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Class & Group Actions 2014

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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 the 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 two 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 such an action 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; this is

currently an opt-out regime, but the Government has published a draft Consumer Rights Bill which, if enacted in its current form, would introduce a new collective action procedure for competition law claims with claims managed on either an 'opt-in' or an 'opt-out' basis (see the answers to questions 2.1 and 9.2 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 five 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.

Because the making of a GLO commits the parties and the court to the allocation of substantial resources to conduct group litigation, the court may decline to grant a GLO where there are an insufficient number of Claimants who have funding in place and intend seriously to proceed with the litigation (*Alyson Austin v Miller Argent (South Wales) Limited* [2011] EWCA Civ 928).

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). A company's shareholders may also bring a derivative claim against the company's directors (regarding breach of duties owed to the company) in certain limited circumstances, with the court's permission.

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 2011 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 is no up-to-date information on the number of GLOs that are currently being managed by the English courts. However, data from 2010 indicated that about 75 GLOs have been managed by the courts, but less than ten GLOs were commenced in each of the last five years. The cases 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.

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 by a representative body 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 seven other companies. The Government has expressed concern about the apparent difficulties of pursuing such actions, stating that the current regime does not provide adequate redress for consumers and businesses, and it has published a draft Consumer Rights Bill, which if enacted in its current form will significantly extend the scope of the current Competition Act procedure. In particular, this will introduce a new collective action procedure for private actions in respect of breaches of competition law which may be brought on either an 'opt-in' or 'opt-out' basis.

These proposals are discussed in more detail in the answer to question 9.2 below.

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.

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 two 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 only.

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 judge will be appointed with the 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 directly 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 test cases. Any generic issues of law or fact will be addressed in the trial of those test cases.

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 test 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 a 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?

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. The court may make directions limiting the scope of factual and expert evidence by, for example, identifying those disciplines or issues to which such evidence may be directed. Evidence is usually mutually exchanged, but the court may, in appropriate circumstances, 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 in his/her written statement or report with the court's permission. Expert evidence is usually given sequentially, but the court may order that it is given concurrently (so-called 'hot-tubbing').

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 such depositions. Evidence can be taken by video if the witness is abroad or too ill to attend court.

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

The Court Rules provide a flexible approach to disclosure of documents. In determining the scope of disclosure, the court will take account of the costs of giving wide-ranging disclosure of documents and will ensure that these are proportionate to the overall sums in issue in the proceedings. In most claims (except certain low value claims), the court can tailor the disclosure order to reflect the circumstances of the individual case and can choose from a menu of options including: dispensing with disclosure; requiring disclosure of documents on which a party relies and specific documents requested by their opponent; issue based disclosure; 'train of inquiry' disclosure; standard disclosure; or any other order that the court considers appropriate. In claims involving personal injuries the general rule is that a party to an action is required to disclose the documents in his control on which he relies and which adversely affect his own case or support another party's case (so-called 'standard disclosure'), although the court may dispense with or limit such disclosure in appropriate cases.

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 has 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 the 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 2011 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 56 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.

Complex group actions may take many years to come to trial. For example, in the third generation oral contraceptives litigation it took approximately six and a half 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 factual 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 six years from the date on which the cause of action accrued (when the damage occurred in tortious claims, and when the breach occurred in contractual claims). 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 ten-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 three years from the date on which the cause of action accrued (i.e. the date of injury or death) or the date of knowledge (if later) of 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 claims, 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 claims, 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 may be awarded in claims regarding infringements of competition law, but only where the breach was intentional or reckless and the Defendant's conduct was so outrageous as to justify an award (see *2 Travel Group Plc (in Liquidation) v Cardiff City Transport Services* [2012] CAT 19). 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?

In general, a Claimant may unilaterally discontinue all or part of his/her claim at any time. However, the court's permission is required for compromise or settlement of proceedings instituted against or on behalf of a minor (aged under 18) or an adult who is incapable of managing their own property and affairs. Court approval is also usually sought where there is a settlement or compromise of an unlitigated claim made by, or on behalf of, or against, such a person as 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 general rule is that the unsuccessful party pays the legal costs of the successful party, (including expert fees and other incidental expenses such as court fees). However, under new rules which take effect from 1 April 2013, in respect of claims for death or personal injuries where a funding arrangement has not been entered into before that date, 'Qualified One-way Cost Shifting' (QOCS) will apply. This means that an order for costs may only be enforced against a Claimant at the conclusion of the litigation to the extent of any damages and interest ordered in favour of the Claimant. In practice this means that in most personal injury claims an unsuccessful Claimant will not be responsible for the Defendant's costs, although this principle will not apply if the claim is struck out, or if the Court determines that the Claimant is fundamentally dishonest. If the Claimant is successful they may recover their costs from the Defendant in the usual way.

Costs are actively managed by the court throughout the proceedings. In most cases commenced after April 2013, except for some types of high value claims (where the case is proceeding in certain specialist courts and the sums in dispute exceed £2 million excluding interest and costs), the parties are required to file and exchange costs budgets after the defence is served or prior to the first procedural hearing, setting out their estimate of the costs they anticipate recovering from their opponent if successful. Strict time limits are applied to filing these budgets, and if these are not met the party in default may only recover court fees. The budgets will be reviewed by the court which will make a costs management order. This may be revised as the litigation progresses, but only significant developments will justify such revisions. In assessing the amount of recoverable costs at the conclusion of the litigation, the court will not depart from the approved budget unless it is satisfied that there is good reason to do so. The budget therefore effectively acts as a cap on the level of costs which the winner may recover from the losing party. This does not restrict the freedom of the parties to investigate and litigate claims as they consider appropriate (the parties may exceed the amount of the court approved budget if they wish to do so), but those costs will not be recoverable from the opposing party on the successful conclusion of the litigation.

The court can also impose a cap limiting the amount of future costs that a party may recover where there is a substantial risk that without such an order the costs incurred will be disproportionate to the amounts in issue and the costs cannot be adequately controlled through usual case management procedures (see *AB and Others v Leeds Teaching Hospitals NHS Trust and in the matter of the Nationwide Organ Group Litigation* [2003] Lloyds Law Reports 355).

The assessment of costs is a matter for the court's discretion and 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. In making the costs management order and determining the amount of recoverable costs, the court will assess whether the sums claimed were reasonably incurred and were proportionate to the overall value of the case.

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, various sanctions will apply. The damages payable will be increased by between 5 and 10% (depending on the amount awarded) subject to a maximum uplift of £75,000 and costs sanctions will apply, namely s/he may become liable for all costs incurred after the offer was made payable on an indemnity basis, and interest on the value of the claim payable at an enhanced rate.

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 test cases 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?

See the answer to question 6.1 above. Costs are actively managed throughout the proceedings and in most cases the court will make a costs management order after service of the defence. The court can also impose a cap limiting the amount of future costs that a party may recover where there is a substantial risk that, without such an order, the costs incurred will be disproportionate to the amounts in issue and the costs cannot be adequately controlled through 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.

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 a summary assessment takes place, the costs ordered to be paid may generally be enforced immediately, before the conclusion of the case. However, where QOCS applies, costs orders may only be enforced at the end of 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?

Public funding is available in England and Wales, but such funding is not generally provided in civil claims (see below).

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

The Legal Aid, Sentencing and Punishment of Offenders Act 2012 largely abolishes public funding for civil claims. Civil legal aid is not available in respect of contract or tort claims, including negligence actions and claims for personal injury and death. There are a number of limited exceptions to this general rule and funding is available in the case of certain clinical negligence actions (involving serious birth injuries and lifelong disabilities) and in other cases, including proceedings concerning family, children, disability, mental health, welfare benefits and immigration matters.

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

Yes, funding is available through Conditional Fee Agreements (CFAs) and Damages Based Agreements (DBAs), a form of contingency fee.

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. Under a CFA, the client initially pays a reduced (or no) fee to his lawyers, but in the event of "success" the client becomes liable for the standard fees plus a percentage uplift on those standard fees. What is a "success" or "failure" is defined in the CFA, often by reference to a level of damages recovered. The uplift is based on the level of risk associated with the claim. Under a DBA, the lawyers' fees are set as a percentage of the sum recovered as damages in the claim, net of any costs recovered from the losing party.

New rules which came into effect in April 2013 have significantly changed the way CFAs operate and legalised DBAs (which were previously unenforceable). Prior to April 2013, a successful Claimant could recover from their opponent the CFA uplift or success fee in addition to their standard costs and also any premium payable to obtain After the Event insurance purchased to protect the client against exposure to the other side's costs in the event of defeat. Where agreements are entered into after this date the CFA success fee and the ATE premium are no longer recoverable from the opposing party: a successful litigant will have to bear these costs and can only recover standard costs from their opponent. A CFA success fee of up to 100% of standard costs can be negotiated; the DBA payment is capped at 50% of damages. In personal injury claims, the success fee or percentage of damages payable under both CFAs and DBAs is capped at 25% of damages other than those for future care and loss.

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 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.

A voluntary 'Code of Conduct for the Funding by Third Parties of Litigation in England and Wales' has been agreed by members of the Association of Litigation Funders and sets out standards of practice and behaviour for members.

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 the 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 recently published a draft Consumer Rights

Bill which, if enacted in its current form, would introduce a range of new measures to try to encourage private actions arising from breaches of competition law. As explained in section 2 above, a limited 'opt-in' collective redress procedure is currently available for 'follow on' damages actions in the competition field. The Consumer Rights Bill proposes to substantially expand this procedure. In particular:

- Current rules only permit approved representative bodies to bring 'follow-on' claims on behalf of individuals where the regulatory authorities have established that there has been an infringement of competition law. The Bill proposes that these rules should be relaxed to allow both stand-alone and follow-on actions to be brought in respect of actual and alleged infringements of competition law.
- The Bill introduces a new collective action procedure. The specialist court hearing the case, the Competition Appeal Tribunal (CAT), must approve the collective proceedings and will direct at the time the collective proceedings order is made whether the action should be brought on an 'opt-in' or 'opt-out' basis.
- The requirement that proceedings may only be brought by approved representative bodies will be relaxed, and it is proposed that the CAT may authorise any appropriate person (whether or not they are a class member) to act as the representative and bring claims on behalf of individuals and businesses.
- The Bill proposes a range of measures to discourage abusive or speculative claims. In particular, the CAT may not award exemplary damages in the context of the new proposed collective action procedure. DBAs will also be unenforceable in 'opt-out' collective proceedings.
- A new 'opt-out' procedure for court approval of collective settlements will be introduced.

With regard to the availability of general measures for collective redress, a number of consultations have taken place, but have not been progressed by the UK Government, pending separate European initiatives on collective redress, which are discussed in our overview chapter, 'EU Developments in Relation to Collective Redress'. In particular:

- In July 2009, the Government rejected proposals (made by the Civil Justice Council (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 suggested that such a procedure might be introduced in specific sectors where there was 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 was appropriate, the Government suggested that the distinction between the 'opt-in' and 'opt-out' models was not clear cut, and described 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 was appropriate would be considered on a sector by sector basis, but the Government recognised the concerns expressed about the full 'opt-out' model and suggested that one of the hybrid models might be the best approach in most cases.
- In its 2009 report, the Government indicated that it intended to develop a framework document setting out the issues to be addressed when introducing a right of collective action, which would 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 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.
- In its consultation 'Private Actions in Competition Law: A Consultation on Options for Reform' published in April 2012, the Government adopted a similar position. It stated that it does not favour the introduction of a generic collective redress mechanism covering all sectors, either in its domestic jurisdiction or at EU level. Instead it favours an approach targeted at specific sectors, such as competition law claims, where there is a need, based on minimum standards of access to justice.

It remains to be seen whether any of these various initiatives will be progressed.

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