

# CASE COMMENT

## Emerald Supplies Ltd v British Airways Plc

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 Air freight; Cartels; Common interest; Damages; Price fixing; Private enforcement; Representative actions; Striking out

In *Emerald Supplies Ltd v British Airways Plc*<sup>1</sup> the claimants (Emerald) were flower importers who used the international air freight services of BA and other airlines. Emerald brought a private damages action in the High Court alleging that a cartel relating to air freight prices, of which BA and other airlines had been convicted in the United States (and for which they are under investigation by the European Commission), had caused them loss in terms of excess cargo charges paid and other consequential losses to their business.

In the same proceedings, Emerald also sought to bring a representative action on behalf of other companies which had purchased air freight services from all the airlines which had been found guilty of participating in the cartel. BA applied to have the representative element of the claim struck out on the grounds (among others) that the other companies whom Emerald claimed to represent did not have the same interest in the claim.

The Chancellor of the High Court (Sir Andrew Morritt CVO) granted BA's application. His judgment illustrates a reluctance to countenance US-style class

actions, and shows that that reluctance also exists in relation to follow-on damages actions in competition law.

### The Chancellor's judgment

CPR 19.6(1) allows (among other things) a claimant to bring a representative action on behalf of other persons where they have the "same interest" in the claim. Under CPR 19.6(4), judgment in the representative action will be binding on all those represented in the claim; however the court's permission is required before judgment can be *enforced* against an entity which was not itself a party.

In support of its application to have the representative part of Emerald's action struck out, BA submitted that the class of persons whom Emerald purported to represent was unidentified and unknowable, given that it incorporated all purchasers worldwide from a very large number of airlines. Emerald submitted that the size of the group resulted from the international nature of the infringement, and that the group would be narrowed down once the awaited decision of the European Commission on the cartel was issued (pending which these proceedings were stayed).

In his judgment of April 8, 2009, the Chancellor first observed that:

"... [T]he mere fact that in this case the relevant class is both numerous and geographically widely spread is not of itself an objection to a representative action."<sup>2</sup>

This size of the group would, however, mean that the "other pre-conditions" for a representative action would have to be clearly satisfied.

The Chancellor next referred to the famous dictum of Lord Macnaghten in *Duke of Bedford v Ellis* to the effect that the claimant and the individuals to be represented must have "a common interest and a common grievance", in which case "a representative suit [is] in order if the relief sought [is] in its nature beneficial to all whom [the claimant proposes] to represent".<sup>3</sup>

Applying the first of Lord Macnaghten's criteria, Morritt CVO held that the claimant and the individuals to be represented must have the *same interest* at the time when the action is commenced. In the present case, the criteria for inclusion in the class of represented entities were dependent on the outcome of the action: the class was described in the particulars of claim as "direct or indirect purchasers of air freight services the prices for which were inflated" by the cartel, and it could only be ascertained which *prices were inflated* once the action was resolved.

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In this issue of E.C.L.R., references to the EC Treaty use numbering which predates the Lisbon Treaty coming into force.  
1 *Emerald Supplies Ltd v British Airways Plc* [2009] EWHC 741 (Ch).

2 *Emerald* [2009] EWHC 741 (Ch) at [30].

3 *Duke of Bedford v Ellis* [1901] A.C. 1 HL at 8.

It followed that it was “impossible to say of any given person that he was a member of the class at the time the claim form was issued”. Thus in this case, “the criteria for inclusion in the class [could not] be satisfied at the time the action [was] brought because they [depended] on the action succeeding”, with the consequence that the first of Lord Macnaghten’s criteria was not satisfied.<sup>4</sup>

In relation to the second of Lord Macnaghten’s criteria, Morritt CVO accepted BA’s submission that the relief sought by the action was not “equally beneficial for all members of the class”. In the present case, a necessary element of the cause of action was the affected individual’s ability to show that it had suffered loss and damage. Some members of the class would be able to do so, but others would not, since (depending on their place in the chain of distribution) some members would have passed on any losses incurred to their customers. There was thus “conflict between the claims of different members of the class”.<sup>5</sup>

The claimants sought to avoid this conclusion by arguing (among other things) that the difficulty could be avoided by amending the definition of the class to exclude entities whose losses had been passed on. Morritt CVO rejected this argument, holding that “[s]uch an exclusion would mean that it would be impossible to ascertain the members of the class even when judgment in the action had been given”; instead further proceedings would first be necessary after the main claim in order to determine which affected individuals could recover damages.<sup>6</sup>

Lastly, in response to the claimant’s reference to the overriding objective, the Chancellor said the following:

“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. The existing 178 additional claimants and any others who seek to join in after the publication of the European Commission’s investigation are more conveniently accommodated under that procedure. The statements in, for example, [the *Duke of Bedford* case] must be read in the light of the fact that Group Litigation Orders were not available until 2000.”<sup>7</sup>

## Comment

This case is interesting as an illustration of a cautious approach to the use of representative claims in competition law cases in England and Wales. The alternative suggested by Morritt CVO, in the form of the Group Litigation Order under CPR 19.11, is more restrictive in that it requires claims to be issued before they are brought within the order, and judgment is binding only on parties to claims which are included in this way. As a practical matter, the GLO route also creates the possibility of different claimants having different representation.

Going forward, the issue of collective redress in the private enforcement of competition law remains a hot topic and developments are likely, if not in the courts, by legislation. The subject is currently being considered by the European Commission, the Office of Fair Trading and the Civil Justice Council. Meanwhile, on June 25, 2009 the Court of Appeal granted Emerald permission to appeal against Morritt CVO’s judgment on the grounds of the prospects of success of its arguments and the importance of the issues raised. It is understood that the appeal was likely to be heard in December 2009.

<sup>4</sup> *Emerald* [2009] EWHC 741 (Ch) at [35].

<sup>5</sup> *Emerald* [2009] EWHC 741 (Ch) at [36].

<sup>6</sup> *Emerald* [2009] EWHC 741 (Ch) at [37].

<sup>7</sup> *Emerald* [2009] EWHC 741 (Ch) at [38].