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PERSPECTIVES

THE CASE FOR CLASS ACTION REFORM IN THE UK

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Access to justice for individuals injured by substantial corporates is all but non-existent in the UK. For a country whose systems of law were once the admiration of the world, it is embarrassing to have to make that statement. This article examines why this situation has arisen and proposes a solution.

It often happens that torts committed by corporate defendants cause modest loss to individuals but that, when the losses of multiple individuals are aggregated, the total loss is very large. The US, Canada and some of the European civil law countries have developed forms of 'class action' to deal with this situation. In the UK an attempt has recently been made to adjust the law in order to

achieve the same result; but the introduction of the procedure failed to take into account the features of UK litigation that are different from other legal systems in which class actions work.

In the US, for example, claimant lawyers are at the heart of the viability of class actions. Lawyers develop claims on behalf of classes of individual or consumer claimants and drive the claims forward to settlement or trial at their own risk. Their reward is a contingency fee comprising an agreed percentage of the settlement or damages. Other than in rare and exceptional cases, there is no adverse costs risk. Claimant lawyers do not need to be concerned with the legal costs incurred by the defendants.



Contrast this with the position in the UK. Here class actions (collective proceedings) are permitted only in one type of claim – competition law claims. Certain claims can be brought as ‘representative proceedings’ where each claimant has the ‘same interest’. However, that procedure is not generally capable of being used to obtain substantial compensation for the commission of torts because, in general, different loss will be suffered by different claimants. For a good example of how restrictive representative proceedings are, see *Lloyd v Google LLC* (2019).

Damages based agreements (DBAs), the UK equivalent of the US contingency fee agreement, are

expressly unenforceable in collective proceedings. Finally, the adverse costs rule means that the class of claimants is exposed, if the claim or any application made during the proceedings is unsuccessful, to an award of costs in favour of the defendant of an amount that cannot be known at the outset.

There are four separate weaknesses of the UK class action system as outlined below.

First, illogically, no consumer or other claims can be brought as class actions other than competition law claims even though it is obvious that, in general, the low level of individual damages awards will make all such claims unviable without collective action.

There can be no rational basis for denying class actions in any type of claim where they could be economically viable.

Second, class actions are not generally devised by claimants – they are organised by claimant lawyers or claims managers. They are hugely time consuming and expensive. No lawyer is going to take on such claims unless adequate compensation is available. Since claimants are not in a position to cover legal fees or disbursements, claimant lawyers are obliged to work at risk for their fees. The returns available under conditional fee agreements (CFAs) are inadequate for claims of this magnitude. The risks involved in these substantial claims cannot adequately be offset by the promise of a success fee of up to 100 percent of a lawyer's base costs. Legislating to make DBAs unenforceable in class actions therefore removes the only viable way that UK class actions could be financed. A review of Hansard prior to the limited introduction of class actions, by amendment of the Competition Act 1998 pursuant to the Consumer Rights Act 2015, reveals that the reason for the unenforceability of DBAs was the fear of certain parliamentarians that DBA funded class actions might create a US-style 'litigation culture'. If such a culture truly exists, would it be worse to replicate it in the UK or to leave individual or consumer claimants with no remedy at all?

Third, a way around this would be for claimant lawyers to obtain funding from litigation funders. However, with limited exceptions, class actions are generally so substantial and the proceedings likely to be so lengthy that litigation funders will not take the risk of so much capital being tied up for so long.

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There are also so many commercial connections between litigation funders and the financial services sector that class actions against the entire financial services sector will be unlikely to find funding.

Fourth, even if litigation funding is an option, the need to obtain insurance cover, so-called 'after the event' (ATE) insurance to protect the claimant class against the adverse costs risk, hugely increases the cost of the funding. In *UK Trucks Claim Limited v Fiat Chrysler Automobiles NV and others* (2019), in the context of collective proceedings, the Competition Appeal Tribunal noted that each claimant group would have ATE cover of £20m against the adverse

costs risks of the defendants and additional (rule 39) defendants. It also did not rule out the possibility of amending its order at a later stage of the proceeding to require the levels of ATE insurance to be increased. These adverse costs risks are very real, both for the claimants in opt-in claims and for the funder. See, for example, *Sharp and others v Blank and others* (2020). Further, class actions are often so substantial that adequate ATE insurance cannot be purchased.

Reform is required if individuals or consumers are to be given access to justice in respect of wrongs committed by substantial corporate defendants. To begin, the categories of collective proceedings should be widened to every type of consumer claim – not just competition claims. That reform ought to be uncontroversial.

Furthermore, the unenforceability of DBAs in collective proceedings should be revoked. Claimant lawyers should be incentivised to take risk in order to find ways of bringing meritorious claims on behalf of classes of individual claimants. As the law stands, they are disincentivised.

Most importantly, the adverse costs rule needs to be abandoned in collective proceedings. The adverse costs risk prevents claimant lawyers from initiating class actions without buying substantial amounts of ATE insurance for which there is a diminishing market. Claimant law firms are not generally structured in such a way as to enable them to afford

to pay premiums that could involve an up-front cash element of £5m or more per claim.

Legislating to remove the adverse costs risk in the case of class actions would remove the need to obtain ATE insurance and would mean that, just as currently happens in North America, the risks involved in bringing class actions could be borne by claimant lawyers who have the expertise and the appetite to take those risks, with disbursements-only funding provided by commercial funders. It would also substantially reduce the dependence of claimant classes on litigation funders who are in any event unable or unwilling to fund many of the larger claims.

Of course, it would be unfair to remove the adverse costs risk from the claimant class without simultaneously removing it from the defendants. In that way, access to justice is widened for those who need it without perpetrating any injustice on UK Plc.

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