CIVIL JUSTICE COUNCIL
COLLECTIVE CONSUMER REDRESS EVENT
Old Windsor, Berkshire

26–27 March 2008

'Sixty (60) Design Issues for an Opt-out Collective Action Regime'

Prof. Rachael Mulheron
Department of Law
Queen Mary University of London
r.p.mulheron@qmul.ac.uk

Preamble:

- There are three parts to any collective action regime: need, design and funding. The 'need' aspect has been previously addressed (***Reform of Collective Redress in England and Wales: A Perspective of Need*** (available at: www.civiljusticecouncil.gov.uk, 'Publications', 8 February 2008).

- This note sketches some points about the 'design framework' of such a regime. The note intentionally does not deal with the treatment of costs and funding (the subject of a separate study).

- The purpose of this note is to ***canvass for wide discussion*** the various design conundrums that arise in the procedural aspects of an opt-out collective action— throughout its beginning, its middle, and its end.

- Procedural aspects 'at the beginning' dominate the framework, for this is the 'engine room' which fires up or extinguishes the collective action at the very outset. It is a moot point whether the 'beginning procedures' are overly stated/prescriptive, but at least in Commonwealth jurisdictions, it seems to reflect an attitude of the law reform commissioners and legislatures to ensure, and demonstrably so, that their collective frameworks are not merely transplants of the US opt-out class action regime.

- Not all of these 'design issues' will necessarily require legislative articulation. Some would probably be dealt with sufficiently by establishing judicial precedent. A few *may* be possible to deal with by consideration and negotiation between litigants during the litigious process rather than by legislative prescription or judicial precedent being set down. All, however, have arisen in class actions jurisprudence elsewhere, and for each one of them, *different* solutions are possible. Hence, that is why their consideration within the design of any supplementary opt-out regime implemented for England and Wales (as a 'third generation statute'), and a fulsome debate by stakeholders about the different solutions, are crucial.

AT THE BEGINNING ...

Pleadings matters

1. In accordance with the usual requirements of CPR 3.4(2)(b) and (c), ***no frivolous, vexatious or abusive claims*** will be permitted to be brought as collective actions.

2. In accordance with the usual requirements of CPR 3.4(2)(a), the collective action ***must disclose a reasonable grounds*** for bringing the claim.

3. In addition to CPR 3.4, the statement of case must also comply with any ***specific pleadings requirements of a collective action regime*** (eg, which require the pleadings to specify the common issues of fact or law, or which require the pleadings to define the class, or which require the pleadings to specify the causes of action and the remedies sought), with sufficient particularity.

The procedural peculiarities of the collective action

4. As a further brake/moderation on the ability to start a collective action, the claimant class should be required to satisfy legislatively-prescribed ***preliminary merits test/s***.

5. A ***'pre-certification protocol***' may be preferable, requiring certain 'Woolf-motivated up-front disclosures' (eg, in the context of a collective action, information about the size of class, or information about the likely common and individual issues, or facts that to go prove why a collective action would be superior to other means of resolving the dispute), prior to the certification hearing.

6. A collective action must be ***the superior form of resolving the class members' disputes***. If another procedural regime, available to claimants, is more efficient and less burdensome, the collective action should not run.

7. The ***type of monetary remedy*** that may be sought and awarded in a collective action (eg, damages, disgorgement, restitution, exemplary damages, financial penalties) needs to be carefully considered, and the legislation appropriately drafted to either cover or restrict the field of remedies.

8. A collective action must be ***manageable***, from the court's point of view (and the court must be satisfied of that at the outset, subject to one possible exception in point 11 below).

9. Whether any ***type of legal issue should be excluded*** from the scope of the collective action regime needs to be legislatively prescribed.

10. ***Appeals from certification orders*** (eg, who has the right to appeal, whether an appeal is as of right or only with leave) should be legislatively prescribed.

11. The circumstances in which a collective action can be certified for the purposes of ***creating a settlement class by consent*** (and which certification criteria can be 'overlooked' for that purpose) will need to be carefully considered.

A spotlight on the class

12. A ***sufficient minimum number*** of class members must exist to form a class.

13. The class members' claims must be ***sufficiently common*** to be heard in the one collective action ('commonality' requiring consideration of whether there has to be a common 'cause of action' in play, whether a common issue of fact or law is sufficient, whether some sort of 'predominance' of common issues is necessary or not, etc). Only if the collective action has sufficient commonality will the action run.

14. The collective action must proceed ***without any conflict of interests*** between representative claimant and absent class members. Otherwise, the collective action should not run.

15. The ***class has to be defined (described)*** in a way that is fair to both claimants and defendants.

16. Whether the class definition can ***'tie' class membership to an external party*** (rather than to the series of events out of which the dispute arose), eg, to a law firm representing the class or to a third party litigation funder, needs to be judicially or legislatively prescribed.

17. A permission to allow the ***formation of sub-classes*** should be legislatively prescribed.

18. The ***status of the absent class members*** (eg, their right to give evidence at certification or at trial, disclosure against them, the scope of the legal duty of care owed to them by the claimant law firm) needs to be carefully considered.

19. Whether ***worldwide classes*** can be the subject of a class definition is most unlikely. How foreign class members should thus interact with an English collective action regime should be explicitly stated.

20. Whether any ***type of entity/person should be excluded from being a class member*** under the collective action (or only permitted to be a class member upon certain pre-requisites being satisfied) needs to be legislatively prescribed.

A spotlight on the defendant/s being sued

21. Proper ***standing requirements*** should apply, where ***multiple defendants*** are being sued in the collective action. Whether that requires that every class member have a pleadable cause of action against every defendant named in the action, or whether it is sufficient that, as against each defendant, there is a class member (and representative claimant) who can plead a cause of action, needs to be legislatively or judicially prescribed.

22. A collective action must be ***fair to the defendant.***

23. Whether any particular ***types of defendants should be excluded*** from the scope of the collective action regime needs to be legislatively prescribed.

A spotlight on those prosecuting the collective action

24. The ***representative claimant must be adequate*** to represent the absent class members. Otherwise, the collective action should not run (and furthermore, during conduct, the circumstances in which a substitution can occur must be legislatively prescribed).

25. The ***representative claimant must have the financial means*** to conduct the collective action (including the capacity to meet any ***security for costs*** order).

26. The ***legal representation*** must be adequate to represent the absent class members. Otherwise, the collective action should not run (and furthermore, during conduct, substitution must be permissible if judicially deemed necessary).

27. The ***status of ideological claimants*** (eg, the criteria permitting their appointment as representative, whether they should act as sole or supplementary / preferred or secondary representative claimants) must be carefully articulated.

Potential abuse of process issues

28. The extent (if any) to which a ***defendant may contact absent class members directly*** **before** ***the collective action is certified*** (with a view to individually settling with those absent class members) will need to be judicially prescribed, in order to set the parameters of acceptable litigious conduct and to prevent claims of inappropriate or abusive process.

29. The extent to which ***the Henderson rule*** applies to collective actions must be articulated. The operation of this rule has an impact upon the degree of finality of a collective action for a defendant.

30. How ***multiple collective actions on the same subject-matter against the same defendant/s*** should be handled and resolved, needs to be carefully considered.

31. How ***concurrent class members' individual actions*** (whether instituted prior to certification of the collective action, or instituted by opt-out class members) should be handled and resolved, needs to be carefully considered.

DURING THE ACTION ....

The opting-out process

32. The ***class members must be adequately informed*** about their opt-out rights under the collective action, giving them a realistic opportunity to opt-out. The ***manner of giving notice*** (eg, when and how often the notice should be given, whether it is mandatory or discretionary to do so, whether group or individual notice should be permitted, what appropriate use can be made of the internet and websites for disseminating opt-out notice) should be legislatively or judicially prescribed.

33. ***Who pays for the opt-out notice*** needs to be considered, if not articulated.

34. The ***content of the opt-out notice***, the appropriate length of the ***opt-out period*** (eg, whether any minimum or maximum opt-out periods should be set), and ***how to opt out***, need to be legislatively or judicially prescribed.

Court control

35. ***Close judicial case-management*** of the collective action (in accordance with recently-discussed management practices for complex litigation) would be mandatory.

36. In accordance with the wide-ranging case-management provision of CPR 3.1, the ***court must have freedom to exercise broad powers*** (to enable it to narrow/widen the common issues, amend the definition of the class, or to direct amendments to the pleadings, etc), in order to permit the collective action to dispose of the dispute as expeditiously and proportionately as possible, in accordance with CPR 1.1's overriding objective.

Conducting the collective action

37. ***When, and how, is the class to be closed?*** At some point (and with very limited exception), the class must convert from opt-out to opt-in. In most scenarios, the class members will have to 'put their feet on the sticky paper' at some point, thereby giving rise to the 'take-up rate' of the action. The parameters of this conversion from opt-out to opt-in must be legislatively or judicially prescribed.

38. The circumstances in which ***communications can be made by the representative claimant (or the claimant law firm) to the absent class members*** (as either formal notice which requires court approval, or as general correspondence which does not) will need to be judicially considered, if not legislatively prescribed.

39. The extent (if any) to which ***a defendant may contact absent class members directly*** **after** ***the collective action is certified*** (with a view to individually settling with those absent class members) will need to be judicially prescribed, in order to set the parameters of acceptable litigious conduct and to prevent claims of inappropriate or abusive process.

40. The person/s (eg, the representative claimant, absent class members) against whom ***disclosure*** can be sought with or without leave, should be legislatively prescribed.

41. The circumstances in which the ***collective action may be de-certified*** should be prescribed.

Limitation periods

42. The ***limitation period will stop running*** for both representative claimant and absent class members, either when the representative claimant files the collective action, or when (or if) the action is certified. The precise circumstances for when the limitation period stops running must be legislatively prescribed.

43. The ***limitation period will start running again*** upon certain events happening; these triggers must be legislatively prescribed.

AT THE END ...

Settlement of the collective action

44. ***Settlement agreements must be subject to a fairness hearing.*** This is, essentially, to preserve fairness for absent class members and for the defendant.

45. ***Adequate notice of the settlement hearing***, and further adequate notice about the ***verdict*** reached at the settlement hearing, will need to be judicially or legislatively prescribed. In all instances, the timing and content of the notices will likely be required to be judicially approved.

46. The '***fairness criteria***' against which the court must subject a settlement agreement should be either judicially or legislatively prescribed. Whether evidence from representative claimants, absent class members, defendant representatives, legal counsel from each side, and experts, would be helpful to the fairness hearing, needs to be considered.

47. The potential impact of any '***bar orders***' (whereby a settling defendant seeks to obtain an order that it is not open to any claims for indemnity and contribution from a non-settling defendant, in the event that the non-settling defendant loses at trial), needs to be considered, if not legislatively prescribed.

48. The procedures by which absent class members can (a) ***object*** to a settlement, or (b) ***opt out*** of a settlement (if a second opt-out stage is to be permitted at all), need to be judicially or legislatively prescribed.

49. The procedure (if any) by which absent class members ***can opt back into a class*** for the purposes of settlement need to be judicially or legislatively prescribed.

Assessing and distributing the money

50. ***Damages assessment*** may be individual, or a class-wide aggregate assessment, depending upon the circumstances. The pre-requisites for aggregate assessment need to be legislatively and judicially prescribed with the utmost clarity.

51. ***Compensation distribution*** should be permitted to be made to class members directly, or via a *cy-pres* order.

52. A direct distribution to class members may be permitted, not by an individual assessment of each class member's entitlement, but on the basis of an ***average or pro rata assessment*** for class members identified at the point at which the assessment is being made.

53. ***Cy-pres distributions*** (and the pre-requisites governing them) will need to be mandated legislatively, if permitted.

54. Whether ***coupon recovery*** should ever be permitted (compensation 'in like', rather than in monetary terms), needs to legislatively or judicially articulated.

55. Whether any ***reversionary distribution*** should be countenanced should be legislatively prescribed.

56. The ***representative claimant*** may seek to make a ***claim for compensation*** for the time and effort expended to represent the absent class members; whether such claims should be permissible will need to be considered, if not articulated.

Treating the class members individually at the end

57. The means of determining ***the individual issues*** (if any) remaining after the determination of the common issues (whether by judgment or pursuant to a settlement agreement) must be clear and explicit.

58. Whether class members ***have the right to insist upon individual assessment and direct distribution***, or whether, in the interests of proportionality, the managing judge may approve an average distribution or a *cy-pres* distribution, regardless of individual class members' indications to the contrary, needs to be carefully articulated.

Rights of appeal

59. ***Appeal rights*** regarding the ***judgment of the common issues*** (who, when, with or without leave), and appeal rights regarding ***judgment on individual issues*** (who, when, thresholds, with or without leave) must be explicitly stated.

60. ***Appeal rights*** (if any) from a judicially-approved ***settlement agreement*** need to be considered, if not judicially or legislatively prescribed.

***

(Please note: a 'best practice' collective action regime, based upon a comparative analysis of the Australian, Canadian and United States' regimes, has been proposed in: R Mulheron, ***The Class Action in Common Law Legal Systems: A Comparative Perspective*** (Hart Publishing, Oxford, 2004) and ***The Modern Cy-Pres Doctrine: Applications and Implications*** (Routledge Cavendish, London, 2006). Almost all of the features mentioned herein are canvassed in much further detail, with comparative treatment and with 'best practice' recommendations, in those books.)