WOODSFORD
LITIGATION FUNDING

Response to
Scottish Civil Justice Council Working Group's
Consultation on Group Proceedings

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1. Woodsford Litigation Funding Limited (Woodsford) welcomes the opportunity to comment on the proposals and questions included in the Scottish Civil Justice Council (SCJC) Working Group's Consultation on Group Proceedings. Woodsford's response to the proposals and questions, together with some background information about Woodsford, is set out below.

Woodsford

2. Since its foundation in London in 2010, Woodsford has developed a reputation as a leading litigation and arbitration funder. Woodsford is a founder member of the Association of Litigation Funders of England & Wales (the ALF), an independent body that has been charged by the UK Ministry of Justice with delivering self-regulation of litigation funding in England and Wales. Woodsford's Chief Operating Officer, Jonathan Barnes, is a member of the board of the ALF. Woodsford has offices in London, the United States, Israel and Singapore. Woodsford has funded litigation in Scotland previously and continues to do so. Woodsford also supports the Public Interest Advocacy Centre in Australia as part of its worldwide commitment to promoting access to justice for those that lack the means to achieve it.

3. Woodsford's executive team blends extensive business experience with legal expertise, and includes lawyers admitted to practise in England & Wales, the United States, Ireland, Israel, Singapore, Canada and New Zealand, and accountants admitted into the Chartered Institute of Management Accountants and the Institute of Chartered Accountants of England & Wales. Woodsford's Chairman, Yves Bonavero, has a track record of success at the highest level of international commerce. Yves was Group Chief Executive Officer at ED&F Man, after which he held key positions in a number of successful businesses, including hedge fund managers in Asia, commercial property investors in the UK, a start-up mortgage bank, which was successfully floated on the LSE in November 2000 and two major businesses in Poland. Yves is also a keen philanthropist and, through his charitable trust, has endowed the Bonavero Institute of Human Rights at Oxford University. Woodsford's Chief Executive Officer, Steven Friel, is a solicitor and formerly partner at two major international law firms. Steven has been recognized by every annual edition of the *Legal 500* published in the last eight years. For commercial litigation work, he is praised as having *"the sort of knowledge that one only gets with years of accumulated experience in heavy or complex litigation"* and a *"strong commercial grip on the relevant legal provisions and financial aspects of cases."* For his work in international arbitration, the *Legal 500* ranked

Steven as *"outstanding"*. Steven has also been recognised as one of the top 100 leading legal consultants and strategists of 2018. Woodsford's Chief Investment Officer for the EMEA and APAC regions, which covers Woodsford's operations in Scotland, Charlie Morris, is a senior lawyer formerly of leading UK disputes boutique law firm Enyo Law and international law firm Addleshaw Goddard.

4. Woodsford has an Investment Advisory Panel (IAP) that brings together senior figures from the world of both litigation and international arbitration, with direct experience spanning many areas of law. Our IAP includes John Beechey, a past President of the International Court of Arbitration of the ICC, Fidelma Macken, the first female judge to be appointed to the Court of Justice of the European Union and Shira A. Scheindlin, a former United States District Court Judge for the Southern District of New York.

5. Our in-house team of legal specialists reviews many hundreds of cases every year coming from all parts of the globe, including Scotland.

Woodsford's Response to the Questions in the SCJC Working Group's Consultation

Consultation question 1: Do you have any comments about the approach taken as to the scope of the group proceedings regime? Do you agree with the approach? If not, please provide comments.

6. Woodsford notes that in support of the SCJC Working Group's recommendation that the "*the new group procedure will not extend to actions subject to petition procedure*" such as "*judicial review proceedings to be raised by a group of persons*" the SCJC Working Group makes reference to the recent judicial review proceedings brought by Joanna Cherry QC MP and others challenging the Prime Minister's advice to the Queen on the prorogation of Parliament (*Cherry and others v Advocate General for Scotland [2019] CSIH 49*).

7. Woodsford considers *Cherry and others v Advocate General for Scotland* to be an inappropriate case from which to form conclusions as to the need for group actions to be allowed (whether by 'opt-in' or 'opt-out' regimes) because this case was exceptional for the following reasons:
    a. the claim was unprecedented in that it raised the political subject matter of prorogation of Parliament;
    b. the claim was brought by a group of 78 parliamentarians, led by the Scottish National Party justice spokeswoman Ms Cherry MP Queen's Counsel and Mr Maugham Queen's Counsel;
    c. the claim was not for damages or any other kind of pecuniary relief; and
    d. the claim attracted largescale media attention.

8. The case can therefore be distinguished from the typical scenario in which a pursuer's access to justice would benefit from the introduction of a group regime. For example, Woodsford suggests that a pursuer group comprising politicians and successful barristers is unlikely to face the access to justice challenges faced by the typical consumer or small business which would benefit from group actions being allowed (whether by 'opt-in' or 'opt-out' regimes) in respect

of judicial review proceedings. Furthermore, in the absence of media interest such as that shown by the press in relation to the *Cherry and others v Advocate General for Scotland* case, funds would need to be spent on raising the profile of a group action so as to attract the participation of sufficient pursuers on an 'opt-in' basis to make the claim cost effective. For the reasons explained in paragraphs 10 to 11 and 14 to 21 below, where an application for judicial review has a financial benefit to the applicants that task is much more likely to be funded by a third party litigation funder if the claim is brought as an 'opt-out' group action. Therefore, access to justice is more likely to be achieved in respect of claims which can be brought on an 'opt-out' basis than those that are brought on an 'opt-in' basis.

9. For these reasons, it is Woodsford's submission that the increased access to justice brought about by the availability of an 'opt-out' group action regime, should also apply to judicial review proceedings.

Consultation question 2: Do you have any comments about the approach taken to the opt-in/opt-out procedure? Do you agree with the approach? If not, please provide comments.

10. Before considering the substance of the SCJC Working Group's recommendations, Woodsford has two comments to make about the approach taken by the SCJC Working Group to the opt-in/opt-out procedure.

11. First, Woodsford notes that the Working Group is proceeding on the basis that, with "*the exception of one 'opt-out' model which was introduced for competition law claims in the UK Competition Appeal Tribunal in 2015, all other group proceedings which are currently in place in the UK are 'opt-in' procedures.*" However, this is not strictly correct. Civil Procedure Rule 19.6 also provides a form of representative or 'opt-out' procedure, allowing a claimant who has the same interest in a claim as other persons to bring proceedings in England and Wales on a representative basis.[1] A recent example of CPR 19.6 being used successfully to launch an action on behalf of a class can be found in *Lloyd v Google LLC* [2019] EWCA Civ 1599, in which Mr Richard Lloyd, an ex-director of consumer rights group *Which?*, brought representative proceedings on behalf of a class of over 4 million UK iPhone users to claim damages from Google for misuse of private information.[2]

12. Second, Woodsford also notes that the "*SCJC Working Group considers that at the present time, an 'opt-out' regime will be too complex for introduction in Scotland whereas the introduction of an 'opt-in' procedure will be a comparatively straightforward exercise.*" In forming that view, reliance appears to have been placed on the Lord President's concern that "*The practical and legal challenges*

[1] Indeed, Practice Direction 19B, paragraph 2.3(2) requires applicants for the opt-in procedure envisaged by a Group Litigation Order to first consider whether any other order would be more appropriate, including orders under CPR 19.6.

[2] *Lloyd v Google LLC* [2019] EWCA Civ 1599. In deciding that members of the Representative Class did have the same interest under CPR 19.6, Sir Geoffrey Vos said (paragraph 78): *"It seems to me that allowing a representative action in a case of this kind is not so much an exception to the rule … but rather an application of the rule".*

presented by an 'opt-out' model are significantly greater that those presented by an 'opt-in' model. One example is the potential extra-territorial effect of orders granted in opt-out proceedings, particularly when a deemed member of a group would otherwise have had the option of raising proceedings in a different jurisdiction."[3] Woodsford respectfully makes two submissions in response:

a. To the extent that there is concern as to how a new 'opt-out' model could be operated in Scotland, Scotland could adopt an amended version of: (i) Rules 71-98 of the Competition Appeal Tribunal Rules 2015 (SI 2015 No. 1648); and (ii) CPR 19.6. The class certification regime under the Competition Appeal Tribunal ("**CAT**") has recently received extensive judicial consideration in the case of *Walter Hugh Merricks CBE v Mastercard Incorporated and Others [2019] EWCA Civ 674*[4], the CAT's first instance judgment having been overturned by the Court of Appeal, and the Supreme Court subsequently giving Mastercard permission to appeal the Court of Appeal's judgment in respect of two issues:
    i. What is the legal test for certification of claims as eligible for inclusion in collective proceedings under the CAT? and
    ii. What is the correct approach to questions regarding the distribution of an aggregate award at the stage at which a party is applying for a Collective Proceedings Order?[5]

   The regime under CPR 19.6 has also been extensively considered by the Court of Appeal in *Lloyd v Google LLC*, mentioned in paragraph 11 above. Scotland therefore has an 'off the shelf' solution, that has been tested by significant English case law (including, as of next month, by the Supreme Court, which is also the highest court in Scotland), which it could tailor to its own requirements.

b. As for the specific concern of extra-territoriality raised by the Lord President, this has already been addressed for all practical purposes by section 20(8)(b) of the Civil Litigation (Expenses and Group Proceedings) (Scotland) Act 2018 which provides that each member of the group on whose behalf the 'opt-out' proceedings are brought must be domiciled in Scotland, unless a member has given express consent to the proceedings being brought on his or her behalf, for example by 'opting in'. Accordingly, the only theoretical concern arises where:
    i. a Scottish resident is included in an 'opt-out' action in Scotland in respect of which the Scottish Court has jurisdiction;
    ii. there is also jurisdiction for that action to be brought outside of Scotland; and

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[3] As cited in paragraph 21 of the consultation paper "*SCJC Working Group: Consultation on Group Proceedings* dated April 2020".

[4] Former financial services ombudsman Walter Merricks CBE brought the claim on behalf of 46 million consumers who used Mastercard in a case worth an estimated £14bn. The claim is made on behalf of all individuals over the age of 16 who had been resident in the UK for a continuous period of at least three months and who between May 1992 and June 2008 purchased goods or services from businesses in the UK which accepted Mastercard.

[5] The Supreme Court will hear the case on the 12 May 2020. See https://www.supremecourt.uk/cases/uksc-2019-0118.html for further details.

iii. that foreign jurisdiction is objectively deemed to be a better jurisdiction to bring the action than Scotland (since otherwise the "*option*" of raising the proceedings there – instead of in Scotland – has little or no value).

In practice the occurrence of all three of these circumstances is likely to be extremely rare. Nevertheless, even if all these circumstances were engaged, all common law jurisdictions already have well developed jurisprudence to avoid double-recovery. As for the civil jurisdictions in the European Union, although it is not clear whether the United Kingdom will enter into successor arrangement to replace Regulation (EU) 1215/2012 of the European Parliament and of the Council on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast), it is likely that principles of universality and comity would be respected so as to avoid the possibility of double recovery.

13. Turning now to the substance of the SCJC Working Group's recommendation to adopt an 'opt-in' group procedure, but not yet an 'opt-out' procedure, Woodsford makes the following submissions.

14. Woodsford notes that whilst the introduction of an 'opt-in' regime will increase access to justice compared to the current procedural framework in Scotland, there will still be many cases where pursuers will be denied access to justice through lack of funding and/or lack of knowledge of: (a) their entitlement to enforce their rights; and/or (b) the procedural means by which to achieve that end. Justice therefore remains limited to those with legal know-how and/or the means to purchase it.

15. The ability of 'opt-out' group actions to remedy this inequity has long been recognised by the several jurisdictions, including Australia, Canada and the United States, all of which avail their Courts with an 'opt-out' procedure. The Netherlands has recently joined that group.[6] For example, the Australian Law Reform Commission (ALRC) first considered the desirability of a class action procedure in 'grouped proceedings' in the Australian Federal Court in 1988.[7] Having considered the ALRC's recommendations, the Federal Government "*determined that an open class system with an opt-out procedure was preferable on grounds both of equity and efficiency*".[8] The then Attorney-General said (of the 'opt-out' collective redress regime that was to be implemented by the Government):

> *"It ensures that people, particularly those who are poor or less educated, can obtain redress where they may be unable to take the positive step of having themselves included in the proceeding. It*

[6] In the Netherlands, legislation came into force on 1 January 2020 that enables 'opt-out' damages claims in relation to a broad range of causes of action, including antitrust infringements and claims based on breaches of consumer, environmental, and data protection laws. The relevant legislation is *Wet Afwikkeling Massaschade in een Collectieve Actie*, dated 20 March 2019: https://zoek.officielebekendmakingen.nl/stb-2019-130.html.

[7] Australia Law Reform Commission Report No 46, 1988, cited in the Australia Law Reform Commission's *Inquiry Into Class Action Proceedings Final Report* dated 21 December 2018, page 34 paragraph 1.52, available at https://www.alrc.gov.au/wp-content/uploads/2019/08/alrc_report_134_webaccess_2.pdf

[8] *Ibid*, page 34 paragraph 1.54.

also achieves the goals of obtaining a common, binding decision while leaving a person who wishes to do so free to leave the group and pursue his or her claim separately."[9]

16. The ALRC also considered the impact of having only an 'opt-in' collective redress system. The ALRC's conclusions were summarised in its report as follows:

> *"The ALRC had drawn attention to the implications that would arise should the consent of all persons affected be required before proceedings could be commenced, thereby in effect creating a closed class. It noted that any finding as to the liability of the respondent would only be binding on those people whose consent had been obtained and that others might never be informed of the situation. If an affected person later sought a remedy individually, the respondent would not be obliged to accept liability but could recontest it.*
>
> *Further, if there was a limited fund from which monetary relief could be obtained, for example an insurance policy, a procedure covering all members of the group would make it more likely that they would all obtain a share of the limited fund. By contrast, if group members were left to pursue individual proceedings, those who obtained judgment first would deplete any fund available, leaving other group members without recourse to the fund. The ALRC also pointed to the reduction in the proportion of costs incurred in pursuing a claim where all persons are involved in the proceeding. It recommended that, subject to appropriate protection of a person's rights where consent is not given, it should be possible to commence a group members' proceeding without first obtaining the consent of that group member."*[10]

17. The fact that 'opt-out' actions are more viable mechanisms for collective redress in Australia than 'opt-in' actions (which are more commonly referred to in Australia as 'closed class' actions) can be seen by analysing the recent data on closed class actions and open class actions in the Australian Federal Court, as was done by Professor Vince Morabito of Monash Business School.[11] He found that between October 2016 and September 2018 a total of 67 group proceedings were brought. Of those, fifty-three (79%) federal class actions were funded by a third-party litigation funder, of which only seven (13.2%) were brought on a closed class basis and 46 (86.8 %) were brought on an open class (or 'opt out') basis.

18. It is Woodsford's submission that the same considerations apply to the SCJC Working Group's recommendation that only an 'opt-in' collective redress system be introduced in Scotland for the time being. For the reasons set out above and further below, such a regime would only promote access to justice in Scotland in a very limited manner, since it would result in a collective redress system that would be largely unsuitable for third-party funding and therefore deprive Scottish pursuers of an effective facilitator of access to justice.

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[9] *Ibid*, page 35 paragraph 1.54.

[10] *Ibid*, page 35 paragraphs 1.55-1.56.

[11] Morabito, V. "*An evidence-based approach to class action reform in Australia: closed class actions, open class actions and access to justice.*" October 2018, page 10.

19. For example, if a pursuer requires third-party litigation funding to be able to bring an action, a third-party funder will only be able to fund such an action if it is commercially viable to do so. Given the large expense of bringing litigation (both in terms of own-side cost and provisioning for the adverse costs orders made in favour of the defender, whether through the purchase of a bond of caution, adverse costs insurance or otherwise), third party funders will typically only fund actions in respect of which the ratio between the likely funding commitment and the pursuer's expected damages is high. A ratio of damages in the order of at least 6 to 10 times more than budgeted litigation fees and expenses is common in the third-party funding industry. This means that consumer actions and those brought by small and medium enterprises (SMEs) are unlikely to be large enough to attract third-party litigation funding, unless they are aggregated with many similar claims as part of a group action (as was the case in the two 'opt-out' actions *Lloyd v Google* and *Merricks v Mastercard*, discussed at paragraphs 11 to 12 above, brought on behalf of 4 million and 46 million consumers, respectively). Aggregation is only feasible on an 'opt-in' basis where the damages per pursuer are relatively high. The claimant classes in *Lloyd v Google* and *Merricks v Mastercard* have very small individualised losses with the result that these claims would likely not have obtained third-party litigation funding had they been litigated on an 'opt-in' basis.
20. Woodsford recognises that the SCJC Working Group's recommendation that 'opt-in' group actions be introduced is a step in the right direction for promoting access to justice to consumers and SMEs in Scotland. However, for such group actions to be viable, a lead pursuer still needs to galvanise the group of pursuers. This requires identifying other potential pursuers with the same claim and encouraging them to instruct appropriate legal representation on a joint basis. Such endeavours are usually very difficult given that:
    a. a pursuer's legal affairs will be private and sometimes of a sensitive nature and so a lead pursuer is unlikely to be able to identify other pursuers based on publicly available information; often the only way to reach such pursuers would be through a significant and costly marketing campaign, which litigation funders are often reluctant to fund on a speculative basis; and
    b. building this stage of a group action is very time consuming and costly, since it often requires the detailed input of solicitors and advocates as well as the management time of the lead pursuer.

21. In jurisdictions such as England, Australia, the United States and Canada, these difficulties are often overcome by lawyers funding the legal costs and expenses of the initial stages in a group action (either with or without the backing of a third-party litigation funder), thereby enabling the case to proceed and provide access to justice to all affected claimants, which are typically consumers and/or SMEs. As the *Lloyd v Google* and *Merricks v Mastercard* examples discussed at paragraphs 11-12 and 19 above demonstrate, and as is reflected by the data available from Australia cited in paragraph 17 above, group claims are usually only feasible if the claim is brought on an 'opt-out' basis because the third-party litigation funder can have greater certainty that the potential number of pursuers will make the action viable from an economic perspective. This is all the more pertinent in respect of actions brought on behalf of consumers and SMEs where individualised losses tend to be relatively small and so an 'opt-in' claim would only be

viable if hundreds of thousands or even millions of affected parties opted-in, which is administratively difficult to manage and often costly and commercially unfeasible.

22. For these reasons, Woodsford submits that an effective 'opt-out' procedure should be adopted in Scotland as soon as possible so that access to justice can be made available to as many consumers and SMEs as possible, as quickly as possible. Whatever procedure is adopted in Scotland, the SCJC should ensure the new regime accommodates third-party litigation funding, an essential feature of jurisdictions with good access to justice.

23. Woodsford has no comment in response to consultation questions 3 – 18.

23 April 2020