HERBERT SMITH FREEHILLS

COVID-19: PRESSURE POINTS: IMPACT OF COVID-19 ON CLASS ACTIONS (UK)

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Legal Briefings – By **Alan Watts, Natasha Johnson, Neil Blake, Richard Mendoza, Olivia Odubanjo and Maura McIntosh**

As well as the human cost of COVID-19, the pandemic has led to unprecedented disruption to both daily life and business activity on a global scale. With seemingly no industry or sector immune from the commercial and economic effects of the outbreak, businesses are facing huge challenges on a day-to-day basis.

First and foremost is the need to safeguard the health and safety of employees and customers. Added to that are the struggles businesses are facing to ensure compliance with rapidly evolving government regulation, to meet contractual obligations despite what may be significant hurdles, and to manage financial resilience in order to secure the ongoing viability of the business for the benefit of all stakeholders.

Against that background, the possibility of COVID-19 related class actions being brought against the company may seem a dim and distant threat, and the identification of potential claims and assessment of litigation risk may not be an immediate priority for most businesses. But it is clear that the current landscape provides a fertile environment for class actions – an area that has been growing in prominence in the UK courts in recent years in any event. Inevitably, this is something that claimant firms and litigation funders (who are often the instigators of class actions) will be looking at with a keen eye.

So, to assist with horizon scanning for businesses that are ready to consider these issues, we highlight below some observations on how COVID-19 is likely to affect the UK class action landscape.

SOME POTENTIAL SOURCES OF COVID-19 RELATED CLAIMS

These are some of the areas where we expect claims may arise.

Employee claims

While many businesses have now closed their doors in the wake of the lockdown, with employees either "furloughed" or on other leave arrangements, many others continue to operate with employees on site. This includes not only those retail businesses designated as providing essential services and therefore able to remain open to the public (eg food retailers, pharmacies, petrol stations etc), but also those operating online where physical employee presence (eg at warehouses and distribution facilities) may still be unavoidable.

Employers are of course under a duty to ensure safe working conditions for their staff (with specific duties in respect of any disabled or pregnant staff), and most businesses will be doing all they can to meet this obligation. But where there are failures, so that employees are required to work in close quarters and/or with insufficient protection, for example, the risk of claims is obvious. And given that many of these issues will be common to groups of employees in a particular role or business unit, there is the potential for class actions to be brought.

Even if a business does not have employees on site, that does not put an end to the risk of claims. If employees are furloughed, for example, employers will need to be mindful of anti-discrimination legislation in putting such arrangements in place. In addition, where employers make staff redundant – or seek to require them to alter their working hours, take unpaid leave or accept reduced pay, with the alternative being to risk losing their employment – any failings in the employer's consultation processes and decision-making (in particular, where collective consultation duties apply) could well lead to claims (again, potentially on grounds of discrimination, or for example for stress at work, breach of contract, unlawful deductions from wages or unfair dismissal (whether actual or constructive)). Where such failings are widespread within the business, these may ground an employee group action.

This may be more likely in a unionised business, if the union is put under pressure from its members to fund such collective employment claims or where the employee representatives are able to bring certain claims (for example, for failure to comply with collective consultation obligations) on behalf of affected employees directly. However, often trade unions may not want to bring such claims (because they do not want to damage the ongoing relationship between the employer and the union). In the absence of union support, claimant law firms (acting on a "no win no fee" basis) may approach employees directly and implement mass marketing campaigns to recruit claimants together in one action (as has been seen with the current mass equal pay litigation affecting several retail businesses in the UK).

(For more information on employment issues related to COVID-19, see our briefing on key issuers for UK employers, here.)

Supply-chain issues (BHR / ESG)

The current crisis is also giving rise to issues across the supply chain, including in relation to business and human rights (BHR) and environmental, social and governance (ESG) matters.

Given the current logistical and financial pressures many are facing, businesses at all levels of the supply chain are looking at their capacity to deliver on contractual obligations, and may be considering potential routes to suspend performance or terminate the contract (see here our post on the extent to which COVID-19 will be a valid basis for terminating contracts). Whether this gives rise to the cancellation of orders or impacts the timing of payment, supply chain disruption inevitably ensues.

The consequences of that disruption are being felt particularly acutely by suppliers in developing markets, where governmental support for businesses and their employees may be minimal. For example, garment factories in developing economies in South Asia have been greatly affected by retailer order cancellations.

How businesses treat their stakeholders and supply chain partners will be critical to the future assessment of their response to the COVID-19 crisis and to their claims to good corporate citizenship generally. Where there are failings, close attention is likely to be paid to public statements made by the relevant company (or other members of its corporate group) on BHR and ESG issues, with potential arguments that the company has thereby assumed obligations to those in the relevant supply chain or others affected by alleged failings. Again, the potential for class actions is obvious.

Privacy and cyber and data security issues

The very fact of a significant proportion of the workforce now working from home – many using personal devices and networks which may not be secure and operating outside of the direct supervision of their employers – inevitably increases the risk of cyber and data security incidents, including personal data breaches and, by extension, the potential for group litigation arising out of any such incidents. Cyber security incidents which affect the integrity of information or lead to information not being available may result in litigation. Financial services regulators, for example, are expecting firms to be able to deliver operational resilience in their important business services despite disruption. Customers may pursue firms and firms, in turn, may pursue those in the supply chain that are responsible for incidents.

Separately, with governments and public authorities increasingly turning to technology and data in their efforts to understand and contain the spread of the virus (including by using data to undertake large scale monitoring of individuals), it is easy to foresee claims arising, relating to potential misuse of individuals' private information. Individuals' privacy rights will have to be balanced carefully against public health needs. A move to app-based symptom reporting and contact tracing involving private sector commercial organisations/developers – as has been widely reported and as has occurred in other jurisdictions – may be beneficial but is also vulnerable to misuse. Group claims (whether against relevant public bodies or those concerned with delivery of the relevant technology) are therefore possible.

We have written previously on the data privacy and cyber issues that organisations should be considering as they adapt to the COVID-19 crisis, as well as government use of data in response to the current crisis: see here, here and here.

Competition issues

The pandemic has generated high levels of demand for certain products, such as hand sanitiser and surgical face masks, and businesses will need to ensure they are not falling foul of relevant competition rules. There are examples already of investigations into unfair pricing in Italy and France, with authorities from the latter imposing price controls on hand sanitiser and taking over the production of protective face masks.

The UK's Competition and Markets Authority has recently issued an open letter warning firms (in the pharmaceutical and food and drink sectors) against exploiting COVID-19 by inflating the prices of high demand products. Businesses found to be practicing anti-competitive behaviour at this time may run the risk of class actions pursued by or on behalf of affected consumers.

Unlike most other areas where businesses may face class actions, competition claims have the added dimension that claims may be brought on an "opt-out" basis, subject to approval by the Competition Appeal Tribunal, under a procedure introduced in 2015. This means that a claim can be issued on behalf of all affected claimants, without the need for individuals to come forward or be identified in the claim – in contrast to the group litigation order procedure used for other types of action, where individual claimants bring claims which are then managed together under the umbrella of the group litigation order. Where the green light is given to an opt-out claim, it is much easier to get the action off the ground – particularly where a large number of consumers has been affected but individual losses may be small.

Securities class actions

Given the volatility in the markets that COVID-19 has prompted, and the associated impact on the oil price and uncertainty as to the future global economic outlook, we have entered a period of increased litigation risk for companies making public statements. Companies will be reluctant to make forecasts to the market in the current climate, where they can avoid it. We have already seen FTSE 100 companies withdrawing forward-looking financial guidance, in order to limit litigation risk.

Companies will need to consider carefully whether, for ongoing transactions, a supplementary prospectus is required because COVID-19 has introduced significant new factors or rendered information in an original prospectus inaccurate. COVID-19 has shown that some disclosure requirements lack the flexibility to enable companies to represent their anticipated future prospects fairly and accurately in light of the current uncertainty. We are also likely to see increasing numbers of third party professionals who are nervous about providing, or are unwilling to provide, companies with support for disclosures, knowing that their work and statements will be relied upon, for fear of themselves incurring liability.

It remains to be seen whether, as a result of lobbying or otherwise, any additional safe harbours or protections will be introduced by legislation or changes to regulatory rules and guidance, in order to increase the flexibility of the disclosure regimes. Subject to such measures, there is clearly an increased risk of securities class actions arising out of the pandemic.

Public sector

The Coronavirus Act 2020 (and associated legislation) has introduced a range of emergency measures to address the COVID-19 outbreak, including new powers for the police and public authorities to help prevent the further transmission of the disease.

The introduction of these measures has been rapid and, with plenty of ongoing uncertainty around the scope of some of the measures introduced, there is a risk of falling into error. For example there is the risk of secondary legislation and other guidance falling foul of primary legislation including the Human Rights Act. There is also the risk of misapplication of the measures. There have, for example, already been reports of individuals being wrongly fined under the new legislation.

The erroneous introduction or misuse of these powers could provide another ground for litigation. This could take the form of test case claims for judicial review, most obviously on the grounds of illegality, procedural unfairness, or irrationality, with the result affecting the position of a wide class of people. Also, where the errors give rise to private law claims, most obviously torts such as breaches of the Human Rights Act 1998, this could give rise to class actions. For example, the prospect of COVID-19 outbreaks in state institutions – such as in prisons – could well give rise to claims if appropriate measures are not taken.

ISSUES FOR CLAIMANT FIRMS AND FUNDERS

COVID-19 related claims present potentially lucrative opportunities for claimant firms and funders – and of course, without the requisite funding, many prospective class actions would struggle to get off the ground.

As one litigation funder has recently predicted, it may well be that the current environment lends itself to an up-turn in big ticket litigation in the near future. That same funder also announced its intention to "husband" liquidity in order to maximise future opportunity (including by not recommending a final 2019 dividend). So we can expect that many funders will be looking to be proactive in identifying and pursuing claims in the current situation.

But only time will tell what the fallout from the crisis may hold for the risk appetite of funders, who may themselves be looking to re-stabilise after a period of considerable turbulence. That may mean an increased focus on "safer bets" in litigation terms, so that those with more uncertain claims are left struggling to find funding. At the same time, since low interest rates are likely to endure for a long while after the crisis abates, one might expect greater investment inflows into litigation funders (among other alternative asset classes). That may drive some funders to entertain claims of a more speculative nature, geared towards extracting early settlements from target defendants perceived as being at their most vulnerable.

ACCESS TO JUSTICE

In our recent post, we discussed the impact of COVID-19 on civil litigation, including the transition to remote hearings in the English courts. Given the current challenges, the High Court is giving priority to urgent matters, and the Court of Appeal is currently hearing urgent matters only.

Class actions have traditionally been seen as a means of promoting access to justice, by treating like-cases consistently and protecting the interests of claimants who might not otherwise have been able to pursue legal action. Equally, the group litigation order rules afford certain protections to defendants, providing a mechanism by which claims giving rise to common issues of fact or law can be ordered to be case managed and tried together when they would otherwise have to be defended separately.

However, with the current prioritisation of urgent work and therefore the prospect of a considerable backlog starting build up, the opportunity for new group litigation orders to be made, and for group claims to be tried, looks likely to diminish in the short term. That is of course likely to be a concern for all areas of litigation, not only class actions.

More on COVID-19

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