WHERE WOULD WE BE WITHOUT CLASS ACTIONS?

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The tide is turning in the world of UK class actions. In the space of just the last three months, we have seen our first three collective actions being given the 'green light' to proceed in the Competition Appeal Tribunal – Merricks v Mastercard, Le Patourel v BT and Gutmann v First MTR South Western Trains & Others. These claims are all trailblazers in the mass claims arena and promote a new wave in the UK justice system. With this comes a renewed energy and enthusiasm for the prospects of collective redress in the UK, at least in the competition space for now.

Most would see these developments in the regime as positive ones, we certainly believe they are, however there are some amongst us who resist the introduction of mass claims on an opt-out basis of this nature, considering it overly litigious or, dare we say, "ambulance chasing". It is therefore important to reflect on where we would be without class actions here in the UK.

Class actions are on an upward trajectory across the globe, having once been considered as typically an American mechanism of litigation. Post-Brexit, it is important to ensure our domestic framework has the ability to protect and compensate consumers here in the UK. Whilst we are seeing the development of collective action regimes in many European countries, in line with the EU Directive on representative actions, this gives rise to a greater need for UK citizens to have access to justice in the same way. Surely, it would be detrimental to our society if a resistance to class actions here left our consumers less protected than those in the EU.

The heightened awareness of corporate behaviour that is to the detriment of consumers, which in part must be informed by the rise in class actions, has also encouraged regulatory review. Recently, the Competition and Markets Authority announced it will place a higher level of scrutiny on UK businesses and strengthen the enforcement of consumer law. Until now, it has often been the case that corporate wrongdoings go unnoticed until such a time as they are brought to light by regulatory findings. An optimist might like to consider the CMA reforms, once implemented, will put an end to businesses breaching competition law. Others will argue that regulatory enforcement acts as a sufficient penalty and deterrent. But will stronger, enforced regulation actually be effective and until we reach a time when corporates are no longer guilty of such conduct, how will consumers be protected?

The emerging CAT's stance on important considerations, such as common issues and suitability, appear to further support the belief that mass consumer claims must be brought on an opt-out basis, sending a strong message that it will no longer be 'business as usual' for corporates making profits from their wrongdoings against consumers.

Outside of the competition space, the prospects for redress on a mass scale are more challenging. Lloyd v Google serves as a reminder of the complexities of collective proceedings, where no framework or established regime exists. The decision in that case throws into question the feasibility of claimants lodging aggregated claims for redress outside the competition space, even where they share a common question of law. A claim regarding loss of control of personal data requires proof of material damage – not an easy task to demonstrate before the Court.

So, why shouldn't those who are ultimately affected by corporate wrongdoings have the right to seek redress in a collective manner, particularly when profit has been made at their expense, which is so often the case.

It is fair to say, without the opt-out class action regime, the scales of justice for consumers in the UK cannot be balanced. The regime relies on individuals willing to perform the important role of class representative, creative legal teams who are committed to collective actions and professional funders willing to finance the litigation – demonstrating a significant number of stakeholders who share a commitment to the development of class actions. And for consumers, damage is damage. Whether they have been cheated in terms of business competition, or their data has been mistreated, their consumer rights have still been impacted.

The key question in this ongoing debate is always going to be whether, eventually, class members will participate and be compensated. That, of course, remains to be seen. But, if we can continue to educate consumers and promote the benefits of these actions being brought on their behalf, for their benefit, and ultimately ensure there is a credible, accessible process for redress, then we stand a good chance of demonstrating that no ambulances are being chased. Instead, that the UK continues to deserve its recognition as a global leader in consumer protection, enforcement and justice.