Kluwer Competition Law Blog

Class Actions in the U.K: Emerald Supplies Limited & Anr. v. British Airways plc

Ruchit Patel (Cleary Gottlieb Steen & Hamilton LLP) · Tuesday, December 21st, 2010

Co-authored by: David Little

The U.K. Court of Appeal has recently rebuffed an attempt by Plaintiff's firm, Hausfeld, to bring a collective "opt out" style action using Rule 19.6 of the CPR rules (*Emerald Supplied Limited v. British Airways* [2010] EWCA Civ. 1284).

The claim arose from the European Commission's investigation into the alleged air cargo cartel. (The Commission subsequently found BA and other airlines guilty of breaching Article 101 of the TFEU and fined the airlines a total of around €800 million.) Emerald Supplies Limited, an importer of flowers based in Yorkshire, commenced proceedings against British Airways in the U.K. courts, alleging that it had suffered loss as a result of the alleged cartel. Hausfeld held Emerald out to be the representative of all direct and indirect claimants worldwide that had suffered loss as a result of the alleged cartel, thereby creating an "opt-out" style claim. BA applied to the High Court requesting that the "representative parts" of the claim be struck out. The High Court allowed that appeal and the claimants then appealed that decision to the Court of Appeal.

The issue considered by the Court of Appeal was essentially whether all claimants in the action had the "*same interests*" as required by Rule 19.6 of the Civil Procedure Rules:

"*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.*" [Emphasis added]

The Court of Appeal held that the circumstances of Emerald's claim did not satisfy the provisions of Rule 19.6 because all claimants did not share the "*same interests.*" More specifically, the Court of Appeal held that:

- The class must have the "*same interests*" … "*[a]t all stages of proceedings, and not just at the date of judgment at the end*." This was not intended to mean that the size of a class could not fluctuate, but rather that it was not possible to determine at a

preliminary stage that Emerald had the "*same interests*" as other members of the class because "*proceedings could not accurately be described or regarded as a representative action until the question of liability had been tried and a judgment on liability given*." In other words, the only aspect linking the claimants was that they might all have a claim for damages against BA, but this required an assumption that BA's liability with respect to each claimant was proven, which was not the case.

- The claimants may not have had the "*same interests*" because certain claimants may have passed on their loss to their customers whereas others may not. Accordingly, certain claimants may not have incurred any loss and, therefore, would not have a claim against BA.

The Court of Appeal refused to grant the claimants permission to appeal to the U.K. Supreme Court, although the claimants may seek leave directly from the U.K. Supreme Court.

The Court of Appeal's judgment is important in a couple of respects:

First, the judgment shows the difficulty of bringing "opt-out" style representative actions under Rule 19.6 before the U.K. courts. Claimants can still rely on "opt-in" methods available under U.K. law, such as group litigation orders, whereby all claimants are identified and have the same cause of action, or representative actions under Sections 47A and 47B of the Competition Act 1998, but these methods have been rarely utilised (there are currently 75 group litigation orders pending in the U.K. courts, none of which concern a cartel claim).

Second, the judgment provides support for the view that the pass-on defense is available to defendants in cartel claims (*i.e.*, defendants may argue that the claimant in fact suffered no loss, as it passed on its losses to its customers).

The implications of the ruling in *Emerald* are a significant setback to claimant firms such as Hausfeld and serve to reinforce the view that the U.K. courts remain resistant to the development of a U.S. style system (*e.g.*, punitive damages are not available – see *Devenish*). The timing of the Court of Appeal's judgment coincides with recent calls by Commissioner Almunia for a consultation on collective redress and fits well with the Commissioner's public view that the "*excesses of the U.S. system*" are to be avoided in Europe.

Other EU jurisdictions would appear to offer better prospects for potential claimants seeking to bring a collective "opt-out" claim – in particular the Netherlands, where the 2005 Act on Collective Settlement of Mass Claims (*Wet collectieve afwikkeling massaschade*) appears to allow for U.S. style actions in cartel damages claims (See Amsterdam Court of Appeals, 29 May 2009, *Shell mass claims settlement and Amsterdam Court of Appeals*, 12 November 2010, Non-US Claims against Converium Holding AG and Zürich Financial Services Ltd. See also Cleary Gottlieb Alert Memorandum, April 16, 2007, "*The Shell Settlement and The Dutch Act on Collective Settlement of Mass Damages*."

To make sure you do not miss out on regular updates from the Kluwer Competition Law Blog, please subscribe here.

This entry was posted on Tuesday, December 21st, 2010 at 12:17 pm and is filed under Source: OECD">Cartels, Source: OECD">Competition, Court of Appeal, European Commission, European Union
You can follow any responses to this entry through the Comments (RSS) feed. You can leave a response, or trackback from your own site.