



THE UNITED KINGDOM

REMEDIES THAT CROSS BORDERS

The Legal System Generally

There is no single unified judicial system for the whole of the United Kingdom (comprised of England, Scotland, Wales, and Northern Ireland). Instead, there is one system for England and Wales, one for Scotland, and one for Northern Ireland. The United Kingdom is primarily a common law system, although Scotland utilizes some elements of civil law. Legislation is enacted by parliament but the judiciary is responsible for interpreting the legislation and following judicial precedent. Legislation and decisions by the courts of the United Kingdom are also subject to legislation adopted by the European Council and the European Court of Justice. The legal system is an adversarial system and each party is responsible for presenting evidence and arguing its claims and defenses. Although there is a right to a jury trial, that right has eroded and judges now typically decide both issues of law and fact.

Unlike in the United States, in the United Kingdom the legal profession is split into two groups: barristers and solicitors. Barristers are often referred to as counsel and they are typically specialist advocates who have the right to appear in higher courts on most substantive proceedings, draft documents for court, and give opinions on particular areas of law. Barristers do not typically interact with clients. Solicitors are responsible for contact with clients and they assume primary responsibility for a case. Solicitors may appear in the high court only if they are so qualified. Judges are appointed by the Judicial Appointments Commission and they are typically experienced barristers.

Class/Collective Actions

There is no procedure in the United Kingdom that is akin to the opt-out class actions that exist in the United States. Instead, the United Kingdom offers three mechanisms for pursuing multi-party litigation: Group Litigation Orders, Statutory Collective Actions, and Representative Actions.

Group Litigation Order

The Group Litigation Order ("GLO") is a case management procedure that allows judges to combine cases that give rise to common or related issues of

fact or law. It may be brought by any person or legal entity that has a claim. It is an opt-in action and only those individuals who have claims that meet one or more of the common legal and factual issues may join the litigation. The GLO grants courts broad discretion and contains very few specific mandates. There is no minimum number of claims that must exist in order for a court to order a GLO. A GLO must, however, specify the group register, the issues the GLO will determine, and the court responsible for managing the claims. Judges may also decide the criteria for a claim to be entered on the group register, may outline the manner in which the GLO may be advertised, and may specify a deadline for joining the actions. Judges may also determine that one or more cases will proceed as the lead or test cases and will appoint lead solicitors. Ultimately, in a GLO, each individual claim remains separate and the outcome of any one case, including the lead or test case, does not automatically determine the result in the remaining claims. Lead or test cases are used as a means of establishing findings of law and fact that may then be applied in other cases and certain findings of law are made binding on all parties that have joined the group register at the time of the judgment. The GLO also may provide for a more expedient resolution to a case as it may encourage defendants to settle.

Statutory Collective Actions

There are five consumer protection statutes in the U.K., implemented as a result of EU directives, that allow for collective actions for misleading advertisements, unfair terms in consumer contracts, unfair trading, and violations of other consumer protection laws. The Office of Fair Trading is entrusted with the primary enforcement responsibility; however, consumer organizations may bring actions for injunctive relief on behalf of consumers. All consumer organizations wishing to bring an action must be approved by the government. "Which?" is the only consumer association that is currently authorized to act in collective consumer litigation. "Which?" has yet to bring any actions for injunctive relief and has so far only brought matters to the attention of the Office of Fair Trading.

Representative Actions

If there are multiple individuals who have suffered losses as a result of a violation of UK competition law, then a "specified body" may bring a representative action. Three conditions must be met in order for the "specified body" to proceed with a representative action:

1. Each individual with a claim must expressly grant the specified body permission to act on his/her behalf.
2. The Office of Fair Trading or the European Commission must have established that there was a violation of competition law.
3. The complaints must all relate to goods or services received by consumers.

Just as in Statutory Collective Actions, an organization must be approved to be a specified body and in order to be approved they must meet criteria such as demonstrating they represent or protect the interests of consumers,

demonstrating a lack of bias and an ability to act independently, impartially, and with integrity. So far only "Which?" has been approved.

Unlike in a Statutory Collective Action, the remedy in a Representative Action is an award paid to the individual consumers and not injunctive relief. While the remedy is typically paid to each individual consumer who was represented in the action, if all the consumers and the "specified body" agree, the award may be made to the "specified body."

Costs of Litigation

The United Kingdom is, at least in theory, a "loser pays" system and a prevailing party may potentially recover both the court costs and legal fees they incurred as a result of the action. All fees and costs, however, are fully within the discretion of the court and in determining the cost award.

In collective action litigation, a group member is liable for the individual costs of their claim and severally liable for their percentage of common costs. Even if common costs were incurred before a litigant joins the group, they may still be liable for a portion of the earlier incurred costs but if they leave an action early they are not responsible for the costs incurred after their departure.

Attorneys are prohibited from representing clients on a contingency basis, but attorneys may charge a conditional fee (where the lawyer bills the client at an hourly rate and charges a success bonus that is equal to a percentage of the base fee). Conditional fee agreements are strictly regulated.

In order to cover the potential costs that may be incurred in litigation, a litigant may take out after the event insurance to cover the costs in the event they lose the case. Third party funding, where an outside party/investor advances all legal costs and fees in exchange for 25-40 percent of any recovery, is also available.

Kessler Topaz's Experience The United Kingdom

Kessler Topaz represents several clients in a recently filed action against Royal Bank of Scotland ("RBS") for its £44 billion loss in market value stemming from facts which suggest that RBS materially mislead investors with respect to its true exposure to subprime-related assets and collateralized debt obligations and inflated the value of its assets, including those assets it acquired from the Dutch bank ABN Amro.