



UK V US CLASS ACTIONS:  
WILL CHANGES TO THE UK COSTS REGIME  
RESULT IN MORE OR LESS CLAIMS?

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September 2013

# UK & US: COMPARE & CONTRAST

- Some facts about the US
- In 2011: 188 federal securities class actions filed up from 176 in 2010
- Average of 150 such actions pa since 1997
- Recoveries run to over \$100 billion
- Largest single: \$7.2 billion for Enron investors
- WorldCom: \$6 billion
- AOL/Time Warner & Tyco: \$3 billion each



# The US: a mature funding market

- Securities Acts 1933 and 1934: reacting to causes of the Great Depression
- Theory of fraud on the market and presumed reliance
- The 20 & 40 day time limits for selection of Lead Plaintiff & Counsel
- Absence of any loser pays principle
- Contingency fees based on % of any recovery
  - The Plaintiff lawyers fund all the costs & disbursements
  - Fees of 15%-30% often an increasing scale for higher recovery

# The UK: an immature funding market

- No equivalent class action model
  - (i) GLOs?: an unpopular straightjacket
  - (ii) Common case management?: limitations
  - (iii) CPR 19.6? *Emerald Supplies*
- Funding Obstacles:
  - (i) The loser pays costs: see *Rhone-poulenc* Posner J
  - (ii) Litigation funders: market exits
  - (iii) ATE Insurers: examples of non-payment
- The attitude of the profession & judiciary

# The Innovator Litigation

- Declaration of interest: I acted for Defendant
- 555 Claimants, 4 represented & 3 LIP Defendants
- No GLO & no orders on costs liabilities
- Inadequate litigation funding & ATE insurance
- Disconnect between Claimant evidence & case
- Difficult climate for Claimants
- Adverse costs liability
- Joint and several costs liability for the Claimants

# Post Jackson: a new dawn?

- New rules from 1<sup>st</sup> April 2013
- The funding of litigation post Jackson
- Inter partes costs recovery post Jackson



# LASPO 2012 – overview of key provisions

- In effect from 1 April 2013
- Success fees and After the Event insurance premiums (and costs undertakings) irrecoverable *inter partes* (s 44(4), 46(1), 47(1))
- Success fee capped in prescribed proceedings at %age of description of damages (s 44(2))
- Damages-based agreements (ie contingency fees) permitted (s 45)
- Payment of additional amounts to claimants where judgment at least as advantageous as claimant's offer to settle (s 55)
- Referral fees for personal injury claims to be banned (s 56)



## Other Key Elements

- Qualified one-way cost shifting (QOCS) in personal injury cases and possibly (after further consultation) others where parties in 'asymmetric' relationships (Jackson chapters 9 and 19)
- General damages awards for personal injuries and other civil wrongs to increase by 10% (Chapter 10; *Simmons v Castle*)
- Fixed costs to be set for fast track cases (Chapter 16)
- Increased role for Before The Event insurance (Chapter 8)
- A role and a code for Litigation (Third Party) Funding (Chapter 11)



# What future for ATE Insurance and Success Fees?

- Will success fees survive, or will competition eliminate them?
- Will litigants pay for ATE cover?



# BTE Insurance in a New World

- Jackson envisages BTE will adapt and have increasingly important role
- But no compulsion to have BTE cover
- Will there be greater take-up from householders and small businesses?
- How will abolition of referral fees affect the BTE market?
- Will people or business have to, or be willing to, pay substantial premiums in order to obtain BTE
- What level of choice and service: a right to choose own lawyer from when letter of claim is sent?



# An End to Referral Fees?

- Jackson described referral fees as 'abhorrent' and 'offensive'
- Not needed to ensure competition
- Contribute to high costs of personal injury litigation
- LASPO s 56: referral fees for personal injury claims, or any other business specified in regulations, to be banned
- Regulated persons (including barristers, solicitors and those regulated to provide claims management services) who either pay or are paid for referrals will be in breach of the statute. Payment would include any form of consideration but would not include provision of hospitality that is reasonable in the circumstances.



# An End to Referral Fees?

- Relevant regulators obliged to ensure appropriate arrangements for monitoring and enforcing ban
- But breach will not be an offence nor give rise to an action for breach of statutory duty, nor make anything void or unenforceable except the contract to make or pay the referral fee itself
- But what is a referral fee?
- Other ways of expressing appreciation?
- Do Alternative Business Structures change the arguments?
- Ownership of lawyers firms by claims referrers



# Damages-Based Agreements

- DBAs permitted for litigation generally: a more North American system?
- CJC Working Party recommendations, MoJ announcement (August, October 2012)
- 25% contingency fee cap on personal injury damages excluding future care and loss (cap in respect of solicitor's and counsel's fees but excluding disbursements)
- 50% cap in all other cases (cf recommendation no cap in commercial cases, except possible 50% consumer/micro enterprise commercial cases)
- Preference for the 'Ontario model', but not to be called that in the rules and regulations



# Litigation Funding

- Regarded by Jackson as beneficial in promoting access to justice
- Most readily obtainable for high value monetary cases with good prospects
- Generally commercial users with full legal advice
- Will there be a market for lower value and/or more risky claims?
- Champerty and maintenance remain: in theory at least, but how do these rather outmoded concepts fit with new world? might some funding agreements actually be declared illegal in practice?



# Litigation Funding

- Association of Litigation Funders of England and Wales Code of Conduct on Litigation Funding (November 2011)
- Funder will take reasonable steps to ensure litigant has received independent legal advice on funding agreement
- Must maintain adequate financial resources
- Funder shall state whether and how it can terminate in respect of merits, commercial viability or breach
- Save in case of breach, funder remains liable for all accrued funding obligations
- Funder cannot have discretionary right to terminate
- Binding QC opinion where dispute arises



## *Simmons v Castle*

- 10% increase to general damages for PSLA, nuisance, defamation and other torts causing suffering, inconvenience or distress
- To do other would be 'little short of a breach of faith' by the judiciary
- Applies to all judgments after 1 April 2013 (CA judgment 26 July 2012) ...
- ... except where claimant falls within LSAPO s 44(6) (CA judgment 10 October 2012)
- Only refers to (all/most) claims in tort?



# QOCS

- Ministerial statement (July 2012)
- No means testing for claimants
- QOCS protection lost where claimant fails to beat defendant's Part 36 offer (but costs payable by claimant capped at damages recovered)
- Protection lost if claim fraudulent, or struck out for disclosing no reasonable cause of action or as abuse of process
- Not lost on discontinuance or for appeals
- QOCS might not apply to elements of claim pursued for benefit of a third party



# A New Approach to Proportionality

- The costs system should encourage proportionate legal expenditure (Jackson chapter 3)
- Addressed in 15<sup>th</sup> implementation lecture (Lord Neuberger MR, May 2012)
- Necessity does not render costs proportionate
- Recommended that court should:
  - (1) assess costs by applying the test of reasonableness; and then
  - (2) consider whether the total figure obtained is proportionate and if not make an appropriate reduction



# A New Approach to Proportionality

- Under the new CPR r. 44.3(5):  
'Costs are proportionate if, and only if, the costs incurred bear a reasonable relationship to:
  - (a) the sums in issue in the proceedings;
  - (b) the value of any non-monetary relief in issue;
  - (c) the complexity of the litigation;
  - (d) any additional work generated by the conduct of the paying party;
  - (e) any wider factors involved in the proceedings, such as reputation or public importance.'
- Law on proportionate costs will have to be developed on case-by-case basis; but Rule Committee may give guidance
- Amount of money involved normally very significant, but will not be determinative
- But will courts be reluctant to disallow necessarily incurred costs?



# Costs Management

- Discussed in 16<sup>th</sup> implementation lecture (Ramsey J, May 2012)
- 'Essential part' of reforms
- It will allow courts to implement new proportionality test
- Will apply to all multi-track cases (except Admiralty and Commercial Courts), unless court orders otherwise



# Costs Management

- Parties must exchange costs budgets within 28 days after Defence
- Court may make a costs management order and then manage costs
- Costs management order will record extent of parties' agreement, or court's approval after appropriate revisions, of budgets
- In making any case management decision, court will have regard to costs of each procedural step as well as any available budgets
- Court can direct future costs budgets; but onus on parties to put forward revised budgets where warranted by significant developments
- When assessing costs on standard basis, court will have regard to party's last approved or agreed budget and will not depart from it without good reason



# What is likely effect of Jackson?

- Will BTE really fill the funding gap?
- Will Damages Based Agreements afford access to justice?
- Will QOCS spread to other areas which are 'asymmetrical' eg prof liability?
- Attitudes within the profession and the judiciary:
  - Access to justice, or
  - Ambulance chasing
- The continuing impediments to multi-party litigation in the UK



## Will UK lose out?

- US litigators starting to access the UK market (eg the UK Pensions market)
  - The impact of *Morrison v National Australia Bank*
  - US federal securities law applies only to US exchange transactions
  - So US litigators looking at non US claimants and actions
  - The growth of portfolio monitoring services for Pension Funds
- The Netherlands
  - No class-action procedure
  - But court approval & European wide recognition of securities settlements reached outside US per 2005 Collective settlement of Mass Claims Act
  - Invoked originally for settlement re Royal Dutch Shell litigation
  - Recently applied to non US element of US class action against Convergium Holdings AG (even though Dutch investors had less than 2% of shares)
- Once the Oligarchs have gone, will the Rolls building be empty?



# CONTINENTAL DRIFT(1)

Commission Recommendation on Common Principles for Collective Redress (June 2013)

Communication from the Commission 'Towards a European Horizontal Framework for Collective Redress'

Policy Tensions:

Cessation of/Redress for 'Mass Harm Situations' v Perceived Threat of US-style Abuse

Policy Outcomes:

Admissibility Criteria: discontinuation when not met

Designated Representatives

Costs: 'Loser pays' Principle

Funding: early disclosure

Opt-in Procedure

No Contingency Fees

No Punitive Damages

Facilitating Collective ADR



## CONTINENTAL DRIFT (2)

- Developments in EU Competition Law may in tandem promote collective action in this field.
- The Claimant-friendly Draft EU Directive on Damages in Competition Law proposes:
  - Joint and Several Liability
  - Presumption of Loss
  - Benevolent Limitation Periods

# Continental Drift (3)

## UK Draft Consumer Rights Bill 2013

- Limited regime by which representative groups or trade associations can take action on behalf of consumers on an opt-out basis within the context of Competition Act 1998 (s. 47B CA as amended)
- Damages paid to the representative for individual claimants to make a claim on the fund (s. 47C CA as amended).
- Facilitation of Collective Settlements (s. 49A CA)
- DBAs unenforceable within context of collective opt-out proceedings
- .
- Echoes more aggressive stance by FCA re eg PPI, LIBOR, CPP etc.

# Union v Union: divergence

- Recommendation facilitating collective redress generally, but published at same time as Draft Directive on Damages in Competition law. Motivation Remains firmly rooted in the internal market.
- Avoids full contingency/opt-out US model.
- EU advocating a model with greater 'resistance' to the flow of multi-party claims.
- By no means set in stone: only a Recommendation (Article 288 TEU)
- UK shifting the frame of reference? Will it become a hybrid, the bridge between the Unions?



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