



Minutes

Collective Consumer Redress Event: Draft Recommendations to Government

**Down Hall Country House Hotel
Hatfield Heath, Hertfordshire**

26 June 2008

Opening remarks by Sir Anthony Clarke, Master of the Rolls

The Master of the Rolls welcomed delegates to the conference. He recorded his satisfaction that the concerns of defendants had been addressed in the main conference paper, *“Improving Access to Justice for Consumers”*: *Developing Better Redress Procedures for Collective Consumer Claims* (hereinafter “main conference paper”). He then noted the issues of complexity and comprehension surrounding the jargon of collective redress.

The Master of the Rolls informed delegates that the remit of the Civil Justice Council (hereinafter “CJC”) is concerned with access to justice and procedure as opposed to substantive law. In this vein, he explained that while the damages debate, the passing on and determination of loss are important and interesting matters, they are not related to matters of procedure but rather of social policy and, accordingly, for Parliament to determine.

The Master of the Rolls touched upon the questions he asked of delegates at the Collective Redress II Conference in November 2007. He stated that the most critical of these questions related to the funding of collective actions and the protection for defendants in such cases.

The Master of the Rolls then turned his attention to two features of the main conference paper. First, in this paper, it is erroneously suggested that only unsuccessful claimants are able to appeal an unsuccessful costs ruling. However, this recommendation was supposed to apply to unsuccessful defendants as well.

The second feature of the paper considered by the Master of the Rolls related to its suggestions regarding the power of the Civil Procedure Rules Committee (hereinafter “CPRC”) in relation to costs at the post-certification stage. Although the paper envisages the use of a protected costs order, the Master of the Rolls articulated his view that the CPRC would take a conservative approach to this. He then looked at the paper’s suggestion regarding costs capping.

The Master of the Rolls concluded his address in describing the proposals for reform as “radical change”. He supported the view that a comprehensive legislative regime would be required to underpin reform to the collective redress system. Though he felt that the system could be improved through rule change, the Master of the Rolls warned that more extensive reform in the absence of primary legislation would lead to endless satellite litigation which “would be a wonderful jamboree for lawyers” but spell misery for everyone else.

Key issues – Michael Napier CBE QC

Michael Napier presented the genealogy of the collective redress debate, taking delegates through the relevant conferences and papers that preceded and accompanied the day’s event. He touched upon the paper referred to by the Master of the Rolls, explaining that it comprised, *inter alia*, a set of recommendations on the improvement of collective redress in England and Wales which – after refinement by delegates and further editing – would be submitted to the Council for its approval before being sent to the Minister of Justice.

Michael Napier guided attendees through a report by the CJC Collective Redress Working Party, which examines the question of whether the implementation of an opt-out collective action regime requires the enactment of substantive legislation or may be achieved through amendment to the Civil Procedure Rules (hereinafter “CPR”). He then drew the attention of delegates to another paper accompanying the conference entitled *Collective Redress – A Business View*, and explained that it would be accompanied by an oral presentation by its author, Business Representative 1, during the course of the day.

After pointing out key elements of the findings and recommendations of the main conference paper, Michael Napier touched upon the importance of refining the language of collective redress; the respective roles of the civil justice system and public bodies in compensating harm/loss; the importance of private actions to the economy and society as a whole; the role of court control in balancing the relationship between claimants and defendants; the need of each party for certainty; the question whether improvements should apply to all types of claim; the opt-in/opt-out conundrum, and the issue of *cy-près*.

Assumptions, findings and recommendations – Academic 1

Academic 1 began her presentation by informing delegates that its purpose was to set the context of the day’s event and explain key terminology, especially the opt-in versus opt-out debate. She explained that much of the report distributed to attendees on the day, together with the recommendations, were authored by the Civil Justice Council itself,

and hence, the report's key points and recommendations would be presented to the conference by a CJC member later in the day. She then proceeded to deliver her presentation in four main segments with the use of an accompanying handout.

1. *The square*

Academic 1 first talked about developments in the field of collective redress in the Commonwealth, European Union, United States and England & Wales. She referred to bold nature of the EU Green Paper on *Damages Actions for Breach of the EC Antitrust Rules* (2006) and the bland White Paper that followed it. According to Academic 1, the fact that the Commonwealth is grappling with aspects of class actions jurisprudence at the highest appellate level means that a perfect system does not exist. In similar vein, it is important to remember that the excesses of the US class actions regime that attract publicity are not applicable in England & Wales as our legal systems and cultures differ. Academic 1 concluded this segment of her presentation by articulating the importance of learning from other jurisdictions in creating a collective redress mechanism and she advised delegates of the need to listen to the voices of claimants and defendants in this process.

2. *The line*

Academic 1 outlined the collective redress process describing the opt-out debate; jurisprudence relating to the timing of opt-out; the limited circumstances in which opt-out does not transform into opt-in; the absence of a presumption in favour of an opt-out class action; and the issue of surplus funds.

3. *The angle*

Academic 1 turned her attention to the evidence of need for an improved collective redress mechanism. She argued that this evidence was borne out by the greater breadth and number of collective actions in jurisdictions with established class actions systems, as well as the absence of collective actions in England & Wales following proven cases of group harm/loss. Academic 1 stated that in the absence of an improved system of collective redress, claimants who would otherwise have sued in England may seek to join actions abroad whose subsequent judgments may not be recognised here. US federal courts seem to be becoming increasingly unwilling to allow 'foreign claimants' to form part of classes in rule 23 actions.

4. *The design aspect*

In the fourth and final segment of her presentation, Academic 1 suggested ways in which an opt-out scheme of collective redress could ensure fair treatment of both claimants and defendants. Such safeguards would include, for example, a tough certification process and cost-benefit analysis, and clear principles of *res judicata* that will give a defendant 'global peace'. Problems encountered by other jurisdictions (e.g. the claimant who reserves part of his case for a second bite of the cherry where their initial claim fails, and

where the Henderson rule is interpreted such that the claimant is allowed to do this) should, she argued, be overcome through third generation legislation rather than used as a justification for not developing collective actions here.

Michael Napier QC:

Michael Napier asked the meaning of third generation legislation and how this compared to first and second generation legislation.

Academic 1:

Academic 1 replied that first generation legislation refers to the light-handed approach taken in the US with Rule 23. The problems encountered in this jurisdiction encouraged the formulation, in Australian and Canada, of more extensive provisions relating to class actions when they developed their own systems (these are the ‘second generation’ statutes referred to). Academic 1 explained that a third generation statute would take into account the issues grappled with by all of these (and other) jurisdictions in the development of a collective redress mechanism while not being heavily prescriptive on all matters.

Collective Redress: A Business View – Business Representative 1:

At the invitation of Michael Napier, Business Representative 1 spoke to his paper on the perspective of business on collective redress. He talked about the importance of this subject to his organisation which has been interacting closely with domestic and international institutions such as the OFT, DG Comp and DG Sanco.

Business Representative 1 remarked that while collective redress is a particularly sensitive topic for global firms that have defended class actions in the US, business would in general subscribe to more effective collective actions. In this regard, he commented on the detrimental effect of cartels on business and the wider economy. Business Representative 1 then considered areas of coincidence with the views expressed by the main conference paper (e.g. the need for a generic private action and balanced solution as well as the importance of funding).

Business Representative 1 explored the broader definition of redress as incorporating ADR and then highlighted the concerns of business. On the subject of funding, he cautioned against amendment to the loser pays rule, expressed support for the development of third party funding, voiced concern about the funding of speculative claims, and conveyed the opposition of business to the introduction of contingency fee agreements. Business Representative 1 articulated his support for an increased role for public bodies and quickly fielded the idea of establishing an Office of Public Advocate to take up claims that would not otherwise be funded. He warned against the development of an opt-out system of collective redress and the introduction of *cy-près* as a punitive measure.

Judge 1:

Judge 1 observed that the following questions seemed to be of particular importance and asked delegates for their views on them:

- 1) Should collective redress extend beyond litigation and purely consumer claims?
- 2) In contrast to the impression that may be given by the main conference paper, an opt-out action – and not a new form of opt-in – is being proposed.
- 3) Is an opt-out action desirable or would it be preferable to have, for example, modification of existing opt-in procedures, compulsory mediation and/or an increased role for public authorities and regulators?
- 4) What is your opinion on the nature of damages that an opt-out system would entail? Are they to be compensatory or aggregation and a *cy-près* application? Is an opt-out system possible with only compensatory damages? Is *cy-près* appropriate as a means of applying surplus funds?
- 5) What would happen in cross-border cases? To what extent would *res judicata* apply? Would “forum shopping” emerge as an inevitable consequence?

Michael Napier QC:

Michael Napier opened the floor for debate on these questions.

Judge 2:

Judge 2 emphasised the importance of exploring the role of public authorities and regulators and its connection to the opt-in/opt-out debate. He expressed his agreement with Academic 1’s argument that in the field of collective redress England & Wales have lagged behind other jurisdictions that they once led and that there now exists the responsibility to catch up with them.

Lawyer 1:

Lawyer 1 advised that the proposals for an improved system for collective redress are at an early stage of progress and he recommended that delegates remain conscious of the cross-border issue and respectful of developments in Europe.

Master of the Rolls:

The Master of the Rolls counselled that any implementing legislation would need to take into account the accompanying need to alter the Brussels regulation.

Mediator 1:

Mediator 1 gave his support to a wider interpretation of redress as embracing out-of-court based solutions.

Trade Union Representative 1:

Trade Union Representative 1 touched upon the conservatism and fear pervading the debate on defendants and their security for costs and he questioned whether surplus funds could in fact be used to cover the costs of a successful defendant.

Lawyer 2:

Lawyer 2 made the following three points:

1. A future system of collective redress will need to be attractive to funders in order to be workable.
2. *Res judicata* is the key settlement question for defendants and will accordingly need to be addressed.
3. Momentum for an improved regime ought not be slowed down by fears of the costs involved in distributing damages as this is already managed effectively by professional IT providers.

Judge 3:

Judge 3 raised the issue of limitation in collective actions in respect of those under a legal disability.

Lawyer 3:

Lawyer 3 asked for an update on the two CJC papers on funding. He opined that third party funding is not a panacea but a private solution which does not advance the interests of justice.

Robert Musgrove, Chief Executive of the Civil Justice Council:

Robert Musgrove reported that the funding papers touched upon a range of options including third party funding, contingency fees and SLASS. CJC recommendations in respect of SLASS are now with the Legal Services Commission, which is currently preoccupied with its wider reform agenda. As regards contingency fee agreements, Senior Costs Judge Peter Hurst and Professor Richard Moorhead have undertaken a study on this matter which is currently in draft. Robert Musgrove informed delegates that the area of third party funding is very active and the CJC has interacted with the Financial Services Authority (hereinafter "FSA"), Law Society and Ministry of Justice in this regard. A proposed code of conduct for the regulation of third party funders is currently

being devised and this, he added, will be considered at an event to be hosted by the CJC next month.

Master of the Rolls:

The Master of the Rolls asked Academic 1 what systems Canada and Australia deal with the costs of a successful defendant, and if so, how?

Academic 1:

Academic 1 said that in Australia, if a third party funder funds the class action, then the third party funder typically covers adverse costs if a representative claimant loses, and she added that this may be enforced by the defendant. In Ontario, in class actions litigation, a CLAS fund operates deducting 10% from every monetary judgment or settlement. However, this fund has received fewer applications than was originally envisaged, and some successful defendants effectively factor in their legal costs as a cost of doing business.

Judge 1:

Judge 1 declared that the Ontarian system does not work.

Academic 1:

Academic 1 stated that the Ontarian system is regarded as problematical because of the 10% levy which discourages applications to it, and because the levy only applies to those actions which were supported by the fund, not to *all* class actions which proceed to judgment or to settlement.

Master of the Rolls:

The Master of the Rolls contended that any proposed opt-out scheme would have to make representative claimant personally liable to the defendant for the costs right up to the end of the trial period, and as such, the representative would need to have access to funding.

Lawyer 4:

Lawyer 4 stated that it might be useful to consider the criticism levelled against the evidence of need argument.

Advice Services Representative 1:

Advice Services Representative 1 suggested the insertion in the main conference paper of a reference to the Consumer Redress Act 2007 which deals with representative bodies in collective actions.

Robert Musgrove:

Robert Musgrove stated that it had already been inserted.

Michael Napier QC:

Michael Napier asked the four syndicate groups to consider the following questions:

1. Does collective redress extend beyond litigation?
2. Do you favour compulsory mediation?
3. Should collective actions extend beyond consumer cases?
4. Are you in favour of Academic 1's model of collective redress?
5. What are your views on damages and how they might be applied?
6. What do you think of the cross-border issue?
7. What is your view on Academic 1's grid chart relating to certification procedures?

Master of the Rolls:

The Master of the Rolls added a further question:

8. Should defendants be fully protected for costs throughout? If not, why not? If so, to what extent?

Judge 1:

Judge 1 acknowledged the limits applied to contingency fees in practice. He added that the proposal regarding their introduction here envisages court approval of the percentage rate on a case-by-case basis.

Group A: Lawyer 5

1. Group A felt that collective redress extended beyond litigation.
2. However, it expressed its opposition to compulsory mediation, feeling that it would send out the wrong message and lead to unacceptable behaviour by the parties.
3. Group A preferred the generic application of collective redress.

4. Group A was in favour of a sophisticated third generation legislative mechanism with checks and balances.
5. The question of damages was considered by Group A to be one of the most challenging issues. It was felt that the rationale of an opt-out mechanism would be lost if aggregation of damages did not follow. Group A concluded that the question of compensatory and punitive damages was one of policy and thus for consideration elsewhere.
6. Group A touched upon the *Italian Torpedo* case. There was the feeling that Europe would impose its own solution on England & Wales as regards the cross-border issue.
8. On the subject of costs protection, Group A thought that a clear opt-out procedure with aggregate damages would encourage funders who would provide costs protection for defendants.

Group B: Trade Union Representative 1

Group B came to similar conclusions as Group A.

1. Group B felt that collective redress extended beyond litigation.
2. Group B considered that ADR methods extended beyond mediation and that in any event its use ought to be encouraged rather than made compulsory.
3. Group B favoured the use of the term collective redress over consumer redress.
4. Group B favoured the introduction of an opt-out collective redress system with two provisos:
 - a. The need to avoid the potential problems already identified in other jurisdictions
 - b. Wide court discretion to deal with any problems which may arise
- 5/8. Group B considered questions 5 and 8 together. It explored the issues of certainty and timing and felt that the approach to damages, protection for defendants and funding would all have to be taken into account. In the context of damages, there was a wide range of views as to what compensation meant and it decided that this was a substantive issue for further consideration.

Group B looked at what might happen with surplus funds. It raised the issue of trust funds which already exist and anticipated the use of *cy-près*. Some members expressed their support for the Access to Justice fund and the possibility of directing any surplus to worthwhile projects. The idea of returning any surplus to the Exchequer and defendants was also touched upon.

6. In relation to the cross-border issue, Group B touched upon the *Italian torpedo* case and the Brussels regulations but did not reach any specific conclusions on this matter.
7. Group B did not have the time to consider Academic 1's grid chart relating to certification procedures.

Group C: Academic 1

1. Group C believed that litigation should be of last resort. Although it was noted that the ombudsman scheme had recently been extended it was recognised that the role of redress is not one envisaged by the OFT though this may change in the future. Group C concluded that litigation is merely part of a bigger picture.
2. Some members of Group C argued in favour of a presumption of a requirement to mediate which could be opted-out of. Others said this should be a matter for judicial discretion. Group C considered the attendant costs of a compulsory requirement to mediate.
3. Group C unanimously concluded that collective redress should extend beyond consumers and consumer cases. It noted that the OFT's proposals regarding subject-specific opt-out representative actions could be broadened in practice if introduced. Group C also noted that SMEs (small and medium enterprises) could comprise members of classes in representative actions, and that these were an often-overlooked, but important, group who could suffer loss and damage from certain types of wrongdoing.
4. It was suggested that a costs analysis comparing cases conducted on an opt-in basis and those conducted on an opt-out basis could be an important and interesting exercise. Group C unanimously agreed that a new opt-out regime was required and felt that, in addition to in-built protections in the regime itself, such a system would guard against unmeritorious claims through the use of three filters: lawyers, funders and representative organisations.
5. Group C viewed aggregate assessment of damages as an integral part of an opt-out collective action. It felt that *cy-près* was a controversial political decision for Parliament to take.
6. Group C did not have the time to consider question 6.
7. It was considered whether the rules should be fairly prescriptive about which ought to be applied or whether the judge should be granted discretion. One member argued that judicial discretion could give rise to satellite litigation.

8. Group C expressed the view that a public fund could be a useful tool but that it would have to be thought out and set up carefully. The general view espoused by Group C was that costs shifting should be retained and abandoned only in very limited circumstances.

Group D: Judge 3

1. Group D felt that collective redress should extend beyond litigation.
2. Group D opposed the compulsory use of mediation. It felt that other ADR methods could be employed and on a more flexible basis with, for example, a pre-action protocol to encourage its use.
3. Group D believed that collective redress should be generic in nature rather than based solely on consumer claims.
4. Group D felt that the question of an opt-out system could not be separated from the issue of costs. It identified problems relating to *res judicata* closure for defendants; the identification of claimants; and the identification of those liable for costs.

There was a strong feeling that conditional fee agreements and the after-the-event (hereinafter “ATE”) insurance market could not support an opt-out scheme of collective redress. Group D explored the possibility of no costs shifting and no defendant’s costs on the one hand, and contingency fee agreements on the other. It concluded that the latter was the preferred option.

Group D felt that Europe would take the initiative in this field but that it would look to England & Wales for a lead. As such, it was concluded that any future model should be sufficiently flexible to be adapted elsewhere and that it should also fit in with the European benchmarks.

5. Group D expressed the view that damages should be purely compensatory in nature as a general principle and that surplus funds should revert to defendants. However, where the defendants have sought to, or would, profit from wrongdoing the surplus should be distributed amongst claimants or dealt with through the use of *cy-près*.
6. Group D did not have the time to deal with *res judicata*. It took the view that England & Wales should devise a collective redress model first and then work with Europe on cross-border issues.
7. On the subject of certification, Group D was acutely aware of the need for specialist judges. It questioned the level such judges would need to be at and the way in which they ought to be trained. Group D also felt that the issues relating to terms of certification were very important.

Judge 1:

Judge 1 asked delegates for their views on costs shifting and the way in which principle should apply in practice.

Judge 4:

Judge 4 stated that Group A considered certification as generally quite straightforward. It would be easy to recognise vexatious cases and certification would only become important in the grey areas in between. Group A felt that once there was certification, funding would follow with built-in protection for defendants. However, the real issue concerned where funding would come from for pre-certification where there is going to be satellite litigation over certification. One group member suggested a dual test comprising a prima facie certification process with a later opportunity for the defendant to vary or set aside the certification order.

Lawyer 1:

Lawyer 1 informed delegates that Group D was particularly concerned about costs shifting. Given that ATE insurance or contingency fees are unlikely to be available, he asked who would pick up the costs of such cases.

Michael Napier QC:

Michael Napier stated that the absence of funding would mean that cases could not be progressed and he asked whether ATE insurers are showing more interest in funding group actions.

Insurer 1:

Insurer 1 confirmed that although ATE insurers are indeed showing more interest in funding group actions, they lack the certainty offered by group litigation orders (hereinafter “GLOs”) and test cases. He added that, in contrast to ATE insurers, third party funders would be concerned about the punitive *vs.* compensatory damages debate. He then stated the need for substantive legal underpinning of any future collective redress regime.

Lawyer 2:

Lawyer 2 remarked that cases are sometimes funded through a combination of insurance and third party funding. He stated that insurers only work on cases prior to certification where there are sufficient aggregate claims. This may suggest that some form of costs limitation at certification with adequate control on both sides could help secure funding.

Lawyer 1:

In response to a question by Judge 1, Lawyer 1 explained how contingency fees and costs shifting could operate independently.

Civil Servant 1:

Civil Servant 1 confirmed that legal aid immunity for costs meant that the costs shifting rule did not apply and successful defendants could not recover their costs. He cautioned against treating recoverability for costs by successful defendants as a sacred cow and vital part of any new collective redress system. He stated that the uncertainty surrounding opt-out actions meant that it was difficult to see how costs shifting would work. Civil Servant 1 spoke of the importance of balancing the interests of the parties and the possibility of removing costs shifting in some circumstances.

Legislation and Procedure – Lawyer 4

Lawyer 4 guided delegates through a paper drafted by the CJC Collective Redress Working Party. This explored the question of whether implementation of an opt-out collective action regime would require the enactment of substantive legislation or could alternatively be achieved by amendment of the CPR.

Lawyer 4 explained that the impetus for the paper arose from a divergence of opinions expressed by members of the working party. He then summarised these divergent views represented by Academic 1 on the one hand, and John Sorabji (Legal Secretary to the Master of the Rolls) on the other. The former argued that five components of a sophisticated collective redress mechanism – namely limitation, *res judicata*, aggregate assessment of damages, *cy-près* distribution of damages and standing against multiple defendants – would require legislative underpinning. Conversely, John Sorabji traced the evolution of the representative rule in equity and common law, concluding that it could be transformed into a modern class action that could rely on rule change except in the areas of *cy-près* and limitation (where primary legislation would be required).

Lawyer 4 described how the key elements of a sophisticated opt-out collective redress system could be enacted. The working party concluded in favour of Academic 1's position stating that the proposed reform programme is extensive and as such requires the sanction of the legislature. He argued that it was not an attractive prospect to revert to 18th and 19th century authorities to justify reform through amendment to the CPR. Lawyer 4 added that such a move would inevitably lead to an *ultra vires* challenge causing spiralling satellite litigation going all the way to the House of Lords. He also suggested the possibility of attempting rule change while waiting for a slot in the legislative timetable.

Lawyer 5:

Lawyer 5 commented that the draft Civil Law Reform Bill might amend the Limitation Act according to Law Commission recommendations, and he suggested that this could be used to introduce a discrete area of the proposed reforms.

Group A: Lawyer 2

Group A expressed the view that a comprehensive legislative solution was the best model and that it should codify the procedures in one place. There was a strong feeling that a parallel rules-based exercise could undermine political will for legislative reform. Group A voiced its belief that political support for an improved collective redress mechanism was required and that future debate should proceed on the basis of draft rules rather than abstract principles.

Group B: Lawyer 4

On the one hand, Group B felt it desirable that the reform process be kick started with new rules. However, it also realised that any political decisions on the future of a scheme could not be anticipated. Group B agreed that matters of policy would require substantive legal change, the timing of which would be uncertain given the present political climate. It was concluded that a “Camp David” method was required, by which Group B meant that a set of rules should be drafted ready for debate.

Group C: Civil Servant 1

Group C favoured a comprehensive legislative solution but accepted that this may be difficult to implement given the longer timescales involved and the current political climate. Group C considered piggy-backing reform on other pieces of legislation and looked at the European Mediation Directive in this regard. Group C worried that reliance on rule change and/or unclear drafting could lead to satellite litigation.

Group D: Lawyer 1

Group D suggested that it would not be good to attempt to lead the rest of Europe in the field of collective redress with rules which might very well end up being challenged. Group D considered European directives and enabling legislation as a vehicle for reform. It questioned whether trusts could be established in every major case and was troubled by the concept of an access to justice trust being used to pay the costs of successful defendants as it could encourage unmeritorious claims. Group D felt that the any residual monies should be given to late claimants and ultimately returned to defendants.

Master of the Rolls:

The Master of the Rolls stated that the CPRC would be reluctant to look at reform on a piecemeal basis in the absence of detailed public consultation. He argued that it would be beneficial for the whole scheme to be drafted in order to facilitate future debate.

Judge 1:

Judge 1 distilled the key elements of the morning debate:

1. Some form of collective redress in addition to existing mechanisms is necessary:
 - a. England & Wales lags behind other jurisdictions where it once led the way
 - b. There is an access to justice problem caused by the inadequacies of the system as it currently stands
2. Collective redress is preferred to the term class or collective action so as to include alternative methods of dispute resolution as well as recourse to the civil courts
3. The apt title is collective redress not consumer redress.
4. The procedure should be generic and not limited to consumer claims however existing procedures such as the OFT's schemes should be maintained and developed in parallel to this
5. Though other forms of dispute resolution are to be encouraged, those other forms should not be compulsory
6. Regulatory and other like bodies they have part to play but there must be recourse to the civil courts in the event of breaches of the civil law
7. There is general support that court-based redress should be an opt-out system but subject to stringent control and safeguards. There would be no new opt-in procedure; existing procedures considered to be adequate.
8. There would be close control by the court with certification in accordance with the agreed provision laid down in the rules.
9. There must be proper protection for defendants. There are some existing controls that weed out frivolous claims.
10. There was a divergence of view on the difficult area of damages. There was a preponderance of opinion that damages should be compensatory. But then this leads to the question of what this means given that there was also general support for aggregation of damages. These are matters of social and public policy. Should there be disgorgement of profit? Is it appropriate to provide access to civil court

for a large number of people with small claims if there is no public mechanism of deterrence? What should happen to surplus?

11. Funding is obviously the key as any new system will simply not get off the ground unless there is proper funding for it. There is some support for contingency fees plus costs shifting. It also appears that ATE insurers may be interested in providing funding. The CJC is hosting a TPF event next month which may be an appropriate occasion to consider this further.
12. Funding is important not only as a means of getting the action off the ground but also because it provides the further safeguards needed for defendants. This must be retained throughout the whole of the procedure.
13. The difficulties of the cross-border situation are recognised but it is suggested that we get on with our own action

Judge 1 then summarised the afternoon debate:

1. There is general agreement that there should be a legislative approach
2. Draft rules might be formulated so that further discussion can focus on something in print.
3. There was disillusionment in some quarters with the perceived lack of political will
4. However, some suggested that a European directive requiring member states to provide access to justice in this area view may mean that our current system is deemed inadequate and others suggested that a reform programme could be pushed along by enabling legislation

Judge 2:

Judge 2 said that legislation cannot be bolted on to directives as they are enacted by regulation under the European Communities Act.

Civil Servant 1:

Civil Servant 1 referred to the importance of regulatory systems and advocated the need to take a holistic approach to the problem.

Michael Napier QC:

Although the main conference paper deals with this point, Michael Napier obtained agreement from Robert Musgrove that it would be given more in-depth treatment.

Trade Union Representative 1:

Trade Union Representative 1 stated that the litigation process effectively underpins the ADR argument.

Judge 2:

Judge 2 voiced his support for the development of draft model rules.

Lawyer 1:

Lawyer 1 suggested the improvement of existing representative actions and GLOs as part of the reform package.

Advice Services Representative 1:

Advice Services Representative 1 referred to the presentational benefit of pushing forward the reform agenda from the perspective of consumers.

Lawyer 4:

Lawyer 4 volunteered the services of the Collective Redress Working Party in drafting the rules.

Judge 1:

Judge 1 ran through responses made to the recommendations of the main conference paper.

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| Recommendation 1: | Nothing to say |
| Recommendation 2: | Reflects what was discussed |
| Recommendation 3: | Perhaps too prescriptive and needs to be made more general |
| Recommendation 4: | Substantial change is needed with costs shifting available throughout the process |
| Recommendation 5: | Needs to be altered through deletion of the first sentence |
| Recommendation 6: | Generally supported |
| Recommendation 7: | Yes except there is reference to disgorgement of profits illegally obtained and there is question that leg would certainly be needed in relation to that |
| Recommendation 8: | Supported |
| Recommendation 9: | Not entirely supported. Divergence of view as to what should happen to such funds. The general sense of the meeting would be reflected by that being put on a broader basis rather than restricted to the Legal Services Act |

Recommendation 10: Generally supported¹

Academic 1:

Academic 1 asked whether Recommendation 1 (*‘A wider range of Representative Bodies should be able to bring claims on behalf of consumers’*) was intended to preclude those members of the class with a direct action from acting as representative claimants – the way that it was presently worded, it could be taken to mean that only ‘representative bodies’ could bring the claims. Judge 1 responded that the present intention was to allow either representative body or a directly-affected class member to bring the claims on behalf of others, and that the recommendation should be reworded to reflect that.

Lawyer 1:

Lawyer 1 suggested that the consensus for a Euro-sensitive approach be reflected in the main conference paper.

Master of the Rolls:

The Master of the Rolls thanked Michael Napier for facilitating the event and he thanked all the delegates for attending. He noted the consensus that had been reached on many aspects of the debate and expressed his hope that the discussions may be taken forward.

¹ NB: the recommendations at this stage were: RECOMMENDATION 1: A wider range of Representative Bodies should be able to bring claims on behalf of consumers; RECOMMENDATION 2: Collective consumer claims may be brought on an opt-in or opt-out basis; RECOMMENDATION 3: Collective consumer claims should meet strict certification procedure by the Court; RECOMMENDATION 4: There should be full costs shifting prior to the point of certification,; thereafter the Court will determine the costs liability of the parties; RECOMMENDATION 5: There should be no right of appeal against positive certification. Appeal against a refusal to certify a claim should be subject to extant rules¹ on permission to appeal; RECOMMENDATION 6: The case managing judge should exercise an enhanced form of active case management, along the lines of the recommendations of Mr Justice Aiken's Working Party; RECOMMENDATION 7: Where a case is brought on an opt-out basis, the court should have the power to award aggregate damages; RECOMMENDATION 8: Where a case is settled on an opt-out basis, the court should conduct a “Fairness Hearing” to ensure that the interests of the consumer claimants are properly and fairly served; RECOMMENDATION 9: Unallocated damages from an aggregate award should be distributed to the Access to Justice Foundation, established under S.194 of the Legal Services Act 2007; RECOMMENDATION 10: Any procedural reform to improve access to justice in collective consumer claims should be of general application.