

applicable to both tangible and intangible assets has already been drafted and recommended by UNCITRAL's soft law instruments. It is debatable whether there is a need to have a separate international registration system specifically for transfers of and security rights in receivables. Nevertheless, from this vantage point, the book is useful in providing a clear comparative analysis of different jurisdictions as to their treatment of transfers of and security rights in receivables.

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Class Actions in England and Wales. Edited by DAMIAN GRAVE, MAURA MCINTOSH and GREGG ROWAN. [London: Sweet & Maxwell, 2018. Hardback £199.99. ISBN 978-04-14057-30-2.]

Collective redress procedures are a necessary feature of any modern civil justice system. Such procedures facilitate access to justice for claimants whose individual losses are insufficient to make litigation practicable. "By combining into a group, a multitude of litigants may command sufficient resources to proceed, ... share the risks of litigation, obtain greater publicity and a manoeuvre into a better negotiating position": Zuckerman, *Civil Procedure*, 3rd edn (2003), [13.61].

The English courts have long recognised the necessary of developing some practicable class action procedures (see *Davies v Eli Lilly & Co.* [1987] 1 W.L.R. 1136, at 1139). In the decades prior to the introduction of the Civil Procedure Rules (CPR), the High Court exercised its powers to facilitate multi-party claims in a number of pharmaceutical cases. These gave rise to novel procedural tools: the use of test cases in the Primodos litigation in 1975 (*Hudd v Schering Chemicals Ltd.* [1980] E.C.C. 375); the establishment of a nominated procedural judge and a system of "master pleadings" in the Opren litigation of the 1980s (*Walker v Eli Lilly & Co.* [1986] E.C.C. 550); and a steering committee of law firms in the Benzodiazepine tranquiliser litigation in the early 1990s (*AB v John Wyeth & Brother Ltd.* (No. 4) (1994) 5 Med.L.R. 1). Welcome as these innovations were, they were no more than piecemeal solutions. In particular, the courts could not change the fundamental principle that members of the claimant group had actively to join – that is, "opt in" to – the litigation.

Class actions formed an important part of Lord Woolf's 1996 report, *Access to Justice*, which described its recommendations in this field as "managing the unmanageable". Ultimately, Lord Woolf recommended that the aims of access to justice, efficiency and fairness could best be achieved by allowing both opt-in and opt-out proceedings. Under the latter system, all persons falling within the class definition are automatically included in the class unless and until they actively opt out of the litigation. The potential advantages of an opt-out procedure for suitable claims are readily apparent. First, it eliminates procedural hurdles for group members, who will prima facie qualify for any relief even without having been parties to the claim. Secondly, it reduces the risk that a group member may fail to join proceedings in time (for example, because he or she did not hear about the litigation) and so lose out on the chance to participate. Thirdly, in cases where the defendant is in a position to identify and compensate all qualifying claimants (such as overcharging by a bank), an opt-out system in fact ensures that all claimants are properly compensated. Fourthly, it ensures that the claim is valued at the full amount of the loss allegedly caused, thereby giving the defendant greater certainty about the scope

of its potential liability, and putting greater pressure on the defendant to settle meritorious claims.

Unfortunately, those implementing the civil justice reforms of the late 1990s chose not to adopt Lord Woolf's recommendations in full. Instead, Part 19 of the new CPR created an opt-out-only regime in the form of Group Litigation Orders ("GLOs"). Through this regime, the CPR made class actions a more accessible and effective part of English procedure, and gave the courts a host of new case management powers. Nonetheless, the CPR represents a missed opportunity to usher in the more radical change promised in the Woolf Report.

Class Actions in England and Wales is written by a team of solicitors at Herbert Smith Freehills who are at the coalface of this new regime, having acted in several of the leading cases. They have intimate knowledge and experience of the issues that arise at various stages of group litigation. The book is at its best when discussing the management of group litigation, from commencing group litigation (ch. 3) to the conduct of group litigation pre-trial (ch. 4) and at trial (ch. 5). These chapters usefully draw principles from the authorities on GLOs, and offer considerable practical advice – for example, in the sections on publicising a GLO, determining the cut-off date for applying for inclusion in the group, and on disclosure.

The provisions of the CPR concerning obtaining a GLO (addressed in ch. 3) are deceptively simple. CPR 19.11(1) says that "The court may make a GLO where there are or are likely to be a number of claims giving rise to the GLO issues". There are, therefore, two threshold requirements: one or more common issues (of law and/or fact), and "a number" of claims (with no specific minimum) giving rise to those issues. Beyond these basic requirements, the court retains a wide-ranging discretion whether to grant a GLO. The authors address the considerable case law on the application of these threshold requirements and other matters relevant to the court's discretion (including the efficient disposal of the claims, costs issues and matters of funding, fairness between the parties, merits of the case). This survey of the authorities is deft, and the enumeration of relevant factors will be extremely helpful to future litigants. The discussion is on occasion disappointingly brief. For example, just two paragraphs are given over to the important issue of "defining the GLO issues".

One particularly interesting issue that arises in the authorities on granting a GLO is the need to protect the interests of the "core" – that is, the most meritorious – claimants in the group. In one respect, the core claimants are best served by the expansion of the claimant group; as the group expands, greater litigation funding is likely to become available, the costs of unsuccessful litigation are spread more thinly, and the defendant may well feel more pressure to settle. In another respect, the strength of the core claims can be diluted by their mixture with unmeritorious claims, and the expansion of the group can lead to disproportionate costs. To take one example, in the *Westmill Landfill Group Litigation (Barr v Biffa Waste Services Limited (No.3))* [2011] EWHC 1003 (TCC); [2011] 4 All E.R. 1065, Coulson J. criticised the addition of 145 claims that "were always likely to fail on the facts" to a core group of seven arguable claims. This, he said, "complicated and expanded these proceedings (which could otherwise have been dealt with in the County Court) to no obvious advantage, certainly not to the seven claimants who were in an entirely different position on the facts" (at [568]).

The authors return to this theme in ch. 5, in their excellent discussion of the use of preliminary issues and test cases. Test cases can, if chosen well, save considerable costs and promote settlement. By way of example, in the *Mogden Group Litigation (Dobson v Thames Water)* [2011] EWHC 3253 (TCC); (2011) 140 Con. L.R. 135, which involved claims for nuisance at common law and under the Human Rights

Act 1998, two groups were identified – those with, and those without, a proprietary interest in the lead properties – and test claimants selected from each group. However, the *Pertussis Vaccine Litigation (Loveday v Renton)* (1990) 1 Med. L.R. 117 provides a salutary lesson in handling test cases. There, the single lead claimant was forced to withdraw late, when inconsistencies in his evidence became apparent; a second test claimant had to be selected, causing inevitable delay and wasted costs.

Chapter 2, on conflict of laws issues, is not quite as instructive. It offers a helpful overview of the general law on jurisdiction, choice of law, and enforcement of foreign judgments but any reader with a question on these topics will surely look to one of the specialist texts in this area. Whilst the chapter raises some of the specific difficulties arising in group litigation, it provides only brief discussion. For example, the authors note the risk that there may be more than one governing law for the group's various claims, but address this risk only in a short section on "after the event" choice of law agreements (dismissing in two sentences the suggestion that English law could develop a special *lex causae* for group claims). There is, however, an interesting section on the recognition of foreign judgments given in "opt-out" proceedings, in which the authors hesitantly commend the decision of the Court of Appeal of Ontario in *Currie v McDonald's Restaurants of Canada Ltd.* (2005) 74 O.R. (3d) 321, that such judgments should be recognised if and only if the non-resident class members were given adequate notice and representation.

Chapters 9 to 11 depart from the structure of the rest of the book to examine in detail three areas in which class actions are especially common: shareholder claims, environmental and human-rights-based claims and competition claims. The first two of these can be criticised on the same grounds as the chapter on jurisdiction: whilst they provide an excellent overview of their respective areas of law (and give some examples of the application of the general law in group litigation) they offer little analysis of the specific problems (if any) posed by class actions in these fields. Much of ch. 10, for example, is devoted to the question whether the UK parent of a group of companies can be sued for alleged environmental (or other) harm caused by a subsidiary in a foreign jurisdiction. This is an interesting question, on which the authors have obvious expertise, but it is not one specific to class actions.

By contrast, the chapter on competition law contains much pertinent discussion that is specific to group litigation, and will be of immense value to those practicing in this field. Competition claims now benefit from a new *sui generis* regime in sections 47B and 49A-49B of the Competition Act 1998 (as amended by the Consumer Rights Act 2015). By far the most significant feature of this regime is that it allows for *opt-out* proceedings and collective settlements. This chapter discusses the various stages and implications of this procedure by reference to the two major cases managed under it so far: *Gibson v Pride Mobility Products* [2017] CAT 9; [2017] 4 C.M.L.R. 33 (concerning an allegedly anti-competitive retail supply agreement for mobility scooters); and *Merricks v MasterCard Inc.* [2017] CAT 16; [2017] 5 C.M.L.R. 16 (concerning multilateral interchange fees for use of debit and credit cards). Much attention is given to the new collective settlement regime, including the requirement that any settlement be "just and reasonable", and (if there has not been a Collective Proceedings Order) the requirement that the settlement be properly advertised, in order to limit the risk of class members being bound by it without having been aware of the litigation.

The discussion of this new regime for competition law claims highlights the debate between opt-in and opt-out procedures that lies at the heart of this topic. The contrast between the competition regime and the general GLO regime is

stark. As Professor Zuckerman notes, “[t]he plain fact is that the GLO procedure is no more than a management tool. It is ill suited for facilitating access to justice of numerous claimants without extensive transaction costs and without the fear of potentially ruinous costs should the action fail”: *Zuckerman*, at [13.103]. Only in the field of competition law has English procedure embraced the full potential of collective redress regimes. Given the Government’s incremental, industry-by-industry, approach to reform in the area of class actions, the perceived success or otherwise of this new regime for competition claims may well determine similar opt-out schemes are extended to other fields.

Class Actions in England and Wales reinvigorates this essential debate, and is welcome for that alone. But it will also be of huge practical benefit to practitioners and to judges, who may not have had a large amount of experience dealing with class actions. To that end, it contains a comprehensive index, and helpful appendices setting out the relevant statutory provisions. As Vos C. says in his foreword, the book fills a significant void for practitioners, in a field of growing importance. *Class Actions in England and Wales* is certain to become the standard point of reference for practitioners, judges and commentators alike.

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