



The Law Society

Legal Breakfast summary

Collective redress: justice for all or free-for-all?

June 2008

supporting
solicitors

This is a summary of the discussions at the second in a series of Law Society Legal Breakfasts: '*Collective redress: justice for all or free-for-all?*'. Speakers were Richard Wiseman, John Wright and Philip Cullum. Their remarks were followed by a discussion with business leaders from city firms, potential investors and business partners and policy makers.

Chairing the breakfast, Andrew Holroyd, President of the Law Society, opened the event by outlining that while collective redress is currently a relatively niche issue in legal circles, it is something the Law Society has examined closely during and since the passage of the Competition Act. As well as raising questions of access to justice for consumers and businesses and of the optimum regulatory regime for business, it is also a potential growth area for the law firms – something of trigger interest to potential investors in the new legal landscape created by the Legal Services Act.

Richard Wiseman, Chief Ethics and Compliance Officer at Shell International Limited, began by stating that he considered one of the interesting features of the UK experience of collective redress was that only a relatively small proportion of cases have succeeded, citing in particular the pharmaceutical sector.

He divided those calling for a collective redress system into two categories: those doing so for entirely legitimate reasons such as consumer groups and individual member states of the EU; and those doing so for self-interest, such as the US plaintiffs' bar.

Posing the question: *why do we need collective redress?* Richard said the problem was not that individuals do not have rights or remedies, but that enforcement is disproportionately expensive. His main concern was that England and Wales might attract tort actions from across the world. He attributed the perniciousness of the US system to the existence of contingency fees, damages awarded by juries and the fact that the loser pays all. He believed the answer for England and Wales was simple: regulators should be given the power to award compensation, and should be encouraged to do so.

John Wright, National Chairman of the Federation of Small Business, began by underlining that with two-thirds of FSB members operating on a turnover of under £250,000 pounds it is impossible for them to tackle large corporations alone. As costs are the determining factor for small businesses participating in a collective action the FSB welcomes the extension of the availability of representative actions. A requirement for small businesses to have to opt-in was therefore a concern, and the FSB favoured a collective redress model in which claims could be brought on behalf of consumers or small businesses.

John welcomed steps by the Office of Fair Trading to ensure representative actions are different to class actions; urged further consideration of how the proceeds from a successful representative action could be managed, if not wholly distributed to individual consumers or small businesses and welcomed the OFT's recommendation that would ensure funding for meritorious cases that would not otherwise have been brought. At a European level, the FSB welcomed the EU's view that having a

functioning cross-border collective redress mechanism is an important step in the completion of a single market, and called for this to be achieved as soon as possible.

Philip Cullum, acting CEO of the National Consumer Council, said the NCC wanted to create an inclusive collective redress procedure to maximise access to justice and give the fullest possible deterrent to illegal activity – something that business should not fear.

His starting point was that the law should reflect the realities of life where people experience common problems and should be able to redress them collectively, not a fictional world where all problems are individual.

He cited a host of recent victories for the consumer such as the National Union of Students campaign on Facebook against HSBC's policy on student accounts; vegetarians campaigning against putting rennet in Mars bars; and the website MoneySavingExpert.com, from which five million letters were downloaded to send to banks about overdraft charges – all of which demonstrated different forms of collective action.

The NCC believed, however, that routes in the civil justice system for consumers to pursue redress are insufficient. Disputes often involve very small amounts of money. Consumers may therefore know they have a right to redress, but choose not to take it due to the disproportionate amount of time it takes to pursue it. Businesses know this and some choose to exploit it. By enabling consumers to join forces, collective redress helps to mitigate this imbalance of power.

Taking up Richard Wiseman's point about the role of regulators, Philip commented that this would make them judge, jury and executioner, outlining three concerns: first, powers in the Regulatory Enforcement and Sanctions Bill are optional and there is no guarantee regulators would seek them; second, regulators are often quite slow at wanting to use the powers they have; and third, regulators do not have unlimited resources and may therefore be unable to pursue every case where action is required.

Much of the following discussion centred on the efficacy of collective redress. The points regarding enforcement agencies' very limited resources and how it could shift their work were repeated. In response, Richard Wiseman made clear that he did not envisage that this would be undertaken on existing budgets.

Different opinions were expressed as to the place of collective redress amongst the whole panoply of means of redress, such as mediation and alternative dispute resolution. Some argued collective redress was a powerful means to remedy the imbalance of power between both consumers and corporations and small businesses and corporations, and others who believed it is unnecessary to create a new means to litigate. Advocates of collective redress underlined that no such system can operate without lawyers, and gave the example of the evolution of employment tribunals, which were intended to be simple and accessible but have developed into a complex area of law.

It was noted that Australia and Canada both have opt-out systems without the perceived negative features of the US and suggested that on closer inspection the opt-out systems at some point becomes opt-in if a claim is to be made. On this basis there was no reason for the UK to not develop a system that extends access to justice without the associated demerits of the US system.

A further point of contention in relation to opt-out systems was the creation of a *cy-pres* regime, and the distribution of compensation in cases where individual claimants were not identified. Notwithstanding the fact that this would require primary legislation, what would be the destination of any unclaimed *cy-pres* funds?

The issue of the balance between claimants and defendants was explored in greater detail in relation to the role of the Civil Justice Council. It was observed that rigid certification criteria might need to be in place before actions could be brought collectively on an opt-out basis.