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ON THE MARCH: > GROUP ACTIONS IN THE UK

The class action market continues to expand in the UK, but the collective active regime remains in need of reform. In this article, James Oldnall, Partner, and Lara Melrose, Managing Associate from Mishcon de Reya, discuss how they see group actions developing with Andrew Jones, Managing Director of Vannin Capital.



LITIGATION FUNDING IS CRUCIAL TO THE LAUNCH OF ANY COLLECTIVE ACTION.

In the UK, we are increasingly seeing a move towards using group litigation as a means to hold large multinationals to account. These huge corporations, particularly those in the finance sector or the knowledge economy, have been operating in industries governed by severely under-resourced regulators. But where the regulator may have failed to take action, we now see that those affected are no longer willing to let big corporations get away with unscrupulous behaviour, and the obvious vehicle for holding them to account is group action.

Similarly, even where there has been a successful intervention by the regulator, for example in the competition arena, dissatisfaction with the power play of these huge corporations means there is a real willingness amongst those affected to take the next step and seek compensation.

The competition arena is the one where we have seen the most movement towards group actions so far in the UK. The Consumer Rights Act 2015 and the introduction of the opt-out regime in the Competition Appeal Tribunal (CAT) seem to have made the UK a more attractive forum for potential claimants, with the publicity around the proceedings that have been brought so far indicating a genuine interest in these sorts of claims.

Practitioners continue to grapple with the CAT's collective action regime because it is novel and relatively untested. At the moment, competition claims that do proceed do so on the basis of trial and error because there is so little authority to turn to. What is obvious from both the *Dorothy Gibson v Mobility Scooters* case and *Walter Merricks v Mastercard*, which both failed to get off the starting blocks, is that the CAT, whilst keen to encourage collective redress for consumers, will really scrutinise the

basis on which the claims demonstrate sufficient commonality and how damages are to be quantified. That means potential claimants must be extremely careful about how their claim is framed, which is a useful lesson for the collective action regime as a whole.

One of the biggest challenges when constructing class actions is that no two group actions are alike. They may share some similarities but each one involves mobilising new individuals with different skill sets, many of whom have never been exposed to litigation before.

Each claim tends to involve a lot of education around how the regime operates in a tight time frame, so it is often about managing expectations. It is therefore critical to have a network of advisors you can trust and that's where having confidence in the backing of a blue-chip funder helps to both galvanise support and lend credibility to the claim.

Just a few of the group actions that stand out in the UK recently include the truck cartel group action, seeking damages from truck manufacturers who entered into a fraudulent price fixing cartel, and the Volkswagen class action, which saw almost 60,000 people sign up to sue the German carmaker over its emissions scandal.

Another fascinating claim that we are currently working on involves the consumer rights champion Richard Lloyd, who we are representing in his high profile representative action against Google Inc. That case is the first of its kind where an individual has brought a claim in the English courts against a huge technology company over data abuses on behalf of millions of consumers. Given the current climate around data privacy, it is very unlikely to be the last and even if the claim is unsuccessful, it will be a critical step in establishing a clear set of guidelines and precedent for similar group claims, whether concerning data abuses or other breaches of consumer rights.

Practitioners and consumer groups alike have watched these cases with interest and are thinking about redress. This, coupled with the availability of funding, has certainly resulted in an increase in group actions on a much larger scale than we have seen before, and we certainly envisage that growth continuing.

As our society continues to grapple with big data as well as the size, reach and sophistication of large multinational corporations, we expect the current wave of group litigation to continue. As the class action market in the UK matures, we also think it is likely we will see more shareholder group actions and securities class actions against issuers in the UK, where these claims historically have been brought in the US.



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But the regime is ripe for reform. Take for example, data protection. The Government has opposed amendments to the Data Protection Bill that would have introduced a specific statutory right for not-for-profits and individual representatives to bring proceedings on behalf of data subjects on an opt-out basis. The current drafting of the Bill, which only allows a data subject to mandate a not-for-profit to bring claims on their behalf (i.e. opt-in), does little to address the massive imbalance in legal firepower between the large data controllers and the data subjects.

It also ignores the reality that most not-for-profits are unlikely to have the resources to round up the necessary numbers of claimants to launch a claim. So, whilst the Lloyd v Google case will undoubtedly assist in this area, there is still much to be done to bring the UK class action regime in line with other more developed jurisdictions.

Undoubtedly the UK has some catching up to do as class action litigation builds an increasing profile outside of the US. We do not think, however, that the rapid development of collective action regimes in other European jurisdictions will pose a competitive threat to the UK after Brexit. Collective actions are usually brought in

the same jurisdiction as the complainants reside, and in our experience are rarely about forum shopping.

One development that is having a hugely positive impact on the market in the UK is the growth of litigation funding options. Litigation funding is crucial to the launch of any collective action. The costs burden in collective claims is too significant for individual claimants to carry and so funding, together with after-the-event insurance, is usually a pre-requisite. Having the support and experience of a funder in your corner allows you the time and resource necessary to formulate a robust collective action. We find that the economics of any claim are as an important aspect to get right as the cause of action and damages analysis.

The availability of litigation funding is a key tool to ensuring the collective action regime in the UK continues to develop. Continued enthusiasm for these kinds of claims amongst litigation funders is important, as is a relationship of support and trust. A creative approach to funding terms, and ability to respond to applications for funding swiftly, will be key to the continuing expansion of class actions in the UK market, alongside some much-needed legislative reform.