Coping with Complexity and Securing Justice through Multi-Party Litigation – Lessons from the Cat and JJB Sports

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Abstract

This article examines the draft UK Consumer Rights Bill, introduced into the UK Parliament in January 2014 as the Consumer Rights Bill 2013. It outlines its proposed reforms to the opt-in follow-on collective action that can be brought in the Competition Appeal Tribunal. In particular, it questions whether the proposed reforms will achieve the aim of furthering access to justice and compensatory damages for individuals who have suffered loss as a consequence of competition law breaches. It further questions whether the introduction of a statutory cy press mechanism to transfer any unallocated damages frustrates that aim.

I Introduction

The English and Welsh civil justice system has grappled with the issue of how to deal effectively with multi-party actions since the early 1980s.[1] Concrete reform was recommended in the Woolf Reports in the 1990s and in the Civil Justice Council's (CJC) Report on Collective Redress reform in 2008.[2] The former report recommended the introduction of a flexible procedural mechanism, to be known as a multi-party situation or MPS. The MPS was intended to manage multi-party actions in a number of ways ranging from the traditional test case, a group litigation order (GLO) to either an opt-in or opt-out class or collective action.[3] This recommendation was only partially implemented. Rather than introduce the MPS the Civil Procedure Rule Committee only introduced one aspect of it. In 2000 the GLO, which is in effect no more than a sophisticated opt-in case management mechanism for unitary claims that share a common or similar issue of law or fact, was introduced into the Civil Procedure Rules (CPR).[4] The latter report in almost all respects, albeit in more detail, reiterated

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[1] For an overview see, J Sorabji, *Collective Action Reform in England and Wales* in D Fairgrieve and E Lein, *Extraterritoriality and Collective Redress* (Oxford University Press, 2012).

[2] J Sorabji, M Napier, R Musgrove (eds), *Improving Access to Justice through Collective Actions – Developing a More Efficient and Effective Procedure to Collective Actions: Final Report* (Civil Justice Council of England and Wales, London, November 2008), see 137ff for its recommendations.

[3] H Woolf, *Access to Justice: Final Report to the Lord Chancellor on the Civil Justice System in England and Wales* at 223ff (HMSO, London 1996).

[4] CPR r 19.10–19.15 and CPR PD19B.

the Woolf Reports call for the introduction of a flexible multi-party, collective, action. In particular it recommended the introduction of a flexible collective action procedure, which could be brought either on an opt-in or opt-out basis. Unlike its predecessor none of its recommendations were implemented.[5]

Since the failure of the CJC's 2008 Report to effect substantive reform there have been no attempts to reconsider whether, and if so how, the CPR could be revised to either implement its recommendations or those made by the Woolf Reports. In April 2012 however the Department of Business, Innovation and Science (BIS) issued a consultation paper that, amongst other things, canvassed views on reforming a form of collective action that is available within the Competition Appeal Tribunal (the CAT). The CAT is not formally part of the English and Welsh civil justice system and not subject to the CPR. It is an independent UK-wide tribunal that has jurisdiction to, amongst other things, hear actions for damages arising from breaches of competition law under the Competition Act 1998.[6] As a consequence of amendments to the 1998 Act effected by section 19 of the Enterprise Act 2002 the CAT is able to hear a specific form of multi-party action.[7] Where the relevant regulatory authority has established a competition law infringement, the CAT can hear what are known as follow-on actions brought on behalf of a class of consumers by specifically authorised bodies. These actions can only be brought on an opt-in basis i.e., individual consumers who fall within the relevant class must expressly consent to be brought within the scope of the proceedings.

The BIS consultation, one in a long line of similar consultations by it and its predecessors, canvassed views whether this opt-in form of collective action should be reformed along the lines previously recommended by the Woolf Report and the CJC's 2008 Report.[8] The results of that consultation were published in January 2013:[9] the CAT's collective action was to be reformed so that it could be brought either on an opt-in or opt-out basis; it was to be capable of being brought either by class members or their genuine representatives; and was to be subject to a number of procedural safeguards e.g., certification, cost-shifting, a prohibition on treble or exemplary damages.[10] The consultation response did not stop there. It was followed by a draft Consumer Rights Bill 2013 (2013 Bill) that contained provisions intended to implement

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[5] See J Sorabji, *Collective Action Reform in England and Wales* in D Fairgrieve and E Lein, *Extraterritoriality and Collective Redress* at 58–62 (Oxford University Press, 2012).

[6] Established by the Enterprise Act 2002, s12 and schedule.

[7] See Competition Act 1998, s47B.

[8] Department of Business, Innovation and Science, *Private Actions in Competition Law: A Consultation on Options for Reform* (April 2012); for an overview of previous such reports see, J Sorabji, *Collective Action Reform in England and Wales* in D Fairgrieve and E Lein, *Extraterritoriality and Collective Redress* at 52ff (Oxford University Press, 2012).

[9] Department of Business, Innovation and Science, *Private Actions in Competition Law: A Consultation on Options for Reform – Government Response,* 6, 26ff and 63–64 (January 2013).

[10] As such the consultation effectively replicated the CJC 2008 Report's recommendations and the position set out in the Financial Service Bill 2009's unimplemented class action provisions. See, Financial Services HC Bill (2009–2010) [6] cls 18–25.

the consultation's recommendations should it be introduced into Parliament as a formal Bill.[11]

While the 2013 Bill only applies to a limited tribunal jurisdiction it raises a number of issues both for the CAT and, mutatis mutandis, for the civil justice system as a whole. In particular it brings into focus whether its intention to introduce a form of opt-out action is consistent with the aim of securing effective access to justice or whether it is a means through which a choice to opt-out of justice can be made. In order to consider this issue it is necessary to outline the nature of the collective action the 2013 Bill intends to introduce.

II Proposed Reform – The Draft Consumer Rights Bill

The Bill, if enacted, would extend the scope of the CAT's jurisdiction, enabling it to hear private actions on a stand-alone basis, where a claimant would have to prove that the defendant had infringed competition law, as well as a follow-on basis.[12] As a matter of substantive law, its original jurisdiction was thus to mirror that of the civil courts. Private actions, either stand-alone or follow-on, under the Bill's provisions are to be capable of being brought on either a traditional, unitary, or on a collective basis.[13] In order to bring an action on a collective basis a number of formalities would, however, need to be satisfied. No collective proceedings could, for instance, be pursued without authorisation from the CAT; authorisation requires the CAT to make a '*collective proceedings order*'.[14] To be authorised as such, there must be at least two claims.[15] Those claims must raise '*the same, similar or related issues of law or fact*'. They must also be '*suitable*' claims to be pursued as collective proceedings.[16] What is meant by '*suitable*' is not defined in the provisions, and would undoubtedly be subject to much satellite litigation over its meaning and scope of application, not least, as it is likely to form the basis on which the CAT's procedural rules could properly introduce a superiority test, including a preliminary merits test, as part of the authorisation process.[17] In addition to ensuring that the claims themselves can properly be brought as collective proceedings, the provisions also require the CAT to be satisfied

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[11] Draft Consumer Rights Bill (Cm 8657, TSO, June 2013), clause 82 and schedule 7. The draft Bill was introduced into Parliament in January 2014. Its provisions concerning collective action reform remain as they were in the draft Bill, albeit they are now contained in clause 80 and schedule 8 of the published Bill.

[12] *Ibid.* Para. 4, Part 1 of schedule 7.

[13] *Ibid.* Para. 4(1) and 5(1), Part 1 of schedule 7, via what would become ss 47A and 47B of the Competition Act 1998. Further references to these two sections of the 1998 Act are to these sections.

[14] New s 47B(4) Competition Act 1998.

[15] New s 47B(1) Competition Act 1998.

[16] New s 47B(5) and (6) Competition Act 1998.

[17] CJC 2008 Report at 147–148, and see Civil Justice Council, *Draft Court Rules for Collective Proceedings,* 6–8 and, at 17–18 (February 2010), draft CPR r. 19.20, which specified that suitability included whether a collective proceeding: would further the overriding objective; is the most appropriate means for the fair and efficient resolution of the common issues taking account of the costs and

that the putative claimant – the representative party who is to bring the proceedings – is fit and proper to do so. It must be specifically satisfied that the representative party is either one of the individual claimants whose claims are within the scope of the collective proceedings i.e., the representative party has a direct interest in the proceedings, or is a person who it is 'just and reasonable' to permit to act as the representative.[18] While the clauses do not flesh out who might fall within the just and reasonable test, given the intention behind the provisions law firms, third party funders and claims management companies are unlikely to satisfy this test. As the explanatory notes to the 2013 Bill make clear, this provision is intended to enable the CAT to authorise relevant consumer bodies and trade associations to act as representative parties.[19]

Assuming the nature of the claims and the putative representative party are capable of justifying a collective proceedings order being made the CAT must then determine the nature of the proceedings: should it proceed on an opt-in or opt-out basis?[20] Again the 2013 Bill's provisions provide no guidance how the CAT should exercise the power to determine the basis on which the collective proceedings should proceed. The CAT's procedural rules may flesh out criteria to be applied in making this assessment. They may however, following the CJC's advice, leave the criteria to be applied for the CAT to determine on a case-by-case basis.[21] Whether or not the proceedings are certified on an opt-in or opt-out basis the CAT is barred from making an award of exemplary damages against the defendant.[22] Where damages are awarded in opt-out proceedings the CAT is not required to carry out an assessment of the amount of damages recoverable in respect of each individual member of the represented class.[23] It can thus make global awards and do so on the basis of statistical evidence or damage aggregation, as had previously been recommended by the CJC's 2008 Report.[24] Where damages are awarded in opt-out proceedings and are unclaimed by represented class members they must be paid to any charity specified under section 194(8) of the Legal Services Act 2007.[25] At the present time that means the only charity to which such unclaimed damages would be paid to is the Access to Justice Foundation. If the proceedings settle prior to judgment, or even prior to issue of proceedings, it is a mat-

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benefits of the proposed action, the availability of ADR and any other (including regulatory) means of resolving the dispute, and the size and nature of the class.

[18] New s 47B(8) Competition Act 1998.

[19] Draft Consumer Rights Bill Explanatory Notes at 73. Further criteria for determining whether it is just and reasonable to authorize a putative representative could properly be taken from the CJC's Draft Rules for Collective Proceedings at 18–19, draft CPR r. 19.21.

[20] The Bill's definitions of opt-in and opt-out proceedings, set out at new s 47B(10) and (11) Competition Act 1998, are drawn directly from the CJC's Draft Rules for Collective Proceedings at 14–15, draft CPR r. 19.16, and see clause 19 of the Financial Services Bill 2009.

[21] See CJC's Draft Rules for Collective Proceedings at 10–11.

[22] New s 47C(1) Competition Act 1998.

[23] New s 47C(2) Competition Act 1998.

[24] CJC 2008 Report at 165–167.

[25] New s 47C(5) Competition Act 1998.

ter for the parties to determine what is to happen to any unclaimed damages awarded under the settlement, as the Bill is silent on the issue.[26]

The provisions set out in the 2013 Bill are very much of a piece with and implement the detailed recommendations set out in the CJC's 2008 Report and that had previously been incorporated into the Financial Service Bill 2009's abortive collective action clauses. If they are, unlike previous reforms, to enter into force, at least two issues will need further scrutiny. First, the question whether the introduction of opt-out proceedings actually serves to increase access to justice needs greater consideration than either the CJC or the BIS consultation gave it. Secondly, and linked to the first question, what to do with any unclaimed damages will need to be given greater scrutiny, not least because the 2013 Bill rejects both the CJC's recommendation in this regard and the position taken in the Financial Services Bill 2009, that the question should be left to the court's discretion.[27] The CJC in particular specifically rejected a proposal that any unclaimed damages must be paid to the Access to Justice Foundation in formulating its recommendations.[28] These questions do not simply arise in respect to the 2013 Bill. They are equally applicable to any future consideration of collective action reform in civil procedure generally. The remainder of this short article turns to these issues.

III Opt-Out and Statutory Cy-Pres – Crippling the Compensatory Function[29]

The starting point for any consideration of procedural reform is to clarify its aim. The aim underpinning the present reforms, and collective action reform in general, is to increase access to justice for individuals whose rights have allegedly been infringed. As the CJC put it collective action reform should '*... better enable individual citizens [to] vindicate their substantive law rights ...*'[30] The introduction of an opt-out form of collective action in the CAT under the 2013 Bill is explicitly intended to achieve that end. The explanatory notes to the Bill make that absolutely clear: '*The purpose of introducing opt-out collective actions is to allow consumers and business to easily achieve redress for losses they have suffered as a result of breaches of competition law.*'[31]

The question that the 2013 Bill needs to answer therefore is does an opt-out form of action achieve that explicit aim. There will be clear cases where it does so. Where, for instance, a large number of individual rights-holders all have a single indivisible

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[26] New s 47C(2) Competition Act 1998 is limited to unclaimed damages that have been awarded by the CAT and new ss 49A and 49B, which deal with collective settlements, have no equivalent provision; see Department of Business, Innovation and Science, *Private Actions in Competition Law: A Consultation on Options for Reform – Government Response*, at 26 (January 2013).

[27] CJC 2008 Report at 181; Financial Services HC Bill (2009–2010) [6] cls 23(5)(b).

[28] CJC 2008 Report at 181 and 352–353.

[29] *State of California v. Levi Strauss & Co.,* 715 P.2d 564, 575 (Cal. 1986).

[30] CJC 2008 Report at 138.

[31] Draft Consumer Rights Bill Explanatory Notes at 73.

right in common i.e., a general, collective right such as those that were the subject matter of 19th Century representative actions, an opt-out, or even mandatory, form of collective action will achieve that end.[32] It is not immediately clear that an opt-out action is otherwise properly capable of vindicating individual rights in the same way. Examining the JJB Football Sports case can most clearly show that this is the case.

The JJB Football Sports case is well known. It is the only case that has arisen under the Competition Act 1998's opt-in collective action procedure and is generally taken to be the paradigmatic example of why it is an inadequate means to secure effective rights-vindication. It was specifically relied in the BIS Consultation as supportive of reform.[33]

These are the facts of this case. In 2003 *Which*, the Consumer Association, issued follow-on collective proceedings under section 47B of the Competition Act 1998 against JJB Sports on behalf of a class of claimants who had been overcharged for replica football shirts. JJB Sports, amongst others, had previously been held to be guilty of price fixing, and fined £6.7 million, following an investigation by the Office of Fair Trading.[34] There were approximately 1.2–1.5 million members of the affected class.[35] Despite significant attempts by *Which* and their lawyers between 130 and 1000 class members opted-in to the proceedings. The claim ultimately settled. As part of that settlement any class member who had not joined the proceedings could come forward to claim an amount in damages under its terms on proof of loss; in other words the settlement operated as if it was an opt-out action as anyone in the class was within the terms of the settlement.[36] In total 15,000 would go on to make a claim under the settlement that would ultimately be reached in the proceedings.[37] Taking these figures at their highest no more than 0.07 per cent of potential class members opted-in to the claim, with a further one per cent claiming under the settlement. It is not difficult to see why the opt-in mechanism has the appearance of being utterly unable to vindicate rights effectively.

If there had been an opt-out follow-on action available at the time the picture might have been markedly different. To see the extent of that difference it is necessary to turn to Mulheron's '*Evidence of Need*' study, which informed the CJC 2008 Report's recommendations.[38] Mulheron examined comparative figures for participation in col-

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[32] See also, M Redish, *Wholesale Justice – Constitutional Democracy and the Problem of the Class Action Lawsuit*, at 6ff (California: Stanford Law Books, 2009).

[33] Department of Business, Innovation and Science, *Private Actions in Competition Law: A Consultation on Options for Reform – Government Response*, at 11 (January 2013).

[34] *Ibid.*; *Consumer Association v. JJB Sports PLC*: case/n 1078/7/9/07.

[35] CJC 2008 Report at 84.

[36] http://www.theguardian.com/business/2008/jan/09/jjbsports.retail.

[37] The exact figures are subject to dispute, see http://www.guardian.co.uk/business/2008/jan/09/jjb-sports.retail; http://www.thelawyer.com/competition-which/1007296.article as well as Department of Business, Innovation and Science (fn 8) at 11.

[38] R Mulheron, *Reform of Collective Redress in England and Wales: A Perspective of Need* (London: Civil Justice Council of England and Wales, 2008). The study argued strongly for the introduction of generic opt-out form of collective action. That recommendation would ultimately be rejected by the CJC (CJC 2008 Report, recommendation 3, at 145), which opted for a recommendation that a flexible

lective actions across opt-in and opt-out regimes. Her figures were summarised in the CJC 2008 Report as follows,

> '*The exercise of* "*crunching the numbers*" *on opt-in versus opt-out confirms the anecdotal evidence that opt-out* "*catches more litigants in the fishing net*". *Where modern empirical data exists, the median opt-out rates have been as low as 0.1 per cent, and no higher than 13 per cent. Where widespread empirical data does not exist as yet, judicial summations of opt-out rates indicate a range of opt-outs between 40 per cent (which is rare, on the cases surveyed) and 0 per cent, with a tendency for the rates of participation under opt-out regimes to be high (that does not, however, guarantee that all class members will come forward to claim their individual entitlements following the resolution of the common issues. On the other hand, whilst the experience in English group litigation indicates that, under its opt-in regime, the opt-in rates vary considerably, from very low percentages (<1 per cent) to almost all group members opting to participate in the litigation, European experience sometimes indicates a very low rate of participation (less than 1 per cent) where resort to opt-in was necessary in consumer claims and where the class sizes were very large. In the United States too, a much lower participation rate has been evident under opt-in than under opt-out. In that respect, the dual pillars – access to justice and judicial efficiency in disposing of the dispute once and for all – are enhanced by an opt-out regime*.'[39]

On the figures thus presented if the JJB Sports case had been prosecuted on an opt-out basis rather than no more than 0.07 per cent participation, an opt-out regime would have produced a class of from 60–100 per cent participation; participation here ranging from an active choice to remain in the class to apathy whether to do so to ignorance of the existence of the class. On the face of it, a far more effective means of securing rights-vindication, while under the surface less so as it is likely to contain individuals within the class who are at best indifferent to the question whether their rights are vindicated or not. The problem with the superficial attraction of an opt-out regime in this instance can be seen by looking back at the rate at which class members made a claim under the settlement reached in the JJB Sports claim. Only one per cent of eligible class members claimed under the settlement. The settlement was open to all affected class members, whether or not they had opted-in to the claim. In other words the settlement applied as if the action was brought on an opt-out basis and no class member had opted-out. Yet of the potential 1.2 to 1.5 million class members still only

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form of collective action be introduced that gave the court discretion to order collective proceedings continue either on an opt-in or opt-out basis. The government, in its response to the CJC 2008 Report, also rejected the conclusion that there was evidence to support the introduction of a generic form of collective action, based on the position set out in the Evidence of Need study, Ministry of Justice, *The Government's Response to the Civil Justice Council's Report: Improving Access to Justice through Collective Actions,* at 8 (London: Ministry of Justice, July 2009).

[39] CJC 2008 Report at 96–97; R Mulheron, *Reform of Collective Redress in England and Wales: A Perspective of Need*, at 147–161 (Civil Justice Council of England and Wales, London, 2008).

15,000 claimed. The fact was that 99 *per cent* of eligible class members did not seek compensation for their loss. They did not seek to vindicate their rights. While many would not have been able to produce proof that they had bought a relevant replica football shirt, many more undoubtedly took the view that the £15 loss they had suffered was simply not worth the candle, even when all they had to do was claim under a settlement. They took the view that they did not want to vindicate their rights; not only was the claim *de minimis* but so was, as far as they were concerned on an individual basis, the right infringed.

The question then arises what happens to any sum awarded under an opt-out collective action, or collective settlement, that goes unclaimed. As the CJC 2008 Report acknowledged, there is in any opt-out action always an amount, and often a very significant amount of damages, that go unclaimed:

> '*Where collective actions are pursued on an opt-out basis experience shows that there is the likelihood that there will remain an unclaimed residue of the judgment damages award, especially where damage aggregation occurs, or the settlement award. Some jurisdictions, albeit not the US system insofar as judgment awards are concerned, have specifically provided the court with a cy-près power so that such a residue can be distributed either for a purpose that will benefit the class generally or benefit, for instance, a charity related to the issue which gave rise to the collective action*.'[40]

Neither the CJC 2008 Report nor Mulheron's evidence of need study nor the BIS Consultation considered the extent to which there were unclaimed damages in opt-out collective actions. They simply proceeded on the basis that there would be such an unclaimed residue and proceeded to focus on the question of what to do with it. As noted earlier, the BIS consultation concluded that the optimum choice would be to ensure that such a residue, where it arose in opt-out proceedings, must be given to the Access to Justice Foundation, a charity that provides funding for pro bono legal advice and to support agencies and bodies.[41] If we assume that the JJB Football shirts case had proceeded on an opt-out basis it would have produced a situation where damages of £15 – £20 per class member could have been awarded i.e., a total aggregate sum of between £20 to £30 million.

Assuming, as happened under the JJB settlement, which operated as if the proceedings had been opt-out and no class member opted-out, that 15,000 class members, each of whom could prove they had suffered a loss, actually then claimed their damages, and thereby ensured their loss was made good and their rights-vindicated, that would have left a sum (assuming all claimed £20) of between £19.7–29.7 million unclaimed. That sum would, under the 2013 Bill, simply be paid to the Access to Justice Foundation, a body that had nothing whatsoever to do with the litigation in

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[40] CJC 2008 Report at 170.

[41] http://www.accesstojusticefoundation.org.uk.

question. The vast majority of the damages would thus be paid out in a way that in no way vindicated the rights in question. Notwithstanding the fact of opt-out proceedings 99 *per cent* of the infringed rights would remain unenforced: they would not have been vindicated and a charitable body would have obtained a windfall payment. The real question the CJC and BIS should have asked was not what is the difference between the numbers who opt-in to proceedings and those who opt-out of them, but what was the difference between the number who opt-in to proceedings, and whose rights are vindicated, and those who obtain damages under an opt-out form of action i.e., how many individuals had their rights vindicated under each form of action. Only if there is a significant difference between these figures can it properly be said that opt-out proceedings are a more effective means to vindicate individual rights.

Where does this leave matters? While the JJB Football shirts case may demonstrate problems with opt-in actions it does not provide a clear case for introducing an opt-out collective action. Given the analogy that exists between opt-out actions and the nature of the JJB settlement it is apparent that the opt-out mechanism was only marginally more effective a means to vindicate rights. What actually appears to be the case is that rather than focusing on individual rights-vindication the use of an opt-out mechanism exists more for the convenience of those who wish to bring such proceedings – it exists for '*the purposes of display*',[42] a point reinforced by a comment made by Deborah Prince, Head of Legal at *Which* at the time when the JJB case was prosecuted. Commenting on her experience in using the opt-in mechanism, and the benefits of introducing an opt-out one, she said this: '*With an opt-out model, you proceed as if you're acting for a million claimants, and if only 1,000 sign up you pay them and the balance goes to charity or some other worthwhile cause. Is it a perfect system? No. But is it better then the current system? Definitely.*'

The difference then has nothing to do with improving rights-vindication through ensuring that individuals who have suffered a loss are made whole. There is an insouciant acceptance that notwithstanding the fact that a claim may be brought in the name of millions realistically it is only going to vindicate the rights of the same or a similar number of individuals who would have actually opted-in to the action if it had been an opt-in action. The residue of unclaimed damages, the product of still unvindicated rights, can simply go to a third party. How this is an improvement, accept for representative parties who can act as if they represent millions rather than the actual number of individuals who actively wish to have their rights vindicated, it is difficult to see. It is particularly difficult to see what benefit is gained by pretending to act for a million class members and then only vindicating the rights of 1000 over and above a system that requires you to act for the 1000 in the first instance and then vindicate their rights. Legal fictions in procedure are as unpalatable as they are in substantive law. Reform should not properly be carried out on the basis of such fictions if at all possible.

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[42] M Redish, *Wholesale Justice – Constitutional Democracy and the Problem of the Class Action Lawsuit*, at 14 (California: Stanford Law Books, 2009).

Advocates of reform may suggest that an opt-out form of action is a more efficient and effective means of prosecuting multiple claims, not least multiple small claims.[43] From a procedural perspective an opt-out form of action, identical in all respects to an opt-in one bar the manner in which rights-holders join the action, ought to be no more efficient a means of prosecuting multiple claims than an opt-in action. The two forms of procedure can quite properly have the same procedural features. There is no reason, for instance, why an opt-in action should be restricted, as the present Competition Act follow-on action is, so that only pre-authorised representative bodies can bring claims on behalf of a class. Equally, there is no reason why liberal funding mechanisms should not be available to class representatives, which would enable a broad range of bodies, trade associations and class members to bring such actions on behalf of those who choose to actively opt-in to proceedings. As such there is a good argument for enabling the use of third-party funding and contingency fee agreements as means to fund such actions. Equally there is a good argument for introducing a bespoke opt-in collective small claims procedure that would operate within the County Court. Such a procedure could be inexpensive to commence. It could be procedurally simple to operate and easy to opt-in to, either before issue, after issue or, for a specified period of time, after judgment. In that way a simple, effective process could be introduced to deal with such small claims, while maintaining our commitment to individual party autonomy and the right to actively choose whether or not to seek to vindicate rights.

Finally, it is suggested that further consideration needs to be given to the question of statutory cy-pres under the proposed reform. It was noted earlier that if the JJB Football shirts case had operated on an opt-out basis, such as that proposed in the 2013 Bill, the Access to Justice Foundation would have received a windfall of between £19.7 and £29.7 million. Such a windfall would, of course, serve a significant public good given the nature of the Foundation. It would however have effectively transformed the action into one that in no real sense could be said to have vindicated the rights of the effected class. Again, it may have effectively ensured that the defendant was in no position to keep the benefit of their unlawful behaviour, but that is the proper role of regulatory enforcement and regulatory fines. The civil justice system does not, in other situations, step in and require defendants to disgorge a benefit from unlawful behaviour where the rights-holder chooses not to take steps to vindicate their rights in the face of that behaviour. If it did the basis on which claims could settle would be placed in jeopardy, as party autonomy would be replaced by paternalistic intervention by third parties who could seek to vindicate the right notwithstanding a decision by the right-holder not to do so. The problem at the heart of the statutory cy-pres mechanism in the 2013 Bill is that it rests on an implicit acceptance that the opt-out action goes beyond the primary purpose of civil proceedings: to secure compensation as a means of rights-vindication. Payments under that mechanism mark a failure to increase effective access to justice, to allow as the Bill intends to make it easier for individuals and businesses to readily obtain redress for breaches of competition law.

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[43] CJC 2008 Report at 138.

They may serve other, punitive, regulatory or deterrent, purposes well, but such payments do not demonstrate an increase in effective rights-vindication. For that a more cost-effective, simpler and efficient opt-in mechanism married to more effective regulation is necessary.

IV Conclusion

The main question to ask in any procedural reform is whether it will improve the ability of individual right holders who genuinely and actively wish to vindicate their rights, either through bringing or defending claims before the courts. The proposed introduction of an opt-out form of collective action combined with a statutory cy-pres scheme for the allocation of unclaimed damages in the CAT for competition law claims, and perhaps in future in the civil justice system, has not properly grappled with that question.

The proposal rests on an unspoken assumption that right-holder inertia in opting-out can be equated to a proper indication of a desire to vindicate those rights. This is an assumption that needs to be tested by Parliament before such a form of action is introduced. It does because the paradigm case that supposedly supports the introduction of an opt-out form of action – JJB Football shirts – underscores how such an action would have done little to vindicate rights while providing a large-scale non-compensatory windfall to a body that had nothing to do with the cause of action.

Looked at properly that case actually demonstrates the strength and advantage of the present opt-in form of action, albeit it would need to be reformed so that it could be brought by other parties than those simply designated by the Lord Chancellor. It allowed class members to opt-in before judgment. It thus respected the right of individuals to make an active and genuine choice whether to vindicate their rights. Enough individuals chose to do so to enable a collective action to commence. It then, under the settlement, permitted those right-holders who for whatever reason did not choice to join the action at the start to opt-in to settlement. The opt-in process to join the settlement carried no litigation risk. It was simple and straightforward, and thus did not carry with it any of plausible barrier to entry that the opt-in action could be said to have had when it commenced.

There were no reasons why any individual – notified through the publicity campaign that accompanied the case – could not have chosen to opt-in to the settlement if they had wanted to do so. There was no reason why all the rights holders who had a genuine claim and could prove that claim could not have effectively vindicated their rights through the settlement process. 99 per cent, for whatever reason, chose not to do so. An opt-out form of action would have taken that right not to do so out of their hands. It is difficult to see how taking that right out of their hands and transferring compensation that was supposed to vindicate such rights to a third party increases effective access to justice.

The opt-in action on the other hand leaves rights-vindication squarely and genuinely in the hands of the rights-holders, where it belongs. Opt-out actions do not. That

they do not becomes particularly egregious when they, as the 2013 Bill proposes, converts such compensation that arises from their infringed right into a benefit to be conferred on a third party, no matter how worthy that third party might be. That it does so contradicts the very aim which reform is said to seek to achieve: increased rights-vindication. Every penny in compensation that is unclaimed and then transferred to the Access to Justice Foundation under the 2013 Bill's propose reforms would highlight the failure of the reform to increase access to justice for those who want to vindicate their rights. It would mark out the reform as one that accepts that the compensatory function, the primary aim of any civil justice system, has been neutered: that the opt-out mechanism is a means to opt-out of justice.

The better approach to reform would be one that makes the process of bringing an opt-in form of collective action easier and more straightforward. It would enable rights-holders to opt-in to the action at any time from its commencement to post-judgment or post-settlement. In that way only those rights-holders who wish to vindicate their rights do so, while respecting the right of other such individuals to choose not to do so. While it might be said that this may leave some defendants in the position that they are able to hold on to gains they ought not to have received that is not properly an issue for civil proceedings. It is an issue for regulatory enforcement. Effective regulation and effective regulatory action ought to ensure that defendants who, for instance breach competition law, are left in the position that they retain no benefit from their unlawful action. Regulatory fines should ensure that that is the case, and then if it is through appropriate the regulatory body could then transfer such fines to charitable causes. Such measures could properly act punitively and as a deterrence mechanism. Undoubtedly these issues will need to be given detailed consideration should the 2013 Bill be introduced into Parliament.