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DEFENDANTS' PLAYBOOK TO GROUP LITIGATION – 10 KEY TAKEAWAYS FROM THE CLIFFORD CHANCE SUMMIT

Group litigation represents a major and growing risk to businesses across all sectors and industries, with increasing numbers of group claims being litigated in the English courts.

On 7 November 2023, Clifford Chance hosted a Summit to discuss the ways in which companies and financial institutions can mitigate the risk of facing group claims, and the strategies which can be deployed if defending such claims. Clifford Chance's team of group litigation experts was joined by the Honourable Mr Justice Marcus Smith (President of the Competition Appeal Tribunal) for the keynote speech, as well as Richard Handyside KC and Peter de Verneuil Smith KC, two of the leading barristers in this rapidly developing area of the law.

Here are 10 key takeaways from the Summit:

1. A key driver of the growth of group litigation has been the proliferation of third-party funding in recent years, with the UK funding market estimated to be worth £2.2 billion, a 10-fold increase over the past decade, which makes the UK the second largest funding market in the world after the US. There is now a Claimant-side industry competing to originate and litigate these claims.

2. Group claims can be brought in either the High Court (under group litigation orders (GLOs), representative actions or through bespoke managed litigation) or in the Competition Appeals Tribunal (CAT). Funders are particularly focused on "opt-out" claims, where every potential member of a class is represented unless they specifically opt out of the claims.

3. Representative actions allow claims to be brought in the High Court on an opt-out basis by a representative who has the "same interest" in the claim as the wider class. Since the Supreme Court's decision in Lloyd v Google [2021] UKSC 50, claimants have had difficulty meeting this test (e.g. where the claim is likely to require an individualised assessment of damages). The High Court's recent decision to allow the continuation of a representative action in Commission Recovery Ltd v Marks & Clerk [2023] EWHC 398 (Comm) indicates a potential softening of the Court's position, although that judgment is subject to appeal.

4. Claimants bringing group claims on an "opt-in" basis will often seek a GLO, in part so as to generate additional publicity around the litigation. As per Moon v Link Fund Solutions [2022] EWHC 3344 (Ch), the Court will need to be persuaded that the perceived advantages of a GLO cannot be replicated using the Court's usual case management powers. As that case makes clear, the purpose of a GLO is not to encourage potential claimants to bring their claims.

5. The CAT is seeing increasing numbers of claims that push the limits of what might be considered competition law as claimants look to take advantage of the opt-out regime. For example, the water companies are facing a series of opt-out group claims arising out of their alleged under-reporting of pollution incidents. There are growing calls to expand the statutory collective proceedings regime beyond competition law to allow other types of claim to be brought on an opt-out basis.

6. Group claims require active case management by the Court, which places significant pressure on the Court's capacity. There is more than enough funding for these claims, they attract a lot of publicity and there is a thriving Claimant bar – but it remains to be seen how the Courts will cope with the coming wave of group litigation claims.

7. NGOs and activists are increasingly using group litigation as a tool to influence corporate behaviour, particularly in the ESG space. Although Client Earth's recent derivative action against Shell was struck out by the High Court, it demonstrates the appetite to use the Courts to put pressure on companies in relation to their environmental and climate change strategies.

8. The continued growth of securities litigation (so-called "stock drop" claims) demonstrates the need for companies to be more mindful of the risk of funded group litigation as well as just regulatory action when scrutinising public disclosures.

9. UK-domiciled parent and group companies may be liable for the conduct of their overseas subsidiaries (as shown by the recent cases involving Vedanta and BHP). For multinational companies, this emphasises the need for effective and robust oversight by parent companies of their subsidiaries, particularly where the parent's public disclosures state that appropriate policies and procedures are in place to ensure that level of oversight.

10. In the EU, the Representation Actions Directive is being implemented across member states, which will enable a greater number of consumer class actions. The Netherlands is already a hotspot for class actions as a result of its introduction of a collective actions regime in 2020. That said, a lack of funding and capacity in the Courts elsewhere in the EU represent two major barriers to the growth of class actions in many jurisdictions.