Collective Actions: the problem of loss in complex cases

Jordan’s Junior Competition Lawyer Conference
Tristan Jones, Blackstone Chambers, January 2013

1. Readers of the BIS consultation on private actions in the UK competition regime\(^1\) are repeatedly informed that the “opt-out collective actions” proposed by the government are not the same as US-style “class actions”. The point is hammered home in a table which is billed as summarising the details of the proposed regime, but which does so by emphasising the contrasts with the US regime:

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\text{Box 6: Key Differences between the US and proposed UK regimes.}
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2. The differing financial incentives for claimants and claimant lawyers in the UK compared to those in the US (“Damages”, “Costs” and “Fees” in the table) would of course be expected to make UK-style collective actions less attractive than US-style class actions. This is intended to deter the sorts of “frivolous” or “unmeritorious” claims (BIS consultation para 5.33) which are reputedly a feature of litigation in the US. Whether or not the UK proposals represent an improvement on the US system is open to debate. What is clear, however, is that the government does not intend to encourage the emergence of an entrepreneurial “plaintiffs’ bar” on the same scale as that which exists in the US.

\(^1\) Department for Business, Innovation & Skills (2012), ‘Private actions in competition law: A consultation on options for reform’. 
3. However, financial incentives aside, the UK proposals look strikingly similar to the US class action regime. The starting point in the US is Federal Rule 23(a), which requires class actions to meet four requirements:

“(1) the class is so numerous that joinder of all members is impracticable;

(2) there are questions of law or fact common to the class;

(3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and

(4) the representative parties will fairly and adequately protect the interests of the class.”

4. Most US antitrust class actions also need to satisfy the requirement in Federal Rule 23(b)(3) that the common issues must predominate over any issues affecting only individual members. State tests tend to be closely based on the federal approach.

5. The BIS proposal uses slightly different language but its debt to the US regime is obvious. The outline proposal is that a class would be certified if it met the following criteria:

• A preliminary merits test, for example that “there is a reasonable possibility that material issues of fact and law common to the class will be resolved at trial in favour of the [claimants]” [fn omitted].

• Minimum numerosity: there must be a minimum number of claimants.

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2 Paragraph 3 of Annex A of the BIS consultation.
• There exists sufficient commonality of issues amongst claimants.

• That a collective action is the most suitable means of resolving the common issues.

• That the individual or body bringing the case is an adequate representative for claimants, in terms of absence of conflicts of interest, adequacy, typicality (if an individual) or a suitable representative of the claimants’ interests.

• That the representative has sufficient funds to cover the costs of the defendant should the case be unsuccessful.”

6. Notwithstanding the loud declarations of difference between the BIS proposals and the US regime, it therefore seems likely that we in the UK will shortly be walking down a path already well-trodden by others. Practitioners will want to draw on the US class action experience, as well as that of other countries with similar regimes.

7. One particular issue which has not received the attention it deserves in the UK, but which has been the focus of considerable debate in the US and Canada (with similar class action rules to those in the US), is the impact of potential differences in the alleged anti-competitive conduct as between potential claimants. In such cases, the individual issues relating to loss may easily overshadow the common issues, and a class action may therefore be inappropriate.

8. The ideal competition class action would be one where the cartelist is a retailer which imposed the same overcharge on all of its customers, all of whom are end consumers. Such a cartel would be a claimant lawyer’s dream – all of the consumers could be treated as a class, and the total overcharge could be calculated and distributed between those consumers.
9. Unfortunately life is often more complex. In In re Hydrogen Peroxide Antitrust Litigation 552 F.3d (the US Court of Appeals for the Third Circuit) the District Court had certified seven issues for the class action. The sixth issue was whether the alleged unlawful acts injured the members of the class. This was a necessary issue because proof of injury is an element of the cause of action. The Court of Appeals stated:

“In antitrust cases, impact often is critically important for the purpose of evaluating Rule 23(b)(3)’s predominance requirement because it is an element of the claim that may call for individual, as opposed to common, proof. See New Motor Vehicles, 522 F.3d at 20 (“In antitrust class actions, common issues do not predominate if the fact of antitrust violation and the fact of antitrust impact cannot be established through common proof.”); Bell Atl. Corp. v. AT&T Corp., 339 F.3d 294, 302 (5th Cir. 2003) (“[W]here fact of damage cannot be established for every class member through proof common to the class, the need to establish antitrust liability for individual class members defeats Rule 23(b)(3) predominance.”); see also Blades, 400 F.3d at 572 “[P]roof of conspiracy is not proof of common injury.”)

10. The defendants provided several reasons, all supported by expert evidence, why the impact of the cartel could not be proved on a class-wide basis. The products in issue were said not to be fungible – they had different supply and demand characteristics. They argued that, over the period of the cartel, the industry had changed significantly. There was no empirical evidence suggesting that prices charged to individual customers moved in tandem. Actual prices charged to individual purchasers did not always reflect the price lists. A number of contracts were individually negotiated. The Court of Appeals quashed the class certification order.

11. The problems of individualised loss become even more pronounced if the calculation of individual loss has to take account of indirect purchasers
(“IPs”) as well as direct purchasers (“DPs”). In any case brought on behalf of IPs, the court will need to work out how much of the overcharge was passed on from the DP to the IP, and potentially from that IP further down the chain of increasingly remote IPs.

12. The problem posed by IPs has arisen in the US because many of the states have passed statutes granting IPs standing to bring antitrust claims. Those statutes are intended to undo the perceived harm done by the famous decision ruling out IP claims at the federal level. In Canada the issue has arisen because until very recently it was thought that IPs could (or arguably could) bring such claims.

13. In many cases, the amount of pass-on from one purchaser to another (and therefore the damage caused to IPs) will vary considerably between claimants. This problem has stood in the way of many attempted class actions.

14. Take for example the alleged cartel over iron oxide pigments used to colour concrete bricks and paving stones which was considered by the Court of Appeal for Ontario in Chadha v. Bayer Inc. [2003] O.J. No. 27, 63 O.R. (3d) 22 (C.A.). The action was brought on behalf of persons who had purchased new homes, all of whom were IPs. The court noted that proving loss was necessary to establish liability. It highlighted the difficulties in proving loss on a class-wide basis:

“[40] In this case, the appellants presented no evidence from industry representatives to explain how the manufacturers and distributors of

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3 Definition of DP/IP: assume a gold dealer enters into a cartel. He sells gold to a jeweller, who makes a ring and sells it to a shop, which sells it to a customer. The jeweller is a direct purchaser – it purchased directly from the cartelist. The shop and the customer are both indirect purchasers. In a complex industry there may be a long chain of indirect purchasers. Consumers are especially likely to be indirect purchasers: the treatment of this group is therefore of particular importance.


5 The right of IPs to bring competition damages claims will soon be decided by the Canadian Supreme Court. The British Columbia Court of Appeal held (in the decisions under appeal) that IPs could not bring such claims: Pro-Sys Consultants Ltd v Microsoft 2011 BCCA 186 and Sun-Rype Products Ltd v Archer Daniels Midland Company 2011 BCCA 187.
bricks and the developers of new homes price their products, and in particular, whether there is a direct pass-through of the price of every component into the sale price of all homes, the relevance of the value of the land component, and how other factors such as the real estate market and the individual bargaining of the purchaser and vendor affect the price. The evidence on the issue of loss to the members of the plaintiff class came only from the affidavit of an expert economist who did not address those issues. In his affidavit, the expert does not suggest that he consulted any industry records or other data which would substantiate a pass-through analysis. […]

[46] As noted above, neither the variables nor the issue of how to prove the flow of the price increase through the distribution chain were addressed by the appellants’ expert in his evidence. Nor does he discuss the effect of the market on real estate prices and the relative effects on the purchase price of (a) the market, (b) the value of the land, (c) the value of the building, and (d) how one assesses the value of the component parts of the building at any particular point in time, remembering that the proposed class members are not only purchasers of new homes, but of resale homes as well, and that not all homes were constructed using the impugned materials.”

15. One American academic has analysed all of the US indirect purchaser class certification decisions.6 In a sobering article, Page suggests that the historic success rate for certification has been about 50% (a total of 42 out of 78 decisions allowed certification). Moreover, the author points out that the success rate to some extent masks the difficulties in bringing such claims, since there will have been many other potential plaintiffs who, on realising the difficulties they faced, decided not to even try.

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16. Page identifies several reasons for the failure of IP class actions. I would add some of my own to come up with the following indicative list of factors which make class actions more likely to fail:

a. The cartelised product is sold through multiple distribution channels;

b. The cartelised product is incorporated into another product. This is especially problematic if –

i. the price of the end product is affected by many variables; and/or

ii. the cost of the cartelised product is a small part of the cost of the end product;

c. The cartelised product is incorporated into numerous other products;

d. The cartelised product actually consists of numerous differentiated “sub-products”; 

e. There are difficulties in identifying all of the members of the class;

f. There are evidential difficulties in proving every class member’s loss;

g. There is evidence that different purchasers had different relationships with the cartelist (including different purchaser power);

h. There is evidence that the price of the cartelised product (or the end product) was subject to negotiation;

i. The alleged cartel changed over time or was geographically variable;
j. The industry or other competitive conditions changed over time;

k. The economic evidence showing a common theory of harm is weak or rests on novel ideas;

l. There is weak factual evidence of common impact.

17. It is also worth keeping in mind that in the UK, these problems will not only afflict IP class actions. Assuming that pass-on is a valid defence, these issues will also arise in the context of DP class actions. If the DPs have passed on the overcharge to IPs then, for the same reasons as are set out above, it is quite possible that some DPs will have passed on more of the overcharge than others. Their common interest in establishing that there was a cartel may be outweighed by the individualised issues relating to loss and pass-on.7

18. An obvious answer to the problem of variation between purchasers would be to certify a class for the purpose of resolving particular issues. In particular, a class could potentially be certified in order to establish: (a) whether there was an infringement of the Competition Act; and possibly (b) if so, what was the total amount of the overcharge. Purchasers could then find separate representation for the purposes of arguing between themselves over how the total pot of money should be distributed – what might be called the ‘distribution’ stage.

19. Allowing the formation of issue-based classes of this type would also overcome another serious problem posed by IPs, namely the inevitable conflict between IPs and DPs. Indeed, there is an obvious tension between all purchasers at different levels in the purchase chain because they will all want to maximise their claim to part of the overcharge. That inevitable conflict was one of the reasons why a Group Litigation Order was refused in Emerald Supplies Ltd v British Airways Plc [2009] EWHC 741 (Ch).

7 This issue has not (so far as I am aware) arisen in the US because pass-on is not available there as a defence to DP claims.
20. The idea of adopting an issue-based approach has received some approval. In the Canadian case of *Sun-Rype Products Ltd v Archer Daniels Midland Company* 2011 BCCA 187, a case concerning artificial soft drinks sweeteners in which IPs and DPs were members of the class, Mr Justice Donald said:

“[70] Turning to the question of a conflict of interest, on the surface there appears to be a problem. Mr. Justice Rice essentially said any conflict could be sorted out later. However, in theory, why would it not be in the DPs’ best interest to join in the defendants’ attempt to strike out the IPs’ claim on the *Hanover Shoe* argument? If the IPs are out of the action, the DPs will not have to split the ultimate award.

[71] I put this question in theoretical terms because there are strategic and pragmatic considerations that cast a different light on the matter. It is as simple as this: as they see things at this stage, the DPs and IPs need one another to form a large enough class to put the case on an economic footing. Counsel for the plaintiffs explained that the DPs do not wish to exclude the IPs only to find that their own numbers are too small to carry on. I think that disposes of the contention that the parties are in a hopeless conflict at the outset.

[72] As to the future of the action, any sharing of an award will involve a divergence of interests, but I do not see how that presents an insuperable barrier to a resolution of the common issues. Neither group is prejudiced in taking the case on together and they may not be able to do it any other way. Separate representation at the damages stage can easily be arranged.”

21. Mr Justice Donald’s comments were made in the context of his dissent; the issue did not arise for the majority. However, a similar approach was taken in another Canadian case, *Pro-Sys Consultants Ltd v Infineon Technologies AG* [2009] BCCA 503. The class in that case also comprised DPs and IPs – all of
whom had purchased DRAM memory chips. Mr Justice Smith, giving judgment for the Court of Appeal for British Columbia, said at [78]:

“The chambers judge concluded the appellant is not a suitable representative because of its conflict with other class members in its particular marketing chain on the issue of pass-through of the overcharge. I see that as a minor issue that may never be reached. The appellant shares a common interest with all class members in establishing the respondents’ wrongful conduct and the aggregate amount of its unlawful gain. In my view, it is, at least at this stage, a suitable representative plaintiff.”

22. However, the idea of splitting claims in this way raises further complexities. Take the first potentially common issue: has there been a breach of the Competition Act? Purchasers should normally share an interest in this issue. Even at this stage, however, practitioners should be careful to ensure that every potential class member shares the same interest in such matters as market definition, duration of the cartel, etc, all of which will need to be resolved as part of the question of ‘breach’.

23. The next potentially common issue is the total size of the overcharge. The purpose of ascertaining the total overcharge would be to fix the size of the defendant’s total liability – it would create the ‘pot’ to be distributed at the later stage. Consider two potential problems which may arise at this stage.

24. First: injury or damage is an ingredient of the cause of action in claims for breach of the Competition Act (see W.H. Newson Holding Ltd v IMI Plc [2012] EWHC 3680 (Ch) at [37]). In other words, you cannot establish that a cartelist is liable unless you establish that the cartelist has caused damage. As set out above, this is repeatedly relied on in the North American authorities as a reason why, to get a class action off the ground, the class representative must be able to demonstrate loss on a common basis. In the one Canadian case mentioned above in which the court did permit a staged approach (Pro-
Sys v Infineon), it stressed that the cause of action was restitutionary and that liability was not, therefore, dependent on establishing loss.

25. An interesting example of a case in which an English court has entertained something similar to an issue-based class action is Prudential Assurance Co Ltd v Newman Industries Ltd [1980] 2 WLR 339. The plaintiff company was allowed to pursue a representative action for a declaration that the defendant was liable in damages to members of the class. That action was allowed to proceed even though, strictly speaking, liability should have been dependent on proof of loss. However, it is important to note that all that was being established in that case was liability in the strict legal sense: the defendant would not actually have to pay anyone any money until and unless individual plaintiffs proved their damages. One can well see in that situation that it would really make very little sense to insist on proof of loss in order to grant the declaration. However, it quite a different matter to say that the court should make a declaration on the defendant’s total financial liability without any proof of loss. That arguably goes well beyond what it permitted on the authorities.

26. Of course, there may be good policy reasons why such a thing should be allowed. It is often said that if a cartelist has overcharged then someone must have suffered loss – and anyway, why should the cartelist keep his ill-gotten gain? I do not mean to disagree with these points. My point is simply that if the government intends to introduce this sort of issue-based approach, it may be prudent to make explicit legislative provision for it.

27. The second problem which may arise at the “total size of overcharge” stage is the potential complexity. In some cases it will be possible to calculate the total overcharge. If a group of cartelists kept records of demonstrating the size of each individual overcharge and the total volume of commerce affected by the cartel, then it might be relatively straightforward to calculate the total overcharge in a class action context.
28. But, again, the real world creates challenges. The overcharge may have varied over time, geography, and product lines. It may have applied in different ways to different customers. The cartelists may have lost or destroyed evidence showing their volume of commerce in the cartelised products. There are, in short, all sorts of reasons why it may not be possible, or not desirable, to calculate a global ‘overcharge’ for distribution between claimants. In such cases, the best that could be achieved through an issue-based class action would be to resolve the question of breach. The size of the overcharge would need to be left for individual actions.

29. Assume that a class action has overcome all of these problems. It has established breach and overcharge as common issues. There is then the much-anticipated “distribution” stage. How would it work? In a relatively simple case it may be possible to divide the class members into sub-classes for the purposes of arguing about distribution. But what about the more complex cases which cause the kinds of problems set out above – e.g. cases with many different types of purchaser, all affected by different variables? The whole point of adopting an issue-based approach would be to avoid the difficulties posed by one massive trial addressing complex individualised issues. But would such a trial be possible to avoid when it comes to distributing the total ‘pot’? Consider some of the issues which would arise:

a. There may be conflicts between the DPs over who bought what value of cartelised product. Their competing claims might therefore need to be considered together. This would seem inevitable if the total amount of the overcharge had been fixed so that they were fighting over who gets what share of the pie.

b. Furthermore, every DP would probably need to have its claim adjudicated in tandem with the claims of the IP(s) beneath it in the vertical supply chain. Purchasers in a particular chain would be in direct conflict over a limited pot of money, so would need their claims to be resolved together.
c. Consumers with a small stake in the outcome would probably still not want or afford individual representation at the ‘distribution’ stage, especially if it were at all complex. But on the other hand, if may be difficult for them to be represented as a class: any problem of individualised loss would again rear its head.

30. As a practical matter, it may well be that all class actions would settle before getting to the ‘distribution’ stage. However, a court would want to be satisfied at the outset of a class action that, assuming the case did not settle, there was a workable proposal governing every stage of the action – including the ‘distribution’ stage. One might expect a court to approach the question with a good degree of flexibility, given the high likelihood of settlement. But these issues could not be avoided altogether. In highly complex cases it may not be possible to resolve the problem of differences between purchasers by simply kicking off the ‘distribution’ issues to a later stage. However one approaches the problem, it seems inevitable that some cases will not be suitable for class actions.

31. I do not mean to be unduly pessimistic. These problems would not arise in every case. If they do arise, many of them could be resolved with a little imagination and a strong dose of active case management. They are, however, important cautionary notes. If the government presses ahead with its proposals it would do well to give further consideration to these issues in the design of the new system. And as practitioners, we should be aware of the challenges which have faced class actions overseas, and which are likely to affect collective actions in the UK.

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