



## Competition Law Association

British Group of the  
Ligue Internationale du Droit de la Concurrence  
(International League for Competition Law)

[www.competitionlawassociation.org.uk](http://www.competitionlawassociation.org.uk)

### UK PRIVATE ACTIONS: UPDATE & REFORM

1 February 2012

Mr Justice Roth (Chair)

At an evening meeting hosted by Ashurst LLP, the CLA were delighted to welcome a distinguished panel of speakers to discuss recent developments in this area. The meeting was opened by Mr Justice Roth, former Chairman of the CLA, summarising the central issues and the substantive discussion was introduced by Ben Rayment's presentation, a comprehensive round-up of the more recent and important cases.

Ben Rayment, Monckton Chambers

Ben's slides can be accessed via the 'past events' section of the CLA website, located directly above the link to this summary. His talk addressed some of the difficult issues and anomalies that are emerging as more parties begin to see private actions as a possible avenue of redress.

- CAT's jurisdiction: recent cases have tended to confirm the CAT's present jurisdiction is too narrow and there is merit in this being reviewed.
- CAT – limitation periods: while the rationale for the specific limitation periods provided for has merit, this has proved difficult to apply in practice.
- Anchor defendants in the High Court: the Court of Appeal has granted permission to appeal from the High Court decision in *Toshiba Carriers* on the question of liability for 'innocent' acts of implementation as well as implementation with 'knowledge' (reflecting the distinction following *Provimi* and *Cooper Tire*).
- The application of the *Masterfoods* stay is being tested quite carefully to optimise case management.
- There is ongoing uncertainty about disclosure in a number of contexts, most notably in light of the Court of Justice's judgment in *Pfleiderer* which has now led the European Commission to provide written observations on the balancing act that must now be undertaken to the High Court in the *National Grid* proceedings. It was noted that the Commission did not seek to argue that the Court's approach was confined to the application of leniency proceedings under national competition law.
- In the context of group actions, Ben discussed whether there was a valid concern that the assignment of claims to an SPV might be contrary to public policy under



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English law as so-called ‘trafficking of litigation’. He considered that the risks in this respect could be readily managed through appropriate safeguards.

- In relation to damages, Ben noted the recent emergence of so-called ‘umbrella’ claims where parties sought to recover for loss not just in relation to the cartelised goods, but also related goods.

### Jane Swift, Deputy Director Consumer and Competition Policy, BIS

Jane noted first that the Government’s conclusions following consultation on institutional reform were expected to be published shortly after the February Parliamentary recess. A consultation on private actions in competition cases was also expected to be published shortly, subject to Ministers’ views. This document would reflect Ministers’ concern to support small businesses and consumers and to emphasise that competition law and policy do not rest only on public enforcement – empowerment is a strong theme.

The Consultation Document will draw on previous work and research and extensive contributions from the legal and academic communities.

The central concerns reflected in the document will be as follows:

- Current competition law enforcement is almost exclusively undertaken by public bodies (although the importance of this aspect is acknowledged).
- Private actions will relieve some pressure on the OFT while also providing an avenue for redress, which public enforcement does not, as well as empowering the private sector to take the initiative.
- The role of representative actions will be looked at again.

Ministers are considering proposals covering broadly four areas, as follows:

1. A wider collective action regime: to enable businesses and consumers to seek an infringement decision or obtain redress
2. Establishing the CAT as the principal venue for competition cases
3. Ways of promoting Alternative Dispute Resolution
4. How to encourage greater private enforcement without undermining public enforcement.



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### Nicholas Green, Brick Court Chambers

Nick commented on key themes emerging from the earlier presentations. He made the following points:

- While the CAT's limited jurisdiction was creating problems, the precise scope of any expanded jurisdiction was not entirely clear, for example, when cases raised Landlord and Tenant issues as well as competition law. However, he thought that a sufficiently flexible system could be devised.
- He challenged the concept that it must be entirely wrong for leniency statements to be capable of disclosure – they are, after all, admissions of 'guilt' and there would be no suggestion in other contexts that such evidence could not be admitted in court. However, he acknowledged the practical risks of this acting as a disincentive.
- While courts did have to respect the requirement not to act in conflict with EU law, where necessary by staying proceedings, the basis upon which such a stay might be granted may now be less interventionist following Regulation 1/2003 in light of the consequent risk that if the Commission did dispose of a matter, its decision would bind the national court.
- In terms of seeking the input of the Commission in domestic proceedings, Nick Green noted the High Court had recently sounded a note of caution in seeking to place too much weight on the views expressed by the Commission when it was also involved in the proceedings and therefore not entirely neutral.
- There were likely to be interesting developments in the context of EU-wide proceedings for damages as claimants were wrestling with various foreign procedures and rules that inhibited their ability to make a claim, for example protection orders in the US. European jurisdictions increasingly have to grapple with US depositions as well.
- The question is likely to arise as to whether one national judgment on a given issue binds other courts seised of effectively the same case (for example where the supply of goods on FRAND terms was required).
- It was interesting how committed the UK appeared to be to collective actions at a time when the US courts were actually rowing back to a degree (see for example the *Walmart* and *AT&T* cases), although the recent cases could be seen as no more than attempts by the US courts to safeguard against abuse of process.



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In response to questions, BIS stated that it was not the present intention to extend its proposals in relation to private actions beyond the competition law sphere. Another participant noted that, in relation to encouraging actions on the part of SMEs, the key constraint in seeking injunctive relief was the risks of a cross-undertaking in damages, rather than access to the courts as such. It was pointed out that these risks were manageable in some cases, in particular those that could be brought to trial quickly (probably without requiring disclosure).