CLEARY GOTTLIEB Alert Memo

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

On November 18, 2010, the U.K. Court of Appeal ("Court of Appeal") upheld a decision of the U.K. High Court striking out an attempt by the claimant to act on behalf of a class of claimants in a follow-on claim for damages resulting from alleged cartel activity (Emerald Supplied Limited v. British Airways [2010] EWCA Civ. 1284). The Court of Appeal's judgment indicates that "opt-out" style class actions are difficult to bring in the U.K. and suggests that claimants wishing to pursue a group action are better placed using established "opt-in" methods provided for by U.K. law (*e.g.*, group litigation orders). The Court of Appeal's judgment is also interesting because it points to the availability of the pass-on defense to follow-on claims (*i.e.*, the defense that the claimant suffered no loss, as it passed on its losses to its customers) as a possible distinguishing factor between claimants, thereby providing support for the acceptance of this defense in the U.K.

I. BACKGROUND

In February 2006, the European Commission (the "Commission") launched a cartel investigation into the fuel surcharges applied by various airlines to air freight flights. A statement of objections was sent to the airlines in December 2007 and a fine of around €800 million was imposed in November 2010.

In September 2008 (before the fine was imposed but after the statement of objections), Emerald Supplies Limited ("Emerald"), an importer of flowers into the U.K., commenced proceedings against British Airways ("BA") alleging that it had suffered loss as a result of the anti-competitive activity under investigation by the Commission. The claim was framed as a representative action (*i.e.*, Emerald was purported to be the representative of all direct and indirect purchasers worldwide that were arguably affected by the alleged anti-competitive conduct).

II. THE HIGH COURT JUDGMENT ON STRIKE OUT

In October 2008, BA applied to strike out Emerald's attempt to act for all direct and indirect purchasers on the basis that the claimants that Emerald purported to represent did not have the "*same interests*" as Emerald. In April 2009, the U.K. High Court ruled in favor of BA and struck out this element of Emerald's claim because

Emerald had failed to show that all members of the class had the "*same interests*" (as required under Rule 19.6 of the Civil Procedure Rules). The claimants appealed that decision to the Court of Appeal on the basis that the reasons for striking out were contrary to precedent and, in any case, any objections could be met by amendments to the particulars of claim (these amendments clarified the class of claimants Emerald purported to represent and attempted to narrow the description of losses suffered).

III. THE COURT OF APPEAL'S JUDGMENT

Rule 19.6 of the Civil Procedure Rules ("Rule 19.6") provides:

> "*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:

- 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, however, was not the case.

- Claimants in the class may not have 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. The claimants may, however, request the U.K. Supreme Court directly to permit them to appeal.

IV. IMPLICATIONS OF THIS CASE

The Court of Appeal's judgment has two significant consequences for follow-on damages claims arising from alleged cartel activity brought before the U.K. courts:

- First, the Court of Appeal's judgment recognizes that "opt-out" style representative actions under Rule 19.6 are difficult to bring and suggests that grouped claimants are better served by relying on "opt-in" methods established under U.K. law (*e.g.*, group litigation orders, whereby all claimants are identified and have the same cause of action, or representative actions brought by the Consumers' Association under Rule 47B Competition Act 1998).

- Second, the Court of Appeal's judgment provides support for the existence of a passing-on defense in the U.K.

The Court of Appeal's judgment stands in contrast to the position in the Netherlands, which, to date, remains the only European country where collective claims can be brought on an "opt-out" basis.[1]

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Please feel free to get in touch with your regular contacts at the firm or any of our partners or counsel listed under "Antitrust and Competition" in the "Practices" section of our website (http://www.clearygottlieb.com) if you have any questions.

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[1] This is based on the Dutch 2005 Act on Collective Settlement of Mass Claims (*Wet collectieve afwikkeling massaschade*). 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.*"

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