



RBS case shows superiority of US investor protection

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OPINION

On 16 March the front page of *The Times* announced that Cherie Booth had been hired by two local authority pension funds to assist in joining a class action before the New York court against Royal Bank of Scotland (RBS) and its board of directors. The allegations in the US action are that between June 2007 and January 2009 RBS failed to disclose what it knew about its own internal financial position, leading investors to buy overvalued stock.

Just a month earlier retired Scottish QC Ian Hamilton started proceedings against RBS in the small claims court in Scotland. Hamilton had bought shares in RBS's April 2008 rights issue. His argument, which is similar to that in the US action, was that the bank should have known about the true state of its finances when it offered the shares for sale.

RBS's reaction to Hamilton's action was

instant. It issued an application asking for the case to be transferred to a higher court due to its "complexity". Of course, as RBS was well aware, proceedings in the small claims court effectively have no adverse-costs risk. In contrast, once in the higher court the amount of costs that a party can be awarded to pay is unlimited. Unsurprisingly, faced by the court's decision to transfer the matter to the higher court, Hamilton withdrew his claim because he did not want to be exposed to the risk of legal costs incurred by RBS's legal team.

In contrast, the action in New York, begun in February 2009, continues apace, with additional claimants coming forward to join the action, such as those UK authorities represented by Booth.

No one says that the US class action system is perfect. However, there is a marked contrast between the access to justice being provided to aggrieved shareholders in the US and that being provided in the UK. In the US purchasers of RBS shares can join and prosecute an action with a law firm acting on a contingency fee, where there is no risk to adverse costs and

where they know that the merits of their case will be heard. In contrast, shareholders in RBS have no obvious practical avenue to the courts in the UK, as Hamilton's case shows. Not only is the law very different, but the barriers to entry, as

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Hamilton found, are extremely steep: finding lawyers to act on a conditional fee arrangement basis is often difficult; the adverse costs risk might be covered by insurance or funding, but this is difficult to find; even then, the non-existence of an opt-out action procedure prevents small claims being grouped together for efficiency, to save costs and to attract funding.

UK shareholders can, of course, seek to join the US action, as Booth's clients have done. But the direction of the US courts in recent years has been to exclude foreign

investors from actions such as this and to restrict its jurisdictional reach. It is very likely that an attempt will be made, which may well succeed, to exclude European investors from the RBS claim in New York.

Does this matter? Yes, both because of access to justice and from a market perspective. If you are a US investor or an investor through a US market you have a mechanism to obtain compensation. In contrast, it is extremely difficult for European investors through European markets to even launch an action. The lesson for an investor is clear: invest through a US market or via a US vehicle. The lack of proper investment protection for European investors can only harm European markets.

Is there an answer to this? Various reform papers have proposed forms of collective opt-out actions to address these issues. These would make a difference but still seems a long way away. In the meantime, innovative practitioners will strive to bring these actions, seeking, for example, to use the remit of the representative action procedure under Rule 19.6 of the Civil Procedure Rules.