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English High Court Rejects U.S.-style Class Action Model in Air Freight Cartel Case

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Trainee solicitor James Lloyd in the firm's London office provided valuable assistance on this alert.

In *Emerald Supplies Ltd v British Airways Plc*, the High Court struck out the representative element of a claim relating to alleged anti-competitive agreements for the supply of air freight services which have been the subject of prosecutions in the United States and an ongoing investigation by the European Commission. The decision deals a blow to pro-claimant bodies that have put forward representative actions as the UK's answer to the U.S.-style class actions.

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The claim

The claimants, Emerald Supplies Ltd, imports flowers using the air freight services of British Airways (BA) among other. The claimants commenced proceedings against BA in September 2008 seeking damages. They set out in the particulars of the claim that they were "direct or indirect purchasers of air freight services the prices for which were inflated by one or more of the agreements or concerted practices. As such, they are representative of all other direct or indirect purchasers of air freight services, the prices for which were so inflated."

The ability of a claimant to sue on behalf of himself and others is regulated by the Civil Procedure Rules (CPR). Rule 19.6 allows one or more persons who have the same interest in a claim to bring a claim as a representative of a class of persons who have a similar interest. All of those persons with the same interest as the claimant automatically fall within the representative class. As such, the procedure has been likened to the U.S.-style class action model where claimants are included in the class unless they 'opt-out'. This is to be contrasted with the English law mechanism of a Group Litigation Order (GLO), where possible claimants must opt-in prior to judgment, routinely accepting the costs consequences of being a litigant.

BA applied to strike out the representative element of the claim (the parties having already agreed that further proceedings in the action should be stayed pending the conclusion of an investigation by the European Commission). It argued that the class of persons whom the claimants sought to represent did not have the "same interest" as required under Rule 19.6 and that, even if they did, the court should direct that the claimants may not act as their representative. BA put in evidence setting out details of its air freight business highlighting its significant size and complexity. BA argued that the claim potentially included every conceivable direct and indirect purchaser worldwide who, at one stage, was directly or indirectly affected by the cost of air freight services during the relevant period.

The decision

The court allowed BA's application to strike out the representative element of the claim.

The judge accepted that the fact that the relevant class is both numerous and widely spread in geographic terms is not, of itself, an objection to a representative action. However, he considered that a pre-condition for a representative action is that the persons to be represented should have the same interest in the claim as the claimants and that they should have that interest at the time the claim is commenced.

The judge therefore sought to identify the members of the class the claimants proposed they would represent. The class was defined by the claimants as 'direct or indirect purchasers of air freight services, the prices of which were inflated by the agreements or concerted practices'. The judge found that the definition of the class in fact described the allegations made by the claimants against BA that they had to prove in the action. Accordingly, the criteria for inclusion in the class depended on the outcome of the action itself and it was, therefore, impossible to say of any given person that he was a member of the class at the time the claim form was issued.

The judge further held that, even if the criteria for inclusion in the class had been sufficiently described in the particulars of the claim, the relief sought was not equally beneficial for all members of the class. Establishing damage is a necessary element of the cause of action that depended on a claimant's position in the distribution chain, and whether the inflated prices had been absorbed or passed on by other members in the chain. Given the nature of the cause of action and the market in which the relevant actions took place, there was an inevitable conflict between the claims of different members of the class.

The judge concluded that, whilst Rule 19.6 is intended to provide a convenient means by which to avoid a large number of substantially similar actions, it was not convenient or conducive to justice that an action should be pursued on behalf of persons who cannot be identified before judgment in the action is given. He suggested that a GLO could be used to avoid multiple actions based on the same or similar facts.

Comment

The decision is noteworthy in light of the recent significant interest in collective redress and representative actions from government bodies and lobbyists. The Office of Fair Trading (OFT) has set out its view that allowing representative stand-alone actions in competition cases on behalf of both consumers and businesses would be beneficial. The Civil Justice Council recommended the introduction of a generic collective action (for all civil claims affecting multiple claimants) on either an opt-in basis (where claimants are identified and consent to bringing the action) or on an opt-out basis (where claims are brought on behalf of all potential claimants subject to them opting out). The decision in *Emerald Supplies* confirms that the pre-existing procedural mechanisms are not sufficient to achieve that, meaning rule changes (and more likely highly contentious primary legislation) would be necessary to carry through any reform – albeit the decision may yet be the subject of appeal.

The decision in *Emerald Supplies* is also interesting for the judge's comments on the so-called 'passing-on' defence. This is dealt with very differently by the US and UK class-action systems. In the U.S., the decision of the U.S. Supreme Court in *Hanover Shoe Inc. v United Shoe Machinery Corp*(1968) 392 U.S. 481prevents claims by indirect purchasers. In the UK, however, there is no reason why an indirect purchaser cannot claim provided that it can prove that the direct purchaser's loss was passed on to it. The court in *Emerald Supplies* acknowledged the difficulties but stated that such problems are better dealt with by the legislature, than by stretching the use of representative actions to accommodate cases

such as this one.
