UK V US CLASS ACTIONS

Will Changes to the UK Costs Regime Result in More or Less Claims?

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I. Introduction

Enhancing the tools for collective redress within the English civil justice system has been an objective of the legal establishment for at least two decades. In his *Final Report on Access to Justice*, published in 1996, Lord Woolf underlined three objectives for any multi-party procedure:

(a) To provide access to justice where large numbers of people have been affected by another's conduct, but individual loss is so small that it makes an individual action economically unviable;

(b) To provide expeditious, effective and proportionate methods of resolving cases, where individual damages are large enough to justify individual action but where the number of claimants and the nature of the issues involved mean that the cases cannot be managed satisfactorily in accordance with normal procedure; and

(c) To achieve a balance between the normal rights of claimants and defendants, to pursue and defend cases individually, and the interests of a group of parties to litigate the action as a whole in an effective manner. (Chapter 17, Paragraph 2)

The achievement of these objectives was dependent upon three notable procedural tools: the Group Litigation Order ('GLO'), the Representative Procedure and the expansion of the general case management powers of the English courts. Unfortunately the seeds that were sown by the civil procedure reforms have failed to deliver the same results as US mechanisms for collective redress. There is no equivalent of the Federal Rules of Civil Procedure (FRCP) Rule 23 in English law. Neither have the attempts at forced evolution through judicial mutation of CPR 19.6 borne fruit. The attempt to produce a mechanism for collective redress that is comparable to the US class action law suit most commonly observed in New York has not been helped by the English costs regime. That regime has traditionally preserved a 'loser pays' principle as a sacrosanct feature of civil litigation and has historically resisted the emergence of the 'contingency fee'.

For those wishing to emulate our counterparts across 'the pond' there may be change afoot. In his *Review of Civil Litigation Costs: Final Report*, published in 2009, Jackson LJ has introduced a number of significant amendments to the English costs regime which may serve

to provide fertile ground for a renaissance in measures for collective redress in English civil litigation.

II. A Question of Maturity

(a) The US Model

The United States adopted its famous instrument for collective redress in the 1960s in the form of Rule 23 of the FRCP. The culture of the class action law suit was, however, encouraged by factors besides this rule change.

The Securities Class Action Phenomenon: The United States' substantive laws are conducive to a healthy legal market for class action law suits. The Securities Acts 1933 and 1934 served as a recognition of the need for wide-scale redress following the Great Depression. In the early 1930s institutional investors such as pension funds had invested the savings of individuals in the securities of publicly traded companies. These securities were purchased at inflated prices due to misrepresentations made to the market as to the true state of these corporate entities and their businesses. The securities class action has been encouraged a statutory regime which is built on the twin features of 'fraud on the market' theory and 'presumed reliance'. In circumstances where a materially false statement has been made by the issuing company, its executive or underwriters liability will be imposed providing that the company and or individual actors cannot prove an absence of negligence on their part. The statute is predicated upon a theory of fraud on the market, which does not require the claimant to prove that the false representation was issued to induce the claimant to enter into the securities purchase. Presumed reliance means that the evidential onus is shifted from the claimants to the defendant. Under the Acts of 1933 and 1934 a class action can be filed in a federal court on behalf of all investors who purchased the same securities within the class period. Twenty days after the first complaint is filed a notice is published advising members of the class that they are afforded a window of 60 days in which to apply for appointment as Lead Plaintiff and Lead Counsel. The Lead Plaintiff title will be granted to the member of the group or class members suffering the largest loss among the applicants. This will ordinarily be an institutional investor such as a pension fund. The statute is consequently a procedural catalyst for class actions.

Costs: Aside from an evidential burden that favours the claimant, which is peculiar to securities suits, class actions are further encouraged by the US costs regime. Of particular significance is the absence of any 'loser pays' principle. Rule 44.3(2) of the English Civil procedure Rules (CPR) provides for a 'general rule' that the unsuccessful party will be ordered to pay the costs of the successful party. US civil procedure has instead traditionally recognised that costs should lie where they fall and that each party should bear its own costs of the action. In multi-party claims the responsibility rests with the Lead Plaintiff to negotiate a fee with the Lead Counsel. This will be a contingency fee in the sense that it will be

deducted as a percentage from the class action recovery. In securities actions this has typically ranged between 15 and 30% of aggregate recoveries, a percentage figure that will often increase on a sliding scale, depending on expected recoveries. This approach to costs has encouraged a mature funding market for class action law suits in the US. This is evidenced by the statistics: in 2011 188 federal securities class actions were filed, up from 176 in 2010, and there have been on average 150 such actions per annum since 1997. The largest single recovery was $7.2 billion for the benefit of Enron investors in 2007. WorldCom and AOL/Time Warner & Tyco investors recovered in excess of $6 billion and $3 billion respectively.

(b) The English Model

In contrast to the US the English model for collective redress remains relatively underdeveloped.

Commentators are agreed that there is no FRCP 23 equivalent in English civil procedure. The Woolf Reforms established a new procedural mechanism for pursuing class actions – the Group Litigation Order ('GLO') – and developed two alternative routes to achieving collective redress by enhancing the case management powers of the courts and the representative action under CPR 19.6.

GLOs: CPR 19.11 permits a GLO to be provided for by the court where there are or are likely to be a number of claims giving rise to the GLO issues. The GLO is fundamentally an 'opt-in' procedure which is the feature that most distinguishes it from the closest US comparator. It requires the establishment of a 'group register' (CPR 11.2(a)). A claim on the group register may proceed as a test claim (CPR 19.15) and the court is granted wide case management powers to regulate the register and the progress of the litigation. This opt-in system prevents the phenomenon by which the aggregation of losses can be used in the litigation process to exert pressure on risk-averse defendants. This is a feature of the US regime which makes the class action such an important tactical weapon in the course of litigation as was famously noted by Posner J in *Rhone-poulenc Rorer Incoporated* 51 F.3d 1293 (1995) [para 15].

Case Management: The English courts have very general case management powers which permit them to join claims for the purpose of judicial efficiency and convenience.

(i) CPR 3.1(2)(h) permits the court to try two or more claims on the same occasion and (m) to take any other step or make any other order for the purpose of managing the case and furthering the 'overriding objective'. That objective (CPR 1.1) includes saving expense and dealing with cases in ways which are proportionate to, inter alia, the value and importance of the case.

(ii) CPR 19.1 provides that any number of claimants or defendants may be joined as parties to a claim.

Though these powers would appear to be extensive, the court's power of joinder is not to be understood as an equivalent to the class action by any stretch of the imagination. Each party is entitled to separate representation in the proceedings and the decision to join claims must satisfy the 'test of convenience', namely that the claims are such as can be 'conveniently disposed of in the same proceedings.'

Representative Proceedings: CPR 19.6 permits legal persons to be represented in civil proceedings by other legal persons, providing that the representative party has the 'same interest' as those other parties. This 'same interest' requirement serves as an obstacle to representative proceedings becoming a surrogate for effective collective redress. In *Emerald Supplies Ltd v British Airways plc* [2010] EWCA Civ 1284 Mummery LJ determined that CPR 19.6 could not be utilised by all of the parties claiming loss by virtue of a freight transportation price fixing cartel. Whilst the claims of direct purchasers of freight transportation might be subject to a passing-on defence the claims of indirect purchasers depended on the allegation that costs had been passed-on. The prospect of different defences being available in respect of the issued claims served in and of itself as an impediment to the use of CPR 19.6 for multi-party proceedings.

(c) Obstacles to Development of an English Class Action

Funding: The 'costs follow the event' principle enshrined in CPR 44.3(2) remains a fundamental obstacle to the development of CPR19.11 as a potent mechanism for collective redress. The principle serves as a disincentive for multi-party litigants. The principle has given rise to an active After-the-Event insurance market whereby insurers underwrite the risk of having to reimburse the defence fees incurred defending document-heavy, labour-intensive multi-party litigation. Notable examples of non-payment by ATE insurers in recent years suggest that, even with the benefit of ATE policies, claimants can find that they are hung out to dry. A recent example of this is evidenced in the Greene Wood & McLean litigation in which Templeton Insurance unsuccessfully attempted to avoid paying out in the context of the British miners compensation scheme litigation (*Greene Wood McLean LLP (In Administration) v Templeton Insurance Ltd* [2010] EWHC 2679). The prospect of a culture of insurer avoidance adds greater uncertainty to the English legal system's class action climate.

The litigation funding market has also suffered from high profile market exits in recent years. Most prominent among these retreats was the announcement of Allianz Litigation Funding in November 2011 that it was ceasing non-extant European litigation funding operations.

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Judicial and professional attitude: English courts are traditionally conservative in their attitude to multi-party litigation. This is perhaps a more subtle prejudice than one might automatically assume and one with arguably logical foundations. The English legal profession is generally sceptical of multi-party litigation due to the fear that difficult arguments as to causation and loss will be lost in the light of a claim which has a value the sheer scale of which forces the other side into a settlement. Though the English courts have long recognised the benefit of combining proceedings where the parties to the litigation have the 'same interest', examples of failure, such as the infamous *AB v John Wyeth* fiasco (*AB v John Wyeth & Brother* [1997] PIQR P385), are demonstrative of the potential for unmeritorious claims to be brought en masse hidden by otherwise meritorious test claims. Five thousand claimants alleged to have suffered physical affects as a result of taking benzodiazepine tranquilizers. The vast majority of these claims were eventually struck-out by which point some £40 million in expenses and disbursements had been paid out by the Legal Aid Board.

It is also worth noting that the functioning of the English judiciary must have some impact on the approach of the courts to multi-party litigation. Unlike in the US, judges within the English jurisdiction do not generally have a long-term interest in their own case load. That is, they do not have their own cases which will be permanently assigned to their list. This arguably accentuates the inevitable difficulties in consistency of understanding, comprehension and preparation that would in any event arise in proceedings for collective redress.

III. The Innovator Litigation

Brown v Innovator One Plc [2012] EWHC 1321 (in which I acted for one of the 7 Defendants) concerned 555 claimants, four represented defendants and three litigant-in-person defendants. The case concerned a collective investment scheme designed to limit exposure to tax liabilities through investments in the ICT industry. The defendants, who had been involved in establishing and operating the investment schemes, were accused of fraudulent misrepresentation, negligent misrepresentation and breach of trust. No GLO was made and no order as to costs liabilities was made.

The claimants had ATE policies that were insufficient to meet the adverse costs order to which they were subject. The conventional rule has long been that multiple parties who are subject to an adverse costs order should be jointly and severally liable for those costs; in other words they should each be liable to pay the full amount of costs and be left to apportion costs liability as between themselves. Representations were made by the claimants to Hamblen J to the effect that the conventional rule should not apply and instead an approach adopted in *Ward v Guiness Mahon* [1996] 1 WLR 894 should be adopted. This would mean that the

costs liability would be several but not joint; costs would be apportioned equally by the court as between the claimants. Hamblen J refused such an order and decided that the conventional rule applied. Absent a GLO, the feature of this case distinguishing it from *Ward,* there was no presumption in favour of costs being awarded on the basis of several liability in multi-party litigation. This arguably serves as an encouragement to acquiring adequate costs protection in the form of ATE insurance but this in and of itself may not be enough to stimulate the market in class action law suits in the light of the discouraging recent history in the ATE market. If ATE insurance becomes paramount to avoid significant costs liability but the market is plagued by insurer exits and a reluctance to indemnify then Hamblen J's decision could serve as another obstacle to the growth of the English 'class action'.

IV. The Jackson Reforms

As of 1st April 2013 the reforms to civil procedure and costs rules outlined by Jackson in his *Final Report* will take effect. One of the primary aims of the reforms to costs was to force a rebalancing in *inter partes* costs recovery so as to infuse the funding of litigation with a sense of proportion and fairness as between litigants. Given this stated aim it was always inevitable that the Jackson reforms would have an impact upon the evolution of multi-party litigation within the English legal system. One of the benefits of multi-party litigation , as underlined by the Woolf Report, has often been described as the cost-effective aggregation of claims which, when taken individually, may not be economically viable. This question of economic viability has at its core a consideration as to the cost of funding and pursuing litigation. Insofar as the Jackson reforms limit the marginal cost of pursuing a claim, they may well serve to encourage the growth of collective redress in English law.

The Key Provisions

The Jackson reforms have been implemented by the Legal Aid, Sentencing and Punishment of Offenders Act 2012.The reforms are wide-ranging but their key features are discussed below.

(a) Inter Partes recovery

Success fees and ATE insurance premiums will no longer be recoverable inter partes. Sections 44(4) and 46(1) serve to amend section 58 of the Courts and Legal Services Act 1990 to institute this substantial change. In England and Wales litigants can enter into a Conditional Fee Agreement ('CFA') with their legal representatives under which payment would be made only in the event of a 'successful outcome' in the litigation . The CFA has to date entailed legal representatives charging a success fee representing anywhere up to 100% of their base costs which will be due to them in the event of achieving a successful outcome and which serves to recognise their exposure to the risk of loss. Under an agreement entered

into prior to 1st April 2013 this success fee is recoverable from the paying party in the event of a successful outcome. No success fee under an agreement entered into on or after 1st April 2013 can be recovered from the other side due to the LASPO reforms. The success fee must itself be subject to a ceiling expressed as a percentage of damages recovered (section 44(2)).

Prior to the Jackson reforms, CFAs were attractive to the lawyers due to the prospect of securing a windfall success fee. CFAs were made attractive to claimants by the prospect of *inter partes* recovery and the mantra of 'no win no fee'. The gradual elimination of *inter partes* recovery that will result from the LASPO reforms is widely predicted to result in the demise of the CFA as a vehicle for pursuing litigation.

With the end of the recovery of the ATE premium comes further doubt as the attractiveness of ATE insurance. It is conceivable that litigants will not apply for ATE cover and will undertake the risk of bearing losses. This may form part of an analysis which recognises that some sunk costs (in the form of ATE premiums) will have to be borne by the litigant in any event.

A consequence of the end of *inter partes* recovery of the ATE premium may well be greater reliance on Before-the-Event (BTE) insurance cover. This was very much envisaged by Jackson in his recommendations, though there was no plan to make BTE insurance compulsory. Of course an inevitable consequence of greater reliance on BTE insurance will be inflated prices within the BTE market. It may well lead to a bull market in ATE insurance as householders and small businesses seek to protect themselves *ex ante* from exposure to expensive litigation.

(b) Damages-Based Agreements ('DBAs')

One of the most significant reforms to be implemented by LASPO is the widespread provision for contingency fees (section 45). These have traditionally been viewed as anathema to the English law principle that the claimant should be 'made whole' in the event of success in litigation. The new Damages-based agreements will permit a carve-out for the lawyers from any future damages recovered by the claimant. Such agreements will be subject to a cap expressed as a percentage of recovered damages (25% in personal injury cases, 35% - as currently accepted – in employment cases and 50% in all other, including commercial, cases).A recommendation in favour of DBAs was made by the Civil Justice Council Working Party in August 2012.

Under DBAs costs can be recovered from the other side 'on the conventional basis' meaning that costs will be assessed by reference to a reasonable hourly rate and a reasonable amount of time spent undertaking the work (referred to by Jackson LJ as the 'Ontario model' for DBAs).

(c) Offers to Settle

Section 55 LASPO provides for payment of an additional sum in circumstances where the claimant has made an offer to settle and obtained judgment at least as advantageous as that offer.

(d) Referral Fees

An area of noticeable growth over the past two decades has been the increased consciousness of litigation as a means of redress due to the existence of claims management companies. These entities have organised claimant activity on behalf of law firms across England and Wales and have been paid a fee for their client referrals.

Jackson was very firmly of the view that these fees represented a deadweight social loss and, in implementing his recommendations, LASPO bans such fees under section 56. Jackson described these fees as 'abhorrent' and 'offensive' and underlined that they contributed to the high costs of personal injury litigation. These high costs further contributed to the high premiums paid by the consumer in the BTE insurance markets.

The end to these fees is significant within the context of collective redress. One of the important characteristics of an opt-in system of litigation is undoubtedly the need to advertise the existence of a claim. In the absence of referral fees claims management companies have no profit incentive in the market place. In the absence of claims management companies this publicising function may well be inhibited.

(e) Litigation funding

In November 2011 the Association of Litigation Funders of England and Wales published a Code of Conduct on Litigation Funding. This was designed to address the concerns that may arise from third party funding of litigation. Jackson had commented in his report that third party funding could provide a significant contribution to access to justice within the legal system and could also serve as a sieve in respect of unmeritorious claims by bringing independent commercial judgment to bear upon the assessment of the viability of a claim.

The code will require funders to

(i) Take reasonable steps to ensure the litigant has received independent legal advice on the funding agreement;

(ii) Satisfy capital adequacy requirements; and

(iii) State whether and how it can terminate the funding agreement in the light of merits, commercial viability of the claim or breach of the agreement.

Under the Code the funder will not have a discretionary right to terminate and, save for the case of breach, the funder remains liable for all accrued funding obligations. There is provision for a binding QC opinion where a dispute arises as between the funder and the litigant.

There remains some confusion as to the exact scope of the rules on champerty and maintenance which remain, in theory at least, embedded within the English legal system. The LASPO reforms did not repeal section 14(2) of the Criminal law Act 1967 which preserves the common law principle to the effect that champertous contracts are void on grounds of public policy.

The expansion of third party litigation funding is potentially limited by rules on champerty and maintenance and yet its virtues are explicitly recognised by Jackson. It is arguable that compliance with the Code may reinforce the legitimacy of third party funding and that over time the common law will give way entirely to practical demands. That litigation funding has experienced a boom in recent years, even in the light of significant market exits as mentioned above, will only be to the benefit of the development of an effective means of collective redress. Litigation funding is expected to take on greater importance as the CFA becomes less attractive to litigants and lawyers alike.

(f) QOCS

In personal injury cases providing the claimant conducts his case properly he will not have to pay the defendant's costs if his claim fails (CPR 44.13-44.17 and PD44 Section II). This will be known as 'Qualified One-way Costs Shifting (or 'QOCS'). It is one-way because it does not apply to the defendant. It is an inherently and unashamedly claimant-friendly initiative. There will be no means-testing of claimants and, as a consequence, QOCS will be available in all personal injury cases. QOCS protection will not apply where the claimant fails to beat the defendant's Part 36 offer in which instance the costs payable by the claimant will be capped at the value of damages recovered. Of further advantage to the claimant is the fact that QOCS protection will apply even to discontinued claims and appeal proceedings. QOCS protection is dependent upon the claim being conducted properly. The regime envisages that costs protection will be lost in the event that the claim is fraudulent, struck-out for disclosing no reasonable cause of action or an abuse of process. It is also understood that where part of a claim is being brought on behalf of another party QOCS protection may be lost. This might be of particular relevance in the context of credit hire or subrogated claims. A subrogation insurer would not be permitted to attach its claim to a low value personal injury claim and

acquire the QOCS protection from an adverse costs order. The courts will in such instances be able to make a direct costs order against the third party beneficiary (CPR 44 PD 12.5).

(g) *Simmons v Castle*

In consort with his recommendation that English civil procedure recognise DBAs beyond employment cases Jackson urged acceptance of a 10% increase in general damages across the board. The Government decided that it was not necessary to statutorily implement this objective as it was achieved by judicial action in the Court of Appeal. In *Simmons v Castle* [2012] EWCA Civ 1288 the Court determined that there was to be a 10% increase in general damages in all civil claims for (i) pain and suffering, (ii) loss of amenity, (iii) physical inconvenience and discomfort, (iv) social discredit, (v) mental distress, and (iv) loss of society of relatives with effect from 1st April 2013 unless the claimant was conducting litigation on the basis of a CFA and the CFA was entered into prior to 1st April 2013 (i.e. unless the claimant falls within s. 44(6) of LASPO).

This may well mean that, as of 1st April 2013, litigants not falling within s. 44(6) LASPO will benefit from a Jackson-inspired windfall. The increased value of these claims will inevitably form part of the assessment of the risk of pursuing multi-party litigation. Of course the counter argument may well be that the 10% increase is designed to reflect the fact that costs may now be paid out of the damages received by the claimant. The 'uplift' may simply restore the claimant to the status quo, as recognition by the courts that to do otherwise would be 'little short of a breach of faith' by the judiciary (per Lord Judge, paragraph 16) in the light of DBAs.

(h) A New Approach to Proportionality

The new CPR 44.3(5), applying to cases issued after 1st April 2013, stipulates that:

"Costs incurred are proportionate if they bear a reasonable relationship to –

(a) The sums in issue in the proceedings;
(b) The value of any non-monetary relief in issue in the proceedings;
(c) The complexity of the litigation;
(d) Any additional work generated by the conduct of the paying party; and
(e) Any wider factors involved in the proceedings, such as reputation or public importance."

The rule is accompanied by a Practice Direction (PD 44, paragraph 6.2) (contrary to the wishes of Jackson LJ) which provides that a court will disallow any costs which it considers

to have been disproportionately incurred or to be disproportionate in amount or where there is doubt as to their proportionality.

The courts will now be required to assess costs by applying the test of reasonableness and then to consider whether the total figure obtained is proportionate. In the event that it is not they must proceed to make the appropriate reduction regardless of whether the costs were reasonably incurred and reasonable in amount.

The future for recovery of costs in litigation under this new test of proportionality remains uncertain. The development of the test will be achieved on a case-by-case basis. Nevertheless the prospect of greater judicial restriction on the financial impact of the 'loser pays principle' may well encourage multi-party actions and dampen the effects of the 'Innovator Principle' as to joint and several liability. Depending on the judicial inclination towards controlling the proportionality of legal costs *ex post facto*, the risks of litigation may well be more proportionately valued by claimants *ex ante*.

(f) Costs Management

A new costs budgeting regime will apply to all multi-track cases (except for the Admiralty and Commercial Courts), unless the court exercises its discretionary power to order otherwise. CPR r 3.12 to 3.18 will have effect from 1st April 2013 and will require detailed budgets to be filed by the parties within 28 days of the defence having being filed and signed by a 'senior legal representative'. The court will then make a Cost Management Order ('CMO') serving to fix those budgets for the purposes of future costs at a level which it approves. In the Sixteenth Implementation lecture Ramsey J suggests that there is a 'presumption' in favour of doing so, though the court can decide not to fix such costs. If the parties agree their budgets between them then the court can simply record the extent of agreement (PD3E, paragraph 2.3).

In the event that a budget is not filed the court will deem the budget to be limited to court fees only, unless it orders otherwise.

In the event that the parties wish to revise their budgets they may need to gain court approval if they are to recover any additional costs incurred over and above the ceiling identified in the CMO. Though there is an exception in instances of unforeseen interim applications (PD3E, paragraph 2.9), this will entail an inevitable uncertainty as to what constitutes a reasonably foreseeable application.

Where a CMO has not been made but budgets have nonetheless been filed costs will still be assessed by reference to those budgets. Where the costs claim exceeds the budget by more than 20% and either party has (reasonably) relied on the budget the court will be permitted to

disallow the excess costs incurred even if that excess is considered reasonable and proportionate (CPR43 PD 6).

The rule prima facie limiting costs to those budgeted will not apply where costs are assessed on the indemnity basis. This means that where the unsuccessful party has behaved unreasonably it may be subject to costs in excess of those budgeted.

It is possible that CMOs, in achieving the objective of restraining unreasonable outlays, might serve to place downward pressure on the value of the risk for litigants pursuing multi-party actions. Nonetheless it is not inconceivable in document-heavy multi-party litigation that CMOs become a constraint upon the pursuit of costly litigation which is inevitably full of surprises. The English costs system, in cases where CMOs apply, is likely to become front-loaded in the sense that a great deal of foresight will be necessary prior to the first cost management conference to appropriately structure a budget. This front-loading will inevitably increase the risk that costs will be irrecoverable at the end of the action where revisions have not been approved but have been necessarily made.

V. What is the Likely Effect of Jackson: Coming of Age.

(a) The Funding Gap

As litigants are expected to recoil from the unattractive proposition of paying irrecoverable ATE premiums and bearing the cost of success fees, an important question is being asked by English lawyers to which, as yet, there can be no definitive answer: how will the funding gap be filled? Some have posited that BTE cover will fill that gap but there are two unknowns in this respect: (i) will householders and small businesses respond positively to rising BTE premiums?; (ii) will BTE providers find a profitable price for the assumption of such risk in the marketplace? These unknowns will determine whether the gap is filled. There is then the further question for which an answer will come only in time: will litigants take the risk of issuing claims in the absence of ATE cover if they are unprepared to commit to sunk costs in the litigation process? All of these uncertainties are compounded in the context of multi-party litigation. This is especially so in a legal system which at present retains the principle that unsuccessful litigants will be jointly and severally liability for costs.

(b) DBAs

If the absence of contingency fees serves as an impediment to funding actions for collective redress then DBAs can only encourage litigation. The value of litigation risk is controlled by the understanding that the legal representatives will receive a carve-out from the damages awarded (if any); in essence the claim pays for itself. Assuming that DBAs become the norm and that the *inter partes* funding arrangements are symmetrical the hypothetical risk averse

claimant will be more willing to enter into multi-party litigation where the risk of loss is entirely borne by the lawyers.

(c) QOCS

The implementation of QOCS has at present been restricted to personal injury claims. This may well have a significant impact upon the pursuit of multi-party actions as the risk of exposure to adverse costs is significantly reduced, only arising in the event of unreasonable behaviour during the process of litigation. The primary rationale for qualified one way costs shifting is the asymmetry of the relationship that exists between personal injury claimants and their conventional defendants. It was understood that the defendant would ordinarily have the benefit of insurance whereas the injured party would not. QOCS served to recognise this imbalance of financial resources. It is worth querying whether, if successful, QOCS will be extended to other areas of litigation in which a similar asymmetry in the litigant relationship exists. In particular my own field of professional liability more often than not exhibits this feature of comparative inequality of resources. Professional liability defendants more often than not have the benefit of insurance protecting them from adverse costs liability. If QOCS were extended beyond its, currently carefully defined, boundary of personal injury litigation it may well encourage a boom in claimant activity.

(d) Continuing Impediments to multi-party litigation

In spite of the possibility of a maturing market for litigation funding in the light of the Jackson reforms there remain significant impediments to the development of a culture of collective redress. This includes in-built judicial concerns about the potential for using collective action as a vehicle for dishonest purposes. It also includes the remaining fact that there is no FRCP 23 equivalent in English civil procedure and, as identified above, all attempts to mutate the existing mechanisms for collective redress have (rightly or wrongly) faced insurmountable obstacles.

VI. Will the UK Lose Out?

London has acquired an increased consciousness of jurisdictional competition in recent years. In its determined attempt to present itself as a world leader in civil dispute resolution it would appear to have neglected the opportunities that present themselves in the field of collective redress. If reforms to the English costs regime are not apt to stimulate claimant activity in this respect then it may well be that the jurisdictional competition will be won by others.

(a) England: America's New Frontier

In *Morrison v National Australia Bank* U.S. 130 S. Ct. 2869 (201) the US Supreme Court determined that federal securities laws apply to investor claims providing that the purchase was on a US exchange or within the US but do not apply to investor claims arising from transactions on foreign exchanges or abroad. Prior to this decision the test of the lower US courts had been the classic 'conduct or effect' test used to establish extraterritorial jurisdiction. As a consequence US litigators are seeking out non-US claimants who have entered into investments on a US exchange. This attempt at market penetration has led to the development of portfolio monitoring services offered by US law firms, particularly in relation to pension funds. American law firms will monitor the portfolios of publicly-traded securities on behalf of pension funds and asset managers. Such firms will often provide this service free of charge. This ensures that where the apparent value of a security in which the fund has invested has been inflated by misconduct the losses to which the fund is exposed can be identified speedily and the options for litigation can be explored. The growth of portfolio monitoring indicates that US firms have seen an opportunity to use US securities legislation to target UK investors.

(b) <u>The Netherlands: Our closest comparator</u>

The Netherlands retains no class action procedure but has been recognised as a jurisdiction evincing potential for class actions. Its Collective Settlement of Mass Claims Act 2005 permits a settling defendant to negotiate a contract which binds a 'foundation' formed of investors who have suffered loss. The binding effect of the contract extends throughout Europe.

Once court approval of the settlement has been granted investors who have chosen not to join the foundation or file their own proceedings are barred from filing any such proceedings.

The Act was first invoked in the context of the Royal Dutch Shell case in which a number of separate resolutions were proposed by different injured parties. The division arose between those who had purchased their securities on a US exchange and those who had purchased on the London or Amsterdam exchanges.

There was some uncertainty as to whether the 2005 Act would apply in circumstances where a Dutch exchange was not involved. However, in *Converium Holdings AG* the Netherlands Court of Appeal approved a settlement for $58m despite the fact that the Dutch investors were connected to less than 2% of Converium's shares.

Though there is great benefit to such a streamlined regime for collective redress it is worth noting that in the *Converium Holdings AG* dispute the settlement provided per share a quarter of the compensation less than was recouped in the equivalent US settlement. The relevant US

class action achieved a settlement of $85m for those who had purchased securities on the US exchange.

VII. Continental Drift

In June 2013, the EU Commission issued a Recommendation on Common Principles for Collective Redress Mechanisms in Member States. The Recommendation is not binding (see Article 288 TEU) but articulates the Commission's political vision for harmonising norms for collective redress arising out of 'mass harm situations'. It was published at the same time as a draft Directive concerning antitrust damages which notably omitted any substantive reference to the need for collective redress but which produced claimant-friendly proposals in the field of competition law which might, in tandem with the Recommendation, serve to encourage multi-party claims. These measures include joint and several liability in antitrust cases, a general presumption of loss in cases of cartel infringement and benevolent limitation periods of at least five years from the date on which a continuous or repeated infringement ceases.

A clear policy tension is highlighted by the Commission which the Recommendation seeks to address. This is the tension between compensating multiple parties for losses arising from a single cause and ensuring that the more 'frivolous' litigation associated with the US class action is avoided (See also '*Towards a coherent European approach to collective redress*', European Parliament Resolution of 2 February 2012 (2011/2089(INI)). The recital to the Recommendation refers to the facilitation of 'access to justice' whilst 'taking into account the legal traditions of the Member States and safeguarding against abuse.'

The resolution of this tension has resulted in the following policy outcomes:

Admissibility Criteria: Member States would provide for a front-loaded mechanism for ensuring that conditions for collective action are met at an early stage. To the extent that these conditions are not met or in cases which are 'manifestly unfounded' such collective actions should be discontinued.

Designated Representatives: It is envisaged that Member States will establish eligibility criteria for designated entities to bring representative actions which would include both (i) representative capacity (financial, professional, logistical) and (ii) that they are of a non-profit character.

Costs: It is recommended that the 'loser pays' principle be adopted throughout Member States.

Funding: US-style contingency fees have been ruled-out and any harmonising measures would require claimants to disclose their funding arrangements at the outset of the proceedings.

Opt-in: In its advocacy of an opt-in procedure for class actions, the Recommendation adopts another feature of the Anglo-Saxon model. But at the same time the UK Government has directly challenged the EU approach in a field of competence cherished by European policy makers: competition law (see the Draft Consumer Bill 2013 below).

Collective ADR: The Recommendation further articulates the need for an effective means for alternative dispute resolution within the context of collective redress.

Punitive Damages: The EU Commission warns against such damages and confirms an EU vision of collective redress that is firmly informed by compensatory justice. The idea that punitive or exemplary justice has no place in the field of multi-party actions is something upon which the UK and EU appear to agree (an amendment to Section 47C CA 1998 by virtue of the 2013 Bill would prohibit exemplary damages in 'collective proceedings').

The Recommendation is indicative of divergence between the US and EU. The Commission appears to recognise the need for effective mechanisms for collective redress whilst steering clear of a full US contingency/opt-out model. Instead, it appears to give voice to the conventionally English fear of encouraging dubious claims, litigious blackmail and the costs to defendants and (potentially) consumers alike. The Recommendation's skeletal pro forma for collective redress is one which puts up greater resistance to multiple claimant actions than that which has been maintained in the US.

Insofar as this represents a drift towards the English model of collective redress (however immature) one might consider that it should be welcomed as a step in the right direction. Given that it is only a Recommendation and does not oblige Member States to follow through with legislation, perhaps it will remain a vision articulated but not realised. Objectives for civil justice will, of course, remain firmly grounded in the advancement of the internal market.

There is, however, a further side to the story: just when the EU sees the need for collective political action, the UK Parliament moves the frame of reference…

The UK Draft Consumer Rights Bill 2013:

- Makes amendments to the Competition Act 1998 which permit a vehicle labelled 'opt-out collective proceedings' before the Competition Appeal Tribunal, (s. 47B CA 1998 as amended by Schedule 7, Part 1, para 5 of the Bill).

- Damages awarded in those proceedings to the successful claimants will be distributed to the identified representative pending claims to be made on the resulting fund by interested parties (s. 47C as amended by Schedule 7, Part 1, para 6 of the Bill).

- Provides for the facilitation of collective settlements. (s. 49A as amended by Schedule 7, Part 1, para 10).

A similar approach can now be seen by the more aggressive stance taken by the regulators (particularly the former FSA, now FCA) in imposing remedial schemes or collective settlements on errant financial institutions (PPI, LIBOR, CPP etc).

The bottom line is that reforms are afoot in both the UK and the EU. It is conceivable that the UK could potentially become the 'bridge' between the US and the EU by advancing hybrid regimes for collective redress.

VIII. Conclusion: The English Class Action?

It has recently been suggested by a senior English judge that the legal system of England and Wales has much to contribute to 'UK Plc'. Vos J has publicly recommended that reforms be structured around a consciousness of this fact (*KPMG Lecture*, 18th October 2011). Even taking into account the Coalitions' 2013 Draft Consumer Bill, if the Jackson reforms cannot encourage the right overarching climate to nurture effective routes for collective redress and other legal systems continue to provide convenient means for facilitating multi-party litigation then it is quite conceivable that jurisdictional forum shopping will increasingly favour the legal professions in the US or Netherlands. One wonders whether, when the oligarchs have left London, the Rolls building might be empty. Perhaps there are lessons to be learnt from our American and Dutch counterparts. Whether or not English lawyers will be clambering to learn them will depend on the outcome of the Jackson experiment.