

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

**Law Society breakfast series, 30 June 2008 – Philip Cullum, Acting Chief Executive,
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My starting point – perhaps a radical one to some – is that the law and legal processes should reflect the realities of life today. The law today still seems largely to take an individualised view of the consumer landscape, in which problems between consumers and companies are viewed as a series of isolated disputes – even where in fact they affect numerous people in the same way.

We are already seeing collective action by consumers – whether it's the vegetarians who successfully and quickly persuaded Mars to change its mind on the ingredients of Mars bars, or the 5 million people who downloaded standard letters about bank charges from moneysavingexpert.com, or the various successful campaigns on Facebook. All examples of not just individual but also collective consumer power.

Ideally, consumers should be able to act for themselves when dealing with businesses. When consumers are able to exercise power, they can help drive fair and competitive markets, where firms that meet consumer expectations prosper and those that don't lose out. And when mistakes inevitably occur, the best situation for everyone is that the problem is resolved informally. But this won't always be possible, for instance if there are genuine disagreements or business lacks the incentive to come to the table.

The availability of formal redress mechanisms is essential in order to deliver competitive markets. Without the knowledge that there are means to right a wrong when companies let them down, consumers may lack the confidence to participate in markets and firms will get away with cutting corners in the knowledge that their illegal actions might escape unpunished.

This isn't just about individual experiences in isolation. It is a feature of modern consumer life that consumers share the same problems at the hands of businesses. Just thinking of my morning so far, I brushed my teeth using the same toothpaste that millions of other consumers use, paid my hotel bill based on standard terms and conditions, joined hundreds of fellow passengers on a short tube journey and grabbed a coffee from a popular chain. In this mass producing and mass consuming world, when things go wrong, they often affect hundreds, thousands or sometimes millions of people.

There are routes in the civil justice system for consumers to pursue redress, including ombudsmen in a limited range of markets and the small claims court. These generally seem to be working well, but they are not suitable in all situations.

Consumer disputes can involve small amounts of money. In these situations, people may choose not to pursue redress, either because life's too short and it will take disproportionate effort, or the legal costs exceed the value of the claim. The BA/Virgin fuel surcharge case, which has been the subject of a class action in the United States, is a case in point. In the UK, the sum that individual consumers are entitled to claim is between £2 and £10 per flight. So it is no surprise that the vast majority of people eligible to make a claim will simply not bother. But this is unsatisfactory, in terms of simple justice and because companies who rip off consumers by small amounts at a time will retain the bulk of their ill-gotten gains. In the US, the class action was settled for \$200 million.

We find that many consumers are put off by the prospect of going to court – not just because of the unfamiliar setting but also because of the challenge in tackling well-resourced companies on their own. However, the possibility to join forces with others to exercise group strength, backed by organisations set up to work for their interests, could make the difference to redress this

imbalance of power.

As firm supporters of evidence-based policy-making, NCC recognises that it is necessary to demonstrate a genuine need for a new collective redress procedure. England and Wales already has a form of collective redress through the Group Litigation Orders system, but this has been used rarely in consumer cases. As you will know, the Civil Justice Council is considering evidence of need at the moment, but the early indications are that something new is required. Early findings of research commissioned by the European Commission appear to reach a similar conclusion.

The government seems unconvinced there is evidence of need, preferring instead to rely on public enforcement. The Regulatory Enforcement and Sanctions Bill includes proposals to introduce restorative penalties, which would give regulators powers to order companies to repair the damage they have caused, including by providing financial compensation. Putting aside concerns that regulators would become judge, jury and executioner, this mechanism will not fill the gap on its own.

- First, these powers are optional and there is no guarantee regulators will seek them.
- Second, the track record of regulators when it comes to using enforcement powers does not fill us with confidence that restoration notices will be used very often. Enforcement should not be seen as an end in itself, but sometimes we see regulators seduced by the mantra ‘we are not an enforcement-led regulator’, preferring instead to have quiet words with companies.
- Third, regulators do not have the resources to pursue every case where action is required. The OFT’s declared strategy is to focus on a small number of high impact cases. It has stressed the need for partnership between private and public enforcement to allow more legitimate claims to be pursued.

There isn’t time to talk about the finer points of a collective redress procedure. However, the starting point should be to design a system capable of providing justice to the widest possible number of affected consumers. This leads us to conclude any future system should include an opt-

out element – it is the most inclusive since it can deal most effectively with the sorts of low-value claims I mentioned earlier.

Businesses sometimes get nervous at this point, by pointing to the excesses seen in the US class actions system; however, this is unfair. Opt-out is one procedural element of the US system, but it is also a feature of collective redress systems in Portugal and Scandinavia and these have not experienced the same problems as the US. It is peculiar features of the American legal system, rather than the nature of the collective redress per se, that have led to the problems. These are not features of our legal system. And I am optimistic that lawyers here will be able to produce something workable that allows the benefits of collective redress without the downsides seen in the US.

After all, European legal systems are characterised by close judicial supervision and it should be possible to build on this tradition by designing-in checks and balances. At the same time, we mustn't overdo these. Consumer groups are unlikely to bring forward claims if only small numbers of consumers will be compensated, as is likely in opt-in systems, or if the risks of becoming liable for very high costs is too great.

In fact, it is in the interests of consumers as well as business that there are proper safeguards to weed out vexatious claims. Competition is distorted when innocent businesses face unnecessary legal costs and these are in turn passed on to consumers through higher prices. Because good businesses benefit from approaches which challenge illegal behaviour, this shared interest gives us hope that it will possible to broker a solution in which all parties can have confidence.

Wrap-up

Consumers need access to a range of redress options if they are to be effective drivers of competition. However, they currently experience problems in markets that our existing legal framework is not well equipped to remedy. We are sceptical that public enforcement can fill this gap on its own.

We should aim to create an inclusive collective redress procedure, to maximise access to justice and serve the fullest possible deterrent to illegal activity. Good business has nothing to fear from

this; indeed, there should be a shared will to design a system that deters vexatious litigants while at the same time encourages legitimate claims.