FOIL UPDATE May 2010

Collective Actions

As reported in the legal press earlier this month, the controversy of the Trafigura case still continues as, following settlement, the issue of costs comes to be considered. As you'll know, the case is a group action brought by Leigh Day & Co on behalf of 31,000 claimants from the Ivory Coast, alleging that they suffered injury following the dumping of toxic waste in the sea close to the Ivory Coast capital, Abidjan. The original claim for £100m was settled for £30m; around £1,000 for each claimant. Trafigura's lawyers have described the claim for costs of £105m as "staggeringly high".

Following the introduction of Group Litigation Orders in May 2000, as a consequence of the Lord Woolf's Report, the issue of collective actions, and how to achieve justice for groups of claimants who have suffered loss from a common cause has been on the agenda of several organisations including the Lord Chancellor's Department, the DTI, the OFT, the European Commission, the Civil Justice Council (CJC) and the Ministry of Justice.

The Civil Justice Council

In November 2008 the CJC produced its final report on "Improving Access to Justice through Collective Actions". The report found that existing procedure did not provide sufficient or effective access to justice for a wide range of citizens particularly consumers, small businesses and employees, leaving meritorious claims un-pursued. Whilst the CJC found that existing collective actions (such as joinder, test cases or GLOs) were effective in part, it reported that they could be improved to the benefit of both claimants and defendants. The report made a number of key recommendations, including that:

- A generic collective action should be introduced, enabling representative bodies to bring collective actions in any type of civil claim.
- A collective action should only be permitted if it were certified by the court as being suitable for the procedure, following a strict certification process.
- Collective claims should be subject to an enhanced form of case management by specialist judges
- Any proposed settlement should be approved by the court within a 'Fairness Hearing' before it could bind the represented class of claimants
- There should be full costs shifting

The CJC also considered the controversial issue of whether collective actions should proceed on an 'opt-in' basis, where litigants actively elect to take part in the litigation as members of the group, or 'opt-out' where individuals are included within the claim unless they actively choose not to take part. Individuals who do not opt-out are then bound by the outcome of the collective action. Lord Woolf recommended in his report that the court should have the power to progress actions on either an 'opt-in' or 'opt-

out' basis. The CJC agreed that it should be for the court to determine which type of action would best suit the claim, taking into account the nature and type of the action, fairness to the parties, efficiency of disposal and public interest. Mixed-certification could also be used, allowing common issues to be decided on an opt-out basis, with claims then continuing on an individual or on an opt-in basis. The report set out that for simple or mass torts, rail accidents, industrial accidents and certain clinical negligence claims opt-in might be most suitable; whilst it anticipated that opt-out would be more suitable for claims such as the bank charges litigation, with a very large number of individual claimants each with a relatively small value claim. The CJC anticipated that 'opt-out' would also be appropriate where there were large numbers of individual claimant class members and where it was impossible or impracticable to indentify all class members at the outset, for example, product liability, consumer and competition claims.

The Ministry of Justice's Response

The MOJ responded to the CJC's report in July last year. The Department's response rejected the CJC's main recommendation for the introduction of a generic collective action enabling actions to be brought by representatives in relation to any type of civil claim in which multiple parties have an interest. The MOJ noted that the main evidence relied upon by the CJC in arguing a need for reform was a paper by Rachael Mulheron, Professor at Law at Queen Mary, University of London. Her paper looked at how collective actions work in other jurisdictions including Australia, Ontario, Portugal and the USA. The MOJ took the view that "without consideration of the wider economic, social and legal contexts, such comparisons do not constitute direct evidence of need in England and Wales". The Department also felt that inadequate consideration had been given to viable alternatives to the creation of opt-out collective actions. In particular, in the context of problems affecting a large number of people the Government took the view that regulatory alternatives should be considered first before considering court-based solutions.

The Government took the view that representative rights of action should only be introduced where there was clear evidence of need, and that the only practical way forward was on a sector by sector basis. Two reasons were given for this approach: firstly, potential structural differences between the sectors would require different consideration. For example, the existence of a regulatory framework and the consideration of opt-in or opt-out approaches could vary between sectors. Secondly, it would be necessary to undertake a full assessment of the likely economic and other impacts before introducing reforms and, as a global impact assessment would be almost impossible to achieve and potentially too broad brush to be helpful in all sectors, it would be better to look at the issues on a sector by sector basis.

The Government agreed with the CJC that the right to bring a collective action would have to be created by primary legislation. The Government's view was that primary legislation should be specific to the sector concerned, and be introduced by the relevant Government department, to ensure that the legislation reflected the specific issues within the sector. This sector approach would allow appropriate regulatory solutions to be adopted wherever possible.

The issue of 'opt-out' or 'opt-in' was described in the response as "a complex and contentious issue". It summarised the issues:

> *"Advocates of the opt-out approach point to the procedural difficulties with getting an opt-in action off the ground. In particular, it can be difficult to identify and mobilise sufficient members of a class at an early stage in order to demonstrate the cost-benefit of the action and secure funding.....On the other hand, opponents of the opt-out approach point to several difficulties of principle. Parties' rights are determined in their absence and, quite possibly, ignorance of the action. Secondly damages have to*

be assessed without direct knowledge of the individual damage to each class member and quite possibly of the exact size of the class. Also it is likely that the defendant will pay more in damages than is ever used to compensate class members. Thirdly, some consider it wrong, and likely to fuel a 'compensation culture,' for people to obtain damages having taken no positive steps to participate in an action and quite possible without knowing it existed".

The conclusion was that the appropriate model for representative actions should be considered on a sector by sector basis. The Government saw considerable weight in the concerns about a full opt-in model and considered that the same objectives would be better met in most cases by one of the hybrid models, but it did not rule out adoption of an opt-out system in some sectors where that was the most cost-effective way of achieving a just outcome.

A significant issue in an opt-out approach is the calculation and distribution of damages. Opt-out requires damages to be calculated on the basis of estimates which can lead to a shortfall or a surplus. The introduction of restitutionary rather than compensatory damages could alleviate the problem but such a change would require a change in substantive law which would then apply to all claims of the type concerned. The CJC did not recommend such a change but the Government response did not rule it out, and indicated that it should be, in line with many of the proposals, considered on a sector by sector basis.

The Government agreed with the CJC that a strict certification process should be adopted for collective actions. One issue identified by the Government to be taken into account in the process was whether the representative body is likely to be able to meet the defendant's costs if unsuccessful, whether from insurance or otherwise, and whether to order the payment of security of costs. The Government believed that the court should retain full discretion to shift costs on to the loser. It was concerned that to do otherwise could encourage so-called 'blackmail litigation'.

In the Government's view ADR should form a crucial element of any collective action procedure. It stated that "there should be presumption that ADR will be used to try to settle the case, where possible before issuing proceedings and certainly before any trial". It was appropriate to consider whether ADR ought to be mandatory either across the board or in certain circumstances.

To take the issue forward the Government intends to develop a policy framework document to assist policymakers and others to address all the issues. In addition the Government also indicated an intention to work with the CJC to develop draft procedural rules to be put to the Civil Procedure Rule Committee. The aim was for the rules to be sufficiently flexible to deal with different models of collective action and "subject to any sector-specific exceptions, the rules should also include provisions for mandatory use of alternative dispute procedures, certification, security for costs, case management and fairness hearings". The framework document has not yet been published but the work with the CJC is underway – see below.

Lord Justice Jackson's Proposals

Following the publication of his Preliminary Report several organisations made representations to Lord Justice Jackson on an appropriate costs regime for collective actions. As would be expected, much of the debate focussed on the merits of opt-in and opt-out regimes and the retention of costs shifting. The CBI and the ABI both favoured an opt-in approach and argued for the retention of costs shifting. The ABI felt, in particular, that ADR should be encouraged with a view to resolving collective claims before the issue of proceedings. APIL favoured

an option canvassed in the Preliminary Report, that there should be no rigid costs rule but that in each individual case the court should consider how to deal with costs, whether there should be full cost shifting or whether there should be a protective costs order or costs capping order. It stressed that claimants needed protection against any "harsh" adverse costs orders up to the certification stage.

Having considered the submissions and arguments, in his final report Lord Justice Jackson proposed that:

(i) The starting point or default position in personal injury actions should be qualified one-way costs shifting (in line with his general proposal for PI cases) and, in all other cases, should be two way costs shifting;
(ii) At the certification stage the court, after considering the nature of the case, the funding arrangements and the resources of the parties, could direct that a different costs regime should operate.

Examining the options for funding collective actions Jackson LJ considered that:

- CFAs would continue to be an important method of funding albeit, under his general proposals, with non-recoverable additional liabilities;
- Rule 9.01(4) of the Solicitors' Code of Conduct should be amended, to permit the third party funding of collective personal injury claims;
- Contingency fees may be appropriate for group actions where the lawyers have sufficient confidence in success and the claimants receive independent advice that the terms of the proposed agreement are reasonable. (The CJC had suggested in the past that contingency fees might be suitable for use in collective actions).
- Serious consideration should be given by the Legal Services Commission to the establishment of a SLAS (Supplementary Legal Aid Scheme) specifically dedicated to collective actions.

The Civil Justice Council – Draft Rules

In November 2009 a CJC working group was established, as a consequence of the Government's intention to work with the CJC, to develop flexible rules to deal with different models for collective actions. The draft rules prepared by the working group were published in February this year. The draft rules are intended to provide a self-contained framework which could be applied without amendment to any collective proceedings introduced by primary legislation, but any sector could choose to include additional provisions if required.

The draft rules adopt the approach that authorisation to issue a collective action must be obtained before issue. The working group explains that this fits with the provisions of the Financial Services Bill, going through Parliament at the time of drafting. The working group actually preferred an approach under which the claim would be issued with an application for authorisation made at the same time, a method preferred as questions in areas such as limitation and jurisdiction can only be addressed upon issue. In fact, the provisions for collective actions under the Financial Services Bill did not become law when the Financial Services Bill received Royal Assent as part of the wash-up provisions at the end of the last Parliament and it may be that the provisions will be looked at again in the light of that change.

The working group sets out in its paper examples of specific gateway criteria, permitting a collective action, which might have been expected, but which it has decided *not* to include in the draft rules:

- ***There is no requirement for mandatory ADR*** – despite the views expressed by the Government the working group concluded that the courts should not force parties to mediate at any one particular point in time, but proposals are included in the rules to encourage the use of ADR. These include a requirement that in an application for collective proceedings the applicant should be required to indicate whether ADR has been used. The issue of whether ADR has been attempted is also included as one of the circumstances the court should consider when deciding whether collective proceedings are appropriate.

- ***There is no specific 'merits' criterion to be applied automatically in every case*** – despite the recommendations of the CJC and the approval of the Government a threshold merits test has not been included. Instead, proposals are included requiring an applicant to state when bringing the claim that it has real prospects of success. In addition the respondent will be able to apply for strike out in appropriate cases, and the court will be required to take into account "all the circumstances", including the strength of the case, when considering whether to certify a case as suitable to be brought as a collective action.

Criteria for approval as a collective action include a requirement that the class representative will be able to pay the defendant's recoverable costs if ordered to do so, but the defendant's recoverable costs may be limited by any costs capping order made.

The working group considered whether any general guidance should be included as to the factors to be taken into account when deciding whether to adopt an opt-out or opt-in procedure. It came to the conclusion that the matter was best left to the court at large.

Conclusion

The issue of how collective actions should be handled is a hot topic at present, with a plethora of proposals on the table from various sources, and active cases highlighting the issues and problems which can arise. The Jackson Report is obviously still under consideration, and the draft rules prepared by the CJC working group are with the Lord Chancellor and the Civil Procedure Rule Committee (CPRC). It is understood that the CPRC will now produce proposals for amendments to the CPR and will carry out a further full consultation before any amendments are made.

In the meantime a copy of the CJC Final Report "Improving Access to Justice through Collective Actions" is available from Shirley Denyer.
The Response of the Ministry of Justice is available on the MOJ website:
http://www.justice.gov.uk/publications/response-civil-justice-report-collective-actions.htm
The draft rules prepared by the CJC working group can be accessed on:
http://www.civiljusticecouncil.gov.uk/files/CJC_Draft_Rules_for_Collective_Actions_Feb_2010.pdf
If you have any comments on the proposals, or on collective actions in general, please contact Shirley Denyer on shirley.denyer@foil.org.uk

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