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Agenda

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A common interest, different solutions: commonality in collective actions

Group litigation—also known as a class action or representative action—allows small claimants to group together in order to ensure better access to justice. Vincent Smith of Sheppard + Smith LLP uses two recent high-profile cases to explore the differences between the US and English approaches to group litigation. He also considers the role for expert economic advice, and how this might change under legislation currently being considered by the UK government and the European Commission

The US and English approaches to group litigation—gathering together similar claims in one action to ensure better access to justice for small claimants and to improve the efficiency of the civil justice system—are very different.

For nearly 50 years, the USA has had a federal class action system, where all claims having a sufficient common element can be grouped together in one action (and those plaintiffs who do not wish to participate have to opt out).

The English representative action is much older but much narrower in scope: it does not allow for an award of damages, nor for the absent claimants to opt out of the proceedings. Both the US class action and the English representative action require claims to be 'common', and in both countries the question of exactly how close the claims of the group members must be before the collective redress mechanism can be used to bring them together in a single action has recently been examined by the courts.

Although only one of these decisions is in a competition (antitrust) case, both have clear lessons for competition litigation on a collective basis, especially as to the type and strength of economic evidence needed at an early stage of such an action. I will attempt here to draw some overall conclusions from the decisions.

At first sight, and despite the differences in their overall approach to group litigation, the rules on the strength of the nexus between the claims which are to be grouped together appear remarkably similar under both systems. The US class action will be available only where:

> there are questions of law or fact common to the class[1]

and the English representative action can be used:

> 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]

Important new precedent on both sides of the Atlantic...

The US commonality principle has recently been the subject of close scrutiny by the Federal Supreme Court in *Dukes v Wal-Mart*,[3] and the degree of commonality ('sameness') of interest needed for the English representative rule to be used was considered by the High Court (upheld by the Court of Appeal) in *Emerald Supplies v British Airways plc*.[4]

Wal-Mart applied to strike out the application by Mrs Dukes to become a lead plaintiff in a class action against it alleging that it had discriminated against approximately 1.5m of its female employees in pay and promotion, contrary to the US Civil Rights Act 1964. Wal-Mart delegated pay and promotion decisions in respect of most of its employees to its store managers, and the plaintiffs did not allege that there was a uniform corporate policy against the advancement of women. Instead, they claimed that there was a strong corporate culture that permitted bias against women and that would 'infect' the discretion of the store managers against female employees. Wal-Mart essentially replied that this was an insufficient degree of commonality between the otherwise individual circumstances of each woman's case and, in any event, that the plaintiffs

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had failed to show any evidence of this culture—and certainly not sufficient to justify certifying a class action.

Emerald was rather different on its facts. There, British Airways (BA) sought to strike out the claimants' claim to represent:

> all other direct or indirect purchasers of air freight services, the prices for which were inflated by the [alleged cartel]

The claim was brought by Emerald Supplies, a flower importer and wholesaler, and others for damages for themselves and a declaration that damages were available to the represented purchasers of air freight services from the cartel in which BA was (subsequently) found to have participated. BA argued that the representative element of the claim should not be allowed to continue, for (essentially) two reasons. First, because it was not possible to tell at the outset of the action who was being represented by the claimants—membership of the group depended on purchases being made at an inflated price, which had yet to be shown by the claimants. Second, in any event, the direct purchasers and the indirect purchasers could not have 'the same' interest in the claim: their claims were not identical and had insufficient in common to engage the representative action rule.

In both cases, then, the question of 'commonality' of the group was squarely in issue; the judicial responses were nuanced.

In *Dukes*, a majority of the US Supreme Court first pointed out that the phrase 'common questions of law or fact':

> is easy to misread, since '[a]ny competently crafted class complaint literally raises common "questions"'

but went on to hold that the class members' claims:

> must depend upon a common contention [...]. That common contention, moreover, must be of such a nature that it is capable of classwide resolution - which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke.

The court then went on to describe how the issue of commonality should be approached:

> Conceptually, there is a wide gap between (a) an individual's claim that he [has been discriminated against] [...] and (b) the existence of a class of persons who have suffered the same injury as that individual, such that the individual's claim and the class claim will share common questions of law or fact

Linking the two issues requires the potential class plaintiff to produce evidence either that there is a biased company-wide evaluation method (it was common ground that there was not in this case) or that there is 'significant proof'—even at the preliminary stage of class certification—that the defendant nevertheless operated under a general policy of discrimination.

... highlight important differences

Clearly the interpretation of the US commonality principle as 'a class of persons who have suffered the same injury' is very close to the wording of the English representative action rule allowing a person to represent any other persons who have 'the same interest' in the potential lead claimant's claim. However, in *Emerald*, the English courts took a narrower view of what 'the same interest' means in the context of the English civil procedure rules.

The English courts deciding the application in *Emerald* were bound by the leading House of Lords case from the turn of the last century on the representative rule, which succinctly described the degree of commonality required:

> Given a common interest and a common grievance, a representative suit was in order if the relief sought was by its nature beneficial to all whom the plaintiff proposed to represent.[5]

The parallels between this formulation and the US Supreme Court's opinion in *Dukes* is striking. There must be a 'common grievance' or (in 21st century American English) a 'common contention', 'a common interest' or (in the US) 'common questions of law or fact', and the action must 'by its nature [be] beneficial to all whom the plaintiff proposed to represent' or (in the US) 'will resolve an issue that is central to the validity of each one of the claims'.

There is at least one important difference, however: although the US Supreme Court emphasised the need for the 'same injury' to the class as a whole, the English courts emphasised that the 'relief' sought had to be beneficial to the represented class. Clearly it is quite possible for the same injury (for example, an overcharge caused by unlawful cartel activity) to give rise to different types of relief (remedy) for different victims of that injury. For example, an injunction prohibiting the cartel from continuing its activities would benefit those purchasers from the cartel who are still in business at the date of the injunction, but would not benefit those who had already been driven out of

business; nevertheless, they have all clearly suffered the 'same injury'—albeit to different degrees of severity.

In *Emerald*, the English courts agreed with BA that the representative aspect of the claims should be struck out, on both of the grounds advanced by BA. First, membership of the represented class could not be dependent in any way on an element which had to be proven in the subsequent action (such as loss caused by a cartel). Second, the interest in the remedy requested by the representative claimant had to be equally beneficial for all those represented (adding a gloss to the century-old rule). Since the proposed class consisted of both direct and indirect purchasers from the cartel, this condition was clearly not satisfied. The represented class did not all have 'the same' (ie, an identical) interest at stake.

The US Supreme Court (in the different context of US civil procedure) took a somewhat different view on the issue of preliminary proof of commonality. In contrast to the English courts, it considered that the need for proof of some elements of the plaintiffs' substantive claim as early as the class certification stage—if they are necessary to allow the court to decide on the commonality question—was not a bar to a class being certified.

However, it did decide that a party seeking to certify a class must show that all of the class members' claims will in fact depend on the answer to at least one common question. If, as in *Dukes*, the dissimilarities between the possible class members are so great that the potential lead plaintiff cannot establish the existence of any common question with an answer which resolves an issue central to each of the claims, the class cannot be certified. This requirement appears to be identical to the requirement that the English representative action be (equally) beneficial to *all* whom the plaintiff seeks to represent.

So, how can the claimants show—even to the prima facie standard required at the early stage of responding to an application to strike out the group claim—that the group members' claims have the required degree of commonality? Again, the comparison of the English and US procedures is instructive.

In *Emerald*, the evidence before the High Court was, as is usual in such circumstances, simply of fact (contained in two witness statements by the solicitors for each party). In contrast, the evidence before the US Supreme Court was significantly more extensive and included both evidence of fact from the representative plaintiffs and expert evidence seeking to show that Wal-Mart had allowed a culture of discrimination to develop which was sufficient to satisfy the commonality test. The Supreme Court did not see anything unusual in requiring plaintiffs to bring such evidence at the early stage of class certification—indeed it pointed out that it is for the party seeking to use the class action to demonstrate that the case fell within the relevant rule.

What role for economic evidence?

In competition litigation—whether in the USA or in Europe—the use of expert economic evidence is likely to be needed to show the harm caused by the allegations of anti-competitive behaviour (eg, a cartel) and, if damages are sought, to quantify them. This 'traditional' use of experts to demonstrate the substantive aspects of a claim at trial is well tested in Europe but, in comparison with the USA, the use of expert evidence in an English court at the beginning of the action is significantly rarer. In common with most other European jurisdictions, expert evidence may be admitted only with the permission of the court and, in England at least, the court is under a duty to restrict expert evidence to that which is reasonably required to resolve the proceedings.

Both the European Commission and the UK government are considering whether to legislate to introduce more effective group action mechanisms for (at least) competition claims.[6] One of the issues which will need to be resolved is the degree of commonality which the claims of the members of the group must show before any new mechanism can be used ('related', 'similar', or 'the same'?). And expert economic evidence will probably need to demonstrate—at least to a prima facie standard—the required closeness of the class claims.

Depending on the commonality test adopted (eg, 'similar' or 'related'), it may be sufficient to show that all members of the group in the putative collective action were harmed by the unlawful anti-competitive behaviour—that is, that there is some economic difference between each of their factual situations and the (common) counterfactual. Established economic techniques (some of which are the subject of a recent Commission consultation document[7]) can be used to show this link with only basic factual evidence.

If, however, a tighter commonality standard—for example, 'the same interest'—is adopted, claimants may also have to bring expert evidence in relation to the likelihood of pass-through of any overcharge caused by the unlawful behaviour, so as to meet objections of the kind advanced against the claimants in *Emerald* and accepted there by the English court. This is likely to be considerably more burdensome in the large majority of cases, since evidence in relation to pass-through will be needed from a wide sample of group members and, in addition, the sampling techniques used will need to be robust.

Conclusion

At the very least, European civil courts hearing competition claims will need to be much more willing to accept expert economic evidence on prima facie causation and commonality issues at a very early stage in collective competition damages proceedings. If a basic European standard of collective redress is to emerge, the procedural rules surrounding the use of experts will be an important element in ensuring the required degree of European consistency. Indeed, it may be that, in practice, most competition damages claims will settle in cases where a group claim is allowed—an economist's 'preliminary' view on commonality of harm may then turn out to have been decisive.

Vincent Smith

[1] Federal Rule of Civil Procedure (FRCP) 23(a)(2).
[2] English Civil Procedure Rule (CPR) 19.6(1).
[3] 564 U.S. (2011) ('Dukes').
[4] [2009] EWHC 741 (Ch); [2010] EWCA Civ 1284.
[5] *Duke of Bedford v Ellis* [1901] AC 1 Lord Macnaghten.
[6] See, in particular, European Commission (2008), 'White Paper on Damages Actions for Breach of the EC Antitrust Rules', COM(2008) 165, 2.4.2008, and other documents on the Commission's web pages at: http://ec.europa.eu/competition/antitrust/actionsdamages/index.html.
[7] European Commission (2011), 'Draft Guidance Paper: Quantifying Harm in Actions for Damages based on Breaches of Article 101 or 102 of the Treaty on the Functioning of the European Union', June.