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LIDW 2024: Mass Litigation and the Courts of Europe and the UK: Have they Finally Found a Place to Call Home?

João Gabriel Volasco Rodrigues · Saturday, June 8th, 2024

The 2024 London International Disputes Week ("LIDW") was stage to several discussions regarding mass litigations. This was definitely not by chance.

Europe has been seeing an exponential rise in mass litigation, particularly in the last twenty years, where aspects arising from environmental, social and governance issues have started to become a trend worldwide.

This post will cover four events where the subject matter touched upon mass litigations, with a particular focus on four main topics: (i) the nature and standard profile of plaintiffs and defendants in these claims; (ii) the applicable regime to these claims; (iii) the legal basis and reasoning underlying mass litigation being brought in EU and UK courts; and (iv) the role that third-party financiers play in these disputes.

Nature and Profile of Plaintiffs and Defendants in Mass Litigation

Starting from topic (i), on 5 June 2024, Mishcon de Reya hosted an event on "The Current Group Actions Landscape in the UK from claimant, defendant and funder perspective". In this event, Richard Leedham (Mishcon de Reya) discussed a number of mass litigation brought in English courts, such as the *Mariana v BHP* dam rupture case, the Glencore securities litigation, as well as the *Morris v Williamss & Co* case concerning negligent legal advice.

Emma Probyn (Freshfields) cited the *Lloyd v Google* case concerning breaches of data protection duties and Oliver Way (Harbour) focused on claims brought before the Competition Appeal Tribunal ("CAT"), such as the *Merricks v Mastercard* case concerning fees charged on credit card transactions.

In practice, the so-called "ESG dispute" is no longer a mere theoretical concept. The group claims brought before English courts vary from environmental claims (E) to a wide range of civil liability and competition claims (S), as well as claims arising from complex financial services disputes (G). The Plaintiffs in these disputes could vary widely from indigenous population in Brazil who suffered from an environmental tragedy to hedge funds that acquired shares based on misleading information. In contrast, the defendants in these disputes exhibit more commonality: apart from a law firm, they are all big publicly-traded corporations operating in different sectors of the global

economy.

Applicable Regime to Mass Litigation

Topic (ii) (i.e. the applicable regime to mass litigation) was widely discussed not only in the event hosted by Mishcon de Reya, but also in two events that took place on 6 June 2024. The first event, titled "The next wave of mass claims: future trends in group litigation", was hosted by Baker McKenzie; and the second, titled "Where are We Going with Class Actions and Collective Redress? Perspectives from the UK, Europe and Canada", was hosted by MacFarlanes.

At MacFarlanes, panellists from four different jurisdictions ordinarily acting on behalf of defendants provided an overview of the collective redress systems in their jurisdictions. Simon Day (MacFarlanes) explained that the Group Litigation Orders ("GLOs") regime applicable in the UK is an "opt-in" procedure under which claimants must individually file their own claim, which will be bundled afterwards.

However, Simon also highlighted that the competition regime applicable before the UK CAT offers the possibility of a representative action by means of an "opt-out" system. This was the procedure applied in *Lloyd v Google*.

Julie Chapuy (Freshfields) shared the French perspective relating to collective claims, explaining that in France, there is only an "opt-in" regime. Julie also explained (i) that there are very few associations authorized to bring mass litigation in France, and (ii) that such associations have to go through a screening process before filing any cases to demonstrate that there is a solid group of claimants who actually suffered the damages claimed.

Matthijs Kuijpers (Stibbe) explained the favourable environment for mass litigation from a Dutch perspective. In the Netherlands, where there is a class representative system, it is possible that a group claim can be assigned to a vehicle and then brought in Dutch courts on behalf of third parties.

Though not from an European jurisdiction, Caroline Zayid (McCarthy Tetrault) nevertheless highlighted the positive framework currently applicable in Canada for mass litigation, which includes an "opt-out" system for all Canadian residents and a class action system generally similar to that from the US (apart from the fact that in Canada there is no double damages).

At Baker McKenzie, Adam Heppinstall KC (Henderson Chambers) also emphasized the efficiency of the Dutch system vis-à-vis its English counterpart, stressing that the GLOs regime could be an obstacle to the celerity of the claim. Adam also made reference to the brand new "opt-in" Scottish class action representative action procedure, comparing it to the requirement to issue individual claim forms in the GLOs regime in England.

Nadia Osborne (Fladgate) discussed potential challenges arising from geographical nuances in the GLOs regime, highlighting that trust and effective communication between claimants are of imperative relevance for the success of a claim. Technology, according to Nadia, is playing a relevant role.

Reasons and Legal Basis for Mass Litigations in European and UK Courts

Moving on to the topic (iii), the question on why mass litigation is being brought in EU and UK courts is linked to the regimes applicable to such jurisdictions, but that is not the main reason. Plaintiffs from less developed jurisdictions have chosen to seek redress in European courts mostly due to their independence and less likelihood of local influence from big corporations.

Then, there is the second part of the topic: how plaintiffs are establishing the jurisdictional angles in UK and European courts, even when the company which effectively caused the alleged damage is not located within European territory? "The Parent Trap" (not the movie of 1998 produced by Walt Disney) event that took place on 5 June 2024 at Jenner & Block London LLP, has provided an explanation.

Lizzie Shimmin (Jenner & Block) explained that although there was never a presumption in the UK legal system that a parent company would be held liable for the acts of its subsidiaries, effective legal measures to hold the controlling entity accountable started to be taken in the recent years.

Shimmin discussed relevant cases where the parent company was demanded in English courts for acts of its subsidiaries, such as the landmark *Lungowe v Vedanta*, *AAA v Unilever*, and *Okpabi v Royal Dutch Shell* cases. In all three cases, there were alleged damages caused by the subsidiaries of the parent English companies outside the UK, but the claims were based on the fact that the parent company owed a duty of care to their subsidiaries.

When assessing whether such claims could proceed in English courts against the parent companies, courts examined whether (a) there was effective management by the controlling entity, (b) there was effective advice on the policy implemented which caused harm, (c) active steps in implementation of such policies were taken, or (d) in published materials, the parent company held itself out of the implementation process, as well as of the supervision and control processes of its subsidiaries.

The panellists further discussed cases not strictly dealing with duty of care under English common law, Such cases include *Mariana v BHP* and *Limbu v Dyson*. In the latter case, as was explained by Angeline Welsh KC (Essex Court Chambers), Dyson was sued in English courts under the supply chain liability doctrine, which has been gaining force in the recent years, following the flow of implementation of regulations concerning due diligence and sustainability directives.

The Jenner & Block event was also joined by Olivia Windham Stewart (Independent Business and Human Rights Specialist), who discussed the relevance of the increase in laws and soft rules concerning human rights liability chain and the consequent rise in liability risks for big companies facing mass litigation in developed jurisdictions.

Role of Third-Party Financiers

Last but definitely not the least is topic (iv) of the post. As mass litigation involves several plaintiffs on one side, claiming for damages in a significant amount, and litigating a generally complex matter against a powerful corporation on the other side, they will certainly demand a relevant sum of resources.

Litigation funders are key players of the sector as they provide the means (or funds) to pursue what they assess to be meritorious claims. Robert Jones (Ankura) in the Baker McKenzie event provided insights to the funding market, stating that it is at the same time a tool for access to justice and a profitable business. He also considered the relevance of a solid assessment by the funders, working alongside experts and economists, who will provide an accurate damages assessment for purposes of deciding whether or not to invest.

Claire Van der Zant (Shieldpay) focused her speech in the Baker McKenzie event on the materiality of having experienced advisors in the distribution phase of the proceedings, highlighting that it could take much more time than what the parties expect to take. Although the last stage of the case appears less complex, the reality is that several issues may arise, such as fraud, data protection and morosity in the payments.

Conclusion

In all four events that touched upon matters relating to mass litigation, what remained undisputed was the opinion that mass litigation and collective claims will continue on the rise and defendants must be prepared to see these claims having more regularly their day in court.

Whether this is negative or positive, it is for the future to tell.

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