

# Insight

## Dispute Resolution

### British Airways - High Court dismisses novel class action claim

In its recent judgment in *Emerald Supplies Limited & Anr. v British Airways Plc* the High Court has struck out an attempt by US claimant law-firm, Hausfeld & Co LLP, to bring what was, in effect, a US-style class action claim before the English courts.

The judgment confirms that, despite calls for reform of the rules on collective redress, the English courts will not adopt flexible interpretations of those rules to achieve the policy-goal of facilitating class actions in competition cases. Instead, if such actions are to be made possible in England, it seems inevitable that this will only be after legislative reform to that effect.

The claim was brought in September 2008 and followed on from the conviction of BA and several other airlines in the United States for price-fixing on the market for the provision of air freight services, a matter which is now also under investigation by the European Commission. The claim was brought by Emerald Supplies Ltd and Southern Glass House Produce Ltd (the "*Claimants*"), importers of cut flowers who purchased air freight services from BA.

The Claimants alleged that they had suffered losses due to the inflated prices for such services which had been imposed on them as a consequence of alleged breaches by BA and other airlines of Article 81 EC and/or s.2 of the Competition Act 1998. However, in a novel twist, the Claimants did not

restrict themselves to claiming on their own behalf but also purported to claim damages on behalf of all other direct and indirect purchasers of air freight services from BA and any other participant in the alleged cartel. They relied upon rule 19.6 of the Civil Procedure Rules ("CPR") which provides that:

"(1) Where more than one person has the *same interest* in a claim (a) the claim may be begun; or (b) the court may order that the claim be continued, by or against one or more of the persons who have the *same interest* as representatives of any other persons who have that interest.

(2) The court may direct that a person may not act as a representative." (*emphasis added*)

The Claimants argued that this rule was intended to provide a convenient means to avoid a large number of substantially similar actions. They argued that the rule should be applied with the "overriding objective" of dealing with cases justly in mind. Specifically, they argued that this approach would allow all relevant claims to be dealt with expeditiously and fairly, allowing the parties to save expense.



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BA applied to strike out the action, and requested the Court to exercise its discretion under r. 19.6(2) to direct that the Claimants could not act as “representatives” for the purported class. Its reasons were twofold. First, BA submitted that the other parties the Claimants sought to represent did not have the “same interest” as the Claimants (within the meaning of r.19.6(1)). Second, even if they did, the Claimants should not be permitted to act as representative in relation to a class of claimants who were “not only unidentified but unknowable, potentially comprising every conceivable so called direct and indirect purchaser [of air freight services] worldwide”.

The case was heard by the Chancellor of the High Court (Sir Andrew Morritt), with judgment delivered on 8 April 2009.

### **A relevant interest at the time the claim is commenced**

Arguments were made regarding the size and composition of the class. From the outset, the Chancellor made it clear that there was no upper limit imposed by r.19.6 on the size of a class. However, he stressed that where a class is extensive, as in this case, the criteria of r.19.6 would apply more stringently than may be the case with a smaller class. This would include the requirement that the representative’s interests must be aligned with the other members of the class.

The Claimants had submitted that, for these purposes, it would be sufficient for them to act as representatives where there was an identity of interests between their claims and those of the other claimants at the time final judgment was delivered. The Chancellor accepted that this was a necessary, but not sufficient, pre-condition to acting as a representative. It was also a precondition that all members of the class could be identified at the time the claim was commenced.

### **All claimants not ascertainable at the time of issuing the claim**

The Chancellor also held that r.19.6 did not permit the Claimants to represent the purported class given that it was impossible to say, of any given party, that they were a member of the class when the claim was issued. The difficulty here was the language of the claim itself. The class of claimants was said to be “direct or indirect purchasers of air freight services the prices of which were inflated by the agreements or concerted practices”. Thus, the scope of the class would itself be determined by the allegations made by the Claimants against BA, which still had to be proved.

The Chancellor differentiated this case from each of the precedents he cited concerning collective actions. In none of those earlier cases was the composition of the class dependant upon the outcome of the action. For instance it was perfectly acceptable for a class to have been prescribed by legislation e.g. “growers” in the *Duke of Bedford* case, or for the class to consist of all the members of the local labour party in *John v Rees*. Similarly, in *Prudential Assurance*, the class was determined by reference to those on a register of members of a company at the time of passing a resolution. The outcome of those cases had not been in issue in determining the inclusion, or otherwise, of the members of a class.

Thus, the Chancellor clarified that it was not the “fluctuating nature” of the body of the claimants that was at issue, but simply that the members of the class could not be identified at the outset of the claim.

### **The action was not equally beneficial for all members of the class**

The Chancellor also accepted BA’s submission that the potential claimants would operate at different levels of the production chain and, as a result, would be affected by the anti-competitive agreements to different degrees. Whilst

damage was a necessary element of the cause of action, some of the claimants would have been in a position to “pass on” inflated prices to purchasers further down in the chain of production. Others would not have had this option and would have had to absorb the inflated prices. The Chancellor therefore made it clear that, “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” (Paragraph 36 of Judgment).

### **Availability of Group Litigation Orders (GLOs) as an alternative**

The Chancellor commented that the avoidance of multiple actions based on the same or similar facts can equally well be achieved under a Group Litigation Order pursuant to CPR r.19.11, under which the existing additional 178 claimants as well as any others could be “more conveniently accommodated”. It is to be assumed that the Claimants had not sought a GLO in the first place out of a desire to maximise the pool of potential claimants to the greatest extent possible.

### **Practical implications of the judgment**

The Claimants have requested permission to appeal the High Court’s decision. It may be that the Court of Appeal can be persuaded to adopt a more flexible approach to the interpretation of r.19.6. Assuming it cannot, liberalisation of the rules relating to the bringing of collective actions will only be achieved through legislative reform. This was expressly acknowledged by the Chancellor in his concluding remarks when he observed that, “the problems the claimants’ advisers anticipate are better dealt with by Parliament than by stretching the use of Rule 19.6 to accommodate cases such as this.”

In this regard, the recommendations of the Civil Justice Council (“CJC”) and Office of Fair Trading (“OFT”) are pertinent. The CJC has called for the development of a more efficient and effective procedure

for collective actions (including the option to bring class actions on an opt-out basis). For its part, the OFT has also recommended that more collective actions should be brought in the future for the benefit of consumers and businesses alike.

Pending any legislative reform, the BA case does provide useful guidance on the application of CPR r.19.6. Although its failure may add further weight to calls for reform of the existing rules, the claim should ultimately be viewed for what it was – an attempt to bring a US-style class action using procedural rules that were simply not designed to permit such claims. Even though such actions will, for now, not be permitted in England, England will remain an attractive jurisdiction for claimants to seek damages in competition cases, not least because of the many procedural advantages of the English system which are unaffected by the judgment.

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