



epiq depth

Culture Clash – Will the
United Kingdom Open Its
Doors to US-type Class
Action Litigation?

Introduction

While class actions have had a long, storied history in the United States, they are relatively new to our neighbor across the pond. New legislation has been passed in the United Kingdom to allow for antitrust class action claims to be brought, but thus far they have all been unsuccessful. Currently, there is no formal way to bring a consumer class action complaint. For the first time, a consumer class action has been filed in the U.K. against Google. It is with bated breath that both attorneys and barristers in the U.K. and U.S. wait to find out if this claim will be dismissed like the recent antitrust claims, or will result in a settlement or trial.

U.S. Class Actions

Class actions were first introduced in the U.S. legal system in 1853 in the landmark case of *Smith v. Swormstedt*¹. It was there that Supreme Court held that the decree in a representative suit bound the absent class members. Then, in 1937 the Supreme Court adopted the Rules of Civil Procedure (FRCP), and created Rule 23. While they did not provide a mechanism for giving notice to class members at that point, or for allowing them to opt-out of a class action, it cemented class action litigation as a legal mechanism. Then, in 1966 Rule 23 was amended to explicitly state that all absent parties are indeed bound. The amendment established a procedure for notifying all parties and giving them the opportunity to opt-out of the class. In 1974, the Supreme Court, in *Eisen v. Carlisle & Jacquelin*², held that, in opt-out class actions, notice must be given to each member of the class who can be identified, even those whose claims are so small that it is unlikely they would opt-out to pursue individual actions. Finally, the latest change to class action law came in 2005, with the Class Action Fairness Act (CAFA). This law moved jurisdiction of any case involving more than \$5 million in damages from state courts to federal district courts. With class action laws well established in the U.S.,

there have been thousands upon thousands of class action claims brought in the past 50 years. Americans are accustomed to seeing notifications asking them to opt-in or out of class action groups and enjoy receiving checks when settlement funds have been distributed.

U.K. Class Actions

Collective or class action litigation in the U.K. is quite new. With a few exceptions, there hasn't really been a proper mechanism in place for cases to be brought as a group action. It wasn't until October 1, 2015, when the Consumer Rights Act (CRA) was enacted, that the potential for opt-out class actions for private enforcement of competition claims was established.

The CRA broadens the jurisdiction of the Competition Appeal Tribunal ("CAT") to hear both 'follow-on' claims and standalone actions, both of which may continue to be brought in the High Court. In addition, it introduced a number of new procedures for damages claims, in particular collective proceedings (on either an 'opt-in' or 'opt-out' basis) and made provisions for collective settlements and collective redress schemes. These changes prompted a revision of the CAT's procedural rules, which are now contained in The Competition Appeal Tribunal Rules 2015 ("CAT Rules"). These were entered into force in October 2015.

Unlike American class action law, under Rule 78(3) (c) of the CAT Rules in the U.K., when considering whether it is just and reasonable for a person to act as a class representative the Tribunal will take into account whether the proposed class representative has prepared a plan for the collective proceedings. The plan must include a method "for notifying represented persons of the progress of the proceedings" (Rule 78(3) (c)(i) and (ii)).

In the U.K., under the CAT, at the same time the

¹ *Smith v. Swormstedt*, 57 U.S. 16 How. 288 288 (1853).

² *Eisen v Carlisle & Jacquelin*, 417 U.S. 156, 94 S.Ct 2140, 40 L.Ed 2d 732 (1974)

claim is filed the lead representative needs to file an application for a Collective Proceedings Order (CPO). Within the CPO a plan for notice and administration of any settlement fund must be included. Unlike its American counterpart, where the subject of notification is not broached until after the class action claim has been fully litigated and/or settled, in the U.K. the following must be sufficiently addressed in the CPO or the CAT will deny the class action as a whole from going forward:

- How will parties find people who should be members of the class?
- How will class members be informed of their rights?
- How will litigation updates be communicated to the class?
- How will claims be submitted?
- What proof will be necessary to determine eligibility of the claim?
- What method will be used to distribute the claim award?

Thus far there have been no claims that have been filed where the CAT has been satisfied with the notice and administrative plan.

The MasterCard Case³

In 2016, a £14 billion damages claim was filed against MasterCard for imposing illegal card charges that were ultimately paid for by U.K. consumers. This was the first claim to be filed under the CRA of 2015 on behalf of all U.K. consumers and was the biggest claim to be filed in U.K. legal history.

In 2014, MasterCard was found to have infringed EU law by imposing interchange fees on the over 500,000 businesses that accepted MasterCard

debit and credit cards. The new section 47A of the Competition Act of 1998, inserted by the CRA, allows a person to make a claim in the CAT for monetary loss in respect of an infringement on EU law. Under section 47B, there is a right to “collective proceedings” so long as the CAT authorizes the person bringing the proceedings to act as the class representative and it must certify the claims as eligible for inclusion.

Though MasterCard was guilty of breaching U.K. and EU competition laws, the CAT refused to grant the CPO because it found the way in which damages were to be paid was too imprecise and would not restore claimants to the position they would have been in but for MasterCard’s breach.

The CAT stated that there must be “sustainable methodology which can be applied in practice to calculate a sum which reflects an aggregate of individual claims for damages”, and a “reasonable and practicable means for estimating the individual loss which can be used as the basis for distribution.” Should the claims succeed, the CAT concluded that there was insufficient data for the different proposed methodologies to be applied on a sound basis. The methods presented have been long accepted by the courts in the U.S., but by denying this CPO, the CAT is making it clear that it will apply more stringent standards than those seen abroad. Following the Tribunal’s refusal to grant an Application for Permission to Appeal, the case was appealed to both the Court of Appeal and High Court. The appeal was made to both courts as this case is so novel there is legal uncertainty over whether there is a direct right to challenge in the Court of Appeal or whether it needs to go to the High Court.

The Google Case

On November 30, 2017, a representative action was filed in the U.K. alleging that Google was tracking the activity of Apple Safari users without their

³ Walter Hugh Merricks CBE v MasterCard Incorporated and Others [2017] CAT 16.

knowledge or consent. They were then aggregating this data and selling the information to advertisers for a very substantial profit. If true, this could be found to violate the Data Protection Act of 1998. The claimants are looking for damages for the infringement of their data protection rights and for the commission of the wrong and loss of control over personal data.

Claimants bring this action under section 13(1) of the Data Protection Act, which allows for individuals to claim compensation for breaches of the Act:

An individual who suffers damage by reason of any contravention by a data controller of any of the requirements of this Act is entitled to compensation from the data controller for that damage.

Unlike the other recent collective actions brought in the U.K., this action was brought pursuant to the Civil Procedure Rules (“CPR”), as opposed to the CRA. CPR 19.6 is a 150-year-old provision that has only been used a handful of times. This claim cannot be brought before the CAT because it is not a competition claim, however, claimants are asking for CAT rules to be used to administer the claim. Claimants are also asking for an opt-out vs. opt-in since the statute of limitation ran out in September and claimants can no longer bring their own claim.

It is estimated that about 5.4 million people could have been affected by the Safari workaround in the relevant nine-month period. The Claimant Class consists of all individuals who:

- i. were present in England and Wales from June 1, 2011 to February 15, 2012;
- ii. had an Apple ID, owned or were in lawful possession of an iPhone;
- iii. used the Apple Safari browsers;
- iv. did not change the default security settings in Safari so as to accept Tracking and Collation and were a resident of England or Wales at the date of issue.

To avoid the Mastercard issue of how to calculate damages that are reasonable and practicable, claimants in this case are asking that each claimant receives the same fixed damages award, which would be set by the Court. Any individual who meets the class criteria and has not opted out will receive compensation if the case is won. If approved, this would be the first representative claim in the U.K. to see its day in court.

Conclusion

While the U.S. has a long history of class action litigation, there are still many unknowns in the U.K. as to what the courts are looking for in order to certify a class. The recent filing of the Google case will hopefully help provide guidance as to whether the CPR will bring better results than the CRA, and what is needed in a notice and administration plan for a claim to succeed in the U.K. Court. Only time will tell if private group consumer redress will be successful on the other side of the Atlantic.

For further information you can contact Lauren McGeever.

P: +1 917 344 9460

E: lmcgeever@epiqglobal.com

Disclaimer: This publication is intended for general marketing and informational purposes only. No legal advice is given or contained herein or any part hereof, and no representations, warranties or guarantees is made in respect of the completeness or accuracy of any and all of the information provided. Readers should seek legal and all other necessary advice before taking any action regarding any matter discussed herein.