



**REFORM OF COLLECTIVE REDRESS  
IN ENGLAND AND WALES:**

**A PERSPECTIVE OF NEED**

**A Research Paper**

**for submission to the**

**Civil Justice Council of England and Wales**

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In addition, the author has derived benefit and assistance from numerous face-to-face and round-table discussions with interested stakeholders (practitioners, law reformers, industry representatives, judiciary, and governmental representatives) in England and in Europe. Sincere thanks are due to each of these parties for insightful and stimulating discussions. Where appropriate, specific acknowledgment of information provided by these parties is provided throughout the Research Paper.

A preliminary version of this Research Paper was presented for discussion at a conference arranged by the CJC on 28–29 November 2007, held at Theobalds Park, Cheshunt. The event, the attendees' contributions, and the written and oral feedback subsequently received, have enhanced the robustness of this research. As and where appropriate, due acknowledgment is also made of these contributions in this Paper.

Finally, any opinions expressed in this Research Paper are those of the author, and should not be taken to necessarily represent the views of the Civil Justice Council. In part, this Research Paper has been prepared to assist the Civil Justice Council in its consideration of possible reform of the collective redress mechanisms presently available in England and Wales. It is understood that the Civil Justice Council intends to publish its views on this matter in the near future.

## EXECUTIVE SUMMARY

The remit of this particular research is to challenge whether there is an ‘evidence of need’ for reform of collective redress in England and Wales, and if so, what/where are the gaps, and how should the gaps be closed off so that any reform has substance, and is not merely ‘a solution looking for a problem’?

Nineteen (19) building blocks add up to suggest that there is overwhelming evidence of the need for a further collective redress mechanism, in order to supplement presently-existing procedural devices available to claimants. (These numbers allotted to the building blocks in the Table below correspond to the substantive Sections which follow in the Paper hereafter. Sections 1 and 2 are addressed as Introduction and Methodology, respectively.)

### The Building Blocks that Construct the Need

<p><b>3. The GLO regime</b> has certainly been used since its introduction in 2000 (62 actions thus far), indicating that collective redress for damages <i>is</i> pursued (most commonly so far, for alleged care home abuses and for environmental claims)</p>	<p><b>4.</b> Whether English opt-in litigation has been run as <i>ad hoc</i> opt-in actions or under the GLO, such litigation inevitably suffers from a <b>rate of participation</b> of group members which is highly variable, but <b>typically low</b>, with many opt-in rates &lt; 30%</p>	<p><b>5.</b> The experience of those law firms who commence and conduct group litigation is that the key reasons as to <b>why opt-in did not suit the action</b> were the sheer task of identifying all group members at the outset, the barriers to litigation that some group members never surmounted in time, and the low value recoveries per group member (other reasons also figured)</p>
<p><b>6.</b> Furthermore, a number of <b>procedural problems have manifested under the opt-in regime</b> of the GLO — eg, frontloading, a skewed costs–benefit analysis, the test case versus generic issue dilemma, the operation of limitation periods, the judicial attitude towards those who do not opt-in</p>	<p><b>7.</b> The <b>‘barriers to litigation’</b> that litigants face are extraordinarily diverse — legal practitioners’ combined experiences gave rise to almost 20 separate reasons as to why group members may fail to come forward to join the class at the outset of the action</p>	<p><b>8.</b> The <b>specialist regime under the Competition Act 1998, s 47B</b>, is a representative opt-in action, which has been notable for its attendant difficulties and lack of utility, largely caused by the opt-in principles upon which it operates</p>

<p>9. A lack of damages claims (whether follow-on or stand-alone), in respect of <b>widespread cartel and other anti-competitive conduct</b>, has also been notable in England — despite the existence of a specialist follow-on representative action for consumer claims arising from such conduct</p>	<p>10. There is a notable lack of private actions for class-wide damages incurred when a widely-utilised contract term is regarded by regulatory enforcers to be an <b>‘unfair contract term’</b> — in circumstances where class-wide loss or damage has feasibly occurred as a result of the incorporation of and reliance upon that term</p>	<p>11. Data produced by the Legal Services Commission indicates that some categories of group actions have featured as <b>major or medium-sized funded applications</b> more so than, say, consumer-oriented group actions (apart from pharmaceutical cases) — perhaps arising from a combination of a lack of applications in those particular areas and applications not meeting necessary funding criteria</p>
<p>12. The number of disputes handled by the GLO regime are notably fewer, and the range of GLO claims is considerably less extensive, than the number/range of claims instituted under <b>opt-out collective redress regimes in Australia and in Ontario</b> over the same time period (2000–07)</p>	<p>13. The <b>opt-out regime in Portugal</b> has been in operation since 1995, and is Europe’s longest-standing opt-out regime. The experience under it — particularly the ability to bring low-value but widespread consumer grievances — is salutary for any reform proposals which may be considered for England and Wales</p>	<p>14. There is an increasing <b>momentum across Europe</b> to facilitate collective redress using the <b>opt-out</b> mechanism (Spain, Denmark, Norway, the Netherlands), whilst avoiding the accoutrements of the ‘US-style’ class action</p>
<p>15. Attempts by English claimants to <b>‘add-on’ or take advantage of the US opt-out regime</b> (federally, under rule 23 of the FRCP) have met with a lack of success on several grounds (eg, <i>forum non conveniens</i>, US statute lacks extra-territorial effect, <i>res judicata</i> concerns)</p>	<p>16. With respect to global products, such as investment opportunities or pharmaceutical goods that are purchased/used by residents, both in England and elsewhere, it is relevant to compare the relative lack of litigation in England, where <b>the same product has been the subject of litigation under opt-out class actions</b> elsewhere</p>	<p>17. The <b>bank charges litigation</b> in English County Courts has been a recent reminder of how inefficient and burdensome widespread unitary litigation can be — with consequences ranging from embarrassing bailiff visits to banks because of a failure to file a defence due to ‘administrative oversight’ to the very real possibility of inconsistent judgments and delays</p>



<p><b>18. Widespread grievances in the employment sphere</b> are also prevalent (eg, equal pay, national minimum wage, discrimination), giving rise to thousands of individual claims which have increased in number markedly over the past 24 months, for which an opt-out collective action would provide greater efficiencies</p>	<p><b>19. The reality is that the GLO regime is a case management ‘umbrella’</b> under which a conglomeration of individual actions is managed — in that regard, individual actions are not only encouraged, but they are required. Commencement of numerous unitary actions which must then be transferred to the ‘umbrella’ of the GLO is not unusual under this system</p>	<p><b>20. Empirical data from the United States and Victoria confirms that the rates of participation under opt-out regimes are very high</b> (at least 87%); and where empirical data does not exist in other jurisdictions, opt-out rates noted in individual cases indicate that the rates of participation, whilst variable, exceeded 60% on the sample selected</p>
<p><b>21. Empirical data from the United States, plus individual case data from Europe and England, confirms that the rates of participation under opt-in regimes, whilst variable, tends to be quite low</b> (in some cases, less than 1%), indicating that, on occasion, very few group members are caught in the litigation’s net</p>		<p><b>Summary of findings:</b></p> <p>There is a ‘gap’ in the collective redress mechanisms available in England and Wales, which could be filled by a regime that is:</p> <ul style="list-style-type: none"> <li>• opt-out</li> <li>• generic (capable of procedurally handling a wide array of disputes that manifest common grievances), and</li> <li>• permissive of an ideological representative claimant.</li> </ul>

**PART I**

**INTRODUCTION**

## 1. BACKGROUND TO RESEARCH PAPER

The Civil Justice Council of England and Wales (CJC) is currently investigating whether initiatives should be proposed in order to improve collective redress mechanisms, for consumers (and others) who allege grievances on a widespread scale. The CJC expects to report on the matter in 2008.

When considering any reform of collective redress, there are inevitably three matters that require consideration:

1. **Whether the regime is needed** (ie, whether there is a ‘procedural gap’ that requires filling), and if so;
- 2, **The design of the regime** (ie, its statutory drafting); and
3. How the litigation conducted pursuant to it will be **funded** (eg, by public fund, third party funders), and how **costs** will be dealt with (eg, whether costs-shifting will be retained, when that may be departed from).

This Research Paper addresses the **first** of these key components: is there a need for a new initiative for collective redress, over and above the mechanisms currently available to litigants (primarily, the group litigation order, and various representative rules)? The CJC’s enquiry pertains to whether there is any ‘evidence of unmet need’ for claimant protection in England and Wales, especially given the non-availability of a generic opt-out mechanism in English civil procedure.

The research itself has been motivated by several factors: by the various reform proposals and studies at European level which are presently reviewing collective redress availability and efficacy; by a proliferation of English discussion papers issued by governmental bodies during 2006–7, which have either enquired about or voiced the need for better group and representative action procedures for this jurisdiction; by the CJC’s relationship with key law representatives around the Commonwealth, whose lessons and insights continue to provide much assistance on the question of collective redress; and by the CJC’s declared position to continue to develop effective, court-controlled, procedures for meritorious consumer claims. On the statutory front too, key developments have occurred recently, notably, the introduction of new collective redress procedures in some European jurisdictions as at 1 January 2008. The author and the CJC consider this Research Paper to be both timely and relevant within the domestic and European contexts.

In addition, a recent study by the Judiciary of England and Wales, entitled, *Report and Recommendations of the Commercial Court Long Trials Working Party* (December 2007), makes several recommendations concerning the commencement and conduct of ‘heavy and complex cases’, or ‘large scale litigation’, in the Commercial Court. The report was prepared to consider and respond to a series of criticisms of the procedures that were adopted in two major commercial trials — the *BCCI* case and the *Equitable Life Insurance Company* case — in which ‘*the claimants’ cases had, effectively, collapsed after years of pre-trial procedures, then many months of trial, all at great expense*’ (at para 22 of the Report). Many of the Working Party’s comments in respect of, for example, judicial case-management, preliminary merits assessment, and the need for efficiencies in litigation, are of relevance to the commencement and conduct of group litigation, even though the comments were not *necessarily* directed toward that specific context, but to Commercial Court work generally. In any event, the Report reiterates the ongoing need to review the procedures available to litigants, and the court’s vital role in case management of potentially resource-intensive cases.

The enquiry undertaken for the purposes of this Research Paper, as to any ‘unmet need’ for better collective redress in England and Wales, has been undertaken by having regard to both intra-jurisdictional and comparative perspectives. Comparatively speaking, the Research Paper is particularly informed by the experiences in Europe and in the Commonwealth. Notwithstanding that a tremendous amount of important jurisprudence on collective redress has emanated from the United States, particularly over the past four decades, the American jurisdiction does not form a particular focus of this Research Paper — given the differences in funding practices, substantive legal principles, costs-shifting rules, and cultural attitudes towards litigation evident in the US (eg, re the employment of jury trials, and the wider availability of exemplary damages), with which many English judiciary members, practitioners and law reformers feel inherently uncomfortable.

It will be suggested in the Summary of Findings that, both individually and cumulatively, the 19 sections of this Research Paper adduce emphatic evidence of ‘unmet need’ for more effective collective redress initiatives for litigants in England and Wales. It will further be suggested that the ‘unmet need’ could be satisfied by the introduction of an opt-out generic collective redress regime.

In this regard, the research undertaken for this Paper resonates with the sentiments and purposes expressed by Lord Woolf in his seminal report published more than a decade ago, *Access to Justice: Final*

*Report to the Lord Chancellor on the Civil Justice System in England and Wales* (1996), where his Lordship said, at ch 17, para 6:

*In this area of litigation more than any other my examination of the problems does not pretend to present the final answer, but merely to try to be the next step forward in a lively debate within which parties and judges are hammering out better ways of managing the unmanageable.*

With the above comments in mind, this Research Paper seeks to take another ‘step forward’ in this most important debate on procedural reform.

## 2. METHODOLOGY

The information contained in this Research Paper is derived from a variety of sources:

**Questionnaire** — On 27 October 2007, a Questionnaire was distributed to four law firms who conduct specialist group litigation practices in England and Wales, and of those, three firms participated in this study — Leigh Day & Co Solicitors, Irwin Mitchell Solicitors, and Hugh James Solicitors. Eleven practitioners from the respondent law firms completed the Questionnaire, who, between them, conducted some 97 group actions. All completed Questionnaires are on file with the author.

Divided into three sections, the Questionnaire sought to elicit information based upon the law firms' experiences in commencing and running group litigation over several years (both under the GLO regime and, prior to that, under *ad hoc* arrangements). The content of the Questionnaire was agreed in consultation with the Civil Justice Council. For the purposes of this Research Paper, the Questionnaire contained the following assumptions, or 'preliminary notes about the exercise':

A. For the purposes of this questionnaire, please *assume* that the funding of the action *would* have been available from *some* source (to enable the focus of this questionnaire to be placed upon other procedural requirements).

B. The questionnaire requires, for some questions, that you assume the role of a 'certification judge', ie, by considering whether the essential requirements of an opt-out class action were met in the action, in your view.

C. Finally, the questionnaire seeks to gather information about actions that would have suited an opt-out regime. This assumes that the class members would have had to opt in *later down the track* in order to have their individual issues determined — but that, at the initial stage, it would have been sufficient to *describe the class*, with the appointment of a suitable representative claimant to litigate the common issues on behalf of the class.'

For the purposes of confidentiality, the names and certain other identifying characteristics of the litigation which were noted in the completed Questionnaires have been deleted when preparing sections of this Research Paper.

The information provided in the Questionnaires was, to some extent, based upon information known only to the participant lawyers, who have provided the information in good faith and with care and caution.

Where the participant lawyer could not provide an ‘accurate-with-certainty’ answer to a question, or where a ‘round estimate’ is all that could feasibly be provided (eg, with respect to the total class size in respect of a particular litigation), then the results of the survey in this Paper record that response.

Following receipt of the completed Questionnaires, the author followed up with some of the Respondents, either by face-to-face discussions or by telephone, to clarify some comments or responses contained in the Questionnaires.

**Interviews and meetings** — Apart from the follow-up meetings referred to above, over the period of Summer/Autumn 2007, the author met a number of governmental officials, legal practitioners, consumer and employee representatives, industry representatives, legal practitioners, those charged with law reform, and other persons interested in reform of English collective redress procedures, both in Europe and in England, from which information and insights were learnt and ideas were developed. Quotations attributed to particular individuals throughout this Research Paper have been checked with the authors prior to publication of the Paper.

**Case law analysis** — In several sections of the Research Paper, it has been necessary to closely examine case law on class proceedings in Canada, group litigation and other representative actions in England, and representative proceedings commenced and conducted under Australia’s federal regime. Reference has also been made to decisions emanating from the United States, for example, in a section which considers those scenarios in which ‘add-on’ classes of English claimants have been involved. All references to case law herein have been derived from the author’s perusal of relevant case law (both reported and unreported) on the following databases: Westlaw (both ‘UK’ and ‘International’ libraries); Lexisnexis Butterworths (various subscribed sources); Canlii; Austlii; and Bailii.

**Secondary literature research** — All government reports, journal articles, responses to consultation papers, newspaper reports, and the like, which are referred to herein, were sourced either via hard copy or via online copies. Where available online, the relevant URL has been provided, for readers’ convenience.

**Preliminary report** — As mentioned in the Acknowledgments, on 28–29 November 2007, the author presented her findings, as at that date, to a conference of stakeholder participants, arranged by the Civil Justice Council, and attended by Sir Anthony Clarke, Master of the Rolls, and held at Theobalds Park,

Cheshunt. Feedback from such stakeholders derived both at, and since, that conference has been incorporated with attribution, where appropriate.

**References to England** — Importantly, the research undertaken for this Research Paper was derived from assistance given by legal practitioners and other stakeholders in both England and Wales, and from primary materials emanating from both jurisdictions; and the findings contained herein pertain to both England and Wales. Thus, any references to ‘England’ should be taken to mean ‘England and Wales’, unless otherwise indicated in the particular context.

**The relevant terminology** — The methodology undertaken to prepare and write this Research Paper has necessarily required that reference be made to a variety of jurisdictions, all of which tend to use different terminology to describe their generic, opt-out, procedural schemes. Ontario calls this a ‘*class proceeding*’; other Canadian provinces prefer the terminology of a ‘*class action*’, as does the United States; and Australia adopts the terminology of a ‘*representative proceeding*’. In this Paper, all of these terms will be included under the umbrella term of ‘*collective action*’. A collective action means, where appearing in this Paper, a procedural scheme which is based upon opt-out, not opt-in, principles; which is generic in the sense that it can handle a variety of substantive law disputes; and which entails the use of either a direct claimant or an ideological claimant. By contrast, the term, ‘*group litigation order*’, where appearing in this Paper, carries the meaning attributed to it by Part 19.III of the Civil Procedure Rules (CPR) — an opt-in regime whereby each claimant must file a claim form and be entered upon the group register. The use of the term, ‘*group action*’, similarly connotes an opt-in arrangement.



**PART II**

**COLLECTIVE REDRESS FOR DAMAGES  
IN ENGLAND AND WALES**

### 3. THE LIMITED LITIGATION COMMENCED UNDER THE GROUP LITIGATION ORDER TO DATE

**The main points:**

- ❑ **there have been, according to records maintained by Her Majesty's Court Service, 62 group actions certified as GLO's since the regime's introduction on 2 May 2000**
- ❑ **on a percentage basis, the most common GLO category of claim has been care home abuses (21% of all GLO's), and the next most common category has been environmental claims (15%)**

- (A) **Constructing the GLO table.** The GLO regime, implemented via Pt 19.III of the Civil Procedure Rules, has been in effect since 2 May 2000. Each GLO, once certified, is required to be entered on a group register (per Practice Direction 19B, para 6). A list of these group registers (one for each GLO) is maintained by Her Majesty's Court Service, and is available for perusal at: <http://www.hmcourts-service.gov.uk/cms/150.htm>.

In Table 1, the author has grouped the GLO's by type, indicating the percentage of GLO's represented by each category of claim. Further information has been sourced from the solicitors conducting the actions, where necessary, to describe the subject matter of the GLO actions. A couple of caveats about the GLO Table should be noted:

- ❑ a couple of the GLO cases appear to have been repeated on the Group Register (eg, the St Williams litigation), in which event they are counted in the Table as one GLO and not as two;
- ❑ a comparison between the list of GLO's at the URL noted above, and judgments and orders which pertain to GLO's available on legal databases, reveals the occasional discrepancy. For example, in a judgment on costs, *Various Ledward Claimants v Kent and Medway HA* [2003] EWHC 2551 (QB), reference is made to a GLO issued on 31 July 2002, but the date and subject matter of that GLO do not appear at the URL noted above.

**TABLE 1 GLO's by category/type (2000–7)**

Type of claim or allegation	No. of GLO's brought for this type of claim	% of GLO's represented by this type of claim	The GLO's name, number and brief description
Employment-related personal injuries	5	8%	<p>Miner's Knee GLO – No. 62 – chronic knee injury resulting from underground work in mines</p> <p>Dexion Deafness GLO – No. 49 – industrial deafness claim</p> <p>Coal Mining Contractors GLO – No. 18 – respiratory injuries (right to contribution)</p> <p>Cape plc GLO – No. 4 – asbestosis-related diseases</p> <p>Havelock GLO – No. 25 – asbestosis-related diseases</p>
Military-related claims against British Government	3	5%	<p>Atomic Veterans GLO – No. 61 – claims by atomic veterans (military and civilians) who participated in the British programme of testing of nuclear explosive devices between 1952–58</p> <p>Kenya Training Areas GLO – No. 29 – dispute about 'ordnance related incidents' in areas of Kenya</p> <p>Chagos Islanders GLO – No. 27 – dispute about exile of Chagos Islanders from homeland by the UK government to make way for a US military base</p>
Disappointed holiday-goers (for loss and damage sustained during package holidays)	4	6%	<p>Soviva Hotel GLO – No. 60</p> <p>Torremolinos Beach Club GLO – No. 48</p> <p>JMC Holidays / Club Aguamar GLO – Nos. 6 and 7</p>

Type of claim or allegation	No. of GLO's brought for this type of claim	% of GLO's represented by this type of claim	The GLO's name, number and brief description
Taxation disputes – including disputes over VAT, refund entitlements, advanced corporation tax, and other taxation disputes	8	13%	<p>VAT Interest Cars GLO – No. 59 – re refunds of VAT to motor vehicle dealers</p> <p>MTIC Damages GLO – No. 54 – dispute whether the raising of an assessment to VAT fell outside the scope of VAT and was in breach of the Sixth EC Council Directive</p> <p>FIDs GLO – No. 43 – dispute over entitlement to tax credits</p> <p>Franked Investment Income GLO – No. 35 – whether the inability to mitigate the incidence of ACT where profits were generated outside the UK was contrary to treaty or double taxation conventions</p> <p>CFC Dividend GLO – No. 34 – dispute whether certain provisions (by which dividends received by UK corporations from companies resident outside the UK were subject to corporation tax) were in breach of treaty or double taxation conventions</p> <p>Thin Cap GLO – No. 33 – dispute whether the thin capitalisation provisions of the corporate tax regime were in breach of treaty or double taxation conventions</p> <p>Loss Relief GLO – No. 30 – dispute whether certain provisions (of the corporation tax legislation relating to group relief for losses) were in breach of treaty or non-discrimination articles of double taxation conventions</p> <p>ACT GLO – No. 16 – whether payment of advanced corporation tax on dividends/distributions from UK subsidiaries to parent companies resident in other States breached treaty and double taxation conventions between UK and the other States</p>

Type of claim or allegation	No. of GLO's brought for this type of claim	% of GLO's represented by this type of claim	The GLO's name, number and brief description
Product liability claims (whether under the Consumer Protection Act 1987 or otherwise)	7	11%	<p>FAC GLO – No. 51 – re anti-convulsant medication taken by pregnant women</p> <p>DePuy Hylamer GLO – No. 50 – hip replacement components</p> <p>Sabril GLO – No. 40 – medication Vigabatrin, allegedly causing visual field constriction</p> <p>Scania 4 Series GLO – No. 28 – claims of defective design of tractor, causing personal injuries to the driver</p> <p>Trilucent Breast Implant GLO – No. 38 – breast implants</p> <p>Persona GLO – No. 21 – contraceptive device</p>
Care home or school abuses and maltreatments	13	21%	<p>Manchester Children's Home GLO – No. 22</p> <p>St Williams GLO – No. 57</p> <p>Staffordshire Children's Homes GLO – No. 47</p> <p>St Georges GLO – No. 44</p> <p>Calderdale GLO – No. 42</p> <p>Kirklees GLO – No. 36</p> <p>South Wales Children's Homes GLO – Nos. 32 and 31</p> <p>St Leonard's GLO – No. 26</p> <p>Lower Lea GLO – No. 17</p> <p>Longcare GLO – No. 15</p> <p>West Kirby GLO – No. 11</p> <p>Redbank GLO – No. 1</p>
Transport accidents	1	2%	<p>Gerona Aircrash GLO – No. 14 – loss and damage suffered by crash of plane at Gerona Airport on 14 September 1999</p>
Employment disputes	2	3%	<p>British Telecommunications GLO – No. 45 – dispute re diminution in pension value available to ex-employees</p> <p>Prentice Ltd/Daimler Chrysler UK Ltd Litigation GLO – No. 0 – effectiveness of termination notices re members of dealer network</p>

Type of claim or allegation	No. of GLO's brought for this type of claim	% of GLO's represented by this type of claim	The GLO's name, number and brief description
Environmental claims	9	15%	<p>Abidjan PI GLO – No. 58 – re injury allegedly sustained as result of exposure to material from vessel which discharged at Abidjan</p> <p>Parkwood GLO – No. 56 – re odours, scavenging birds, pests, etc, connected with a landfill site</p> <p>Corby Group GLO – No. 53 – airborne contamination resulting from land reclamation</p> <p>Mogden GLO – No. 52 – re odours and mosquitoes from a sewage treatment works</p> <p>Newton Longville GLO – No. 39 – re management of landfill site</p> <p>Sandon Dock GLO – No. 23 – exposure to odour/emissions from a waste-water treatment plant</p> <p>Trecatti GLO – No. 19 – re management of a landfill site</p> <p>Nantgywyddon GLO – No. 13 – re management of a landfill site</p> <p>Gower Chemicals GLO – No. 5 – toxic fumes in sewage pumping station</p> <p>Misnamed GLO – No. 12 – re whether land should be treated as set-aside land for purpose of entitlement to compensation</p>
Financial misstatement or financial negligence cases, financial entitlement disputes	4	6%	<p>Evolution Film Group GLO – No. 46 – claims made by subscribers to a film partnership scheme re defendant as sponsor, promoter, etc</p> <p>Lloyds Names GLO – No. 41 – re Lloyds insurance and investment portfolio selection</p> <p>RyanAir GLO – No. 20 – dispute about outstanding commissions payable to agents on traffic documents</p> <p>Esso Collection GLO – No. 10 – disputes arising out of a partnership licence agreement</p>

Type of claim or allegation	No. of GLO's brought for this type of claim	% of GLO's represented by this type of claim	The GLO's name, number and brief description
Personal injuries, allegedly negligently-caused	3	5%	<p>DVT Air Travel GLO – No. 24 – whether onset of DVT was an ‘accident’ within the meaning of art 17 of the Warsaw Convention</p> <p>McDonald’s Hot Drinks GLO – No. 8 – alleged personal injuries (scalding, etc) caused by dispensing and serving hot drinks in certain materials/containers</p> <p>Lincoln Prison GLO – No. 55 – claim for physical or psychiatric injuries as a result of a prison disturbance</p>
Medical negligence / wrongdoing	3	5%	<p>Nationwide Organ Retention GLO – No. 9 – retention of tissue and organs of stillborn and deceased children (at venues other than the Royal Liverpool Children’s Hospital) causing parents psychiatric injury</p> <p>Royal Liverpool Children’s Hospital GLO – No. 2 – retention of tissue and organs of stillborn and deceased children causing parents psychiatric injury</p> <p>Kerr / North Yorkshire GLO – No. 3 – alleged negligent and inappropriate treatment of patients by a psychiatrist</p>
<b>TOTAL</b>	<b>62</b>	<b>100%</b>	

Note that the Table only refers to those actions which passed through the GLO certification criteria — it does not refer to those where application was made, unsuccessfully, for a GLO order. To recap for convenience, the relevant certification criteria under the GLO regime are as follows:

**The five GLO certification criteria:**

1. There must be a 'number of claims', per CPR 19.11(1) (the numerosity requirement);
2. These must give rise to 'common or related issues of fact or law', per CPR 19.10 and 19.11(1) (the commonality requirement);
3. Managing the litigation by means of a GLO must be consistent with the overriding objective of the CPR, which is to enable the court 'to deal with cases justly', per CPR 1.1(1) (a suitability requirement);
4. The consent of the Lord Chief Justice, the Vice-Chancellor, or the Head of Civil Justice (whichever is appropriate), is required before a GLO is possible, per PD 19B, para 3.3 (a preliminary merits, or screening, criterion);
5. A GLO will not be commenced if consolidation of the claims, or a representative proceeding, would be more appropriate, per PD 19B, para 2.3 (the superiority criterion).

**(B) Comparison with other jurisdictions (later in the report).** Notably, the *types* of GLO claims are not nearly as wide-ranging, and the numbers of private grievance claims are not nearly as frequent, as the types of claims which have been the subject of litigation under opt-out collective actions in Australia (under its federal regime) and in Ontario (under its provincial regime), over the same time period (described later in Table 12).

Indeed, some of the categories evident under opt-out regimes, for example:

- overcharge cases of small amounts recoverable per class member (or which are capable of being distributed in Canada by a *cy-près* order, upon satisfaction of certain criteria);
- claims on a widespread scale by lessees or purchasers of real estate;
- claims for cartel behaviour or other anti-competitive behaviour; or
- shareholder actions, on the basis of non-disclosure or misleading disclosure,

have made no appearance under the GLO regime to date. This topic will be revisited when the other jurisdictions are examined more closely in Part IV of the Paper.



#### 4. PROBLEMS WITH OPT-IN ACTIONS IN ENGLAND: PARTICIPATION RATES

**The main points:**

- the experience in English group litigation ‘on the ground’ (via practitioner feedback) indicates that, under an opt-in regime, the opt-in rates vary considerably, from very low percentages (<1%) to almost all (90%), or all, of class members opting to participate in the litigation**
- in several instances, the percentages of opting-in cannot be determined because early cut-off dates were established, and the total number in the class was never able to be ascertained before the litigation was finalised**
- in addition to the practitioner feedback, some judiciary have observed, on occasion, the large difference between the purported class size and the number of claimants identified under the relevant GLO action and who have opted in**

(A) **The methodology for this Section.** For this part of the Research Paper, a Questionnaire was sent to various law firms where employed legal practitioners are experienced in commencing and conducting group litigation (either under the Group Litigation Order regime, or prior to that, litigation conducted on an *ad hoc* basis by agreement among the court and parties). For further details, please refer to ‘Methodology’ in Part I hereof.

The Questionnaire sought to gather information about actions (‘the Relevant Actions’) that were conducted by the legal practitioners (hereafter, ‘the Respondents’) under an opt-in group litigation arrangement. For each of the Relevant Actions, the Respondents were asked to identify how many were in the class, in their best estimate; and how many were captured (ie, participated) in the litigation as identified class members?

For each Relevant Action, the title of the litigation, and the name of the conducting law firm, have been removed from the Table, for the purposes of confidentiality. The size of the Respondent group was 11; and collectively, these Respondents were responsible for the conduct of 97 group actions. Note that this cohort of 97 also includes pre-GLO cases; and the cohort does not include all the GLO cases noted in Table 1.

(B) **The results.** The results of the Questionnaire are shown in Table 2, following:

**TABLE 2 Results of Questionnaire re English group litigation: participation rates**

	Type of claim	No. of identified class members	Total number in class (estimated or actual)	% of opt-in (approx.)
1	negligent supply of essential services	160	20, 000	0.8%
2	employment-related injury	176, 000	Not precisely known	Unknown
3	alleged medical wrongdoing	1, 200	Not precisely known, but estimated to be in the thousands	Unknown
4	product liability	200	Not precisely known, but estimated to be in the thousands	< 20%
5	employment-related injury	560, 000	approx. 625, 000	90%
6	environmental claim	50	approx. 500	10%
7	employment-related injury	approx. 50	Not precisely known	Unknown
8	environmental claim	470	Small additional number of class members	>80%
9	product liability (drug)	400	approx. 50 came later	90%
10	product liability (drug)	1, 500	Not precisely known	Unknown
11	product liability (drug)	2, 000	Not precisely known	Unknown
12	product liability (device)	2, 000	Not precisely known	Unknown
13	product liability (drug)	17, 000	Not precisely known	Unknown
14	financial dispute	750	10, 000	7.5%
15	environmental claim	approx. 130	approx. 1, 000	13%
16	environmental claim	approx. 400	approx. 2, 000	20%

	<b>Type of claim</b>	<b>No. of identified class members</b>	<b>Total number in class (estimated or actual)</b>	<b>% of opt-in (approx.)</b>
17	environmental and human rights claim	approx. 1, 300	approx. 5, 000–10, 000	13%–26%
18	product liability (drug)	over 600	1, 200	50%
19	product liability (drug)	approx. 400	approx. 2, 000	20%
20	product liability (drug)	200	approx. 500	40%
21	transport accident	150	150	100%
22–74	personal injuries (illness sustained)	several actions: no. of identified class members ranged between 1,925 and 12, depending upon the action	in none of the actions was it possible to determine the precise number of class members, but it ‘could be several hundred more claims’ or ‘could be many more claims’, depending upon the action	Unknown
75	transport accident	25	approx. 50	50%
76	transport accident	15	30	50%
77	transport accident	11	25	44%
78	transport accident	8	20	40%
79	transport accident	3	55	5.5%
80	transport accident	7	35	20%
81	transport accident	11	15	73%
82	aircraft incident	50	200	25%
83–92	employment contractual disputes (pay)	several actions: no. of identified class members ranged between 50 and 1,000, depending upon the action	Not precisely known	Estimated as between 25%–50% of total classes
93	environmental claim (giving rise to personal injury)	40	approx. 1,000	4%

	Type of claim	No. of identified class members	Total number in class (estimated or actual)	% of opt-in (approx.)
94	environmental claim (giving rise to personal injury)	15–20	approx. 1, 000	2%
95	product liability (drug)	400–500	approx. 10, 000	5%
96	product liability (drug)	approx. 12	600–3, 000	at best, 2%
97	employment-related injury	250	approx. 1, 000	25%

(C) **Observations based upon these results.** Table 2 indicates a real disparity of rates of participation under opt-in actions in England — some relatively small classes having a very low opt-in rate (eg, action 79), whereas action 5 was a very large class with a high rate of participation.

However, it is evident that, in the majority of cases in which some approximation of the numerator and denominator of the equation could be made, the opt-in rate was less than 50%.

**TABLE 3 Calculating the opt-in rates from the sample of responses**

Opt-in rate	evidenced in X number of the Relevant Actions, where X equals:	evidenced in X % of the Relevant Actions, where X equals:
10% or less	8	8%
11%–50%	24	25%
more than 50%	5	5%
unknown	60	62%
<b>TOTAL</b>	<b>97</b>	<b>100%</b>

Of course, even under an opt-out regime, then in the majority of cases, the class members will ‘have to put their feet on the sticky paper’ and actively seek to establish individual entitlement to monetary recovery in the event that the common issues are decided in the class’s favour, or the action is settled. In only some cases, a direct refund to the class members in accordance with records

held by the defendant, or (in North America) a *cy-près* distribution to an analogous group of people (or organisation), may preclude opt-in altogether.

At this point, it must be said that an opt-out collective redress mechanism does not magically wave away the difficulties of resolving mass grievances. For example, by reference to a few illustrative Ontario cases: the method established for determining the individual issues, following the common issues being decided in the class's favour, may require tinkering with to prevent it becoming too expensive, given the issues and amounts at stake: *Webb v 3584747 Canada Inc* (2002), 24 CPC (5th) 76 (Div Ct). Alternatively, the take-up rate by class members following the resolution of the common issues in the class's favour may be less than 100% — eg, in *Hislop v Canada (Attorney General)* (Ont SCJ, 30 April 2004), it was about one-third, by the time that the question of the lawyers' fees came to be determined. Notably, the substantive points raised by this litigation subsequently proceeded on appeal to the Ontario Court of Appeal in 2004 and to the Supreme Court of Canada in 2007 — for present purposes, however, it is interesting to note the court's comments, in its judgment delivered in April 2004, that the take-up rate was, quite commonly, not more than 75% in those cases which depended upon the claimants coming forward at the end of the litigation (at para 17):

*It is estimated that there are a maximum 1500 class members. ... However, the reality is that there has never been a class proceeding that has had 100% participation by class members. Class proceedings where there is a high level of participation generally involve cases where there is a known finite group such as patients of a physician. In those cases, class members are readily identified and contacted. Even in cases with high participation rates such as Nantais v Telecommunications Proprietary (Canada) Ltd (1996), 28 OR (3d) 523 and Anderson v Wilson (1997), 32 OR (3d) 400 (certification motion), the participation rates did not exceed 75%. I accept [the] submission that it is rare that a class action has more than a 75% take-up rate. To date, despite a well-funded notification campaign and the notoriety of the trial judgment in this case only 500 class members have come forward.*

As a further difficulty, some class members may ask to join the class and claim their entitlement at some point *after* the cut-off date which the court has set (in Ontario, s 25(4) of the Class Proceedings Act provides that the court will set a reasonable time within which individual class members may make claims), as was evident in: *Denis v Bertrand & Frere Construction Co* (SCJ, 28 Aug 2002).

In addition, when a class can be legitimately *closed* under an opt-out regime, and on behalf of precisely *what described class* the collective action can properly be constituted, can give rise to real difficulties, as the Australian experience has demonstrated. For example, class members may be under an obligation, in effect, to take a positive act to join the class — by proactively entering into a client retainer with the law firm which has conduct of the matter, or by entering into a contract with the third party funder which is financing the litigation — because, from the outset, the class definition is worded so as to impose that ‘tie’. A series of Australian decisions have grappled with this very point, with differing views. Some judges variously consider such a class definition to contravene the spirit of an opt-out regime, to subvert the legislation by imposing an opt-in requirement, and to define the class other than by reference to the cause of action itself (eg, *Dorajay Pty Ltd v Aristocrat Leisure Ltd* [2005] FCA 1483, Stone J; *Rod Investments (Vic) Pty Ltd v Clark* [2005] VSC 449, Hansen J; *Jameson v Professional Investment Services Pty Ltd* [2007] NSWSC 1437, Young CJ), whilst, on the other hand, the Full Federal Court has recently endorsed one version of a limited class definition by reference to those who entered into a litigation funding arrangement (*Multiplex Funds Management Ltd v P Dawson Nominees Pty Ltd* [2007] FCAFC 200).

However, the key point about the participation rates under the English opt-in group litigation sampled in this Section is that opt-in rates can be extremely low when participation, *in the sense of a formal commencement of individual proceedings by each group member*, is required at the outset of the litigation, as the GLO stipulates.

- (D) Judicial observations about low opt-in rates.** In addition to the practitioner feedback outlined in this Section, a review of the case law determined under the GLO regime since its implementation in May 2000 reveals some judicial observations about the disparity between the purported total size of the class and the number who had opted in at the time that the GLO was being certified or when some other pre-trial interlocutory application was being determined by the court.

Under an opt-in regime, sometimes the focus — almost preoccupation — seems to be on the group register, and who, and how many, are on it, at those early stages. For example, some disparity between opt-in’s and total class is noted in the following judicial comments arising out of English group litigation:

***Autologic Holdings plc v Inland Revenue Commissioners*** [2005] UKHL 54, para 87:

*[The GLO] was made on 23 May 2003 by the Chief Chancery Master. It has been amended several times. There are now a large and growing number of corporate groups on the group register (the Revenue's printed case puts the total at 89 groups and [Autologic's] printed case puts the total number of companies involved at over 1,000).*

***Hobson v Ashton Morton Slack Solicitors*** [2006] EWHC 1134 (QB), para 10:

*This has been brought by a number (currently less than 100) of Applicants who have all had sums withheld, or have paid, from their compensation recovered under one or more of the schemes either by firms of solicitors or the trades' union concerned. The precise number is a matter of some doubt, it lies between 65 and 156 together, it is said, with about 1,000 more who have expressed an interest in the proceedings and "wish to bring claims falling within the proposed GLO issues" [citing from a lawyer's statement].*

***Multiple Claimants v Sanifo-Synthelabo Ltd*** [2007] EWCA 1860 (QB), para 21:

*There are currently 39 claims on the group register. There are a further 29 claims where claim forms have been issued and served but claims have not yet been put on the register. There are something like 100 further claims where there has not yet been investigation.*

## 5. PROCEDURAL PROBLEMS WITH OPT-IN ACTIONS IN ENGLAND: IDENTIFIED BY PRACTITIONERS

### The main points:

- ❑ the Respondents indicated that the vast majority of the Relevant Actions sustained some procedural difficulties because they were conducted under an opt-in regime
- ❑ the most significant reasons identified for these difficulties were the task of identifying the sheer numbers of claimants at the outset, the low value recovery per class member, and the task of preparing individual pleadings/claim forms upfront

- (A) **The methodology for this Section.** This Section of the Research Paper is also based upon the Questionnaire which was sent to lawyers responsible for the commencement and conduct of group litigation in England (described in ‘Methodology’, Part I).

For each of the Relevant Actions, the Respondents were asked to consider what, if any, problems arose in the commencement of the actions under the GLO or under *ad hoc* arrangements, because the action was conducted in accordance with an ‘individualised’ opt-in approach. For the purposes of consistency, the Respondents were asked to choose from a key of reasons (denoted by letters A–I) in order to answer this question.

The sample group of Relevant Actions totalled 97. In a few of these Relevant Actions, Respondents indicated that these actions suited the opt-in procedure and, optimally, should not have been conducted under any different procedural mechanism.

- (B) **The results.** The responses to this enquiry are summarised in Table 4 below.

Notably, by way of extra observation, in some cases, Respondents volunteered that, when all class members were not entirely aligned or similarly situated, the formation of two or more sub-classes, with a representative claimant for each sub-class, would have suited the litigation.



**TABLE 4 Why opt-in did not suit the Relevant Actions**

	<b>Reasons why opt-in did not suit the litigation</b>	<b>No. of Relevant Actions where this reason was given</b>	<b>% of Relevant Actions affected by this reason</b>
A	the sheer numbers of class members who had to be identified at the outset of the action	80	82%
B	the low-value recovery per class member	81	84%
C	actual or perceived barriers (whether economic, social, etc) to class members coming forward at the outset of the action	84	87%
D	insufficient commonality between the claims	4	4%
E	individual preparation of pleadings/satisfying pre-action protocols per class member too onerous, compared to one master pleading for a representative class member at the outset	15	15%
F	inconsistent judgments along the way for or against class members	8	8%
G	too much satellite litigation (whether about costs or procedure) about how individual claimants should be dealt with	8	8%
H	the amount of damages recovered per individual class members was a small proportion of the class-wide damages sustained by the class	7	7%
I	some other reason	7	7%

The actual or perceived barriers to which the Respondents refer as being disadvantageous under an opt-in regime (per Item C of the Table) are detailed more fully in Part II, Section 7, later in the Research Paper.

## 6. PROCEDURAL PROBLEMS WITH OPT-IN ACTIONS IN ENGLAND: IDENTIFIED IN JUDGMENTS

### The main points:

- ❑ a close analysis of judgments delivered on GLO actions since 2000 indicates that a number of problems are evident, many of which stem from the attempt to bring large-scale litigation under an opt-in regime
- ❑ the most significant difficulties are frontloading, difficulties with limitation periods, the use of the test case versus the generic issue approach, the costs–benefit analysis at the outset of an opt-in action, and the judicial attitude towards those who do not opt in at the early stages of the litigation

- (A) **Judicial decisions indicating further procedural difficulties.** In several judgments delivered in respect of GLO actions since May 2000, judicial comments have thrown up (either directly, or by implication) some of the procedural difficulties that are associated with the regime. Notably, many of these stem from the fact that the GLO is an opt-in regime, and a fairly light-handedly drafted one at that.

For reference, further details about some of the GLO’s deficiencies have been previously discussed by the author in: ‘*Some Difficulties with Group Litigation Orders — and Why a Class Action is Superior*’ (2005) 24 *Civil Justice Quarterly* 40–68; and ‘*Justice Enhanced: Framing an Opt-out Class Action for England*’ (2007) 70 *Modern Law Review* 550–80.

- (B) **The various procedural difficulties.** On the basis of the judgments to date, these may be summarised as follows:

- ❑ **maintaining the group register all-important** — entry of claimants’ names and details onto the group register is essential upfront — the GLO regime anticipates and entails that investigations of all putative claimants’ circumstances occur at the outset, in order to file a claim form for each claimant (note that para 6.1A of Practice Direction 19B provides that ‘[a] claim form must be issued before it can be entered on a Group Register’). See, for

example, the comment in: *Multiple Claimants v Sanifo-Synthelabo Ltd* [2007] EWCA 1860 (QB), para 21:

*There are currently 39 claims on the group register. There are a further 29 claims where claim forms have been issued and served but claims have not yet been put on the register. There are something like 100 further claims where there has not yet been investigation.*

The group register also requires ongoing maintenance, even where the future of the litigation is uncertain, per: *Re MMR and MR Vaccine Litigation Sayers v Smithkline Beecham plc* [2006] EWHC 3179 (QB), para 62.

- **test cases versus generic issues** — both continue to be used, depending upon the circumstances (rendering the proceedings rather more unpredictable than an opt-out collective action which proceeds according to the procedure laid down in the relevant statute) — the test case approach was used in, eg, *Pirelli Cable Holding NV v Revenue and Customs Commissioners* [2007] EWHC 583 (Ch), in *Sempra Metals Ltd (formerly Metallgesellschaft Ltd) v Her Majesty’s Commissioners of Inland Revenue* [2007] UKHL 34, and in *Boake Allen Ltd and others v Her Majesty’s Revenue and Customs; NEC Semiconductors Ltd and other Test Claimants v Inland Revenue Commissioners* [2007] UKHL 25. On the other hand, the generic issues approach was used in, eg, *Esso Petroleum Co Ltd v Addison* [2003] EWHC 1730 (Comm).

Recently, the device of trying a series of six preliminary issues, based upon a set of assumptions, failed in: *Multiple Claimants v Sanifo-Synthelabo Ltd* [2007] EWHC 1860 (QB) (re the use of the anti-epileptic drug Epilim by pregnant women).

- **frontloading** — whether sufficient commonality could be found among the claimants’ claims may only be safely determined after **each** of the claimant group members has prepared and served ‘particulars of their claim, together with a report from a medical expert in an appropriate field’, as noted in: *Re MMR and MR Vaccine Litigation Sayers v Smithkline Beecham plc* [2006] EWHC 3179 (QB), para 3 (note that a practice direction giving effect to the litigation proceeding as group litigation was implemented in this case,

on 8 July 1999, rather than have the litigation proceed as a GLO, which practice direction was recently revoked on 11 July 2007 — for present purposes, however, the point about front-loading is the same, no matter how the litigation proceeded):

*The thinking which lay behind these orders was that the relatively small number of claimants who were pressing ahead with their claims, and the variety of different disorders from which they are alleged to suffer, called into question whether their claims should continue in the context of group litigation. But a decision could only be made about that once the claims had been properly pleaded, and the link between the various disorders and the vaccines had been asserted.*

- ❑ **aggressive marketing of the action can draw the disapproval of the court** — under an opt-in regime, the onus is inevitably on the claimant lawyers to find, identify, name, and particularise the various claimants as early as possible in the action. On occasion, this has drawn adverse comment, as the following comment from *Various Ledward Claimants v Kent and Medway Health Authority* [2003] EWHC 2551 (QB) shows, at para 11 — (the claimants alleged that they had been raped or sexually assaulted by a gynaecologist formerly employed by the defendant health authority, and now deceased):

*I am satisfied that this case is a classic example of litigation, driven by the lawyer acting for the Claimants in which there is a real risk that costs have been and will be incurred unnecessarily and unreasonably.*

- ❑ **cost–benefit analysis may look poor, under an opt-in regime** — in *Hobson v Ashton Morton Slack Solicitors* [2006] EWHC 1134 (QB) (in which certification of the action as a GLO was denied), Sir Michael Turner noted (para 12) that the size of the opt-in class at the time of this particular interlocutory application was fewer than 100; that the group’s size was ‘a matter of some doubt, it lies between 65 and 156 together, it is said, with about one thousand more who have expressed an interest in the proceedings’; and that ‘the sums claimed are modest, the largest being about £500, the mean is £357.50, although they are of obvious importance to the Claimants themselves.’ Hence, it was concluded that, on the size of the opt-in class at that point, and ‘[f]rom the figures so far provided, it is manifest that the total recovery in respect of all present claims, assuming that the action is brought in the form which is now sought, and it succeeds, will be a sum less than £25,000.’ In addition to his view that some simpler form of dispute resolution (say, 2–3 test cases) would

be far superior to a GLO in this case, Sir Michael Turner also raised a cost–benefit analysis (paras 45–46):

*If it be assumed that all the “would be” applicants came forward and were joined in the litigation, the total sum claimed would still be only about one half of the costs incurred to date, leaving aside the additional costs which would be incurred if the action were to proceed, as the Applicants’ solicitors envisage. The Applicants sought to meet this obvious and grotesque imbalance by claiming that, if this application was to be successful, “there are many more potential Claimants who will be bringing like claims”.*

*The reality is that since July 2005 there has been very substantial publicity and media attention (newspapers, television and radio) quite apart from meetings sponsored by interested Members of Parliament and, yet, the numbers of Applicants to date are no greater than as set out above. ... It is, in these circumstances, highly speculative whether there will be any significant increase in “would be” Claimants coming forward to join in the litigation if a GLO were to be made.*

*Even were there to be a number of “would be” Claimants who might be willing to join in the proceedings, it must be doubtful if the making of a GLO would be justified on such a speculative basis.*

This passage combines various potential threshold tests — a minimum numerosity threshold, a cost–benefit analysis, the ‘need’ for a group action which is a superiority criterion elsewhere under some opt-out regimes — in circumstances where the GLO regime is largely silent on all of these issues. The difficulties of satisfying a cost–benefit analysis on the basis of those claimants who have come forward, even before the GLO is ordered, is fully apparent from this case.

- ❑ **how limitation periods operate for those who have not opted in** — regardless of the certification of a group litigation order, the limitation period is not tolled for class members under an opt-in system until they have filed their claim forms, which can have serious ramifications for a claimant who does not commence individual proceedings and join the group register, as discussed in: *Taylor v Nugent Care Society* [2004] EWCA Civ 51, paras 15–16.
  
- ❑ **compulsion to join the class?** — in *Taylor v Nugent Care Society* [2004] EWCA Civ 51, para 15, the Court of Appeal noted that the GLO provisions:

*have no requirement which would enable a court to make an order requiring a claimant to join a group action if the claimant chose not to do so. A claimant is perfectly entitled to decide to bring an action without taking that step. The fact that he has that right does not mean, however, that there are no good reasons why he should join a GLO which covers issues which will be involved in his litigation. If a claimant does not join such a GLO when it would cover his proceedings, then he is nonetheless subject to the management powers of the court. If he brings the proceedings in parallel to a GLO, the court is fully entitled to manage the proceedings which he brings in a way which takes account of the position of those who have joined the GLO.*

It was suggested by the Court of Appeal that, upon cold and considered reflection, claimants *should* join a GLO rather than pursue their own claim, for if they do not:

*Those litigants who join the group action are entitled to have their interests (whether they are claimants or defendants) given higher priority than those of a claimant who does not take that course. This is because of the fact that they are likely to be large in number, but also because by joining the group action they are co-operating with the proper management of the proceedings, whereas the litigant who does not take that course is not so doing.*

It must be remarked, however, that no opt-out class action in the Commonwealth, nor the US class action, creates a mandatory class for damages recovery. The right to opt-out in such actions is either legislatively or judicially-enshrined; and those (generally few) who opt out may have opted out precisely because they think that they can do better individually. Opt-outs are not necessarily seen as being ‘unco-operative’.

- **a multitude of individual claims** — the GLO regime adopts an essentially individualistic and potentially costly approach to group litigation, essentially because claimants must commence their proceedings as if they were unitary claimants. In *Boake Allen Ltd and others v Her Majesty's Revenue and Customs; NEC Semi-Conductors Ltd and other test claimants v Inland Revenue Commissioners* [2007] UKHL 25, Lord Woolf described the process in the following terms (at para 32):

*Before a GLO can be made it is necessary for each individual potential member who wishes to join the GLO to make an individual claim under CPR Part 7 or Part 8. This in conjunction with the application to register enables the court to*

*determine whether the respective litigants qualify to be a member of the GLO. It also prevents time continuing to run for purposes of limitation of actions. None the less the claim once made will usually almost immediately be of only limited historic interest because what matters is the application to register and the register of the GLO on which all proceedings subject to the GLO are registered. The purpose of a GLO is then 'to provide for the case management of claims which give rise to common or related issues of fact or law (the GLO issues)' (CPR Part 19.10). Section III of Part 19 contains additional case management powers for GLOs which include directing that there shall be a group particulars of claim and specifying the details to be included in a statement of case (Part 19.13 (d)). Directions may also provide 'for one or more claims on the group register to proceed as test claims' as happened in the cases the subject of these proceedings (Part 19.13(b)). Where judgment is given on an issue on the group register in relation to a GLO, that judgment or order is binding on the parties to all other claims that are on the group register at the time the judgment is given, unless the court orders otherwise. (Part 19.12 (1) (a)).*

It follows that, under an opt-in regime, where there may be an absolute multitude of claim forms, then significant costs and logistical ramifications if any amendments are required to those claim forms, can easily follow. In *Boake Allen*, Lord Woolf cautioned (paras 30–33) that:

*GLOs can involve hundreds or thousands of different parties. In such a situation any step which each of the many parties has to take can cumulatively so effect the total costs, as to make them disproportionate both to the means of the parties to the action and the issues at stake. For this reason it is important that such steps generate the least possible costs.*

*... All litigants are entitled to be protected from incurring unnecessary costs. This is the objective of the GLO regime. Primarily, it seeks to achieve its objective, so far as this is possible, by reducing the number of steps litigants, who have a common interest, have to take individually to establish their rights and instead enables them to be taken collectively as part of a GLO Group. This means that irrespective of the number of individuals in the group each procedural step in the actions need only be taken once. This is of benefit not only to members of the group, but also those against whom proceedings are brought. In a system such as ours based on cost shifting this is of benefit to all parties to the proceedings.*

*In the context of a GLO, a claim form need be no more than the simplest of documents ... bearing in mind its place in the GLO process and the need to limit pre registration costs so far as this is possible. In this case the suggested deficiency in the claim forms are that they did not sufficiently identify the basis for the Revenue being under an obligation to repay the tax paid assuming this should not have been claimed by the Revenue. This is an area of the law the parameters of which are still evolving.*

*In my judgment it would be wholly inconsistent with the objective of the GLO to require the nature of the remedy claimed to be spelt out in detail in the claim forms of the taxpayers. The Revenue knew perfectly well the basis of the claims once the issues had been defined for the purpose of the GLO. For each of the parties to have to spell out details of the manner in which they would advance their claim at the outset would have caused substantial extra costs to be incurred in researching the law. Cumulatively this would have been grossly wasteful. The decision of the Court of Appeal should not be treated as requiring a claim to set out more than an outline of the claim.*

Here, then, is a judicial attempt to reduce the frontloading which the GLO inevitably entails, by instructing legal practitioners not to devote an over-abundance of detail and preparedness on each individual claim form. (Interestingly, the desirability of reducing the upfront costs and complexity of initiating proceedings was recommended also in the separate context of the **Report and Recommendations of the Commercial Court Long Trials Working Party** (December 2007), in Section D, 'Statements of Case and Lists of Issues').

Nevertheless, the reality is that opt-out regimes, by not requiring every individual case to be identified, pleaded and filed at the commencement of the litigation, do not entail the same time, resources and expenses as opt-in regimes do, and are back-loaded to a greater extent. To that end, the 'voice of experience' about the downside of front-loading, insofar as the opt-in regime implemented by s 47B of the Competition Act 1998 (in respect of follow-on actions for anti-competitive infringements) is concerned, is referred to shortly, in Section 8 of this Part.



## 7. REASONS FOR NOT OPTING-IN UNDER ENGLISH GROUP LITIGATION

**The main points:**

- ❑ **the experience in English group litigation indicates that there are almost twenty (20) reasons as to why class members may not opt in to litigation that is conducted on an opt-in basis**
- ❑ **these reasons may be conveniently grouped into: social and psychological reasons; reasons to do with the defendant; procedural reasons; and economic reasons.**

- (A) **Sources of information.** When answering the Questionnaire which was circulated for the purposes of this Research Paper, some Respondents provided reasons as to what barriers class members perceived in declining to join the class (where the Respondents had noted that, in Table 4 previously, reason C was a factor).

This question was also teased out by the author with Respondents in follow-up meetings or correspondence, where the Respondents had indicated reason C.

Furthermore, some lawyers contacted the author following the presentation of the Interim Report at the Civil Justice Council conference held on 28–29 November 2007, with further information as to why, in their experience, some class members did not opt in.

The information in this Section is drawn from **all** of the abovementioned sources.

- (B) **The reasons.** The following Table 5 represents a collated list of the barriers which Respondents have noticed to cause potential class members ('class members' in the Table) not to opt in to the litigation. The author has grouped the reasons given by category:

**TABLE 5**      **Why class members may not opt in**

<p><b>Legal practitioners' feedback:</b></p> <p><i>Social or psychological reasons:</i></p> <ol style="list-style-type: none"><li>1.      some class members do not feel engaged with the legal process, do not feel that it 'is for them', are nervous about the law and being involved with the law, or have a very limited understanding or knowledge of the English legal system;</li><li>2.      some class members are fully familiar with the English legal system (eg, they are lawyers themselves), but do not consider that the 'system will deliver' cheaply and efficiently, and hence disassociate themselves from the process;</li><li>3.      some class members have language difficulties/cultural differences which puts them off contacting lawyers, or from being involved in litigation;</li><li>4.      some feel antagonistic towards other class members and do not want to 'be in the same boat' as other class members;</li><li>5.      some class members hold the view that they would <i>never</i> sue, either individually or collectively, because they don't believe that litigation is <i>ever</i> worthwhile;</li><li>6.      some class members are ashamed or fear stigmatisation, because of the nature of the claim or of their own behaviour that has given rise to the claim (although were liability/the common issues to be decided in the class's favour, they may feel able to claim with a minimum of publicity, depending upon how the individual issues (if any) were to be determined);</li><li>7.      some class members do not want to revisit a painful or traumatic episode in the past, out of which the litigation arises (ie, the death of a child) and would rather 'leave it alone', although again, as above, were some common issues or liability as a whole decided in the class's favour, they may feel sufficiently vindicated to pursue the individual issues necessary to complete their claim;</li></ol> <p><i>Reasons to do with the defendant:</i></p> <ol style="list-style-type: none"><li>8.      some class members fear recriminations or reprisals from the defendant (especially in employment scenarios, but elsewhere as well) if they file a claim form;</li><li>9.      some class members are approached directly by the defendant to accept an offer in settlement of their dispute, or are offered some 'goodwill' gesture, that excludes them from the litigation thereafter;</li><li>10.     some class members retain both goodwill and loyalty toward the defendant, and do not wish to sue that defendant under any circumstances;</li></ol> <p style="text-align: right;"><i>Continued overpage ...</i></p>
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**TABLE 5 (cont).**

<b><i>Procedural reasons:</i></b>	
11.	some class members do not know of the existence of the litigation, despite advertising's best efforts, and these class members who do not come forward may be difficult for the lawyers to find;
12.	some class members perceive that, somehow, they are actually in an opt-out regime where, despite taking no proactive step, they will receive a beneficial outcome from someone else's litigation;
13.	some class members believe that they will gain compensation via some other avenue (eg, a criminal compensation fund, public enforcement) without their having to, themselves, be involved in litigation;
14.	some would prefer that others 'bore the grief' of the litigation, but are willing to 'piggy back' in any subsequent litigation if that proves worthwhile (ie, if liability has been determined in other group members' favour);
15.	some class members believe (correctly or incorrectly) that their claims are statute-barred (bearing in mind that, in actual fact, the statute of limitations does not toll for them if other members of the group file claims);
16.	some believe (correctly or incorrectly) that their claims will be disallowed if they cannot locate documentary proof of damage (eg, receipts in the case of price-fixed goods), and hence, do not bother to pursue the claim to ascertain whether other means of proof (eg, sworn statements) are acceptable, should liability be established in the class's favour;
<b><i>Economic reasons:</i></b>	
17.	some class members are worried about having to bear costs in proving the common issues, let alone their individual issues;
18.	some consider that the litigation is 'not worth it' in this particular instance, given their own individual small amount at issue;
19.	some class members will not opt-in because they deliberately wish to sue individually, primarily because they think that they will recover more compensation if they 'go it alone'.

(C) **‘Opting-in’ later in the action.** There are three scenarios, at least, where an opt-out action *never* ‘converts’ to an opt-in action: (a) where the class loses on common issues relevant to liability, (b) where the class wins on common issues/liability, and thereafter damages are awarded upon an aggregate basis and distributed *cy-près*, or (c) where the class wins the common issues/liability, and thereafter the damages can be awarded without any proactive steps being taken by the claimants because the defendant has the information on class members and direct credits/refunds can be facilitated without any intervention of the claimants at all.

Otherwise, if the class members win on common issues relevant to liability, or (more likely), the action settles and the settlement agreement requires the class members to come forward to claim their damages amounts, the class members are going to have to take a proactive step to assert their entitlements *at some point*. This has the hallmarks of opting in — although, under an opt-out regime, the class members already enjoy the status of ‘absent class members’ if they fall within the class definition and have not opted out. As mentioned in a previous Section, the number of class members who do assert their right to recovery after the common issues have been determined in their favour is often referred to as the ‘take-up rate’.

Some of the reasons given in Table 5 (eg, nos. 3 and 5) would presumably apply to some class members to preclude their taking that step to assert their individual entitlements, irrespective of whether the litigation was conducted on an opt-in or an opt-out basis. However, several of the reasons provided in response to the Questionnaire are particularly applicable to the class members’ unwillingness to opt in *at the outset* of the action. As one participant noted from the floor at the Civil Justice Council conference (28–29 November 2007):

*nothing would make class members come forward more than the carrot of monetary recovery after the hard work in proving or settling liability has already happened, courtesy of the representative claimant.*

## 8. A 'SPECIALIST' OPT-IN REGIME IN ENGLAND: FOLLOW-ON ACTIONS

### The main points:

- ❑ a 'specialist' representative action, on behalf of consumers who have been the victims of infringing anti-competitive conduct, has been permitted by legislation since 2003 — this action operates on opt-in principles
- ❑ to date, there has been only one representative action instituted under this provision, in respect of price-fixing of England and Manchester United football shirts
- ❑ in addition to the paucity of representative actions, problems have been evident because of — the opt-in regime, low participation rates, and the limitations upon class members and ideological claimant that the legislation imposes

- (A) **The representative action explained.** Section 47B of the Competition Act 1998, c 41, permits a representative action to be brought by a specified body, in respect of 'consumer claims made or continued on behalf of at least two individuals' which are follow-on actions for damages in respect of previously-proven anti-competitive breaches.

This 'specialist' representative action has only been available since 20 June 2003 (the provision itself was inserted by the Enterprise Act 2002, c 40, s 19).

The only 'specified body' to date is Which? (the Consumers' Association), pursuant to: Specified Body (Consumer Claims) Order 2005, SI 2005/2365. This designation occurred on 1 October 2005, and it is only since then that 'consumer claims' have been possible to pursue under s 47B via this representative action.

The representative action operates on opt-in principles, whereby the consent of each consumer is required before that consumer can be a member of the class.

Moreover, insofar as the claimant and class are concerned, there are two important limitations. The representative action can only be instituted by a specified body as ideological claimant (and not by a directly-affected consumer as representative claimant); and only consumers

can be included within the class (not businesses who have suffered detriment as a result of anti-competitive conduct).

The representative action is a true follow-on action. No representative claim is possible under s 47B until an anti-competitive infringement (as defined in s 47A(5)) has been established. Under s 47A(6), such a decision, which then paves the way for a follow-on action if there is a desire to bring one, may be made by the Office of Fair Trading (OFT), by the Competition Appeal Tribunal (CAT), or by the European Commission (EC).

The consumers represented in the class are immunised from any adverse costs order, should they lose.

The relevant legislation, which permits the representative action, provides as follows:

**47B Claims brought on behalf of consumers**

- (1) A specified body may (subject to the provisions of this Act and Tribunal rules) bring proceedings before the Tribunal which comprise consumer claims made or continued on behalf of at least two individuals.
- (2) In this section ‘consumer claim’ means a claim to which section 47A applies which an individual has in respect of an infringement affecting (directly or indirectly) goods or services to which subsection (7) applies.
- (3) A consumer claim may be included in proceedings under this section if it is—
  - (a) a claim made in the proceedings on behalf of the individual concerned by the specified body; or
  - (b) a claim made by the individual concerned under section 47A which is continued in the proceedings on his behalf by the specified body;and such a claim may only be made or continued in the proceedings with the consent of the individual concerned.
- (4) The consumer claims included in proceedings under this section must all relate to the same infringement.

The representative action has suffered from a number of difficulties, four of which are referred to in the following sections.

(B) **Paucity of actions thereunder.** In the four years since s 47B was enacted, there has been just *one* case instituted under it:

*The Consumers Association v JJB Sports plc* (case number: 1078/7/9/07).

The relevant Notice of a Claim for Damages, dated 12 March 2007, is available at:

<http://www.catribunal.org.uk/archive/casedet.asp?id=127>

The consumers in this case purchased either replica Manchester United football shirts, or replica England shirts, in circumstances where there were price-fixing arrangements among the manufactures and distributors of these football shirts during 2000 and 2001. As a result of this cartel in operation, the price uplift per replica football shirt was approximately £15. The OFT found JJB Sports plc and its co-defendants guilty of price-fixing and imposed a substantial fine on JJB Sports of £18.6 million (together with lesser fines on the co-defendants). However, the number of consumers named in the claim form was low, as recent press describes:

*'Which? action to settle'* (*The Lawyer*, 10 December 2007):

'An intense media campaign in early 2007 by Which? promised redress for hundreds of thousands of customers, but the time-lag between the price-fixing and the action meant that many people no longer possessed vital evidence such as receipts. Ultimately, the action named just 144 customers aiming to secure compensation of £20 each.

DLA Piper client JJB Sports had already been fined £18.6m, after being found guilty of price-fixing by the Office of Fair Trading.'

One reason for the paucity of actions is that, under s 47B(7), the 'consumer claim' must be concerned with goods (or services) received as a consumer, and not in a business context. This very much restricts the type of scenario that lends itself to an action by Which? for follow-on damages. Indeed, in its Discussion Paper, *Private Actions in Competition Law: Effective Redress for Consumer and Business* (Apr 2007, OFT916), the OFT makes the following points:

**OFT Competition Law Discussion Paper:**

Para 4.6 ... no provision is currently made for representative follow-on actions to be brought on behalf of businesses.

Para 4.13 The scope for representative actions could be extended by allowing duly authorised bodies to bring both follow-on and stand-alone actions, on behalf of consumers or businesses, as appropriate. A statutory basis would be needed for stand-alone representative actions. The same applies for all follow-on representative actions in the ordinary courts, and claims brought on behalf of businesses before the Competition Appeal Tribunal (as section 47B of the Competition Act 1998 only deals with representative actions on behalf of consumers).

Another reason for the lack of actions is the resource-intensive nature of the litigation, especially for a consumer organisation to be compelled to bring, as mentioned further in section (E) below.

(C) **Opt-in may not suit the circumstances.** Those who were influential in both paving the way for the commencement and for the subsequent conduct of the action in *The Consumers Association v JJB Sports plc* have expressed doubts about the exclusively opt-in principles to which s 47B adheres, which require the action to be pursued from the very commencement as an action on behalf of named consumers, rather than on behalf of a class described:

- ❑ Per the OFT in: ***Private actions in competition law: effective redress for consumers and business: Recommendations from the Office of Fair Trading*** (OFT916, 26 November 2007), para 7.12:

**OFT, Private Actions Nov 2007 Paper:**

‘The current evidence suggests that representative actions exclusively on behalf of named consumers continue to fail to optimise economies of scale and give rise to unnecessary costs and complexity. There is a risk that meritorious cases may not be brought or may only be brought by, or on behalf of, a small number of those who have been harmed. [citing, in fn 28, the JJB Sports case]’



- Per the representative claimant itself, Which?: this view is contained in the *Submission by Which?* to the OFT’s Discussion Paper of April 2007 — Which?’s response is dated 2 July 2007, and was prepared by Ms Ingrid Gubbay, former Principal Campaigns Lawyer for Which?, in light of Which?’s experiences garnered under the *JJB Sports case* by that time. In the following extract, Ms Gubbay explains the ‘front-loading’ consequences that any opt-in scheme entails:

**Which?’s response:**

‘Para 5.1. The single biggest hurdle to the effectiveness of the current statutory representation procedure is the requirement to name claimants on the claim form. We believe that there should be a high degree of flexibility in this area.

Para 5.2. Currently the claim form in s 47B damages claims are front loaded, they must contain a concise statement of the relevant facts, legal issues, and amount claimed in damages. All essential documents must be annexed to the form. In practice, settling the claim form and supporting documents is a substantial amount of work.

Para 5.8. ... There is in our view a compelling case for an opt out provision to be made available.

Para 5.17. Making available an opt out procedure in appropriate cases and calculating damages on established guidance, must be an important step in calibrating the balance so that representing parties and business have some certainty about the process and principles underlying the calculation of damages, and public and private enforcers can combine expertise and resources to produce a sustained and chilling effect on unlawful anti trust activity.’

- Per the representative claimant’s lawyers, Clyde & Co: the Litigation Partner responsible for the conduct of the action, Mr Philippe Ruttley, gave a presentation on 25 October 2007 at the EU Civil Justice Day, at Chancery House, Law Society of England and Wales, London, entitled: *The Lessons of the UK Consumers’ Association case (2007)*. The presentation, and the accompanying slides, contained many interesting insights and observations by Mr Ruttley, including the following ‘key lessons’ and ‘conclusions’ (per slides 26 and 31, respectively):

**Clyde & Co presentation at EU Civil Justice Day, 25 Oct 2007:**

‘Key lessons:

- Evidential obstacles:  
consumer claims against e.g. airlines or computer manufacturers easier because (a) claimants’ names likely to be retained by Defendants for longer periods (e.g. for security reasons); and (b) records of payments for larger sums are likely to exist – fewer cash payments
- Cartels having small individual impact on consumers are unlikely to be sued: e.g. 2007 OFT allegations against dairy producers and supermarkets – no-one is going to sue over a litre of milk!
- Consumer representative actions are likely to be of limited practical use.’

‘Conclusions:

- Consumer actions against cartels only possible in cases where evidence is easy to obtain
- Procedural obstacles remain
- Level of damages likely to be small
- Costs and complexity of litigation process likely to deter’

- Per the Head of Legal Affairs, Which?, Dr Deborah Prince, via email correspondence between Dr Prince and the author dated 6 December 2007, and reproduced with approval:

**Observation by the Head of Legal Affairs, Which?:**

‘One of the biggest issues with the current legislation is that it only allows an opt-in system. Because of the generally low level of uptake, the opt-in system will invariably result in proportionality issues. To make it attractive for designated bodies to bring follow-on actions in all competition redress cases, the system must be changed so that opt-out systems can be used. As most representative bodies will be charities, there will always be concerns about proportionality if an opt-in system prevails — both from a cost and time perspective. The only real, practical way to get over this is to introduce an opt-out system.’

- Hence, bearing in mind these various comments, it is striking how much more effective the

follow-on ‘football shirts’ case may have been, had it been possible to litigate such an action under an opt-out regime which permitted an aggregate class-wide assessment of damages, and thereafter, a *cy-près* order for damages distribution.

The same thoughts occur in respect of the milk price-fixing case (referred to in Mr Ruttley’s presentation, above), where the profits made from the cartel clearly outstrip the fines imposed, where the purchasers have no prospect of proving the fact of purchase, where the amount per claim is very small, but where the aggregate profits have no realistic prospect of being stripped without aggregate damages assessment and *cy-près* distribution:

*‘Supermarkets guilty of milk price-fixing’ (The Lawyer, 7 December 2007):*

‘Supermarket mega-chains Asda, J Sainsbury and Safeway have pleaded guilty to fixing milk and dairy prices following a probe by the Office of Fair Trading (OFT). The trio will have to pay a total of £116m in fines.

The supermarkets could now face the prospect of follow-on actions by wronged consumers or competitors.

The watchdog said that in setting the fines it had “taken into account information provided by the parties involved in the early resolution discussions which demonstrated the pressures they were under at this time to support dairy farmers.”

The admissions followed the OFT’s September findings that said major UK supermarkets fixed the price of milk and other dairy products between 2002 and 2003. The cartel cost the consumer around £270m, said the OFT.’

**(D) Low participation rates.** The number of replica football shirts subject to the price-fixing arrangement in 2000–01 was huge. Around the time that the litigation was commenced, it was reported in the media that:

*‘Compensation claim for rip-off football kits’ (The Telegraph, 9 Feb 2007):*

‘The [Consumers’ Association, Which?] believes that as many as a million people could have been overcharged between £15 and £20 for the replica shirts.’

and:

***‘JJB Sports faces legal action over price-fixing’*** (*The Times*, 8 Feb 2007):

‘Hundreds of thousands of consumers could receive payouts after Which?, the consumer group, announced that it was intending to sue JJB Sports on behalf of fans who were overcharged for football shirts.

The consumer body said that the case applied to total of one million shirts, and is appealing to the hundreds of thousands of customers who bought them to come forward.’

Thereafter:

- ❑ the Notice of Claim for Damages referred to the fact that 130 consumers were noted in the Appendix to the Claim form;
- ❑ the number who opted in to the action was reduced by the fact that the defendant JJB Sports made an offer to affected purchasers, shortly after the action commenced:

***‘JJB offers free football shirts’*** (*BBC News*, 13 Feb 2007):

‘Retailer JJB Sports has issued details of how customers can claim a free England shirt and mug from their shops. It is a response to threatened legal action over the firm’s price-fixing of football shirts several years ago. Customers who can prove they bought a 1999/2001 England shirt or a Manchester United home or Centenary shirt of 2000/2002 will qualify. ...

However, consumers choosing to claim their free England shirt and mug from the firm instead will not be able to be part of the consumer group’s action. To make a claim at a JJB shop, buyers will have to present evidence of a purchase, such as the receipt or the old shirt itself.’

- ❑ at the *EU Civil Justice Day presentation*, Mr Philippe Ruttley noted (slide 18 of the presentation) that *‘JJB claim over 12,000 customers took up this offer’*.

Hence, even allowing for those consumers who took up the free shirt and mug offer, the opt-in rate in this action has been low.

- (E) The ideological claimant.** Which? remains the only ‘specified body’ permitted to bring representative actions under s 47B. This creates resource problems for Which? itself, and removes any ability for other interested ideological claimants (or, indeed, any well-financed individual who

has a direct claim) to pursue an action on behalf of consumers. Both aspects have been the subject of some notable comment, for example:

- By Mr Philippe Ruttley, Partner of Clyde & Co, responsible for the conduct of the football shirts case, in the presentation, '*The Lessons of the UK Consumers' Association case (2007)*', slide 28:

**Clyde & Co presentation at EU Civil Justice Day, 25 Oct 2007:**

'Consumers' Association is a registered charity with limited financial resources compared to large multi-nationals.'

- By former Principal Campaigns Lawyer for Which?, Ms Ingrid Gubbay, in the *Submission by Which?* to the OFT's Discussion Paper of April 2007:

**Which?'s response:**

'Para 3.1. We have always supported the proposal that the private enforcement regime should be opened up to other bodies for designation. The current system simply offers little real threat to would-be cartelists ...

Para 3.6. We believe that confining designation to statutorily appointed 'specified bodies' such as those suggested [by the OFT in its Discussion Paper] for the purposes of representative actions to effective private action could be counterproductive. We continue to favour a system where private enforcement is opened up to a wider group with appropriate checks and balances in place.'

- (F) **The recent settlement.** On 9 January 2008, Which? announced that it had settled the football shirts case with JJB Sports. Which? described the terms of settlement in the following manner (per its announcement, available at:

<[http://www.which.co.uk/reports\\_and\\_campaigns/consumer\\_rights/reports/Ripoffs,%20scams%20and%20fraud/JJB\\_agree\\_shirts\\_deal\\_news\\_article\\_557\\_128985.jsp](http://www.which.co.uk/reports_and_campaigns/consumer_rights/reports/Ripoffs,%20scams%20and%20fraud/JJB_agree_shirts_deal_news_article_557_128985.jsp)>):

***‘JJB to pay fans over football shirt rip-off’*** (*Which?’s website announcement, 9 Jan 2008*):

‘Sports chain JJB Sports has agreed to pay consumers who were unlawfully overcharged for football shirts.

It’s agreed to give payments to fans after Which? took legal action against the high street chain.

Fans who paid up to £39.99 for certain England and Manchester United football shirts during specific periods in 2000 or 2001 and joined our case against JJB Sports will receive a payment of £20 each.

However, if you bought one of the affected shirts but didn't join the case, you can still claim back £10. To do this, you must present either proof of purchase or the shirt itself, with its label intact, at a JJB store before 5 February 2009.

Which? Head of Legal Deborah Prince said: ‘The agreement reached with JJB Sports is a good deal for the hundreds of consumers who purchased football shirts and joined our case against JJB.

‘Many of those who purchased the relevant shirts still have the whole of next year to take their shirt or proof of purchase into a JJB store, so we encourage them to do so.’

If you present a shirt, the payment is reduced to £5 if the label is missing, and any shirt presented will be indelibly marked.’

Two features lacking in the settlement contrast with the powers that would be available under Ontario’s opt-out class action regime, for example:

- no aggregate assessment of class-wide damages derived from the price-fixing;
- no *cy-près* distribution of the aggregate sum, either on a price roll-back or organisational *cy-près* basis.

This, of course, renders the settlement rather less painful for JJB Sports than it *might* otherwise have been under an opt-out class action regime. The relatively modest amounts for which JJB may be liable (depending upon how many come forward to claim their individual entitlement), and some other interesting consequences which this settlement may entail, were reiterated in recent press:

*'Everyone's a winner in football shirts settlement'* (*The Times*, Michael Herman, 9 Jan 2008):

'Which? and its lawyers at Clyde & Co have negotiated a settlement that covers anyone who bought one of the relevant football shirts from any of the price-fixing retailers regardless of whether they have already signed-up and they don't even need to produce a receipt. This is good news for a number of reasons. First, the pool of people who can now be compensated has vastly increased. Since the fundamental principle of consumer class actions is to compensate the individuals who lost out, this has to be a good thing. That people may not bother to make a claim is a valid but secondary point. The fact is Which? have made it possible and reasonably easy for them to do so. We cannot blame Which? for consumer inertia.

Likewise, we cannot blame Which? for the numbers. While its fair to say that £10 for a shirt with a label and £5 for one without is not going to raise the pulses of any JJB executives or shareholders, in light of recent events it's not a bad deal. Which? had originally asked for exemplary — or punitive — damages that would fetch consumers a much higher sum. But a recent High Court case on a similar issue in the vitamins market [see *Devenis Nutrition Ltd v Sanofi-Aventis SA* [2007] EWHC 2394 (Ch)] made this much less likely after a judge ruled that those who had been cheated were not entitled to exemplary damages. So, although Which? could have fought all the way and demanded higher compensation, this was always far from guaranteed.

... It has also established a useful precedent for how such cases can be dealt with in the future. That does not mean that British Airways, Virgin or any other businesses that may face consumer lawsuits over price-fixing will agree to settle on the same terms, but it shows it can be done where the numbers make sense.

The fact that JJB has agreed to an all-inclusive settlement may also help convince Parliament that it is not such a bad thing. The Office of Fair Trading — aware of the limitations of the “must sign up in advance regime” — has asked the Government to allow all-inclusive settlements in appropriate cases. Businesses said this was unfair and raised the spectre of the American system (and its abuses) to argue against such a move. But if JJB has made a commercial decision to agree to it in this case, then it sends a powerful message that it cannot be such a terrible, unthinkable policy.

As for JJB, they must also be smiling. Yes, they will have to pay £20,000 up front and that amount could rise substantially - but it probably won't. And even if it does, JJB has essentially bought itself legal certainty that the matter is behind it for what must be a relatively modest sum. ...

**PART III**

**'MISSING' COLLECTIVE REDRESS FOR DAMAGES IN  
ENGLAND AND WALES: LOOKING INWARDS**



## 9. LACK OF PRIVATE ENFORCEMENT: ANTI-COMPETITIVE CONDUCT

### The main points:

- ❑ **between 2001–7, both the OFT and the EC have imposed numerous fines/penalties where infringing behaviour (anti-competitive conduct) has been proven on the part of one or more defendants**
- ❑ **however, private actions for damages — whether ‘follow-on’ actions or independent liability + quantum claims — are rare in the UK, a fact which has recently been acknowledged in a survey conducted by the OFT**
- ❑ **the relative paucity of actions is highlighted further by the poor cost–benefit prospects of bringing action under unitary or opt-in arrangements, and by the contrast with the opt-out anti-competitive actions brought elsewhere**

- (A) **The role of the State as enforcers.** The Office of Fair Trading (OFT) has an investigative responsibility under the Competition Act 1998, to determine whether any infringement of one or more of Articles 81 and 82 and the Chapter I and Chapter II prohibitions has occurred.

The OFT notes, of its role in Competition Act 1998 investigations, that its function is to achieve enforcement and deterrence, and **not** to achieve compensation for those injured by anti-competitive conduct, per the *OFT website*:

(see remarks at: <[http://oft.gov.uk/advice\\_and\\_resources/resource\\_base/ca98/](http://oft.gov.uk/advice_and_resources/resource_base/ca98/)>):

### The OFT’s enforcement role:

‘When carrying out investigations under the Competition Act, we focus on outcomes that add value to both markets and consumers through effective prioritisation, investigation and improved legal certainty. We will use the entire range of policy and enforcement instruments available to the OFT in tackling problems within markets.

Following an investigation under the Competition Act, the OFT may make a decision establishing that one or more of Articles 81 and 82 and the Chapter I and Chapter II prohibitions have been infringed. In such cases, the OFT may impose penalties on the undertakings committing the infringement and give directions to bring the infringement to an end.’

This has again been acknowledged in the recent publication of the OFT, *The Deterrent Effect of Competition Enforcement by the OFT* (see both Discussion Document, OFT963, November 2007, and the report on the same topic prepared for the OFT by Deloitte, OFT962, November 2007). As the OFT notes, some of the ramifications of its enforcement role and of its penalties upon cartels, for example, are the conferral of benefits on society in general, from lower prices and increased productivity. However, this is benefit on a ‘macro scale’; individualised compensation to those affected, from a ‘micro’ perspective, is not within the OFT’s remit. For example, p 5 of the Discussion Paper notes:

**OFT Deterrent Effect Paper, Nov 2007:**

‘This is the first time the OFT has commissioned research into the wider benefits of competition enforcement. The research confirms that the OFT’s merger control and competition law enforcement work plays an important role in preventing other anti-competitive behaviour from taking place and that the benefits of OFT work go well beyond the direct financial benefits in terms of lower prices that consumers get as a direct result of our merger and infringement decisions.

Activity that deters cartels or abuse of dominance leads to major benefits: lower prices, wider choice, higher productivity and higher innovation. To put a price on all of this is difficult, but as the direct effect of competition enforcement in 2006/7 was £116m, the OFT estimates that, given the scale of the deterrence effect, the benefits to consumers from OFT work may be at least a further £600m per year. This compares to an OFT total annual budget of about £70m.’

Most recently, in its paper, *Private actions in competition law: effective redress for consumers and business: Recommendations from the Office of Fair Trading* (OFT916, 26 November 2007), the OFT noted (at para 5.7) that all competition authorities have finite resources, that resources are already consumed in the OFT’s case in order to establish infringements that enable consumers to bring follow-on actions, and that —

**OFT Private Actions Paper, Nov 2007:**

‘it is not realistic to expect that a competition authority could investigate all cases where consumers have been harmed and then take on the role of securing redress for them’.

Similarly, insofar as the EC is concerned, art 81 of the Treaty establishing the European Community prohibits agreements and concerted practices between firms that distort competition within the Single Market. Fines of up to 10% of their worldwide turnover may be imposed on the guilty parties. The purpose of EC penalties is one of deterrence, not compensation, as the EC notes (in *Memo/06/415*, dated 8 November 2006, and *Memo IP/01/1892*, dated 20 December 2001, respectively):

**EC's role, per Memos:**

'The amount of the fines is paid into the Community budget. The fines therefore help to finance the European Union and reduce the tax burden on individuals.'

...

'The federations have three months in which to pay the fines, which are entered into the general budget of the European Union once they have become definitive. The overall EU budget is fixed in advance and so any unscheduled revenues are deducted from the contributions made by Member States to the EU budget, ultimately to the benefit of the European taxpayer.'

**(B) OFT decisions.** Between 2001–7, the cases of anti-competitive conduct, in which the OFT imposed penalties for culpable behaviour, are summarised in Table 6 below.

Note that decisions in which the OFT found infringing behaviour but where the decisions were set aside by CAT — *Attheraces* and *Mastercard UK Members Forum Ltd* — are *not* included in Table 6.

The details in this Table are sourced from the *CA98 Public Register of Decisions*, available at: <[http://oft.gov.uk/advice\\_and\\_resources/resource\\_base/ca98/decisions/](http://oft.gov.uk/advice_and_resources/resource_base/ca98/decisions/)>, with some further details about individual cases drawn from individual relevant decisions by the Competition Appeal Tribunal, at: <[www.cattribunal.org.uk](http://www.cattribunal.org.uk)>:

**TABLE 6      OFT Infringement decisions, 2001–7**

<b>Case</b>	<b>Type of conduct</b>	<b>Date of OFT decision</b>	<b>Any appeal to CAT?</b>	<b>Eventual penalty imposed</b>
Aberdeen Journals Ltd	abuse of dominant market power; predatory pricing	16 Jul 2001; remitted and decided 29 Sep 2002	yes, two appeals; last heard 23 May 2003; OFT upheld	£1,328,040
Aluminium spacer bars	price-fixing/market-sharing	28 Jun 2006	no	across 4 companies, and after leniency: £898,470
Arriva plc and FirstGroup plc	market-sharing	30 Jan 2002	no	across both companies, and after leniency: £203,632
English Welsh and Scottish Railway Ltd	predatory pricing, discriminatory pricing, excluding competition	(Office of Rail Regulation) 17 Nov 2006	no	£4,100,000
felt and single ply flat-roofing contracts in NE England	collusive tendering	16 Mar 2005	no	across 7 companies, and after leniency: £559,985
felt and single ply roofing contracts in Western-Central Scotland	collusive tendering	8 Jul 2005	no	across 6 companies, and after leniency: £138,515
flat roof and carpark surfacing contracts in England and Scotland	collusive tendering	22 Feb 2006	no	across 13 companies, and after leniency: £1,557,471
flat-roofing services in the Midlands	collusive tendering	16 Mar 2004	yes, appeal 24 Feb 2005; OFT decision upheld	across 9 companies, and after leniency: £297,625.54
Replica football kit	price-fixing	1 Aug 2003	yes, appeals 1 Oct 2004, upheld most of OFT decision; also CA decision 19 Oct 2006	across 10 companies, and after leniency: £18,587,000
Genzyme Ltd	abuse of dominant position	27 Mar 2003	no	£6,800,000

<b>Case</b>	<b>Type of conduct</b>	<b>Date of OFT decision</b>	<b>Any appeal to CAT?</b>	<b>Eventual penalty imposed</b>
Harwood Park Crematorium	refusal to allow access	29 Jun 2004	yes, and OFT decision replaced by CAT 6 Jul 2005	not noted in CAT decision
Hasbro UK Ltd/Argos Ltd/Littlewoods Ltd	price-fixing	21 Nov 2003	yes, two appeals, in last, OFT decision upheld; also CA decision 19 Oct 2006	across 3 companies, and after leniency: £22,650,000
Hasbro UK Ltd and distributors	price-fixing	6 Dec 2002	yes, but withdrawn	after leniency: £4,950,000
John Bruce (UK) Ltd/Fleet Parts Ltd/EW (Holdings) Ltd	price-fixing	–	no	across 3 companies, and after leniency: amounts not published in OFT judgment
Lladro Comercial SA	bi-lateral price-fixing agreements	31 Mar 2003	no	£0
Mastic asphalt flat-roofing contracts in Scotland	collusive tendering	15 Mar 2005	no	across 4 companies, and after leniency: £87,353
Napp Pharmaceutical Holdings Ltd	abuse of dominant position	30 Mar 2001	yes, OFT decision mostly upheld on 15 Jan 2002	£3,200,000
Northern Ireland Livestock and Auctioneers' Association	fixing of commissions	3 Feb 2003	no	£0 (due to 'wholly exceptional circumstances')
Schools: exchange of information on future fees	agreement to prevent, etc, competition on school fees	20 Nov 2006	no	across numerous Participant Schools (bar one): £10,000 per school
Stock check pads	price-fixing/ market-sharing	31 Mar 2006	no	across 3 companies, and after leniency: £168,318.75

Case	Type of conduct	Date of OFT decision	Any appeal to CAT?	Eventual penalty imposed
UOP Ltd/UKae Ltd/Thermoseal Supplies Ltd/Double Quick Supplyline Ltd/Double Glazing Supplies Ltd	fixing minimum resale prices	8 Nov 2004	yes	across 5 companies, and after leniency: £1,707,000

(C) **EC infringement decisions.** Since January 2000, the Commission has imposed fines in almost 50 cases in which cartel behaviour has been proven. Over the period 2003–7, the following cases in Table 7 resulted in the nominated respective fines.

The information in Table 7 is sourced from: ‘*Commission Action against Cartels: Questions and Answers*’, dated 18 April 2007, and by reference to the various press releases noted therein:

**TABLE 7 EC infringement decisions, 2003–7**

Sector affected	Date of decision	Fine (in Euros)
Dutch beer market	18 <sup>th</sup> Apr 2007	273,783,000 against 4 companies
elevators and escalators	21 <sup>st</sup> Feb 2007	992,312,200 against 4 groups, including 17 subsidiaries
gas insulated switchgear cartel	24 <sup>th</sup> Jan 2007	750,512,500 against 11 companies
alloy surcharge cartel	20 <sup>th</sup> Dec 2006	3,168,000 against one company
synthetic rubber (producers and traders)	29 <sup>th</sup> Nov 2006	519,050,000 against 6 companies
price-fixing and market sharing cartel for steel beams	8 <sup>th</sup> Nov 2006	10,000,000 against one company
price-fixing of copper fittings	20 <sup>th</sup> Sep 2006	314, 781,000, against 11 companies
price-fixing of road bitumen in the Netherlands	13 <sup>th</sup> Sep 2006	366,717,000 against 14 companies
price-fixing of acrylic glass	31 <sup>st</sup> May 2006	344,500,000 against 5 companies

<b>Sector affected</b>	<b>Date of decision</b>	<b>Fine (in Euros)</b>
cartels involving hydrogen peroxide	3 <sup>rd</sup> May 2006	388,129,000 against 7 companies
rubber chemical cartel	21 <sup>st</sup> Dec 2005	75,860,000 against 4 companies
industrial bags cartel	30 <sup>th</sup> Nov 2005	290,000,000 against 16 companies
Italian raw tobacco market cartel	20 <sup>th</sup> Oct 2005	56,000,000 against 6 companies
industrial thread cartel	14 <sup>th</sup> Sep 2005	43,487,000 against 11 companies
MCAA chemicals cartel	19 <sup>th</sup> Jan 2005	216,910,000 against 5 companies
animal feed vitamin cartel	9 <sup>th</sup> Dec 2004	66,340,000 against 6 companies
needle and other haberdashery market cartel	26 <sup>th</sup> Oct 2004	60,000,000 against 3 companies
Spanish raw tobacco market cartel	20 <sup>th</sup> Oct 2004	20,038,000 against 9 companies
cartel in French beer	29 <sup>th</sup> Sep 2004	2,500,000 against 2 companies
sodium gluconate cartel	19 <sup>th</sup> Mar 2002	19,040,000 against one company
copper plumbing tubes cartel	3 <sup>rd</sup> Sep 2004	222,291,100 against 9 companies
industrial copper pipes cartel	16 <sup>th</sup> Dec 2003	78,730,000 against 5 companies
organic peroxides cartel	10 <sup>th</sup> Dec 2003	69,531,000 against 6 companies
carbon and graphite products cartel	3 <sup>rd</sup> Dec 2003	101,440,000 against 6 companies
sorbates cartel	2 <sup>nd</sup> Oct 2003	138,400,000 against 5 companies
French beef	2 <sup>nd</sup> Apr 2003	16,680,000 against 6 companies

Some of these infringements clearly did not operate in the United Kingdom. For example, the lift and escalator cartel was specifically noted to operate in Belgium, Germany, Luxembourg, and The Netherlands only; and the French beef decision only pertained to unlawful agreements by six French federations in the beef sector to set minimum prices for some types of beef and limit or suspend imports of beef into France. However, plainly some of the cartels nominated above *did* affect consumers in England and Wales.

(D) **The types of follow-on actions.** In respect of follow-on actions for damages:

- ❑ **individual** actions are permitted by the Competition Act 1998, in respect of OFT decisions and EC decisions finding infringing behaviour. Section 47A was introduced by the Enterprise Act 2002, s 18, and came into effect on 20 June 2003:

**Relevant provisions of s 47A:**

- (4) A claim to which this section applies may (subject to the provisions of this Act and Tribunal rules) be made in proceedings brought before the Tribunal.
- (5) But no claim may be made in such proceedings—
  - (a) until a decision ... [of the OFT, Competition Appeal Tribunal or EC] has established that the relevant prohibition in question has been infringed; ...

Of this provision, the Competition Appeal Tribunal has observed, in *BCL Old Co Ltd v Aventis SA* [2005] CAT 2, para 28, that:

*this specialised jurisdiction under section 47A has been created by Parliament with a view to facilitating claims for damages or restitution on the part of those who have suffered loss as a result of infringements of domestic or European competition law.*

- ❑ Furthermore, **representative** actions by a specified body, brought in respect of ‘consumer claims made or continued on behalf of at least two individuals’ are also possible, under s 47B of the Competition Act 1998. However, as discussed previously in Section 8, the utility of s 47B to date has been extremely limited. The only ‘specified body’ to date is Which?, pursuant to the Specified Body (Consumer Claims) Order 2005, SI 2005/2365, and the only action brought pursuant to s 47B has been the case of *The Consumers Association v JJB Sports plc* (case number: 1078/7/9/07).
- ❑ regardless of the type, follow-on actions have distinct advantages to a claimant over stand-alone actions for anti-competitive conduct, as the CAT explained recently in: *Cityhook Ltd*



*v Office of Fair Trading* [2007] CAT 18 [205]–[210]. The advantages outlined include:

- explicit evidence of unlawful conduct can be difficult to identify by a stand-alone claimant;
- a claimant cannot use the investigatory powers available to the OFT in respect of obtaining documents and information;
- funding a stand-alone private action against a defendant with substantial resources can be challenging; and
- there may be extra-jurisdictional service problems or language barriers for the stand-alone claimant.

(E) **Paucity of follow-on actions.** However, there have been very few follow-on actions brought in England, in respect of either OFT or EC infringement penalty decisions, so far, since these provisions were introduced in June 2003. The follow-on actions to date are shown in Table 8 below:

**TABLE 8** 'Follow-on' actions brought in England

Case	Notice for damages filed	Current status
ME Burgess, JJ Burgess and SJ Burgess (trading as JJ Burgess & Sons) v W Austin & Sons (Stevenage) Limited and Harwood Park Crematorium Ltd	23 Aug 2007 (under s 47A)	time for serving defence extended; case management conference fixed for 11 April 2008
Emerson Electric Co v Morgan Crucible Company plc	28 Feb 2007 (under s 47A)	there have been disputes about whether claim brought within time. Last development noted was a case management conference on 13 Dec 2007
Healthcare at Home Ltd v Genzyme Ltd	13 Apr 2006 (under s 47A)	interim relief order made 15 Nov 2006; claim withdrawn 11 Jan 2007 by order of CAT following settlement
BCL Old Co Ltd (2) DFL Old Co Ltd (3) PFF Old Co Ltd v (1) Aventis SA (2) Rhodia Ltd (3) F Hoffman-La Roche AG (4) Roche Products Ltd	Approx. 27 Feb 2004 (under s 47A)	consent orders by which proceedings against all defendants dismissed
Deans Foods Ltd v (1) Roche Products Limited (2) F Hoffman-La Roche AG (3) Aventis SA	Approx. 26 Feb 2004 (under s 47A)	proceedings against all defendants either dismissed or discontinued
Borders (UK) Ltd v Commissioner of Police of The Metropolis	not known; appeal delivered 3 March 2005	exemplary damages against infringer upheld
Devenish Nutrition Ltd v Sanofi-Aventis SA (France)	not known; judgment delivered 19 Oct 2007	preliminary points of law decided against the claimants, re exemplary and restitutionary damages
The Consumers' Association v JJB Sports plc	12 Mar 2007 (under s 47B)	the matter settled on 9 January 2008

(F) **Interaction with the substantive law.** The paucity of follow-on actions for anti-competitive infringements in England, when compared with the number of infringement decisions given by the OFT and by the EC, is noteworthy.

However, one substantive law reason for the difficulty in bringing such actions, which must be remarked upon in the context of this Section, is the potential availability of the passing-on

defence. This defence, where available, is a significant substantive law barrier to any party in the supply chain from bringing a follow-on action.

In the first action commenced under s 47A — *BCL Old Co Ltd v Aventis SA* [2005] CAT 2 — the claimants brought a follow-on action for damages in respect of a vitamin-pricing cartel, for which the defendants had been fined by the EC for infringement of art 81(1) of the EC Treaty. The claimants argued that the defendants cartelists had caused each of the claimants to pay higher prices than would otherwise have been the case for vitamins manufactured and supplied into the UK. The defendants, on the other hand, argued that it was only if they could not succeed in establishing the ‘passing-on defence’ that the claimants would be able to prove any ‘damage’. In that respect, the defendants argued that:

- the claimants passed on any overcharge to their customers and accordingly suffered no loss by any overcharge made to them; and
- the claimants would not be able to establish that any overpayment was passed onto them by those who supplied them, where such intermediate suppliers existed between the defendants and the claimants.

On the question of the passing-on defence, the Competition Appeal Tribunal remarked (when hearing a security for costs application), at para 23, upon both the legal and evidential difficulties confronting those claimants in the supply chain where follow-on actions are concerned:

*The Defendants, however, rely on what is known as the ‘passing on defence’, which is that the Claimants have suffered no loss, either because any higher prices resulting from the cartel (which is not admitted) were absorbed by the first line purchasers who then sold on at normal prices to the Claimants, or because the Claimants themselves passed on any higher prices they may have paid to sub-purchasers. ... questions of whether the defendants are entitled to raise the ‘passing on defence’ (either upstream or downstream), what is the effect of any such defence, and who bears the burden of proof, are novel and important issues both in this case and for future cases. ... These issues are as yet undecided in the United Kingdom nor, as far as we know, definitively decided in any other European jurisdiction. In addition in this case there are important evidential matters to be resolved, such as whether the buying power of supermarkets prevented any ‘passing on’, even if the ‘passing on defence’ is available.*

The author is indebted to Mr David Greene, Litigation Partner of Edwin Coe LLP, a practitioner experienced in conducting actions arising out of anti-competitive infringements, for pointing out the difficulties confronted by the passing-on defence in England. Mr Greene gives, by way of further example, the copper cartel which related to the supply of copper tubing (referred to in Table 7 above). This example arose during the course of discussions at the Civil Justice Council Theobalds Park conference, and in written correspondence between Mr Greene and the author subsequently in December 2007 (quote reproduced with approval):

**David Greene, Litigation Partner, Edwin Coe LLP:**

‘That was the subject of proceedings started in Texas, but it was virtually impossible to pursue any claim here because everyone would be met in the supply chain with a passing on defence. The ultimate loser (which rather reinforces the consumer action process) was the consumer fitting copper tubing in their central heating system. Even for them, however, the supply chain is of such a length and complexity that it would be very difficult to prove causation and ultimate damages.’

On this point of substantive law, and looking towards an opt-out regime of relevance to this Research Paper, it is also worth noting the fact that the passing-on defence has been raised in Ontario price-fixing class actions to date. Its availability and potential application certainly impacted upon the eventual denial of certification in *Chadha v Bayer Inc* (2003), 63 OR (3d) 22 (Ont CA), affirming 54 OR (3d) 520 (Div Ct), where the claimant purchasers claimed that the defendants had conspired to fix prices of iron oxide pigments used to colour concrete bricks and paving stones.

The representative claimants, representing a class of homebuyers and other end-users of bricks, had bought a new home and alleged that they were indirect purchasers of bricks containing the price-inflated iron oxide pigments. Certification in this case was denied on appeal. There was no evidence that the full measure of the inflated prices brought about by the price-fixing would have been passed on through the various links in the chain of distribution to have a price impact upon the homebuyer class, the ultimate consumers. A model that calculated damages on the basis of that assumption was not permitted to go forth — and liability could therefore not be a common issue — because the Court of Appeal was not satisfied the assumption was provable by some method on a class-wide basis (s 24 of Ontario’s Class Proceedings Act permits aggregate assessment of damages after liability has been established, but not the *fact of damage*, said the Court). Although there were

other common issues pertinent to the price-fixing conspiracy case, it was concluded that a class action was not the ‘preferable procedure’, and certification was denied.

Certification was also denied in the price-fixing case of *Price v Panasonic Canada* (2002), 22 CPC (5th) 379 (Ont SCJ).

However, since *Chadha*, certain price-fixing class actions have indeed been certified in Ontario, as Table 12 (later, in Part IV, Section 12), illustrates. Note, especially, the very recent comments about *Chadha* and *Price*, and points of particular relevance about the passing-on defence, in: *Axiom Plastics Inc v EI Dupont Canada Co* (Ont SCJ, Hoy J, 27 Aug 2007), paras 123ff, one of the certified decisions referred to in Table 12.

**(G) Recent acknowledgments by OFT and the EU of lack of private enforcement.** Notwithstanding the substantive law problem noted above, the lack of follow-on actions for compensation has been a cause of governmental concern in both England and the EU.

- In a recent November 2007 report, *The Deterrent Effect of Competition Enforcement by the OFT*, prepared for the OFT by Deloitte and Touche LLP (and available at: <[http://www.of.gov.uk/shared\\_of/reports/Evaluating-OFTs-work/oft962.pdf](http://www.of.gov.uk/shared_of/reports/Evaluating-OFTs-work/oft962.pdf)>), at paras 5.84–5.96, the authors of the report discuss the problem by reference to a questionnaire distributed to a sample group of companies.

The key findings of that report, insofar as damages actions are concerned, may be summarised thus:

- private damages actions for anti-competitive infringements was ranked 5<sup>th</sup> (out of 5), in terms of importance in deterring infringements, by both competition lawyers and by companies who responded to Deloitte’s survey — hence, ‘*the threat of private damages actions is seen as a relatively unimportant factor in creating a deterrent effect*’ (para 5.84)

- 22% of all company respondents (group 1) considered that their company had been harmed by breach of a competition law by someone else — but of group 1, more than half (56%, representing group 2) did not consider bringing a private action for damages — and 70% of group 2 stated that the reason that they did not consider it was that the expected costs outweighed the expected benefits of the litigation. More particularly, the reasons given by the respondents for not pursuing private actions for damages were as follows:
  - the time-consuming process of litigation;
  - potentially damaging a commercial relationship with a supplier;
  - lack of evidence or satisfying burden of proof;
  - lack of clarity in the law;
  - the ‘David v Goliath’ scenario of taking on well-funded defendants;
  - lack of an OFT decision upon which to ‘piggy back’ was crucial;
  - damages would be ‘eaten up’ by costs;
  - the adverse outcome, award of a contract to a rival, would not be reversed by any litigation.

It is interesting to note that some of the abovementioned reasons coalesce with the reasons for not opting-in that were elicited in the Questionnaire distributed to law firms for the purposes of this Research Paper, and which are summarised in Table 5, earlier.

- Deloitte’s conclusions with respect to anti-competitive infringements are sobering, as the following passage shows (footnotes omitted):

**Deloitte's Deterrent Effect paper prepared for the OFT, Nov 2007:**

'Para 5.95            The questions of what are the main obstacles for companies bringing private actions, and how these can be reduced, are complex and multi-faceted.

Para 5.96            We make two observations based upon the results of the survey:

[First], the results provide an indication of the scale of use of damages actions for competition infringements in the UK. Five of the 202 companies in the sample (just over 2%) had brought an action.

[Second], companies have many reasons why they do not bring a case, even when they consider that they have been harmed by a breach of a competition law by someone else. The most important are the cost and delay, concern about damage to commercial relationships, lack of evidence, lack of clarity in the law, the size of the counter-party, and the limited perceived benefits in the event of success.'

- This scenario of a bereft private-action landscape was earlier acknowledged by the EU in the Green Paper, *Damages Actions for Breach of the EC Antitrust Rules* (19 December 2005), SEC 2005/1732, at para 1.2:

**EC Green Paper on Damages Actions for anti-competitive breaches:**

'While Community law therefore demands an effective system for damages claims for infringements of antitrust rules, this area of the law in the 25 Member States presents a picture of "total underdevelopment"' [citing its earlier study of the Working Group on the same matter].

- The most recent word on the topic in England has been given by the OFT, in its paper, *Private actions in competition law: effective redress for consumers and business: Recommendations from the Office of Fair Trading* (OFT916, 26 November 2007):

**OFT Private Actions Paper, Nov 2007:**

‘Para 2.2 ... private actions have not played the role that was envisaged for them ... : there remain significant barriers to those who have suffered loss (consumers and small and medium-sized businesses, in particular) taking a private action, such that the likelihood of obtaining compensation remains remote and that incentives for business to comply with competition law are more limited than was intended. This impedes the overall effectiveness of the competition regime in the UK, such that the regime is not yet delivering the productivity and competitiveness benefits to the UK economy that were originally contemplated.

Para 3.3 A system which incorporates effective public enforcement and a real possibility of private actions will increase the likelihood that anti-competitive behaviour is detected and addressed, whether by way of a complaint to the competition authorities, an approach to the infringing undertaking(s), or through the issuing of legal proceedings.’

In this latest Paper, the OFT has suggested ‘beefing up’ private enforcement by recommending that the Government should consult on whether (and, if so, how best) to allow representative bodies to bring stand-alone and follow-on representative actions for damages or injunctions on behalf of consumers and businesses in competition law (paras 5.13 and 6.8)

**(H) Costs–benefit difficulties of bringing liability + quantum anti-competitive issues.** This Section of the Research Paper would not be complete without mentioning the difficulties which confront those wishing to commence actions for the purposes of establishing both liability for anti-competitive infringements, and the quantum of damages flowing therefrom.

- ❑ various disincentives to bringing private stand-alone actions, where an anti-competitive infringement is claimed to have occurred, have already been pointed out in the *Deloitte study*, previously;
- ❑ a more effective ability to bring stand-alone actions, on behalf of consumers and businesses, by representative bodies, has also been adverted to previously, in the OFT’s Discussion Paper, *Private Actions in Competition Law: Effective Redress for Consumers and Business* (Apr 2007), Section 4, ‘Representative Actions’;



- furthermore, in some cases, the amount of damages per group member will be fairly small, rendering the cost–benefit analysis of bringing the action under an opt-in regime (such as the GLO) of dubious worth. It is one thing to particularise and prove infringement in respect of the representative claimant, with determinations on common issues then applying to all members of the described group, but it is quite another to have to particularise these in respect of each group member from the outset.

With respect to the *Questionnaire* distributed by the author to practitioners for the purposes of this study, a few Respondents commented on whether any grievances had ‘crossed their desk’ which were not litigated under the available opt-in regimes (and at all), but which they consider *may* have suited an opt-out regime. Obviously, it was not possible for the Respondents to provide a closely considered view on the certification tests employed (with some variation) elsewhere; particularly bearing in mind, for example, the abovementioned Canadian case law which illustrates how carefully certification courts will scrutinise price-fixing actions to determine whether they should proceed as class actions or not. One Respondent, however, provided the following interesting example (in Table 9 below):

**TABLE 9 Example of action not brought**

<b>Type of claim</b>	<b>What the claim was about</b>	<b>Why it did not suit opt-in or unitary litigation</b>
price-fixing action	both liability and quantum on price-fixing of a particular brand of motor vehicle was at issue	<p>the amount per claimant purchaser would have been approx. £4,000–£5,000 per claimant;</p> <p>approx. 10,000–15,000 claimants were affected;</p> <p>the ‘cost–benefit’ ratio did not warrant the action being brought;</p> <p>identifying the asset owners at the outset would have been difficult (but if the class had been able to establish liability for price-fixing, and if the defendant had been ordered to hand over sales records by which to identify class members, identification would have been more straightforward).</p>

## 10. LACK OF PRIVATE ENFORCEMENT: UNFAIR CONTRACT TERMS

### The main points:

- ❑ where unfair terms are identified as standard terms being used by businesses in consumer contracts, the OFT and other qualifying bodies have the legal authority to apply for an injunction to prevent reliance upon that term (in practice, the OFT has mainly negotiated for the redrafting or deletion of the offending term)
- ❑ however, it is not the OFT's or other qualifying bodies' roles to seek compensation on behalf of consumers adversely affected by unfair terms
- ❑ the Citizens' Advice Bureau has recently suggested that a lack of enforcement exists, in respect of both (a) the widespread use of unfair terms or potential unfair terms on which its advice is sought, and (b) the continued use of unfair terms by businesses, even where similar-type terms have been publicised to be unfair by the OFT.

(A) **Enforcement means injunctive, not compensatory, relief.** In its recent Consultation, *Unfair Contract Terms Guidance: Consultation on Revised Guidance for the Unfair Terms in Consumer Contracts Regulations 1999* ('the *Guidance*') (OFT311, April 2007), the OFT noted that:

- ❑ the enforcement of the Unfair Terms in Consumer Contracts Regulations 1999 ('UTCCR') is a task shared among the OFT, local authorities, utilities regulators, and the Consumers' Association (see Sch 1 'Qualifying Bodies');
- ❑ 'enforcement' is used here in the sense of injunctive relief, to prevent the continued use of unfair terms; the OFT (and the other qualifying bodies) do not have the power to seek compensation on behalf of individuals (p 2);
- ❑ the purpose of the *Guidance* is to explain what might be considered (by the OFT, at least — as the OFT notes, it cannot speak definitively for other qualifying bodies in this regard) to be fair or otherwise about particular kinds of standard contractual terms (p 1) — of course, only a court can declare a particular standard contractual term to be unfair. The purpose of the *Guidance* (at page 54):

**The OFT Guidance on unfair contract terms:**

‘is ... to illustrate, in a practical way, how the OFT interprets the Unfair Terms in Consumer Contract Regulations 1999, and so help businesses to ensure that their terms are fair and enforceable. The examples have been selected from cases where the Director General of Fair Trading took action under the Regulations.’

**(B) But what if compensation is due to the claimants, on a widespread scale, where the unfair terms are used?** Several scenarios arising out of the OFT’s *Guidance*, Annexure A, could feasibly give rise to collective claims of compensation, if the contractual terms concerned were used across an industry in a widespread and repetitive manner.

Of particular interest are the types of clauses where the claimant consumer may have paid over money or forgone property, and may have the right to restitution of monies paid over or compensation for property foregone, if the relevant clause is struck out as of no effect.

By way of selecting a round figure, **ten** examples of potential collective claims for compensation arising out of ‘unfair clauses’ are listed in Table 10 below (these are sourced and summarised from Annexure A of the *Guidance*):

**TABLE 10 Examples of OFT action on unfair terms**

	Type of term	Examples of contracts identified in Annexure A that contained that type of term	Why collective redress for compensation could feasibly arise on the term’s wording
1	Additional charges imposed by supplier	Cable and Wireless Communications Ltd (Bulletin 7)	Interest was charged at ‘appropriate’ rate; clause reworded so as to be charged at ‘Barclays Bank base rate’ after OFT action
2	Cancellation fees imposed on consumer by supplier	Homestyle (UK) Northern Ltd (Bulletin 5)	Cancellation fee of 30% of the order was charged under the contract; the term was deleted after OFT action

	Type of term	Examples of contracts identified in Annexure A that contained that type of term	Why collective redress for compensation could feasibly arise on the term's wording
3	Unfair charges imposed on consumer by supplier	Kirkplan Kitchens and Bathrooms (Bulletin 5)	Supplier charged 'survey fee' and 'administration charge' in the event that the supplier was denied access to the customer's premises; these were deleted, and other charges reduced, as a result of OFT action
4	Payments required on part of consumer, even if supplier defaulted or suspended service	Vodacall Ltd (Bulletin 4)	Consumer remained liable for fees throughout any period in which the Network Services was suspended unless the supplier determined otherwise in its discretion; a refund of such charges was required, after OFT action
5	Charges for return of goods to be borne by consumer	Time Computer Systems (Bulletin 4)	Defective goods/parts returned to the supplier had to be transported at the consumer's cost; the consumer was only liable for transport costs where the failure arose from the consumer's misuse, after OFT action
6	Call-out charges to be borne by consumer	Certes Security Ltd (Bulletin 5)	Any visit other than a scheduled maintenance visit would be charged on a 'time and material basis'; a lesser charge could be imposed, after OFT action.
7	Credit notes issued by supplier instead of refund of purchase price	Bennetts (Retail) Ltd (Bulletin 4)	If product was faulty, supplier could 'issue a credit note to cover the cost'; supplier required to repair/replace/refund purchase price, after OFT action.
8	Clauses stated that the supplier was not liable for consequential or 'associated' losses	British Sky Broadcasting Ltd (Bulletin 5)	Supplier sought to exclude all liability for 'any indirect or consequential loss resulting from negligence or any other tort' on the part of the supplier; supplier rendered liable for any foreseeable loss or damage, as a result of rewording by OFT action.
9	Cancellation without refunds	Connections Introduction Agency (Bulletin 8)	Membership could be withdrawn without refund; fees had to be refunded, less a reasonable amount for costs and expenses incurred in administration and management of the membership, after OFT action
10	Disproportionate penalties upon consumer's breach	A&S Domestic Services (Bulletin 10)	If consumer breached and legal action was required by supplier, then consumer liable for supplier's legal fees on a 'full indemnity basis'; consumer only liable for 'all costs allowable by the courts if an award is made in A&S's favour', after action by OFT.

- (C) **Lack of enforcement.** It would appear, however, that the cases listed in Annexure A of the *Guidance*, as examples of those in which the OFT has successfully taken action to challenge as unfair, are only the ‘tip of the iceberg’.

The lack of enforcement of the UTCCR 1999 has recently been noted by the Citizens’ Advice Bureau’s Response to ‘Unfair Contract Terms Guidance’ (response dated 14 June 2007) (hereafter, the ‘*CAB Response*’), and available at:

<[http://www.citizensadvice.org.uk/index/campaigns/social\\_policy/consultation\\_responses/cr\\_consumerandebt/unfair\\_contract\\_terms\\_guidance](http://www.citizensadvice.org.uk/index/campaigns/social_policy/consultation_responses/cr_consumerandebt/unfair_contract_terms_guidance)>.

The Citizens’ Advice Bureau expressed concern with respect to the number, and widespread use, of standard contract terms which may be unfair and thus unlawful:

**CAB Response:**

‘In the first three quarters of 2006/7 we estimate CAB in England and Wales received 18,700 enquiries about terms and conditions. These are made up of: in relation to goods and services (6,373); for utilities & communications (2,707); for travel & transport (153); and on financial services (9,462). We fear that this indicates the shortfall in enforcement.’

- (D) **Continuing use of unfair terms.** Furthermore, even in respect of those terms which have been indicated to be ‘unfair’, the Citizens’ Advice Bureau provides specific examples whereby reliance upon such terms is continuing. Notably, these particular scenarios, reproduced below, could, by reason of their facts, give rise to *collective actions for compensation*, if the term was proven to be unfair and unlawful:

**CAB Response:**

‘We are concerned that the guidance contains a large number of terms that are reported by CABx as being in use but which are defined as unfair, for example:

1. A CAB client from Central London, who lives abroad, sought advice when a lettings agency she was using wanted a tenancy introduction fee for tenancy renewals. The adviser thought this might fall foul of Regulation 5(1) of the UTCCR 1999. The local authority’s contact with OFT revealed that the term imposes an unfair contingent liability on the landlord to pay a significant commission, in exchange for which the agency may not provide any service.
- ...
3. A CAB in Cambridgeshire reported their client on Income Support had been assured of a two month period for the cancellation of a gym contract. But when he tried to cancel he was told the written terms did not provide for cancellation. He was only provided with a copy of the terms when the adviser requested it. It does say that the agreement is non-cancellable and the gym claims he is due to pay the total amount of £396.72, to which debt collection charges will be added.
4. A CAB client from Lancashire had been repaying a loan from her bank in accordance with a CCJ made against her. She has not defaulted. At the same time, the client had reclaimed unfair bank charges and had eventually agreed a refund. The bank assured her verbally the refund on charges would be hers to dispose of as she saw fit and she intended to use it to pay off other debts. When the refund was made, it was, instead, deducted from the outstanding balance under the CCJ and telephone and personal appeals in the branch failed to release the sum to the client.

This suggests to us that there is insufficient enforcement.’

**(E) Compensation for unfair terms elsewhere under opt-out regimes.** It should be noted that seeking redress for unfair terms in standard contracts (overcharges and the like) has been evident under the Commonwealth opt-out collective action regimes (see, eg, the examples given in Table 12, later in the Research Paper) and under the Portuguese opt-out regime (discussed later in Section 13).

Notably, seeking compensation in respect of unfair or misleading contract terms is also one of the areas in which the Danish Ombudsman considers that the new Danish regime may be used (see Part IV, Section 14). As will become evident, such actions are only permitted to proceed under opt-out in respect of individual claims which are of low value.

The facilitation of low-value but widespread claims via an opt-out collective redress mechanism, as described above, highlights the importance of being able to ‘sweep in’ class members

where the incentive to bring individual actions is very low. Further, many of these contracts are not able to be individually negotiated, thus rendering the class members more vulnerable than contracting parties who negotiate terms at arms' length and with the benefit of legal advice.



## 11. FUNDING APPLICATIONS FOR GROUP LITIGATION

### The main points:

- ❑ in monetary terms, the Legal Services Commission has funded a large amount of Major group actions and Medium group actions over the past decade or so
- ❑ two points are notable, from the data available: (a) the low number of group actions now recorded by the Legal Services Commission in comparison with previous years, and (b) the areas in which legal aid funding has been concentrated for funded Major and Medium group actions — after grouping these actions into categories, it is apparent that, apart from the category of pharmaceutical/medical claims, consumer-type claims do not largely feature as funded group actions (either because of a lack of applications or because they did not meet the Commission’s funding criteria)

- (A) **Information about funding.** One aim of this Research Paper has been to identify avenues by which to determine where ‘common grievances’ may not have progressed to court or settlement — not because of funding difficulties (although, of course, these do undoubtedly exist), but more because of procedural difficulties with the sorts of group actions available to claimants in England and Wales at the present time.

It will be recalled, from the ‘Background to Research Paper’ in Pt I, that funding represents one of a trio of issues that any procedural law reformers will need to consider (the other two being ‘evidence of need’ for such reform — the subject of this Research Paper — and the design of such a regime, both with respect to the commencement and conduct of actions). The author has considered the various potential funding avenues and costs-shifting rules for an opt-out collective action regime elsewhere, in: *The Class Action in Common Law Legal Systems: A Comparative Perspective* (Hart Publishing, Oxford, 2004), ch 12; and in a joint article with Dr Peter Cashman, ‘*Litigation Funding: A Changing Landscape*’ [2008, forthcoming]. Briefly, in addition to the provision of legal aid — which is the responsibility of the Legal Services Commission in this jurisdiction — other possible avenues include: a special fund created with seed money and thereafter, self-funding upon contributions from successful class actions; funding from ideological claimants; funding from third party ‘strangers to the litigation’; the implementation of an equivalent of the ‘common fund doctrine’; and contingency fees (either multiplier or percentage of recovery).

However, for present purposes — this study about ‘evidence of need’ — enquiries were made of the Legal Services Commission (LSC), with respect to the levels and types of funding which have been provided to group actions over recent years. Via the provision by the LSC of certain FOI information, two pointers are of interest.

- (B) A reduction in recorded MPA’s at the LSC.** The Legal Services Commission divides applications for funding for group litigation (termed ‘Multi-Party Actions’ or ‘MPA’s’ by the Commission) into three categories: (i) major MPA’s (where the gross costs are likely to exceed £5 million); (ii) medium MPA’s (where the gross costs are likely to sit between £250,000 and £5 million); and (iii) minor MPA’s (for which the gross costs are likely to be less than £250,000).

According to a report released by the LSC, dated 1 March 2005, entitled ‘*Multi-Party Actions: Freedom of Information Disclosure for the Association of Personal Injury Lawyers*’, of those LSC-funded actions which could be ‘traced as completed’, the LSC funded 10 such major MPA’s over the ten years prior to 2005 (some of which obviously pre-dated the GLO regime). These actions cost the Fund, in gross terms, £110,900,000. The equivalent figure for Medium MPA’s, over the same period, for a total of 18 actions (again, many of which pre-dated the GLO regime’s implementation in 2000), was £23,700,000. The LSC does not produce data regarding the cost breakdown of minor MPA’s, nor particulars of the MPA’s which it has rejected over this period (applications for funding may fail because of a poor cost–benefit analysis or an assessment of poor merits).

More recently, in a document entitled, ‘*Multi-Party Actions — FOI Information Sept 2007*’, dated 14 September 2007, some interesting data is provided by the Commission with respect to recorded actual or potential MPA’s, which is reproduced below. The data covers the period during which the GLO regime has been operative (2000–):

**Legal Services Commission Information Sheet, Sep 2007:**

'Following the introduction of the Access to Justice Act in 2000, the volume of Multi-Party Actions recorded by the LSC has been as follows:

<i>Year</i>	<i>Number of actions</i>
2000/01	133
2001/02	67
2002/03	45
2003/04	16
2004/05	20
2005/06	8
2006/07	4

NB. The year on year reduction is primarily due to the decrease in the number of child abuse actions being brought. There were substantial police investigations in the 1980s and 1990s following the identification of abuse in children's homes. These police investigations and criminal prosecutions resulted in claims. The peak in these actions has now passed.

Of the 293 actions, the main categories of action are:

Child Abuse	156
Health, Medical and Pharmacological	34
Prisoner Actions	27

There have been a limited number of major MPA's, defined namely those which are either likely to cost the Fund more than £1,000,000 or where the total *inter partes* costs are likely to exceed £5,000,000, assuming in each case that the action proceeded at least as far as a contested trial.

The LSC has funded in part or full each of the following major MPA's:

- Veterans of the UK Atomic Tests (veteran suffering from cancer and other problems — action discontinued) [GLO No. 61 in Table 1 of the Research Paper];
- Vigibatratin (an anti-epileptic drug that causes eye damage) [GLO No. 40 in Table 1];
- Seroxat (an anti-depressant drug with withdrawal effects) [not certified as a GLO as yet];
- Miner's Knee (industrial injury to miners from their working conditions) [GLO No. 62 in Table 1]; and
- Foetal Anti-Convulsant Syndrome (injury to children in the womb caused by sodium valproate based anti-epileptic drugs taken by the mother) [GLO No. 51 in Table 1].

David Keegan  
Director, High Cost Case Contracting'

The most notable feature of the data reproduced above is the sharp decline in recorded MPA's over the 7-year period. Apart from the decreased number of child abuse claims being brought now in comparison with previous years, as referred to, anecdotal evidence received from Respondents during the course of receiving the Questionnaires, and from various practitioners during

the Theobalds Park conference, indicate that applications for legal aid funding may not be made now as regularly as in previous years.

It does not seem possible, however, to infer from a lower level of recorded MPA's that there is a lack of presently-existing 'common grievances' when, for example, there are continuing attempts by English claimants to 'add on' to US class actions (see Part IV, Section 15 of the Research Paper); and when experienced practitioners (both those quoted in this Research Paper at various junctures and some who contributed to the Questionnaire responses on an anonymous basis) continue to express concerns that some alleged common grievances are not reaching the stage of a hearing on the merits at all.

- (C) **Lack of consumer group actions funded by legal aid.** Furthermore, apart from some notable medical and pharmaceutical cases, the types of Major and Medium group claims which have been funded via legal aid tend not to be consumer-focused claims whereby a grievance about a widely-available good or service is the subject of the dispute.

To illustrate this proposition, it is interesting to have regard to the 28 Major and Medium MPA's that were funded by the LSC in the ten years prior to 2005 and which had been traced as completed by that time, which are the subject of discussion in the Commission's document, '*Multi-Party Actions — Freedom of Information Disclosure for the Association of Personal Injury Lawyers*', dated 1 March 2005. It will be recalled that several of these actions were not the subject of any GLO order, having been commenced and case-managed prior to the GLO regime coming into force. In Table 11 below, the author has grouped the funded actions according to categories of grievance, to highlight the areas in which legal aid funding has been concentrated over that period, at least insofar as completed Major and Medium MPA's are concerned:

**TABLE 11 Legally-aided group litigation, 1995–2005**

<b>Title of litigation accorded by LSC</b>	<b>Gross cost (in millions)</b>	<b>Outcome, noted by LSC</b>	<b>No. of claimants (approx)</b>
<i>Medical and pharmaceutical – treatment or products</i>			
Benzodiazepene	£30.0	Proceedings abandoned	7, 000
Third generation contraceptive pill side-effects	£11.5	Lost at trial	300
MMR vaccine side-effects	£21.0	Proceedings abandoned	1, 350
Infected blood products (Hepatitis or HIV)	£5.3	Won at trial	450
Infected HGH with variant CJD	£5.0	Partially won at trial	450
Myodil	£2.6	Won	250
breast radiation injury litigation	£2.8	Lost at trial	100
Christies' Hospital Radiation overdoses	£0.3	Proceedings abandoned	15
cervical smear test failures	£0.3	Settled	40
LSD treatment of psychiatric patients	£0.5	Settled	100
Norplant contraceptive implants	£1.4	Proceedings abandoned	350
steroids	£0.9	Proceedings abandoned	340
<i>Employment-related claims</i>			
BCCI employees	£13.5	Settled	700
emphysema for miners	£5.6	Won at trial	3, 000
CAPE employees with asbestos	£8.0	Settled	6, 000
Gulf War syndrome	£5.0	Investigations abandoned	800
post-traumatic stress disorder for servicemen	£6.0	Lost at trial	450
vibration-induced white finger syndrome	£2.2	Won at trial	1, 000
Thor mercury poisoning of miners	£0.5	Won	20

<b>Title of litigation accorded by LSC</b>	<b>Gross cost (in millions)</b>	<b>Outcome, noted by LSC</b>	<b>No. of claimants (approx)</b>
<i>Abuse claims</i>			
Leicester child abuse	£1.7	Won	90
Stoke Place	£1.0	Settled	50
Danesford	£0.8	Settled	40
Kilrie	£0.4	Settled	20
Forde Park	£0.7	Settled	80
<i>Financial claims</i>			
Home Income Loans	£4.3	Won	1, 000
<i>Environmental claims</i>			
Volclay Plant pollution	£1.0	Won	3, 000
Docklands nuisance claim	£1.7	Lost during proceedings	1, 000
Flexsys Plant pollution	£0.6	Won	250

The absence of consumer-type claims in the Table above (except for the medical and pharmaceutical category, and the Home Income Loans case) does not prove, of course, that such actions are not brought via other funding means, nor that there is an absence of ‘common grievances’ in the consumer-oriented category. What the Table does demonstrate, however, is that there are areas in which legal aid funding has not been quite as prevalent for Major or Medium MPA’s, either because funding was not applied for, or because the actions did not meet the various funding criteria set by the Commission.

**PART IV**

**‘MISSING’ COLLECTIVE REDRESS FOR DAMAGES IN  
ENGLAND AND WALES: LOOKING OUTWARDS**

## 12. CONTRAST GRIEVANCES PURSUED UNDER OPT-OUT REGIMES IN AUSTRALIA AND CANADA

### The main points:

- ❑ several categories of common grievances brought in Australia and Ontario have no equivalent under the GLO regime
- ❑ alternatively, where some equivalent GLO claims have been evident within the same category (eg, in the product liability claims category), the range and number of claims litigated in Australia and Ontario have not been reproduced under the GLO, over the same time period (2000–7)
- ❑ several of the claims in Australia and Ontario have been, individually, non-recoverable claims, in which individual litigation was extremely unlikely — however, the opt-out systems of these jurisdictions have also been used for collective actions in which large-value individual claims have been encompassed by the action

(A) **The comparative table.** Table 12 in this Section encompasses data on collective actions brought under the opt-out Australian federal regime; and under the opt-out provincial common law regime of Ontario, Canada.

Australia’s federal regime and Ontario’s provincial regime have been deliberately chosen for the purposes of this Section, rooted as they are in two countries which have strong parallels with the litigious landscape and culture, and substantive law, of England and Wales.

Both of the opt-out regimes under consideration commenced prior to 2000 — Australia’s ‘representative proceedings’ regime commenced on 3 March 1992, when Pt IVA of the Federal Court of Australia Act 1976 came into force; and Ontario’s ‘class proceedings’ regime commenced on 1 January 1993, pursuant to the Class Proceedings Act, SO 1992. However, for the purposes of comparison, only the actions that have been certified/commenced as opt-out collective actions in these jurisdictions from 2000 onwards have been noted in Table 12. The aim of this restriction is to more usefully compare and contrast the activity under these regimes with that evidenced under England’s GLO regime (which commenced operation in May 2000).



The purpose of Table 12 in this section is two-fold: to contrast —

- ❑ the **number** of actions commenced under the Australian federal and Ontario provincial regimes between 2000–7 (**164** separate actions are noted in Table 12), and the number certified under the GLO in that same time period (which was **62** — see Table 1); and
- ❑ the **range** of disputes which have been brought by means of the opt-out collective action in Australia and Ontario between 2000–7.

Notably, the number and range of collective actions instituted in Australia and Ontario arise in jurisdictions with a combined population which is far lower than that of England and Wales. The respective populations (to the nearest thousand, and derived from Statistics Canada, the Australian Bureau of Statistics, and UK Statistics, respectively) are as follows: Ontario: 12,160,000; Australia: 20,434,000; England and Wales: 52,042,000.

- (B) Private law grievances.** One of the principal purposes of constructing Table 12 is to highlight an awareness of the number of private law grievances that are aired under opt-out collective actions — actions which do not rely upon the activity of a regulator to enforce or act for the claimants, but disputes that arise out of private causes of action (breach of contract, negligence, breach of fiduciary duty, for example). The reality is that regulators differ from jurisdiction to jurisdiction in their ability and willingness to commence compensatory actions on behalf of a class of aggrieved persons — but private law grievances inevitably depend upon a representative claimant stepping forward to assume (at least, tacitly) the responsibility for the litigation. In any event, for the purposes of comprehensive coverage, *all* certified class actions have been included in Table 12.

If an opt-out collective action was part of English civil procedure, Table 12 is illustrative of both the types and range of grievances which class members *might* seek to prosecute by way of private enforcement. Furthermore, it is notable that many of the grievances noted in the Table are generic, rather than linked to a particular geographical area.

- (C) The different attitudes towards certification.** For the purposes of Ontario, Table 12 only includes the actions which survived certification, that is, where the representative claimant could prove each

of the following certification criteria, pursuant to s 5(1) of the Class Proceedings Act:

**Ontario's Class Proceedings Act, SO 1992, c 6, s 5(1):**

The court shall certify a class proceeding ... if,

- (a) the pleadings or the notice of application discloses a cause of action;
- (b) there is an identifiable class of two or more persons that would be represented by the representative plaintiff or defendant;
- (c) the claims or defences of the class members raise common issues;
- (d) a class proceeding would be the preferable procedure for the resolution of the common issues; and
- (e) there is a representative plaintiff or defendant who,
  - (i) would fairly and adequately represent the interests of the class,
  - (ii) has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying class members of the proceeding, and
  - (iii) does not have, on the common issues for the class, an interest in conflict with the interests of other class members.

In the case of Australia's federal regime, by contrast, there is no formal certification regime. Instead, there are certain 'threshold requirements' which must be satisfied under s 33C of the Federal Court of Australia Act, failing which the defendant may challenge the proceedings as being improperly constituted as representative proceedings. There are further powers vested in the court to discontinue representative proceedings under any of ss 33L, 33M or 33N, at least in that form, where the scenarios stipulated in those sections are met. At the outset, section 33C requires that:

**Australia's Federal Court of Australia Act 1976, s 33C(1):**

Subject to this Part, where:

- (a) 7 or more persons have claims against the same person; and
  - (b) the claims of all those persons are in respect of, or arise out of, the same, similar or related circumstances; and
  - (c) the claims of all those persons give rise to a substantial common issue of law or fact;
- a proceeding may be commenced by one or more of those persons as representing some or all of them.

Certification, in Canada's case, or survival of a discontinuance application (because either s 33C was not met or that 33L, 33M or 33N require discontinuance) in Australia's case, are crucial in procedural terms. As Cullity J remarked in *Stewart v General Motors of Canada Ltd* (Ont SCJ, 8 June 2007), at para 3: '*As a practical matter, the effect of a denial of certification will often terminate the proceeding.*'

- (D) Included cases.** Certification is not a decision on the merits of the action, and hence, Table 12 **includes** cases that may have ultimately **failed** in proving liability on the substantive law. Certification merely means that those cases had (at least, at the date of the Table's compilation) a tenable basis in law. Were English courts to implement an opt-out regime, they might see the question of substantive liability differently from the decisions in these other jurisdictions. Hence, all cases which had an arguable cause of action on their face, and which survived the certification hurdle, are included herein.

In addition, Table 12 includes those decisions in which certification was made out, in conjunction with an application for judicial approval of a settlement agreement. In these circumstances, '*certification is on consent [but] the court must be satisfied that the requirements of s 5 have been met*': per *Gilbert v Canadian Imperial Banks of Commerce* (2004), 3 CPC (6<sup>th</sup>) 35 (Ont SCJ), at para 8. Indeed, where a conjoint application of this type is brought, then, per *Toronto Transit Commission v Morganite Canada Corp* (Ont SCJ, 6 Feb 2007), at para 11:

*The requirements are the same in a settlement context as in a litigation context, although it is generally accepted that they need not be as rigorously applied in a settlement context as a litigation context.*

- (E) GLO claims which have no equivalent.** Although the incontrovertible impression that one derives from a perusal of Table 12 is the range and number of actions which have no equivalent under the GLO regime, it would be remiss not to mention that the position can, occasionally, be reversed!

It will be recalled, from Table 1, that GLO #55 concerned a claim for physical or psychiatric injuries as a result of a prison disturbance at Lincoln Prison. Coincidentally, a class action also

arising out of a prison riot was filed in Ontario in: *R v Nixon* (2002), 21 CPC (5<sup>th</sup>) 269 (SCJ). Prisoners at the Kingston Penitentiary set fire to items and property one evening on 31 October 1999, and it was alleged in the claim that correctional officers failed to respond to fires appropriately and treated inmates in inhumane manner, and that the Crown failed to maintain proper safety equipment, inspections and procedures. The representative plaintiff proposed a class action encompassing all inmates who were present, except those who consented to be excluded or those who were proven to have been involved in fire setting. However, certification of the class proceeding was denied, because of problems with: the adequacy of the representative claimant; the class definition; conflicts with the class; and the small class size, making individual actions feasible.

Thus, it may be that, when the facts and circumstances of certified GLO's are tested against suitably drafted statutory certification criteria of an opt-out regime, the claim may not achieve certification. Certification criteria in an opt-out regime certainly do not permit all collective grievances to go forth in class action form.

**(E) Comprehensiveness and dates.** It should be noted that Table 12 is prepared on an 'E&OE' basis. It does not purport to be a complete list of competent collective actions in the two jurisdictions selected, but has been prepared on the following basis:

*Notes about Ontario.* In order to compile the Ontario column of the Table, the author has trawled through the decisions handed down by the Ontario first instance and appellate courts since 2000, and has sought to identify which actions were certified (after lengthy appeals in some cases). However, omissions whereby an action was missed or a certification appeal was overlooked may have occurred during the Table's preparation, for which the author apologises in advance. The following Ontario actions have been **excluded** from the Table:

- actions which were not certified because one or more of the certification criteria failed;
- actions which were certified at first instance, but then the certification decision was overturned on appeal;
- actions which were certified, but then the certification order was set aside and the

proceedings stayed, because another dispute forum (eg, arbitration) was mandated;

- actions which were not certified, but that decision was overturned on appeal and the case remitted back to the trial judge to re-examine certification in light of the appeal decision, but no further decision could be located, according to the author's searches.

The year designated against the Ontario case signifies when the action was certified by judicial hearing (reiterating that it is the purpose of the Table to only incorporate proceedings that were certified after 1 January 2000).

*Notes about Australia.* The Australian column is, with absolute certainty, an incomplete record of all competent Pt IVA actions between 2000 and the present, because in the absence of a certification hearing, the only ways in which to track class actions in the Australian federal arena are to (a) trawl law databases to ascertain where a discontinuance or other interlocutory motion may have been brought in the matter; (b) check media outlets as to actions which have been filed, according to press or news reports (reports about likely or anticipated class actions have not been included); and (c) check the websites of claimant law firms, and other websites of interest (see, eg, the shareholder class actions listed at: <<http://www.delisted.com.au/legal.aspx>>), to ascertain already-filed actions which are being publicised on such websites. Whilst the author has undertaken each of these exercises, unfortunately the end result does not, and cannot, purport to be a complete list of Pt IVA actions.

However, whilst the caveat of likely incompleteness remains, the range and number of Pt IVA actions shown in Table 12 is sufficient to substantiate the comparison with the GLO regime which is the object of this Section of the Research Paper.

Inclusion of Australian actions in the Table indicates that the judgment itself or other source mentions a filing date of 2000 or later.

In respect of *both* jurisdictions, the Table seeks to exclude actions in which:

- a court discontinued the class proceeding as a class proceeding;

- ❑ the court struck out the action on the basis that it disclosed no cause of action against the defendant on the face of the pleadings (where the cause of action was not one known to law, or where the action represented an innovative attempt to push the boundaries of the limits of a duty of care, say, which the court would not permit on the current state of the law of proximity or for policy reasons);
- ❑ the court struck out the action on the basis that it was instituted frivolously or vexatiously;  
or
- ❑ the court granted summary judgment on the application of the defendant against the representative claimant.

**TABLE 12 Actions litigated in Australia and Ontario, 2000–7**

Category of alleged grievance of class	Australia (federal)	Ontario (provincial)
<p><i>Negligence/misleading and deceptive/misrep/breach of statutory duty claims brought by consumers re products/services:</i> consumers complaining of misleading and deceptive conduct in respect of the nature of a product/service</p>	<p>Williams v FAI Home Security Pty Ltd (No5) (home alarm systems)</p> <p>Petrusevski v Bulldogs Rugby League Club Ltd (2003) (those betting on the outcome of a football sports competition)</p> <p>.Au Domain Administration Ltd v Domain Names Aust Pty Ltd (2003) (dispute over conduct in relation to domain names)</p>	<p>Lee Valley Tools Ltd v Canada Post Corp (2007) (parcel shipping charges)</p> <p>Currie v McDonald’s Restaurants of Canada Ltd (2007) (promotional games and contests)</p> <p>Farkas v Sunnybrook and Women’s College Health Services Centre (2005)</p>
<p><i>Actions for defective products (excluding pharmaceutical and medical devices):</i> against manufacturers for personal injuries, property damage, or economic losses allegedly caused, whether under breach of contract, negligence, statutory actions</p>	<p>Lowe v Mack Trucks Australia Pty Ltd (2001) (design and construction of Mack truck components)</p> <p>Nendy Enterprises Pty Ltd v New Holland Australia Pty Ltd (2001) (alleged defects in combine harvesters)</p>	<p>Garipey v Shell Oil Co (2002) (leaky pipes and fittings)</p> <p>Bondy v Toshiba of Canada Ltd (2007) (laptop computers)</p> <p>Bonanno v Maytag Corp (2005) (front-load washing machines)</p>

Category of alleged grievance of class	Australia (federal)	Ontario (provincial)
<p><i>Actions for defective medical devices or pharmaceutical products:</i></p>	<p>Courtney v Medtel Pty Ltd (2002) (heart pacemakers and accelerated battery depletion)</p> <p>Darcy v Medtel Pty Limited (No 3) (2004) (also pacemakers)</p> <p>Bright v Femcare Ltd (2002) (Filshie clip calibration)</p> <p>Bates v Dow Corning (Australia) Pty Ltd (2005) (breast implants)</p>	<p>Tesluk v Boots Pharmaceutical plc (2002) (sale and marketing of Synthroid)</p> <p>Knowles v Wyeth-Ayerst Canada Inc (2001) (diet drug Pondimin)</p> <p>Wilson v Servier Canada Inc (2000) (Ponderal and Redux diet drugs)</p> <p>Taylor v Canada (Minister of Health) (2007) (temporomandibular joint implants)</p> <p>Andersen v St Jude Medical Inc (2003) (artificial heart valves coated with Silzone)</p> <p>Peter v Medtronic Inc (2007) (defect in batteries used in implantable cardioverter defibrillators)</p> <p>Heward v Eli Lilly &amp; Co (2007) (Zyprexa, antipsychotic medication)</p> <p>Coleman v Bayer Inc (2004) (Baycol medication)</p> <p>Boulanger v Johnson &amp; Johnson Corp (2007) (Prepulsid)</p> <p>Serhan Estate v Johnson &amp; Johnson (2006) (testing strips for blood glucose levels; constructive trust allegation)</p>



Category of alleged grievance of class	Australia (federal)	Ontario (provincial)
<p><i>Breach of contract claims by purchasers/lessees of real property:</i> to distinguish such category from consumer-type transactions above</p>	<p>1059/05 Francey v Sharpe Development Group Pty Limited (2004) (complaint that resort did not contain day spa, as represented to purchasers of units)</p> <p>McBride v Monzie Pty Ltd (2007) (alleged backdating of contracts)</p> <p>Overton Investments Pty Ltd v Murphy (2001) (dispute about liability for outgoings)</p> <p>McIntyre v Eastern Prosperity Investments Pte Ltd (No 4) (2000) (disputes between lessor and lessee re shopping centre management)</p> <p>Revian v Dasford Holdings Pty Ltd (2002) (disputes between lessor and lessee re shopping centre management)</p>	<p>Despault v King West Village Lofts Ltd (2001) (disputes over realty taxes)</p> <p>Vitelli v Villa Giardino Homes Ltd (2001) (dispute over design of condominium units)</p> <p>Politzer v 170498 Canada Inc (2005) (burst water-pipe in apartment complex)</p> <p>Cheung v Kings Land Development Inc (2001) (incompleted condominium project and refund of monies)</p> <p>Denis v Bertrand &amp; Frere Construction Co (2000) (crumbling foundations due to fly ash)</p> <p>Lewis v Cantertrot Investments Ltd (2006) (maintenance fees payable in condominium)</p> <p>Ward-Price v Mariners Haven Inc (2002) (dispute about deposit interest under an interim occupancy agreement in condominium)</p>

Category of alleged grievance of class	Australia (federal)	Ontario (provincial)
<p><i>Claims arising out of insurance or insurance practices:</i></p>		<p>Mandeville v Manufacturers Life Insurance Co (2002) (conversion from mutual insurance company to share corporation)</p> <p>Directright Cartage Ltd v London Life Insurance Co (2001) (dispute about policy coverage)</p> <p>MacRae v Mutual of Ohama Insurance Co (2000) (dispute over ‘premium offset’ options)</p> <p>Gibbs v Jarvis (2001) (dispute over ‘premium offset’ options)</p> <p>Hague v Liberty Mutual Insurance Co (2004) (use of non-original manufacturer parts to repair cars damaged in collisions)</p> <p>McNaughton Automotive Ltd v Co-operators General Insurance Co (2003) (insurance industry practice re salvage value payout less deductible) (however, this case had a chequered path with intervening changes in the law and re-interpretation of the crucial standard insurance term, and eventually certification was set aside in 2006)</p>
<p><i>Consumers of food:</i> personal injury caused by consumption or purchase of food, allegedly due to negligence, breach of contract, statutory actions, etc</p>	<p>Graham Barclay Oysters Pty Ltd v Ryan (2002) (contaminated oysters)</p> <p>consumers v Knispel Fruit Juices (2001) (salmonella contamination of fruit juice)</p> <p>Georgiou v Old England Motel Pty Ltd (2004)</p> <p>consumers v Sofia’s Restaurant (salmonella outbreak) (2005)</p>	<p>Vezina v Loblaw Cos (2005) (infected employee; food contaminated by Hep A)</p>

<b>Category of alleged grievance of class</b>	<b>Australia (federal)</b>	<b>Ontario (provincial)</b>
<p><b>Medical negligence:</b> personal injury (including psychiatric injury and human rights infringements) claims alleged against medical service providers</p>		<p>Bellaire v Daya (2007) (surgery for fertility problems)</p> <p>Barbiero v Pollack (2004) (cosmetic surgery and use of liquid silicone)</p> <p>Rose v Pettle (2004) (skin infections following acupuncture treatments)</p> <p>McCarthy v Canadian Red Cross Society (2001) (contaminated blood, Hep C)</p> <p>Phaneuf v Ontario (2007) (treatment of those on remand)</p> <p>Healey v Lakeridge Health Corp (2006) (TB exposure in hospital)</p>
<p><b>Agricultural negligence:</b> economic loss claims</p>	<p>Dovuro Pty Ltd v R&amp;E Wilkins (2000) (canola seed merchants)</p>	
<p><b>Environmental claims:</b> claims for negligence, nuisance, strict liability, statutory actions, etc, brought by residents/landowners/businesses</p>	<p>Tongue v Council of the City of Tamworth (2004) (alleged failure to supply water from dam fit for purpose)</p> <p>Grinberg v Roads and Traffic Authority (2007)</p> <p>Glenelg Residents (re failure of sluice gates, causing flooding) (2007)</p> <p>Residents v operators of Stuart Shale oil project (2004)</p>	<p>Pearson v Inco Ltd (2005) (contaminated land near refinery)</p> <p>Ludwig v 1099029 Ontario Ltd (2007) (factory fire forcing evacuations)</p> <p>McLaren v Stratford (City) (2005) (severe rainstorm, backed-up sewers)</p>

<b>Category of alleged grievance of class</b>	<b>Australia (federal)</b>	<b>Ontario (provincial)</b>
<p><i>Employment pensions:</i> employee (or ex-employee) actions against pension fund operators, for lost or reduced pension entitlements, health and medical benefits, discriminatory practices between different pension-holders, etc</p>	<p>Levitt v United Medical Protection Ltd (2001)</p>	<p>National Trust Co v Smallhorn (2007)</p> <p>McMaster University v Robb (2001)</p> <p>Givogue v Burke (2003)</p> <p>Burleton v Royal Trust Corp of Canada (2003)</p> <p>CSL Equity Investments Ltd v Valois (2007)</p> <p>Hislop v Canada (Attorney General) (2004) (re the Canadian Pension Plan and same sex survivors' entitlements)</p> <p>Kranjcec v Ontario (2004)</p> <p>Lacroix v Canada Mortgage and Housing Corp (2001)</p> <p>Markle v Toronto (City) (2004)</p> <p>Vivendi Canada Inc v Philp (2007)</p> <p>Vivendi Universal Canada Inc v Jellinek (2006)</p> <p>Dhillon v Hamilton (City) (2006)</p> <p>Hislop v Canada (Attorney General) (2005)</p> <p>Mortson v Ontario (Municipal Employees Retirement Board) (2004) (subject to amendments to statement of claim and submissions on preferable procedure)</p> <p>Paramount Pictures (Canada) Inc v Dillon (2006)</p> <p>Ontario Public Service Employees' Union v Ontario (2005)</p> <p>Sutherland v Hudson's Bay Co (2005)</p>

<b>Category of alleged grievance of class</b>	<b>Australia (federal)</b>	<b>Ontario (provincial)</b>
<p><b><i>Employment disputes:</i></b> against employer (or third party, eg, Crown) for lost jobs, discriminatory practices, sexual abuse, wrongful dismissal, wrongful collection of union fees, withheld remuneration, unpaid wages</p>	<p>Schanka v Employment National (Administration) Pty Ltd (2001)</p> <p>Smith v University of Ballarat (2006)</p> <p>Batten v Container Terminal Management Services Ltd (2001)</p> <p>Finance Sector Union of Australia v Commonwealth Bank of Australia (2000)</p> <p>Various aircraft personnel v Australian Federal Govt (2005) (personal injury; cleaning F-111 fuel tanks)</p> <p>Non-union workers v Patrick Corp (2002)</p> <p>Automotive Food Metals Engineering Printing and Kindred Industries Union v The Age Company (2004)</p>	<p>Isaacs v Nortel Networks Corp (2001)</p> <p>Downey v Mitel Networks Corp (2004)</p> <p>Englefield v Wolf (2005)</p> <p>Ormrod v Etobicoke (City) Hydro-Electric Commission (2001)</p> <p>Elliott v Currie (2001)</p> <p>Kanagaratnam v Li (2005)</p> <p>Berry v Pulley (2001)</p>
<p><b><i>Overcharges in financial transactions:</i></b> debtors suing credit card companies, store credit operators, banks, service providers, alleging overcharges in interest on loans, on overdraft facilities, unlawful fees, unlawful interest charges, etc</p>		<p>Cassano v Toronto Dominion Bank (2007) (foreign exchange transaction fees)</p> <p>Gilbert v Canadian Imperial Bank of Commerce (2004)</p> <p>Nehme v Civil Service Co-operative Credit Society Ltd (2004) (early payout penalties on mortgages when house is sold)</p> <p>Smith v National Money Mart Co (2007) ('payday loan' fees)</p> <p>Joseph v Quik Payday Inc (2006) ('payday loan' fees)</p> <p>McCutcheon v Cash Stores Inc (2006) ('payday loan' fees)</p> <p>Markson v MBNA Canada Bank (2007) (credit card cash advances)</p> <p>Naintais v Easyhome Ltd (2005)</p>

<b>Category of alleged grievance of class</b>	<b>Australia (federal)</b>	<b>Ontario (provincial)</b>
<i><b>Student claims:</b></i> for negligence, breach of contract, negligent misstatement, etc, in performance of educational courses, etc		Hickey-Button v Loyalist College of Applied Arts & Technology (2006)
<i><b>Transport accidents:</b></i> giving rise to personal injury/death on the part of class members		Nunes v Air Transat AT Inc (2003) (plane emergency landing)  Brimner v VIA Rail Canada Inc (2001) (train derailment)
<i><b>Anti-competitive conduct:</b></i> actions for price-fixing, abuse of market power	Bray v F Hoffman-La Roche Ltd (2002) (vitamins for human consumption and treatment)  Darwalla Milling Co Pty Ltd v F Hoffman-La Roche Ltd (No 2) (2006) (vitamins for animal consumption and treatment)  Jarra Creek Central Packing Shed Pty Ltd v Amcor Ltd (2006) (cardboard and packaging products)  Air freight price fixing action (2007)	Axiom Plastics Inc v E I Dupont Canada Inc (2007) (engineering resins in automotive parts)  Alfresh Beverages Canada Corp v Hoechst AG (2002) (sorbates)  Minnema v Archer Daniels Midland Co (2003) (lysine)  Toronto Transit Commission v Morganite Canada Corp (2007) (electrical carbon products)  Ford v F Hoffmann-La Roche Ltd (2005) (vitamins)  Bona Foods Ltd v Ajinomoto USA Inc (2004) (monosodium glutamate)
<i><b>Agency and franchise disputes:</b></i> between principal and agents/franchisees (regarding termination, failed commissions, etc)	Leonie's Travel Pty Ltd v International Air Transport Association (2006) (re commission on surcharges)  Leung v American International Assurance Co (Aust) Ltd (2004)  Jarrama Pty Ltd v Caltex Australia Petroleum Pty Ltd (2004)	1176560 Ontario Ltd v Great Atlantic & Pacific Co of Canada Ltd (2004)  Al-Harazi v Quizno's Canada Restaurant Corp (2007)  Wilson v Re/Max Metro-City Realty Ltd (2003)

Category of alleged grievance of class	Australia (federal)	Ontario (provincial)
<p><b><i>Shareholder actions for non-disclosure or misleading disclosure:</i></b> against company for misrepresentations in prospectus, directors' statements, or other public documents, allegedly causing the shareholders economic loss from reduced share value</p>	<p>Dorajay Pty Limited v Aristocrat Leisure Ltd (2003)</p> <p>Guglielmin v Trescowthick (re Harris Scarfe Holdings Ltd) (2002)</p> <p>P Dawson Nominees Pty Ltd v Multiplex Ltd (2006)</p> <p>Johnstone v HIH Insurance Ltd (2002)</p> <p>Shareholders of Sons of Gwalia Ltd v Sons of Gwalia Pty Ltd (2006)</p> <p>Cadence Asset Management v Concept Sports Ltd (2004)</p> <p>Crosbie, in the matter of Media World Communications Ltd (Admin Appointed) (2005)</p> <p>ASIC v Chemeq Ltd (2006)</p> <p>Taylor v Telstra Corporation Ltd (2006)</p> <p>Shareholders v Village Life Ltd (2007)</p> <p>Shareholders v Westpoint Group (2007)</p> <p>Watson v Australian Wheat Board Ltd (2007)</p>	<p>Kerr v Danier Leather Inc (2001)</p> <p>Gould v BMO Nesbitt Burns Inc (2007)</p> <p>Frohlinger v Nortel Networks Corp (2006)</p> <p>Gallardi v Nortel Networks Corp (2006)</p> <p>Elliott v Boliden Ltd (2006)</p> <p>CC&amp;L Dedicated Enterprise Fund (Trustee of) v Fisherman (2002)</p>
<p><b><i>Other shareholder actions:</i></b> for alleged misconduct or mismanagement of the company or its affairs</p>	<p>King v AG Aust Holdings Ltd (formerly GIO Aust Holdings Ltd) (2000) (hostile takeover bid, action on behalf of former minority shareholders)</p> <p>Milfull v Terranora Lakes Country Club Ltd (2002) (management of redeemable preference shares)</p>	

<b>Category of alleged grievance of class</b>	<b>Australia (federal)</b>	<b>Ontario (provincial)</b>
<p><b><i>Investor actions</i></b>  <i>(excluding the shareholder actions noted previously):</i>  investors against operators of investment vehicle (property developer, brokers, promoters of investment schemes, solicitors, etc) for misconduct/ mismanagement/poor choices/bad advice (eg, misrepresentations in prospectus, undisclosed fees, losing investors promised tax relief, etc)</p>	<p>Hunter Valley Community Investments Pty Ltd v Bell (2001)</p> <p>Patrick v Capital Finance Corp (Australasia) Pty Ltd (2001)</p> <p>Sereika v Cardinal Financial Securities Ltd (2001)</p> <p>Haslam v Money for Living (Aust) Pty Ltd (Administrators Appointed) (2005) (converting real property ownership into life tenancies)</p> <p>Australian Competition &amp; Consumer Commission v Bio Enviro Plan Pty Ltd (2003) (worm farming schemes)</p> <p>Reiffel v ACN 075 839 226 Ltd (2003) (property investments)</p> <p>Lean v Tumut River Orchard Management Ltd (2002) (scheme for growing and selling peaches and nectarines)</p> <p>Lukey v Corporate Investment Aust Funds Management Pty Ltd (2000) (tracknet project)</p> <p>Spangaro v Corporate Investment Australia Funds Management Ltd (2003) (cotton project)</p>	<p>Toevis v Yorkton (2006) (fraudulent schemes)</p> <p>Carom v Bre-X Minerals Ltd (2000) (salted mineral samples)</p> <p>Hurst v Berkshire Securities Inc (2006) (referrals to Portus)</p> <p>Murphy v BDO Dunwoody LLP (2006) (financial projections prepared by accountants)</p> <p>Lau v Bayview Landmark Inc (failed real estate investment scheme)</p>
<p><b><i>Residents of care homes/residential schools</i></b> who allege physical, sexual and/or emotional abuse</p>		<p>Cloud v Canada (A-G) (2004)</p> <p>Baxter v Canada (Attorney General) (2006)</p>
<p><b><i>Misfeasance of public office:</i></b> and unlawful interference by a public authority in the class's economic interests</p>	<p>Wotton v State of Queensland (2007) (not entirely clear from court report, although indicated, in respect of civil unrest on Palm Island)</p>	



Category of alleged grievance of class	Australia (federal)	Ontario (provincial)
<b>Professional negligence and/or breach of contract and/or unconscionable behaviour:</b> alleged against accountants, lawyers, banks	Hunter Valley Community Investments Pty Ltd v Bell (2001)  Crawford v Bank of Western Australia Ltd (2005)	
<b>Defamation:</b> alleged defamation of providing misleading information about class members	Bailey v Veda Advantage Information Services and Solutions Ltd (2007) (credit-worthiness references)	
<b>Taxation disputes:</b>	Pantral Pty Ltd v Commissioner of Taxation (2002) (sales tax on motor vehicle instruction manuals)  Meredith v Commissioner of Taxation (2001) (re tax scheme)	
<b>Disputes arising out of native title:</b>	Holt v Manzie (2000)	

To reiterate, the total number of collective redress actions in Table 12 — representing (a necessarily incomplete tally of) the actions certified/commenced without striking-out or discontinuance in Ontario and Australia — is 164. This contrasts to a mere 62 certified group actions over the same period under the Group Litigation Order regime in England and Wales.

### 13. THE LEAD TAKEN BY THE OPT-OUT REGIME IN PORTUGAL

**The main points:**

- ❑ **Portugal’s opt-out regime has been in operation since 1995, and the consumer organisation DECO has obtained valuable experience in bringing actions under it**
- ❑ **DECO’s view is that the regime has worked well, although the limited number of collective actions for damages is a direct result of the limited resources which DECO has to prosecute such actions**
- ❑ **DECO notes that certain features of the Portuguese opt-out regime may be worth re-visiting for clarification and operational efficacy — observations which provide very useful lessons for English lawmakers**

- (A) **Europe’s oldest opt-out regime.** An opt-out system has been implemented in Portugal since 1995. The relevant laws facilitating the regime are: Law No 83/95 of 31<sup>st</sup> August, Right of Proceeding, Participation and Popular Action; and Law No 24/96 of 31<sup>st</sup> July, Establishing the Legal System Applicable to Consumer Protection.
- (B) **Features of the Portuguese opt-out legislation:** DECO, the Portuguese Association for Consumer Protection, and in particular, Mr Nuno Oliveira, formerly Legal Advisor, and Mr Luis Silveira Rodrigues, Director, have kindly assisted with this Research Paper by providing written materials describing the operations and efficacy of the opt-out laws, and by meeting with both Mr Bob Musgrove, Chief Executive of the Civil Justice Council and with the author, on 8 November 2007, to discuss the Portuguese experience in further detail.

The author has also referred to DECO’s presentation, ‘*Group Action: Experience from Portugal*’ (paper presented to the Conference on Collective Redress, Lisbon, 9 November 2007) for the purposes of compiling this Section. Another useful publication on the background, content, and pro’s and con’s of the Portuguese opt-out action is that by J Pegado Liz, ‘*Notion and Regime of the “Popular Action” in Portugal*’ (paper presented to the conference, *Group Action: Taking Europe Forward*, 11 October 2007, copy on file).

Features of the Portuguese opt-out regime, which may be of interest to English law-makers, include the following:

- ❑ the regime has no certification requirement, but the court has the ability to discontinue;
- ❑ standing: any consumer, and any association or foundation, has the right to initiate a collective action, provided that the association has legal existence and its purposes are within the interests at stake (hence, a consumer association such as DECO can bring an action with respect to consumer protection, even though it is ‘not directly affected’ by the culpable behaviour);
- ❑ the subject matter of the collective regime is wide-ranging, eg, public health, the environment, quality of life, consumer protection and consumer services, cultural heritage, and public domain;
- ❑ the usual requirements to strike out frivolous litigation (when the ‘source of the request is manifestly improbable’) are maintained;
- ❑ the association does not require an express mandate to represent consumers;
- ❑ the court stipulates a period for opting out, and arranges how the opt-out notice is to be advertised (this is usually by media and press conference; individual notice to class members is not required);
- ❑ where damages cannot be individually assessed, the court has the power to fix an aggregate sum for class-wide damages;
- ❑ the decision of the court is binding upon all consumers, except those who opted out; the decision is published in the two main newspapers;
- ❑ a consumer organisation bringing the claim is exempt from an adverse costs order, should it lose.

- (C) **The lessons of experience.** The following observations about how the regime might be improved have been provided by Mr Nuno Oliveira, formerly Legal Advisor at DECO (*‘Collective Redress: An Overview of the Portuguese Legislation’*, August 2007, copy on file with the author). Based upon DECO’s experiences, some areas of the regime may require re-visiting:

**DECO’s overview of suggested refinements and improvements:**

‘The general overview of the present opt-out framework might be considered positive for consumers, and it has been a quite useful tool in order to protect their interests. Notwithstanding this overall appreciation for the merits of the regime, issues still remain that require improvements, namely:

- *concept of the citizen* — it is not clear under collective redress law whether the foreign citizen might be able to participate in the lawsuit;
- *ad hoc groups* — [re the requisite legal standing to commence opt-out suits], the current laws only include associations and foundations with legal existence, and do not include *ad hoc* groups of interests;
- *effects of the public announcements about collective redress lawsuits* — the reality has demonstrated that the opt-out mechanism does not always assure opting-out rights, which can be particularly relevant when decisions are unfavourable;
- *unclaimed compensatory damages* — the law should stipulate some governing rules, whenever consumers do not claim their compensatory damages, creating a Fund with goals which are aligned with consumers’ affairs, similar to ‘fluid recovery’ in the United States [termed ‘*cy-près*’ in this Research Paper];
- *execution of the court’s decision* — the law does not contain any provisions that govern the case of breach or violation of the court’s decision. Therefore, in spite of the recognition of consumers’ rights by the court, sometimes it can be difficult to enforce the court’s decision, and the consumers may then not be able to benefit from the decision;
- *calculation of damages* — the law should state clear rules for calculating different types of damages (liquidated, general, reliance, restitution, punitive, expectation, etc), and include also a provision for damages distribution between consumers as well as a partial distribution for the plaintiff consumers’ association.’

- (D) **Actions brought under the opt-out regime.** Since the inception of the Portuguese opt-out regime, DECO has instituted three opt-out actions for damages, as the following Table 13 shows:

**TABLE 13 Portuguese opt-out collective actions for damages**

Action against ...	How many actions?	Notes about actions
Portugal Telecom	3 (1/1998, 2/1999)	<p>Class included almost all Portuguese consumers (almost 2 million consumers) and involved damages of about 120M Euros.</p> <p>Its purpose was to disgorge/compensate for the consumers' payment of over-charges.</p> <p>Portugal Telecom and DECO reached a settlement agreement that allowed consumers to make free phone calls every Sunday for one year and also on consumers' international day.</p>
Language school, Academia Opening	1 (in 2003)	<p>Action for breach of contract in demanding credit payments of fees in advance, after the language school closed down suddenly.</p> <p>About 42,000 students were affected by fact that, after closure, students were requested to continue their credit payments to the financial providers.</p> <p>The action is presently under appeal in Portugal.</p> <p>A similar action was brought against Academia Opening in Spain by consumer organisation, OCU.</p>
Water provider	1 (in 2003)	<p>Action to recover extra charges that company demanded from consumers to repair malfunctioning water meters (they exploded in cold weather).</p> <p>Five councils were sued, and the action settled.</p>

As the above cases demonstrate, the Portuguese opt-out regime has certainly coped with large class sizes and relatively low-value individual recoveries. It has also witnessed an effective *cy-près* settlement distribution of damages (in the form of price-rollback *cy-près* with respect to telephone charges).

The relatively small number of actions commenced for damages is largely due to the reality that DECO has finite resources with which to prosecute collective actions of this sort, rather than due to the efficacy of the regime itself.

For further information and analysis about the various Portuguese collective redress regimes, please refer to the following National Report by Prof. Henrique Antunes, '***Class Actions, Group Litigation and Other Forms of Collective Litigation (Portuguese Report)***', prepared for the *Globalization of Class Actions* conference, Oxford, December 2007, and available for perusal at: <[http://www.law.stanford.edu/display/images/dynamic/events\\_media/Portugal\\_National\\_Report.pdf](http://www.law.stanford.edu/display/images/dynamic/events_media/Portugal_National_Report.pdf)>.

## 14. 'NEARBY' OPT-OUT REGIMES BEING IMPLEMENTED IN EUROPE

### The main points:

- ❑ **there are two long-standing opt-out regimes in Europe — in Portugal (as discussed in Section 13 above) and in Spain**
- ❑ **several other European jurisdictions (Denmark, Norway, the Netherlands) have recently introduced opt-out regimes of various types**

- (A) **Using opt-out for low-value claims: Denmark's lead.** Some European jurisdictions have considered that, especially for low-value claims, opt-out regimes are superior.

In particular, Denmark has just introduced an opt-out collective action regime, to be implemented as a 'secondary model' to an opt-in model, pursuant to the Administration of Justice Act (Denmark), Pt 23, Act No. 181 of 28 Feb 2007 [in force 1 Jan 2008].

According to the Ministry of Justice's publication, '*New Rules on Class Action under Danish Law*' (26 June 2007, copy on file with the author), together with relevant information and helpful insights derived from discussions with Mr Henrik Oe (the Danish Ombudsman), and from the Ombudsman's publications, '*Collective Redress*' prepared for the Leuven Brainstorming Event, 29 June 2007, and also '*Collective Redress*' prepared for the Conference on Collective Redress at Lisbon, 9–10 November 2007, the following are pertinent points to note about the Danish regime:

- ❑ the legislation is derived from Report No. 1468/2005 of the Standing Committee on Procedural Law, on reform of civil justice IV (Class actions etc);
- ❑ opt-in is the 'main model' under the legislation;
- ❑ but an opt-out model will be permitted by the court upon two conditions being satisfied:

**The pre-requisites for Danish opt-out actions:**

- (a) the claims are so low-value that it cannot be expected that they would be pursued through individual actions — according to the explanatory notes to the Bill, this first condition should normally only be satisfied if the individual claim does not exceed approx DKK 2,000 (about £200); **and**
- (b) the opt-in model is considered an inappropriate method of dispute resolution — presumably, this will be especially able to be satisfied in the case of a very large class, where the distribution of opt-in notices would be a practically burdensome requirement and where identification of the class members may be difficult at the outset.

- ❑ only a public authority (and not individual class members) can institute an opt-out action, and presently, the Danish Consumer Ombudsman is the sole recipient of this status under the legislation — the justifications for this are that *‘public authorities, as opposed to, eg, private associations, etc, are subject to a general objectivity requirement which applies when the relevant authority is to decide whether there is a basis for bringing the class action according to the opt-out model’* (p 8 of the MoJ’s publication), and also, that *‘public authorities in some respects are bound by obligations of professional secrecy and impartiality’* (presentation by Mr Henrik Oe, Leuven, 29 June 2007);
- ❑ whilst the Standing Committee on Procedural Law acknowledged the possibility that some small minority of class members might not become aware of an opt-out notice, that *‘cannot be deemed to be a major interference with the freedom of action, etc of the persons concerned, and taking part in such class action does not imply any financial risk for the individual class member’*;
- ❑ the Danish collective action does not require identical claims — only that the claims arise from the same factual circumstances and the same legal basis;
- ❑ the Danish collective action contemplates a split trial of common issues (for which a declaratory judgment is issued), and thereafter (if necessary), individual claims for compensation or to determine other individual issues relevant to liability;



- ❑ the Danish class action contains ‘adequate representative’ and ‘superiority’ requirements typically found in opt-out regimes;
- ❑ a certification/screening stage is included in the regime;
- ❑ individual notice is the optimal, and is preferred when it would not entail disproportionate expenses, otherwise, press advertisements or public announcement will suffice;
- ❑ the adjudicating court may decide that the class representative must provide security for costs (although this would be considered to be unnecessary against the Danish Ombudsman, or indeed, against any public authority);
- ❑ when the Bill was being examined by the Danish Parliament, a ‘sunset’ clause was inserted, whereby revision of the collective action regime must be conducted when the Act has been effective for three years (ie, in the Parliamentary year 2010–11);

The Danish Ombudsman, Mr Henrik Oe, anticipates that the opt-out collective action may be particularly useful for certain types of claims. At the presentations at Leuven and Lisbon, noted previously, the following uses were foreshadowed (per slide #11):

**Danish Ombudsman’s presentation on the new legislation:**

‘Future application:  
Examples of potential collective redress actions initiated by the Consumer Ombudsman:

- collection of an unlawful fee;
- contracts concluded on the basis of misleading marketing activities (eg, the UCP Directive); and
- unfair terms of contract (eg, the Directive on unfair terms in consumer contracts).

For further information about the Danish opt-out regime, please see: Prof. E Werlauff, ‘*Class Actions in Denmark — from 2008*’ (National Report prepared for conference, *The Globalisation of Class Actions*, Oxford, 12–14 December 2007, and available for perusal at: <[http://www.law.stanford.edu/display/images/dynamic/events\\_media/Demark\\_Legislation.pdf](http://www.law.stanford.edu/display/images/dynamic/events_media/Demark_Legislation.pdf)>

(C) **Other European opt-out regimes of interest.** Opt-out regimes of one form or another have also appeared on the European landscape in recent times. To summarise

☐ Civil Procedure Code (**Norway**) [in force 1 Jan 2008]

- opt-in is the ‘main model’, but an opt-out model will be permitted if two conditions are satisfied: (a) the claims represent such small values that a clear majority of them could not be expected to be pursued individually, and (b) the claims are not foreshadowed to raise individual issues.
- For further information, please see: ‘*Norway Introduces Class Actions Legislation*’ (Wiersholm Mellbye & Bech, Oslo, 2007)); and also: Prof. C Bernt-Hamre, ‘*Class Actions, Group Litigation and Other Forms of Collective Litigation in the Norwegian Courts*’ (National Report prepared for conference, *The Globalisation of Class Actions*, Oxford, 12–14 December 2007, and available for perusal at: <[http://www.law.stanford.edu/display/images/dynamic/events\\_media/Norway\\_National\\_Report.pdf](http://www.law.stanford.edu/display/images/dynamic/events_media/Norway_National_Report.pdf)>).

☐ Act on Collective Settlement of Mass Damages (**The Netherlands**) [in force 27 July 2005]

- an opt-out regime for settlement agreements for ‘mass disaster accidents’;
- it has only been used three times to date: for product liability (the Dutch DES hormone case); for financial services (Dexia Bank Nederland re securities leasing); both had court-approved settlements; and a third case pending: securities litigation re Royal Dutch Shell plc, described in detail in: ‘*The Shell Settlement and the Dutch Act on Collective Settlement of Mass Damages*’ (Cleary Gottlieb, Brussels, 16 April 2007));
- for further information on The Netherlands regime, please see: DL Scheuleer, ‘*Collective Claims and Settlements in the Dutch polders*’ (paper presented to the Conference on Collective Redress, Lisbon, 9–10 November 2007); and the Dutch

Ministry of Justice, '*The Dutch "Class Action (Financial Settlement) Act*' (paper presented to the Conference on Collective Redress, Lisbon, 9–10 November 2007); and, in addition, for detailed discussion and analysis, please see: Prof. I Tzankova, '*Class Actions, Group Litigation and Other Forms of Collective Litigation Dutch Report*' (National Report prepared for conference, *The Globalisation of Class Actions*, Oxford, 12–14 December 2007, and available for perusal at: <[http://www.law.stanford.edu/display/images/dynamic/events\\_media/Netherlands\\_National\\_Report.pdf](http://www.law.stanford.edu/display/images/dynamic/events_media/Netherlands_National_Report.pdf)>.

- the Spanish Law of Civil Judgment 1/2000 (Spain) [in force 1 Jan 2001]
  - permits an action on behalf of unidentified individuals; the action must be brought by consumer or user organisations; and the regime is only available for recovery of damages sustained by consumers and users;
  - unidentified individuals have five years in which to come forward to seek enforcement of a judgment of general damages in their favour;
  - for further information on the Spanish regime, please see: Prof. P Gutiérrez de Cabiedes, '*Group Litigation in Spain National Report*' (National Report prepared for conference, *The Globalisation of Class Actions*, Oxford, 12–14 December 2007, and available for perusal at: <[http://www.law.stanford.edu/display/images/dynamic/events\\_media/spain\\_national\\_report.pdf](http://www.law.stanford.edu/display/images/dynamic/events_media/spain_national_report.pdf)>.

For a recent overview of the European collective actions landscape, see the comprehensive discussion in: Freshfields Bruckhaus Deringer, '*Class Actions and Third Party Funding of Litigation: An Analysis Across Europe*' (June 2007, and distributed at a conference, *Third Party Funding*, arranged by the British Institute of International and Comparative Law, 22 January 2008).

## 15. PROBLEMATIC ENGLISH 'ADD-ON CLASSES' TO UNITED STATES CLASS ACTIONS

### The main points:

- ❑ where English claimants have sought to 'add on' to class actions instituted in the United States, or have sought to bring a stand-alone claim in the US, some difficulties have ensued, that have resulted in the English claimants being 'dumped out' of the actions, or being treated unfavourably in comparison with domestic US claimants
- ❑ many of these actions had a 'connection' with the English jurisdiction that may have permitted an action to be brought in England — but in the absence of an opt-out collective redress regime in England, joining or commencing US opt-out actions has had some unhappy outcomes for English claimants

- (A) **Joining class actions in other jurisdictions.** There have been instances in which English residents have sought to comprise 'add on' classes of 'foreign' residents to opt-out class actions elsewhere, with attendant difficulties. This has been especially evident in some litigation conducted pursuant to rule 23 of the US Federal Rules of Civil Procedure (FRCP).

This section concentrates specifically upon the problem of English residents being 'dumped out' of US class actions.

- (B) **Problems encountered.** The number of actions in foreign countries in general, and in US class actions in particular, which have involved English residents, is impossible to quantify. However, a perusal of relevant case law (summarised in Table 14) indicates a *sample* range of problems that have been faced by English class members who have sought to join class actions in the United States:

**TABLE 14 Problems experienced by English claimants under US class actions**

The case:	The outcome:	The problem for English add-on claimants (or European claimants generally):
<p><i>In re Parmalat Securities Litigation</i>, 487 F Supp 2d 526 (SDNY, 24 July 2007)</p>	<p>claims of foreign purchasers of Parmalat securities (including English investors) dismissed against defendant auditors and two banks</p>	<ul style="list-style-type: none"> <li>• Securities Exchange Act of 1934 (US) did not have sufficient extra-territorial application to include claims of these foreign purchasers</li> <li>• the evidence was that fraud took place in England, where Eureka UK purchased receivables, so the ‘essential core’ of the fraud took place away from the US</li> </ul>
<p><i>F Hoffmann-La Roche Ltd v Empagran SA</i>, 542 US 155 (2004)</p>	<p>claims of foreign purchasers of vitamins in Ukraine, Australia, Ecuador and Panama not permitted to proceed in the class action</p>	<ul style="list-style-type: none"> <li>• as a general rule, the Sherman Act did not apply to conduct involving trade and commerce with foreign nations; exceptions are created where that conduct significantly harms imports, domestic commerce or American exporters; here, the general rule, and no exceptions, applied</li> <li>• in any event, several non-US countries (UK, Germany, Canada, Japan) filed briefs citing that to apply US private treble-damages remedies to anti-competitive conduct taking place abroad was undesirable, that it would ‘unjustifiably permit their citizens to bypass their own less generous remedial schemes, thereby upsetting a balance of competing considerations that their own domestic antitrust laws embody.’</li> </ul>
<p><i>Kruman v Christie’s plc</i>, 284 F 3d 384 (2<sup>nd</sup> Cir, 2003)</p>	<p>foreign class members (including English purchasers of items at Christie’s and Sotheby’s) had to file pleadings and fight on against defendant’s motion to dismiss; domestic US class settled on favourable terms (over \$500 million in cash and discount benefits to the domestic class)</p>	<ul style="list-style-type: none"> <li>• judicially noted that legal work to prepare an English-equivalent action in London was commenced but not pursued, due to a later settlement</li> </ul>

The case:	The outcome:	The problem for English add-on claimants (or European claimants generally):
<p><b><i>In re Factor VIII or IX Concentrate Blood Prod Liab Litig</i></b>, 408 F Supp 2d 569 (2006) aff'd <b><i>Gullone v Bayer Corp (In re Factor VIII or IX Concentrate Blood Products)</i></b> 484 F 3d 951 (7<sup>th</sup> Cir, 2007)</p>	<p>hemophiliac residents of United Kingdom had their suit against manufacturers of blood-clotting products ('second generation' claims) dismissed</p>	<ul style="list-style-type: none"> <li>• dismissed on <i>forum non conveniens</i> grounds</li> <li>• UK an adequate forum because: all defendants consented to UK courts' jurisdiction; the <i>Fairchild</i> exception to causation was potentially applicable to enable the causal link to be proven; legal representation in the UK was no difficulty, and financial difficulties of mounting such cases 'more apparent than real'; and costs-shifting did not compromise the adequacy of the UK forum</li> </ul>
<p><b><i>In re Vioxx Products Liability Litigation</i></b>, 2007 US Dist Lexis 23164 (ED La)</p>	<p>classes of Italian and French consumers of drug dismissed</p>	<ul style="list-style-type: none"> <li>• dismissed on <i>forum non conveniens</i> grounds</li> </ul>
<p><b><i>In re Vioxx Litigation</i></b>, 395 NJ Super 358, 928 A 2d 935 (2007), on appeal from Judge Higbee</p>	<p>class of 98 consumers residing in England and Wales had their claims for personal injuries against Merck &amp; Co (developers and manufacturers) dismissed</p>	<ul style="list-style-type: none"> <li>• dismissed on <i>forum non conveniens</i> grounds</li> <li>• the facts: that a cause of action available in NJ was not available to the claimants in UK; that punitive damages were not available in the UK; that less generous discovery and no jury trial were available in the UK; that costs-shifting in the UK could put the claimants at a disadvantage compared to the 'American costs rule'; and that public funding could be difficult or challenging to obtain for product liability group actions in the UK — did not render NJ the appropriate or convenient forum, nor did these facts indicate that the UK was an inadequate forum for this litigation</li> </ul>
<p><b><i>In re Vivendi Universal SA Securities Litigation</i></b>, 242 FRD 76 (SDNY, 2007)</p>	<p>defendants disputed that class of foreign shareholders (from France, England, the Netherlands) <i>could</i> bring a US securities fraud class action against the defendants</p>	<ul style="list-style-type: none"> <li>• several observations as to the fact that there 'is no clear authority addressing the <i>res judicata</i> effect of a US class action judgment in England'</li> <li>• 'while the issue is hardly free from doubt, based on the affidavits before it, the court concludes that English courts, when ultimately presented with the issue, are more likely than not to find that US courts are competent to adjudicate with finality the claims of absent class members and, therefore, would recognise a judgment or settlement in this action'</li> </ul>

The case:	The outcome:	The problem for English add-on claimants (or European claimants generally):
<i>In re Daimler Chrysler AG Securities Litigation</i> , 216 FRD 291 (D Del, 2003)	certification of the class action proceeded, but only on the basis of ‘domestic investors’; foreign class of shareholders was excluded from the class action	<ul style="list-style-type: none"> <li>• there were a ‘significant number of foreign investors’, of whom the court said that there were ‘practical difficulties involved in maintaining a class comprising foreign investors’</li> <li>• issues of concern to the court were how the foreign investors’ damages on foreign exchanges were going to be quantified, and how the class would be managed</li> </ul>

Notably, the reasons given for dumping English/foreign claimants out in many of these cases was that there was some, or some substantial, connection between the English jurisdiction and the claimants (provoking the thought that, had an opt-out action been available in England, these claimants may not have felt it necessary or desirable to turn to the US for class action membership).

(C) **A practitioner viewpoint.** These various difficulties are especially crucial in pharmaceutical product liability claims, according to practising lawyers who are experienced in such claims.

For example, to quote *Mr Mark Harvey, Partner of Hugh James Solicitors, Cardiff*, per written correspondence with the author, and reproduced with approval:

**Mark Harvey, Hugh James Solicitors:**

‘There is currently little prospect of getting a pharmaceutical product liability case quickly to the UK courts, unlike in the US. An example of the contrast is Vioxx, with enough litigation in the US to force settlement and the adamant refusal of the defendant to compensate UK claimants who Merck know can’t or won’t sue, with the costs risks. The same applies to Lipobay, where last year, one UK claimant who had made his own way to the US was barred on *forum non conveniens* grounds there, and despite Bayer paying out over \$1Billion in damages for the same proven injury in the US, there is no prospect of that UK claimant being able to pursue his action on his own.’

Further, to quote *Mr John Pickering, Partner and Head of Personal Injury at Irwin Mitchell Solicitors, London*, from written correspondence and oral discussions with the author, and reproduced with approval:

**John Pickering, Irwin Mitchell Solicitors:**

‘There are quite a number of cases involving products of one form or another, particularly pharmaceutical devices, where litigation has been successfully pursued in the United States but for various reasons has not been pursued in this jurisdiction. To just give a couple of examples in which I have personally acted:

*DES.* This litigation was successfully pursued in the US and also in other jurisdictions, notably Holland. I am currently acting on behalf of a group of DES victims but no litigation has been possible in this jurisdiction, mainly because of key differences in the substantive law between the US and the UK, and we are currently exploring whether there may be other political-style remedies.

*Haemophilia/HIV.* In general terms, the litigation in the United States has been successful and the litigation in this country has been much more patchy. We are, however, currently acting on a group of cases that were returned to this country, having fallen down in the United States. [On that point, see, further, Table 14 above, and the decision of the 7<sup>th</sup> Circuit US Court of Appeals of 4 May 2007.]

The reasons behind the successes and failures of group actions are varied — some relate to lack of funding/costs benefits problems and others relate to what may be described as deficiencies within the law.

Nevertheless, if courts are to be able to effectively deal with all types of multi-party actions, many of them raising difficult issues and complex facts, then it is important that the courts have a full range of procedural tools upon which to draw, depending upon which procedural framework is most appropriate in all the circumstances of the case.’

Both practitioners consider that an opt-out regime, by which the common issues in dispute between the class of users of a product and the defendant manufacturer could be determined initially, followed by a resolution of the individual issues (if necessary), would assist the ability to viably commence and conduct pharmaceutical product liability claims in this jurisdiction. There are, however, some circumstances where the lead case approach may work very well (eg, John Pickering refers to the British Coal litigation arising out of the Vibration White Finger condition, *Armstrong v British Coal Corp* [1996] EWCA Civ 1049, as one such instance, where nine cases were selected as lead cases) — it is not a case of ‘one cap fits all’.

- (D) **US to UK: ‘It’s your problem’.** Note the robust views recently taken by the US state appellate court in the *Vioxx* litigation, and by the United States Court of Appeals for the Seventh Circuit in the contaminated blood litigation, respectively, regarding the prospect of bringing complex litigation in the UK, and reproduced below. Although the comments pertain specifically to the costs-shifting rule which applies in the UK, and the disincentive to litigation that it presents, the view of the



practitioners above — that the lack of an opt-out system also hampers litigants’ attempts to bring such actions — renders the US courts’ comments relevant to the availability of the procedural laws in the UK, *in general*:

***In re Vioxx Litigation***, 395 NJ Super 358, 373–74 (Sup Ct NJ, App Div, 2007):

‘In sum, we have difficulty accepting the position of a group of residents of the UK that perceived inadequacies in the tort and damages laws and the rules for funding and cost allocation of their countries of residence entitle them to seek justice in New Jersey where the law and fee arrangements are more favorable. By this argument, plaintiffs essentially contend that the UK provides an inadequate forum for the resolution of the disputes of the English and Welsh living within its borders.

We do not regard the claimed inadequacies of one country’s system of funding suits and allocating costs as a ticket to relief elsewhere, but rather, as a subject for legislative or court reform, should such be warranted. ... the UK constitutes an adequate alternative forum for plaintiffs’ litigation.’

***Gullone v Bayer Corp (In re Factor VIII or IX Concentrate Blood Products)***, 484 F 3d 951, 958 (7<sup>th</sup> Cir, 2007):

‘Plaintiffs argue that there are “extreme impediments” to their funding of the litigation, if it were to proceed in the United Kingdom, largely because the English legal system uses a “loser pays” rule for attorneys fees and because compensatory damages tend to be low. We do not see how the use of a different fee-shifting rule for attorneys’ fees can weigh against dismissal, however ...

Obviously the English Rule is less favorable to plaintiffs whose chances of losing are too great (which, for risk-averse plaintiffs, might even be 30% or 40%), but we believe that must be regarded as the kind of unfavorable difference in legal system that carries little weight. In fact, the United States stands almost alone in its approach toward attorneys’ fees, and so if we were to find that dismissal was wrong for this reason, we would risk gutting the doctrine of *forum non conveniens* entirely.’

## 16. ACTIONS BROUGHT ELSEWHERE RE GLOBAL PRODUCTS/SERVICES WITH NO EQUIVALENT LITIGATION IN ENGLAND AND WALES

### The main points:

- ❑ **due (it is said) to a lack of familiarity with the process by which an opt-out system works, some English claimants are failing to claim their entitlements under US class action settlements, a matter which has drawn adverse comment from the National Association of Pension Funds recently**
- ❑ **in respect of some pharmaceutical products that have recently been the subject of litigation in Canada under its provincial opt-out regimes, and where those products are also sold and used in England, there has been no equivalent litigation in England to test whether or not liability can be established in respect of those products**

- (A) **A lack of pursuit of compensatory entitlements by English claimants.** One problem — the converse of that considered in the previous Section in which willing English class members were ‘dumped out’ of US class actions — which has manifested in some quarters in England is an apparent reluctance to become involved in US class actions.

The lacuna has been recently highlighted by the National Association of Pension Funds, when English residents *do* comprise part of the described class in a class action commenced in the US, but fail to pursue the compensation which has been set aside for them pursuant to class actions settlements. According to the NAPF’s report, ‘*Pension Funds’ Engagement with Companies*’ (Aug 2007), at page 26:

### NAPF 2007 Report:

‘Class actions can enable investors to recover losses incurred owing to an act of fraud or to change corporate governance practices. In 2006, \$18.3 billion was paid out by US companies under class actions settlements, Institutional Shareholder Services estimate. Following suggestions that some \$2.4 billion remains unclaimed by UK and European investors, the NAPF published a guide to help trustees ensure their funds were not missing out on significant sums.’

In a publication issued in March 2007, the National Association of Pension Funds reiterated that, in its view, a trustee of a pension fund has a duty to protect pension scheme assets, and that part of this duty entails ensuring that securities class actions in the US are monitored. In '*Securities Litigation — Questions for Trustees*' (March 2007) (available for perusal at: <[http://www.napf.co.uk/DocumentArchive/Policy/Reports%20and%20Responses%20to%20Consultations/10\\_2007/20070315\\_Securities%20Litigation%20-%20Questions%20for%20Trustees%20-%2015%20Mar%202007.pdf](http://www.napf.co.uk/DocumentArchive/Policy/Reports%20and%20Responses%20to%20Consultations/10_2007/20070315_Securities%20Litigation%20-%20Questions%20for%20Trustees%20-%2015%20Mar%202007.pdf)>), the NAPF stated:

**NAPF Advice, March 2007:**

'The principal potential benefits of joining a lawsuit are twofold: to gain compensation for real financial losses incurred; and to encourage reform of corporate governance practices at a company, thus protecting or enhancing shareholder value in the longer term. ...

As far as we can ascertain, no UK trustee has been sued for not joining a securities class action. Even in the US a recent case against a group of mutual funds alleging that leaving money on the table was a breach of their fiduciary duties, did not come to court. That said, it seems self-evident that trustees have a duty to protect the assets in their scheme and that they should therefore at the very least not neglect opportunities to recoup losses, where the cost and effort are commensurate with the expected return.'

Furthermore, at the *NAPF's annual Investment Conference*, held at Edinburgh on 15 March 2007, the NAPF's Head of Corporate Governance, Mr David Paterson, indicated that part of the reason for the lack of pursuance of compensatory amounts was a lack of familiarity of English pension trustees with the US class action system:

*'NAPF urges pension funds to monitor US lawsuits'* (Reuters, 15 Mar 2007):

'UK pension schemes should monitor U.S. securities class actions more closely to ensure they don't miss out on potentially big settlements, the National Association of Pension Funds (NAPF) said on Thursday. The industry body, which is holding its annual Investment Conference in Edinburgh this week, said UK schemes have a duty to recoup losses for members from securities class-action suits and should set out policies to monitor them. ...

"If a class action is settled and all you need to do is make a claim, I don't see why you shouldn't make it. If you've got investments in the U.S. you ought to be asking the question," the NAPF's Head of Corporate Governance David Paterson told Reuters.

Many UK and European pension schemes have failed to file claims when settlements are reached in U.S. courts, where class actions tend to be concentrated because of a more plaintiff-friendly legal structure. This often stemmed from a lack of familiarity with the system, Paterson said. "The big ones (pension funds) are very much aware of the issue and do take it seriously," Paterson said. "We're saying to pension funds more broadly that you, as trustees, ought to be thinking about how to tackle this and have a policy about how to monitor class actions."

"At a time when pension scheme deficits are a matter of ongoing concern, scheme members could be forgiven for asking why trustees are not taking every available opportunity to recoup funds to which they are rightfully entitled," he added.'

Of course, whether such pension funds could commence their actions in the UK, were the UK to have an opt-out collective redress action, would depend upon the requisite nexus being established between claim, claimants and jurisdiction. However, at the very least, the *availability* of an opt-out regime in the UK would increase the familiarity of English business and consumer residents with the process by which to seek to recover group entitlements to compensation.

**(B) Lack of equivalent pharmaceutical product and medical device litigation in England.** A more claimant-friendly litigious environment in the United States — particularly the general absence of costs-shifting, the availability of jury trials, and the possibility of punitive damages awards — together with differences in substantive law between jurisdictions, do not wholly explain the relative paucity of pharmaceutical product and medical device claims in England. According to Table 1 previously, only five of these actions have been certified under the GLO regime since its implementation (FAC, DePuy Hylamer, Sabril, Trilucent implants, and Persona).

An opt-in regime in which unitary litigation must be commenced in respect of each user of the product, rather than in the name of a representative claimant on behalf of a class described at the outset, may also partially explain the fewer number of such actions in England. This proposition is

particularly borne out by the fact that several pharmaceutical and medical class actions have received certification in Canada, under various of the provincial opt-out regimes in operation there — where the opportunities giving rise to claimant access are not nearly as prevalent as in the United States.

During the course of the research undertaken for this Paper, several actions were mentioned as examples of pharmaceutical products being litigated elsewhere under opt-out collective actions, without any parallel litigation being yet witnessed in England, but where putative class members who had used the product were English residents. The practitioners concerned referred to the difficulties in mounting the actions, where the opt-in regime frontloaded the litigation and where adequate funding was difficult to achieve. The *Vioxx* litigation, which has recently settled in the United States, has already been mentioned in the previous Section within this context. Other examples referred to by *lawyers Mark Harvey, Partner, Hugh James Solicitors, and John Pickering, Partner and Head of Personal Injury, Irwin Mitchell Solicitors*, in discussions with the author, included: Seroxat / Paxil; hormone replacement therapy; DES; and Lipobay / Baycol.

It is pertinent to consider, by way of contrast with the English position, the number and variety of *pharmaceutical product and medical device* litigation that has been certified thus far under the various Canadian opt-out provincial common law regimes (Quebec is excluded from consideration). In most cases, there has not been any trial of the litigation (most have either settled or are still *sub judice*). However, the important point for present purposes is that the fact of certification permits it to proceed as a collective action whereby, procedurally, a representative user of the product or device represents a described class, without the difficulties that accompany opt-in group litigation on a large and complex scale.

Note that medical negligence actions, *per se*, are not included in Table 15 below (with the exception of the tainted blood cases) — the aim is to focus upon pharmaceutical products and medical devices that have a global presence. In addition, the Table does not include actions concerning pharmaceutical products or medical devices where proceedings were filed, but where no certification decision was locatable on databases of reported and unreported judgments which the author searched for the purposes of compiling this Table:

**TABLE 15 Certified Canadian pharmaceutical and medical actions**

<b>The product or device</b>	<b>The Canadian class action certification decision</b>
cardioverter defibrillators ('ICDs') and cardiac resynchronization therapy defibrillators ('CRT-Ds')	<i>Peter v Medtronic Inc</i> (Ont SCJ, 6 Dec 2007)
Baycol — a cholesterol-lowering prescription drug	<i>Walls v Bayer Inc</i> [2005] MBQB, (2005), 189 Man R (2d) 262
Baycol	<i>Coleman v Bayer Inc</i> [2004] OJ No 1974 (SCJ)
Synthroid — for treatment of underactive thyroid	<i>Tesluk v Boots Pharmaceutical plc</i> (2002), 21 CPC (5th) 196 (SCJ)
Ponderal and Redux — prescription weight-loss drugs	<i>Wilson v Servier Canada Inc</i> (2000), 50 OR (3d) 219 (SCJ)
silicon gel breast implants	<i>Harrington v Dow Corning Corp</i> [2000] BCCA 605, (2000), 82 BCLR (3d) 1
Baycol	<i>Bouchanskaia v Bayer Inc</i> [2003] BCSC 1306
Baycol	<i>Wheadon v Bayer Inc</i> (2004), 46 CPC (5th) 155 (Nfld and Lab SC, Trial Division)
Baycol	<i>Bayer Inc v Pardy</i> [2005] NLCA 20
Prepulsid (cisapride) — for the treatment of gastroesophageal reflux disease	<i>Boulanger v Johnson &amp; Johnson Corporation</i> (Ont SCJ, 18 Jan 2007)
Zyprexa — an antipsychotic medication	<i>Heward v Eli Lilly &amp; Co</i> (Ont SCJ, 6 Feb 2007), appealed on other grounds
Device to test for presence of Chlamydia and Gonorrhea	<i>Cardozo v Becton, Dickinson &amp; Co</i> [2005] BCSC 1612
Vitek Temporomandibular Joint Implants	<i>Sawatsky v Societe Chirurgicale Instrumentarium Inc</i> (BCSC, 4 Aug 1999)
Surestep System (for monitoring blood glucose levels)	<i>Serhan Estate v Johnson &amp; Johnson</i> (2006) (Ont) (testing strips for blood glucose levels; constructive trust allegation)
heart pacemaker leads	<i>Nantais v Telectronics Ltd</i> (1995), 25 OR (3d) 331 (SCJ)
tainted blood (Hepatitis C)	<i>Endean v Canadian Red Cross Society</i> (1999), 68 BCLR (3d) 350 (SC)
tainted blood (Hepatitis C)	<i>Killough v Canadian Red Cross Society</i> [2001] BCSC 1060
tainted blood (Hepatitis C)	<i>Parsons v Canadian Red Cross Society</i> [1999] OJ No 3572 (Ont SCJ)
Pondimim (diet drug)	<i>Knowles v Wyeth-Ayerst Canada Inc</i> (2001), 16 CPC (5th) 330 (SCJ)

The product or device	The Canadian class action certification decision
Vioxx — anti-inflammatory drug to reduce pain and swelling	<i>Wuttunee v Merck Frosst Canada Ltd</i> [2007] SKQB 29 (certification hearing deferred)
Vitek TMJ implants (in the temporomandibular joints of class members' jaws)	<i>Taylor v Canada (Health)</i> (Ont SCJ, 5 Sep 2007)
silicon gel breast implants	<i>Bendall v McGhan Medical Corporation</i> (1993), 14 OR (3d) 735 (Gen Div)
silicon-coated mechanical heart valves, or annuloplasty rings	<i>Andersen v St Jude</i> (2003), 67 OR (3d) 136 (SCJ)
the leads component of an artificial cardiac pacing system	<i>Hoy v Medtronic Inc</i> [2003] BCCA 316
temporal mandibular joint implants	<i>Bisignano v La Corporation Instrumentarium Inc</i> [1999] OJ No 4346 (SCJ)

(C) **Judicial perspectives.** Perhaps the most pertinent reason underlying the robust attitude which the Canadian courts have adopted towards pharmaceutical and medical class actions — and their preparedness to allow them to proceed under opt-out regimes — is the willingness to sever the individual from the common issues, and conduct a ‘common issues trial’. In the TMJ implant case of *Taylor v Canada (Health)* (Ont SCJ, 5 Sep 2007), at para 85, Cullity J explained the reasoning:

*Plaintiff's counsel did not dispute the expert evidence tendered by the Attorney General that related, among other things, to the numerous individual factors that could affect the issue of causation. In their submission, however, these should not be considered to overwhelm, or outweigh, the advantages to be achieved from a single trial of the common issues. I accept that submission. A determination of the common issues would resolve most of the contentious issues relating to the defendant's liability in favour of the plaintiff, or it would terminate the litigation.*

*The manageability of the proceedings is always a concern that must be addressed but it has not been found to raise an insuperable obstacle in cases of pharmaceutical products and surgical implants of various kinds in which similar objections have been raised on behalf of defendants.*

A further interesting judicial perspective — this time, about the global nature of the law's problems — was provided recently by Chief Justice Spigelman, in a *recent interview* with the *Australian Financial Review*, reported on 12 January 2008:

**Interview with Chief Justice Spigelman** (as reported in: '*Big Litigators should foot the bill: judge*', *Australian Financial Review*, 12 January 2008, p 12):

'This year, for the first time, judges involved in commercial litigation from around Asia will meet in Sydney to discuss ways of harmonising court processes and practices, particularly cross-border insolvencies, and create international protocols between courts.

Justice Spigelman said different court practices and procedures in different countries acted as "non tariff" trade barriers and an impost on international commerce. They were also being used by lawyers to hinder the speedy resolution of major commercial litigation.

According to Justice Spigelman, the growth of international hedge funds over recent years gave rise to complicated legal issues and the ability to tie up capital through legal battles over venues had the potential to significantly affect the prospects of economic recovery.'

Although the Chief Justice was discussing, in this interview, methods of harmonising court processes and practices, especially in the context of cross-border insolvencies, the remarks reproduced above are of potential application when having regard to the global use of products and services generally, and the problems which have been faced by English claimants in seeking cross-border redress — specifically when their own procedural regimes lack utility.



**PART V**

**A PLETHORA OF UNITARY ACTIONS FOR DAMAGES  
IN ENGLAND AND WALES**

## 17. THE BANK CHARGES LITIGATION IN COUNTY COURTS

### The main points:

- ❑ since March 2006, the English county court system has been increasingly overwhelmed by an exponential number of bank charges complaints being filed by bank customers (that followed a consumer awareness campaign by Which? in the same month)
- ❑ the various litigation strategies adopted have been beset with difficulties, and the lack of cross-jurisdictional binding application of the test case to be heard by the Commercial Court in the matter has been noted elsewhere (eg, in Scotland);
- ❑ the bank charges litigation brought *en masse* in the English county courts has also raised other dangers associated with numerous individual suits — the risk of inconsistent judgments, delays in outcome, and adverse publicity for the defendant who misses a judgment against it through ‘administrative error’

(A) **The source of the dispute.** Generally, the bank charge complaints the subject of this section have arisen in a scenario whereby bank customers had been levied charges by banks which fell within one or more of the following categories:

- ❑ charges for overdrawn accounts when there was no overdraft facility;
- ❑ charges for exceeding an agreed overdraft limit;
- ❑ charges levied when there was not enough money in the account for the bank to honour a direct debit, standing order mandate, or a cheque drawn on the account; or
- ❑ charges levied when the bank wrote to demand that an overdrawn balance be reduced.

Bank customers claimed that the charges were not lawfully levied.

In March 2006, the English Consumers’ Association, Which?, campaigned on this issue, and thereafter, bank customers started claiming refunds *en masse*, by filing claims in the county courts.

The details of the Which? campaign are outlined at:

<[http://www.which.co.uk/reports\\_and\\_campaigns/money/campaigns/Banking%20and%20credit/Bank%20charges/bank\\_charges\\_campaign\\_559\\_74996.jsp](http://www.which.co.uk/reports_and_campaigns/money/campaigns/Banking%20and%20credit/Bank%20charges/bank_charges_campaign_559_74996.jsp)>.

**Which?'s website announcement:**

'The Unfair Terms in Consumer Contract Regulations 1999 state that charges can't be disproportionate to the costs incurred by the bank. These charges cannot be used as a deterrent or a profit stream by the bank.

The banks argue that the Regulations don't apply to these terms and that the charges are fair. Which? thinks bank charges are disproportionate to the amount it actually costs the bank to deal with an account in the red. We have called on the banks to open their books and justify their charges – something they haven't done so far.'

- (B) The number of claims.** In order to separate the bank claims cases from other cases brought in the county courts over the period from March 2006 onwards, figures have been obtained from IMAGE, the statistics branch of Her Majesty's Court Service. These figures have been previously published as representing the number of cases where known named banks are defendants.

Prior to March 2006, there were a handful of general claims against banks (ie, where banks were named defendants). The average figure for claims against banks prior to March 2006 was 81 claims per month. Therefore, this figure has been subtracted from the overall number of bank claims commenced since March 2006, to identify (by estimation) the number of claims that have been brought against the banks on the bank charge claims.

The relevant number of estimated claims is shown in Table 16 as follows:

**TABLE 16 Bank charges: claims per month**

Month	No. of claims issued against bank defendants		New total (notionally bank charges cases)	
March 2006	191		110	
April 2006	249		168	
May 2006	380		299	
June 2006	665		584	
July 2006	737		656	
August 2006	1, 264		1, 183	
September 2006	1, 452		1, 371	
October 2006	1, 818		1, 737	
November 2006	2, 108	<b>Subtract 81 claims per month</b>	2, 027	
December 2006	1, 815		1, 734	
January 2007	3, 127		3, 046	
February 2007	4, 514		4, 433	
March 2007	7, 839		7, 758	
April 2007	8, 333		8, 252	
May 2007	8, 927		8, 846	
June 2007	6, 226		6, 145	
July 2007	3, 969		3, 888	
August 2007	925		844	
<b>TOTAL:</b>	<b>54, 539</b>			<b>53, 081</b>

The number of actions above do not take into account the recourse which many bank customers had to the Financial Ombudsman Service (as discussed, eg, in: '*Bank Charges: The Jury is Still Out*' (*The Telegraph*, 22 May 2007)).

**(C) Litigation strategies.** For the court actions themselves, the litigation strategies for dealing with these individually-prosecuted bank charges claims varied:

- From March 2006 until July 2007, the banks defended claims by filing lengthy stock

defences, and then awaited the listing for hearing by District judges (who tended to list them in blocks as small claims hearings), only to settle with the claimant either a few days before the hearing or on the morning of the hearing itself.

- ❑ On 26 July 2007, the OFT set down a test case in the Commercial Court against seven banks, in order to obtain a determination as to whether the provisions of the Unfair Terms in Consumer Contracts Regulations that deal with unfairness apply to unauthorised overdraft charges. The banks who are parties to the test case are: Abbey National plc, Barclays Bank plc, Clydesdale Bank plc, HBOS plc (includes Halifax and Bank of Scotland), HSBC Bank plc, Lloyds TSB Bank plc, Royal Bank of Scotland Group plc (including Natwest), and Nationwide Building Society.

The background and details of this strategy are explained by the OFT at: [http://www.offt.gov.uk/advice\\_and\\_resources/resource\\_base/market-studies/personal2](http://www.offt.gov.uk/advice_and_resources/resource_base/market-studies/personal2)). The Commercial Court hearing commenced in mid-January 2008.

After the test case was set down for hearing, the banks issued defences with applications for stays of proceedings pending the Commercial Court hearing. The District Judges again listed these in blocks to provide an opportunity for the claimants to resist the application. District Judges have indicated that about 30% of applications for stays are resisted by claimants.

- ❑ Another feature of the bank charges cases is that it is one field in which non-lawyer claims management companies have been particularly active, collecting large numbers of claims through aggressive advertising campaigns. Prior to the test case being announced, claims management businesses were bringing claims on behalf of individual claimants. Issues have arisen about how such actions were funded (no-win-no-fee, and some appeared to be funded by contingency fee arrangements, noted to be in excess of 25%, according to *The Telegraph* article noted above), and whether the claims firms were acting *ultra vires* in bringing the claim on behalf of those with the direct cause of action.

In recognition of the substantial role that claims management businesses were playing in the litigation, the Ministry of Justice took the step of publishing a document, '*Claims Management Services Regulation: Claims in Respect of Bank Charges: Guidance Note 2007*', on 27 July 2007. The MoJ cautioned, at page 4:

**MoJ Bank Charges Guidance Note 2007:**

'The Financial Ombudsman Service has announced that pending the outcome of the [test] case, it has put its own work on hold; a similar response is expected from the county courts. This means that where a consumer has made a complaint through a claims management company then no further action is likely to be taken on the complaint until the test case is settled. Claims managements businesses are being reminded that they must act in accordance with the contract that they have with their clients. In many cases, this will mean the claims management company putting the case on hold until the test case is settled.'

- finally, where a plethora of individual litigation of this sort occurs, individual claimants cannot always serve as 'torch bearers' for the general bank customer class in the absence of a properly-constituted collective action, as Pitchford J recently noted in: *Brennan v National Westminster Bank Plc* [2007] EWHC 2759 (QB) (27 Nov 2007), para 42 (the claimant bank customer sought to amend his pleadings, which application was denied):

*The claimant made it quite clear in his witness statement what was his motivation for keeping the action alive at all costs. It was to enable him to act as standard bearer for other customers and to expose the unfairness of the bank's terms and conditions. This was not an adequate reason for permitting the action to proceed if the claimant's arguable claim had been fully satisfied by the bank, since consumer interests in general are the concern of OFT which is taking action to protect them and not the claimant. I accept that OFT would not, even if minded to seek a declaration, be able to bring surrogate proceedings on behalf of individual consumers. The fact is, however, that the public interest is represented by the OFT. On the other hand, if the claimant has reasonably arguable claims to a declaration, account, aggravated damages or exemplary damages he should not be prevented from pursuing them merely because he has a "public interest" motive for doing so.*

However, the claimant had no reasonable claims to those remedies.

Furthermore, any declaration in this claimant's favour, that the imposition of bank charges levied on his account was unfair and/or a penalty, was to be judged by reference to

all the circumstances and terms of *his* contract — and in the circumstances, Justice Pitchford considered that such a declaration would serve no useful purpose, at para 44:

*The claimant could not obtain a declaration in the terms sought because regulation 6 required the court to assess the fairness of the term, amongst other things, in the circumstances attending the conclusion of the contract, that is the contract between the bank and the claimant. The trial judge could not make a declaration determinative of other contracts made with other consumers at other times.*

The point about the non-utility of a declaration in the case of this particular customer is interesting, for had this bank charges dispute been litigated under an opt-out collective action, it may have been feasible for a variety of ‘representative bank customers’ to be chosen, to test the efficacy of different terms used in standard bank–customer contracts as common issues, and also to resolve some of the questions which, as Pitchford J mentioned, are not to be the subject of the test case (para 21):

*OFT has not decided whether or not to litigate the fairness of historical terms and will not in any event be litigating the question whether consumers can establish liability in tort and/or are entitled to damages, interest, consequential loss, and exemplary and aggravated damages.*

- (D) The risk of inconsistent judgments.** On 15 May 2007, District Judge Cooke handed down a decision on one bank charges case, in *Berwick v Lloyds TSB Bank plc* (Birmingham County Court). Mr Berwick had sought the recovery of £1,982.37 in bank charges levied on his account since 5 October 2000. The judgment was largely favourable to the defendant bank.

A convenient summary of the judgment is provided by Anderson Strathern Solicitors, via newsletter update, ‘*Bank Charges Update*’, available for perusal at:

<<http://www.andersonstrathern.co.uk/pdfs/343.pdf>>.

However, the risk of inconsistent judgments is evident from the facts that:

- the decision by Cooke DCJ is not a precedent which would bind any District or Circuit or High Court judge who hears a later case — later judges are obliged to have regard to

previous decisions of the County Court, but are not obliged to follow them, and could reach a different decision on the same contract wording — only a High Court or further appellate judgment would be binding;

- ❑ even if a superior court does hand down a decision (say, the test case being heard in the Commercial Court), a different charges scenario or a different contract wording could give rise to a different outcome;
- ❑ the bank charges cases involved mixed questions of fact and law, and the different facts governing the imposition of, or giving rise to, the charges could feasibly lead to a different outcome.

**(E) Risk of delays in outcome.** Significant delays have been incurred because of the way in which the bank charges disputes have evolved:

- ❑ it took a considerable period of litigation *en masse* before a test case was ordered to be heard, during which time many bank customers were enmeshed in a cycle of applications, holding defences, and stays, in the county courts;
- ❑ as noted previously, a hold has been placed on bank charges cases, pending the outcome of the test case in the Commercial Court. In the county courts, from August 2007, all live bank charge claims have been subject to applications for stays pending hearing of the test case. Once the Commercial Court has given judgment, all those thousands of cases will return to the county courts for determination. This will involve considerable further judicial and administrative time;
- ❑ should the test case then be the subject of appeal, further judicial and administrative time will be involved in considering further stay applications (the author understands that there would be a likely delay of around two years for any appeal to come before the Court of Appeal and be decided), and that cycle could be repeated for a third time, should the case then proceed to the House of Lords.



- (F) **Risk of adverse publicity.** Individual actions requiring individual defences can put the defendant banks at risk of an embarrassing error, as the following newspaper report demonstrates:

*'Bailiffs Raid Royal Bank of Scotland' (The Guardian, 20 January 2007):*

'It's a heart-warming tale for anyone who thinks it is impossible to fight back against unfair charges by big banks. Last week, bailiffs raided a Royal Bank of Scotland branch in London to take control of computers, fax machines and a cash till after a customer won a court judgment over more than £3,000 in overdraft charges.

The unprecedented raid followed a long battle by RBS account holder Declan Purcell, 48, who had been an RBS customer for more than 20 years and ran a motorcycle business until recently.

He says: "Each time I exceeded my limits, the bank hit me with penalties of around £30. From 2002 to 2004 it added up to £3,000 on my business account alone."

Following advice from Guardian Money and website Consumer Action Group, Mr Purcell challenged the penalties, citing legal precedents to show the bank could not take more from him than the actual costs incurred with his unauthorised overdraft.

He also asked for copies of bank statements using a Data Protection Act "subject access request". He sent £10 for each account.

"The bank ignored all this so I took out a small claims court action in Bow County Court in late October. The bank did not respond in the 14 days allowed. The court gave me default judgment. The court then gave the bank a second chance but it did not enter a defence. So I asked the court to send in debt enforcers. By now, I was owed £3,369, including interest and court fees. This month, I went back to the court to get my money," he says.

The bailiffs enforced a "walk-in possession", effectively putting a sticker on items which would be grabbed and sold later if the bank did not cough up the judgment monies.

The bank admits the bailiff visit took place. It says: "Unfortunately, due to an administrative error, the bank failed to defend the claim, leading to a default judgment and a resulting warrant. The bank has since organised payment. No goods were actually taken."

On a similar note, see also: *BBC News Online*, 9 July 2007, *'Bailiffs go in at Abbey Branch'*

- (G) **The potential extra-jurisdictional reach of an opt-out collective action.** Were these bank charge cases to be litigated under an opt-out regime, where the opt-out regime was governed by a statute pertinent to England and Wales, one question which may arise is whether class members residing in another jurisdiction, and who allege that they were damaged by the same defendants, would have the scope to join the class (possibly as an opt-in class to thereby signify their submission to the court's jurisdiction) or otherwise fall within the class definition.

As it happens, a plethora of bank charges cases has arisen in Scotland too, as noted in *Coleman v The Clydesdale Bank* [2007] Scot SC 49 (7 Sep 2007), where it was stated:

*Counsel explained that banks, such as the defenders, have received a large number of claims for the refund of bank charges. The usual grounds for refund are the same as in the present case. In Scotland there have to date been 350 claims, of which 57 are in this sheriffdom.*

In this case (where the two defendants were also defendants in the OFT test case in the Commercial Court of the High Court of England and Wales), a stay of certain Scottish bank charges cases had been sought, pending the outcome of the OFT test case, but this was ultimately refused:

*My understanding of the law of precedent is that the Commercial Division of the High Court in England ranks equally to an Outer House judge in the Court of Session whose decision is not binding on a sheriff but should be treated with respect. Whether or not that means the same as persuasive or highly persuasive is perhaps an exercise in semantics. ... What does matter is that whatever respect is given to the Commercial Division's decision, it is not binding on the Scottish courts. ...*

*In my opinion, it is one thing to seek to sist an action pending a decision by a court which is binding on the courts below; it is quite another to seek to sist an action pending a decision in a foreign jurisdiction which does not have that force. Putting to one side for the moment what the defenders will do in the event that they do not achieve the result they seek before the High Court in England, it is in my view unsatisfactory to compel a pursuer to be delayed in the remedy he seeks merely for a decision of a foreign court, which will guarantee no certainty in defining the law which ought to be applied.*

Although the point was not relevant whatsoever to the present procedural landscape in England and Scotland, the facts do raise an interesting issue about extra-jurisdictional reach of any opt-out collective action that may be enacted, where the defendants in the two jurisdictions are the same, where the contractual terms at issue were identical, and where the relevant regulations (UTCCR 1999) have UK-wide application. Further discussion, however, lies outside the scope of this Paper.

- (H) Capacity to be pursued under an opt-out regime.** The recent certification decision in *Cassano v Toronto Dominion Bank* [2007] ONCA 781, in which the Ontario Court of Appeal certified an action brought on behalf of a class of credit-card holders (and overturned the trial judge's refusal of certification), provides an insight into how an opt-out action can serve to assist the resolution of the type of litigation that the bank charges customers have been attempting to pursue in English courts.

The claim arose out of foreign currency transactions conducted with Visa credit cards issued by the Toronto-Dominion Bank. The card-holders claimed that the Bank breached its contract with them by charging undisclosed and unauthorised fees — a so-called ‘conversion fee’ and an ‘issuer fee’ — in respect of those foreign currency transactions, fees which were undisclosed under the standard cardholder agreement. The cardholders and the Bank disagreed over what, precisely, was covered within the ambit of the contractual phrase, ‘*Foreign currency transactions are converted to Canadian dollars at the exchange rate determined by the Bank*’, or whether such fees were covered as ‘*service fees*’.

The class action was certified by the Court of Appeal on the basis that:

- ❑ whether the Bank had charged its card-holders an unauthorised fee when converting the debits and credits incurred in a foreign currency to Canadian dollars was an issue that could be resolved on a class-wide basis, because it depended on the interpretation of the standardised documents provided by the Bank to card-holders;
- ❑ the card-holders’ damages for breach of contract (if such were proven) could be assessed on an aggregate, class-wide basis (the scenario fulfilled the precondition for aggregate assessment stipulated by s 24(1) of the Class Proceedings Act), and would not require proof of damages on an individualised basis, and thus, the class action would not be overwhelmed by the extent of individual issues;
- ❑ an opt-out class action was the preferable means of resolving the common issues because, at para 57:

*[t]he relatively small amounts of money that are likely to be at stake in individual claims and the disproportionately high costs associated with litigating claims on an individual basis overwhelmingly favour a class proceeding.*

Table 12 gives details of further decisions, arising out of similar overcharge scenarios, which have been certified in Ontario. In *Gilbert v Canadian Imperial Banks of Commerce* (2004), 3 CPC (6<sup>th</sup>) 35 (Ont SCJ) too, the relatively small amounts at issue was one of the key factors that prompted

certification of the suit (at para 8):

*[t]he amounts of the individual settlements to class members is relatively small, from less than one dollar to almost \$15, making it clear that a class proceeding advances the goals of the Act of access to justice and judicial economy.*

## 18. EMPLOYMENT CLAIMS (EQUAL PAY, ETC)

### The main points:

- ❑ **there are presently over 44,000 equal pay disputes which have been individually lodged at the Employment Tribunal, an increase of about 150% on 2006 figures, with a similar explosion of other compensatory-type claims before the Employment Tribunal**
- ❑ **whilst a recent governmental Consultation Paper does not perceive any need for opt-out or representative actions in employment disputes, this has been strongly rebutted by both the Equality and Human Rights Commission and trade union representatives, all of whom have called for the introduction of representative actions so as to provide better access to justice for employees**
- ❑ **an opt-out collective procedure has been called for in respect of equal pay disputes, backpay disputes, and the like — claims which do not merely require injunctive relief, but entail some compensatory amount to be paid to the claimants**

(A) **Explosion of some types of employment claims in recent times.** Statistics from the Employment Tribunal demonstrate the explosion of particular types of claims in the past year in England — viz, equal pay, national minimum wage, sex discrimination claims, and working time directives — in which compensatory (monetary) relief has been sought by claimants. Table 17 below sets out the figures denoting the number of individual claims brought in these categories of employment claims:

**TABLE 17 Employment claims in England: extract**

<b>Nature of Claim</b>	<b>2004/5</b>	<b>2005/6</b>	<b>2006/7</b>
Equal pay	8, 229	17, 268	44, 013
Working Time Directives (pertaining to lack of holidays, rest breaks, or pertaining to hours of work — all of which can give rise to compensatory claims)	3, 223	35, 474	21, 127
Sex discrimination (which frequently give rise to compensatory claims)	11, 726	14, 250	28, 153
National minimum wage (NMW) claims	597	440	806

See, for source of this table: *Annual Report: Employment Tribunal and EAT Statistics (GB), 1 April 2006 to 31 March 2007*, Table 1, p 2, 'Jurisdiction Mix of Claims Accepted', available for perusal at:

<[http://www.employmenttribunals.gov.uk/publications/documents/annual\\_reports/ETSAS06-07.pdf](http://www.employmenttribunals.gov.uk/publications/documents/annual_reports/ETSAS06-07.pdf)>).

Plainly, the Employment Tribunal is presently bearing a considerable burden under this welter of individual litigation *en masse*. This fact was acknowledged in a news release published by the Tribunals Service on 3 September 2007:

**'Employment Tribunal Cases Rise by 15 Per Cent'** (Tribunals Service News Release, Sept 2007):

'The number of cases brought to employment tribunals in Great Britain in 2006–07 rose by 15%, from 115,039 in 2005–06 to 132,577, according to figures published today. ...

There was an increase of 26% in multiple cases [cases where a number of people bring cases against one employer on the same or very similar grounds and these individual cases are progressed together] ... Multiple cases now make up 60% of all cases received, compared to 55% last year and 36% in 2004–05. ...

With the exception of race discrimination, all [categories of claim] showed an upward trend, with equal pay claims showing a 155% increase on 2005–06.'

Added to this conglomeration of individual claims has been the long-running saga of the part-time worker pensions, the history of which is described by the Employment Tribunal at the following site: <<http://www.employmenttribunals.gov.uk/pensions/history.htm>>. A brief history, extracted from this website, is as follows:

**The part-time workers pension cases:**

‘In 1994, two European Court of Justice judgments (*Vroege v NCIV Instituut Voor Volkshuisvesting BV*, 1994 : IRLR651 and *Fisscher v Voorhuis Hengelo BV*, 1994 : IRLR 662) were published which said that an occupational pension scheme which excluded part-time workers contravened European equal pay laws if the exclusion affects a much greater number of women than men, unless the employer shows that the exclusion of part-timers can be objectively justified on grounds unrelated to sex. Subsequently, unions in England and Wales from the health, local Government, education, banking and electricity supply sectors lodged a number of test cases with the Employment Tribunal on behalf of members who worked part-time.

In November 1995, the test cases, referred to as *Preston v Wolverhampton Healthcare NHS Trust*, came before a tribunal which found that:

- Pension rights should be granted to part-time workers
- Rights should be back-dated two years
- Rights should only be granted where the claimant had commenced their Employment Tribunal claims within six months of leaving their employment.’

[Thereafter, various appeals (up to the House of Lords), tribunal hearings, and settlement models, occurred, as described on the website].

It is estimated that approximately 60,000 proceedings have been lodged with the Employment Tribunal in this matter since 1994.

- (B) Why an opt-out collective redress mechanism would suit these types of dispute.** Employment cases are, in many respects, a paradigm example of the features of the class, the claim, and the defendant, which particularly ‘fit’ the dispute to an opt-out collective redress mechanism.

In an *interview between Mr John Usher, Trade Union Legal Consultant, and Mr Richard Arthur, Partner of Thompsons Solicitors*, who represents employees in many of these disputes, and the author, held on 13 December 2007 at Congress House, London, the practicalities of why an opt-out collective redress regime would suit employment claims of the types canvassed in Table 17 were discussed in detail. The results of that interview are summarised, with approval of the interviewees, in the box below:

**Interview, 13 December 2007, with John Usher and Richard Arthur, contrasting the present employment litigation scenario with the benefits of an opt-out regime:**

- the *type of claimants* in employment disputes about equal pay and national minimum wage, for example, are likely to come from a demographic which would be most unlikely to sue individually to enforce the national minimum wage; such claimants may be foreign, unable to speak English particularly well, with significant cultural differences of view and of the role of the law, etc — the group members, as a whole, are not sophisticated, and in some cases, are extremely vulnerable. HOWEVER, if these class members could be described, and not have to come forward at the outset of the litigation, this would be very beneficial for the class as whole;
- under the unitary litigation scheme at present, *upfront claim preparation costs for each claimant* (and for the defendant employer) can be substantial. HOWEVER, under an opt-out regime, this could be reduced to the preparation for claims for those representatives per class or sub-class, at least until the common issues were determined;
- there will invariably be individual issues arising out of employment disputes — eg, the quantum of pay entitlement depends upon the period of employment. HOWEVER, under an opt-out regime, if the common issues were decided in the class's favour, the vast majority of *individual issues could realistically be handled 'on the papers'*, without the need for formal hearings, thus rendering the process more streamlined and efficient than is presently possible;
- the *expiry of limitation periods* is a very big concern in employment disputes which are run on a unitary basis — the period is only six months 'after the last day on which the woman was employed in the employment', pursuant to the Equal Pay Act 1970, c 41, s 2(4), when read together with s 2ZA — an onerous restriction when taking into account that changing employment can occur merely by the employee accepting a promotion with the same employer. The period is only three months in unfair dismissal claims, per Employment Rights Act 1996, c 18, s 111(2), and in many other Employment Tribunal claims. HOWEVER, under an opt-out regime, where the limitation period is tolled by the filing of proceedings by the representative claimant, many more employees would be protected than is presently the case;

*Cont. overpage ...*



**Interview, 13 December 2007, with John Usher and Richard Arthur (cont.):**

- where union members have to be identified as litigants in order to commence proceedings, it reveals their union membership status, a point that can be somewhat inconsistent with the fact that whether a person is a member of a trade union comprises '*personal sensitive data*' under s 2 of the Data Protection Act 1998, c 29. HOWEVER, although an opt-out regime would not preclude such membership being discovered if the class won on the common issues and needed to come forward to claim their entitlement, such sensitive data would not necessarily need to be disclosed, if the class lost on the common issues;
- the *binding effect of a collective action*, at least as far as the common issues are concerned, is attractive, to enforce a ratified collective pay agreement — otherwise, in the present unitary system of litigation, the reality is that individual litigation can be used to 'unpick' collective pay agreements in a haphazard manner — the non-binding nature of test cases has also proven unsatisfactory in the past;
- an opt-out action would counter the increasing tendency for *unions* to be *sued in negligence* for failing to ensure that all members apply within a limitation period that may follow an unfair dismissal or an unequal pay scenario. HOWEVER, if the proceedings could be filed by a representative employee claimant, thereby tolling the limitation period for all, that would protect unions from these types of suits in negligence;
- the *class* in employment disputes concerning equal pay, etc, can be *large, but finite* — hence, if the common issues were determined in favour of the class, it would be a relatively straightforward matter to identify the individual claimants who would need to come forward to seek to prove their individual issues;
- unitary equal pay litigation can have the effect of *setting employees in one firm against each other*, to the detriment of morale at the workplace. HOWEVER, in an opt-out action, all employees in the class would be 'in the same boat', unless they consciously and deliberately did not wish to join the litigation;
- some employees will not countenance equal pay litigation for *fear of reprisals* from the employer (or experience difficulties with their employer when they choose to persist with a claim). HOWEVER, such employees would benefit from remaining anonymous, whilst the common issues were being resolved one way or the other.

This point about reprisals can be a very real concern in the employment context. Indeed, it was amply demonstrated recently in *St Helens BC v Derbyshire* [2007] UKHL 16. A useful summary of the circumstances giving rise to this litigation is contained in a newsletter by Thompsons Solicitors dated 10 May 2007, ‘*Victimising the Victims*’, available at: <<http://www.thompsons.law.co.uk/ltxt/lelr-weekly-015-victimising-the-victims.htm>>, an extract of which reads as follows:

**Thompsons’ summary of the *St Helens* case:**

‘Section 4 of the 1975 Sex Discrimination Act says that victimising someone for bringing a claim under the Equal Pay Act is, in itself, a discriminatory act.

In *St Helens MBC v Derbyshire*, the House of Lords said that the women were victimised by their employer when they were sent letters warning them of the implications for the school meal service if they continued with their equal pay claims. The women’s union — the GMB — instructed Thompsons to act on their behalf. Almost 500 female catering staff brought equal pay claims against the Council in 1998.

The vast majority settled, but 39 (including Mrs Derbyshire) successfully pursued their claim. However, two months before their claim was heard in 2001, they received a letter from the Council, asking them to withdraw and warning them that it could not absorb the cost of their claims. The second (sent to all catering staff) warned that the cost of school meals would rise and everyone’s job would be at risk, if the 39 were successful.

The women were distressed by the letters, but the Council justified them by saying that the purpose was to get the women “to face facts and to take a responsible view of reality”. ...

The Lords ... agreed ... that the women had been victimised ... They said that although employers had a right to send out letters pointing out the possible consequences of a successful claim, the letter sent by the Council was “intimidating”.’

(C) **Effectiveness of present ‘representative’ devices could be bolstered.** Certain representative devices currently on the statute books with respect to employment disputes have some problems or limitations associated with them, viz:

- ❑ s 189 of the Trade Union and Labour Relations Act 1992 (re a failure to inform and consult in relation to collective redundancies); and reg 15 of TUPE (re a failure to inform or consult in relation to a TUPE transfer) — the claim is brought by the trade union, in each scenario, in its capacity as the ‘appropriate representative’ of any affected employees.

However, these are not truly representative proceedings, because the right to information and consultation is the union's, not the employees'. Thus, the employees' entitlements are derived from the primary entitlements of the trade union.

Procedural problems in bringing action under these provisions have occurred, for example, in: *Nottinghamshire Healthcare NHS Trust v Prison Officers Association, R Adams & 716 Others* (Employment Appeal Tribunal, Case No EAT/757/02/DA, 4 Apr 2003), where a union and 717 of its members sued re enforced change of working hours and unfair dismissal. The defendant sought to strike out the pleadings on the basis that the proceedings were issued without all of the members' authority, and that the union had no express or implied authority to issue proceedings on behalf of union members who had not ratified the commencement of proceedings (some members had ignored letters sent to them by the union, informing them of the intent to issue proceedings). Although the dispute was resolved largely in favour of the union, the procedural spat indicates that ratification/agency/authority issues can arise under these provisions.

- s 19(1) of the National Minimum Wage Act 1998 empowers officers to issue enforcement notices and, in the event of non-compliance, present complaints to the Employment Tribunal or the civil courts on behalf of members to whom the enforcement notice relates. Furthermore, s 19(3) provides that:

**National Minimum Wage Act 1998, s 19(3):**

An enforcement notice may relate to more than one worker (and, where it does so, may be so framed as to relate to workers specified in the notice or to workers of a description so specified).

The problems:

- trade unions are not 'officers' for the purposes of this representative device' — HMRC are the enforcers — this limits a trade union's powers to protect its employees significantly;

- the provision has been used, eg, in: *Leisure Employment Services Ltd v Commissioners of Inland Revenue* [2007] IRLR 450, *Commissioners of Inland Revenue v Post Office Ltd* [2003] IRLR 199, and *British Nursing Association v Inland Revenue* [2002] IRLR 480;
- these cases indicate an ‘evidence of need’ for collective redress generally in respect of NMW disputes, but it would be helpful for standing to be widened from the specialist representative action available under s 19(3).

**(D) Recent consultation paper does not favour further collective redress.** In June 2007, a Consultation Paper was produced by the Department for Communities and Local Government, entitled: *Discrimination Law Review —A Framework for Fairness: Proposals for a Single Equality Bill for Great Britain* (12 June 2007) (‘the Equality Consultation Paper’).

In this Consultation Paper, the Department sought views on ‘*the retention of the current approach on representative or class actions for discrimination cases in goods and services cases*’. Its preliminary views were as follows (at paras 7.28–7.30; p 122):

**Equality Consultation Paper:**

- ‘7.28. We have considered the approach in other legal systems, where a body such as an equality commission or trade union may be empowered to bring a claim on behalf of a group of individuals – often known as a representative action. This can take one of two forms: action on behalf of a group of unnamed individuals who have some defining characteristic but are not identified (sometimes known as a class action), or action on behalf of a group of named individuals.
- 7.29. Some argue that representative actions brought by such bodies can provide a useful route for people to bring their cases to court when they are unwilling or unable to bring claims themselves. However, a number of stakeholders, including business, have expressed reservations about creating a further mechanism for litigation. Representative actions are often seen as a major factor in developing an undesirable ‘litigation culture’. Although they may assist those with legitimate claims, the system can also benefit those with spurious claims, who may not even have felt aggrieved until encouraged to join a representative action. Representative actions on behalf of a group of unnamed individuals are also particularly difficult to quantify, making it hard for an organisation to consider early settlement proposals which would keep legal costs down.
- 7.30. Having considered the arguments carefully, we are not persuaded that there is a good case for establishing this further mechanism.’

This governmental view, however, has met with strong opposition, from stakeholders and public authorities. Instead, there have been several suggestions for the implementation of a representative action under which any type of employment dispute could proceed, and under which a trade union would have standing to sue as an ideological claimant, as the following sections demonstrate.

- (E) **The Equality and Human Rights Commission perceives a need.** The stance put forward in the Government’s Equality Consultation Paper received strong rebuttal by the Equality and Human Rights Commission, in its formal Response to the Consultation Paper. In a reply dated September 2007 (the ‘*EHRC Response*’), the Commission states (at pp 37–38):

**The EHRC Response:**

‘For certain types of cases, representative claims should be permitted. This was anticipated in the EC directives, all of which require member states to ensure that ‘associations, organisations or other legal entities, which have ... a legitimate interest in ensuring that the provisions of this Directive are complied with, may engage, either **on behalf of** [our emphasis] or in support of the complainant, with his or her approval, in any judicial and/or administrative procedure provided for the enforcement of obligations under this Directive’. ...

In relation to discrimination or harassment, the new equality act could provide for representative actions requiring similar safeguards – such as designating the Commission and registered trade unions, and allowing the Secretary of State to designate voluntary sector organisations with a demonstrated interest in discrimination and equality. The Commission, a trade union or other organisation could bring a representative action on behalf of a group of people who have shared the same unlawful discrimination and who would otherwise all make an identical complaint.’

- (F) **The TUC perceives a need.** The TUC, representing 59 affiliated trade unions with a total 6.5 million members, also disagreed with the governmental view that no representative action would be useful. The TUC took this stance, in its formal Reponse dated September 2007) (the ‘*TUC Response*’), for three reasons which primarily focus upon the equal pay dispute (although these reasons are not necessarily limited to that type of claim) —

- first, collective redress means more efficient redress;
- secondly, it is doubtful whether the presently-existing procedures enable the Government

to comply with art. 141 of the EC Treaty; and

- thirdly, the complexities of equal pay disputes, in particular, would be suited to collective groups of claimants being handled/managed by a trade union which is knowledgeable and well-resourced.

These reasons are expanded in the TUC's own words, as follows:

<b>The TUC Response:</b>	
'p 4:	we believe the mass of current equal pay litigation would be far more efficiently dealt with by allowing trade unions and other suitable bodies to bring representative actions on behalf of groups of women. Such actions would also more accurately reflect the collective nature of the problem and ensure better remedies, compliance and understanding of equal pay in the long term.
p 25–26:	Article 141 of the EC Treaty places an obligation on member states to 'ensure that the principle of equal pay for male and female workers for equal work or work of equal value <i>is applied</i> ' (emphasis added). It is quite plain that the current system is not delivering equal pay for work of equal value because of its individual focus, complexity, and the absence of proactive obligations on employers to review their pay systems. Jacqui Smith, then deputy minister for women, acknowledged to the Select Committee on Trade and Industry that 'Equal pay legislation, being designed to tackle discrimination, would not address the fundamental problem of the undervaluing of women's work'. The Government appears to overlook that, to the extent that this is correct, it is the Government's job to come up with a legislative approach which will deliver its obligations under Article 141. In our view such an approach must include some form of proactive obligation on employers and scope for representative actions in equal pay cases.
p 27:	Equal pay claims are not straightforward, with many taking many years to reach resolution as numerous appeals on different points of law are made to the higher courts. Co-ordinating such a vast number of individual claims, involving similar points of law or relating to similar facts, is an immense task, which we believe would be greatly facilitated by enabling representative actions.'

Notably, there is considerable support for the notion that, arguably, the present UK law on equal pay being pursued by unitary action means that the UK may be in breach of art. 141.1. For example, John Usher, Trade Union Legal Consultant, Unite, notes (in discussions with the author during the course of this study, reproduced with approval) that —

*The principle of equal pay is not applied if the legislation does not work effectively. Certainly, in my view, class or representative actions would help UK compliance.*

- (G) **The new Chair of the EHRC also perceives a need.** In addition, and following release of the governmental *Equality Consultation Paper*, the new Chair of the Equality and Human Rights Commission, Mr Trevor Phillips, mooted the desirability of more effective collective redress mechanisms for employment disputes, in a speech delivered in Cardiff on 23 October 2007 (at the annual *Bevan Foundation lecture*). Relevant parts of the speech are as follows:

**The Bevan Foundation lecture:**

‘One way to give more people power is to allow them to act collectively. We know that many people face discrimination, but fail to act because they feel that the trouble involved for them as an individual far outweighs the potential gain. They nurse their hurt and sense of injustice, which is bad enough. But even more importantly, the offender gets away with it. That is why the National Employment Panel reported last week that 83% of employers for example now believe that they will never face any sanctions for discrimination.

Access to justice through the courts is a luxury good for many of those experiencing discrimination. Many cases are meritorious, many have had an experience which has been intolerable, and who should have their day in court – but there is just no way to fund them. ... In truth, taking action against discrimination today is the business of heroes. It should not be.

These are powerful reasons for shifting the burden away from individuals taking a case, towards organisations such as the Equality and Human Rights Commission, taking a case on behalf of a group of individuals.

We call this representative action. By using representative action the Commission could bring a claim on behalf of a number of identified individuals, and use the full weight of our force to fight their battle. In financial terms, this provides real access to justice. It also protects the individual from having to stand up and fight his or her own case, living in fear of victimisation for doing so.

One area where this could make a real, practical difference is in terms of equal pay. A couple of City sex discrimination claims taken by individual women, receiving a great deal of media attention and record compensation payouts, have overshadowed the fact that many victims of unequal pay are women working alongside other women doing the same kinds of work – school catering assistants; local government administrators – and it really doesn’t make sense to deal with this kind of situation as a series of disconnected individual claims. It disadvantages the citizen and clogs up the tribunals. There are currently over 44,000 equal pay claims lodged with the employment tribunal, an increase of about 150% on last year – this is in no-one’s interest. ... Representative actions would provide quicker and more effective access to justice.’

(H) **A practical insight into equal pay claims brought on a unitary basis.** The practicalities of employees bringing unitary actions for equal pay can be rather unfortunate on three bases — the prospect of inconsistent judgments, delays, and costs — as John Usher, Trade Union Legal Consultant, Unite, explains (in *meeting between John Usher and the author* on 26 November 2007, reproduced with approval):

**The practical points about equal pay disputes:**

- ‘the ‘material factor’ defence is raised repeatedly by employers who are sued for contravention of equal pay – often on entirely different fact scenarios from previous instances where the defence was relied upon – this gives rise to a concern as to inconsistent judgments being issued in respect of material factors;
- the delays in equal pay cases are so extensive that this results in justice denied – there are, for example, too many cases being run in the name of the personal representatives of those that have died – hardly ‘equal pay’;
- it is lawful to charge contingency fees in equal pay disputes, as these are considered ‘non-contentious’ for the purpose of fees — that has permitted contingency fees of approximately 30% at times, which substantially reduces the compensation available to the employee (as discussed in: *Bainbridge v Redcar & Cleveland BC*, UKEAT/0424/06/LA, 23 March 2007, paras 55–56) and, because of the way in which the contingency fee agreement is drafted, may also undermine a settlement (*Bainbridge*, paras 58–59)’ [note that this third point is also forcefully made in: *Amicus Section of Unite: The Union Response to the DTI Consultation on Dispute Resolution* (2007), para 8.10].

(I) **Opt-out regimes facilitate employment claims.** It will be recalled that, when considering the types of opt-out collective actions brought in Australia and Ontario and outlined in Table 12, employment disputes featured very strongly. These disputes included, for example: disputes over loss or reduction of pension entitlements; the availability of health or medical benefits; discrimination allegations, giving rise to differential pension entitlements; terminations or redundancies; wrongful collection of union fees; unpaid or withheld pay; and discrimination-based employment practices.

Similarly, one would expect all manner of employment claims to be handled effectively under a generic collective action regime, were such a regime to be introduced into English civil procedure.



## 19. UNITARY LITIGATION *EN MASSE* UNDER THE GLO REGIME

### The main points:

- ❑ **the purpose of the GLO regime is to provide for the case management of claims which give rise to common or related issues of fact or law — unlike an opt-out regime, the GLO regime requires that each party opt in by issuing a claim form, and litigation commenced prior to the formation of the GLO register will be vacuumed up under the umbrella of that GLO**
- ❑ **some judicial comments have noted the volume and administrative burden of handling the unitary litigation that has been commenced prior to a GLO's formation**

- (A) **The emphasis is upon ‘individualism’ under the GLO regime.** The GLO regime does not merely require litigants to opt in, but it also requires that each litigant issue a claim form, by virtue of para 6.1A of Practice Direction 19B. Hence, individual litigation is required; and furthermore, given the notion that litigants must opt in, the filing of claims is all-important to protect both the prospect of being handled under any eventual GLO order that might ensue, and to protect limitation periods.

As the GLO is intended as a case management tool, and not brought as the one action by a representative claimant on behalf of a number of unnamed but described class members, the GLO serves as an ‘umbrella’ under which a number of claims are managed — those claims *have* to be filed, and in some cases, litigation has ensued before the GLO is formed — and, on occasion, the claims are filed across many courts, which then have to be transferred into the one court, adding to the administrative burden in gathering those claims back under the one ‘umbrella’.

Under an opt-out regime, by contrast, the class member does not bear the same onus of filing individual proceedings, for he is caught by the collective action, if he falls within the class description and if he does not take some proactive step to disassociate himself from the collective action by opting out.

**(B) Judicial comments about the extent of individual litigation.** Multiple unitary litigation before any GLO order is made, with attendant burdens for case transference, etc, is not unusual, as the following judicial comments show:

- ❑ ***R (A and others) (Disputed Children) v Secretary of State for the Home Department*** [2007] EWHC 2494 (Admin), para 9 — the case concerned a challenge to the legality of the policy of the Secretary of State that an asylum seeker would be treated as an adult, even if he claims to be a child, if his appearance and/or demeanour “strongly suggested” that he was over 18:

*During 2005 and 2006 a significant number of actions raising this generic issue were commenced: some in the Administrative Court by way of judicial review; others in the Queen’s Bench Division or in the County Court as simple actions in tort claiming damages for unlawful detention.*

In this case, a GLO was applied for, but denied by Beatson J.

- ❑ ***Re Claimants under Loss Relief Group Litigation Order*** [2004] EWCA Civ 680, para 2 — re advance corporation tax and double tax conventions:

*The decision in Hoechst has spawned a huge number of claims against the Revenue totalling many billions of pounds as international groups of companies seek to take advantage of the implications of the decision. ... Many cases have been brought in the High Court. We are told that a group litigation order (GLO) has been made for each of five different classes of cases.*

- ❑ ***Esso Petroleum Co Ltd v Addison*** [2003] EWHC 1730 (Comm), para 5 — re Esso promotion schemes:

*A large number of claims were made against individual licensees in courts across the country, but eventually a group litigation order was made with a view to enabling this court to determine issues common to all those licensees whose disputes with Esso had not been resolved.*

**PART VI**

**'CRUNCHING THE NUMBERS' ON OPT-IN  
VERSUS OPT-OUT**

## 20. OPT-OUT REGIMES ATTRACT A HIGHER DEGREE OF PARTICIPATION

### The main points:

- ❑ for those jurisdictions for which modern empirical data exists, opt-out rates have been as low as 0.1%, and no higher than 13%
- ❑ for those jurisdictions for which empirical data does not exist as yet, judicial summations of opt-out rates indicate a range of opt-outs between 40% and none at all
- ❑ rates of participation under opt-out regimes are typically very high

(A) **Availability of empirical data.** In two cases of opt-out regimes, empirical data of opt-out rates is available — in respect of Victoria’s state regime and the United States’ federal regime.

### VICTORIA

The opt-out regime: Supreme Court Act 1986, Pt 4A

Source of data: Professor Vince Morabito, *Draft Empirical Study of Victoria’s Class Action Regime: Preliminary Findings* (dated 17 September 2007, with a fuller report to follow in due course. Professor Morabito welcomes enquiries with respect to his study: [Vince.Morabito@buseco.monash.edu.au](mailto:Vince.Morabito@buseco.monash.edu.au)). Further information in relation to this empirical study is also available in Professor Morabito’s National Report: *‘Group Litigation in Australia — “Desperately Seeking” Effective Class Action Regimes: National Report for Australia Prepared for the Globalisation of Class Actions Conference, Oxford University, December 2007*, available for perusal at: [http://www.law.stanford.edu/display/images/dynamic/events\\_media/Australia\\_National\\_Report.pdf](http://www.law.stanford.edu/display/images/dynamic/events_media/Australia_National_Report.pdf).

Opt-out rates: At the time that Professor Morabito conducted his study, class members had been provided with an opportunity to opt out in 11 of the Victorian actions on foot. The data thereby obtained was as follows (quoting directly from p 4 of the study):

**Professor Morabito's empirical study:**

- ❑ 'The median opt-out rate is 12.90%.
- ❑ The average opt-out rate is 24%.
- ❑ The significant difference between these two figures is attributable to the fact that in one proceeding, the opt-out rate was around 94% whilst in another proceeding the opt-out rate was around 75%. The incredibly high opt-out rates in these two proceedings were in turn due to the aggressive implementation by the defendants in question of a strategy that entailed contacting individual class members directly, for the purpose of settling their individual claims without the involvement of the court or of the solicitors for the class representative.
- ❑ The more accurate statistic is the median opt-out rate. This becomes apparent when one considers that, after the two cases mentioned in the preceding paragraph, the next highest opt-out rate in a Part 4A proceeding was 22%. Furthermore, in none of the remaining 8 opt-out proceedings, did the opt-out rate reach 14%.'

**Hence, rate of participation in the litigation:                      the median level of participation was 87% of class members**

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**UNITED STATES**

The opt-out regime:    Federal Rules of Civil Procedure, rule 23(b)(3)

Source of data:            Willging *et al*, *Empirical Study of Class Actions in Four Federal District Courts: Final Report to the Advisory Committee on Civil Rules* (Federal Judicial Centre, 1996)

Opt-out rates:            The authors of the report note as follows (quoting directly from pp 52–54 of the report):

**The Willging empirical study:**

The study identified 407 class actions in the four districts; of those, 152 were certified as class actions. Of those 152, the authors noted of opt-out rates:

- ❑ 'in all four districts, the median percentage of members who opted out was either 0.1% or 0.2% of the total membership of the class;
- ❑ 75% of the opt-out cases with opt-outs had fewer than 100 total opt-outs;
- ❑ this left 7 cases in the study with more than 100 opt-outs (and of these, three were securities actions);
- ❑ at the certification stage, the percentage of certified class actions with one or more class members opting out was 21%, 11%, 19% and 9% in the four districts [hence, in 79%, 89%, 81% and 91%, of these class actions, respectively, no-one opted out at all]
- ❑ comparison of the opt-out rates in this study with those in the [earlier 1974 study, *The Rule 23(b)(3) Class Action: An Empirical Study*, 62 Georgetown LJ 1123], published more than 20 years ago, showed no increase in the rate of opting out. The levels of opting out reported in the Georgetown study, in fact, indicate that opting out may have declined considerably'

**Hence, rate of participation in the litigation:                      the median level of participation was at least  
99.8% of class members**

**(B) Lack of empirical data.** In the case of the provincial regime of Ontario, and Australia's federal regime (both selected for comparison in Table 12), no empirical studies have, as yet, been conducted on opt-out rates, so far as the author can ascertain.

In these circumstances, the best that can be done *pro tem* is to peruse Canadian and Australian case law databases to obtain a sample of those cases in which, judicially, it has been noted as to how many opted out of the action, in order to give at least some 'feel' for opt-out rates. In the case of the opt-out regimes in Portugal and in the Netherlands, individual case data is also available, as some indication of the opt-out rate. It must be noted, however, that for all of these jurisdictions, the case sample is very small indeed:

## CANADA

The opt-out regime: the provincial regimes in Ontario and British Columbia

Source of data: perusal of judgments, obtaining a sample of cases

Opt-out rates: *Jeffery v Nortel Networks Corp* [2007] BCSC 69 — about 5,000 class members in British Columbia; 13 opt-out requests lodged to be excluded from the class action settlement (para 54)

*Fischer v Delgratia Mining Corp* (1999, BC SC [In Chambers]) — 5,000 class members approximately; 9 opt-outs from the settlement agreement (para 20)

*K Field Resources Ltd v Bell Canada International Inc* (SCJ, 1 Sep 2005) — no opt-outs (para 3)

*Nunes v Air Transat AT Inc* (2005), 20 CPC (6<sup>th</sup>) 93 — of 291 original class members, 115 opted out of the action (para 3)

*1176560 Ontario Ltd v Great Atlantic & Pacific Co of Canada Ltd* (Ont SCJ, 4 Oct 2004) — of the 29 class members, one opted out (para 2)

**Hence, rate of participation in the litigation:                    between 60% and 100%**

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## AUSTRALIA

The opt-out regime: Federal Court of Australia Act, Pt IVA

Source of data: perusal of judgments, obtaining a sample of cases (and in addition, the information about the opt-outs in *Courtney* has been supplemented by information kindly

received and reproduced, with approval, from the defendant's solicitors, Mr S Stuart Clark, Managing Partner, Litigation and Dispute Resolution, Clayton Utz Solicitors, Sydney, and Ms Christina Harris, Senior Associate, Clayton Utz Solicitors, Sydney)

Opt-out rates:

***King v AG Australia Holdings Ltd (formerly GIO Australia Holdings Ltd)*** [2002] FCA 872 — original total shareholder group was 67,224; about 17,800 opted out; representative group thus equalled about 50,000 (GIO put the number at 49,399) (para 5) — so opt-out rate was approximately 27%

***Guglielmin v Trescowthick (No 5)*** [2006] FCA 1385 — 3,893 group members to begin with; 35 opted out; 26 persons to whom the notice had been given but the notice was returned as undelivered, and attempts to secure identification of the whereabouts of those persons unsuccessful, and common ground that those persons were also be treated as having opted out of settlement; total number of opt-outs was 61; so represented group was 3,832 (para 23) — so opt-out rate was approximately 1.6%

***Courtney v Medtel Pty Ltd*** [2003] FCA 36 and [2004] FCA 1598 — the original class consisted of some 1,048 members who had a Pacemaker surgically implanted in Australia; 432 group members opted out initially, leaving the group size as 616 persons; thereafter another group member opted out, taking the opt-outs to 433 persons (this information is collectively derived from both the judgments and from the assistance of Clayton Utz lawyers Mr S Stuart Clark and Ms Christina Harris, as noted above, who represented the defendants in this matter) — so opt-out rate was approximately 41%

***Reiffel v ACN 075 839 226 Pty Limited (No 2)*** [2004] FCA 1128 — 146 members to begin with; 23 group members opted out; final class size was 123 — so opt-out rate was approximately 16%

**Hence, rate of participation in the litigation:                    between 59% and 98.4%**



## PORTUGAL

The opt-out regime: Law No 83/95 of 31<sup>st</sup> August, *Right of Proceeding Participation and Popular Action*

Source of data: Mr Nuno Oliveira, formerly Legal Advisor, and Mr Luis Silveira Rodrigues, Director, DECO (Portuguese Association of Consumer Protection)

Opt-out rates: ***DECO v Portugal Telecom*** — the class included almost all Portuguese consumers (approx. 2 million people); 5 opted out of the action

***DECO v Academia Opening*** — re language school fees — the class consisted of about 1,200–1,500 persons; no opt-outs known

***DECO v Water provider company*** — re exploding water counters — the class consisted of about 1,000–2,000 persons; no opt-outs known

**Hence, rate of participation in the litigation: almost 100%**

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## THE NETHERLANDS

The opt-out regime: Act on Collective Settlement of Mass Damages (in force 27 July 2005)

Source of data: BEUC, ***Private Group Actions — Taking Europe Forward*** (8 October 2007), p 15

Opt-out rates: ***Dexia Bank Nederland NV*** (aka the Legiolease case), in which Dexia and other companies were sued for damages resulting to private investors from investing in securities lease products offered by Dexia and others. A settlement agreement was reached in April 2005, and following introduction of the new Act, a request was made to have the settlement agreement declared collectively binding. That

declaration was made in January 2007, with the possibility to opt out. The total class size was approximately 715,000 consumers. The opt-outs totalled approximately 25,000.

**Hence, rate of participation in the litigation: approximately 97%**

**(C) Take-up rates impossible to determine.** Under many opt-out collective actions, if the common issues are determined in favour of the class and individual issues are then to be resolved on a case-by-case basis, or if a settlement agreement provides that certain monetary compensation will be payable to the class members who come forward to claim their entitlement by proof of individual (including quantum) issues, the class members will need to seek to assert that entitlement in the manner decreed.

This degree of participation at the ‘back end’ of the litigation (termed, earlier in this Research Paper, the ‘take-up rate’) is very difficult, if not impossible, to quantify, for the numbers of persons coming forward is usually a matter of private, not public, record. Hence, when this Section refers to ‘rate of participation’, it should be taken to only refer to the rate of participation that is consequential upon the number of opt-outs that occurred during the opt-out period.

**(D) Summary of figures.** To recap this Section:

**TABLE 18 Rates of participation for opt-out regimes**

<b>Jurisdiction from which empirical studies/cases emanated</b>	<b>Rate of participation in the litigation ...</b>
Victoria	approx. 87%
United States	approx. 99.8%
Canada	approx. 60%–100%
Australia	approx. 59%–98%
Portugal	almost 100%
Netherlands	approx. 97%

## 21. OPT-IN REGIMES ATTRACT A LOWER DEGREE OF PARTICIPATION

### The main points:

- ❑ the experience in English group litigation indicates that, under an opt-in regime, the opt-in rates vary considerably, from very low percentages (<1%) to almost all class members opting to participate in the litigation
- ❑ European experience indicates a very low rate of participation (less than 1%) where resort to opt-in was necessary in consumer claims and the class sizes were very large (>100,000)
- ❑ the number of cases in the US sample is extremely small, but indicates a much lower participation rate under opt-in than under opt-out

(A) **Individual case data.** In respect of the English group litigation, the information supplied by the Respondents to the Questionnaire provides a useful insight into opt-in rates in English group litigation.

### ENGLAND

The opt-in regime: either the Group Litigation Order under CPR 19.III, or group litigation conducted on an *ad hoc* basis by agreement between the parties and the court

Source of data: Questionnaire completed by law firms acting for claimant classes in group litigation

Opt-in rates: the rates are shown in Table 2 earlier in the Research Paper (note, also, the very low opt-in rates evident in *Consumers' Association v JJB Sports plc*, referred to in Sections 8 and 9)

**Hence, rate of participation in the litigation: opt-in rates varied between <1% and 100%**

(B) **Individual data elsewhere.** Under other opt-in regimes in Europe, or where the US class action was



Opt-in rates: *Altroconsumo v Parmalat* in Italy: 3,000 class members opted in, out of a class of hundreds of thousands of investors

*UFC Que Choisir v Orange France, SFR and Bouygues Telecom* in France: 12,521 class members opted in, out of a class of 20 million phone subscribers

Hence, rate of participation in the litigation: **less than 0.03% of all class members opted in to these actions**

(C) **Summary of figures.** To recap this Section:

**TABLE 19 Opt-in rates**

<b>Jurisdiction from which empirical studies/cases emanated</b>	<b>Rate of participation in the litigation ...</b>
England	approx. 0.8%–100%
United States	approx. 27%–61%
Europe	less than 0.03%

## 22. SUMMARY OF FINDINGS

### 1. Overall conclusion

In the author's view, the research which underpins this Paper demonstrably evidences an 'unmet need' for reform of collective redress mechanisms in English civil procedure. Whether this is to be achieved by the introduction of a new collective redress mechanism or by the supplementation of an existing procedure, 'something more' is required to facilitate the litigation and testing of widespread grievances, in circumstances where, presently, these grievances are not being addressed nor compensated.

On the basis of this current research, and supported by earlier in-depth comparative analyses into collective action regimes in common law jurisdictions elsewhere (*The Class Action in Common Law Legal Systems: A Comparative Perspective* (Hart Publishing, Oxford, 2004), *The Modern Cy-près Doctrine: Applications and Implications* (Routledge Cavendish, London, 2006), and most recently, 'Justice Enhanced: Framing an Opt-Out Class Action for England' (2007) 70 *Modern Law Review* 550, the author considers that an opt-out collective redress regime would provide much utility in the present procedural landscape. A number of scenarios discussed in this Research Paper appear to be eminently suited to such a regime.

It is essential, however, that any supplementary regime be drafted in a measured and balanced fashion, with 'brakes', and with in-built requirements to provide procedural fairness to both claimants and defendants. One of those 'in-built' criteria *must* be a 'superiority' analysis — an opt-out collective redress action should only be permitted to go forth by the court if it is indeed preferable to decide the dispute in that way, rather than via one of the other procedural tools presently available to litigants. As many practitioners mentioned throughout the course of this study, no procedural tool is going to be 'the cap that fits all heads' — flexibility is the key.

A collective action procedure would enable class members who are, technically speaking, non-parties (or 'absent claimants'), and who are merely described at the outset, to have the ability to opt-out, rather than being required to opt-in as identified parties at the point when the litigation commences. As is presently the case under the GLO, the proceedings themselves would require that the court act as both 'gate-keeper' and 'case manager'. Hands-on judicial control is already a feature that is permitted, indeed encouraged, under

the Civil Procedure Rules (rules 1.4(2) and 3.1, especially the wide powers conferred by rule 3.1(2)(m)), notwithstanding that case management of such actions is a resource-heavy judicial tool — a fact recently acknowledged, for example, by the Commercial Court Long Trials Working Party in its December 2007 Report (at para 163).

The implementation of a further collective redress mechanism would assist both (a) the ability of aggrieved persons to ‘have their day in court’ (or be considered when a settlement is being negotiated); and (b) the efficiency and effectiveness of the judicial resources at the State’s disposal. Notably, a third possible objective — to achieve better deterrence of culpable behaviour — was mentioned frequently by stakeholders and interested parties with whom discussions were held in the course of preparing this Research Paper.

## **2. Substantiating reasons for this conclusion**

Since the GLO was introduced in 2000, there have been notably fewer group actions than the number of collective actions which have been commenced in Australia. Similarly, the number of class proceedings in Ontario (where certification is required at the outset, on criteria which are somewhat more discerning than the GLO’s certification requirements) far exceeds equivalent litigation over the same time period under the GLO regime.

However, it is not just a question of numbers. The *types* of collective actions are also far wider under the opt-out regimes of Australia and Ontario than the types of group claims brought so far under the GLO regime — in circumstances where, feasibly, the same or similar grievance could exist among UK citizens too. Indeed, several categories of grievance brought in Australia/Ontario have no equivalent under the GLO regime (for example, the very small over-charge cases, or real estate disputes involving, say, a dispute between the landlord of a shopping centre and the tenants). Notably, several of the claims in Australia/Ontario were, individually, non-recoverable claims, in which case individual litigation was extremely unlikely — however, the opt-out systems of these jurisdictions have also been used for collective actions in which large-value individual claims have been encompassed by the suit.

There is, in reasonable proximity to England and Wales, the long-standing Portuguese opt-out regime, entitled the *Right of Proceeding, Participation and Popular Action*. It has been in operation since 1995, and the consumer organisation DECO has obtained valuable experience in bringing actions under it.

DECO's view is that the regime has worked well, although the limited number of collective actions for damages is a direct result of the limited resources which DECO has available to it to prosecute such actions. As always, when turning one's attention to the second of the trio of issues which were outlined in the 'Background' earlier (at p 2) — need, design and costs/funding — the lessons to be learnt from other jurisdictions' legislative design and experiences thereunder are of paramount importance. In that respect, the refinements and improvements proposed by DECO are most interesting for English law reformers.

Other opt-out regimes have recently been introduced in Europe (Spain, Denmark, Norway, the Netherlands), each of which has different features and pre-conditions for use.

Where English claimants have sought to 'add on' to class actions instituted in the United States (under rule 23 of the Federal Rules of Civil Procedure), problems have sometimes ensued, that have resulted in the English claimants being 'dumped out' of the action or treated unfavourably by comparison. Although some of these actions had a 'connection' with the English jurisdiction that would have permitted an action to be brought in England, nevertheless, claimants sought to be joined to a US opt-out action, in the absence of any opt-out regime in England under which the action could have been commenced. This has not always ended happily for the English claimants, as both judicial decisions under rule 23, and the practical experience of UK law firms, will attest to.

Since March 2006 (when Which? launched a direct campaign of consumer awareness), the English county court system has been increasingly overwhelmed by a multitude of bank charges claims being filed by bank customers. The bank charges litigation has also raised other dangers associated with numerous individual suits. For all litigants, there are the risks of inconsistent judgments and delays in outcome. For the defendant, there is the added risk of embarrassing and adverse publicity if it overlooks the need to enter a defence to one or more of these unitary actions.

Other contexts in which 'unmet need' is evident are: compensation for loss or damage incurred where unfair terms are identified as standard terms being improperly used by businesses in consumer contracts; where infringing behaviour has been identified and punished by way of fines/penalties in respect of anti-competitive conduct, but where neither 'follow-on' actions nor stand-alone (liability + quantum) claims have been brought by injured parties; and in the employment context, where the numbers of individual claims filed for equal pay, sex discrimination and working time directives, have 'exploded' in the past 1–2



years. In each of these contexts, a collective opt-out regime would provide better access to justice and judicial efficiency. Furthermore, calls for better private enforcement procedures have been made by public bodies or publicly-funded bodies in each of these categories — in some instances, by entities that could feasibly act as an ideological claimant in collective actions.

Having regard to these particular contexts, the author does not intend to suggest in this Research Paper that different collective action frameworks should be implemented in each context — these contexts are merely provided by way of example, to show an ‘unmet need’. A *generic, statutory*, ‘build the field and they will come’-type regime, which covers all types of scenarios potentially giving rise to collective actions, is preferable, in this author’s view.

A Questionnaire distributed to Respondents who have had experience in conducting opt-in group litigation in England produced some interesting insights during the course of preparing this Research Paper. The experience in English group litigation indicates that, under an opt-in regime, the opt-in rates vary considerably, from very low percentages (<1%) to almost all (90%), or all, of group members opting to participate in the litigation. In several instances, however, the percentages of opting-in could not be determined because early cut-off dates were established, and the total number in the group was never able to be ascertained before the litigation was finalised. Respondents indicated that the vast majority of the Relevant Actions sustained *some* procedural difficulties because they were conducted under an opt-in regime — and the tasks of identifying and communicating with large classes, together with pleadings requirements at the outset, were especially difficult.

Furthermore, the experience derived from English group litigation indicates (per Table 5) that there are almost twenty (20) reasons as to why group members may not opt in to litigation — reasons that are as diverse as is human nature. While some of these reasons will preclude these claimants *ever* choosing to litigate their grievances, many of the reasons for not opting-in that emerged in the study for this Research Paper are particularly pertinent when the litigation is in its ‘infancy’, prior to any determination or settlement of the common issues, and when the litigation inevitably retains such an ‘individualised’ hue.

The exercise of ‘crunching the numbers’ on opt-in versus opt-out confirms the anecdotal evidence that opt-out ‘*catches more litigants in the fishing net*’. Where modern empirical data exists, the median opt-out rates have been as low as 0.1%, and no higher than 13%. Where widespread empirical data does not exist as yet, judicial summations of opt-out rates indicate a range of opt-outs between 40% (which is rare, on the

cases surveyed) and 0%, with a tendency for the rates of participation under opt-out regimes to be high (that does not, however, guarantee that all class members will come forward to claim their individual entitlements following the resolution of the common issues, hence, the less-than-100% take-up rates referred to earlier in this Paper). On the other hand, whilst the experience in English group litigation indicates that, under its opt-in regime, the opt-in rates vary considerably, from very low percentages (<1%) to almost all group members opting to participate in the litigation, European experience sometimes indicates a *very* low rate of participation (less than 1%) where resort to opt-in was necessary in consumer claims and where the class sizes were very large. In the United States too, a much lower participation rate has been evident under opt-in than under opt-out. In that respect, the dual pillars — access to justice and judicial efficiency in disposing of the dispute once and for all — are enhanced by an opt-out regime.

### **3. Concluding remarks**

The various ‘building blocks’ which have been the subject of examination in this Research Paper point toward the incontrovertible conclusion that, in England and Wales, there is an ‘unmet need’ for better redress of common grievances which have allegedly given rise to monetary loss and damage to a class of claimants. This is *not* a ‘solution in search of a problem’. The need for progressive procedural reform exists, and a more effective method of collective redress in England and Wales is urgently required to address it.