlined in section 2 above.

8.2 Can consumers' claims be brought by a professional commercial claimant which purchases the rights to individual claims in return for a share of the proceeds of the action? If so, please outline the procedure.

A litigant may assign his/her cause of action to a third party who can then litigate the matter in their own name. In the insolvency context, liquidators are given statutory powers to sell a cause of action to a third party in return for a share of any proceeds recovered. Otherwise the legality of such an assignment will be subject to the rules on champerty outlined in the answer to question 7.4. The courts have upheld such assignments where the funder has a genuine commercial interest in the enforcement of the claim (*Trendtex Trading Corporation v Credit Suisse* [1982] AC 679).

8.3 Can criminal proceedings be used as a means of pursuing civil damages claims on behalf of a group or class?

No (although in sentencing an offender the criminal courts may make an order requiring the offender to pay compensation to a victim for any personal injury, loss or damage resulting from the offence).

8.4 Are alternative methods of dispute resolution available e.g. can the matter be referred to an Ombudsperson? Is mediation or arbitration available?

Yes. There are a variety of different methods including mediation, arbitration and neutral evaluation. A range of Ombudsman schemes are also available.

The courts encourage the use of alternative dispute resolution (ADR) to resolve disputes and the pre-action protocols to the court rules provide that the parties should consider whether some form of ADR is more suitable than litigation before commencing proceedings. While the courts cannot compel the parties to use ADR procedures (*Halsey v Milton Keynes General NHS Trust* [2004] EWCA Civ 576), failure to follow the protocols may result in a cost sanction. Indeed, courts have refused to award costs to a successful party where they unreasonably refused to mediate (*Dunnett v Railtrack plc* [2002] EWCA Civ 303).

An Ombudsman will investigate complaints of maladministration. Examples include the Parliamentary and Health Service Ombudsman, the Local Government Ombudsman and the Financial Ombudsman. Although the exact procedures vary, in general where a complaint is upheld the relevant Ombudsman will write a report and make recommendations as to how to deal with the complaint, including suggestions as to compensation. Such recommendations are not usually legally binding.

8.5 Are statutory compensation schemes available e.g. for small claims?

There is no general scheme. However specific statutory schemes are available. For example, the Criminal Injury Compensation Scheme provides statutory compensation to victims who suffer personal injuries as a result of violent crime. Under the Vaccines Damage Payments Act 1979 fixed compensation is paid to persons suffering severe disablement as a result of certain vaccinations. Compensation schemes are also available in other areas, such as the financial services sector (for example, the Financial Services Compensation Scheme provides compensation to customers of authorised financial services firms who are unable to meet claims against them). Schemes are sometimes also set up to resolve specific claims e.g. the schemes relating to HIV and Hepatitis C contamination of blood products supplied by the National Health Service.

8.6 What remedies are available where such alternative mechanisms are pursued e.g. injunctive/declaratory relief and/or monetary compensation?

In the context of an arbitration, the parties can agree on the powers exercisable by the arbitral tribunal by way of remedies. Unless otherwise agreed, the tribunal has power to order the payment of monetary compensation, make a declaration, and require a party to do or restrain from doing something (section 48 of the Arbitration Act 1996). Mediation is a consensual process intended to reach agreement between the parties and no 'remedies' are therefore available.

9 Other Matters

9.1 Can claims be brought by residents from other jurisdictions? Are there rules to restrict 'forum shopping'?

Yes. Proceedings may be brought in England and Wales by foreign claimants against English based corporations or bodies based on the actions of their subsidiaries in other jurisdictions. For example, group actions have been pursued in England in respect of actions arising from exposure in South Africa to asbestos mined or processed by an affiliate of an English company (*Lubbe v Cape Plc* [2000] 1WLR 1545); by a group of claimants from the Ivory Coast against a British based oil trader, *Trafigura*, for damage allegedly caused by the dumping of toxic waste and by a group of Bangladeshi villagers against The Natural Environment Research Council, a British organisation which allegedly conducted a negligent survey, in respect of damage arising from contaminated ground water (*Sutradhar v Natural Environment Research Council* [2006] UKHL 33).

Broadly, where the parties are European questions of jurisdiction will be governed by the Judgments Regulation (No. 44/2001(EC)); where the claimants are non-EU, the English courts generally have jurisdiction to hear cases brought against persons domiciled in England. The courts no longer have discretion to refuse jurisdiction against such English Defendants on the ground that the courts in another jurisdiction would be a more suitable venue for the trial of the action (*Owusu v Jackson* [2005] ECR I-1383).

9.2 Are there any changes in the law proposed to promote class/group actions in England & Wales?

The Government has rejected proposals (made by the CJC in its July 2008 report, "Improving Access to Justice through Collective Actions") that a new generic collective action procedure should be introduced as an alternative to the GLO. Instead it suggests that

such a procedure might be introduced in specific sectors where there is evidence of need and following an assessment of alternative options, in particular regulatory options (such as giving regulators the power to order the payment of compensation). Where a collective action is appropriate, the Government suggests that the distinction between the 'opt-in' and 'opt-out' models is not clear cut, and describes four possible approaches defined according to when the Claimant joins the action: 1) before the claim is issued (full 'opt-in'); 2) before the common issues of liability are decided (hybrid system); 3) after the decision on liability, but before damages are awarded; or 4) after damages are quantified (full 'opt-out'). What model will be appropriate must be considered on a sector by sector basis, but the Government recognises the concerns expressed about the full 'opt-out' model and suggests that one of the hybrid models may be the best approach in most cases. Legislation will be needed to introduce any new collective action. The

Government intends to develop a framework document setting out the issues to be addressed when introducing a right of collective action, which will act as a 'toolkit' for legislators.

In February 2010 the CJC published draft court rules for collective actions that could be adapted to any model of collective proceedings that may be permitted by primary legislation. The draft rules are intended to supplement the existing court rules governing the case management of multiple claims, including the powers to make a GLO and to consolidate proceedings. They provide for court approval of an action as suitable for collective proceedings and set out criteria for the appointment of a class representative to bring the action. As part of the certification procedure the court would rule whether the collective action would be brought on an 'opt-in' or an 'opt-out' basis. The draft rules do not contain any guidance on this matter to assist the court; the CJC considered that this would be better left to the development of case law.



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Arnold & Porter is an international law firm with over 600 attorneys in nine offices in the U.S., London and Brussels. The firm is recognised as one of the leading class action defence firms, providing clients with an integrated litigation service on a transatlantic basis. It handles the defence of class actions and coordinated litigation in a wide range of areas including product liability, antitrust, consumer protection/false advertising, counterfeit goods, securities, distributor disputes and environmental matters.

The firm's European lawyers are at the forefront of "group action" litigation with experience derived from the successful defence of many of the major multi-claimant cases that have been brought in the UK and elsewhere in the EU over the last 30 years. In the US, the firm has acted as both national counsel and trial counsel and its attorneys litigate in state and federal courts throughout the US.

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