HERBERT SMITH FREEHILLS

UK CLASS ACTION MARKET HEATING UP IN 2016

13 April 2016 | London
Legal Briefings

The next 12 to 18 months is likely to be a turning point in the UK class action market driven by some key trends and developments:

- litigation funding on the rise with new players entering the market and existing funders raising significant funds,
- growing enthusiasm to pursue class actions, including major shareholder claims,
- the introduction of a new collective action procedures for competition claims (effective since October 2015), and
- the emergence of class action tourism as claimants go in search of the litigant-friendly jurisdictions.

CONTINUED GROWTH IN THE UK LITIGATION FUNDING MARKET

Over the last 12 to 18 months, we have seen growth in both the level of funding available and the interest of new funders in the UK market. This has been brought on by:

- New entrants: Bentham Europe is now a player in the market and Balance Legal Capital has been launched, and
- Significant capital raisings by existing funders, such as Therium's announcement of a £200 million fundraising in May 2015.

Not only have funders continued to enter the market and raise new funds; they have also shown a marked increase in their enthusiasm for pursuing class actions, including major securities actions – as demonstrated for example by Bentham Europe's conditional funding of the widely publicised shareholder class action against Tesco. That same enthusiasm did not exist in the early years of UK litigation funding, when the focus was on more traditional commercial claims, but we have seen a steady increase in the involvement of litigation funders in group actions in recent years.

It will also be interesting to see how keen funders are to fund claims under the new collective action procedures for competition claims from 1 October 2015 (discussed below).

"*Not only have funders continued to enter the market and raise new funds, they have also shown a marked increase in enthusiasm for pursuing class actions.*"

THE RISE OF SECURITIES CLASS ACTIONS IN THE UK

The number of shareholder securities cases commenced in the UK is continuing to grow.

There are currently a number of significant cases before the English courts, including claims brought by thousands of retail and institutional shareholders in RBS and Lloyds in relation to their 2008 Rights Issue and takeover of HBoS respectively. Most recently, it has been announced that Tesco is likely to face a claim from its shareholders to recover losses suffered following its recent accounting scandal.

Traditionally the United States was seen by claimants as the premier forum in which to bring a securities action against a publicly traded company. However, since the United States Supreme Court dramatically limited the extraterritorial application of US securities laws in 2012, the filing of such claims has increasingly shifted to other favourable jurisdictions, including the UK.

Another significant factor in the increase in claims is the involvement of litigation funders. The litigation funding industry in the UK has developed considerably and continues to evolve, with a number of funders already active in the market and further funders from other jurisdictions joining the market. Whilst such funding is not yet as common as in other jurisdictions, such as Australia, its use is increasing and the upwards trend is expected to continue.

FURTHER SHAREHOLDER ACTIVISM MORE GENERALLY HAS BEEN ON THE RISE.

Following the financial crisis, shareholders have recognised the need to engage more closely with the companies in which they invest, leading to them taking a more active stance where they are not happy with a company's strategy or decisions. Hedge funds and other alternative investors are usually considered to be the principal players in the activist community in the UK, but institutional investors have in recent years shown an increased willingness to voice their concerns.

In addition, where issues are regulator-driven, there are often well publicised key findings on broad issues at an early stage that can be used by plaintiff law firms as a hook to hang claims on. For example, the RBS rights issue litigation commenced after the FSA report into the collapse of RBS. The greater levels of enforcement action and investigatory activity undertaken by UK regulators, particularly the FCA, and the subsequent public disclosure of such action and activity are expected to continue.

"*Traditionally the US was seen by claimants as the premier forum to bring a securities action against a publicly traded company. However... the filing of such claims has increasingly shifted to other favourable jurisdictions, including the UK.*"

THE NEW COMPETITION LAW CLASS ACTION

The Consumer Rights Act 2015 has now come into force in the UK. The Act introduces a collective action regime for competition law claims in the specialist Competition Appeal Tribunal (CAT), together with a process for collective settlements (whether or not a claim has been brought). Importantly, the new regime applies to causes of action arising before commencement. As a result, claimants may seek to bring collective actions in relation to cartels and other competition law infringements which have already been identified and sanctioned by the UK and EU competition authorities.

"*Whilst the level of take-up of the new collective action will depend on how the certification process is carried out in practice, an increase in claims is likely.*"

Controversially, the new collective action can be brought on either an opt-in or an opt-out basis, subject to certification by the CAT. This increases the opportunities for claimants and burdens for defendants. We expect the opt-out process (or the threat of this) to be utilised in particular in relation to those cartel and other cases where market-wide harm is large, but individual losses are relatively small and dispersed. Such claims will be facilitated by the fact that the CAT will be able to make a damages award without assessing quantum for each class members' claim.

Actions can be brought (by a class member or a representative body) on behalf of both individuals and businesses. They can relate to either 'follow-on' competition claims (claims based on a competition authority's infringement decision) or 'stand-alone' claims (where the claimants will need to establish competition law liability). The opt-out aspect will apply to UK domiciled claimants only, but non-UK claimants can opt in to proceedings. In opt-out cases unclaimed damages will be paid to a prescribed charity, increasing incentives on defendants to settle such claims (for example on the basis that unclaimed funds revert to the defendant – such unclaimed funds often amount to the majority of the total claimed damages).

The certification process has the stated aim of avoiding frivolous and unmeritorious claims, and will include consideration of a number of factors. These include the strength of the claim, the availability of alternative dispute resolution and whether:

- The claims raise the same, similar or related issues of fact and law.
- The claims are suitable for collective proceedings and whether proceedings should be on an opt-in or opt-out basis (e.g. taking into account the size of the class, the ease of determining class members, the strength of the claims, and the estimated level of individual damages).
- It is just and reasonable for the representative to bring the claim (contrary to initial proposals, there will now be no outright bar on law firms, funders and SPVs doing so).

Other safeguards include a prohibition on exemplary damages and on the use of damages based agreements/contingency fees. However, in opt-out cases the CAT may order unclaimed damages to be paid to the representative in respect of costs incurred.

Whilst the level of take-up of the new collective action will depend on how the certification process is carried out in practice, an increase in claims is likely. This is in particular the case given the active claimant bar in the UK and its willingness to pursue group claims and offer attractive funding solutions.

LEGAL NOTICE

The contents of this publication are for reference purposes only and may not be current as at the date of accessing this publication. They do not constitute legal advice and should not be relied upon as such. Specific legal advice about your specific circumstances should always be sought separately before taking any action based on this publication.
