Neutral Citation Number: [2010] EWCA Civ 1284

Case No: A3/2009/1003

IN THE HIGH COURT OF JUSTICE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
CHANCERY DIVISION
THE CHANCELLOR OF THE HIGH COURT (The Rt Hon Sir Andrew Morritt CVO)
HC08C02648

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 18/11/2010

Before :

LORD JUSTICE MUMMERY
LORD JUSTICE TOULSON
and
LORD JUSTICE RIMER

- -

Between :

(1) EMERALD SUPPLIES LIMITED **(2) SOUTHERN GLASS HOUSE PRODUCE LIMITED**	**Appellants**
- and -	
BRITISH AIRWAYS PLC	**Respondent**

- -
- -

MR IAIN MILLIGAN QC and MR BEN RAYMENT (instructed by Hausfeld & Co LLP) for the Appellants
MR KENNETH MacLEAN QC and MR ROBERT O'DONOGHUE (instructed by Slaughter & May) for the Respondent

Hearing dates: 17th December 2009 & 8th March 2010

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Approved Judgment

Lord Justice Mummery :

Introductory

1. This appeal is a bold attempt at keeping a procedural novelty alive. At the instance of the defendant, British Airways PLC (BA), the Chancellor struck the representative part of the action out for failing to conform to the requirements of Civil Procedure Rule 19.6 ("Representative parties with same interest"). The claimants, Emerald Supplies Limited (Emerald) and another, appeal.

2. The claims are for global infringements of competition law by illegal price-fixing cartels operating in the area of air freight charges. The aim of the litigation is to obtain collective redress for consumers of the services. They are a very extensive group, numerically and geographically. It is asserted that forms of collective redress are now widely regarded as essential for breaches of competition law. Without them there are difficulties in ensuring effective compensation for law-abiding businesses and consumers on whom huge costs are imposed by illegal price-fixing. The issue of redress for price-fixing is so pressing that it is currently under consideration by the EU Commission, the UK Office of Fair Trading and the Civil Justice Council.

3. Procedures under CPR 19 for representative parties and for group litigation and the problems posed by them are concisely put in context by Professor Zuckerman in his valuable pioneering exposition of the principles of procedural law, *Civil Procedure-Principles of Practice* (2nd ed-2006):

> "12.22 There is no limit to the number of persons who can be claimants or defendants to an action. There is therefore no impediment to a large number of claimants suing together or to a large number of defendants being sued together, but the multiplicity of parties, all of whom exercise their right to participate in the proceedings, may hinder the effective resolution of a dispute by causing duplication and confusion. Yet, it might be equally inefficient if each of a multitude of claimants with similar cases were required to establish their claims independently of each other, because it would require the court to deal with identical issues many times over. As Uff observed, two different sorts of interest may arise in the multi-party proceedings context. One is the true collective interest, where all those concerned share a single common interest (e.g. pollution; anti-discrimination). The second arises where individual substantive rights happen to be shared by several persons relating to a single event or similar transactions (e.g. personal injury claims following mass disasters; product liability claims). The procedural process suitable for administering one such sort of claim is not necessarily suitable or most appropriate for administering the other. Accordingly CPR 19 provides two principal devices for handling multi-party actions. One is the representative action. The other is the group litigation order…"

4. No group litigation order was sought in this case, which relates to the jurisdictional and discretionary aspects of an order for representative parties. CPR 19.6 requires the parties in question (in this case the claimants and those whom they purport to represent) to have "the same interest." As Professor Zuckerman explains, the key

factor in representative proceedings is identity of interest in the relevant group. That identity of interest is determined with a view to promoting the litigation objectives of justice, economy, efficiency and expedition. Although the modern trend is to give the rule an increasingly liberal interpretation, so that the court can deal with as many claims as possible within one set of proceedings, Professor Zuckerman comments (at paragraph 12.27) that "it is not surprising that the use of this procedure has so far been confined to situations where the interests of the representatives and the represented were virtually the same." That approach is conditioned by two principal considerations: first, the binding effect of the proceedings on the represented persons, who have not given their leave to litigate on their behalf and do not actively or actually participate in the proceedings; and, secondly, the limited powers of the court to ensure that the proceedings are conducted in the interests of all the represented persons. The potential presence of separate defences also militates against representative proceedings by claimants: a defendant should not be prevented from raising a defence that he may have against only some of the persons represented.

5. Consumer claims for overcharging are given (paragraph 12.30) as an example of a case in which each person's damage is small, but a representative action may not be very useful: although many people are affected by legal wrongdoing, that may not be to a sufficient extent to motivate any one of them to commence an action against the wrongdoers.

6. On 18 September 2008 the claimants brought their proceedings against BA for breach of statutory duty in allegedly fixing charges for air freight. This procedural dispute arises from the way in which Emerald and their co-claimant have, in their pleadings, appointed themselves as representatives of groups of consumers of the freighted goods, being direct or indirect purchasers of air freight services the prices for which were allegedly inflated by agreements or concerted practices. A declaration is claimed that BA is liable to pay damages to those purchasers.

7. BA has reacted strongly to the form of the proceedings and denies that "the so-called representative action" brought by Emerald is permitted by the CPR. BA makes no admission as to the nature or extent of the cargo services provided to Emerald which may be subject to the provisions of EC law and of the Competition Act relied on, or as to those claimants, who may be considered indirect purchasers of those services. BA contends that the so-called representative element of the claim constitutes a wholly indeterminate and vast range of potential claimants that far exceeds the scope of the proceedings contemplated or permitted as representative proceedings and whose interests may be divergent or even conflicting. The class of "indirect purchasers" is not only unidentified but unknowable: potentially it comprises every so-called direct and indirect purchaser worldwide who at one stage or another were arguably affected, directly or indirectly, by the cost of air transport during the relevant period 1999 to 2006.

8. The wide-ranging submissions of counsel covered many points on the procedural requirements of representative actions in general and the nature of these particular proceedings. Does the size of the represented group matter? Are common ingredients in individual causes of action sufficient for identity of interest? What is the identity of this represented group? Does that identity have to be determined or be determinable when the proceedings are constituted? Or is it sufficient if class identity can be determined at any time down to and including judgment in the proceedings? Is

confining relief to a declaration of liability "in principle" prior to the quantification of individual damages claims an effective way of establishing identity of interest? Is this action equally beneficial to all members of the class? Are conflicts within the class inevitable if it is open to BA to raise a defence against the claims of some members of the class but not others? e.g. a defence that the inflated price paid by the customer has been "passed on"? If so, does that mean that the persons represented do not have "the same interest"? If the case falls within the rule, what factors are relevant to the court's discretion to make an order for the continuation of the representative action?

9. By an order dated 8 April 2009 (paragraph 1) the Chancellor granted BA's application to strike out the purported representative element of Emerald's claim. (I shall refer to the claim made by Emerald as including the claims made by its co-claimant without naming it separately). The Chancellor's judgment [2009] EWHC 741 (Ch) was based on lack of jurisdiction in this case to make a representative party order. As he concluded that the pleaded claim did not fall within the rule, he did not have to consider and did not in fact consider whether, if there is jurisdiction, this is a proper case for the exercise of discretion to make a representative party order. This court heard arguments on both the jurisdictional and discretionary aspects.

10. The Chancellor refused permission to appeal against his order. Permission was granted by Arden LJ on 24 June 2009. An application issued on 8 September 2009 for permission to amend the grounds of appeal and the Appellants' Notice to deal with costs questions was initially opposed, but at the hearing there was no objection to the grant of permission for the proposed amendments. There is no appeal against paragraph 2 of the Chancellor's order staying the remainder of the claim pending a final decision of the European Commission's proceedings into the Air Cargo Sector (Case COMP 39.258), or any appeal that may follow on from that.

CPR 19.6

11. The appeal turns on the scope of CPR 19.6. The court was provided with an informative chart prepared by counsel tracing the development of the procedural rules relating to representative proceedings from 1875 down to their present incarnation in the CPR. In specified circumstances the rule allows a claim to be begun and, by order of the court, to be continued by one or more persons who have "the same interest" as representatives of any other persons who have that interest. Broadly stated, the issue here is whether Emerald and those whom they claim to represent have "the same interest" in the pleaded claim. At first sight it seems to be a relatively straightforward short point of practice and procedure of the kind that used to be swiftly settled by the QB Master in the hurly-burly of the Bear Garden. If possible, it should be kept that way, despite two days (separated by an interval for an application to amend) of concentrated legal argument from Leading Counsel and three lever arch files of authorities.

12. The rule 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.
>
> (3) Any party may apply to the court for an order under paragraph (2).
>
> (4) Unless the court otherwise directs any judgment or order given in a claim in which a party is acting as a representative under this rule –
>
> > (a) is binding on all persons represented in the claim; but
> >
> > (b) may only be enforced by or against a person who is not a party to the claim with the permission of the court."

13. The kernel of BA's objection to the representative party element of Emerald's claim is that the other persons whom Emerald purport to represent do not have "the same interest" as Emerald or as each other within sub-rule (1). It is common ground that the rule must be construed and applied to promote the overriding objective and that, if the case falls within the rule at all, it is as "a common interest" case and is not synonymous with a case arising from a single event, product or transaction. The points touched on in paragraph 8 above stem from two main aspects of "the same interest" requirement.

14. The first aspect is whether the class of persons to be represented as having the same interest have to be identified or to be capable of being identified at the date when the action is constituted; or is it sufficient that a person can be identified as a member of the represented class at the date when judgment in the action is obtained? The identity of interest in this case depends on the success of Emerald's claim: only if and when judgment is given in favour of Emerald are the members of the represented class capable of being identified.

15. The second aspect is whether the representative character of the proceedings would be equally beneficial for all persons in the represented class. That would not be the case if, for example, there is a potential conflict between those in the class who "pass on" and those who do not "pass on" to their customers the inflated element of the illegally fixed prices. BA might be able to raise a "passing on" defence (i.e. a defence that no damage has been suffered) against some members of the represented class, but not against other class members.

16. Emerald contends that the reasons given for the striking out order are contrary to the decision of the House of Lords in *Duke of Bedford v. Ellis* [1901] AC 1, which is discussed below, and that, if there is any substance in BA's objections to the representative character of the proceedings, they can be met by proposed amendments to the Particulars of Claim, to which I now turn.

Adjournment for amendment application

17. The appeal was originally listed for hearing on 17 December 2009 along with the application issued on 8 September 2009 for permission to amend the grounds of appeal. Draft amendments to the Particulars of Claim were sent to the court under cover of a letter dated 14 December 2009 explaining that, in so far as any of BA's

arguments were sustainable, they could be overcome by some or all of the draft amendments. No formal application for permission to amend was issued or indicated at that stage.

18. In the course of his opening of the appeal Mr Iain Milligan QC, on behalf of Emerald, made it clear that, while maintaining that there is no need for Emerald to amend in order to succeed in the appeal, permission would be sought from this court to amend the Particulars of Claim in any event. The application to amend was not, as BA and the court thought it was, contingent on an unsuccessful outcome of his appeal against the judgment below on the basis of the unamended pleadings.

19. The proposal to amend was opposed by Mr Kenneth MacLean QC on behalf of BA. He said that it was too late to make an application for permission to amend, which had not been made at or following the hearing below. In any case he said that the amendments indicated ought to be refused on the ground that they were pointless, as they did not cure the legal flaws in Emerald's efforts to bring its case within CPR 19.6. He also pointed out that the action was in any event stayed pending a decision from the European Commission, it not being possible for the national court to reach a decision contrary to that of the Commission. There is no point, Mr MacLean QC submitted, in changing the pleaded case, if the proceedings themselves are stayed. Emerald's claim for a declaration is pointless, as the case would be overtaken one way or the other by the Commission's decision. He would be asking the court to dismiss the appeal from the order based on the existing state of the pleadings.

20. The court heard argument about an application for permission to amend the Particulars of Claim. Mr Milligan QC made it perfectly clear that the application was without prejudice to his primary contention that the existing pleadings were good and that the representative element should not have been struck out. As for the role of the Commission, he said that the proceedings would be necessary in case it did not decide everything covered by the action and that the objection based on the Commission's role was no reason for refusing permission to amend on the representation point. The Commission might decide points at a high level of generality, leaving particular points to be decided by the national court.

21. Mr MacLean QC persisted in his opposition to the amendment proposal, stating that he had prepared his skeleton argument in response to the appeal on the basis of the existing pleadings, not on the basis of the amendments to it now proposed. If the amendments were allowed, he would need an adjournment in order to prepare to meet the new case arising from the amended Particulars of Claim. Mr Milligan QC accepted that, in principle, he could not oppose the grant of an adjournment.

22. After argument the court ruled that it was not too late for Emerald to amend the Particulars of Claim and that permission *in principle* would be given to amend, but without prejudice to Mr MacLean's right to argue that, even on the proposed amendments, this case falls outside CPR 19.6, as the amendments do not cure deficiencies in the representative claim. The appeal was adjourned part heard on 8 December 2009. It was reserved to the same constitution, which inevitably resulted in difficulties in listing logistics and delay. The costs of the appeal, including the costs of and occasioned by the application to amend the Particulars of Claim, were reserved to be dealt with at the end of the appeal. BA was granted permission to serve a respondent's notice and to lodge a revised, self-contained skeleton argument dealing

with the amended Particulars as well as the original Particulars. Emerald was granted permission to lodge a reply skeleton argument.

Basic facts pleaded

23. According to the pleadings Emerald imports cut flowers into the United Kingdom from Columbia. It uses BA's air freight services and those of other international airlines. The factual background is set out in more detail in the judgment under appeal (paragraphs 5 to 8) and repetition in this judgment is unnecessary.

24. Emerald alleges that BA was a party to agreements and/or concerted practices involving a number of airlines for the purpose of unlawful price fixing in the air freight services provided and so inflating prices. The claim is made by Emerald on its own behalf and on behalf of all other direct or indirect purchasers of air freight services affected by the alleged price fixing. Breaches of Article 81(1) of the EC Treaty and s2 of the Competition Act 1998 are alleged. The relief claimed is a declaration that damages are recoverable "in principle" from BA by those purchasers in respect of 3 specified types of loss: the inflated element of the price in so far as it was passed on to them; loss of sales volume in so far as the inflated price was passed on by them to their own buyers; and loss of sales volumes of other products as a result of brand damage. It is accepted by Emerald that, in the event that a declaration is made, proof of individual losses by those represented could not be dealt with under CPR 19.6, but would have to be proved individually.

Judgment on strike out

25. BA applied to strike out the representative element of the claim on the ground that the other purchasers whom Emerald sought to represent did not have "the same interest" in the claim within CPR 19.6(1).

26. The Chancellor agreed that the fact that the number of persons is both numerous and geographically widespread is not of itself an objection to a representative action, but added that the more extensive the class, the more clearly should the other preconditions of Rule 19.6 be satisfied. In granting BA's application the Chancellor held that the class of persons which Emerald seeks to represent must have "the same interest" in the claim as Emerald at the time the claim was issued i.e. on 18 September 2008. That requirement is not satisfied in a case in which the criteria for inclusion in the class to be represented depend on the success of the claim itself. Here the criteria for inclusion in the represented class are that those persons were direct or indirect purchasers of air freight services the prices for which had been inflated by one or more of the alleged agreements or concerted practices. Those persons were not identified or capable of being identified at the date the proceedings were started. It was simply not possible to say of any particular person that he was a member of the class at that date.

27. The Chancellor distinguished between the authorities cited and a case such as this in which, according to the criteria, inclusion depends on the outcome of the action itself i.e. on proof of the allegation that the persons to be represented were purchasers of air freight services at prices inflated by agreements and concerted practices. That was distinct from cases such as the *Duke of Bedford* case in which (see discussion below)

the composition of the relevant class ("growers") was independent of the outcome of the action. The Chancellor summarised the position:-

> "35. In my view, this distinction demonstrates that r19.6 does not authorise these claimants to represent the class described in the particulars of claim. 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 that the criteria for inclusion in the class cannot be satisfied at the time the action is brought because they depend on the action succeeding."

28. Further, he concluded that the relief sought in the action was not equally beneficial to all members of the class.

> "36. It is not disputed that damage is a necessary element in the cause of action of individual 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."

29. None of the grounds on which Emerald sought to avoid that consequence were accepted e.g. reliance on the decision of the Supreme Court of the USA in *Hanover Shoe Inc v. United Shoe Machinery Corp* (1968) 392 US 481 on the availability of the "passing on" defence to a claim for compensation for the overcharge. The Chancellor described that as a policy decision not open to the English courts, damage being a necessary ingredient of the cause of action. (The passing on defence is that the claimants have suffered no loss, either because any higher prices resulting from the alleged cartel were absorbed by the first line purchasers, who then sold them on at normal prices to the claimants, or because the claimants themselves passed on to sub-purchasers any higher prices they may have paid: see *BCL Old Co Ltd & Ors v. Aventis SA & Ors* [2005] CAT 2 at paragraph 33.)

30. The case of *John v. Rees* was cited, but distinguished (see discussion later), and the Chancellor said that the amendments proposed to him so as to exclude the claims for damage which had been "passed on" did not solve the problems and, indeed, might even increase them.

31. The judgment concluded with some general comments responding to Emerald's submissions:-

> " 38. ...It is not 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 r19.11. 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* must be read in the light of the fact that Group Litigation Orders were not available until 2000."

Draft proposed amendments (as indicated in italics)

32. Emerald claims on its own behalf and as representative of all those identified in paragraph 8 of the draft amended Particulars of Claim.

33. Paragraph 2 alleges that the Defendant BA has been a party to agreements, or to concerted practices, with other undertakings who supply air freight services, directly or indirectly to fix the prices at which air freight services were supplied to the purchasers of those services. Paragraph 3 alleges that the object and effect of the agreements or concerted practices to fix prices has been to prevent or restrict or distort competition. Paragraph 4 identifies 10 undertakings with whom the agreements or concerted practices were made or undertaken. Paragraph 6 alleges that the overall effect of the agreements and concerted practices was to inflate the prices at which air freight services were supplied to purchasers. Paragraph 7 alleges that the agreements and concerted practices constituted infringements of Article 81(1) of the EC Treaty, Article 53 of the EEA Agreement and s2 of the Competition Act 1998.

34. Paragraph 8 reads as follows:

> "8. The Claimants were direct or indirect purchasers or both of air freight services *from the Defendant and also from one or more of the undertakings identified in paragraph 4 above between December 1999 and March 2006.* As such they are representative of all other direct or indirect purchasers of air freight services *from the Defendant and also from those undertakings between December 1999 and March 2006.*"

35. Paragraph 9 reads:

> "By virtue of the inflated prices, the direct or indirect purchasers, including the Claimants, have suffered losses, including losses, under one or more of the following three heads:
>
> (1) the inflated element of the price, in so far as it was passed on to them [*and not passed on by them],[and/or]*
>
> (2) loss of sales volumes in so far as the inflated price was passed on by them to their own buyers, and
>
> (3) loss of sales volumes of other products as a result of brand damage."

36. Paragraph 10 reads as follows:

"10. In the circumstances the Claimants claim on their own behalf and on behalf of all direct or indirect purchasers of air freight services *from the Defendant and from the undertakings identified in paragraph 4 above between December 1999 and March 2006* a declaration

(1)that the Defendant was a party to the agreements or practices described in paragraph [2];

(2) that the object or effect of those agreements or practices was as described in paragraph 3;

(3) that the agreements or practices spanned the period between December 1999 and March 2006, as described in paragraph 4;

(4) that the agreements or practices involved one or more of the undertakings identified in paragraph 4;

(5) that the object or effect of the agreements or practices was to inflate the prices at which airfreight services were supplied to purchasers above those which would have prevailed had there been no such agreements or practices, as described in paragraph 6;

(6) that the agreements or concerted practices constituted infringements of Article 81(1) EC (Now Article 101 of the Treaty on the functioning of the European Union), Article 53 of the EEA Agreement and section 2 of the Competition Act 1998, as described in paragraph 7; and

(7) that damages are recoverable in principle from the Defendant by those purchasers in respect of each of the three types of loss described in paragraph 9."

Emerald's submissions

37. Mr Milligan QC prefaced his incisive point-by-point critique of the judgment with some preliminary points.

38. First, jurisdiction. The matter had been dealt with as one of jurisdiction to make a representative order under the CPR, which was held not to apply. The court below never reached the stage of considering the exercise of discretion.

39. Secondly, class size. This was exaggerated by BA: the class was confined to those who have purchased freight services from air lines participating in the cartel. It did not include the purchasers of goods or other kinds of services. As for the length of the period covered in the pleading that was of BA's own making. The breadth of the class was the reason why it was beneficial in practice to have a representative claim.

40. Thirdly, the representative action rule. This had become broader and more flexible over the years, as appeared from the chart mentioned earlier and as illustrated by the trend of the authorities.

41. Mr Milligan QC turned to the particular reasons given for striking out the representative claim.

(1) Size of class

42. The rule does not numerically limit the relevant class. Mr Milligan QC submits that the Chancellor was wrong to say the larger the class the more clearly the criteria had to be satisfied. The size of the class has no bearing on whether the pre-conditions of the rule are satisfied. Their fulfilment is not a matter of degree: the conditions are either satisfied, or they are not. In this case they are satisfied.

(2) Lack of identification.

43. The members of the class are only identified when the outcome of their claims is known. When the proceedings were issued in a representative form it could not be said that there was a class whose members had "the same interest." Until the proceedings are concluded it could not be known whether they would have the same interest. The Chancellor held that the case was therefore outside CPR 19.6. Mr Milligan QC submits that that approach and that conclusion are wrong. The authorities establish that the represented class may fluctuate: the persons in it do not have to be the same throughout the period between the start of the action and judgment. What matters is that there was a class of more than one person when the action was commenced and that those persons represented by Emerald had "the same interest" at the relevant time. It did not follow that persons represented had to be the same at the start of the action and at the point of judgment and in the period between those two points of time. The rule does not specify that the start of the proceedings is the *only* relevant time to consider. Whether or not the members of a class have the same interest at the relevant time is a matter of principle: it does not turn on the practical issue of when the question of identity of interest is or can be determined.

(3) The authorities discussed

44. Mr Milligan QC analysed the *Duke of Bedford* case cited in support of his submission that it is sufficient for a representative action to have an indivisible class, the members of which have a common interest and have suffered the same wrong, although the membership of the class may fluctuate between the beginning and the end of the proceedings. In that case the plaintiffs sued the Duke of Bedford on behalf of themselves and all other "growers" of fruit, flowers, vegetables and so on within the meaning of the Covent Garden Act 1828. The action was brought to enforce rights to preferential stands in the market alleged to have been given to the class of growers by that Act. The plaintiffs, who had separate causes of action, jointly claimed a declaration and other relief.

45. It was held that, as the plaintiffs had an interest in common, the defendant Duke was not entitled to have the action stayed. The plaintiffs were entitled to sue on behalf of all other growers having the same interest in one cause or matter to enforce the same rights and privileges which the Duke refused to recognise i.e. the preferential rights claimed under the Act. They had a common interest with those they claimed to represent Anyone who was a "grower" under section 6 of the Act could take advantage of the representative judgment given in favour of the plaintiffs, whether they were growers when the action started, or only later. They were a large, indefinite

and fluctuating class consisting of persons having the same rights and relying on one and the same Act as their charter. The House of Lords rejected the nature of that class as an objection, holding that, although it might be difficult or impossible to compile a catalogue of growers, there was not much difficulty in determining whether a particular person claiming a preferential right was a grower or not. Thus the representative class with same interest can fluctuate: under the rule what matters when the action starts is that there is a class of more than one person.

46. Lord Macnaghten said (at page 8), having rejected the contention that the rule for representative actions was limited to persons having a beneficial proprietary interest, that:-

> "... Given a common interest and a common grievance, a representative suit was in order if the relief sought was in its nature beneficial to all whom the plaintiff proposed to represent."

47. I note that in the *Duke of Bedford* case it was possible, before judgment in the action, to say of the class, suing as a represented body of persons, who could be identified as a member of it. As Lloyd LJ said in *Pan Atlantic Insurance Co Ltd & Anor v. Pine Top Insurance Co Ltd* [1989] 1 Lloyd's Law Reports 568 at 571 the rule was interpreted by Lord Macnaghten

> "...as requiring three conditions to be fulfilled. First, the parties must have the same interest in the proceedings; secondly, they must have a common grievance; thirdly, the relief sought must be beneficial to all."

48. In *Pan Atlantic* it was held that the members of a syndicate were seeking, as against the defendants, to enforce identical interests arising out of the very same contract, that the plaintiffs and the members of the syndicate had suffered a common wrong by reason of the defendants' failure to pay and that they had a common right as against the defendants. This is to be contrasted with *Markt & Co Ltd v. Knight Steamship Co Ltd* [1910] 2 KB 1021 where, although there was a common wrong suffered by people in similar circumstances, there was no common interest or right. Fletcher Moulton LJ stated (at page 1084) that in the case of representative actions it is essential that the class on behalf of which the relief is sought should be defined: it is impossible for the court to give any judgment as to the rights of the parties by virtue of their being members of a class without its being defined what constitutes membership of the class. That requirement is satisfied in a case where all the members are identifiable and have the same interest by virtue of enjoying identical contractual relationships created under the same commercial exercise that gave rise to a proportionate liability for a single identified loss: see *Irish Shipping Ltd v. Commercial Union* [1991] 2 QB 206 at 240.

49. In *John v. Rees* [1970] Ch 345 a representative action was brought by individual members of an unincorporated association (a local Labour Party in which there were divided views between numerous persons of a single body) claiming personally and on behalf of all save three of the members of the association. An application was made to strike out the claim for relief in a representative capacity on the ground that there was no common interest or common grievance and the relief was not beneficial to all. Megarry J, who rejected the application, reviewed the law on representative

actions, including the opinion of Lord Macnaghten in the *Duke of Bedford* case. He agreed that it was a "flexible tool of convenience in the administration of justice" (page 370E) which he was slow to apply "in any strict or rigorous sense." He held that all who belonged to the Pembrokeshire Divisional Labour Party were bound to each other by contract, linked by a common membership and a common interest in the assets. They had a common interest. It was no reason for striking it out that the plaintiffs did not represent all of the members. Some of the members supported the defendants. Those members could be added on the other side as defendants, or be represented by other defendants instead of by the plaintiffs.

50. *Radcliffe v. Coltsfoot Investments* (1984-86) Manx Law Reports 386 was brought to the attention of counsel by Toulson LJ. who appeared in it as junior counsel nearly 25 years ago. Hytner JA, delivering the judgment of the Staff of Government Division (the Isle of Man Court of Appeal) reviewed the authorities at length in the context of representative proceedings by plaintiff depositors against the defendant members of the Finance Board. The claim was for damages for financial loss caused by breach of duty and negligence in the performance of duties under the Banking Acts in relation to the licensing and supervision of the Savings and Investment Bank Ltd.

51. It was held that the case did not fall within the rule governing representative actions. Although the claims involved common questions of fact or law, they did not satisfy the test that the plaintiffs should have a common interest. The duty was not the same in each case. The represented class did not suffer the same grievance or seek the same remedy. The only final relief claimed was damages. The remedy sought by way of declaration as to breach of duty would not be final: it had only been sought in order to convert the suit into a representative action.

(4) Critical date.

52. Mr Milligan QC submits that the authorities show that it is not necessary that the whole of the class with the same interest should exist and be fixed at the date when the action began. There is no practical difficulty in being unable to identify the members of the class before the outcome was known. The members of the class did not need to know of the proceedings before judgment was obtained.

(5) Amendments.

53. If, however, he is wrong on that point, Mr Milligan QC submits that the objection could be met by amending the Particulars of Claim (paragraph 8). There were 2 named claimants and 170 purchasers in the same interest when the claim began. Emerald applies to amend paragraph 8 so that the claimants are representatives of purchasers of air freight services from BA and from one or more of the identified undertakings between December 1999 and March 2006. It is submitted that the class does not depend on the outcome of the action and is capable of being applied at its outset.

(6) Not equally beneficial/ passing on defence.

54. The judgment below accepted BA's objection that the claim is not equally beneficial to all members of the class. There is a conflict between those who do and those who do not "pass on" the inflated price to their customers. No damage would have been

suffered if the inflated element of the price had been passed on. There is inevitably a potential conflict between members of the class as to the damage suffered. That could not be avoided by the proposed amendments to the Particulars of Claim.

55. Mr Milligan QC submits that the judgment is wrong on those points. Damage is not a necessary element of each individual's cause of action. What matters is that there is a common interest in achieving an outcome and no conflict between the members of the class in respect of some common ingredients of the claim. They do not have to have a separate cause of action: *Prudential Assurance Co Ltd v. Newman Industries Ltd* [1981] Ch 229 at 252, 255. Some common ingredient of the causes of action of each member of the class suffices. Further, the relief claimed here is for a declaration *in principle*. It is not necessary for damage to be suffered for declaratory relief to be available.

56. There is no inevitable conflict on the issues, unless the court has determined finally that no recoverable loss has been suffered where loss has been passed on. That point was not considered or decided by this court in *Devenish Nutrition Ltd v. Sanofi-Aventis SA* [2008] EWCA Civ 1086 at paragraph 91. It ought not to be decided at an interlocutory hearing in the absence of full argument. Further, as appeared from *John v. Rees*, an actual or potential conflict as between members of the class does not matter, provided that argument could be advanced by members of the class at a time before damages which may be payable to them are awarded.

57. The amendments proposed to paragraph 9 and paragraph 10 would avoid any such problems. The class consists of those who have not passed on the whole of the inflated element of the price leaving them individually to prove their specific losses under one of the heads. Whether or not a particular person fell within that class would be determinable at the time when they sought judgment, as in the *Duke of Bedford* case.

58. The amendment to paragraph 9 limits the claim for the inflated price to cases where the inflated element was not passed on by the claimants. The amendment to paragraph 10 relates to the declarations of recoverable loss in principle. The declarations are confined to ingredients of the claim in which all members of the defined class have an interest. Passing on issues are then dealt with later on quantum. The decision of principle will be binding.

59. Mr Milligan QC also submits that an unjustified assumption was made that there was a defence of "passing on" to a claim of infringement and that the claimants suffered no damage, as they passed to their customers prices paid to members of the price-fixing cartel.

Conclusions

A. Jurisdiction

60. I am unable to accept the core criticisms made by Mr Milligan QC of the judgment under appeal. CPR 19.6, construed according to the ordinary meaning of its language and according to the underlying principles laid down and applied in the authorities, does not fit this case: Emerald and the persons in the class it purports to represent do not all have "the same interest."

61. The Chancellor's reference to the size of the class of persons to be represented, which has been singled out for criticism, was no more than a general observation: it did not lay down and was not intended to lay down a distinct condition that is absent from the rule.

62. In my judgment, Emerald's case for a representative action, whether as originally pleaded or as proposed to be amended, is fatally flawed. The fundamental requirement for a representative action is that those represented in the action have "the same interest" in it. At all stages of the proceedings, and not just at the date of judgment at the end, it must be possible to say of any particular person whether or not they qualify for membership of the represented class of persons by virtue of having "the same interest" as Emerald.

63. This does not mean that the membership of the group must remain constant and closed throughout. It may indeed fluctuate. It does not have to be possible to compile a complete list when the litigation begins as to who is in the class or group represented. The problem in this case is not with changing membership. It is a prior question how to determine whether or not a person is a member of the represented class at all. Judgment in the action for a declaration would have to be obtained before it could be said of any person that they would qualify as someone entitled to damages against BA. The 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. It defies logic and common sense to treat as representative an action, if the issue of liability to the claimants sought to be represented would have to be decided before it could be known whether or not a person was a member of the represented class bound by the judgment.

64. A second difficulty is that the members of the represented class do not have the same interest in recovering damages for breach of competition law if a defence is available in answer to the claims of some of them, but not to the claims of others: for example, if BA could successfully run a particular defence against those who had passed on the inflated price, but not against others. If there is liability to some customers and not to others they have different interests, not the same interest, in the action.

65. In brief, the essential point is that the requirement of identity of interest of the members of the represented class for the proper constitution of the action means that it must be representative at every stage, not just at the end point of judgment. If represented persons are to be bound by a judgment that judgment must have been obtained in proceedings that were properly constituted as a representative action *before* the judgment was obtained. In this case a judgment on liability has to be obtained before it is known whether the interests of the persons whom the claimants seek to represent are the same. It cannot be right in principle that the case on liability has to be tried and decided before it can be known who is bound by the judgment. Nor can it be right that, with Micawberish optimism, Emerald can embark on and continue proceedings in the hope that in due course it may turn out that its claims are representative of persons with the same interest.

B. Discretion

66. Mr Milligan submits that the court should refuse to exercise its discretion to strike out the representative claim on the application of BA on the basis of the perceived

disadvantages to the member of the represented class. He points out that no case has been advanced by BA that there would in fact be any disadvantages to the members of the class if the representative claim were to continue and that the court cannot assume or speculate that the member of the class would be worse off by virtue of the representative claim.

67. As the case falls outside CPR 19.6 it is unnecessary and I think undesirable to consider how the discretion would be exercised if the case falls within the rule.

Result

68. I would refuse permission to amend the pleadings and dismiss the appeal. There is nothing wrong with the Chancellor's judgment. Emerald's proposed amendments to their pleadings are pointless, as they would not overcome its basic difficulties in bringing the case within the scope of CPR 19.6.

69. After all the applications, arguments, authorities, amendments and adjournments, it is a straightforward Bear Garden kind of case that falls outside the rule on representative actions. Emerald and those they purport to represent do not all have "the same interest" required by the rule. The persons represented are not defined in the pleadings, either initially or in the proposed amendments, with a sufficient degree of certainty to constitute a class of persons with "the same interest" capable of being represented by Emerald. The potential conflicts arising from the defences that could be raised by BA to different claimants, such as direct purchasers who have "passed on" the inflated price and would not want BA to run that passing on defence to their claims and those indirect purchasers to whom the inflated price has been passed on and who would want BA to raise the pass on defence to claims by direct purchasers, reinforce the fact that they do not have the same interest and that the proceedings are not equally beneficial to all those to be represented.

Lord Justice Toulson:

70. I agree.

Lord Justice Rimer:

71. I also agree.