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English High Court Strikes Out "Class Action" Against British Airways

On April 8, 2009, the Chancellor of the High Court (who is the head of the Chancery Division of the High Court of Justice of England and Wales) granted an application by British Airways ("BA") to strike out the representative element of a claim for damages arising from its alleged participation in an air cargo cartel. The claimants, Emerald Suppliers Ltd, imported cut flowers from Colombia and Kenya using the air freight services of BA and other international airlines. They alleged that BA had been party to agreements to fix the prices at which air freight services were supplied, or to control or share the market for the supply of those services in breach of the EC and UK competition rules (the "Claim"). The claimants asserted 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."

Under Rule 19.6 of the Civil Procedure Rules ("CPR"), a party can bring a claim on behalf of himself and others (a "representative action") where he/she shares the same interest as those others in the claim. BA applied for an order that the representative element of the Claim be struck out, arguing that it did not fulfill the conditions of CPR Rule 19.6 because it was not possible to identify other persons with the same interest in the Claim and there was an inherent conflict of interest between the members of the class (in so far as they were identifiable).

In particular, BA argued that the "class" of people contained in the Claim "is not only unidentified, but unknowable, potentially comprising every conceivable so-called direct and indirect purchasers worldwide who at one stage or another were arguable affected...by the cost of air transport shipping services." This meant that the class was not limited to air freight services provided by BA, but could equally apply to any other undertaking providing such services. Nether was it limited to purchases of air freight services within the EU or the UK. The claimants objected to BA's application on the basis that the size of the class forming the representative element of the Claim is "unavoidable" due to the global nature of the infringements alleged, and class size is irrelevant to any assessment of the application of CPR Rule 19.6.

The Chancellor reviewed the case-law relating to CPR Rule 19.6 and concluded that the application of Rule 19.6 was dependent on two essential preconditions. First, there should be more than one person satisfying the second pre-condition. The Chancellor held that Rule 19.6 does not place any limit on the number of people that can be represented and a representative

action is not precluded by a class that is numerous and geographically wide. However, he remarked that the more extensive the class the more clearly the second pre-condition should be satisfied. The second pre-condition is that those persons have the relevant interest at the time the claim is begun. On this point, the Chancellor, relied on the principles in a 1901 English Court of Appeal ruling in Duke of Bedford v. Ellis [1901] AC 1 that the claimants and the class must have "a common interest and a common grievance: and "the relief sought [must] in its nature [be] beneficial" to them all.

The Chancellor concluded that that the second pre-condition was not satisfied and, therefore, that the claimants could not represent the class described in the Claim. He held: (i) the criteria for inclusion of a person in the class depended on the outcome of the action itself, i.e. the claimants purported to represent purchasers of air freight services the prices of which were inflated; (ii) whether the prices were, in fact inflated must be proved by the claimants; it was, therefore, "impossible" to say whether a given person was a member of the class at the time the Claim was issued - it would not be until the final judgment that those persons could be identified, if at all; and (iii) the relief sought was not equally beneficial to all members of the class – it would depend on where a particular purchaser sat in the chain of distribution. The Chancellor accepted BA's argument that there was an inevitable conflict of interest between class members, with some purchasers having absorbed the increased prices, and some having passed the increases on to their customers. As a result, the Chancellor granted BA's application and struck out the representative element of the Claim.

In the judgment, the Chancellor considered that a class action of this type might be "more conveniently accommodated" under the Group Litigation Order or "GLO" procedure under CPR Rule 19.11. GLOs differ from representative actions in that rather than one claimant bringing a single action on behalf of a group of others, claimants are required to bring individual claims, although those claims are ultimately heard together. Claimants do not need to have the same interest, but merely a common or related interest, and whereas the claims of all claimants in a representative action will succeed or fail together, in a GLO there may be different outcomes for different claims. However, as recognized by the UK Office of Fair Trading ("OFT"), GLOs can have costs risks for individual claimants, and do not benefit from the same economies of scale as a representative action.

Another avenue available to potential claimants is follow-on action before the UK's Competition Appeal Tribunal or "CAT" under Section 47B of the UK's Competition Act 1998 ("CA"). Specified organizations have the power to bring claims on behalf of consumers. However, there are several drawbacks to this route. To date, only Which? (a UK consumer organization) has been designated as able to bring such a representative action under the CA. The provision will also not assist in cases such as the above Claim, where it is not only end consumers who have suffered loss but also players at other levels of the distribution chain. The action must also be "follow-on," i.e., must be based on an existing infringement decision by the UK or EC competition authorities. Since there was no infringement decision against BA, the claimants were unable to bring an action before the CAT and were limited to a "stand-alone" action in the High Court. Finally, follow-on actions will usually be stayed until the appeals process against the infringement decision has been exhausted. This could result in lengthy delays before the action can be heard.

The European Commission and the OFT have published papers setting out various recommendations as to how private antitrust actions can be encouraged. The OFT has recommended that designated representative bodies should be able to bring stand-alone actions before the High Court on behalf of consumers at large. It would be open to the judge to decide whether a representative action was appropriate and, if so, whether it was to be "opt-in" (only on behalf of consumers who specifically request to be part of the action) or "opt-out" (on behalf of all consumers unless they request otherwise). Also in the UK, the Civil Justice Council has published a paper setting out recommendations to the UK Government on ways to improve the efficiency and effectiveness of the class action procedure, in particular suggesting the availability of a generic collective action for all civil claims affecting multiple claimants, on either an opt-in or opt-out basis.

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