A collective debate

Alan Owens predicts a long wait if the UK is to adopt a class action regime

IN BRIEF

- *Emerald Supplies Ltd v British Airways Plc* [2009] EWHC 741: highlights the status of the current collective mechanisms in the UK.

There has in recent years been much debate about the development of collective action mechanisms both at national and European levels. In the case of *Emerald Supplies Ltd v British Airways Plc* [2009] EWHC 741 (Ch) the chancellor of the High Court struck out the representative element of a claimant's claim concerning alleged anti-competitive agreements which have been the subject of prosecutions in the US and on-going investigations by the European Commission. The decision highlights the status of the current collective mechanisms in the UK.

The claim

The claimants imported cut flowers from Columbia and Kenya and used the air freight services of British Airways (BA) and other international airlines. The claimants alleged that BA had been a party to agreements and concerted practices with other international airlines directly or indirectly to fix the prices at which air freight services are supplied or to control or share the market for that supply with the object or effect of such agreements or practices to prevent or distort competition. The claimants claimed that BA was liable for infringing Art 81(1) of the EC Treaty, Art 53 of the EEA Agreement and s 2 of the Competition Act 1998 (UK) and sought damages.

The claimants asserted in their particulars of claim that they "were direct or indirect purchasers or both 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 claimants contended they had the ability to do this by virtue of the representative action rules contained in CPR, r 19.6 which provides that where more than one person has the same interest in a claim the claim may be begun or continued by or against one or more person who made the same interest as representatives of any other persons who made that interest. CPR, r 19.6 provides that unless the court otherwise directs any judgment or order given in a claim in which a party is acting as a representative is binding on all persons represented in the claim but may only be enforced by or against a person who is not a party to the claim with the permission of the court.

BA issued an application seeking that the purported representative element of the claim be struck out on the basis, among other things, that the "other persons" whom the claimants sought to represent did not have "the same interest" so as to fall within CPR, r 19.6(1) and, even if they did, the court should direct that the claimants may not act as their representative under CPR, r 19.6(2).

The decision

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

The judge 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 court held that this formula described the allegations made by the claimants against BA which must be proved by the claimants in the action. The court stated that "CPR 19.6 does not authorise these claimants to represent the class described in the particulars claim" for "the simple reason is that it is impossible to say of any given person that he was a member of the class at the time the claim form was issued. It is not that the class consists of a fluctuating body of persons but the criteria for inclusion in the class cannot be satisfied at the time the action is brought because they depend on the action succeeding". The court contrasted this with the case of *Duke of Bedford v Ellis* [1901] AC 1, where the class was prescribed by legislation and could therefore be determined from the outset.

The court also held that the relief sought by the claimants was not equally beneficial for all members of the class. Whether or not an individual member of the class can establish that necessary ingredient will depend on where in the chain of distribution he came and who if anyone in that chain had absorbed or passed on the alleged inflated price. Given the nature of the cause of action and the market in which the relevant transactions took place there is an inevitable conflict between the claims of different members of the class. The court stated that: "It is not convenient or conducive to justice that actions should be pursued on behalf of persons who cannot be identified before judgment in the action and perhaps not even then. Further, the avoidance of multiple actions based on the same or similar facts can equally well be achieved by a Group Litigation Order made under CPR Rule 19.11."

What does this mean for representative actions in the UK?

The decision in *Emerald Supplies* confirms that the pre-existing procedural mechanisms do not permit collective action on an opt-out basis (where claims are brought on behalf of all potential claimants and a member of that class may elect not to take part in the action).

The Civil Justice Council (CJC) recommended to the Lord Chancellor in its final report on Improving Access to Justice through Collective Actions published in November 2008 (the CJC Report) that a generic collective action regime should be introduced on an opt-out basis (similar to the US Class Action model) as an alternative to the current opt-in system (where claimants are identified and expressly consent to bringing the action). The CJC considered in detail all of the necessary changes that would have to be made to current regime and whether they could be brought about by way of amendment to the CPR. The changes which the CJC thought would be necessary in order to implement an opt-in system are:

i) Requiring absent claimants, ie a person who falls within the class description, who has not opted out, and who is represented by the representative claimant until the determination of the common issues, but who takes no active part in the litigation until or unless required to prove the individual issue/s pertaining to that person) to forfeit or limit their appeal rights in some circumstances.
ii) Permitting any determination of the common issues argued in the class action to bind absent claimants, hence a modification in the principles of *res judicata*.
iii) Permitting aggregate (class-wide) assessment of damages.
iv) Permitting the evidence of an absent claimant to be given by a representative and not by the class member himself.
v) Permitting, by specific evidentiary rules, that evidence on individual issues can be given by expeditious means, including by virtue of amending the rules of evidence or means of proof.
vi) Amending the Henderson rule so that the class is not required to bring forth its whole case and the defendant will not be judged to be prejudiced by the failure of the class to do so.
vii) Permitting a representative claimant to assert a cause of action against a defendant against whom the claimant has no direct cause of action.
viii) Permitting statistical evidence to be used as a means of both establishing liability (for example, as a means of establishing loss), and the quantum of damages.

Amendment

The CJC noted that, while certain changes would have to be brought about by primary legislation, it may be possible to implement others by amendment of the CPR. However, the CJC considered that the amendments

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were almost certain to be vulnerable to an ultra vires challenge, which would be deeply unattractive to the claimant relying on them. Accordingly, the CJC recommended that, if there is to be an opt out collective action regime, it should be implemented by primary legislation (see pps 127–134 of the CJC report).

Criticism

The CJC has also criticised the group litigation procedure under CPR, r 19.11. The court commented in *Emerald Supplies* that multiple actions based on the same or similar facts can equally well be achieved by a Group Litigation Order (GLO). However, in its report the CJC concluded that the GLO procedure was not the ideal vehicle for collective claims as claimants had to issue a claim form to opt-in to proceedings, saying: "Barriers to entry, to access to justice for those individuals whose claims are of limited individual quantum and where the litigation (cost) risk far outweighs the potential value of a successful judgment."

OFT view

The Office of Fair Trading has set out its view that allowing representative stand-alone actions in competition cases on behalf of both consumers and businesses would be beneficial. In its discussion paper on Private Actions in Competition Law: Effective Redress for Consumers and Business in April 2007, the OFT recognised that despite the Competition Act 1998, s 47B which allows specified bodies to bring representative follow-on actions in the Competition Appeals Tribunal, there is currently no provision for representative follow-on actions to be brought on behalf of businesses.

Lending support

The *Emerald Supplies* decision deals a blow to pro-claimant bodies that have put forward representative actions as the UK's answers to the US style Class Action and confirms that the pre-existing mechanisms do not achieve this. However, it lends support to the view of the CJC that if there is to be an opt-out collective action regime, then it will be necessary to introduce primary legislation.

The future

The consumer lobby is powerful, particularly in Europe, but, as it stands, the prospect of there being sufficient political will for such a controversial step in the current economic climate might be easily judged. Any legislative change, if it happens at all, is surely years away. NLJ

Alan Owens is a commercial litigation partner at Morrison & Foerster. E-mail: *Aowens@mofo.com*